Perceptions of Democratic Legitimacy and Democratic Deficit: Implications for the European Project

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I. INTRODUCTION

The Euro crisis unleashed an avalanche of criticism directed at the European Union. Politicians, media, and academia have all examined the EU and found it democratically wanting. As the only directly elected of the EU institutions, the European Parliament (EP) has been especially plagued by accusations of democratic deficit. Indeed, current public discourse treats the question as settled.

The universal objections to the European Parliament are that it is too difficult to understand how the EP works, that for this reason it is not obviously representative of the people, and that all of this makes it impossible to hold it to account for its decisions. These broad objections are filled in by more particular complaints: European elections are not as well publicized as national ones and their mechanism is not intuitive; lack of European political parties makes it difficult to understand how the MEPs organize themselves into political groups once in Brussels; and perhaps most damning of all, the European Parliament is seen as a very lucrative hinterland for the D-list of national politicians – those too washed up or extremist to hold national office.

Many of these objections apply to the national parliaments of EU member states as well but, broadly speaking, national parliaments are accepted as democratically robust while the EP is dismissed as democratically deficient. This double standard is strongly indicative of the fact that current analysis of the European Parliament is academically unsound, producing unreliable results. It is the aim of this paper to outline a universally applicable theory of legitimacy of legislatures and apply it to the European Parliament to see how it fares under robust scrutiny. This paper’s ultimate aim is to answer the question: is the European Parliament a democratically legitimate legislature?

Why use the discourse of legitimacy?

The organization of this paper around legitimacy is driven by public discourse surrounding the European Parliament, which is routinely described as democratically deficient. Perhaps it is not immediately obvious why democratic deficit is the reverse of democratic legitimacy. Formally, legitimacy comprises three criteria: legal validity of the rules, justifiability of the rules in terms of shared beliefs, and legitimacy through expressed consent.¹ When the second is missing – that is, when a political body’s rules are not supported by the society’s shared beliefs or when there is some discrepancy between the rules and shared beliefs – the political body in question is said to have a legitimacy deficit.²

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² Ibid.
Academic linguistics alone is not sufficient reason for couching this analysis in the discourse of legitimacy; most crucially, the objections leveled against the European Parliament match up with the substantive criteria of legitimacy.

**Table 1 Complaints Against the European Parliament**

<table>
<thead>
<tr>
<th>Criteria of legitimacy</th>
<th>Corresponding complaint against EP</th>
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<tbody>
<tr>
<td><strong>Legal validity</strong> Did the body acquire its power according</td>
<td>• Lack of transparency as to the European Parliament’s composition and procedures.</td>
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<tr>
<td>to established rules, whether formalized legal codes or</td>
<td>• Questions about whether EP is serving the interests of the people it purportedly represents or</td>
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<tr>
<td>unwritten informal convention? Is it exercising its</td>
<td>serving its own interests as an institution.</td>
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<tr>
<td>power according to the rules?)</td>
<td></td>
</tr>
<tr>
<td><strong>Justifiability of rules in terms of shared beliefs</strong> –</td>
<td>• Members of the European Parliament are those politicians who cannot “make it” in domestic politics</td>
</tr>
<tr>
<td>is power derived from a valid source of authority? Do those</td>
<td>• EP procedures are too opaque for the public to know whose interests it is trying to serve</td>
</tr>
<tr>
<td>in power have the qualities appropriate to its exercise?</td>
<td>• EP is seen to be more interested in grappling for power with other EU institutions than in legislating for the public good</td>
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<tr>
<td>Is the structure of power seen to serve a recognizably</td>
<td></td>
</tr>
<tr>
<td>general interest?</td>
<td></td>
</tr>
<tr>
<td><strong>Legitimation through expressed consent.</strong> Is there</td>
<td>• Ever-declining voter turnout in European elections.</td>
</tr>
<tr>
<td>demonstrable support – expressed through actions which</td>
<td></td>
</tr>
<tr>
<td>provide evidence of consent - on the part of the</td>
<td></td>
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<tr>
<td>subordinate to the power relation in which they are</td>
<td></td>
</tr>
<tr>
<td>involved?</td>
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</table>

This paper will explore existing scholarly ideas and debate about legitimacy. It will then discuss the importance of legitimacy for legislatures and propose a nuanced and multi-layered theory of legislative legitimacy. This universally applicable theory will then be applied to the European Parliament in an effort to answer the question of whether the EP is, in fact, democratically legitimate.

**II. EXISTING LITERATURE ON LEGITIMACY**
Philosophical, Legal, and Social Scientific Approaches to Legitimacy

The Philosophical Approach

Discussion of legitimacy is split along three streams: the prescriptive, philosophical approach; the rules-based legal approach; and the descriptive, empirical social scientific approach.

The philosophical approach grapples with the dual questions of process and outcome. For a political body to have democratic legitimacy, it must be procedurally fair, acceptable to all reasonable citizens, and be “epistemically the best among those that are better than random.”³ Most concepts of legitimacy, especially democratic legitimacy, are rooted in proceduralist understandings. These theories are normative, based on the idea that “the most that can be said for a legitimate democratic decision is that it was produced by a procedure that treats voters equally in certain ways.”⁴ As long as the process of reaching a decision is fair, the political body generating that decision is legitimate.

Many philosophers find this proceduralist understanding too bare and expand the criteria for legitimacy to the outcomes of the procedure as well as the procedure itself. This is known as the correctness theory of legitimacy, and it focuses on the decision itself: as long as the political decision is correct, it is legitimate.⁵ In its extreme form, this is a total denial of proceduralism.

