



# **What Democracy for Europe?**

Proceedings from the  
RECON Midterm Conference

*Erik O. Eriksen and John Erik Fossum (eds)*

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Cover picture: The Astronomical Clock ('Pražský orloj') at the Old Town City Hall in Prague, The Czech Republic.



## Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 21 partners in 13 European countries and New Zealand, and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at [www.reconproject.eu](http://www.reconproject.eu).

The RECON project has reached halfway in its project period, and on this occasion the RECON midterm conference was held in October 2009 in Prague. The event gathered some 100 researchers as well as policy makers, civil society actors and representatives from the general public to discuss the project's focus on the future of democracy in Europe. The conference was opened by EU Commissioner Vladimír Špidla, and a number of external researchers attended the conference and contributed with critical project feedback.

The event successfully accommodated for constructive discussions on the theoretical models underlying the project and taking stock of RECON's research halfway through the project. Moreover, it provided an opportunity for all RECON researchers to present ongoing projects and preliminary research results within as well as across work packages. The report contains the proceedings from RECON's Midterm Conference on 9-10 October 2009 in Prague.

Erik O. Eriksen  
RECON Scientific Coordinator



# Table of contents

## **Introduction**

<i>Erik O. Eriksen and John Erik Fossum</i> .....	1
---	---

## **Chapter 1**

### Opening speech

<i>Vladimír Špidla</i> .....	11
------------------------------	----

## **Chapter 2**

### What democracy for Europe

<i>Erik O. Eriksen</i> .....	17
------------------------------	----

## **Chapter 3**

### The mutation of the EU as a regulatory regime

<i>Giandomenico Majone</i> .....	31
----------------------------------	----

## **Chapter 4**

### Challenging the first model

<i>Deidre Curtin</i> .....	73
----------------------------	----

## **Chapter 5**

### Democratic legitimacy, political normativity and statehood

<i>Rainer Schmalz-Bruns</i> .....	83
-----------------------------------	----

## **Chapter 6**

### Challenging the second model: Can a regional supranational form of democratic statehood work?

<i>Ulrike Liebert</i> .....	115
-----------------------------	-----

## **Chapter 7**

### The EU as a cosmopolitan order

<i>Hauke Brunkhorst</i> .....	133
-------------------------------	-----

## **Chapter 8**

### Challenging the third model

<i>Agustín José Menéndez</i> .....	157
------------------------------------	-----

## **Chapter 9**

### Concluding remarks

<i>John Erik Fossum</i> .....	171
-------------------------------	-----

<b>Appendix</b> .....	185
-----------------------	-----





# Introduction

Erik Oddvar Eriksen and John Erik Fossum  
*ARENA, University of Oslo*

We considered the RECON midterm conference as an important occasion to take stock of the project, this far. The meeting in Prague was set up to achieve this in a two-pronged manner. The most central component of the stock-taking exercise consisted of the nine meetings that took place in the project's different work packages (WP1 Theoretical framework; WP 2 Constitutional Politics; WP 3 Representation and Institutional Make-up; WP 4 Justice, Democracy and Gender; WP 5 Civil Society and the Public Sphere; WP 6 Foreign and Security Dimension; WP 7 Political Economy; WP 8 Identity Formation and Enlargement; and WP 9 Global Transnationalisation and Democratization Compared). The work packages are the project's 'work horses' whose individual and combined efforts and contributions are essential to the overall success of the project. This important stock-taking was fed into the operation of the project but is not included in this report.

The other component of the midterm conference was intended to support the stock-taking exercise through obtaining critical feedback on the basic RECON framework from scholars both within and

without the RECON project.<sup>1</sup> We structured this along three complementary dimensions. First, we invited three prominent scholars and asked each to structure the talk around one RECON model each. The intention was to solicit comments from experts who were especially familiar with the basic logic of the model they were commenting on. Thus, Giandomenico Majone was asked to talk to the first audit democracy model; Rainer Schmalz-Bruns was asked to reflect on the second multinational federal democracy model; and Hauke Brunkhorst was asked to reflect on the third, the regional-democratic model (of cosmopolitan democracy).

Second, we also asked three scholars (two inside and one outside the project) to prepare written comments on these three interventions. Deirdre Curtin commented on Majone's; Ulrike Liebert commented on Schmalz-Bruns's; and Agustín Menéndez commented on Brunkhorst's contribution. We also had three panel debates that focused on core concerns in each model, and included a broad and multidisciplinary cast of scholars (Christian Joerges, Berthold Rittberger, Vivian Schmidt, Wolfgang Wagner, Yvonne Galligan, Zdislaw Mach, Agustín Menéndez, Jana Reschova, Rainer Forst, Beate Kohler-Koch, Claire O'Brien, and Phillippe Schmitter).<sup>2</sup>

This report contains the opening speech by EU Commissioner Vladimír Špidla, a brief introduction to the research question of RECON by Erik O. Eriksen, the three interventions and the three comments, and a brief set of concluding reflections by John Erik Fossum. The report thus only includes the main plenary presentations that were given at the conference. These provide us with important reflections on the project as well as more concrete feedback. We are pleased to publish these important interventions in report form. The report provides an illustration of some of the key challenges facing students of EU democracy, and also offers critical feedback on RECON's approach to the study of EU democracy. It does however not offer a coherent or comprehensive overview of the

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<sup>1</sup> See the framework paper: Eriksen and Fossum (2008) 'Reconstituting European Democracy', ARENA Working Paper Series 08/1, Oslo: ARENA. Available at: [http://www.arena.uio.no/publications/working-papers2008/papers/wp08\\_01.xml](http://www.arena.uio.no/publications/working-papers2008/papers/wp08_01.xml).

<sup>2</sup> Summaries of the panel debates are found in RECON Newsletter 1/2010, available for download on the RECON webpage: <http://www.reconproject.eu/projectweb/portalproject/Newsletters.html>.

project and its approach, neither does it speak to the sheer range of research that is conducted within the project, nor does it offer a systematic evaluation of this.<sup>3</sup>

In the remainder of this introduction we provide a brief and schematic overview of the three RECON models and very short summaries of the chapters in the report with particular attention to what they highlight with regard to RECON.

## Three ways of conceiving of democracy in Europe

The question of democracy in Europe is not only a highly politically charged matter; it is also a major intellectual challenge that cuts to the heart of democratic theory. The critical issue is, as Erik O. Eriksen also points out in his chapter: What democracy for what Europe? Simply framing the question in these broad terms gives a clue to how profoundly challenging it is. We cannot take for granted what should figure as the appropriate conception of democracy; neither can we take for granted what type of entity this is to operate in. Both matters are deeply contested. To illustrate, the debate has not reached any consensus on the critical issue as to whether properly dealing with the matter of EU democracy entails abandoning state-based democratic theory. What people take for granted when studying democracy in America or in any other part of the world today is now a highly contested matter in Europe. European scholars discuss whether it is still possible given the transformative effects of the non-state EU to devise a democratically viable constitutional and institutional framework that continues to rely on state-based democratic theory. Or is it necessary to devise a new theory of democracy that may be more suitable to the alleged transnational character of the EU or to an EU that is part of an increasingly cosmopolitanised world? To give this question its due we have opted for three ways of conceiving democracy in Europe that approximate to the core democratic requirements of autonomy and accountability.

The first democratic audit model envisages democracy as still directly associated with the nation state. In other words, the model presumes

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<sup>3</sup> For a more comprehensive overview of the project see Eriksen and Fossum 2009 *RECON: Theory in Practice*, RECON Report No. 8, Oslo: ARENA. See also the RECON website for an overview of the published output from the project: <http://www.reconproject.eu/projectweb/portalproject/Publications.html>.

that the EU has not effected such a profound transformation of the nation state that a full-fledged democratic arrangement is necessary at the EU-level. Further, the model is attentive to the presumption – widely shared by Eurosceptics – that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well-developed collective identity, the citizens can participate in opinion-forming processes and put the decision-makers to account at regular intervals, as well as continuously through public debate. The model implies that the EU must be such institutionally fashioned as to ensure that the institutions at the EU level are accountable to the member states, which continue to serve as the main vehicles for ensuring autonomy. More concretely, the model understands the emerging structure at the European level as a narrowly confined regulatory regime deeply embedded in extensive institutional arrangements of public (or semi-public) character. The model presumes that the member states delegate competence to the Union, a competence that can in principle be revoked. Although this entails a form of self-binding on the part of the member states, such delegation can come with a powerful set of controls imposed by the member states, in order to safeguard that they remain the source of the EU's democratic legitimacy. The member states both authorise EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties, as well as through a set of institutions that permit each and every member state to exercise the power of veto. In addition, the model includes a set of EU-level institutions specifically designed to ensure that the delegation is democratically legitimate; the label audit democracy refers to the fact that some of these institutions have a direct popular mandate to conduct such an audit. The model can thus be understood as a way of addressing the democratic problems that complex state interdependence and globalisation bring forth, through establishing European institutions that are accountable to the national democratic systems.

The second model sees democracy in Europe as best ensured through state-based democratic constitutionalism embedded in a European federal state. The model is set up to sustain the notion that the legitimacy of the law stems from the autonomy presumption that it is made by the people or their representatives – the *pouvoir constituant* – and is made binding on every part of the polity to the same degree and amount. The conventional shape of such a community is the

democratic constitutional state, based on direct legitimation, and in possession of its own coercive means. The assumption is that the system can ensure EU-level democracy because it builds on the notion that a federal European state would be institutionally equipped to claim direct legitimation, and entrench this in legally binding form. Federal state structures not only heighten autonomy and accountability, but can also greatly reduce the incongruence that globalisation and complex interdependence produce. A legally integrated state-based order is often seen as premised on the existence of a sense of common destiny, an 'imagined common fate' induced by common vulnerabilities, so as to turn people into compatriots willing to take on collective obligations to provide for each other's well-being. The European Union's multinational character requires modifying the standard federal model which must accommodate to the fact that nation-building at the EU level will be taking place *together with* nation-building at the member state (and partly even regional) level. The modified version would therefore be a *multinational federal European state*.

The third model sees European democracy as a regional sub-set of a broader – cosmopolitan – system of democracy. This structure we argue need not take on the shape of a state. We posit that a non-state entity can make up a system of government insofar as it performs the functions of *authorised jurisdictions*. By government we therefore refer to a system of authorised rule which depicts the political organisation of society, or construed in more narrow terms, as the institutional configuration of representative democracy and of the political unit. From this we posit that whereas the Union can be set up as a *non-state entity*, it must nevertheless also retain some of the hierarchical attributes of government. The idea is that since 'government' is not equivalent with 'state', it is possible to conceive of a non-state, democratic polity with explicit government functions. Such a government-type structure can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or collective identity that is needed for comprehensive resource allocation and goal attainment. Such a governmental structure is based on a division of labor between the levels that relieves the central level of certain demanding decisions. This model therefore seeks to graft the authorised procedures of the constitutional state onto the European level but within a more limited remit of action than the sovereign

state. The model posits that the European Union's democratic legitimacy can be based on the credentials of criss-crossing public debate, multilevel democratic decision-making and enforcement procedures and the protection of fundamental rights to ensure an 'autonomous' civil (transnational) society. This is the clearest manifestation thus far of democracy as a principle based on a post-conventional form of consciousness, one seen to have been generated by the struggles and processes that produced modern constitutions. Whereas such an entity holds traits that undermine the distinction between states and international organisations, it cannot do away with the modern legitimating principles that were established through democratic revolutions. The concept of government highlights the *moral authority* of the procedures entrenched in the democratic *Rechtsstaat* – as a legitimating, trust and compliance-generating mechanism.

## Brief chapter summaries

In Chapter One, the opening speech, Vladimír Špidla appropriately focuses on the central role of freedom. He cautions against thinking of freedom in the absence of constitutional rules and safeguards. Untrammelled freedom simply benefits the strong, be it in the political or in the economic sphere. Legal rules are necessary to ensure competition, to sustain freedom for all, to enable collective action and ultimately to ground a viable constitutional democracy.

Erik O. Eriksen in Chapter Two underlines that the EU has developed into a multilevel configuration with an operational remit that exceeds well beyond that of intergovernmentalism, as is also clearly reflected in its legal-political make-up. This also means that the EU's democratic quality cannot be ensured through democratically derivative means. Since the EU has become a polity in its own right it also needs direct legitimacy. The challenge is how to ensure this also given constraints such as those recently brought forth by the German Constitutional Court in its Lisbon Treaty ruling. In opting for the third seeks to spell out further what 'stateless government' entails in today's Europe.

Giandomenico Majone in Chapter Three, focuses on RECON's first model. Majone understands the EU as a distinct type of political entity, which on the one hand has exceeded beyond

intergovernmentalism but on the other lacks the preconditions to sustain a European-level democracy. He takes as his point of departure the strong institutional asymmetry in the EU in favour of negative over positive integration but argues that to cast this as a fundamental flaw is misconstrued. There is great and unfounded belief in positive integration which has not been borne out and whose alleged merits serve mainly as integrationist myths. The EU's diversity will render efforts to foster positive integration ineffective and reduce rather than bolster its legitimacy. Lack of support for a European federal state coupled with EU integration through stealth has engendered a distinct EU crypto-federalism founded in a particular – integrationist – political-institutional culture which is democratically highly problematic. The obvious solution is to downscale the EU. Majone sees this as also serving cosmopolitan ends. The interesting point is that this process of downscaling, Majone argues, need not take the EU back to RECON model I.

In her response Deirdre Curtin in Chapter Four questioned Majone's core thesis to the effect that there is a need to change the hierarchy between positive and negative integration. Part of the reason for this is because Majone overstates the role of the Commission to the detriment of for instance the Court of Justice, a key instrument for negative integration. In effect, Majone's solution can end up stimulating unaccountable juridification. Another point is that Majone's distinction focuses overly much on economic issues to the detriment of foreign and security policy with a different configuration of positive and negative integration. Curtin expresses scepticism of the RECON approach but nevertheless implicitly confirms the need for several models in that she points to the way in which the EU today exhibits traits of all three RECON models.

In Chapter Five Rainer Schmalz-Bruns is particularly concerned with the many efforts to delink democracy from the European project. Instead he argues that there is an internal relationship between the principle of democratic legitimation and European integration. The point is that the nation state does not have an answer to the question of the self of self-legislation: the nation state is democratically inadequate because it has no answer to the question of how a democratic decision on a democracy's borders can be reached. In the post-national constellation the processes of legitimation are expansive and cannot be confined to the domestic realm; thus establishing

national democracy requires a cosmopolitan inversion of perspective. But this cosmopolitan inversion does not entail abandoning statehood in a more abstract sense: hierarchy is necessary to ensure effective self-legislation. In effect, then, what Schmalz-Bruns advocates for RECON is the need to locate and consider RECON's model II on multinational federal democracy within the broader ambit of model III in the sense that the European state must retain the internal and external cosmopolitan vocation that is intrinsic to model III.

In her response to Schmalz-Bruns in Chapter Six Ulrike Liebert assesses the aspects of Schmalz-Bruns's model against what has been found in detailed studies of European integration practices, notably within the realm of civil society and public sphere. There is clear support for the emergence of a transnational justification community in Europe, although it is also found that the supranational dimension is not so pronounced; democratic legitimacy figures centrally as a component of the normativity of the EU; albeit there is far less evidence to the effect that these processes point towards European statehood.

In Chapter Seven Hauke Brunkhorst reflects on the EU as a regional subset of a cosmopolitan democratic order. He on the one hand underlines the deep roots of cosmopolitanism – in the sense of having preceded by far the system of nation states and in fact also having been stymied by it – but also reinvigorated and at least in principle compatible with democracy in its modern version. Today's legal order Brunkhorst notes, is the world's first cosmopolitan order, an order without an attendant state but nevertheless also with strong elements of stateness embedded in it. But the link to democracy remains tenuous as the world's pluralistic political structure constrains and hems in the democratic constitutionalism required to support democratic cosmopolitanism. Two implications for RECON are discerned. The first is that since we already are in the cosmopolitan constellation of state constraint, the three RECON models are not qualitatively different in statist terms but rather reflect different degrees of stateness. The second is that for RECON model III 'because modern democracy is internally cosmopolitan, democracy cannot be finalised (as long as it is democratic).' (see p. 148)



In Chapter Eight, Agustín Menéndez provides an assessment of Brunkhorst's approach that in overall terms is very supportive. Menéndez is particularly concerned with making more explicit what can be discerned of relevance to RECON from Brunkhorst's approach. First is the Union's constitutional origins, notably the apparent tension between international treaty form and constitutional substance. This Menéndez rightly points out is muddled constitutional thinking that is rendered clear once we take into account the cosmopolitan understanding of the Union. Second, that law can have both emancipatory and repressive functions (open to manipulation). Third is that Brunkhorst's conception of cosmopolitanism carries with it a democratic undercurrent that has clear progressive and emancipatory potentials (in contrast to earlier forms of cosmopolitanism). Menéndez concludes by urging better clarification of RECON model III, and whether not this might in the end take us to some form of state.

In the concluding chapter John Erik Fossum reflects on the lessons that these important contributions bring forth for the RECON project and research on democracy in Europe in more general terms.



# Chapter 1

## Opening speech

Vladimír Špidla

*EU Commissioner for Employment, Social Affairs and Equal Opportunities*

Ladies and Gentlemen, Distinguished Guests. Thank you for the invitation. I accepted it with pleasure for a number of reasons; most importantly, because I find the topic of your conference particularly inspiring, of the upmost importance, and very well timed. The 20th anniversary of the year 1989, which was in every way groundbreaking, offers us an important incentive to contemplate where we are coming from and where we are going to.

### **Freedom of all citizens versus the abuse of power by the powerful**

In the Czech milieu, years after the Velvet Revolution, the misconception of freedom as 'deregulation' prevails. According to this logic, the freest are those who do not answer to any rules, like the citizens of failed states like Somalia.

In reality, the example of failed states shows how meaningless this conception is: in failed states, only the strongest are free - free to deliberately use violence against the weak, to appropriate their property, to take their life without fear of punishment. Yes, the

strongest ones, the chief bandits, are really 'more free' than members of societies bound by the rules, where no such things are possible without punishment.

The necessary condition for such über-freedom is that others (the majority) do not have any secure freedom, no protection of their property, dignity and life. (This phenomenon appears to a lesser degree in countries where the state formally functions, but the rule of law cannot be upheld because the rule of law is undermined by powerful political and economic oligarchies, for example in some of the former USSR countries).

If freedom is meant to be a characteristic of society as a whole, however, then the presence of relatively firm and clear rules (in the form of constitutional order and laws) is not in conflict with freedom, but is a prerequisite.

## Freedom and the market

Freedom is certainly not derived solely from the market, but the free market, understood as competition is part of freedom. Similarly, the market can be free only if competition is based on rules, based on law – as formulated already in the 18th century by the patron saint of the free market – Adam Smith. It is almost grotesque that many of those who otherwise strongly support Adam Smith simultaneously distance themselves from the rule of law, which provides the basis for the Anglo-Saxon understanding of the market economy. The free market cannot function without the rule of law.

If the opposite is the case (as, for example, when free competition is misinterpreted by cartels and monopolies or corruption and favoritism by political actors), the competition is not freer, but on the contrary less free.

The neo-liberal axiom is that the level of freedom is directly proportional to the level of justice. On the contrary, competition misinterpreted by monopolies or corruption is less free and less just. Contemporary economic liberals and neo-liberals (not only in the Czech milieu) are not real liberals, but social Darwinists! As the Germans say: 'Die Neoliberalen sind gar keine Liberale.' The neo-liberals are not liberals.

The classic example of such “neoliberal” misconception is the statement that the extent of freedom is directly proportional to the extent of the taxation. Again, according to this claim, the freest countries are those like Somalia and the least free are countries such as Denmark or Finland – even when the opposite is clearly the case. Nonetheless, the Czech media continue to present the so-called day of tax freedom (the date in the year until which we all worked “for the state”) as reality and not as misleading right-wing propaganda.

## Freedom and political (representative) democracy

Freedom cannot be reduced to political democracy. There are countries which are formally democratic (particularly in Asia and Africa), in which elections take place at regular intervals, but these countries can still not be seen as democratic in the full meaning of the word because the ruling party or parties employ this or that form of political monopoly – such as control over the media, the use of the state's finances for its own propaganda and proliferation of the leader's personality cult. These “democracies” limit people's access – especially those with disparate opinions – into the decision-making positions, hinder and threaten them in everyday life.

Similarly, in the case of economic monopolies, electoral competition is less free and less just. It leads to inequality and unfairness and, more importantly, to the confirmation and further strengthening of the seemingly democratic power of those who hold the power. The American political scientist of Indian origin Fareed Zakaria calls these states illiberal democracies.

