A genealogy of EU discourses and practices of deliberative governance:

Beyond states and markets?

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ABSTRACT

The paper offers a genealogy of 'deliberative governance' in the EU – an important contemporary discourse and practice of 'throughput legitimacy' within that setting. It focuses on three key episodes: the late 1990s 'Governance' reports of the European Commission's in-house think-tank, the Forward Studies Unit (FSU); the Commission's 2001 White Paper on Governance; and the EU's 'Open Method of Co-ordination', which emerged in the 1990s and was widely studied in the early and mid 2000s. The genealogy serves to highlight the particular intellectual lineages and political contingencies associated with such a discourse and in so doing points to its exclusive potential in both theory and practice. In particular, the paper argues that it excludes, on the one hand, those championing the enduring sociological and normative importance of the nation-state and an associated representative majoritarianism and, on the other hand, those (excessively) critical of a functionalist, neo-liberal, market-making status quo.

Key words: EU, deliberation, governance, 'throughput' legitimacy.

Introduction

The European institutions have long been preoccupied with the legitimacy of the Union and its antecedents. Efforts have focused variously on pushing the message that integration has been favourable to the people of Europe ('output legitimacy') and creating channels for the inclusion of the people of Europe in shaping integration ('input legitimacy') (see Scharpf 1999; Schrag Sternberg 2013). In part as a consequence of the perceived failures of these efforts, an alternative intellectual agenda took shape within the European Commission in the mid-1990s. This took a different approach, aiming not primarily to drive prosperity and economic growth ('output') or legitimate Europe as a nation-state in the making ('input'), but instead pointing to, championing, and looking to improve upon, an emergent multi-level and networked post-national *governance* (De Schutter, Lebessis and Paterson 2001, pp. 21-22; Schrag Sternberg 2013, pp. 141-145).

Such governance was portrayed as both a (sociological) consequence of and an appropriate (normative) response to conditions of rapid globalisation and increasing complexity in national and global politics. While the term 'throughput legitimacy' was not deployed, the ideal of good governance presented by the European Commission at this time chimed to a large extent with the concept now widely deployed in the public administration literature (Schmidt 2013) and the focus of this symposium, particularly that aspect of it concerned with both understanding and improving processes or procedures inside the institutional 'black box'. This particular vision emphasised, in particular, the possibility for transparent stakeholder, interest-group or civil society deliberation in post-national policy-making. It envisaged

deliberative throughput procedures at the centre of a virtuous circle (Schmidt 2013) between input and output legitimacy; open, transparent and reflexive processes would permit issue dependent, legitimate stakeholder inputs to produce more legitimate outputs.

Such a vision chimed with, *inter alia*, a broader post-Cold War emphasis on liberal pluralism; an international studies' preoccupation with 'globalisation theory' and 'global governance'; the burgeoning idea of a 'network society' (Castells 1996); public-policy scholarship on public sector reform at national level (Bevir 2010, p. 436); scholarship on the 'third way' (Giddens 1998) and stakeholder capitalism that was gaining influence in centre-left circles in the UK and US; and a normative scholarly and practitioner turn to deliberative governance and democracy (for an overview see Smith and Brassett 2008). This broad post-Cold War intellectual *zeitgeist* has been thoroughly critiqued and even (prematurely) declared 'dead' (for instance, Rosenberg 2005). But in the EU it remains very much alive (if not necessarily well) in the context of complex networks of multi-level, regulatory and functionalist forms of governance in search of greater legitimacy. Indeed, the contemporary scholarly turn to 'throughput legitimacy' is itself a testament to the endurance of such thought, both in terms of sociological diagnosis and normative prescription.

Adopting a broadly interpretivist approach, this paper conducts a historicist genealogy (Bevir 2010) of these deliberative or proceduralist discourses as they emerged within the EU institutions in both theory and in various practices. In so doing the paper makes a specific contribution to this symposium by showing, from a theoretical and

historical perspective, the limitations of 'throughput legitimacy' as a practical and normative goal. While other contributions emphasise the limitations of contemporary institutions and mechanisms for civil society engagement – the limitations of 'throughput' in practice – this article *also* offers a critical analysis of throughput in theory. In line with an interpretivist approach, it views deliberative and proceduralist discourses as emerging within a particular context and as a result of particular historical contingencies. More specifically, it is interested in critically considering the 'naturalised' or common-sense knowledge claims of these discourses and exposing the ways in which they govern or constrain subjects/identities, despite their claims to reflexivity, inclusivity and openness.