When the philosopher tries to combine proceduralism with correctness theories, the result may seem more reasonable, but it is logically muddled. Correctness theory of legitimacy, in moving the focus from the procedure to the outcome, necessarily moves the analysis from the level of the institution to the decision itself. The decision stands alone, usually as a legal text. This invites a textual formalism that is difficult to reconcile with the spirit of proceduralism. It can create difficult conclusions like a new law that is objectively morally ‘correct’ produced by a legislature that uses ‘unfair’ procedures like voting on legislation based on bribes received.

Under pure correctness theory, this would be considered politically legitimate because the decision is legitimate. Under pure proceduralism, the legislative body and the decision itself would be considered illegitimate because the procedure was procedurally unfair. Under theories that embrace proceduralism as well as correctness, the seemingly reasonable and

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⁴ Ibid., 70.

⁵ Ibid.
conciliatory alternative, would the legislature be considered legitimate or illegitimate? It is impossible to know.

Philosophical understandings of legitimacy turn on questions about the moral justification of the use of power. It is a normative, prescriptive approach requiring that correct procedure or outcome be acceptable to any rational individual. The philosophical understanding is therefore not overly concerned either with the legal claims of power or with the public’s consent to use of power, which a broader view of power relations reveals to be important. Moreover, the philosophical approach is not concerned with contextual variation in use of power. It is especially unconcerned with empirical examples. The result is a discussion about the normative principles of power and legitimacy that, while important to the development of our ideas on how government should rule, is nevertheless almost wholly divorced from the actual practices of institutions of power. Consequently, it is not an approach that is useful to analyzing the legitimacy of the European Parliament or national parliaments.

The Legal Approach

The legal, rules-based approach to legitimacy requires that power be derived from a valid source of authority – usually an establishing document like a constitution –, the rules themselves must create a baseline criteria that ensures that those who come to hold power are qualified to exercise power, and the power must be structured such that it is seen to serve a “recognizably general interest, rather than simply the interests of the powerful.”

The legal approach is useful in analyses of the letter of the law, but the laws themselves and the structure of government are only part of the picture of legitimacy. A legislature may be made up of politicians who are elected by the processes set out in a constitution, and that same legislature may enact laws using only the proper channels, yet the output may be considered illegitimate all the same. Because power is considered legitimate to the extent that it comes out of established law and is exercised according to established law, legitimacy is coextensive with the legal validity of power. But this is only half the story. The missing piece is the public, who can express acceptance of the government and its legitimacy. The legal approach does not take public consent into account at all, and for this reason it is too rigid and hollow to be of any real use to this analysis of the European Parliament and national parliaments.

The Social Science Approach

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6 Beetham, The Legitimation of Power, 17.
7 Ibid., 4.
The social scientific approach is descriptive rather than prescriptive. Unlike the philosophical approach, it is contextual and empirical. According to social scientists, legitimacy is a relationship between those in powers and their subordinates. A power is accepted as legitimate not, as Weber originally outlined, because people simply believe in its legitimacy, but because it can be justified in terms of the beliefs of the people. This view of legitimacy measures the “degree of congruence, or lack of it, between a given system of power and the beliefs, values and expectations that provide its justification.”

The social scientific approach to legitimacy is based on three fundamental components: the legal validity of the political power, the extent to which the rules created by the political power conform to shared societal beliefs, and expressed consent of those subordinate to the political power.

This is a holistic view that combines the essence of both the philosophical and legal approaches and adds the necessary facet of context and empiricism. It also exposes two important debates within the literature as false dichotomies: the dispute between the Weberian and non-Weberian social scientists over whether public belief in legitimacy is the ultimate determining factor of legitimacy or if there are objective measures as well and the endless philosophical debates between correctness and proceduralist theories of legitimacy. The suggested social science approach gives each its due – legal validity is objective and proceduralist, justifiability of rules through shared beliefs includes analysis of outcomes and measures their ‘correctness’ against social norms, and public consent takes into account both subjective and objective elements, without attempting to mind-read.

To be fully legitimate, a political power must fulfill all three conditions, though it is rare if not impossible for any power to completely fulfill all three. Unlike the more cut and dry point of view of the philosopher or the legal scholar, the social scientist does not see legitimacy as an all-or-nothing matter; rather, what matters is how far from the ideal type a power has strayed and how substantial that deviation is from the societal norms and beliefs that determine the legitimacy of that power in the first place.

III. THE NEED FOR A THEORY OF LEGISLATIVE LEGITIMACY CRITICISM

Choosing the social science approach to legitimacy is insufficient. The definition is broad by design, allowing it to be applied to any person, group, or institution that has power over some set of subordinates. It is hardly tailored to an analysis of legislatures specifically. This paper seeks to make sense of sweeping accusations of the democratic illegitimacy of the European Parliament; to apply so broad a theory of legitimacy to such an amorphous debate would hardly be rigorous. Yet one is hard-pressed to find any useful rubric for

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8 Ibid., 11.
9 Ibid.
10 Ibid., 16.
11 Ibid. 20.
determining the legitimacy of democratically elected legislatures. Most discussions focus on the legitimacy of legislation, but debate surrounding the European Parliament focuses on elections, the inner workings of the Parliament, and the MEPs themselves. Because popular debate rarely if ever touches on the text of the regulations and directives the EP produces, this analysis must go beyond theories of legitimate legislation. Those theories, along with existing general analyses of legislatures, however, are useful for setting the foundations of the theory this paper will propose.

**Democratic Legitimacy and Legislatures**

Democratic legitimacy is the language of all institutions that make any claim to democratic foundations. This can include an executive like a Prime Minister or a President, local councils, ministries, and, of course, legislatures.

