Expertise and Democracy

Cathrine Holst (ed.)

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Cover picture: Plato and Aristotle.
Excerpt of the fresco painting School of Athens (1511) by Raphael, Stanza della Segnatura, Apostolic Palace in the Vatican.

Preface

Why not epistocracy? Political legitimacy and 'the fact of expertise – (EPISTO) is a five year research project hosted by ARENA Centre for European Studies, University of Oslo. The EPISTO project is financed by the Research Council of Norway.

EPISTO inquires into the role of knowledge and expertise in modern democracies. Epistocracy means rule of the knowers, and the project has a particular focus on 'epistocratic' developments in the European Union (EU).

The kick-off conference took place in Oslo on 4 and 5 April 2013 and was the first of several international events to take place within the project. This report includes a majority of the papers presented at this conference, which was organized around three main themes:

1. Expert-rule and democratic legitimacy
2. The role of knowledge and expertise in EU governance
3. The European Commission's use of expertise

Discussions around the first theme concentrated on implications of modern democracies' knowledge and expertise dependence for political and democratic theory, with a particular focus on epistemic approaches to deliberative democracy.

Contributions addressing the second theme discussed general trends and developments in the EU with regard to the role of expertise and experts in political decision-making, the implications for the EU's democratic legitimacy, and analytical strategies for studying expertise and democratic legitimacy in an EU context.

The last theme focused on the European Commission's use of expertise and the Commission's expert group system in particular. I want to thank all authors for their contribution and cooperation, and Kadri Miard, Linn Hege Lauvset, Veronica Thun, Silje H. Tørnblad and Marit Eldholm at ARENA for excellent work with preparing the report.

Cathrine Holst
Project Coordinator

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Introduction

Why not epistocracy? Political legitimacy and 'the fact of expertise'

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The role of knowledge in political decision-making has been a central topic in normative political theory at least since Plato in *The Republic* recommended states to be run by philosopher kings. Recently, the topic has been re-introduced by political philosopher David Estlund in his discussions of the legitimacy of 'epistocracy', a 'rule of the knowers', referring to the Greek word *episteme* (Estlund 2003, 2008: 1–20, 206–222). Estlund's discussion is a response to the epistemic turn in normative political theory discussions of legitimacy: the idea that a political rule to be legitimate must deliver good outcomes, or what Thomas Christiano (2013) refers to as 'truth-sensitive' or 'truth-tracking' decisions.[1] Estlund supports the turn to epistemic legitimacy criteria, but along with others he worries about the implications: If 'true' decisions and outcome improvements are all we have to consider, is it not likely that a rule of the knowledgeable and educated will outperform a rule of the people? (Martí 2006; Lafont 2006; Peter 2011).

[1] Epistemic justifications of political rule are seldom regarded as sufficient. A common claim is rather that a normative defense of democracy must refer both to democracy's instrumental value, how it is a form of rule that improves on decision quality, and to the inherent value of democratic procedures.

This normative political theory discussion has its counterpart in worries spurred by experiences and a range of empirical studies from the last decades that highlight how contemporary governments and political decision-making processes rely extensively and increasingly on knowledge and expertise. Critics claim that democratic government as we know it is eroding as a result of growing expert power. One expression of this is the increase in depoliticised expert bodies with substantial decision-making power, such as courts, independent governmental agencies and central banks; another is parliamentary and executive institutions' heavy reliance on expert advice. Consider for example the European Union (EU), a case often brought forward by democratic critics, where the European Commission, in addition to relying on substantial internal expertise, routinely consults around one thousand expert groups and committees with considerable powers not least with regard to agenda-setting. In addition, there are currently more than forty increasingly powerful EU agencies and the European Central Bank, perhaps the most independent of contemporary central banks, centrally determining the Union's monetary policy, which is a decisive variable for member state economies. Furthermore, the rulings of the European Court of Justice trump member states' court rulings and parliamentary majorities. Adding to this are the new measures that drastically reduce member states' scope for independent fiscal policies, newly introduced in the aftermath of the euro crisis.[2]

These developments, in the EU and elsewhere, raise fundamental normative questions about the limits, but also of the legitimate role, of knowledge and expertise in decision-making. On the one hand, modern societies' rely intimately on expert knowledge and judgment, and so on a division of labor between experts and non-experts. We are confronted with a seemingly unavoidable expert dependency or a 'fact of expertise' (Kitcher 2011, Holst 2012)[3]: It is impossible – and most people recognize that it is impossible – to make rational political decisions in complex societies like ours without relying extensively

[2] For an instructive overview, see Lord (2012).

[3] Discussions of normative legitimacy must be based on general facts about human society, such as 'the fact of pluralism' (Rawls 1993). Among the basic facts normative theory must relate to, is what we could call 'the fact of expertise', or modern societies functional dependence of expertise and experts (Holst 2012).

on expert advice and even expert decisions. On the other hand, democratic procedures arguably have inherent moral value: citizens have a right to equal participation. How are these concerns to be reconciled? Where are we to draw the line between legitimate expertise arrangements and an illegitimate expert rule at odds with democratic standards? Normatively speaking, what are proper and acceptable uses of expertise, and when do expert arrangements turn illegitimate?

The task of EPISTO is to contribute to answering such normative questions, and to shed light on the empirical characteristics of the 'fact of expertise' in an EU context. What are the characteristics of EU expertise? What is the role of experts in EU decision-making? Obviously, assessments of legitimacy are closely connected to the interrogation of such empirical questions. Before we can evaluate and make normative judgment with regard to something, we must know what this 'something' is.

The EPISTO kick-off conference included papers addressing EPISTO questions explicitly, and papers dealing with related problems. Most of the papers presented are included in this volume.

Chapter 1, 'Epistemic democracy and accountability of experts' by Cathrine Holst and Anders Molander, discusses the normative legitimacy of epistocracy by democratic delegation on the basis of an epistemic account of legitimacy. Assuming, hypothetically, that good outcomes and decision improvements are all we have to consider, i.e. as long as basic democratic requirements such as equal rights of participation and democratic procedures of delegation are fulfilled; how can we avoid a democratically delegated epistocracy? Among the standard objections of democratic critics confronted with arguments for epistocracy, are a) that we cannot know who the experts are, and b) that all political decisions have moral dimensions, and that there is no moral expertise. Therefore, they say, epistocracy in whatever shape is illegitimate, even on the basis of epistemic justification criteria. Holst and Molander argue that such standard objections are ineffective and in central respects mistaken, and that the problem must be re-defined into one of institutional design: Which institutional mechanisms can contribute to ensuring that experts are really experts and use their competencies in the right way? The chapter ends with sketching a set of such mechanisms.

In chapter 2, 'A dual justification for science-based policy-making', David Budtz Pedersen argues that science-based policy-making must be epistemically and politically robust, scientifically sound and politically suitable and legitimate at the same time. On the one hand, descriptions, explanations and forecasts must be accurate and reliable according to scientific standards. On the other hand, local knowledge, affected stakeholders' preferences and social relevance must be taken into account. According to Pedersen, this brings questions of organisational design to the fore, and he concludes with arguing for an institutional approach that focuses in particular on the need for science advisors and advisory bodies as 'brokers' or intermediaries.

Alfred Moore's 'Democratic theory and expertise: Between competence and consent', chapter 3, aims at spelling out the more exact character of the problems expertise constitute for democracies. At the outset, there is a democratic promise of expertise. Ideally speaking, expertise is supposed to enlighten the political will and empower collective action. It seems rational to delegate certain tasks to experts to carry them out, and when experts operate at their best, they may be able 'to tell truth to power' from a position of relative independence. However, there is also a democratic threat of expertise. A central problem is that it may contribute to perverting democratic politics, by means of narrowing the sphere of democratic debate and moving it into a 'technocratic' terrain. Another problem is the politicisation of expertise undermining its proposed 'independence' and expert authority. Crucial for the future balancing of the threats and promises of expertise, according to Moore, are an adequate division of deliberative labour between experts and non-experts, and venues for constitutionally oriented meta-deliberations, but also for citizens' contestation, active scrutiny and critique.

In chapter 4, 'Science and democracy in the third wave: Elective modernism not epistocracy', Robert Evans is discussing effects of the so-called third wave in science studies. The first wave of science studies, dominated by philosophers, focused on demarcating science from non-science and on specifying criteria of valid knowledge, truth, objectivity, etc. The second wave, dominated by social and historical approaches, focused on how scientific practices, just as any other set of practices, are socio-cultural practices and in this sense 'unexceptional'. The recent third wave, with Evans himself and Harry Collins as central figures, combines the concerns of the two first

waves, and focuses on the significance of valuing and preserving the institutions of expert knowledge as distinctive and important parts of contemporary democratic society, even if there may be no such thing as 'true' or 'objective' knowledge. A core idea for Evans is that of 'elective modernism': we should value scientific values and scientific institutions, but this is inevitably a moral choice that cannot be justified on purely utilitarian grounds. At the same time, one must recognize the limits of expert knowledge. A central distinction in this connection is that between descriptions and prescriptions: whereas the latter involve values and must be left for citizens, the first is the domain of what Evans refers to as 'contributory' and 'interactional' expertise.

'Philosophers as experts: Principles vs. moral trajectories', chapter 5, by Beate Elvebakk revisits the classical Platonic theme of the role of philosophers in political decision-making by means of a critical engagement with political philosopher Jonathan Wolff's *Ethics and Public Policy* (2011). Her main claim is that policy contributes to creating political and moral trajectories that shape how we, philosophers included, will think in the future. Philosophers getting involved in the muddy waters of bargaining and compromises of public policy development must be aware of this. The sub-optimal concessions they make relative to their primary positions may start a trajectory that undermines the very possibility of these positions at the next crossroad. Elvebakk exemplifies with the case of road safety in Norway.

Silje Aambø Langvatn's 'Public reason and political legitimacy', chapter 6, addresses the concept of legitimacy in John Rawls' late writings. She positions this legitimacy concept as a normative alternative to Weber's classical notion, and argues that Rawls' contributions on this point are more interesting and challenging than often thought. Pivotal to his project is what he elaborates as 'public reason'. 'Rawls' idea', Langvatn says, 'is that the basic structure of authority in a constitutional democracy will be sufficiently legitimate if (all, or at least most) citizens and public officials exercise their political power on the basis of what they see as the most reasonable conception of political justice and are willing and able to explain this basis publicly.' She goes on arguing that this idea is not purely procedural, but based on substantive political-moral ideas, and that it acknowledges and integrates the tensions between the democratic

and the constitutional liberal ideas of legitimacy in an original and productive way.

In chapter 7, 'Factual disagreement and political legitimacy', Klemens Kappel asks how we should think of legitimacy confronted with disagreements about policies that trace back to disagreement about non-normative factual questions (i.e. not moral disagreement or conflict of interest), so-called fact-dependent policy-disagreements. In such cases, what does it take for a policy to be legitimate? He goes on arguing that in the end there is no viable conception of legitimacy that applies to fact-dependent policy-disagreements in a way that takes into account all reasonable constraints on conceptions of legitimacy in all realistic cases. We are then forced, he says, to conclude that concerns of legitimacy do not apply to non-normative factual disagreements, or that one or more of the standard constraints of conceptions of legitimacy must be lifted, or in favor of either disjunctionism ('even if no one conception of legitimacy meets all constraints in all realistic cases, there might for each decision problem be at least one viable conception of legitimacy'), or non-ideal conceptions of legitimacy. An example of the latter is to argue that policy choices that involve fact-dependent policy-disagreements will have to be made on other grounds than legitimacy, 'say on grounds of expected utility, or concerns for rights or fairness'.

Karin Jønch-Clausen and Klemens Kappel's 'Scientific standards in public reason', chapter 8, asks what role scientific rationality plays in theories of public reason, and focuses on Rawls. According to Rawls' notion of public reason, should proper public reasoning be in line with established science, or can one, according to his notion, be perfectly reasonable while at the same time disregarding scientific standards? They assess different options of how to justify scientific standards on the basis of Rawlsian public reason; that such standards secure the determinacy and completeness of public reason; that they facilitate publicity; that they are constitutive of the reasonable person or reasonable world-views; that there is no reasonable disagreement on scientific standards; and that they may be justified in virtue of being implicit in the public culture of liberal democracy. According to Jønch-Clausen and Kappel, none of these routes are successful. To be sure, taking scientific standards into account seems reasonable on the face of it. However, doing so is in tension with central elements of

Rawls's theoretical framework. Apparently, scientific standards do not accord with the liberal principle of legitimacy.

In chapter 9, 'Let's study arguments! Deliberation in EU decision-making', Marianne Riddervold takes as her point of departure how several international agreements are hard to explain on the basis of rational choice theory and bargaining approaches. The EU integration in particular has arguably moved beyond an intergovernmental bargaining model. There is thus need for communicative action theory in research on EU decision-making processes. However, it remains to make this theory more applicable, or in Riddervold's own words, 'to analytically specify and empirically trace the micro-mechanisms by which arguments presented during EU decision-making processes may lead to changes in positions and thus have an action coordinating effect'. Her core idea is to focus on arguments as units of analysis, what the decision-makers say and whether this is accepted by co-decision makers, instead of on actors' motives. Arguments can, she argues, be treated as the possible causes of action in an EU decision-making setting, in that 'arguments explain common policies if they are accepted and acted upon by the decision makers'. One may then distinguish analytically between different types of arguments, and assess and compare the causal force of 'deliberation' relative to that of 'bargaining' in different cases.

Espen D.H. Olsen and Hans-Jörg Trenz's 'The micro-macro link in deliberative polling: Science or politics?', chapter 10, presents an analysis of the results and organisation of EuroPolis, a transnational deliberative poll on the EU level. On this basis, they argue more generally that random sampling, crucial as it may be for claiming the internal (scientific) validity of democratic experiments, is insufficient for defending the representativeness of the mini-publics as 'standing for or speaking in the name of the political community of democracy'. There is thus a need to distinguish more profoundly between the internal validity of a bounded deliberative setting and the democratic legitimacy of public debate and decision-making: 'In plural and multicultural societies, the claim for democratic legitimacy of the citizens' voice is not only insufficiently grounded in the statistical representativeness of the sample but also needs to be generated through public authorization and accountability'.

Chapter 11, 'The European Citizens' Initiative and the activation of EU demoi: The role of knowledge and expertise' by Lucy Hatton, takes as its point of departure the claim that the EU cannot be a democracy because it does not have a demos. However, according to Hatton, a demos is something not to be 'found', but something to be constructed and 'made': Multiple demoi can be activated in the EU, and she goes on arguing that the European Citizens Initiative (ECI) has the potential to facilitate this process. Recent theorizing on political representation provides a reason to believe that the use of the ECI process by lobby groups, NGOs (non-governmental organizations) and CSOs (civil society organizations), with their insider knowledge of the EU's political system and sufficient resources to launch campaigns, need not be considered a bad thing. We should rather think of them as stakeholder experts that can, through the claims to representation they make, assist with the formation and activation of demoi in the EU by calling them into existence.

Julia Metz argues in 'EU Commission expert groups: Between exclusive and effective policy-making', chapter 12, on the basis of Fritz Scharpf's idea of output legitimacy, that policy-making needs to be both effective and inclusive, corresponding to the two dimensions of this idea of legitimacy. The chapter examines empirically the extent to which the EU Commision's expert groups can reconcile this trade-off on the basis of a quantitative descriptive and network analysis and qualitative case studies. The empirical insights reveal, Metz argues, that in practice the EU Commission is caught in a struggle of balancing the two output legitimacy dimensions: 'While expert groups' institutional structure renders them promising instruments for the enhancement of output legitimacy, in practice the Commission is caught in the trade-off between open and plural consultation and the need for efficient and timely advice'. An illustration is the dilemma of whether to elect familiar advisers that are known to 'deliver', or to go for more unfamiliar candidates. Unfamiliar candidates constitute a risk; they may end up being unsuitable, but there is also the chance that they will do a better job than the familiar ones, due to other competences and fresh outlooks.

In chapter 13, 'For the sake of democracy? The European Commission's justifications for democratising expertise', John R. Moodie and Cathrine Holst take as their point of departure the expanding role of expert groups in EU policy-making. The

Commision's expert group system has exacerbated the debate about the technocratic nature of policy-making and the EU's democratic deficit. The expert groups have been referred to as a 'democratic liability', and criticized for being closed, elitist and lacking legitimacy. The chapter analyzes how the Commission has responded to this critique by means of a systematic reading of Commission documents. More specifically, the aim is to trace the Commission's different justifications of its use of expertise. Moodie and Holst distinguish between a democratic justification, an epistemic justification and an effectiveness justification for giving expertise and expert knowledge privileges in EU decision-making, and argue that the Commission's reliance on these different justifications reflect a conflicting institutional environment and competing normative pressures. Among the three justifications, the democratic justification is arguably the less prevalent. This may be said to confirm criticism of technocracy, but Moodie and Holst stress how a balanced assessment must take into account the broader process of consultation and the need to balance democratic concerns with other legitimate concerns such a epistemic quality and effectiveness.

Marion Dreyer and Ortwin Renn's 'EFSA's involvement policy. Moving towards an analytic-deliberative process in EU food safety governance?', chapter 14, focuses on the role of stakeholder and public involvement in the EU-level food safety governance. The opening up of the scientific advice producing process to non-scientists in this area, is arguably 'a true procedural innovation', according to Dreyer and Renn. There is however the concern that the integrity of scientific risk assessment may be compromised by including external stakeholders. The authors recognize that 'technical-expert modes of risk assessment and evaluation need to engage with the knowledge, values and interests of stakeholders and the wider society'. At the same time, a main justification of stakeholder involvements in this area must be genuine contributions to an 'epistemic discourse' of how to improve on governance. This is facilitated by a properly 'multistaged' process that takes into account the real complexity of risk assessment and separates properly between the different issues and levels involved.

Chapter 15, 'Expertise and power: Environmental agencies operating in complex policy environments' by Anthony Zito, has its focus on learning and policy adaption in governmental agencies, and in

particular on how bureaucratic autonomy and political control are managed and balanced. The chosen cases are environmental agencies in the EU, in the US, and in Great Britain, with the aim of tracing common tendencies as well as variance across policy systems and levels. Zito argues that 'a greater focus on different multilevel contexts, which the three agencies face, may create other possible dynamics, including government and policy learning'. He also argues that principle-agent (PA) is unable to capture the dynamics involved: 'In all three cases, multiple principals created complex dynamics that the agency could work to its favour, as suggested in government learning. They also suggest strong restraining conditions for any potential entrepreneurship and learning'.

Finally, Christoph Ossege in chapter 16, 'Is expertise the driving force? Explaining agency autonomy in the EU', analyzing three major EU agencies, takes it that expertise – the central organizational resource of these agencies – may affect agency autonomy in two ways: either expertise or information asymmetries shield these agencies from external influence, or they engage in processes of so-called 'procedural insulation', relying on the agencies' extensive regulatory expertise and their ability to engage in soft-law rule-making. Ossege's study confirms that expertise affects autonomy along both tracks, although in different ways, depending on institutional history and context and changes in political salience. Moreover, there is reason to say that these agencies are central 'technocratic bodies' in EU decision-making contributing, for better and for worse, to 'depoliticising the public'.

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Chapter 1

Epistemic democracy and the accountability of experts

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The idea of epistemic democracy has an intuitive appeal. As citizens we are interested in the quality of collectively binding decisions and we think of democracy as a way of reaching better decisions. This implies that there is 'some procedure-independent fact of the matter as to what the best or right outcome is' (List and Goodin 2001: 280, see also Cohen 1986: 34). At the same time, it is a hardly deniable fact that some have significantly better epistemic capabilities – relevant knowledge and skills – than others. This creates a tension with democratic equality: if the probability of getting 'the best or right outcome' increases when deliberation is restricted to the most knowledgeable, why not let the knowers or experts rule? This is the fear of critics of the idea of epistemic democracy. They think that it might illegitimately privilege the opinions of knowers, and foster what has been called epistocracy (rule of the knowers).

On the background of the idea of epistemic democracy, and given contemporary societies dependence on expertise, we discuss the conditions for legitimate expert arrangements within a democratic

* We thank participants at the EPISTO kick-off conference and in particular Klemens Kappel for helpful comments. This chapter is still work in progress.

order. We argue that the standard objections against the political role of experts are flawed. What we are confronted with instead is a problem of institutional design[1]: Which mechanisms can contribute to ensuring that experts are really experts and use their competencies in the right way?

The fact of expertise

When we here take the intuitive appeal of the idea of epistemic democracy as our point of departure, we assume that a moral justification of democracy is insufficient (Estlund 2008). To be a desirable form of government the procedures of democracy must have 'truth-tracking' or 'truth-sensitive' qualities that contribute to improving on decisions (Christiano 2012). However, along with what most democratic theorists would argue, we also take it that exclusively epistemic justifications will not do (Lafont 2006; Peter 2011). A normative defence of democracy must refer both to democracy's instrumental value, how it is a form of rule that improves on decision quality, and to the intrinsic value of democratic procedures.

Furthermore, we find it likely that a so-called minimal epistemic argument for democracy can be made, that '[…] democracy is at least as good as, and occasionally better than, a random decision procedure at making decisions, although it can be inferior to rule by the wise few or the lone genius' (Landemore 2012a: 8, see also Goodin 2003). This argument has different sources. One is Condorcet's jury theorem.[2] The theorem states that the more individuals in a group, the greater the chance for a majority in the group to make correct decisions, granted that each individual has more than 50 per cent chance of being right. Another tradition goes back to John Stuart Mill (1859) and others who argue that a diversity of arguments and perspectives, pursuing investigations and discussions from a variety of relevant angels as possible, will facilitate better outcomes (see Anderson 2006). Arguably, this is a case for making democratic processes as deliberative and inclusive as possible.

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[1] Cf. Elster (2013). He is, however, not concerned with expert decision making but with juries, assemblies and elections.

[2] The theorem was first stated by Marquis de Condorcet in *Essai sur l'application de l'analyse à la probabilité des décisions rendues à la pluralité des voix* (1785).

However, even weak assumptions about positive epistemic effects of democracy are vulnerable. With regard to Condorcet's jury theorem, the assumption that most people are more likely to be right than wrong is not obvious (Martí 2006). Political decisions in modern societies involve complex questions, often with contra-intuitive answers, that non-experts have limited knowledge of. Hypotheses of positive connections between broadly inclusive deliberative processes and outcome improvements are variably confirmed. Typically, the most encouraging results come from artificial settings, where representative population samples are given relevant and balanced information and the opportunity to contemplate and discuss over time in well moderated discussions (for example Fishkin 2009). In such cases decision quality is significantly improved after deliberation. Results from studies of actual democratic processes are mixed. Some conclude that correlations are non-existent or even negative.[3]

The maximal version of the epistemic argument for democracy, is the idea that 'democracy is at least as good as and occasionally better than, any alternative decision rule' (Landemore 2012a: 8). According to Hélène Landemore, who recently has given the most general account of this idea (Landemore 2012a, 2012b), democracy has, at least in theory, certain properties that makes it epistemically superior to decision making by for example a group of knowers, even if we could identify in advance and agree on who the knowers are. She bases her argument on Scott Pages' Diversity Trumps Ability Theorem, which says that under certain conditions cognitive diverse groups outperform less diverse groups of individually more capable persons as problem solvers (Page 2007, ch. 6). Since larger groups usually are more diverse, Landemore generalises this diversity theorem into a Numbers Trump Ability Theorem. Here we cannot go into the specific conditions under which the diversity theorem works and discuss the tenability of generalising it into a number theorem justifying the epistemic quality of democratic decision-making, as Landemore does. But note that it is not necessarily so that a *relevant* diversity, i.e. one that is optimal or at least sufficient from an epistemic point of view, is also the most inclusive. Why not only include those who contribute either with their ability or their diversity? (Martí 2013). Moreover, Landemore does not discuss

[3] For an example of the latter, see Rothstein (2011).

whether epistocratic arrangements can be justified in certain contexts and for certain purposes *within* a democratic order, such as the delegation of decision-making power to non-democratic but deliberative expert bodies such as central bank boards and supreme courts. Most of us seem to think that we by means of delegating decisions to relevant experts or relying on their advice when we make decisions ourselves, are likely to get better decisions than without such delegation and advice. Several institutions and organisations of contemporary democracies operate on the assumption that extensive delegation of decision-making power to experts is appropriate and legitimate. Add to this the decision-making in parliaments, by cabinets and other executive institutions based routinely on expert advice. Citizens seem to accept decision-making on these terms as legitimate and place trust in procedures and institutions that privilege experts and expert opinions.[4] This acceptance and trust is intimately linked to modern societies' expert dependency or *the fact of expertise* (Holst 2012; Kitcher 2011)[5]: It is impossible – and most people recognise that it is impossible – to make rational political decisions in complex societies like ours without relying extensively on expert advice and even expert decisions. Some commentators frame this fact as a critique of democratic ideals. Following Anthony Downs's (1957) classical portray of citizens as ignorant of facts, Guido Pincione and Fernando Tesón (2006) and Bryan Caplan (2007) elaborate how democratic discourse systematically produces positions that disregards the best available evidence as defined by the relevant scientific disciplines. Against this pessimistic diagnosis of 'discourse failure' (Pincione and Tesón 2006), Christiano (2012) outlines more constructively how expertise may function as a 'filter' that secures the truth-sensitivity of policies and legislation passing through.

Either way; without moral arguments for democratic equality holding us back, epistocracy lurks in the background of this line of reasoning. If we can set such arguments aside and 'best' decisions

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[4] At the same time expertise and expertise-based arrangements are questioned and controversial (Beck 1992; Jasanoff 2005), but the controversial cases should not make us miss the underlying picture of social acceptance and trust.

[5] Normative discussions of legitimacy must be based on general facts about society, such as 'the fact of pluralism' (Rawls 1993). Among the basic facts normative theory must relate to, is what we could call the fact of expertise, or modern societies' functional dependence of expertise and experts.

and outcome improvements are all we have to consider, what is wrong with transforming our parliaments and cabinets into parliaments and cabinets of knowers that most likely will contribute to such improvements? And why not leave even voting to the better informed – or at least give the better informed an extra vote?

However, we take it that moral concerns *are* holding us back, and find it likely, that there is enough bite in arguments for the intrinsic value of collective self-government and equal participation to rule out proposals of unequal voting schemes – for example giving the educated an extra vote,[6] and undemocratic delegation procedures. For expert arrangements to have democratic legitimacy, the experts must be appointed by someone who is elected by free and equal citizens, by someone who is appointed by someone who is elected by those citizens, or by someone who is appointed by someone who is appointed by someone elected by citizens etc.. However, for the purposes of this chapter, we also assume that this is as far as you get with arguments based on the intrinsic moral qualities of democratic procedures.

What remains given these assumptions, is a *prima facie* case in favour of as much expert-guided and expertise-based decision-making as possible, granted that there is an intimate relationship between filtering decisions through expertise and truth-tracking decisions, and that certain democratic requirements are fulfilled, such as equal rights of participation and democratic procedures of delegation. This would be to allow for a lot of what contemporary critics currently denounce and dismiss as undemocratic 'elitism', 'technocracy' and 'expert rule'. Consider for example the debate on the European Union's democratic deficit in the handling of the current economic crisis. If the *prima facie* argument is tenable, there is nothing wrong with delegating the full handling of the crisis to economists and other experts in the European Commission, in the European Central Bank, in the EU agencies and in national governments, without further inclusion of citizens and civil society, as long as doing so is licensed by elected parliaments at some point, and as long as one could reasonably expect this to result in better, more efficient, and even more equitable decisions, than decisions made by a democratic

[6] Consider Mill's famous proposal in *Considerations on Representative Government* (1861) and recent discussions of this proposal (Estlund 2008).

assembly or directly by the plebiscite. Relying on and delegating to relevant expertise should even be encouraged, granted that doing so is truth-tracking and as long as the delegation chain is triggered at some point by the people, so that the experts in questions arguably operate as their agents. Seemingly, under such conditions, there would be no democratic deficit (see also Christiano 2012: 34).

Finally, we assume that a regime with arrangements like these – what we might call epistocracy by democratic delegation – could be a stable political regime; i.e. that citizens would consider it acceptable and abide to it. By this assumption we thus leave aside arguments saying that an expertise-based and expert-reliant rule of this kind, will cause and stand in danger of being undermined by social tensions and upheaval.

What would be the arguments of democratic critics in such a situation? Of course, one could expect them to question and correct some or more of our assumptions, claiming for example that the moral imperative of democracy imply a more wide-ranging curtailment of expert power and more inclusive deliberative processes, or that extensive technocratic governance contributes to political instability and social conflicts. However, let's say this was not an option and that our assumptions were not up for grabs. What then would be these critics' response? Three claims are common, and we believe they would be central: 1) that we cannot know who the knowers or experts are when it comes to political issues; 2) that all political decisions have moral dimensions, and that there is no moral expertise; and finally, 3) that we cannot know whether the knowers act on the basis on their knowledge or on the basis of their private interests. Because of this, democratic critics will argue, the legitimate space for epistocracy by delegation is non-existing or very limited. In the following we will examine the worries raised in 1 and 2, and more briefly in 3.

However, before we start our examinations, two flawed assumptions that give apparent strength to the democratic criticism should be addressed. First, it is sometimes argued that the fact that distinguishing between x and y is difficult or impossible contributes to discrediting claims that include references to x or y. For example, pertaining to 1, since it can be hard to distinguish between expert and non-expert, we cannot distinguish at all and argue that some know more about a

subject matter than others. Or pertaining to 2, since facts and values are intertwined, we cannot make use of arguments that refers to technical expertise as something distinguishable. And with regard to 3, since it can be hard to distinguish between people's motivations, any argument assuming that experts or others operate on the basis of something distinguishable from private interests, are naïve and suspect. The flaw of the underlying assumption is that the lack of clear cut criteria means that there are no demarcating criteria at all or that all attempts to identify something as x (and not y) are in vain.

Secondly, democratic critics sometimes argue as if there can be a viable democratic rule that is so democratic, that make 1, 2 and 3 somehow irrelevant. However, the fact of expertise makes the most democratic of modern societies dependent on a certain epistemic division of labour and thus deeply reliant on expertise. Due to this fact, the problems to distinguish between expert and non-expert, and that there may be no such thing as moral expertise, are challenges not only for the justification of expert arrangements but for any conception of democratic rule under contemporary conditions. The case is similar with regard to the intrusion of private interest; the possible corruption of rulers is a potential problem in any political regime. The challenge is arguably more prevalent for less democratic than more democratic rules, but it is a challenge everywhere.

'We cannot know who the experts are'

Who are the knowers? Who qualify as experts? Undoubtedly, people often disagree on this. It is easy to say that decisions would improve if these were informed and even taken by experts. However, it is notoriously difficult to identify beyond controversy who are experts and who are non-experts in different cases. This is the basis of claim 1 above: The fact that we cannot know for sure who the knowers are, undermines claims of extensive powers to those who say they know. Following Alvin Goldman (2011), we may distinguish between four aspects of this problem (see also Gelfert 2011). The first is the layperson-expert problem – we will later refer to it simply as Goldman's first problem. Confronted with an expert testimony a layperson lacks the ability to assess its reliability directly and is dependent on trust. The second problem appears when laypersons are confronted with two or more experts' conflicting opinions on a matter and have to judge who is the most credible or trustworthy. The third problem is the expert-expert problem where experts

appraise the opinions of other experts. The fourth problem concerns the appeal to expert opinions in the dialogue between laypersons. Here we will focus on the two first questions.

It seems reasonable to regard expertise as a comparative phenomenon. An expert is always an expert compared to those who know less in a certain domain and as an expert s/he is a novice compared to experts in other domains. The problem for non-experts is how to assess who are really experts or experts objectively speaking and distinguish these from those who are only seemingly experts. This is crucial, since it is only the real experts that are more likely to have well-founded beliefs than lay people. In his discussion Goldman stresses the comparative or relative dimension of expertise when he defines experts as those within a given domain that 'have more beliefs (or high degrees of belief) in true propositions and/or fewer beliefs in false propositions within that domain than most people do (or better: than the vast majority of people do)". However, there must also be a threshold. In Goldman's words, to qualify as an expert 'a person must possess a substantial body of truths' (2011: 115). If someone knows marginally more about trivial aspects of something it does not seem right to call him or her an expert. Moreover, an expert does not only possess accurate information, s/he also has 'a capacity to deploy or exploit this fund of information to form beliefs in true answers to new questions that may be posed in the domain' (Goldman 2011: 115). Real experts have understood and internalised their knowledge in ways that makes it possible for them to apply it on new intellectual and practical problems in their field.

However, as research on expert judgments has shown, it is not only ordinary people that are subject to cognitive biases and errors. Also experts are subject to reasoning failures. When assessing probabilities putative experts make use of heuristics that can lead to systematic errors and they are often overconfident in answering questions (Kahneman 2012; Tetlock 2005; Tversky and Kahneman 1974). In light of this research, in order to qualify as a 'true' expert a person must thus be less disposed than ordinary people to rely on what cognitive psychologists call the intuitive 'system 1' than on the reflective 'system 2'.

In contemporary societies science has an institutionalised monopoly of knowledge. What counts as knowledge must be validated

according to the standards of scientific methods and to count as an expert one has either to be a full member of a scientific community, or to operate according to, or at least in ways that do not contradict with, scientific standards and procedures. The problem for citizens is that they as non-experts are not in the epistemic position to assess expert reasons. Traditionally, epistemology warns us against relying on authority as a source of knowledge. In *An Essay Concerning Human Understanding* (1690) John Locke famously lists reliance on authority as one of the main sources of false beliefs. Yet, we are dependent on other persons' and especially on experts' testimonies. This means that trust and not only direct evidence is a source of knowledge (Hardwig 1985 and 1991; Origgi 2004). However, blind trust is irrational, and there must be some justification for believing in an expert judgment *p*. A must have good reasons to believe that B has good reasons to believe *p*. This is the 'principle of testimony' (Hardwig 1991). But if A is a non-expert, how can A then ascertain the trustworthiness or reliability of B, when B is an expert? Hardwig suggests two strategies. One is to rely on other experts in B's domain: A has good reasons to believe that C (D, E…) has good reasons for believing that B has good reasons for believing *p*. The other is to rely on second opinion, i.e. on a C (D, E…) who is independent of B and also able to judge whether *p.* Both these strategies redistribute trust. The object of trust is no longer the single expert but his co-experts and in the end the epistemic community itself. This means that Goldman's first problem – the layperson/expert problem – can be rephrased in terms of what makes an epistemic community trustworthy. We will return to this below.

Moreover, in a question at hand there may be competing claims to expertise, what Goldman refers to as the 'novice/2-experts problem'. In addressing this issue, Goldman lists possible evidential sources (incorporating Hardwig's two strategies): argumentative performance of experts; agreement from fellow experts in the field; experts' past track records; and evidence from interests and biases (Goldman 2011: 116). The first source of believing an expert statement is 'dialectical superiority': If one of the experts scores best in an argumentative exchange, this may be an indicator that justifies the inference that his conclusion is the more correct one. However, non-experts are variably able to assess experts' argumentative achievements. To be sure, sometimes it may be possible for most people to evaluate consistency, accuracy and reasonableness of expert statements, without extensive expertise in the field. In other cases the

problem is exactly that a real assessment of the quality of expert argumentation requires expert knowledge that non-experts lack. Goldman's first problem then occurs once more.

To conclude about expertise on the basis of agreement from fellow experts, may in some cases be sound, but is generally somewhat problematic. To what extent does the fact that more experts reach overlapping conclusions indicate that these conclusions are correct? History is full of examples of expert majorities getting it wrong. According to Goldman, a central variable is experts' independence of one another: There are reasons for lay persons to emphasise the relative number of experts that approves of a statement or a theory, if the experts in question have reached their conclusions independent of one another. However, if experts support other experts without any independent investigation and assessment of the case in question, expert consensus is of little value, and non-experts may just as well rely on their own judgment.[7] If so, we are once more confronted with Goldman's first problem.

This is also the case if lay people are to choose among competing experts based on past track records, because to do so they must be able to have justified beliefs about the cognitive quality of these experts' achievements. The same is very often the case when non-experts are to rank experts one the basis of possibly distorting influences from interests and biases. With regard to interests, this can be part of lay persons' assessments, but it is a concern that should not necessarily be decisive. An expert statement can be correct even if the expert in question has an interest in it being correct, and disinterested experts can possess little expertise, or be real experts, but be wrong in the case at hand. Moreover, evidence on pecuniary interests is more accessible for a novice than the more subtle influence of biases. If all or most members of a community of experts have the same bias, the problem of numbers becomes even trickier. Non-experts then once more depend on being able to trust epistemic communities' abilities

[7] Goldman develops a Bayesian argument about the relationship between the relative number of experts that subscribes to a statement, expert independence, and the probability that the statement is right or wrong. For a discussion of this argument, see Coady (2006) and Almassi (2012).

to correct themselves and sanction improper behaviour.[8]

To sum up the discussion of claim 1: It is possible for non-experts to know who the experts are, in the sense that real experts are accepted as experts by epistemic communities where members operate in accordance with scientific standards and procedures. The question is which communities that qualify on this basis, including how they cope with and communicate scientific disagreements and uncertainty. Epistemic communities or members of such communities can make this or that promise, but be more or less trustworthy. It is therefore in novices' interests to develop strategies to assess epistemic communities' credibility. In part II we will briefly sketch some such strategies in terms to keep experts accountable.

'All political decisions have moral dimensions, and there is no moral expertise'

However, we first have to deal with point 2 above; the argument that all political decisions have moral dimensions and that there is no moral expertise. In this case there are really two claims in need of assessment: First, that all political decisions have moral dimensions. This is the claim – we call it 2a – that is-questions and ought-

[8] Goldman's strategies aim at finding out who is the most credible expert. Another and even more complicated case is Rawls's 'reasonable disagreement'. Here diverging opinions do not reflect different epistemic credibility, but non-eliminable hazards which influence the use of human reason, what John Rawls called 'burdens of judgment' (Rawls 1993: 54). According to Rawls' these burdens explain why there may be disagreements that are fully reasonable. Three of the points on Rawls's list apply to theoretical reason, three to practical reason. His points concerning the use of theoretical reason are: 1) Relevant facts in a case can be complex, contradictory and difficult to assess because they point in different directions. 2) Even if we agree about which considerations are relevant in a case, we can disagree about their weight and therefore arrive at different conclusions. 3) To a certain degree all our concepts are indeterminate and vulnerable to hard cases. The use of concepts must therefore be based on judgments and interpretation, where reasonable persons can disagree. If also expert reasoning works under these conditions and one may expect a reasonable disagreement that is not due to differences in epistemic credibility, which procedures can non-experts then use in their assessment of diverging expert testimonies? There seems to be at least three possibilities. One is to abstain from or postpone judgment. When that is not possible one may use relative numbers in favour of the opinions (cf. Goldman). If conclusion A has more support than conclusion B among equally credible experts, one may – for the time being – choose A. A third possibility is to settle the question by judging the different conclusions according to their consequences if they should be true.

questions, facts and values, are always intertwined. The second claim – 2b – is that there is no moral expertise, meaning that even if we could know who the knowers are with regard to is-questions, and refute 1) as far as technical expertise is concerned, it is impossible to identify experts and distinguish them from non-experts on issues involving values. Moreover, because of 2a, issues concerning values are in the end all issues – facts and values are always intertwined. 2b thus transforms 2a into a version of 1: We cannot know who the knowers are, since facts and values are intertwined, and there are no moral experts. Once more, this should make us suspicious of handing over extensive powers to those who claim to know.

An assessment of 2a must distinguish between the logical and the empirical level. On a logical level it is not the case that is-questions and ought-questions cannot be distinguished. Logically speaking descriptive and causal characteristics, questions of how things are, of why things are as they are, and of whether and how an intervention, for example an introduction of a new policy, has effects, is logically independent of questions of whether things ought to be like they are, how we ought to intervene, and how we should assess the effects of an intervention. We can neither deduce what we ought to do from what is, nor what is from how things ought to be. Hence, in principle facts and values can be separated.

However, on an empirical level, policy-making involves both facts and values and it will often be hard to distinguish the one clearly from the other. We could consider any policy field, but let's first exemplify with policy-making that is clearly dependent on input from technical expertise, for example the regulation of a certain toxic. Toxic regulation policies will typically aim at minimising the bad effects of the toxic in question. No doubt, discussing and choosing policies wisely in this case will require sophisticated technical knowledge of the toxic in question and its effects on health and the environment. However, several normative questions will be involved as well, for example which values to include in the analysis of effects (should effects analysis also include considerations on the implications for economic growth and competitiveness, and look at the distribution of effects of toxic exposure between social groups?), the more specific definitions of the values and standards involved (which indicators are relied on when measuring consequences for health and the environment?), including when something is to count

as a bad effect (which social distributions of toxic exposure are bad, and which are acceptable?), and the priority of standards and ends (should we allow for some bad effects on the environment if the toxic producing activities stimulate growth and competitiveness?). In addition, normative considerations may be involved when it is concluded that 'enough' studies have been made to establish an effect (Kitcher 2011): If some studies indicate serious environmental effects of this toxic, how many studies and what kind of studies are required before we can conclude that these indications are real, scientifically established effects? What do we do if a significant amount of studies indicate substantial health costs and risks, while fewer, but seemingly solid studies conclude that these studies exaggerate the costs and risks involved? Are we then to apply a precautionary principle and when are we to apply it (Kusch 2007)?

Hence, even if the making of a toxic regulation policy requires technical knowledge, it certainly involves normative considerations as well. Add to this policy areas where the role of advanced technical knowledge is more questionable, or at least more contested. Consider for example policies for gender equality. Once more values would be involved on a range of levels, including questions of what gender equality should be good for (is gender equality desirable as part of a social justice ideal, or because women's full inclusion in higher education and the labour market contributes to economic growth and competiveness?), what gender equality means (equal opportunities for all irrespective of sex, or balanced 50/50 distributions of positions and resources between women and men?), and the priority of gender equality relative to other norms and aims (what do we do when freedom of religion or concern for private choice or market freedoms conflict with gender equality concerns?). To be sure, also factual, scientific questions are central in this case, from establishing current gender equality levels and the explanation of current gender equality levels to estimating effects on such levels of different policies and different combination of policies. However, the expertise that is presented as or puts itself forward as purely technical and scientific will more likely and more easily be contested than the technical knowledge of the toxic regulation case. First, it is more difficult to predict human action and interaction, for example different groups of women and men's response to gender equality policies, than establishing how a toxic will respond to this or that measure, because of the human capability to consciously reflect on how to respond.

Secondly, the analysis of the effects of a certain toxic may be difficult, even impossible to understand and comprehend for people without relevant scientific education, whereas analyses on the social situation of women and men and of the effects of different policies on their situations may be easier to grasp and assess for the lay person. Both factors – the uncertainties as well as the common-sense aspects of our knowledge of gender relations – will easily trigger contestation on what the purely technical or scientific component of gender equality policy-making in the end amounts to.

We can thus conclude that in highly different policy areas, from the field of toxic regulation to the field of gender equality policy-making, policy decisions are as much about values as about scientific facts and technical expertise, and in some policy areas (more than in others) the distinction between technical expert and non-expert will be contested. Furthermore, it is certainly the case that facts are not always easily distinguishable from values. When scientists disagree on how many and what kind of scientific studies are needed to conclude on whether health costs and risks are certain and substantial, when are they 'simply' technical experts doing and applying science, and when make evaluations about how strongly we should care about different aspects of our health relative to other concerns? Moreover, consider the many instances where matters that have been regarded for long as purely factual are transformed into matters of normative contestation. For example, unequal gender relations were for centuries regarded as a natural order and a matter of fact.

However, that things are 'often' or 'sometimes' indistinguishable do not imply that they are 'always' or 'necessarily' indistinguishable, and even if distinctions initially seem to evade, it may make sense to uphold them anyway after closer considerations. The concerns that have been raised above transform thus 2a into another version of 1 if and only if what has been put forward so far implies that facts and values are inevitably intertwined and indistinguishable and 2b – that there is no moral expertise – is correct. With regard to the first, a radical thesis of the inseparability of is-questions and ought-questions seems hard to defend. In our two examples – toxic regulation and gender equality policy making – we would come a long way with distinguishing factual from normative questions and 'science' from 'values'. Clearly, what should count as bad effects of toxic waste is a normative question, but when the answer to this

question is decided and the proper values and standards are decided upon, measuring effects seem like a relatively technical question for scientists. Similarly, different ethical approaches and political views imply different ideas of gender equality, but given that certain gender equality indicators are opted for, investigating and stipulating effects of this or that policy along these indicators, look like an overly technical endeavour. This is to say that it may be quiet reasonable to talk about technical experts even in the domain of the human and social sciences. It is thus generally hard to see why we cannot talk of technical or scientific experts as a separate category. Hence, if there is no moral expertise (i.e. 2b) the implications of this must not be exaggerated, since there seem to be distinguishable technical/factual questions that can be made into proper objects for scientific investigations.

Turning to the question of moral expertise the default position in the literature seems to be that there is no such thing; 'the idea of ethical expertise is a distortion of the (ethical) project', says Philip Kitcher in a recent treatment of the subject:

> The only vehicle available to us – to anyone – for arriving at judgments about values is discussion in which the participants come as equals, and in which the goal is to satisfy all (that is, to reach an outcome in which everyone can acquiesce).
>
> (Kitcher 2011: 49–50)

In democratic theory this position has been elaborated famously for example by Robert Dahl (1989) who states that there is 'no moral expertise' because there are 'no methods' that can be applied to reach 'moral judgments that are valid or acceptable for all'.

However, Dahl admits that moral questions cannot be reduced to 'subjective' questions pertaining simply to different 'tastes'; there is scope for 'reason and experience based argumentation'. This raises the question of whether there cannot be moral experts after all. As Bernhard Gesang has pointed out, the question of whether there are moral experts depends on the answer to the meta-ethical question of whether and how moral judgments can be justified (Gesang 2010). If you subscribe to a non-cognitivist position there can be no moral expertise, while accounts of rational moral justification opens up for the existence of moral expertise. Consider here Kitcher (2011: 51)

when he says that 'our ethical discussions are adequate to the extent that they reach the conclusions that would have resulted from an ideal deliberation under conditions of mutual engagement'. What if a group of trained moral experts are able to track these 'ideal' conclusions better than any non-ideal moral conversation including all, trained or untrained in moral thinking and argumentation?

It is such questions that spur Peter Singer (see also Gesang 2010) to conclude that 'moral expertise would seem to be possible' – in a certain sense:

> Someone familiar with moral concepts and with moral arguments, who has ample time to gather information and think about it, may reasonably be expected to reach a soundly based conclusion more often than someone who is unfamiliar with moral concepts and moral arguments and has little time.
>
> (Peter Singer 1972: 117)

To talk about moral experts along these lines does thus not imply that one regards non-experts as having inferior moral worth. We can take equal concern and respect for all to be the fundamental norm while at the same time granting that some are better informed and better in pursuing moral arguments consistently than others. Also, moral experts in this sense do not necessarily act in morally superior ways. The point is that they have knowledge of ethical theories and are better at reaching justified conclusions in moral affairs. Furthermore, we should avoid talking about moral expertise in terms of special 'inner' capacities that some people possess and other people lack. Moral expertise is developed by means of training, socialisation and education, and transfer of skills and knowledge. Finally, we can talk about moral expertise in more or less ambitious ways. On the one hand, there can be moral experts that conceptualise and elaborate the meaning of involved norms, values and ends, that explicate implications of pursuing this or that end or of defining this or that value in one way or another, that explore normative conflicts and consequences of such conflicts, etc.. On the other hand, there is the moral expert that enters 'the kingdom of ends' and discusses the justifiability of norms and political aims and of different interpretations, priorities and balancing of normative ideas and ideals.

Granted that this is a sensible approach, and that it makes sense to

talk about moral expertise in this way, we are once more confronted with on what grounds 'novices' or non-experts are to trust moral experts. If a putative 'justice expert' based on a complex argument concludes that this or that is the appropriate metrics of distributive justice and then argues for a principle of just distribution, say of health care, or tells us that this or that is the reasonable way to approach conflicts between rights; how are we to approach his/her claims? On what basis can we trust or distrust him/her? What makes epistemic communities – that include also moral experts – trustworthy?

Mechanisms for holding experts to account[9]

The central question is thus not whether there can be experts in certain fields, but how we can we ensure that they will perform their democratically entrusted tasks in an acceptable, and preferably, in the best way possible. How are we to know that experts use their competencies in 'the right way'? This is a variant of the principal-agent problem and concerns what we will refer to as *the accountability of experts* engaged to consider a certain question within his field.

Accountability is a three-fold predicate: Someone (an agent) is accountable to someone else (a principal) with respect to something. In common usage, 'accountability' is associated with the process of being called 'to account' for what one does or has done (Mulgan 2000: 555). The closest synonym is 'answerability'. To be accountable in this sense does not only mean that one may be asked to inform about one's judgments, but also to *justify* them. The currency of accountability is good reasons and the basic meaning of accountability is the following (Molander et al. 2012):

(a) A is accountable to B if A has a duty to justify his judgments, decisions and actions to B.

A's duty to justify his judgments, decisions and actions stem from B's right to demand justification, thus:

(b) A has a duty to justify his decisions, judgments and actions to B because B has a right to demand such justification.

[9] What we say about accountability mechanisms is tentative at this point.

However, accountability cannot be understood as a purely discursive relation between the accountable and accounting parties. It implies more than the interchange of questioning and answering. Accountability demands reactions to misconduct. It designates 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences' (Bovens 2007: 9).

There are different mechanisms for ensuring accountability of experts (cf. Molander 2013). One type of mechanisms is *negative* and aims at prohibiting misconduct and bad performance. Other kinds of mechanisms are positive and aim at improving the performance of experts as problem solvers. Examples of the first type of mechanisms are sanctions against sloppy work and exclusion of persons with bad past records as candidates for assignments. To this category also belong blocking mechanisms introduced to prevent the intrusion of illegitimate private concerns and the problem of mixed motives and mixed interests more generally.

Positive mechanisms of accountability target the arguments experts use. These mechanisms aim at establishing conditions for well-founded arguments by putting expert opinions under scrutiny. Here we will focus on four such mechanisms. The first type of mechanism refers to epistemic norms guaranteeing the pursuit of truth through a fair competition between arguments (cf. Popper, Merton, Habermas, and others). The second mechanism concerns the institutionalisation of epistemic self-constraint. Experts may be over-confident, lack insight into the evaluative, non-scientific dimensions of problem and so on. It is demanded of experts that they are clearly aware of what is their specific area of competence and make their provisos explicit. This relates to a third mechanism which refers to cognitive diversity and intellectual division of labour. Cognitive diversity is an aspect of the first mechanism, but here we think of cognitive diversity in terms of cooperation between different disciplines and fields that enlighten a subject matter from different angles. There must be established a well-functioning division of labour between relevant disciplines and fields, including a cooperative division of labour between factual and normative analysis. The fourth mechanism is the test of arguments in different forums of justification. One such forum, which is operative in connection with the first mechanism, is the forum of peers or a

specific scientific community. This forum must, if necessary, be extended to include experts from other relevant disciplines. Another type of forum is the legislature and other political bodies. The most extended and inclusive forum is the public sphere, where experts argue their opinions to the ordinary citizen. However, once fora that include non-experts are mobilised, we are once more confronted with Goldman's first problem, since non-experts, be they parliamentarians, judges or ordinary citizens, only to a limited degree will have the competence that is needed to assess expert' statements and justifications directly.

Concluding remarks

If we now return to the *prima facie* argument for epistocracy by democratic delegation, what is left of it and of the democrat's case against it? We must first remind about the assumptions of this discussion that were spelled out in the first section of this chapter. One possibility for the democrat would be to say that one or more of these assumptions are invalid or unacceptable, for example that there are moral grounds for broader citizens' participation and 'more' democracy than epistocracy by democratic delegation allows for, or that the latter is an unrealistic option since people will not accept a rule where their opportunities to have a say is this limited, at least not over time. The first may be right, but needs arguments that do not presuppose the conclusion. There are also functional limits to democratic participation, and the concern for participation must be balanced with the concern for good outcomes, granted that democratic procedures must be justified both as instrumentally and intrinsically valuable. A crucial issue is then how to integrate expert knowledge in democratic decision-making processes in order to make them as truth-sensitive as possible while at the same time keeping their democratic qualities. The stability argument for 'more' democracy can very well be valid, but it is likely that citizens' accept of epistocracy by democratic delegation will be related to whether it delivers good decisions and solutions.

Furthermore, if the assumptions are as they are, our discussion has shown that some of the claims democratic critics typically make; that we cannot know who the experts are, that is- and ought-questions are inseparable, at that there cannot be moral expertise, are not necessarily decisive. There are fair things to say both about who the experts are and about the relationship between facts and values. The

real problem is how non-experts can trust that putative experts are real experts, when they are not themselves experts and thus not in an epistemic position to assess experts' statements and justifications directly. Key here is the institutionalisation of mechanisms that can hold experts to account. This is a core issue in the democrat's case against epistocracy by democratic delegation, and future discussions should follow this path more consistently.

This can also make it possible to state the limits of democratisation more precisely. Mechanisms to keep experts accountable can be put in place and made more effective, but Goldman's first problem cannot be eliminated, and unavoidably at lot depends on epistemic communities' ability to control and sanction their members internally.

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Chapter 2

A dual justification for science-based policy-making

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Introduction

Science-based policy-making has grown ever more important in recent years. In parallel with the dramatic increase in the complexity and uncertainty of the ways in which science and technology interact with society new expert institutions have emerged at the national, regional and global level. Installing a proper framework for ensuring the integrity and trust in science is becoming an urgent task for European and global policy makers.

People rightly expect politicians to be honest with facts when they decide about public policies and future scenarios. This is why scientific evidence in policy-making is so important. In liberal democracies, policies are legitimate and accepted only if they are sufficiently justified, efficient and respectful of social and individual rights (European Commission 2008). Various scholars and policy makers have contributed to the discussion on what a workable compromise between science and democracy may look like. On the

[*] The views expressed here are those of the author and may under no circumstance be regarded as an official position. A longer version of this chapter will be published in the journal *Society* in 2014.

one hand, it has been argued that we should avoid what the political theorist David Estlund calls *epistocracy*, that is, a society in which the experts rule over the democratic polity (Estlund 2011).[1] On the other hand, society needs to install proper measures to avoid dogmatism and vulnerability towards irrational behaviour while maintaining assess to cognitive authorities and scientific evidence. Science and democracy are based on a social contract shaped by different but often implicit political norms. These norms can roughly be schematised as follows: (1) In a well-ordered society, democratic decision-making and public debates must be informed by a scientific approach to the relevant facts; (2) Democratic decisions and public policies that deliberately ignore relevant scientific facts are illegitimate or otherwise normatively defect; and (3) The scientific community must inform policy makers about facts and findings, where this is relevant, but should leave decision-making to the democratic process. In short, there should be a division of cognitive and deliberative labour, generally corresponding to the division between facts and values.

At various points, scientists are faced with normative questions and background values. But it is not the task of scientists or experts to determine the right answers to these questions. Rather, in so far as policy decisions depend on normative questions, it is for the wider democratic community to determine how to deal with these questions (Kappel 2012). Simply listening to the best-qualified scientists for policy advice may not always ensure that research and development are conducted for the public good. Care must be taken to avoid the public paralysis that sometimes accompanies expertise. Studies of disasters —such as the Challenger shuttle, Fukushima, or the financial meltdown — confirm that terrible events cannot always be avoided by listening to technical experts. Instead a much wider institutional design must be initiated which has the capacity of filtering and translating scientific expertise into policymaking (Jasanoff 2009).

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[1] Estlund's theory – which he calls epistemic proceduralism – avoids epistocracy, or the rule of those who know. He argues that while some few people probably do know best, this can be used in political justification only if their expertise is acceptable from all reasonable points of view. If we seek the best epistemic arrangement in this respect, it will be recognisably democratic – with laws and policies actually authorised by the people subject to them.

Epistemic and political robustness

Although it may seem obvious that policy should be informed by scientific understanding, and should therefore be evidence-based, this assumption is itself based on surprisingly little consensus or evidence. Debates continue, for example, about what exactly constitutes good evidence, where and how such evidence should be sought, and at what stage in the policy process different forms of evidence might be appropriate (Sutherland et al. 2012). That such debates persist reflects the fact that there are many open questions about the nature of science-policy interactions. Therefore, we need to ask not just how science can best inform policy institutions, but also how policy and political processes can support the institutional arrangements for producing robust and reliable advise.

Sheila Jasanoff's seminal study of science advisers shows that the value of science in policy stems in part from its capacity for detailed engagement with practical policy problems. At the same time, the authority of science depends on maintaining its independence from politics, in what has been coined as 'boundary work' or institutional differentiation (Gieryn 1983). In practice, however, experiences in different institutional contexts, both national and international, have brought about a much greater awareness of the processes of interconnection among science, politics and the public (Nowotny et al. 2001). Justus Lentsch and Peter Weingart have provided an important contribution to the debate about the institutional design of scientific advisory organisations. In the volume *The Politics of Scientific Advice* (2011) they argue that the particular connection between scientific experts and policy makers should be identified as an institutional mechanism by which two different forms of *justification* are united: on the one hand *epistemic robustness* that pertains to the justification of knowledge and, on the other hand, *political robustness* that refers to aspects of responsiveness and political justification. According to Lentsch and Weingart, scientific advice must be epistemically *and* politically robust at the same time. Expert knowledge communicated by science advisers has to have a dual reference. It is not enough to simply meet the standards identified by epistemic criteria of scientific validity and reliability. Rather, scientific advice must be scientifically sound and politically suitable and legitimate at the same time (Lentsch and Weingart 2011).

As the knowledge generated in advisory bodies responds to specific societal problems and, thus, usually transcends normal disciplinary knowledge production, it has to meet the requirements of exactness and validity, and at the same time leave enough space for democratic deliberation and decision-making. Instead of packaging knowledge claims in a well-ordered body of expertise that leaves no room for discussion, science advisers must open up science and consider the values, concerns, uncertainties and perspectives of those affected by the decisions and actions. Still, knowledge that is uncertain and ambivalent may be epistemically robust if the probabilities of the claimed functional or causal relations are sufficiently reliable. Political robustness, on the other hand, refers to the public acceptability of knowledge, and the feasibility to implement recommendations based on it. An advice is robust if it can be politically implemented and meets the standards of policy makers. Hence, political robustness implies that the local knowledge and preferences of the affected stakeholders are taken into account (Lentsch and Weingart 2011: 8–9).

The distinction between the two dimensions of justification throws new light on two common assumptions underlying most science advisory bodies: first, it reaffirms that sound scientific knowledge provides the best possible foundation for public policy (i.e. peer review, scientific credentials, etc.), and second, it opens for scientists, policy makers and citizens to engage in a dialogue regarding the political robustness and relevance of the evidence in questions (Lentsch and Weingart 2011: 10–11). As Lentsch and Weingart further notes, the quality of scientific advice to politics depends on the degree to which these two requirements are met. It is obvious that they cannot be met equally at the same time:

> The overall question is: which form must expert advice have, and in which institutional arrangements must it be generated and communicated to meet the dual requirements of political acceptability and scientific validity? Phrasing the problem in this way means that the quality of expert advice to governments is primarily an issue of organisational design. The focus is on organisational conditions because they influence the quality of advice and, at the same time, they can be shaped by scientists and policy makers.
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> (Ibid.: 9)

Institutional design and science advisers

The question of the appropriate institutional design of scientific advisory bodies and the quality of the advice they offer, i.e. their capacity to bridge between science and politics, has been widely discussed in the scholarly literature as well as in practical policy-making. Upon taking office, the Obama Administration in the United States was strongly committed to promoting scientific integrity. On the basis of his concern that the sciences of climate change, stem cells and evolutionary biology, were subject to political influence under the former administration, Obama declared his intention to 'restore science to its rightful place'.[2] Soon after he took office, he issued a memorandum outlining his administration's basic policy for scientific integrity and evidence. US science adviser, John P. Holdren, later finalised a more detailed set of guidelines in collaboration with several government agencies for ensuring a wider use of evidence in policymaking (Holdren 2011). Worldwide, novel structures for scientific advice have been established: both through new institutions like the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) in the United Kingdom; and through the appointment of Chief Scientific Adviser Anne Glover to the President of the European Commission. Add to this the various advisory bodies, covering a spectrum from think tanks, governmental policy-oriented research institutes to agencies and academies (Contandriopoulos et al. 2010).

The overarching need, particularly in the context of today's complex societal challenges, is not so much for specific technical recommendations, or for certainty in the face of environmental and social complexities, but for the capacity to reflect on and cope with uncertainties, while making clear what science can and cannot do. In other words, scientific advice is not merely a body of information but a dynamic process. This process should have a clear task and mandate, yet in practice the responsibilities of advisory bodies are many and diverse. Some institutions, such as the US National Research Councils, act as scientific academies, providing independent advice. The German Science Council seeks consensus among

[2] See 'Scientists Welcome Obama's Words', *New York Times*, 22 January 2009, available at: <http://www.nytimes.com/2009/01/22/us/politics/22science.html?pagewanted=all&_r=0> [last accessed 6 November 2013].

stakeholders and citizens, while the Danish consensus model stimulates negotiations over policy options and emphasises compromise so as to enable dialogue and build influence. These international trends also highlight the importance of different national cultures in shaping responses to demands for credibility and legitimacy (Bocking 2013).

Political epistemology

The benefit of taking an institutional approach to the science-policy interface is that it downplays traditional philosophical queries about constructivism and realism. Whether or not the fact-value distinction can be sustained – practically or conceptually – in all societal domains is not the main concern. Instead, the institutional approach is based on a political epistemology that distinguishes between the epistemic goals and preference in different institutional settings. Functional differentiation makes it possible to analyse distinct institutions as following distinct epistemic codes or logics. The logic of science is to produce maximally reliable knowledge; the logic of democracy is to produce maximally legitimate decisions; and the logic of scientific advice is to ensure the equilibrium and interpretative balance between the two other systems (Budtz Pedersen forthcoming).[3]

For instance, within the broad field of climatology and climate policy there has been a growing concern about the difficulties of translating scientific evidence into policy. On the one hand, scientists have expressed dissatisfaction with the virtues of democracy and a mounting appeal to exceptional circumstances, as perceptively analysed by Nico Stehr (2013). On the other hand, citizens and policy makers have expressed worries that climate science still exhibits too many uncertainties to guide political action. The strong desire to reach specific policy outcomes, spelled out by the scientific community, has led leading scientists to become sceptical towards the democratic process, as well as it has led several democratic organisations to become distrustful about the neutrality of science.[4] In

[3] For a more elaborate account of this proposal for an institutional epistemology, see my book, *Political Epistemology* (forthcoming), Basingstoke: Palgrave Macmillian.

[4] In a recent article, Nico Stehr (2013) has called this an emerging argument for the *inconvenience of democracy*. Among the voices of this argument are the Australian scholars David Shearman and Joseph W. Smith who in their book *The Climate Change Challenge and the Failure of Democracy* from 2007 wrote: 'We need an authoritarian

this situation, there is a need for a strong intermediary institution that can establish the interpretative mediation needed for science and democracy to effectively interact. Among other things this is reflected in the creation of the Intergovernmental Panel on Climate Change (IPPC). IPCC is a science advisory body with the mandate to offer alternative policy options for political discussion and decision.

However, as long as the two subsystems are confronted with each other's worldviews without mediation there will be no viable solutions. Scepticism towards the effectiveness of democratic processes in solving complex global problems such as global warming, however well intended, will not lead to legitimate or efficient outcomes. Focusing only on principles of liberty and deliberation without the input of scientific advisers will not make democracy capable of dealing with long-term harms and risks. What is needed instead is a parallel justification of the power of objective knowledge and the legitimacy of decisions supported by and derived from the democratic citizenry. Adding more robust findings about the causes and consequences of humanly induced climate change, together 'with the empowerment and enhancement of knowledgeability of individuals and groups' is the only way to enhance democratic governance as an effective response to urgent societal challenges (Stehr 2013: 59–60). Part of this dual justification is the existence of scientific advisory bodies.

Rebuilding public trust in science

In spite of its importance, the access to fair and qualified scientific advice is sometimes troubled, and periodically erupts into public controversy. Prominent examples include the debate over scientific understandings of climate change, as we have just seen, or dispute over the use of genetically modified crops (Sutherland et al. 2012). Still more recently, it has been debated if there is a risk that 'evidence-based policy' turns into 'policy-biased evidence' with public research institutions and universities receiving an increasingly large part of their budgets in funding from the industry. Chief Scientific Adviser

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form of government in order to implement the scientific consensus on greenhouse gas emissions' (cited from Stehr 2013: 58) Further, climate scientist Mark Beeson has claimed that '[…] forms of "good" authoritarianism, in which environmentally unsustainable forms of behavior are simply forbidden, may become not only justifiable, but essential for the survival of humanity[…]' (cited from Stehr 2013: 58).

to the President of the European Commission, Anne Glover, has expressed that she is 'extremely uncomfortable' witnessing the lack of trust in some quarters at the role of industry in scientific institutions[5] The suspicion that industry involvement in science is only geared towards profit may threaten to derail trust in science. This is evident from a recent Eurobarometer survey that documents that Europeans on average have lost confidence in science due to researchers' dependence on industry funding. Today, close to three in five Europeans (58 per cent) agree that 'we can no longer trust scientists to tell the truth about controversial scientific and technological issues because they depend more and more on money from industry' while only 16 per cent of respondents at the EU27 level disagree.[6]

It is the role of science advisers to find transparent ways to counter-balance this situation. Industry is the largest investor in science and will expect that the science policy is set up to facilitate its success. Yet, it is important that science is independent and transparent. Vested interests must be disclosed and conflicts of interest avoided. Science should have an inherent integrity and quality, both individually and collectively, enforced by continuous peer review and certification.[7] Above all, scientific research should avoid a strong competitive mentality and not keep negative research results undisclosed (Budtz Pedersen and Hendricks 2013). In post-Fukushima Japan, policy-makers have worked out a number of guidelines for a robust system of linking scientific advice to public policies that may serve as inspiration for other countries. The Japanese Science and Technology Agency's Centre for Research and Development, has issued a policy proposal calling for measures to enhance the effectiveness and integrity of science-based policy-making. The proposal features a

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[5] For more information, see EurActiv website article 'Top EU scientist calls for ethical standards to ease suspicion of industry', available at: <http://www.euractiv.com/science-policymaking/chief-scientist-calls-standards-news-519033> [last accessed 6 November 2013].

[6] Special Eurobarometer 340/ Wave 73.1, 'Science and Technology', January – February 2010.

[7] See the press release of SciCom 'European Scientists Call for Greater Integrity, Openness, Clarity and Public Engagement from Global Policy-makers', 18 February 2012, available at: <http://www.eurekalert.org/pub_releases/2012-02/s-ms-esc020912.php>, [last accessed 6 November 2013].

number of general principles on science-to-policy relations that are worth contemplating (Arimoto and Sato 2012: 1176–1177):[8]

- *Seeking scientific advice in a timely manner*. The government must endeavour to identify policy issues that require scientific knowledge in a timely and pertinent manner and act to acquire the best scientific knowledge available.

- *Ensuring the independence of scientific advisers*. Policy makers must not intervene inappropriately in the activities of scientists and experts. As a means to ensure objectivity and fairness, scientific advisers shall declare any potential conflicts of interest.

- *Achieving broad perspectives and balance*. When policy makers seek scientific advice, they should strive to secure the participation of scientists with appropriate insight and experience matched to the nature of the issues and to obtain balanced and interdisciplinary advice.

- *Ensuring the quality of advice*. Scientific advisers must strive for a balanced treatment of observational and experimental results and of cited papers and should improve the quality of scientific advice through peer review.

- *Proper handling of uncertainty*. Scientific advisers must provide policy makers with clear explications of uncertainties and diversity of views associated with scientific knowledge.

- *Even-handed treatment of scientific advice*. Policy makers must treat the scientific knowledge they acquire with fairness. They should not commission scientific advice with any preconception, distort scientific knowledge, or intentionally add wrong interpretations when using advice in policy-making.

- *Ensuring transparency of scientific advice*. To improve the quality and reliability of policy-making, policy makers must ensure transparency of the scientific advice process.

[8] Here, I quote in extenso from Arimoto and Sato (2012).

Scientific knowledge is an essential prerequisite in policy processes, and policy makers must duly respect it. At the same time, scientific advisers must recognise that scientific knowledge is not the sole basis of democratic decision-making. In promoting relevant efforts and following normative principles such as those stated above, particularities of diverse policy and scientific institutions must be given due consideration. Depending on national differences and scientific traditions, it is important to build greater trust among scientists, policy makers and citizens through a long-term, sustained and participatory dialogue. Science advisers and other relevant advisory bodies can serve as 'brokers' and ¨'intermediaries' between science and policy. With the increased focus among science policy makers and funding agencies on the 'grand challenges' of contemporary society, such as climate change, energy and food security, and sustainable resources, it is important to coordinate efforts to provide the best possible scientific advice. Evidence-based policies are crucial for more effective and efficient policies, and for sustaining a non-dogmatic form of governance that abides to the rules of democracy and political legitimacy. The effective implementation of future European framework programmes such as 'Horizon 2020' and other transnational funding programmes requires strengthening the evidence-base and developing methodologies and tools that are oriented towards assessing and translating scientific knowledge into the democratic process.

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Chapter 3

Democratic theory and expertise
Between competence and consent

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Experts, it is often said, should be 'on tap, but not on top'.[1] The proper place of expertise in democracy often seems clear: Informing democratic opinion, but not manipulating it; empowering democratic will, but not dominating it; using delegated power to act, but not alienating final control. Yet in practice the place of expertise in a democratic system is more troublesome. In this chapter I will consider what exactly is problematic about expertise in democracy. First, I introduce the problem of the politicisation of expertise. Second, I discuss two sets of democratic anxieties about expert authority. These anxieties turn on the democratic threats and goods of expertise, and they suggest that expert authority is at the same time frighteningly powerful and fatally weakened. In the final section, I take up the essentially Millian and Deweyan insight that in order for expertise to be responsive and reliable it requires a context of contestation. That is, the threats and the goods of expertise are interrelated. I will develop this insight in terms of the place of expertise in a democratic system. In particular, I frame the problem of expertise as an especially acute case of a general problem of distributed deliberation, and I

[1] The phrase is usually credited to Winston Churchill. Harold Laski, in a similar vein, writes that the expert 'is an invaluable servant and an impossible master' (1931: 10).

discuss the ways in which democratic theory has dealt with this problem and how it can be extended to the problems of constituting expert authority.

What is political about expertise?

The idea that experts should be 'on tap, but not on top' presumes and requires a division of labour. Expertise can only serve as a resource for politics in virtue of its separation from politics and its autonomous development.[2] Yet, in practical terms, such a division of labour has come under pressure. Science and expertise seem in recent decades to have become increasingly political. I should say a few words about what I mean by the politicisation of expertise. There is a great deal that can usefully be said about the variety of senses in which scholars have cashed out the claim that 'the technical is political' (Thorpe 2007; see Moore 2010a). However, here I only want to specify the sense in which I take expertise to be politically problematic. I take it that something is 'political,' following Warren (1999), when it becomes subject to conflict under pressure for collective decision. Politics, on Warren's definition, is:

> the subset of social relations characterized by conflict over goods in the face of pressure to associate for collective action, where at least one party to the conflict seeks collectively binding decisions and seeks to sanction decisions by means of power.
>
> (Warren 1999: 218)

On this conception the domain of the political is defined in terms of the intensity of conflict within social relations. And this account of politics requires the possibility of coercion. Thus, democratic discussion and various forms of agreement within constitutionally organised institutions are understood to be ultimately motivated by the possibility of resolution through collective coercion (Warren 1996a: 247). Even if we aim for consensus, political deliberation takes place under the shadow of coercion.

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[2] This is expressed in the idea and practice of a 'social contract for science' (Bush 1945; Polanyi 1962), in which the state provides funding and delegates decision power to experts themselves in an implicit bargain to produce the public goods of knowledge, policy advice and technological development.

This gives a clear scheme for identifying the domain of politics. In a social relationship where there is no pressure for a collectively binding decision underwritten by power then there is no politics, regardless of whether there is conflict. Where economic, cultural or coercive power is present, and there is conflict in which a collectively binding decision is at stake, then we have the domain of politics. Where power is present but there is no conflict, there may be suppressed or latent politics. The routines and relations of power might be uncontested because they are consensual. But they might be uncontested because of vulnerability, where people lack the resources to contest injuries or injustices, or because of hegemony, where people are under relations of domination such that they are unable to recognise themselves as being involved in relations of power. On this conception, politics has no essential or necessary boundaries. That is, conflicts of power are not always channelled through institutions, and thus cannot be defined in terms of their institutional locations (Warren 1999: 218). Furthermore, in complex contemporary societies there is an 'ever greater number of relationships that are politicized and thus require political resolutions – that is, resolutions that are negotiated, compromised, agreed, or imposed, rather than as a result of traditions, habits, or automatic structures or mechanisms such as markets' (Warren 1996a: 248). Not everything, then, is political, but anything can become political – even science and expertise (see Brown 2009).

If science and expertise become political, then, it is not because values are embedded in or delegated to artefacts (Latour 1991), or because it involves the distribution of resources (Greenberg 2001; Kitcher 2001) or risks (Beck 1992), or simply because it shapes the material conditions of our lives (Kitcher 2001: 199; Winner 1986: 29; Sclove 1995: 17). Expertise becomes political to the extent that it is a site of conflict under the shadow of coercive decision. And by this definition we can see a pattern of politicisation of science. Consider some emblematic examples. In controversies over human embryo research, the stakes have been high, involving coercion in the form of legal regulation or an outright ban on practices related to human embryo research, and settlements have been provisional, fragile and hard won. From the early debates over the regulation of embryo research, to current contests over the permissibility or regulation of research on stem cells derived from human embryos, the self-government of science was clearly contested, and new institutions have emerged to negotiate

political resolutions, most notably in the form of bioethics (Moore 2010b). Climate change today is another emblematic case of human actions having negative unintended consequences, and the assessment of consequences, the processes for identifying associations and establishing causal claims, the models for predicting consequences, the processes for gathering data, and the norms of peer review, have all been fiercely contested in the shadow of possible coercive government action and a perception of dangers from inaction. There are also examples of the politicisation of the power of particular experts in political decision processes. One emblematic case involves farmers in the north of England who contested government assessments of the risk of contamination of sheep that had eaten grass made radioactive by fallout from the Chernobyl nuclear disaster (Wynne 1996). The decisions of the experts from the Ministry of Agriculture were highly consequential for the farmers, and their methods, assumptions and results were fiercely contested. There are numerous other parallel cases from studies of environmental justice movements in which the apparently mundane matter of risk assessment became politicised. In such cases the status, credibility, reliability and neutrality of expertise are at the heart of disputes, and it is therefore clear that in such cases expertise cannot easily function as a neutral ground on which to resolve disputes.

When expert claims or practices become a matter of contestation under pressure for a collective decision, they cannot straightforwardly be said to be either on tap or on top. Expertise is often not able to play what is thought to be its part in the democratic system. There have been significant politicisations of science over at least the last forty years, and significant institutional and potentially democratic responses to those politicisations. To make sense of those responses from the point of view of democratic theory, we need to first get a sharper sense of the democratic goods and dangers of expertise.

The democratic threat of expertise

Within democratic theory there are two different sets of anxieties about expertise. The first emphasises the threat posed by experts to democratic politics. This in turn takes several different forms. One prominent argument is that 'technocratic' politics threatens to narrow the sphere of democratic debate. The term 'technocracy' originated in the early 20th century in the USA and it has come to be associated with the view that social problems can best be managed by intelligent

expert action within the state apparatus. While this view has often been associated with the progressive left, in Germany in the 1960s it was associated with conservatism, and the claims of 'technocracy' formed the backdrop to Jürgen Habermas's early democratic theory. Because I will be drawing later on his account of deliberative democratic politics, I will say a little more about Habermas's critique of technocracy.

Technocratic politics, for Habermas,[3] comprises two distinct elements. The first is the idea that specialist knowledge narrows the scope of political choice. What Habermas called the 'scientization of politics' consisted in both the technical refinement of the means of political struggle and the rising power of what he calls steering knowledges in the conduct of government. The facts about such things as the nature of a modern economy, for instance, delimit a set of options, and this in turn gives a lot of influence to those experts who determine the menu of 'realistic' choices. The second element is Weber's 'decisionist' thesis that those choices are made in a context of ultimately irreconcilable value pluralism, and in the last instance cannot be rationally grounded. These two elements – scientism and decisionism – are often found together. In the early postwar period the logical positivists claimed that all genuine knowledge is scientific knowledge, and that all other claims to knowledge were literally without meaning. In as much as such statements were not strictly scientific, they were regarded as having the same status as declaring a preference for chocolate over vanilla ice cream. Thus Margaret Macdonald (1956: 49) claimed that '[t]o assert that "Freedom is better than slavery" or "All men are of equal worth" is not to state a fact but to choose a side. It announces this is where I stand'. In this way, claims about the status of scientific knowledge and claims about the status of political decision were closely linked. Political values and behaviour might be scientifically explained, from the outside as it were (the project of modern political science), but they cannot be objects of rational discussion. Habermas's concern was that 'when this type of science attains a monopoly in the guidance of rational action, then all competing claims to a scientific orientation for action

[3] See in particular his essays on 'Technology and science as "ideology"', and 'The scientization of politics and public opinion' in his collection of essays *Toward a Rational Society* (Habermas 1970).

must be rejected' (Habermas 1973: 317–318).[4] When the technical refinement of the means of political struggle and the rising power of expert steering knowledges in the conduct of government was coupled with a decisionist account of political value, it produced a politics that narrowed the scope for citizen involvement and for reason in politics.