Given the breadth of these discourses as object of critique, the approach does not seek to provide a definitive history or a systematic analysis of particular archival documents. Rather, it is, as Elbe (2001, p. 262) puts it, '"episodical" in the sense that it restricts itself to those historical episodes that are of decisive importance in seeking to understand [that] phenomenon in the present, which is singled out as being problematic.' It is important to note that, while the deliberative discourses and practices that emerge in the EU and are analysed in this paper are indeed regarded as 'problematic', 'to question beliefs is not necessarily to reject them. To expose the particularity of a perspective is not necessarily to deny its validity' (Bevir 2010, p. 429). The aim then is not to outright reject deliberative forms of governance or the normative importance of 'throughput legitimacy', nor to valorise the alternatives that these discourses implicitly or explicitly exclude (a point that is made clear in conclusion). In short, critique is not, as Foucault (1984, pp. 45-46) puts it, 'practised in the pursuit of formal structures with universal value'. The aim is not, then, to

provide a definitive alternative to deliberative governance as legitimation strategy. Rather, the aim is to offer a critical intervention into both scholarly and policy discussions in the EU context and beyond, which still treat as panacea or excessively valorise procedural, deliberative and networked forms of governance and public administration.

The 'episodical' genealogy proceeds as follows. In a first step, the paper considers the work of the Commission's Forward Studies Unit (FSU), the in-house think-tank that, within the EU, first proposed this conception of a deliberative or procedural governance in the late 1990s, contextualising it in terms of the broader social and political theory in which it is grounded. This section is based on an analysis of the published FSU reports, the preparatory and seminar materials that preceded the publication of the reports and interview data from discussions with a key protagonist in this 'governance' project. In a second step, the paper notes how the FSU agenda was at least to some extent manifest in later Commission visions of good governance – particularly its 2001 White Paper and the 'open method of co-ordination' – arguing that in practice those visions failed to come close to the radicalism of the early agenda and that deliberative possibilities were considerably constrained. In a third and decisive step it is argued that these practical issues are not simply a matter of practice not living up to theory. On the contrary, they are rooted in the very conception of the social world upon which the 1990s FSU reports – and prevalent ideas on governance in public administration and international studies that remain significant today – are based. Deliberative governance, as a *response* to what has variously been described as the functionalist, networked, globalized, 'neo-medieval' or marketised social world, is, in short, *co-constitutive of* that very world and excludes alternatives to it. Finally,

the implications of this critique in the context of the EU's contemporary crises are considered.

The Forward Studies Unit's Vision of Deliberative Governance

Merged with the Group of Policy Advisors in 2001, the Forward Studies Unit described itself as an in-house future-regarding think-tank of the European Commission. The unit was established by Jacques Delors during his activist Presidency, but saw a dip in its influence under the Santer Presidency. In 1995, in the context of that latter presidency, the FSU was – under the leadership of the senior official, Jerome Vignon – actively seeking to make itself relevant to the broader workings of the Commission and EU. It was against this backdrop that it developed its 'governance' project in conjunction with the *Centre de philosophie du droit* (CPDR) at the *Universite Catholique de Louvain*. The work of Jacques Lenoble and Jean De Munck in CPDR had piqued the interest, in particular, of Nottis Lebessis in the FSU, who led its governance initiative. John Paterson, a researcher at CPDR working with Lenoble, was partially seconded to the FSU to assist with the project and co-authored the key reports (now a Law Professor in Aberdeen, Paterson was twice interviewed for this paper).

The FSU held a series of seminars on the governance theme in the mid-1990s that drew together FSU officials and academic experts working on public administration and law (scholars involved in the seminars included: Lenoble, De Munck, Ladeur, De Schutter, Perret, Teubner, Herzog, Majone, Dehousse and Hood. For a list and their contributions, see De Schutter, Lebessis and Paterson 2001, pp. 14-15). Outputs were

shared in various 'working' forms within the Commission in the late 1990s. However, Paterson noted in conversation, that the work did not gain significant purchase until President Prodi came to office in 1999, on the back of the ignominious resignation of the Santer Commission. An academic by background and confronted with a legitimation crisis affecting the Commission and EU at large, Prodi turned to the FSU and, in particular, revived its work on governance. This was presented explicitly as part of his agenda for 'shaping the new Europe' (Commission 2000). Prodi at the same time launched a series of administrative reforms of the Commission, led by a new Vice President, Neil Kinnock.

Two reports of the FSU, authored by Lebessis and Paterson (1999a, 1999b), were published in 1999 and a large seminar was held in Brussels to launch a more high-profile governance initiative, led by Jerome Vignon. In 2001 the FSU published a more detailed account of the work of its 'governance project' (De Schutter, Lebessis and Paterson 2001) and in the same year the White Paper on Governance was published (see the following section). The key point for present purposes is that we can identify in this work a deliberative or 'proceduralist' discourse of government (as govern*ance*). The aforementioned reports, as well as the preparatory seminar minutes and documents, reveal important intellectual lineages or narratives (Bevir 2010, p. 437). They establish an underlying social theory, the starting point for which is a perceived crisis of regulation and government in conditions of globalisation and complexity. They then assert a set of normative commitments in relation to the practice of legal regulation and governance.