Legislative bodies hold a special place in the democratic mythology. Even in systems where popular election determines who the executive is, it is the parliament that is seen as the continuing voice of the people after the polls have closed. The principle of legislation by a large assembly is fairly universal to democracies. Legislatures are overwhelmingly assemblies of anything from 50 to almost 3,000 members. They are not assemblies of cabinet size. Exactly why this is the case is not clear; increasing the size of a parliament from 25 to 250 does not increase the proportion of the population that each legislator represents significantly enough to make the system noticeably more representative. Indeed, an increase in size can often lead – or seem to lead – to an ineffectual cacophony of voices. Numerosity of legislatures can therefore be seen as an obstacle in and of itself. Nevertheless, legislatures operate on the same currency of democratic legitimacy as any other ostensibly democratic institution.

Parliaments have the vital task of issuing laws. Laws must have authority to be obeyed and enforced. Consequently, legislatures require authority for their legislation to be accepted. Waldron argues that without an ideal type of legislation, it is impossible to determine how far real legislation falls short. This is equally true of legislatures.

It is the aim of this paper to outline a theory of the legitimacy of legislatures and to apply it to the European Parliament. This paper is not concerned with the legislation issued by the European Parliament but rather with the legislature itself. Broadly speaking, national parliaments are accepted as democratically robust whereas the European Parliament is dismissed as democratically deficient. This paper's ultimate aim is to create a system by which the legitimacy of any legislature can be analyzed.

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13 Ibid., 32.
14 Ibid.
Philosophical and Political Science Views of Legislatures

Discussions of legislatures breaks down along several fault lines, the dominant of which separates philosophers from political scientists. Philosophers generally adhere to a unitary model of legislature, in which a parliament is described as a single actor possessed of one mind, one will, and specific intentions. Viewed under this lens, it is hardly surprising that these scholars have a pessimistic view of a legislature’s ability to be representative of the people. This is furthermore a simply unrealistic understanding of legislatures, which in reality are made up of multiple minds and wills with widely divergent intentions. The daily business of the legislature is to provide a setting for disagreement and negotiation among their members, not to coalesce into a single will.

Political scientists reject the unitary model of the legislature. They recognize that law-making is just one of many functions legislatures perform. Each of these functions, however, can pose problems for the legitimacy of the legislature. Legislatures provide a platform for venting grievances, discussing national policy, processing budgetary and other negotiations, ratifying appointments, mobilizing support for the executive, and even selecting the executive.

These functions can and often do result in three main problems: first, non-transparency among the members of the legislature, expressed as vote-trading and pork-barreling; second, non-transparency in relations between members of the legislature and third party interest groups which can, through pecuniary sponsorship of legislators, come to turn legislators into representatives of private rather than public interests; third, especially taking into account the aforementioned complications, there may not be sufficient Arrovian collective rationality in a legislature to allow it to represent the public interests in even so small a task as negotiating a stable deal. The result is a portrait of a legislature in which “[w]hat emerges from the legislative process may well be a matter of who controls the agenda or, even more arbitrarily, of where in the cycle of voting a ‘decision’ happens to pop out.”

These problems with legislatures are real and must be reflected in a theory of legislative legitimacy. Such a theory must also dismiss the unitary model as unrealistic though philosophically convenient. This paper proposes a theory of legislative legitimacy grounded in the three-pronged approach of the social science theory of legitimacy but that is tailored specifically to the unique characteristics of legislatures.

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15 Ibid., 42.
16 Ibid., 53.
17 Ibid., 28.
18 Ibid., 28.
19 Ibid., 30.
### IV. Discussion and Implications for Policy

**A Theory of the Legitimacy of Legislatures**

The legitimacy of legislatures can be measured using the same three broad categories as general legitimacy – legal validity, justifiability of rules through shared beliefs, and public support through acts of consent. These categories can be improved and targeted to legislatures as follows:

**Table 2 Components of Legislative Legitimacy**

<table>
<thead>
<tr>
<th>Legal Validity</th>
<th>Justifiability of procedures and outcomes through shared beliefs</th>
<th>Public support through acts of consent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the legislature constituted according to the relevant legal documents?</td>
<td>Is the legislature procedurally just according to shared social beliefs about fairness?</td>
<td>Does the public support the legislators through acts of consent?</td>
</tr>
<tr>
<td>Are internal operations in compliance with those documents?</td>
<td>Does the legislature produce distributive justice through fair outcomes?</td>
<td>Does the public support the legislature itself through acts of consent?</td>
</tr>
</tbody>
</table>

Each of the three broad categories is broken down into two sub-categories. These categories are tailored to analysis of legislatures specifically. They are broad enough to allow for variation among legislatures (e.g. national parliaments are often created in accordance with a constitution, but the European Parliament is not because there is no European constitution) yet narrow enough to suggest methods of analysis particular to that sub-category.

The question of whether the legislature is procedurally just according to shared social beliefs about fairness can be broken down into four questions. First, are the decision-makers neutral and unbiased? Second, are legislators motivated to be fair? Third, does the public have an opportunity to be heard? Fourth, do legislators have the qualities...
appropriate to wielding their power? Answers to these questions can be pursued according to the specific context of each legislature.

Table 3 *Measuring Justifiability of Procedures Through Shared Beliefs*

<table>
<thead>
<tr>
<th>Requirement of procedural fairness</th>
<th>Suggested method of analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are the decision-makers neutral and unbiased?</td>
<td>Is the legislature a forum for fair debates?</td>
</tr>
<tr>
<td>Are legislators motivated to be fair?</td>
<td>Are private interests over-represented?</td>
</tr>
<tr>
<td>Does the public have an opportunity to be heard?</td>
<td>Do legislators solicit or accept public input? Do they provide opportunities for public comment on issues or legislation?</td>
</tr>
<tr>
<td>Do legislators have the qualities appropriate to wielding their power?</td>
<td>Do legislators have a history of political engagement? Do the legislators have any history of corruption or acting in bad faith? Are the legislators well-respected by the society?</td>
</tr>
</tbody>
</table>

The question of fair outcomes can be broken down into two aspects. First, does the legislation produced by the legislature serve the general interest? Second, does the legislature exercise any checks it might have on other institutions?