The scope for practical or political deliberation, Habermas worried, was being narrowed in a pincer movement: scientism closes down debate by technical fiat, and decisionism closes down debate by suggesting that debate itself is a fruitless venting of opinions. Action requires orientation, but in technocratic politics this orientation is 'dissected into a rational implementation of techniques and strategies and an irrational choice of so-called value-systems' (Habermas 1973: 317–318). It is the fact that such science 'attains a monopoly in the guidance of action' that is for Habermas the central concern. That is to say, his interest was less in the expertise element of technocratic politics, than in the dangers of value-free decision. Technocratic politics amounted to the use of a technically grounded language of necessity in an attempt to avoid explicit debate and justification of value positions. However, as Habermas rightly observes, there is no necessary connection between expertise and technocratic politics. One could draw on expert knowledge without succumbing to the errors of scientism and decisionism. In this Habermas drew inspiration from the American pragmatists, who took seriously the problem of integrating technical knowledge within public debates on practical action. I'll come to this later.

Part of the concern about the position of experts in political decision structures is that the necessary delegation to experts can amount to a de facto alienation of control. This concern motivated Robert Dahl's (1985; 1989) early advocacy of the 'minipopulus,' which he saw as a way to generate representative groups of citizens who were competent enough to prevent delegation becoming alienation. I won't discuss this institutional innovation here, but I will briefly consider

[4] This is why a large part of his early career was concerned with establishing that a critical theory of society was an emancipatory form of knowledge (Habermas 1968/1971; see also Geuss 1981). This, however, became less of a concern after the 1960s – he no longer saw epistemology as the 'royal road' to a critical theory of society (quoted by Specter 2010: 94).

why he thought expertise posed such a threat. On Dahl's view, the informational asymmetry involved in relations between expert and non-expert is absolute. They know something you don't, and in deciding whether or not to trust their account you have nothing to go on but external signs and signals. Expert claims, so construed, are like secrets. If you were to have the means to rationally judge the claims, you would be in on the secret, and then it would no longer be a secret. The asymmetry would disappear. But if you're not in on the secret, your capacity to rationally judge your authority is weak. You are in a relation of dependence. Dahl picks a case that exhibits this compound of expertise and secrecy in a particularly stark way. Nuclear weapons policy draws not only on foreign policy knowledge, skills and experience, but also on privileged information. The reliance on secret information means that the non-expert could not have the means to judge those claims without being brought into the circle of experts. Dahl thus fears that what looks like a reasonable delegation of authority to a group of better placed individuals quickly becomes an 'alienation' of final control. Delegating power to experts, he seems to suggest, is like signing yourself into an asylum and thereby losing the capacity to sign yourself out again. By delegating to experts certain powers to act, he suggests, we simultaneously – because of the starkness of the asymmetry involved in expertise – hand over own capacity to judge the terms of the delegation. He extrapolates more widely from this case, but it is significant that he conceives expert authority in terms of a surrender of judgment.

Both Habermas and Dahl ultimately recommend improved communication between experts and non-experts as the precondition for democratic control.[5] However, a more radical reading of the threat of expertise addresses the power of expertise within the dimension of communication itself. The worry here is that expert discourse itself does the work of constricting the space for public and political deliberation. Frank Fischer, for instance, argues that while experts do not exercise formal political control, their 'information and methods'

[5] A democratic solution requires that 'citizens should possess sufficient competence, both moral and instrumental, to make adequately enlightened judgments either about policies or about the terms on which authority to make decisions may safely be delegated' (Dahl 1985: 72). Second, they 'should be able to exercise sufficient control during the process of decision making to insure that the final decision corresponds with their informed intentions' (Dahl 1985: 72).

have become indispensable resources in governance. Indeed, he suggests that 'the dispersal of power and social control away from the formal centres of governance' (Fischer 2000: 25) is enabled by the techniques and practices of experts in the policy process. 'The focus on the political position of the technocrat in the decision structure,' he concludes, 'misses the more fundamental power of professional discourses' (ibid.: 24). Critics in this broadly Foucaultian tradition see expert authority as defining what is sayable and unsayable in a particular domain. The worry here is that expert authority has such performative strength that it marks out the channels within which meaningful claims can be raised, and silences those claims that fall outside. Underlying this concern is the idea that expert authority is a danger to democracy because it amounts to a license to define reality for the purposes of political deliberation. This has long been a focus of scholars in the field of science and technology studies. Sociologist of science Thomas Gieryn defines expert authority, with a nod to Max Weber, as 'the legitimate power to define, describe and explain bounded domains of reality' (Gieryn 1999: 1). This power is fundamental, since it concerns the right to make credible statements about reality. And this power has political implications. 'The capacity of scientists to authorise and certify facts and pictures of reality,' Yaron Ezrahi once claimed, is 'a potent source of political influence' (Ezrahi 1971: 121).

The invocation of the deep and politically significant power of expert authority seems at odds with the claim that epistemic authority is being eroded in the face of widespread public and political contestation. Yet one can interpret the vigour of such contestation as a testament to the value of the prize. Public contestation and controversy over expert claims, Gieryn suggests, does two things at once. At one level, such 'credibility struggles' serve to settle, for a limited time and in a particular context, what science means and what it says, and what is and is not scientific. These struggles for credibility amount to a form of 'boundary work,' by which he means 'the discursive attribution of selected qualities to scientists, scientific methods, and scientific claims for the purpose of drawing a rhetorical boundary between science and some less authoritative residual non-science' (Gieryn 1999: 4–5). Yet at the same time as these struggles result in some purported facts and interpretations being regarded as unscientific or false, they reinforce the cultural authority of science, for 'the disputing experts all appeal to science as the tribunal of

reason and truth. As each side brings science to the battle in defense of its claims, the link in principle between science and truth or reliability is sustained' (Gieryn 1999: 3). On this account, the problem for democracy is not that particular experts have a privileged status in a decision process, but rather that expert authority is granted such political weight that properly political struggles are conducted by proxy on the terrain of claims to expertise. Rather than explicitly argue over values, those who contest policy prefer to discredit epistemic claims. In this way, belief in the power of expertise to settle political debates serves largely to displace political struggle into the domain of expert claims.

The democratic promise of expertise

Yet the democratic threat of expertise coexists with a crucial promise. As democrats such as Habermas argued, and John Dewey[6] before him, expertise is crucial to the enlightenment of political will. The dangers that some democrats associate with expert power are significant in part because it seems so obvious that government in functionally differentiated and technologically advanced societies requires expertise. The value of having experts 'on tap' draws on the intuition that some people know some things better than others, and that we would make better individual and collective judgements and decisions if we deferred to their knowledge, skills and experience. There are at least three ways in which expertise supports democratic goods: informing public and political deliberation, empowering democratic collective action, and telling truth to power from a position of independence. Each of these roles would require expertise to maintain its autonomy and separation from politics. From this point of view the politicisation of expertise threatens to undermine democratic self-government.

Informing political and public deliberation

Expert knowledge seems essential for informing political and public deliberation. One of the motivations behind the 'deliberative turn' in democratic theory was a sense that existing forms of collective

[6] See, for instance, *The Public and Its Problems* (Dewey 1927/1988), in which Dewey responds to Walter Lippmann's pessimistic account of the defeciencies of information and judgment among both general publics and politicians.

judgment and decision were deficient in epistemic terms.[7] As Goodin writes:

> I take it that most deliberative democrats are 'epistemic democrats' as well, valuing deliberative procedures at least in part because they are more likely to yield 'correct' outcomes where there is some independent truth of the matter for decisions to track.
>
> (Goodin 2008: 109)

Without going as far as the moral realist claim of some epistemic democrats that democratic processes track the truth about the common good, we might at least say that deliberative democrats tend to be committed to the idea that deliberation should be not only 'other-regarding' and 'future-regarding,' but also 'fact-regarding' (Offe and Preuss 1991: 156–157). No deliberative democrat wants people entering a deliberative process with true beliefs and leaving with false ones. There is a general recognition that democratic will needs to be accurately instructed in its technical potential.

For some contemporary democratic theorists, the demand for a factual basis for public deliberation involves both an appeal to the truth or at least reliability of expert knowledge, and, importantly, to the value of publicity. It is for this reason, I think, that deference to an expert consensus is so often called on as the basis for the 'fact-regarding' quality of public deliberation. Thomas Christiano, for instance, argues that public deliberation must be a 'truth-sensitive' process, one which takes up the 'best available reasons', and the best available reasons are those that reflect 'the status quaestionis [state of investigation or scholarly consensus] in the relevant reliable scholarly disciplines' (Christiano 2012: 52). The proper role of experts is to 'filter' the deliberations of other parts of the system and present the best conclusions of their own deliberations. Citizens, he argues, are to decide on the basic aims of society, but their choices need to be constrained to options that are at least consistent with a basic

[7] This, indeed, follows directly from Habermas's critique of decisionism. But it changes the valence of expertise in politics, from a threat to a promise.

consensus of experts. This appeal to consensus treats expert authority as what John Stuart Mill called a 'voucher for truth.'[8]

Yet the value of relying on a consensus of experts in deliberation appeals not just to epistemic reliability but also to the value of publicity. This general approach can be traced back to Rawls. While his ideal agents considering the just ordering of society from behind a veil of ignorance must be ignorant of their own material position within that society and their own qualities and capacities, they must be equipped with knowledge of the 'general facts about society' (Rawls 1971/1999: 480). In working out the principles of justice that such 'rational persons with true general beliefs' would agree to, 'we must rely upon current knowledge as recognized by common sense and the existing scientific consensus' (ibid.: 480). It is significant that Rawls couples 'common sense' and 'the existing scientific consensus'. By 'true general beliefs,' he of course invokes the notion that such beliefs should indeed be true rather than false. But he links the value of deference to expertise with the value of publicity. The appeal to expert consensus turns not directly on its truth – for it is always fallible and revisable – but rather on its public accessibility. This point is emphasised by Amy Gutmann and Dennis Thompson. At the heart of their account of democratic deliberation is reciprocity. Reciprocity requires both that reasons are given to justify policies and decisions made by citizens and their representatives, and that the reasons should be accessible or comprehensible to all the citizens to whom they are addressed (Gutmann and Thompson 2004: 4). Expertise may be practically difficult to understand, but it is a form of reasoning that is in principle public because it can be recovered or retraced, with sufficient effort.[9] In this much, expert knowledge must be distinguished from secret sources of justification or revelatory sources, or others that are by definition not publicly accessible. Deference to expert authority is thus folded into the commitment to reciprocity. 'By using the most reliable methods of inquiry, we demonstrate our mutual commitment to reach deliberative agreement in the empirical realms that are relevant to moral argument' (Gutmann and Thompson 1996: 15).

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[8] See Moore (2013) on the relation between Mill's concept of authority and the modern problems of expertise.

[9] The potential recoverability of expert reasoning is also emphasized by Henry Richardson (2012).

It is for this reason that deference to a consensus of experts can seem a precondition for the exercise of public reason. And it is for this reason that the politicisation of expertise is so alarming to some democrats: When citizens or decision makers refuse to defer to a consensus of experts, they violate the norms of public reason. The denial of an apparently settled consensus of experts disrupts the common ground of given beliefs that all reasonable people must be assumed to share as a precondition for reasonable public deliberation. Gutmann and Thompson add an important complication to the discussion. When discussing the valuable role of expert claims in underwriting the accuracy of deliberations about health care, they note that while lay people may be obliged to accept the claims of experts,

> [w]e should not, of course, accept these conclusions uncritically. Accepting the justification for such conclusions presumes a certain amount of trust, but not blind trust. More specifically, the trust is not blind if two conditions hold. First, there is some independent basis for believing the experts are trustworthy (such as a past record of reliable judgments). Second, the experts can describe the basis for their conclusions in an understandable way. The justification would then be accessible in the way that reciprocity requires.
>
> (Gutmann and Thompson 2004: 146)

On this occasion I will not take up the general question of the grounds that non-experts may have for accepting expert claims. I would simply like to note the complexity of the obligation to defer to expertise in public deliberation. Those who refuse to defer to such 'common sense and the existing scientific consensus' (Rawls 1971/1999: 480) place themselves outside the bounds of reasonable discussion and violate the terms of reciprocity. And yet they are supposed to be exercising judgment in critically deciding how far to trust in expert claims.

Empowering democratic collective action

A second democratic good has to do with empowering collective action. In the most crudely stylised models of the political system, the sovereign people, through their representatives, decide on a course of

action, and then delegate to experts the task of carrying it out.[10] The good of expertise is as the 'tool' to the legislative 'intention', to adapt a phrase from Bruno Latour (2002: 248). This suggests, at least ideally, a division of labour between those questions of collective goals and values on which everyone is competent to deliberate and those matters 'in which people should defer to experts' (Kitcher 2011: 21). Similarly, Collins et al. (2007) distinguish the 'political phase' from the 'technical phase' of public decision-making, each involving different standards of evidence and reasoning, and different criteria for participation. They, too, distinguish sharply between those questions on which all can have an opinion and ought to be allowed to express it, and those matters on which laypeople should defer to the judgment of experts. The democratic ideal of collective action empowered by expertise seems to be threatened by the 'erosion' of epistemic authority. Both Philip Kitcher (2011) and Harry Collins with Robert Evans (2007) frame their accounts of expertise and democracy against a popular threat to the possibility of coherent collective action on complex issues. When Collins and Evans talk of democracy they emphasise the democratic good of empowered collective decision.[11] They see the proliferation of public challenges to expert authority as undermining the necessary relations of deference and delegation to appropriately constituted expertise.

Yet this issue is complicated by the reality that the division of labour is rarely clean. A legislature may specify a goal, such as vaccinating the population against contagious illness. How exactly this may be achieved not only calls on expert knowledge, but also entails reliance on expert judgment to specify the content of law where it is underspecified, to make technical decisions that have material consequences, and to decide strategies and methods for achieving specified goals.[12] Experts in administrative agencies are thus, as

[10] In the form of what Roger A. Pielke (2007) calls the 'linear model' of the place of science in policy – first get the facts, then hand off to political actors to make decision – this idea is remarkably commonplace.

[11] Darrin Durant rightly observes that they treat democracy as a 'decision-process capable of generating workable consensus' (Durant 2011: 3).

[12] Even in the case of 'pure' scientific expertise, knowledge is not produced in a way that is entirely detached from values (Douglas 2009; Kitcher 2011: 30–39). Pielke (2007) usefully emphasises that experts are more valuable in a democracy precisely when they do not merely state the facts but when they also advance interpretations and attempt to expand the menu of available policy options.

Henry Richardson emphasises, not only 'necessary handmaidens' but also 'potential traitors' to the power of the legislature (Richardson 2002: 10). The delegation of administrative power has the potential to become de facto arbitrary rule, in the sense that bureaucratic decisions may not bear 'an appropriate connection' to what Philip Pettit calls 'the welfare and world-view of the public' (Pettit 1999: 56). But administrative discretion is indispensable in empowering the democratic capacity to act. Richardson argues that administrative discretion can be made compatible with rule by the people, in as much as collective reasoning about public ends can be distributed across the institutions and agencies of representative democracy. I will discuss this further below, because his solution, which involves both the legitimacy of the initial delegation and the possibility of scrutiny by informed intermediary advocates, is a line of thought I aim to further develop.

Telling truth to power

A third democratic good of expertise involves the capacity to tell truth to power from a position of independence. This clearly involves experts making substantive claims that are true, reliable, and so on. However, what I want to emphasise here is that the phrase 'truth to power' typically invokes an appeal to institutional independence and professional autonomy.[13] As Michael Schudson emphasises, the real significance of the idea of experts telling truth to power is that it means they have 'an ethical or professional commitment to truth-seeking according to the standards of their community', and willingness to submit to the judgment of that community as to their qualification' (Schudson 2006: 500). That is, telling truth to power is made possible by their self-regulating capacities as an autonomous professional community. A politician may pressure experts to reach a judgment favourable to the needs of the politician at that moment – perhaps a declaration that a certain foodstuff is safe, or that there are known to be weapons of mass destruction in this or that place, or that climate change is or is not man-made. Schudson's claim is that the expert would be constrained from telling politicians what they want to hear by her professional community – by concern for her reputation, by loyalty to her professional colleagues rather than her political clients, by threat of formal or informal sanction from her peers. In this

[13] Haskell (1984), see also Schudson (2006) and Turner (2003).

way, the independence and self-governance of professional communities is the source of their ability to tell truth to power.[14]

While some democratic theorists are anxious about experts acquiring *de facto* powers of guardianship, then, Schudson worries that experts do not have enough power to declare that political projects are incoherent, contradictory or counter-productive. What is valuable about expertise is precisely that it makes an independent claim to authority that is drawn from the purposes, values and culture of the institution (like the budget office) or field (like climate science, economics or accounting). It is in the name of such independence that experts can stand up to and offer something distinct from elected politicians. The problem is how to ensure that:

> […] democratic authority give[s] experts enough autonomy so that the voice of the expert represents the expert's expertise rather than the views of politicians or bureaucrats who pressure the expert into submission? In other words, how can the leash be long enough to keep the expert from becoming a toady?
>
> (Schudson 2006: 497)

There is for Schudson no question that ultimate decision-making power must rest with the people, exercised through the institutionalised democratic process. However, 'often that process will work best when it affords experts great autonomy. Fawning experts are not useful experts. Fearful experts are not useful experts. In practical politics, too little expertise is more problematic, and more common, than too much' (Schudson 2006: 499). Tight lines of accountability may prevent experts doing harm, it seems, but they may equally prevent experts from doing more good.

This discussion of the goods of expertise points to a second broad set of democratic anxieties about expertise. Expertise supports democratic goods of deliberation and collective decision in a number of ways. But they all require properly constituted expert claims to be treated as authoritative in a particular context. The politicisation of expertise –

[14] Though, as Thomas L. Haskell notes, and Michael Schudson recognizes, such autonomous communities always threaten to devolve into 'country clubs and fraternal lodges. Unchecked, the republic of letters becomes a republic of pals' (Haskell 1998: 215).

the contestation of expert claims under the shadow of collective decision – signals a weakening of expert authority. The erosion of expert authority seems also to undermine democratic capacities for collective action and informed collective judgment and deliberation.

These two different assessments of the problem of expert authority today – that expert authority is frighteningly powerful and that it is fatally weakened – support correspondingly different accounts of how to respond. On the one hand, there is a strong valorisation of agonistic struggle and contestation to unmask the political character of expertise and thereby open horizons for political engagement. On the other hand there is an emphasis on formal mediating institutions designed to shore up expert authority in a context of public suspicion. Yet it is quite clear – and has been so to those democratic thinkers like Mill and Dewey who have seriously considered the question of expertise in politics – that the two anxieties are interrelated. I mean not only that contestation and critique are sometimes taken to erode the capacity of expertise to deliver its goods, but rather that in order for expertise to be responsive and reliable it requires a context of contestation. I will develop this insight in terms of the place of expertise in a democratic system.

Expertise, deliberation and democracy

The problem posed by expertise for democracy – both its threat and its promise – turns on asymmetry and separation. Experts claim to know something you don't know, and they know it in virtue of a process in which you were not a participant. In so far they resemble deliberators behind closed doors. As a claim to authority, expertise thus looks like a form of secrecy. And where we are faced with 'first order secrecy,' as Thompson observes, we seem wholly reliant on 'second-order publicity' to justify it (1999: 185). Unlike secrets, however, expert claims are potentially public, and can be scrutinised by those who acquire the knowledge and commit the resources to do so.[15] Of course, when someone learns for themselves the basis for a claim, it would seem that they are no longer in an authority relationship at all. Just so. But expert authority, while it involves not

[15] While a secret stops being a secret when you look behind the veil, an expert claim remains unchanged even if outsiders come to access it; what perhaps changes is the relation of expert authority.

learning for ourselves the grounds of the claim, depends on the actualised possibility of scrutiny or publicity over time. I will not develop this claim in detail here; for now we can simply note that in practical terms the specialisation of knowledge has the effect of making expert deliberations exclusive and secluded. Furthermore, the complexity of modern government and the limits on everybody's time and desire and ability to inform themselves make divisions of labour practically unavoidable. It is therefore to some degree unavoidable that citizens, as James Bohman puts it, have to 'surrender their autonomy to experts, delegates, and other forms of division of labor' (Bohman 1996: 168). In this section I will approach the democratic problem of expertise as a special case of a general problem of systemically distributed deliberation.

Distributed deliberation

The special normative claim of deliberative democracy is that democratic legitimacy attaches to collective decisions that, as Bernard Manin put it, 'result […] from the deliberation of all' (Manin 1987: 352). Manin meant this to be entirely consistent with practices of representation, and with decision by majority rule. Habermas, too, regards practices of representation and decision by aggregation as indispensable in democratic systems. Deliberative democratic theory, however, focuses attention on the context of public discussion within which opinions are formed in communication that surrounds the expression of will through the vote. When we ask, then, how a collective decision could in any plausible sense result from the deliberation of all, the answers will have to do in general with the temporal and institutional distribution of the popular will. That a collective decision can be said to result from the deliberation of all does not, then, mean that everybody actually participated in deliberation. Rather, the claim turns on equality of 'opportunity to access to political influence' (Knight and Johnson 1997: 280).

The idea of equality of opportunity of influence in turn has two broad dimensions. It involves on the one hand the formally equal distribution of decision power through the vote (assuming one person, one vote). This dimension is directly linked to the formal institutions of what Habermas calls the 'parliamentary complex' that make collective decisions and have the capacity for collective action. But this is only one dimension of the process of democratic legitimation. The popular will also takes its form through processes of public

deliberation. This is underpinned by certain formal equalities, including rights to voice and freedoms of speech and association. But equality within the deliberative dimension does not take the form of an equal weighting of opinions. Opinions and arguments are not granted equality in the manner of votes. Rather, equality attaches to the process of argumentation itself. This process of argumentation is ideally to unfold under what Habermas calls the 'force of the better argument,' which means in particular the exclusion of influence deriving from inequalities in wealth and power. Equality is associated with the condition of publicity. Knight and Johnson rightly observe that:

> […] the procedures that govern the deliberative phase of democratic decision making protect equality by ensuring that all claims and counter-claims are subject to critical public scrutiny and that, when challenged, any participant must defend her proposal or back her objection with reasons.
>
> (Knight and Johnson 1997: 288)

Deliberative democratic equality requires not equal participation, but rather a context of active public scrutiny.

'Deliberative democracy' was perhaps an unfortunate term, for it runs together the element of binding collective action that proceeds ultimately from equally distributed decision power in the form of votes, and the element of deliberation on matters of public concern in the absence of coercion, in which arguments acquire persuasive force in the process of deliberation itself. Deliberative democrats sought to resist the claim that democracy reduces to the aggregation of pre-existing wills. But they did not seek to reduce democracy to deliberation, nor did they imagine deliberation would displace aggregative politics. Many deliberative theorists have made a point of distinguishing 'democracy' from 'deliberation,' that is, between the dimension of communication oriented to persuasion by reason-giving and the dimension of equal distribution of empowerments in the form of votes and rights (see Bohman 2007; Habermas 1996; He and Warren 2011: 271).[16] However, we might take this observation

[16] 'Democracy,' Baogang He and Mark Warren claim, 'involves the inclusion of individuals in matters that potentially affect them, realized through distributions of empowerments such as votes, voice, and related rights. Deliberation is a mode of

further. Not only does equal distribution of decision power differ from the sort of equality expressed in terms of the force of the better argument. It might even be said that they are in tension.

To put it another way, equality in the dimension of deliberation is often taken to imply a degree of distance from mass or popular involvement. So an election may have the highest democratic pedigree, since virtually all adults have a formally equal power to influence the result (ignoring any vagaries in particular electoral systems). But it is characterised by the lowest deliberative expectations. While voters are of course free to give their reasons to anyone who wants to know, they are not required to justify their choice. Indeed, where voters are subject to such pressures, we would worry about the integrity of the electoral process. But other parts of the political system strike a different balance between deliberative expectations and democratic pedigree. Legislatures are at one remove from the people, since they are populated by representatives. But legislatures have higher deliberative expectations. Parliamentary debate prompts members to 'rationalize acceptance or rejection' of legislation (Goodin 2005: 188). Indeed, the function of parliamentary deliberation is to 'justify […] the selection of a problem and the choice among competing proposals for solving it' (Habermas 1996: 307). And yet further along the scale we find institutions like constitutional courts, which, if they are appointed, are detached from direct democratic influence altogether. But they are subject to higher deliberative standards. There are formal requirements for decisions to be accompanied by reasons, and those reasons must be persuasive. Simone Chambers thus distinguishes between 'Socratic' and 'plebiscitary' reason.[17] The 'rational component of public reason' (Chambers 2004: 393), she argues, appears to be safeguarded by conducting deliberation away from the 'glare' of publicity. What is important to note here is that the distinction between 'Socratic' and 'plebiscitary' reason, or between deliberative expectations and democratic pedigree, places a high value on the seclusion of deliberation

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communication in which participants in a political process offer and respond to the substance of claims, reasons, and perspectives in ways that generate persuasion-based influence' (He and Warren 2011: 271).

[17] Philip Pettit, too, sharply distinguishes between the rule of reason and the will of the majority. Thus, he can say that democracy thrives when it is 'not governed by public will, and, often not opened to the public gaze' (2000: 140).

and the limitation of direct public involvement. John Ferejohn in particular emphasises that seclusion is substantially linked to higher deliberative expectations. Closed-door deliberation insulates participants from the need to 'impress' a 'poorly informed audience'. Members are able to change their minds and switch positions 'without worrying about their public reputations for consistency' (Ferejohn 2008: 209). By closing the doors, Ferejohn argues:

> Internally deliberative processes may provide an environment in which issues can be decided free from coercion and temptation and in that way approach what Habermas has called an ideal speech situation. At least from the viewpoint of those in the room.
>
> (Ferejohn 2008: 209)

Deliberative democratic equality, then, requires the absence of coercion, or at least limits on the influence of wealth and power on the outcome of deliberations. But such equality is entirely consistent with practices of representation and delegation, and with various divisions of deliberative labour. This point has been brought out strongly in the recent 'systems' turn in deliberative theory (Mansbridge et al. 2012). As Ferejohn puts it, the systems' view recognises 'the inevitability of a political division of labour and of relations of power and deference within deliberative processes' (Ferejohn 2008: 203). Of course, deliberative democrats have long emphasised that the merits of the public sphere are not the same as the merits of practices of 'secluded' deliberation (Habermas 1996). What the systems approach brings to the fore is that while deliberation may be distributed across different moments and institutional locations, the broad regulative ideal is that 'power in the sense of coercive power is absent in a deliberative system' (Mansbridge 2010: 41). Yet this gives us a sharper view of a problem that looms large when considering a democratic theory of expertise: How might we have relations of power and deference within a deliberative system and yet imagine that it could approach the regulative ideal of the absence of coercive power?

Meta-deliberation

Expertise presents an acute version of a general problem of distributed deliberation. And it is a common enough observation in democratic theory that divisions of labour and inequalities of

influence must themselves be capable of being justified through democratic deliberation. We might say that Thompson's democratic justification of secrecy, that 'first order secrecy' must be justified through a process based on 'second-order publicity,' extends to many less extreme forms of asymmetry. Minimally, policies and processes must be public in order to be potential objects of consent. A central claim of the deliberative systems approach is that the relations between parts or moments in the deliberative system – the division of deliberative labour – must itself be subject to deliberative justification. As Thompson puts it, a crucial feature of deliberative systems is that at the 'meta-deliberative' level, the 'place of deliberation in the larger process should be open to deliberative challenge itself' (Thompson 2008: 515). Bohman makes a similar point: Democratic change 'relies on the reflexivity of the democratic order', and this means that not only must citizens in a democracy 'be able to deliberate about matters of common concern', but they must also 'be able to deliberate about the procedures by which they deliberate, the reasons they accept as public reasons, their practices of self-government and so on' (Bohman 2007: 1).

The question of how divisions of deliberative labour can themselves be held to deliberative standards can be answered in at least two ways. The first is 'constitutional' meta-deliberation, that is, deliberation directed at the design of democratic process itself. Ideally this would involve deliberative constitution-making, but can also apply to deliberative events that address the organisation of other parts of the system. In the British Columbia citizens' assembly of 2004, for instance, citizens deliberated on the framing of proposal for electoral reform to be put to a referendum in British Columbia. This experiment in allowing citizens 'the right to choose the system by which they choose representatives' (Thompson 2008: 21) has since been followed in Ontario and the Netherlands, but these remain exceptional cases.[18] Nonetheless, they exemplify 'constitutional meta-deliberation', that is, democratic deliberation about the organisation of the democratic system itself. At this 'constitutional' level, meta-deliberation addresses the question 'what are the most effective and desirable relationships among the various bodies that operate within the structure of deliberative democracy – those designed to

[18] For a study of all three citizens' assemblies, see Fournier et al. (2011).

deliberate, as well as those constituted to decide in other ways[?]' (Thompson 2008: 516). This approach to 'meta-deliberation' regards the constitution of a formal political system as something that itself should be held to the highest deliberative standards.

A second approach involves piecemeal challenges that take place below the level of formal constitutional reform, but which nonetheless address the structure of the deliberative system or the relations between its parts, and can thus meaningfully be called 'meta-deliberations'. These piecemeal challenges are local responses to particular problems and conflicts and claims about the status of reasons, rather than explicit attempts to reform a constitution, but they are often made in the name of deliberative ideals and can prompt institutional changes that affect the deliberative system as a whole. In the context of scientific and expert authority, such piecemeal challenges have had big institutional effects. Many deliberative and participatory institutional innovations in scientific governance emerged in response to problematisations of existing ways of governing science and politics by a range of actors, from moral and religious movements concerned about the social effects of new reproductive technologies to environmental and other movements concerned about the systematic lack of attention being paid to the potential negative effects of technological development. Surveying the landscape of institutional innovations in scientific governance in Europe and America, which now routinely involves participatory technology assessment, bioethics commissions, minipublics, citizen's assemblies and consultations of various kinds, we can see that, without having had a constitutional convention, there have been major changes in the way that certain parts of the deliberative system interact – specifically, expertise and scientific knowledge, and political decision processes. Thus, while 'constitutional' deliberation concerns the founding of a deliberative system as a whole, piecemeal challenges are directed in an ongoing and unpredictable fashion at the role of particular moments in relation to the whole.

Communication: internal and external reasons

Distributed deliberation presents a further problem. It requires those 'outside the room,' so to speak, to exercise judgment with regard to deliberations 'inside the room,' whose content and experience they do not share. How can those 'outside the room' have grounds to trust

the outcome of deliberations at which they were not present? This is difficulty is especially acute where expert deliberations are concerned. To consider this problem, we can distinguish between 'internal' and 'external' legitimacy. Internal legitimacy derives from the acceptance by the participants of the outcome of a deliberation within a particular institution or body. Bohman calls this 'internal legitimacy', where the participants

> could see that all views were fully and civilly considered, and that their groups and in the plenary sessions they had opportunities to shape and influence the course of the deliberation, even if they perhaps did not agree with its outcome.
>
> (Bohman 2007: 10)

Ferejohn, in a similar vein, defines 'internal deliberation' as deliberation in which 'members attempt to reason among themselves, in camera, to produce a joint recommendation on behalf of the whole body' (Ferejohn 2008: 209). External legitimacy, on the other hand, derives from acceptance by institutions or publics outside of the deliberative forum. The idea is that there can be good reasons to accept the outcomes of a deliberation at which one was not present, and these reasons may be different to the ones that establish internal legitimacy for those in the room.[19] The distinction between internal and external legitimacy emphasises: first, the separation between those who are in the room and those who are not; and second, that the reasons shared by those in the room will not be necessarily be the same as the reasons that convince those not in the room to accept the outcomes of their deliberation. It is as though, in the case of the BC Citizens' Assembly on electoral reform, the voting citizens outsourced the task of substantive deliberation on the best electoral system for the province to a small citizens' assembly, and then simply trusted its recommendation. Those outside the room may not have been considering substantive arguments about different electoral designs so much as making judgments about the representativeness and competence of the citizens' assembly itself (Cutler et al. 2008). Michael Mackenzie and Mark Warren thus argue that citizens' assemblies and other minipublics can function as 'trusted information

[19] Gutmann and Thompson note such second-order reasons in the case of expert claims in deliberations on medical issues (2004: 146).

proxies' (2012: 110) for those outside the room. The problem is that those outside the room share neither the substantive matter of the deliberations, nor the experience that the deliberation was fairly conducted and so on. It is for this reason that Ferejohn (2008: 208) describes the situation of those outside the room as one of 'trust without reason-giving'.[20]

One issue to keep in mind as we extend this analysis to the problem of expertise is the sharpness of the boundary between internal and external reasons. If the boundary is impermeable, then what is left to those outside the room is only acclamation or rejection. Such a strict division of labour would, as Chambers points out, 'exclude citizens from substantive deliberation about the issues altogether' (2004: 397). This in turn raises three concerns. It could protect elite deliberation from substantive scrutiny and challenge. It could effectively hand democratic ratification over to a fully 'plebiscitory' (and non-deliberative) process (Chambers 2004: 397). And, as Bohman (2007) argues, to restrict public judgment to the approval or rejection of the initiatives of others could preclude public influence over agenda setting.[21] Chambers, usefully, speaks of whether secluded deliberations are 'porous' (2004). 'Ideally what we want,' she suggests, 'is a public sphere not entirely dominated by plebiscitory reason and closed sessions not entirely dominated by private reason' (Chambers 2004: 398). The 'porousness' of secluded deliberations is particularly important when considering expertise. Expert deliberations look like an archetype of a 'closed' or 'internal' deliberation, for all of the reasons mentioned above, and for the additional reason that external audiences are unable to comprehend the proceedings, and thus should not be exposed to confusion and anxiety by being shown what's going on. And there is a special reason for the closure of expert deliberations, which comes in two parts: First, it is held that in order to reach sound conclusions, expert participants must be free to argue vigorously, to present alternative positions, and to reach a decision on what is acceptable to all the members – in short, there is

[20] By this Ferejohn means trust without their reasons, but I would emphasise that this does not mean that those outside the room trust without any reasons at all.

[21] Bohman emphasises the importance of enabling citizens' 'capacity to begin'. Initiative involves in the first instance a capacity to amend the basic normative framework. Secondly – and more relevant to my argument – it involves a capacity to 'initiate joint, public deliberation', to 'set an item on an open agenda' (Bohman 2007: 8).

to be a Millian freedom of discussion within the room. Second, it is often thought that the joint recommendations of such a body only in fact carry authority outside the body – will only be 'trusted without reason-giving' – if they are presented as a consensus or unanimity position of the expert group.[22] The problem here concerns the extent to which substantive deliberation can be undertaken by those outside the room as well as those in the room. Another way to put this issue is the extent to which 'internal' or substantive judgments are required or involved in the trust judgment. This gives important democratic shape to the extensive discussions in sociology of science and social epistemology of the capacity of lay people to exercise judgments with respect to expert claims.

Contestation: iterative change and tacit consent

Yet what is at stake in meta-deliberation about divisions of deliberative labour is not simply the communication of reasons or justifications. Public judgment also importantly involves an active office of scrutiny, which involves interaction, and even contestation. One reason for emphasising the activity of scrutiny and contestation is that it has the potential to influence the behaviour of those who are being scrutinised. What is at stake is not merely the communication of reasons and justifications, such that the norm of public deliberation is honoured merely by the fact that reasons are given by officials for public actions and approved by those subject to their effects, but the influence of the democratic public on the elite deliberation. The relationship between the formal institutions of collective decision and action and the informal realm of public opinion-formation is more than mere ratification, even if it is less than control.

This general insight can be specified by thinking in terms of 'iterated' deliberation. 'Iteration' involves different deliberative moments as and when they are needed. This shifts the focus from the deliberative system as a fixed sequence of steps, in the manner of the passage of a bill through the legislature, and towards the process of questioning and challenging the division of deliberative labour itself. Iteration can engage different institutions, harness different deliberative capacities, and go through many phases. Thompson claims that this model 'can reap the benefits of the division of labor in distributed deliberation

[22] This claim is questioned by Beatty and Moore (2010).

without the costs' (2008: 515). That is, it can maintain a division of labour while incorporating challenges to the division of labour, as criticisms can be answered through subsequent iterations. Furthermore, it brings to the fore deliberative democracy's 'dynamic capacity for self-correction' (Gutmann and Thompson 2004), emphasising the reversibility and revisability of decisions and decision-processes. While Thompson describes iteration in terms of repeated revisions to policy proposals,[23] we can usefully think of it more generally as a way of accommodating spontaneous and informal challenges to established decision processes. In contrast to the formality of an ordered sequence of deliberative moments, the 'iteration' model involves the constant possibility that a routine decision process might be called into question and opened up to closer deliberative scrutiny and revision. This, of course, brings the danger of inefficiency, for more iterations take more time, and decision-making could be brought to a standstill (Thompson 2008: 515). However, the point of iteration is precisely that it is not a routine and fixed part of decision procedures, and that most of the time the various processes of closer deliberative scrutiny would not be called into action. In the context of scientific and expert authority, this model can thus address the problem of the inefficiency and undesirability of engaging full deliberation on policies and decision processes that are largely settled and unproblematic. 'Iterated deliberation' outlines how challenges and contestations could be accommodated without losing the efficiencies of a deliberative division of labour.

Another crucial reason for emphasising active challenge has to do with consent. Policies and processes are legitimate to the extent that the people affected by them consent to them. Consent can be construed in hypothetical terms, as in Rawlsian models of democratic legitimacy. In the context of expertise, this produces arguments about what would be a reasonable object of deference, and, as we saw above, this in turn embeds expertise in the requirement for reasonableness by means of a settled consensus of experts (Christiano 2012). To reject such a consensus is simply to place oneself outside the

[23] As Thompson (2008: 515) puts it: 'A political body (which may or may not be deliberative) proposes a policy to a deliberative body, which returns a revised version of the policy to the original body. That body revises the policy again and submits it for further consideration to the deliberative body before it is enacted'.

bounds of reasonable discourse. Another broad family of deliberative approaches emphasises the need for actual and ongoing consent. As Gutmann and Thompson put it, the process of reciprocal reason-giving must be actual, and not merely hypothetical. '[R]easoning must survive the test of actual deliberation if it is to ground laws that actually bind all citizens' (Gutmann and Thompson 2004: 100). Yet, as we saw above, actual deliberation must in fact be institutionally and temporally distributed. In this context, the requirement that binding decisions be objects of consent suggests that we must be talking about some form of tacit consent.

A key feature of tacit consent is that consent can only be assumed where there is the live possibility of refusing it. Realistic means and opportunities for protest and contestation are necessary for actualising tacit consent. Only where there is the realistic possibility of refusing to go along with policies and processes can we assume consent from the fact that a policy or process is largely uncontested. Though they do not frame their arguments in terms of tacit consent, both Richardson (2002) and Warren (1996b) emphasise the importance of the possibility of challenge and contestation in grounding an assumption of consent when policies and processes are not challenged. Thus, Richardson argues that divisions of epistemic labour and delegations to bureaucratic judgment are warranted under two conditions. First, they must issue from a legitimate collective decision originating in the formal institutions of representative government. So, we might say, a properly constituted government might initiate a vaccination programme, and then delegate a series of non-trivial judgments about how best to specify the objectives and carry them out to empowered experts in the administrative apparatus. The second condition is that such delegations are themselves subject to the watching power of activist groups who are in a position to scrutinise and monitor that delegation. Warren, in turn, makes the possibility of challenge from a 'critical public sphere' crucial to the more generation of authority in a deliberative democracy. His key point, which applies also to expertise, is that authority relations are warranted to the extent that they could be publicly scrutinised and challenged, and that the authorities thus have to give justifications in terms of the goods served by such authority. And this in turn requires that such relations, from time to time, actually are brought into question. In the case of a recent vaccine controversy in the UK (see Moore and Stilgoe

2009), the challenge of vaccine-critical activists has brought forth justifications that were already present but were not widely publicised. Thus, even though the criticism brought no substantive policy change, it did raise questions about existing practices, and it did bring to light justifications for those practices in terms of the basic goods the authorities in question were supposed to serve. The point here is twofold. First, the effect of such challenges is not simply to 'erode' authority, but rather to bring to the surface the basic justifications of such practices and present them to a wider public audience. If such practices are indeed successfully justified, then we could be said to have moved from a technocratic to a democratic mode of expert authority. Second, by demonstrating the possibility of such challenge and successfully meeting it (if they successfully meet it), the assumption of public consent to those policies and practices that are not contested acquires plausibility. The demonstration of the live possibility of scrutiny and contestation serves to actualise tacit consent. This is particularly important when we are thinking of the way in which we could possibly say that a complex system in which deliberation is temporally and institutionally distributed meets the high normative demands of deliberative theory. While the regulative ideal of the absence of coercion is highly demanding and often points to the need for secluded deliberation, the presence of criticism at least gives some grounds for the assumption that when authority relations and divisions of labour are not questioned, the absence of criticism indicates tacit consent rather than latent or suppressed dissent.

One of the major features of the deliberative systems idea is that it addresses the intersection of deliberative ideals and the realities of governing complex societies. And here the general principle that policies and processes derive their legitimacy from the consent of the governed, and that such consent must be constructed in ongoing processes of communicative justification, must face the fact that most of the time such justification cannot take place. The question is not just whether there is a hypothetically justifiable division of deliberative labour, but whether there is active scrutiny and critique. Such active scrutiny is important not only for its indirect influence on the governmental capacity to act. It is also important for actualising tacit

consent to those policies and practices that are largely uncontested.[24] Another way to put this is to say that the democratic legitimacy of policies and practices comes not simply from their formal authorisation in a sovereign legislature, but neither does it emerge only from direct popular participation. What is required, rather, are divisions of labour that are potentially open to question and scrutiny, and policies and processes that are open to iterative change.

Conclusion

The conceptual and institutional separation of expertise from politics seems to some democrats as a threat, and to others as a promise. On the one hand, only from outside politics, and with insulation from the logic of political struggle, can expertise deliver the kinds of goods that are expected of it: informing political and public deliberation, empowering collective will, and telling truth to power. Expertise has the potential to operate as a constraint on politics, as a rationalising, stabilising counterweight against ignorance and expediency among both publics and elites. Expertise is seen as a potential nourishment for processes of communication and opinion-formation, and as an indispensable aspect of the collective power to act. The politicisation of expertise seems to erode its capacity to deliver these goods. On the other hand, conceiving expertise as outside politics seems to grant a form of unaccountable power, and seems to endanger the democratic good of inclusion. The cloak of political neutrality may simply mask the operation of unaccountable interests. To exaggerate just a little, those who fear the erosion of expert authority are concerned in particular with the quality of public deliberation and the capacity for coherent collective action in the execution of agreed policy goals. Those who fear expert domination are concerned in particular with the exclusivity of expertise, that is, they are concerned with the power differential that becomes evident when one group defines the terms of legitimate inclusion and voice.

I suggest that treating expertise as a special case of distributed deliberation can give us the theoretical resources to accommodate these different aspects of the problem of expertise in democracy. The

[24] This point is suggested by Mansbridge in a discussion of incumbency, where she notes that '[i]n non-corrupt systems, long stretches of repeated re-election and the absence of opposition often signal a satisfied constituency' (2009: 389).

deliberative systems framework, I suggest, can respect the importance of distance to the functions of expert deliberative institutions, but can also frame a range of potential ways of exercising democratic influence and control through institutions and practices ranging from social movement contestation, opposition and dissent, to novel forms of expert commissions, to regulatory agencies opening up to 'lay' members and public contributions, and organised minipublics and other participatory democratic innovations. This framework can situate recent work on expertise and democratic theory, finding a place for accounts that emphasise the value of deference to properly constituted expert authority as a pre-condition for public deliberation, as well as those that emphasise the need for societal critique and critical engagement between experts and lay people.

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Chapter 4

Science and democracy in the third wave
Elective modernism not epistocracy

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Introduction

If epistocracy is the 'rule of the knowers', then neither the Third Wave paper (Collins and Evans 2002) nor its subsequent elaborations (Collins and Evans 2007; Collins et al. 2010) are arguments for epistocracy. Instead, the Third Wave provides an argument for valuing and preserving the institutions of expert knowledge as distinctive and important parts of contemporary democratic society. Reducing one to the other, as Wave One and Wave Two threatened to do, must be avoided as we need to preserve both forms-of-life for the difficult decisions that lie ahead.

In the Third Wave paper, the difference between the expert and democratic aspects of technological decision-making in the public domain was captured by distinguishing between the 'technical' and 'political' phases. In this chapter, I shall outline the main elements of this distinction and show how it has developed into the more elaborate notion of Elective Modernism. In particular, I shall argue that the position taken in the Third Wave paper is essentially a moral argument in the sense that valuing scientific values – and the institutions that embody them – is a choice that cannot be justified on purely

utilitarian grounds. This, in turn, leads to an argument for both continuing to value expert knowledge and for recognising its limits.

This new approach begins with two classifications. The first is the classification of expertises set out in the Periodic Table of Expertises (Collins and Evans 2007, see esp. chapters 1 and 2). The second is the distinction between specialist 'technical' decisions and non-specialist 'political' decisions (Collins and Evans 2002). According to the Third Wave approach, specialist technical decisions should be delegated to specialist experts (contributory and interactional experts in the Periodic Table of Expertises) as these are the social groups with the skills needed to appreciate the complexity of the problem. This, in turn, implies limits on participation in the technical phase as only those with the relevant experience have the necessary expertise. In contrast, political decisions rely on more widely distributed expertises that all citizens have access to ('ubiquitous' and 'meta' expertises in the Periodic Table of Expertises). Political debates, discussions and decisions can, therefore, be dealt with through democratic institutions (Evans 2011), though the exact way in which these are instantiated (e.g. mass media, street protest, parliamentary debate, public consultation, national referendum, citizen panel etc.) will vary from place to place and topic to topic.

Making these distinctions depends on two important assumptions, both of which have been challenged by mainstream Science and Technology Studies (STS).[1] The first is the assumption that substantive expertise exists as something other than the mere attribution of credibility – i.e. that expertise is 'real' and hence that some people are not, and cannot be, experts about some specific topic. The second is that there are values that characterise the scientific community and that these provide a benchmark against which other epistemic practices that claim to produce expert knowledge can be compared. Combining these two assumptions leads, in turn, to the argument that, if the legitimacy of expert knowledge is to be retained within a democratic society, then scientific values must also be valued. This is the position known as 'Elective Modernism' (Collins 2010a; Collins 2010b; Collins et al. 2010).

[1] For a selection of responses to the Third Wave paper, see: Durant (2011); Epstein (2011); Fischer (2011); Forsyth (2011); Gorman (2002); Jasanoff (2003); Jennings (2011); Owens (2011); Rip (2003) and Owens (2011).

Technical and political phases

The distinction between the technical and political phases is first made in Collins and Evans (2002; though see also Collins and Evans 2003; Evans and Plows 2007). The idea is to distinguish between different aspects of technological decision-making in the public domain and draw out the ways in which they pose different kinds of questions. Although the word 'phase' can imply a chronological ordering, with one phase preceding another, here the word is used in the scientific sense of different forms (e.g. solid, liquid, gas) of the same substance (e.g. ice, water, steam). In other words, depending on the conditions, a technological decision can shift between a focus on technical and political issues and may even have elements of both running concurrently (e.g. a glass of water with ice).

The crucial point from the Third Wave perspective is that the values that animate the technical and political phases are different. This means that what counts as a 'legitimate' move in a technical and political argument are also different (Collins and Evans 2002: 261–262 in particular). In the case of the political phase, things are relatively straightforward. Decision-making should follow the norms of democratic theory and citizens have the right to participate whatever their expertise. Clearly the ways in which democratic ideals are put into practice will vary from place to place and it is fair to say that the initial Third Wave paper has very little to say about which form of democracy it prefers. The idea of elective modernism goes some way to redressing this problem (see Collins et al. 2010) and, more recently Darrin Durant (2011) has argued that the Third Wave is consistent with a Rawlsian model of liberal democracy. In any case, the most important point to note is that the Third Wave approach is not opposed to democracy, as some of the initial responses claimed, and, in fact, gives primacy to the political phase in the sense that political decisions always trump technical ones (Collins and Evans 2007; Collins et al. 2010).

In the case of the technical phase, the argument is more complex. Here the decision-making is an expert-led process in which participants are chosen on merit (i.e. they must have the appropriate expertise) and in which traditional scientific values of communalism, universality, disinterestedness and (organised) scepticism are valued. The difficulty is that this support for traditional values must be made at the same time as accepting that scientific and other expert

communities actually work in the way described by mainstream STS. In other words, interpretive flexibility is inevitable and some form of social process, quite possibly linked to social interests, will be needed in order to reach any kind of closure (i.e. the intrinsic politics referred to in Collins and Evans (2002).

So how then, can we say that the technical phase is different to the political phase? More specifically, why does the fact that it is possible to observe 'non-scientific' influences at play in even the most exemplary passages of science not lead to the conclusion that 'nothing scientific is happening' and/or that 'there is nothing special or different about science'. The answer lies in the role of values and in the distinction between 'description' and 'prescription'. For example, in the case of the political phase, the prescriptive dimension comes from democratic values (e.g. equality, justice, freedom) and actors in the political phase have to orientate themselves around these norms in order to be recognised as making a legitimate claim to be acting 'democratically'.

In practice, of course, there will be times when political decision-making will not follow these norms. Here the description will differ from the prescription. The crucial question is what follows from this. Typically we say that a mistake has been made and that the democratic process has been subverted or corrupted in some way. What we do not say is that because 'doing democracy' is difficult, and will always fall short of the ideal in some way or other, we should give up on the idea. Nor do we say that, because we can find un-democratic behaviour being legitimated by claims to be acting for the greater good, there is no such thing as democracy. And finally, we do not say that the way to address these problems is to explicitly promote un-democratic practices so that the normative 'ought' of our political theorising becomes a better match for the descriptive 'is' of our political institutions.

Applying the same argument to the technical phase, we can argue that the defining characteristics of technical expertise as a culture and institution is not the content of that expert advice or even the practice of individual experts, but the values to which those experts should cleave when determining what is or is not a legitimate move in a technical debate. Thus, for example, in a technical debate it is reasonable to expect one's interlocutors to present evidence for their

views, to test arguments against data, and to refuse to base their formal conclusions on what they think people want to hear. The fact that scientists and other experts may not live up to these ideals does not undermine their value as aspirations that guide actual practice and to which experts are expected to conform. In other words, just as the imperfections of any specific democratic process do not negate the idea of democracy but encourage us to re-double our efforts to reach the ideal, so too failures of expert advice should not lead us to abandon the idea of expertise but, instead, encourage us to try even harder to achieve the impossible and strip out all un-scientific influences (cf. Collins 1996).

Of course, you could argue that there is no need for expert decisions to be based on evidence, that scientific hypotheses can be tested by a show of hands or that experts should simply confirm what the majority wants to hear. If you do this, however, then you are destroying the institution of science and, with it, the idea of expertise as distinctive form-of-life with its own values and culture.

Scientific values and democratic values

If we accept that the technical phase and political phase are informed by different kinds of values, this poses the question of how these different sets of values are related to each other. In the case of democratic values, there are many different versions of democracy and many different democratic theories that articulate how they can be instantiated in practice (see e.g. Held 2006). Nevertheless, and at the risk of some generalisation, we can say that what makes a democratic society 'democratic' will be some commitment to at least the following normative ideals:

- Citizens as free and equal before the law.
- Decision-makers who are accountable to these citizens.
- Government decisions made in public and open to inspection by citizens.

The important point about these democratic values is that they function as 'formative aspirations' that specify the kinds of ends to which democratic institutions should orientate their practice (cf. formative intentions in Collins and Kusch 1998). Legitimate actions are those that both conform to the values and further embed their practice. In contrast, un-democratic or illegitimate actions are those

which undermine these values, e.g. by giving undue influence to one group of citizens or removing decision-making from the public domain.

In the case of science, the equivalent of these formative aspirations is something like the following:

- Importance of observation, corroboration and falsification, i.e. concerns identified by traditional philosophy of science.

- Importance of communalism, universalism, disinterestedness and organised scepticism, i.e. norms identified by traditional sociology of science.

- Importance of honesty and integrity; focus of legitimate interpretation; clarity of expression; individualism; continuity; open-endedness; expertise, i.e. characteristics identified by Third Wave of Science Studies.

As with the democratic values, these values function as ideals towards which scientific conduct – and expert argument more generally – ought to be orientated. For example, a good expert is one who bases his or her views on evidence, is ready to test their ideas against new evidence, and does not discount criticism simply because it comes from the 'wrong' kind of person. Of course, not all experts will live up to all these aspirations. Nevertheless, it is only by recognising that these values are important that those who do not live up to them can be seen as failing in some sense. For example, without these values as a benchmark it makes no sense to say that tobacco companies behaved 'unscientifically' when seeking to prolong the controversy over the effects of tobacco smoke.

Having set out the values, we can now return to the question of how they relate to each other. Firstly, it is not clear that the two sets of values are in conflict with each other. For example, many of the scientific values are similar to democratic values (e.g. the Mertonian norms have a clear resonance with the idea of free and equal citizens). To some extent, this is no surprise given the historical origins of Merton's sociology of science but it is worth highlighting as it shows that, at least in terms of their values, science and democracy are not diametrically opposed to each other.

Second, it is also clear that scientific values are not completely subsumed by democratic values. There are some distinctive parts of the scientific culture that differ from democratic culture (e.g. the emphasis on expert/peer review rather than lay/public scrutiny) as well as some aspects of democracy that differ from science (e.g. the legitimacy that comes from having majority opinion on one's side).

Taken together this suggests that although scientific values overlap with democratic values they do not reduce entirely to them. This, in turn, suggests a new way of thinking about why we might value science as a social institution. Traditionally, the rationale for valuing science has always been instrumental and epistemic – i.e. science provides better answers than any other institution, where 'better' is defined as closer to nature or 'more true'. Unfortunately, accepting the constructivist accounts of STS means that this argument is no longer available. Since the publication of Thomas Kuhn's *Structure of Scientific Revolutions* in 1962, the idea that science progresses ever closer to reality has become increasing untenable as it becomes ever clearer that what science believes to be true is, at least in part, a function of the place and time in which it is done.

As a result, the epistemic argument for science is lost – it is simply not possible to say it is 'more true' than other forms of knowledge. It is, like all knowledge, the property of a social collectivity and legitimated by the local, social and cultural conventions of that social group. To say this is not necessarily a criticism of science – there is nothing else that it could be from an STS perspective – but it does mean that if science, or expertise more generally, is to be valued then it needs to be valued on some other basis.

So, why should this particular cultural institution be preserved and, in some cases, privileged above others? The answer lies in the values of science. Again, the comparison with democracy is useful: given a commitment to freedom, equality and justice, then a society of citizens who are all free and equal before the law is the best way of realising these ambitions. You do not attempt to justify democracy to its critics by, for example, arguing it is more efficient or more economically productive than alternative modes of social organisation. Instead, you argue that values of freedom, equality and justice that democratic institutions are supposed to embody are good values and democratic societies are good societies because they adhere to them.

Of course, other benefits might flow from the democratic society but the fundamental justification is in terms of the values. The implication for science is that, here too, the rationale must be value-based. Science is valued because its values are good values in themselves and worthy of support on that basis alone.

To see how this works, we need only consider some of the values listed above and see how desirable the alternative would be. For example, consider the following:

- Anti-falsificationism: would we really want to defend the authority of an expert institution in which those claiming to be experts did not have to test their theories and explore the limits of their applicability? In such a society, simply saying that something was so would be enough to make it so and nothing more would be required.

- Anti-universalism: would we really want to defend a society in which it was perfectly appropriate for a person's opinions to be judged purely on the basis of the speaker's demographic characteristics? Such a society would presumably be full of what we would now call racism and sexism but, as there could be no such thing as 'epistemic injustice' (Fricker 2007), such behaviours would be completely legitimate.

- Anti-clarity: would we really value a society in which the experts and others deliberately spoke in ways that were obscure and difficult to understand, with the ability to produce incomprehensible prose seen as a skill to be nurtured and developed. Clearly such writing does exist even now but, in an anti-clarity society, such work would not be the butt of jokes; instead it would represent the very pinnacle of scientific endeavour.

- Anti-expertise: Would we really value a society in which studying a topic in great detail and depth for many years counted for nothing? This is the key one for technological decision-making in the public domain and for those of us who work in universities – without some notion that experience matters, the whole idea of education collapses as the idea of a teacher makes no sense in a world where all opinions are equal.

It is possible to do a similar thought-experiment for all the scientific values listed above. In most cases it is pretty easy to see that, were the opposite of scientific values to be pursued in a whole-hearted way, it quickly leads to a dystopian society that has about as much appeal as the un-democratic society in which justice is arbitrary, citizens have no rights and the powerful rule unchecked. Recognising this is what leads to the conclusion that the value of science – that is the reason why it is to be valued – is the values it embodies and preserves. It is this insight that lies at the heart of elective modernism.

Elective modernism[2]

Applying this understanding to technological decision-making in the public domain leads to an argument that defends the role of expertise in the technical phase, i.e. those propositional issues where expert advice and analysis is needed. This does not mean that only expert advice is needed – the political phase remains important too – but elective modernism does argue that the culture and institutions of expertise need to be preserved as well. As Harry Collins and Robert Evans wrote:

> Democracy cannot dominate every domain – that would destroy expertise – and expertise cannot dominate every domain – that would destroy democracy.
>
> (Collins and Evans 2007: 8)

This means that retaining both expert and democratic institutions is important as neither can be reduced to the other. For some this distinction between 'politics' and 'expertise' sounds a lot like the old fact-value distinction that STS has discredited. There are, however, some important differences that mean elective modernism does not reduce to technocracy (expertise destroys democracy) or populism (democracy destroys expertise).

The starting point for elective modernism is that policies are the responsibility of politicians and their citizens but that policies should not ignore the technical consensus. What this means is that specialist

[2] This section draws on a draft manuscript, provisionally entitled 'Elective Modernism', being written by Collins and Evans. A working paper that sets out the idea is available as Collins (2010a). The idea of elective modernism is also discussed in Collins et al. (2010) and in the final chapter of *Gravity's Ghost* (Collins 2010b).

technical expertise is relevant to decision-making and should be considered within the wider political debate. This does not, however, mean that technical issues define the limits of the debate. Rather, the claim is the more modest one that the advice of specialist experts, scientific or otherwise, is one of the things that should be considered as part of technological decision-making in the public domain.

It is because of this limit on the influence of experts – that they have to be heard not that they have to be obeyed – that elective modernism is not technocracy. Once the expert advice has been produced, it is perfectly legitimate for the decision that is made to be justified in other terms and to reject the option that technical experts might have preferred. In other words, under elective modernism, politics always trumps technical consensus.

On the other hand, elective modernism is not simply an argument for populism either. It was a concern with the problem of extension and the diminishing status of expertise that led to the Third Wave paper in the first place. This tension is handled in practice by introducing a rule about the ways in which the political phase can legitimately over-rule the expert advice or opinion that comes from the technical phase. The rule is that it must be done clearly and it must be clearly stated that it is happening. In other words, technical consensus must never be disguised or distorted so as to make the political decision easier. The politicians must say something equivalent to: 'this is the technical consensus but we are going to make this political decision which over-rules it'. Alternatively, where there is no consensus, the politicians must say something like: 'although the experts disagree about the current situation, we have decided to commit ourselves to this course of action and ignore the doubts of those who say it will fail'. In other words, politicians must take responsibility for the policies they enact and be clear about the extent to which expert consensus supports these decisions.

Elective modernism: an example

An example of how elective modernism can be applied in practice is Thabo Mbeki's decision in the later 1990s not to distribute anti-

retroviral drugs to pregnant women with AIDS.[3] Here there was a clear expert consensus amongst medical researchers that it would help to prevent transmission of HIV to new-borns, but Mbeki did not implement the policies they recommended.

In his defence, it is said that Mbeki had many political reasons for this decision – he did not want South Africa to fall under the thrall of Western pharmaceutical companies, he did not think the country could afford the drugs, and he did not want to give credence to the neo-colonialist image of a promiscuous, disease ridden, country. All this may be true, but what he actually said to his parliamentarians is that they should read the material on the internet that claimed that the drugs were useless or harmful. In other words, Mbeki justified his decision by claiming there was an on-going scientific controversy about the efficacy and safety of the azidothymidine (AZT) treatment. This claim was simply incorrect. The material to which he referred did not represent the technical consensus within the relevant core-set of medical research. Instead it was the product of a fringe group of scientists whose ideas had long been dismissed by the mainstream scientific community. In justifying the non-distribution of anti-retrovirals in this way, Mbeki was effectively disempowering the political process and failing to take responsibility for a political decision, if such it was. The criticism that elective modernism would make of Mbeki is, therefore, not that he refused to distribute anti-retrovirals but that the reasons he gave for doing so were bad reasons. If he thought there was a controversy, then he had made a mistake as there was no controversy, something which could have been confirmed by asking any representative sample of core-set scientists. If it was really a political decision, then the reason given should have acknowledged the technical consensus and made clear why he had chosen to follow an alternative path. In other words, elective modernism does not say that experts (technocrats) should make policy decisions. Instead it says that politicians should make policy decisions but that the reasons they give should not distort the advice of the specialist experts that are needed to inform democratic institutions.

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[3] This example is discussed in more detail in Martin Weinel's doctoral dissertation: *Technological Decision-making under Scientific Uncertainty: Preventing Mother-to-Child Transmission of HIV in South Africa* (Weinel 2010). See also Weinel (2007).

Citizens and experts

Technological decision-making involves listening to both citizens and experts and understanding what each group has to offer. In the case of citizens, their contribution is made via democratic institutions and, as such, all citizens have the right to contribute to public debate about technological issues. Where specialist technical advice is needed decision-makers need to avoid both the problem of legitimacy and the problem of extension.

This is where the arguments of the Third Wave are most relevant. They show how the technical phase can be more inclusive than traditional approaches because expertise is the outcome of relevant experience and there is no reason why these experiences are only open to members of the scientific community. On the other hand, because expertise is linked to experience, there are limits to participation in the technical phase as those without the relevant experience, scientific or otherwise, have not had the socialisation needed to become experts.

Seen this way, elective modernism suggests that individuals can participate in technological decision-making in three distinct ways, each of which relate to the development of particular kinds of expertise. The first two relate to the political phase and are best judged against the ideals of democratic aspirations. The third relates to the technical phase and is more appropriately judged against the yardstick of scientific values.

Citizens in the political phase

Citizens can participate in the political phase in at least two different ways. The first of these draws on the ubiquitous expertises of everyday life and the rights granted by democratic society. For example, citizens have a right to contribute to debates about how technological choices should be framed and what kinds of outcomes should be seen as desirable. Although they cannot resolve technical debates, citizens can influence the context within which specialist technical expertise is invoked and applied. Or, to put the point the other way round, those charged with making technological decisions should be attentive not only to expert advice but also the concerns and preferences of non-expert citizens who must ultimately consent to the decision.

The second way citizens can participate in political phase depends on a different kind of expertise – meta-expertises that are used to make judgements about experts – but is otherwise very similar. This situation arises when the process of technological decision-making either enables or forces citizens to choose between the competing sides of a technical dispute. For example, they might choose to join a campaign group that supports one side or the other in a debate or take the decision to have or not to have their child vaccinated. In these circumstances, citizens are not determining the outcome of the technical debate but they are making a choice about which set of technical experts to trust.

The practical outcome of these decisions is that a social judgement (e.g. A looks more trustworthy than B) is transmuted into a technical judgement (e.g. A is right). To put this slightly differently, we can say that citizens are able to make judgements about an expert's trustworthiness without necessarily understanding the technical details of their claims. Indeed, we can go further and say that citizens often have no option but to make this kind of choice and that it is quite right for those making technological decisions to take these preferences and choices into account. Nevertheless, and this is the key insight of the Third Wave, it would be quite wrong to say that these judgements, even when there are a lot of them, provide an alternative way of resolving the technical controversy in which the experts are engaged.

Experts in the technical phase

Under elective modernism, where technological decision-making in the public domain requires some specialist technical expertise, we are no longer concerned with the political phase but with the technical phase. Here high level specialist expertise – contributory and interactional expertise – in some relevant domain is needed before individuals can contribute. Clearly the composition of the experts may change over time, but this does not affect the underlying principle that technical debates require expert participants.

These issues matter because the purpose of the technical phase is to provide an assessment of what is or is not known about the topic in question at that particular time. This will include both a statement of what the current understanding is and some assessment of how strong the consensus around this claim is. Unlike technocratic forms

of policy-making, the aim of this work is not to develop the optimum policy or even a menu of choices from which policy-makers must then choose. Instead the purpose of the technical phase is to provide decision-makers and the wider public with a distillation of expert opinion that is relevant to the topic. Ideally this output would include a statement of the consensus view and an assessment of how strong the consensus supporting it might be.

This expert statement would provide a resource for public debate, but there is no requirement under elective modernism that it provides any kind of constraint on the technological decision itself. Instead, the only requirement is that the final decision refers to the technical consensus and explains how the policy being adopted accepts or rejects that advice. As the example of Thabo Mbeki makes clear, this does not rule out the possibility of policy decisions that differ from expert advice. Instead, all it seeks to prevent is the misleading rationalisation of policy decisions through inaccurate representations of expert knowledge. That is to say, the constraint elective modernism would impose on decision-makers does not relate to the policy choices they enact but to the ways in which those choices can be justified.

Summary

Elective modernism is a way of thinking about the relationship between specialist technical expertise and the wider society. Because elective modernism insists that expert advice must operate within the boundaries set for it by democratic institutions it is not an argument for technocracy (or even epistocracy). Instead, it says that where technological decision-making requires some specialist technical advice, then those with relevant experience should be consulted. This will include the opinions of scientific experts from the relevant disciplines but other, experience-based, experts may also have legitimate contributions to make.

The implication of this is that non-experts have no role to play in the technical phase. Technical decisions require specialist expertise and, by definition, non-experts are not specialist experts. That said, for specialist experts to earn and retain the trust of non-experts they need to be able to claim they are impartial and objective. Whilst STS shows that making such claims is always a social accomplishment, adhering to scientific values is a good way of ensuring these claims are made in

the 'right' way and for the 'right' reasons. Moreover, to the extent that citizens – that is non-experts – are able to see that these values have been upheld this can provide a legitimate, though far from infallible, reason for choosing to trust one set of experts over another.

Finally, note that this is an argument based on values rather than instrumental efficiency. The claim is not, as Philip Kitcher (2011) might argue, that science (or expertise) is to be valued because it is epistemically superior and produces 'better knowledge' than other ways of knowing. Given what has been shown by STS we know that this argument is impossible to make. Instead, the argument is that scientific values are the important thing and these are what need to be preserved. The argument of elective modernism is that valuing science means preserving these values and that it is only by doing this that we can put some balance into debates about expertise and democracy.

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Chapter 5

Philosophers as experts
Principles vs. moral trajectories

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Introduction

Over the last decades, the subject of ethics has been increasingly professionalised, and ethical expertise is frequently, sometimes routinely, employed in various fields of politics. Many of the ethical experts are trained as philosophers, a field that does not, like traditional scientific disciplines, exhibit uniform agreement on conclusions or methodologies. Philosophical training is presumably seen as a guarantee for rigorous arguments and sound reasoning, and that all relevant aspects of the matter have been considered. This kind of use of expertise is not without its problems, however, and the inclusion of ethical expertise in decision processes may also veil fundamental difficulties and deep disagreement.

In his recent book Ethics and Public Policy, Jonathan Wolff argues that philosophers trying to take part in the sphere of practical policy cannot simply rely on adapting their theories to the subject matter at hand, but must develop new ways of working and thinking. Philosophy understood as philosophical theories fares badly because taking a philosophical theory and applying it to a public policy area is likely to yield consequences that are 'unreasonable and unacceptable' (Wolff 2011: 2). The reasons for this can be found in the nature

of philosophy, which thrives on disagreement and encourages extreme positions rather than consensus, but also in the nature of public policy. Public policy, unlike philosophy, must aim for agreement, as a decision has to be made. Also, policy has an inevitable bias towards the status quo – any major deviation from this bears the burden of argument. Third, the question of whether a moral view is correct is less important than its being acceptable or widely shared, so the best way of moving forward is to draw more people into a consensus view. These three features make philosophers' favoured approach – to set out and argue for the alleged morally correct view – untenable when engaging with public policy. Philosophers, Wolff claims, have often failed to 'interpret the world they live in', and 'failed to investigate why it is society does the things it does (ibid.: 174).

Public policy engagement

In this chapter, I will argue that the kind of engagement with public policy advocated by Wolff is not an entirely theory-neutral procedure, but may be incompatible with certain philosophical positions, at least if we adopt two further premises which Wolff seems to be accepting. I will also use the case of Norwegian road safety policy as an example of how partaking in the development of public policy on the terms suggested by Wolff might create what I will refer to as moral trajectories. I will start out with my first point, that Wolff's methodology might be incompatible with certain philosophical positions, given that we also accept two other premises from the book:

1) That 'the strength of our convictions that something is right (or wrong) is not a clear guide to whether, in fact it is right (or wrong)' (ibid.: 173). Instead, it seems, many of our moral convictions are based on current practices, or habits – while we could perfectly well get used to a new rule, and develop a different set of intuitions.

2) That moral argument, even when convincing, will most likely fail to be sufficiently motivating to cause behavioural change. Instead, Wolff holds, we should seek to make changes in external conditions that allow people to continue to get what they want, but with a clean conscience. 'Structural change is needed to facilitate behavioural change' (ibid.: 182).

I believe that if we accept these two assertions, there might be very good reasons why some philosophers might consider working with public policy under conditions similar to those described by Wolff morally problematic.

If we cannot appeal to a moral framework, and we cannot trust that our primitive moral convictions are dependable guides, we do seem to be left with the option of thinking 'about the issues as clearly and imaginatively as we can, while being as self-critical about our own assumptions as we can bear', as Wolff concluded. But even so, considered moral argument plays a limited role if change, or improvement, is to be achieved. Its main consequence seems to be to induce guilt, rather than to influence behaviour.

Taken together, these statements give public policy an extremely important role in moral development. If moral argument does not motivate, but structures – in conjunction, at best, with moral argument – do motivate, structures can change practices. And if existing practices are essential for forming moral convictions, public policy will be likely to shape moral arguments, rather than the other way around. Changing structures will lead to novel practices which in turn create not only a new social and political status quo (towards which any future policy will have a bias), but also the very moral intuitions upon which not only future policy, but also future argument, is based. In other words, public policy creates not merely a given practical result, but what we might call a political and moral trajectory; in partly shaping how we will act, policy will also to some degree shape how we will think in the future.

This situation creates some potential worries for anyone involved in shaping public policy as it might be the case that what we perceive as an improvement on the present situation could, in the long term, lead to consequences that we would not, in the present position, find morally acceptable. I will return to this point shortly.

Wolff on improvement and equilibrium

Throughout his book, Wolff avoids talking about the 'correctness' of any given position or approach to public policy. He explicitly endorses a pluralist position, which might not be reducible to an overall systematic framework, and suggests that the question of moral realism is irrelevant to public policy, as the one correct answer to a problem – if

indeed it exists – might not be recognised as such in public debate, and moral argument holds little persuasive power. Even if there exists one right answer to a moral problem, and even if philosophers are able to identify this correct answer, this answer still could not legitimately be enforced on others who do not accept their authority.

However, Wolff repeatedly makes use of other concepts that appear to bear some resemblance to the notion of correctness. He states that a given policy or solution can be an 'improvement' on the current situation, and refers to the idea of making 'progress'. This idea of moving forward, improving and making progress is never explicitly defined or discussed in the book, beyond pointing out that a coherent framework is not a necessary condition for such progress. It remains unsaid, for instance, whether this progress is relative to the standards of the philosopher; or relative to the standards of the policy makers, or even relative to the standards of the majority of the population, for instance. On the background of the rest of the book, I am inclined to think that the most reasonable interpretation of the notion of improvement is that a solution is found which is closer to being a consensus position and which accommodates as well as possible the moral considerations that are found to be reasonable. It is thus a position which is able to draw more people into it, perhaps one based on the recognition that their differences were to some degree imagined or exaggerated, and a position that preserves as many of the values, convictions and intuitions identified as possible, as far as these are seen upon scrutiny to have some legitimacy. An improvement, on this view, is not only an ethical improvement but also a practical one, thus the task of the philosopher in the public policy arena is to clarify positions, make distinctions, and work out consequences of positions. An improvement on the current situation, however, does not mean that one is able to make the best decision that would be possible, however.

I think it might also be warranted to say that this kind of moral improvement could be described as a more stable moral equilibrium, where moral arguments and moral practices are more closely related, so that people can indeed 'continue to get what they want, but with a clean conscience' (Wolff 2011: 201). Improvement is perhaps where infrastructure, argument and practices co-exist in a more harmonious manner than used to be the case.

Given that the political measures that are chosen will be an improvement, but not ideal, and that political measures create a trajectory, the possibility arises that measures might also induce convictions that lead to a further development that would not be acceptable relative to our present intuitions, and would not reflect the motivations behind the institutional change in the first place. To take a very simplistic example, you might find the number of casualties in road traffic unacceptable, and believe that the best possible solution to this problem would be to reduce road traffic as much as possible. This would have further beneficial effects, such as environmental consequences, and improvements in public health, given that people would get more exercise (on average, according to Sanae Inagami et al. 2009, people who own cars weigh four kilos more than those who do not). However, in the present political climate, restrictions on car use would be unacceptable, and you therefore opt for what you see as a second best solution, which is likely to win popular approval; namely constructing safer roads. Motorways being the safest kinds of roads there are, this is an argument for constructing more of those. This might in turn render driving relatively more attractive compared to other – and otherwise more beneficial – forms of transport, and the ideal with which you started will be further from realisation than it was at the outset. Thus, having accepted a sub-optimal improvement, you could have started a trajectory that undermines your current position in the future, and it might even be that the position that you now hold, will seem outlandish and unrealistic to people like yourself in the future, as infrastructure, practices and hence intuitions will have undergone changes.

Or, to use an example taken from book; in the case of scientific experiments on animals, the three R's of refinement, reduction and replacement seem to open up for progress towards a state where animals suffer less at the hands of scientists than is the case today. This is likely to create a situation where we feel more comfortable with our existing practices, and hence something closer to equilibrium. But if your real position is that this kind of use of animals is fundamentally wrong, and just one of a number of expressions of our morally unacceptable exploitation of animals, you might fear that this policy would in the long run lead to an acceptance of the very situation that you find immoral, because we have been able eliminate the moral unease experienced. As an analogy, we might imagine anti-slavery proponents who as a compromise accept a minimum set of

rights for slaves, which in turn weaken popular opposition against the institution. In short, accepting anything less than the optimal solution may undermine your basic intuitions, not only for now, but also in the future. If you believe there is such a thing as a morally optimal solution, settling for less need not be an improvement, although it might appear to be.

Here, it seems in order to add a few comments on the various possible understandings of what an optimal solution might be. For one thing a given policy may be the best policy in an absolute sense, and this might be so whether or not we are able to know that this is so. This kind of best solution is, however, explicitly deemed irrelevant to the debate. Then again a policy might be the best policy as judged by the philosophers, whose abilities to think clearly and imaginatively, and to question their own assertions might make for superior judgments in the public policy arena. Third, the optimal solution may also be the one identified or agreed upon by the relevant groups of experts or policy advisors. This would be the best solution that could be reached as an informed consensus, where different interests and concerns have been taken into account as far as possible. This solution might still be seen as sub-optimal by the philosopher as part of the group of experts. Fourth, the best policy might mean the best policy available to us in the current climate, given what we know about the workings of politics and media, for instance. Thus the experts or the committee might agree that another policy would be a better one, yet also be aware that the way this policy would be taken up by the media would make it impossible to get it through parliament. Although it is recognised that a morally superior course of action is available, one settles for the one that is practically feasible. I believe that the problem I have alluded to could be relevant to all of these interpretations except the last one, but that it will be especially pertinent if you hold that there is such a thing as an objectively morally right solution, and one which you can discover through philosophical work.

If this is right, this also seems to suggest that the kind of policy involvement for philosophers heralded by Wolff will not just as a matter of practical feasibility, but necessarily lead to conclusions that cannot be seen right as such, but at best right for the time being. Anyone having different ideas about the role of philosophy should therefore be wary of getting involved in public policy development.

The individual in road traffic

Finally, I would like to describe certain aspects of the development of road safety work in Norway, in order to illustrate the kinds of trajectories of public policy that I have in mind, and how they partially work through a transformation of moral convictions and intuition within a certain sphere.