The proponents of these regimes often point to their high levels of electoral support for their leaders. This is clearly a self-fulfilling prophecy, since support for authoritarian rules is achieved through manipulation. They attack their critics by saying that “they did not get the votes”, and “have no mandate” to take part in the political discussion. Similar argumentative strategies can be found among populist politicians in countries where the political arena is clearly monopolized – for example, in the Czech Republic. Many of those who succeeded in elections base their right to govern in an unwarranted manner and their right not to be controlled by those who in their eyes failed and have no mandate. In the most drastic case, they openly or covertly usurp the right to treat the state like a

bounty which belongs to them in its entirety and belittle attempts to be stopped by those “elected by none”.

The consistent liberal view based on the rule of law is the exact opposite of this scenario. Those who gain the power in democratic societies do not gain the right to act in an unwarranted manner; on the contrary, with their increasing power, their freedom is increasingly limited by growing responsibility.

The old Greeks would probably have loftily (but fittingly) summarized this with an axiom that society needs demos, but demos is not a sufficient condition for its functioning. The society has to also adopt ethos...

Translated into the Czech reality, this means that Citizen Novak has the right to express his opinion concerning the fact that the icebergs are not melting and that global warming is a myth or that the 9/11 was performed by Americans. But official members of the president's cabinet have no such right.

Karl Popper, the author of the theory of open society (a society that does not claim to be perfect, but attempts to improve itself continuously), stated more than half a century ago that the biggest advantage of liberal democracy is not greater legitimacy among its elected representatives. Unelected politicians who are meritocratically nominated can be equally legitimate; and as Zakkaria states, these often enjoy greater support and trust from society than the elected officials (based on surveys). Monarchies can also enjoy legitimacy, be it a constitutional monarchy such as the Dutch, the Swedish or the British, or the absolute monarchy of Saudi Arabia. The real advantage of representative democracy is not the freedom to elect the “chosen ones” or the higher blessing of these, but only the possibility to replace these elected representatives; ipso facto, the right of the electorate to continuously improve the present imperfections.

## Freedom from, freedom against, and freedom to something

Misconceptions of freedom typically see freedom as liberation from something: from laws, from taxes or from ethical rules to follow: “we

have the mandate, you be quiet” can also be interpreted as the pretense to liberate elected/chosen ones from ethical or legal rules valid for mere mortals. Of course, freedom can be liberation from something, for example, from the totalitarian dictates, and the call for freedom can be directed against something or someone - against tyranny. Those who truly cherish freedom do not tend to reduce it to freedom from something or the struggle against something or someone: they tend to understand it (such as the Charter 77) as freedom to something – not freedom to pursue pre-defined surrogate ideology with the opposite sign as compared to the preceding one, but as the freedom to cultivate intellectual and political pluralism.

African American thinker Orlando Patterson points out that freedom understood as delineation against someone ‘we the free’ against ‘those not free’ has a long and tragic history in Western thought. National socialist Germans in January 1933, after Hitler seized the power, felt without doubt ‘more free’, when they were free to burn the books of unfit authors, break the shop windows of the sub-humans, etc. It was freedom from something (from the binding rules of liberal democracy.) But it was freedom to something, to something destructive against the others.

Freedom to something offers an interesting comparison to the post-communist Central Europe and to post-Franco Spain and Portugal. In this comparison, the Iberian countries win: they clearly defined their freedom after the dictatorship as freedom to something, freedom to include those who were pushed to the edge of society (such as Spanish Roma but also migrants), freedom to include the others.

On the contrary, in Central Europe, including the Czech Republic, the conception of freedom to exclude (most typically in relationship to minorities, most often to the Roma) dominates (probably as a reaction to unconvincing egalitarianism of the communist regimes).

The difference between an inclusive and an exclusive understanding of representative democracy is crucial and the time is right to start a discussion about it. Therefore, I am honored to have the opportunity to open your conference. Please, let me wish you all a successful and inspiring meeting filled with discussion.





# Chapter 2

## What democracy for Europe?

Erik O. Eriksen

*ARENA, University of Oslo*

Today's Europe is marked by *complex interdependence embedded in a multilevel governance configuration*. The European integration process is persistent. Processes of institution building at the European level, adaptation at the domestic level, and co-evolution of the two levels, are challenging the fundamental building blocs of democratic rule in Europe. Integration in Europe not only testifies to Europeanization of the nation states, but also to new forms of political rule emerging beyond the international system of state relations. It testifies to 'EU-isation'. The EU has sustained a rapid expansion of political regulation in Europe, and has over a period of fifty years transformed the political landscape in a profound manner. Integration has deepened as a wide range of new policy fields have been subjected to integrated action and collective decision-making. This has taken place not only with regard to trade, monetary and business regulation, fishing and agriculture, but also with regard to foodstuff production, gene- and bio-technology, labour rights, environmental protection, culture, tourism, immigration, police and home affairs, and now also with regard to a common foreign and security policy. Even though the powers of the Union in many policy areas – such as social and tax policy – are severely restricted, a significant amount of laws and

amendments in the member states stem from the binding EU decisions, directives and regulations. The EU is an entity with *supranational elements* equipped with an organized capacity to act.

As long as the EU could be boiled down to a distinct type of international organisation, its effects on the core features of member state based democracy would not be very dramatic. In other words, if the EU was only an instrument for the nation states to realize their mutual interests, it would leave the integrity and the identity of its constituent parties intact. In that case, the EU would be an organisation based on delegated powers, where the member states have the right to veto and are able to control their representatives, and, hence, there would be no serious democratic problem. When the member states delegate competences to the Union, competences that in principle can be revoked, national democracy is *not* upset.

However, when the EU is a power-wielding system which establishes domination relations, the electoral authorization of ministers at national level, and their accountability to their national parliaments cannot provide for democratic legitimacy. The EU's legal basis is international treaties, but its competence and law making power reaches so deep into the working conditions of the member states, that the EU can not be legitimized on this basis alone. The European integration process has affected nation state democracy and its legal basis has been Europeanized. The democratic legitimacy of the member states cannot be established independently of the EU, because these states have become so deeply entangled that the pattern of legitimate authority in the states has been transformed. The process is, more over, tainted with juridification and executive dominance. It is a process that has sapped parliamentary sovereignty at the member state level, and the question is whether democracy at the European level can compensate for this.

The upshot is that in order to establish what democracy can mean today in Europe, one has to take the EU into consideration. The point of departure of the RECON project is exactly the question that simple intergovernmentalism does not hold for the European integration process.

## **Intergovernmentalism transgressed**

The European integration project cannot be understood merely as a win-win situation, as intergovernmentalists claim. Their argument depends on the presumption that the EU produces Pareto-efficient outcomes. With regard to issues of 'high politics' inter-state relations are based on the lowest common denominator politics that cannot challenge states' sovereignty and core national interests. Thus, the EU leaves the preferences of the member states intact and is itself strictly limited to regulatory, not redistributive, politics. G. Majone, who advocates delegating policy making power to non-majoritarian institutions – not to directly elected or accountable agencies – acknowledges the ensuing questions of accountability and legitimacy, but maintains that these could be solved by sectioning off particular policy areas. He argues:

Delegation is legitimate in the case of efficiency issues, that is, where the task is to find a solution capable of improving the conditions of all, or almost all, individuals and groups in society. On the other hand, redistributive policies, which aim to improve the conditions of one group in society at the expense of another, should not be delegated to independent experts.

(Majone 1996: 5)

This is problematic, first of all because the decision to institutionalize certain issues as technical, subjected to efficiency considerations only, is essentially a political one. An issue is never merely technical and 'output oriented legitimation' as Scharpf (1999) famously coined it, is not neutral. To leave e.g. the monitoring of free trade and competition, of currency stability, to agencies withdrawn from the control of affected parties, is a political decision of vital importance. Secondly, the European Union has emerged from humble beginnings into an entity whose policies cover virtually all areas of public policy. The EU does not merely regulate. It also re-regulates and performs some market-redressing functions, through standard-setting and rule-making. The EU has become a polity which performs functions that affect interests and identities all over Europe. EU regulatory decisions often inflict costs and benefits on different actor groups. Its decisions impinge on national priorities, influence the domestic allocation of resources, and constrain the sovereignty and autonomy of the states. The EU is interfering with the interests and preferences

of the states and citizens of Europe, and hence creates winners and losers; it benefits and threatens, it rewards and punishes, and transforms identities.

The European Communities may not initially have had much power or many competences at their disposal, but with the aim of furthering integration and closer cooperation, accompanied with the attainment of requested means, they transformed the constituent parties. The Euro-polity has in the last decades undergone a marked change - from a largely economic organisation whose legitimacy was derived from the member states - to an entity that today asserts it represents an independent source of democratic legitimacy. Hence, the level and scope of European integration indicates that there is something to be legitimized at the European level beyond what efficiency can provide for.

The ECJ with its compulsory jurisdiction provides a novel system of compliance - the 'all or nothing effect' (Weiler, 1982: 53) which means that the states are 'unable to practice selective application of Community obligations' (ibid.: 54). The 'all or nothing effect' results in 'the replacement of the virtually voluntary character of state obedience which characterizes the classical international legal order with a binding judicial process' (ibid.:54). In Europe there is thus a move beyond *jurisdictional pluralism*, which is the constitutional basis of Westphalian international relations. The European states have domesticated international relations among themselves. Today there is in fact a superior political community to which the states are subordinate.

In contrast to what is the case with an ordinary international treaty, in which presumably equal parties enter into, renew or terminate an agreement, the EU is based on a *status contract*, whose purpose it is to change the status of the parties. Its object is to change, confirm or 'nullify the status of at least one of the parties' (Offe and Preuss 2007: 192). Corresponding to this is the idea of the Union as a *Bund* between a *Staatenverbund* (a compound of states)<sup>1</sup> and a *Verbundsstaat*. In a *Staatenverbund*, as in international organizations in general, 'constitutions' are *contracts* in which 'the *pouvoir constituant*' is

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<sup>1</sup> A term established in the Maastricht judgment of October 12, 1993, by the German Federal Constitutional Court .

structured as a juridical relationship between separate parties: a 'gentlemen's agreement' presupposing individual membership and sovereignty, and where the signatories represent individual modalities of government, rather than a social pact among the citizens. Contract-based orders do not put up normative criteria of political legitimacy (Frankenberg 2000: 260-1).

A *Bund*, in contrast, is not a hierarchical order, but a cooperative venture of conflict resolution and problem-solving coordination within an obligatory frame of reference. The *Bund* is characterized by a fundamental antinomy, as it is a legal-political reality on its own at the same time as it is dependent on, and protecting, the legal political reality of the member states (Schönberger 2004: 103).<sup>2</sup> We thus witness in Europe the development of a supranational political order that recognizes the difference of its constituent parties. The EU is not based on a culturally homogenized people, nor is it brought about by coercion and brute force. The EU's 'contract' aims at changing the identity of the contracting partners – from nation-states to member states. The EU is a particular kind of *Bund*, which originated through treaties, and which not only created a 'distinct political entity [...] but which at the same time transformed the political status of the parties to this treaty' (Offe and Preuss 2007: 192).

## International law plus

The supranational character of the Union's legal structure started with the constitutionalization of the Treaty system, which transformed the EC from an international regime into a quasi-federal legal system based on the precepts of higher law-constitutionalism. All legal persons and not just states, have judicially enforceable rights. Further, the progressive strengthening of the doctrines of supremacy and direct effect is coupled with the growth of the number of EU provisions and Court rulings, where the Court acts as a trustee of the Treaty and not as an agent of the member states. The upshot is that:

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<sup>2</sup> 'Ein Bund ist danach eine auf freier Vereinbarung beruhende, dem gemeinsamen Zweck der politischen Selbsterhaltung aller Bundesmitglieder dienende, dauernde Vereinigung, durch welche der politische Gesamtstatus jedes einzelnen Bundesmitgliedes im Hinblick auf dem gemeinsamen Zweck verändert wird' (Schönberger 2004: 100).

The constitutionalization of the Treaty of Rome constitutes an 'unintended consequence' of monumental proportions. The member states, after all, had designed an enforcement system that one can characterize as 'international law plus', being (a) the compulsory nature of the Court's jurisdiction, and (b) the obligatory participation of the Commission in various proceedings.

(Stone Sweet 2003: 27)

The EU appears to have reached a stable political form based on a material constitution (Menéndez 2004). The European Treaties have the function of a constitution as they establish both a unitary European citizenry, distinct from the national ones, and a set of autonomous European bodies, which make European-wide law and are committed to the Union itself.

Increasingly, the EU has become *a polity in its own right*, with some competence-competence and one that subscribes to democracy and human rights as legitimating criteria. In contrast to an international organization the EU establishes own channels of legitimation. The Treaty of Maastricht (1992) created a European Union citizenship. Democracy came to the fullest expression so far through the decision in 1976 to elect the representatives of the European Parliament by direct universal suffrage; the Treaty of Maastricht mentions it in the fifth recital of the Preamble; and eventually democracy was made a constitutional principle of the Union in the Amsterdam Treaty.

Another contrast to an international organization is the EU's *organized capacity* to act – to make collectively binding decisions. The EU, unlike an international organization, carries out its affairs not through diplomacy and bargaining, but through a set of institutions and procedures in which the decision-makers have to justify their claims but also can make collectively binding decisions without unanimity. The use of qualified majority voting – the waning of veto rights – in the Council has eroded the ability of individual countries to postpone new legislation.

## Supranationalism rebutted

However, The German Constitutional Court's Lisbon Treaty ruling on 30 June 2009, still holds the EU to be a *Staatenverbund* 'founded on the principle of the reversible self-commitment' (§233). The principle of conferral applies<sup>3</sup> and The *Bundesverfassungsgericht* restates that democracy is only possible at the national level: 'The "Constitution of Europe", the law of international agreements or primary law, remains a derived fundamental order.' (par. 231). Democratic criteria do not apply as it is the states and not the citizens that make up the 'constituencies'. States are the sole sources of legitimacy and supranational bodies act internationally on indirect and delegated powers on governance functions. Hence, 'steps of integration must be factually limited by the act of transfer and must, in principle, be revocable' (par. 233). The integration process has now in fact reached the limit of how much competences can be established at the European level for German democracy to prevail.<sup>4</sup>

The Court's ruling has been profoundly criticised by legal scholars. But whereas critics have pointed to deficiencies in the Court's empirical foundation and normative reasoning, so far no systematic analysis of the Court's democratic reckoning has been provided on the connection between the concepts of democracy and polity. How to make sense of the EUs move beyond intergovernmentalism in democratic terms? That there is a need for thinking of different alternatives to intergovernmentalism and indirect democracy in Europe, the Court's ruling itself underwrites: In contrast to *political Machiavellianism* and a 'rigid concept of sovereignty', the German Basic Law, 'codifies the maintenance of peace and the overcoming of the destructive antagonism between the European states as outstanding political objectives of the Federal Republic of Germany.'<sup>5</sup> Further: 'The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems

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<sup>3</sup> '[T]he principle of conferral under European law and the duty, under European law, to respect identity, are the expression of the foundation of Union authority in the constitutional law of the Member States' (par. 234).

<sup>4</sup> For critical rejoinders, see German Law Journal No. 8 (1 August 2009) Special Section: The Federal Constitutional Court's *Lisbon Case*.

<sup>5</sup> See par. 224 of the German Constitutional Court's ruling, June 30, 2009.

such as the United Nations is tantamount to submission to alien powers' (§220).

The Court runs with a conception of a changing state sovereignty that unfolds more in line with cosmopolitan than with classical Westphalian statist principles. So we are left bewildered. What is there to legitimate in the EU? How to grasp a move beyond intergovernmentalism when the EU is not a state?

## Reconfiguring European democracy

RECON establishes three models of European democracy (Eriksen and Fossum 2008): (1) Reframing the EU as a functional regulatory regime and reconstituting democracy at the national level; (2) Establishing the EU as a multinational federal state; and (3) Developing a post-national Union with an explicit cosmopolitan imprint

The intergovernmental model is extended to what we call audit democracy, adjusting for the existence of supranational institutions which are seen to perform supervisory functions. The first model thus posits that democracy in the EU can operate through a combination of audit democracy at the Union level and representative democracy at the member state level. However, still this model can not ensure a democratic Europe given the magnitude of Communitarized competences, and, as a consequence, 'Brussellization' of preference formation. So Majone may contend (in this volume) that 'under present conditions it is impossible to reduce the democratic deficit without drastically reducing EU competences' (chapter 3 in this volume).

However, in a globalized world, the individual nation state cannot with the help of its own resources alone realize the freedom and welfare of the citizens. The international situation is marked by an *intense interdependence* between the states. States produce externalities that are not paid for by the producers. The citizens of Europe are in complex ways affected by each other across borders. Interdependence affects the freedom, security and well-being of the subjects. So even if the problem of EU democracy disappears with the scaling down of EU competencies, the problem of democracy does not go away. Democracy is a claim of justice: those affected



should be heard and have a say. Hence, under conditions of complex interdependence and international juridification, the question rather becomes what democracy for what European Union.

With less integration, more problems are left unattended, such as problems with tax havens, unstable financial markets, climate changes, pollution, migration, refugees, and human rights violations. Because of de-nationalization and the emergence of new forms of governance beyond the nation state, no national community is fully able to control its scope of action, and no state decides exclusively what conditions should apply for its own citizens. Hence integration is a demand of justice. Democracy in one country is no longer viable – if it ever was – and the idea of constitutionalism premised on individual rights protection itself directs us to cosmopolitanism. The idea of national sovereignty safeguarding constitutional rule, which in turn enables and justifies democracy and thus the protection of the citizens' rights and interests, becomes confining. Democracy requires that the citizens, when their rights have been infringed on, can bring their grievances before a superior authority. Any 'people' can get it wrong, and needs correctives; majority decisions can harm individuals and minorities, and national basic law does not always protect. Supranational bodies are needed in order to prevent the nation states from violating the rights of their citizens, states harming each other, and to ensure that the policies of one state do not lead to negative externalities that others have to pay for.

The second model posits that democracy in the EU is best served through establishing the EU as a *multinational* federal state. But is statehood really needed at the supranational level in Europe?

### A stateless government?

The third model posits that European democracy can be reconfigured through the EU serving as a regional *post-national* Union with an explicit cosmopolitan imprint. It stems from the thrust that we should not *replicate* at the supranational level what went wrong at the national level, and which created the need for international organizations and supranational bodies in the first place. There is the need to overcome the disgraceful power politics of an international order locked up in nationalistic struggles for

influence, dominance, and religious and xenophobic zeal. To upload the state model to the European level would replicate the problems at the global level, pitting states against each other; hence it represents yesterday's answers to yesterday's problems (Peters 2005, Eriksen 2009). Habermas writes:

The aim of the integrationists is not a federal state but institutions and procedures which build on democratic foundations and make possible a joint foreign and security policy, a gradual harmonization of taxation and economic policy, and a corresponding alignment of the social welfare system.

(Habermas 2009:82)

The circumstances of justice in Europe are not comparable to those that existed prior to state-formation, in which a lawless area was to be domesticated by coercive law states. When we are dealing with already legally domesticated and politically integrated orders, supranational powers need not take the state-form in order to ensure compliance and law-abidingness. The EU carries out many functions of a state but lacks its legitimacy base – a collective identity – as well as the instruments to perform these functions. First of all, it has inordinately weak enforcement mechanisms and relies mainly on the administrations of the member states to implement its policies. It is especially weak in the classical state-type functions: internal and external control. It has neither a police force, nor an army of its own, and there are no European prisons. It is the member states that keep the monopoly of legitimate use of violence in reserve. This reduces both European legislators' and courts' leverage at the supranational level. The self-proclaimed democratic system of law-making and norm interpretation at the European level, constrained by the member states, has built-in assurances, checks and balances, ensuring that the multilevel constellation that makes up the EU does not become an power-usurping, unchecked entity – an eventual 'world despotic Leviathan'.

According to MacIver (1928: 277) we ought to 'distinguish between the government and the state and regard constitutional law as binding, not for the state, but for the government. It binds the legislator in the making of law itself.' Government refers to the authorized body within a system of rule that has the power to make

and enforce rules, laws and regulations. It is the overall container and regulator of power, maintaining order by limiting all other expressions of power and thereby turning permitted powers into rights. The characteristic feature of governmental power is not coercion, but the ability to act in concert and to be recognized. Government refers to the political organization of society and to the fact that a state is not merely a Hobbesian coercive order as Weber's famous definition alludes to.<sup>6</sup> It is an expression of common will and public opinion as well.<sup>7</sup> *Government* depicts the political organization of the polity and its societal legitimacy basis; a non-state conception of a legally constituted community.

The EU has obtained competencies and capabilities that resemble those of an authoritative government. It embraces democracy as a founding norm, has representative institutions, and over time the parliamentary principle has become more strongly institutionalized. Its institutional setup is complex but 'still it legislates, administers and adjudicates. The legitimacy of these processes also has to be assessed according to the same standards that one would apply to any government' (Chalmers et al. 2006: 87).