Table 4 *Measuring Justifiability of Outcomes Through Shared Beliefs*

<table>
<thead>
<tr>
<th>Requirement of just outcomes</th>
<th>Suggested methods of analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the legislation produced by the legislature serve the general interest?</td>
<td>Does the legislature seem to consistently serve the interests of some groups over others?</td>
</tr>
<tr>
<td>Does the legislature exercise any checks it might have on other institutions?</td>
<td>Does the legislature, where it legally can and should, challenge decisions made by other institutions?</td>
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Finally, the third category of public support through acts of consent can similarly be analyzed in three main parts. First, what is the state of turn-out at elections? Second, do constituents appeal to their legislators (showing that legislators are seen as a valid resource for help and information)? Third, does the public comply with the laws produced by the legislature?

Table 5 *Measuring Public Support Through Acts of Consent*

<table>
<thead>
<tr>
<th>Aspect of public consent</th>
<th>Suggested methods of analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the state of turn-out at elections?</td>
<td>What percentage of the population eligible to vote actually votes? What are the statistical trends in turn-out over the last few election cycles?</td>
</tr>
<tr>
<td>Do constituents appeal to their legislators?</td>
<td>Do people contact their legislators to give input on proposed or enacted legislation? Do people contact their legislators for help in matters that legislators are legally able to assist them in?</td>
</tr>
<tr>
<td>Does the public comply with the laws produced by the legislature?</td>
<td>How widespread is violation of the law? Is there significant corruption – people feeling the need to bribe officials in order to get what should be free and legal services?</td>
</tr>
</tbody>
</table>

Some methods of analysis will unavoidably overlap. Corruption can be an indication of lack of procedural fairness as well as a lack of public consent; the former is a question of legislators soliciting bribes whereas the latter is more a matter of citizens demonstrating that the letter of the law, as produced by legislators, is not enough to actually provide the services promised. In the latter case, it need not necessarily be the legislators themselves who receive bribes, but any official whom the law requires to provide a service but who does not feeling himself or herself fully obliged to act in strict accordance with the law. This is a more indirect form of public non-consent than, say, reporting a wayward legislator or abstaining from elections. Nevertheless, no reasonable citizen enjoys paying a bribe; it is at best a grudging payment made to move things along, an indication that the legislature is incapable of producing laws that get the job done.
The question of public input is also one that overlaps categories but can have two
directionalities. A legislature that solicits public comment on laws and regulations is one
that actively promotes procedural fairness. A citizenry that provides public comment is one
that demonstrates its consent and, consequently, the legislature’s legitimacy. A legislature
that solicits public comment can still fail enough of the other categories of legitimacy that
the public does not indicate its consent by accepting the invitation to provide input on
proposed legislation.

The Ideal Type

The ideal type of legislatures fulfills all the aspects of legitimacy in the left hand columns,
though it does not necessarily provide answers to all the suggested methods of analysis.
This is because there is wide variation in how legislatures are structured, each according to
the rules in its establishing document. Not all legislatures are endowed with the power to
check other government institutions, for example. This is why the methods of analysis are
only suggestions. When determining the legitimacy of a legislature, it is crucial to judge
how its own specific expectations are met.

While the ideal type is a legislature that fulfills each and every component, it is important
to note that a legislature can still be legitimate without embodying every element.
Legitimacy is a question of degree, not a simple on-or-off switch.

Applying the Theory: Legitimacy of the European Parliament

Legal Validity of the European Parliament

The European Parliament is the product of a sequence of treaties. The legislative body had
a number of names before becoming the “European Parliament” in 1962. Since then,
European treaties have developed and amended its competences. Its legal validity is
therefore based on these treaties, specifically the Treaty of Lisbon, which came into force
on 1 December 2009, amending the Treaty on the Functioning of the European Union and
the previous Treaties of Rome, Maastricht, Amsterdam, and Nice.

Determining legal validity requires answering two questions. Is the European Parliament
constituted according to the relevant treaties? Are internal operations in compliance with
the treaties?

The answer is a resounding yes for both. The Treaty of Lisbon dictated a number of
changes to the structure and functions of the European Parliament and the institution has
promptly complied, though some changes will only come into effect at the next European elections in 2014.

The EP was already in structural compliance with previous treaties, providing each member state with exactly as many seats for representatives as the treaties required. Lisbon marks a major change in that no longer does the treaty dictate the precise number of seats for each member state; rather, it allows the Council of the European Union to decide on the number of MEPs (Members of the European Parliament) per member state. Lisbon also caps the total number of seats at 751 (there are currently 766) but the cap will not come into effect until 2014.

Functionally, European treaties have put guidelines in place to help the EP retain efficiency in its decisionmaking. Members of the European Parliament are organized based on political beliefs rather than nationality in an effort to keep national interests from dictating European policy. Additionally, the fact that no political group holds a majority creates “strong incentives for groups to find agreement across party lines.”21 This also provides a larger institutional balance against the Council of the European Union, which does operate on national lines. The Parliament keeps to its guidelines for political groups and indeed, a culture of negotiation between political groups has evolved, accomplishing the treaties’ call for a Parliament that debates different visions of a European future rather than purely national interests.