The traditional paradigm for road safety in Norway has been an attempt to limit the number of accidents without too severely restricting the freedom of the car-using population. The underlying ethical notion behind much national discourse on traffic safety seems to be what we might term 'mitigated liberalism'. In general, the liberty of individuals to drive where, when, and how much they please is seen as the 'natural state', and restrictions and limitations must be justified by reference to harm done to others, directly or indirectly. That said, the traffic system has always been highly regulated, so that drivers and vehicles are thoroughly standardised through such measures as training and education, periodic vehicle inspection, automatic traffic surveillance, random traffic controls, etc. There are of course good reasons why actions should be restricted in road traffic; as a driver, you may potentially inflict serious harm on others, and in some situations, the risks you take on other's behalf are deemed unacceptable, as when driving under the influence of alcohol (which increases risk by many hundred per cent, if you blood alcohol level (BAC) is above a certain threshold – not the threshold set in Norway, which is 0.2 per cent, incidentally, as risk does not seem to be substantially heightened if your BAC is less the 0.5 per cent (Assum, 2010). Driving under the influence of marihuana, however, will not raise your risk relative to driving, and does not entail significant more risk than driving sober (Assum 2005). Speed limitations can also easily be justified with reference to risk to others.

The underlying idea seems to have been freedom, but freedom for highly standardised liberal subjects. The free traffic user was a trained, sober, alert person in a vehicle that meets the set safety requirements. The liberal subject is a highly constructed unit, and this construction in itself reflects ethical judgments – on what it is to be a responsible individual. This individual is in turn subject to the basic guidelines of the system, such as regulations and speed limits. The scope and severity of these regulations, however, have always been contested. The fundamental legal responsibility of the driver is set out

in the law on road traffic, which states that: 'A driver shall show consideration and be alert and cautious so that he does not cause damage or risk, and so that other traffic is not unnecessarily obstructed or inconvenienced.' (Vegtrafikkloven [Norwegian Road Traffic Act] § 3) On the other hand, the overarching policy has often been constructed on the basis of cost-benefit analyses that have much in common with classical utilitarianism. The utilities in the system are ascribed a monetary value, and calculations show what safety measures are profitable for society as a whole in terms of the aggregated sum of welfare.

However, more recently, the approach taken to road safety has tended to place less emphasis on the responsibility of the individual, and more on the responsibility of the authorities to prevent fatalities and serious injury in traffic perceived as a system. From 2000, Norwegian road safety policy and road safety work is supposed to be based on the so-called Vision Zero (Ministry of Transport and Communications 1999-2000), which is a vision of a traffic system that does not lead to fatalities or severe injuries. Vision Zero is based on two innovative premises:

1) That accidents will happen, but that their impacts may be so restricted as to not cause fatal harm, and

2) That fatal accidents are not consequences of the shortcomings of single individuals, but of the entire transportation system. This means that the authorities have a pronounced and overarching responsibility for how the road users fare in the system (Ministry of Transport and Communications 2006).

Vision Zero considers accidents system-failures, where the system includes cars as well as drivers, roads as well as signposts, pedestrians as well as motorcyclists. In short, the accident is not to be blamed on single actors, but on the interaction in the system. The agency, we might say, is distributed in the system.

One politically radical consequence of Vision Zero is that the system planners are explicitly accorded responsibility for their contribution to the accidents: the road system. According to Vision Zero the road authorities should have an articulated responsibility for all accidents,

and should even be obliged to seek to prevent accidents for which the road users themselves are obviously to blame.

The underlying motivations from this shift comes from several sources, an important one being the realisation that appeals to personal responsibility simply do not work as well as we might wish. The effort to reduce the number of fatalities in road traffic (which is a process that has been extremely successful, if we compare the risk in road traffic in 1970 with the situation today[1]) creates its own momentum, which opens up for an ever more active role for the state. Since people simply do not adhere to the requirements of the law, as cited above, other measures must be taken if the statistics are to continue to improve. The new measures range from building median guard rails to physically prevent head-on crashes, and creating safety zones so that cars swerving off the roads do not hit anything hard, to an increased willingness to make use of more coercive measures, such as automated surveillance, intelligent speed adaptation systems and even suggestions to ban the use of motorcycles – as motorcyclists are at extremely high risk in road traffic.

It is important to note here that the risk you expose others to in road traffic, in spite of the high number of annual casualties, is not very high. As a driver of a car, you are unlikely to ever get involved in a serious accident, and the risk you expose yourself and your fellow road users to is significantly lower than the risk freely accepted by those who choose to ride a bike, for instance.

What I believe we can see from this development, is that road safety work no longer takes the individual as an unproblematic given, whose actions may or may not be restricted by the authorities. As we have already mentioned, a number of compulsory safety measures are clearly paternalistic, and do not aim at reducing the risk you expose others to, but the risk to yourself. The desire to reduce the number of fatalities, then, goes beyond a desire to limit behaviours that are risky to others, and leads to measures that I believe would have been deemed absurd a few generations ago. In fact, after major

[1] In 1970, there were 560 traffic fatalities in Norway, whereas the number was 145 in 2012 (Statistics Norway 2013). This reduction has taken place in spite of a large increase in the number of kilometres driven.

accidents, one frequently sees calls for holding the authorities responsible, as the road could not have been sufficiently safe.

This story mirrors some of Wolff's lessons for philosophy: the policy has contained elements from several, possibly incompatible traditions, and it never seems to have been entirely consistent. And if you, as a philosopher, were to try to argue in favour of a strictly libertarian position, for instance, the consequences would certainly be seen to be 'unreasonable and unacceptable'. Arguments against the mandatory use of seatbelts and safety equipment would simply not be taken seriously by the authorities involved.

Road safety work today does not treat the individual as a completely separate entity with ownership of their actions. Instead, the road users are conceptualised partly as functions of causes which lie outside them – they, and their actions, are the outcome of a process, rather than its beginning. Their actions can therefore be shaped and restricted in specific ways, through knowledge of and interference with this process, which does not always bear much resemblance to appealing to them as moral subjects.

Admittedly, road safety is a very limited area of public life – though, of course, it is extremely pervasive in modern societies, and most people spend a considerable share of their time in traffic, in some way or the other. However, I believe the lessons to be learnt from this sphere can also say something more general about how central strands of public policy, especially in the areas of health and safety, relate to questions of moral significance: the main point is frequently to relate to consequences of individuals' actions, rather than the rights and responsibilities of individuals. So, what does this story show about the position of philosophy relative to public policy?

The first point has already been mentioned; it is that a gradual development can make us accept consequences that would at one time have seemed unacceptable, although the fundamental facts of the matter have not changed. The current approach to road safety would have seemed ludicrously strict and paternalistic only a few decades ago, when the toleration for risk – not just in traffic, but in general – seems to have been much higher. Think only of how the compulsory use of seatbelts was strongly opposed, or, even more poignantly, when the compulsory use of child restraints was seen as

an infringement on private life. The practice of using this kind of safety equipment has become so entrenched that it is extremely hard to imagine that anyone would protest against them today, and the normal practice in the seventies of allowing your children to sit in a car unrestrained, is seen as an example of criminally irresponsible parenting.

Another point is that public policy frequently deals with people's actions as consequences or products of circumstances, rather than as choices freely made. This is obvious also in the case of health, for instance, when there is a desire to reduce the number of smokers, or encourage exercise and a healthy diet, irrespective of whether these are the results of personal choices. The desire to influence these choices will often lead to a fragmentation of the idea of an action as something belonging fundamentally to a person, as measures are taken to change the process, through other means than appealing to the individuals' judgment or personal responsibility.

This development in turn leads to a conception of individuals that renders the approaches of much traditional ethical theory irrelevant to the discussion, as questions of personal responsibility and duties are frequently side-lined, as other ways of achieving the desired results are simply more effective than appeals to morality.

If you are convinced that this is a fundamentally flawed way of conceptualising relations between individuals, or between individuals and their actions, it will be extremely difficult to take part in a discussion with policy makers. The terms of debate have been set, and they are hard to renegotiate.

Trying to make an improvement on the current situation while retaining a critical attitude towards the basic assumptions, would almost certainly lead to a situation where the assumptions were nevertheless more entrenched, and hence the outcome would be further away from your basic position.

Conclusions

Interpreting the world we live in, in the way recommended by Wolff, would, in the case of road safety policy, already imply taking a stand in favour of certain conceptions of individuals, and therefore certain theories of how individuals should relate to each other, and how the

state should relate to them. If you fundamentally disagree with this conception, it seems that any attempt at finding an improvement could contribute to further undermining your basic political position. Public policy, then, could be said to have a sort of momentum on its own. Conclusions are not merely conclusions against which one must argue in the future, but starting points that will determine future development through their very existence as well as through the moral convictions they engender.

We have seen that on Wolff's view, engaging with public policy will involve the acceptance of rebuilding the basis for future moral argument, through changing structures, practices, and, presumably future intuitions. Given that there is a bias towards the status quo, any change must be incremental, but any change will also serve to limit the options – perhaps also moral options – available in the future.

If we, like Wolff, assume that moral argument plays a very limited role for human motivation, and that changes in behaviour mostly come about as consequences of structural changes, it seems that the only way philosophy could have an impact would be through public policy. But if the starting point of philosophical theories is too far removed from the context of policy, this influence would have to be limited to helping create a broader consensus, which takes account of a wider range of moral reasons, and perhaps better reflects the actual intuitions underlying the various positions, then there is no substantial contribution from philosophical theories as such, and the critical potential of philosophy may be more limited than some philosophers would find acceptable.

As the case of Norwegian road safety policy hopefully makes clear, using ethical expertise as a kind of external source of justification for decisions can be extremely problematic; when accepting the role of ethical expert, one will implicitly frequently have to accept a certain framework, that may go against many possible and actual ethical positions.

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Chapter 6

Public reason and political legitimacy

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Introduction

Over the last decades there has been a burgeoning of interest in ideas and conceptions of legitimacy. Thus, it is now commonplace to talk about 'legitimacy problems', 'legitimacy deficits' and 'legitimacy crisis', not only in political science and international relations theory[1], but also in political philosophy and international law.[2] But the term 'legitimacy', and the term 'political legitimacy' in particular, is more often than not clearly defined in these discussions. In spite of increasing attention on questions of legitimacy in the literature, the concept of legitimacy remains contested, and according to many, an under-theorised concept.[3]

In this chapter I go back to John Rawls's late writings to see what Rawls says about political liberalism there. Rawls famously initiated a turn to theories of *justice* and normative political philosophy in the early 1970s. But in the early 1990s Rawls made an equally important contribution to political philosophy by shifting the focus to *political*

[1] Cf. Beetham (1991); Clark (2007); Simmons (2001).
[2] Cf. Bodansky (2013); Buchanan (2004).
[3] Cf. Solum (2011); Weithman (2012).

legitimacy and offering a normative alternative to Max Weber's influential sociological and descriptive conception of legitimacy. (Rawls 1993; 1995/1996; 1996. Cf. also Rawls 1999). Unfortunately, Rawls failed to present his ideas on political legitimacy in a systematic and clear way, and nor did he explicitly discuss why he shifted the focus from justice to political legitimacy. What I will do here is to gather Rawls scattered comments about political legitimacy and try to piece them together in a more systematic way,[4] hoping to show that Rawls offers a more interesting and challenging conception of political legitimacy than is often thought. I first look at the various characteristics Rawls use to explain the meaning of the term 'legitimacy', and at why Rawls came to shift the focus from justice to political legitimacy in his later works. I then go on to give a very rough sketch of Rawls's own normative conception of political legitimacy, where the idea of public reason plays a major role.

Rawls: Weber's descriptive conception of legitimacy is insufficient

In Rawls's first major work, *A Theory of Justice* (Rawls 1971) the concept of legitimacy holds no central place.[5] In *Political Liberalism* (Rawls 1993), legitimacy is one of the most frequently mentioned concepts, and this is where Rawls formulates his own normative conception of legitimacy. However, in *Political Liberalism* Rawls never problematize the concept legitimacy as such, or try to define its general meaning. It is first in Rawls's reply to Jürgen Habermas' criticism in *The Journal of Philosophy* (Habermas 1995) that Rawls takes a step back and characterises his understanding of legitimacy in some detail.

In 'Political Liberalism: Reply to Habermas', Rawls first of all dismisses the purely sociological or descriptive conception of political legitimacy associated with Max Weber (Rawls 1995/1996: 429, fn. 77). Weber defines political legitimacy as the *de facto* ability of a political regime to secure acceptance based on belief (*legitimitätsglaube*) as opposed to securing compliance based on coercion alone.[6] Rawls

[4] Cf. Peter (2009); Weithman (2012).

[5] Rawls uses the term legitimacy a total of three times in *A Theory of Justice*, twice to refer to citizens 'legitimate interest' and at one point he uses the formulation 'a legitimate constitution'.

[6] 'The basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising

dismisses this conception as insufficient. Not because Rawls thinks that Weber is wrong to focus on acceptance as an important part of what it means for a regime to be legitimate, but because Rawls thinks that we need a *benchmark of appropriate acceptance*, or a *benchmark of sufficient justification*.

The most obvious contender for such a normative benchmark of acceptance is to say that a political regime must be *just* in order to be accepted by citizens on appropriate terms, or in order for the regime to be acceptable to its citizens. Does this mean that legitimacy is essentially the same as justice? Rawls explicitly rejects this and says that 'to focus on legitimacy rather than justice may seem like a minor point, as we may think "legitimate" and "just" the same. A little reflection shows that they are not' (Rawls 1995/1996: 427). So what is legitimacy if it is not the same as justice?

Rawls's six characteristics of legitimacy

In 'Political Liberalism: Reply to Habermas' Rawls says six important things about what he takes legitimacy to be in general:

1. Firstly, Rawls says that legitimacy has an essential connection to justice.[7]
2. He specifies that legitimacy requires both sufficient *procedural justice* and that the *outcome* of the procedure is sufficiently just.[8]
3. But Rawls also says that legitimacy is a *weaker* idea than justice in the sense that it imposes weaker constrains on what can be done, or that it allows a certain 'leeway' with regard to justice.[9]

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authority are lent prestige' (Weber 1964: 382). Weber postulated three main sources of legitimacy: 'charismatic authority' (based on the participants faith in the abilities and insights of the ruler), 'tradition authority' (based the participants faith in a particular political or social order because it has been there for a long time), and 'rational-legal authority' (where the participants believe in the legality and rationality of the regime).

[7] E.g. 'there is of course an essential connection with justice' (ibid.).

[8] Rawls also writes that 'neither the procedures nor the laws need to be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy and so will the injustice of the political constitution itself' (Rawls 1995/1996: 428).

[9] E.g. 'Thus legitimacy is a weaker idea than justice and imposes weaker constraints on what can be done' (Rawls 1995/1996: 428). And 'legitimacy allows an undetermined range of injustice that justice might not permit' (ibid.). 'A significant

Now, if we focus solely on these three characterizations of legitimacy we get the impression that 'legitimacy' for Rawls simply means 'sufficiently just'. This may in turn lead us to think that when Rawls turns the focus from justice to legitimacy he is lowering his normative ambitions. It is a widespread understanding of Rawls's late works that he here give up the idea that political regimes can be fully just, and that he therefore focuses on a less ambitious standard for when they are sufficiently just – a standard of political legitimacy. But when we think that Rawls see legitimacy merely as 'sufficiently just', we ignore two further characteristics of legitimacy that Rawls also emphasises:

1. Rawls emphasises that legitimacy also connects to *pedigree*,[10] or how something came about, i.e. whether it came about 'in accordance with established rules and traditions'.[11]
2. Furthermore, Rawls says that legitimacy is institutional and/or connected to law.[12]
3. Finally, he says that legitimate constitutional law can confer legitimacy to ordinary laws and decisions.[13]

When we bring these six characterisations of the meaning of 'legitimacy' together, we see that Rawls connects legitimacy to

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aspect of the idea of legitimacy is that it allows a certain leeway in how well sovereigns may rule and how far they may be tolerated. The same holds under a democratic regime' (ibid.: 427). Rawls also writes that 'before this point is reached [the point where injustice corrupts the legitimacy of a political procedure], the outcomes of a legitimate procedure are legitimate whatever they are' (Rawls 1995/1996: 428).

[10] Cf. the origin of the word 'legitimacy' from 'legitimate', in turn from late Middle English meaning 'born of parents lawfully married to each other'.

[11] E.g. 'Their [king or queen] being legitimate says something about their pedigree: how they came to their office. It refers to whether they were the legitimate heir to the throne in accordance with the established rules and traditions of, for example, the English or the French crown' (Rawls 1995/1996: 427). Or more generally, it says something about how e.g. a law 'came about, whether it was made in accordance with established rules and traditions' (ibid.).

[12] Cf. the linguistic roots of 'legitimacy' in Medieval Latin: *legitimatus* 'made legal', from the verb *legitimare*, from Latin *legitimus* 'lawful', from *lex*, leg-'law'.

[13] E.g. 'It [legitimacy] is also institutional' (Rawls 1995/1996: 428), and 'Thus citizens recognise the familiar distinction between accepting as (sufficiently) just and legitimate a constitution with its procedures for fair elections and legislative majorities, and accepting as legitimate (even when not just) a particular statute or a decision in a particular matter of policy' (ibid.: 393).

sufficient procedural and outcome justice, but also to pedigree or origin and that he asserts that legitimacy is an institutional and legal category. This shows that for Rawls the question of legitimacy is not simply the question 'When is x (a regime, a basic structure, a government, a law, decision, political act) *de facto* accepted on the basis of a belief?' Nor is it simply the question 'When is x (a regime, a basic structure, a government, a law, decision, political act) sufficiently just?' For Rawls the question of legitimacy is rather of the following type: 'Under which conditions are we political-morally obliged to accept x (a regime, a basic structure, a government, decision, political act) when we think that x is wrong and even unjust?'[14] Or: 'Under which conditions must the 'losers' in a political process see a law or political decision as reasonably acceptable, or as both lawful and appropriate?' When we raise questions of legitimacy we do not only ask whether the outcome of the political procedure is sufficiently just. We also raise the question of whether the agent who made the decision is authorised to make the decision, how the decision has been made, or whether the decision has been made in accordance with established and accepted procedures that are themselves sufficiently just.

Why a focus on political legitimacy?

So far I have only discussed what Rawls takes the concept of legitimacy to mean in general. What we want to know is why the concept or dimension of legitimacy becomes so important for Rawls in his latest writings. Why a shift in focus to political legitimacy?

Rawls connects the need for distinguishing legitimate from illegitimate decisions to the 'lack of unanimity on basic questions' in political life (Rawls 1995: 393). The need for distinguishing between legitimate and illegitimate decisions arises when we need to make collective decisions[15] and no unanimous decisions can be expected because the parties disagree on what constitutes a just and right decision. The larger and more pluralistic the collective is, the more

[14] I interpret Rawls as saying that legitimacy creates a political-moral obligation to comply, and that legitimacy justifies coercive measures. This connection to an obligation to comply is not a part of all conceptions of legitimacy; cf. Ronald Dworkin in Dworkin (1986: 191).

[15] Decisions that affect the collective of citizens, and where we also expect the collective of citizens to authorise the decision.

frequently we can expect situations where there is disagreement on what is a just or right outcome.

In large and pluralistic collectives one often introduces *law* to regulate the cooperation.[16] As we have seen, Rawls sees law and legitimacy as connected in intimate ways, but unfortunately Rawls says very little about the nature of cooperating in the medium of law. From his exchange with Habermas, however, it is clear that Rawls shares many of Habermas' views on the function of law in modern societies[17] : The idea is that law becomes a functional necessity for enabling cooperation in large scale associations where we cannot expect unanimity. Because laws are, or should be, publicly known to the parties the laws enable a convergence of expectations and effective coordination. Legal systems' impartial mechanisms for dispute settlement and adjudication provides a final arbiter in cases of conflict, and its mechanisms for ensuring compliance reduced the opportunity costs for parties to have trust in each other. Moreover, modern political regimes are typically constitutional regimes, meaning that they have a hierarchy of laws, or a distinction between higher or constitutional law and ordinary law and decisions. The importance of this is that the constitutional law defines the substantive norms, values or rights which ordinary laws cannot conflict with, and it outlines the appropriate procedures for making ordinary laws. Constitutional law is seen as conferring legal legitimacy to statutes and decision enacted in accordance with it.[18] We have a legal duty to comply with decisions and laws made in accordance with a valid just constitution. This means that if we can come to agreement on the essentials of the constitution we can continue to cooperate in spite of disagreement on the desirability and justice of particular laws and decisions. Law makes cooperation more efficient and reduces conflicts in cooperation because it relieves the participants from having to come to agreement on every single issue of cooperation.

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[16] Large cooperative ventures are also typically structured with the help of institutions. Like law institutions are typically public, rule bound, hierarchical and impersonal (not entirely dependent on the whims of particular persons filling the positions or on personal connections between the agents in the cooperation). Like law institutions convergence of expectations and facilitate cooperation and trust.

[17] Cf. Habermas (1996).

[18] Cf. Rawls (1995: 393).

Rawls builds on these ideas about the role and function of constitutional law when he says that a sufficiently just constitution confers political-moral legitimacy to laws and decisions enacted in accordance with it. In other words, as long as the constitution is sufficiently just we have a political-moral obligation to abide by ordinary laws and decisions enacted in accordance with the constitution – even when we disagree with these ordinary laws and decisions and think that they are less than just.

Now, the idea that laws can be legitimate and political-morally binding on us in this way without being fully just, is not an idea Rawls came up with in *Political Liberalism*. A close reading of *A Theory of Justice* shows that this idea is taken for granted already in his early work.[19] When Rawls grants the concept legitimacy so much attention in *Political Liberalism*, however, it is because Rawls by then had come to think that the disagreement and pluralism in constitutional democracies runs even deeper than what he had acknowledged in *A Theory of Justice*. In Rawls's late philosophy he no longer thinks that it is reasonable to expect citizens to fully agree on a comprehensive doctrine of morality and justice, or expect them to agree that a particular comprehensive doctrine of morality or justice as the most appropriate, or even acceptable, basis of their shared constitution. According to Rawls it is an unrealistic, and unreasonable, starting point for political philosophy to assume that all reasonable citizens will come to see the same moral, religious or philosophical comprehensive doctrine as the most appropriate, or as true. Instead Rawls takes as a starting point for a reasonable and realistic political sociology that there is a reasonable pluralism of moral, religious and philosophical comprehensive doctrines among reasonable and informed citizens. The task of political philosophy should thus not be first to try to find the right or true comprehensive doctrine of justice in general and then use this doctrine as the standard for what is a sufficiently just constitution. Rawls does not mean that justice and conceptions of justice should play no role to play in normative

[19] Though he does not use the concept 'legitimacy' in *A Theory of Justice*, he expresses this understanding of legitimacy when he says that '[…] being required to support a just constitution, we must go along with one of its essential principles; that of majority rule. In a state of near justice, then, we normally have a duty to comply with unjust laws in virtue of our duty to support a just constitution' (Rawls 1971: 311), cf. Weithman (2012).

political philosophy. What he means is that normative political philosophy must take as its starting point that in addition to unreasonable moral doctrines and unreasonable conceptions of justice there can be a reasonable pluralism of conceptions and doctrines of justice.[20] When Rawls makes this shift in what he considers to be a reasonable and realistic political sociology, he shifts the normative burden from a conception of justice to a conception of political legitimacy. Moreover, Rawls can no longer define political legitimacy simply as acting in accordance with a constitution that confirms sufficiently to the principles of justice of Justice as fairness. So how does Rawls formulate a conception of political legitimacy that can take on this normative burden? This is where public reason enters into Rawls's conceptualisation legitimacy. It is time to look at the normative conception of political legitimacy that we find in Rawls's later writings.

Rawls's normative conception of political legitimacy for a constitutional liberal democracy

Different kinds of political regimes claim to produce legitimate laws and decisions on different grounds. A *theocracy* takes God's word to be its ultimate source of legitimacy. *Socialist* regimes claim legitimacy on the basis of producing an egalitarian outcome, etc. It is important to see that Rawls does not try to work out a normative conception of political legitimacy applicable to all kinds of regimes. He does not even try to work out a normative conception of legitimacy appropriate for all regimes which call themselves democratic, or for all regimes which claim legitimacy on the basis of securing liberal freedoms. The task of Rawls's political legitimacy is to work out a

[20] Rawls's point is not that all moral doctrines and doctrines of justice are equally true, or that none of them are true. His point is that it is unrealistic to think that all reasonable and informed citizens will arrive at the same preferred moral doctrine and the same doctrine on justice, and that it is unreasonable to require citizens to be obliged by a constitution that builds on a particular moral doctrine or religion they cannot accept or see as reasonable. In the first formulations of his political liberalism, e.g. in the first edition of *Political Liberalism* in 1993, Rawls did not make it clear that he also thought there would be a reasonable pluralism of *political liberal* conceptions of justice. But in his latest articles it is clear that *Justice as Fairness*, understood as a political liberal conception of justice and not as a Kantian comprehensive theory of justice, is only one of several conceptions of political justice that satisfies the criterion of reciprocity and can be seen by citizens as an appropriate conception of political justice in a constitutional liberal democracy.

conception of legitimacy appropriate for a particular kind of regime: The kind of regime which we call *constitutional liberal democracy*.[21]

The very name of this form of regime reveals that it build on two types of claims to legitimacy, or that it claims to produce legitimate laws and decisions on the basis of satisfying two normative benchmarks: a) On the one hand, *democracy* or *popular sovereignty* (laws are legitimate because the subjects of the laws can also view themselves as the *author* of the laws); and b) *liberal constitutionalism* (laws are legitimate because they are enacted in accordance with a constitution which secures a certain set of rights and freedoms for all citizens).[22]

Now, why does Rawls see a need for working out a conception of political legitimacy for this particular kind of regime? Constitutional liberal democracies have had an incredible success and now seem to be the most plausible contender for a type of regime that can both be stable and reasonably just. Rawls starts from within this kind of regime because he thinks that the basic ideas of this kind of regime is acceptable to its citizens upon reflection, at least when compared to other forms of political regimes, and also because it is a regime that can be reasonably stable and produce acceptable outcomes.[23] But Rawls emphasise that in spite of its historical success, and in spite of the persuasiveness of its basic political-moral ideas, constitutional liberal democracy is a form of regime that lacks an agreed-upon and public conception of political legitimacy.[24] Indeed, Rawls thinks that there is not just a lack of agreement but even a *deep conflict* in the normative self-understanding of constitutional democracies. Hence

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[21] Rawls refers to constitutional liberal democracies both as constitutional democracies, liberal democracies, modern democracies and as modern liberal states. In a central passage he explains that these refer to the same kind of regime, which he most often refers to as constitutional democracy. I shall follow Rawls in using the latter term.

[22] Liberal constitutionalism is not the same as 'comprehensive liberalism' or 'perfectionist liberalisms' which measure the legitimacy of a regime by its ability to maximize liberty (in some way).

[23] However, Rawls does not always endorse the actual practices of many constitutional democracies and find that there is a discrepancy between its stated ideals and actual deeds.

[24] Since constitutional democracy is a form of regime that sees the collective of citizens as the ultimate sovereign the lack of a publicly recognised conception and standard of legitimacy is particularly problematical.

his attempt at working out a new way of conceptualising political legitimacy for this kind of a regime.

Rawls identifies two traditional and dominant ways of conceptualising political legitimacy in the public political culture of constitutional democracies (Rawls 1993: 4ff). On the one hand we have the *liberal tradition* from Locke. This tradition sees the main criterion of legitimacy as a constitutional democracy's ability to secure a set of rights and liberties for all citizens. In this liberal tradition there is a tendency to view political rights and democratic procedures as primarily having an instrumental value, i.e. as a means of securing other liberal rights of individuals.[25] On the other hand, we have the tradition from Rousseau, or the *civic republican tradition* (Rawls 1993: 4; 1993: 219; 1995: 396). This tradition gives priority to democracy and democratic procedures as the source of legitimate decisions, and emphasise the active participation of citizens and the virtues and values of public political life. Whereas the liberal tradition warns against the tyranny of the majority, the republican tradition questions the legitimacy of 'rights' that lack a democratic basis and fails to have a connection to citizens' own deliberation. In other words, we find that there is a polarisation between the two sources of legitimacy that define constitutional liberal democracy, and a tendency to reduce the one source of legitimacy to the other in its two dominant traditions of interpretation. Or at least there is a tendency to see either popular sovereignty or liberal rights as the more fundamental source of legitimacy. According to Rawls this has led to an interpretative stalemate in the public political culture of constitutional democracies, and a mutual mistrust between proponents of the two alternative interpretations. An ambition of Rawls's late political philosophy is to move beyond this impasse and find a way of conceptualising political legitimacy for constitutional democracies that can be publicly recognised as appropriate for this regime by all its reasonable citizens. But how can Rawls possibly proceed here? Rawls is looking for a conception of political legitimacy appropriate for a constitutional liberal *democracy*, and in a

[25] The modern legal thinker Joseph Raz, for instance, states that if democracy does not contribute to better outcomes, it is not necessary for political legitimacy. Thinkers who conceptualise political legitimacy in terms of a substantive utilitarian or egalitarian criterion of outcome often have a similar instrumental understanding of democracy.

democracy it is the citizens themselves who hold the ultimate political authority to decide what an appropriate basis for their common political life is. But if Rawls is right in his political sociology, with its assumption of a 'fact of reasonable pluralism', free and informed citizens will not come to agreement on a moral doctrine, or doctrine of justice, as the sufficient normative standard of their constitution and basic structure.[26] So how does Rawls conceptualise political legitimacy for a constitutional liberal democracy?

The role of public reason in Rawls's conception of political legitimacy

Rawls's refers to his normative conception of political legitimacy as the 'liberal principle of legitimacy'. Confusingly, Rawls has several formulations of this principle. The earliest formulation in *Political Liberalism* does not differ significantly from the conception of political legitimacy which Rawls had expressed already in *A Theory of Justice* and reads as follows**:**

> [O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy.
>
> (Rawls 1993: 137)

This formulation, however, leaves us wondering what it takes for a constitution to 'have essentials that all citizens as free and equal can endorse in the light of principles and ideals acceptable to their common human reason'. How can we know whether the constitution has this quality? And what do we do when one group of citizens

[26] Rawls himself formulates the problem in this way: 'We start from two facts: first from the fact of reasonable pluralism, the fact that a diversity of reasonable comprehensive doctrines is a permanent feature of a democratic society; and second, from the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body. These two points give rise to the problem of political legitimacy. For if the fact of reasonable pluralism always characterizes democratic societies and if political power is indeed the power of free and equal citizens, in the light of what reasons and values – or what kind of a conception of justice – can citizens legitimately exercise that coercive power over one another?' (Rawls and Kelly 2001: 40).

think that the constitution has this quality, and other groups of citizens disagree?

Rawls's later formulations of the liberal principle of legitimacy bring us closer to an answer to this question. Here Rawls does not set up a criterion for how to evaluate the constitution or the basic structure directly. What he does is to set up a criterion for what counts as a legitimate exercise of political power, or more precisely, a criterion for what is legitimate exercise of political power in the fundamental political cases – i.e. in cases that touch on constitutional essentials and matters of basic justice. Rawls assumes that the constitution and the basic structure are shaped over time, and whenever citizens and public officials exercise political power in the fundamental cases.[27] The idea is that if citizens and public officials, when they exercise political power in the fundamental cases, do so in a particular way, then the resulting constitution and basic structure will also be legitimate and sufficiently just. So what is the criterion that citizens and public officials must follow when they exercise political power in these cases?[28] Rawls's basic idea is that citizens and public officials must exercise their political power to shape the constitution and the basic institutions in a way that satisfies what Rawls calls *the criterion of reciprocity*. This criterion says that:

> Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons. This criterion applies on two levels: one is to the constitutional structure itself, the other is to particular statutes and laws enacted in accordance with that structure.
>
> (Rawls 1997: 771)

[27] In a democracy it is, or should be, the collective of citizens who make the laws and decisions. Citizens can make laws directly in a referendum, through elected representatives in a legislative assembly, or through public officials/bureaucrats who are more or less accountable to the citizens.

[28] Rawls is aware that citizens seldom exercise political power directly in constitutional issues (exceptions could include binding referendums) but they do so indirectly when they vote for representatives, and by holding their representatives accountable.

This is the essence of Rawls's so-called *ideal of public reason*. Rawls proposes that the ideal of public reason should apply most stringently to public officials and in particular to justices in regimes with judicial review. But Rawls strongly emphasise that the ideal must also apply to ordinary citizens since they too exercise political power – and since they hold the position as the ultimate power holders in a constitutional liberal democracy. But what does this ideal of public reason mean in practice? How can public officials and ordinary citizens respect this ideal of public reason and exercise political power in a way that satisfies the criterion of reciprocity? What reasons can we both see as sufficient and reasonably think that other citizens might also reasonably accept as appropriate and sufficient?

As Rawls himself remarks, the formulation of this criterion for legitimate exercise of political power is almost tautological. To understand the meaning of this criterion we must interpret it in light of several assumptions that Rawls make as part of his late philosophy. To make a very long story very short[29] , I will say that what Rawls proposes the following ideal: When citizens and public officials exercise political power in the fundamental political cases,[30] they should not decide directly on the issue on the basis of what is in their own private interest, or on the basis of what they take to be in the common good as measured by what each takes to be the correct religious, moral, or philosophical comprehensive doctrine. Rather, the ideal is that they should decide this kind of political cases in a way that they sincerely believe to secure their common good and fundamental interests *as* citizens in a constitutional liberal democracy, or in a way that they believe to respect the basic ideas of constitutional liberal democracy (i.e. popular sovereignty or democratic rule and the guarantee of certain liberal freedoms and rights for all citizens) and this kind of regime's way of conceptualising citizens and society (i.e. seeing citizens as free and equal, and society as a fair system of cooperation over generations). The idea is that if we believe in constitutional liberal democracy as a reasonably fair and stable form of regime, then we must keep an eye on its basic constitutive ideas when we exercise political power in

[29] I discuss this in more detail in my doctoral dissertation (Langvatn 2013).
[30] I.e. where constitutional essentials and matters of basic justice is at stake.

ways that can change the regime itself, or its basic institutions. In practice this means that when confronted with a fundamental political case they are to decide upon, public officials and citizens should consider different sides of the issue and decide for the side which they sincerely believe to give the *most reasonable balance of political values on the issue*, as measured by what each sees as the most reasonable and coherent interpretation of the basic ideas and conceptualisations of this form of regime.

What Rawls refers to as the 'basic ideas and conceptions of constitutional liberal democracies' are political-moral ideas and conceptions thought to be familiar to us through the public political culture and central writings, and more or less implicitly accepted by those who accept this form of regime. Rawls's idea is that these are political-moral ideas that all reasonable citizens in a constitutional democracy see as morally reasonable and as an acceptable basis for their shared laws and basic institutions. But these basic political-moral ideas and conceptions are also vague and general and many citizens connect these ideas to some particular moral, religious or philosophical doctrines. We will disagree on their specific interpretations, and on their deeper doctrinal justifications, but they form a shared ground and it is on this ground we must justify our exercise of political power over one another. This, however, requires that we are willing to think through these political-moral ideas on their own terms, and try to reason about how they can form a political conception of justice appropriate for a constitutional liberal democracy,[31] instead of simply deriving a conception of justice from one's comprehensive religious or moral doctrine and apply this as the appropriate standard of justice in a constitutional liberal democracy. It also requires that we conduct our public political justification in terms of these political-moral ideas and conceptions, and the political

[31] Rawls's idea is not that public officials and ordinary citizens should pick and choose among the basic political ideas and conceptions when they try to justify their exercise of political power. This would only encourage us to tailor our justification to what suits us best in any given situation. The ideal is rather that we should sincerely try to work out what we see as coherent and 'sufficiently complete' interpretation of these basic political-moral ideas in the form of a political conception of political justice. Meaning that we should try to show how democracy and liberal rights connect and work out principles of justice that cohere with this understanding, and with our political conception of the person and society. Moreover, we should also try out whether other citizens too can see our interpretations as at least reasonable.

conceptions of justice we work out on the basis of them, and not primarily on the basis of ideas of justice and moral concepts taken directly from our comprehensive doctrines. This is what Rawls's ideal of public reason and conception of political legitimacy requires.

The idea is that if citizens and public officials exercise their political power in the fundamental cases in accordance with what each sincerely see as the most reasonable political conception of political justice appropriate for a constitutional democracy and also use publicly shared methods of inquiry and forms of reasoning,[32] then they exercise their political power in a way that satisfies the criterion of reciprocity. When (all or most) citizens and public officials exercise their political power in a way that satisfies the criterion of reciprocity, then 'the legal enactment expressing the opinion of the majority is legitimate law' (ibid.: 770), and we can also see the basic structure of authority as sufficiently legitimate.[33] Why? Because citizens can then recognise that the liberal rights and the democratic procedures entrenched in the constitution are based on the basic political-moral ideas which citizens somehow share insofar as they accept constitutional democracies as an appropriate form of regime. Moreover, in this situation the citizens can also see the constitution and the basic institutions as shaped by a process of opinion and will formation where they have participated and had the chance of presenting their interpretation of the basic political-moral ideas. When citizens and public officials have reasoned and decided in this way the outcome is sufficiently legitimate to be politically-morally binding on us, even when we do not think that the effective constitution, nor the laws and decisions enacted in accordance with it, express what each may consider to be the *most reasonable* interpretation of justice, or the most reasonable interpretation of these political ideas.

Rawls argues that his way of conceptualising political legitimacy in a constitutional liberal democracy makes it possible to move beyond the impasse between the civic republican tradition and the liberal

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[32] 'Moreover, in view of the fact of reasonable pluralism, those guidelines and rules must be specified, by reference to forms of reasoning and argument available to citizens generally, and so in terms of common sense, and by the procedures and conclusions of science when not controversial' (Rawls 1993: 162).

[33] Cf. Rawls (1993: 136).

traditions of interpretation. The political conceptions of justice, and the basic political-moral ideas which Rawls's ideal of public reason recommends us to justify out political decisions from are familiar and acceptable to both liberals and civic republicans, and allows us to see popular sovereignty or democracy and liberal constitutionalism as *co-original and co-equal sources of legitimacy,* and as something that is continually reinterpreted (Rawls 1996: 433). The problem, Rawls argues, is not to come to an agreement on these basic political-moral conceptualisations and ideas. The deep conflicts of the public political culture connects with the way different groups attempts to provide these basic political-moral ideas with a deeper foundation on the one hand, and the attempts to concretise or specify these basic ideas in principles of justice and appropriate policies, on the other hand. The typical strategy in political philosophy has been to find a moral theory which can provide both a deeper justification of these political-moral ideas and guidelines for how to work out concrete policies. But if we proceed in this way we will never get out of the impasse of our public political culture, because there is, Rawls argues, an irreducible and reasonable pluralism of such moral and religious comprehensive doctrines. What we must do if we want to move away from the impasse, and to respect other citizens and their ability to make up their own mind about such matters, is to start in the middle of the public political culture, try to interpret these basic political-moral ideas and conceptions we share there and which defines the particular practice we call constitutional liberal democracy, and specify them into coherent and appropriate conceptions of political justice which we can see as appropriate for this kind of regime, and see if other citizens too can accept them as appropriate and reasonable basis of political justification within this kind of regime. One could say that Rawls recommends us to do is to stay at the level of the political-moral ideas, conceptions and values when we reason about how to exercise our political power in the fundamental political cases.[34] The ideal requires an awareness of the role and obligations

[34] With David Reidy we can say that for a conception of political justice to satisfy Rawls's criterion of reciprocity it must express the idea of 'reciprocity of advantage' (as opposed to mutual advantage). But since there is disagreement even on what reciprocity of advantage amounts to we also need 'reciprocity in justification'; the concepts, values and ideas we formulate reciprocal terms of cooperation must also be acceptable to all reasonable persons. Rawls's contention is that this is only possible insofar as the conception is formulated and presented in terms of the political-moral

that follow from the particular kind of practice we call constitutional liberal democracy, and a way of making this role and obligation compatible with one's other roles, commitments and moral convictions.

To sum up: Citizens' and public officials' exercise of political power is legitimate if they exercise their power in accordance with a sufficiently just constitution. The constitution and the basic institutions are sufficiently just insofar as all citizens and public officials, when they exercise political power in cases touching upon the constitution or the basic institutions consider both sides of the issue and decide for the side which they sincerely believe gives the most reasonable balance of political values on the issue – as measured by what they sincerely believe to be the most appropriate political conception of political justice for a constitutional democracy. Rawls's idea is that the basic structure of authority in a constitutional democracy will be sufficiently legitimate if (all, or at least most) citizens and public officials exercise their political power on the basis of what they see as the most reasonable conception of political justice and are willing and able to explain this basis publicly.[35] Without the public explanations and reasoning about one's political choices we cannot learn from each other or approximate a *shared* understanding of political legitimacy and of the basic political-moral ideas and conceptions. From this we can conclude that Rawls's conception of legitimacy underwrites the view that constitutional liberal democracies must be a kind of *deliberative* democracies, i.e. one where deliberation and decision-making in the fundamental political cases is guided by the ideal of public reason (Rawls 1997: 772).[36]

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conceptions, ideas and values implicitly shared in the public political culture of constitutional democracies and does not derive from or depend on a particular comprehensive doctrine (Reidy 2006).

[35] Cf. Rawls (1993: 136).

[36] 'The definitive idea for deliberative democracy is the idea of deliberation itself. When citizens deliberate, they exchange views and debate their supporting reasons concerning public political questions. They suppose that their political opinions may be revised by discussion with other citizens; and therefore these opinions are not simply a fixed outcome of their existing private or non-political interests' (Rawls 1997: 772).

A substantive or purely procedural conception of legitimacy?

Rawls's conception of political legitimacy is sometimes described as a *purely procedural conception* of legitimacy.[37] This is not surprising given that Rawls starts from the assumption that we cannot expect all reasonable citizens to agree on a substantive criterion of outcome justice in a constitutional democracy. We cannot, for instance, expect all reasonable citizens to agree that laws and political decisions must conform to certain principles of justice that belong to a particular comprehensive doctrine, not even a liberal comprehensive doctrine, like Rawls's. Instead of starting from a fixed set of individual rights and liberties, or a fixed set of principles of justice which laws and democratic decisions must conform to, Rawls emphasises the democratic deliberative process as decisive for producing legitimate law and legitimate decisions. Hence, we may think that he presents a *purely procedural conception of political legitimacy* for a constitutional democracy.

Now, Rawls does say that 'Constitutional political procedures may indeed be – under normal and decent circumstances – purely procedural with respect to legitimacy' (Rawls 1995: 426).By this he means that when we follow the constitutional political procedures in a correct way the resulting laws and decisions will be legitimate, no matter what its content is. But Rawls goes on to say that:

> There are serious doubts, however, about this idea of procedural legitimacy […] this assurance of legitimacy would gradually weaken to the extent that the society ceases to be well ordered. This is because, as we saw, legitimacy of legislative enactments depends on the justice of the constitution (of whatever form, written or not), and the greater its deviation from justice, the more likely the injustice of outcomes. Laws cannot be too unjust if they are to be legitimate.
>
> (ibid.: 429)

[37] Cf. Peter (2009). Both Peter and Rawls oscillate between the formulation 'purely procedural' and 'pure proceduralist'. The essential feature of a pure procedural conception of legitimacy is to say that what is legitimate is defined by the outcome of the procedure, whatever it may be, i.e. that there is no prior and given criterion against which the outcome is to be checked. Cf. Rawls's definition of pure procedural *justice* (Rawls 1993: 72).

Rawls denies that his overall conception of political legitimacy is a pure procedural conception. In fact, Rawls says that all allegedly pure proceduralist conceptions of legitimacy have an *illusory character,* and that the same is the case for all allegedly pure procedural conceptions of justice (ibid.: 431). He also says that 'It is a common oversight […] to think that procedural legitimacy (or justice) tries for less and can stand on its own without substantive justice: it cannot' (ibid.: 425). Rawls argues that every procedure exemplifies and instantiates certain values, and that what counts as a 'fair procedure' is always connected to what we consider to be fair or acceptable outcomes of the procedure. In the end we always rely on substantive judgements of justice (ibid.: 429ff). But if this is the case, then why does Rawls put so much emphasis on the deliberative and democratic procedures? Does Rawls assume that all reasonable citizens agree on a substantive criterion of correct outcome of the democratic procedure, after all? No.

What Rawls does assume is that reasonable citizens in a constitutional regime (more or less implicitly) accept certain ideas and conceptions that are constitutive of this form of regime, and familiar from its public political culture.[38] These are *substantive political-moral* ideas and conceptions which influence what we consider to be a sufficiently just constitution, and what we consider to be a sufficiently just democratic procedure, and these ideas and conceptions influence what we consider to be sufficiently just and acceptable outcomes in a constitutional democracy. But these substantive political-moral conceptions and ideas are too vague and general to amount to an unequivocal criterion of justice for a constitution and for democratic outcomes. Rawls's idea is that when we exercise political power in the fundamental cases we should orient ourselves to these conceptions and ideas, and make sure that our political decisions does not conflict with what we see as a conception of justice which interprets these ideas in a coherent and sufficiently complete way. In this way we specify, reinterpret and institutionalise these substantive and political-moral conceptions and ideas – the hope being that we can arrive at a publicly acceptable and justified political conception of political justice or at least see each other's political conceptions of political justice as reasonable in the context of deciding on our shared laws and

[38] I.e. the conception of persons as free and equal citizens, society as a fair system of cooperation, and the ideas of acceptability, liberal rights and democracy.

institutions. The public deliberative process oriented in this way is a procedural device for arriving at publicly justifiable conceptions of political justice expressing these basic political-moral ideas in a more specified form.[39]

A deliberative procedure can be used to construct outcome. But every deliberative procedure exemplifies and expresses certain values, procedural and substantive (e.g. by granting the participants in the procedure status as free and equal participants, and secure their standing as such). What Rawls says is that we should make sure that the political procedure of a constitutional democracy reflects the political-moral conceptions, ideas and values we share in the public political culture. This is because no other ideas and values can be reciprocally and freely agreed to by all reasonable citizens as an appropriate basis for their shared laws and institutions. Such an orientation, and restrictions on admissible reasons for making political decisions, is according to Rawls necessary to secure the legitimacy of the constitution and the basic institutions of a constitutional democracy in the *long run*. Or as Rawls puts it:

> The point is that no institutional procedure without such substantive guidelines for admissible reasons can cancel the maxim 'garbage in, garbage out'. […] the mix of views and reasons in a vote in which citizens lack awareness of such guidelines may easily lead to injustice, even though the outcome of the procedure is legitimate.
>
> (ibid.: 431)

An integrative approach to political legitimacy

Rawls's ideal of public reason has a legion of critics, and the volume and vehemence of these criticisms is likely to make Rawls a non-starter for those who look for ways to conceptualise political legitimacy in a constitutional liberal democracy. But there is no reason to accept or reject Rawls's late political philosophy wholesale.

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[39] One can say that in *Political Liberalism* a democratic deliberative process guided by the ideal of public reason substitutes the procedural device Rawls employed in *A Theory of Justice,* i.e. the Original Position. Both the deliberative process of public reason and the Original Position are procedural devices for constructing specific principles and conceptions of justice on the basis of certain substantive but vague and general normative ideas and conceptions

It is possible to appreciate some of the ways in which Rawls approach the question of political legitimacy without endorsing his particular normative conception of political legitimacy, or his ideal of public reason.

There are several interesting things in Rawls's approach to the question of political legitimacy. Many theorists of legitimacy focus exclusively either on legal legitimacy (legality), sociological/ descriptive legitimacy (*de facto* acceptance of laws or regimes) or exclusively on normative legitimacy (moral justifiability). Rawls, however, attempts give a more integrative approach drawing on all these three perspectives. In this way he comes closer to capturing the multiplicity of ways in which we use the concept legitimacy. I also see it as an advantage that Rawls in his general analysis of the concept of legitimacy deliberately avoids the simplified and exaggerated dichotomies between input/procedural legitimacy, on the one hand, and output/substantive legitimacy, on the other hand. Furthermore, Rawls does not try to present a criterion of political legitimacy that applies to all kinds of regimes under all kinds of circumstances. He limits his project to explicating political legitimacy for and from within a particular kind of regime, while being open and explicit about the political sociological assumptions he builds on while doing so. I also appreciate that his normative conception of political legitimacy for a constitutional liberal democracy avoids conflating the two sources of legitimacy which are defining of this form of regime: Rawls's normative conception of political legitimacy acknowledges the tensions between the democratic and the constitutional liberal ideas of legitimacy and tries to integrate them.

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Chapter 7

Factual disagreement and political legitimacy

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Introduction

As is all too familiar, we rather often face persistent disagreements about common policies, or about the design of institutions that affect us all. We disagree, for example, about abortion, minimum wages, legalising same-sex marriages, death penalty, energy policy, and climate policy. Often these disagreements exist because we fail to reach a settled agreement about what is morally right or best, or simply because we have different interests. It is commonly thought that whatever policy or decision adopted and enforced on everyone, including those who disagree, the policy should at least be *legitimate*. So, it is a requirement of justice that policies enforced despite persistent disagreements about values or interests should be legitimate.

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My interest here is how this concern for legitimacy should apply to disagreements about *non-normative factual matters*, or more accurately, to disagreements about policies that trace back to disagreement about non-normative factual questions. I will refer to this type of disagreement as *fact-dependent policy disagreement*, to distinguish it from the more familiar *value-dependent policy disagreement*. The main question I want to address is this: Suppose we have a persistent disagreement about a particular set of policy options, not because of an underlying moral disagreement, or a mere conflict of interest, but rather because we disagree about a crucial non-normative factual assumption underlying the justification of the policy choices. In such a case, what does it take for a policy choice to be legitimate?

A word of warning: Despite its importance, the issue of legitimacy in fact-dependent choices is, I believe, rather neglected in political philosophy. It may even seem an odd question to those familiar with theorising about legitimacy in political philosophy. It is commonplace that policy disagreements are value-dependent. But it is equally obvious that policy disagreements can be fact-dependent, and very often, of course, policy disagreements are both value-dependent and fact-dependent. So, the question of legitimacy in fact-dependent choices is one that we need to address, unless we want set aside concerns about legitimacy altogether.

What I will present is a negative argument to the effect that given apparently plausible constraints on conceptions of legitimacy, there is no viable conception of legitimacy to apply to fact-dependent policy disagreements. Second, after presenting the negative case, I outline some of the options available on the assumption that negative case is sound. The plan of the chapter is as follows. First, I offer some clarifying remarks about the notion of a fact-dependent policy disagreement. Then I outline the concept of a legitimate policy choice by suggesting a set of constraints that any admissible conception of legitimacy should meet. Next I discuss a range conceptions of legitimacy that one might suggest or derive from current work in political philosophy, and I argue that none of them meet the constraints laid out in the previous section. Finally, I offer some reflections and suggestions for further work.

Fact-dependent policy disagreements

It will be useful to begin with some clarification of what I called fact-dependent policy disagreements. Roughly, I take a *policy* disagreement to be a disagreement about which common policy should be adopted in a given polity. A *common* policy is one that applies to everyone in the polity, and thereby affects everyone though perhaps sometimes in rather indirect ways.[1] There is a *disagreement* about common policies when members of the polity have conflicting views about which common policy to adopt: some favour it, others don't. We have a *fact-dependent* policy disagreement when a policy disagreement depends on non-normative factual disagreements. Non-normative factual disagreements, in turn, are disagreement about the truth of non-normative factual propositions. Two individuals disagree about a proposition just in case they have different doxastic attitudes to that proposition; say because one believes the proposition, while the other rejects it, or because one has very high credence in the proposition, and the other lower credence.

I take non-normative factual disagreements to include disagreements about the epistemic status of factual beliefs, e.g. when someone takes a belief to be known, while another thinks that the belief is reasonably justified but not known. And I want to include disagreements about when and whether some method of inquiry or doxastic practice is reliable. I want, however, the notion of a non-normative factual disagreement to *exclude* disagreements about moral questions, aesthetic questions, political values, and disagreements based merely on divergent individual interests. These latter disagreements are, as I have already mentioned, value disagreements.

A prominent and much debated case of a fact-dependent policy disagreement is the controversy about climate policy, in so far as this disagreement trace back to factual disagreements about climate change, that is, whether it occurs or not, and if it does, whether there is a significant anthropogenic cause. Another case is that of former South African President Thabo Mbeki who based parts of South African health policy on the assumption that HIV infection is not the

[1] See Nagel's remarks about when coercion requires a legitimising justification (Nagel 1987: 224).

cause of AIDS.[2] An interesting issue in health policy concerns the proper place of complementary/alternative medicine (CAM) in publicly funded health care. The question is whether CAM should be funded by public money, and the policy disagreement turns on whether or not is there is proper evidence for the efficacy of CAM, or indeed what would constitute proper evidence.[3] Philip Kitcher offers an extreme, though fortunately less consequential case featuring 'the proposal that destabilization of the Near Eastern world is a precondition for the return of Jesus.' As Kitcher writes, 'A significant minority of Christians believe that their Bible tells them that this is so, and some are inspired to think that American foreign policy should be shaped by the directive to prepare the world for the Savior's return' (Kitcher 2008: 12). Others disagree, and would assess the policy choices on the table rather differently.

Some of these examples point to a rather general class of fact-dependent policy disagreements, namely, disagreement that arises because we accept different epistemic principles, or place trust in different authorities. Some accept the epistemic authority of established science or academia for the purpose of common policy making, but others disagree. When we face such disagreements, we may ask whether it would be legitimate to accord the controversial scientific institutions or disciplines the role of a privileged epistemic authority in political decision-making. This is a wide scope version of the question I address in this chapter.

Turn now to the very notion of a fact-dependent policy disagreement. We have such disagreements because our rankings of policy options generally depend on doxastic attitudes to factual propositions, and we sometimes accept different doxastic attitudes to these propositions. This is the broad picture. The details are more complicated. In general, an agent's normative views will determine whether support for a particular policy rationally depends on how a particular contingent factual question is resolved. So, for one agent a particular factual question may be very important for ranking a set of policy options, whereas for another agent with different values, that particular factual question might be irrelevant. In much the same

[2] See Jones (2002) for this case and some interesting reflections.
[3] See discussions and further references in Hansen and Kappel (2010).

way, whether some individual's ranking of options rationally depends on a particular non-moral factual proposition is contingent upon other propositions the individual accepts.

To illustrate, consider this case. For Adam, the choice of whether to endorse legalising active euthanasia on request by competent medical patients is fact-dependent. Adam's endorsement basically hinges on the risk of a slippery slope, or other forms of abuse that might follow in the wake of legalising active euthanasia on request. This is Adams overriding moral concern, but as it happens, he is convinced that in a properly designed institutional and legal framework, such risk is negligible. Ben, by contrast, is inclined to think that a slippery slope is looming. For Ben, however, this is at most an additional reason to worry. Even if Ben were to concede to Adam that there is no significant risk of abuse, Ben would still oppose legalising active euthanasia on request. This is because for Ben the decisive question is whether legalising active euthanasia would permit actions that violate a deontological constraint. Ben thinks that it would, and for him this is a decisive reason to oppose legalising active euthanasia.

In certain respects this policy disagreement depends on a factual question, but in other respects it does not. If Adam and Ben were to agree that legalising active euthanasia would very likely have serious negative consequences, then they would agree what policies to pursue. But if Adam and Ben concurred in rejecting the prospect of a slippery slope, then they would still not agree that active euthanasia ought to be legalised. So, it is not that there is simply one factual question that separates the two.

This case suggests that we adopt a rather broad notion of fact-dependent policy disagreements, or at any rate this is what I want to do.[4] We have a fact-dependent policy-disagreement between two individuals when (a) they disagree about which policy option is best, (b) there is some non-normative factual proposition P upon which each of their orderings depend, and (c) some doxastic attitude to P, such that if they both adopted this attitude, they would agree about

[4] Note that fact-dependent disagreements are also relativised to pairs of individuals. A disagreement regarding the same set of policy issues may be fact-dependent for some pairs of individuals, but not for other pairs, depending on which values and beliefs they have.

which policy option is best. This broad notion makes Adam's and Ben's disagreement about legalising euthanasia come out as a fact-dependent disagreement, though there clearly are value differences that also set Adam and Ben apart. So, while Adam and Ben's disagreement is indeed fact-dependent, it is not *purely* fact-dependent. Note that this broad notion of a fact-dependent disagreement does not require that there is any proposition and doxastic attitude to that proposition, such that when agents have that attitude, then their entire ordering of alternatives is identical. Two individuals can have very different values influencing their rankings of alternatives, and yet what separates them is nonetheless a dissenting view regarding certain factual matters.

Of course, these are quite abstract ways of specifying a notion of a fact-dependent political disagreement. In real life things are not so neat. People may be mistaken or insincere in the way they conceive of and present the political disagreements they are involved in. They may say, and even sincerely believe, that some disagreement is fact-dependent, while it really is not. In some cases, there might be strategic advantages to framing a disagreement as fact-dependent, even when it is not. Or conversely, disagreements may be framed as value-dependent, when they are really fact-dependent, and so on. While obviously important in many respects, I will abstract from these issues.

The concept of *legitimacy*

Consider now the question concerning the legitimacy of policy decisions made in domains where we face fact-dependent policy disagreement. What are the criteria for political legitimacy in such cases? This is a difficult question, in part because theorising about legitimacy is a difficult area on its own. My approach will be to assume a familiar way of thinking about political legitimacy found in the writings of Thomas Nagel and John Rawls, though I am not aware of ways of laying out the notion similar to mine.[5] In order to characterise the notion of legitimacy, I will adopt the familiar distinction between the concept of legitimacy and more specific

[5] I found Steven Wall's paper on legitimacy very valuable (Wall 2002). Wall discusses a series of interesting issues different from those discussed here, and he does not specify the concept of legitimacy in the way I do, but I think that my account owes a lot to his.

conceptions of legitimacy.[6] In this section, I will then offer a characterisation of the concept of legitimacy. In the next section, I will discuss a range of more specific conceptions of legitimacy.

I will assume that the concept of legitimacy acquires its content from a particular role in mediating disagreements over the use of coercive political power. What role does the concept of legitimacy play? When we disagree about policy options, it is because we have, and continue to have, different views about what morality or justice requires, or indeed about what the relevant non-normative facts are. When such disagreements occur, the policy adopted and enforced on everyone should at least be legitimate. This points to a certain role that the concept of legitimacy has. More specifically, when we cannot reach an agreement about what the best policy choice is, it should nonetheless be easier for us to come to see that certain options are legitimate. And second, when realising that some option qualifies as a legitimate, this acknowledgement should command some sort of respect, or obedience, even among those who do not agree that it is the best, or the right, option to pick. Believing that a policy choice is legitimate should provide agents with a reason to willingly comply with it.

I will now offer a way of spelling out the details of this functional specification of the concept of legitimacy. I will do so in terms of what I will call *determinants* on the concept of legitimacy – features that determines the content of the concept. I will assume that these determinants in turn are to be considered as minimal constraints on any acceptable conception of legitimacy. So, for some proposed conception of legitimacy to be an admissible conception, it should meet the constraints laid down by the determinants of the concept of legitimacy.

So, what are the determinants of the concept of legitimacy? The first, quite important, determinant is:

(a) Distinctness. The property of being legitimate is distinct from the properties of being morally right, just or permissible.[7]

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[6] See D'Agostino (1996: 15) for helpful remarks about the distinction between concepts and conceptions, and its roots in Hart and Rawls.

[7] Note that the property of being legitimate is also distinct from the property of being morally permissible. On some conceptions of morality, any set of alternative actions

The reason why we need Distinctness is clear. As mentioned earlier, we can disagree about whether a particular policy is right or just, but nonetheless agree that it is legitimate. So, an agent can find a particular policy wrong or unjust, but concede that it is legitimate. Conversely, one can think that a policy is right or just, but insist that it is not legitimate. These possibilities demonstrate the need for Distinctness. If we did not think of the property of legitimacy as being distinct from these other properties, rational individuals could not consider a policy legitimate and yet not best or just.[8]

Next, the task of identifying the property of legitimacy should, in a certain sense, be less challenging than the task of identifying the properties of being just, or morally right, or morally permissible. When we find ourselves unable to agree, we should still be able to find a legitimate decision. When we disagree about policies, legitimate options should exist, and it should be easier and generally feasible for us to identify those legitimate options. We can spell this out in terms of two properties, the first of which is:

(b) Determinateness. Given a properly framed decision problem, and a properly functioning political system, at least one policy option should come out as legitimate.

Note that the requirement is not that *any* decision problem has at least one legitimate option. This is because a decision problem might be ill formed, say because some of the relevant alternatives to choose between are not represented, or it might be that no alternatives are legitimate, e.g. because deliberative processes necessary for

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falls into three categories: the morally right alternatives, the permissible ones, and the wrong ones. On such conceptions, there might be alternative courses of actions that aren't exactly right, though they are not wrong either - these actions are morally permissible. So, while all right actions are permissible, actions may be permissible without being right. On other conceptions of morality, such as for example standard consequentialism, there are only two classes of actions: the right ones, and the wrong ones. All right actions are permissible, of course, but no action is permissible and yet not right. The important point to note is that the property of legitimacy is not identical to the property of a permissible action. We might disagree whether a policy is morally permissible in the sense outlined, and yet agree that it is a legitimate policy.

[8] Cf. Wall on the insufficiency of correctness-based justification in fulfilling what he calls the 'reconciling function' of public justification (Wall 2002: 387). See also Estlund (2007: 99ff).

legitimacy cannot be carried out. This is why Determinateness only requires that properly framed decision problems contain at least one legitimate policy choice, and only when situated in a properly functioning political system.

One might worry that Determinateness is too weak. Suppose that more than one policy option is declared legitimate, but that they affect members of the polity in very different ways. How are we then to choose between the plurality of legitimate choices? Wouldn't there be something distinctly illegitimate about, say, the powerful simply picking the option that serves their interests best? I agree that this is a concern. So, intuitively, in a properly framed decision problem situated in a well-functioning political system, there should be at least one legitimate option, but there should not be more than one, unless all legitimate options are, in some sense, equally good. However, another determinant will cater for that possibility, and this is the determinant I call Non-arbitrariness. Roughly, the idea behind Non-arbitrariness will be that if some conception of legitimacy counts too many rather different policy options as legitimate, then it cannot simultaneously meet the condition of Non-arbitrariness. I will return to this determinant in a moment.

But for now turn to the next determinant that together with Determinateness secures that legitimate options can be identified:

(c) Accessibility. In a properly framed decision problem, and given a properly functioning political system, the legitimate choices should be jointly epistemically accessible to us, i.e. we should be able to discern and agree that they are indeed the legitimate choices among those available.

I noted before why the provisos regarding properly framed decision problems and properly functioning political systems apply. The idea behind Accessibility, of course, is that it is not sufficient that there are legitimate policy choices. We should be able to find them, and agree that we have found them.

While the previous determinants of the concept of legitimacy may seem rather uncontroversial, turn now to what may at first sight appear as a more contestable determinant. It seems that there should be distinct functional relation between the legitimacy of policy

choices and the correctness of those choices. When some option comes out as legitimate, this should somehow testify to its correctness:

(d) Non-arbitrariness. If (but only if) there is a procedure independent correct decision relative to a given policy choice, then some subset of the properties that make a decision legitimate also tend to make it correct, or constitute defeasible and fallible evidence that this decision is correct, or is likely to be correct.

The intuition behind Non-arbitrariness is familiar from David Estlund's work on related questions.[9] Suppose that a procedure for identifying legitimate policy options were no better than random as regards chances of identifying the procedure-independent correct policy option, assuming that there is one. Why even bother to identify legitimate options and why comply with them, once they are acknowledged to be no better than random as regards being correct? How would the property of legitimacy serve the reconciliating function that partly defines it's content, if there is no positive correlation to correctness? So, while legitimacy should remain distinct from correctness, legitimacy should nonetheless track correctness.[10]

It might perhaps be said that when we disagree about what to do, a random choice of policy options would be legitimate, even if the random choice does not track correctness. But this mistakes the assumption about procedure-independent correctness. A random choice of policy options in a particular type of cases would be

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[9] See Estlund (2007: 99ff) for a discussion of a similar constraint in his defence of epistemic proceduralism: 'Democractic legitimacy requires that the procedure can be held, in terms acceptable to all qualified point of view, to be epistemically the best (or close to it) among those that are better than random). See also page 112 for Estlund's remarks on how to spell out the notion of an epistemically good (accurate) procedure. Here I want to discuss epistemic proceduralism in general, but only suggest that Non-arbitrariness is a general determinant of the concept of legitimacy.

[10] In one respect the term *Non-arbitrariness*, is misleading. What would be required is more something like reliable indication of correct choices. Suppose that some procedure for identifying legitimate choices is not completely arbitrary, but still only slightly better than that. What we would want is more than this. And suppose we have two procedures to choose between, both of them non-arbitrary, but one considerably more reliable than the other, then it would seem wrong and odd to insist on using the less reliable procedure, other things being equal. These complications will not affect the argument below.

legitimate if fairness were constituted by randomness in those cases. But this would be to reject the assumption of procedure independent correctness.

Finally, legitimate policies should in a certain way command our moral respect. Again, this derives from a view about what role of function defines the concept of legitimacy. When we are reasonable individuals, we should find ourselves able and willing to abide by what we consider legitimate decisions. Here is a way to state this final requirement:

(e) Reason-giving. There is a *pro tanto* moral reason to comply with legitimate decisions, and for rational agents fully believing that a decision is legitimate should provide a *pro tanto* motivation to act in compliance with that decision.

This aspect of a theory of legitimacy is obviously important, though it will not play much of a role later. There is a lot to be said about moral reasons and moral motivation in an attempt to explain how legitimate policy-choices can be properly motivating, this is not the place to do so. I include it for completeness.

Eight conceptions of legitimacy

As already mentioned, the list of determinants partly specifies the concept of legitimacy, even if only in rough outline. I will assume that the list of determinants of the concept of legitimacy provide constraints on admissible conceptions of legitimacy: a proposed conception of legitimacy is admissible only if it successfully captures and explains each of the five determinants (a), (b), (c), (d), and (e). Different conceptions of legitimacy offer different sets of necessary and sufficient conditions for legitimate policy choices, or offer different specifications of the properties that make decisions legitimate. So, different conceptions of legitimacy differ as to how and why determinants can be met. In this section I consider a range of suggestions for conceptions of legitimacy in fact-dependent policy disagreement. My main contention is that no one conception of legitimacy manages to meet all constraints in all realistic cases.[11]

[11] Wall raises the question of a higher order justification of a conception of public reason (or a conception of legitimacy) (Wall 2002: 388).What I discuss is only whether

First, however, we need to recall one of the complications about characterising the notion of a fact-dependent policy-disagreement. Policy disagreements might be both fact-dependent and value-dependent, and these dependencies may interact as we have seen. As a simplifying assumption, I want to set these intricacies aside, and merely consider policy disagreements between individuals that have the same values, but differ in non-normative factual beliefs about the world.

To make it a bit more concrete, suppose that some polity need to decide a common policy in some domain. A substantial part of the population, the *Affirmers*, firmly believe some non-normative factual proposition P, while another part, the *Deniers*, believe not-P. Everyone agrees that the purely factual non-normative question whether P is of vital importance for what common policy to adopt and enforce on everyone in the particular domain in question. Assume that we can ignore all other value differences between the Affirmers and the Deniers, so if they were actually to agree on their doxastic attitude to P, they would also agree about what policy to adopt in the domain. We should assume also that the disagreement about P has been present for a considerable time, and there has been ample exchange of reasons and evidence between the Affirmers and the Deniers, but this has led only few individuals to change sides. Most members of the two groups are unwavering in their confidence in their views.[12] We can think of this as a case in which both Affirmers and Deniers hold, as a part of their outlook, a theory of error that serves to explain why the other side is indeed in such grave error.[13]

Before we proceed, note two further assumptions. First, Rawls assumed that questions of legitimacy apply only to constitutional essentials (Rawls 1994: 137). This is an important qualification, though it is far from universally accepted. I will set this issue aside,

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the proposed conceptions of legitimacy meet reasonable constraints. But surely, the question of higher order justisfication is worth. A conception of legitimacy might be self-defeating in the sense that when applied to itself, it comes out as not legitimate, or in the sense that it cannot be justified by appeal to premises that are themselves legitimately entered in public reason.

[12] See Bergmann 2009 for a useful discussion of the social epistemology of this sort of situation. For views on how individuals may disagree in ways that do not permit rational resolution, see Kappel 2012, Lynch 2010 and Lynch 2012.

[13] Cf. Bergmann 2009: 338.

and simply assume that we consider domains in which concerns about legitimacy applies, whatever the nature of this domain.

Second, it might be objected that the schematic case I describe is unstable in a certain sense. One might argue that either Affirmers or Deniers must fail to be rational in their appreciation of the evidence available to them.[14] So, it cannot be that both groups are rational, understand that they initially disagree, and yet continue to disagree. One view goes like this. Perhaps Affirmers and Deniers will not be able to agree who the mistaken part is. But still, Affirmers and Deniers cannot ignore that other sensible individuals disagree with them. If rational, Affirmers and Deniers should realise that the existence of an irresolvable disagreement is an important piece of social evidence that should lead them to reduce their confidence in the views that set them apart and perhaps even agree to suspend beliefs.[15]

Though I cannot elaborate the view here, I will assume that this objection fails. Affirmers and Deniers may have very diverse background beliefs making it rational for them adopt incompatible epistemic principles, or trust different authorities, and interpret common evidence in very different ways. Affirmers may hold views that explain why Deniers are deeply mistaken, and why the fact they

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[14] Kitcher proposes a view of this sort, at least as applied to certain religious groups. Kitcher considers what he calls chimeric epistemology, which is an epistemology 'including two methods of certifying that can deliver opposing verdicts about acceptance and rejection' (Kitcher 2011: 157) see also Kitcher (2008). Kitcher wants to suggest that 'if this chimeric epistemology were brought into the open and scrutinized, it would be seen as a very uncomfortable position' (Kitcher 2011: 157). See further discussion in Kappel (2012).

[15] This objection could be motivated by what is known in social epistemology as conciliationism. This view holds, roughly, that the rational response to a known disagreement with an epistemic peer disagreement is to conciliate, that is, to adjust one's confidence in one's own view in the direction of that of one's peer. An epistemic peer is someone who is as competent with respect to a particular domain, and has access to the same evidence, and who has thought equally carefully about the evidence. Various forms of conciliationism have been defended by Christensen (2011), Elga (2007) and Feldman (2006). The authors mentioned have not, to my knowledge, applied their view to the sort of disagreement to that I have in mind, so they might agree that even if conciliationism is plausible in general, it does not require that Affirmers and Deniers conciliate. See again Bergman's discussion Bergmann (2009).

Disagree does not constitute a reason for Affirmers to change their view. But Deniers may have similar views that explain where Affirmers have gone wrong. So, neither Affirmers nor Deniers need to have made a mistake in the way they form beliefs, despite maintaining undiminished confidence in their own view, even after acknowledging the prolonged disagreement.[16]

Let us now turn to the eight different conceptions of legitimacy in fact-dependent policy disagreements that I want to consider. To discuss these, it will be convenient to introduce a little more terminology. Let us say that a fact-dependent policy disagreement hinging on the factual proposition P is a *P-dependent* policy disagreement, and calls for a *P-dependent policy-choice*, or a P-*dependent decision*. Given the simplifying assumptions made above, let us say that in a P-dependent policy disagreement, the *correct* choice to be made is the one that individuals would agree to make if they all believed the truth about P.

The conceptions to be discussed are all more or less well-known from the literature on legitimacy, though I have adapted them to the current problem of legitimacy in fact-dependent policy disagreements. The first conception is familiar:

(1) Truth. A P-dependent decision is legitimate if and only if this decision would have been ranked highest by the affected parties, had they believed the truth about P.

This proposal identifies legitimacy with correctness, and it is easy to see the attraction of this proposal. When we have a P-dependent policy disagreement, someone gets the facts wrong, and it is natural to think that the legitimate policy would be the one that we would agree about if we all believed the truth about P. It is equally clear, however, why this conception of legitimacy fails to meet the Distinctness constraint. On conception (1), individuals could not find a decision legitimate, and yet wrong. If they believe that some policy choice is wrong, because it is based on faulty assumptions about the world, they will also reject its legitimacy.

[16] See the previous note.

Moreover, conception (1) fails on account of Accessibility. Assume that Affirmers accept that P, while Deniers reject that proposition. This is why they cannot agree on the best policy option. But clearly, given this starting point, Affirmers and Deniers could not agree which policy option is legitimate according to (1) either. This is because they disagree about the truth of P. So, in this sort of case while (1) would identify a determinate option as legitimate, the disagreeing parties could not jointly agree which one it is. Therefore, conception (1) cannot serve to mediate a policy-disagreement turning on whether to accept P.

Consider then a close epistemological cousin to (1). Rather than defining legitimacy in terms of true belief, we might try to define legitimacy in terms of the beliefs we ought to have if we were fully rational:

(2) Epistemically rational doxastic attitude. A P-dependent decision is legitimate if and only this decision would have been ranked highest, had the affected parties had the most rational doxastic attitude to P, given the available evidence.

There are of course issues of epistemological details that need to be noted. First, there is a question about what counts as available evidence; conception (2) might work only if we assume that all agents have access to the same body of evidence, but this requirement may be difficult to spell out convincingly. Second, conception (2) would seem to presuppose something along the lines of Feldman's uniqueness principle.[17] This principle says that that for a given body of evidence and a proposition there is just one most rational doxastic attitude one can take. If one does not adopt the uniqueness principle, then conception (2) might fail to be determinate. The uniqueness principle, however, is controversial.[18] Though these issues are important, let's nonetheless assume that we can set them aside; maybe we can think of conception (2) as outlining a kind of ideal situation, and it might be valuable to learn what legitimacy requires under such ideal circumstances.

[17] See Christensen (2007) and Feldman (2007) for a careful discussion.
[18] See White (2005).

Clearly, conception (2) meets the Distinctness condition. If the right decision in a P-dependent choice is based on agents believing the truth about P, then a decision based on the objectively correct doxastic attitude to P is distinct from the right decision. Also, conception (2) would seem to meet the Determinateness condition; given the simplifying assumptions I have made, and the noted idealisations, (2) would succeed in identifying a policy-choice as legitimate.

There will, however, be a problem concerning Accessibility similar to the one we saw affecting conception (1). All rational inquirers will think that they themselves hold the most rational doxastic attitude to P given the evidence. That is, rational inquirers cannot accord a certain level of credence to a proposition P, and yet rationally think that a different level would be more rational, given the available evidence. If this is right, then we get the following: when Affirmers and Deniers are divided because they accord some proposition P different levels of credence and yet think of themselves as adopting just the correct or most rational level of credence to P, then evidently, they disagree about what the most rational level is. In turn, this means that even if conception (2) identifies a legitimate policy option, Affirmers and Deniers cannot agree which one it is.

Defining legitimacy in terms of true belief or fully rational beliefs are demanding options, of course, and it is about time that we consider something weaker. Consider what one might call an *epistemically reasonable* doxastic attitude. There is no widely shared theory of this in epistemology, but the basic idea should nonetheless be tolerably clear. Suppose we very roughly characterise the epistemically reasonable along the following lines: some subject S's doxastic attitude to P is epistemically reasonable just if S has made a sincere effort to get to the truth about P, has considered the question whether P is true carefully, has not ignored readily available evidence pertaining to P, but has responded to by adjusting her views about P or by rebutting the evidence, and has made no immediately evident mistakes in her reasoning about P. Clearly, this rough characteristic of the epistemically reasonable proceeds in terms that are themselves in need of more precise specifications, but hopefully it is clear enough

for us to use the notion.[19] We might now devise a conception of legitimacy in terms of the epistemically reasonable:

(3) Epistemically reasonable doxastic attitude. A P-dependent decision is legitimate if and only this decision would have been ranked highest, had the affected parties had an epistemically reasonable doxastic attitude to P, given the available evidence.

Surely, conception (3) meets the Distinctness condition. Holding an epistemically reasonable attitude to P is distinct from believing what happens to be the truth about P. And one can agree that a particular policy choice is based on a reasonable doxastic attitude, and yet think that it is wrong. Unlike the two previous proposals, arguably (3) meets the constraint about Accessibility. The reason is that having a reasonable doxastic attitude to P is a more relaxed requirement than having a true belief about P, and also a more lenient demand than having a fully rational doxastic attitude to P. Surely, for a given body of evidence and a proposition, there are many reasonable doxastic attitudes that one could have, and some of them will imply believing a false proposition, or holding a less than fully rational belief. And it would appear to be much easier to agree whether certain views are reasonable or not. First, it is simpler to agree that someone is within the bounds of the reasonable than to determine that she is fully rational. Second, reasonable views are not mutually exclusive in the way that views aspiring to full rationality are. Thus, someone can freely consider her own view reasonable, and at the same time consider a dissenting view reasonable. So, even when the evidence is complex and difficult to interpret, we might be in a position to identify a range of reasonable doxastic attitudes that one can have.

The problem, of course, is that exactly this liberal nature of the reasonable threatens to make conception (3) fail regarding

[19] Note that the concept of the epistemically reasonable is very different from Rawls' concepts of the reasonable (Rawls 1993: 48–54). For Rawls, being reasonable is in part a moral property of individuals comprising among other things the readiness 'to propose principles and standards as fair terms of coorperation and to abide by them willingly, given the assurance that others will likewise do so' (ibid.: 49). This willingness to cooperate is no part of the concept of the epistemically reasonable. Rawls distinguishes the reasonable from the rational, where the rational concerns the choices of means for ends, among other things. Epistemic reasonability, by contrast, concerns the way we form belief about the world, not pratical rationality.