The social theory is presented, inter alia, in the FSU report, 'Evolution in Governance' (Lebessis and Paterson 1999a). It suggests that complexity and uncertainty increasingly characterise the contemporary social world. A traditional form of govern*ment,* as rooted in a fixed constitution and parliamentary order located in a nation-state context, is said to be facing certain limitations and challenges. At the same time, the narrow expert-driven technocratic vision of the market as organising principle is also problematic. Social complexity in contemporary conditions of globalisation leads to a sense that reality is never definitive, but contingent. As the report states: '[A]ll models of reality must be understood to be inherently contingent and unstable. Accepting this to be the case means that there is no single universal model of reality and equally no means by which we could eventually arrive at a definitive version of reality'. (Lebessis and Paterson 1999a, p.13)

Preparatory seminar notes reveal that such a social theory was indebted to the 'hypothesis of proceduralisaton' work of the CPDR (especially Lenoble and De Munck – see also, De Schutter, Lebessis and Paterson 2001, pp. 11-12). In Paterson's own interpretation – which was particularly significant given his central role as the scholar who drafted the key FSU reports – this approach can fruitfully be understood as navigating a path between Niklas Luhmann's functionalism and Jürgen Habermas's more idealist pluralism, while building upon both (although in interview he noted that Lenoble, De Munck and Ladeur tried to distance themselves intellectually from these thinkers). Notwithstanding the famous disagreements between these two pre-eminent German social theorists in the 1970s, Paterson is not alone in noting a possible theoretical reconciliation (Kjaer 2006). For present purposes, suffice to say that the portrayal of an inexorable globalisation as the social

context for governance chimes with the 'systems' perspectives of the sort contained in Luhmann's functionalism. And this is a functionalism that Habermas has accepted to a large extent in his own social theory (Schmid 2018; Streeck 2016, pp. 169-170). The latter perceives liberal capitalism and bureaucratic socialism as systems, both of which are encroaching on the emancipatory space of the 'lifeworld' or society.

This social theory has normative implications. For Habermas, it means 'erect[ing] a democratic dam against the colonising encroachment of system imperatives on areas of the lifeworld' (Habermas 1992, p. 444). These *imperatives* include both capitalism and bureaucratic socialism. Habermas promotes his discourse or communicative ethic as the appropriate response to the technocracy inherent in such systems. This ethic is, in simple terms, about establishing the reflexive conditions or procedures within which a genuine consensus or agreement is possible (Habermas 1986, 1996). Notably, this discourse ethic has been an important influence on and reference point for many subsequent theorists of deliberative democracy (among many others: Bohman 1997, Elster 1998, Dryzek 2000).

Something very close to a Habermasian reflexive discourse ethic is present in the normative commitments established in the FSU reports. As one of the 1999 reports states:

> *From experience, it is clear that agreement and shared meanings are possible.* But a mutual acceptance of the contingency of models and a mutual striving to understand the models upon which others operate improves the value of reality constructions.… [T]he emphasis shifts away from improving information and

action based on a dominant model, as in formal and substantive rationality, and towards a concern with *the adequacy of the procedures* by which different models are exposed to each other, that is confronted with their own contingency and encouraged into a posture of collective learning. In this way, what is universal is less the content of models than the procedures which develop this understanding of contingency and the need for learning (1999a, p. 14, emphasis added).

Flexibility and a related inclusiveness become two central features of legitimacy within the vision of 'new governance' offered. The view that knowledge is socially constructed, 'contingent' and 'unstable', leads the authors to advocate an inclusive, discursive and reflexive mode of governance that has strong affinities with a deliberative discourse that builds on a Habermasian discourse ethic. In supporting the notion that there may be no reliable Archimedean point upon which government can ground itself, government itself becomes a far less grounded endeavour. Against such a backdrop, it is asserted that, 'Europe needs to address issues of legitimacy and effectiveness in a comprehensive manner and must be prepared to consider new methods of achieving them beyond those suggested by traditional majoritarian parliamentary models… There is a need, in short, to abandon ideas of central planning and control' (Lebbesis and Paterson 2001, p. 267).