European treaties also dictate the legislative process of the European Parliament. Articles 289 and 294 of the Treaty on the Functioning of the European Union (post-Treaty of Lisbon) set up the co-decision procedure by which the European Parliament, European Commission, and Council of Ministers create and adopt legislation.22 As the Parliament itself does not propose legislation, its job is to research the European Commission’s legislative proposals. It does this by committee. Committees are meant to investigate the proposal, write a report, and present the report and the legislation (which it can amend) to a plenary session of the Parliament.23 The Rules of Procedure of the European Parliament set out the committee system. Rule 37, for example, provides that “the committee responsible for the subject-matter shall first verify the legal basis.”24

The European Parliament not only follows the rules of structure and procedure, it does so with significant transparency. All standing committees, special committees, and former special committees are listed on the EP website. Each committee has its own website that lists the committee members, contact information, calendar, reports, opinions, amendments, and drafts of reports and opinions. Moreover, all meeting documents are available in multiple languages. This makes it easy to track the Parliament’s inner workings and to ensure that they adhere to the requirements set out by the legislature’s establishing documents. As the Parliament does conform to these requirements, it is a legally valid legislature and does not lack legitimacy at the legal level.

**Justifiability of the European Parliament’s Procedures and Outcomes**

To determine the extent to which the European Parliament’ procedures are justifiable in terms of shared beliefs, one must answer four broad questions. Are MEPs neutral and unbiased? Are MEPs motivated to be fair? Does the public have an opportunity to be heard? Do MEPs have the qualities appropriate to wielding their power?

The European Parliament’s procedural fairness is tarnished but intact. The EP is on the whole a forum for fair debate, though these discussions do not necessarily resemble more traditional ideas of parliamentary debate. Rules 115 and 110 of the Rules of Procedure dictate how debates are conducted. Rule 115 specifies that a question for the Council or Commission may be put on the agenda only by a committee, a political group, or at least 40 MEPs. Questions for the Commission must be submitted to the Commission itself and questions for the Council must be submitted to the Council itself. A member of the committee moves the question for five minutes, at which juncture a member of the Commission or the Council has five minutes to answer it. Debates are also held when a committee wants to present a report to plenary for a vote. After the initial presentation and statement by the commissioner or Council member, each political group is allowed to make a statement and is usually allotted two minutes to do so. After each political group has had its say, the representative of the Commission or Council as well as the original inquiring group or rapporteur can respond.

It is rare for MEPs to use their two minutes to respond directly to each other; they generally read a prepared 2-minute statement. Because the EP is responding to a written proposal for legislation from the Commission, it is not unusual for MEPs to briefly

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acknowledge the statement of the commissioner before continuing to read their political group’s prepared statement. Crucially, there are few MEPs present for these debates; videos of the debates reveal that the seats surrounding the speakers are usually empty. The vote associated with each debate is held the next day and that is when the rest of the MEPs come in to ensure a quorum and push the ‘yes’ or ‘no’ button on their voting machines.

This debate format is certainly different from the cacophony of overlapping voices we generally associate with parliamentary debate. EP debates are highly regimented and scantly attended. The EP itself does not generate legislation; that is the responsibility of the Commission, as set out in the co-decision procedure. The EP responds to proposed legislation by researching it at committee level and then presenting reports to a plenary session. The fact that the EP does not function in the same way as most national parliaments does not mean that it is not a forum for fair debate. Indeed, each political group is given equal amounts of time to voice its opinion. The President allows enough flexibility to the structure of the debate to allow for extra time or statements if they are called for. Problematic is the fact that not all questions submitted for debate get answered. Even if a question is accepted, it is up to the Conference of Presidents to decide the order of questions on each agenda and whether a question will actually make it to an agenda. Questions that are accepted but do not make it onto an agenda within three months of submission lapse. The debates themselves may be fair, but not all questions will see the light of day. This is not unusual in legislatures, where there will inevitably be more agenda items to discuss than there is time. As a result, the European Parliament may not live up to the idea type of legislatures, but it is nevertheless a forum, however imperfect, for fair debate.

The second question and fourth questions regarding procedural fairness can be answered simultaneously. To determine whether the MEPs are qualified to hold their positions and whether legislators are motivated to be fair, one has but to examine the role of private interests and corruption in the European Parliament. If private interests are over-represented, it is an indication that legislators are not motivated to be fair; furthermore, if legislators are not well respected or have been known to be corrupt, that is an indication that they are not well qualified to wield their power fairly.

Lobbying is a well-established side dish to legislating, one that too often tries to overpower the main course. The presence of lobbyists is not necessarily an indication of corruption; indeed, lobbying can be essential for legislators attempting to “gauge the impact of policies

32 Ibid.
on specific sectors” in which they lack technical expertise.\textsuperscript{33} Unfortunately, the 3,569 registered lobbying groups in Brussels\textsuperscript{34} have been too tempting for some MEPs to refuse. It is mostly commissioners who benefit by walking through the ‘revolving door’ between the Commission and high-paying consultancy and industry jobs once their terms expire.\textsuperscript{35} However, reforms in transparency directed mainly at these lucrative transitions for commissioners did not stop a “cash for laws” scandal from rocking the European Parliament. In 2011, a number of MEPs were caught agreeing to influence legislation in exchange for cash payments.\textsuperscript{36} Two MEPs resigned from the European Parliament altogether, another was expelled from his political group but remained an MEP.\textsuperscript{37} UK journalists posing as lobbyists offered 60 MEPs positions on the board of a made-up consulting firm paying salaries of €100,000 per year in exchange for manipulation of legislation. Fourteen MEPs agreed to meet to discuss the offer and four were caught on video accepting the offer.\textsuperscript{38}