Determinateness. Once there are many reasonable doxastic attitudes, there might easily be too many to permit identifying any one policy option as the highest ranking. Think of the factual issues underlying the disagreement over climate policy. If affirming the existence of anthropogenic climate change as well as firmly denying it are both reasonable attitudes, what policies would then be legitimate according to conception (3)?

One can, obviously, imagine a spectrum of more or less permissive conceptions of epistemic reasonability. On the most permissive conceptions, one could count as epistemically reasonable just if one has made no mistakes of reasoning (according to one's own conception of correct reasoning), and one has not been ignoring relevant evidence (according to one's own conception of what constitutes relevant evidence). It is easy to see why this very permissive conception of reasonability would fail to sustain Determinateness.

Less permissive conceptions of epistemic reasonability could be devised in terms of subject-independent standards of proper reasoning and proper sources of evidence. We can imagine that the least permissive conceptions of epistemic reasonability would leave no space for a plurality of epistemically reasonable doxastic attitudes to the same proposition, given a fixed body of evidence. Such strict notions of epistemic reasonability would make conception (3) sustain Determinateness. But this move would bring back the problems about Accessibility we saw in the discussion of conception (1) and (2). We are, of course, not in a position to provide the correct specification of subject-independent epistemic standards for epistemic reasonableness. And even if there are such standards, and even if some parties to a disagreement actually comply with them, there will be the problem that also those who happen not to comply with the subject-independent standards, will sincerely claim that they *are* within the bounds of the reasonable. And they will reject any proposed conception of epistemic reasonability that excludes their view as being not reasonable. So, more objective conceptions of epistemic reasonability seem to incur a cost regarding Accessibility.

The views considered so far define legitimacy in P-dependent policy choices in terms of what agents would accept, were they to believe the truth about P, have fully rational beliefs about P, or have

epistemically reasonable beliefs about P. We have seen that none of these strategies seem to work when exposed to the constraints on conceptions of legitimacy that I proposed in section 2. Turn now to two conceptions of legitimacy that are based on a permissive notion of epistemic reasonability, but don't assume or require that we agree in our reasonable factual beliefs. Consider the following familiar suggestion:

(4) Convergence and compromise. A P-dependent decision is legitimate if and only it is the highest ranking common policy, given the agent's epistemically reasonable doxastic attitudes.

Clearly, Affirmers and Deniers could prefer the same policy option, but for entirely different reasons. So, they might converge on the same policy, even if their justificational pathways diverge because they disagree about certain facts underlying their policy preferences. According to (4), such a convergent policy option would be legitimate. Of course, the possibility of convergence is only a limiting case, and given way I defined the notion, it is not even a case of a fact-dependent disagreement, because we here imagine that Affirmers and Deniers don't disagree about which policy option is best, though they do disagree about the reasons for preferring this option. So, we need to focus on cases in which the no convergent option, no policy choice that Affirmers and Deniers agree, is best. In that case, conception (4) defines legitimacy in terms of a sort of compromise that consists in selecting the highest ranking common policy option. To illustrate the idea, suppose that my wife and I are considering where to vacate over the summer. We agree to consider three options: staying in Denmark, going to Italy, and taking trip to Poland. I prefer staying Denmark over Italy, which I in turn prefer over Poland. My wife prefers Poland to Italy, and Denmark comes as her least preferred option. There is an obvious way in which going to Italy comes out as the highest ranking common policy.

While this conception of legitimacy may seem promising at first sight, it takes only little reflection to see that there are many cases in which it will flout the requirement of Determinateness. The simplest case is this. Suppose that we have two policy options, A1 and A2. Because they have different factual beliefs, Affirmers prefer A1 over A2, whereas Deniers have the reverse order of priorities. According to conception (4), which policy option is the highest ranking common

policy? Both have an equally good claim of being the highest ranking common policy, and yet they might be very different from the perspective of the Affirmers and the Deniers. Of course, a plausible conception of legitimacy may imply that there is more than one legitimate option. It should not, however, have this implication when the options are very different because in that case we will be left with an arbitrary choice. If a conception of legitimacy selects a plurality of options that are very different on the parameters that matters most as equally legitimate, the conception is of no help in settling out disagreement about what to do.

A different proposal is this:

(5) Common ground. A P-dependent decision is legitimate if and only if it ranks highest, given the shared set of epistemically reasonable doxastic attitudes.

The idea is the following. First, we should set aside all beliefs that are not reasonable on the assumed very permissive notion of epistemic reasonability. Then set aside all beliefs that are not shared. That is, let everyone pretend that they did not have those beliefs. Then find the best alternative, given the shared basis of factual beliefs that are now left. If there is no best alternative, given the common ground (the shared set of factual beliefs) then it is because we are facing a partly value-dependent disagreement, and have different values. But recall, for the purpose of this discussion, we assume for simplicity that all agents have the same values. So, when we ground our ranking of policy options in shared set of factual beliefs, we will agree about which option is best. So, conception (5) preserves Determinateness. Distinctness, too, is preserved. And, as noted above, it might be easier to identify which doxastic attitudes are reasonable and which are not. So, we can hope that Accessibility is sustained as well.

Yet, I want to note two related difficulties with this conception of legitimacy. The first concerns Non-arbitrariness. Seeking the common ground requires us to ignore every factual assumption that we disagree about. Obviously, this procedure does not approximate truth about the disputed factual proposition; rather we focus on other truths that don't divide us. But then, on the assumption that correctness of a P-dependent policy choice is the choice we would have made, had we believed the truth about P, then seeking the

common ground will have at best a very loose correlation to correctness. So, conception (5) would seem to violate the non-arbitrariness requirement.

The second and related concern is that policies picked out as legitimate by conception (5) could be vastly inferior to what anyone would see as optimal choices. Sometimes they might appear catastrophic, and the question arises about how one could take oneself to have a good reason to comply with such decisions. Consider again the climate controversies. Assume that Affirmers and Deniers disagree about a number of factual premises concerning the very existence anthropogenic climate change, and the likely consequences of various climate policies we might adopt. Now let Affirmers and Deniers set aside all non-shared factual views, and then choose policies on the basis of the shared factual assumptions left intact. What will those policies be like? And how appealing would they appear to, say, Affirmers who sincerely believe that a significant and highly anthropogenic climate change is under way? Why should this way of selecting legitimate policy options be motivating for Affirmers? How could conception (5) meet the constraint that acknowledging some policy-choice as legitimate should provide a reason to abide by that policy, even if one happens to disagree.

It is interesting to note that Rawls probably had something similar to conception (5) in mind as a part of his view on public reason.[20] Rawls held that in public reason citizens are 'are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial' (Rawls 1993: 224). There are questions about how this is to be interpreted (See Galston 1995). For some method or conclusion in science to be admissible in public reason, should it be generally accepted within the scientific community, or within society at large, or perhaps both? Some precepts in Rawls thinking suggest the more demanding requirement, that methods and conclusions should be widely accepted in the general population, to be admissible parts of public reason. On this interpretation, if not generally agreed upon among the non-scientific members of the polity, scientific methods and conclusions should be disregarded for the purpose of public

[20] Thomas Nagel (2008) assumes a somewhat similar view.

reason, no matter how well established they are within the scientific community. When transposed to the related issue of legitimacy in fact-dependent choices, this would give us something like conception (5).

The conceptions of legitimacy considered so far are based on various forms of consent to policies, where the consent is given more or less idealised set of doxastic attitudes, the full actual set of minimally reasonable doxastic attitudes, or some restricted (shared) set of minimally reasonable doxastic attitudes. We have found all of these conceptions wanting when examined in light of the general constraints on conceptions of legitimacy outlined in section 2.

Consider now three conceptions of legitimacy based on procedure, rather than actual or hypothetical consent.

(6) Popular vote. A P-dependent decision is legitimate if and only if it is based on a doxastic attitude to P chosen by popular vote, where this vote is preceded by a fair and open exchange of reason and evidence for and against P.

There are many ways of organising such a vote of course, but no doubt many that terminate in a unique doxastic attitude to P, which could then in turn form the basis of policy choices. So, conception (6) would seem to sustain Determinateness and Accessibility, and it will, of course, also support Distinctness. Popular vote will, however, in many actual cases fail to support Non-arbitrariness.

As pointed out by Condorcet, voting can be a highly reliable method for determining the truth of a proposition under certain conditions (Estlund 1994; List 2001). The crucial condition is that voters are competent with respect to a question, that is, they are more likely than not to be right with respect to the question (the average probability that they are right should be above 0.5). Let this be the competence condition. We now have two crucial issues for the viability of conception (6). One is whether the competence condition is actually met in particular cases of social disagreement over a fact-dependent policy choice. Conception (6) will only support Non-arbitrariness if this condition is met. The other issue is whether we can agree that the competence condition is met in the sort of cases we consider. It is easy to imagine cases in which both assumptions are

questionable. Consider a case in which Affirmers and Deniers are separated by certain factual questions in the climate debate. Assume that Affirmers hold that there is a genuine change of the Earth's climate, and that its cause is anthropogenic. Deniers deny both assertions: there is no climate change, as distinct from mere fluctuations, and if there were one, human activity would not be a significant cause to it. Suppose that the truth of the matter is that the Affirmers are right. The question is now whether voting will identify the correct factual view (and by extension the correct policy). Obviously, this will depend on the details of the sizes of the two groups – if the Affirmers count more members than the deniers, then the competence condition will be met. Alas, this will be the exact condition under which one would expect Deniers to claim that the competence condition is not met (though in fact it is). As mentioned, when two groups have a persistent disagreement about some subject, we should expect members of the groups to form a theory about why members of the other group can be wrong. Maybe they have been subject to manipulation, or suffer from ideological ignorance, or have led themselves astray by wishful thinking. If this is what one thinks about the majority of a population, then one would, of course, be inclined to think that the competence condition fails. In turn, we should expect conception (6) to fail to meet the requirement on accessibility.

Turn then to what is no doubt the most familiar way of solving the problem of factual disagreement:

(7) Delegation to experts. Fair and open exchange of reason followed by delegation of decision power regarding the relevant factual questions to experts, whose task it is to offer a unique doxastic attitude, upon which a policy choice should be made. A P-dependent decision is legitimate if (and only if) it is based on the doxastic attitudes thus identified by the experts.

Properly conducted, this conception of legitimacy could surely determine a unique factual doxastic attitude. Determinateness is thus supported, and so is Distinctness. What about the other features? Consider Accessibility. Once a specific doxastic attitude to P has been selected by some group of experts, there would normally be no additional problem in identifying it. But this will not quite give us Accessibility, at least not in the form we want. This is because of the

familiar problem of identifying who the relevant experts are. When facing protracted disagreements about factual questions, we normally also disagree about who the relevant experts are. Suppose that Affirmers and Deniers disagree sharply about some factual proposition P, and have been doing so for a long time. Both sides point to putative experts whose judgement support their view, and both sides have their views about why the other side and their experts are in error. Clearly, Affirmers would be inclined to reject the proposal that some individual who is inclined to reject P is an expert on the question, and conversely for Deniers. Indeed, in order for Affirmers and Deniers to preserve both their rationality and their disagreement, they have to disagree about who the relevant experts are. Even if schematic, this is of course a familiar scenario, and in that scenario, conception (7) will fail to meet the Accessibility constraint. I don't mean to say that conception (7) will fail in all scenarios; fortunately there will be cases where, though Affirmers and Deniers disagree about P, they can still agree to delegate the question to a mutually recognised group of experts; when this happens, conception (7) is likely to meet all criteria.

What we have considered so far are conceptions of legitimacy that implicitly acknowledge a particular division of labour in democratic decision-making: democratic decision-making consisting in combining two separate components. One component consists in establishing what the facts are, and the other in deciding what policies to pursue in light of the facts. The latter is a matter of negotiating the diverse values and interests that we have, while the former is rather different. Ideally, we would conduct the appropriate inquiries, or consult experts who have done so, and then we would agree about the facts. We can then turn to the other component of the decision-making process that addresses our differences in values and interests. The proposals considered so far addresses a situation in which this two-part decision process is upheld, but where the factual input cannot be provided because we simply fail to agree about the facts. The proposals offer conceptions of legitimate factual input, while still assuming that the factual component and the value component of the decision process are to be kept separate.

However, one might worry about this very separation of a factual part and a value part of the decision process. We have, it seems, found no conception of legitimate factual input that meet our

constraints. We can defer to experts, but we will disagree about who the right experts are. We can appeal to voting, but will disagree about when voting is a Non-arbitrary procedure. We might insist that factual views going into the decision process should be rational, but we will then disagree about whose views are rational. We might suggest that factual views admissible into the process should at least be epistemically reasonable, but this permits too many diverse factual views. Finding the common ground among the epistemically reasonable views, on the other hand, permits too few – the relevant intersection of our factual views may be much too small to allow for sensible decisions to be made.

In response to this, one might suggest that upholding the two-component view of the decision-making process is a mistake. We should collapse the two, and let the value-part take care of the factual part, so to speak. Deciding what sort of factual input that would be admissible into the policy-making process would itself be included in the value-part of the process. Factual disagreements would simply be included in their raw form in the policy-making process, and it would be for anyone to decide on their own how they should respond to factual disagreement. There would be no special factoring out of concerns for legitimacy as regards fact-dependent disagreements as distinct from value-dependent disagreements. There might be several ways of institutionalizing this general strategy of course, but the most obvious one is may be this:

(8) Delegation to policy makers. A P-dependent decision is legitimate if made by properly informed and duly elected policy makers, following a fair and open exchange of reasons.

So, according to this conception, there should be a fair and open exchange of reason followed by a democratic delegation of decision power to policy makers. These decision makers are then free to select any policy they want in the light of whatever *they* consider the facts. So, once duly elected, policy makers can base decisions on any factual view they consider appropriate, and they can appoint whatever experts they like, even highly controversial figures whose expertise within some domain is not generally acknowledged. If policy makers base their policies on controversial factual views, or appoint cranks as experts, they may become unpopular among certain voters, and they may risk not being re-elected, but they remain within the bounds of

political legitimacy; the outcome of the process would still count as legitimate. Policy makers might in such cases be criticised for adopting policies that ignore the evidence, or are based on faulty assumptions about the world, but the policies cannot be criticised for being illegitimate.

In a sense this sort of view is quite natural; it solves the problem of legitimate factual input by extending the domain of democratic decision-making into the factual realm, though not in the absurd sense of voting about what the facts are, or by pretending that these parts of democratic decision-making are especially prone to track truth. Rather, candidates for office will be elected in part on their views about factual questions; promoting their favoured policies in the light of what they take to be sound evidence will be part of what is entrusted them. So, one can easily imagine situation in which Non-arbitrariness is not met. And when this is so, there would seem to be an additional problem about motivation, or reason-giving. Why should the fact that some decision is legitimate (on this conception) motivate or provide reasons for one to comply with the decision (as distinct from external motivational features).

It is easy to see what the general problem is. We want conceptions of legitimacy to be inclusive and engaging at the same time. They should include everyone no matter what worldview they happen to subscribe to, except individuals who are not epistemically reasonable on some rather permissive understanding of this notion. At the same time, conceptions of legitimacy should engage: they should provide us with a reason to care about legitimacy. If the discussion above is on the right track, it is not clear that any procedure will deliver on both measures, when members of a polity are sufficiently divided in their factual views.

Four concluding remarks

If what I argued above is correct, there is no conception of legitimacy in fact-dependent dependent that meets all reasonable constraints on conceptions of legitimacy in all realistic cases. Surely, the discussion is not conclusive, but enough have been said to warrant considering some responses.

Firstly, could it be that concerns of legitimacy simply do not apply to non-normative factual disagreements? The conspicuous absence of

explicit attention to the issue might suggest that this is a widely shared assumption in political philosophy. Yet, such a view would be hard to sustain. Rawls and others in the liberal tradition readily appeal to the relative epistemic inaccessibility of the right answers to moral, metaphysical and religious questions as part of the reason why we need a theory of legitimacy when policy disagreements depend on such matters.[21] The exact same epistemological troubles plague fact-dependent policy disagreements. So it seems that *if* concerns about legitimacy apply to value-dependent disagreements, they also apply to fact-dependent disagreements.

Clearly, one option would be to consider the negative argument to be a reductio against the notion of legitimacy in general. After all, the proposed constraints on conceptions of legitimacy are generic, and it may not be obvious that any conception of legitimacy in value-dependent choices manages to meet them.[22]

Secondly, should we reject one or more of the constraints of conceptions of legitimacy? If the arguments in the previous section are on the right track, then no conception of legitimacy meets all reasonable constraints in all realistic cases. We might respond by rejecting one or more of the proposed constraints. Brief reflection will tell that it is at least not easy to see how this would go. Recall the constraints: (a) Distinctness, (b) Determinateness, (c) Accessibility, (d) Non-arbitrariness and (e) Reason-giving. What motivates these constraints is the sort of mediating role that concept of legitimacy is supposed to have; the constraints are part of what determines the content of the concept. So, the question is really whether we can imagine some way of specifying a notion of legitimacy that permits concerns over legitimacy to have the same role, and yet denounces one or more of the determinants. It is not immediately obvious how this would go, but surely the question deserves more consideration.

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[21] Apart from Rawls' own concern about the burdens of judgement, see the related discussions in Barry (1995) and Larmore (1987).

[22] Space does not permit a discussion of this, but in conceptions of legitimacy applying to value-dependent disagreements, it might be much more appealing to adopt a procedure-dependent view of truth. This might make the Non-arbitrariness requirement much easier to meet.

Thirdly, one option may be to adopt what one might call *disjunctivism* about conceptions of legitimacy. Even if no one conception of legitimacy meets all constraints in all realistic cases, there might for each decision problem be at least one viable conception of legitimacy. This would be sufficient to serve the sort of mediating role of legitimacy that is the underlying concern. We do not need to find one single conception of legitimacy that applies across the board.

A few brief comments on this option. Clearly, the overriding concern for the mediating role of legitimacy is compatible with disjunctivism about conceptions of legitimacy. It would be a problem, however, if several distinct conceptions were to apply to the same decision problem, if they also yield different outcomes. We would then need to devise some sort of criteria for prioritising the different conceptions. Note next that the main problem is that conceptions of legitimacy cannot both be inclusive and engaging when we are sufficiently divided on factual questions. None of the proposed conceptions manages that feat. Of course, we are not all that divided on all factual questions, but in some important cases we are. So, while disjunctivism is surely an improvement, it is not clear that it will solve the problem.

Fourthly, yet a venue worth exploring would be *non-ideal conceptions of legitimacy*. I assumed earlier that admissible conceptions would have to meet all constraints. Clearly, however, we might abandon that assumption, and instead rank conceptions of legitimacy according to their degree of compliance with the constraints. Even if no one conception of legitimacy meets all constraints in all cases, surely all conceptions meet some of the constraints in all cases, though sometimes to a much greater degree than others. Realising that no conception of legitimacy is perfect, we may then aim to use the best conception available to us.

Presumably, there will be few cases where one conception comes out as superior on all parameters, and we might not agree about how to weigh the different parameters. Thus, taking this route would of course raise a higher order selection problem concerning the weight each of the parameters. For example, a high score on Accessibility would have to be traded off against a lower score on Non-

arbitrariness.[23] There is also a question about how partially non-ideal conceptions of legitimacy can fill the role that defines the concept of legitimacy. If a conception fails to deliver on one dimension, but does well on others, could it still serve the mediating role that concerns about legitimacy are thought to play?

A second way of taking a non-ideal turn is the following. When introducing the concept of legitimacy, I said that when we disagree about what common policies to adopt, the policy eventually enforced on everyone should at least be legitimate. So, legitimacy was framed as a necessary condition on the, all things considered, moral rightness of a choice of common policy. We can now see why this assumption may require some reconsidering. Suppose that, for the reasons discussed above, there are significant realistic cases of policy-disagreements where no acceptable conception of legitimacy can be devised. In those choice situations, no policy choice can count as legitimate. In response to this, we may want to think of legitimacy as a contingent good-making feature of policy choices, rather than as a necessary condition on the, all things considered, moral rightness of a policy choice. So, on this view concerns about legitimacy would have some weight. So, if in a particular choice situation a conception of legitimacy applies and identifies one option as legitimate, then that would be a strong or even overriding reason in favour of picking that option. However if, in a particular case, no conception of legitimacy is applicable, then policy choices will have to be made on other grounds, say on grounds of expected utility, or concerns for rights or fairness.

[23] D'Agostino (1996) discusses similar problems.

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Chapter 8

Scientific standards in public reason

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Introduction

What role should scientific rationality play in theories of public reason? Should public reasons be in line with established science? In Rawls influential account, it is suggested that public reason should be guided by common sense as well as 'the methods of conclusions of science, when these are not controversial' (Rawls 1993/2005: 224). We will refer to this criterion as *scientific standards*. In this chapter we offer what we consider to be the best interpretation of the criterion in order to pose the question: How can scientific standards in public reason be justified?

Our strategy will be to stipulate potential answers to this question that might be derived from Rawls's general theoretical framework. We will examine the following possibilities for justification: (1) scientific standards secure the determinacy and completeness of public reason; (2) scientific standards facilitate publicity; (3) scientific standards are constitutive of the reasonable person or reasonable worldviews; (4) there is no reasonable disagreement on scientific standards; (5) scientific standards may be justified in virtue of being implicit in the public culture of liberal democracy. We argue that none of the justification routes are successful. Rawls does not provide us with an

adequate justification for excluding from public reason methods of inquiry and conclusions that are at odds with established science. While the chapter's focus is Rawls's public reason account, we conjecture that some of our findings also have a bearing on a broader range of accounts on legitimacy in contemporary political philosophy.

Public reason and the politically reasonable as a primarily moral notion

In order to pose our question about the justification of scientific standards, it will be helpful to briefly rehearse central building block of Rawls's public reason account (PR). In so doing, we will illustrate how it is an account that rests on the idea of the politically reasonable as a primarily moral notion. This aspect of public reason is important, since we will later show how certain epistemic justifications of scientific standards would be at odds with this aspect of the account.

The most recent and thorough articulation of the idea of public reason is found in Rawls's *Political Liberalism: Expanded Edition* (Rawls 1993/2005) and the following essay *The idea of Public Reason Revisited* (Rawls 1997/2005).The idea of public reason emerges as a natural development of central concepts in *Political Liberalism (*PL). Central to PL is the idea of *reasonable pluralism*: the idea that a free society will comprise a plurality of reasonable, yet sometimes conflicting moral, religious, and philosophical worldviews and a commitment to the *liberal principle of legitimacy*: the idea that political power is legitimate only when exercised in accordance with principles that all reasonable citizens could accept (Rawls 1993/2005: 137). Rawls took reasonable disagreements between different worldviews to be a permanent feature of liberal democracy and in light of his commitment to liberal legitimacy, he held that no one comprehensive worldview should serve as the public justification of the basic institutions and political principles of a free society. Justification should be 'freestanding' in the sense of avoiding the presupposition of any one comprehensive worldview (Rawls 1993/2005: 10). Only by committing ourselves to freestanding justification of our basic political principles, can we avoid illegitimate coercion of reasonable citizens holding reasonable worldviews.

Rawls attributes the fact of reasonable pluralism to *the burdens of judgment*. Put very roughly, the burdens of judgment states that the

complexity in evaluating evidence, difficulty in weighing political and moral values, inherent vagueness of our concepts, and variations in life experiences will inevitably lead people reasoning under conditions of freedom to endorse a plurality of different but reasonable worldviews. The idea of reasonable pluralism thus rests partly on epistemological notions. According to Rawls, reasonable people will acknowledge that these burdens apply to important political matters and that other good-willing citizens will come to different conclusions on these issues. Since reasonable citizens, on grounds of fairness, will want to avoid illegitimate coercion of their fellow citizens, they will be committed to a certain kind of epistemic confinement when engaging with political essentials. This is where the idea of public reason emerges. Reasonable citizens will want the basic political principles of their regime to be endorsable by fellow reasonable citizens. When engaging with political essentials they will therefore let their reasons be guided by principles and values that are publicly available, and that can be shared by fellow reasonable citizens.

It is important to return for a moment to the burdens of judgment, since they comprise part of the epistemological dimension of public reason. Because reasonable citizens acknowledge the burdens of judgment, they realise that there are limits to the kind of reasons for fundamental political principles that they can expect fellow citizens to accept (as reasonable). Citizens therefore refrain from appealing to the whole truths that they endorse, when these purported truths are considered controversial from another reasonable point of view. The burdens of judgment do not imply that reasonable citizens should resort to scepticism about their beliefs or comprehensive worldviews. Rawls is explicit about this (Rawls 1993/2005: 62–63). Rather, the burdens help us recognise what reasonable citizens with reasonable worldviews, wishing to engage in fair cooperation with others as equals, can require of each other when justifying and engaging with fundamental political questions.

Rawls insisted on keeping the account of reasonable worldviews 'deliberately loose' (Rawls 1993/2005: 59) and he held that the criterion of reasonableness should be seen 'as giving rather minimal conditions appropriate for the aims of political liberalism' ibid.: 60). This burden of judgment argument is thus what gets the moral concept of reasonableness off the ground so to speak. We are offered an epistemic reason to engage with others as reasonable. It seems fair

to interpret Rawls to mean that the burdens of judgment are to be understood, partially, as taking on a kind of 'benefit of the doubt'-role. We recognise that the burdens of judgment explain reasonable disagreement, but we set the bar for reasonableness low in order to accommodate what Rawls calls the aims of political liberalism, including the aim of treating fellow citizens with respect as political equals.

The idea of *reasonable disagreement* thus also comprises both epistemic and moral dimensions and it is therefore importantly different from ideas of reasonable disagreement found, for example, in social epistemology literature[1]. Reasonable citizens do not have to assume some kind of epistemic parity amongst each other when assessing basic political principles. Rather, for *moral* reasons they give each other the benefit of the doubt (explained in terms of the burdens of judgment) when assessing whether a disagreement is reasonable.

When relating this point about the burdens of judgment and reasonable disagreement to the idea of public reason, we see that in public reason, reasonable citizens treat as sectarian (and thus omit) beliefs of their own that they in the background culture (or non-public realm) may count as obviously true. They do so primarily on moral grounds. Being committed to an idea of public reason is thus part of what is means to be reasonable and reasonableness is largely a moral notion. In Rawls's words,

> […] being reasonable is not an epistemological idea (though it has epistemological elements). Rather, it is part of a political ideal of democratic citizenship that includes the idea of public reason. The content of this ideal includes what free and equal citizens can require of each other with respect to their reasonable comprehensive views.
>
> (Rawls 1993/2005: 62)

Interpreting the scientific standards criterion

We have seen how PR emerges from the political liberal framework instantiating the politically reasonable as a primarily moral notion. In

[1] See for example Christensen (2007); Feldman (2006); Goldman (2010) and Kelly (2005).

the following we will further characterise central features of the account in order to locate the scientific standards criterion and provide the best possible interpretation of it.

The starting point of PR is *reasonable political conceptions of justice* generated from fundamental ideas and values implicit in the political culture of a liberal democratic society. Reasonable political conceptions of justice specify, assign priority to and facilitate the effective use of citizens' basic liberties and opportunities. PR thus emerges from a liberal democratic tradition and incorporates certain liberal ideas as cornerstones in the deliberative/justificatory framework. Furthermore, PR specifies standards and criteria for free and public inquiry appropriate for the fundamental political questions which it seeks to settle and justify (Rawls 1993/2005: 223).

Rawls did not specify the content of shared standards of inquiry in detail. We are told that PR demands that citizens 'are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial' (ibid.: 224) i.e. the scientific standards. The scientific standards are familiar from Rawls's original position argument. In the original position representatives are modelled such that they abide by common sense reasoning and publicly recognised modes of inquiry and they are informed by the 'existing scientific consensus' (Rawls 1971/1999: 480) and have 'the general information provided by natural science and social theory' (Rawls 1999). The scientific standards are thus not peculiar to PR. However, since our interest in this discussion is in scientific standards in Rawls's later public reason account, we will leave this issue aside and merely use Rawls's reflections on scientific standards with respect the original position to shed light on the limited information we are offered with regards to scientific standards in PR. In using Rawls's reflections on scientific standards as they apply to the original position argument in *A Theory of Justice* (TJ), we grant that scientific standards in TJ and PL are supported by similar kinds of reasoning. We grant this because the original position device and PR have a similar structure and aim – namely, a structure that has agents reflect on principles and reasons from an impartial standpoint and an aim of working towards a certain kind of consensus in spite of conflicting comprehensive worldviews.

In order to stipulate on what more precisely Rawls could have in mind with regards to non-controversial scientific methods and conclusion, we need first pose the question: controversial to whom? William Galston raised this question in his in his paper 'Two Concepts Liberalism':

> […] controversial to whom? For some religious groups, the theory of evolution remains contestable. For others, including established organisations such as the Christian Scientists, 'spiritual healing' is equal (at least) to science-based modern medicine. If 'not controversial' means 'not challenged by any religion,' then virtually nothing of contemporary science can be included in public reason. But if we construe 'not controversial' to exclude the claims of dissenting religious groups, then once again, as with an overly restrictive definition of the reasonable, we fail to take deep diversity seriously.
>
> (Galston 1995: 520)

We need to determine whether Rawls had a broad conception of consensus in the general public in mind or whether he had a more narrow conception involving a mere scientific consensus or perhaps a mix. It seems implausible that Rawls took scientific standards to refer to methods and findings that are publicly endorsed, but highly controversial or rejected in scientific communities. After all, we are attempting to identify a range of *scientific* methods and findings.

When terms such as 'existing scientific consensus' (Rawls 1971/1999: 480) are used, one easily gets the idea that Rawls had an intra-scientific consensus in mind that does not necessarily include consensus in the public. However, while this interpretation does have some textual support, it is an interpretation that is obviously at odds with Rawls's general theoretical framework. The whole idea of seeking a justification for our basic political principles and institutions that can be endorsed by most citizens meeting only very minimal requirements of epistemic reasonableness seems obviously at odds with a requirement that PR be guided by methods and conclusions endorsed by scientists, but highly controversial in or rejected by the public.

The most favourable interpretation must therefore be one that includes an intra-scientific as well as a public consensus. However, as

Galston points out, if what is meant by scientific standards is science that is disputed by no one, then not much science would be left. It is hard to come up with a range of scientific findings or methods that are not contested by *some*, either in the public or in the scientific communities. Should Rawls have universally accepted scientific standards in mind, then scientific standards are rather vacant and should perhaps be thought of as a somewhat superfluous stricture that does not do much work and to which Rawls did not devote much thought. However, we will see that Rawls believed that the standards *do* fulfil important tasks such as securing the publicity and the completeness of public reason. Rawls sometimes used the term 'widely accepted' in referring broadly to shared epistemic standards and given the above considerations; we find that this is the best translation of non-controversial. Non-scientific methods and conclusions must be understood, not as universally accepted in the public and established scientific communities, but rather what at any given time can be considered 'widely accepted'. Textually this interpretation is supported by phrases such as the following:

> As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on plain truths now widely accepted or available to citizens generally. Otherwise, the political conception would not provide a public basis of justification.
>
> (Rawls 1993/2005: 225)

We have argued that the most plausible interpretation of scientific standards appeal to wide and not universal consensus. This interpretation allows for *some* minority dispute in the scientific communities as well as in the general public. In deliberating on gender equality it would, for example, be at odds with scientific standards to assume that men were unequipped to fulfil a range of roles in society due to inferior intelligence. The conclusion that there is a significant, over-all difference in intelligence between the sexes is at odds with non-controversial science. It is a conclusion that is widely accepted in the public and established scientific communities. It is non-controversial science despite the fact that there are laypersons and scientists who contest the conclusion. Note that in our actual, roughly speaking, liberal democracies scientific standards may come out differently on such issues as intelligent design. In the

United States there is a significant, long-standing disagreement[2] about this issue in the general public. In many other of our actual liberal democracies, this is not the case.

Scientific standards are thus not completely immune from controversy, since they may be disputed by minority groups or individuals. If we suppose for a moment that some of these groups were composed largely of reasonable citizens, holding reasonable worldviews, then the scientific standards seem to be in discord with the liberal principle of legitimacy. We conjecture that this could indeed be the case. We will return to this complex problem shortly, first we will show how scientific standards make the framework of public reasoning more feasible by securing determinacy and completeness.

Scientific standards and the determinacy and completeness of public reason

It is clear that scientific standards play a role in securing the determinacy and completeness of public reason. Public reason must be complete in the sense that it must be comprehensive enough to secure a reasoned and determinate justification for most fundamental political issues on the basis of public reasons alone. Shared standards and principles of inquiry help citizens rationally order competing values, avoid 'arguments that are too immediate or fragmentary' (Rawls 1997/2005: 455) and to assess when and how principles of justice are satisfied and ultimately what these principles require of particular institutions (Rawls 1999: 429). If public reason was void of epistemic standards to guide public inquiry it could be seen as too thin or indeterminate to address many fundamental political questions.

But, the scientific standard criterion cannot be justified by reference to its role in securing the determinacy and completeness of public reason *alone*. These consideration provide an explanation for how scientific standards make public reason more *feasible*, but in a

[2] Note that it could only be disagreements that are significant and long-standing in the general public that could render a scientific issue controversial in the context of public reason. The reason being that Rawls would not want public reason to be bound by sways in public opinion.

Rawlsian framework such pragmatic concerns fall short of addressing the justification problem. We need to see how the scientific standards may be justified in light of a commitment to the liberal principle of legitimacy. As we illustrated in section I., public reason indeed arises from this principle of legitimacy: the idea that political power is legitimate only when exercised in accordance with principles that all reasonable citizens could accept (Rawls 1993/2005: 137). If scientific standards were reasonably rejectable, then while attributing to the feasibility of PR, they would violate other, more foundational strictures of the account. We need to know why reasonable citizens would be able to converge on such standards and conclusions.

In section II we alluded to the problem that scientific standards may be at odds with the liberal principle of legitimacy. However, Rawls did not think that the scientific standards criterion faced this serious problem. Quite to the contrary, Rawls explicitly argued that common sense reasoning as well as scientific standards are perhaps *the only* criteria that can accommodate the liberal principle of legitimacy. Referring to these criteria he writes that 'the liberal principle of legitimacy makes this the most appropriate, if not the only, way to specify the guidelines of public inquiry. What other guidelines and criteria have we for this case?' (ibid.: 224). If the question here is what epistemic standards we have that could be appropriate to serve as a guideline to public inquiry *and* remain non-controversial from *any* reasonable standpoint, we presume that it may indeed very few (if any). It seems strange that Rawls so readily, and without much explanation, takes scientific standards to be among them. In the following we examine several ways by which Rawls could justify the scientific standards in accordance with the liberal principle of legitimacy.

Justifying scientific standards in accordance with liberal legitimacy

In order to examine possible justification routes that would accord with the liberal principle of legitimacy, it needs to be shown that scientific standards are standards that all reasonable persons could accept (for the purpose of public reasoning).[3] There are many possible

[3] Among reasonable comprehensive worldviews there can be many sets of incompatible epistemic standards that reasonable citizens could ascribe to. So,

justification routes that could lead to such a conclusion. None, however, seem to hold water at closer examination.

A short preview might be helpful. One justification strategy is based on the idea that the specified standards of inquiry, including the scientific standards, are the only standards that can adequately meet the publicity criterion. Another approach is to argue that abiding by scientific standards is constitutive of the reasonable person or reasonable worldviews. In a similar vein, one could hold that there simply is no reasonable disagreement on scientific standards. Finally, scientific standards may be justified in virtue of being implicit in the public culture of liberal democracy. In what follows, we will go through each of these justificatory strategies and attempt to show that at closer examination, none of them are satisfactory.[4]

The publicity condition

Let us start with the argument that reasonable persons could come to see that the specified standards of inquiry, including the scientific standards, are the only (appropriate) standards of inquiry that meet the publicity criterion and thus properly accommodate the liberal principle of legitimacy. This approach has a lot of textual support in Rawls writings and it is without a doubt one of the ways by which Rawls attempted to justify the role of science in public reason. In order to examine this justification approach let us first turn to Rawls's publicity condition. Roughly the publicity condition seeks to ensure that the reasons that ground fundamental political principles are known, understood and endorsable by implicated citizens such that their required proper consent is enabled.

Now there are at least two ways by which Rawls's standards for inquiry, including the scientific standards must and can be considered appropriately public (and only these standards are appro-

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reasonable citizens can accept incompatible epistemic standards. However, being reasonable they will not use such standards when assessing political essentials with fellow citizens i.e. they cannot play a part in public reason.

[4] It should be noted that Rawls's writings indicate that Rawls would justify scientific standards using a combination of some of the proposed justification routes. For purposes of simplicity, we treat them separately. It should also be noted that we do not see a combination of justification routes that would successfully justify the scientific standard criterion.

priately public). First, scientific standards are accessible or available to citizens generally, i.e. they are not based on any kind of esoteric mode of reasoning and second, scientific standards are non-sectarian in that they do not rely on any given comprehensive worldview. Let us consider these in turn.

The first idea is that established scientific fact is available, in that it can be understood and assessed by citizens generally. Citizens must be able to come to know and accept the basic political principles that ground their polity and these principles must therefore be supportable by facts or modes of reasoning that are not highly speculative, tremendously elaborate or complex (Rawls 1993/2005: 162) or based private evidence such as religious experience. If the reasons grounding these principles are somehow inaccessible to implicated citizens, the principles cannot be considered legitimate. Rawls clearly thought that scientific standards featured the accessibility attribute. We find this assessment questionable. Maybe we can grant that non-controversial science is not highly speculative due to the broad intra-scientific consensus and wide public acceptance (although such a judgment is not entirely non-controversial). However, we cannot grant that non-controversial science is not based on reasoning that is tremendously elaborate or complex. For example, we know that there is a broad scientific consensus on the fact that climate change attributable to human activities is taking place. However, few in the general public have the ability to assess the evidence for themselves. It is fair to say that the evidence is indeed elaborate and complex in light of the competencies of the layperson or general public. This goes for many or most scientific findings. Furthermore, it can be difficult to assess the nature and structure of a given scientific consensus and to determine whether there *is* a broad scientific consensus on a scientific conclusion.[5] Here one may also note that a wide range of non-

[5] Elizabeth Anderson (2011) has made a contrary point that it is fairly easy for laypersons with access to the web to make second-order assessments about scientific consensus. She demonstrates this by showing how easy it is to acquire accessible information about the scientific consensus on anthropogenic global warming. However, this may be characterized as a special case. In the case of global warming the scientific consensus *itself* has been the subject of much public debate and media attention. Therefore we can expect *Wikipedia* to offer accessible information about the global warming controversy, as well as the scientific consensus on the matter.

scientific methods and conclusions that may conflict with non-controversial science could be considered appropriately available in the sense specified in this criterion. Examples include religious evidence based on the Bible or Quran and the teachings of certain religious authorities. There certainly are religious believers who hold that there is ample accessible, observable evidence to support their religious views.

The second idea is that non-controversial science is public in that it does not imply a certain comprehensive worldview. Note here that scientism, the general idea that science alone can render truths about almost all aspect of human life, would obviously violate this constraint (and this view is not implied in the scientific standards criterion). After all, Rawls held that both religious and non-religious worldviews can be considered reasonable and a very broad range of religious worldviews would undoubtedly consider scientism to be false. Reasons that necessarily imply scientism are thus sectarian and fall outside the boundaries of PR. According to Rawls, this evidently does not hold for non-controversial science. Any reasonable judgment will be in line with widely accepted and established scientific fact.[6] It is, however, hard to see a clear cut distinction here. Many established scientific facts and methods are widely accepted and yet controversial from point of view of certain minority groups. We need further explanation as to why it is that established scientific facts and methods are not to be considered sectarian, when they are the subject of deep controversy in the general public.

Imagine a dispute on an established scientific fact or method in which one party is in agreement with non-controversial science and the other not. Imagine now that on both sides of the disagreement are citizens who are warm supporters of liberal democracy and who ascribe to reasonable worldviews. In such a controversy, why should sectarianism be attributed to the point of view that disagrees with established science and not both parties? It seems more appropriate for the general aim of public reason in political liberalism to insist

[6] Note that we here speak of reasonable judgment and not reasonable worldviews. A reasonable worldview does not comprise of only reasonable beliefs or judgments. However, a reasonable person will distinguish between those judgments arising from her reasonable worldview that can or cannot be considered reasonable in the public realm.

that both parties in such a disagreement refrain from drawing on the epistemic commitments (scientific or non-scientific) in question. Would this solution not be more faithful to the idea of publicity? We need to know why established scientific facts and methods can make claim to a privileged epistemic standing in disagreements like the ones described above. Certainly, it is not clear that this special status does not involve unwarranted coercion of epistemic minorities.

Scientific standards as constitutive of the reasonable person or reasonable worldviews

Turn then to the next idea, the suggestion that abiding by scientific standards is constitutive of the reasonable person. To explore this approach, let us return for a moment to the previous example in which two supporters of liberal democracy, both ascribing to reasonable worldviews[7], disagree on an established scientific fact or method (i.e. scientific standards) relevant to a fundamental political question. Maybe it could be argued that the party on the wrong side of the controversy (the non-scientific side) ceases to be reasonable once she exhibits epistemic commitments that are irreconcilable with parts of established science. The disagreement thus ceases to be reasonable since it is no longer a disagreement between reasonable persons. The party on the scientific side of the disagreement is thus in her right to use scientific standards in justifying her point of view in public reason, since there is no coercion of *reasonable* fellow citizens involved in such an activity. Reasonable citizens simply cannot disagree on scientific standards, because abiding by them is part of what it means to be reasonable in the first place. In order to assess this approach we need first to review the idea of the reasonable person as it is employed by Rawls.

A reasonable person is willing to propose and abide by principles of fair terms of cooperation, given the assurance that others will likewise do so. She is able to exercise her two moral powers: a capacity for a sense of justice (the capacity and willingness to abide by fair terms of cooperation) and a capacity for a conception of the good (the capacity to form, to revise and to rationally pursue a conception of

[7] We will review the concept of a reasonable worldview when we assess the justification route that attributes the quality of accepting scientific standards to the make-up of reasonable persons.

one's rational advantage or good) (Rawls 1993/2005: 19). As a necessary requisite for exercising her moral powers, she has the intellectual powers of judgment, thought and inference. The reasonable person recognises the burdens of judgment and she harbours a commitment to mutual respect of her fellow citizens and to an idea of reciprocal justification: the idea that basic political principles and fair terms of cooperation should be endorsable by all implicated reasonable citizens (Rawls 1993/2005: 50). She recognises the basics of a conception of political objectivity, which put very roughly means that she has the ability and willingness to reason from an impartial perspective. Finally, the reasonable person will adhere to a reasonable comprehensive doctrine.

Rawls defined a reasonable comprehensive doctrine as 'an exercise of theoretical reason [which] covers the major philosophical, religious, and moral aspects of human life in a more or less consistent and coherent manner' (ibid.: 59), an exercise of practical reason by its ability to prioritize values significant to a given case, a doctrine that is stable yet able to revise itself in light of relevant reasons and evidence, a doctrine that can be affirmed in a reasonable way (ibid.: 60) and that can support a democratic society (Rawls 1997/2005: 83). It is obvious from this deliberately lose characterisation of reasonable doctrines that it does not invoke the epistemic constraints harboured in the scientific standards.

Now it seems that the only trait of the reasonable person to which one could attempt to tie a commitment to scientific standards, would be the trait that specifies the willingness and ability to reason from an impartial standpoint; or in Rawls's terms, the reasonable person's recognition of a basic conception of political objectivity. The argument would be that a recognition of a basic conception of objectivity is inherently connected with an acceptance to abide by scientific standards. According to Rawls, this basic conception of objectivity features certain essentials, it establishes 'a public framework of thought sufficient for the concept of judgment to apply and for conclusions to be reached on the basis of reasons and evidence after discussion and due reflection' (Rawls 1993/2005: 110) this requires that we can reason from mutually recognised criteria and evidence; it specifies an order of reasons that (in the required circumstances) will guide citizens whether or not they conform with their own point of view and similarly, it will distinguish an objective

point of view from any particular point of view. Finally, it gives an account of agreement in judgment among reasonable agents (Rawls 1993/2005: 111–112). The original position is an instantiation of Rawls's constructivist account of objectivity. It establishes an impartial standpoint and shared perspective from which we can imagine reasonable citizens making objective judgments about justice. Public reason tracks this ideal of objectivity in political judgment.

Does a proper recognition of political objectivity imply a commitment to abide by scientific standards? It seems that Rawls does indeed believe that this is the case, simply because scientific standards are thought to be the only epistemic standards that are appropriately accessible and non-sectarian and therefore they are thought to enable impartial reasoning based on mutually recognised evidence and criteria. But in assessing the argument from publicity, we have already shown that it is by no means clear that the scientific standards exhibit these key features. An argument from objectivity does not provide this discussion with any new insights. Like the similar argument from publicity, it therefore appears to an unviable justification strategy.

There is no reasonable disagreement on scientific standards

An alternative justification strategy is simply to argue that there is no reasonable disagreement on scientific standards. As previously mentioned, reasonable disagreement in Rawls must be understood as disagreements that persist due to the burdens of judgment. But what if the non-controversial scientific findings and methods are no longer subject to the burdens of judgment? It could be argued that the methods and conclusions harboured in the scientific standards rely on evidence that is no longer considered conflicting and complex, concepts that are no longer considered vague, an area of inquiry in which we should be expected to roughly agree on relevant considerations and the weight we grant these consideration etc.

Arguing that the burdens of judgment do not apply to scientific standards is not a viable justification route upon further inspection. We have seen that it is important for Rawls to set the bar of reasonableness that applies to the burdens of judgment low in order accommodate the moral aims of political liberalism. If the burdens of judgment do not apply to non-controversial science, we are not

setting the bar very low. We have to pose the question of why we should not give the benefit of the doubt to the religious believer, who believes that established science is wrong about certain fundamental facts relevant to political essentials, but who nevertheless is a supporter of liberal democracy and is willing to cooperate with fellow citizens as free and equal on terms that all can accept? In Rawls's terms, this would seem appropriate in the light of the aims of political liberalism.

Scientific standards are implicit in public culture

The final strategy for justifying the scientific standards could be to show these standards are implicit in the public political culture of democratic society. We have seen that political conceptions of justice, that provide the content of public reason, are:

> […] expressed in terms of certain fundamental ideas seen as implicit in the public culture of a democratic society […and…] This public culture comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those judiciary), as well as historic texts and documents that are common knowledge.
>
> (Rawls 1993/2005: 13–14)

When developing conceptions of justice, we do not start with a blank slate. We draw from a shared fund of recognised basic ideas and principles implicit in the public culture of democratic society (Rawls 1993/2005: 8) and let such ideas provide the framework for conceptions of justice. Citizens who reject the liberal democratic project wholesale, including these familiar ideas and principles, fall outside the scope of the political liberal project. Rawls's liberal project thus starts *within* a liberal democratic tradition and uses ideas ingrained in liberal democratic culture as fabric in developing political conceptions of justice. Public reason is thus already furnished with ideas that are currently seen to be inherent to liberal democratic culture.

Now we may ask if scientific standards can be thought to belong to the class of ideas that are commonly recognised as being implicit on liberal democratic culture? Rawls clearly thought this was the case. He explicitly wrote that we are to 'keep in mind that we aim to find a conception of justice for a democratic society under modern conditions; so we may properly assume that the methods and conclusions

of science play an influential role' (Rawls 1999: 324). It does indeed to hold true that scientific methods and conclusions play an influential role in many societies that we today broadly would call liberal democratic societies. But in order to add scientific standards to our shared fund of ideas, we need to know that they are more than merely *prominent* in most liberal democracies, we need to know that they are an *essential component* of modern liberal democratic culture. We see this when we assess the reason for including ideas that are implicit in modern democratic culture. One of the main aims of political liberalism is to develop the most feasible and appropriate conceptions of justice that realise core liberal democratic values. Rawls enables this aim by allowing input from the public culture of democratic society. These ideas provide direction and a framework to operate within when deliberating on conceptions of justice. Now we find, for example, in the public culture of modern liberal democracy an idea of religious toleration. This idea is in many ways inseparable from this culture, it is an inherent and by no means accidental feature of this culture. In public culture of democratic society today, we would say that we cannot secure democratic liberty and equality if we also oppose religious toleration. A political conception of religious toleration is thus part of the fabric that must be included and interpreted in any reasonable conception of justice. Political liberalism does not address itself to those who reject this value wholesale because they cannot earnestly take part in the project of developing conceptions of justice that account for core liberal democratic values and the project of applying these principles of justice to liberal democratic laws and institutions. The same does not appear to go for those who reject certain established scientific methods and conclusions. Non-scientific beliefs simply do not seem to feature the same kind of inherently distorting effect. Scientific standards are part of, but not inherent to the public political culture of liberal democracy.

Concluding remarks

We have asked the question of whether scientific standards could be internally justified in Rawls's public reason account and thus explain how the exclusion of non-scientific views in public reason could be warranted. In our attempt to answer this question, we explored several justificatory strategies that Rawls could follow to justify the special role of non-controversial science in public reason. However, none of the strategies seemed to lead to a satisfactory justification.

While the scientific standard criterion seems reasonable on the face of it, further scrutiny shows that it is in tension with central elements of Rawls's theoretical framework: the scientific standards do not accord with the liberal principle of legitimacy.

Therefore, we see Rawls as facing a legitimacy problem when he excludes in this public framework reasons that are contrary to non-controversial science, in particular, when these are proposed by engaged supporters of liberal democracy.

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Chapter 9

Let's study arguments! Deliberation in EU decision-making

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Introduction[1]

An increasing number of studies are finding Jürgen Habermas's theory of communicative action helpful when seeking to explain international agreements that are puzzling from a rational-choice based perspective.[2] These studies have shown that it is too simplified to assume that international decision-making processes are characterised by bargaining. This is not least so in the European Union (EU), where the member states have integrated far beyond what one would expect on the basis of an intergovernmental bargaining model. Studies building on communicative action theory however still face analytical and methodological challenges related to empirical research.

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1 This chapter is based on Riddervold (2011a and 2011b).

2 See amongst others Bächtiger et al. (2008); Deitelhoff (2009); Deitelhoff and Müller (2005); Diez and Steans (2005); Eriksen (2005, 2009); Eriksen and Fossum (2000); Eriksen and Weigård (2003); Jacobsson and Vifell (2005); Janssen and Kies (2005); Müller (2004); Risse (2000, 2004); Risse and Ulbert (2005); Risse and Kleine (2010); Sjursen (2003, 2004, 2006); Thompson (2008).

Most importantly, although many claim that deliberation (sometimes referred to as arguing)[3] is important for understanding international and European policy-making, few are clear on the mechanisms by which deliberation influences decision-making processes.[4]

The aim of this chapter is to contribute to make communicative action theory more applicable in descriptive and explanatory studies of EU decision-making processes by discussing how the effects of deliberation might be studied empirically. The discussion builds on two analytical claims. The first is that deliberation has behavioural consequences only when actors change their positions due to the arguments presented (Eriksen 2009). Second, to explain a common policy, this means that one must identify the arguments that were not only presented but also acted upon, thus functioning as what Helene Sjursen (2002) calls mobilising arguments. On this basis, I suggest how to analytically specify and empirically trace the micro-mechanisms by which arguments presented during EU decision-making processes may lead to changes in positions and thus have an action coordinating effect.

In doing this, I start from the assumption that bargaining and deliberation should be treated as analytical distinct types of decision-making processes (Deitehoff and Müller 2005; Eriksen 2005; Risse 2000, 2004). However, building on Habermas's distinction between actor-independent and actor-relative arguments Habermas (1996, 1996/1998: 307–342), I refine this claim by suggesting that for methodological purposes, deliberation and bargaining can be distinguished analytically on the basis of the content of the arguments presented. More precisely, I suggest that when applied in explanatory and descriptive studies, *deliberation* should be defined not only as reason-giving (Deitelhoff and Müller 2005; Risse and Kleine 2010). Instead, for such purposes, it is helpful to define deliberation as a policy-making process where the actors involved justify their positions and proposals by *actor-independent* arguments (Habermas 1996, 1996/1998: 322). These are arguments that can be accepted by all the actors involved in a given policy-making process – one can replace the speaker and it would still be valid. Empirically, in

[3] In the descriptive/explanatory international relations and European integration literature, both concepts are applied. This chapter uses the term 'deliberation'.
[4] See however Deitelhoff (2009); Eriksen (2009), and Sjursen (2004).

the EU context, such mutually acceptable arguments may refer to universal or collective norms, to facts or expertise knowledge or to existing law. Analytically distinct to this, *bargaining* is ideal-typically characterised by the use of actor-relative arguments (Habermas 1996, 1996/1998: 321), to arguments that are valid only to the persons who utters them. In empirical terms, this type of arguments is linked to what in the literature is referred to as threats and promises (Elster 1992). Moreover, in both types of processes, the decision makers may or may not reach agreement on common policies. However, to the extent that they do, they do it on the basis of the arguments presented. Following this understanding, it is not the type of decision-making process itself or particular scope-conditions that explain the agreed outcome, but the extent to which other actors act upon the particular arguments presented. By in this way focusing on arguments as units of analysis, the micro-mechanisms of bargaining and deliberation become directly comparable. Thus, one can study collective decision-making processes and try out comparable and competing hypothesis as to why the decision makers reached a certain agreement.

In the following, I first systematise and sum up some main arguments found in the existing literature of why communicative action theory may provide helpful tools in studies of international decision-making outcomes that are puzzling from a rationalist perspective. Second, I discuss some challenges also found in the existing literature, using EU studies as an example. I then proceed to discuss a methodological framework focusing on arguments as units of analysis. I also elaborate on the main assumptions underlying such a micro approach. Lastly, I discuss some challenges.

Why apply communicative action theory in studies of European decision-making processes?

What is the added value of applying elements of Habermas's communicative action theory in descriptive and explanatory studies of EU decision-making processes?

Although their empirical focuses differ, scholars applying elements of Habermas's theory of communicative action for explanatory or descriptive purposes start from the basic assumption that humans operate in a given social context where they coordinate behaviour

through language.[5] Furthermore, both rational choice based and communicative approaches maintain that human action should be studied as the result of rational behaviour, that is, as intended actions conducted to obtain a particular goal or intention (Eriksen and Weigård 2003). Actors are seen as rational, but rationality is defined differently than in the rational choice based perspectives. Instead of assuming strategically rational actors, when applying communicative action theory, the researcher builds on the assumption that socially interacting agents are communicatively rational. By communicative rationality I understand that actors have the ability to justify and explain their actions, and to consider and evaluate arguments presented by others (Deitelhoff 2009; Eriksen 2005; Risse 2004; Sjursen 2003).

These assumptions allows for the possibility that actors may not only bargain but also deliberate in order to reach agreement on common policies. When applying tools building on these assumptions, analytical and empirical focus is put on the decision-making *process*, on how preferences might change during discussions as the actors involved are convinced by each other's arguments (Deitelhoff 2009). As argued by Sjursen (2004), the strength of using communicative action theory in empirical analysis is that it helps specify alternative micro-mechanisms to that of the rationalist perspectives. By assuming that the actors are communicatively rational, one allows for the possibility that different types of arguments may form the basis of common policies. The action-coordinating arguments may refer to interests or contain threats and promises, but they may also refer to other standards such as collective or universal norms, law or to facts and expert knowledge. This helps specify the constructivist claim that norms not only function as constraints on actors' self-interested behaviour, as rational choice based approaches assume, but that norms might also have direct behavioural consequences.[6] More precisely, the assumption of communicative rationality allows for the possibility that norms, facts, or expertise might influence EU decision-making outcomes because policies are constructed through communicative processes where actors' positions and behaviour can

[5] Bächtiger et al. (2008); Bächtiger and Steiner (2005); Deitelhoff (2009); Dür and Thomas (2010); Eriksen (2005); Eriksen and Fossum (2000); Eriksen and Weigård (2003); Sjursen (2003, 2004); Riddervold (2011a, 2011b); Risse (2000, 2004); Risse and Ulbert (2005); Thompson (2008).

[6] Adler (1997); Katzenstein (1996); Kratochwil (1989); Risse (2000); Ruggie (1998).

change on the basis of the arguments presented by others (Deitelhoff 2009; Eriksen 2005; Eriksen and Fossum 2000; Risse 2000; Risse and Ulbert 2005; Sjursen 2003; Thompson 2008). 'It is through a communicative process in which norms are rationally assessed that the relevance and binding character of norms is established' (Sjursen 2004: 115).

These analytical concepts are particularly relevant in studies of EU decision-making for several analytical and methodological reasons.

First, by specifying alternative micro-mechanisms to that of the rational choice based perspectives one opens up to more possible explanations of collective policies than provided by alternative perspectives. By starting from the assumption of communicatively rational actors, one increases the range of decision-making outcomes that are analytically possible. Interest-based behaviour is a rational choice, but so are EU policies based on different types of norms. This is particularly helpful as it makes it possible to spell out alternative hypotheses that can be tried out in empirical studies (Eriksen 2009; Riddervold 2011a, 2011b; Sjursen 2003, 2004). While rationalist perspectives simply start from the assumption that actors are motivated by their material interests, the question of what motivates collective action is left to empirical analysis.

Second, when applying communicative action theory the analytical focus is put on the intersubjective process by which different types of arguments are presented and – if considered legitimate or valid – are acted upon (Eriksen 2009 calls this methodological interactionism). By this, communicative action theory may help us study both how particular norms of legitimate behaviour are established in the first place but also the processes by which such norms may change: Through the communicative process, the actors may learn of new norms that if considered valid and relevant in a particular policy-making situation may lead to agreement on the normative basis of a particular policy (Risse 2000). It also follows from this claim that a possible explanation of why particular social norms and institutions are upheld is that the actors consider them valid (Sjursen 2003).

Lastly, applying a communicative perspective may be particularly helpful in explanatory studies of the EU and other international decision-making outcomes that are puzzling from a rationalist

perspective as both analytical and empirical focus can be put on the *content* of observable arguments. When building on the concepts of communicative rationality and deliberation, analytical focus is put on what goes on between actors who co-ordinate their behaviour through argumentation (Eriksen 2009). There is an underlying assumption that the actors are able to learn and see the issue under discussion from different angles by communicating with each other. Through the use of language, through communication, the actors can reach a common understanding of the situation. And most importantly, they must give reasons for their preferences and positions and evaluate the arguments presented by others (Deitelhoff and Müller 2005; Eriksen 2005; Risse 2000; Sjursen 2003). If a justification or argument given for a particular policy is perceived as convincing by the other actors, the expectation is that they have the ability to learn from this argument and change their initial positions and behaviour accordingly. For coordination of action, what is important is thus that the arguments and reasons in themselves are such that other reasonable actors can support them. As a consequence they can lead to agreement on a given policy (Deitelhoff 2009; Deitelhoff and Müller 2005; Eriksen 2005, 2009; Sjursen 2003). 'Co-operation comes about when the process of reason-giving generates a capacity for change of viewpoints' (Eriksen and Fossum 2000: 257).

Arguments as units of analysis

An important methodological implication of applying communicative action theory is thus that the researcher when conducting empirical analyses can focus on arguments as the units of analysis. This is particularly relevant in empirical studies because the analytical and empirical focus thereby can be shifted from individual motives to the arguments they present and the extent to which they are acted upon. Instead of focusing on the actors' motives when interpreting their reasons for behaviour, arguments can be treated as the empirically identifiable evidence (Riddervold 2011a; Sjursen 2002, 2006).

Such an analytical and empirical focus on arguments as units of analysis differs both from what is common in the rational choice based literature and in much of the contemporary constructivist literature. On the one hand, rational choice based perspectives simply assume that actors are instrumentally and/or strategically rational. Within this analytical frame, parsimonious causal research can be conducted (King et al. 1994). Following many constructivist

approaches that are applied in studies of international and European policy-making processes, on the other hand, norms are given the same status as interests, but to study their possible effects on outcomes it is argued that you must study and seek to identify the actors' behavioural motives (see, amongst others, Checkel 2006; Tonra and Christensen 2004; Parsons 2007). It is however problematic to argue that norms may influence decision-making but that the researcher can only study this from the perspective of actors' motivations. This is so for several methodological reasons. First and most importantly it is difficult, if not impossible, to identify the actors' real motives empirically. As rational choice theorists argue**,** we can never get into the actors' heads and discover their 'true' motives. Motives as causes of international decisions are therefore impossible to discover. Second, even if one assumes that it somehow would be possible to observe the actors' true motives, it would still be difficult for instance to distinguish individual state officials' motives from the positions of the states they are representing. And lastly, it is difficult to see how the researcher can verify the actual importance of norms in any particular case by studying actors' motivations at the cognitive level.

A communicative micro-perspective might help resolve this dilemma between, on the one hand, assuming that actors are instrumentally rational, as assumed in rational choice based studies, and on the other hand, claiming that the explanation of international behaviour must be found on the basis of actors' motives, as is argued in much of the constructivist literature. If one instead treats arguments as the analytical units under study, it is what the decision-makers say and whether or not these arguments are accepted by the co-decision makers that is important for understanding collective outcomes. As argued by Dennis F. Thompson (2008: 6) 'actual arguments are what matter, not motives'. Instead of studying actors' motives, explanation of action can be sought in the perceived legitimacy or credibility of the arguments presented, identified by the extent to which they are acted upon. The reasons of action, that is the justifications or arguments given by the policy actors, can be treated as the possible causes of action. Arguments explain common policies *if* they are accepted and acted upon by the decision makers (Riddervold 2011a, 2011b).[7]

[7] Thus, when conducting a mechanism explanation based on communicative action theory, the researcher does not apply the distinction often made in the IR literature

Challenges in the existing literature

Research applying communicative action theory has increased our understanding of international and European decision-making processes and their outcomes. It has contributed to a much higher understanding of EU and international policies by specifying the importance of language and process for understanding why agreements on collective action is reached, as well as how we can understand the outcome of these processes. [8] However, a challenge still facing many studies applying the concepts of communicative rationality and deliberation in studies of European and international decision-making processes is how to make these concepts relevant for empirical research. There is still scholarly disagreement on the extent to which policy makers at the international level deliberate, and few explicitly define and/or empirically specify the concept when applying it to empirical research (see Bächtiger et al. 2008 and Thompson 2008 for overviews). Due to a variety of approaches and few or diverging conceptual operationalisations it is thus hard to make general conclusions about the role and impact of deliberation in EU policy-making. It makes it hard to draw comparisons across different case studies, and it makes it more difficult to evaluate the validity of the findings (Janssen and Kies 2005). Most importantly, there is little scholarly agreement on the mechanisms by which deliberation affects policy-making outcomes – on what it is about deliberation, as opposed to bargaining, that is important for understanding particular common policies (also see, amongst others, Bächtiger et al. 2008; Janssen and Kies 2005; Thompson 2008). Thus, although a main strength of applying a communicative approach in studies of collective decision-making processes and their outcomes as argued is that it provides us with alternative analytical micro-foundations to those of the rationalist approaches, this is seldom reflected when scholars apply the theory in empirical research. In the existing literature, few scholars explicitly specify and study the micro-

between causes of action on the one hand and reasons for action on the other, where reasons refer to the justifications given for a particular action (Jørgensen 2010).

[8] See amongst others Bächtiger et al. (2008); Deitelhoff (2009); Deitelhoff and Müller (2005); Diez and Steans (2005); Eriksen (2005, 2009); Eriksen and Fossum (2000); Eriksen and Weigård (2003); Jacobsson and Vifell (2005); Janssen and Kies (2005); Müller (2004); Risse (2000, 2004); Risse and Ulbert (2005); Risse and Kleine (2010); Sjursen (2003, 2004, 2006); Thompson (2008).

mechanisms by which deliberation may have an effect on policy outcomes (exceptions are Deitelhoff 2009; Sjursen 2003, 2006).

As a key example, in light of the many studies confirming that international decision makers not only bargain but also deliberate, studies of European integration have recently focused not on 'whether arguing takes place in EU negotiations but under which circumstances arguing affects actor preferences' (Dür and Thomas 2010: 616). A main reason for this focus on scope-conditions is that '[t]he authenticity of a "persuasion conversion" as proof of actors' orientation […] [is] impossible to confirm', (Deitelhoff and Müller 2005: 171). As a consequence, it is claimed that for empirical purposes, 'arguing, then, is simply reason-giving'[9] (Deitelhoff and Müller 2005: 176). Having defined arguing as a process of reason-giving, scholars of international decision-making have therefore argued that:

> [T]he new research frontier for constructivists is in assessing under which circumstances arguments affect negotiating actors' preferences, and subsequently lead to outcomes that are more than mere co-ordination on a policy outcome and, thus, not easily explained in bargaining terms.
>
> (Risse and Kleine 2010: 708)

Researchers should in other words focus their efforts on unveiling '[w]hich institutional scope conditions are conducive to arguing to prevail in multilateral negotiations and, thus, to affect both processes and outcomes – (Risse and Kleine 2010: 711) – on 'identifying potential institutional scope conditions for arguing leading to persuasion (ibid.: 712).

By maintaining that the effect of deliberation must be studied at the micro-level, this chapter takes issue both with the claim that deliberation, for methodological reasons, is 'simply reason-giving', and with the claim that one therefore should focus on unveiling scope-conditions of deliberation. There are two main reasons for this. First

[9] As I will show, I suggest a different definition, where deliberation is not only defined as reason-giving but a particular type of reason-giving, namely one where the actors justify their positions and proposals by mutually acceptable, i.e. actor-independent arguments.

and most importantly, as will be elaborated below, for explanatory and descriptive purposes, I maintain that it is the *content* of the typical arguments presented – the type of reason-giving – that distinguishes deliberation from bargaining. Not whether or not there is evidence of reason-giving as such or of particular scope-conditions. Bargaining is also characterised by reason-giving, but this reason-giving is different from the reason-giving characterising deliberative processes. Second, studying the impact of deliberation on international and European policy-making processes by focusing on scope-conditions comes with two methodological challenges. The first is that one cannot draw conclusions on actor behaviour on the basis of contextual variables. Although there is evidence of particular scope-conditions this does not necessarily mean that the actors will deliberate (or bargain). The second is that even if there *is* evidence of deliberation in a given case, this deliberation does not necessarily affect the outcome. Analytically, there is no necessary link between the way the actors communicate and the extent to which they are able to agree, let alone the type of policies they agree to conduct. A policy-making process in a given case may even be characterised by perfect deliberation but without this resulting in any agreements on common policies. Thus, to study the impact of deliberation on decision-making outcomes it is not sufficient to reveal particular scope-conditions and/or to study '*whether* actors use arguments and reason to justify their actions and their interests' (Risse 2004: 299). To know if these arguments had any effect on the decision-making outcome, it is equally important to identify whether or not particular arguments also lead to agreement on collective actions, i.e. that particular arguments had behavioural consequences. Without tracing the impact of arguments on collective outcomes empirically, we risk conducting an explanation that resembles what Peter Hedström and Richard Swedberg (1998/2007: 9) call a black-box explanation of political outcomes. The reason why such explanations are problematic is that although one knows the output (for instance agreement on a particular EU policy or an international treaty) and has identified the input (in this case the scope-conditions present in a given case), one cannot say what caused the output, i.e. what links input and output. One 'says nothing about why this is the case […]. To answer such questions it is necessary to introduce and explicate the generative mechanisms that might have produced the observed difference or outcome' (Hedström and Swedberg 1998/2007: 11). The fact that there is evidence of deliberation or of particular scope-

conditions conducive of deliberation is without doubt important for understanding European and international decision-making outcomes. But neither the fact that the decision-making actors give reasons for their positions nor the existence of particular scope-conditions suffice to tell us why the actors reached an agreement on a collective outcome, let alone why they reached the agreement they did. To know this we must also study the micro-mechanisms by which particular arguments lead to particular outcomes.

Conducting empirical research: The micro-mechanisms of deliberation

On this basis, a possible methodological approach applied in studies of EU decision-making outcomes that are puzzling from a rationalist perspective would be to interpret the arguments the actors give for their actions and positions in order to discover the arguments that mobilised the actors to agree to and conduct a certain collective policy (Sjursen 2002). To further specify this approach empirically, I suggest that it for explanatory or descriptive purposes may be helpful to define *deliberation and bargaining* as two analytically distinct types of policy-making processes characterised by analytically different types of arguments. Different analytical micro-mechanisms explain agreement in the two types of decision-making processes.[10] This argument oriented methodological framework builds on four main assumptions.

Communicatively rational actors

First, a methodological focus on arguments as units of analysis builds on the basic assumption that all actors who engage in political processes where the aim is to find some sort of common outcome despite initial disagreement are communicatively rational, as defined above. According to Habermas (1996/1998: 315) this form of rationality is 'inherent not in language as such, but in the communicative use of linguistic expressions.' This implies that I assume that the decision-making actors have the ability to give reasons for their positions and proposals and that they can change their positions on the basis of what others say. Actors can use arguments in a purposive-rational or strategic way, seeking to

[10] Although analytically distinct we will always find a mix of the different types empirically.

promote certain interests or use reference to norms strategically; they can adapt automatically to existing norms, or they can explain their positions and change behaviour due to learning from presented arguments. However, the underlying assumption of actors' *rationality* remains the same. The decision-making actors do not lose the ability to evaluate what others say or lose the ability to justify their own positions, views or proposals. Instead, it is precisely this basic assumption of communicative rationality that *allows* for different types of behaviour being equally rational and thus being considered as equal analytical possibilities when studying collective decision-making processes (Eriksen 2009; Sjursen 2003). Without this ability, political agreements cannot be reached through the use of language, neither through deliberation nor bargaining.

Communicative processes

Second, the analytical framework builds on the assumption that all voluntary political decision-making processes are communicative processes, by which I mean that the actors seek to reach some sort of inter-subjective understanding or agreement on collective outcomes on the basis of the arguments presented (Deitelhoff and Müller 2005; Eriksen 2005; Risse 2004). This definition applies both to processes of bargaining and deliberation/ arguing, as in both cases, 'actors try to gain agreement by proposing and evaluating arguments' (Deitelhoff and Müller 2005: 168). In both types of processes or types of communication it is reasonable to assume that 'the speech act is first of all supposed to be understood by the hearer and then – as far as possible – accepted' (Habermas 1996/1998: 315). Building on this definition, it is hard to imagine decision-making processes where there is no communication before a putative agreement is reached, except in outcomes settled through the use of direct force or in cases where threats, or the use, of force leads to direct surrender, which do not count as communication according to the definition. Applying this assumption seems like a relatively uncontroversial claim in studies of most international and not least of EU decision-making processes.

Actor-relative and actor-independent arguments

Third, the framework builds on the assumption that there are certain arguments that can be accepted as valid by everyone involved in any given social process, including in EU policy-making processes (Risse 2004).

On this basis, to develop a distinct analytical definition of deliberation and spell out the micro-mechanisms by which it can affect EU decision-making outcomes so that this can be studied empirically, I build on Habermas's distinction between weak and strong communication identified by actor-relative and actor-independent arguments respectively (Habermas 1996/1998: 307–342). According to Habermas, when communicating, as defined above, the actors justify their positions by what he defines as rational arguments or speech-acts. Rational arguments are 'all comprehensible speech acts, for which the speaker can take on a *credible* warranty in the given circumstances to the affect that the validity claim could, if necessary, be vindicated discursively' (Habermas 1996/1998: 315–316). These rational arguments can take two forms; they can be actor-relative or they can be actor-independent. This distinction can be used to distinguish analytically between deliberation and bargaining. First, following this approach, during *bargaining* the actors ideal-typically use actor-relative arguments. Actor-relative arguments 'constitute good reasons only for the one or the other of them' (Harbermas 1996/1998: 321). These are arguments that 'can qualify as good reasons only according to premises that are valid for the actor but not for the addressee' (Harbermas 1996/1998: 322). Analytically distinct to this, for explanatory purposes, *deliberatio*n can instead be defined not simply as reason-giving but as a type of strong political communication where the actors use actor-independent arguments (Harbermas 1996/1998: 322). The ideal type of deliberation 'always involves reference to a mutually accepted external authority to validate empirical assertions' (Risse 2004: 298). Such arguments refer to something that could be accepted by all affected participants in an open and free debate. The premise of this analytical type of argument is thus not valid only to the person who utters them, but can be accepted by all the actors involved – one can replace the speaker and it would still be valid. Actor-independent arguments can typically refer to factual statements or expert knowledge, to common law, or they can refer to commonly acceptable norms, resting on Habermas's discourse principle for establishing valid action norms: 'Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses' (Habermas 1996: 107).

Different micro-mechanisms

Lastly, I assume that both of these analytically distinct types of arguments may lead to agreement on a collective policy (Deitelhoff

2009; Elster 2007; Eriksen 2009, Risse 2004; Sjursen 2003). The actors may agree on a collective action or reach a decision due to a presented actor-independent argument, i.e. they may agree on the basis of justifications that in principle can be accepted as valid by all actors involved, for reasons that are intersubjectively shared. Alternatively, they may agree on the basis of an actor-relative argument, which is valid only to the person who utters it. In both cases the actors must present justifications or arguments and the audience must accept at least the credibility of the argument for agreement on a common action to be reached. However, when agreement is reached through weak communication or bargaining, characterised by the actors using actor-relative arguments, they must do only this: The only requirement is that they accept that it is likely that the actor who utters a claim also means it and has the ability and the intention to act upon what she says. These are 'the conditions that have to be met for the actors to interact in a success-oriented and strategic manner' (Eriksen and Weigård 2003: 41). At a difference to this, when agreement is reached on the basis of an actor-independent argument, the actors involved reach agreement because they accept the argument as inter-subjectively valid and therefore change their positions accordingly (Eriksen 2009; Riddervold 2011a).

On this basis, it follows that the (analytical but empirically traceable) micro-mechanisms by which agreements on collective policies are reached are different in ideal bargaining and deliberation processes. In typical bargaining processes and in line with conventional rationalist perspectives on international negotiations, it is assumed that the preferences actors bring to the table are pre-set and fixed; they are thus independent of what goes on during the process (Moravcsik 1998; Moravcsik and Schimmelfennig 2009). Having entered the negotiations, the actors use arguments in a purposive-rational or strategic way (Eriksen 2009; Elster 2007). Actor-relative justifications or arguments are oriented towards success for the person who utters them, they are 'pragmatically used intentional sentences' (Habermas 1996/1998: 319). The aim is to get others to change their positions on the basis of the actor-relative arguments presented. As stated by Jon Elster:

> To bargain is to engage in communication for the purpose of forcing or inducing the opponent to accept one's claim. To achieve this end, bargaining relies on threats and promises […]

> Bargaining power does not derive from the 'power of the better argument', but from material resources, manpower and the like.
>
> (Elster 1992: 15–16)

The effect of these threats and promises depends on the extent to which they are considered credible by the other actors involved in the decision-making. What matters for such credibility is thus the relative resources or powers possessed by the different actors. A country's resources could be linked to economic or military size, but it could also be linked to so called 'institutional power', i.e. to its 'ability to exit, veto and set institutional agendas' (Bailer 2010: 746. Also see Tallberg 2008; Warntjen 2010). To reach agreement during bargaining, the main point is however first, that actor-relative arguments are presented, and second, that they are accepted as credible by at least enough co-decision makers for agreement on an outcome to be reached. Agreements reached through bargaining are, in other words, reached because the other actors involved find these actor-relative arguments credible and evaluate them against their own interests and relative powers. The micro-mechanism leading from an actor-relative argument to a collective outcome is thus what can be called strategic adaptation or resource-based adaptation. By this I mean that the actors involved accept a presented actor-relative argument as credible so that they act upon them.

In contrast, the micro-mechanism leading to agreement in ideal-typical deliberative processes would be what can be called *argument-based learning*. Having defined deliberation analytically as a policy-making process where the actors involved justify their positions and proposals by actor-independent, i.e. mutually acceptable arguments, by argument-based learning I mean that an actor accepts the validity of a presented actor-independent argument, so that (s)he acts upon it.[11] In other words, that the actor involved changes position after

[11] Theoretically, the concept of argument-based learning is also linked to a cognitive process – it is about an actor being convinced by the validity of an argument so that she makes it her own. However, methodologically, as we can never study motives at the cognitive level empirically, this can only be studied by seeking to trace behaviour back to presented arguments: The effect of arguments can only be indicated by changes in behaviour. For analytical purposes, one may moreover argue that the actors' true motives are irrelevant for understanding collective decision-making

having considered and accepted the relevance and validity of an actor-independent argument. If enough decision-making actors change positions on the basis of a presented actor-independent argument (for instance an expert opinion or a particular behavioural norm) so that agreement on a collective action can be reached, this argument explains the decision-making outcome. The two types of decision-making processes and corresponding micro-mechanisms are summarised below, in Table 9.1 and Figure 9.1.

When applying this approach in empirical studies, this means that the researcher would need to find and trace the arguments that were both presented *and* acted upon. It is not enough to study whether or not there is evidence of deliberation (or bargaining). That is – of whether or not the actors justify their positions and proposals by mutually acceptable, i.e. actor-independent arguments – or if they bargain by using actor-relative threats and promises. To know if any of the presented arguments had any effect on the outcomes, one must also study whether there is evidence to suggest that the arguments presented influenced the actors' positions and thus had an action-coordinating effect.