Not only should we untie government from penalizing connotations of state, we should also disentangle it from nation. The crux of government is not state in its collectivistic, nationalistic reading, but *democracy*. (Eriksen and Fossum 2004) The EU is opposed to nationalism as a doctrine. Most of the member states insist on retaining their national identities, and the EU is also formally committed to retain such (Article 6.3 TEU). But how can this order be effective when a pan-European collective identity, as well the *sanctioning, organizing, and executive powers* of a state, are lacking; powers which are held to be needed for ensuring rights enforcement, stabilizing normative and legal expectations, and the implementation of political programmes. In other words, how can compliance come about in a polity that lacks the enabling conditions of sovereignty that confers stability on social relations in the form of a 'centralized authority to determine the rules and a centralized monopoly of the power of enforcement' (Nagel 2005: 116)?

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<sup>6</sup> To Weber (1946: 78) the state is 'a human community that (successfully) claims *the monopoly of the legitimate use of physical force* within a given territory'.

<sup>7</sup> According to Hegel 1821; MacIver 1928; Arendt 1969.

Schmalz-Bruns, in chapter 5 and elsewhere, counters the claim that there can be democracy without a state. The state form is needed for protecting and realizing rights on an equal basis. We must, however, disentangle state-ness from the idea of a territorially fixed (and bound) nation state in order to account for its normativity (see Brunkhorst in this volume).

Conceiving of the Union as a government based on differentiating state functions implies downplaying the coercive elements and upgrading the normative-institutional elements. Such an organization can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of 'homogeneity' or thick collective identity that is widely held to be needed for comprehensive resource allocation and goal attainment. It is based on a division of labour between the levels that relieves the central level of certain demanding decisions. The claim of model three is that the EU can manage to stabilize behavioural expectations and achieve collective 'bindingness' for its laws with reference to *the legal form* in which they are dressed.

## Conclusion

Today's Europe is marked by *complex interdependence embedded in a multilevel governance configuration*. The supranational character, the Commission, the EP, the ECJ, and the status contract are what make the European form of cooperation stand out in marked contrast to international cooperation in general. Increasingly, the EU has become *a polity in its own right*, and one that subscribes to democracy and human rights as legitimating criteria. However, the German Constitutional Court's Lisbon Treaty ruling on 30 June 2009 still holds the EU to be a *Staatenverbund* (*a compound of states*) 'founded on the principle of the reversible self-commitment'. The Constitutional Court's ruling has rightly been criticised by constitutional scholars, but nobody has taken proper heed of the link between democracy and the European polity. What would a move beyond intergovernmentalism entail in democratic terms; a multi-national federation or a regional cosmopolitan democracy?

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# Chapter 3

## The mutation of the EU as a regulatory regime

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### Positive and negative integration

The distinction between positive and negative integration – crucially important for understanding the present and future role of the EU as a regulatory regime – goes back to the earliest studies of regional integration. The Treaty of Rome did not attach any normative connotation to this distinction. The common market was to be achieved by both methods, but in fact with greater reliance on negative integration – witness the number and significance of such rules as Articles 12-17 (elimination of customs duties); 30-37 (elimination of quantitative restrictions to intra-Community trade); 48-73 (free movement of persons, services and capital); 85-94 (rules against distortion of competition); and, not least, Article 119 – prohibiting gender discrimination at the workplace. Also the legislative strategy devised by the European Commission to accomplish the objectives of the Single Market Programme was largely based on measures of negative integration to remove physical, technical, and fiscal barriers to free movement within the common area.

Fritz Scharpf, Jürgen Habermas and other scholars have criticised the 'institutional asymmetry' between positive and negative rules – an asymmetry which they believe a supranational social policy should correct. Their contention is that the rules of negative integration, being primary (i.e., treaty-based) European law, are directly enforceable by the European Commission (EC) and Courts, while policies promoting social protection and cohesion – positive integration – usually require intergovernmental agreement (in some cases unanimous agreement) and are therefore designed and implemented with much greater difficulty. There is indeed an asymmetry between primary and secondary rules; but it is far from clear how, or even whether, it should be corrected. The basic reason for this asymmetry is that heavily regulated national markets could not have been integrated without primary rules restricting the interventionist tendencies of national governments, as well as the protectionist temptations of both publicly-owned and private firms. Since the method adopted by the Founding Fathers makes the integration of national markets the starting point of a long march towards 'ever closer union', it follows that negative integration is a *constituent*, rather than a contingent, element of their grand strategy.

Over the years the superiority of positive over negative integration has come to be taken for granted by many students of European integration. The former has been identified with positive values like environmental protection, reduction of social inequality, the correction of market failures, and 'deep' integration; the latter with deregulation, narrow economic interests and 'shallow' integration. As it turns out, economic interests and other special interests often find it expedient to support measures of positive integration, such as harmonisation, while fundamental rights under European law are generally more effectively protected by means of negative integration. The latter is not only about removing national restrictions to the free movement of the factors of production. It is also about limiting monopoly power and market dominance, restricting the discretionary power of national governments, protecting the diffuse interests of consumers, and fighting discrimination on grounds of gender, nationality, age, and other factors. As an expression of supranational constitutionalism, negative integration is compatible with, and indeed supportive of, a more cosmopolitan vision of the European integration process.



Positive integration, on the other hand, tends to reproduce at the supranational level some of the less attractive features of domestic politics. The reason is the irresistible temptation to use all the possibilities offered by the integration process, not to solve concrete problems of general interest but to pursue particularistic institutional or national interests. The clearest example of such misuse of positive integration is provided by the Common Agriculture Policy (CAP) – still the largest programme of this type in terms of budget, administration, and volume of legislation. The CAP effects a considerable transfer of money from consumers and taxpayers to farmers, and for this reason it has been greeted by some students of EU social policy as the first stage of the supranational welfare state of tomorrow. However, the CAP is not only an inefficient, but also a perverse type of social policy. In 1992 the European Commission reported that the richest 20 per cent of European landowners and agribusiness companies received 80 per cent of EU farm aid, and it seems that the situation has not changed since then. Thus, among the largest receivers of CAP subsidies today are some of the most prestigious aristocratic families of Britain, and the present owners of the large collective farms privatised after the fall of East Germany's communist regime (Majone 2009: 146-7). Despite the damage to the legitimacy of the integration process caused by subsidies to the wealthy, national governments are reluctant to support reform plans advanced by the Commission to make the system less unfair. Equally well documented are the costs imposed by the highly protectionist CAP on the farmers of developing countries. The capture of what was supposed to be the core of a 'welfare state for farmers' by powerful national interests exemplifies some of the problems that a European welfare state, and positive integration more generally, would have to face.

In contrast, the national governments have accepted, however reluctantly, the discipline imposed by the rules of negative integration. The best-known example of negative integration in the area of individual rights is the already mentioned Article 119 of the Rome Treaty (now Article 141 EC), which requires application of the principle of equal pay for male and female workers for equal work or work of equal value. The Article itself conferred no positive regulatory powers, until it was amended by the Treaty of Amsterdam. The new paragraph inserted by that treaty extends the scope of the article to positive measures ensuring equality of opportunity and is

thus not restricted to measures simply outlawing discrimination. So far, however, the most dramatic results have been achieved by Article 119 in its original 'negative' formulation. In the landmark *Defrenne II* case (*Defrenne v. Sabena*, Case 43/75) the European Court of Justice (ECJ) held that the article is directly enforceable and grants rights to an individual if remedies do not exist under national law.<sup>1</sup> In the *Bilka* case of 1986 the Court indicated its willingness to strike down national measures excluding, without a clear justification, women from any employer-provided benefits, such as pensions.<sup>2</sup> In a later case, the ECJ held that all elements of pay are due to all employees in a particular activity, without regard to the hours worked. In Germany at that time, employees who worked less than ten hours a week for a commercial cleaning company did not receive statutory sick-pay. This regulation affected mostly women, thus the Court saw it as an indirect discrimination against women, hence as a violation of Article 119. The *Barber* case (1990), in which the Court extended the meaning of Article 119 to cover age thresholds for pension eligibility, demonstrates the symmetric effect of this norm.<sup>3</sup> Mr. Barber, having been made redundant at age 52, was denied a pension that would have been available immediately to female employees; instead, he received a lump-sum payment. The Court held that this treatment was illegal since pensions are pay and therefore within the scope of Article 119.

Consider now the difference between the judicial enforcement of the right not to be discriminated against on the ground of, say, gender or nationality, and the promotion of substantive equality, or even of equality of opportunity. The latter objectives are much broader than the simple prohibition of discriminatory practices, and normally require positive interventions. The costs of such interventions will fall on the citizens of the member states affected by the measures, without having been authorised through the normal democratic process. Similarly, positive integration in the form of harmonised regulations, for instance in the area of environmental protection,

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<sup>1</sup> Judgement of the European Court available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61975J0043:EN:HTML>>.

<sup>2</sup> Judgement of the European Court available at: <<http://www.minorityrights.org/download.php?id=289>>.

<sup>3</sup> Judgement of the European Court available at: <<http://www.minorityrights.org/download.php?id=308>>.

imposes costs which may not adequately reflect national resources, preferences and policy priorities.

At issue here is not the merit of the objectives of various positive measures, but whether, or to what extent, they can be legitimately pursued at a European level. Supporters of a stronger role of the Union in social policy, deem the principle of non-discrimination and the resultant negative law insufficient because they do not tackle the roots of inequality; on the contrary they are premised on the existing cultural and social divides to be found in the member states. One example of the static nature of the concept of non-discrimination is taken to be the comment of the ECJ – in *Hofmann v. Barmer Ersatzkasse* – that the 1976 Equal Treatment Directive was ‘not designed to settle questions concerned with the organisation of the family, or to alter the division of responsibility between parents’ (cited in Ellis 1998: 323).<sup>4</sup> This attitude is considered too timid. What is required if real equality of opportunity is to be achieved, social-rights activists argue, is ‘law and policy which encourage a degree of social engineering and transform some of the ways in which our lives are presently organised’ (ibid.: 324).

Such sweeping legal and policy changes are incompatible with the nature of a system based on the principles of subsidiarity, proportionality, and enumerated powers, but activists hope that the EU may evolve into a political union with the legal and financial resources needed to enforce all kinds of positive social rights – and thus be able to overcome the institutional asymmetry between the two modes of integration. Unfortunately, such a vision is not shared by a majority, or even a significant minority, of European citizens. As long as federalist aspirations continue to enjoy only elite support, the legitimacy of the integration process, such as it is, will continue to depend largely on negative integration. The principle of non-discrimination may not tackle the roots of inequality, yet its enforcement by the ECJ has improved the quality of the democratic process in the member states; while an activist social policy would aggravate the EU’s legitimacy problem – instead of generating a sense of transnational solidarity – it would reinforce the popular image of an ever-expanding and highly bureaucratised Union. In fact,

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<sup>4</sup> Judgement of the European Court available at:  
<<http://homepage.univie.ac.at/~holzlee2/EuGHHofmann1984.pdf>>.

the historical experiences of both the American New Deal and the European welfare states show that the expansion of redistributive social policies has been one of the main causes of political and administrative centralisation in the twentieth century.

When comparing the two modes of integration, another factor should also be taken into account. While the outcomes of positive integration policies are uncertain, in part because of their dependence on implementation by national bureaucracies with their different methods and uneven levels of efficiency, the results of negative integration are clear-cut and, as already noted, are generally implemented by the affected member states. The power of negative integration was again revealed by the ECJ's decision of October 2007 against a German law protecting Volkswagen from hostile takeovers – a significant legal victory for the Commission, which in an effort to get rid of the law had taken the German government to court in October 2004. This victory followed the decision of Microsoft to surrender in its nine-year battle with the Commission over its dominance of the software market. Microsoft agreed to apply the decision globally, thus acknowledging that the Commission's influence as a competition regulator extends beyond Europe. More recently, the Commission has imposed a record fine of 1.06 billion euro on Intel, and called for changes in the way the company sells its microprocessors. According to *The Wall Street Journal*,<sup>5</sup> the decision 'confirmed the EU's role as jurisdiction of choice for U.S. tech companies seeking redress from larger competitors'. Comparing such results with the failure, or limited success, of so many positive integration policies (Cf. Majone 2005: 111-38), we can see that negative integration still works – even in a period of growing doubts about the effectiveness of the EU.

Under a negative integration regime, most regulatory responsibilities would be left with the people most directly affected by a given problem, and who have to bear the costs of regulation. As far as market regulation is concerned, the tasks of the European institutions would consist primarily in monitoring the behaviour of national regulators to make sure that they do not abuse their autonomy for protectionist purposes, or to violate rights guaranteed by European law. Where the functional requirements of the common market

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<sup>5</sup> *The Wall Street Journal*, 14 May 2009.

require some type of harmonisation, this could be achieved by a variety of methods; ex-post harmonisation brought about by regulatory competition; statutory regulations developed and implemented by transnational regulatory networks; greater reliance on (non-binding) international standards; and especially by self-regulation. Centralised, top-down harmonisation would become an instrument of last resort.

## Rise and decline of regulatory harmonisation

Harmonisation of national laws and regulations is one of the three legal instruments available to the Commission for establishing and maintaining the common market – the other two being liberalisation and the competition rules. While liberalisation and the rules against anticompetitive behaviour are modes of negative integration, centralised harmonisation is the main tool of positive integration. For this reason the crisis of harmonisation, to be discussed in this and in the three following sections, has implications for the entire policymaking machinery of the EU.

From the early 1960s to the mid-1970s, the Commission's approach to harmonisation was characterised by a distinct preference for detailed measures designed to regulate exhaustively the problems under consideration, to the exclusion of previously existing national laws and regulations – the approach known as *total harmonisation*. Under total harmonisation, once European rules have been put in place, a member state's capacity to apply stricter rules by appealing to the values mentioned in Article 36 of the Treaty of Rome – such as the protection of the health and life of humans, animals, and plants – is out of question. Total harmonisation corresponds to what in the language of American public law is called 'federal pre-emption', and it does indeed reflect early federalist aspirations. For a long time the ECJ supported total harmonisation as a foundation stone in the construction of the common market. By the mid-1970s, however, it had become clear that total harmonisation 'confers on the Community an exclusive competence which it is simply ill-equipped to discharge [...]. The Community lacks the expertise and the institutional maturity to exclude the participatory role of national authorities' (Weatherill 1995: 154). At the same time, mounting opposition to what the new member states considered excessive centralisation convinced the Commission that harmonisation had to

be used so as not to interfere too much with the regulatory autonomy of the national governments. The emphasis shifted from total to optional and minimum harmonisation, and to mutual recognition. Optional harmonisation aims to guarantee the free movement of goods, while permitting the member states to retain their traditional forms of regulation for goods produced for the domestic market. Under minimum harmonisation, the national governments must secure the level of regulation set out in a directive but are permitted to set higher standards – provided that the stricter national rules do not violate Community law. Finally, the mutual recognition of national laws and standards does not involve the transfer of regulatory powers to the supranational institutions, but nevertheless restricts the freedom of action of national governments, which cannot prevent the marketing within their borders of a product lawfully manufactured and marketed in another member state.

The idea that economic integration demands extensive harmonisation of national laws and regulations has been criticised by a number of distinguished economists since the early years of the EC. According to the economist Harry Johnson, for instance;

[t]he need for harmonisation additional to what is already required of countries extensively engaged in world trade is relatively slight [...]. The problems of harmonisation are such as can be handled by negotiation and consultation according to well-established procedures among the governments concerned, rather than such as to require elaborate international agreements.'

(Kahler 1995: 12)

Against the harmonisation bias of the literature on economic integration, Johnson argued that the gains from harmonisation should be weighed against the welfare losses caused by harmonised rules not tailored to national preferences except in a rough, average sense. The welfare losses entailed by centralised harmonisation has become a major theme in the recent literature on free trade and harmonisation (Bhagwati and Hudec 1996), but has been largely ignored by EU policymakers and analysts. The first crisis of harmonisation was initiated by the member states' loss of trust in the capacity for self-restraint of the European institutions, rather than by

a clear realisation of the welfare losses potentially caused by the method.

The Treaty of Maastricht defined for the first time new European competences in a way that actually limited the exercise of Community powers. For example, Article 126 (now Article 149 EC) adds a new legal basis for action in the field of education, but policy instruments are restricted to 'incentive measures' and to recommendations; harmonisation of national laws is explicitly ruled out. Likewise, Article 129 (Article 152 EC) creates specific powers for the Community in the field of public health protection, but this competence is highly circumscribed as subsidiary to that of the member states; harmonisation is again ruled out. The other provisions of the Treaty – defining new competences in areas such as culture, consumer protection, and industrial policy – are similarly drafted. Unwilling to continue to rely on implicit powers, which seemed out of control, the framers of the Treaty on European Union (TEU) opted for an explicit grant that delimits the mode and the reach of action (Weiler 1999). The same approach has been followed by the Treaties of Amsterdam, Nice, and Lisbon.

In its *Tobacco Advertising* judgment of October 2000 – annulling for the first time a measure adopted under the co-decision procedure – the ECJ showed how seriously the limits on the Community's regulatory powers are taken today. The Court argued that recourse to Article 95 (on the harmonisation of national laws and regulations) must be aimed at improving the conditions of the internal market, not at market regulation in general. As the requirements for resorting to Article 95 had not been fulfilled – the prohibition of all forms of tobacco advertising neither facilitated trade nor contributed to eliminate distortions of competition – Directive 98/34 was annulled.<sup>6</sup> Such care in spelling out the limits of the delegated powers reveals growing awareness of the fact that 'harmonisation tended to be pursued not so much to resolve concrete problems encountered in the course of constructing the common market as to drive forward the general process of integration'. This, professor Alan Dashwood

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<sup>6</sup> Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services. Available at: [http://ec.europa.eu/enterprise/policies/european-standards/files/standards\\_policy/vademecum/doc/98\\_34\\_ec\\_consolidated\\_version\\_en.pdf](http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/vademecum/doc/98_34_ec_consolidated_version_en.pdf).

continues, 'was bound to affect the judgment of the Commission, inclining it towards maximum exercise of the powers available under Article 100 and towards solutions involving a high degree of uniformity between national laws' (Dashwood 1983: 194). One of the unanticipated consequences of the latest enlargements of the Union has been to call attention to the welfare costs of harmonisation – the issue economist Johnson raised in the early 1970s, but which has been ignored for thirty years.

### The changing cost-benefit calculus of harmonisation

Growing socioeconomic heterogeneity is likely to become an even more serious obstacle to top-down harmonisation than opposition to the Commission's centralising tendency. Because significant cross-country differences in socioeconomic conditions are necessarily mirrored in a diversity of national priorities, welfare-enhancing regulations have to be different rather than harmonised. This means that each new enlargement of the EU is likely to change the calculus of the benefits and costs of harmonised rules. The economic theory of clubs, originally developed by Buchanan (1965) and further developed by Casella to study the regulatory implications of expanding markets, provides a useful perspective on the socioeconomic limits to centralised harmonisation:

Once we recognise that standards are public goods fulfilling specific functions deemed desirable by the community that shares them, it becomes clear that they must reflect the characteristics of the community: preferences, endowments, and technological possibilities and constraints. Two conclusions follow. First, we expect different communities to be in need of and having different standards. There is no presumption that general standards should be the same across economies, even when they fulfil the same function, since other characteristics of the economies will differ [...] Second, standards should change as these characteristics change: standards are endogenous.

(Casella 1996: 124)

It follows that 'opening trade will modify not only the standards but also the coalitions that express them. As markets [...] expand and become more heterogeneous, different coalitions will form across national borders, and their number will rise' (ibid.: 149). The



relevance of these arguments extends well beyond the narrow area of standard-setting. In fact, Casella's emphasis on heterogeneity of endowments and preferences as the main force against centralised harmonisation and for the multiplication of 'clubs' suggests an attractive theoretical basis for the study of differentiated integration in the EU (Majone 2009: 205-34).

Before proceeding with the argument, we need to introduce the key concepts of Buchanan's theory. *Pure public goods*, such as national defence or environmental quality, are characterised by two properties: first, it does not cost anything for an additional individual to enjoy the benefits of the public goods once they are produced (*joint-supply property*); and second, it is difficult or impossible to exclude individuals from the enjoyment of such goods (*non-excludability*). A *club good* is a public good from whose benefits individuals may be excluded – only the joint-supply property holds. An association established to provide excludable public goods is a *club*. Two elements determine the optimal size of a club. One is the cost of producing the club good – in a large club this cost is shared over more members. The second element is the cost to each club member of the good not meeting precisely her individual needs or preferences. The latter cost is likely to increase with the size of the club. The optimal size is determined by the point where the marginal benefit from the addition of one new member, i.e. the reduction in the per capita cost of producing the good, equals the marginal cost caused by a mismatch between the characteristics of the good and the preferences of the individual club members. The important question is: what happens as the society becomes more complex, perhaps as the result of the integration of previously separate markets? Casella shows that under plausible hypotheses the number of clubs tends to increase as well, since the greater diversity of needs and preferences makes it efficient to produce a broader range of club goods. The two main forces driving the results of her model are heterogeneity among the economic agents, and transaction costs – the costs of trading under different standards. Generally speaking, harmonisation is desirable only when the market is small and relatively homogeneous.