In this context, *procedures* become the crucial gauge of governmental legitimacy. Indeed, '[i]n the context of complexity, of the pluralisation of explanatory models, of interdependency and of uncertainty, the centralised and *a priori* formulation of public problems (let alone solutions) as supposed by substantive rationality is rendered

difficult' (1999a, p. 14). A consequence of the emphasis on procedure is that structures of 'norm production and application' are enjoined to become more 'diffuse, decentralised and flexible' and 'a new definition of the principle of subsidiarity' is required (1999a, p. 12). Subsidiarity is not merely multi-level, but conceived as multi-scalar, overlapping and multi-perspectival. This requires of institutions such as the European Commission that they try to move beyond excessively bureaucratic forms of functional specialisation, beyond 'unilinear expert models upon which regulatory models have traditionally been based' (1999a, p. 17) and at the same time seek to construe and *enable,* 'context-specific' networks involving a plurality of effected actors or 'stakeholders'. Public actors ought not then impose 'a particular understanding of the problem to be tackled nor the means by which they might be resolved' (1999a, p. 18). The role of the public actor is instead to ensure the legitimacy of process through maximising inclusiveness and transparency. Such processes are not to be one-off, but involve 'feedback loops', which account for changing circumstances, actors and, in general, complexity. Public actors 'take on an auditing or oversight role which seeks to ensure the ongoing adequacy of the procedures and the attainment of collective objectives by the means agreed' (1999a, p. 19). The other 1999 FSU document argues that, 'the entire policy process from the framing of problems, through the formulation of policy, its implementation, evaluation and revision needs to be opened up and liberated from the shadowy world it currently inhabits – *civil society* needs to be engaged in and by European action' (Lebessis and Paterson 1999b, pp. 11-12, emphasis added). It is emphasised that this concern with 'input' legitimacy and inclusive internal procedures or 'throughput' legitimacy is not to be regarded as in tension with the efficiency of regulation or 'output' legitimacy: 'the opinion of the people involved are not an obstacle to the

effectiveness of a decision: they are an essential ingredient' (De Schutter, Lebessis and Paterson 2001, p. 19).

The FSU papers highlight that these 'new forms of governance' are at least immanent in the context of extant limitations on national level government – wrought by (inexorable) globalisation – and the associated realities of multi-level (including local and supranational) governance in situations of interdependence and complexity (Lebessis and Paterson 1999a, p. 7). Supporting materials note, for instance, increased flexibility in the governance of Research and Development policy, which in the mid-1990s established new flexible processes, which cut across traditional silos associated with rigid commission Directorate Generals. Comitology – the process via which member states influence implementation of EU law – is cited as an example of procedural governance, albeit a flawed and incomplete one (Vignon 2001), as is co-ordination in employment policy (which would later become the model for the 'open method of co-ordination' (OMC) – see next section) (Lebessis and Paterson 2001, p. 293). Indeed, in discussion, Paterson suggested that in retrospect the OMC was probably the closest manifestation in EU governance reality of the FSU's deliberative vision. References are also made (for instance, in a working paper by Paterson on the UK), to stakeholder capitalism and democracy (popularised by, for instance, Hutton 1995). Along with Gidden's (1998) emerging thinking on the 'third way', such ideas were, at the time, gaining traction within the UK's New Labour opposition under Blair and supported notions of increased regulatory and governance flexibility and inclusiveness.

It certainly suited the commission's broader legitimation exercise under Prodi to highlight that the state was being *de*-legitimised in sociological and normative terms. Thus, on the one hand, the view that parliamentary democracy at the national level may not be 'as healthy as is often contended' (1999a, p. 9); a claim that could be extended, of course, to a critique of the European Parliament and, more broadly, to traditional forms of majoritarian decision making in the era of an emerging regulatory polity (Majone 1996; Mair 2013). And on the other hand, the presentation of, 'the emergent reality of new modes of governance' as an opportunity for public actors in general and the commission/EU in particular (1999a, p. 18).

Limits of a Deliberative Governance in Practice

The more radical FSU focus on process or throughput has, unsurprisingly, not materialised in EU practice. As noted in introduction, both market-making (to the end of output legitimacy) and the attempted production of a European demos (to the end of input legitimacy) have remained core focuses of the institutions even as these deliberative discourses were being enunciated. In short, the FSU proposals were not the only legitimating discourse within the EU institutions and the commission clearly does not have a monopoly on that discourse. However, the appeal of this ostensibly 'new' governance did manifest in less abstract forms within EU practice and discourse. We consider two manifestations here: the 2001 White Paper on Governance and initiatives stemming from it and the Open Method of Coordination. A direct lineage to the FSU reports is apparent in the former. The latter emerged in parallel with the FSU work (although, as noted above, that work also pointed to its

potential). It represented a move in the EU context from 'hard' towards (in some policy areas at least) 'soft' and flexible law/governance (Abbott and Snidal 2000).

Jerome Vignon – as noted above, a significant actor in the FSU and its governance project and a close advisor to President Prodi – was responsible for co-ordinating the White Paper on Governance. It was produced after lengthy consultations with a range of scholarly and institutional expertise and represented a perhaps inevitable watering down of the bolder FSU vision (indeed, John Paterson noted that this caused consternation among certain individuals in the commission who had been involved in the Governance project). It nevertheless retained some of the key principles established in the FSU work. As presented in the White Paper, these were: openness, participation, accountability, effectiveness and coherence (for a detailed discussion, see Joerges et al. 2001). It makes, among others, the following points:

- 'The Union must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments.'