In practical terms, when studying concrete cases of international decision-making such as in the EU, this means that the researcher might first spell out alternative empirical hypotheses of what might explain agreement (the outcome)[12] on the basis of relevant different theoretical perspectives, and second, operationalise the empirical expectations one would have to the actors' argumentation if any of these hypotheses are substantiated by the empirical data. In the EU, one might for instance differentiate between three types of actor-independent arguments that we know from previous studies are

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outcomes. What matters when studying European/ international decision-making processes is instead whether or not an argument is acted upon. If so, it affects the outcome, independently of whether or not the co-decision making actors make this argument their own, if they are 'really' convinced by it. As suggested here, a possible way to study the impact of deliberation empirically is thus to seek to trace the possible impact of actor-independent arguments on actors' positions to find the arguments that had an action-coordinating effect.

[12] By differentiating between types of argument, the approach may be used both to study why agreements are reached, i.e. by bargaining or deliberation, but also why agreement on particular outcomes were reached, for instance on a certain policy within a particular policy-field.

relevant in the EU context.[13] These are law-based arguments, i.e. arguments referring to already existing EU/Community legislation; factual or expertise arguments, i.e. arguments referring to scientific or specialist knowledge, and lastly norm-based arguments, i.e. arguments referring to commonly shared or universal norms. To know if any of these actor-independent arguments can explain a particular policy-outcome, one would moreover expect to find evidence suggesting that three corresponding types of learning led to agreement on common policies; law-based learning, factual or expertise learning and normative learning. That is, that at least some of the policy-making actors changed their positions after having heard and considered such arguments so that an agreement could be reached. Empirically, when trying to explain EU decision-making outcomes in cases where the actors initially disagreed, this means that one would need to first systematically study the arguments the decision-making actors present in favour (or against) a particular policy or position during the decision-making process. Second, to explain agreements one would moreover need to identify which of these arguments that had an impact on other actors' behaviour and positions so that a policy-decision was made. Empirically, one may for instance trace changes in actors' argumentation and positions by studying written material such as minutes or press-releases, as well as by conducting interviews with the actors involved in policy making. If the analysis suggests that different types of argument-based learning are important for understanding agreement on different issues, a part of the analysis would in some cases moreover be to control for rhetorical action (Riddervold 2010; Sjursen 2006). That is, for the possibility that 'in reality', actor-independent arguments did not impact on actors' behaviour, but were used rhetorically or instrumentally only, in line with what one would expect following rational choice based perspectives (Schimmelfennig 2003). Typical ways of doing this would be to collect data from different sources and in particular to look for consistency – across different data sources, between the arguments of different actors, and not least between words and deeds, between what is said and what is done (Checkel 2006).

[13] For more on how to operationalise this, see Riddervold (2011b).

Table 9.1: Bargaining and deliberation, ideal characteristics

	Type of decision-making process	
Decision-making mode	**Type of communication**	**Type of arguments used**
Bargaining	Weak communication	Actor-relative arguments
Deliberation/arguing	Strong communication	Actor-indepentent arguments

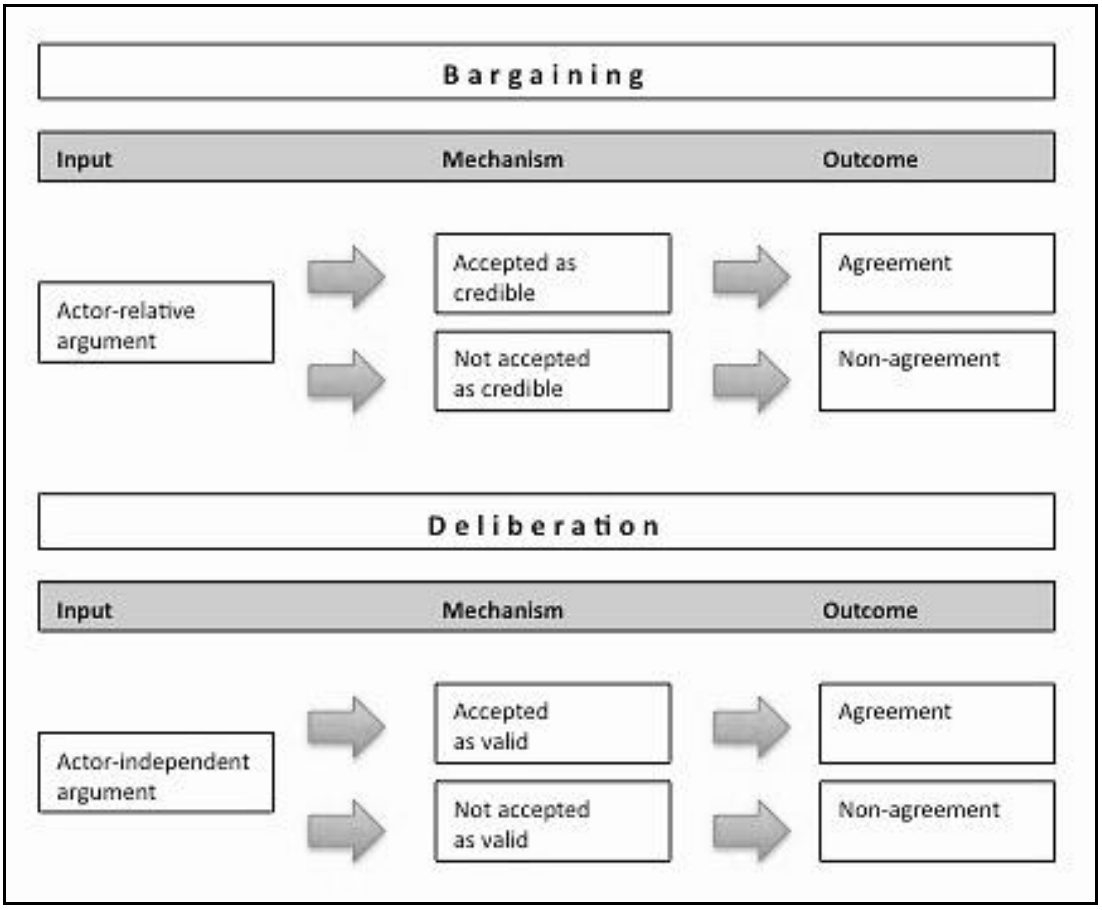

Figure 9.1: Bargaining and deliberation: Communicative micro-mechanisms

Concluding remarks

In this chapter I have presented an analytical approach suggesting how to study the effects of deliberation on decision-making outcomes empirically.

By focusing on arguments as units of analysis as suggested in this chapter, the empirical level of analysis is put on the actor-level. Others may however argue that a possible weakness of such an

approach is that the researcher risks underestimating the impact of contextual or structural factors on EU decision-making outcomes. As we know from previous studies, common institutions, different types of institutional arrangements, and processes like socialisation are key to understand EU integration.[14]

However, to argue that it may be helpful to empirically focus on actors and their arguments does not exclude the possibility of also studying the impact of different structural or contextual factors such as for instance power relations – which are often emphasised by neorealist scholars (Morgenthau 1993: Waltz 2000) – or of norms or institutional frameworks as often emphasised by different more constructivist or institutionalist scholars (Checkel 2006; Tonra and Christensen 2004, Olsen 2007; Parsons 2007; Risse 2000). To the contrary, one of the main advantages of applying communicative action theory in empirical studies of international decision-making is as argued in this chapter precisely that it allows us to study the putative impact of many different variables, including contextual variables such as common institutions, norms or relative powers. Structural factors such as international power structures may for instance limit or increase the possible behavioural choices at the actors' disposal or the extent to which threats and promises are considered credible. Yet other contextual factors, like institutional settings or particular norms or rules, may increase or limit the likelihood of either deliberation or bargaining, and they may affect the likelihood that any of the presented arguments are considered credible or valid so that they also have an effect on the outcomes. However, in many cases, to understand a particular decision-making process and its outcomes, it is also necessary to study the micro-mechanisms by which particular arguments influence positions and thus have an action-coordinating effect. This chapter has discussed two ways of approaching this empirically.

[14] See amongst others Egeberg (2006); Elgström and Smith (2006); Olsen (2007); Tonra and Christiansen (2004).

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Chapter 10

The micro–macro link in deliberative polling Science or politics?

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Introduction

This chapter discusses how deliberative experiments taking place in a transnational and pluri-lingual setting can claim to generate democratic legitimacy. Such experiments, like citizens' assemblies, citizens' juries, town meetings, and deliberative polls provide a microcosmic snapshot of deliberative practice between lay citizens (Dryzek 2010; Fung 2003). As such, they often rest on an assumption that the mini-public can have a tangible and lasting impact on mass politics.

The question of how to link the 'micro' of mini-publics with the 'macro' of the larger political system can be examined by focusing on deliberative 'successes' in terms of a) factual information that is acquired about the issue and that informs political decision makers about the political preferences of the citizens (Goodin and Dryzek 2006); b) the quality of the deliberative process as such that is justified in terms of equal participation and informed opinion-making (Fishkin 2009); and c) the trust generating potential of deliberative mini-publics that inform wider public debates and guide political judgments of the broader citizenry (Warren 2009). The claim is, in short, that representation of deliberative mini-publics can be anticipatory, gyroscopic and surrogate (Mansbridge 2003). As *information*

proxies and *anticipatory publics* they signal potential problems and their solutions to decision-making bodies. As *gyroscopes*, they 'look within' and make use of their own experience to derive conceptions of public interest (Dovi 2011). Finally, as *trustees*, they appeal to the broader constituency and suggest potential concerns or problems of shared relevance (Mackenzie and Warren 2012).

In deliberative polling experiments, mini-publics are mainly conceived as 'gyroscopes'. The underlying assumption is that a statistically representative sample of the relevant population of a mini-public – the claim of validity – is by *itself* sufficient for acknowledging its potential macro consequences. Taking issue with this view, we argue in this chapter that the democratic legitimacy of the collective will expressed by randomly selected citizens also needs to feed back into procedures of public authorization and accountability. The latter refers to the validation of the legitimacy claims raised by deliberative mini-publics through publicity, contestation and debates that mediate between informed opinion-making of selected participants and the collective will of all.

From micro to macro in deliberative polls: internal validity and democratic legitimacy

Deliberative experiments, like citizens' assemblies, citizens' juries, town meetings, and deliberative polls are part of a practical turn in deliberative democratic research in recent years (Dryzek 2010). Experiments of so called mini-publics provide a 'microcosmic' snapshot of deliberative practice between lay citizens. As such, they often rest on an assumption that the mini-public can have a tangible and lasting impact on mass politics (Fishkin 2009). This is further grounded on the idea that the political equality between citizens and thereby the public relevance of the bounded deliberative event is secured through some form of random sampling from the relevant population (Fishkin 2009).

In this chapter, we take issue with the idea that a statistically representative sample of the relevant population of a mini-public is by *itself* sufficient for acknowledging its potential macro consequences. Based on an analysis of the results and organization of EuroPolis, a transnational deliberative poll on the EU level, we argue that random sampling can be considered as a sufficient condition for claiming that the internal (scientific) validity of democratic

experiment but not for defending the representativeness of the 'mini-public' as 'standing for' or 'speaking in the name of' the political community of democracy. As a general contribution to the debate on citizen's deliberation and participatory democracy that is promoted in this volume, we thus propose to distinguish more neatly between the internal validity of bounded deliberative setting and the democratic legitimacy of public debate and decision-making.

In the next part we start out by highlighting the core features of the EuroPolis deliberative pool. We then proceed to assess the equality of participation in EuroPolis. In the remainder of the analytical part we critically assess the transmission of the results from the validated private dialogue of EuroPolis to the wider European public. We utilise the experience and organisation of deliberative polling among European citizens to critically assess the representative and public status of citizens' deliberations in a transnational setting. Concretely, we argue that in plural and multicultural societies, the claim for democratic legitimacy of the citizens' voice is not only insufficiently grounded in the statistical representativeness of the sample but also needs to be generated through public authorisation and accountability. The latter refers to the condition of publicity, contestations and debates that cannot be controlled by the deliberative setting but can only be its contingent outcome.

The case: the EuroPolis deliberative poll

EuroPolis, a transnational deliberative poll that took place one week ahead of the 2009 European Parliamentary elections[1] is an ideal case for analysing the link between the internal validity and democratic legitimacy of deliberative experiments because it introduced variation in terms of constituency and group plurality under the controlled conditions of a scientific experiment.[2] The democratic constituency of EU politics is clearly less settled and more contested than in local or national settings. From this perspective, a transnational mini-public provides a strong test for the internal validity of experiments

[1] EuroPolis was a project co-funded by the 7th Framework Programme of the European Commission, the King Baudoin Foundation, the Robert Bosch Stiftung, Compagnia di San Paolo, and the Open Society Institute. For an overview see <http://cdd.stanford.edu/polls/eu> [last accessed 25 September 2013].

[2] Deliberative Polling® is a trade mark of James S. Fishkin. For a further specification of research design and method, see Fishkin and Luskin 2005.

in lay-citizen deliberation. EuroPolis is further an interesting critical case from the point of view of EU studies. In the aftermath of the Maastricht Treaty and the debate on the democratic deficit the possibilities of activating European citizens as members of a constituency of European democracy has frequently been addressed. The citizens participating in the bounded deliberative exercise of EuroPolis might have experienced a sense of 'personal Europeanization'. From a legitimacy point of view the question would be: So what? This chapter addresses exactly the vexing issue of the extent to which face-to-face deliberation can be transformed to salient issues for a general European public. We address this issue by focusing on three interrelated issues. First, we provide a first take on specifying scope conditions for deliberation, with direct reference to the lessons from the polling experiment. Second, we reflect on the methodological problems associated with this undertaking, focusing especially on the link between random sampling and democratic constituency. Third, we attempt to discern ways to move from citizen deliberation to will formation and from specific to general legitimacy in the transnational setting of EU politics.

EuroPolis was set up to conduct a transnational deliberative experiment that engaged citizens from all EU Member States in debates on issues of shared concern. The cross national citizen dialogue specifically addressed climate change and immigration; two high profile issues of recent political debates in Europe. The participants were divided into several groups consisting of two or more languages.[3] EuroPolis' main innovation was, therefore, to probe the conditions for deliberation among citizens in a transnational and multilingual setting through an empirical and comparative experiment. By facilitating and testing the political outcomes of deliberative practice, EuroPolis allowed assessment of opinion transformation that is likely to occur as a result of raising political awareness of randomly selected citizens and engaging them in thoughtful argumentation and dialogue. In addition to these issues of practice with regard to the constituency of deliberation and the group dynamics, by addressing questions regarding multilevel decision-making and the division of competences

[3] Discussions were led by moderators who had the task to raise certain predetermined issues for debate as well as to manage the workings of the group. In addition, there was a host of translators involved with each group due to their plurilingual character.

between national and EU institutions, EuroPolis also crucially reflected the issue of democratic legitimacy and citizens' involvement in European politics.

Transnational deliberative polling: testing the link between deliberation and democratic legitimacy

There has been a long discussion on how to assess the discursive quality of deliberative mini-publics and the validity claims generated by them (Grönlund et al. 2010; Steiner et al. 2004). The main aspects of discursive quality within a deliberative mini-public are based on the following assumptions: discussions should a) pay respect to each participant and offer a fair chance to be heard (*equality* condition); and b) be ruled by the informational and the substantive value of the arguments (*epistemic* condition). We argue that these two criteria relate to what can be called the internal validity of the deliberative setting, but are not sufficient to generate democratic legitimacy.

From the outset, political equality is defined as 'equal consideration of everyone's preferences', where 'everyone' refers to some relevant population or *demos*, and 'equal consideration' means a process of equal counting so that everyone has the same 'voting power' (Fishkin and Luskin 2005: 285). In turn, 'deliberation' refers to procedures of 'weighing' competing considerations through discussion that is informed, balanced, conscientious, substantive and comprehensive (ibid.).

In EuroPolis, the political equality condition was handled through random sampling and a claim to statistical representativeness. Through this approach, the organisers of the event could claim to have created a 'scientifically selected European microcosm,'[4] that revealed how Europeans would think, had they a better opportunity to be engaged in reasoned opinion and will-formation. There is an inherent link here between the selection of participants to the micro setting of deliberative polling and democratic legitimacy. Statistical (or descriptive) representation through scientifically validated random sampling is seen as one crucial variable for the generation of political legitimacy. It assures that the selected sample mirrors the

[4] See James Fishkin in an interview at: <http://www.opendemocracy.net/blog/dliberation/this_experiment_revealed_euopres_public_sphere_a_conversation_with_james_fishkin> [last accessed 25 September 2013].

larger constituency in socio-demographic terms like age, gender, and class background. In this view, the representative body reproduces the 'higher being' of democratic politics and therefore can legitimately claim to speak for it.[5]

In order to turn a private, experimental and 'internal' deliberative setting focused on statistical equality and knowledge formation into public deliberation with the potential to claim democratic legitimacy, two additional requirements need to be met. We argue that deliberative bodies in order to generate democratic legitimacy need: c) to represent the informed opinions of the general public (*representativity* condition); and d) to address and to potentially include all the citizens that collective decisions apply to (*publicity* condition).

How can deliberative polling in a transnational setting simultaneously maximise the values of deliberation and political equality and spell out procedural guarantees for representation and publicity? In other words: how can the 'micro' of citizen deliberation be linked to the 'macro' of democratic politics and public legitimacy? We answer this question related to the *politics* of deliberative polling in the next section, focusing on the crucial mechanisms of representativity and publicity.

Representativity

In terms of representativity of the selected participants, the available data[6] from EuroPolis point in somewhat different directions. On basic background variables like gender, age, and education, EuroPolis participants deviated from non-participants only to a little extent. In terms of age groups there was virtual parity between participants and the control group. For gender there was a slight over-representation of male citizens taking part in the deliberative poll. There were also a slightly higher percentage of students among the participants, and a somewhat higher level of education.[7]

In terms of class, the sample of EuroPolis was less representative. There was a strong over-representation of so called 'upper-middle class' (38.17 per cent against 24.88 per cent in the control group) and

[5] On the notion of descriptive representation, see Pollak et al. (2009: 11).

[6] For data from the questionnaires, see: <http://cdd.stanford.edu/polls/eu/> [last accessed 25 September 2013].

[7] The 'level of education' was measured in terms of 'age of completion'.

equally strong under-representation of participants from a 'working class' background (23.96 per cent against 38.28 per cent in the control group). This aspect is crucial for our assessment of the discursive quality and democratic credentials of EuroPolis, not the least as it is more difficult to pinpoint the popular constituency of EU democracy than in a national setting. Several studies on popular opinion have indeed highlighted a class and educational divide regarding support for the EU and European integration (Diez Medrano 2003; Eichenberg and Dalton 2007; Gabel 1998).

EuroPolis was assembled to address substantive policy issues and citizens' views on European institutions and the distribution of competences between the EU and national levels. In light of this, the deviation in terms of class background may have contributed to biases in the participants' responses. Hence, while EuroPolis can clearly document isolated opinion change due to participation in the deliberative event itself, it is less clear that we can draw sound conclusions regarding the EU polity dimension. In addition, EuroPolis participants also to a much higher degree responded that they intended to vote (82.27 per cent intended to vote, 9.8 per cent not to vote) in the EP elections than the control group (65.18 per cent intended to vote, 20.18 per cent not to vote). We can only speculate on the reasons for this difference, but it is not unlikely that this may be an attribute of relatively higher education and the specific class belonging of participants. As such, it seems that self-selection has created a certain bias in EuroPolis towards individuals that on average are more politically engaged; both in terms of choosing to participate in a political event like the deliberative poll and in terms of electoral participation. As a consequence one should be cautious with accepting a seamless link between the scientifically derived authority of deliberative polling and its democratic status in a public sense.

The distribution across nationalities was clearly more representative than in terms of class. There were no major deviations from the control group, except for a slight under-representation of most of the larger member states. Nationality is important for the representativity of the EuroPolis deliberative poll as the idea of its transnational character was to reflect the diversity of the democratic constituency of the EU. Here, EuroPolis succeeded in giving the different member states more or less the same standing in relative terms. The question remains, however, whether this effort has contributed to a solution

regarding the establishment of a transnational constituency for democratic will formation in the EU. Does upholding the 'unity in diversity'-slogan of the EU suffice in order for the representativity condition to having been met? Or are additional criteria needed in order to constitute transnational deliberation in the EU setting?

The claim for scientific authority of deliberative polling is, however, not simply grounded in the statistical representativeness of actors. Random sampling is rather used as a method to arrive at public judgment. As such, deliberative pollsters link the method directly to the wider democratic status of the experiment. Concretely, the claim is that the experiment has a revelatory function related to what would be the considered judgment of European citizens in European elections. In this view the deliberative microcosm 'represents' public judgment, not actors. The crucial claim of proponents of deliberative polling is that the results of such experiments in lay citizen deliberation reflect what people speak, not what people are (Fishkin 2009). It can be questioned, however, whether one on the basis of deliberative polling can claim that the citizens assembled in the poll *represent* the people of Europe as a well-established democratic constituency. Although the polling experiment relates in a number of ways to the context of European Parliamentary Elections, its participants do not represent the European electorate but rather deviate from it in a number of significant ways. As such, it can be argued that they constitute an 'alternative public', which, in contrast to the actual choices by the electorate, arrives at collectively expressed positions on substantial policy issues, on the EU polity and on European political parties. Most importantly, these positions on European integration are not pre-given but shaped through considered deliberations. They thus take the shape of public opinion and not of individual attitudes (as, for instance, measured by Eurobarometer). It has therefore been argued that the opinions expressed and the choices made by citizens after deliberation have a higher legitimacy than the actual voting results (Fishkin 2009: 137).

The idea of a seamless link between the micro of deliberative polling and the macro of deliberative democracy should by now be clear. In the logic of deliberative polling, the microcosm of European citizens is linked to political representation not simply in terms of actors that constitute it. Random sampling of citizens is rather seen as a scientific guarantee to 'represent' the informed opinion of European citizens.

Through careful experimental design, the deliberative poll is introduced as a method to combine moral and expert judgment and it is only this combination, which grounds the claim for scientific authority regarding the representative status of the experiment. Democratic legitimacy in terms of inclusion could thus be approached by designing the deliberative poll in such a way so as to ensure that every European citizen had an equal chance to participate and that the sample represented the whole population of Europe in a statistically significant way (see e.g. Fishkin and Luskin 2005: 287).

Through this combined scientific and democratic programme, democratic legitimacy in terms of epistemic value of deliberation could be achieved through providing unbiased information to the participants and scientific monitoring of the event. As is customary for deliberative polls, in the case of EuroPolis, balanced briefing materials were used to pre structure the discussions. Group discussions of the event were steered by trained moderators who encouraged the plurality of voices and opinions. The moderators also ensured that all major proposals and counterproposals were addressed. Through this approach, the moderators thus facilitated opinion change and convergence. In other words, the deliberative poll is structured so as to strengthen deliberative ideals of equality and non-domination.

Opinion formation (and transformation) was further facilitated by experts and politicians who responded to questions by the participants. Finally, deliberative polling also generally aims at pre- and post-event publicity to spread the results and the opinions generated during the event among the population at large and to discuss its validity. Through publicity, the deliberative poll is meant to offer a mirror for citizens. By 'looking in the mirror, citizens consider themselves as ideal citizens. Moreover, this mirror image serves the important role of indicating the policy choices of an informed citizenry to the politicians. Media broadcasts are therefore seen as a 'helpful adjunct to the design – a way of motivating both the random sample and the policy experts and policy makers to attend, of educating the broader public about the issues, and, perhaps, of nudging public opinion in the direction of the results' (Fishkin and Luskin 2006: 184).

While deliberative polling may be carefully designed scientifically speaking, it is important to keep in mind that that statistical indicators are not innocent, i.e. legitimate per se, but need to be justified. Validity in a scientific sense does not at the outset create a 'perfectly' representative 'mini-public'. There are also many possible reasons for groups (or particular members of the groups) to deviate from equal representation of all as guaranteed by random sampling. Deliberative polling rests on the idea of coherence between population and the sample of citizens that take part in the experiment. This claim to representativity overlooks the fact that scaled systems of representation are typical for federal systems, in which group rights or territorial representations play a more important role than the equal representation of individual citizens. Inequality in representation is, then, not necessarily understood as unjust or undemocratic. Deviations from the ideal random distribution of citizens are also frequently applied in representative democracy, for instance through minority rights or quotas for women. In the EU, a multilevel system of political representation through experts, stakeholders, national and European parliaments, governments of the member states and the EU bureaucracy has developed, which is based on a fragile balancing of citizens and group rights as well as social, sectorial and territorial interests and which cannot easily be subjected to a regime of unitary representation (Benz 2003; Crum and Fossum 2009). The upshot of this is that one cannot extrapolate democratic qualities from the bare bones of scientific methods alone.

We argue that democratic politics is more than the sum of its parts, which in the context of deliberative polling are the randomly selected participants that take part in the deliberative experiment. This links up with arguments regarding the constitution of democratic constituencies and practices of representation in modern politics. In this regard, one important argument holds that the forum of citizens that is selected by random representative sampling is not legitimate *per se*, but needs to be authorised by the broader constituency (Brown 2006). Authorisation comprises several components: the selecting agents, the selection procedure and the results. Not only the participants of public deliberation must be recognised as legitimate speakers, also the selection agents (in this case the scientists) and the deliberative setting must be recognised as appropriate by a broader constituency (Rehfeld 2006: 7). In classical representative theory authorisation usually takes place through elections. Participants of

citizen forums that stand for public deliberation, could, in principle, also be elected but this would open a selective process that 'distinguishes' elected representatives from the lay public.

The 'distinctiveness' of elective representation is, however, exactly what the method of random sampling is meant to avoid. It is, therefore, usually defended not by an explicit consent of the constituency but as a universally valid procedure authorised by science. The micro-macro link is, then, not understood as contingent on the mediation of small scale deliberation to the wider sphere of democratic politics. Indeed, random sampling is not only seen as the more accurate procedure to represent 'lay publics', it also further helps to *depoliticise* the setting, does not create majorities and minorities and thus guarantees high degrees of acceptance of the citizens. In the view of proponents of deliberative polling, random sampling also has the additional advantage that it is not limited by social scale: 'It does not make any appreciable statistical difference whether the same size sample is representing a town, a city, a small nation, or the entire European Union' (Fishkin 2009: 96). The claim here is that the randomly sampled citizens have a type of lay authority, they are legitimate precisely because they are not experts or persons distinguished by the preference vote of their fellow citizens (ibid.: 98).

Although they are selected through procedures of random sampling, participants in deliberative polls are not separated from political representation. Moving beyond random sampling as an alternative mechanism of selections to elections[8], participants in the deliberative experiment are encouraged to take on the role as representatives of the larger citizenry. In this way, political representation and accountability comes back in through what Mansbridge (2003) calls anticipatory representation. Accountability in citizens' forums is not meant in the sense that single participants are formally hold accountable for their opinion but in the sense of 'giving an account' to the broader public and to the scientists that accompany the event (Brown 2006: 210). The onus is rather on 'acceptability'. The participant must argue in a way that is acceptable to the other participants or, in the case of conflict within the group, position themselves and seek to formulate

[8] Selection by lot is not unprecedented in the history of democracy, and indeed was the preferred mode of Athenian democracy to select representatives from the body of citizens (Manin 1997).

positions agreeable to others. Experts or likeminded politicians, for instance, can be used as a yardstick to measure the representativeness of the opinions expressed by the participants. This requirement of acceptability is added to by the requirement of justification when moving from the micro setting of the experiment to the macro politics of public deliberation. If sufficient publicity of the deliberative polling event is guaranteed, participants of deliberation also need to contest for the recognition as representatives through *public* justifications that can be accessed and weighed by the broader audience. In public deliberations, participants weight their arguments by anticipating possible acceptance of a broader public. The publicity condition is thus crucial to defend the democratic legitimacy of deliberative polling in relation to political equality and representativity of the opinion expressed.

Publicity

Establishing a tentative European 'public' over a weekend in Brussels can, as we have seen, generate lively debate, respectful dialogue, reasoned deliberation, and opinion change among the participants. Yet, even if the validity of the scientific design of deliberative polling is accepted, we argue that some doubts remain with regard to the normative conclusion about the representative status of the polling experiment. We argue that the transnational setting has affected the conditions for meeting two central criteria of *public* deliberation. First, the criterion that the general validity of arguments and opinions has to be defended; and second, that political equality has to be justified as the inclusion of all potentially affected citizens in public will formation. In a public sense, these criteria can only be met when the mirror that is created through statistical representativeness also reflects back. Without the creation of public resonances within the wider audience of citizens that 'reflect' about the validity of the propositions made in the specific mini-public, the democratic status of the experiment remains in doubt.

In this light, we argue that equating the scientifically derived internal validity of the democratic experiment with democratic legitimacy can lead to serious misreading of the status of deliberative polling in relation to democracy. If the assumption that deliberative polling arrives at a more accurate and scientifically grounded representation of public judgment is taken further in political terms, one is easily led to the supposition that they should also replace general elections as

the more legitimate expression of the collective will of the people. Moreover, this could lead to arguments for de-politicisation on scientific grounds. As a consequence of the claim of scientific authority it is possible to conceive the representative judgment of the microcosm as a substitute of the judgment of the whole. We could then perfectly imagine deliberative polling as a scientific tool to arrive at public judgment while the whole body of citizens no longer need to bother to deliberate at all (Brown 2006: 216), thus leading to the potential abandonment of deliberative democracy from mass democracy (Chambers 2009).

Against this purported 'scientification' of democratic legitimacy one can argue that the legitimacy of the public judgment expressed through deliberative polling is only *insufficiently* grounded in statistical representation. To become legitimate it needs to be recognised through a broader process of public will formation, bringing with it the problem of how the 'representative opinion' of the microcosm of the experiment can be amplified within the broader public sphere. If citizens' deliberation 'represents' a combination of the best epistemic and moral judgment available, they need to be mediated to and conceived as a contribution to ongoing societal deliberations. This continuity between citizens' deliberations in the experiment and societal deliberations is arguably more difficult to achieve in a European setting than in local or national politics. One way to approach this aim consists in selecting only the most salient topics during election campaigns. The planners of deliberative polling will however face difficulties to prognosticate what will become topical in future elections and, in addition, have to pay tribute to the varieties of campaigning styles and contents between the member states.

In EuroPolis, the 'representativeness' of issue selection was safeguarded by three criteria: a) issues had to be object to EU legislation and shared authority between the EU and the member states; b) issues had to be addressed by party manifestos and had to be controversially discussed along a left–right cleavage with the possibility to build cross national alliances and to arrive at common European problem perceptions and solutions; c) issues had to raise public attention and concern in all member states over a consistent period of time (as documented by Eurobarometer). The two issues selected, immigration and climate change, guarantee high degrees of salience and contention in all member states and can build on a common

history of debate that forms the knowledge of European citizens. Although they have not been hot campaigning topics during 2009 election campaigns, both topics were regularly raised in public and media debates and became the object of partisan contestation.

EuroPolis clearly had ample opportunity to address this *public* aspect of deliberation. The event was purposely situated just before the 2009 European parliamentary elections in order to enhance its public relevance. This would prove not to have significant effects in terms of actual media coverage and the spreading of results to the wider public. In disseminating its results and informed opinions at the level of mass political communication, the event encountered a couple of hurdles that need to be discussed in relation to the specifics of the transnational setting. The first problem relates to the character of EP elections as 'second order elections' (Marsh 1998; Reif and Schmitt 1980). The EuroPolis experiment evoked an imaginary EU constituency, for which EP elections would purportedly take a new meaning as *first* order elections. This is contrasted by the debates held at the level of mass politics in Europe with low degrees of contestation, a main focus on national topics and actors, and finally the spread of Euroscepticism in interpreting the relevance of the EU.[9] In this light, EuroPolis created an idealised contrast image of a European public sphere, which, following the dominant logics of mass political communication, cannot simply be amplified by national mass media. The topics addressed by the deliberative poll were obviously of transnational political relevance, but could not, it seems, be easily reconnected to the non-substantial and personalised debates that often dominate national debates.

The second problem relates to the fact that EP campaigning is generally not focused around policy issues and solutions but around politics in terms of party competition and the images of candidates. Moreover, party cleavages were made less salient in the topics of debate chosen for the polling experiment, which rather required the agreement on global solutions and the expression of consensus that 'something needs to be done'. This is exemplified by one crucial component of the experiment which consisted precisely in cutting the

[9] This is based on findings from a parallel analysis of online media debates at the level of mass communication of the 2009 EP election campaigns in 12 member states (Michailidou and Trenz 2010).

participants off from the 'imperfect' world of political communication at the level of mass media communication. By blending out parallel lines of conflict, the likelihood to express consensus on single issues is enhanced. At the same time, it can be argued that the issues selected laid the ground for 'soft deliberation', in which self-interests are not part of the process of exploration and clarification.[10] Immigration and climate change were discussed as topics that required collective choices and that invited the single participants to speak as a 'we' in defence of collective goods and not of personal interests.[11] It does then come less as a surprise that the discussion of green issues turns participants 'greener' with a tendency to change voting preferences for Green parties.[12]

The point to be made here is not to question the validity of the experimental design as such, but rather to emphasise the discrepancy between an idealised deliberative public (micro-level) and the structural weaknesses and fragmentation of the general public at the level of mass political communication (macro-level). This fragmented character of a European public and media sphere constituted the main hurdle for publicising the event and claiming general legitimacy. Symptomatically, the transnational deliberative poll did not receive substantial public and media attention. On the two press conferences held before and after the event, the Brussels based media correspondents were difficult to mobilise.

Moreover, EU correspondents clearly have limited impact on EP

[10] See Mansbridge et al. (2010) for a general critique of blending off self-interest from deliberation.

[11] Consider the framing of information material around two competing collective good problems (economic growth versus environmental sustainability and free movement versus security respectively). Also in responding to the questionnaire, the participants are not asked what is at stake for them but how they think the topic affects their community of belonging: 'Some people think that immigrants have a lot to offer to [COUNTRY]'s cultural life. Suppose these people are at one end of a 1–7 scale, at point 1. Other people think that immigrants threaten the [NATIONALITY] culture.' 'Some people think we should do everything possible to combat climate change, even if that hurts the economy. Suppose these people are at one end of a 1-to-7 scale, at point 1. Other people think that we should do everything possible to maximize economic growth, even if that hurts efforts to combat climate change'.

[12] For data on voting intentions before and after the deliberative poll, see <http://cdd.stanford.edu/polls/eu/> under the heading 'Results' [last accessed 25 September 2013].

election campaigning, which is mainly reported by domestically based journalists. This latter group was even more difficult to reach, since no systematic media contacts could be built at member states level (e.g. through decentralised press conferences or press releases in several languages). The upshot of this in theoretical terms is that while the internal validity of bounded deliberative settings can more or less be controlled *ex ante* through specified procedures and statistical sampling of participants, the conditions for the *ex post* transmission of its results at the level of mass political communication will remain contingent. The scientific validation of representativeness in the micro setting of deliberative polling does not translate automatically into democratic legitimacy in macro political terms. In other words, one should not confound the validity of the experiment with democratic legitimacy. The latter is generated through the *public* deliberation and testing of the generalised validity and representativeness of the results of the polling experiment. For that objective to achieved, publicity needs to be created through the intermediation from the 'strong public' of 348 randomly selected citizens to the general public of some 500 million Europeans.

In this chapter, we have thus raised some serious doubts whether the imposition of scientific authority can really justify the gap between the deliberative opinion of the microcosm and non-deliberative opinion of the mass publics. Social scientific instruments can only safeguard the internal validity but not the public legitimacy of deliberative polling. Scientific authority alone is not sufficient to generalise the validity of the results of the experiment and defend them as publicly legitimate. The problem is that statistical representativeness might well be universally applicable but nevertheless be contested in practice. Ruling out such contestations as 'undesired' or 'inappropriate' elements of public deliberations does certainly not resolve the issue.

It also makes a significant practical difference whether the microcosm of citizens is recruited from a relatively homogeneous group of local citizens or whether it shall represent the many populations of Europe. One argument frequently brought forward in the debate on the applicability of European deliberative democracy is precisely that the underlying entity is too heterogeneous and dispersed. The people of Europe cannot be properly identified and described by socio-structural indicators that could form the basis of statistical analysis.

Yet, both random selection and authorisation rely on a pre-existing constituency. The dynamics of deliberation in the transnational setting are however rather about the constitution of constituencies. The people of a European democracy is invented, imagined and mobilised as part of the ongoing deliberation process about the future shape of democracy in Europe (Fossum and Trenz 2006). How can deliberative polling deal with such fundamental contestations about the constitution of constituencies? Such contestations will ultimately also challenge the 'scientific choices' taken to demarcate the underlying constituency of deliberative democracy in Europe. To define such resistances against the universal validity of science by default as 'illegitimate' and thus to prevent the scientific design of the setting from being contested by the participants or by a third party does not seem practicable.

Conclusion

In this chapter we have argued against the 'scientification' of democratic deliberation and its emphasis on the epistemic value of argumentative exchanges and reason-giving among formally equal participants. Democratic deliberation in bounded and experimental settings is not to be equated with deliberative democracy (Chambers 2009). The latter is to be measured not only in the epistemic quality of deliberation in terms of knowledge formation, respect and informed opinion among the participants but in the realisation of political equality, which needs to be justified in broader terms as the inclusion of all potentially affected citizens in political will formation. In short, we argue that *science* cannot substitute *politics*.

To distinguish more neatly between the internal or *scientific* validity of deliberations and the generalised validity of legitimacy claims raised *politically* in the public sphere, we have proposed that equal participation and informed opinion-making as general indicators for the measurement of discursive quality of deliberative mini-publics need to be discussed in relation to the generalised claims of deliberating citizens to represent public judgment and/or the broader citizenry (the representation condition) and to expose their arguments to public discourse (the publicity condition).

The experience and results from the EuroPolis deliberative poll with regard to approaching these four criteria of democratic legitimacy were remarkable. Lay citizens from all member states and from all

strata of society were engaged in a process of collective opinion and will formation, increased their knowledge and attitudes on specific policy issues and on the EU in general and were more likely to vote in the subsequent European elections. This was perhaps all the more surprising as EuroPolis took place under pluri-lingual and multicultural conditions. These results from the bounded deliberative venue of EuroPolis could, then, be seen as a possible panacea to the problem of democratic legitimacy of the EU. To engage ordinary citizens through deliberative experiments could be one answer to the conundrum of public discontent with EU policies and institutions. This can be argued to be especially salient in a time when EU politics are more politicized than before, yet still also more contested. EuroPolis gave citizens the opportunity to engage in real debate on actual political issues. Previously, the EU institutions have sought to mobilize citizens through media campaigns and public relations exercises. The platitude of such campaigns clearly find an antidote in deliberative polling which offers opportunities to voice opinion, engage in respectful dialogue and to raise awareness of decision-making and democratic legitimacy. In short, EuroPolis has provided a microcosmic European 'public'. However, as we have argued in this chapter, the democratic legitimacy of deliberation is ultimately dependent on the public transmission of its bounded opinion formation to have an impact on the will-formation of the general public.

Our analysis of the EuroPolis deliberative poll based on group observation and questionnaire data has highlighted that there is no straightforward process from group deliberation to public deliberation. There were relatively high hopes for the media impact of the event and thus widespread dissemination of its purpose, design, and results. The news value of the deliberative experiment was, however, drowned out by the nationalised debates of the European parliamentary elections. In this sense, EuroPolis – despite its merits in bringing citizens together – was not less 'secretive' than, say, deliberation in the comitology system of the EU. This is important as publicity through mediation from strong publics to general publics is a general condition for the generation of democratic legitimacy (Fraser 1992; Habermas 1996). To clarify these issues deliberative democratic theory needs to relate back to international comparative media analysis, which has highlighted the cultural and system specificity of public deliberation cultures (Esser and Pfetsch 2004; Hallin and Mancini 2004; Wessler 2008).

We have shown in this chapter that despite the promise of facilitating cross cultural deliberation in a pluri-lingual setting, the EuroPolis experiment also exhibited serious limits of mini-publics as solutions to the problems of EU democracy. In particular, the European setting requires us to rethink the conditions for fostering general public debate and claiming democratic legitimacy in response to multiple sectorial and territorial constituencies. As political conflict and dissent with national and EU institutions is on the rise in Europe, it is unlikely that there are 'easy' solutions to the problems of EU democracy. Public spheres remain in many respects nationally oriented, also in debates over supranational politics. Bounded deliberation in settings like EuroPolis informs us about the potential for *facilitated* deliberation between lay citizens. Such experiments are, however, not automatically mediatised and publicised. This is true for 'national' ones, and especially so for the European experiment. Political culture and media are yet to be Europeanised to the extent that an experiment like EuroPolis would not meet additional hurdles in the quest to become disseminated to deliberation in the public. Deliberative mini-publics cannot on their own trigger such transformations and stand, as such, in danger of remaining relevant *only* to participants engaged in micro deliberation without the requisite macro consequences needed for a link to democratic legitimacy. We conclude, therefore, on a cautious note. Democratic reformers should not stare themselves blind at the potential 'cures' that deliberative polling may provide to long-standing issues such as the democratic deficit of the EU. This is especially important to highlight as long as citizens' deliberations are not supported and amplified by a broader communicative infrastructure of the public and media sphere.

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Chapter 11

The European Citizens' Initiative and the activation of EU demoi
The role of knowledge and expertise

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Introduction

The demos, it is argued, is the necessary starting point for democracy. As Robert E. Goodin (2007: 43) notes, it is a logical truth and temporal fact that 'constituting the demos is the first step in constructing a democracy'. However, this necessity has led to the claim that the European Union (EU) cannot be a democracy because it does not have a demos, using whatever definition of the demos the claimant requires to support his or her argument. Varying definitions of the demos have emerged over time; scholars do not always use the term to refer to the same phenomenon, or use several different terms to refer to the same occurrence (Beetham and Lord 1998; Bohman 2007; Goodin 2007; Habermas 2001; Weiler 1995). Most approaches to defining the demos fall into two broad camps: the compositional approach, which considers the demos to be defined by the characteristics of its members, and the performative approach, which considers the demos to be defined by its function for facilitating governance (List and Koenig-Archibugi 2010: 84). Both of these approaches to the demos are, however, too specific and narrow and place too much emphasis on the citizens who constitute the demos, conceiving of it as a natural occurrence that need only be discovered. By defining the demos much more broadly and alongside recent

theories of representation I will argue that in fact a demos is something to be constructed, to be made and not found. In this sense, multiple demoi can be activated in the EU and the European Citizens' Initiative (ECI) has the potential to facilitate this process. Therefore, I deny the claim that the EU cannot be a democracy because it does not have a demos; EU democracy can be based upon multiple demoi that are activated by representatives with significant knowledge and expertise, who are able to use the ECI to pursue their aims.

After challenging the arguments related to the no demos thesis in the first section, I consider the alternative possibility of multiple demoi and argue that the EU should be considered to have, and to significantly benefit from, the existence of multiple demoi on which its democracy can be based. I use a much broader definition of the demos than proponents of the no demos thesis based on that offered by Christian List and Mathias Koenig-Archibugi who suggest that a demos is simply a group of individuals with shared attitudes towards a particular issue, who act in pursuit of their shared attitudes and, importantly, have institutional channels available to them for this purpose. In the third section I propose that the EU's new participatory innovation, the ECI, could provide an important institutional channel for the pursuit of common interests, as is required in the definition of demoi I offer, and as such can facilitate the activation of demoi in the EU. This is in spite of the major criticism that the ECI has been intended primarily for the use of existing Brussels-based civil society organisations (CSOs), non-governmental organisations (NGOs) and other pre-existing lobby groups. In the final section I argue that recent theorising on political representation provides a reason to believe that the use of the ECI process primarily by such pre-existing groups and organisations, with their insider knowledge of the EU's political system and sufficient resources to launch campaigns, need not be considered a bad thing. This is because these so-called experts can, through the claims to representation that they make, assist with the formation and activation of demoi in the EU by calling them into existence.

The 'no demos thesis'

Many scholars agree that the existence of a demos, however defined, is necessary for democracy (Beetham and Lord 1998; Goodin 2007; Weiler 1995; Wendt 1999). This is primarily because only with shared interests, established communication and sense of community can a

minority be expected to accept a majority decision. As Joseph H. H. Weiler notes, 'the authority and legitimacy of a majority to compel a minority exists only within the political boundaries defined by a demos' (Weiler 1995: 222). Where individuals belong to a demos, therefore, the decisions made will be acceptable to them whether or not they as individuals support those particular decisions. Because of the necessity of a demos for democracy, some argue that the EU does not, and cannot, have a singular demos and therefore it cannot be democratic. This is termed the *no demos thesis* (ibid.: 230). In their comprehensive analysis, David Beetham and Christopher Lord (1998: 33) highlight the absence of a collective identity among the people of Europe, a demos, as a key obstacle to the legitimacy of the EU. As Tobias Theiler (2012: 783) argues, 'only a shared sense of belonging to an overarching European communal unit could help Europeans develop the trust and commitments a democratic polity needs'. There are several potential arguments as to why the EU does not have a demos, each depending on a slightly different definition of the concept.

First, and based on a compositional approach to the definition of the demos, the EU has been argued to lack the 'ethno-cultural homogeneity' necessary for collective citizen identification with the EU and hence the formation of an EU demos (Beetham and Lord 1998: 36). The historical experiences of the EU member states are so divergent, it has been claimed, that it would be impossible to foster the feelings of community and shared attitudes that underpin nationhood and provide legitimacy for the outputs of the governments of nation states. Consequently, it is suggested, the nation remains the primary locus of political activity for citizens and the EU cannot be democratically legitimate because the people do not identify with it as they do with their nation states (ibid.: 37). As far as Will Kymlicka is concerned, the choice of citizens to participate in international organisations, such as the EU, is a way of affirming their national identities and national sovereignty rather than any indication of a coming together of individuals from different EU member states to form a collective European people (Kymlicka 1999: 118). Empirical evidence suggests that there is a lack of public identification with the EU, further implying that there is no European demos (Theiler 2012: 784). Ordinary individuals are more inclined to engage with national politics and national frames of reference than with the EU, which is considered by many as too distant and abstract

to engage with (Liebert 2012: 112). The lack of shared culture and history, therefore, is considered an insurmountable obstacle to the realisation of democratic agency amongst individuals from different member states in the EU.

Furthermore, those who argue that the role of the media in forming a demos is fundamental observe that there is little in the way of European media which could assist in the formation of a European demos (Grimm 1995). In particular, the media are responsible, it is suggested, for the evolution of a truly public opinion and a European public discourse, which is required for effective participation in democracy and democratic agency (Grimm 1995: 293–295; Kymlicka 1999: 121). This argument is thus based on a more performative definition of a demos. Linked with the claim that a lack of European media signals the impossibility of a European demos is the argument that there is no common language among all citizens of the EU that could be used for communication through such media, as Dieter Grimm notes: 'Information and participation as basic conditions of democratic existence are mediated through language' (Grimm 1995: 295). There is likely to be more participation in national politics where all citizens can engage in discussions about it, and develop shared attitudes towards it, rather than in European politics where it tends to only be elites who can communicate across linguistic barriers (Kymlicka 1999: 121). Therefore, it has been argued, a lack of shared language indicates a lack of the basic conditions of democratic existence in the EU. Kymlicka, for whom collective deliberation is vital for democracy, takes forward the argument that without a common language, such collective deliberation, and therefore democracy, is implausible (ibid.: 120). Collective deliberation requires, in his view, not only a shared language but a certain level of trust and understanding between individuals, which can also only be achieved where there exists a common identity and common attitudes towards particular issues (ibid.: 119). As Weiler sums up, proponents of the no demos thesis argue that 'long-term peaceful relations with thickening economic and social intercourse should not be confused with the bonds of peoplehood and nationality forged by language, history, ethnicity and all the rest' (Weiler 1995: 229). This lack of 'peoplehood' means that the EU cannot be democratic.

However, these arguments related to lack of a shared identity and shared language have been rejected by several scholars. Jürgen

Habermas (1995: 306), for example, argues that in modern times all nations must be based on something alternative to a shared ethno-cultural history as all societies become more multicultural. He states that 'European identity can in any case mean nothing other than unity in national diversity', highlighting the possibility of democracy at the EU level based on a slightly broader conception of the demos in which the membership criterion does not stipulate a shared ethnicity or culture (ibid.: 307). Weiler similarly notes that there is no reason why a European demos must be defined using the same membership criteria as used to define a national demos (Weiler 1995: 252). Language need not be such a significant barrier to the formation of a demos with shared attitudes towards issues faced by all, nor need the lack of a shared history. Indeed, many European countries went through the same painful periods of history in the 20th century and all now face the same challenges, for example in terms of globalisation, that can provide the basis for feelings of commonality and shared beliefs amongst citizens from different countries (Habermas 2001: 21). As Habermas points out, the EU's Charter of Fundamental Rights explicitly lists the things that all EU citizens have in common, illustrating the point that EU citizens can be united to provide the foundations for EU democracy (ibid.: 21). Indeed, in terms of language, Habermas notes the increasing proficiency in English amongst many European citizens, and the use of English in all EU institutions, which suggests communication across borders may not be as difficult as previously suggested (ibid.: 19). In addition, there are several examples of multilingual and multiethnic nations which prove that cultural diversity and political unity can co-exist side by side, and in which citizens have multiple, layered identities, such as Switzerland, which provide optimism for the potential formation of an EU demos consisting of citizens of many different nationalities uniting in their attitudes towards the issues that concern them all (Theiler 2012: 788). Citizens can therefore be participants in multiple, overlapping demoi (Weale 2007: 238), an argument I develop in the next section.

The 'multiple demoi thesis'

Building on the idea of multiple overlapping identities, recent theorising on publics and demoi has indicated the potential for citizens to belong to multiple demoi and for multiple demoi to co-exist in providing the basis for democracy. That is, one singular, static, EU demos is not required for it to be democratic (Theiler 2012:

794). David Held argues that political communities are not singular or bounded entities but are 'enmeshed and entrenched in complex structures of overlapping forces, relations and movements', and therefore are not necessarily constrained within territorial boundaries (Held 1999: 102). As communication across territorial borders increases and the effects of globalisation become more apparent, citizens are likely to look beyond their nation state for the formation and development of their interests and opinions, and, in time, 'people would come to enjoy multiple citizenships […] they would be citizens of their immediate political communities, and of the wider regional and global networks which impacted upon their lives' (Held 1999: 107). In Europe, then, this relates to all individuals residing in an EU member state being a citizen of that nation state, acting in pursuit of their attitudes in relation to national issues, as well as a citizen of the EU, a status conferred on all EU residents in the Treaty of Maastricht in 1992, and acting in pursuit of their attitudes towards European issues. Weiler discusses a similar idea to Held when describing a 'concentric circles' approach to demoi, that is, individuals simultaneously belonging to overlapping demoi, one inside the next, each involving the same feelings of identification albeit at different intensities (Weiler 1995: 252). These overlapping demoi could also have different sources of identification, that is, membership criteria, with the national one based on organic-cultural feelings of attachment, and the European one based on shared civic values, such as those described in the Charter of Fundamental Rights as identified by Habermas (Habermas 2001: 21; Weiler 1995: 256). In Switzerland, for example, an individual may identify first with their town or city, then with their canton and then with the nation as a whole, such that each may have a series of nested identities. Empirical evidence identified by Beetham and Lord (1998: 47) supports the idea of multiple overlapping identities of EU citizens, with the European identity being the weakest. However, they conclude from this evidence that the overlapping identities can be cumulative and mutually reinforcing, leading to the argument that the EU could play the important role of an umbrella infrastructure for all of the many identities and interests of its citizens. Cumulatively, these identities can provide solidarities between citizens that are all the more acceptable because they are reflexive, changeable and negotiable (ibid.: 45–47).

Such a reflexive and adaptable conception of a demos contributes to the possibility that there need not be a single EU demos on which to

base its democracy. Philip Schlesinger and Deidre Kevin, for example, argue that the notion of a single European public sphere must be replaced by a 'sphere of publics', with political communication and community building taking place not only at the national level, but also above that level within the supranational EU and below the nation state at the subnational level (Schlesinger and Kevin 2000: 206–209). As they point out, 'multi-level governance, and the continuing tensions and divergences between the supranational level and those of the member states and regions, rather require us to think in terms of overlapping spheres of publics' (ibid.: 220). This idea of a sphere of overlapping publics implies the possibility of multiple, overlapping demoi existing in a transnational and multilevel organisation such as the EU.

Perhaps the fiercest advocate of multiple demoi is James Bohman, who argues that multiple, overlapping demoi are not only possible but that belonging to such demoi is also the best possible means to ensuring the protection of fundamental human rights, particularly the republican right to freedom from domination and the expansion of citizens' normative powers (Bohman 2010: 82). A fundamental difference, according to Bohman, between a nation state and the EU is that the EU is an organisation of multiple demoi rather than of a single demos (Bohman 2007: 10). This further supports Schlesinger and Kevin's idea of the EU as a sphere of overlapping publics and is in line with the idea of European 'demoicracy', which is discussed below. The multilevel nature of the EU means that politics, and democracy, must, according to Bohman, be organised in multiple units across the many levels and sites of government. As a consequence, each unit will have its own public, or demos, with shared attitudes related to the relevant issues facing that unit, and these plural demoi will overlap and interact with each other (ibid. 33). The ultimate political community, or demos, in Bohman's eyes is humanity itself, which contains all human beings: humanity is therefore the overarching community of demoi (ibid.: 126). This is similar to List and Koenig-Archibugi's suggestion of the possibility of a global demos, incorporating all the citizens of the world, and of Goodin's 'all affected interests' principle, whereby in theory there are many issues which affect every single individual on Earth and, as such, the membership criterion of 'all affected interests' implies a demos incorporating everyone (Goodin 2007; List and Koenig-Archibugi 2010). As far as Bohman is concerned, multiple,

overlapping demoi, with humanity as the overarching political community in which all other demoi exist, is necessary for the realisation of common liberty and freedom from domination (Bohman 2007: 128–130). This is because overlapping memberships in different demoi means that citizens have increased opportunities and entitlements, and are therefore more likely to have their human rights realised effectively, particularly when humanity itself is invoked as a political community of which all individuals are members (ibid.: 146). Being a member of multiple demoi, at different levels and sites of government, also enables citizens to increase their normative powers to change the terms of democracy: what Bohman calls the democratic minimum (ibid.: 156).

The EU provides the ideal model, Bohman asserts, for pooling national sovereignty whilst simultaneously creating political institutions that are not a direct replica of those in nation states, which presuppose the existence of a single political community (ibid.: 133). Consistent with the no demos thesis, Bohman points out that the EU does not have a single people, but he does not consider this to be an impediment to its democracy as democracy can be based on the plural peoples it organises (ibid.: 140). The existence of multiple demoi ensures the secure realisation of the democratic minimum; viewing the EU as a community of multiple demoi is both feasible and desirable. This idea of multiple demoi underpinning democracy in the EU has also emerged in the recent work of Kalypso Nicolaïdis (2004) and Francis Cheneval and Frank Schimmelfennig (2013: 340), who propose viewing the EU as a 'demoicracy', a new and specific political order, rather than fruitlessly pursuing the application of a nation-state image of democracy and a singular demos to a supra-national polity. Despite criticising Bohman's argument for placing too much emphasis on European deliberation and underspecifying the relationship between this deliberation and decision-making (ibid.: 340), Cheneval and Schimmelfennig argue, in agreement with Bohman, that a key function of multiple demoi consists in the protection of basic rights (ibid.: 337). The multiple demoi arguments of Bohman, Nicolaïdis and Cheneval and Schimmelfennig therefore put to rest the no demos thesis and reassure that the lack of a single political community, whether or not this assumption is correct, is no hindrance to democracy in the EU as it can realistically be based on multiple overlapping political communities, or demoi.

However, whilst the idea of multiple demoi is particularly useful for a supranational organisation such as the EU, a major issue remains in that all of the conceptions of the demos used thus far, whether conceiving of a singular demos or multiple demoi, remain attached to the idea of a demos being something that is centred around the citizens that constitute it. Even Nicolaïdis, in her depiction of a new model of demoicracy for the EU, conceives of the constituent demoi as the 'plurality of component peoples' who are 'organised into states', and argues that 'these states should continue to be at the core of the European construct' (Nicolaïdis 2004: 82–83). This implies a continued attachment to demoi established on a national, ethno-cultural basis. Many of the definitions of the demos used to make the above arguments similarly focus on either the compositional or performative aspects of a demos: either that a demos exists where a group of individuals share a particular characteristic, or where a group of individuals have an identifiable general will, or public opinion. List and Koenig-Archibugi argue, on the contrary, that any conception of a demos must include all of these different approaches and components, not selectively some or others. On this basis, a demos can be defined as 'a collection of individuals, demarcated by the appropriate membership criterion, which is in principle capable of being organised, in a democratic manner, in such a way as to function as a state-like group agent' (List and Koenig-Archibugi 2010: 90). By 'state-like group agent' they mean that the group of individuals has democratic agency. That is, it has attitudes, beliefs and preferences towards the issues it faces and takes action in pursuit of these attitudes, beliefs and preferences, and that institutions are available to it for this purpose (ibid.: 89). This conception of the demos which identifies the components that are required for a demos to exist rather than specifying the contents of the components is sufficiently broad to incorporate the majority of the uses of the term and is consequently significantly more useful than the very specific definitions of the demos that have been used in the past to argue about the existence and possibility of an EU demos or demoi. The temporary and issue-specific capacity of demoi identified using this definition is also important for the potential for multiple, overlapping demoi related to different issues, and on which the EU can base its democracy (ibid.: 82).

In addition to expanding the definition of the demos in its application to the EU, I also propose a move away from the citizen-centred

emphasis on demoi, which assumes that demoi exist almost naturally and we can simply identify them by detecting some kind of characteristic in the members. As I will argue in the penultimate section of this chapter below, shifting the idea of the discovery of demoi to the idea of the activation of demoi, driven by representatives, provides a useful alternative approach to the consideration of demoi and the potential role of the ECI in this process, and the knowledgeable organisations that are likely to make use of it.

The European Citizens' Initiative and the activation of multiple demoi

As List and Koenig-Archibugi's (2010: 89) definition of the demos highlights, it is not only the membership criterion and the ability for democratic agency that is important for the existence of a demos but also that institutional channels be available to the demos through which it has the potential to act in pursuit of its members' shared attitudes, beliefs and preferences. I argue here that the recently launched ECI is a potential institutional channel within the EU through which demoi can act in pursuit of their shared attitudes towards the issues the EU faces, and in fact that the representation that occurs during ECI campaigns can call demoi into being and facilitate their activation. Bohman (2010: 82) argued that a commitment to a greater role for publics, representatives and citizens was lacking in the EU and that, if instituted, this would facilitate the achievement of democratic agency among the demoi at the multiple sites and levels of EU governance. That may well have been the case at the time Bohman was writing. I, however, argue that since the launch of the ECI in April 2012, the EU now has a viable opportunity for the increased participation of citizens, their representatives, and publics; this opportunity has the potential to improve the democratisation of the demoi in the EU and increase the variety of demoi on which EU democracy is based.

The ECI has been hailed as the first formally instituted transnational instrument of participatory democracy in world history. The process invites at least seven citizens of the EU, residing in at least seven member states, to come together to form a Citizens' Committee with the purpose of inviting the European Commission to propose new EU legislation. The proposal must fall into the EU's sphere of competence and must relate to the implementation of the EU's

existing treaties: it must not propose anything that would require their reform. Once the Commission has verified that the proposed initiative is indeed within its remit the initiative becomes open for signatures. Each initiative is given one year in which to collect a minimum of one million signatures, online or on paper, from at least seven member states. Each qualifying member state requires a minimum number of signatories to be counted amongst the seven. When this threshold is reached, and the signatures have been validated by member state governments, the Commission has three months in which to: meet with the Citizens' Committee; arrange a public hearing in the European Parliament related to the initiative, and adopt a formal response setting out what action the Commission intends to take on the suggestions of the initiative, if any (Regulation (EU) No 211/2011). The ECI was introduced in the Treaty of Lisbon in 2007 under Title II with the heading 'Provisions on Democratic Principles' (Treaty of Lisbon 2007), and with a view to increasing the participatory democracy of the EU to supplement its already existing representative democratic credentials. The day before it was launched, European Commission Vice President for Inter-Institutional Relations and Administration, the directorate-general responsible for the ECI, expressed optimism at the potential of the ECI to 'encourage the development of a genuine European "demos", as citizens come together across borders to debate issues that are important to all of them' (European Commission 2012). However, the extent to which the ECI is able to achieve its objectives and the hopes of the European Commission is subject to much debate.

One of the purported advantages of the ECI is, as Elizabeth Monaghan points out, its potential to encourage public debate; even if the Commission is unlikely to act on the initiative there are other benefits to engaging with the process and the related discussions (Monaghan 2012: 292). The promotion of public debate and consequent agenda-setting influence have long been purported benefits of mechanisms of direct and participatory democracy (Barber 1984: 284). Debate will potentially be promoted by the ECI between citizens in different EU member states, fostering the development of common attitudes towards the relevant issues, in line with Vice President Maroš Šefčovič's aspirations. Additionally, if the profile of the campaigns reaches a certain level national media interest could contribute to the formation of a public opinion related to the issues raised in the initiative, thereby fulfilling the requirement of media

interest in EU issues considered a necessity for democracy by Grimm (1995) and Kymlicka (1999). Indeed, the ECI could be exactly the mechanism the EU needs to catalyse the pan-European communication and mobilisation necessary for increased citizen awareness of EU issues and the development of common attitudes towards them, thereby enhancing individual citizens' identification with a European political community (Bouza Garcia and Del Rio Villar 2012: 320). As deliberation begins to occur across territorial boundaries as a consequence of the ECI, its potential for the creation of a European public sphere has not gone un-noted (Bouza Garcia and Del Rio Villar 2012; Monaghan 2012). As Habermas argues, a public sphere is an important step in the emergence of common interests in a European political community and subsequently EU democracy (Habermas 2001: 17). Increasing the number of participants in important discussions related to the EU and European issues and making their role in the discussions more significant than mere consultation will also contribute to the formation of a European public (Bouza Garcia and Del Rio Villar 2012: 313). With the greater opportunity to act on shared interests comes a more compelling sense of a demos. Consequently, as Bohman points out, citizens who participate in transnational communication and interactions across borders are able to self-consciously create public spheres which can then be used as a basis for additional innovative practices to pursue democratic ends such as the establishment of common liberty (Bohman 2010: 83). Therefore, by encouraging communication across member state borders and pan-European mobilisation in pursuit of the required one million signatures, ECI campaigns, particularly if picked up by the media, have significant potential for the formation of European public opinions and common attitudes, public spheres, political communities and demoi centred around the particular issues raised by the ECIs.

However, one particular criticism of the ECI is that it has been introduced primarily for the use of existing CSOs, lobby groups, and others who have the benefit of knowledge of the system, expertise in their area of interest and sufficient resources to successfully pursue a campaign. As Bouza Garcia and Del Rio Villar (2012: 314) point out, 'organised civil society is more likely to be the main user of this mechanism'. Consequently the purported powers that the ECI gives to the ordinary EU citizens are in fact minimal. Monaghan (2012: 294) goes so far as to argue that the EU's very understanding of participation

is elitist as it tends to define participation in terms of NGOs and CSOs, rather than emphasising the participation of ordinary citizens. This draws on the earlier observations of Paul Magnette (2003), who argues that 'citizenship in the European Union is likely to remain an elitist practice, limited to those citizens and groups who benefit from their intellectual and financial resources to try to influence EU politics and policies'. Most reforms designed to increase participation in EU politics, he suggests, are likely to remain the monopoly of already organised groups with limited potential for the participation of ordinary citizens. This charge of elitism is reminiscent of the argument noted above that only political elites are able to communicate effectively across borders, restricting participation in EU matters from the general population (Kymlicka 1999: 121).

This concern about elite participation was reflected in the origins of the ECI, which, according to De Clerck-Sachsse (2012: 300–301), presented a paradox: 'an initiative allowing for greater civic involvement in EU policy making was achieved due to insider lobbying rather than because of wide ranging public mobilisation'. During the Convention on the Future of Europe in 2002 and 2003, CSOs were engaged in the debates with a view to increasing participation in the drafting of the European Constitution. However, the way in which the CSOs involved themselves in the Convention was more in the way of promoting their individual interests through personal connections with decision makers and insider strategies of influence[1] rather than through engaging the wider public in the constitution drafting process. The CSOs' focus faced inwards, on including particular interests in the draft treaty, rather than outwards in terms of mobilising the wider citizenry, raising important issues related to the future of the EU and assisting in the formation of attitudes towards these issues (ibid.: 302). This paints a concerning picture of the potential difficulties that will be faced in attempts to

[1] Insider and outsider strategies of influence refer to the position of lobbying groups in relation to the institutions they seek to influence. Insider groups are typically recognised by the institutions they aim to influence and are frequently consulted by decision makers on the issues that they campaign about. Outsider groups on the other hand tend to work outside the formal rules of the game, either because they are yet to develop the skills necessary to be recognised by decision makers or through conscious choice not to participate in government. The distinction was originally coined by Wyn Grant (1978).

mobilise the wider public in present and future ECI campaigns, as, during the Convention on the Future of Europe, CSOs' 'failure to mobilise a wider public leaves room for doubt about the capacity of an instrument such as the ECI to foster broader public participation and thereby redress concerns about a democratic deficit in EU decision making' (ibid.: 307). In addition to the existing channels of influence and insider expertise that favours established organisations in the ECI process are the financial and organisational burdens associated with launching an initiative. The financial cost has been estimated at €1 million per ECI, which clearly indicates a significant barrier to the involvement of ordinary citizens in the launching of an initiative (Bouza Garcia and Del Rio Villar 2012: 318). There are also the burdens of organisation and coordination, particularly in the pursuit of the one million signatures required for the ECI to be considered by the Commission, that seem to privilege pre-existing organisations with established communication networks across the EU. Indeed it seems no coincidence that the first initiative to meet the minimum signature thresholds, the Right2Water initiative which campaigns for the right to clean water to be recognised by the EU as a human right, has the highest reported funding figure of all currently registered ECIs, at €100,000, and is organised in conjunction with no fewer than nine pre-existing organisations.[2]

However, there are reasons to believe that the role of CSOs or other lobbying groups in the ECI should not be considered a barrier to increased citizen participation in EU politics. Deliberation within existing networks of NGOs, for example, can enhance the EU's democracy by facilitating interaction between the purportedly distant EU institutions and the wider public (Bohman 2007: 154–155). In addition, as Magnette highlights, even if the ECI process is limited to those with knowledge of the system and sufficient resources to launch a campaign, all citizens will likely benefit from the mobilisation of the elite few, particularly in terms of increased or more secure access to fundamental rights, as may become the case with the Right2Water initiative (Magnette 2003). CSOs and NGOs have the potential to act as 'agents', turning social spaces into public spheres and providing the preconditions for effective citizen participation

[2] See the website of WATER is a Human Right! (2012) 'About our Campaign', available at: <http://www.right2water.eu/node/37/view> [last accessed 15 October 2013).

(Bohman 2007: 32; Liebert 2012: 116). Indeed, through Brussels-based organisations reaching out to the wider EU public through their ECI campaigns, awareness of EU politics is likely to increase among the general public and this can be expected to increase popular participation in the ECI process. As Habermas argues, democracy in the EU depends upon a shared political culture, that is, feelings of shared concerns. The shared political culture requires the emergence of a European public opinion, or shared attitudes towards the shared concerns, which in turn depends on the inputs of European civil society organisations (Habermas 2001: 16–19). The work of CSOs and NGOs in launching ECIs could provide the first step in this process towards EU democracy in Habermas' eyes, as the organisations and Citizens' Committees proceed to campaign throughout Europe and reach out to ordinary people in pursuit of their one million signatures and individual member state quotas they can facilitate the formation of common attitudes towards EU-related issues. Therefore, there is reason to believe that the emphasis on the participation of CSOs and NGOs rather than ordinary citizens in the ECI process may not be as detrimental to the democratic credentials of the ECI, and the formation of EU demoi, as first thought.

Nevertheless, the obstacles to the increased participation of ordinary citizens instituted by the emphasis on CSOs and NGOs as the primary participants in the ECI process do seem to place doubts on the potential for the ECI to promote the transnational communication and consequent formation of shared attitudes towards EU issues as the necessary basis of EU demoi. However, as I will argue in the next section, the emphasis on elite participation and the roles of CSOs, NGOs and other lobbying groups with pre-existing communication networks, expertise in EU policy making and sufficient resources to launch an ECI, may not be such a hindrance to the formation of multiple demoi across the EU as earlier arguments might have suggested.

The role of knowledge, expertise and civil society in EU demoi activation

Recent theorising on political representation suggests that the focus of the ECI on the participation of existing groups with significant knowledge, expertise and resources, may not constrain the ECI's potential to activate numerous political communities across EU

member states' territorial boundaries. Hence, pre-existing organisations can facilitate the emergence of multiple overlapping EU demoi. I argue that the actions of representatives can call issue-specific demoi into being in the EU. Disconnecting the concept of representation from elections and electoral institutions unveils an important space for non-elective representation which can be highly significant in terms of establishing demoi and publics with common interests. CSOs, NGOs, lobby groups and other elites who are in a privileged position in relation to launching an ECI could, it is argued, become non-elected representatives of these shared interests, thereby contributing to the formation and activation of multiple, overlapping demoi in the EU.

The idea of 'representative claims' recently advanced by Michael Saward (2010), for example, provides a way in which we can envisage an important role for CSOs, NGOs and other elites in the formation and consequent activation of EU demoi. Representative claims offer a new way of looking at representation, which is much more dynamic and flexible than previous theories with its emphasis on the power relationships between individuals rather than static institutions of representation (Saward 2010: 1). Saward's approach moves towards a focus on what representation does, that is, its constitutive dimension, and the role of representation in non-elected, non-territorial, real-world situations (ibid.: 32–34). For these reasons the application of the idea of representative claims to the question of EU demoi formation is particularly valuable. In a representative claim, representatives construct their own representation; they call into being the collective that they represent through the claims that they make. The representative claim process works as follows: a maker of representations puts forward a subject, which stands for an object, and is offered to an audience (ibid.: 37). In terms of the ECI, then, a CSO or NGO (the maker), could offer certain individuals, perhaps those on the Citizens' Committee (the subject), as appropriate representatives of a particular interest, that advanced in the particular ECI they are pursuing (object), to the wider EU public (the audience). Representative claims are not, therefore, relevant only to elected political representatives, but, importantly, can be temporary, not confined to territorial boundaries, explicitly partial in that the claims can be made to represent only specific interests, and explicitly or implicitly made. This therefore indicates the potential for multiple demoi, with each demos specific to a particular issue, which can cross geographical boundaries. These demoi can have the membership

criterion simply of those who share an interest in relation to that specific issue at that point in time.

The most important point here is that the representative claims bring the constituencies into being. Representation is, as Saward (2010: 47) points out, a two way street: 'the represented play a role in choosing or accepting representatives, and representatives "choose" their constituents in the sense of portraying them or framing them in particular, contestable ways'. The word 'contestable' is important here also, as audiences must engage with the representative claims in some way, for example by accepting or rejecting them. A CSO may make a claim that through using their existing expertise and knowledge of the EU political system to launch an ECI the relevant Citizens' Committee is in fact representing all citizens of the EU who associate themselves with the particular interest being pursued in the initiative. If the audience of EU citizens accept this claim and engage with it, then those who share the interest pursued in the ECI have the potential to become a demos, with a shared attitude towards a common issue facing them. This demos is pursuing its common attitude through being represented by the Citizens' Committee in the ECI process.

The related idea of non-democratic representation presented by Andrew Rehfeld is also of relevance. As he points out, non-democratic, that is, unelected representation occurs often in international organisations yet traditional theorising on representation tends to focus on democratic representation with appeal to concepts such as authority and accountability (Rehfeld 2006: 3). Representation is still representation, whether or not a particular representative has been given authority to act or is accountable to those he or she represents. Rehfeld uses the term 'non-democratic' representation to refer to representation that is detached from elections, but it may be more appropriate to refer to it simply as non-elected representation as unelected representatives can play highly significant roles in democracy; to label them as non-democratic is potentially misleading. What is more important than being directly elected, Rehfeld argues, in line with Saward's assertions about representative claims, is that the represented accept an individual as their representative: 'Political representation, I argue, results from an audience's judgement that some individual, rather than some other, stands in for a group in order to perform a specific function' (ibid.: 2).

In this conception of non-elected representation, the audience uses a set of rules to identify the representative, with the rules specifically setting out an appropriate selection agent, who uses a decision rule, to select the representative from a qualified set. The audience must be that group of people relevant to the specific function of the representative, and they must recognise the decision rules as appropriate to the context (ibid.: 5).

In terms of the EU and the ECI, therefore, Rehfeld's conception of non-elected representation would work along the lines of:

- the EU citizens (the audience),
- identify the individuals who share a common interest (the selection agent);
- to choose amongst NGOs, CSOs or other experts launching ECIs (the qualified set);
- on the basis of the one that best relates to their shared interest (the decision rule);
- to act as their representative with the function of pursuing their shared interest through the institutional channel of the ECI.

In this conception, the citizens with a common interest identify the representative organisation that best supports that interest to represent them. Alternatively, and perhaps more in line with Saward's top-down representative claims, it is possible that:

- the EU citizens (the audience);
- accept as valid and appropriate the rules that identify the organisers of ECIs, as in the CSOs or NGOs, as an appropriate selection agent;
- and that same group as the relevant qualified set;
- and consider their self-declaration as a representative of a particular interest an appropriate decision rule for selection as a representative.

As long as the audience perceives self-declaration by an ECI organiser as representative of that interest as an appropriate decision rule, and therefore accepts that NGO or CSO as a representative of that particular interest, then the representative organisation can purport to represent those throughout the EU with that shared

interest. In doing so, the representative can call into being a demos consisting of all of those individuals who share an attitude towards a particular issue and act in pursuit of it through the ECI process. It is clear, therefore, that these theories of representation that are explicitly separated from elections and claims to authority and accountability provide a picture of how Brussels-based CSOs, NGOs and other groups with knowledge and expertise can facilitate the formation of multiple, issue-specific demoi in the EU. In this sense, demoi can be activated by representatives, and not merely discovered.

Conclusion

In this chapter I have challenged the 'no demos thesis' in relation to the EU on the basis that the assertions of specific definitions of a demos, such as membership criteria of a shared ethnicity, culture, language or history, or performative criteria such as an identifiable public opinion as a requirement for the existence of a demos, are too narrow. Any demos can have any number of appropriate membership criteria, from 'that group of individuals with a very specific interest' to the 'all affected interests' principle which presupposes the inclusion of all humanity in a global demos. In addition I refuted the assumption that there must be a single demos underpinning the EU by highlighting that multiple demoi can in fact exist at various levels and sites of politics, and that these can overlap with individuals being members of several demoi simultaneously at any one point in time. As Bohman (2007: 175) has argued, membership of multiple demoi is actually advantageous for democracy and the realisation of secure human rights.

By broadening the definition of a demos to incorporate any group of individuals with a common attitude towards a common objective which acts in pursuit of that attitude and has institutional channels available to it for this purpose, I have demonstrated the potential for the EU to be based on such multiple, issue-specific demoi that are not territorially-confined. In addition, by shifting the perspective of demoi from common conceptions that emphasise the citizenry included in the demos to one that is driven by representatives and conceives of demoi as formed and activated rather than discovered or found, I have highlighted a novel way of conceiving demoi that contests the no demos thesis and suggests the potential for multiple, temporary, issue-specific demoi on which the EU can base its democracy.

From this perspective I have argued that the newly launched ECI, as a mechanism for increased citizen participation in EU politics, provides an institutional channel through which a demos can act in the pursuit of its members' shared attitude. The potential to be incorporated into institutional mechanisms for the advancement of the demos' shared beliefs is a requirement for a group of individuals to function as a demos (List and Koenig-Archibugi 2010). Even though the ECI has been criticised for its emphasis on the participation of existing organisations with pre-existing expertise, insider knowledge of the EU political system and significant resources that can be used to launch an ECI, I have pointed out that these organisations have the potential to facilitate the activation of EU demoi by reaching out to ordinary EU citizens in their campaigns to collect one million signatures. In doing so they have the potential to raise awareness of EU issues on which ordinary citizens can develop opinions and beliefs; their associated provision of information and encouragement of debate will facilitate this process. However, as I have pointed out, this doesn't necessarily assist with the requirement for the group of citizens to act in pursuit of its common attitude in order to form a demos, and the related necessity of access to institutional channels for this purpose.

By drawing on recent theorising on non-elected political representation, I have, however, illustrated how these organisations with their expert knowledge can call into being issue-specific demoi in the EU. By claiming to act as the representatives of the citizens who share the interests pursued through the particular ECI the organisations are campaigning for, they are in fact establishing groups of individuals, with a common attitude towards an issue they all face, who act in pursuit of that attitude through their involvement in the ECI process facilitated by the CSOs, NGOs and other expert groups that have the capacity, resources and knowledge to successfully launch the initiatives. Therefore, whilst the ECI's emphasis on the participation of pre-existing networks of Brussels-based organisations seems in the first instance to be a significant disadvantage to the participatory credentials of the EU, it may, upon re-examination, actually turn out to be an advantage of the ECI process. This could be true specifically when it comes to the activation of multiple and overlapping EU demoi facilitating the representation of many more interests in EU policy making than was previously possible.