Think now of a society composed not of individuals, but of states. Associations of independent states (alliances, leagues, confederations) are typically voluntary, and their members are exclusively entitled to enjoy certain benefits produced by the association, so that the theory

of clubs is applicable to this situation. Actually, since excludability is more easily enforced in the context envisaged here, many goods that are purely public at the national level become club goods at the international level (Majone 2005: 20-21). The club goods in question could be collective security, policy coordination, common technical standards, or tax harmonisation. In these and many other cases, countries unwilling to share the costs of producing the goods are usually excluded from the benefits of inter-state cooperation. Now, as an association of states expands, becoming more diverse in its preferences, the cost of uniformity in the provision of such goods – harmonisation – can escalate dramatically. The theory predicts an increase in the number of voluntary associations to meet the increased demand of club goods more precisely tailored to the different requirements of various subsets of relatively homogeneous states. It should be clear now why growing heterogeneity in the EU is such a serious problem for regulatory harmonisation; not only for total harmonisation, which is seldom used nowadays, but even for minimum harmonisation. Today, income inequality, as measured by the Gini coefficient, is greater in the socially-minded EU than in the arch-capitalist USA. Hence, it is increasingly difficult to ignore the welfare costs of harmonised regulations. In fact, heterogeneity is an obstacle not only for regulatory harmonisation, but also for its main alternative: the mutual recognition of national regulations.

## The limits of mutual recognition

Since the landmark *Cassis de Dijon* (1979) ruling, it has been thought that harmonisation problems, whatever their source may be, could be overcome by appealing to the principle of mutual recognition.<sup>7</sup> Unfortunately, also mutual recognition presupposes more homogeneity (and more trust) between countries than can be assumed in the present Union. Growing popular resistance to both top-down harmonisation and mutual recognition is the reason why the integration of the national markets for services has proved to be so problematic. ‘Is Europe still capable of moving forward?’ asked the editorial of *Le Monde*.<sup>8</sup> The topic was the draft Services Directive, then being considered by the European Parliament (EP). The editorialist of the influential French newspaper stated very clearly the dilemma

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<sup>7</sup> Judgement of the European Court available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61978J0120:EN:HTML>>.

<sup>8</sup> *Le Monde*, 16 February 2006.

facing the EU today. On the one hand, integration of the market for services is indispensable; with agriculture and industry no longer creating new jobs, only the services sector – which counts for more than 70 per cent of the GDP of industrialised countries – can contribute decisively to a reduction of the high level of unemployment in the eurozone. On the other hand, in a socially and economically highly differentiated Union, such integration implies serious social problems, in particular with respect to wages. In fact, Directive 2006/123/EC seeking to facilitate the exercise of the freedom to provide services became the most controversial piece of EU legislation in recent history.<sup>9</sup> Previous directives liberalising particular services – such as Directive 89/646 on credit institutions – the ‘Second Banking Directive’ had relied on mutual recognition and the country-of-origin principle, i.e. homecountry control.<sup>10</sup> Also Directive 89/48, which aimed to create a single market for the regulated professions, did not attempt to harmonise the length and subject-matters of professional education, or even the range of activities in which professionals can engage.<sup>11</sup> Instead, it relied on mutual recognition to prevent member states from denying access to, or the exercise of, a regulated profession on their territory to EU citizens who already exercise, or could legitimately exercise, the same profession in another member state. The question is why an approach which had been used without serious problems in the 1980s should become so controversial some twenty years later.

Like the previous directives based on mutual recognition, the draft Services Directive presented in early 2004 by Internal Market Commissioner Frits Bolkestein was based on homecountry control. Bolkestein was convinced that this was the only way to dismantle the many regulatory and bureaucratic obstacles still remaining at the national level, and to make access to the market for services as

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<sup>9</sup> Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:EN:PDF>>.

<sup>10</sup> Second Council Directive 89/646/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0646:EN:HTML>>.

<sup>11</sup> Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration. <Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989L0048:EN:HTML>>.

automatic as possible. The draft did not address sectors already covered by European regulations, such as the directives dealing with 'posted workers' working for no more than twelve months in another EU country; it only aimed to complement such measures. The most controversial aspects of the draft directive had to do with the conditions applicable to workers providing cross-border services. In principle such movement falls under the 1996 Directive on the Posting of Workers, by which *host-country* conditions are always imposed on posted workers (except for social security dues). Thus, a French firm hiring a Polish construction worker must apply French standards and regulations, and offer a French wage and French working hours. One may assume that under such conditions the firm has few incentives to hire Polish or other East-European workers; as a result, labour mobility across Europe is severely restricted.

The 2004 Bolkestein draft explicitly stated that the directive on posted workers would not only remain in force, but in case of conflicting rules it would prevail over the new directive. The proposed regulation focused instead on the temporary provision of services rendered by self-employed individuals in another EU country. Article 16 of the draft stated: 'member states shall ensure that [service] providers are subject only to the national provisions of their member state of origin'. According to economist Kostoris Padoa-Schioppa;

[t]his sentence by itself, if adopted, would have implied a true revolution. That was so well understood by trade unions, by protected employees and by their parties in continental Western Europe that they aimed only at its cancellation, after massive demonstrations where they pretended to represent social Europe.

(Padoa-Schioppa 2007: 741)

The Services Directive finally approved in December 2006 – against the strong opposition of East European governments – made no reference to the homecountry principle, so that the host country rule now applies to self-employed and to employee workers. As a matter of fact, the new directive does little more than restate principles that have evolved in the case law concerning the freedom to provide services and the freedom of self-employed professionals and companies to set up the base of their operations anywhere in the EU ('freedom of establishment').

A recent reconstruction of the history of the Services Directive from the initial draft to the approval by the EP and the Council of the final, watered-down, text in December 2006 concludes that;

[t]here is little doubt that the EU's biggest enlargement since its inception conditioned the reactions to the services proposals [...] the level of differences in national regulatory and legal settings was becoming too great to sustain the permissive consensus on liberalisation that had (more or less) prevailed until then.

(Nicolaidis and Schmidt 2007: 724)

The campaign against the 'Frankenstein Directive' – as the Bolkestein draft had been renamed by its opponents – could elicit popular support because diffuse fears of 'social dumping' and wage competition, previously associated with globalisation, now had a specific (East-) European focus. After the eastern enlargement, public opinion could be fed concrete images such as that of 'the Polish plumber' taking away jobs from French workers – an intentionally deceptive symbol since France has a minimum-wage law, but one which played a role in the rejection of the Constitutional Treaty, as well as in the fate of the Bolkestein draft.

After passage of the watered-down services directive, some economists predicted that it would take a decade, or more, to have an internal market for services. However, such predictions were based on the assumption of rapid economic convergence between the new member states and the old EU 15 – a doubtful assumption in view of the fact that the process of enlargement is far from being concluded. Thus, Nicolaidis and Schmidt (2007) report that in Poland Solidarity justified its opposition to the Bolkestein draft by pointing to the risk that Polish workers would soon suffer from wage differentials with Ukrainian workers. Obviously, the argument could be repeated with each new enlargement bringing in countries whose GNP is considerably below the EU average, say, the Balkan countries or Turkey.

The principle of mutual recognition is supposed to play a key role also in the area of Justice and Home Affairs (JHA). At the Tampere European Council of 1999 it was decided that this principle should become a cornerstone of judicial cooperation in both civil and criminal matters within the EU. The first, and symbolically most

important, measure to apply mutual recognition in JHA was the Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW). According to this measure, a decision by the judicial authority of a member state to require the arrest and return of a person should be recognised and executed as promptly and as easily as possible in the other member states. Being based on mutual recognition, the EAW Framework Decision presupposed the essential equivalence of national standards, in this case standards of criminal law. For this reason the Ministers of Justice of the EU had initially agreed to limit the application of the Decision to the members of the old EU 15, where the assumption of equivalence of standards of criminal law was likely to be more easily satisfied. The agreement was later reversed by the Committee of Permanent Representatives on political grounds, but the initial doubts were apparently justified: recent decisions by national courts show that the necessary level of trust in each other's judicial systems cannot be assumed (Lavenex 2007).

## Social harmonisation

Let us return to regulatory harmonisation. One of the standard arguments in favour of top-down harmonisation of national laws and regulations is the need to prevent the possibility that the members of the EU take advantage of the single European market to engage in a competitive lowering of social standards ('social dumping') in order to attract foreign investments. Indeed, many measures of positive integration in the areas of health, safety, and environmental regulation, have been justified by the argument that without EU-level harmonisation member states would engage in a socially undesirable 'race to the bottom'; i.e. they would compete for industry by offering social standards that are too lax relative to the preferences of their citizens. It is not difficult to show, however, that the argument is unsound – not only in our case, but generally. Following Richard L. Revesz (1992) we may take the simplest case of two states that are identical in all relevant aspects, including (say) the level of environmental quality desired by their citizens. State one initially sets its standard of pollution control at the level that would be socially optimal if it were a completely independent country. State two then decides to set a less stringent standard, and we assume that industrial migration from State one to State two will ensue. To recover some of its loss of jobs and tax revenues, the first state then considers relaxing

its own standard, and so on. The process of adjustment continues until an equilibrium is reached. At the conclusion of the race, both states will have adopted sub-optimally lax standards, but will have roughly the same level of industrial activity as before engaging in the race. If the two states could enter into a cooperative agreement to adopt the optimal stringent standard they could maximise aggregate welfare without engaging in 'unfair' competition for industry. This presupposes, of course, that the agreement is enforceable and that preferences for environmental quality are about the same in the two jurisdictions. As long as the jurisdictions are independent states, any cooperative agreement would lack credibility, but the situation is different if they are part of a federal or quasi-federal system. In such a case the sub-optimal outcome could be avoided if national environmental standards were harmonised – *provided* that the harmonised standards were equal to the standards the two states would find optimal if they were independent. The proviso about the equality between the harmonised and the optimal national standards is crucial; it implies what has already been noted above, namely that in a highly heterogeneous union of states, rules that maximise welfare should be different rather than harmonised. If the level of socioeconomic heterogeneity is high, even a minimum common standard reduces aggregate welfare – unless the minimum is lower than all the national standards, in which case it is useless.

Moreover, Revesz points out that the race-to-the-bottom argument is incomplete because it fails to consider that there are more direct means of attracting foreign investments than lowering social standards. The advocates of social harmonisation implicitly assume that states compete over only one variable, such as environmental quality or labour costs. Given the assumption of a 'race', however, it is more reasonable to suppose that if harmonisation prevents competition on the social dimension, states would try to compete over other variables, such as taxation of corporate profits. To avoid such alternative 'races', the central regulators would have to harmonise national rules, so as to eliminate the possibility of any form of inter-state competition altogether. This would amount to eliminating any trace of national autonomy, so that the race-to-the-bottom argument is, in the end, an argument for centralisation and against subsidiarity.

Naturally, the fear of social dumping is not the only rationale for harmonisation of social standards. A more plausible argument for EU-wide harmonisation is the need to dismantle non-tariff barriers to trade within the Single Market. Even in this respect, however, *ex ante*, top-down harmonisation may have been pushed too far. A number of case studies have shown that the costs imposed by social standards are only a minor consideration in the location decisions of multinational firms: quality of infrastructure, education of the labour force, or political stability are much more important factors influencing their decisions (Majone 2005: 153-5). Today it is also recognised that an initial difference in health, safety, or environmental standards need not distort international trade; rather it is trade itself that leads to their eventual convergence. The reason is that the level of social standards is positively correlated with the standard of living: as wealth grows as a result of more inter-state trade, the endogenous demand for higher social standards grows as well. As a matter of fact, the 1957 Treaty of Rome rejected the view that differences in social conditions between the member states represent a form of 'unfair' competition, so that social regulations ought to be harmonised prior to, or concurrently with, trade liberalisation within the common market. Rather, the Treaty, and the authors of the Treaty's precursor, the Spaak Report, assumed that social harmonisation should in general be regarded as a corollary of, rather than a requirement for, market integration; a rapid amelioration of living standards throughout the Community would bring about an *ex-post* harmonisation of social conditions (Sapir 1996). This assumption has proved to be largely correct, at least in the old EC/EU.

## Inter-state competition as a preference-revelation device

The theory of clubs explains why in an expanding and increasingly diversified polity, net aggregate welfare is enhanced, not by centralised harmonisation, but by allowing a variety of rules tailored to the resources and preferences of different communities. This line of reasoning can be further strengthened by the argument that inter-state or inter-jurisdictional competition, as well as policy innovation and learning, are more likely to occur in a decentralised system. Thus, policies that prove to be politically unfeasible in the EU at large might be acceptable to the members of smaller, more homogeneous subsets



of states – or trans-national communities with common interests and similar priorities. Instead of compromise solutions that do not really satisfy anyone, genuine policy innovations would become possible – albeit on a smaller scale – and other states or communities could later draw lessons from the practical experience of the pioneering groups. In this way the ‘clubs’ forming within the Union, or cutting across its borders, could effectively become policy laboratories, without the bureaucratic complications and background noise that necessarily arise when all the member states are expected to participate in the experiment, as in the case of the Open Method of Coordination (OMC).

In an important contribution to the economic theory of politics and public finance, Breton (1996) has shown that competition within and between governments drives democratic politics to equilibrium outcomes by revealing the citizenry’s demand functions for public goods and services. Rules on market competition are a key element of the EU institutional framework. As already mentioned, a common European market would be practically impossible without such rules; but this pro-competitive philosophy does not extend to inter-jurisdictional competition – in particular to competition between different national approaches to economic and social regulation. Indeed, a well-known legal scholar maintains that regulatory competition is incompatible with the notion of undistorted competition in the internal European market. For this reason the UK – the member state which has most consistently defended the benefits of inter-state competition – has been accused of subordinating individual rights and social protection to a free-market philosophy incompatible with the basic aspirations of the European Community: ‘Competition between regulators on this perspective is simply incompatible with the EC’s historical mission’ (Weatherill 1995: 180). Unsurprisingly, Breton finds that in the EU inter-country competition has been virtually suppressed through excessive policy harmonisation. His conclusion is worth quoting here:

[in the EU] competition is minimised through excessive harmonisation of a substantial fraction of social, economic, and other policies [...] if one compares the degree of harmonisation in Europe with that in Canada, the United States, and other federations, one is impressed by the extent to which it is greater in Europe than in the federations'

(Breton 1996: 275-6)

The Canadian economist points out that part of the opposition to the idea that governments, national and international agencies, vertical and horizontal networks, and other organisations, should compete among themselves derives from the widespread notion that competition is incompatible with, even antithetical to, cooperation. He cogently argues that this perception is mistaken. Excluding the case of collusion, cooperation and competition can, and generally do, coexist, so that the presence of one is no indication of the absence of the other. In particular, the observation of cooperation and coordination does not per se disprove that the underlying determining force may be competition. If one thinks of competition not as the *state* of affairs neoclassical theory calls 'perfect competition', but as an *activity* – à la Schumpeter and Hayek – then it becomes plain that 'the entrepreneurial innovation that sets the competitive process in motion, the imitation that follows, and the Creative Destruction that they generate are not inconsistent with cooperative behaviour and the coordination of activities' (ibid.: 33). Given the appropriate competitive stimuli, political entrepreneurs, like their business counterparts, will consult with colleagues at home and abroad, collaborate with them on certain projects, harmonise various activities, and in the extreme case integrate some operations – all actions corresponding to what is generally meant by cooperation and coordination.

In some governmental systems the potential movement of citizens from one jurisdiction to another offering comparable services at lower cost may act as a stimulus to intergovernmental competition. According to the so-called Tiebout hypothesis, inter-jurisdictional competition results in communities supplying the goods and services individuals demand, and producing them in an efficient manner. Breton, following Pierre Salmon, extends this hypothesis to governmental systems where Tiebout's potential entry and exit mechanisms do not work effectively, for instance because mobility is

limited by language and/or cultural and social cleavages, as in the EU. The extension consists in assuming that the citizens of a jurisdiction can use information about the goods and services supplied in other jurisdictions as a benchmark to evaluate the performance of their own government. This is of course the idea underlying the OMC, but the results of the method so far have been disappointing (Majone 2009). One important reason is that national parliaments are largely excluded from the OMC process, so that citizens are unable in practice to use information about the performance of other member states to induce their government to improve its own. Thus, the stimulus to intergovernmental competition is missing, which is assumed by the proposed extension of the Tiebout hypothesis.

Like market competition, interstate or inter-jurisdictional competition need clear rules and forceful competition regulators. Hence, in the model of differentiated integration suggested here – a variety of ‘clubs’ cooperating and competing within a general framework of common rules, preferably legitimated by referendums to be held simultaneously in all the member states, the European Commission and Court would still play a crucial role in enforcing both the rules of negative integration and the meta-rules of interstate/inter-jurisdictional competition. Many people will strongly object to the idea of a Union limited to managing negative integration and monitoring regulatory competition. In the following sections, I argue that the opportunity cost of giving up overly ambitious goals is not as high as it is often assumed – indeed, there may be a net gain of legitimacy and effectiveness.

## **Integrationist myths**

Let me start by recalling Lipset’s point that legitimacy and effectiveness are distinct but closely related concepts, especially in the case of new political systems: if a new polity is unable to sustain the expectations of major groups for a long enough period to develop legitimacy on a new basis, then a serious legitimacy crisis is likely to arise, sooner or later (Lipset 1960: 64-70). To which extent has the EC/EU been able to sustain the expectations of the majority of Europeans? The opening lines of the Commission’s White Paper on *European Governance* claim:

European integration has delivered 50 years of economic prosperity, stability and peace. It has helped to raise standards of living, built an internal market and strengthened the Union's voice in the world. It has achieved results which would not have been possible by individual member states acting on their own.

(European Commission 2001: 9)

The same optimistic message is reiterated by EU leaders on every possible occasion. In reality the accomplishments celebrated by the political elites are more in the nature of legitimating myths than actual achievements of European integration (Majone 2009: 81-90). This is not to deny that such myths, like all myths, contain a grain of truth. It is certainly true that since the end of World War II Europe has experienced unprecedented prosperity. The doubts concern, not the evidence of economic progress which gives the myths the necessary plausibility, but the causal role of the integration process in the economic development of the continent. If that causation cannot be clearly determined – and most accurate quantitative studies indicate that the gains from the Common Market were very small in relation to the increases in income that the member states enjoyed in the 1950s and '60s – then it must be admitted that the myth of fifty years of prosperity made possible by European integration rests on the *post hoc, ergo propter hoc* fallacy; inferring a causal connection from a mere sequence in time. Between 1950 and 1970 Europe was the fastest-growing region in the world, Japan excepted. During this period European GNP grew on average by about 5.5 per cent per annum, and industrial production by 7.1 per cent, so that by the end of the period output per head in Europe was almost two and a half times greater than in 1950. However, 'this growth was shared in all parts of the continent – in north-western Europe's industrial core, in the Mediterranean lands, in eastern Europe; even the sluggish British economy grew faster during this period than it had for decades' (Kennedy 1987: 421). In sum, the earliest stages of economic integration of the six original members of the European Economic Community (EEC) could not have played a significant causal role in the impressive post-war development of Europe.

After the phase of very rapid catch-up with the United States, moreover, convergence in the levels of per capita income stopped at the beginning of the 1980s and has remained unchanged since, at

around 70 per cent of the U.S. level. A common trade policy, extensive harmonisation of national laws and regulations, the Single Market Programme, and finally a centralised monetary policy, made apparently no difference as far as the economic performance of the EC/EU, relative to its major competitors, was concerned. While the American economy was generating employment as well as maintaining working hours, Europe's employment performance was weak and working hours fell consistently:

Overall growth slowed from the 1980s, which itself had slowed from the 1970s, in spite of the implementation of far-reaching reforms in both the macro-environment (consolidation of public finances and lower inflation, EMU) and micro-environment (Single Market Programme, Uruguay Round and to a certain extent labour market reform)

(Sapir et al. 2004: 25)

The will to improve poor economic performance has driven EU policy over the last thirty years: from the Single Market Programme, meant to be a response to perceived 'Eurosclerosis' in the 1970s and '80s, to the economic and monetary union (EMU) in the 1990s, and to the 'Lisbon Strategy' in the following decade. At the summit held in the Portuguese capital in March 2000, the European Council announced two unrealistic objectives: by 2010 the EU should become the 'most competitive, knowledge-based economy in the world'; in the same period it should grow at an annual average rate of three per cent, so as to create 20 million new jobs. In fact, the data show that, far from closing the gap, and then overtaking the U.S. economy, the EU as a whole continues to lag behind in terms of employment and productivity, and in most years also in terms of growth rates. Although generally ignored by writers on the democratic deficit, the ineffectiveness of many EU policies has significant implications for the legitimacy and stability of the EU system. Shackleton (1998) has argued that it is not necessary for the EU to meet the same level of legitimacy as its member states, provided that it delivers a reasonable level of benefits in terms of efficiency. This may be true, but the problem is that only pro-integration elites seem to agree that the EU satisfies even Shackleton's modest standard.