- 'There needs to be a stronger interaction with regional and local governments and civil society.'

- '[The commission must]…. [e]stablish a more systematic dialogue with representatives of regional and local governments through national and European associations at an early stage in shaping policy.'

- '..[b]ring greater flexibility into how Community legislation can be implemented in a way which takes account of regional and local conditions.' (Commission 2001, pp. 4-6)

The White Paper emphasises then that legitimacy is to be regarded not only in terms of outputs; input and throughput also matter. Dialogue, flexibility and participation are all the order of the day, at least in the rhetoric of this White Paper and, in a similar fashion to the FSU report, such features of governance are directly linked to its effectiveness and quality (although how these things are judged is not really specified) (Commission 2001, p. 10). The commission's follow-up to the White Paper included the development of consultation procedures permitting civil society access to policy making processes and a transparency initiative which sought to ensure that the inclusion of civil society – broadly conceived to include an array of interest groups and lobbyists – remains conditional on their public declaration of interests (Commission 2002, 2005, 2006, 2007, 2008, 2009).

However, the commission's vision of consultation is de-limited because it operates within the constraints of the so-called community method (since the Lisbon Treaty of 2009, called 'union' method), which grants the commission a monopoly on the right of initiative in many policy areas. The extent to which ex ante consultation is either possible or meaningful in such areas is therefore highly questionable. Moreover, the community method tends to involve the establishment, via the ordinary legislative procedure, of a 'hard law' and in the White Paper, the commission is clear that 'regulations' – the 'hardest' legislative instrument in that they are directly enforceable and require no transposition to domestic law – ought to be more widely used where legal certainty and uniformity are needed; notably, in areas relating to the internal market (Commission 2001, p. 20). Consequently, policy in such areas is based on far less inclusivity – less 'input' and, indeed, less 'feedback'– than envisaged by the FSU

and a greater uniformity in policy 'output'. There is no room for localised ex post flexibility in implementation of the sort envisaged by the FSU. The key point for present purposes is that deliberation of the sort envisaged by the FSU is delimited in the context of a community method that the commission continues to promote.

That said, the community method is no longer the only governance mode in operation at EU level. While the White Paper, probably unsurprisingly, notes the continued important role of hard legal instruments such as regulations it does also highlight the increased importance of softer, more flexible instruments such as 'framework directives', co-regulation and the 'open method of co-ordination' (OMC). The OMC received extensive scholarly attention throughout the 2000s (inter alia, Eberlein and Kerwer 2004; Borras and Jacobsson 2004; Buchs 2007; de la Porte 2002; de la Porte et al. 2001; Idema and Kelemen 2006; Lodge 2007; Radaelli 2003; Schafer 2004; Trubek and Trubek 2005; Dawson 2011). As noted, the OMC emerged in the 1990s in the context of employment policy, but it was named as an instrument in the context of the Lisbon 'competitiveness' strategy of 2000. It has been conceived as a 'soft' form of policy making that – contrary to the 'hard' community method, which involves the creation of directly applicable or transposable law – involves co-operation among primarily member state officials and interest groups, exchange of best practice and the establishment of broad guidelines. It became popular for policy makers for a number of reasons. In adopting notions of 'peer review' and 'audit', it borrowed from the popular lexicon of management and accountancy. It allowed the EU to have some relevance in policies (inter alia, macro-economic policy, employment, social policy) where member states were reluctant to cede formal competence. At the same time it

was sufficiently 'soft' to ensure member states would ultimately still be able to pursue their own agendas.

For current purposes it is notable that such approaches were legitimised in terms of their deliberative potential; their potential to accord in practice with the theoretical position established by the FSU. Indeed, as noted above, before the White Paper the FSU's work approvingly refers to employment policy; an instance of the OMC *avant la lettre*. Moreover, following the formal establishment of the OMC in 2000, many scholars, including proponents of a cosmopolitan deliberative democracy, highlighted its normative potential in deliberative or proceduralist terms (Beck and Grande 2007; Bohman 2004; Cohen and Sabel 1997, 2003; Sabel and Zeitlin 2010). For Beck and Grande the OMC offers one way 'out of the dead end of the Community Method' (2007:248). Bohman similarly notes that '[m]ultiperspectival inquiry could be taken a step further in the EU beyond comitology [also mentioned in the FSU reports as noted above] in creatively employing its 'Open Method of Coordination' (OMC)' (2004:332).