Nevertheless, this new approach to demoi is not without its potential issues and further work must be done to answer some additional questions it raises. Firstly, previous attempts to broaden the conception of the demos have encountered issues with practicality. For example, Goodin's proposal of the all affected interests principle as the most suitable membership criterion for a demos ran into problems related to how this could actually be implemented. The principle could be interpreted to suggest, for example, that all future generations who would be affected by a particular decision should be consulted in making the decision, which is obviously infeasible (2007: 64). Goodin therefore has little option but to resort to territorially-defined demoi as the most practical option. A similar situation may arise with the model I have proposed. A further question is raised with regard to longevity, and the wider implications for democracy in the EU; as I have highlighted the temporariness of demoi it may be possible that this model of demoi on which the EU bases its democracy is not sustainable over the long term. Finally, the ECI is in its very early stages of development and so it is not possible at this time to adequately assess its actual impact on the question of demoi formation in the EU. All that is possible for the time being is to speculate about its potential role in the formation and activation of EU demoi. I have argued in this chapter that the ECI's potential in this regard is highly significant, but more empirical work must be done in the future to determine whether this potential is fulfilled.

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Chapter 12

EU Commission expert groups Between inclusive and effective policy-making

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Introduction

The involvement of experts in policy-making is widely viewed as enhancing the effectiveness of public policies. Often policy makers do not possess sufficient in-house expertise to formulate adequate problem solutions and therefore have to rely on external experts. This demand is particularly pronounced in the European Union, where governing institutions are both highly understaffed and geographically detached from domestic settings to which EU regulation applies. Most importantly this is true for the European Commission, the institution responsible for drafting and monitoring the implementation of EU legislation. The EU Commission has to draft solutions to complex trans- or supranational problems. In addition, as a supranational institution based in Brussels it is too distant from the domestic settings and from the actual impacts of its policy interventions to be sufficiently informed about the practical needs and situations in its 27 member states (Boswell 2009). Moreover, unlike many federal political systems, no executive 'dependencies' exist at subfederal or regional level that implement European law directly.

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Instead, the European Commission has to rely on national administrations that implement EU law, and therefore depends on their information (Egeberg 2006; Olsen 2010).

Confronted with this serious task overload, the EU Commission has, however, relatively little man power compared to its far-reaching legal responsibilities (Mazey and Richardson 2006). Equipped with less than 23,000 employees (European Commission 2010a), the institution's personnel resources stand in stark contrast to its pronounced demand for specialist knowledge to fulfil its tasks properly. As the European Commission often has insufficient internal expertise to draft, implement and monitor increasingly complex regulation, it has to rely on external sources for expertise and technical know-how and to develop an understanding for the diversity of domestic settings. This lays high demands for external 'experts' – actors with recognised specialist knowledge on a specific issue, be it produced by scientific research or by practical experience. Notably, around 1,000 expert groups, which in total assemble more than 30,000 experts, advise the EU Commission throughout the policy process, from policy initiation, to formulation, implementation, monitoring, and evaluation.

However, while the European committee system is vital for effective policy-making, it has been criticised for favouring powerful and elitist interests (Weiler 1999; Rhinard 2002; Coen 2009;). Thus, the involvement of expert groups into the policy process raises the fundamental trade-off between effective and inclusive decision-making (Dahl 1994). This chapter identifies this trade-off as inherent to Scharpf's (1999) concept of 'output legitimacy' and argues that EU Commission expert groups' institutional structure has the potential to reconcile the trade-off between pluralistically effective and open consultation. Expert groups' institutional structure allows for both, plural interest representation and iterative interaction, which facilitates cooperative behaviour and increases the effectiveness of the policy process.

In the following first the EU Commission's expert groups are introduced. Subsequently they are discussed in the context of legitimate governance. Building on Scharpf's (1999) concept of output-oriented legitimacy an empirical analysis investigates in how far the EU Commission's expert group system complies with this concept. The empirical analysis includes a quantitative and a network

analysis, and a qualitative analysis of the expert groups' role in policy formulation. The final section provides a discussion of the empirical findings and concludes that expert groups' contribution to EU output legitimacy is not clear-cut. While expert groups' institutional structure renders them promising instruments for the enhancement of output legitimacy, in practice the Commission is caught in the trade-off between open and plural consultation and the need for efficient and timely advice. This implies that it favours familiar advisers, which challenges the foundations for a truly open problem-solving endeavour necessary for the generation of output legitimacy.

European Commission expert groups and their institutional framework

European Commission expert groups are formally defined as 'consultative entities set up by the Commission or its services, comprising at least six public and/or private sector members, which are foreseen to meet more than once' (European Commission 2010b: 3). They are solely affiliated to the European Commission, which distinguishes them from other types of EU 'committees', such as the EU's formal 'grand' committees (the Social and Economic Committee or the Committee of the Regions), the working groups of the European Council and the European Parliament committees, or the 300 comitology committees that advise Commission and Council in policy implementation. Expert groups assist the European Commission with all the institution's policy-making tasks. Their formal role is to 'provide advice and expertise to the Commission and its services'(European Commission 2010b: 8). Whereas the consultation of some expert groups is compulsory for the Commission, their advice is never binding. Thus, formally expert groups only have advisory character and no formal veto powers in the European policy-making process.

Next to expert groups the Commission can draw on a variety of other advisory channels, such as contracting studies to external consultancies, conducting public consultations, recruiting seconded national experts, organising workshops or conferences, or bilateral exchanges to individual advisers, such as personal advisers to the Commissioners (Hartlapp et al. 2014, forthcoming). Expert groups set themselves apart from other advisory instruments by allowing for repeated interaction (European Commission 2010b: 5). Although no specific

guidelines exist for the exact frequency of meetings, in expert groups the EU Commission meets with advisors 'more than once' (ibid.:3), i.e. repeatedly, and can therefore rely on a stable information channel.

Expert groups are established and managed at the administrative level of the EU Commission's Directorates-General (DGs), and are therefore organised according to the bureaucracy's sectorial portfolio lines. DGs may appoint expert group participants either a) as representatives of a public authority (national, regional or local), the civil society, or interested parties, or b) in personal capacity. Whereas representatives of an institution are invited to act on behalf of their institution, members participating in personal capacity 'shall act completely independently' (European Commission 2005a: 4). No formal rules exist for the recruitment and selection of expert group members. The Commission's Secretariat-General nonetheless recommends DGs to follow certain guidelines defined in the horizontal rules, which are, however, not mandatory (European Commission 2010b: 10). Following these guidelines DGs are asked to select expert group members 'in a transparent manner, on the basis of clearly defined objective criteria'(European Commission 2010b: 9). Nonetheless, DGs have retained their possibility to refuse him/her if they do not feel that the nomination is appropriate, particularly if there is a conflict of interests (European Commission 2005a). The internal guidelines do not further specify what is deemed a 'conflict of interest.' Participants invited in personal capacity are personally appointed by the Commission and should be 'selected, as far as possible, through a call for applications' (European Commission 2005a: 6). DGs are further asked to respect a certain balance in the composition when installing a new expert group:

> [T]he Commission and its departments shall aim at ensuring a balanced representation of relevant areas of expertise and areas of interest, as well as a balanced representation of gender and geographical origin, while taking into account the specific tasks of every particular expert group and the type of expertise required.
>
> (European Commission 2010b: 3–4)

However, the horizontal guidelines are only voluntary for the Commission's DGs. In practice DGs have substantial leeway when creating a new group. Therefore, an empirical analysis is necessary to examine how these guidelines play out in practice.

Expert groups and legitimacy: theoretical assumptions

In the EU the legitimate exercise of government authority predominantly depends on its output legitimacy, while suffering from weak input legitimacy (Scharpf 1999). Although the EU today is in many respects comparable to national democracies, this characteristic distinguishes it from nation states (Hix 2005). A political system's input legitimacy originates from the people to the sovereign through chains of delegation and election, representation and accountability and is therefore also referred to as 'government *by* the people'. Not any kind of involvement of the people into the policy process is sufficient, but explicit democratic decision-making is necessary, i.e. that decisions are legitimated by the people via democratic procedures: 'what makes democratic regimes democratic, is precisely that they contain mechanisms by which the people, the ultimate principals in democratic societies, can select and control their representatives' (Strøm 2000: 267).

Output legitimacy, in turn, evaluates governance processes by their performance. A government is legitimated by its outputs if they meet citizens' goals and solve their problems, such as by increasing the public welfare, societal freedoms and public goods. Output legitimacy is therefore also described as 'government *for* the people'. More precisely, output legitimacy demands 1) the ability of a political system to deliver outputs and 2) a correspondence between policy outputs and the collective preference of the citizens, rendering citizens satisfied with the ends and outcomes of governance (Scharpf 1999: 10–13). Thus, it demands both, effective problem solving and the pluralistic inclusion of various (diverging) interests.

In the EU citizens have limited capacity to democratically control decisions taken at supranational level, which, however, are considered to achieve more efficient outcomes than national-level solutions. Therefore the EU suffers from weak input legitimacy and is largely based on the principle of output legitimacy (however, for a critique of the EU's fading of output legitimacy in the Eurocrisis see Scharpf 2012). Also a strong involvement of external experts in EU decision making is considered detrimental to the EU's input legitimacy, and instead increasing output legitimacy. Relying on technocratic expertise may threaten democratic principles of decision-making. Likewise, the European committee system may favour technocratic, insulated and elitist policy-making (Rhinard 2002; Heard-Lauréote

2010). Preparing EU legislation in expert committees may further reduce the role of formal democratically legitimised institutions (Eriksen 2009). Thus, as Peters notes, expert committees are not the right place to enhance the EU's input legitimacy:

> Although democratic legitimation is an important goal of the use of committees in the EU, these structures are not necessarily well designed for that purpose, and their procedures, and in particular their tendency toward secrecy, make them less effective legitimators than committee systems in many national governments.
>
> (Peters 2007: 47)

Instead, expert groups may enhance the EU's output legitimacy. EU committees may serve as inclusive elements of European governance that increase the EU's output legitimacy by facilitating the adoption of legislation. As 'supranational negotiation arenas' (Joerges and Neyer 1997) they provide national experts a forum to meet and exchange their views and knowledge. Political decisions are prediscussed in informal committees that serve as fora for consensus-building, which alleviates the formal decision-making process. Committees therefore help to 'escape from deadlock'(Héritier 1999) in the European multilevel system and increase the EU's problem-solving capacity (Scharpf 1999: 74–75). Others argue that the delegation of regulatory measures to independent experts leads to qualitatively better outputs than achieved by majoritarian institutions (Majone 1996). This rests on the assumption that independent experts shielded from political short-term goals can better reach long-term efficient policy solutions than elected politicians.

However, these approaches overlook that output legitimacy not only demands effective problem solving, but also policy solutions to be in the public interest. Institutional mechanisms ensuring output legitimacy therefore must serve 'two potentially conflicting purposes' (Scharpf 1999: 13): 'They should hinder the abuse of public power and they should facilitate effective problem-solving – which also implies that all interests should be considered in the definition of the public interest'(ibid.). Thus, Scharpf's concept of output legitimacy also demands an inclusive and open consultation process on the input side – the input and output side of legitimacy seem to be conflated. In contrast, deliberative or participatory approaches to

democracy view procedural aspects of inclusive and open consultation as aspects of input legitimacy (Skogstad 2003). Alternatively, the openness and transparency of policy-making has also been associated with throughput legitimacy (Schmidt 2010). However, this chapter takes a liberal democratic approach and stresses the necessity of accountability chains for input legitimacy (Strøm 2000); emphasis is put on the fact that an inherent link between the input and the output dimension exists within the concept of output legitimacy. Thus, output legitimacy demands taking into account processes at the input side, without however, confusing this with input legitimacy.

Accordingly, when assessing the potential of expert groups to contribute to output legitimacy, this contribution takes both dimensions of output legitimacy into account – effective problem-solving and the pluralistic inclusion of various interests. Output legitimacy may be guaranteed by public elections that ensure office holders, eager for re-election, to orient themselves towards the public interest. Alternatively this may be achieved through other institutional mechanisms, such as the co-existence of open policy networks, where policy solutions are deliberated: pluralist policy networks involving 'private individuals, interest groups, public-interest organisations, and governmental actors' are 'able to make contributions to policy formulation and policy implementation' (Scharpf 1999: 19).

This chapter argues that EU Commission expert groups can be seen as pluralist policy networks that have the potential to enhance the output legitimacy of EU governance. Expert groups thus formally comply with Scharpf's (1999: 18–21) concept of policy networks that may improve the quality of policy choices. This demands that they are pluralistically open in order to ensure the inclusion of all relevant actors necessary for identifying solutions that are in the public interest. Expert groups thus should be heterogeneously composed and capture the diversity of interests affected by a policy (such as nationalities or diverging sector interests). In addition, they should be open and transparent in their recruitment process, in order not to exclude any diverging views and interests a priori. If expert groups comply with these criteria they may raise 'the awareness of alternative policy options that might be able to accommodate a wider variety of these interests in win-win solutions' (Scharpf 1999: 20–21). Putting it differently, only if expert groups do not only provide factual expertise, but also capture the diversity, variability and complexity of

interests, problems, and solutions in the EU, they are able to enhance the quality of problem solutions both, in technical terms and in the sense of answering the collective demands of EU citizens.

Moreover, policy networks' institutional structure allows for cooperative behaviour and thus effective decision-making. Compared to single-shot games, institutionalised iterative interaction facilitates a cooperative interaction style among self-interested rational actors (Scharpf 1997: 76). Thus, expert groups should also provide an institutional environment that enables cooperative behaviour, and thereby facilitates effective problem-solving.

And indeed, according to their formal rules introduced above expert groups may be pluralistically composed, openly and transparently selected and facilitate cooperative behaviour. Their institutional framework allows for both: a pluralistic inclusion of many actors, as well as efficient policy-making – and thereby bridges the two conflicting dimensions of output legitimacy. However, given that the internal guidelines are only voluntary, the following empirical analysis will examine in how far they also apply in practice.

Empirical analysis

The empirical analysis is undertaken in three major steps. First, the expert group system is analysed in a quantitative descriptive and network analysis. This analysis examines expert groups with regard to their plural and open composition. Secondly, a qualitative analysis of the EU Commission's use of expert groups in the policy process provides insights into the mechanisms and causalities of expert group participation. Thirdly, two case studies trace the impact of expert groups' advice on policy output, in order to assess whether differences in their composition is reflected in the problem solutions found. It is examined in how far expert groups' institutional characteristics also have the expected effect on the policy outputs, as expect expert groups that comply with Scharpf's concept of open policy networks should also lead to policy outcomes that are effective and in the public interest.

Quantitative analysis

The quantitative analysis draws on data from the EU Commission's online expert group register, which was introduced in 2005 and provides extensive information on active expert groups.[1] The data used here has been extracted from the database in February 2010.[2] In order to assess the diversity of expert group composition the analysis further takes into account findings from other studies using data from this register (Gornitzka and Sverdrup 2011, 2013; Metz 2012).

Descriptive measures: examining diversity in expert groups

The diversity of expert group composition is measured by examining the distribution of participants across various societal actor groups and the geographical balance in expert groups, in order to identify whether an often proclaimed bias towards large business and powerful member states exists in these EU Commission's consultation structures.

The empirical data reveals that expert groups have an average size of 30 members and comprise a broad variety of actors: institutional representatives from public authorities (national, regional or local), civil society or industry, as well as independent individuals (see also Metz 2012). While the composition of EU Commission expert groups varies strongly across policy sectors (Gornitzka and Sverdrup 2011), in overall expert groups reveal a plural composition with regard to the distribution of various actor groups (Gornitzka and Sverdrup 2013). On the one hand, member states representatives form the largest fraction and are present in 80 per cent of all expert groups. On the other hand, they are often mixed with a number of societal actors – business and enterprise, social partners, consumer organisations and NGOs. In a recent study Åse Gornitzka and Ulf Sverdrup (2013) reveal

[1] For the EU Commissions's online expert group register, see <http://ec.europa.eu/transparency/regexpert/> [last accessed 22 August 2013].

[2] While the total number of EU Commission expert groups at this time was 1014, only a share was used for the following analysis, which demanded data on the composition of an expert group at individual level. However, the EU Commission's horizontal guidelines only require the publication of individual names for members acting in personal capacity. For participants acting as representatives the names of the represented bodies are sufficient. Therefore, membership lists were not available for all expert groups. The final dataset includes individual-level data for 311 expert groups. Thus, only about one third of all expert groups is included in the following analysis. This may cause a bias towards expert groups from DGs that publish membership lists and/or that invite more experts acting in personal capacity.

that while business and enterprise make for the largest societal group (present in 29 per cent of all expert groups), taking NGOs and consumer organisations together, these are represented in almost as many expert groups (8 per cent plus 17 per cent). Social partners are represented in 12 per cent of all expert groups and practitioners in 13 per cent. Thus, while a slight bias to business can indeed be identified, member state representatives are by far the most prominent actor type in Commission expert groups.[3]

The distribution of nationality in Commission expert groups is examined by correlating it with the distribution of Council votes, which is taken as an approximation for member state weight in the EU. If these figures are highly correlated, the national balance in expert groups captures the variance of nationalities in the EU very well. Indeed, we can find a very high and significant correlation of $R = 0.82$ ($p < 0.01$) between the distribution of expert group members' nationality and the distribution of Council votes. This indicates that expert groups are well balanced according to member state size. This is remarkable, given that the sub-sample of 311 committees analysed here is presumably dominated by groups with participants acting in 'personal capacity' (see footnote 3). Such participants 'shall act completely independently' (European Commission 2005: 7), and nationality should therefore be of minor importance. Nonetheless, the Commission's DGs seem to ensure that their expert groups are geographically well balanced, and therefore also comply with the EU's intergovernmental norm.

Network analysis: assessing expert groups' openness

Although the quantitative analysis has shown the participation in expert groups to be pluralistic, it has not revealed whether it is also open, which is necessary for not excluding any diverging interests a priori. In order to test expert groups' openness, a network analysis should provide insights, based on the dataset from the expert group register (N = 311). In the following the network analogy serves as an analytical tool to assess the structure of the Commission's committee

[3] However, Gornitzka and Sverdrup's (2013) data only allow for indicating the percentages that denote the actor types participating and not the precise number of participants of each actor type. For example, an expert group that includes nine members from industry and one from an NGO is coded as including both parties equally.

system, and not as a theoretical concept.[4] The network analysis aims to identify in how far the expert group system resembles a (closed) network spun by overlapping memberships. A high degree of overlapping memberships suggests that always the same experts are invited to EU Commission expert groups, which puts a question mark behind the groups' openness. Thus, openness is measured by the degree of overlapping memberships.

The network of expert groups is based on links between committees that are created through *overlapping memberships* of individual experts in different committees. When a person participates in more than one expert group, a link is established between these two groups. In network analytic terms, one 'node' is one expert group; a link or 'tie' between two expert groups is created by an individual expert who participates in two groups at the same time. The overall expert group network results from the sum of nodes (expert groups) and ties between the groups (participants with multiple memberships).[5]

Network analytic measures of network cohesion describe the overall structure and density of a network, and therefore provide information on the existence and amount of overlapping memberships. *Network size* compares the 'connected' network to the 'unconnected' network. While the former only includes those expert groups that are connected via a common member, the latter includes all expert groups in the dataset, i.e. also the isolates. A comparison therefore assesses the share of expert groups that are actually connected by overlapping memberships of single experts.

[4] All network analytic measures are undertaken with the network analysis software UCI-Net 6, Version 6.278 (Borgatti et al. 2002).

[5] Expert groups may vary in size. As larger expert groups have 'better chances' to have members participating in other groups simultaneously – which makes these groups better connected to other groups – a weighing factor could be introduced. However, not all network measures are applicable to networks with 'valued' ties. Accordingly, here multiple ties between two groups are treated as one tie, all ties are therefore given the value '1', which is a common strategy for large valued networks (Scott 2000).

Table 12.1: Network cohesion of the expert group network

Measure	Expert group network
Network size, unconnected network	311
Network size, connected network	231
Average degree, unconnected network	2.80
Average degree, connected network	3.77

Notes
Unconnected network = dataset including isolates (N = 311)
Connected network = dataset excluding isolates (N = 231).
Data: Register of expert groups, data compiled in February 2010.

Table 12.1 shows that two thirds of the groups have at least one member sitting in more than one group (231 of 311). Thus, multiple memberships in Commission expert groups occur frequently. A network's *average degree* reflects the average number of node connections, i.e. the connections of one expert group. A node's 'degree' is measured by its number of ties and 'corresponds to the intuitive notion of how well connected a point is within its local environment' (Scott 2000: 83). Table 12.1 shows that one expert group is in average connected to about three other groups. *This means that in every committee of an average size of 30 one to three experts are members of about three other Commission committees at the same time*. This degree of overlapping memberships seems to challenge the Commission's aim and arguments that its expert groups reflect a pluralistic, broad and balanced consultation (European Commission/Secretariat-General 2009). However, overlapping memberships may also result from DGs having to resort to always the same experts that belong to a certain minority (e.g. a small member state), when aiming to ensure well balanced groups. Thus, the existence of overlapping memberships need not necessarily stand in tension with a plural composition.

Yet, it does suggest that, while expert groups may be pluralistically composed, they may not be fully open to outside interests. The network analysis shows that a network of Commission committees created via experts with multiple memberships indeed exists, as overlapping memberships is by no means a rare case. Figure 12.1 visualises the EU Commission's expert group network based on 'Markov clustering,' a specific clustering technique.[6]

[6] The Markov clustering algorithm partitions a network into clusters. By applying an iterative algorithm it determines the appropriate number of clusters deduced from

In Figure 12.1 different node shades indicate DG affiliation, and node size the size of an expert group's 'ego-network.' A committee's *ego-network* represents the number of other groups this committee ('ego') is directly connected to, including 'ego' itself. It measures the size of the 'direct neighbourhood' of an expert group. Node size therefore indicates a group's individual connectedness and can reveal whether a cluster is connected via one committee placed at its centre, or whether connections are evenly distributed across several groups.

The graph also shows that larger and denser clusters largely aggregate according to DG demarcation lines; truly multi-coloured clusters are comparably rare. Thus, DGs seem to vary in the extent to which they invite the same experts across several groups. The density and the large size of the nodes of the DG Research (DG RTD) cluster, for example, indicates that the extent of overlapping memberships across this DG's expert groups is high. Moreover, several committees of the same few DGs often cluster together (e.g. DG EAC-DG EMPL or DG RTD-DG TREN), which likewise indicates that multiple memberships across expert groups do not occur in a random manner. This may suggest that certain DGs share their experts following conscious interactions. In order to determine what really drives member selection and may explain the existence of overlapping memberships the following qualitative analysis should provide further insights.

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the structural properties of the network. Here 47 clusters were identified, containing two to 17 committees each.

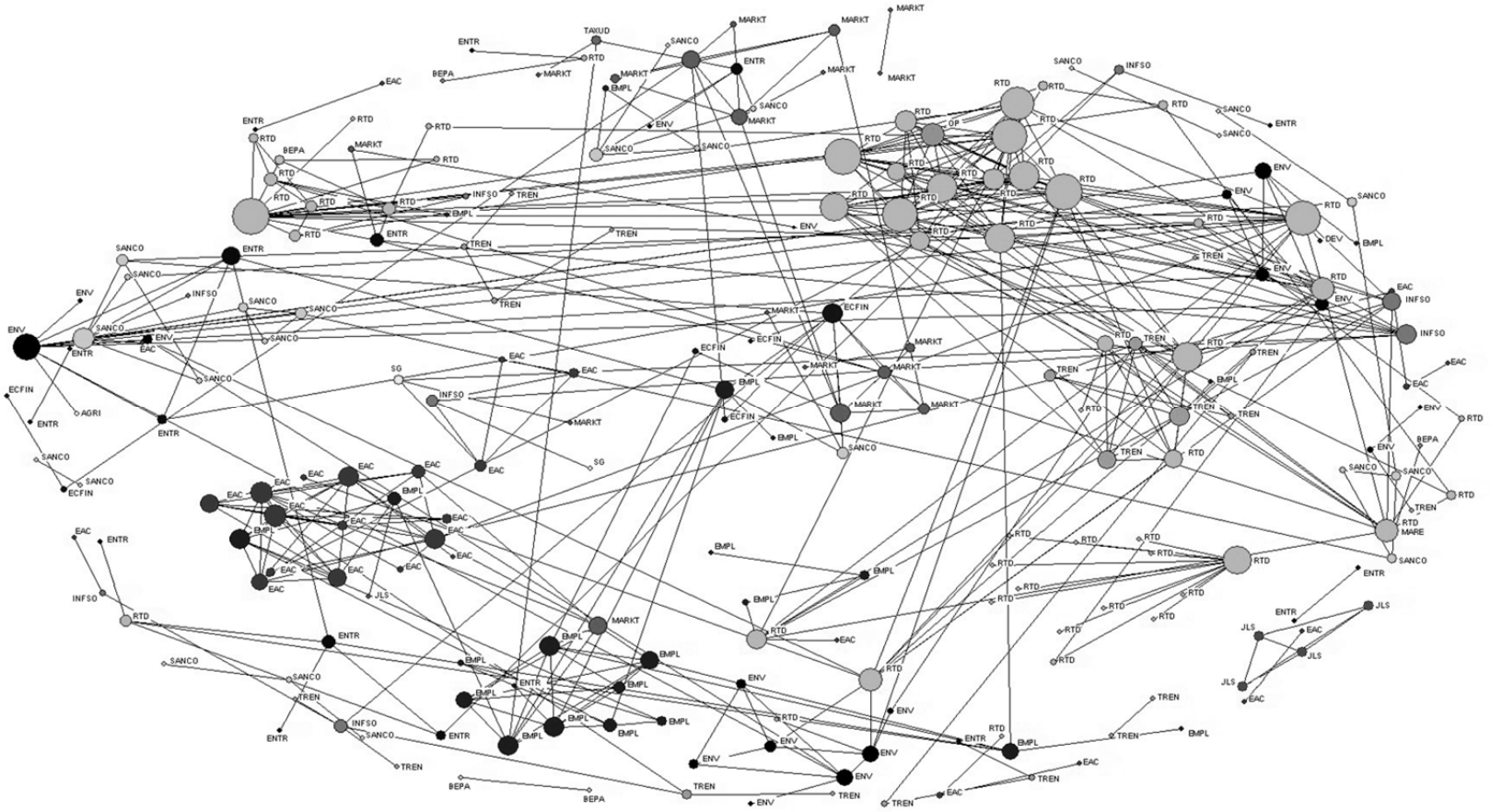

Figure 12.1: Network of expert groups, according to Markov clustering

Notes

Unvalued, connected network; node colour indicates DG; node size measures size of ego-network; for list of DG abbreviations, see Annex.

Data: Register of expert groups, data compiled in February 2010.

Qualitative analysis

The qualitative data is based on an empirical analysis of the EU Commission's use of four expert groups in the area of research and innovation policy in the preparation of legislative proposals from 1999 to 2008. The case studies draw on empirical data from 60 semi-structured interviews with Commission officials (49) and expert group members (11), as well as a number of primary documents (legislative texts, legislative drafts and other internal documents, expert reports and analyses, position papers, and media coverage).[7] Although expert groups have been selected from one policy domain (research and innovation policy) – thus, given the sectoral differences revealed in the network analysis above, possibly causing biased results – the four expert groups were nonetheless affiliated to different DGs, which allows for variation across portfolios.

1) DG Research's European Research Advisory Board (EURAB, 2001–2007) was created in 2001 by an EU Commission Decision and used to be the Commission's central high level group that provided guidance on EU research policy. It consisted of 45 members, coming in equal shares from academia and industry, and played a particularly important role in the development of the European Research Council (ERC) in the 7th Research Framework Programme.

2) DG Research's European Research Area Expert Group on Research Infrastructures (ERA expert group on infrastructures, 2007–2008) was composed of eight members. It was created to help the DG with the preparation of a legal framework for pan-European research infrastructures (European Commission 2008) , examples for existing research infrastructures are the European Organisation for Nuclear Research CERN or the European Molecular Biology Laboratory EMBL).

3) DG Information Society's (DG INFSO) Information Societies Technology Advisory Group (ISTAG) was established in 1998 and had 26 members at that time. It was created to advise the DG in the implementation of the 5th Research Framework

[7] Interviews are cited as COM1, COM2, etc. (for Commission official) or EXP1, EXP2, etc. (for expert group member).

Programme, but in practice it also provided advice on new initiatives, such as the 6th Research Framework Programme.

4) DG Enterprise's (DG ENTR) Enterprise Policy Group's Business Chamber (EPG Business Chamber) was created in 2000 by an EU Commission Decision and was composed of 40 professionals, mostly self-employed and from small and medium-sized enterprises (SMEs). Formally it existed next to the EPG Member States Chamber, but in practice the two chambers had little interaction. The EPG Business Chamber had the broad mandate to advise the Commission on EU enterprise policy issues.

Truly pluralistic and open?

The quantitative and network analyses revealed that while expert groups are heterogeneously composed, overlapping memberships is not a rarity. Does this mean that EU Commission expert groups are perhaps pluralistic, but the selection process in fact not truly open, implying that often the same experts are recruited? In order to assess in how far EU Commission expert groups are in practice 'closed shops' the following analysis examines inductively the staffing process of these expert groups.

The horizontal guidelines for expert groups lay down that EU Commission services are responsible for selecting the members to their expert groups and recommend the use of open calls (see above). This could also be observed empirically, with either the responsible directorate or unit in a DG selecting the participants, as it knew best which expertise was required for a specific advisory task (COM122; COM135). Often DGs issued open calls for participation. However, in how far the final member selection was always truly open is another question. Often DGs asked member states' representations in Brussels or (EU-level) associations to identify appropriate candidates (COM136). In the case of DG Research's high-ranking expert group EURAB Research Commissioner Busquin established an external working group composed of independent experts to assist him in the creation and composition of EURAB, in order to ensure EURAB's independence (COM138; EXP7). The Commissioner fully accepted the working group's list and formally nominated the members to EURAB (COM138). However, leading participants of this very working group later also assumed leading positions in EURAB, such as in EURAB's governing board, which exerted a 'very strong

leadership' (COM138) on the group and operated closely with the Commission. Thus, these experts with privileged access to the Commission had initially been carefully selected by the Commission into the working group – rendering the following process of open and independent member selection slightly hypocritical.

Considering the criteria for member selection, DGs seemed to attach more importance to a balance of nationalities than of stakeholder groups. This supports the quantitative findings that were slightly more ambiguous with regard to the latter dimension. Whereas all four expert groups examined qualitatively were geographically well balanced, three out of four were not as well balanced with regard to stakeholder groups. In DG INFSO's ISTAG, for example, the formal requirement to balance representation with regards to 'various actors (researchers, industrialists, users) and nationalities' (European Commission 1998: 6; also COM122) had not been followed (COM11). The membership list from 1998 discloses that two thirds of the group were industrialists and one third scientists.[8] A former participant confirmed that ISTAG displayed 'a large presence of people coming from the industry, both manufacturing and service industry' (EXP3). As indicated by its name, DG ENTR's EPG Business Chamber was exclusively composed of business and enterprise representatives, however, involving a range of business interests, such as self-employed, small enterprises and micro enterprises. DG RTD's ERA expert group on infrastructures displayed a bias towards actors from the information and communication technology (ICT) sector, with three out of eight members coming from this field. Solely DG RTD's EURAB displayed a careful balance of actor groups. A EURAB member reflected cynically upon this, by referring to external demands that necessitate the Commission to engage in an arduous balancing act:

> The higher the profile of these committees, the more important their composition. Everybody only looks at who is sitting in these groups, rather than paying attention to the content. And who are the participants? It is all about a balancing of countries, cultural areas, men, women, gender, also industry or academia,

[8] For an overview of the 1998 membership list, see <http://ec.europa.eu/research/fp5/eag-names.html> [last accessed 22 August 2013].

> within industry different branches, and then NGOs, environmental groups, etc. It is a tedious balancing task, which revolves around itself. The main aim is to find the best balance, which should prevent anyone from criticizing. And that's the Commission's task.
>
> (EXP7, own translation)

A further dominant pattern in the DGs' selection process was a preference towards advisors that DGs knew and could trust. In other words, Commission DGs favoured 'repeat players' or 'EU-insiders' when acquiring advice. However, in all cases it was emphasised that nonetheless a balancing took place in parallel. As one former leading ISTAG member reflected upon his recruitment: 'They had to involve an Italian, and in activities supporting the Commission my name was very well known.' (EXP3) Thus, when ensuring a geographical balance DG INFSO chose to recruit a familiar adviser at the group's top rather than someone unknown. Likewise, one former member of the working group establishing EURAB and later of EURAB's governing board deemed that his familiarness by the EU Commission was a reason for having been asked to assist in the formation of EURAB:

> I was known in the European research scene, even by the Commissioner, who knew me right away. […] In this sense I know how they are wired, and [XY, another former EURAB board member], too. That's why we were part of the Board. In EURAB there were certainly also others that did not belong to us insiders; but of course you need them as well.
>
> (EXP7, own translation).

Thus, from his view, next to the core of EU-insiders, who largely led the group 'there were also some people that were not as recognised, putting it mildly, [which] were recruited because of some kind of proportionality criteria.' (EXP7, own translation) Reflecting the last point one DG Research official emphasised that in EURAB '[s]ome of the members of course were people that were not very knowledgeable on EU procedures, that was good because you needed the outside view.' (COM136) Thus, from the Commission's view next to the existence of familiar advisers a balance of old and new faces made sense – for the quality of advice (also COM122).

Also DG RTD's ERA expert group on infrastructures was composed of members that had 'always been very constructive' and had shown 'a wide interest to develop a new legal instrument' in other consultation fora (COM135). At the same time the DG certainly 'had to keep a certain balance' (COM135). Reflecting this, the chair of this expert group had been advising the EU Commission on research infrastructures since the early 1990s and had therefore been a well-known and frequently consulted expert in the area (EXP11). For example, he was also member to DG Research's EURAB. Next to DG Research he had also been consulted as an expert by DG INFSO on questions of ICT-based infrastructures – thus, an issue at the intersect of the two DGs' portfolios. This is one example of how cross-DG clusters detected in the network analysis may evolve, and clearly speaks for an expertise-driven rationale in expert recruitment.

In one case, however, familiarity with the EU Commission and an inside view of EU policy-making was not relevant for being invited: DG Enterprise's EPG Business Chamber's business professionals had mostly been unknown to the EU Commission. Here, DG Enterprise did not ask for actors experienced in advising the EU Commission, but for entrepreneurs with long practical experience in SMEs and in working in an interest association. In addition the DG sought for a national balance (COM137; EXP9).

Apart from this last example, in all cases EU Commission officials tended to favour familiar 'EU-insiders' over time and across several groups. This may explain the existence of overlapping memberships detected via the network analysis. Recruiting familiar advisers facilitated the advisory process and made the use of expert groups in the policy process more efficient. As one DG Research official emphasised, it was crucial to be able to trust the advice: 'There has to be the trust principle. It has to be there. The one who requests the advice has to trust the people who provide the advice.' (COM136) As trust develops easier in long-term relationships, it makes sense for the EU Commission to invite familiar experts which it already knows and can trust. However, often a core of 'EU-insiders' was surrounded by less familiar experts, in order to ensure a balance of nationalities and of old and new faces, both beneficial for the quality of advice and to comply with externally demanded proportionality criteria. This hints at the EU Commission's struggle to reconcile demands or a wish for

pluralistic representation and relying on mechanisms that facilitate the advisory process, i.e. enhance effective policy-making.

The following section traces the impact of expert groups' advice on the policy output. By doing so it assesses the empirical plausibility of the argument that open and plural policy networks enhance the output legitimacy of governance.

Impact on the policy output

This contribution expected expert groups to have a positive impact on the policy process and its output, i.e. to enhance decision-making efficiency and further solutions that are in the general interest. This section therefore examines the impact of expert groups on concrete EU policy proposals. It analyses where and how expert groups actually had influence on the EU Commission's position. In order to do so, it examines two cases where expert group influence on the EU Commission's position can actually be traced: DG INFSO's ISTAG's and DG RTD's EURAB's influence on the 7th Research Framework Programme (FP7, European Commission 2005b). Both expert groups are comparable in several respects (balance of nationalities, preference for familiar advisers). With regard to its composition, however, ISTAG displayed a bias towards industrial representatives, while EURAB was well balanced between academic and industrial representatives – DG RTD's two main stakeholder groups. The following analysis should therefore reveal whether a more balanced or pluralistic expert group also produced policy outcomes that were more in the public interest.

DG INFSO's expert group ISTAG showed a bias towards familiar advisers and towards one stakeholder group, namely industry and industrial research representatives. Although this is not surprising in the field of ICT research, which is often applied and 'close to the market', its biased composition was nonetheless highlighted by expert group members (EXP3) and by Commission officials (COM11, COM122). Thus, the question is whether ISTAG's advice taken up by the Commission also shows a bias towards industrial rather than academic research interests. During the Commission's drafting process of its FP7 proposal ISTAG issued five reports that gave recommendations for the content of the future FP7-ICT research pillar. One had a broad scope addressing FP7's overall strategic orientation, and four took up more specific aspects of the future ICT

research strategy. A number of these research priorities recommended by the expert group in its reports were also taken up by the Commission in its legislative proposal for FP7 (European Commission 2005b). Given the ICT sector's inherent closeness to applied and industrial research, it is empirically challenging to identify an 'industrial bias'. However, it is striking that the expert group did not mention or recommend financing to ICT research that explicitly addresses basic (or 'frontier') research. Although previous FPs had financed basic ICT research (through the 'Future and Emerging Technologies' pillar, FET), i.e. it could have been an established area to lobby for, the expert group ISTAG prioritised differently. Instead, it gave priority to areas such as 'Experience and Application Research' and on the development of 'Grids, Distributed Systems, and Software Architectures', with a focus on the benefits for industry – which were both taken up by the Commission.[9] Thus, in its recommendations for FP7 the expert group ISTAG displayed a bias towards industrial interests, which might be related to its biased composition.

DG Research's expert group EURAB, in turn, had been carefully composed to display a balance of industrial and academic research interests. One issue where EURAB successfully influenced the EU Commission's FP7 proposal was the introduction of a European Research Council (ERC), a basic research-funding agency. The expert group EURAB played a significant role in promoting and launching an ERC. In two reports it publicly argued for the establishment of such a research agency at EU-level. Moreover, in its close contacts with the Research DG and its Commissioner EURAB made its interest in such an institution crystal clear (EXP7; EXP10; COM136; COM138). As the idea was also taken up by the Commission, the expert group was also successful. This process clearly discloses a bias towards academic interests, as industry did not have much to gain from a basic research-funding ERC. Despite of this, the endeavour of establishing an ERC was interestingly backed unanimously by academia *and* by industry in EURAB. Former expert group members, however, admitted that the industrial representatives had been 'absolutely against it, at the beginning' (EXP7, own translation). But

[9] For an overview of the ISTAG reports, see <http://cordis.europa.eu/fp7/ict/istag/reports_en.html> [last accessed 22 August 2013].

industry had to give in to the ERC, as the two camps in EURAB had made a deal from early on: industry agreed to support academia with their ERC ambitions, while academia promised to support them in the lobby process of funding 'European Technology Platforms' in FP7, which were considered as more attractive for industry than for academia (EXP10; European Research Advisory Board 2004). Having brought together two opposing sides of the science community was therefore considered as one of EURAB's big achievements, as it enabled – or perhaps even forced – the communication between these two sides and allowed to close package deals.

This case shows how the policy output achieved with the assistance of an expert group balanced by different actor groups can lead to policies that have something to offer for both stakeholder groups. In how far the solution found reflects 'the public interest' by accommodating a wide variety of interests and therefore contributing to output legitimacy (Scharpf 1999: 20–1), however, is debatable. EURAB's case indicates that a 'cooperative' outcome was not achieved through deliberation but through a bargained package-deal. Thus, whereas the expert group's institutional framework allowed the different sides to come together and find an agreeable solution, actors found a compromise rather by bargaining than by arguing. Thus, cooperative outcomes (which increases policies' effectiveness) need not imply deliberative interaction, which ensures actors to disregard their own interests and find solutions that are in the public interest. In turn, cooperative outcomes may also be achieved through bargaining determined by actors' self-interests (see Naurin 2010). Thus, while finding compromises in an informal arena certainly enhanced the effectiveness of decision-making, it remains open in how far a pluralistically composed expert group found solutions that were in the public interest.

Conclusion: implications for legitimacy

This chapter departed from the popular assumption that EU Commission expert groups enhance the output legitimacy of EU governance by rendering decision-making more effective. It argued that this view disregards a second dimension inherent to Scharpf's (1999) concept of output legitimacy, namely that problem solutions reflect the general interest. This demands both, pluralistically open and effective stakeholder consultation. According to their formal rules expert groups have the potential to reconcile this notorious trade-off (Dahl 1994). This

chapter argued that expert groups allow for both, plural interest representation and iterative interaction that facilitates cooperative behaviour and thus increases the effectiveness of the policy process.

The foregoing empirical analysis exposed expert groups as part of a broader political system, regulated by internal rules and procedures, and merely assisting – instead of replacing – formal EU decision-making. As expert groups do not substitute the EU's formal decision-making rules, speaking of 'unelected legislators' (Van Schendelen and Scully 2003) does not adequately capture their role in the policy process. Expert groups were further revealed as pluralistic, however, not necessarily open. Both, quantitatively and qualitatively two parallel patterns emerged: while expert group composition appears as well balanced, EU Commission DGs tend to favour experts they already knew, e.g. from former or parallel expert groups. In the network analysis this became visible in a network of overlapping memberships that spans the EU Commission's expert group system. In average an expert group with 30 members is linked to three other groups via experts that participate there in parallel. The qualitative analysis showed that often a core of 'EU-insiders' was surrounded by less familiar experts, in order to ensure a balance of old and new faces, to enhance the quality of advice and to comply with externally demanded proportionality criteria. However, with view to expert groups' impact on policy outputs, pluralistically composed expert groups are not a guarantor for policy solutions to reflect the public interest. Instead, solutions may very well also reflect package deals struck by opposing camps within an expert group.

Summing up, with regard to their formal rules EU Commission expert groups fulfil most of the criteria that enable them to contribute to the output legitimacy of EU governance. The empirical insights, however, also suggest that this needs to be put into perspective to the finding that despite all balancing efforts EU Commission DGs seem to have a preference for familiar 'EU insiders', which challenges their outright openness. It narrows the spectrum of desirable advisors within one policy area, as DGs are inclined to invite the same experts to several expert groups. In this regard the empirical insights support that '[t]he logic here [i.e. in EU committees] is one of functional appropriateness, not reflection of the public interest' (Rhinard 2002: 200). Thus, whereas expert groups' institutional structure suggests an *ability* to reconcile the tension between effectiveness and inclusiveness, in practice this may be

more difficult. The EU Commission is caught in a struggle between using expert groups as open deliberation arenas in the public interest and the need to deliver policy solutions in a timely and efficient manner.

Whereas inviting familiar advisers may facilitate the advisory process for the Commission, and therefore contribute to the first dimension of output legitimacy (a political system's ability to deliver outputs) it may come to the detriment of the second dimension (the provision of solutions that correspond to citizens' collective preferences). Thus, the tension identified here is not the one often evoked between input and output legitimacy, but lies within the concept of output legitimacy itself. As this tension is inherent to the theoretical concept of output legitimacy it requires policy makers to continuously engage in an arduous balancing act.

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Annex

Table 12.2: Commission DGs and their number of expert groups (February 2010)

		Expert groups	
Directorate General		**Total**	**Quantitative analysis**
ADMIN	DG Personnel and Administration	0	0
AGRI	DG Agriculture and Rural Development	58	7
AIDCO	EuropeAid Cooperation Office	4	0
BEPA	Bureau of European Policy Advisers	4	4
BUDG	DG Budget	3	7
COMM	DG Communication	0	0
COMP	DG Competition	4	0
DEV	DG Development and Humanitarian Aid	16	4
DGT	DG Translation	2	2
DIGIT	DG for Informatics	0	0
EAC	DG Education and Culture	51	33
ECFIN	DG Economic and Financial Affairs	11	6
ECHO	Humanitarian Aid and Civil Protection	0	0
ELARG	DG Enlargement	1	0
EMPL	DG Employment and Social Affairs	51	25
ENTR	DG Enterprise and Industry	97	24
ENV	DG Environment	68	28
EPSO	European Personnel Selection Office	1	0
ESTAT	Eurostat	93	3
HR	Human Resources and Security	4	1
IAS	Internal Audit Service	0	0
INFSO	DG Information Society and Media	29	9
JLS	DG Justice and Home Affairs	43	9
JRC	DG Joint Research Centre	1	0
MARE	DG Fisheries and Maritime Affairs	13	5
MARKT	DG Internal Market and Services	43	23
OIB	Office for Infrastructure and Logistics in Brussels	0	0
OIL	Office for Infrastructure and Logistics in Luxembourg	0	0
OLAF	European Anti-Fraud Office	4	0
OP/OPOCE	Publications Office	1	1
PRESS	DG Press and Communication	1	0
REGIO	DG Regional Policy	40	1
RELEX	DG External Relations	7	0
RELEX DEL	External Delegations, Representations and	0	0

	Offices		
RTD	DG Research and Technological Development	69	62
SANCO	DG Health and Consumer Protection	77	29
SCIC	Interpretation service	0	0
SG	Secretariat-General	4	2
SJ	Legal Service	0	0
TAXUD	DG Taxation and Customs Union	139	3
TRADE	DG Trade	7	0
TREN	DG Transport and Energy	68	23
Total		**1014**	**311**

Notes

Data for network analysis only includes expert groups for which members could be identified (mostly expert groups consisting of members attending in 'personal capacity', and not as representatives of a member state or an institution).

Data: Register of expert groups, data compiled in February 2010.

Chapter 13

For the sake of democracy? The European Commission's justifications for democratising expertise

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Introduction

In the modern post-industrial society, knowledge and expertise have become the terrain of policy-making (F. Fischer 1990; Radaelli 1999). Policy and decision makers increasingly rely on expertise and expert advice to cope with the demands of a technology-driven knowledge economy (Schaefer 2002). This growing dependence upon expertise is proving an increasing source of tension at all levels of governance; in particular, it has generated a wide-ranging debate about the implications of these developments for the nature of democratic processes in the 21st century. It has raised issues about accountability and the need to democratise the use of experts through the introduction of a more open and transparent system that is accessible to all groups and citizens.

This debate has been particularly pronounced at the EU level, where the use of expertise has rapidly expanded in recent years as the European Commission has become increasingly reliant on an extensive network of expert groups to assist in the formulation and implementation of policy (Gornitzka and Sverdrup 2008; Larsson 2003). The expanding role of expert groups in EU policy-making has exacerbated the debate about the technocratic nature of policy-making and the EU's

democratic deficit (Featherstone 1994; Harcourt and Radaelli 1999; R. Fischer 2008; Tsakatika 2002; Wallace and Smith 1995).

The increasing role of expert groups in the EU also highlights a perpetual conflict between the need for both democratic legitimacy and effectiveness in contemporary public policy-making (Dahl 1994). This particular dilemma has been deeply ingrained within the institutional structure of the European Union since its inception, with the Commission lacking a direct democratic mandate and therefore seeking legitimacy for its policy proposals through knowledge and expertise. Indeed, the EU expert group system, in particular, has been criticised as failing to find a balance between the two, with an effective system being emphasised at the expense of democratic legitimacy (Presson 2007; Rhinhard 2002). The underlying theme of this criticism of the Commission is that it is a bureaucracy that seeks to dominate through knowledge.

The academic Mark Rhindhard (2002), notes that while expert groups 'contribute substantially to the effectiveness of European policy-making, they are also a democratic liability'. The Commission has faced similar internal and external criticism from the European Parliament working in collaboration with lobby groups who have criticised the Commission's expert group system as being closed, elitist and lacking legitimacy (see for example Alter EU 2008). Recently, in 2011/12, the European Parliament expressed its concerns by withholding funding for Commission expert groups until greater openness and transparency measures had been implemented. The Commission has been forced to respond to this criticism by addressing the democratic norms that have underpinned this debate.

This chapter examines the way in which the Commission has formally responded to this critique through the publication of a number of policy documents outlining the need to 'democratise' expertise through the development of a more open and transparent expert group system. The focus of the analysis is based on an assessment of primary Commission documentation pertaining to the role of expertise and expert groups in EU policy-making (European Commission 2001a, 2002a, 2005, 2010a, 2010b). The aim is to assess what these documents tell us about how the Commission justifies an extensive role for experts and expert groups in EU policy-making. How does the Commission's position on expertise impact on the

debate surrounding the effectiveness and democratic legitimacy of the EU policy-making process?

From political and democratic theory we know of different ways to justify democratisation and democratic reform (see Peter 2010 for an instructive overview). We have organised our reading and analysis of the Commission documents around three justifications from this literature: the democratic justification,[1] the epistemic justification and justifications pertaining to efficiency and effectiveness. Accordingly, the democratisation of expertise and expertise arrangements, such as the Commission expert group system can be promoted and defended, roughly speaking, because it follows from a commitment to norms of democratic participation and fair democratic procedures; a broader and more inclusive scope improves the quality and rationality of decisions, or because inclusion and openness, bringing all parties and affected on board, reduces conflict and controversy, increases decision-making effectiveness and contributes to political order and stability. We have been interested in finding out how these justifycations are expressed in Commission documents, how they interact, strengthen or modify one another, and which of them are the more prevalent.

The chapter begins with a brief history of the development of the European Commission's expert group system, outlining recent attempts to democratise it and ending with a presentation of the central documents for our analysis. The next part of the chapter introduces the three justifications for the use of expertise and presents and reflects on our methodological approach. Part three contains the empirical analysis examining what the selected documents tell us about the Commission's justifications for democratising expertise. In the fourth and final part we discuss the significance of our findings and what are the broader implications of the Commission's position for the relationship between democracy and effectiveness and on the proper role, use and organisation of expertise in modern democratic societies?

[1] In political theory debates this justification is often referred to as the procedural or internal justification of democracy and democratisation. It is also referred to as the participatory justification (Habermas 1992).

Expert group history and documents

Since its genesis, the role of experts in policy-making has been a defining characteristic of EU governance. Indeed, expert groups and committees form an integral part of the fabric of the contemporary EU policy-making process, providing assistance in both the formulation and implementation of policy (Egeberg et al. 2003). Expert groups come under numerous different guises and names, including, committees, working parties, working groups, sub-groups, *ad hoc* groups, permanent groups, umbrella groups, steering groups and high level groups (Larsson 2003).

The proliferation of expert groups at the supranational level has stimulated a large body of academic literature examining their role in EU governance and policy-making.[2] Most of this literature has primarily focused on European Council and Parliamentary Committees, particularly Comitology Committees. Very few publications can be found with a specific focus on the Commission's expert group system (Gornitzka and Sverdrup 2008; Larsson 2003), which is somewhat surprising given that the European Commission is the most prominent instigator of expert groups at the supranational level.

The complex interaction of the European Commission with expert groups and stakeholders formed an integral part of the policy-making process outlined in the Treaty of Paris in 1951, establishing the European Coal and Steel Community (ECSC) and the Treaty of Rome in 1957, establishing the European Economic Community (EEC). The significance of this complex interaction spawned a new theory of integration outlined in Ernst Haas': *The Uniting of Europe: Political, Social and Economic Forces* (Haas 1958). From the outset, the High Authority of the ECSC and the Commission of the EEC was required by Treaty definition to act independently of all interests, including national interest, but to consult widely with interested parties. In addition, the Commission/High Authority was accountable to the Council of Ministers and the Parliament (Assembly) and policy proposals were, therefore, subject to intense scrutiny at both the supranational and national level. The later emergence of the

[2] See Christiansen and Kricher (2000); Christiansen and Larsson (2007); Joerges and Neyer (1997); Larsson (2003); Pedler and Schaefer (1996); Rhinhard (2002); Schaefer (2002); Vos (1997).

Committee of Permanent Representatives (COREPER) added to the level of scrutiny in that it could be carried out on a day to day basis by national representatives based in Brussels.

This intense level of scrutiny placed further emphasis on the need for the Commission to generate policy that was well researched, evidence-based and this could only be ensured by wide-ranging consultation with expert and societal interests. Finally, the fact that the High Authority and the Commission was, and remains, a relatively small bureaucracy in human resource terms has served to put further pressure on the Commission to seek external expertise in the development, preparation and implementation of policy. Indeed, the need to consult is now firmly enshrined in the EU Treaties with Protocol 7 requiring the Commission to 'consult widely before proposing legislation and, wherever appropriate, publish consultation documents' (Treaty of Amsterdam 1997).

Despite the significant role of expertise in the policy-making process there is an absence of reliable data on the number of Commission expert groups. Although there has been, over the years, a number of what might be described as informed guesses about the number of expert groups (Gorntizka and Sverdrup 2008), Torbjörn Larsson and Jarle Trondal (2006) note that not even the Commission has an accurate knowledge of the scale of expert group activities. Despite this lack of accurate data, academic studies point to a steady rise in the number of expert groups: From the 537 groups that were reported in 1975, the number had risen to 602 groups in 1990 (Wessels 1998), 851 groups in 2003 (Larsson 2003) and by 2007 the number of expert groups had reached 1237 (Gornitzka and Sverdrup 2008). Commission expert groups can include a range of stakeholders, including national administrators, industrialists, business leaders, scientists, academics, trade unionists, NGO's and societal group representatives. However, a large number of studies have argued that expert groups are closed and exclusive and dominated by a small group of sectoral actors, from industry, business and academia (Eising 2007; Green-Cowels 1995; Sandholtz and Zysman 1989).

In the early years of the Community, the Commission did little to enhance the visibility of the expert groups that it consulted; the system was regarded as opaque and lacking transparency (Schaefer 2002). In the 1980s, the Commission developed an annual

authorisation system, which enabled the Secretariat General to keep track of the number of expert groups through group expenses claims (Metz 2012). However, the 2002 Kinnock financial reforms which placed budget control and finances in the hands of individual departments made the annual authorisation system obsolete as the Secretariat General could no longer accurately assess expert group numbers (Larsson 2003). As Julia Metz (2012) notes, the obsolescence of the annual authorisation system and increased pressure for greater openness and transparency forced the Commission to reconsider its expert group reporting and management system.

The White Paper on Governance marked the first major response by the Commission to the perceived crisis of legitimacy at the EU level. The Commission acknowledges in this document that there is a lack of clarity about who is consulted and who makes decisions at the supranational level:

> It is often unclear who is actually deciding – experts or those with political authority. At the same time, a better informed public increasingly questions the content and independence of the expert advice that is given. These issues become more acute whenever the Union is required to apply the precautionary principle and play its role in risk assessment and risk management.
>
> (European Commission 2001a)

The White Paper outlines the need to enhance openness and transparency in the formulation and delivery of EU policies in order to restore public confidence and trust in EU institutions and politics (ibid.). The paper argues against an exclusively parliamentary approach to representation and accountability in EU policy-making (Metz 2012). For the Commission, widespread stakeholder participation is regarded as a vital means of tackling the perceived democratic deficit in the EU. The White Paper proposes 'opening up the policy-making process to get more people and organisations involved in shaping and delivering EU policy' (European Commission 2001a: 11). It pointed out that:

> [L]egitimacy today depends on involvement and participation. This means that the linear model of dispensing policies from above must be replaced by a virtuous circle, based on feedback, networks and involvement from policy creation to

> implementation at all levels.
>
> (European Commission 2001a: 11)

In response to these concerns, the Commission has made strenuous efforts to 'democratise' the role of experts noting that it 'must boost confidence in the way expert advice influences policy decisions' and will 'publish guidelines on collection and use of expert advice, so that it is clear what advice is given, where it is coming from, how it used and what alternative views are available' (European Commission 2001a). True to its word, the Commission published a number of documents solely related to the role of expertise and knowledge in EU policy-making which made a clear commitment to enhance openness and transparency in expert groups by increasing stake-holder participation and ensuring the need for 'epistemic diversity' and 'knowledge plurality' that extends beyond a narrow scientific and technical focus (European Commission 2001b, 2002c). This was followed up with the publication of documents setting out a framework outlining new rules about the composition and role of Commission expert groups in EU policy-making (European Commission 2005, 2010a; 2010b). The Commission notes that it is:

> […] politically responsible for its initiatives; it must not appear to 'hide behind' expert advice. Instead, the Commission must be capable of justifying and explaining the way expertise has been involved, and the choices it has made based on advice.
>
> (European Commission 2002c)

In 2004, the Commission made a commitment to the European Parliament to enhance the transparency of groups that assist in the development of policy. Article 16 of *The Framework Agreement on relations between the European Parliament and The European Commission* noted:

> [T]he Commission shall inform Parliament of the list of its expert groups set up in order to assist the Commission in the exercise of its right of initiative. That list shall be updated on a regular basis and made public.
>
> (European Commission 2004)

On the basis of this framework, in 2005, the Commission introduced an online register containing information on the composition, structure and function of their expert groups.

These measures have assisted the Commission in making expert groups more identifiable to outsiders. The Commission has even gone to the lengths of providing a definition, describing an expert group as 'a body set up by the Commission or its departments to provide it with advice and expertise, comprising of at least 6 public and/or private-sector members and meeting more than once' (European Commission 2013). A Commission expert group can be set up via a Commission decision/legal act (formal expert group), or by an individual Commission department with the agreement of the Secretariat General (informal expert group). Commission expert groups do not have a formal role in the process; their role is purely consultative commissioned to provide expert advice and expertise and a forum for discussion and exchange of information (ibid.).

Despite Commission attempts to 'democratise' their expert group system, concerns remain that their efforts have been largely cosmetic. The process has been criticised by some stakeholders on the grounds that it retains a degree of exclusivity and is dominated by a small group of actors from academia and industry; for example, Fischer (2008) highlights major concerns about the dominance of industry in Commission expert groups in the food safety sector. The Commission also has a tendency to rely on technical expertise at the expense of other types of related knowledge and practical experience (Alter EU 2008). The seriousness of these concerns became apparent when the European Parliament, in 2011/12, withheld funding for Commission expert groups on the grounds that there needs to be greater transparency in expert group activities[3].

Furthermore, despite a large body of new information being made available through Commission documents and the online register, the academic interest has been somewhat constrained to date. Only Åse Gornitzka and Ulf Sverdrup's (2008) study has made significant inroads into decoding the information within the online register. This

[3] EU Observer (2012) *MEPs Unblock Funds for EU Expert Groups*, available at: <http://euobserver.com/institutional/117633> [last accessed 29 October 2013].

research provides a comprehensive overview of the role, type and composition of Commission expert groups, providing a breakdown on key information including: DG connection, policy focus, sectoral breakdown of participants, formal or informal status, whether they are permanent or *ad hoc*, and the key tasks they conduct. Further research, however, is needed.

Here we will examine Commission documentation relating to the rationale and role of expertise in policy-making and expert groups (European Commission 2001b, 2002c, 2005, 2010a, 2010b). The growing range of Commission documentation on expert groups, provide an insight into the meaning that the Commission give to their thoughts and actions. It is through the production of documents, whether they come in the form of communications, white or green papers, or working documents, that the Commission is able to communicate their viewpoint to other EU institutions and external stakeholders. They provide one source of knowledge for researchers into how the Commission frame and conceptualise issues/problems and justify the need for action.

The Commission has produced a number of communications in relation to EU governance in which the issue of expert involvement in policy-making featured prominently. The 2000 *Commission Working Document: Science, Society and the Citizen in Europe* was the first to raise the issue of expert involvement, acknowledging that a growing knowledge gap and mistrust had opened up between experts and citizens. This was swiftly followed by the 2001 *European Governance: A White paper,* which stressed the need to enhance openness and transparency in policy-making to restore public trust in EU institutions. In 2002 the Commission published the 2002 *Science and Society Action Plan* outlining its responses to the above.

These documents raised the debate about the role of knowledge and expertise in EU policy-making and, therefore, can be viewed as the catalyst for the production of Commission communications that deal directly with this issue; such as the 2001 *Report of the Working Group: Democratizing Expertise and Establishing Scientific Reference Systems*, and the 2002 *Communication from the Commission on the Collection and Use of Expertise by the Commission: Principles and Guidelines – 'Improving the Knowledge Base for Better Policies'.*

Corresponding with the development of the 2005 online register of expert groups, the Commission produced a number of documents relating solely to their expert group system. The 2005 Communication to the Commission *Framework for Commission's Expert Groups: Horizontal Rules and Public Register* outlines minimum requirements and guidelines with regard to the composition of Commission expert groups and their role in the policy-making process. This document has, more recently, been updated in two 2010 Commission working documents of the same title. However, as Julia Metz (2012) notes, the 2010 documents are a consolidation exercise and add little additional rules or information with regards to Commission expert groups.

Theory and methods

The theoretical context for this study is an interpretive approach in which we analyse the purpose and meaning the Commission attach to their actions in relation to the way they use experts in the preparation and implementation of policy. More concretely, we present a detailed analysis of the way the Commission has formally responded to criticism through the publication of a number of policy documents that rationalise their approach and provide guidelines for the future operation of the expert group system.

In analysing these documents, inspired by democratic theory, we have searched for the justifications that underpin the Commission's attempt to rationalise and justify their response to the critique: a democratic justification, an epistemic justification and an effectiveness/stability justification. Whereas the democratic justification regards democratic procedures, inclusive and accessible participation and accountability as inherently valuable, the epistemic and the effectiveness/stability justifications both regard democracy and democratisation as having instrumental value (Estlund 2008; Peter 2010). The relationship between democracy and rational, knowledge-based decision-making is often presented as a trade-off relationship. The epistemic justification turns this relationship upside down and explores the cognitive benefit and the rise in decision-making quality and rationality of democratising organisations, institutions and polities. Similarly, the relationship between democracy and effectiveness is often introduced as a dilemma: Improved effectiveness comes with a democratic cost, while democratisation is decreasing effectiveness. However, the stability/effectiveness justification highlights that too little democracy could also be an obstacle to effective decision-making

and political stability, when important groups and stakeholders are excluded, feel excluded, and so resist accepting decisions.

The normative legitimacy of democracy and democratisation and how to justify democratic reform from a normative point of view is not our main concern in this chapter. What we do rather, is to make use of three justifications developed by democratic theorists with normative-theoretical ambitions, in a different analytical endeavour, namely to classify empirical material where a particular institutional political actor – the Commission – is reflecting on and justifying democratisation of certain arrangements – expert advice and expert group organisation.

Initial readings of the documents made clear that our threefold scheme made good sense as a way of ordering the material. However, we have also been interested in capturing the more specific shape of the different justifications and their prevalence. Which of the justifications are dominant, and which are more marginal? Taking this as our point of departure, we have examined the documents systematically and highlighted formulations that express each justification in one way or the other. However, it soon became clear that many of the most decisive formulations contained traces of all three justifications. It also turned out that simple counting of particular words, sentences and arguments would not necessarily give us good measures of prevalence and significance. The meaning and significance of single words, turns and argumentative moves in governmental documents will vary with political context, type of documents and the broader interpretation of the text in which they occur. We thus ended up with a qualitative content analysis approach where the central aim has been to give substance and nuances to the broader pattern that we saw occur as we examined and coded our documents, namely the striking significance of the epistemic and stability/ effectiveness justifications relative to 'purer' arguments pertaining to the inherent value of democratic procedures and participation.

When we flesh out our findings in the next section, the following is important to have in mind. First, we say here nothing of how the Commission is actually organising expertise advice and its expert groups, and how its actual policies and moves can be justified. It may very well be that the Commission's use of expertise in practice takes a different path than what formal documents and plans tell us.

Secondly, our approach may not reveal all Commission justifications for the use of expertise. For example, recent research has shown how the Commission uses knowledge and expertise to build stakeholder coalitions behind policy proposals to strategically enhance their position vis-à-vis other EU institutions (Boswell 2008; Metz 2012; Moodie 2011). Finally, we have tried not to blur the crucial distinction between analytical categories and actor level categories. For example, even if the Commission documents here and there state that democracy has inherent, 'basic' and 'fundamental' value, this of course does not necessarily imply that the democratic justification is overall the 'basic' and 'fundamental' one.

Documentary analysis of Commission justifications for the democratisation of expertise

Democratic justification

Given the continuous and growing pressure on the Commission to enhance the openness and transparency of their expert group system, it is wholly unsurprising to find that democratic justifications are common throughout the documentation. Statements revealing a commitment to democratic norms of inclusive participation are regularly stated; for example, the Commission White Paper on Governance notes that 'democracy depends on people being able to take part in the public debate' (European Commission 2001a). This position is confirmed in Commission consultation documents where it 'wishes to stress that it will maintain an inclusive approach in line with the principle of open governance: Every individual citizen, enterprise or association will continue to be able to provide the Commission with input' (European Commission 2002b).

While the Commission is treaty bound to widespread consultation, they are keen to stress that consultation is a supplement, not a replacement, to representative democracy:

> So there is no contradiction between wide consultation and the concept of representative democracy. However, it goes without saying that, first and foremost, the decision-making process in the EU is legitimised by the elected representatives of the European people.
>
> (Ibid.)

The European Parliament restated this argument in its Resolution on the White Paper on Governance noting that 'consultation of interested parties […] can only ever supplement and never replace the procedures and decisions of legislative bodies which possess democratic legitimacy' (European Commission 2001a). Clarifying statements such as these suggest that while consultation and expert groups should be made more open and inclusive, democratising the policy-making process is not the primary function of expertise as this is primarily to be taken care of through other EU institutions.

The main criticism levied against the Commission's consultation of expert groups is that they do not broaden participation, but foster an opaque, closed and exclusive system promoting technocratic forms of policy-making (Schaefer 2002). This criticism is acknowledged by the Commission when they note that:

> [T]he challenge of ensuring an adequate and equitable treatment of participants in consultation should not be underestimated. The Commission has underlined, in particular, its attention to 'reduce the risk of policy-makers just listening to one side of the argument or of particular groups getting privileged access.
>
> (European Commission 2002b)

While the Commission acknowledges the need for greater openness they are clear that 'democratizing expertise' is not about 'majority voting in science'. 'Democratisation' is framed in terms of a pluralistic approach to policy-making aimed at broadening and enhancing participation and equality of access (European Commission 2001b). The need for plurality, widespread participation and equality of access is most clearly emphasised when the Commission notes that 'all relevant interests in society should have the opportunity to express their views' (European Commission 2002b). Indeed, the Commission regularly stresses the importance of enhancing the role of civil society organisations and the public in policy-making (European Commission 2000a, 2000b 2002a, 2007). For example, there are regular suggestions to open up Commission expert group meetings to the public and for the promotion of direct citizen involvement through the development of participatory mechanisms such as consensus conferences, citizen juries and science shops (European Commission 2000a, 2001b, 2002c). However, the

Commission notes that 'the aim cannot and must not be to nurture an unfailingly favourable attitude on the part of the public. It must be to create the conditions for an informed democratic debate' (European Commission 2000a). However, the forums for citizen participation outlined above have not been embraced at the supranational level and should not be extended to an explanation or understanding of Commission expert groups given the low level of citizen involvement.

In 2005, with the introduction of the online register of expert groups, the Commission produced the document *Framework for Commission Expert Groups: Horizontal Rules and Public Register*, which laid out minimum requirements for expert group representation and the need for broad representation:

- When defining the composition of expert groups, the Commission and its departments shall aim at ensuring a balanced representation of relevant areas of expertise and areas of interest, as well as a balanced representation of gender and geographical location.

- Where the Commission or its departments appoint the members of the expert groups, they shall seek a balance between men and women; the medium term aim shall be to have at least 40 per cent of representatives of each gender in each expert group.

- When creating the expert group, the DG concerned shall describe the composition of the group in general, indicating categories of experts forming part of it; national, regional or local public authority represented, civil society organisation represented, interested parties, scientific or academic experts.

It is interesting to note the language used in reference to participation is not as open and inclusive in the expert group documentation (European Commission 2005, 2010a, 2010b). For every reference to the need for balanced representation, there are numerous references to the need for specialist expertise; for example, references to 'specialists with skills in the field', 'proven competence and experience', 'professional competence and experience' and 'specialists with competence' are scattered throughout the documents (European Commission 2005, 2010a, 2010b). The Commission seeks to establish

'a selection process that guarantees a high level of expertise' which raises the questions about the genuine openness of its democratic justifications.

There appears a contradiction in the Commission thinking in relation to democratic justifications; on the one hand, they advocate inclusive and open governance without participatory restrictions, but on the other, stipulate targeted consultation and the development of consultation criteria. The Commission acknowledges the inherent value of their democratic justifications through repeated references to accepted norms of democratic participation. However, participatory restrictions serve to weaken the democratic justification and suggest it is not central to the Commission's rationale for democratising expert groups.

Epistemic justification

At the heart of the epistemic justification is the view that Commission expert groups make vital knowledge contributions to the development of successful EU policy: 'as a condition for success, it is crucial that policy choices are based and updated on the best available knowledge. This requires access to the right expertise at the right time' (European Commission 2002c). Recent public controversies surrounding transformative technologies have revealed such great uncertainty and division amongst scientific experts that it is no longer clear what constitutes the 'the right expertise':

> Scientific expertise is then as much about stating what is unknown, or uncertain with degrees of probability, as about setting out commonly agreed and accepted views. The Commission might be confronted by a panoply of conflicting expert opinions, coming from within the academic world, from those with practical knowledge, and from those with direct stakes in the policy issue. The opinions may be based on quite different starting assumptions and with different objectives. They may also link to issues that go beyond what is commonly regarded as 'scientific'.
>
> (Ibid.)

Faced with this panoply of expert views and opinions, the Commission has become particularly sensitive to debates raised in the field of science of technology studies about what constitutes

expertise and what types of knowledge should be consulted in policy development (Beck 1992; Giddens 1990 Irwin 1995; Irwin and Wynne 1996; Jasanoff 2005, 2012). Scientific expertise is no longer regarded as the central foundation for the development of policy. Deep divisions have exposed the value free neutrality claims of experts:

> [E]xpertise is a difficult area due to the nature of the scientific problems at issue and also to the particular way it works, with experts called upon to give assessments that are bound to include subjective elements of some kind.
>
> (European Commission 2000a)

The impact of these discussions on Commission thinking is clear, as academics prominent in this area of study, such as Brian Wynne and Sheila Jasanoff, were invited to produce a Commission document on science and governance. The 2007 report produced, entitled *Taking European Knowledge Society Seriously*, followed on from themes raised in previous Commission document looking at the relationship between science and society, stipulating the need to enhance civic engagement in scientific debate and embrace diverse types of knowledge in policy-making, including ethical considerations (European Commission 2007).

This debate has had a manifest impact in relation to the Commission's thinking on expert groups and the knowledge they contribute to the policy-making process. Expertise is now increasingly understood in a broader sense; science is no longer the ultimate depository of trusted knowledge as new technologies are confronted by ethical and social implications (European Commission 2001b). The Commission's epistemic justification for the democratisation of expertise is, therefore, based on a pluralistic framework and the need for promoting knowledge diversity in policy-making. The Commission notes:

> The objective is to deliver knowledge for decision-making that is 'socially robust'. This implies a notion of expertise that embraces diverse forms of knowledge (plurality). Expertise should be multi-disciplinary, multi-sectoral and should include input from academic experts, stakeholders, and civil society. Procedures must be established to review expertise beyond the traditional peer community, including, for example, scrutiny by

> those possessing local or practical knowledge, or those with an understanding of ethical aspects.
>
> (Ibid.)

Knowledge plurality has become a popular term developed by the Commission in reference to the role of knowledge and expertise in EU policy-making. The 2002 *Communication from the Commission on the Collection and Use of Expertise by the Commission: Principles and Guidelines – 'Improving the Knowledge Base for Better Policies* is particularly focused on the need for greater epistemic diversity in policy-making. The Commission acknowledges that expertise extends beyond scientific knowledge and that the quality of policy is determined by ensuring a breadth of expertise is consulted, including practical and ethical knowledge. The Commission notes that 'wherever possible, a diversity of viewpoints should be assembled. This diversity may result from differences in scientific approach, different types of expertise, different institutional affiliations, or contrasting opinions over fundamental assumptions underlying the issue' (European Commission 2002c).

The Commission shows a willingness to open the process up to citizens, noting that 'ordinary members of the public, once they have all the information in their possession, can conduct high-quality dialogue with experts, put judicious questions to the experts, deliver balanced judgments and reach a reasonable consensus' (European Commission 2000a). However, references to openness often appear cosmetic when caveated with comments such as:

> [T]here are circumstances when too much openness could be detrimental to the quality of advice, or may damage the legitimate interest of those concerned with the process. The level of openness should be tailored to the proportion to the task in hand.
>
> (European Commission 2002c)

This indicates a clear trade-off between the epistemic and democratic justifications in which the quality and type of expertise takes precedence over equality of access. Furthermore, the need for experts to highlight the evidence on which their advice or comments is based further reduces the capacity of citizen to contribute knowledge to the process (ibid.). The Commission states the need to mobilise expertise

beyond the scientific community, but the stakeholder examples they provide promote specialist experts such as lawyers, ethicists and those with practical knowledge of the policy in question (ibid.). Such caveats suggest a rather narrow epistemic justification for expert groups with the Commission battling the need for greater epistemic plurality, without a reduction in the quality of knowledge expert groups provide.

Effectiveness justification

Implicit in the Commission documentation on expert groups is the view that a balance is required between widespread participation and quick decision-making (European Commission 2002b). This view was reconfirmed in the Commission publication on horizontal rules for expert groups that emphasises the need for a streamlined and efficient expert group system: 'the new framework aims at simplifying and clarifying provisions introduced by the previous framework of expert groups in 2005, increasing transparency, enhancing coordination, while reducing the administrative workload of services' (European Commission 2010a). The reference to reducing administrative workloads indicates the Commission's concern that the expert group system should not be encumbered by unnecessary bureaucracy.

The effectiveness justification is grounded in the idea that experts can contribute to the effectiveness of policy-making by being more time efficient, protecting the process from vested interests and delivering policy that meets citizens needs and demands (European Commission 2001a). This provides confirmation the Commission thinks that an effective and stable policy process, can, in itself, provide sound policy output. The Commission emphasises that the role of experts is to assist them in exercising its power of initiative and in its task of monitoring and coordinating its activities with the member states. They are required to:

> [A]ssist in a variety of functions, ranging from the provision of early warning, to target setting, policy implementation and evaluation. Diverse types of expertise can be needed depending on the functions, stages and time horizon of policy-making and public debate.
>
> (European Commission 2001b)

The important role of expert groups in ensuring the smooth transition of policy from formulation to output is reiterated below:

> Furthermore, no matter what seems to be the 'right' decision for those involved in the advisory process, it is essential that interested parties and the public at large are themselves convinced that decisions are sound. Increasingly, then, the interplay between policy makers, experts, interested parties and the public at large is a crucial part of policy-making, and attention has to be focused not just on policy outcome but also on the process followed.
>
> (European Commission 2002c)

This, again, confirms the need to focus on the output of sound policy that is then ratified by the EU legislative process and European citizens. This raises questions about how extensive the initial consultation process in the preparation of the policy need actually be if the emphasis is upon output and not process.

Many scholars have criticised the Commission's overall approach; in particular, the White Paper on Governance has been criticised as having technocratic undertones, with its emphasis on efficient problem solving not doing enough to dispel the legitimacy problems faced by the EU (Eriksen 2001; Joerges 2002; Kohler-Koch 2001;). It is difficult for the Commission to sustain the efficiency justification in the light of their requirement for plurality and diversity in pursuit of the best available knowledge. The reality is that wide-ranging consultation is both time consuming and bureaucratic. This potential contradiction has been acknowledged by the Commission who note that 'the "democratisation of expertise" entails some potential trade-offs. One is the balance between legitimacy and efficiency' (European Commission 2001b).

The Commission also expresses concern about the need to 'ensure that an excessive multiplication of expert groups is avoided' (European Commission 2005). Furthermore, they emphasise that 'the number of members in the group should remain *limited* in order to guarantee the effective operation of the group and ensure the quality of expertise' (ibid.). Here, the documents openly acknowledge the tension that exists between opening up the process and the effect that this could have on efficiency and the quality of policy. This is a

difficult dilemma to resolve in that by limiting the range of expertise consulted, the Commission may overlook a particular area of knowledge or interest with potentially damaging consequences later in the policy process. Commission proposals are constantly scrutinised at the supranational and national level and important areas of knowledge left unconsidered would be quickly exposed and could significantly undermine the quality of a policy proposal. The need to ensure that the knowledge base and economic and societal impacts have been fully explored, in a given policy area, is a vital ingredient in avoiding criticism that might undermine their policy proposal.

Furthermore, reference in Commission documents to the best available scientific knowledge and the most excellent scientists places considerable emphasis on the selection process. It is not always easy to identify the best available scientific knowledge and the relevant scientists. It is also important to take into account that scientific knowledge is often subject to conflict and division and that there is rarely one best solution to a given problem. There is often a countervailing theory and opinion and, therefore, limiting the range of knowledge consulted could prove problematic. The Commission notes that 'in light of the diversity of circumstances in which expert groups operate, the Commission believes that it is not appropriate to draw up common criteria for the selection of groups' members; selection should continue to be done on a case by case basis' (European Commission 2012). The above statement clarifies that there should not be a one size fits all approach to expert groups and member selection should be determined on the issue being dealt with.