Disappointed expectations are one important, if not the main reason why the EU, instead of progressively attracting the loyalty of its

citizens, with the years is becoming less popular. 'The Union is losing touch with citizens on concrete issues', warned the EU foreign ministers at a meeting on 16 June 2008, after the Irish voters had rejected the Lisbon Treaty. Indeed, the concomitance of the referendum with protests across Europe against rising food and energy prices underlined a loss of confidence among significant parts of the electorate in the EU's ability to deal with everyday issues. Inflation and economic stagnation had hit hard on the European economy in the 1970s as well, yet few people at the time accused the EC of being unable to deal with everyday issues. The politically significant new factors in the present legitimacy crisis are: the end of what has been called the 'permissive consensus' of the 1960s and 1970s; the growing divergence between elite and popular estimations of the value added by integration; and at the most basic level, the steady expansion of supranational competences without a corresponding growth either in problem-solving capacity or in normative resources. Since its beginning, the process of European integration has been driven by economics. Indeed, the essence of the Monnet method consists in pursuing political integration under the guise of economic integration – integration by stealth. The major risk of this strategy is that poor economic performance over a period of decades may undermine the normative foundations of the entire integration project.

What about the claim that European integration delivered fifty years of peace and stability, and strengthened the Union's voice in the world? Peace in Europe as the greatest achievement of the integration process is the most common argument in Euro-rhetoric, but largely a fiction nevertheless – in fact, another instance of the *post hoc, ergo propter hoc* fallacy. It is certainly true that since the end of World War II Western Europe has enjoyed more than half a century of uninterrupted peace. Doubts concern, once more, the causal role of European integration in this achievement. A moment's reflection suggests that it is hardly believable that after the disastrous results of two world wars in fifty years, West European states had either the resources or the will to once again use military means to resolve their conflicts. This is precisely the conclusion Hirschman reached some thirty years ago:

[T]he European Community arrived a bit late in history for its widely proclaimed mission, which was to avert further wars

*between* the major Western European nations; even without the Community the time for such wars was past after the two exhausting world wars of the first half of the twentieth century.  
(Hirschman 1981: 281)

In the same essay Hirschman advanced the 'ironic conjecture' that although the EC had arrived too late to claim to have averted further wars between European countries, it could nevertheless have as one of its important missions 'the avoidance of civil wars or wars of secession *within* some of the Western European countries, as it provides the newly secession-prone regions with novel channels for voice' (ibid.; emphasis in the original). It is doubtful, however, that the EU has either the moral or the institutional resources necessary to intervene in conflicts of this type. Being one of the founding members of the EC, and actually hosting its headquarters, has not helped Belgium to bridge the deep division between Flemish and Walloons which undermines the foundations of their federation. According to some Flemish leaders 'it is the entire Belgian construction that is going to implode',<sup>12</sup> but no mention has ever been made of a potential mediating role by the EU. Neither is it the case that Spain's membership in the Union has helped terminate four decades of violence in the Basque region that has claimed more than 800 lives. Northern Ireland seems to have finally found peace, but the EU as such hardly played a role in the peace process.

Performance has been even more disappointing in the EU's 'near abroad'. When the Yugoslav crisis broke out in June 1991, Jacques Poos, the rotating president of the European Council, unwisely declared: 'This is the hour of Europe, not the hour of the Americans' (cited in Wallace 2005: 437). Unfortunately, the EU proved unable to enforce stability and peaceful coexistence among the peoples of the former federation, and had to appeal to the United States for help. The civil war in Bosnia was ended by the intervention of the American superpower, which also mediated and guaranteed the Dayton Agreement of November 1995 between Serbs, Croats, and Moslems. Again in 1999, this time in Kosovo, the EU was forced to ask the military assistance of the United States; an assistance President Clinton provided only under the condition that the war would be conducted on American terms, i.e. only from the air and on

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<sup>12</sup> *Le Monde*, 27 August 2007

targets selected by the US military – with the well-known disastrous consequences for the population and the civilian infrastructure of Serbia. On a number of other occasions the EU – ‘one of the most formidable machines for managing differences peacefully ever invented,’ according to some starry-eyed academics (Menon et al. 2004: 11) – proved incapable of taking at least adequate diplomatic and economic sanctions. Thus, it failed to impose sanctions on Uzbekistan when in May 2005 the armed forces of that country opened fire on peaceful demonstrators in the city of Andijan, probably killing several hundreds. The EU expressed horror at the worst massacre of demonstrators since Tiananmen Square, but in practice it displayed, in the words of the editorialist of *The Economist*,<sup>13</sup> a ‘spinelessness worthy of a sea full of jellyfish’.

Finally, a small but influential body of elite opinion sees not only economic, but also political integration as steps toward the ultimate goal of a ‘Social Europe’. Only a strong social dimension, they claim, can legitimate the process of European integration, and rescue the national welfare state threatened by globalisation. After the rejection of the Constitutional Treaty, then Belgian Prime Minister Guy Verhofstadt claimed that the French and Dutch voters had opposed the treaty, not because it was too ambitious, but because it did not go far enough in the direction of a supranational welfare state. Also Habermas explained the failure of the draft Constitution primarily as an indication of the opposition of the voters to the neo-liberal bias of the document, and as an expression of popular demand of a more welfare-oriented Union. In a newspaper article Habermas wrote: <sup>14</sup>

If something can be deduced with certainty from the [French and Dutch] vote, it is this: that not all western nations are willing to accept the social and cultural costs of welfare inequality, costs which the neo-liberals would like to impose on them in the name of accelerated economic growth.

In reality, European voters, not neo-liberalism, are the real obstacle to the establishment of a European welfare state.

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<sup>13</sup> *The Economist*, 27 August 2005

<sup>14</sup> *Sueddeutsche Zeitung*, 9 June 2005.



One of the major strengths of the welfare state is the broad electoral base for core social programmes. Naturally enough, the same voters who strongly support the national welfare state also resist any significant transfer of social policy competences to the European level. Eurobarometer data mapping the responses of citizens in the EU 15 with regard to their preferred level of government for social policymaking, indicate that merely one-third of the population is favourable to a shift of social policy competence to the Union (Obinger et al. 2005: 556). The only countries where a majority of citizens support social-policy integration are the net receivers of European transfers. If such countries are excluded, then the data show that support for a European social policy has declined among the wealthier member states, and net contributors to the EU budget, at least since the late 1980s. The impossibility of transferring to the supranational level even a 'light' version of the existing welfare states implies the political unfeasibility of a European federal state. A full-fledged European federation would face a highly constrained public agenda, being barred from pursuing policies subsidising particular socioeconomic groups or jurisdictions at the expense of other identifiable groups or jurisdictions. Hence, it could not pursue precisely those redistributive policies that legitimate the national welfare state; and being unable to provide the variety of public goods citizens of modern welfare states take for granted, it could not attract sufficient popular support – or retain it for long. *Pace* Habermas and Belgium's former prime minister Guy Verhofstadt, the root of the EU's democratic deficit is not an alleged social deficit, but a *sui generis* political culture.

### The primacy of (positive) integration

The core principle of this culture is the primacy of integration; democracy as well as policy effectiveness have been willingly sacrificed on the altar of integration. Community law, Jacqu  tells us, 's'est vu assigner un objectif  conomique   court term, la construction d'un march  commun, et un objectif politique   plus long term, la creation d'une Union europ enne' (Jacqu  1991: 247). Two different objectives with different time horizons inevitably raise a 'time-inconsistency' problem. Because democracy is a system of government *pro tempore*, democratic politicians tend to resolve the problem in favour of short-term goals; this is the main rationale for the independence of central banks. In the EC/EU, a polity largely

exempt from the uncertainties of democratic politics, the long-term objective generally prevails. Hence the Commission's monopoly of agenda setting (see below), but also measures of positive integration undertaken less to solve problems which could not be tackled at the national level, than as a means of expanding supranational competences. People familiar with policymaking in Brussels discovered this bias long time ago. For instance Lucas, who analysed Community energy policy from the late 1950s to the mid-1970s, concluded that:

[s]ectorial policies will not be designed simply to produce an optimal technical solution, but to some extent will be designed to promote the influence of the Commission and to forward the aim of European political unity [...] technical soundness need not be a high priority in Commission work

(Lucas 1977: 96-97)

Similar observations have been made in other, very different, policy fields. For example, the Common Fisheries Policy (CFP) – one of the few areas of exclusive competence of the EU – has largely failed in its aim of conserving fishery resources, notwithstanding its seemingly institutional advantages over other international fisheries regimes (Majone 2005: 111-4). The problem is that the CFP has been shaped more by concerns about Community powers than about effective conservation measures. According to Symes and Crean:

[t]he underlying principles of the CFP [...] have more to do with reinforcing the concept of European unity and co-operation than with effective management of a seriously depleted, highly sensitive and unstable resource. The CFP is a political statement neatly aligned with the Community's general principles, and designed to avoid rocking the European boat.

(Symes and Crean 1995, cited in Payne 2000: 312)

Insiders, too, have paid tribute to the skill of the Commission in using all the ambiguities built into the European treaties in order to advance integrationist objectives by roundabout means. In the words of one of the first and most influential members of the college of Commissioners:

The Commission was determined to push ahead with the process of integration, not only in the economic field but also from the institutional and political aspects, and to this end to make use of all weapons and methods provided in the [Rome] Treaty and to employ all the opportunities for further development.

(von der Groeben 1987: 31)

This roundabout strategy – integration by stealth – is made possible by the first rule of the Community Method: ‘The Commission is independent of the other European institutions; it alone makes legislative and policy proposals’ (European Commission 2001: 12). The Commission’s monopoly of legislative and policy initiative implies that other European institutions, including the parliament, cannot legislate in the absence of a prior Commission proposal. It is up to this institution to decide whether the Community should act and, if so, in what legal form, what should the content be, and which implementing procedures should be followed. The Commission can amend its proposal at any time while it is under discussion, but the Council can amend the proposal only by unanimity. On the other hand, if the Council unanimously wishes to adopt a measure that differs from the Commission’s proposal, the latter can deprive the main Community legislator of its power of decision by withdrawing its own proposal. This monopoly of agenda setting granted to a non-elected body represents a violation of fundamental democratic principles that is unique in modern constitutional history (Majone 2009: 30-2). It is of course true that in contemporary parliamentary systems most legislative proposals are introduced to parliament by the executive as draft legislation. Once legislators receive such proposals, however, they are free to change or reject them, which is not the case under the Community Method.

Some years ago a sympathetic American observer noted: ‘It is unimaginable that Americans would grant such political power as the Commission staff enjoys to a career bureaucracy. Not surprisingly, the people of Europe increasingly expect democratic accountability by Community political and bureaucratic leaders’ (Rosenthal 1990: 303). These words were written a few years after the Single European Act (SEA) greatly extended the Community’s competences. It is indeed significant that the issue of the democratic deficit was hardly ever raised before the SEA. The delegation of important

policymaking powers to a non-elected body could be normatively justified as long as the Community's powers remained limited. What was originally a trade-off at the margin – a small sacrifice of democracy for the sake of greater efficiency in limited areas of economic integration – became a surrender of basic democratic principles as the competences of the EU kept growing. In the early stages of integration, moreover, the primacy assigned to integration could be viewed as a temporary expedient. Neo-functionalist scholars assumed that the superior problem-solving capacity of the supranational institutions would be sufficiently evident to induce the progressive transfer of the loyalties and political demands of key social groups from the national to the European level. This is what Ernst B. Haas meant by political integration: 'Political integration is the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities to a new centre, whose institutions possess or demand jurisdiction over pre-existing national states' (Haas 1958: 16). The progressive shift of legitimacy to the supranational level has not taken place, quite the contrary. Hence, it is impossible to pretend that the primacy of integration is only a temporary phenomenon.

The willingness of integrationist EU leaders to sacrifice democracy for the sake of deeper integration was again demonstrated at the time of the Maastricht Treaty, when it was decided to give quasi-constitutional status (i.e. a treaty basis) to the independence of the European Central Bank (ECB). Before the monetary union, the independence of national central banks had only a statutory basis. This meant that in principle national parliaments could always change the rules if they thought the central bank was using its independence in a way of which they did not approve. This was the truth for the Bundesbank, and is still true for the Bank of England and for the U.S. Federal Reserve. Instead, to change the rules under which the ECB operates requires a treaty revision acceptable to all the member states – a complex and politically hazardous procedure. The net result is that the national parliaments have lost control over monetary policy, while the EP has no authority in this area. The ECB is free to operate in a political vacuum since there is no true European government to balance its powers, and even the institutions of economic governance are still poorly defined. Unless the holes in the policymaking machinery are filled, authority over the entire domain of monetary policy will continue to flow, by default, to the ECB.

Monetary economists generally agree that the socially optimal delegation of monetary policy is not to a completely independent central bank; rather, governments should have the option of overriding central bank's decisions under some circumstances. This is because there is a trade-off between the competing benefits of commitment to monetary stability and flexibility in responding to unanticipated shocks. But since there is no secretary of the treasury or finance minister at the European level, it is unclear how appropriate procedures for overriding ECB decisions could be designed and enforced. This is a revealing example of how the democratic deficit entails not only normative but also efficiency costs: it deprives the EU of many instruments which democratic governments can use in order to face serious crises, or to reduce political transaction costs (Majone 2010).

## **Negative integration improves the democratic process and fosters cosmopolitanism**

Every expansion of positive integration, if unmatched by a corresponding increase of legitimacy and problem-solving capacity, can only aggravate the EU's democratic deficit; and because of the eurocentrism built into this mode of integration (Majone 2009: 79-81), it adds to the obstacles facing a cosmopolitan vision of the EU. In contrast, implementation of the commonly agreed rules of negative integration can improve the quality of democratic life at national level; and by implementing the model of a supranational constitutional order it familiarises Europeans with the notion of a rule-based, rather than power-based, global order. Contemporary western democracies are constitutional democracies, but 'democracy' and 'constitutionalism' are, both historically and conceptually, distinct ideas. While a constitution is an instrument to limit, control and divide the power of governments, democracy – at least in its populist version – it tends to concentrate potentially unlimited power in the hands of the current majority. According to the populist model, majorities should be able 'to control all of government – legislative, executive and, if they have a mind to, judicial – and thus to control everything politics can touch' (Lijphart 1991: 485). Today it is generally admitted that a constitutionally unconstrained democracy is not only more unstable but also less efficient than a constitutional democracy. This is because constitutional constraints, like most other constraints, are enabling as well as limiting. It is only an apparent

paradox that Jean Bodin – the first modern theorist of sovereignty and absolutism – was also one of the first political philosophers to point out that limited power is more powerful than unlimited power, and that by closing off some options a ruler can open up others. As he writes in Book IV of the *République*: ‘The less the power of the sovereign is...the more it is assured’ (cited in Holmes 1995: 115). Bodin understood very clearly that in order to achieve his objectives a king must cultivate a reputation for trustworthiness, and this requires him to play by the rules. In similar fashion, constitutional constraints improve the effectiveness of the modern sovereign – the sovereign people – by guaranteeing property and basic civil rights, limiting arbitrary executive discretion, and enhancing the credibility of long-term policy commitments.

Constitutional scholars have been concerned about the ‘eclipse of constitutionalism’ in twentieth century Europe (Matteucci 1993). During this period, the need to tax, spend, and borrow to finance two world wars and extensive welfare provisions greatly increased the economic role of the state. The constitutional consequence was to strengthen the executive branch of government. The assumption of macroeconomic responsibilities by the ‘Keynesian state’ further extended the already wide discretionary powers of the executive. In the end, it was inevitable that the old constitutional truth would be rediscovered: that discretionary powers can be abused and that the prevention of such abuse is, to a large extent, a matter of good institutional design (Harden 1994). In Europe the rediscovery of the virtues of constitutionalism has been greatly facilitated, perhaps made possible, by the process of economic integration. Keynesian policies require not only extensive discretionary powers to ‘fine-tune’ the economy, but also the separateness of the national economies. The creation of a common European market and the attendant rules of negative integration, meant that governments could no longer pursue protectionist policies within the EC, nor continue to protect public and private monopolies within the national borders. The discipline imposed on state subsidies and on the methods of public procurement further reduced the discretionary powers of the national executives – and the various forms of rent-seeking and political corruption which often accompany administrative decisions in these areas. Notice, too, that the enhancement of the power of the executive at the expense of parliaments (‘executive dominance’) caused by the transfer of competences to the Community, is largely attributable to

the proliferation of measures of positive integration, rather than to the rules of negative integration.

The constitutionalisation of the EC/EU and the evolution of dispute-resolution mechanisms in the GATT/WTO are notable examples of what, in spite of occasional lapses, appears to be a general trend: the transition from a power-oriented to a rule-oriented approach in international economic relations. Under the former approach, international disputes are settled by negotiations where the relative bargaining power of the parties inevitably counts a great deal. Failure to reach agreement would involve the use of all instruments of retaliation – economic, political, possibly even military – available to the more powerful country. Understandably, a small country would hesitate to oppose a large one on whom its trade and international position depend. Under a rule-oriented approach, on the other hand, disputes are resolved by reference to norms to which both parties have agreed. The current movement towards a rule-based system of international relations in a sense recapitulates the process of progressive constitutionalisation of domestic governance during the last two centuries. Transnational constitutionalism may not be a prelude to transnational democracy, but as noted above it can improve the quality of democracy at the national level, and contribute to the formation of a political culture of cosmopolitanism, by constraining the discretionary powers of the nationstate.

In order to realize the democratic and cosmopolitan potential of transnational systems of rules, national parliaments must devise more effective ways of enforcing public accountability at European and international level. Concretely, this means that national legislatures should assume an active role in areas traditionally reserved to the executive branch of government. Historically, the domain of foreign affairs has been regarded as a core executive function over which parliaments have had difficulty in extending their control. Even the 'sovereign' British parliament has failed to establish full control over foreign affairs and treaty-making – in the past, both aspects of the royal prerogative. In an age of growing interdependence among nations, however, any sharp distinction between 'domestic' and 'foreign' is becoming increasingly difficult to maintain. It is certainly true that, as noted above, European integration has weakened the position of national parliaments to the benefit of national executives and of the supranational institutions.

Nevertheless, some parliaments have undertaken to react to the challenge of supranationalism by strengthening their control of the executive branch. The most stringent control is through mandate, and the Danish parliament, on accession to the EU, has extended to the supranational level its constitutional power to mandate its ministers in matters relating to European policymaking. No other member state has adopted the mandate model, but everywhere mechanisms are put in place to ensure better control of European policymaking by the national parliaments (Harlow 2002).

## Concluding remarks

Eriksen and Fossum (2008) express the fear that a significant downscaling of the present EU would imply: a serious loss of the protective apparatus of human rights; a weakening of the constraints on aggressive nationalism; possibly the end of positive integration measures, including some redistributive schemes; and a loss of organised capacity to make binding decisions. The arguments and evidence presented in the preceding pages suggest that such fears are either ungrounded, or that the feared losses may be more than compensated by potential benefits. For example, the enforcement of positive rights at the EU level can only increase the democratic deficit for the simple, but often overlooked, reason that such rights – say, the right to education or to a clean environment – entail costs, and hence cannot all be enforced simultaneously. They have to be prioritised and traded off at the margin, and in a democracy such choices are made through the political process rather than by bureaucratic fiat or through interstate bargaining based on opaque package deals. Again, losses of power due to downscaling of EU competences may be more than compensated by the reduction of commitments which exceed the available normative and institutional resources. It was precisely the recognition of the importance of matching commitments and resources that led Tocqueville to observe that ‘the real weakness of federal [i.e., central] governments [in confederations] has almost always increased in direct proportion to their nominal powers’ (cited in Breton 1996: 247). I have argued that reducing the present overload would actually increase the effectiveness of the Union by forcing the supranational institutions to concentrate on what they can do best: monitoring the implementation of commonly agreed rules and the enforcement of rights protected by European law. More concretely, a clearly defined range of tasks would help reduce the democratic



deficit by allaying widespread fears of creeping competences and of government by judiciary.