In practice, the ostensibly open method has been less open, however, than the institutional rhetoric suggests and than its proponents would like. As the commission White Paper (2001, p. 22) says, 'the use of the method [OMC] must not upset the institutional balance nor dilute the achievement of common objectives in the Treaty.' These common objectives have emerged via, in particular, the development of an economic constitution since the Rome Treaty, which has promoted a mode of government geared towards the expansion of market-making. Consequently, it can be argued that the domain in which deliberation is possible within the OMC is delimited

by a strict and unwieldy economic constitution. Consider, for instance, an economic and monetary policy at EU level, which promotes 'ordo'-liberal principles of monetary management via the growth and stability pact (Joerges 2005, Ryner and Cafruny 2017). One consequence of those principles is that in the areas of employment and social policy (where OMC processes are used) the discussion cannot be 'open' in terms of scrutinising the full range of economic policy that could be utilised. As Scharpf (2002, p. 655) puts it, '[i]f unemployment rises in the Euro area generally … EES [European Employment Strategy] guidelines could not recommend lower ECB interest rates; if unemployment rises nationally, EES recommendations could neither relax the deficit rules of the stability and growth pact nor the competition rules on state aid to depressed regions or industries.'

While it is true, then, that the OMC has allowed European level government to say something about, inter alia, social policy, it is important to reflect on *what* precisely it has said; what kind of social policy has it promoted? As many critics have noted, the ostensibly 'social' policies that have been promoted via 'soft' OMC technologies within the context of the Lisbon strategy and its successor 'Europe 2020' have been widely critiqued for their adherence to a supply-side neoliberal agenda (Apeldoorn 2009). More generally, deliberative processes including the OMC have, in more recent years, been increasingly constrained by what a growing chorus of critics have described as an ever-hardening 'authoritarian' (Oberndorfer 2015) or Hayekian (Höpner and Schäfer 2012; Streeck 2014) economic governance or constitutionalism that has emerged in the context of the Eurozone crisis.

What can be said in these ostensibly deliberative forums is linked, of course, to *who* is able to partake in them. It is notable in this respect that in practice, inclusion via the OMC does not equate with deliberative governance in the inclusive way in which it is conceptualised by the FSU; peer-review processes may seem to include an array of actors, but power is very much in the hands of member state governments (Curry 2016). Indeed, the OMC can be regarded not so much as marking a deliberative and reflexive shift away from a restrictive community method, but as the reflection of the broader turn towards what has been termed a 'new' intergovernmentalism (Bickerton et al. 2015), itself a consequence of the limits of the community method as driver of integration in certain areas and a diminution of the role of the commission, at least in terms of ex ante policy initiation. From this perspective, it is little wonder that the commission was, in its White Paper – and notwithstanding its own rhetorical support for deliberative governance – at least circumspect with regards to the relative merits of the OMC vis-à-vis the community method.

Limits of a Deliberative Governance in Theory

Champions of deliberative governance have not necessarily been unaware of its limitations in practice. The danger of a potential gap between FSU theory and EU/commission practice was one that Lebessis and Paterson (2001) themselves identified prior to the publication of the White Paper (2001). The OMC can be similarly critiqued. As a new mode of governance or a 'throughput' process, it has not in practice lived up to the expectations of those who identified its potential to facilitate a virtuous circle, increasing both 'input' legitimacy (greater inclusiveness) and 'output' legitimacy (a social rebalancing). As Bohman (2004, p. 333) says of the

OMC, 'its primary democratic deficit is insufficient transparency and openness to publics'. However, he goes on to argue that this 'could be corrected by use of the strategy of minipublics and broadening the agenda-setting powers of institutions outside the commission. Thus, directly deliberative polyarchy is properly distributed and decentered; but its democratic character in the EU needs to be deepened. This transformation will itself take an experimental process of collective learning'. Bohman and others thus hold on to the legitimising and democratising capacity of a deliberative or proceduralist governance *in theory* even as they acknowledge its limitations in the EU *in practice*.

While the OMC in particular and EU governance more generally, is clearly not fully aligned with the deliberative discourses and aspirations of the FSU, this is to understate the issue. In short, potential problems arising from a deliberative discourse are not simply about implementation; they are theoretical as well as practical. The FSU and other deliberative discourses do rest on a thin conditionality; the possibility of a contingent consensus, which requires the capacity for reason, rationality and reflexivity (Smith and Brassett 2008). In the transition from theory to practice a political decision inevitably has to be made about who is considered capable of deliberation; who is reasonable, self-reflexive, capable of learning. Such a decision implies a power relation; the promotion of certain (reasonable) subjectivities and exclusion of other (unreasonable) ones. Only if such conditionality is established can a dialogic politics or a discourse ethic manifest in a consensus, even a contingent one. Indeed, the very assertion that any contingent constitutional framework must permit a consensual outcome is itself an act of power, as critics of a Habermasian discourse ethic or 'ideal speech situation' have argued (Parker 2009). As Mouffe (1999, pp.