Although we have used three justifications to order and analyse the Commission's rationale for their expert group system, it is important to note that they are not mutually exclusive and they interact upon each other, both positively and negatively, in relation to what the Commission is trying to achieve. It is often the case that two (and sometimes all three) justifications are relied on at the same time, or things are phrased ambivalently, so it is not altogether clear which justification is being appealed to. This creates the impression that the Commission is struggling to reconcile the interconnected nature of its expertise justifications.

Indeed, democratic and effectiveness justifications are often twinned together, with increased participation viewed as essential for policy legitimacy. The Commission notes that openness should 'encourage more involvement of interested parties through a transparent consultation process, which will enhance the Commission's accountability' (European Commission 2002b), and 'the quality of EU policy depends on ensuring widespread participation throughout the policy chain – from conception to implementation' (European Commission 2001a). Here the Commission creates a positive link between democratic and effectiveness justifications i.e. greater participation enhances both input and quality of output. However, for every positive correlation, the Commission is keen to stress that a focus on input should not impact negatively on effectiveness; what is most essential is that 'consultation periods should strike a balance between the need for adequate input and the need for swift decision-making' (European Commission 2002b).

Occasionally, epistemic and effectiveness justifications are placed together, such as when the Commission notes that:

> [T]he first objective is to help Commission departments mobilise and exploit the most appropriate expertise, with a view to establishing a sound knowledge base for better policies. The second objective is to uphold the Commission's determination that the process of collecting and using expert advice should be credible.
>
> (European Commission 2002c)

This is an interesting example of how the presence of the effectiveness justification in relation to the selection of expertise serves to undermine the epistemic justification. At times, all three justifications can be found together in one sentence, for example:

> By fulfilling its duty to consult, the Commission ensures that its proposals are technically viable, practically workable and based on a bottom-up approach. In other words, good consultation serves a dual purpose by helping improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large.
>
> (Ibid.)

Another good example of this rationale is when the Commission emphasises that 'the final determinant of quality is pluralism. Wherever possible, a diversity of viewpoints should be assembled' (ibid.). The grouping of justifications shows that they are not mutually exclusive, but closely interconnected and can positively impact on each other and the process of expertise democratisation. This is particularly the case when linking together the effectiveness justification with either, or both, the democratic or epistemic justifications. The latter are predominantly viewed as being incompatible with effective policy-making, whereas, above they are presented as a necessity for quality of output. The democratic and epistemic justifications are consistently referenced in relation to the need for an effective process; this suggests that the effectiveness justification is a key trade-off for the Commission when it comes to the democratisation of expertise.

Conclusion

The pressure to reconcile the need for effectiveness and democracy in EU policy-making represents a constant existential dilemma for the Commission. The 2001 White Paper presented a blueprint and commitment to democratise the process by enhancing openness and transparency, which has been subject to constant review and evaluation over the last 13 years, particularly in relation to the use of expertise and expert groups. The documents we have analysed, therefore, represent more than merely a snapshot of the Commission's position on this issue at a particular moment in time, but reflect an ongoing attempt to resolve this complex dilemma.

The documents reveal a concerted effort on the part of the Commission to address the criticisms about the undemocratic nature of their expert group system. In outlining their vision for a democratised expert group system, it is clear there are inherent tensions between the three justifications on which they have based their strategy; in particular, the implementation of a knowledge-driven (epistemic plurality) process that is efficient and streamlined (effective and stable) does not fit easily with wide-ranging consultation, equality of access and citizen involvement (democratic).

The larger number of references to the democratic and epistemic plurality justifications can be viewed as an expression of the Commission's normative values and its concerns about addressing

the technocratic and democratic deficit critique. The normative desire for a more democratised process is obviously an important aspiration for the Commission; however, the documents raise concerns that overemphasising epistemic plurality and open participation might lead to an ineffective policy process which impacts on the quality of policy output. For the Commission, a policy proposal should be capable of gaining the confidence of legislators and the European citizen. Since the Commission is not an elected body, the quality of their proposals, both in terms of the knowledge on which they are based and the degree of consultation and confidence they gain, is a critical source of legitimacy. This approach could be compromised by a time consuming consultation process that might delay decision-making and undermine the quality of policy proposals.

More often than not, references to effectiveness are linked with one or both of the democratic and epistemic justifications. This raises questions about the Commission's rationale for linking justifications. It would appear that it serves the purpose of toning down the technocratic undertones of the effectiveness justification. However, combining justifications with references to effectiveness invariably serves to undermine and weaken both the democratic and epistemic justifications; in doing so, the latter appear diluted with levels of participation often clarified or minimised.

The clearest and strongest manifestation of the effectiveness justification arrives in the acknowledgement that there should be no one size fits all approach in relation to the membership of expert groups (European Commission 2012). In other words, there can be no ideal type or model of expert group membership in relation to the democratic and epistemic justifications. Levels of participation and knowledge plurality, therefore, need to be assessed on a case by case basis with regard to the membership of a particular group. This is a manifestation of the Commission's view that the range of consultation and participation in expert groups is to be determined by the nature and focus of the group activity and not a normative commitment to democratisation.

In analysing the Commission's response to their critics, it is evident that while they accept the democratic paradigm as the basis for a dialogue, it continues to place a greater emphasis on the need for an efficient and effective policy-making process. The Commission is

trying to manage a complex set of circumstances by attempting to balance an efficient and effective policy process using the best available knowledge with a system that will satisfy its critics. In doing so, it is in danger of creating the impression that it is not fully committed to its own democratisation agenda and is merely using the democratic lexicon to placate its critics in what could be viewed as an essentially cosmetic exercise. The Commission has, however, made considerable efforts to implement guidelines in an attempt to ensure a more balanced composition and broader epistemic plurality within their expert group system. These measures, if fully implemented, have the potential to not only improve the epistemic quality of policy, but more importantly, ensure that one group of experts does not dominate the policy debate.

When examined as individual units of analysis, the technical nature and focus of Commission expert groups leaves them open to criticism on technocratic grounds. It is important to remember, however, that expert groups are one source of information for the Commission in a much broader consultation process; expert groups can therefore act as a supplement, rather than a replacement, to more direct forms of democratic legitimacy in EU policy-making. The main issue for the Commission is not so much the democratisation of their expert group system, important as this may be to placate their critics, but to ensure that in the preparation of a policy proposal they engage with as wide a diversity of opinion and knowledge as is possible and ensure that their policy proposals are subject to wide ranging exposure.

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Chapter 14

EFSA's involvement policy
Moving towards an analytic-deliberative process in EU food safety governance?

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Introduction

Since the second half of the 1990s, stakeholder involvement in the regulation of health and environmental risks has gained momentum in Europe. This is in large part due to increased public awareness of such risks, growing demands of civil society to have a voice in the risk handling process, and the explicit acknowledgement of scholars and policy makers alike that both facts and values play a role in all types of risk decisions. Revised EU regulatory frameworks such as those for chemicals control (Heyvaert 2008; Renn and Elliott 2011), safe use of biotechnology in agriculture (Steffek and Ferretti 2009), and food safety (Dreyer and Renn 2009a) offer new possibilities for interested individuals and socially organised groups to scrutinise relevant parts of the risk decision process and provide an input into the process. This can be highlighted by the following quote pointing to:

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* Adapted by permission of the Publishers from 'EFSA stakeholder and public involvement policy: a risk governance perspective', in Foundations of EU Food Law and Policy eds. Alberto Alemanno and Simone Gabbi (Farnham: Ashgate, 2013). An earlier version of the chapter was presented at the EUI Conference Mapping the Global Regulatory Space for Risk Governance, Florence, 28–29 May 2012.

> […] the gradual opening up of public expert institutions to societal engagement practices in order to meet societal demands for reliable, unbiased and transparent information and an active role of citizens in the construction of knowledge, in particular in the field of risks and environmental issues.
>
> (Hériard Dubreuil and Baudé 2008: 137)

The focus of this chapter is on the role of stakeholder and public involvement in the EU-level food safety governance. The Directorate-General Health and Consumers (DG SANCO), the food risk management authority at EU-level, has promoted this trend towards more open governance since the late 1990s. This is also true for the European Food Safety Authority (EFSA), the scientific expert body responsible for risk assessment since its establishment in 2002. EFSA has the dual role of both risk assessor and risk communicator. Its mandate is to provide the European Commission, the Member States and the European Parliament with independent, high quality scientific advice *and* to communicate about its findings. It has adopted a set of mechanisms of stakeholder and public involvement. The opening up of the scientific advice producing process to non-scientists – albeit in a clearly limited manner – is a true *procedural innovation in the regulation of food safety at EU-level.* Prior to the 'BSE-turning point', this process was the exclusive domain of scientific experts and lobbyists, forming a 'black box' to all those not directly involved in the process (Millstone and van Zwanenberg 2002: 607).

This trend towards more inclusive governance is for instance not (or not as clearly) observable in the United States. This observation relates to the field of environmental risk regulation where 'most risk assessors appear still to follow the old expert-dominated risk paradigm, in which the public has little or no voice' (Shrader-Frechette 2010). The paper by Shrader-Frechette contrasts this practice with the mandate of the famous 1996 report 'Understanding Risk' of the U.S. National Academy of Sciences (Stern and Fineberg 1996) that advised agencies to involve the public throughout the entire risk handling process. The paper relates the U.S. practice to targeted measures by industry groups for promotion of the view of risk assessment as a purely scientific and objective activity (ibid.).

Being inclusive does not contrast with EFSA's and the EU Commission's position that risk assessment is essentially a scientific

and objective activity. This position is upheld in the European Parliament and Council Regulation 178/2002, widely known and referred to as the 'General Food Law Regulation' (EC Regulation No. 178/2002[1]), and a prominent view advocated by the responsible authorities. The question of whether EFSA's interaction with stakeholders is compatible with the formal mandate and declared aim of safeguarding the independence of risk assessment has remained a contentious issue since the Authority's inception. Since recently, however, the most prominent issue is not the potential conflict between EFSA's scientific risk assessment mandate and involvement of external stakeholders. Rather a debate has unfolded, instigated by some press coverage and political observers, on whether the independence of EFSA's work is threatened by too close links between the scientific experts and the members of the Management Board (amongst others responsible for appointment of the members of the Scientific Committee and the Scientific Panels) on the one side and industry on the other. This debate has caused EFSA to undertake a new initiative in 2012 and open up its scientific meetings to observers from interested parties. This initiative has been introduced as a means of providing greater insights to the risk assessment process. Indirectly, it has been directed towards rebuilding trust and towards demonstrating transparency and openness. It is still an open question whether the new EFSA's 'glass house'[2] policy will reach its targeted goals. It also remains to be seen if the scientific experts will accept the policy. Some scholars see the risk that opening up expert meetings might impede hard-headed and focused deliberations among the experts (cf. Vos 2009: 257–258 with reference to Balet al. 2004).

In this chapter we discuss issues of legitimisation that EFSA faces in regard to its policy on stakeholder and public involvement. We argue that a successful involvement policy requires that EFSA's risk assessment activities are embedded in a multistage risk governance process in which stakeholder involvement in assessment-related

[1] Here it says: 'In order for there to be confidence in the scientific basis for food law, risk assessment should be undertaken in an independent, objective and transparent manner, on the basis of the available scientific information and data' (EC Regulation No. 178/2002, Recital 18).

[2] See EFSA's approach on Public Consultations on scientific outputs: available at: <http://www.efsa.europa.eu/en/keydocs/docs/consultationpolicy.pdf> [last accessed 17 September 2013].

activities should serve mainly the purpose of collecting relevant knowledge from stakeholders without being influenced by their evaluations or policies. To develop this argument we draw on a concept of risk governance that distinguishes four main governance stages (IRGC 2005; Renn and Walker 2008) and is inspired by the idea of an analytic-deliberative process, first developed by the US-National Academy of Sciences (Stern and Fineberg 1996).

In order to explain the rationales underlying EFSA's stakeholder policy we, firstly, describe the socio-political context within which EFSA had been established and which favoured a positive stance towards interacting with stakeholders. Next, we outline the Authority's stakeholder policy and describe it as supplementary to DG SANCO's stakeholder initiatives. Then, we reflect on the contentious issues in regard to EFSA's stakeholder policy by reference to the multistage IRGC risk governance concept. The chapter is completed by a summary of our main arguments and some conclusions.

Stakeholder and public involvement in EU food risk governance

By the late 1990s, academics and policy makers alike diagnosed serious problems of legitimacy and transparency in the decision-making processes about food safety in Europe. Two main (interrelated) shortcomings were identified in connection with the management of the series of food scares that had occurred in the 1990s, with the prion disease BSE (Bovine Spongiform Encephalopathy, known as 'mad cow disease') and the human variant CJD (Creutzfeldt-Jakob Disease) as the politically most delicate and contentious issue. First, the scientifically driven process of understanding and characterising food risks and the way in which the outcome of this process was used in decision-making on risk management were criticised as opaque and secretive (Vos 2009: 253). Second, there was the widely shared supposition that risk management decision-making was biased towards economic interests – in particular in the BSE case.

These shortcomings were believed to exist in risk decision-making at member state level (in the BSE case it was the UK which was caught in a crossfire of criticism); but also the European Union was strongly accused of being at fault:

> The Commission was faced with accusations stemming from the [European] Parliament, of being biased towards industrial interests and of giving priority to the objective of achieving the Single Market over public health.
>
> (Demortain 2007: 75)

It was a widely expressed concern at the time of the food scares that, as a result of economic globalisation and trade liberalisation, the EU would advance powerful industry interests at the expense of public health and consumer interests. Food safety regulators giving precedence to the goals of economic growth and competitiveness were criticised as being too lax in controlling compliance to food laws and too lenient for fast approvals even when lacking the necessary evidence. Uncertainties were seen as being ignored and public health protection compromised (cf. van Zwanenberg and Millstone 2005). Further, the public's diverse attitudes and values were not sufficiently recognised and respected in the handling of food safety issues (Hansen et al. 2003; Vos 2000).

These worries were interpreted in European policy circles as manifestations of serious problems of trust and legitimacy. In its White Paper on European Governance the Commission (European Commission 2001) even identified the widely perceived failure of the EU to manage food incidents effectively as one of the reasons for rising public misgiving and reticence about EU policies and institutions (Vos 2009: 251). One major objective of the thorough reform process to which EU food risk decision-making principles and institutional arrangements were subjected in the wake of the BSE crisis was to restore what had come to be perceived as a most valuable, however, increasingly scarce resource: *public trust* in food safety and those responsible for protecting the public from food safety-related risks.

The core of the reforms at the EU-level was the allocation of responsibilities for risk assessment and risk management to separate institutions. This division of responsibilities is codified in the General Food Law Regulation, the EU's overarching legal instrument that the European Parliament and the Council adopted in January 2002 (EC Regulation No. 178/2002). The stated aim of the 'two-body' solution' (Millstone 2009: 629) is to assure the *independence* of science-based food risk assessment. This independence is related to the objective of

trust restoration. The European Commission's White Paper on Food Safety had identified scientific advice 'being produced to the highest standards of independence, excellence and transparency' (European Commission 2000: 9) as a basic requirement for consumers' confidence in EU food safety policy.

The EU (and among the member states also very much the UK) also resorted to reforms designed to uphold the *procedural legitimacy*[3] of food safety governance by incorporating or strengthening democratic norms in the process of dealing with food safety issues[4]. Advancement of the *democratic quality* of the governance process forms another major response to the situation of 'contested governance' and the perceived loss of public trust (Ansell and Vogel 2006)[5]. It is formulated on the website of the European Commission's Directorate General for Health and Consumer Protection (DG SANCO) as follows: 'Transparency of legislation and effective public consultation are essential elements of building this greater [consumer] confidence'[6].

There are three major modes by which this purpose was served in future food safety policy and regulation (Dreyer et al. 2006):

- by making the risk handling process, including risk assessment[7],

[3] The exposition adopts here the argumentation by Grace Skogstad (2003: 324), who suggests in her analysis of GMO (genetically modified organism) regulation in the EU that, 'all strategies to render policies acceptable by virtue of democratising the procedures by which they are arrived at can be viewed as input-oriented legitimation'. While the 'test of appropriateness' under output (or results-based) legitimation standards was the perceived merit of policy outcomes, the merit of this test under input (or procedure-oriented) legitimation standards was the conformity of decision-making procedures with democratic norms of public participation and control (ibid.: 324–325).

[4] The same holds true for the UK and Germany, and to a lesser extent for France, which have also declared the (re)establishment of consumer confidence as one objective of their revised food safety policy (cf. Dreyer et al. 2006: 57).

[5] Christopher Ansell and David Vogel refer to the situation of 'both sudden and pervasive loss of trust and legitimacy and an uphill battle to restore it' (2006: 20) as 'contested governance' and argue that European food safety regulation over the turn to the new millennium exemplified such a case.

[6] See the 'General Food Law Principles', available on DG SANCO's website: <http://ec.europa.eu/food/food/foodlaw/principles/index_en.htm> [last accessed 11 September 2013].

[7] EFSA's current practice is to publish scientific opinions as well as the agendas and minutes of meetings and other key documents on its website; the Authority also

more transparent through wider public documentation;
- by offering more readily comprehensible and process-oriented information on risks to the public at large, specifically addressing major consumer concerns;
- and by providing more and improved opportunities for the consultation of economic and civil society actors in relation to food policy, legislation, and risk assessment and risk management activities.

Hence, the new provisions on food safety were tied up with two main objectives both related to rebuilding public trust: Strengthening of the expertise and independence of scientific advice and the introduction of more transparency, consumer-oriented risk communication, and stakeholder involvement in the risk handling process (Vos 2009: 252; Vos and Wendler 2006).

Reforms of stakeholder and public involvement policy and practice

Since the 2002 reform, efforts to involve stakeholders in EU food risk governance have gained momentum. These efforts are accompanied by verbal declarations highlighting the value of and the need for connecting with citizens and stakeholders, open dialogue, and understanding and addressing the concerns of stakeholders and consumers. Since the mid 2000's, these declarations present a standard part of the official rhetoric of many European policy makers, regulators and expert advisors. Involvement practice and rhetoric have a legal basis. Public consultation and interaction with stakeholders constitute one of the main pillars on which the General Food Law Regulation rests.[8] The Law stipulates that, with the exception of urgent matters, there shall be 'open and transparent

broadcasts through its website important meetings (including all Management Board meetings) and events; see the section on 'Openness and transparency' on EFSA's website: <http://www.efsa.europa.eu/en/values/transparency.htm> [last accessed 12 September 2013]. The Register of Questions database provides information about each request to EFSA including supporting documents and the current status, available at: <http://www.efsa.europa.eu/en/request/requests.htm> [last accessed 12 September 2013].

[8] Two further major cornerstones are the application of the principles of independence, objectivity and transparency in risk analysis, and the application of the precautionary principle in the face of scientific uncertainty.

public consultation, directly or through representative bodies, during the preparation, evaluation and revision of food law' (EC Regulation No. 178/2002: Art. 9). Furthermore, it specifies that EFSA shall develop 'effective contacts with consumer representatives, producer representatives, processors, and any other interested parties' in the course of risk assessment (Art 42).

The Law is also specific about the participation in risk management. This is defined as 'weighing policy alternatives in consultation with interested parties' (Art. 3(12)). This is in line with the concept of risk communication advocated by the Commission's White Paper on Food Safety, which defines its involvement concept as an interactive and involving dialogue with and feedback from stakeholders (European Commission 2000). Public consultation directly relates to participation as one of the five normative principles of 'good governance' which the European Commission has identified in its White Paper on European Governance. It requires governance institutions to ensure wide participation from the conception of policy options to the implementation of decisions (European Commission 2001).

The opportunities that EFSA provides for involvement is not related to risk management but to risk assessment. The involvement concept consists mostly of an 'elicitation of responses to pre-formed proposals' (Stirling 2006: 4) (i.e. of consultation), which has been contrasted to 'symmetrical two-way deliberation' (ibid.) with the potential to empower inputs from different social actors.[9] Empowerment of civil society and economic actors to influence decision-making is restricted to being part of EFSA's management. Four of the Management Board members, out of fifteen, are required to have a background in organisations representing consumers and other interests in the food chain (EC Regulation No. 178/2002: Art. 25(1)). However, these (as all other) members are mandated to act

[9] Andy Stirling (2006: 4) uses these terms to describe the 'bottom line recommendation' of a European Commission Workshop dealing with the topic of 'From Science and Society to Science in Society: '[…] European activities in these areas [the governance of research and the scientific advice process] should be informed by, and should themselves incorporate, more effective forms of symmetrical two-way deliberation, empowering inputs from a wide diversity of social actors'.

independently in the public interest (EC Regulation No. 178/2002: Art. 37(1)) and do not formally represent a specific sector or particular concern – though their particular background will inevitably have an impact on their views as Board members (cf. Alemanno 2008: 7). Generally, stakeholder interests are not supposed to interfere with the scientific decision-making process.

There is *change* from the earlier involvement practices in EU food safety risk governance in three respects. First, consultation occurs on a more regular basis and also increasingly in a more open manner, with EFSA's Stakeholder Consultative Platform taking a prominent position in regard to risk assessment matters, and DG SANCO's Advisory Group playing a more influential role in regard to risk management matters. This contrasts with ad-hoc, informal and confidential 'behind closed doors' consultations, which are highly dependent on the discretion of individual risk managers. This ad-hoc mode of including stakeholders was typical for SANCO policy-making style and still is to a large extent.

Second, the European institutions also seek advice from stakeholders on how to improve their system of consultation. The Stakeholder Consultative Platform advises EFSA in regard to the Authority's stakeholder policy and assists EFSA to better tailor its stakeholder involvement procedures to stakeholders' concerns in the area of food safety. DG SANCO consults the Stakeholder Dialogue Group (European Commission 2007) on how to improve the quality of its consultations in the areas of public health and consumer protection including safety of the food chain.

The third and most notable change, connected with the two others, is the actual opening of the former 'black box' of risk assessment to outside parties. Statements such as this: 'As for transparency and participation, scientific committees remain opaque and the participation of civil society and stakeholders is obviously not developed' (Demortain 2007: 42) are no longer a proper description of EFSA's performance in these regards. As will be highlighted in the next section, EFSA's public involvement procedures have expanded significantly in the recent past (cf. Klintman and Kronsell 2010).

EFSA's involvement approach

EFSA's practice of stakeholder and public involvement as it has evolved over the past decade comprises a variety of procedures and provisions. These include multilateral discussions at scientific conferences, face-to-face technical meetings, public consultations via the Authority's website, an annual Stakeholder Colloquium and the Stakeholder Consultative Platform[10].

With the establishment of the Platform, EFSA institutionalised stakeholder consultation through a permanent body. The Platform was established in 2005 as a 'forum of regular dialogue and exchanges' (EFSA 2010a: 1).[11] It is composed of EU-wide stakeholder organisations operating in the food chain and within EFSA's remit. As indicated above, its main task is to assist the Authority in developing its overall relations and policy with regard to 'civil society stakeholders'. According to EFSA terminology, these include 'consumer groups, non-governmental organisations (NGOs), and market operators such as farmers, food manufacturers, distributors or processors and science professionals'.[12] Its mandate includes commenting on EFSA's work program and annual management plant, advising on risk assessment methodologies and providing information and cooperation at the technical level (EFSA 2010a). EFSA has been quite rigorous in designing a selection process for stakeholder involvement on the basis of fair representation and competence.

Increasingly, EFSA has also sought advice and input on general and issue-specific risk assessment approaches and methodologies from stakeholders. To date, the Authority has launched public consultations on issues such as the scientific and technical guidance documents for the application for authorisations of a health claim; the

[10] See the section on openness and transparency on EFSA's website, note 7 above.
[11] The inaugural meeting took place in Parma, 6–7 October 2005. The Platform holds meetings three times a year. See 'Stakeholder Consultative Platform' available on EFSA's website: <http://www.efsa.europa.eu/en/stakeholders/cp.htm> [last accessed 15 September 2013].
[12] See 'Stakeholder Initiatives' on EFSA's website: <http://www.efsa.europa.eu/en/networks/stakeholders.htm> [last accessed 15 September 2013]. EFSA distinguishes civil society stakeholders from 'institutional stakeholders' referring to 'those to whom the Authority has a legal obligation to work with under Community rules, e.g. the European Commission, the European Parliament and the Member States' (ibid.).

guidance for risk assessment of genetically modified plants and derived food and feed; the methodology for conducting Geographical BSE risk, and others.[13] EFSA also invites public comments on draft scientific opinions. For instance, the Authority has carried out a public consultation to receive input on the draft Scientific Opinion on Dietary Reference Values (DRVs) for protein (in 2011) (see EFSA 2012a) and on the draft Scientific Opinion on the assessment of allergenicity of GM plants and microorganisms and derived food and feed (in 2010) (see EFSA 2010b).

In addition to web-based public consultations, EFSA resorts also to a more targeted approach to invite comments and input in regard to scientific outputs or procedures such as technical meetings with its Stakeholder Consultative Platform or establishment of working groups of the Platform. In the second half of the 2000 decade, EFSA established a working group with Platform members mandated to provide EFSA's Scientific Committee with advice on how to draft EFSA's recommendations for Transparency in Risk Assessment (EFSA 2009: 3; EFSA 2010a: 3). EFSA also held a technical meeting with all Platform members on its draft Opinion on animal cloning.[14]

In 2012, as part of its openness and transparency policy, EFSA provides interested parties with the opportunity to participate in Scientific Panel meetings as observers. In the past, this option of stakeholder involvement has been the subject of highly controversial debate (Vos 2009: 265). EFSA has ventured into this new openness with mixed feelings: the Authority is going to 'test the feasibility' of this additional step in enhancing the transparency of the risk assessment business (EFSA 2011: 9). The observer status does not allow stakeholders to contribute information or data or transport their views into the expert discussions. However, it does give them formal access to the expert exchanges and strengthens their 'monitoring power' (Tamm Hallström and Boström 2010). Further, it enables them to increase their constituency's knowledge about

[13] See the section on openness and transparency on EFSA's website, note 7 above. In 2010, EFSA launched 91 public consultations (EFSA 2011: 9).

[14] See 'Technical meeting with EFSA's Stakeholder Consultative Platform on its draft Opinion on animal cloning', Brussels 7 February 2008, on EFSA's website: <http://www.efsa.europa.eu/en/events/event/stakeholder080207.htm> [last accessed 17 October 2013].

specialised information and the argumentative basis of risk assessment outcomes.

Critical reflection of EFSA's involvement policy and practice from a risk governance perspective

The notion of food risk governance

In the last decade, the term 'governance' has experienced tremendous popularity in various research fields including risk research. While there is no generally agreed definition of what constitutes 'risk governance', this concept is typically understood as involving the translation of the substance and core principles of the governance term to the context of risk and risk-related decision-making (van Asselt and Renn 2011; Renn 2008: 8–9).

This implies that the concept of risk governance pays special attention to collective decision-making on risk as a multi-actor and multilevel process involving new modes of regulation and collaboration. Within a broad notion, risk governance refers to the complex web of actors (governmental and non-governmental), rules, conventions, processes and mechanisms concerned with how relevant food risk information is collected, analysed and communicated and with how decisions on risk management are taken and implemented at different policy levels.

Food Risk Governance (or the similar term of Food Safety Governance) in this perspective is understood to include but also to extend beyond the three conventionally recognised inter-related components of risk analysis (risk assessment, risk management, and risk communication). Food risk governance also involves the collaboration of and coordination between public authorities and commercial and civil society actors and wider contextual factors such as institutional arrangements, regulatory styles, legislative procedure and political culture (cf. Ansell and Vogel 2006; Dreyer and Renn 2009a; Klintman and Kronsell 2010; Millstone et al. 2004; Millstone 2009).

It has been underlined that in the context of risk the notion of 'governance' is used 'both as a description of how decisions are made and as a model for how to improve decision-making structures and processes' (van Asselt and Renn 2011: 443). In this chapter we rely on a specific framework of risk governance that has been developed and

promoted by the International Risk Governance Council (IRGC 2005; Renn and Walker 2008). One of the principles that this concept endorses is that the pursuit of risk governing purposes cannot be confined to public authorities but requires the inclusion of a wider array of actors. The idea of *inclusive governance* is inherent to this concept. It is based on the assumption that affected and interested parties have something valuable to contribute to all major steps of the governance process. Of course, not all stakeholders are interested in providing constructive advice and feedback, yet the system is built on the assumption that stakeholder input in general can enrich the process and enlighten the responsible authorities. Particularly in cases of risks surrounded by complexity, uncertainty and ambiguity, the argument goes, mutual communication and exchange of ideas are likely to significantly improve the final decisions, rather than impede the decision-making process or compromise the quality of scientific input and the legitimacy of legal requirements (see also Webler 1999; Renn 2004).

Designing inclusive risk governance consists according to the IRGC framework of a chain of four central activities to handle risks: Framing, risk appraisal, risk evaluation, and risk management. The risk process has an iterative nature and communication is linked to all activities. We draw on this four-stage design for suggesting how a structured approach to public and stakeholder involvement in food safety governance could look like.

Tailoring involvement to the different risk governance stages[15]

Specifying the role of stakeholder and public involvement in each of the four different stages is essential since 'public engagement is not a stage of governance that can be completed, tidied up and filed away' (Stilgoe et al. 2006: 53; see also Jasanoff 1993). Therefore, one needs to distinguish between *different purposes* served at the four governance stages to which public involvement needs to be tailored. In order to define the purposes served at these four stages we propose to distinguish between four discourse categories (cf. Renn 1999). The following paragraphs provide a brief description of the four discourse categories and the way public involvement should be

[15] This subsection draws on Dreyer and Renn (2008) and Dreyer and Renn (2009b); see also König et al. (2010).

related to them. Each of the four discourses produces different types of outcomes that are fed into the next governance stage.

Involvement at the stage of *Framing* requires a *design discourse*. This discourse is aimed at defining the food safety threat, setting the terms of reference (including the scope, focus and design of Appraisal), and at specifying the way (breadth, concrete procedures) in which stakeholders and/or the wider public may be included in the further steps of the governance process (König et al. 2010).

The *epistemic discourse* is generic to the stage of *Appraisal* which is aimed at understanding risk (including both possible physical impacts and social concerns and impacts). It comprises communication processes in which experts of knowledge (not necessarily scientists) grapple with the clarification of a factual issue. The goal of such a discourse is the representation and explanation of a phenomenon as close to reality as possible. By knowledge, we refer to *systematic* knowledge collected by established means of natural and social sciences and *experiential* knowledge collected by interactive techniques such as hearings or focus groups (Renn 2010). Both types of knowledge are important for describing what we generally know about the food safety issue and what we have learned in dealing with the risk or a similar risk in the past. Subject to the provisions of framing, civil society actors and also the wider public may contribute to the broadening and refining of the infrastructure of knowledge and information upon which evaluation and management decisions will then draw. It is important to note, that it is *not* the task of stakeholders and representatives of the wider public in the epistemic discourse to deal with normative questions pertaining to the acceptability or tolerability of either the risk itself, possible alternatives to the risk source in question (substances, processes, practices), or management measures for dealing with the risk. These normative issues need to be dealt with at the evaluation and management stages. They are based on value judgements about what is 'desirable' rather than what is 'true' (this is also a prominent justification of the allocation of risk assessment and risk management responsibilities to different institutions in EU food safety regulation).

The *reflective discourse* is generic to the *Evaluation* stage. This stage is concerned with arriving at a balanced judgement on the risk on the basis of the outcome of the epistemological discourse and social

values and preferences. The reflective discourse encompasses communication processes dealing with the interpretation of factual issues, the clarification of preferences and values, and a normative judgement of the risk's tolerability or acceptability[16]. The tolerability or acceptability judgement is informed by the results of the scientific assessment process (for which EFSA is responsible), but it is not determined by it. Other important considerations on wider social and economic issues (e.g. benefits, societal needs, quality of life factors, sustainability, distribution of risks and benefits, social mobilisation, conflict potential) may be included in the balancing process. The main purpose of participation here is to ensure that all values and preferences are included in the weighing procedure, and that the final judgement reflects the societal balance between innovativeness and caution. This discourse would require the cooperation of risk assessors and risk managers since technical competence and value judgements are both needed to come up with a prudent evaluation.

The *practical discourse* is generic to the *Management* stage which is concerned with acting on risk. It involves communication processes aimed at the identification, assessment, and selection of different management measures for reducing and managing 'intolerable risks' or 'tolerable but not acceptable' risks. This discourse looks at the variety of possible interventions, addresses the pros and cons for each measure or package of measures and suggests a set of measures that appear to be effective, efficient and fair. The main purpose of public involvement is here to assure that relevant knowledge and different preferences are considered in the conclusions on the selection of one or more management measures.

EFSA's emphasis on knowledge collection and consultation

From the outset, the issue of EFSA's engagement with stakeholders and the public has been controversial. There continues to be concern that interaction with outside parties might politicise the risk assessment process or provide an access point for industry interest representation (cf. Vos and Wendler 2006: 124).

[16] The term 'tolerable' refers to an activity that is seen as worth pursuing (for the benefit it carries), yet it requires additional efforts for risk reduction within reasonable limits. The term 'acceptable' refers to an activity where the remaining risks are so low that additional efforts for risk reduction are not seen as necessary (IRGC 2005: 36).

During the past two years, EFSA has stressed in documents explaining its policies on consultation and independence that stakeholders and the public are invited to contribute their specific *knowledge* on questions of risk assessment so that the quality of the assessments can be improved. These documents state explicitly that the Authority will not take perspectives and judgments on issues of risk management (such as whether addressing the risk requires the initiation of risk-reducing actions and how these actions should be designed) into consideration since EFSA has no mandate for risk management issues. Here we provide some examples of such statements:

> EFSA is committed to openness and regularly consults and meets its partners, stakeholders and the public at large on key issues, both scientific and otherwise. This includes EFSA's core planning and strategy documents as well as key scientific issues and all guidance documents. Consultations and scientific events *contribute to enhancing the quality and completeness of EFSA's scientific outputs.*
>
> (EFSA 2011: 8; emphasis added)

> However, EFSA creates a firewall that prevents hearing experts from exerting any undue influence over the discussions of the independent experts by excluding the former from the drafting of outputs and from the final exchanges and voting on those outputs. This allows the Authority to take stock of the *data or expertise developed by industry, NGOs and other interested parties on newly developed practices, processes, substances, and products.*
>
> (EFSA 2011: 9; emphasis added)

> The [public] consultation will also need to clarify the consultation target audiences, the nature of relevant information and further operational details e.g. *comments which* do not relate to the contents of the document or contain information on individual cases or *are related to policy or risk management aspects, which is out of the scope of EFSA's activity, will not be taken into account.*[17]

[17] See page 6 (emphasis added) EFSA's approach on Public Consultations on scientific outputs: available at: <http://www.efsa.europa.eu/en/keydocs/docs/consultationpolicy.pdf> [last accessed 17 September 2013].

If words are being turned into action, this specification of EFSA's involvement policy can help to add legitimacy. Concerns that EFSA's risk assessment work is unduly influenced by 'external' considerations can be allayed, when there is clarity that EFSA does not provide a platform for participatory processes and deliberation around competing interests, values and visions but instead collects relevant knowledge from different sources to produce more informed opinions.

It would require empirical investigation to assess whether in fact serious efforts have been undertaken to improve the knowledge basis of risk assessments through stakeholder and public consultation. Without such investigation the possibility cannot be ruled out that knowledge improvement is foremost a rhetorical issue in terms of a reinterpretation of previous practice where the main motivation was trust-building through involvement procedures. If, however, EFSA can convincingly demonstrate that it values and considers outside parties' knowledge, it can also reduce perceptions that its participatory engagement presents a mere trust-building exercise (cf. Bengtsson and Klintman 2010: 112–113) with impacts of the consultations not going beyond shaping of the Authority's stakeholder policy.

In addition to legitimacy, the open governance policy is meant to generate and sustain trust. The Authority's self-presentation strongly highlights the need for trust and independence of EFSA's scientific advice. This motive is also the prime rationale for the new 'observer policy':

> By providing the opportunity for interested parties to observe Panel meetings in action, how scientific opinions are developed and how various points of view are debated by experts, EFSA aims to build further confidence in the risk assessment process and in its own scientific work and outputs.
>
> (EFSA 2012b)

This new policy needs to be seen against the background of the recent accusations that several of the experts working in EFSA scientific panels have too close links to the food industry, which could compromise the Authority's independence. The former head of EFSA's Management Board, Diána Bánáti, was publicly attacked to have

failed to declare a conflict-of-interest situation to EFSA (caused by simultaneous work for the industry-funded think-tank International Life Sciences Institute (ILSI) Europe). Since this event[18], EFSA has been under great pressure (amongst others from the European Parliament) to demonstrate that the scientific experts (and the Management Board members, who are amongst others responsible for the governance of the expert selection process) are not biased in their work and decisions. Whether the panel experts will accept the new observer policy or oppose it remains to be seen.

It is clear, that trust-building in regard to the independence and quality of scientific advice will remain an important rationale of EFSA's involvement policy. In 2011 and 2012 EFSA conducted two major workshops in which it invited stakeholders to discuss the new independence policies and to collect advice on how to sustain scientific integrity. The new policy indicates that the 'instrumental rationale' is complemented with a 'substantive rationale'[19] for consulting stakeholders and the wider public: From the substantive perspective, consultation leads to 'better ends' (Stirling 2007: 220), i.e. in EFSA's case to improved scientific advice (Finardi et al. 2012: 436). If EFSA is able to demonstrate that getting substantive advice is a serious motivation for their new openness policy, this could produce better outcomes but also enhance public trust in the Authority's performance.

In cases of risk associated with high levels of complexity and/or uncertainty it seems advisable to complement the currently used consultation procedures where interaction occurs mainly in an aggregate manner (Bengtsson and Klintman 2010: 113; Borrás et al. 2007) with deliberative procedures, i.e. communication processes based on mutual exchange of arguments and reflections allowing for in-depth discussions.

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[18] In response to the pressure of the European Parliament, EFSA has recently strengthened its rules on transparency and conflicts of interest (EFSA 2011); on 9 May 2012, EFSA announced that Diána Bánáti had resigned from the EFSA post.

[19] In considering the range of rationales and motivations bearing on participation in science and technology governance Andy Stirling (2007; 2009) has proposed to distinguish between three types of perspective: normative, instrumental and substantive. This analytical distinction builds on earlier conceptual work by Daniel Fiorino (1989) on different rationales and imperatives for participatory engagement of powerful institutions.

Lack of provisions for deliberations in regard to risk evaluation

A thorough reform to dismiss legitimate concerns that stakeholder and public involvement could undermine the quality and credibility of the risk assessment would be to organise risk evaluation as a risk governance phase in its own right as proposed by the IRGC risk governance framework. This would imply separate structures and processes including particular procedures of stakeholder and public involvement.

Current participatory mechanisms are not designed to capture, reflect on and deliberate over the wider concerns and expectations that individuals, social groups, and different cultures may link with food safety-related issues (Dreyer and Renn 2006; Dreyer et al. 2010; Steffek and Ferretti 2009). Deliberations around value judgments are relevant at the framing, evaluation and management stages (cf. Dreyer and Renn 2009b). In cases in which the food risk is associated with high levels of uncertainty, complexity and/or ambiguity, deliberations at the evaluation stage are of particularly high importance. What the current EU food safety governance system lacks is an institutional location and platforms where these deliberations can *legitimately* take place. EFSA is often challenged about non-scientific aspects of a problem or a pending decision to which it cannot respond due to its remit. Hence, the Authority appears to be insensitive and far-removed from reality as it does not address these concerns. One way to resolve this problem is for EFSA to identify those concerns and bring them to the attention of SANCO or other risk management agencies that have responsibility for addressing these issues. Such a transfer of identified items to risk management authorities highlights the need for *joint risk evaluation practices*. In the current system, evaluation activities are exercised in a manner that is largely implicit and ad-hoc. As evaluation is a task at the interface between risk assessment and risk management[20] involvement procedures would need to be organised in cooperation

[20] This task draws on both scientific knowledge and political and socio-economic considerations. The risk tolerability/acceptability judgment requires a good understanding of the web of evidence, residual uncertainties, and ignorance (i.e. the scientific characterisation of the risk) as well as judgmental competencies for making the necessary trade-offs between risk, benefit and other relevant impact categories (cf. Dreyer and Renn 2008).

and interaction between risk assessment and risk management authorities.

In those cases in which food risks are highly ambiguous and likely to trigger public controversy the results of what has been termed a 'concern assessment' (IRGC 2005; Renn 2008) would be an important input into the deliberations during the phase of evaluation. In a concern assessment social scientists and economists identify and analyse risk perceptions and social concerns using social science methods such as surveys, focus groups, macro-economic modelling, or structured hearings with stakeholders.[21] In the current EU food safety governance system there are no clear provisions for the use and performance of such concern assessments. The European Group on Ethics in Science and New Technologies has produced some opinions that could be considered relevant for addressing food safety-related concerns. It has been controversial, however, whether consideration of these opinions was within EFSA's remit or an exclusive risk management task. One way of institutionalising the identification and analysis of risk perceptions and social concerns within the current governance system would be to establish a 'concern assessment panel' in EFSA. This panel would extend EFSA's scientific panels by one and take the same format as the other panels except that this panel would comprise experts with a background in the social, psychological and economic sciences (Vos and Wendler 2009). The present Advisory Group on Risk Communications has been serving this purpose since its establishment in 2002. However, it cannot substitute for a panel that would be responsible for identifying social concerns and impacts as an important input to the later stages of evaluation and subsequent management process.

Summary and conclusions

In this chapter we addressed the role of stakeholder and public involvement in the opinion forming process of EFSA. The inclusion of

[21] In the food safety area we have defined Concern Assessment as '[…] a systematic process of gathering knowledge about the concerns, expectations and perceptions that individuals, groups or different cultures may link to a certain risk and about the associated potential of social controversy and conflict, knowledge which can be used to assess the likeliness of wider socio-economic and socio-political impacts related to the source of a food risk […] or indeed risk management practices […]' (Dreyer et al. 2010: 1624).

stakeholders has been reinforced by the need for additional knowledge from various stakeholders and actors in the assessment process, by the request for trustworthiness and by the requirement for public legitimisation. EFSA is committed to a gradual opening of the risk assessment process to outside parties in the EU's revised food safety system. 'The scrupulous application of the general principles of openness and transparency' (EFSA 2012c: 7) has been one response to the perceived loss of public trust in food safety and science-based food risk assessments after the BSE scare.

However, this openness can also be interpreted as a potential threat to the independence of risk assessment (in terms of its scientific integrity). Being subject to inputs from different interest groups could compromise the impartiality of the scientific panels. To address these concerns, the Authority needs to ensure that stakeholder and public involvement is reconcilable with the protection of risk assessments from 'inappropriate policy [and other] influences' (National Research Council 1983: 14). The independence principle is of central importance to the EU food safety system: Separate institutions for risk assessment and risk management were deliberately designed to guarantee that assessment is done independently from management. While the value of the institutional divide is debatable (due to the many interactions and interdependencies between risk assessment and risk management, cf. National Research Council 1983: 6; Jasanoff 1993; Codex Alimentarius Commission 2007), there is wide agreement on the merits of a functional distinction between the two tasks as they involve 'different goals, kinds of expertness, and operating principles' (National Research Council 1983: 151).

If EFSA can convincingly demonstrate that those consulted are contributors to an 'epistemic discourse' and that their knowledge is used to improve risk assessments and risk assessment guidelines, it will enhance its credibility that the principles of independence and openness are adhered to. It may experience the risk that not all stakeholders are interested in such a role and use this discourse for public advocacy. Yet if the mandate of including relevant knowledge is made clear and transparent such strategic behaviour may outmanoeuvre itself. Over time, the contributors to improved knowledge will become the dominant players in the epistemic discourse. At the same time, EFSA should not treat criticism by stakeholder groups as attacks against the institution and its

performance. There is a fine line between unreasoned attack and well-founded criticism. Being open to critical remarks and demonstrating that critical remarks are taken seriously can also help the Authority to overcome the objections that several stakeholders have raised (cf. Bengtsson and Klintman 2010: 112–113). In particular, EFSA has been criticised that its involvement practice is restricted to 'sham involvement' in terms of a 'simple exercise in democratic legitimation and trust enhancement' (Everson and Vos 2008: 29[22]). EFSA's very emphasis on trust-building as a rationale for stakeholder and public involvement has partially nurtured such accusations. Explicit reference to building and sustaining trust is usually met with public scepticism. Certainly, such accusations and misperceptions can only be overcome if EFSA is able to demonstrate that its strengthened rules about conflicts of interest are consistently implemented. The two workshops on scientific integrity have been paving the path in this direction, but there is certainly more evidence needed that the practice is following the rhetoric.

We have further argued that EFSA's involvement policy could gain credibility and legitimacy, if the EU's food safety system included a concern assessment as part of the scientific investigation and included a separate phase of risk evaluation as a bridge between assessment and management. Hence, there is a need for clearer structures and processes through which the 'integration principle', i.e. the 'need to collect and synthesize all relevant knowledge and experience from various disciplines and various sources including uncertainty information and *articulations of risk perceptions and values*' and the 'reflection principle', i.e. a balanced risk judgment which takes into account also wider economic, social and cultural issues that requires a *collective reflection and deliberation process* (van Asselt and Renn 2011[23], emphasis added) are implemented in EU food safety governance.

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[22] The authors refer here to the Dutch government's public participation initiatives in regard to genetically modified organisms.

[23] The 'communication and inclusion principle' holds that the higher the levels of uncertainty, complexity and/or ambiguity, the greater the variety of actors that need to be involved in this process (van Asselt and Renn 2011: 443). According to Marjolein B.A. van Asselt and Ortwin Renn the three principles synthesise what needs to be seriously considered in organising processes and structures to govern uncertain, complex and/or ambiguous risks in particular.

Towards an analytic-deliberative process in EU food safety governance?

We can conclude that it is not sufficient to address EFSA when the aim is to move towards realising an 'analytic-deliberative process' in EU food safety governance. At the core of this approach lies the combination and reconciliation of scientific/technical oriented analysis[24] with argumentation-based deliberation in risk characterisation and evaluation[25]. It is inspired by the recognition that technical-expert modes of risk assessment and evaluation need to engage with the knowledge, values and interests of stakeholders and the wider society. Only then the two main elements of collective decision-making on risk can be properly addressed: knowledge about cause and effect relationships and judgments about risk acceptability and the need for risk mitigation activities.

EFSA's recent innovations in stakeholder involvement are instrumental to strengthening the analytical component of risk assessment. They can be used to elicit and consider the specialised knowledge of stakeholders in relation to scientific-technical or other issues relevant to assessing the risk situation. They are also instrumental to strengthening the deliberative component of risk assessment if they imply purposeful *discussion* of knowledge-related issues and claims with the stakeholders.

With the establishment of a 'concern assessment panel' in EFSA experts of social science (and not experts of natural sciences only) would support the analytic elements of the deliberation around evaluating a risk. Concern assessments could deliver the information that is needed to properly represent diverse and non-obvious concerns and interests of stakeholders and citizens in relation to a particular risk (e.g. relating to social, economic, ecological and ethical

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[24] '*Analysis* uses rigorous, replicable methods, evaluated under the agreed protocols of an expert community […] to arrive at answers to factual questions' (Stern and Fineberg 1996: 3–4, emphasis in original).

[25] 'Deliberation is any formal or informal process for communication and collective consideration of issues. Participants in deliberation discuss, ponder, exchange observations and views, reflect upon information and judgments concerning matters of mutual interest, and attempt to persuade each other' (Stern and Fineberg 1996: 4, emphasis in original).

outcomes) in the risk evaluation, even if the stakeholders/citizens do not become involved themselves[26].

If highly diverse interests need to be reconciled and/or broad value judgments or issues of social justice addressed, it requires direct participation efforts aimed at deliberation around plural values and interests. This type of deliberation which does not focus on knowledge claims but on *balancing of interests* and/or *value judgments* principally requires other forums than EFSA panels, committees and platforms – be it with our without direct participation of stakeholders and/or citizens. It requires the purposeful creation of structures and procedures that are located at the *interface* of risk assessment and risk management and include EU risk management authorities. These would interact directly with representatives of EFSA and key stakeholders (and if required of the wider society) for the purpose of (re)framing the problem (the selection of facts relies largely on the choice of concerns) and evaluating risk.

In short, EFSA alone cannot realise an analytic-deliberative process in EU food safety governance. Moving further towards such a process requires above all new provisions for deliberations at the interface of risk assessment and risk management which EFSA could advocate but not establish.

[26] 'Coping with a risk situation requires a *broad understanding* of the relevant losses, harms, or consequences to the interested and affected parties' stresses the US National Research Council (Stern and Fineberg 1996: 2, emphasis in original).

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Chapter 15

Expertise and power
Environmental agencies operating in complex policy environments

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Introduction

This chapter asks how environmental agencies manage to learn and adapt to policy challenges in a global context; the chapter particularly focuses on how these agencies have sought to shape the balance between bureaucratic autonomy and political control. Critiquing principal agent theory, it investigates the evolution of three environmental agencies (the European Environment Agency, the England and Wales Environment Agency and the United States Environmental Protection Agency), particularly in the area of climate change. The chapter examines how the agencies seek to influence environmental policy on domestic, regional and global levels, with a special focus on the political principals who seek to steer the agency in particular directions. The chapter examines the role of agencies and bureaucracies more generally, interrogating some of the assumptions of the bureaucracy literature, particularly principal agent models. The chapter suggests that a greater focus on different multilevel contexts, which the three agencies face, may create other possible dynamics, including government and policy learning. Principals may be divided, and expertise itself may be located in different sources. Agencies may be able to use network and alliance

building to strengthen their policy/political positions within their respective systems.

Environmental policy creates global and local governance demands on any agency seeking to cope with the scientific uncertainty, inter-linked issues and diverse societal concerns (climate change being an example that encapsulates all of these concerns). This difficulty is further heightened by the equally complex nature of the European Union (EU) and United States (US) policy-making processes. This chapter looks at one dimension of the policy process in these complex multilevel systems. The chapter focuses at the organisational/meso level on three environmental agencies and their historical evolutions: the European Environment Agency (EEA), the Environment Agency for England and Wales (EA), and the US Environmental Protection Agency (USEPA). Comparing the EU and the largest national environmental agency in the EU provides a more useful multilevel comparison of the powerful US Federal agency.

The chapter formulates some theoretical propositions based on the bureaucracy and learning literatures. It asks: what are the key conditions that shape the relationships between the agencies and the political masters and constituencies; and which of these conditions can help trigger agency innovation and change, particularly in the area of climate change? The research is based on primary documentation research and interviews with over 70 current and former officials from the USEPA, the EEA, the EA, Department for Environment, Food and Rural Affairs (DEFRA), and associated organisations in the 2007–2012 period.

The next section formulates some theoretical propositions for bureaucracies. The third, fourth and fifth sections investigate how the respective relationships of the USEPA, EEA and the EA formed with respect to their clients/principals. The sixth, seventh and eight sections explore respectively the USEPA, EEA and EA evolutions from their origins, focusing on their government learning and policy learning, and how these shape the individual agency policy towards climate change.

Theoretical overview

Principal agent approaches

The principal-agency (PA) literature focuses on the core relationships between bureaucratic organisations (the agents) and the principals, the political authorities. PA theorists conceptualised politicians as principals who anticipate the potential for bureaucratic manipulation and assert their long term control over their agency by setting various control mechanisms (McCubbins et al. 1987). Bureaucrats also have personal preferences that conflict with the principals' concerns, and the delegation of authority to agents gives the bureaucrats information advantages (Bendor 1988: 363; McCubbins et al. 1987: 246–247).

To avoid expensive monitoring and sanctioning costs, the principals have incentives to build mechanisms that control the bureaucratic process (the 'rules of the game'), but do not require specifying or even knowing the detailed policy outcomes that bureaucrats pursue (Calvert et al. 1989: 598–599). Agency discretion happens only when the agency manages to choose a policy that differs from the principals' expectations when establishing the procedures (Calvert et al. 1989: 604–607). PA approaches label this discretion as 'shirking', where an agency engages in opportunistic behaviour that leads it to select alternatives that are more costly for the principal (Kassim and Menon 2003: 122). This approach expects agency innovation to only happen rarely and at a marginal level; external changes in the environment provide the more substantive change.

Rationalist path dependent approaches

Terry Moe (1984: 773) offered a structural perspective in which the dominant advocacy coalition consisting of the government and its associated constituency seeks to build administrative structures that insulate their achievements from politics. The opposing coalitions are geared to protecting their voice in the structural design of bureaucracies and will seek to impose structures that subvert effective performance and politicise agency decisions (Moe 1989: 273–277). The agency's characteristics are the product of strategic design on the part of politicians and all those affected interests. Since there is no singularity of interests, the design of the personnel decisions, administrative goals reflect a much more chaotic discussion than predicted by the PA approach. In this arena, no one succeeds in achieving their particular agency design: opposing coalitions seek to

impose structures that inhibit agency performance and enhance external control while the coalition in power defends the agency with their own structures (ibid.: 281–285). The structural choices of the creation period continue to endure and dominate over future incremental changes; agencies are likely to have the discretion for policy innovation but the overall impact is likely to be static.

Historical path dependent approaches

James G. March and Johan P. Olsen (1998: 948) define 'institution' as 'a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations'. Institutions such as environment agencies are generally slow to change and tend to change in an incremental fashion that reflects the enshrined norms and rules. The difficulty of getting new policy ideas through the EU system with its multiple veto points has been discussed at length elsewhere (Weale 1996), but the same holds true for the US system. Institutional analysis emphasises how structures persist over time and resist rapid, non-incremental change.

Nevertheless, institutional change can be more regular and gradual yet have substantial impact over time. Wolfgang Streeck and Kathleen Thelen (2005: 18–31) suggest five potential mechanisms. The first (*displacement*, ibid.: 19–22) involves the increasing salience of a subordinate institutional mechanism and ideas relative to the dominant institutional framework. These institutional and ideational alternatives end up displacing the current choices as growing numbers of actors defect to these previously unacceptable practices. *Layering* (ibid.: 22–24) follows from having additional elements added to an existing institutional structure: although they might not appear to be fundamental changes at the time of adoption, over time these elements may grow at a more significant rate and absorb more resources than the more traditional elements. *Drift* (ibid.: 24–26) encapsulates what happens when an institution is allowed to erode and change due to deliberate neglect. The institutional rules and norms remain but the context in which they operate has changed. *Conversion* (ibid.: 26–29) involves active redirection and redefinition (by new governments or coalitions, for example) of the institution towards new goals and purposes. Finally institutions may suffer *exhaustion* (ibid.: 29–30) where an institution is forced to change because, for example, its own activities have undermined its function or it finds itself over-extended.

James Mahoney and Kathleen Thelen (2010: 18–19) push this typology into a framework understanding the conditions governing the nature of change, namely: does the political context afford defenders of the status quo strong or weak veto weapons, and how much discretion do the actors within the institution have with respect to interpretation. Where the status quo actors can block large scale change and low institutional discretion exists, institutions will see layering. High discretion and strong veto points and players may result in institutional drift. Weak veto chances/players and low discretion may generate displacement, while high discretion and weak veto chances may lead to conversion. One or perhaps even more of these patterns may come into play in examining how environmental agencies seek to adapt to their environment, and shape environmental policy. Accordingly, this perspective would expect agency change to be rarer but it may be possible without agency learning.

Entrepreneurship and learning

Waterman et al. (2004: 24–46) ask what happens when one relaxes both fundamental assumptions of the PA approach (i.e. that conflicts between goals are inevitable and that agents tend to have more information than principals). They mapped out different possibilities for the array of advocacy coalitions in two tables, which have been consolidated into Table 15.1 below.

Table 15.1: Principal-agent scenarios

Goal Conflict Versus Goal Consensus	**Agent's Comparative Level of Information**	**Principal's Comparative Level of Information**	**Scenario**
Goal Conflict	Little	Little	1. Bumper-Sticker Politics
Goal Conflict	Much	Little	2. Classic Principal-Agent Model
Goal Conflict	Much	Much	3. Advocacy Coalition
Goal Conflict	Little	Much	4. Patronage System
Goal Consensus	Little	Little	5. Theocracy
Goal Consensus	Much	Little	6. Politics versus Administration
Goal Consensus	Much	Much	7. Policy Subsystem
Goal Consensus	Little	Much	8. Plato's Republic

Notes

Adapted from Waterman et al. (2004: 25).

Table 15.1 illustrates dramatically how the Principal-Agent model, the second scenario, is only one possible relationship (Waterman et al. 2004: 24–31). This is not to discount the importance of this scenario: it is a frequent one and raises the most challenges for maintaining policy control over bureaucracy. Taking the other scenarios– scenario one suggests that there may be certain issues where knowledge for both agents and principals are discounted, such as the argument about whether the Judeo-Christian heritage should be incorporated in an EU Constitution; in such cases, the bureaucracy moves back into the background as it is no more than one interest among many in the discussion. In contrast, the third (advocacy coalition) outcome illustrates the case where the particular agency is allied with a supporting coalition that shares its information and is opposed by another coalition that contests its ideas and values. The fourth scenario highlights the possibility that the principals have the key information advantage and use it to strip the bureaucracy of all but a menial task role.

When we move towards scenarios where consensus operates between government and bureaucracy, the fifth scenario again suggests the marginalisation of the bureaucracy as they largely become supporters for whatever ideas the politicians are willing to promote. Where information asymmetry favours the agent, we see the classic depiction of bureaucracy as becoming technocrats whose expertise gives them considerable autonomy as long as they produce preferred results. The policy subsystem suggests the case where all the actors share information and there is a consensus on the goals, leading to a stable network or triangle built on trust and consultation. The final scenario best fits political systems with little administrative capacity.

The implications of these scenarios are that agency discretion is heavily constrained in scenarios 1, 4, 5, and 8, and unproblematic in scenarios 5, 6, 7, and 8. Bureaucratic control is most problematic and contested in the principal agent and advocacy scenarios. These scenarios encompass the possibility that there will be competing principals as well as competing agents. Neither the principals nor the agents are likely to be unitary in outlook, and this very much reflects the complex nature of EU, UK and US institutional politics.

This reality underlines the importance of coalitions. Agencies have incentives to ally themselves with principals who share their goals

and policy outlook. Agencies and other interest groups have a strong incentive to share information to likely supporting coalitions, and thus the situation of information asymmetry decreases. This leads Waterman et al. (2004: 37–42) to conclude that information and learning is a core dynamic that transforms the bureaucracy—principal relationship: both sets of actors are learning over time about policy, politics and their own organisations.

Claire Dunlop and Oliver James (2007) find strong evidence in the EU agricultural policy discussion of hormones that principals recognise that they are in complex relationships with their agents and that learning how to better operate it is possible. They find that particular conditions may spur or inhibit such as the organisational culture of the agent organisation and the degree to which the principals use organisational change to reshape that culture. Nevertheless unforeseen crises and particular cognitive blinders on the part of the principals may lead the principals to lose control of the learning process.

This chapter is more interested in the reverse possibility: namely the ability of agencies and their leadership to learn about coalitional and public policy possibilities; this leads potentially to asymmetric and opportunistic behaviour that some theorists describe as a 'moral hazard' although this is too narrow a label (Arrow 1968). Daniel Carpenter (2001: 14–35, 353–367) has explored how bureaucracy can build autonomy and establish direct links to the citizens and the new associations. Entrepreneurship is crucial and differentiates this from functionalist accounts (e.g. Majone 1997). Bureaucracies need stable legitimacy for themselves, and not just for the policies. Accordingly they push policy innovation (Carpenter 2001: 14–18). Genuine autonomy exists when agencies can make the decisive first moves towards a new policy, establishing an agenda or the most popular alternative, which become too costly for politicians and organised interests to ignore.

Agencies can alter the preferences of the principals (the public, organised interests, and politicians); this does not constitute shirking as the agency acts to *transform* the systems and the thinking of the principals. Agencies operating with discretion may exert a process of bureaucratic entrepreneurship (Carpenter 2001: 30–31). Here the agency leadership experiments with new programs and introduces innovations to existing programmes while gradually convincing the

diverse political actors and coalitions to value the new innovation and the agencies themselves. Agency actors sustain this preference shift by using recognised legitimacy in the policy area, by building superior ties to the public and/or media, or by establishing reputations for impartiality or the pursuit of public good. Agencies operating in the classic PA scenario will seek to develop advocacy coalition scenarios or even more secure policy subsystem and technocracy relationships where there is stability, recognition and legitimacy for the agency role.

Table 15.2: Learning Modes

Learning types	**Learns What**	**To What Effect**
Government Learning	Process-related behaviour and strategy	Organisational Change and Political Positioning
Lesson Drawing	Instruments	Programme Change
Social Learning	Ideas, worldviews	Core Paradigm, Value Shift
Blocked Learning	Cognitive change occurs but structures, interests and current worldviews block behavioural change	Learning remains at individual or group level, and is not embedded into organisation and network routines
No learning	No change in cognition and behaviour	Actors in process are satisfied with status quo

Colin Bennett and Michael Howlett (1992: 278–288) provide a useful synthesis of the policy learning literature, which is included in Table 15.2. The first type of learning, 'government learning', focuses on understanding the administrative process with the aim of organisational change. By contrast, 'lesson drawing' focuses on how programmes change via actors learning about new instruments and tools. An oversimplified way of seeing the distinction is to see government learning as targeting internal and external actors involved in the agency policy process while lesson drawing focuses on policy objectives. Finally social learning encompasses the learning process where new world views and outlooks are learned that lead to radical shifts in policy paradigms. Differentiating lesson drawing from social learning in this way allows one to isolate the fact that it is possible to adopt or borrow new instruments without changing fundamental values or outlooks (Page 2003). The two lower categories in Table 15.2 emphasise the contingent possibilities contained in all of these learning processes. There must be both a cognitive change of understanding on the part of the actors, as well as a behavioural adaptation to this new knowledge. Accordingly, if actors within an organisation do not identify some form of new knowledge, then no

learning will occur. 'Blocked learning' represents a scenario where such learning is identified, but it is not embraced and accepted by the overarching process/government.

This chapter assumes that agency actors see themselves as seeking to fulfil aims and to set evolving aims. This assumption may have to be reconsidered in light of the empirical evidence, as William West (1988) and Thomas McGarity (1991) argue that actors within an agency can vary considerably in terms of their perceived role and their outlook towards policy. Discretion and even autonomy are worthwhile aspirations for pursuing those objectives. Agencies are seeking to expand resources, including knowledge, to fulfil their goals. This may involve all three types of learning that are the focus above. Agencies need to learn how to build alliances with others, or to convert the principals to the agency's preferred consensus. Agencies also need to better understand their tasks in terms of wider understandings as well as instruments. Table 15.3 outlines some of the possibilities for agency learning and coalition-building.

Table 15.3: Learning Strategies

Dimensions of Agency Activity	**Maintain/Safeguard Arena**	**Expand Political Arena**
Innovation is Stable	(A) Iron triangle, policy community or classic Principal-Agent: limited learning	(B) Political engagement and advocacy coalition building on entrenched ideas: government learning and perhaps some lesson drawing
Innovation is Pushed	(C) Internal coalitional learning and organisational learning	(D) Expansive advocacy coalition – entrepreneurial learning: all three forms of learning

Notes
From Zito (2009).

Situation A is more likely to involve incremental adaptation or limited lesson drawing that does not modify the organisational strategy and worldview. There are some tactical adjustments and increased peripheral knowledge in order to maintain the agency position in relation to the inner core principals and constituencies. Blocked or no learning (either actively blocked by particular actors or the absence of an agency impulse) is also possible in this scenario. Both the PA and the Moe approaches would expect this scenario to dominate future agency performance; any discretion takes the mild

form of shirking. Innovation, particularly social learning, is unlikely and only at a very marginal level. Situation B relates a similar pattern although incremental adjustments to political strategy are more likely. This scenario occurs in changing political circumstances when power is shifting (e.g. changes in government) or the actor coalitions are more fluid. Instrumental and organisational learning can occur in this scenario, but social learning does not.

Situation C suggests substantial coalition innovation through endogenous processes although exogenous pressures also may appear. Organisational changes or lesson drawing may occur that seek to improve agency performance, but there is no focus on transforming the wider context. Social learning is less likely. Situation D encapsulates Carpenter's entrepreneurial learning concept where agencies actively push innovation and seek a wider actor coalition to embrace this knowledge and embed it into their own routines, rules and behavioural norms. All three forms of learning may occur in this situation, but social learning is most expected to transform the understanding of the principal and the agent.

Comparing environmental agencies

The USEPA and the original PA relationship

President Nixon's push for an agency occurs in the context of a greater national environmental awareness in the 1960s and early 1970s. This led both the Democratic and Republican parties to try and balance their traditional voter bases (e.g. trade unions, employers) with new concerns about the environment. In this new, transitional and therefore somewhat ambiguous context, Nixon pushed for the landmark National Environmental Protection Act and started the process of building institutions to support this agenda. In 1969, Nixon created a cabinet committee, the Environmental Quality Council, which issued a preliminary report recommending the creation of a new Department of Environment and Natural Resources (Landy et al. 1994: 22–31). This substantial administrative move involved the Department replacing the Department of Interior, absorbing many of that Department's historical functions for the natural environment as well as elements from other departments. However, several Cabinet Secretaries disliked this plan, and this led Nixon to instead issue an executive order creating the EPA (ibid.: 30–33).

The new EPA was thus constituted out a range of offices with varying departmental histories and outlooks. Nixon's advisory council recognised at an early stage in developing an operational plan for the agency that such diversity would create future problems. However, the political calculation was that the EPA needed to establish its credentials in the short term and only in the longer term work through a rationalised system based on functional lines (Landy et al. 1994: 33–36). Thus the first Administrator Ruckelshaus pursued a wide range of enforcement actions. This strategy, while extremely successful in promoting the agency's credibility as an environmental champion, had the consequences of putting questions of organisational development and re-organisation on the backburner (McMahon 2006: 36–43). This short historical overview suggests most strongly the rationalist account of Moe, with its focus on coalitions of political (and bureaucratic) interests jockeying in the design of the new agency. The actual outlook of the offices amalgamated suggests strong elements of the historical/sociological approach as the different media offices often fell back on old networks and outlooks. Ruckleshaus's initial strategy also suggests an entrepreneurial bid to satisfy the principals in the Democrat-controlled Congress and reach out to the new constituency of the environment interests. But this effort is contained within the pathways generated at the USEPA's origin.

The EEA and the original PA relationship

On 17 January 1989, the Commission President Delors highlighted the idea in a speech to the European Parliament (EP), Members of which had already filed motions for such an agency (Brown 1995; European Parliament 1987). Although accepting the general premise of providing better data to support implementation, member state, Commission and EP actors diverged on the scope of the agency. Certain member state governments (particularly the UK and Spain) and some Commission officials (fearing a competing agent) wanted a very limited data coordinator while the Environment Commissioner (Ripa di Meana), the EP Environment Committee, Green MEPs and other supporters wanted an agency with regulatory power (Ladeur 1996; Majone 1997).

The Commission proposed the agency in 1989, and that same year the Environment Ministers agreed its establishment (European Commission 1989; Schout 1999). However the state representations could only generate a consensus for a network governance agency.

Top Commission officials accepted this perspective, arguing that any further EEA enhancement should be a future development (Brown 1995). The EP only accepted this weakening of its initial vision with the addition of a review procedure that obliges the consultation about any reform of agency tasks (Bailey 1997). The 1990 Council Regulation established the EEA and 'a European environment information and observation network' (or EIONET; see EEC Regulation No. 1210/90: 2). The Regulation granted the Agency legal autonomy but also maintenance of close links with Community institutions and member states it emphasised that the Agency's activities should 'avoid duplicating the existing activities of other institutions and bodies' (EEC Regulation No. 1210/90 1990: 3).

In the EEA's creation, one set of principals, the 12 member states, managed to dominate the key decisions. The regulation placed the EEA in a classic, limited PA role of information and network coordination (Ladeur 1996). Nevertheless, the differing principals' negotiating positions are reflected in some of the original regulation's ambiguities and tensions: particularly the EEA's relationship to the Commission and the EU role in formulating policy (Majone 1997). The composition of the overseeing Management Board included a range of principals, namely the EP, Commission and the Member State representatives, who contested the Agency's role. Moe's approach better explains these ambiguities in comparison to the PA approach which would highlight the dominance of the principals. The agency received a greater scope than the most negative member states had wanted, but lost the chance to have the ambitious and independent scope set out by its advocates.

The EA and the original PA relationship

In 1991, Prime Minister Major announced the idea of amalgamating various units to establish a combined environmental agency (Carter and Lowe 1995: 38–39). This announcement reflected a degree of social learning occurring in the UK. There was an increasing learning process on the part of actors, such as the Royal Commission on Environmental Pollution. This learning involved the recognition that the lack of a unified administration among the various UK agencies, particularly Her Majesty's Inspectorate of Pollution (HMIP), the National Rivers Authority (NRA) and the Waste Regulation Authorities (or WRAs). Lack of coordination was hampering the handling of cross-media policy challenges as well as the ability to

implement the detailed EU regulatory stipulations and to engage with EU decision-makers (Carter and Lowe 1995: 41–43; Haigh 1986).

As Moe's framework predicts, two ministries (the Department of the Environment, DoE, and the Ministry of Agriculture, Fisheries and Food, MAFF) contested control over the agency; this dispute over responsibility was extended to coastal protection matters (Carter and Lowe 1995: 38–49). The degree to which the principal agencies (the HMIP, NRA and WRA) were merged was also controversial, leading to a 1991 consultation process (Department of Environment 1991). Business, particularly the Confederation of Business Industry, wanted to strengthen the position of the HMIP within such a restructuring. Fishing, farming, riparian, amenity and rural interests all preferred the agency to reflect a strong NRA.

The Conservative Government passed through the 1995 Environment Act establishing the EA for England and Wales (United Kingdom 1995). The organisational principle was to retain the strengths of the core agencies and allay the fears of the respective constituencies. Moe's thesis explains well the resulting incoherent administrative structure that reflected this effort, building future tension within the new organisation. Each of the three core bodies wanted the EA to reflect the dominant key organisational characteristics of their own body (McMahon 2006: 147–174). Arguably the main winner in this process was the NRA, which was the largest element of the new EA. Another organisational compromise was the creation of multi-skilled teams, an approach that reflected the HMIP and its integrated pollution control approach (Interviews, EA officials 2007). In a similar vein the EA adopted a matrix structure organised around nine over-arching themes which required regional and area actors to work across the themes. These diverse approaches and compromises ensured that most officials faced new and unfamiliar administrative structures (McMahon 2006: 147–174).

The USEPA's evolution and consequent position for the climate change challenge

In contrast to the EA and EEA, the USEPA has had decades of development and a consequent level of activity. Therefore this section only focuses on changes in the PA control mechanisms and examines the issue of networking and innovation of governance instruments through the climate change case.

The USEPA also differs from the other two agencies in that the White House administration selects political appointees to head both the agency and its key offices. This is a clear control mechanism by a key principal; these appointees are in a sense agents with a more direct link and association to the principal. However, the agency control and impact of these officials varied widely depending on the individual. Some of the more effective USEPA administrators, such as Ruckleshaus, had developed their own independent political base and prestige (Interviews, USEPA officials 2007–2008). In Ruckleshaus' case, this partly reflected his two separate stints as Administrators, but in most cases the political appointees bring their political leverage from their past political/policy lives (e.g. Christine Todd Whitmann was a prominent Republican governor).

A somewhat notorious example of the White House seeking to radically shift the direction of the agency by means of this PA mechanism was the Reagan appointment of Anne Gorsuch as USEPA administrator and a number of other political operatives. These appointees possessed little Washington experience and a strong ideological purpose that environmental groups found threatening. The Reagan administration also sought to subordinate the agency to a number of administrative measures (Landy et al. 1994: 248–250). The Reagan administration created a number of Cabinet Councils to consider policy questions in a process that marginalised the USEPA.

The Reagan administration also continued a centralisation instrument adopted during Carter's term: namely the Office of Management and Budget (OMB). The White House issued an Executive order requiring all proposed major rulemaking to be submitted to the OMB for review as well as enabling the OMB to examine all extant rules using a cost benefit analysis (Interviews, USEPA officials 2007–2011). Succeeding presidential administrations wielded this tool extensively.

The third control mechanism was the budget and budget limits. The USEPA had to implement numerous 1970s laws that had reached the implementation stage, but the White House substantially contracted its budget. Between 1980 and 1982, the EPA budget declined from $ 701 to $ 515 million in 1972 dollars, and the number of non-Superfund positions at the agency declined by 22.6 per cent from 1981 to 1983 (Landy et al. 1994: 248–250). The White House did not have it all its own way as the Democrat-controlled Congress fought

hard on budgetary issues and pushed to investigate the Gorsuch-led USEPA in a manner that contributed to her downfall.

Subsequent presidential administrations have sought to make use of these mechanisms although for varying objectives. Vice President Gore undertook one of the key planks of the Clinton administration, the programme title the 'Reinvention of Government' and installed a 'National Performance Review' (NPR) team in his office. The Programme, based on new public management principles, required institutions such as the USEPA to develop a strategic plan (McMahon 2006: 91–105). The USEPA had to submit this plan to the OMB and Congress. The USEPA Plan highlighted moving away from command and control focus to more flexibility in governance mechanisms and more emphasis on partnerships with states and bigger emphasis on compliance assistance (Interviews, USEPA officials 2007–2008).

In the context of the new public management principles, the NPR team pushed the USEPA and its Administrator Browner to address its media-oriented approach (which was seen as being too 'top down' and 'stove pipe' focused) and to streamline the management processes (McMahon 2006: 91–105). While some elements of the USEPA completely reorganised themselves along this theme (e.g. Region 1), the USEPA's overarching historical divisions remained.

The George W. Bush administration continued to use the control mechanisms of previous administrations; nevertheless, the emphasis on cost benefit analysis and the justifying of proposals constrained USEPA initiatives more than they had done so previously. There was no substantial rollback of USEPA programmes, but the Bush White House imposed considerable budgetary restrictions, with the result that the USEPA did little hiring during the Bush II Presidency. This contrasted enormously with George Bush senior's administration substantial increase in the USEPA budget as well as a respect for the strict application of environmental regulatory law, a presidential era that many USEPA officials remembered fondly. The budget cuts of the Bush II White House compelled the USEPA office to re-prioritise what they saw as vital activities and abandon less essential items (Interviews, USEPA officials 2007–2008). This led to a substantial re-direction of USEPA effort without a very visible national confrontation over environmental laws and protection as witnessed in the Gorsuch period.

The climate change case study arguably starts with the USEPA publication of two substantial documents on the issue in the 1989–1990 period (Landy et al. 1994: 291–295). There was a tremendous examination of the science but a general conclusion that much of the science was uncertain. Nevertheless, the reports argued for stringent efforts to reduce greenhouse emissions. The Bush Sr. administration was unwilling to follow through with substantial mitigation agenda either at the national or international level. The Clinton era saw a more favourable approach to climate change, but it is the USEPA relationship with the George W. Bush Presidency that illustrates many of the key PA dynamics.

For most of the Bush II Presidency, the USEPA focus on climate change was relatively limited. President Bush announced in 2002 the plan to reduce greenhouse gas intensity by 18 per cent over a decade (USEPA 2009: 23–24). The USEPA was encouraged to pursue some lesson drawing about climate change instruments, but this exploration was centred on designing and managing a number of voluntary climate efforts, as well as exploring technological solutions in areas such as transport (Interview, former USEPA official; USEPA 2009: 23–24). Accordingly, the USEPA joined the Department of Energy to implement the ENERGY STAR programme to promote energy-efficient products and processes.

This constraint was reflected most significantly in the actions and outlook of the Headquarters Unit, which is based so near the White House. There was a clear recognition that a more interventionist USEPA program was not possible given the orientation of the Bush Presidency. Numerous interviews have suggested that a number of lower level managers in the EPA Headquarters were simply 'waiting' (and hoping) for Obama (Interviews, USEPA officials 2007–2008). However, this does not reflect the overall USEPA involvement on this subject. In particular, the lower layers of the USEPA have been involved with a number of state initiatives as well as carrying out their own limited activities in this area.

This dynamic changed further as other national institutions collided with the Bush administration. In 2003, the governors from Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont started talks to develop a regional tradable permits scheme for emissions for power plants. In

2005, this group of states, excepting Massachusetts and Rhode Island, signed a memorandum of understanding to create the Regional Greenhouse Gas Initiative (RGGI). Later Massachusetts, Rhode Island and Maryland joined.[1] The program started its cap and trade system with an auction in September 2008. The geographic location of these states is important. Although a number of them had Republican governors, all of the states felt a need to tackle this issue in the absence of Presidential leadership. This left the Regional Headquarters of Region 1, which covers the New England states, and of Region 3 (Mid-Atlantic States) with a balancing act.

The reality of the USEPA is that the more regional elements of the agency must work closely with the state governments and environmental protection agencies to ensure that the national laws and regulatory targets are met (Interviews, state representatives 2012. In this context, the Region 1 leadership decided to consult closely with the governors, giving advice and making suggestions. This effort maintained low visibility, without a specific budget; resources within the offices were shifted from the traditional handling of issues to this climate change question. This Regional EPA effort would constitute alliance building around the climate change objective, but not active policy leadership as shown by the states. This effort has taken an international dimension as the same governors held discussions, again with the support of the regional EPA officials, with the Canadian provincial premiers who were emphasising climate change. The Regional offices have been able to carve out their own small niches to tackle climate change even during the Bush II era. This suggests both government learning and lesson drawing.