Before concluding I would like to add a few comments on the three models considered by the RECON project, as well as on the issue of accountability. Concerning Model one, I think it is increasingly difficult to envisage the present EU as a functional regime to address issues which the member states cannot resolve on their own. I have repeatedly stressed that the EU's problem-solving capacity is limited: examples of commitments unmatched by actual achievements and of outright regulatory failures, abound (Majone 2005, 2009). Policy failure is a well-known phenomenon also at the national level, of course, but where the voters can express their dissatisfaction by changing the governing majority at the next elections. Failed European policies and institutions can survive for years, sometimes for decades: The European Atomic Energy Community (EURATOM) still manages to survive. At any rate, growing socioeconomic heterogeneity is a key factor behind the impending mutation of the regulatory regime from positive to negative integration. As suggested by the economic theory of clubs, positive integration above the national level can still be welfare-enhancing, but on a scale smaller than the present EU.

While I stress the limitations of the EU as a functional regime, I fully acknowledge its importance as a device to limit the discretionary powers of national governments. Future historians may well consider supranational constitutionalism to be the greatest achievement of the integration process. This same process has also demonstrated how difficult it is to transfer the national model of democracy to the supranational level. The experiment seems to have failed, in spite of the fact that the background conditions were probably more favourable in Europe than in any other part of the world. This, in itself, is a very important lesson, because it shows that the third transformation of democracy – cosmopolitan democracy, after the direct democracy of the Greeks, and modern, nationstate based, representative democracy – is very unlikely to be a simple extrapolation of the national model.

More precisely, such an extrapolation would perhaps be possible, at least in our continent, if a majority of European voters supported the establishment of a European federal state – and were prepared to

accept the inherent limitations of a multinational federation. I have no doubts that in such a case the institutional architecture of the polity envisaged by Model two would satisfy all democratic canons. For the reasons, however, a federalist solution appears to be unfeasible for the foreseeable future. Of course, federalists are entitled to continue their efforts to convert to their credo as many people as possible. What is unacceptable, as well as counterproductive, is the tendency to pursue positive integration *as if* the EU was bound to become a federal state. Let me mention some applications of this philosophy: the judicial doctrine of the supremacy of Community law (Article 6 of the U.S. Constitution: 'The laws of the United States [...] shall be the supreme law of the land' – *Bundesrecht bricht Landesrecht*); total harmonisation ('federal pre-emption'); monetary union (total harmonisation of national monetary policies and consequent federal pre-emption of the field); the CAP (the ECJ has taken the view that member states are precluded from legislating within the field covered by it); the CFP (the member states can no longer enact conservation laws, even if no Community measures have been taken). Hans Vaihinger argued that falsehoods or fictions should be accepted in order to live peacefully in an irrational world. To this end, man must use his will to construct fictional explanations of phenomena 'as if' there were rational grounds for believing that they reflect reality. According to the German philosopher, acceptance of false fictions is justified as non-rational solutions to problems that have no rational answer. Personally, I still hope that the problems of European integration – unlike the deeper problems of physics, psychology or ethics considered by Vaihinger – may find rational, or at least reasonable solutions.

Model three envisages the development of 'a post-national Union with an explicit cosmopolitan imprint', but gives no hint of how the present Union could be made to move in that direction. In this chapter, (and in greater detail in Majone 2009), I argue that it is impossible to have democracy in the EU without giving up – not only something as central as the Community Method – but much of the political culture developed in half a century of attempts to 'make Europe without Europeans'. A return to the philosophy of the Treaty of Rome, with its limited objectives and greater emphasis on negative integration, would not only reduce the growing mismatch between expanding policy commitments and shrinking normative resources, but would also make it more plausible to conceive the EU 'as a part,

and a vanguard, of an emerging world order'. As was noted above, Eurocentricity is an essential feature of the present EU, and a basic tenet of its political culture. One among many possible examples: the Commission's *Communication on the Precautionary Principle* states, *inter alia*, that in considering the positive and negative consequences of alternative risk strategies, one should take into consideration '*the overall cost to the Community, both in the long- and short-term*' (European Commission 2000: 19; emphasis added). Such Eurocentrism could perhaps be justified if the cost of precautionary measures was felt only by exporters from rich countries, but what if the cost is borne by very poor countries? The EU claims to be deeply committed to assist, financially and otherwise, developing countries, especially African ones. However, World Bank economists have been able to estimate the serious impact on some of the poorest African countries of precautionary health standards proposed by the Commission in 1997 (Majone 2005: 136-8). Given such precedents, additional to the built-in protectionism of the CAP, it is easy to imagine the reaction of developing countries to the idea that the present EU may be the vanguard of cosmopolitanism.

Finally, I would like to raise the issue of accountability, to which the RECON project does not, in my opinion, devote sufficient attention. The problem of establishing an effective system of accountability, while less daunting than the elimination of the EU's democratic deficit, has become more urgent since the launching of EMU, the start of an indefinite enlargement process, and the string of negative referendums. The EU's accountability deficit (Majone 2009: 175-8) is an important special case of the general issue analysed by Grant and Keohane (2005) in an important paper on 'Accountability and Abuses of Power in World Politics'. The problem discussed by these scholars is how to secure accountability in situations where the traditional standards of democratic accountability are either inapplicable or unenforceable. The first step toward understanding the general issue, I argue, is to recognise that accountability to the voters, or to their elected representatives, is only one dimension of accountability – important, but not always the most relevant one. Also in democratic polities giving reasons to one's peers, to experts, to stake holders, or to particular segments of public opinion, may be the most appropriate way of explaining one's decision, and of activating other accountability mechanisms. At international (or supranational) level, the very meaning of democracy, hence of democratic accountability,

is contested. It is, however, important to realize that although there is no global state, there is a global civil society, and an ever more active international public opinion. Paradoxically, the influence of international public opinion is all the more significant because of the absence of a global state, that could oppose its official views to those of global civil society – or, in the extreme case, use coercion rather than persuasion. The existence of a global public opinion means that what is most urgently needed today is a sophisticated *technology of accountability*, going beyond the one-dimensional model of accountability to the voters. The crucial element of a good accountability framework is the choice of appropriate criteria. I suggest that we should think in terms of *accountability vectors* – where each entry corresponds to a particular criterion – and also of *accountability spaces*, since the set of appropriate accountability criteria will generally vary according to the level of governance: sub-national, national, regional, global.

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# Chapter 4

## Challenging the first model

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### Trouble spots

It is a pleasure to be here this morning. By coincidence this is the second time this year that I have been invited by different sets of conference organizers to comment on a presentation by Professor Giandomenico Majone. It seems we move in tandem from trouble spot to trouble spot, at least when it comes to the ratification of the Treaty of Lisbon – and so far so good!

At a conference in Dublin in January 2009, Majone presented a paper that was largely on the distinct political culture in the EU, ‘integration by stealth’ as he has famously called it, and specifically in the context of the rationally ignorant voter in a referendum context (Majone 2009). Rationally ignorant voters, Irish specifically, has now second time round behaved as the political elite wanted all along and finally voted yes – and in outstandingly large numbers too! Actually the second time round lack of information played a less salient role thanks largely to the bottom-up efforts within civil society itself.

Now the spotlight has moved right here to Prague where the Czech Constitutional Court (fronted by the President ) can impede further

final ratification by the Czech Republic until the role of the national parliament is adequately assured. We now therefore have the rather peculiar situation that the judiciary may tell the legislature how it should control the executive power, in copycat fashion to what happened in the ruling of the *Bundesverfassungsgericht* of 30 June 2009 and already has been implemented in the German context.

## Integration by stealth

As discussant I can cherry pick what I comment on and throw up for discussion. I would like to begin by picking up a key point in Majone's very interesting and rich chapter. His core thesis is that the hierarchy between positive and negative integration needs to change in Europe today in the interests of the legitimacy of the Union as a whole. In his view much of the legitimacy problems being caused at the EU level is due to the powerful role of the Commission as an unelected actor, as well as problems of reaching agreement at all on measures of positive integration.

I query his supposition that if negative integration were prioritised more extensively over positive integration, the democratic deficit at EU level would really be reduced and the quality of democratic life at the national level improved. The latter point is in particular not clear in his chapter. He seems to envisage a series of what he terms 'clubs' formed within the EU as 'policy laboratories', legitimated by referendums to be held simultaneously in all the member states (Majone 2009: 16). I have difficulty in imagining this. Also I would point out that negative integration relies heavily on the role of the European Court of Justice (ECJ) – a very central role as he shows in the specific examples he quotes, e.g. on gender discrimination in one form or another. Does that really lead to a reduction in the democratic deficit? I think this requires a greater discussion on the specifics of what exactly is envisaged and how.

In any event my key point in this regard is a different one: Even though the distinction between negative and positive integration still may apply to the fields of economic policy, internal market etc., I wonder how useful or comprehensive it is to capture the full range of ways in which the integration project is moved forward. This also includes what used to be the fringes (e.g. common foreign and

security policy and police and judicial cooperation), but are increasingly definitional in terms of what the EU polity is and represents itself to be. I am left with the feeling that the debate between the hierarchy of positive and negative integration only captures part of the picture these days.

And integration by stealth – well it may no longer be only economic integration and it is no longer only by the Commission. I would like to see explicitly factored into the equation the role that executive actors whose powers are increasing at the European level, such as the European Council, the Council General Secretariat and the veritable explosion of EU level agencies, some of whom, especially the newer ones, are given at times potentially far reaching decision-making power (See further Curtin 2009).

Maybe it is because I am a lawyer and lawyers perhaps have less fantasy and tend to look at the nitty gritty of rules and institutional facts, but I prefer to start from the *here and now* and not from what *could be* (but probably what will not be or only partially be). I prefer to depart from *what is* and thus not what might be or even ought to be. This recalls the wisdom of my Irish countryman, who when asked by a fellow traveller for directions as to how to get ‘there’, a particular place, replied as a wily Celt: ‘To get there, you should avoid starting from here.’

I plan to start from ‘here’ not from a re-imagined or reconstituted ‘there’. And I am going to start where Professor Majone in fact ended, with what he termed the ‘accountability deficit’. What is the here and now in this context? By focusing on this I think I can show why I do not find the three separate models presented by Eriksen and Fossum (2008) in their paper as the right approach at this point in time – although the time I have as a discussant does not really allow me to elaborate on this in any great detail.

## Accountability

Across the globe, accountability has come to be considered a hallmark of democratic governance. It should therefore come as no surprise that, as the European Union is turning more and more into a genuine polity, issues of accountability have increasingly found their

way onto the political and academic agendas. There is a growing concern that the shift from national, state-based policy-making to transnational and multi-level European governance is not being matched by an equally forceful creation of appropriate accountability regimes. Accountability deficits are said to be a key cause of the low public visibility and legitimacy of the EU.

Accountability can be conceptualised and analysed in its own right. We can discern at least three distinct sets of accountability questions: who is accountable, to whom and for what? The answers that can or will be given to these very basic questions depend to a large extent on one's perspective on the nature of the EU.

### **An intergovernmentalist perspective**

An intergovernmentalist will focus on the national actors and accountability forums, and will regard further EU-level checks and balances at best as supplementary, at worse unnecessary or fundamentally flawed. On this model the member states are the main vector for ensuring accountability and democratic legitimacy.

This is certainly the view of the German Constitutional Court (*Bundesverfassungsgericht*), reflected in its judgment on the Lisbon Treaty of 30 June 2009, stressing the primordial role of the German *Volk* as defined in the German Constitution. In this understanding of legitimacy a polity can only be built around a culturally homogenous community – so that can never be the EU with no demos. Leaving this point to one side, we cannot deny that the political system of the EU in some of its aspects (not just treaty ratification, the role of the European Council, but also some bits of EU foreign policy) is quite simply intergovernmental.

Logically this approach would correspond with Eriksen and Fossum's (2008) first model with the emphasis being put on democracy at the national level. Yet intertwined in their first model seems to be the role of the EU as a problem solving entity, i.e. its more regulatory tasks. I think this is not logical but perhaps this explains the proposal for the role of the European Parliament (EP) as a type of auditing forum. This seems to me to be an unnecessary proliferation and confusion of accountability forums at the European

level. I cannot see the added value compared to what we already have and what is developing as a matter of practice.

### A supranational perspective

Moving on, what if over and above the intergovernmental, the nature and intensity of the EU and its policies is such that a wide range of rights and interests of individual citizens are deeply affected by it, thus piercing the veil of national sovereignty? We see this happening not just with regard to the internal market, competition law, environmental policy etc., but also in the context of the external relations of the EU, justice and home affairs, certainly post Lisbon and even in some respects before.

If one adopts a more supranational perspective then it can hardly be argued that the *indirect* legitimacy that heads and members of national governments confer upon EU governance by virtue of being elected in their own national political systems is sufficient. A supranationalist will thus focus in addition on the need to hold (autonomous) EU actors accountable, and on the institutional capacity of EU-level accountability forums to do so effectively. This fits within Eriksen and Fossum's second model.

This is of course extremely challenging and may indeed require more ambition than the mere normalisation of what we find at national level at the European level, if that is at all possible. But for the foreseeable future we are stuck with effectively bits and pieces, imperfect and overlapping models and evolving and increasingly visible practices.

### A regulatory perspective

To move on to what I see as the third perspective on the nature of the EU and the one most closely associated with our keynote chapter – the regulatory perspective. A regulatory state scholar will focus on the public value produced by European (non-majoritarian) actors, and consider apolitical expert and stakeholder dominated bodies to be the most salient accountability forums. This perspective is neutral as to what governance level at which accountability is organised, but strongly favours administrative, professional, and to some degree

*social* accountability over political and, to some degree, legal accountability types.

In institutional terms this perspective resonates clearly with what we find on the ground in terms of the expanding numbers and role of what can be generically called the non-majoritarian actors, EU level agencies and even networks of actors. How does the existence of this phenomenon mapped so eloquently by Majone in the body of his work tie in with his more recent approach of stressing negative integration and the national level (as well as certain umpires at the EU level such as the ECJ)? Does he go back on his earlier analysis or can it be integrated into the same manner he now presents the mutation of the EU as a regulatory regime?

In his chapter he only mentions the European Central Bank (the ECB) and seems to criticize the ECB as operating in a 'political vacuum', and that I quote 'unless the holes in the policymaking machinery are filled, authority over the entire domain of monetary policy will continue to flow, by default, to the ECB'. How does this fit in with his previous work on non-majoritarian institutions where he seemed to advocate precisely their apolitical function, in legitimacy terms?

To conclude then on the three perspectives on the nature of the EU, we find elements of all three perspectives in the EU as it is constituted today in a pretty inextricable and complex way. It will not be realistic to factor out any one given the empirical realities nor to focus only on one perspective and come up with a solution, democratic or otherwise, for only one of them to the exclusion of the others.

Take the example of comitology committees, a long-standing bugbear of democratic practice. They are composed of national representatives that are part of the normal democratic hierarchy at the national level. So they need to be controlled and held to account at the national level. But when it comes to the collective level, the unit, then control and accountability can only be exercised at the European level. It is not – and in my view – should not be *either or* but *both*. The reality of EU governance both front-stage and back-stage shows that it is not confined to neat one level interactions but in many cases there is a plurality of interactions at a plurality of levels.

## Composite accountability

If time permits I would like to assess the status quo in terms of practices of *democratic* accountability. Both the rules and the practices of democratic accountability are developing in a dynamic and incremental fashion, but at different governance levels (European and national) and also in ways that overlap (See further, Bovens et al. forthcoming 2010). It is thus again not 'either-or' but an accumulation. The European Parliament as an imperfect repository of democratic legitimacy at the European level is nonetheless engaging with new and less than fully visible actors at the European level and finding ways and means, often informal, to put and keep them under the spotlight. We see this not only with the obvious front stage example of the European Commission but also with the more backstage example of European agencies. Since this is the practice already, why should we conceive a new institution with only a so-called audit function as proposed by Eriksen and Fossum in their first model?

The reason why the *Bundesverfassungsgericht* missed is that; in spite of all the theoretically perfect democratic legitimacy of the German parliament under the inalienable core of the German Constitution, they (and all national parliaments) simply cannot reach any of what happens at the collective supranational level. In effect this kind of purely intergovernmentalist attitude is the equivalent of the ostrich with its head in the sand, choosing to ignore the realities around it that it does not wish to see or engage with.

That said, at the national level too we see an intensification in the role being asserted at least *de jure* by national parliaments and an increasing realization that they constitute the appropriate democratic forum to hold political actors such as (prime) ministers (and national civil servants) to account. So in order to start understanding democracy in Europe and the way it will most probably continue to develop in the coming decade, we need to put both levels together in a composite fashion, even if huge problems remain in terms of the meta parameters of the political system. The absence of a viable European public sphere and of genuine European political parties who compete for the votes of European citizens on the basis of European issues platforms continue to be considered as major deficits

in the realm of representation in Europe. Yet in the realm of accountability practices, recent empirical work shows that substantial progress has been made.

When it comes to a more constitutional perspective on accountability then the same picture of the composite nature of the evolving constitution emerges. 'Checks and balances' are largely under construction by European and national courts. Recent empirical work has already highlighted the activist role of the European courts in constructing an unwritten constitution, case-by-case, actor-by-actor, practice by practice. Their approach is rarely holistic and depends to a large extent on the actual cases brought before them for judicial review (with all the inherent access to justice problems).

But at the same time national courts – and especially national constitutional courts – also consider that they are engaged in this constitution defining exercise, in particular regarding the boundaries with their own national constitutions. This multi-level trend of engagement, activism and boundary control is one that no doubt will continue and perhaps intensify. So neither the vision of intergovernmentalists nor of the supranationalists on their own can suffice. They need, somehow, to be put together in composite fashion.

The regulatory perspective also transcends the idea of separate spheres of government at levels; national, European and indeed international or global levels. Its emphasis on governance as collective problem solving, the pivotal role of (transnational) professional expertise and more learning-oriented forms of accountability is one that both transcends levels and requires them to be put together. The jury is still out on the impact that the higher effectiveness of European governance that such practices allegedly bring may have on citizen perceptions of the EU.

### **The many hands**

A key analytical (as well as practical) challenge for the future is how to deal with the many hands in multilevel, networked governance settings that are so common in EU: how to track accountability practices involving not a simple 'billiard ball' model of one actor accounting to one forum, but a complex cast of actors, only some of



which are fully 'public sector', operating at European, national and subnational levels of governance, accounting in range of ways to a whole cast of accountability forums. Crime fighters and counterterrorism experts are fond of saying that it takes a network to catch a network, but from an accountability perspective the simultaneous dispersal of both actors and forums into networks creates a whole new set of challenges.

The EU is moreover not an island, and its structures and processes are partially and perhaps increasingly intertwined with those of larger international regimes, creating the kind of 'networks of networks' that are perhaps the most elusive targets for democratic accountability designers and scholars alike.

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# Chapter 5

## Democratic legitimacy, political normativity and statehood

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### European integration as a project

One of the most astonishing features of the elite-driven project of European integration is the paradoxical and still pervasive fact that a large part of its success is due to the more or less successful attempt to consciously hide it away from the view of all those engaged and involved in the process.<sup>1</sup> It may seem as if the project were premised on and constructed to effectuate the same kind of justificatory device John Rawls relied on when confronting the problem of how the basic institutional structure of a just and well-ordered society can be designed (Cf. Rawls 2001, esp. part III). Yet, from another point of view, not only the outcome but the intent of such a strategy must seem rather dubious, especially when it is translated from an original position designed to establish the moral point of view on which such an enterprise is premised into a device which functions as a safe filter that keeps off public scrutiny all we can and should know in order to come to an enlightened judgment of the merits or failures of the

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<sup>1</sup> For a recent investigation into the mechanisms that are operative in the process of hiding European integration away from itself and thus lifting the self-imposed veil of ignorance see Fossum (2010).

project (Cf. Majone 2009). For Majone, this pervasive feature can be thought of as rationally induced only under at least two conditions, i) the prevalence of a political culture which prioritises 'integration over all other competing values, including democracy' on the one hand (Majone 2009: 4), ii) and the organised insensitivity to this phenomenon on the part of especially the intellectual elites and students of European integration alike (Majone 2009: 2, 4).

Be that as it may, what is remarkable here is the conviction underlying this diagnosis that democracy as a normative principle is basically at odds with the process of European integration which progressively decouples itself from its if not only, at least its most prominent, value base. This is another way to say that the process of European integration not only progressively undermines its normative credentials, but also consequently acquires the status of a merely aspirational (and for that matter: contingent) political goal without any normative force or bite.<sup>2</sup> This force could only fuel European integration if it in one way or another can be seen to be internally linked to the moral promises of self-determination, self-legislation and self-realisation. This kind of sorting normative issues which finds its basic expression in the strategy of decoupling the question of integration from the democratic question, to me seems to be the most fundamental contention of all those who find themselves in a progressively sceptical position towards European integration.