751-2) has said, 'the very conditions of possibility of deliberation constitute at the same time the conditions of impossibility of the ideal speech situation.'

It is because of these deeper theoretical issues that, 'the institutionalisation of deliberative practices in the EU has mainly been geared towards the evacuation of conflict' (Crespy 2013, p. 6). In practice, then, we see that although the burden of legitimacy often rests on the ability of throughput processes to include civil society, it becomes a subject of governance at a price: it is simultaneously rendered an object of government. Its freedom is constrained; it is 'responsibilised' and rule-bound both by legal frameworks and by those who it represents. It is, in short, engaged in a 'contractual implication' with the state, the public institution, or, more broadly, with a dominant rationality or regime of government (Bartelson 2006, Sending and Neumann 2006). In the EU context this contractual implication is sometimes explicitly clear. As the commission White Paper has it, 'the Commission will [e]stablish partnership arrangements going beyond the minimum standards in selected areas committing the Commission to additional consultation *in return for* more guarantees of the openness and representativity of the organisations consulted' (2001, p. 4, emphasis added). Openness and representativity might seem like *reasonable* conditions for involvement in decision-making, but many who do not engage in the contractual implication – who do not to the commission's satisfaction demonstrate their 'representativity' – are left unrepresented.

More generally, there has been a 'professionalization' of civil society in response to the commission's embrace which means, *inter alia*, that civil society activists are increasingly drawn from professional legal and communications backgrounds (often

graduates of famous European management schools) rather than specialists in their organisation's field with grassroots experience (Saurugger 2009). As Kohler-Koch et al. (2008, p. 6) put it: '[t]he dominant picture [within European civil society] is that of "EU-level lobbying professionals".' There may, then, be a disjuncture between grassroots civil society and their representatives at the European level (Kröger 2013, 2018; Parks 2015). The distance between such organisations and the publics they supposedly represent are, therefore, often extremely large and the lines of accountability to such publics are, at best, extremely long, particularly in a multi-state organisation such as the EU.

Importantly, there is also no clear and straightforward way for diverse publics to sanction civil society representatives as they would political representatives. As Papadopoulous (2010, pp. 1042-3) argues, 'even if processes of multi-level governance are participatory and inclusive, broad organised pluralism cannot be a corrective to the uncoupling of governance networks from the democratic (representative) circuit.' Going further, it can be argued that such pluralist governance has an adverse impact on the 'democratic (representative) circuit'. To the extent that it encroaches on areas where representative democracy may have once been important, it plays a role in undermining such democracy and, potentially, 'input' legitimacy as conceived in representative terms. This chimes with critiques of a 'regulatory' governance (Majone 1996) in the EU, which note that it has removed elected representatives from governance regimes, to be replaced by (supranational) experts or stakeholders. This may have the effect of reducing the policy-making remit of such representatives, 'hollowing' or de-politicising party politics – pushing it on to a 'centre' and broadly pro-market ground – and diminishing the practical importance of

representative democracy (see, for instance, Mair 2013). In the EU context this may mean a situation of what Schmidt (2006) has pithily described as 'politics without policy' at national level and 'policy without politics' at EU level.

It was clearly not the intention of the FSU to contribute to technocratic, pro-market and anti-democratic outcomes, which – along with the continued predominance of the nation-state – it explicitly identified as problems to be solved. However, the FSU's social theory – rooted in a functionalist systems theory that views globalisation and the demise of the nation-state as *imperatives* (see Rosenberg 2005 for a fuller critique of 'globalisation theory') – produces a teleological line of reasoning that forecloses or excludes certain solutions. According to such reasoning, global governance – by private and public actors – produces globalisation, which produces the need for more legitimate global governance. This social theory underpins a vision of deliberative governance that requires the participants in deliberation to have a certain deference towards or acceptance of the inexorability of these scales – *the global, the European* – and also to the market-making which constituted them. This is a deference that any meaningfully included – *civil* – societal actor would have to share. In short, the ontological centrality of conditional consensus to even an abstract and theoretically reflexive discourse of deliberative governance such as that proffered by the FSU *necessarily* implies some form of exclusion.

Conclusion and Discussion

Given the peculiarly supranational identity and market-making function of the European Commission it is perhaps not surprising that a legitimating vision that

rejects a (methodological, sociological and normative) nationalism and does not substantively challenge a 'negative' or market-based integration, might have been conceived as both attractive and useful from its perspective. In other words, it is not surprising that the commission was the context from which emerged the particular FSU perspective of throughput legitimacy as deliberative and proceduralist governance; a perspective that side-lines the nation-state and representative majoritarian decision making in favour of procedures permitting direct interest group and civil society deliberation. The vision of multiple demoi – as interest groups and civil society – interacting to promote good governance was certainly designed to lend legitimacy to a damaged commission, which, while an unelected bureaucracy, could nevertheless be presented as an honest (and neutral) broker in establishing the throughput processes for a directly deliberative democracy fit for the era of inexorable globalisation. But, as this paper has shown, we can challenge that honesty and neutrality in important respects given the unacknowledged exclusionary implications of a discourse of deliberative governance and its underlying ontological assumptions. In answer to the question in this paper's subtitle ('beyond states and markets?'), such a discourse certainly takes us beyond the state – or at least seeks to transform the state – but in so doing risks conceding far too much to the market.