What is daunting about this scandal is not the four MEPs who were caught in the sting operation but the sense that unknown numbers of MEPs might already have been engaged – and may still be engaging - in this type of corruption. Indeed, one of the four ousted MEPs, Ernst Strasser, “was covertly earning hundreds [of] thousands of euros lobbying for industry while an MEP,” long before the Sunday Times’ covert investigation.\textsuperscript{39} In response to the scandal, lobbying rules were altered to allow for greater transparency. The EP is now the only EU institution that has “a system of accreditation for lobbyists, consisting of both a register and a code of conduct.”\textsuperscript{40} In response to the scandal, political groups have been more proactive in sussing out breaches of the rules, as demonstrated by a complaint to the President of the European Parliament in the spring of 2013 over a joint lobbyist-MEP pay-per-plate dinner debate.\textsuperscript{41}

\textsuperscript{34} Total number of persons and organizations accredited for access to the European Parliament as of 25 July 2013.
\textsuperscript{37} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{41} “ALTER-EU groups complain about breach of parliamentary Code of Conduct by European Parliament Former Members Association + Reply from President Schulz,” 2 May 2013, http://www.alter-eu.org/documents/2013/05/02/alter-eu-groups-complain-about-breach-of-parliamentary-code-of-conduct-by
Despite these positive changes, it is difficult to shake the impression that EU officials, most notable commissioners, have too many opportunities for illicit activity. This is hardly only a problem for the European Parliament; the expenses scandal that rocked the UK parliament 2009 is ample proof that bribery and corruption are real problems for legislatures everywhere. Moreover, scholarly investigation has demonstrated that despite the EU’s laissez-fair approach to lobbying in Brussels, the European Parliament is nevertheless more transparent and more accessible than many of the member states’ national parliaments. The fact remains that some MEPs, like some national parliamentarians, do not have the characteristics required to fairly wield their power. Fortunately for the European Parliament, co-decision procedure among the EU institutions results in legislation that is free of significant over-representation of private interests. Indeed, the struggle is usually one between national versus European interests.

The last piece of the puzzle of procedural fairness involves the ability of the public to be heard in the legislative process. There are two main ways in which a member of the public can contribute to the EU legislative process: by petition and through open consultations. Article 20 of the TFEU gives every citizen of the European Union the right to petition the European Parliament, to apply to the European Ombudsman, as well as the right to address any institution and advisory body of the EU in any of the 24 official languages and receive a reply in the same language.

Any citizen or resident of the EU can send a petition directly to MEPs. Petitions can be either complaints or requests. The European Parliament’s own Petitions Committee reviews all petitions received and its members decide which petitions are actionable. In 2011, the Petitions Committee received 2,091 petitions, of which 900 were declared admissible – meaning that the subject of the petition fell within an area of EU competence. Admitted petitions are then either referred to the EP committee with expertise in the subject area or, less often, the Petitions Committee itself investigates the petition (this happens when the petition is a complaint about an infringement of the petitioner’s rights, in which case the Petitions Committee “tries to find non-judicial remedies for citizens whose claims are substantiated”). If a petition requests action about a subject matter in which the EP is not already considering legislation, the EP committee in question may investigate and prepare a report to be voted on in plenary session.

If petitions are the EU’s way of passively accepting public comment, the open consultation system is the corresponding active solicitation of public input. Open consultations are announced online with the policy field, period of consultation, and target group (which can

43 TFEU Article 20.2(d), 2008 O.J. C 115/47.
45 Ibid.
range from something as broad as “all interested stakeholders”\textsuperscript{46} to more specific groups like “academia,”\textsuperscript{47} “local or regional public authorities,”\textsuperscript{48} “citizens,”\textsuperscript{49} and “public authorities deploying financial and fiscal instruments for facilitating SME access to finance”\textsuperscript{50} clearly outlined. A brief objective is presented, along with detailed instructions on how to submit a contribution and a variety of contact details.

Open consultations are not merely for citizens of the EU but also for organizations, notably for lobbying firms, which are referred to the Interest Representative Register and directed to subscribe to its Code of Conduct before contributing. Any results of the consultation are announced on the same page as the call for contributions. It is an open and transparent system of solicitation for public comment; unfortunately, it is run by the European Commission and not the European Parliament. Nevertheless, as the Commission and the Parliament pass legislation via co-decision procedure, the results of these open consultations do filter into drafts of laws submitted to the EP and debated therein. It is less a fault of the EP that it does not solicit open consultations as much as it is a triumph of EU attempts at public accountability in all of its institutions.

The European Parliament also provides EU citizens with a separate page for each MEP, complete with information on his or her parliamentary activities, history of parliamentary service, and detailed contact information at both the Brussels and Strasbourg EP offices as well as a separate general postal address. In this way, any EU citizen or resident who wishes to contact an MEP may do so with little effort.

The cash-for-laws scandal and (albeit decreasing) opacity of the EU lobbying system keep the European Parliament from being perfectly procedurally fair. Nevertheless, the proactive nature of MEPs and other EU officials in combatting corruption, together with easy availability of MEP contact information and open door policy for petitions on any subject area within the EU’s competence means that the European Parliament errs on the side of being procedurally fair.

Determining whether the European Parliament fulfills the requirement of producing fair outcomes involves answering two difficult questions. First, does the legislation produced by the legislature serve the general interest? An expedient way of analyzing this is to look at whether the legislature seems to consistently serve the interests of some groups over


\textsuperscript{48}Ibid.

\textsuperscript{49}Ibid.

others. The second question to be answered is: does the legislature exercise any checks it might have on other institutions? The suggested method of analysis here is examination of whether the European Parliament, where it legally can and should, challenges decisions made by other EU institutions.

There are many competing interests in the EU that the European Parliament must balance. There is the constant contest between the national interests of the member states and European interests, the interests of industry and business versus the interests of consumers, and the competing interests of the EU institutions themselves. The presence of thousands of lobbying consultancy firms in Brussels, together with the 2011 cash-for-laws scandal, may give the impression that private interests consistently win out over public interests. Fortunately, this does not seem to be the case.