In the following reflections, I will try to explain why there is an internal relationship between what is torn apart in the eurosceptical discourse,<sup>3</sup> and which normative lessons this might entail. I start from the internal conceptual link that exists between the principle of democratic legitimation and European integration. In order to show how it combines with the expansive dynamics of the cosmopolitan dimension built into justificatory foundations of the project of European integration, I then more specifically address the problem of the paradox of democratic self-foundation (Cf. Eriksen 2009, chapter six). Only against this normative background we are able to address

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<sup>2</sup> For this distinction between 'merely aspirational goals' on the one hand and 'matters of justice' see Lafont 2009: 259.

<sup>3</sup> As regards the issue of euroscepticism cf. also Trenz and de Wilde 2009; Trenz et al. 2009.

the question of which basic principles of its institutional design the European Union is most likely to strive for on its yet unfinished journey to democratisation. The contours of an answer to this question is roughly provided in two steps: The first step is to address the meta-theoretical issue of political normativity in order to establish the conceptual link that exists between the principles of democracy and statehood as an constitutive feature of democratic self-determination. The next step is to further develop the outline by highlighting those structural properties of the notion of statehood that are fundamental in displaying the virtues of democratic self-determination. This move admittedly urges us to draw a conceptual distinction between the notion of statehood on the one hand and the notion of the classical nation state on the other, which only is one historical – and by no means the only conceivable – form of the realisation of statehood. Finally I try to spell out some of the implications of this conceptual analysis for RECON's basic attempt at modelling alternative future developments of the European polity.

## **The expansive dynamics of the process of democratic legitimization**

When measured against the tradition of legal republicanism, as Fritz Scharpf (2009: 173-5) has recently tried to urge, the EU can only be a thoroughly liberal polity lacking all republican credentials. Without any doubt, this contention is perfectly in line with a view from an ethically toned civic republicanism. Still this view does not only not fully exploit the normative potentials of the much broader republican tradition, it can also be argued that it offers us a seriously restricted version of the republican principle of democratic legitimacy.<sup>4</sup> We may then discern the traces leading to such an account when asking ourselves if it is not just the post-national constellation that again confronts us with a challenge that has only been provisionally mastered by the national projection of the social constituency (or self) of the principle of the sovereignty of the people (Bohman 2007: 19) Further, we may ask if it is not the case that under national conditions the claim to democratic self-determination necessarily leads us to a situation where the decentred parts of the democratic self confront

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<sup>4</sup> For a more comprehensive account of the normative credentials of legal republicanism and the cosmopolitan outlook they might offer see Besson and Marti 2009.

themselves in a constellation of a reciprocal, but potentially asymmetric form of mutually assured heteronomy? (see Bohman 2007: 9). And could we, under such circumstances not even go on to consider the potentially much more benign democratic effects of a 'democracy-enhancing multilateralism'?<sup>5</sup> Then, a more complete account of the normative challenges of the post-national constellation should give adequate weight also to the problem that

[...] it is unclear how a community could be internally democratic without first recognizing the commitment to the non-domination of the communities it is linked with in indefinite social interaction. Given these difficulties, political relationships under these conditions would be as indefinite as other forms of social and economic interdependence, and as a result freedom as control of conditions of association would supply no normative guidance for solving problems of cooperation and conflict among non-individuated actors.

(Bohman 2007: 26)

When pitted against the republican principle of non-domination, it should be obvious that the lesson we have to learn in order to judge on the democracy-normative merits of a European polity and to establish the standards which it has to meet when it is considered as an exemplar solution to the problem of democratic heteronomy, is much more complex than for example Scharpf or Majone allow for. Once we are confronted with the challenge to conceive of a situation which allows for democratic decision on the borders of democracies, the pivotal question is whether we need to interpret the principle of the sovereignty of the people in a more abstract way. At this point, the answer to the question of identifying the self of self-legislation is internally linked to the question of how we might arrive at such a decision – a constitutive circle which cannot but be broken up by the same procedural means that are central to the legitimacy of democratic will-formation. Again I restrict myself to some conceptual remarks.

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<sup>5</sup> As it has been recently suggested by Keohane et al. 2009.

In a very instructive move, Fraser (2005)<sup>6</sup> decisively altered our view on the kind of challenges which democratic thinking has to confront with respect to the changing basic structures of politics in the postnational constellation. What becomes visible when we look at things from the point of view of justice are not only the deep traces of all sorts of injustice by which the current system is marked – by the injustice of maldistribution, of misrecognition or of misrepresentation – but that the very grammar which structures our claims to justice force us to consider not only the question of what justice demands from us in substantial terms, to ask ‘who’ is the subject of claims to justice and how we might come to terms with the problem of ‘how’ to determine who the subject should be. This once again brings to the fore the inherently reflexive structure of our settled answers to all these questions because claims to justice are more and more addressed to an international community which in some sense is a moving target and does not itself dispose of preestablished territorial bonds and a constituency that might legitimately and authoritatively answer these questions (Fraser 2005: 72). In other words, what is happening is that through a ‘metapolitical’ form of the politicization of questions of justice, triggered by the more or less free floating communications within a global public – which in itself remains indetermined and does not, either in a functional or in a legal dimension, constitute a subject able to take or implement authoritative decisions – we are torn into a pyramidal process displaying the normative force of the ‘all-affected-principle’ and a moral right to justification (Cf. Forst 2007a), which confronts us with the issue of participatory parity and adequate representation:

Above and beyond their other demands, these movements are also claiming a say in a post-Westphalian process of frame-setting. Rejecting the standard view, which deems frame-setting the prerogative of states and transnational elites, they are effectively aiming to democratise the process by which the frameworks of justice are drawn and revised. Asserting their right to participate in constituting the ‘who’ of justice, they are simultaneously transforming the ‘how’ – by which I mean the accepted procedures for determining the ‘who’.

(Fraser 2005: 84)

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<sup>6</sup> In the following, I refer to Fraser 2005.

Without going more deeply into (these claims), it should have become plausible that because of their fundamentally reflexive properties we cannot nationally domesticate the expansive dynamics of processes of legitimation. Instead, we hit upon the procedural core of the principle of the sovereignty of the people. And we can see that the rationality underlying these procedures force us to acknowledge two immediate implications – democratic procedures must allow for the determination of the self of self-legislation, and they must also generate the means by which a decentered and pluralised democratic self can nonetheless reflexively act upon itself and its future shape. This is also the programmatic core of James Bohman's (2007) vision of a transnational democracy, a vision derived from the principle of non-domination which basically spells out as follows:

In a sufficiently reflexive democracy [...] citizens can deliberate upon and change the terms of their association as well as exercise their normative powers and communicative freedoms so as to achieve justice [...]

(Bohman 2007: 175)

– under the condition that sovereignty is not invested into a single demos but evenly distributed among multiple demoi which also provide for an overarching democratic structure of their relationship (Bohman 2007: 178).

Bohman does not stop here and reaches well beyond such an internal justification of the basic structure of an emerging transnational order, envisioning an additional justification of his project to be derived from an instructive reinterpretation of the Kantian thesis of democratic peace:

If this is the explanation of peace, it is important to make clear that war and the preparation for war often have the opposite effects [...]. As modern warfare became increasingly lethal and professionalised, however, the institutional powers of the state have outstripped [...] mechanisms. The institutionally embedded normative powers of citizens are no longer sufficient to check the institutional powers of states to initiate wars, and these arrangements have left citizens vulnerable to the



expanding militarisation that has weakened these same entitlements.

(Bohman 2007: 183)

Now, underlying this inversion of the Kantian inference from the internal democratisation of nation states to the prospects of the project of a global peace as a demand of reason is a dialectic of the securitisation of domestic as well as foreign policies, even in democratic states. In the last instance this dialectic emanates from the impossibility to gain a grasp on the dynamics of the international system from the part of single states, and thus are moved to internally reproduce those lines of conflict responsible for the spread of external violence (Bohman 2007: 184-185). At this point it is important to see how Bohman reacts to this interesting diagnosis – i.e. by inferring that the unfolding negative dialectics between democracy and peace invites us to seriously reconsider our deeply rooted assumptions concerning the location of democratic structures. Peace, he urges us to acknowledge, does not demand democracies, but democratisation on different levels and as well as democratisation of processes that unfold between these levels:

If democracy is conceived actively in terms of the joint exercise of normative powers and rights, a different analysis of the presuppositions of a reconstructed democratic peace must be provided. [...] In order to increase the capability of citizens to exercise their normative powers in these contexts, new and better transnational democratic practices are required [...].

(Bohman 2007: 186-7)

Now, if this provides an adequate account of the normative dynamics implied in the principle of democratic legitimation, we are also forced to invert the perspective by which we judge the normative status of the national projection of the idea of democracy. Basically it is not the perspective from the nation state that can safely inform our judgement upon the normative merits of processes integrating national units into a larger and overarching order, but rather it is the other way around – conceptually, the attempt to nationally domesticate the idea of democracy must remain arbitrary as long as it cannot be thought of as rationally willed by an encompassing and inclusive community of equal individuals (Cf. Bohman 2007: 174).

## The view from political normativity

Once we accept that with reference to the principle of democratic legitimacy the justification of the basic institutional structure of the EU thus necessarily acquires a cosmopolitan dimension, we are immediately confronted with the problem that the existing link between the principle of democratic legitimation and political authority – so far only safely institutionalised at the level of the democratic nation state – is severely weakened as long as we are unable to identify and think of new forms of political authority or new configurations of statehood beyond the nation state, on an international, a transnational or a supranational basis. In order to explain why this is the case, I will first present the issue from the point of view of political normativity. Understanding political normativity helps us to see that this link itself is not only instrumental, but also normative in character; and additionally it shows that much more is involved than what is commonly thought to be implied in the idea of the rule of law, i.e. the reference to an authoritative command and an effective sanctioning force which provide for the social and political normativity of legal norms which cannot rest on moral reasons alone.<sup>7</sup>

Normativity is such a pervasive phenomenon of social and political life that it is virtually coextensive with sociality (Cf. Swindler 2008). This is not only in the sense that the social or the political domain is structured by all sorts, and not only moral sorts, of normative expectations that are constitutive for establishing personal bonds, patterns of fair cooperation to our mutual advantage over time, or to help us spelling out what makes us members of a self-legislating political community and the demands given us by this membership. Normativity also takes on a generic meaning, because we do not only wish to rely on the mutually binding force of normative expectations, but also to know that norms are always socially or politically derived and will not be effective unless we all, taken individually, are committed to them. Then the reasons for this commitment can be

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<sup>7</sup> In a very similar way Niederberger (2009) bases his account of democratically legitimate rule beyond the nation state on the twin pillars of justice and order – although he finally arrives at a different conclusion as to the transnational and network-based organizational form that democratic rule might acquire under these conditions.

made publicly plausible and reliable. To put it another way; social and political life is preconditioned on the normativity of norms – the way they effectively and reliably bind us – and our knowledge about the sources from which it may be derived.<sup>8</sup>

What we immediately see is that with the issue of normativity in general or of social or political normativity in particular, we address a particular task when asking these kind of questions, i.e. to understand how it might be possible that we are reliably bound by norms (e.g. of reciprocity), although we know that they are socially or politically crafted and put into validity (and thus are changeable), and at the same time know that the final decision whether or not to act upon them is ours. Social or political norms are not determining us in the sense laws of nature do, and this is why we often believe the bindingness of norms to be derived from an external authority able to effectively sanction compliance or non-compliance (Cf. Gosepath 2009: 252-4). Although this is a phenomenon to be frequently observed especially in political relations, it can only serve as a preliminary answer to our problem for two reasons. One reason is that what we are dealing with when putting things in this way is not normativity, but the power of an authority external to us; and the second is that by doing so, we miss the crucial link between our autonomous will and normativity. Normativity then makes itself felt and can only unfold in a process where we rationally act upon justified norms which are forced upon us because of the special character of the 'ought' they display, i.e. an ought that articulates itself as a 'must', as a kind of obligation or duty that is not within our reach, and that, as in some sense implied in our practice and deeply rooted in our self-understanding, we cannot avoid to have or feel. What we are looking for when looking for normativity thus is a threefold internal and safe relationship between an ought or a moral command, our autonomous will, and the 'must' of a necessary condition which establishes the link between the content of a norm and our volition or motivation to act upon it (see Stemmer 2007: 298-9). Against this background it is hardly astonishing that theories of

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<sup>8</sup> Concerning the issue of normativity which has attracted broad attention in scholarly debate in recent years see Brandom 2009; Gosepath 2009; Hitzel-Cassagnes and Schmalz-Bruns 2003; Stemmer 2007; Jarvis Thomson 2008; Wedgwood 2009; Korsgaard 1996, 2008, and 2009; Pink 2007; O'Neill 2007.

social or political normativity in their attempt to bridge the gap between 'ought' and 'must' in one way or the other start from the explanation of the 'must', i.e. from a practice-theoretical perspective which spells out the 'must' as implied in norms that structure and guide our practice of generating norms (or, in more political terms: of self-legislation) and thus acquire a quasi grammatical sense. Let me very briefly summarise three prominent versions of such an account.<sup>9</sup>

### The first strategy

The first strategy is derived from the broadly Kantian premises that find their expression in the formula that moral laws are the laws of autonomy in the sense that they are constitutive of autonomous action, and it is aptly summarised by Korsgaard in a formulation that takes for granted that we cannot account for the normativity of practical reason within the confines of instrumental or prudential reason alone. Instead we have to start from the insight that

[...] our unconditional principles must be laws of autonomy [which] brings us back home to the old Hegelian question: can any substantive requirements be derived from the mere fact of our autonomy? How much determinative content do the constitutive norms of autonomy have? And does this content coincide with, or include, morality? [...] As I see it, then, only three positions are possible: either (i) the Kantian argument that autonomy commits us to certain substantive principles can be made to work; or (ii) we are left in the position of a heroic existentialist who must ultimately define his will through acts of unconditional commitment that have no further ground; or (iii) complete practical normative skepticism is in order.

(Korsgaard 2008: 66)

Now, against the background of the less attractive or completely unattractive possibilities (ii) and (iii) I submit that much energy has been put into showing that the Kantian argument can indeed be

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<sup>9</sup> In the following I restrict myself to an analysis of conceptual strategies which does not preclude, but demand a complementary strategy of dealing more empirically with these issues. A very instructive attempt in this direction has, by using a reconstructive methodology, in a series of recent articles and books been made by Daniel Gaus to whom I owe much of the formulation of the problem I try to deal with here. See Gaus 2008, 2009a and 2009b.

made to work by shifting the issue of the normativity of practical reasons from the individual to the collective. Paradigmatic here is of course the work of Jürgen Habermas (1992), who grounds normativity in the unavoidable preconditions that have to be met once we engage in communicative action in order to show what is necessarily required from us as participants in a discursive practice – a practice that itself is constitutive and (nearly) co-terminus with sociality.<sup>10</sup>

It is not necessary to go more deeply into it at this point because what is rather of interest here is that this search for the sources of normativity corresponds well with two of the requirements of the theory of normativity mentioned above: It conforms with the requirement of deriving substantive norms or principles from the fact of (collective) autonomy, and second it is able to provide the necessary link between an action guided by moral norms and the conditions under which the goals of that action can be achieved – a link that is moreover not made but given by the structure of interaction. What Habermas' account of the rationality of discursively mediated mutual understanding and consensus cannot provide (or to put it less strong: what he has not sufficiently investigated into) is an answer to the question of why we should assume that an insight into the structure of interaction also motivates us to reliably act upon the substantive norms implied in interaction.<sup>11</sup>

## **The second strategy**

To find an answer to the last requirement of an adequate account of normativity is surely one of the driving forces that is inspiring and fueling Axel Honneth's attempt to reconfigure the whole issue in the

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<sup>10</sup> A similar approach is also underlying the work of Rainer Forst who, as far as I can see, with his principle of reciprocally general justification focuses more closely on the epistemic connection that exists between moral norms on the one hand and collective autonomy on the other – although so far this project has been more restricted in scope than that of Habermas he currently tries to develop into the direction of a critique relations of justification in analogy to Habermas' idea of a critique of [Verständigungsverhältnisse]. See Forst 2007a, and forthcoming.

<sup>11</sup> It can of course be argued that he addresses this gap more systematically especially in his writings on democratic theory in 'Between facts and norms', providing a mainly institutional solution to the problem (at least as far as political normativity is concerned) – I will come back to this issue later.

left-hegelian tradition of a theory of recognition. As this move is particularly instructive for the argument to be developed here, I shall go a little bit deeper into it.<sup>12</sup>

Drawing on recognition as a paradigm-building term, Honneth moved, through quite a number of different but closely related kinds of reasons, to reach beyond the disciplinary, methodological and thematic confines of the discourse on political and social justice in political philosophy.<sup>13</sup> In most general terms, on the disciplinary level, he was striving for, firstly, a systematic re-appropriation of the merits of social in contradistinction to political philosophy properly, which consisted in social philosophy's emphasis of what he termed the diagnosis and theoretical explanation of structurally induced societal pathologies indicating structural barriers that lead to systematically distorted forms of self-appropriation under conditions of modern society. Closely related to this move – by which he also wanted to rearticulate the inspirations of earlier Critical Theory and which was partly inspired by his reception of the ethics of authenticity figuring so prominently in Foucault's later work (Cf. Basaure et al. 2009: 92) – is, secondly, his dedication to the methodological persuasion associated with left-hegelianism and its notion that the social domain already contains the normative criteria applied in order to criticise its incomplete realisation in society – i.e. the idea that a critical perspective must be thought of as always already anchored in existing forms of life (Cf. Basaure et al. 2009: 112, 150). These motives are, finally and on a substantial level, firmly connected to his interest in investigating those kinds of human needs that come into play when we ask for the normative principles of justice, and when the reference to needs underlying claims to justice has a double function on the motives which fuel the dynamics and direction of moral development, which allow for a much broader account of our everyday moral conviction than for example discourse ethics do (Cf. Basaure et al. 2009: 106-7, 120). Against this background I briefly sketch the broad programmatic outlines of recognition theory and follow them up to a point where some of the conceptual

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<sup>12</sup> In the following I draw upon Hitzel-Cassagnes and Schmalz-Bruns forthcoming.

<sup>13</sup> A good account of the different theoretical motives which inspired his work is provided by a recently published series of interviews with Axel Honneth in Basaure et al. (2009).

tensions built into the theory become visible – especially its attempt to internally link an account of injustice as the denial of the normative status of persons which protects our vital interests connected to our status as equal members of a political community, to an account of those psychological needs that must be fulfilled in order to safeguard our personal integrity and thus the conditions of self-realisation.

For Honneth, recognition does not just – like Fraser prominently claims – denominate a partial dimension of the political realm that might be captured in status-related struggles of cultural groups (see Stojanov 2007), it is not just – as critics frequently state – a culturalist perspective of identity politics. For him, recognition is far more a perspective that tries to grasp normativity as a social phenomenon and tries to explain the sources and reasons for social struggles in general. For Honneth, as for Taylor, recognition is a ‘vital human need’, a constitutive aspect of ‘the intersubjective nature of human beings’ (Fraser and Honneth 2003: 145). As Kompridis summarises the intuition of Honneth:

We do not just desire recognition, we need multiple kinds of recognition – respect in the political sphere, esteem in the social sphere, and care in the intimate sphere of the family. Lacking these interlocking experiences of recognition, we cannot achieve full ‘self-realisation’: we cannot become who we want to be, cannot realise the kind of life we want for ourselves [...] Lacking such confirmation we will be unable to develop ‘intact’ personal identities, and so, by implication, be unable fully to function as self-realising agents.

(Kompridis 2007: 278)

The claim is hence that recognition does not only address status-related experiences and struggles of groups that are characterised by a set of cultural and ethical forms of identity, but the whole range of socially mediated processes and forms of individual self-realisation within sociality (Honneth 2003: 173-5). Recognition is a paradigm building term because it grounds a different theoretical perspective on the intersubjective and social conditions of the individual’s self-realisation (Honneth 1994, 1995). An underlying premise is that it is possible to formulate general normative principles of (modern) sociality by reconstructing social pathologies in terms of practices and

structures that damage the subject's ability of worthy self-formation and development. That is why the conceptual starting point is a moral phenomenology of insult, harm and suffering – because 'our reactions to insult reveal fundamental features of our normative orientation to the world' (McBride 2005: 501).