This is not, as noted in introduction, to reject outright the notion of deliberative governance. Rather it is to suggest that we adopt a pragmatic and cautious approach to its deployment. Notably, such pragmatism seems to be apparent in Habermas's own work on the EU. While in *theory* a Habermasian discourse ethic was, as noted, a central influence on the deliberative accounts of the FSU and has been picked up by deliberative democrat scholars, it is notable that Habermas himself is far more closely

aligned in his *practical* political interventions on Europe with discourses focused on legitimation via the promotion of a European demos (Parker 2009). As Bohman (1994, p. 897) puts it, 'many faithful readers of Habermas may find his approach to legal and political legitimacy ...somewhat surprising. Rather than defending participatory democracy directly he instead embeds these radical democratic principles in a complex account of the political and legal institutions of constitutional democracies.' The discourse ethic for Habermas, is understood then as a regulative ideal via which *already constituted* institutions might be assessed. He makes this clear in his critiques of Rousseau and those who would follow him in promoting the ideal of direct democracy (Bohman, 1994, p. 903). Thus, Habermas adopts a methodologically nationalist position in support of his European cosmopolitan position. He supports reinforced representative majoritarian decision-making at the EU level; concretely reforms to the European Parliament and party system geared towards the imagining of a European polity. His critique of a neoliberal trajectory in the contemporary EU is explicit (Habermas 2001). And his notion of a 'constitutional patriotism' and call for a European constitution also certainly has some affinities with the attempt (albeit unsuccessful) to develop a Constitutional Treaty via a deliberative Convention for Europe and ground a European identity in a common set of ex ante principles such as human rights and democracy.

Of course, moves towards something approximating a European federal state – Habermas stops short of calling for this, but his prescriptions certainly take us in this direction – is not without its own issues. The practical failures of attempts to constitute the EU as a polity in the image of nation-state – perhaps most notably, the failures to strengthen transnational parliamentary democracy – speak to the reality of

this issue. For all of its significant empirical limitations and functional decline, extant national democratic settlements are still afforded affection by many Europeans and the Brexit referendum was a stark but by no means unique case in point. Some critics of Habermas have therefore noted that the very mention of deeper political integration is anathema to the majority of Europeans and could, indeed, drive further disintegration to the extent that it exacerbates a legitimacy crisis (Streeck 2014). For such critics the balance of authority between the EU and its member states needs to shift back towards the latter, though there is debate on how far that shift should go (Scharpf 2015).

While these would-be methodologically nationalist critics of deliberative discourses/practices are divided then between more cosmopolitan and more nationalist perspectives, what they have in common is a defence of constitutional, representative and accountable forms of government. As noted in introduction, the Foucauldian methodology and ethic that informs this paper would certainly not treat such perspectives as alternative panacea. Indeed, the methodological nationalism found in the work of either such positions is not without its own shortcomings (Chernilo 2011) and potential for sometimes violent exclusion, as Europe's troubled twentieth century history attests and as the contemporary exclusions wrought by an ostensibly 'fortress EU' in relation to inward migration also shows (Foucault 2003; Parker 2013, pp. 97-113). This is certainly a point that those promoting a methodological cosmopolitanism of the sort we might associate with the FSU deliberative discourses on governance would be keen to make, and with some justification.

However, notwithstanding the exclusionary potential inherent in nationalism, these representative forms of government are arguably more aligned with a 'thin' Foucauldian ontology, rooted in a conception of conflict and power as irrevocable. As noted above, representative democracy can be conceived as a mode of government for legitimately and accountably managing, *but without overcoming*, power and conflict. It allows for agonistic adversarialism, thereby blunting the potential emergence of antagonistic enmity (Mouffe 1999, 2013). To emphasise the continued importance of such forms of government is not to abandon the idea of deliberation (as noted, a 'regulative ideal' in Habermas's thought) or dismiss calls for greater 'throughput legitimacy' in the EU. But representative institutions are regarded as important legitimising frameworks within which deliberative practices can take place because they are directly accountable to publics and open to sanction and therefore change. As argued in this paper, neither the European Commission nor the various civil society actors at the centre of the FSU work are obviously accountable in the same way. More fundamentally, an ontology of consensus that underpins broader discourses of deliberative governance – and the very assumption that agreement is possible – can easily support a practical politics of exclusion that is not easily remedied.

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