To illustrate this in more detail, each Region has had to implement the Safe Water Drinking Act (Interviews, USEPA officials 2008). To fulfil the objectives of this legislation, the top managers of Region 1 actively shifted their focus to incorporate the issues of climate change, using the rationale that the potential impact on water systems due to climate change raises questions for the drinking water objectives. To some extent this responded to the thinking of the national media office, the Office of Water, which has had to address this question.

[1] See the website for RRGI's Program Design, available at: <http://rggi.org/design/history/> [last accessed 16 September 2013].

While this is technically outside the statutes, it nevertheless could be a very important issue linkage. Therefore Regional office 1 shifted some resources at the margins to address this problem and examined water studies that investigated the issue. It also has meant turning the tools at hand dealing with the water issue to the linked area of climate change, such as the monitoring of the waste water industry's energy efficiency. A similar shifting of effort and purpose occurred in energy conservation efforts.

Other regions have tackled other angles that were of greater concern. The state of California took a very visible line against the USEPA and the Bush executive; the state filed a lawsuit against the USEPA to force a decision about whether California could enact emission standards on cars, light trucks, and sport utility vehicles (United States Government Accountability Office 2009).[2]

It is important not to overstate the impact of USEPA innovation. Much of the USEPA activity was done under the policy radar screen at the national level and at the margins. The reality is that the tide towards climate change was turning in the United States during the Bush II administration. On the one hand, one of the other principals, the US Congress, saw several bills get developed with the idea of directly tackling climate change, creating some clear blue water between these Congressional actors and the White House. Furthermore, the Bush Presidency and Congress did manage to agree in December 2007 a new energy bill which included legislation improving fuel-efficiency standards for passenger vehicles for the first time since 1975.[3]

However, of more immediate importance to the USEPA was the US Supreme Court 2007 ruling against the USEPA. Here a number of petitioners, joined by the state of Massachusetts, sought to see greenhouse gas emissions as pollutants that can be regulated under the extant US law, namely the Clean Air Act; the Court took the

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[2] See also Washington Post (8 November 2007) 'California Sues EPA over Global Warming', available at:<http://www.washingtonpost.com/wp-dyn/content/article/2007/11/08/AR2007110801123.html> [last accessed 13 September 2013].

[3] Washington Post (20 December 2007) 'Solidarity for Bush, Democrats', available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/19/AR2007121900815.html> [last accessed 13 September 2013].

position of the petitioners (Supreme Court of the US 2007). The USEPA responded to this Supreme Court decision by empowering the Office of Air and Radiation to develop a rule to tackle greenhouse gasses through the mechanism of the Clear Air Act. The Office of Air and Radiation is in the process of drafting this rule (USEPA 2008). There is a larger regulatory question of how effective and efficient it would be to regulate the complex issue of climate change under regulations designed for other air pollutions concerns (Interview, USEPA official 2007). The Obama administration seems to have wrestled with the question of how far such efforts should be expanded within the Clean Air Act, or whether a new pollution act should be the central response.[4] With the various political battles over healthcare, the Obama administration has seemed to shift more to a default position of relying on extant laws.

With the establishment of the Obama administration and new political appointees, a number of notable changes can be seen. In response to the scientific review ordered by the 2007 Supreme Court Decision, the USEPA Administrator Jackson signed an action that the current and projected concentrations of the six key greenhouse gases be considered a threat to the 'public health and welfare of current and future generations' (USEPA 2009). This action, an acknowledgement of the climate change threat, triggered mandatory action under the Clean Air Act. In addition to the extant provisions in the Clean Air Act, Obama signed the American Recovery and Reinvestment Act on 17 February 2009. This Bill provided the USEPA, among other things, with $ 6 billion to improve wastewater infrastructure and to improve/protect surface and groundwater and drinking water quality (Recovery.gov 2009).[5] Such funding tackles energy efficiency and the ability of water systems to cope with climate change. The Obama administration managed to secure an agreement (between the USEPA, the Department of Transportation, the United Auto Workers, the automobile manufacturers, the state of California and other state

[4] Fox News (17 February 2009) 'AP Interview: EPA near Ruling on Greenhouse Gases', available at: <http://www.foxnews.com/printer_friendly_wires/2009Feb17/0,4675,JacksonEPA,00.html> [last accessed 13 September 2013].

[5] Recovery.gov (2009) 'Agency Recovery Plan: Environment Protection Agency', last updated 15 May 2009, <http://www.recovery.gov/?q=content%2Fagency-recovery-plan&agency_id-020> [last accessed 16 May 2009].

governments) to adopt new national fuel efficiency standards for all new cars and lorries sold in the USA (White House 2009).

In terms of broader climate change policy, the Obama administration's first term strategy relied initially on the US Congress creating a climate change bill that would include a cap and trade scheme. The Obama administration announced the target of 14 to 15 per cent reduction in greenhouse gas emissions from 2005 levels by 2020. However, in the wake of Congressional deadlock and significant opposition in both national parties, the Obama administration has shifted its focus to one using the 2007 Court ruling to exploit extant regulations, in this case the Clean Air Act. So far the US court system has upheld the endangerment finding as seen in the US Court of Appeals Decision on 26 June 2012. In line with this approach the EPA proposed a Carbon Pollution Standard for new power Plants that defines national limits on the carbon emissions of power plants for the first time (USEPA 2012).

To a large extent this recent USEPA history does suggest that there has been some discretionary action informed by USEPA social learning, government learning and lesson drawing, but that the much more significant changes that the USEPA has witnessed have been in the changes in thinking amongst the principals, particularly the White House.

The EEA evolution and consequent position for the climate change challenge

Following the adoption of Regulation 1210/90, a task force within DG XI started the EEA groundwork. For five years the team developed information concerning individual environmental themes and the CORINE data inventories, (Institute for European Environmental Policy [IEEP] and European Institute for Public Administration [EIPA] 2003: 26; House of Lords 1995). More important for PA dynamics was the effort to form relationships with other institutions. The formal acknowledgement of these relationships usually consisted of protocols/MoUs (Memoranda of Understanding, see House of Lords 1995).

From 1994 to 1999 the fledgling agency worked to increase its staff to achieve the Regulation aims (Caspersen 1999: 72; House of Lords 1995). The EEA also followed a five year Multi-Annual Work

Programme focusing on specific projects. The EEA organisational chart outlined a Director's Office, an administrative department, three operation departments, an oversight Management Board and a Scientific Committee.

Given the explicit Regulation mandate to base the network system on the extant European structures, the EEA had to work with national institutions. The EIONET network contained nine European Topic Centres (ETC) that constitute groupings of specialist research organisations (EEA undated). Also present were the National Focal Points, national institutions charged with assisting in the preparing and implementing the EEA work programme and the EIONET's development. Regulation Article 14 specifically mandates EEA cooperation (but without duplicating effort) with other international organisations (EEC Regulation No. 1210/90). Thus the Regulation required a global dimension to the EEA's networking.

The original Regulation required a Commission review of the Agency's performance after two years, with proposals concerning additional tasks, for the Council's consideration (EEC Regulation No. 933/1999: 1). The actual Regulation revision process started in 1997. As noted previously, several principals viewed this provision as a mechanism for expanding EEA powers in a desirable direction. Simultaneously, however, the review could be a negative PA monitoring tool that assessed performance, potentially triggering constraints and sanctions. The review could produce widely varying results depending on the support and view of the clients/principals, particularly the Council, the Commission and the EP.

The ensuing Regulation 933/1999 was not such a dramatic tool, but it included important changes of nuance. The Revised Article 2 changes the aims 'to provide the Community and the Member States with the objective information necessary for framing and implementing sound and effective environmental policies' (EEC Regulation No. 933/1999: 2). This changed the interpretation of the EEA role as not simply a database collector but one involving an explicit policy function. The Regulation also specified that the Agency utilise the data generated by Eurostat and the national statistical offices; this reinforced the reality that the EEA was only one of several competing data agents in this PA relationship.

This revised Regulation pushed the Agency to engage in some internal government learning, via reforming its information systems and gaining a new focus on sectoral integration and prospective analysis (IEEP and EIPA 2003: 26). The revised Regulation still enshrined a PA monitoring process, requiring a review of the agency's performance and efficiency and mandating a 2003 report, to be submitted to the key Principals (the Commission, Council and EP) for assessing the Agency's progress (EEC Regulation No. 933/1999: 2).

The Arthur Andersen evaluation assessed the 1994–2000 EEA performance in a positive light, affirming the need for the Agency and EIONET (IEEP and EIPA 2003: 26–27). The evaluation praised the network for linking the agency to capacity-building at the national level. It argued that the Agency's work needed to fit more closely with the principal clients' needs, but that it could not serve all users and nor policy areas given extremely limited resources. Acting as a monitoring device for the principals, the review argued that the EEA's role needed to shift from providing stand-alone products (such as reports) to providing services to the policy-making actors. Such a recommendation could encompass a strong element of task expansion involving influence over the policy process (Ibid). The 2003 Review (IEEP and EIPA 2003) also triggered an explicit Council statement enshrining the EEA's independent role as serving the entire EU (Interviews, EEA official 2007; European Commission 2003).

Another active PA mechanism was the EEA Management Board, which acts as body representing the various principals (member state representatives, Commission officials and EP-selected appointees). The Board must approve the EEA work programme and various organisational/staffing decisions, and it acts as conduit of information and network between the EEA and its principals.

The core PA relationships have evolved as have the mechanisms (the nature of the Management Board has become more diffuse with enlargement). The relationship with Commission DG for Environment, the key interlocutor between the Commission and the EEA, has ambiguities given the Commission's traditional role as guardian of the treaties and the fact the EEA budget is located within the DG Environment Budget. The DG has special control over EEA and can make proposals. This has led to a perception among some DG officials that the EEA is taking the DG's money and accordingly

obligated to do its bidding (Interview, EEA official 2007; IEEP and EIPA 2003: 62–63). An effort by the EEA leadership in the 1990s to enlist the EP as a PA counterweight to the Commission exacerbated maters without stimulating the desired MEP interest (Interview, EP official 2007).

The policy role has been core in the EEA evolution away from simply writing reports and maintaining information integrity. This moves the Agency into tension with the Commission's policy role as an agent. In the 1990s, the Director Generals of DG Environment viewed themselves as the chief client and actor responsible for policy and that the EEA should focus on data collection. The 1998 and 2000 budget discussions led the DG to push heavily for the EEA downgrading lower priority tasks (IEEP and EIPA 2003: 38–40, 61–62). Nevertheless, the EEA actors understand that the question of data and the provision of environmental information are ambiguous; data gathering is not a neutral activity. Even mere data organising raises issues of how policy problems are perceived and how policy works (Interview, EEA official 2007).

Since 2000, the Commission and the EEA have constructed a more collaborative relationship although differences in opinion remain about the EEA role in policy implementation and effectiveness (IEEP and EIPA 2003: 42–42). This partly reflects a politically more discrete and sensitive EEA approach and senior management relationships to the DG, compared to the 1990s (Interviews, EEA and EP officials 2007; IEEP and EIPA 2003: 60–62). Regular interaction at both the top and lower management level has aided mutual communication and understanding (Interviews, EEA officials 2007).

This suggests substantial government learning over time about discerning the boundaries of the EEA roles (Interviews, EEA official 2007). One illustration was the EEA commitment to the operation of an Environment Data Centre. High level Commission leadership had promoted this objective to share management of databases amongst the EEA, DG Environment, Eurostat and the Joint Research Centre; the EEA conducted an internal reorganisation to solidify its cooperation (EEA 2006: 50). One of the core internal changes within the EEA has been a restructuring of its teams and mid-level management and increased focus on technical and management training (Interview, EEA official 2007). The 2001–2004 restructuring increased

mid-level management to supervise project managers and to provide more focused groups for studying issues, as well as data integration across policy sectors and environmental themes (EEA 2004: 26–28). This move was partly a signal to the principals about the EEA commitment to fundamental aims-centred data collection and to interacting with the Commission, Eurostat and other institutions. The Commission's thinking also has evolved: its 2003 review acknowledges the importance of EEA's role and accepts a potential extension of EEA support activities 'along the entire range of stages of the policy cycle' (European Commission 2003: 10; Interview, EEA official 2007).

Service to the entire Community raises the question of the other PA relationships and potential government learning: the EEA has developed gradually stronger links to the Council and groups of like-minded member states (IEEP and EIPA 2003: 42). The EEA has undertaken various collaborative efforts, including the development of conferences and the provision of background notes. Changes in EU policy demands found in the system have supported this expanding EEA policy role (IEEP and EIPA 2003: 28–29). Thus the Cardiff process and the Sixth Action programme generated particular policy requests (by the clients/principals) that the Agency could respond to with specific information. Since 1998, the EEA has worked with the Commission and Council Presidency in actual policy development, in such areas as the Greenhouse Gas Monitoring Mechanism; EEA staff made presentations to the informal Environment Councils (IEEP and EIPA 2003: 32). The EEA made two initial efforts to assess the policy effectiveness of packaging waste implementation and on urban waste water treatment directives.

The EP Environment Committee views the EP as a client (principal) and has asked the Agency for a number of *ad hoc* reports. The Committee laid out the need for background material on Commission legislative proposals and on related member state activity. Part of this request was a conscious EP effort to boost the EEA scope to conduct a level of discrete, limited policy analysis; a memorandum of understanding between the EEA and EP concretised this effort (Interview, EP official 2007). This has not always led to plain sailing as the EP has criticised the EEA Director for how funds have been managed and her personal links to a NGO (European Parliament 2012).

The EEA has exploited its role as a network agency to build closer ties with actors inside and outside the EU policy-making process. The EEA officials carefully adhere to the original Regulation, which has the ambiguity to give limited scope for task expansion (Interviews, EEA officials, 2007). For the EIONET to function properly, the EEA must interact with member state officials, scientific experts, and civil society stakeholders as well as the EU institutions.

EEA officials adhere to the Regulatory requirement to engage with international organisations. They engage with third countries and international institutions in a way to showcase EEA policy knowledge as well as ideas about networking and data collection, based on the EU experience (EEA Interviews 2007).

Compared to the policy developments in packaging waste and urban waste water treatment, the EEA focus on Climate Change takes a more traditional form, but even this suggests a certain policy engagement. The main focus is to help monitor and assess the EU progress in achieving its agreed greenhouse gas emission policy targets. Its current strategy had a number of short-term objectives, including the creation of an Environmental Data Centre in the area of Climate change in 2009 (EEA 2009: 11, 19).

The EEA also seeks to provide analysis for the planning of a European low-carbon economy as well as the provide support information for the latest attempts at an international climate settlement. The low-carbon economy analyses include the study of integrated mitigation and adaptation outlooks, as well as analysing future scenarios across a wide range of developments. Special attention is also devoted to improving and maintaining information and indicators of the climate change impacts, looking at current trends as well as hindcasting and forecasting Europe's climate (EEA 2009: 19). The EEA has the annual responsibility of reporting the inventory of EU climate change emissions to UN Framework Convention on Climate Change process.[6] Concerning the climate change issue, the EEA's positioning reflects its more standard PA

[6] See EEA's Annual European Union Greenhouse gas inventory 1990–2010 and inventory report 2012 at: <http://www.eea.europa.eu/publications/european-union-greenhouse-gas-inventory-2012> [last accessed 16 September 2013].

relationship, providing data as well as a small amount of policy analysis to the Commission, member states and the EP.

The EA evolution and consequent position for the climate change challenge

Since its 1996 creation/amalgamation, much of the EA learning effort has been internal governmental learning. The EA staff had to make sense of the EA's complex new structure and features (e.g. matrix structures, see McMahon 2006: 156–157). The 1996–1998 transition also witnessed the lack of management consensus about the agency's tasks and processes. The communication and coordination problems and unfamiliarity generated a substantial period of low morale (Interview, EA official 2007; House of Commons Select Committee on Environment, Transport and Regional Affairs 2000). Many EA staff complained that the move had destroyed the sense of mission that they had possessed previously (Interview, EA officials 2007). An additional challenge facing the EA was the complexity in the principals that the EA must answer to. The principals included the Government in London as well as the relevant House of Commons and the Welsh Assembly.

From 2002 to 2012, the EA has undergone considerable changes: there has been a considerable personnel movement, which partly explains the gradual ease in tensions (Interview, EA officials 2007). The Head Office sets agency policy and defines how localities interpret legislation, but the regions conduct the direct regulation. The EA management restructured the headquarters into three strands: policy setting unit, the unit translating policy into detailed instructions for regions and the Science Department. The reorganisation's aim has been to ensure that a consistent policy and set of instructions trigger an undeviating decision-making process at the regional level (Interview with EA official 2007; House of Commons Environment, Food and Rural Affairs Committee 2006: 16–17).

The 2010 Government Coalition has forced some significant organisational changes, and the Government is conducting reviews that have potentially drastic consequences, not least a review of the 'value added' that EU membership gives the UK. At the meso level, the government did eliminate the EA's advisory bodies in the 'bonfire of the quangoes' (Interview, DEFRA official 2011). The Government ordered a triennial review of UK ministries and all associated 'arm's

length' agencies to see if they really do need to exist outside the ministries and/or as independent entities (DEFRA 2012a). In June 2013 the actual review concluded that the EA should remain a separate body but that it should continue to reform how it delivered service and to improve efficiencies (DEFRA 2013).

As of 2013, it is the budget cuts that have seen the largest organisational change. In 2007, the Agency had to implement a 5 per cent efficiency target set by the government as well as a short-term severe spending cut being carried out by DEFRA to meet a recent overspend in the agriculture area (Interviews, EA officials 2007). The Coalition Government has particularly focused budgetary cuts on the DEFRA budget, which is the ministry that provides the major budget for the EA. The EA leadership has had to plan for a 25 per cent cut, with a reduction of the staff by a third (Interview, EA official 2010). By the end of 2012, the Agency had lost 20 per cent of its budget and 2000 member of staff. The Government has even forced cuts in a key climate change-related issue area, namely flooding although the floods in 2012 forced a partial row back.[7] In addition to the very changed budgetary context, the Coalition government gave a very clear steer that the EA should not challenge Government policy and should have a more internal organisational focus; the EA staff has implemented this with a substantial change in job titles (Interview, EA official 2010).

Within the EA one can discern an instrumental learning that has some social learning elements: there has been a major rethink of how the agency regulates industry. The limited social learning is most concretely demonstrated by the modernising regulation initiative, which existed within the Agency even before becoming a priority of the New Labour government. This is partly recognition that the management of regulation must be done to maximise efficiency, given the kind of constant resource constraints mentioned above (DEFRA 2003: 12–16; House of Commons Environment, Food and Rural Affairs Committee 2006: 13–15). Under the current UK government, however, DEFRA and the EA are likely to have to

[7] The Guardian (30 November 2012) 'David Cameron Forced into U-turn on Flood Defence Spending Cuts', available at: <http://www.theguardian.com/environment/2012/nov/30/flooding-120m-defence-spending> [last accessed 13 September 2013].

further adjust regulatory thinking as the government seeks to streamline environmental regulation further (DEFRA 2012b).

Perhaps a much more significant long-term learning move that is occurring is the development of new civil sanctions powers out of the 2008 Regulatory Enforcement and Sanctions Act. Interviews suggest that both high level and mid-level officials in the EA took particular interest in the wide range of potential sanctions available to the USEPA in the US context (Interviews, EA, USEPA officials 2007–2008). These new sanctions tools have the role of supplementing regulation with the aim of finding more appropriate ways of sanctioning breaches in environmental law.[8] This includes fines as well as enforced undertakings (where the violator agrees to take remedial action in the form of a voluntary agreement with the regulator). Other instruments that have had an impact are discussed below in the examination of the EA role in climate change policy.

There is some evidence of the EA leadership and representatives working hard to shape both international and regional networking and thinking. The EA Chief Executive Harman gave considerable attention to the Networks of the Heads of Environmental Protection Agencies; making the EA one of the primary leaders. The network discusses various issues, including how agency leaders conduct both political and policy strategy with respect to their respective contexts (Interview, EEA actor 2007). The Agency has helped drive some of the group's stances, including the 2006 Prague meeting statement declaring regulation's positive impact. With DEFRA, the EA is also very active in the Implementation and Enforcement of Environmental Law **(**IMPEL) network and the EEA networking activities. The EA pushed the better regulation agenda heavily in these fora (Interview, EA officials 2007). Before the major restructuring of the EU, its EU and International Relations office undertook a number of networking projects around the world (Interview, EA official 2007).

The recognition that the EA is a competent authority for implementing EU regulations necessitated Agency involvement in the discussion of new EU measures. However the policy community

[8] See the section on civil sanctions on EA's website at: < http://www.environment-agency.gov.uk/business/regulation/116844.aspx> [last accessed 16 September 2013].

recognised by the end of 2000 that the EA involvement varied significantly depending on the policy area and, on the whole been relatively reactive and less strategic in the past (Interview, EA official 2007). Nevertheless, over time the Commission has learned to listen to the Agency and recognise that it has a significant voice distinct from the government (Interviews, EA officials 2007). This separate identity from the principal, the UK government, has gained recognition internationally.

The Agency has taken an evidence-based approach to its argumentation that the Commission finds useful; the EA has also pushed the better regulation agenda in the EU fora (Interviews, EA officials 2007). The EA influenced the EU process; it formulated, for example, the general structure and specific (e.g. groundwater) provisions of the Water Framework Directive (Interview, EA official 2007). Similarly, the EA has helped articulate the UK promotion of risk-based calculations in the formulating environmental management, such as the Contaminated Land Directive (Interview, EA official 2007).

Although the EA has an EU strategy as well as Concordat of Understanding to undertake various roles at the EU level, its engagement with the Commission on policy issues is prescribed (Interview, EA official 2007; House of Commons Environment Committee 2006: 29). DEFRA is careful of its policy-making and EU representative role; it takes Agency people to support its Council negotiations, but the Agency does not solely represent the UK. The EA also must maintain the Ministerial (the principal) line (Interview, EA officials 2007). In its care over its role, DEFRA makes much of the effort to network with both the Commission and other EU institutions such as the EEA. The EA has to keep its efforts of networking from competing with DEFRA's efforts. These networking efforts constitute government learning as the EA actors seek to reshape the boundaries of their roles and responsibilities with respect to external actors.

In this context, the EA approach to climate change has a striking element of a balancing act. There was some debate about whether the EA had responsibility for climate change policy beyond its tremendous responsibility for climate change adaptation, in the form of flood control. The main EA focus is on enforcement, but it has

increasingly seen its general UK policy role as a champion for environment in the period before 2010 (Interviews, EA officials 2007–2010). However, the lack of a remit to engage with energy and transport sectors sets natural constraints on the EA policy engagement on climate change.

As part of the UK implementation of the EU UN Framework obligations, the EA is in charge of implementing the EU Emissions Trading Scheme, including the issuing of carbon allowances. Given the role of the USA in pushing emission trading at the UN level and the creation of an EU Directive to implement this scheme, the EA has not had a particular lead in designing this instrument but its role as a regulatory and advisory body allowed it to influence UK government decisions, including a UK trading scheme that anticipated the EU one. The EA serves as the principal government advisor (on such matters as climate capture and storage) as well as the regulator of key climate change emissions including non-carbon dioxide emissions from plant installations and landfill sites (Interviews, EA officials 2010).

Assessing the EA's traditional strengths, there is less scope for the EA role in modelling of climate change since there is a very advanced and healthy activity in other institutes within the UK. But the EA does have the scope to be involved in assessing how the changing climate will evolve. One of the key strengths of the EA has been its advanced integrated catchment strategy, which allows officials to obtain data on rainfall and temperature. Therefore the EA focus is less to deal with mitigation issues than with the monitoring and adaptation roles while the mitigation fights occur at the EU and UK ministerial levels.

The EA balancing act, applicable to its general situation and its role in climate change can be neatly summarised in looking at budget resources. On the one hand, the EA role in the UK policy adaptation towards climate change is fundamental. A central, and relatively protected, part of the EA budget deals with flood control, identified as being a consequence of greater uncertainties caused by the changing water patterns. Indeed there was some Agency concern in the fact that government pondered whether a standalone flood agency would be more suited to dealing with the future flooding challenge; however the government review covering flood policy did

not embrace this idea (Interview, EA officials 2007). This possibility seems to have moved off the agenda, but it reinforces the general insecurity of context facing the agency.

This is much truer of the wider agency situation, where substantial cuts continue to be planned; these have affected both the policy sectors as well as the science wings of the Agency, many of which deal with activities with linkages to climate policy and climate adaptation. The 2008 EA restructuring preserved climate change as a separate programme (Interview, EA official 2007). More than one official interviewed for this project has suggested a trend across the policy offices is to try and incorporate climate change in their descriptions of the projects they are hoping to fund (Interviews, EA officials 2007). Various efforts were made to link current projects to this new interest. In terms of the EA strategic documents, the EA has pronounced the need for increasing the work on adaptation, publishing an Adaptation Strategy in 2010 (EA 2010).

The network links with the Commission did help the EA to convince the Commission to accept the UK approach to flood risk management. Here the EA worked closely with DEFRA. EA has large investment in mapping flood risks, but the Commission proposed a flood risk proposal that was substantially different from the UK one. The EA representatives managed to explain what the UK was doing and persuade the Commission to tweak its draft to allow the EA to keep its system in place.

Conclusions

The comparison of three very different agencies has limitations: it matters that the USEPA involves a cabinet level leadership, and that both it and the EA are powerful regulatory bodies. In contrast the EEA is a small agency managing a large network. It is problematic to overemphasise the changes in the EEA: the overall EEA impact on the environment, compared to the other two agencies, is quite small.

Nevertheless, interesting comparisons abound. All three agencies started as political ideas capturing the environmental spirit of the particular context. These ideas were very thoroughly negotiated and transformed in a way suggestive of Moe's depiction of the structural choices and negotiations that occur at the start of an agency's history. In all three cases, coalitions of actors arrayed themselves to give the

agency more or less scope, often due to an institutionalist desire not to radically transform existing bodies and networking relationships. The consequence of these discussions was that that the consensus could only establish an environment agency burdened with a weight of diverging responsibilities and expectations but also a set of problematic paths.

The subsequent histories warn against a straightforward presentation of a PA relationship. In all three cases, multiple principals created complex dynamics that the agency could work to its favour, as suggested in government learning. They also suggest strong restraining conditions for any potential entrepreneurship and learning. In the EA and EEA cases, the dynamics created by competing agents who might be principals looms large.

With the widest regulatory scope, the USEPA has had to act within a number of overarching constraints set by the principals. In recent decades, this was not simply a case of having political appointees in charge of each major unit. The Executive has asserted control through the mechanism of the OMB and the process of approval for initiatives as well as through budgetary allowances. To some extent, however, this has been mitigated by the reality of multiple principals, particularly Congress as well as multiple constituencies. The multilevel nature of the USEPA also increases the scope for discretion and 'shirking' at the more local level.

The EEA has far less regulatory scope and is much more marginal in terms of policy impact. Nevertheless, the reality of the multiple principals has created opportunities for growth; at the same time the EEA must follow a careful balancing act as it faces not only multiple principals but other competing agents (a key one being the Commission where the staff also sees themselves as principals over the EEA). This ambiguous sense of principal versus competing agent also strikes a chord in the EA history where DEFRA has been strong in protecting its prerogatives.

In terms of learning approaches, the agency histories suggest some government learning. Government learning suggests that agency officials will learn to adapt to political and organisational contexts. Such learning across the entire agency is much clearer in the EA and EEA cases. Both agencies underwent substantial management and

organisational changes that reflect agency adjustment to internal developments and external pressures; this in itself is not learning but institutional adaptation as well as perhaps 'sedimentation' as defined by Streeck and Thelen (2005). Simultaneously both agencies have invested heavily in network and building relationships with the principals that they are most heavily engaged; this purposive networking behaviour suggests more strongly government learning. The EEA has advanced farther in this task expansion – in part because it had the greatest distance to travel: its growing presence in policy analysis compares starkly with the EA's large, inherited regulatory responsibility. Inherent in this learning was an increased appreciation of the role of networks and information which takes the form of lesson drawing. By contrast, the massive, multilevel organisation of the USEPA suggests that localised learning might have happened but is harder to identify systematically beyond the individual offices.

There is some evidence for social learning being generated by the agencies in isolated cases, but it is less clear how systematic across each agency such learning is. On the issue of climate change, it seems more a case that the social learning has occurred at the EU, UK and US levels in the respective executive bodies and governing political parties, and that the agencies have responded accordingly. The illustration of the EA pushing hard for new understandings of making regulations more efficient, which involves some re-thinking of policy values and principles, suggests the possibility of a social learning track, which then informs instrument learning (lesson drawing).

Also requiring further systematic study across various policy issues is the question about whether the agency relationships with their principals reflect either the classical PA or another scenario. In all three cases, the neat PA relationships are challenged at the very moment of institutional design, strongly supporting Moe's argument. However it is less certain that Moe's long-term pessimism is merited in these cases over time.

Efforts by key principals to monitor and control agency behaviour are in evidence. In the USEPA, the major aspects of climate change policy was clearly defined by the positions taken in the principals, particularly the Presidency; it is only when the US executive lost the Supreme Court case that the shift to greater regulatory intervention

occurred. The evolution of the USEPA relationship with its principals suggests that the OMB has increasingly been wielded to maintain control, but the changes depend more on the principals and the actions they pursue.

In the EEA's case there are periodical EEA reviews, the Management Board, and the founding Regulation itself. In the EA case, DEFRA controlled the policy decisions, as well as the EA budget and access to the EU. Both of these agencies have shown a concerted effort to improve their internal organisation but also to reach out to their specific principals as well as other actors through networking. This suggests that some expansive coalition building is altering but perhaps not yet transforming the principal–agent relations in both cases. The relative newness of these organisations (1989 and 1996) suggests some scope for the future, but both agencies face a continuing process of being reviewed with the potential for massive organisation restructuring and changes in organisational culture. In contrast the USEPA seemed to have a more established and larger organisational culture that could wait for a new administration whilst still undertaking climate change policies.

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Chapter 16

Is expertise the driving force? Explaining agency autonomy in the EU

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Introduction

Whether we take a plane, eat food, or purchase medication, we are – often without knowing – affected by European regulatory agencies (ERAs). Enjoying a meal, we depend on the European Food Safety Authority (EFSA) to assure the quality of our food; taking medicines, we entrust the European Medicines Agency (EMA) with the authorisation of these products. Being a visible manifestation of the so-called trend of 'agencification', European agencies have significantly shaped our daily lives and have assumed ever more tasks originally located at the national level. Accordingly, ERAs reflect a more general trend of depoliticising the public sphere (Flinders 2004).

The main expectation placed on these agencies by many is to cope more effectively with increasingly complex socio-economic challenges cutting across borders, and to overcome political short-sightedness. For that aim, ERAs ought to base their decisions on 'expertise' and be autonomous from 'non-scientific' influence, be it political, economic, or otherwise (Levi-Faur 2009; Majone 1997, 2009). Expertise and autonomy thus become the two operational cornerstones of ERAs. Expertise here is understood as accurate information held by experts and that rests upon shared causal beliefs

and common notions of validity (Haas 1992). Autonomy refers to the degree to which an agency can *de facto* take decisions and actions irrespective of external actors' preferences. As Carpenter argues, expertise (and reputation) is a 'key prerequisite for bureaucratic autonomy' (Carpenter 2001).[1] Strikingly, the relationship between expertise and autonomy remains in the dark. Autonomy itself has only recently received attention, most research focusing on the role of the agency design and organisational structure (Busuioc 2009; Groenleer 2009; Yesilkagit and Christensen 2010). Expertise as a complementary explanation has been neglected. The little research on expertise itself has only looked into the 'application' of expertise (Boswell 2008; Radaelli 2009; Schrefler 2010), neglecting its potential effects on organisational behaviour (i.e. autonomy). This study will address this relationship between expertise and autonomy. The research question reads: *How and to what extent does expertise affect the autonomy of ERAs?*

Considering expertise the central organisational resource of ERAs, I propose two ways in which it affects autonomy: (a) expertise asymmetries, and (b) a process of 'procedural insulation'. ERAs form an 'extreme' case when studying expertise and autonomy: Given their reliance on an extensive regulatory network, they presumably concentrate major expert knowledge. At the same time, the extensive contacts to public and private actors established through their networks pose a potential threat to ERAs' autonomy.

In the following, I first introduce you to the current debate on ERAs. In the next section, I elaborate on my analytical framework to explain how expertise contributes to agency autonomy. This is followed by a short methods section. Then, I present the empirical findings: First, I show whether information asymmetries shield ERAs from external influence. Second, I study whether ERAs engage in procedural insulation, therewith reducing potential footholds for influence. I conclude by linking findings back to some more general debates on agencies and EU governance.

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[1] In fact, the relationship is 'circular': While expertise contributes to autonomy through the two mechanisms outlined in this chapter, a high degree of autonomy might also contribute to expertise: Independent scientific operations might be highly attractive to top-level researchers and thus make it easier to attract these towards the agency.

Regulation by information: ERAs as autonomous expert bodies

Over the last decades, we have witnessed a general trend of 'depoliticizing the public sphere' (Flinders and Buller 2006). Next to the proliferation of Commission Expert Groups and the committee system ('comitology'), this is reflected in the establishment of currently 35 'decentralised' agencies at the EU level. Before the establishment of the new financial supervisory bodies, only eight EU agencies enjoyed a formal role in the decision-making process: the Community Plant Variety Office, the Office for Harmonization in the Internal Market, the European Chemicals Agency (ECHA), the European Aviation Safety Agency, the European Maritime Safety Agency, the European Food Safety Authority (EFSA), the European Railway Agency, and the European Medicines Agency (EMA).[2] Even these, however, lack formal decision-making powers. While the scientific agency opinions ought to be taken into account, the formal decision-making powers mostly remain with the political (accountable) actors during committee procedures (Commission and Member States). Potential reasons for this lack of formal powers might be found in the hesitation of national actors to delegate formal competences to the EU level, as well as the so-called Meroni-doctrine imposing legal constraints on such delegation[3] (Demortain 2008).[4] Nevertheless, in practice some ERAs have become quite influential in the regulatory decision-making (Gehring and Krapohl 2007; Groenleer 2009). Most centrally, three agencies have been identified to be significantly more powerful than their mandates suggest: EMA, EFSA, and ECHA (Busuioc 2013: 211).

Various reasons exist as to why these agencies are created, ranging from limiting political interference to signalling credible commitment

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[2] For information about the agencies, see <http://europa.eu/agencies/regulatory_agencies_bodies/index_en.htm> [last accessed 6 November 2013].

[3] The so-called 'Meroni'-doctrine reflects constitutional reservations against 'powerful' agencies. In the 1960s the European Court of Justice (ECJ) ruled in its 'Meroni'-case (Meroni vs. High Authority (Case 9/56 [1957-1958] ECR 133) that the 'institutional balance' shall be preserved between the treaty organisations, thus preventing ample delegation of competences to other organisational entities (i.e. agencies).

[4] Contestation of the regulatory decisions thus has to take place at the EC. Accordingly, this might bring about serious implications regarding the accountability of EU agencies (also see Busuioc 2009).

(for an overview, see Groenleer 2009; Majone 2009). Both rationales require agencies to operate autonomously from external influence (Gilardi 2005; Majone and Baake 1996; Yesilkagit and Christensen 2010). In most accounts agencies' assumed superior expertise and their problem solving capacity ranks central.[5] According to Giandomenico Majone, agencies ought to 'regulate by information' (Majone 1997). Given this synthesis of high-level expertise and autonomy from political interference they are often associated with technocratic accounts of governance (Shapiro and Guston 2007). In fact, agencies largely derive legitimacy from their expert claims (Boswell 2008; Majone and Baake 1996).

Despite the centrality of expertise and autonomy to legitimise ERAs, research remains scattered. Especially the role of expertise in regulatory agencies remains in the dark. A vast body of (American) delegation literature refers to expert knowledge or 'information' as a main concept: it forms a reason in favour of delegation, increasing effectiveness (Huber and Shipan 2000). But at the same time, the 'information asymmetry' derived from this expert knowledge allows the agent to 'shirk' – increasing control costs for the principal (Alchian and Demsetz 1972; Kiewiet and McCubbins 1991). In that sense, delegation theory suggests that expert knowledge provides agencies with discretionary space to pursue their own goals. In this vein (while departing from the traditional delegation theory), research has shown that national regulators apply their expertise quite strategically (Boswell 2008; Radaelli 2009; Schrefler 2010). Scholars focusing on ERAs have studied how ERAs 'recruit' their expertise, putting an emphasis on their embedment into so-called European regulatory networks (ERNs). These ERNs are rather 'technical' in their nature, including the national competent authorities (NCAs), (university) research institutes, other regulatory agencies, as well as standard setting authorities (i.e. Organisation for Economic Co-operation and Development, World Health Organization, and World Trade Organization). According to the Commission, ERAs should form the central node in these executive relations. The ERNs give ERAs access to the crucial 'policy good' of information (Braun 2012), contributing to the expertise of ERAs (Thatcher and Coen

[5] To what extent each ERA falls into one or various (and which) of these categories, however, remains an unanswered empirical question.

2008). ERNs can thus be seen to increase ERAs' expert knowledge and thus expertise-based legitimacy.

But ERAs do not only interact with regulators and expert bodies. They also interact with political bodies and private stakeholders. These interactions with 'non-scientific/non-technical' actors provide these with the precondition to exert 'undue' influence: direct access (Braun 2012). These interactions hence pose a potential threat to agency autonomy. In the literature, various factors have been identified that protect an agency's autonomy against external influence: One group of scholars has looked into the effects of the formal agency mandate on agency autonomy (Christensen and Laegreid 2007; van Thiel 2004; Yesilkagit 2004). The mandate, however, only seems to affect bureaucratic autonomy to a minor degree (Egeberg and Trondal 2011), since autonomy 'is external to a contract and cannot be captured in a principal-agent relationship' (Carpenter 2001: 17). Accordingly, other scholars look beyond the agency mandate: Some argue that the regulatory environment affects agency autonomy. If agencies operate in highly salient areas, for instance, they will experience a decrease in autonomy (Gormley 1986; Verhoest et al. 2010). A third vocal group suggests that organisational structure plays a major role in shaping agency autonomy (Egeberg 2012, Egeberg and Trondal 2011). Despite a general 'lack of systematic empirical research on the relationship between bureaucratic structure and actual decision behaviour', these scholars have identified various relevant factors (Egeberg 2012): the type of specialisation (horizontal/vertical) and cooperation (hierarchical/ collegial), as well as organisational size (ibid.). Next to structure, an agency's demography seems to matter: while many 'socialization experiences are not relevant to policy disputes and thus are unlikely to reveal a representational linkage' (ibid.), the most central demographic factor seems to be 'education' (Suvarierol 2008). Groenleer (2009) argues that autonomy might change over time due to a process of 'institutionalization', subsuming a process of identity formation alongside the creation of organisational legitimacy (ibid.). This argument is in line with neo-institutional and organisational theory, since organisational structure is not restricted to formal rules, but also implies informal norms and practices that emerge over time. The relative importance of these explanatory factors remains in the dark.

At the same time, one central explanatory factor seems to miss on the list: delegation theory clearly suggests that expert knowledge might create 'information asymmetries' and therein affects organisational behaviour. Beyond the concept of 'shirking', however, the role of expertise has not been explored. Accordingly, this study looks into the effects of expertise on organisational behaviour, more specifically on agency autonomy. These effects go beyond the 'asymmetries' predicted in delegation theory. In combination with the extensive administrative procedures shaping regulatory behaviour, expertise is believed to trigger a process of 'procedural insulation' (Balla 1998; Bawn 1995; Kaufman 2001). Also, delegation literature has limited its attention to the narrow relationship between an agent and its principal. This study, to the contrary, considers the effects of expertise on autonomy from a variety of external stakeholders.

Since I focus on the role of expertise in shaping agency autonomy, this study pursues an x-centred design. Since the goal is not to explain autonomy in its entirety, other explanatory factors receive only limited attention. Expectations on the relationship between expertise and autonomy are partly derived from theory. Given the so-far inconclusive knowledge on the relationship, however, the study remains open to explore the empirical data for additional facets.

Analytical framework

When studying the ways in which expertise might affect agency autonomy, one should first of all specify the central concepts. Expertise contrasts with lay knowledge (Schrefler 2010) and can be broadly defined as being 'accurate information that is of use to politicians and policy makers' (Haas 2004). Since expertise is held by experts or professionals (Radaelli 1997: 169), it can be seen as a demographic 'resource' of an organisation (Egeberg 2012). There seem to be two dominant types of expertise in ERAs, which can be accumulated at organisational level: (a) scientific/technical expertise; and (b) procedural/legal expertise, which I also refer to as regulatory expertise. One can identify two levels of expertise: A more abstract level of 'normative' and 'deep core' beliefs, as well as a more applied set of 'causal' beliefs and notions of validity (Haas 1992; Weible and Sabatier 2009). Both levels of beliefs are shaped by social processes and hence controversies 'can arise out of honest philosophical differences' (Jasanoff 1995). As, e.g., 'prospect theory' shows, experts rely on different heuristics to interpret scientific data (Levy 1997).

When speaking of 'expertise', from now on I refer to the more applied causal beliefs.[6]

Autonomy essentially means whether and to what extent an agency is free from constraints by external stakeholders. Analytically, one can separate two questions: (a) 'autonomous regarding what?' and (b) 'autonomous from whom?'.

a) Autonomy is commonly distinguished between legal, financial, personnel, as well as decision-making autonomy with regard to choosing policy instruments and/or setting policy goals (Verhoest et al. 2004).[7] This study focuses on policy autonomy. More specifically, I study the autonomy of agencies in adopting the formal scientific opinions, which is done in the scientific committees. An agency is autonomous if it adopts opinions by relying on the decision-making criteria specified in its mandate. In the agencies under study here, these criteria are mostly 'risks/ hazards' and (medicinal or nutritional) 'benefits' and can be labelled 'scientific'/ 'technical'. Accordingly, ERAs ought to consider all 'scientific' information on risks and benefits, even if provided by external actors. Incorporating arguments not specified in the mandate, however, reduces agency autonomy. These ('non-scientific') arguments can potentially be of re-distributive or normative nature, but also refer to individual actors' cost-benefit calculations.

b) Similarly important is the question of 'autonomous from whom?'. As outlined above, ERAs entertain links with 'technical' as well as 'advocacy actors'. The 'technical' actors are assumed to behave like epistemic communities, deriving their goals from and operating according to the 'logic of science' (Cross 2013). They are believed to contribute to the scientific capacity of ERAs. Advocacy actors,

[6] The abstract 'deep core' beliefs are rather constant over time. They are partly enshrined into the agency design, and therewith lie beyond an individual agency's competences. It might of course happen that activities referring to the core scientific work of the agency transcend into more general principled belief systems and policy goals. Since the design of this study does not properly allow covering the longer timespan to observe those changes, observations in this direction will only be elaborated on in passing.

[7] One can also identify a normative dimension of autonomy as to why actors should (not) be autonomous. Positive manifestations of autonomy can be assessed against this normative benchmark.

however, are believed to introduce arguments into the agency decision-making that deviate from the mandate. Firstly, one can identify the political institutions, namely the European Commission, the European Parliament (EP), and the Council (Member States), pursuing national (or European) economic or normative interests, often of (re-)distributive nature. These political actors also partly act as 'principals' to the agencies, therewith having certain formal powers over these (budgets, etc.). Industrial companies (and their federations) are assumed to pursue goals based on cost-benefit calculations fostering their economic self-interest. NGOs are similarly non-scientific, albeit often pursuing interests other than 'economic'. Industry and NGOs here are also referred to as '(private) stakeholders'. Based on this 'ideal-type'-dichotomy between 'epistemic' and 'advocacy' actors, this study focuses public and private 'advocacy actors'. Since these actively try to induce their preferences into the agency, these advocacy actors are believed to pose the greatest threat to agency autonomy.

The causal link: How expertise might increase autonomy

Relying on delegation as well as organisational theory, I expect that expertise can affect autonomy in two ways. Firstly, the high quality expertise of ERAs establishes an 'expertise asymmetry' towards external actors. Secondly, ERAs engage in a process of 'procedural insulation' by (re-)interpreting and modifying the regulatory framework. This second mechanism closely relies on the ability of ERAs to engage in soft-law rulemaking (Chiti 2013). While both mechanisms are deemed effective, their relevance depends on the type of expertise ('technical'/'regulatory'), as well as the type of external actor that is concerned ('public'/'private'). The focus on these two mechanisms should not be seen as exhaustive. The empirical analysis might reveal additional ways in which expertise affects autonomy. Moreover, the relationship between expertise and autonomy goes beyond a one-way causal link. In fact, both concepts are linked in an interdependence model: While expertise is hypothesised to increase autonomy, autonomy might also contribute to expertise (e.g. by increasing the 'technocratic' reputation, attracting high-level scientists). This study restricts itself to the ways in which expertise affects autonomy.

Expertise asymmetries

In line with delegation theory, ERAs might benefit from 'expertise asymmetries' towards their political principals. ERAs hold significant scientific expertise, given the functional demand for it as well as their involvement in ERNs. Other public actors lack this degree of expertise, which triggered the delegation to ERAs in the first place (Alchian and Demsetz 1972). Accordingly, ERAs are in a hegemonic position *vis-à-vis* public actors such as the European Commission, the European Parliament, the Council and Member States.

Regarding the expertise of private stakeholders, delegation theory becomes less vocal. The interest group literature suggests that – at least concerning industry – one cannot speak of a classical asymmetry. In fact, industry seems to hold major expertise. Nevertheless, an ERA's high-quality expertise might enable it (a) to question scientific arguments put forward by external actors and potentially develop counter-expertise. Moreover, an ERA can (b) identify and dismiss 'non-scientific' arguments that go beyond the decision-making criteria specified in the agency regulations and guidelines. Accordingly, I assume that the agency's scientific expertise protects it effectively from external influence: from public actors because these lack the expertise to exert influence, and from private stakeholders because ERAs hold sufficient scientific resources to counter challenges by industry or NGOs.

Expectation 1a (E1a): Expertise asymmetries increase an agency's de facto autonomy.

Procedural insulation

Secondly, ERAs might engage in a process of 'procedural insulation'. This mechanism relies on the extensive regulatory expertise of ERAs and their ability to engage in soft-law rulemaking (Chiti 2013). It most centrally applies to private stakeholders. The initial delegation contract to an ERA already contains extensive regulatory provisions. The rules specify guidelines and procedures, required test methods, time frames for the assessment process, as well as the interactions with external stakeholders. This plethora of rules and guidelines restricts the behaviour of ERAs, but simultaneously provides them with significant autonomy (Gehring and Krapohl 2007; Huber et al. 2001; Yatanagas 2001). As Kaufman explains: 'What is red tape to one person may be a treasured procedural protection to another' (Kaufman 2001: 34).

All rules require interpretations and many ask for modifications once an ERA has gained more experience in implementing the regulatory framework. What is more, within the larger legal framework set by the European Institutions, ERAs can develop new rules to further define the regulatory procedures. By interpreting and modifying existing rules and introducing new ones, ERAs effectively raise procedural standards. This might significantly reduce legal uncertainty and improve the quality of the regulatory output. Most centrally in the context of this study, however, these rising standards limit access for external actors, and thus their ability to exert influence on the agency.

Expectation 1b (E1b): Relying on regulatory expertise, ERAs increase their autonomy by engaging in 'procedural insulation'.

Since ERAs are thought of as technocratic/epistemic actors, this insulation might be an 'externality' to the goal of improving regulatory decision-making. This scenario suggests an 'instrumental' application of expertise. But the agency might also insulate itself for strategic reasons. Independent of any potential scientific or regulatory gains, the agency might be tempted to introduce new guidelines and refine existing ones to protect its organisational interests (Boswell 2008; Schrefler 2010). Claudio M. Radaelli suggests that agencies apply their expertise more 'strategically' when they deal with issues of high political salience (Radaelli 2009, but see also Gormley 1986). In his seminal article, William T. Gormley (1986) identifies salient issues as those ones with a broad scope and intensity of conflicts (Gormley 1986: 598).[8]

How can we tell? A methodological note

The study compares three different ERAs ('cross-case'), but also engages in observing variation within each organisation ('within-case'). While providing a detailed understanding of each case, it shall also provide some external validity (Gerring 2007: 20ff). The selected

[8] In fact, next to political salience Gormley identifies 'issue complexity' as a second scope-condition. In line with Gormley (1986: 598) a 'highly complex issue is one that raises factual questions that cannot be answered by generalists or lay persons'. Given the highly technical nature of ERAs' regulatory tasks, however, 'complexity' is assumed a constant. For a convincing application of 'complexity' to explain knowledge utilisation, see Schrefler (2010).

cases are the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), and the European Food Safety Authority (EFSA). All three agencies selected operate in highly technical regulatory fields, qualifying them as 'extreme' cases (Gerring 2007: 101). This reliance on highly technical cases also supports the analytical distinction between 'scientific' and 'non-scientific' arguments, which is most intuitively studied among these cases. Cases are selected based on a most-similar-system-design to control for most alternative explanations for agency autonomy: (a) all three ERAs operate in a similar environment (industry structure, stakeholder activities); (b) the ERAs hold similar mandates; (c) explanatory factors linked to organisational structure are also controlled for (specialisation, cooperation, size, and budget). Holding these factors constant, the ERAs differ in their degree of institutionalisation, and they show (mostly internal) variation regarding their types and application of expertise.

The analysis is based on a variety of data sources including interviews and formal documents (COM decisions, agency regulations and guidelines, as well as scientific opinions). In total, 37 semi-structured interviews have been conducted: with agency officials, covering committee members, management and scientific staff working in the secretariats, and members of the management boards. In addition, I spoke with representatives from the Commission, the EP, industry groups, and NGOs. Interview data (analogue to survey data) potentially suffers from biased information, being prone to social desirability. In the context of this study, agency staff might hence have a tendency to overestimate their expertise. In addition, interview data is inherently perceptional. While this is a prerequisite for some perceptional variables of interest, the potential downsides regarding other factors are controlled for as far as possible: Speaking to a variety of agency members as well as external stakeholders allows to (partly) control for a potential bias. Moreover, significant variation on all my central variables suggests that social desirability is not a major problem. By triangulating the interview data with official agency documents, a potential bias inherent in any interview data is believed to be accounted for.

Analysis

Autonomy

All three ERAs interact with both public and private advocacy actors. Overall, neither public nor private actors seem to have significant influence on the scientific output of ERAs, as many interviewees explicitly argue. In fact, none of the 37 interviewees suggests that the scientific output of any of the three ERAs is significantly influenced by external actors.

At the same time, however, there are clear indications of a certain 'industry-cosiness' among all three agencies. This cosiness finds expression in two aspects. Firstly, both NGO and Commission representatives linked to ECHA report a clear 'service-orientation' towards industrial corporations (ECHA–NGO, ECHA–COM)[9]. Secondly, the NGO representative points at the high share of agency personnel holding an explicit industry background (ECHA–NGO). This observation on ECHA is supported by the recent report by the European Court of Auditors with regard to EMA and EFSA (European Court of Auditors 2012). All three agencies thus seem to experience 'revolving doors'. Since organisational affiliation might influence individual preference formation (Egeberg 2012), this aspect closely links to the more general issue of conflicts of interest. Especially EMA and EFSA have experienced occasions where its members have been accused of holding (and/or hiding) potential conflicts of interests (e.g. former industry employment or research funding). Despite major scandals, though, the scientific decision-making itself does not seem to have been 'captured' by industry. According to my interviews, this can be explained by the organisational structure of ERAs: Most conflicts of interests are linked to secretariat staff. Given the organisational separation from the scientific committees, the secretariats only marginally influence committee decisions (Ossege 2013). Accordingly, their conflicts of interest seem not to translate into the scientific agency output to a significant degree.

[9] Interviews are cited as EMA1, EMA2, etc. (for agency officials), or EMA-NGO, EMA-COM, etc. (for interviewees employed with other organisations such as NGOs, the Commission, or industry federations).

The role of scientific knowledge – asymmetries and counter expertise

Expertise plays a key role in explaining the high degree of autonomy. First (a), I turn to 'expertise asymmetries' and show how ERAs capitalise on the asymmetric distribution of expertise towards public actors. Since ERA interactions with the EP and MS are scarce, the emphasis is put on the interactions with the Commission, which can be seen as the main principal of ERAs. Then, I study whether they also hold enough expertise to 'counter' the claims of private stakeholders. Second, I turn to the mechanism of 'procedural insulation' and elaborate on how the agencies rely on both their scientific and regulatory expertise to keep private stakeholders at bay.

Asymmetries towards the principal

The Commission is the main public actor ERAs interact with, both formally and informally (ECHA–COM). Nevertheless, the DGs are perceived to have little influence on the agencies' scientific decisions. While the COM has an observer status in the committees of each agency, its representatives do not take active part in the scientific discussions. As one interviewee involved in an ECHA committee recalls her experience (ECHA8): 'The Commission is sitting in the committee as an observer, they can contribute to the discussion, if they want to. But I do not recall that they said anything.' This perception is shared by the other interviewees involved in the committee work, across agencies (e.g. ECHA–RAC, EMA6, EMA7, EFSA1, EFSA2, EFSA3 EFSA8, ECHA1, ECHA7, ECHA8). A main explanation for this low influence of Commission representatives seems to be their lack of scientific expertise, preventing them from intervening with the scientific decision-making. As two interviewees from EMA and ECHA aptly put it:

> It can happen that the people in the EC do not understand the opinion and then they follow up with questions. But the EC completely lacks the potential and scientific foundation […].
>
> (EMA1)

> I do not think they have a lot of scientific expertise. They never had. They are policy makers. Of course they have scientists working there, and they have lawyers working there, but the lawyers do not deal with individual decisions and the scientists are not supposed to be. […] I mean the Commission has

> outsources this sort of questions to the agencies, that is why they established agencies, that agencies do the regulatory work, the individual decisions, plus then provide them with the scientific opinions, with the scientific expertise. They only need to keep the level of expertise that they can understand what is coming and to be properly informed so that they can make the decision.
>
> (ECHA1)

While the Commission seems to lack the expertise to influence ERA decision-making, they hold enough knowledge to follow the argumentation of the latter (ECHA–COM):

> And so [the COM] have of course their expertise, but now of course with the more defined roles of different actors we are the body that is supposed to be the technical and scientific body, really having the in-depth scientific expertise; and they are more deeply into the policy and regulatory level so that there is not too much overlap. But of course, also we have to understand each other and therefore they have relevant expertise for us, and we are consulting with them on issues.
>
> (ECHA7)

When the Commission does enquire on scientific issues, hence, this seems to reflect a 'knowledge transfer' from the agency to the Commission. Reasons for these enquiries are similar to the ones making the Commission take part in the meetings in the first place: the DGs want to be aware of the (conflicting) scientific arguments put forward in the debate – before they have to deal with them (and potentially defend them) during the following comitology procedures or even legal litigation (EMA7). Especially the threat of legal challenges seems to shadow on much of both the agencies' and the Commission's decision-making (ECHA–COM; EMA–Industry; ECHA1). Against this background, some interviewees attribute the COM a slightly bigger role, exerting considerable oversight. In this vein, EMA has experienced a surge in oversight since 2010. In March 2010, the Commission's Pharmaceutical Unit was moved from DG INDUSTRY to DG SANCO. Alongside this organisational shift, agency staff and external stakeholder report an increasing scrutiny of the agency opinions by the Commission. However, this increasing scrutiny

mainly refers to regulatory rather than scientific elements (EMA–Industry).

With their regulatory oversight role, the DGs thus seem to contribute to the regulatory consistency of the committees' output. They only partly follow up on the scientific details of the committee opinions. If they do so, it rather appears like a knowledge transfer. The DGs seem to lack the scientific expertise to introduce their own 'scientific' views into the agencies' scientific opinion.

Counter-expertise towards private stakeholders

The picture changes when studying the relationship with private stakeholders. Extensive interactions take place via stakeholder fora and workshops. EFSA and ECHA hold open consultations on scientific aspects of product applications. ECHA collaborates with COM and Industry in the 'Director's Contact Group' to tackle regulatory challenges. While formally treated equally, industry seems to enjoy privileged access to ERAs compared to NGOs. Many interviewees attribute this to the superior resources of industry (ECHA–NGO). While most interactions take place formally, especially industry federations entertain at least partly informal contacts (emails, telephone, face-to-face; EFSA6). Nevertheless, these informal contacts seem rare (EMA–CHMP; EFSA–GMO, ECHA–MSC).

Despite the intensity of contacts, ERAs seem autonomous from private stakeholders. Contrary to public actors, this does not stem from a traditional information asymmetry. Industry companies invest billions of Euros into research and development (R&D), attract highly skilled experts in their field, and accordingly accumulate top-level expertise. Moreover, industry companies design and execute the scientific tests on products they submit to the ERAs for authorization. Accordingly, especially industry holds a considerable amount of scientific knowledge. Rather than substantially more, ERAs merely have 'enough' expertise (a) to control the adequacy of stakeholder claims, and (b) to develop counter-expertise where necessary. Moreover, ERAs seem to engage in procedural insulation by altering regulatory rules. Since most interactions are directly affected by these rules, the rising procedural standards directly reduce the ability of external stakeholders to exert their preferences.

All three ERAs seem to hold the scientific expertise to 'uncover' flaws in application dossiers. These flaws can be due to a lack of experience among applicants with the complex application systems, or for changes in the regulatory procedures. While flawed dossiers due to a lack of regulatory understanding are submitted to all three agencies, it seems to affect the recently established ECHA most (Pricewaterhouse-Coopers 2012). However, interviewees also report on deliberate intents to hide 'certain things' in their documents (ECHA4), and on companies submitting flawed data (EFSA–GMO). ERAs regularly request additional information from the applicant– 'either to solve the problem in a positive way or to say 'it is better to withdraw the product' (EMA1). It regularly occurs in all three agencies that applicants withdraw their applications before a final verdict after having received critical signals on their initial application (EMA1, EMA–CHMP, EFSA–GMO, ECHA–MSC). At EMA, between 2009 and 2011 approx. 14.5 per cent of the initial applications to the CHMP for authorization have been withdrawn prior to a final agency opinion. An additional 5.5 per cent of the applications have received a negative opinion by the agency (European Medicines Agency 2011). The relatively high number of withdrawals partly explains the low percentage of negative scientific opinions.

If additional expertise is required, ERAs apply two strategies: Where possible, all three ERAs make frequent use of the wider scientific community (working groups, external experts, etc.). If the scientific knowledge does not exist, the ERAs engage in own research activities, organise workshops on pertinent or emerging scientific issues and stimulate exchange and potentially learning among experts. All three ERAs thus seem to pool sufficient expertise to assess submitted dossiers.

The legal obligation to process and respond to each comment received drains on the organisational resources (EMA6).[10] At the same time, the formal obligation to review external claims obliges ERAs to consider novel scientific information in their decision-making. The authorisation of the genetically modified Maiz 1507 is one example of how this might actually change an agency decision. Already in 2005, EFSA's GMO panel provided a first scientific opinion allowing the

[10] Moreover, this legal obligation is used strategically by stakeholders: it allows them to substantively delay potentially restrictive regulatory decisions.

cultivation of the product. After Testbiotech ('scientific' NGO) provided novel scientific data during a public commenting procedure, the GMO panel had to revise its assessment, and replaced its original opinion with a more restrictive one (EFSA–GMO).[11]

Another example of ERAs' responsiveness to novel scientific information can be seen in Avandia, a diabetes treatment (also known as 'Rosiglitazone', marketed by GlaxoSmithKline). Centrally authorized for the European market in 2000, EMA suspended the authorization in September 2010, following a similar decision by the UK's Commission on Human Medicines. While EMA has been heavily criticized for its late decision, one has to consider that other regulators across the globe either took less restrictive actions or similar measures at an even later point in time.

Regulatory expertise and soft-law rulemaking

Decreasing legal asymmetries

ERAs hold the scientific expertise to protect their autonomy. They can also capitalize on the extensive regulatory provisions guiding their work, and their superior (regulatory) expertise in applying these. As long as they are applied properly, the procedures protect ERAs from external influence. The agencies seem to know the regulatory framework better than other actors, suggesting a typical informational asymmetry. This is partly due to the functional demand on agencies to apply the framework, and partly due to the complexity of the regulatory fields (food/feed, pharmaceuticals, and chemicals). Given the panacea of rules to be considered (and their partly changing nature over time), many private stakeholders experience a lack of expertise in the procedural dimension. Especially small and medium enterprises (SMEs) seem to struggle with the magnitude of formal requirements to file a product application (EMA) or submit a dossier (ECHA). Companies working with EMA have difficulties to understand the role of the individual committees (EMA–Industry). NGOs' lack of regulatory expertise is partly due to their lack of (financial and HR) resources (ECHA–NGO; EMA–NGO). These experiences have led all three agencies to launch a variety of initiatives to support the applicants, including: the 'advice-units'

[11] To read the opinion, see: <http://www.efsa.europa.eu/en/efsajournal/doc/2429.pdf> [last accessed 6 November 2013].

established by all three agencies[12]; pre-application meetings (EMA) to sort out detailed requirements of the application, clock stops during the scientific assessments to provide room for additional questions, as well as more general stakeholder workshops and fora to disseminate regulatory information. The establishment of these workshops reflects external actors' lack of regulatory expertise. From an agency perspective, the information activities thus seem a double-edged sword. On the one hand, they reflect an instrumental application of expertise that contributes to better regulation. On the other hand, they undermine the hegemonic position of ERAs in applying the regulatory framework. In fact, several examples suggest that companies and stakeholders overcome the expertise barrier and initiate formal complaints or even aim for legal litigation (Busuioc 2013).

Procedural insulation – bureaucratic and risk averse interpretations?

Decreasing asymmetries, however, seem not to decrease autonomy. This seems to be the case since ERAs also engage in 'procedural insulation' to protect their autonomy. The insulation seems to become more frequent and more purposeful ('strategic') in areas of high political salience (ECHA–RAC; EMA4). Even the most basic legal or administrative provisions require interpretation by ERA staff:

> This may not sound like it, but the issue about public consultation, how the process works and the input of ECHA's secretariat in that, is not fully crystallized. I do not think there is quite 100 per cent common view on it.
>
> (ECHA3)

This discretionary space, however, does not translate into 'bold' interpretations. All three ERAs are labelled as 'bureaucratic' by most interviewees. As such, a bureaucratic operation can reflect a very instrumental application of the regulatory framework: an interviewee describes ECHA as 'strictly respecting legislation' (ECHA–CEFIC). Moreover, though, this bureaucratic behaviour might reflect a high risk aversion. According to a variety of interviewees, ERAs seem to follow the rules 'to the letter' at least partly to avoid contestation or litigation on its decision (among others: EMA–Industry; EFSA5). This procedural

[12] EMA, for instance, established the Small and Medium Enterprise Office (SME-office); EFSA as well as ECHA introduced a '(Application) Helpdesk' for applicants.

insulation becomes successful since the threat of litigation by external actors is most promising on procedural grounds (ECHA–COM). While the impression of bureaucratic behaviour is shared by many interviewees across all three agencies, ECHA seems to be the most bureaucratic and risk-averse agency:

> [ECHA is] extremely obsessed with procedures. Sometimes it really drives me mad. I can see partly why they do it, but it gums up the works to some extent. In fact, PwC did a report, they did a workshop here and invited some of us there to discuss. Industry and NGOs agreed that ECHA is very bureaucratic, so that is something we share views on.
>
> (ECHA–NGO)

This might be explained by ECHA's lack of institutionalization. Since no common practices have emerged over time, the legal uncertainty related to the regulatory framework is high (ECHA8; ECHA–COM). Over the last years, ECHA seems to have developed a more self-confident behaviour, albeit only slowly:

> So if you had asked two years ago, I think all of them would have agreed that we are difficult to approach, sitting in an ivory tower, administrative, all of that. But I think it is very understandable when you think about the situation and how an organisation from zero has to come into life and start functioning. You do not have capacities for everything.
>
> (ECHA1; similarly ECHA–COM)

While all three ERAs interpret the existing rules in a highly bureaucratic manner, they modify existing rules and device new ones. New rules are introduced regarding the internal operations of the agencies, as well as their relationship with external stakeholders. As one interviewee explains the process over time:

> Working from there we have established one hundred-paged documents with more descriptions of what specific data are needed to meet those specific data requirements. So we do have, if you wish to call that a kind of an interpretation, yes, of course we do that. The thing is that we would always work in agreement with what is internationally already accepted as standard, and the most recent evolvement is that what EFSA

> produced as a guidance document will now be adopted by the MS themselves as being an Annex to the legal text of regulation, so it will become a legal guideline. So, whereas in the beginning you can call it an interpretation, it is going to be a law.
>
> (EFSA7)

Most regulatory changes seem to reflect a process of organisational learning: Detecting deficiencies in the current procedures, EFSA, ECHA, and EMA seem to alter these rules to prevent regulatory failures in future. Using this lens, ERAs apply their regulatory expertise instrumentally to improve the overall regulatory process. As a side-effect, the alterations impose additional regulatory constraints on external stakeholders and therewith insulate the ERAs from external influence.

Turning strategic: high political salience

When the political salience of an issue increases, two things change. External stakeholders seem to increase their pressure on the agencies (ECHA–RAC). In response to that, all three agencies seem to engage in self-insulation more frequently as well as more strategically:

> there we have more leeway. There we have a number of documents which are guidelines, which are supposed to be followed but they are not legally enforceable. So you are not breaking the law if you don't follow them. Many of these guidelines are being drawn up by us. […] we [normally] do a good job, but for particular sensitive dossiers we would take extra care, for example in how conclusions of an assessment report are worded, or in making sure that the procedure is followed to the letter.
>
> (EMA4)

The quote indicates that agency members are aware of their own discretionary space to interpret the regulatory framework – and they make strategic use of it (EMA4). Members from all agencies also suggest that committee experts invest more effort into handling the scientific dossiers (EFSA6, ECHA–RAC). As the following examples illustrate, these behavioural changes protect agency decisions from the increasing external pressures.

Recurring issues in all three ERAs under study are the policies governing conflicts of interests. The 'scandals' have triggered close scrutiny by the European Parliament and the European Court of Auditors (European Court of Auditors 2012). As a response to the public criticism, all three ERAs have made their policies more restrictive. The screening of secretariat staff and committee members has been intensified, and the standards been raised (European Chemicals Agency 2011; European Food Safety Authority 2011; European Medicines Agency 2012). ERAs have thus modified their guidelines to protect their scientific decision-making. According to most observers, the rules have become more effective (European Court of Auditors 2012).[13] Given the immense political attention to the policies, however, the more restrictive reforms might also (at least partly) be seen as symbolic action (Boswell 2008).

Despite its merits, ERAs seem to face a potential trade-off when insulating themselves. As the example of conflicts of interests suggests, a high degree of autonomy might come at a price. The recruitment of high-level experts becomes increasingly difficult:

> Suddenly all agencies get problems of recruiting experts. You will not find a professor of distinction in pharmaceuticals, who has not in some way, via third party funding, collaborated with industry. Why should he, in the first place? Not everyone, who has collaborated with industry is a criminal. […] Everyone who exchanges views with industry seems to be a Trojan horse for the detriment of people or public health. […] With the result that we have difficulties to recruit experts.
>
> (EMA1)

Colleagues from EMA and EFSA agree, saying that 'it is wishful thinking that you can have expertise with no links to pharmaceutical industry' (EMA2). Similarly, 'every expert naturally has somehow contacts [to industry], otherwise he would not be an expert' (EFSA6). Another interviewee puts it more cautiously: 'Still, there is a degree of a problem, also with the internal experts because they have different levels of confidentiality and conflicts of interests. It is an issue, always' (EMA3). ECHA, as the more recently established

[13] This does not prevent many from claiming additional modifications, though.

agency, still seems to be in a position to recruit good experts. The conflicts of interest policies are thus required to delineate a fine line. On the one hand, they ought to protect from 'external interests'. Through recent modifications, this seems to be increasingly successful. On the other hand, however, the policy should not pose obstacles to the recruitment of high-quality expertise crucial for the regulatory work: 'One has to manage this tension: you want qualified people, and these sometimes do come from industry' (ECHA–MB).

In 2011, ECHA's risk assessment committee (RAC) took its final scientific opinion on gallium arsenide (GA).[14] The substance is centrally used in the micro-electronics industry. Initially, the product was proposed for CLP by France in 2009, suggesting label in category 2 (basically rendering the substance harmless). Given new scientific information, ECHA's RAC decided to classify GA as highly carcinogenic (category 1a). At this point in time, major criticism on the decision was voiced by industry, both towards ECHA directly, and towards the Commission. While disagreeing with the final classification in substantive terms, industry centrally raised a procedural objection: The public consultation prior to decision-making suggested a classification of GA as 'category 2'. Industry convinced the Commission that if they had known about the potentially more restrictive regulatory action, they would have taken part in the public consultation differently. Wary of potential litigation, the Commission asked ECHA to run a second public consultation and re-evaluate the hazard qualities of the substance (ECHA–MSC2). This second public consultation took place in 2011, receiving a plenitude of external comments by industry, and on 1 December 2011 the RAC adopted its final opinion on gallium arsenide. Aware of the close scrutiny put on their work, committee members invested substantive additional resources to deliver a sound scientific opinion (ECHA–RAC). In this second opinion, the substance was classified as 1b, hence still suggesting it to be carcinogenic.[15] While the second scientific opinion was thus slightly altered, a committee member attributes this to the scientific argumentation, rather than lobbying pressures: „we then

[14] Epoxiconazol is a substance with as similar history, but the final verdict has not been published yet.

[15] For the entire scientific opinion, see: <http://echa.europa.eu/documents/10162/13641/gallium_arsenide_opinion_en.pdf> [last accessed 15 November 2013]

decided for 1b, which sounds like a 'rotten' compromise, but in my view it is well-argued for.' (ECHA–RAC)

Moreover, a categorisation as 1b has a similar impact on industry as category 1a: it implies potentially burdensome authorisation procedures to use the substance, procedures that would not be applicable if categorised as '2'. Hence, the scientific essence of the RAC opinion does not seem to have been affected by external pressures. As the same RAC member suggests, there were at least no direct effects:

> But the pressure led to the second evaluation round including a more detailed consideration of specific arguments, sometimes also specific or additional studies. In my view it is practically impossible to decide which share lobbying pressure had on changes in the RAC opinion – surely no direct one.
>
> (ECHA–RAC)

EFSA's panels also operate highly autonomous from external influence. In fact, my findings suggest that EFSA might even be considered the most scientifically autonomous of the three agencies. In December 2006, the COM passed the Regulation 1924/2006 to harmonise the nutrition and health claims in the EU. The regulation states that health claims in relation to food products must be based on scientific evidence and require authorisation[16] EFSA has received 4637 Health Claims by the EC between 2008 and 2010, which had already been consolidated by the EC from initially more than 44,000 claims provided by member states. While the process in on-going, it has been characterised by many as highly scientific. The regulation says that a food product, in order to make health claims, needs to have 'been shown to have a beneficial nutritional or physiological effect, as established by generally accepted scientific evidence' (EC Regulation 1924/2006: 12). On many health claims, relevant scientific data required in the regulation is absent. Accordingly, about 80 per cent of the health claims presented to EFSA have been rejected (EFSA1, but see also: ANH Europe 2011)). This high number of rejections is an indicator of EFSA's rigorous application of the legal framework. By applying the guidelines in a very stringent

[16] For more on the regulation, see the section on 'Health claim applications': <http://www.efsa.europa.eu/en/nda/ndaclaims.htm> [last accessed 6 November 2013].

bureaucratic manner, EFSA avoids potential litigation. At the same time, many commentators criticise EFSA's scientific approach as:

> Too stringent […] it takes into account very little scientific evidence and dismisses claims that have been approved in several European countries […] in contradiction to the European Medicines Agency, which, through the directive on traditional herbal remedies, recognises the healing properties of dozens of plants.
>
> (Ms Rivasi, MEP, quoted in ANH Europe 2011)

With this overly restrictive scientific approach EFSA might be 'hitting the target but missing the point' (Bevan and Hood 2006: 521). In 2011, the responsible EFSA 'panel on Dietetic Products, Nutrition, and Allergies was asked to provide an opinion on the scientific substantiation of a health claim related to water and reduced risk of development of dehydration' (EFSA Panel on Dietetic Products, Nutrition and Allergies (NDA) 2011). In accordance with the regulation governing its actions, the panel required the identification of the relevant risk factor to process the health claim. However, the suggested factor by the applicant ('water loss in tissues') was considered to be a measure of the disease itself. Given the lack of a risk factor, the claim was dismissed by EFSA on procedural grounds (EFSA Panel on Dietetic Products, Nutrition and Allergies (NDA) 2011). Natural and botanical food ingredients, which have nearly been rejected in its entirety, serve as another illustration (ANH Europe 2011). While in both examples adhering to the standards prescribed in the regulation, EFSA runs the danger of operating in a vacuum – neglecting the potentially re-distributive effects of its decisions on entire industries.

Conclusions

This study has examined the relationship between expertise and autonomy among three major ERAs. Findings show that expertise contributes to high scientific autonomy, confirming the theoretical expectations outlined above (Alchian and Demsetz 1972; Carpenter 2010; Egeberg 2012). In line with delegation theory, ERAs benefit from an information asymmetry towards public stakeholders. Towards private stakeholders, ERAs are 'merely' well enough equipped to identify flaws in submitted dossiers and develop counter arguments where necessary (Schrefler 2010). Moreover, ERAs engage

in a process of procedural insulation, capitalising on their regulatory expertise and benefiting from extensive existing regulatory provisions (Gehring and Krapohl 2007; Huber et al. 2001). Given its low degree of institutionalisation, ECHA seems to be more risk-averse than its experienced siblings. At the same time, the application of expertise seems to change: Generally, modifications to the regulatory framework seem to aim at improving the regulatory process, rendering the 'insulating effect' an externality. When issues become more politically salient, ERAs behave more strategically to avoid potential contestation (Boswell 2008; Radaelli 2009; Schrefler 2010). This more strategic insulation explains why ERAs can remain autonomous despite the increasing pressures by external stakeholders.[17] At the same time, the ECHA example of gallium arsenide suggests that industry succeeds in significantly delaying regulatory action.

The study contributes to the discussion on the organisational behaviour of ERAs, as well as their more general role in the European polity. Organisational behaviour is clearly shaped by the (use of) expertise of an ERA. A narrow focus on the 'usual suspects' (organisational structure and mandate) when studying agency autonomy thus risks overlooking the crucial role of expert knowledge. These effects are partly direct, and partly interacting with organisational structure (regulatory procedures, see above).

As the *raison d'être* of agency creation, empirical findings on the role of expertise emphasise the role of ERAs in 'depoliticizing the public' (Flinders and Buller 2006). The central role of expertise in the operation of ERAs and their rule-orientation give credence to their technocratic claim and expertise-based legitimacy (Shapiro and Guston 2007). Since ERAs partly act strategically, they might turn into

[17] At the same time, the high scientific autonomy of ERAs seems to trigger change in stakeholder strategy. Rather than changing the content of the agency opinion, industry seems to succeed in delaying regulatory action. By contesting the first public consultation on procedural grounds, industry managed to keep the decision-making on Gallium Arsenide open for more than 12 additional months: 'no direct influence of lobbying pressures, the strategy is clear: re-opening decision-making or keeping it open and therewith eroding the 'problem' (ECHA–RAC). Given the generally sluggish nature regulatory politics (see Avandia, where suspension took three years after first scientific doubts), these delays might provide stakeholders with significant competitive advantages.

'political actors in their own right', though (Moe 1982). At the same time, the health claim example on 'dehydration' suggests that ERAs should not operate in a 'vacuum'. Autonomy ought not to be seen as an absolute standard since the agencies' mandates themselves might institutionalise certain biases: While implementing the regulation to the letter, EFSA decisions might have clear re-distributive consequences. This finding indicates that the 'postulated' separation between risk assessment (by the agency) and risk management (by the Commission) is difficult to maintain in practice.

Despite its merits, the study experiences several shortcomings: While the focus on highly 'technical' agencies ('extreme cases') forms a precondition for a sensible analysis of the research questions at hand, it also limits the generalization of the findings. The effects of expertise on autonomy might be less pronounced among less 'technical' regulatory agencies. Accordingly, also the conclusions regarding the role of ERAs in 'depoliticizing the public' have to be taken with care.

This study thus provides valuable insights, but also indicates the necessity of future research on the role of expertise in ERAs, and other European (and national) expert bodies more generally: Being the central organisational resource of technocratic bodies, future research should take the role of expertise more seriously, addressing its effects on organisational behaviour more generally, and evaluating its importance *vis-à-vis* other relevant factors.

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Why not epistocracy? Political legitimacy and 'the fact of expertise' (EPISTO) is a five-year research project which examines and assesses the legitimacy of expert rule in modern democracies, with a particular focus on the European Union and the European Commission's expert groups.

This report is based on the proceedings of EPISTO's kick-off conference that took place in Oslo in April 2013. The contributions in this report are multifaceted and interdisciplinary and range from chapters on normative political theory to analyses of the role of experts in specific policy fields. The contributions follow three main themes: expert-rule and democratic legitimacy, the role of knowledge and expertise in EU governance, and the European Commission's use of expertise.

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