The European Parliament is an adamant supporter of European citizens’ fundamental rights, having recently adopted a resolution ensuring that EU citizens have a right to redress in the case of NSA surveillance activities infringing on their privacy, complete with access to information when their data is processed in the United States as well as equal access to the United States judicial system as US citizens. The EP has also overwhelmingly adopted a report calling for steps to be taken in order to ensure that austerity measures in member states do not continue to regressively affect vulnerable social groups like the elderly, the disabled, and children. While industry and business groups are certainly protecting their interests through lobbying, the resolutions and reports the EP adopts do on balance favor the public interest. Much more prevalent is the struggle between the interests of the European Parliament and the other EU institutions. This is a struggle that addresses not only the question of interest representation but also of checks and balances within the EU.

Progressive strengthening of the European Parliament has slowly resolved the old struggle between the dominating interests of national parliaments and the comparatively weak EP. The initial solutions to the problem of dominant national parliaments were to endow the Commission with the power to set the agenda and to introduce qualified majority voting (QMV) in the Council. After these changes, national parliaments no longer controlled and shaped legislative outcomes, but the European Parliament was not left with very much power within the EU, save some veto capabilities in very limited policy areas. The Treaty of Lisbon created co-decision procedure, endowing the EP with the most power it has ever

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53 Simon Hix, What’s Wrong with the European Union and How to Fix It (Cambridge: Polity Press, 2008), 73.
had. Under these new procedures, the European Parliament and the Council are equal legislators.54

Three main legislative procedures regulate the relationship between the EP and the Council under Lisbon: consultation, consent, and the ordinary legislative procedure. Under consultation, the Commission proposes a regulation, the EP responds by passing an opinion by simple majority, after which the Council can adopt, amend, or reject the proposal.55 Under consent, the Commission issues a proposal and the Council adopts a position on the proposal either by QMV or unanimity. Afterward, the Parliament can assent by simple majority, unless the proposal is for the accession of a new EU member state or amendments to European election procedures. In these cases, the EP must assent to the proposal by absolute majority. Lastly, under ordinary legislative procedure, the Commission proposes a legislative text, in response to which a committee of the Parliament presents a report. After the Commission’s text has been revised, amended, and adopted in plenary, the EP has determined its official position. This process can be repeated for more than one “reading” until agreement is reached with the Commission and the Council.56 Specifically, at a second reading – after each institution has had its initial say – the Parliament can only amend or reject the text by absolute majority (a majority of all MEPs – 384 of the current 766 – as opposed to a simple majority, which is a majority of MEPs present for the vote). This requirement makes it much more difficult to reject or amend a proposal than simply to pass it, leading to a broad belief that the Parliament is still at a disadvantage to the Council.57

The calibration of the co-decision procedure is vital because it is through amendment or rejection of proposals that the Parliament can check the power of the Council or Commission. The European Parliament itself cannot propose legislation. It merely reacts to the vision of Europe that the other EU institutions propose. As the only democratically elected institution, the EP balances the Council and Commission by ostensibly representing the public throughout the legislative process.

Quantitative study has shown that the Council of Ministers does indeed have the most bargaining power of the three institutions and that Parliament attempts at checking the Council often fail. Helstroffer and Obidzinski undertook a study of European lawmaking in the areas of asylum, gender equality, maternity leave, and fishery. Helstroffer and Obidzinski identify a four-part model of procedure for co-decision: first, the Commission tries to predict the outcome of the co-decision procedure when it initially proposes a text; second, the European Parliament accepts the text but with amendments that raise the standards of the proposal – the process of amendment being the EP’s method of balancing

55 Ibid., 68.
the other institutions; third, the Council has misgivings about raising the standards as proposed by the EP and as a result does not accept the proposition, implicitly threatening failure of the entire negotiation process; fourth and last, the negotiation either stalls with the Council’s refusal to accept the amendments or the initial proposal is amended to accommodate the Council’s position. Consequently, though the European Parliament does use its legal powers of checking and balancing the other institutions through amendment, it is overwhelmingly unsuccessful against the Council.

For the EP to produce just outcomes, it is insufficient for it to simply attempt to balance the other institutions. It must, on a nontrivial level, actually succeed in doing so. Its own legislative output is broadly just. Unfortunately, the structure of EU institutions means that the European Parliament is very rarely successful at seeing its own just output come to fruition against the overriding interests of the Council. The EP does, however, have other balancing powers that it exercises. For example, it has veto power over the selection of the Commission itself and has over time been increasingly using this veto power to combat “heavy lobbying” from national governments. The EP rejected the initial line-up of the Barroso Commission in October 2004 for this very reason.

On the whole, the European Parliament maximizes its growing powers to create just outcomes, especially when it comes to checking the encroachment of national interests on European policymaking. The fact that it is not always successful does not mean that it is illegitimate and indeed makes the EP no different from European national parliaments that fail to check political overreaching within their own borders. The Hungarian parliament, for example, approved amendments to the constitution which greatly eroded not only the parliament’s own powers of checks and balances but also paved the way for loss of fundamental rights to Hungarian citizens.

On the whole, the European Parliament strives to produce just outcomes through just procedure, running into difficulties that are all too common to legislatures everywhere: the prevalence of lobbying and the primacy of other governmental institutions vying for a superior negotiating position. When there is some discrepancy between the procedures and outcomes and their supporting beliefs, it is said to create a deficit in legitimacy. While there is inevitably some discrepancy between the actual procedures and outcomes of the European Parliament and the EP’s supporting ideals of fairness and pure servicing of the public interest, the deficit is not nearly as large as critics and media sources insist. Only the ideal type has no legitimacy deficit and there is no existing legislature that meets the standards of the ideal type. The European Parliament is quick to acknowledge its deficits and proactive in its attempts to close the gaps.

59 Hix, What’s Wrong with the European Union and How to Fix It, 73-74.
60 Ibid.
61 Beetham, The Legitimation of Power, 16.
Public Support for the European Parliament through Acts of Consent

Public support for a legislature is measured through acts of public consent, notably election turn-out, public appeals to legislators, and general public compliance with laws produced by the legislature. This is the category in which the European Parliament suffers most.

Turnout for European elections has been falling steadily since the first election in 1979. In 1979, 61.99% of eligible European citizens turned out to select their MEPs. In 2009, that number fell to 43%. But these disheartening numbers do not tell the whole story. In 1979, there were only nine member states while in 2009 there were 27, with an EU population of 500 million. Michael Bruter points out that while the overall European turnout declined from 49.51% in 1999 to 45.47% in 2004, when taking into account that EU membership had increased from 15 to 25 states in that time, it can be shown that turn-out has in fact increased. Moreover, turn-out in many member states has increased over time. Denmark, Luxembourg, Latvia, Poland, Estonia, Slovakia, Bulgaria, Romania, and even the United Kingdom have increased turn-out since their first European elections, though in many cases that turn-out has fluctuated over time. Turn-out has decreased in more member states. In Spain, Germany, Ireland, France, and Portugal, turn-out has fallen since their first European elections but has remained constant over the last two election cycles. Italy, the Netherlands, Greece, Austria, Cyprus, Latvia, and Hungary have seen steady and constant drops. Belgium alone has maintained a turn-out of at least 90% since 1979. The overall picture is one of a fragmented Union in which some national publics—usually in the recently admitted member states—are becoming more involved in electing legislators to the European Parliament while others—many in the original EU member states—are decreasing their involvement.

This decrease in involvement extends to individual appeals to the European Parliament and MEPs. The number of petitions received by the European Parliament is also steadily declining. Interestingly, the largest number of complaints is sent from those member states in which turn-out has been decreasing sharply: Germany, Spain, and Italy. Individual correspondence with MEPs is not disclosed and therefore cannot be included in this analysis.

Public compliance with EU laws is also difficult to monitor, as it is the responsibility of each member state to incorporate EU law into its own national legal system and then prosecute its citizens for noncompliance. Some information is nevertheless available. The Commission

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66 Ibid.
is responsible for enforcing correct application of EU law under TFEU Article 258 and can bring action against infringing member states under this provision. In a November 2012 press release, the Commission reported that compliance with EU law was too slow, though improving. In 2011, there were 15% fewer open infringement procedures than in 2010. Some infringements can be resolved through other channels besides official proceedings, so the total number of infringements is much higher than the 1,775 open procedures in 2011. The public, including individual citizens as well as businesses, reports many of these infringements. The public therefore does play a vital role in ensuring compliance with EU laws.

The 3,115 registered complaints received by the Commission in 2011 are not enough to make up for the overall deficit of acts of public consent to the European Parliament. Election turn-out data demonstrates that large swaths of Europeans in many member states are becoming disengaged from the European Parliament. Simultaneously, the overall number of petitions submitted to the European Parliament is also dropping. There are many possible explanations for this phenomenon but the simple fact remains that not many European citizens are actively engaged with the European Parliament and public support through acts of consent is lacking.

V. CONCLUSION

The European Parliament is the only directly and democratically elected EU institution. It is built on the traditional model of a national legislature but, unlike national parliaments, the European Parliament is one part of a larger legislative mechanism that involves other institutions. Accountability for the lawmaking process is spread across the EP, the Commission, and the Council. Consequently, there are significant differences between how the European Parliament legislates and how its national counterparts legislate. Nevertheless, under this paper’s proposed theory of legislative legitimacy, the European Parliament is more legitimate than not.

The EP does suffer from a lack of broad public consent and its reputation for procedural fairness has been damaged by a lack of transparency in lobbying that resulted in the 2011 cash-for-laws scandal. At the same time, it is a powerful advocate for European citizens’ fundamental rights and produces legislation protecting the public interest. MEPs have become far more proactive about re-establishing the procedural integrity of the European Parliament by reporting suspicious behavior and creating an official register of lobbying

68 Ibid.
69 Ibid.
70 Ibid.
organizations and a code of conduct. Moreover, the EP pays minute detail to its establishing treaties, ensuring its legal validity as a legislature.

The problems that plague the European Parliament are the same problems afflicting national legislatures. Parliamentarians everywhere are seen as distant from the public and the inner workings of national legislatures are often just as complex and difficult to navigate as EU co-decision procedure. Furthermore, there has been no shortage of parliamentary scandal in recent years, notably in the UK expenses scandal and the Hungarian constitutional amendments that the Hungarian parliament passed even though the fact that these amendments greatly diminish citizens’ rights. Despite the scandals, these two national legislatures have not been universally decried as democratically deficient. Yet public discourse seems to have almost unanimously agreed that the European Parliament’s democratic legitimacy is dead and buried. Why might this be?

There is no single easy answer. The most fundamental difference between the European Parliament and national parliaments is that the EP is not attached to a single nation. This alone is insufficient to make it democratically deficient. Nevertheless, the supranational nature of the European Parliament puts it in a unique position, one that breaks with traditional notions of a legislature just enough to make it inhabit an uncanny valley between the kind of parliament Europeans are accustomed to and the kind that they fear. As the EU expands and the European Parliament grows into its powers, it is possible that this wall of unfamiliarity will melt and that Europeans, politicians, academics, and the media will be able to see the EP more clearly and accept its legitimacy as a legislature. But this is something that only time will tell.
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