The normative criteria derived from such a reconstructive phenomenology can be used to describe the process of self-realisation as the subject's capability of confirming herself as both in her uniqueness and selfhood, and at the same time in her being a worthy member of society. In Honneth's view, the subjective and intersubjective side of the coin is held together by an intertwining of three forms of recognition. That is to say, there are three layers of a person's practical self-relation that are dependent on three kinds of recognition, together constituting 'the moral point of view': the first and original form is designated to the sphere of care, empathy and love; the second form is recognition as respect; and the third form recognition as social esteem (Honneth 1995). The experience of empathy at first constitutes a self-relation of the subject in which she becomes aware of herself as an independent and concrete person equipped with her own needs and wishes. To develop this elementary form of confidence or self-esteem, each of us needs to be recognised as an individual whose needs have a unique value for somebody else. However, to value one's own discernment and to develop self-respect, we also need to be recognised as universally equal. So, the experience of respect enables a person to consider herself also as a subject with dignity and with moral autonomy. Finally, the experience of social esteem enables her to articulate those personal features and capabilities on the basis of which she can make her unique contribution to society and by means of which she becomes a worthy member of a society. Apart from this, to develop a feeling of possessing certain good and appreciated capacities has some intrinsic value, because each of us need to be recognised as a valuable member of a 'concrete' community.

The central idea is that the subjective and intersubjective perspectives are co-original in a strong sense, i.e. self-realisation is always intersubjectively mediated at the different stages of self-formation. In other words: Self-consciousness can only be realised intersubjectively since the self depends on the presence of another consciousness to



affirm its own self-image (Honneth 1995). Against this background, Honneth (1997) criticises that strictly formal Kantian notions of symmetry and similarity in terms of equal treatment exclude the more substantiated responsibility for the concrete other who is always different from me, and in consequence he argues that 'the moral point of view' should be more comprehensive. It should refer to all the attitudes we must adopt 'to protect human beings from injuries that spring from the communicative presuppositions of their self-relation' (Honneth 1997). The intuition underlying his model is that social progress is based on the normative expectations of individuals which must be construed as moral claims, and which cannot be reduced to the status of socio-economic interests, for example political expectations or legal demands. As Deranty and Renault note,

[c]onsequently, the political model to be derived from the framework of a struggle for recognition is a form of 'ethical life' (Sittlichkeit), in the precise Hegelian sense of a multi-layered social morality, not just an institutional framework designed by legal principles, but the structural model of a 'decent society' in which all aspects of individual demands for recognition are met.

(Deranty and Renault 2007: 92)

Honneth emphasises that recognition is not only a psychosocial condition of individuation and autonomy, but a moral claim as far as each individual needs to be recognised in her dignity if she is to maintain a positive relation to herself. One implication of this kind of reasoning is that individual subjectivity depends on intersubjective relations and that, accordingly, individual autonomy functioning as the telos of individual demands of recognition is 'decentred' autonomy (Honneth 1995), i.e. an autonomy that can only be reached through social recognition. For Deranty and Renault, this is the reason why Honneth's theory is basically an ethics of recognition (and not a political theory of recognition): 'The purpose of the concept of recognition is not only to describe injustice but also to emphasise that justice is a matter of conflict' (Deranty and Renault 2007: 97). At the most general level, recognition theory is relying on two assumptions: the first one is that recognition as a moral point of view has to be conceptualised as a comprehensive process of ethical

self-realisation, the second one is that recognition is not just about acknowledging the generalised self, the universalisable properties of personhood respectively, but also about acknowledging the particular uniqueness of a concrete self. But to combine these two fundamental dimensions of the normative project asks us to take the preoccupation with an authentic form of self-realisation, insofar as our individual identity is concerned, as serious as the intersubjective concerns and demands that, as far as our social identity is concerned, are wedded into any such project.

It is ultimately this challenge that seems to introduce to the theory some fundamental tensions that are decisively felt when regarding the above mentioned requirements of an adequate account of normativity in general and political normativity in particular. Broadly speaking, the problem is that there is a structural gap between emotions of misrecognition and psychologically induced claims to social recognition of the particular traits of one's own identity resulting from them, and the justification of such claims. The gap occurs because the structure of general and reciprocal justification introduces a kind of selectivity that asks us to evaluate individual claims from the perspective of not only everyone else (taken separately), but from the perspective of a collective (social or political) identity that reflects the scheme of reflexive cooperation we are engaged in as members of a society or political community. Now, while it is certainly true that there is an important merit of recognition theory to sensitise us to processes at the psychological level of social identity formation that are constitutive of our capacity to effectuate the normative statuses we acquire as participants of a scheme of reflexive cooperation, it is certainly also true that recognition theory has precisely for this reason trouble in discriminating between the normative content of claims generated in the individual or collective perspective. In the end, although it is precisely designed to confront the challenge of spelling out the necessary condition that establishes a link between the substantive content of moral norms or principles on the one hand and our willing of that norm on the other, recognition theory fails to prove how practical norms provide a motivation for action and a justification for following the norm (see Gosepath 2009: 255, 259 and 260-268). In other terms, normativity is here too firmly nested within the confines of individual self-realisation and can therefore hardly provide the

step from the individual to the collective level, from which political normativity must be derived.

### **The third strategy**

These considerations lead to a decisive point where it becomes obvious for political theory to provide an adequate account of normativity in which it is crucial to establish the fundamental role that institutions might play in this regard. Although building on the most fundamental idea that the sources of normativity cannot be detected but in the structures of a reflexive social (or political) practice of norm-generation or self-legislation, and although acknowledging that the more substantive norms derived from this fact must somehow be related to the inner forces that drive our search for recognition, in order to get an initial grasp of the reasons that might induce such a turn to what I preliminarily call institutional normativity we also have to see that institutions form an integral element of such practices and compensate for the motivational weakness and epistemic indeterminacy of sentiments and emotions that fuel our drive for self-realisation:

And nonetheless, we do not exclusively rely on these forces. They are constrained in their scope, and sometimes they are only particular, they are, from time to time, not activated for lack of insight or prove not to be strong enough. Everyone, for these reasons, is therefore interested in being safely enabled to count on these inclinations and action orientations, i.e. interested in an additional element, that is not particular in nature, but equally important for all those involved [...] and builds on something that can be generally presupposed. And it should be evident and so strong that its probability to decisively influence us in our actions is high. Thus everyone, for moral reasons must be interested in additional reasons for acting morally, and that is why any society [or political community] will try to artifactually establish such reasons for moral action.

(Stemmer 2007: 304, author's translation)

Now, if we can safely presuppose that there is a necessary moral interest in institutions so understood, the reason does not solely and

not even primarily rest in the idea that compliance to norms should be fostered by authoritative sanctions.<sup>14</sup> Instead, I submit, institutions are internal to a reflexive practice of self-legislation for basically four kinds of reasons: In a moral sense, firstly they help to establish what we may call the visibility and mutual credibility of those norms that necessarily structure our practice and thus, through their moral integrity help to induce forms of a generalised mutual trust that are constitutive in forming a community of equals engaged in a practice of self-legislation (Cf. Offe 1999: 65-74; Estlund 2009, in particular chapter one). Secondly they are conducive to a sense of appropriateness which helps to constrain the more instrumental or prudential forms of rationality that inform our orientations towards other as well as our own actions.<sup>15</sup> Thirdly they procedurally articulate the epistemic link that exists between the principle of democratic legitimacy and the more substantial content of those norms and laws in the light of which we constitute ourselves as a self-legislating community of others. Finally, by channeling and funnelling the flow of public communication, they serve as a mechanism of the normative self-irritation of political communities.

Admittedly, these are only catchwords which still need to be worked out, but that should nonetheless help us framing the conceptual perspective which allows us to roughly prospect the lines along which the search for a normatively justified political order of the EU might proceed. But before trying to substantiate this claim a bit further, we should keep in mind one important conjecture which results from the investigation into the sources of political normativity – i.e. that it is crucial for any political order, and so for the EU, to provide for the normativity of norms in the light of which it recognizes itself as a distinct political form.

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<sup>14</sup> Although this Hobbesian element in any account of normativity is important. See for example Stemmer 2007: 304-305; or Gosepath 2009: 252-254. It is not, as I see it, constitutive of the way institutions work.

<sup>15</sup> A paradigmatic account of such a view on how institutions work we owe to Johan P. Olsen: Cf. March and Olsen 1989; Olsen 2007.

## The EU – a post-national, not a post-statist political order

This suggests that any account of the form of legitimate political rule beyond the nation state, and among them the EU, remain incomplete as long as we do not also seriously consider both the issue of stateness and the reasons that might lead us to conceptually link it to its very core - the idea of sovereignty of the people and reflexive institutionalisation, which is at its heart. To explain why, let me briefly point to the fact that in the republican tradition it is constitutive for the institutionalisation of people's sovereignty that the subjection of the state apparatus to the self-legislative command of the people necessarily requires a vertical and hierarchical ordering of those institutions providing democratic rule of law (see Maus 1999: 287, and 2005: 243-244). If I understand it correctly, Maus' argument is based on three kinds of reasons. In a factual dimension it is first of all the normative premise of the indisposability of the democratic procedure which underlines the paramount position of the legislative process as hierarchically superior to all other branches of government – the main reason here being that the rationality of the law-making process as such can only be safeguarded as long as the administrative and judiciary branch do not dispose over precisely those reasons and norms that serve as premises in their decision-making, and thus preserve the generality of legislative norms by effectively insulating the legislative process from concerns that arise on the level of determining the content of concrete laws or being induced by consideration concerning the conditions of their applicability (Maus 2005: 244). In a social dimension the argument is complemented by her concern that the legislative process should moreover be effectively sheltering the political process against the intrusion of economic power in order to be able to guarantee the substantial preconditions that are necessary to make effective use of political freedoms.

In a spatial dimension, once the principle of formal statehood, i.e. the juridical personality of the state, is established, Maus unfortunately restricts its applicability to the nation state for primarily the reason that any supranational perspective tends to structurally undermine the legislative grip on, and the democratic control of administrative, economic and judicial powers (Maus 2005: 259). By so channelling the

normative powers of the principle of the sovereignty of the people, Maus also completely cuts any political process extending beyond the borders of the nation state off from the sources of democratic normativity so that a real democratic dilemma emerges (Maus 2007: 370). As long as democracy is only firmly institutionalised on the national level on the one hand, and any outlook on more inclusive forms of the institutionalisation of democracy from the outset is barred by normative reasons on the other, we cannot democratically avail ourselves of Maus' factors that objectively induce the denationalisation of politics. This would leave us with the rather paradoxical conclusion that for democratic reasons we should directly jump into a postdemocratic era. But does the link between democratic rule and the idea of a formal state really force this conclusion, or are we able to detach also the idea of formal statehood in its structural properties from the credentials provided by a territorially delimited and ethically integrated nation state?

The answer to this question is twofold. Firstly, it is argued that while we necessarily must retain important elements of statehood in the post-national constellation, we should look for a more abstract account of the structural properties of the notion of formal statehood and thus distinguish stateness from the nation state as the historical form of its realisation. While this allows for thinking of new and more flexible configurations of statehood beyond the nation state, the second part of the argument is devoted to the task of indicating why any such new configuration must necessarily retain the hierarchical ordering of the process of democratic self-legislation, and of the three powers contributing to it.

### **On the first part of the argument**

As far as I can see, the scholarly debate on idea of statehood has since the times of Kant mainly been driven and fuelled by a series of practical concerns among which the argument from its non-desirability is surely the most important because it establishes a normative threshold that must be overcome when trying to assess the conceptual and normative merits of this idea. The argument that 'even if a world state were possible, nobody would really want it', doubtlessly represents the greatest challenge to be met because we reach a point where we are confronted with the cutting edge of the

German staatsrechtliche tradition, marking a conceptual threshold that one should not transgress. The achievement of the secularisation of the conceptual foundations of the authority of the state by itself points to democracy and imperatively demands that we should complete the institutional enforcement of this insight instead of taking recourse to the overcome metaphysics of statehood (Habermas 1992: 534). Now, this line of reasoning is evidently broadly premised on the conceptual contradistinction of statehood on the one hand and of constitutionalism on the other, to the effect that statehood is deprived of its self-contained conceptual meaning. But even when I in the following accept and presuppose this as a conceptual starting point, this hardly exploits the full meaning of the idea of statehood for at least two reasons. Even if the notion of statehood is rightly deprived of its ontological traits, this by itself does not tell us that the question of order may be distinct to what is captured by the idea of 'normative orders'. Neither can it conceptually preclude that there is something normative to the idea of 'order', especially such as our understanding of democracy is incomplete as long as we do not conceive of order spelled out in a certain way as normatively implied in the idea of democracy. Against this background the following reflections take shape, and I will provisionally engage with this question in two steps.

Firstly, I deal with the juridical conception, in contradistinction to a sociological or an ethical conception of the state, by which the state is conceptualised as 'a pure form – a legal system – that provides the position of retreat in which we can reflect upon our contested sociological and ethical conceptions and their relations to truth and acceptability of our preferred ways of life' (Koskenniemi 1994: 29). While this helps to clear the conceptual ground to which any acceptable notion of statehood minimally must refer to today, an additional reason must be given to why we even then should be faithful to the semantics of statehood instead of referring to the idea of the public use of reason to demarcate this space as the public sphere, itself co-terminus with the idea of deliberative democracy or a constitutional system. In reaction to this conceptual challenge, I will very roughly try to characterise the perspective which allows us to see the sense in which democracy itself might be internally linked to statehood.

In a series of current criticisms of the state (from the neo-left critique of the liberal Rechtsstaat to the feminist critique of the public-private distinction) Koskenniemi (1994: 24-26) uncovers what he sees as the grammar of the critique of the modern state as

‘excessively artificial’. Each such criticism, he concludes, ‘invokes an image of authenticity [and thus posits] a fact or principle outside both statehood and the law, that is fundamental or foundational, on which the ordering of human affairs should be based [so that finally the idea of statehood] should be replaced by the form of life suggested by the relevant ideal of authenticity’.

(Koskenniemi 1994: 26)

Against this line of criticism he then alludes to the problem that none of the invoked authenticities can sustain itself merely by appeal to its self-evidence, so that there must be a critical point outside these languages (‘jargon’) of authenticity which makes their common evaluation possible. In his view, to build and protect this public space for the ascertainment of the truth or acceptability of the proposed forms of life, is the state in its pure form. This leads us to what he with the help of Kelsen refers to as the juridical conception of the state which is derived from and co-terminus with the enlightenment ideal of the public use of reason as the medium of the process of collective self-determination (Koskenniemi 1994: 28-9).

This attempt to provide a more abstract notion of statehood, is more or less detaching it from the realisation of any concrete and historically specific form of life and tailoring it to the demands of institutionalising the conditions that must be given in order to provide for the reflexive acquirement of a collective form of life under the condition of pluralism as a collective learning process.

Against this background we can now easily see that the presumption in favour of stateness is wedded to a procedural account of the rationality of the democratic process of self-determination. Remember that the important structural features of a democratic process that has to account for its own rationality, in this regard cover several equally important dimensions that are not reducible to guaranteeing the organisational capabilities necessary for democratic



self-intervention to become effective. Note that beyond this, the rationality, legitimacy and confidentiality of the democratic process, which holds that there should be no basis for doubting the justice of the outcomes on the basis of some palpable unfairness or other undesirable features of the process that produced them (see Estlund 2009), is premised on observing principles such as the following:

- The principle of deliberation. Part of the idea of the force of (better) reasons is the claim that we must allow them to be decisive.
- The principle of publicity. It is important to note that the idea of the public use of reason by itself puts a premium on collectively general, in contradistinction to distributively general, forms of opinion and will formation.
- The principle of public equality. It is important for people to engage in common affairs upon the presumption that they only mutually recognize each other as equal, but that they can see themselves as equally treated in processes of collective self-determination.
- The principle of civic trust. While the moral plausibility of institutions and procedural rules is important for civil trust to emerge, it can only be sustained and further nurtured to the degree that they can effectively alter the political, social and economic conditions crucial for their understanding and recognizing of themselves as free and equal.
- The principle of the rule of law which asks from us that we must not only be able to effectively sanction non-compliance, but that we must be able to understand the sanctioning force as itself legally constituted or domesticated.

This suggests that legitimate democratic will-formation and decision-making is premised on the structural properties of these processes and capabilities related to agency that fuel an understanding of stateness that is not tied to the historical formation of the (nation) state. In more abstract terms the notion of stateness signifies those structural properties of the democratic process that are directed at funnelling and channelling the public flow of communication toward the common good, and at providing the features necessary to that

end, such as authority, bindingness, responsibility and accountability (see Genschel and Zangl 2009: 346).

### On the second part of the argument

These features are what make a *democratic order* a democratic order, and the idea is to say that it is precisely the rationality of the democratic process that brings to the fore an hierarchical element that is necessarily involved in democratic self-determination. This claim can further be substantiated if we take a look on it from the vantage point of international institutions and its claims to legitimacy on the one hand, and from the phenomenon of judicial borrowing which is an important aspect of what we term international juridification on the other. Against this phenomenological background it is instructive to address the question which should be the normative standards that inform the architecture, structure and functioning of international or supranational institutions in order to provide for the legitimacy of political decisions made at this level. What emerges is that the normativity of such kind of decisions for three kinds of reasons cannot exclusively, and not even primarily, derive from decentered sources. Firstly, it has to do with the kind of functional requirements that these regulations have to meet; secondly, this is due to epistemic problems we face when striving for decentered modes of problem-solving; and thirdly, it has to do with the kind of asymmetries that arise once we try to explain the normative dignity of global actors from the vantage point of the representation of particular forms of will-formation. In each paradigmatic case, the legitimacy of international institutions will instead depend on meeting the crucial demand; that the decisive solutions to problems of collective action must be understood by all those involved as emerging not from egoistic, but from general and mutually acceptable reasons (Buchanan and Keohane 2006: 409; see also Keohane 2006: in particular 82-85; and Keohane et al. 2009). At least two important lessons can be drawn from such an account of the legitimacy of institution-building at the international level. The first is that we cannot view the legitimacy of international institutions as dependent on external sources, even democratic states, because (a) not all those concerned by international regulations are members of democratic states and may therefore foster a type of accountability that is detrimental to just the interests of the world's worst-off people;

because (b) it would probably overstretch the rather long chain of legitimation if we trace legitimacy back to the consent to the representatives of individual states and not to the representatives of world citizens; and because (c) this solution would tend to make us overlook the fact that the freedom to consent or to withhold consent may be severely altered by the structural vulnerability, and especially by members of weak states (Buchanan and Keohane 2006: 414-416). The second lesson thus is that it would be much more promising if we directly derive the normativity of these institutions from the kind of reflexive challenges to be met even in regulative politics. Typically, these are challenges of reversibility, or the problems that emerge from the normative monophthalmia of distributive forms of will-formation, or from epistemic (cognitive) insecurities emerging from the fact that the capacity of those concerned to arrive at an informed judgment on the legitimacy of international institutions, itself depends on guaranteeing those conditions which allow for generating and making publicly accessible the kind of knowledge necessary for informed judgment. The upshot of these reflections is that the legitimacy of international institutions must be derived from an account of structural aspects of democratic will-formation which can be discerned with reference to what I call the logic of communification, the logic of public will-formation and the logic of self-intervention. All of them hint to a hierarchical element in any normative political order that can be directly derived from its reflexive character and which is thus necessary for its claim to democratic legitimacy.

A similar result is given when confronting the task of providing a theory of a common feature of judicial globalisation, i.e. judicial borrowing (Cf. Flaherty 2006; Waldron 2005). To make a long story short, what is at stake when reflecting upon the practice of national courts that base their own judgments on judgment of other national or international courts, is an account of the source of normativity from which norms may be derived, and that are able to pervade and even overrule the claim to democratic legality on which their work is premised. Again, what is interesting is that any of the current possible accounts of the norms of international law leads us to the same kind of conclusions already mentioned above. Be it that we refer to the 'global mirror'- thesis which takes any particular system of legal norms as the instantiation of a global and commonly shared

idea of law, and thus takes customary law in its classical sense as a source of validity of (legal) norms in its own right; or be it that we must think of this layer of overarching legal norms as ideally derived from a global process of law-making, itself subject to and legally domesticated by a global system of the separation of powers and checks and balances; or if we emphasise the rational quality of democratic or legal law making instead of the aspect of willing, and then derive its normativity from the conditions of discursive and scientific problem-solving.

In any case, it is important to note that the idea of the rule of law is premised on the acknowledgement of a fall of normativity between international law and its different sources, such as humanitarian international law, customary international law or human rights, and national systems of democratic legislation, based on the following assumptions. Firstly, the norms of customary international law acquire a validity that cannot be matched by punctuated democratic legislation, because customary law forms part of the common venture of states in a truly collective sense and its very nature seems to commit states through forms of practice that cannot be traced back to any precisely identifiable democratic decision (Palombella 2007: 467); secondly, these norms also acquire a constitutional status insofar as they can be understood and interpreted as a kind of constitutional self-binding of national states (Palombella 2007: 474); and thirdly, their normative status may be derived from the fact that important norms of the international systems can be conceived of as trans-systemic rules in 'that they can present themselves as the legal point of connection, i.e. the rationale, between the two systems' (Palombella 2007: 474).

## **Conclusion: Implications for modelling the basic structure of the future Euro-polity**

What all this suggests is that our understanding of normative orders for normative reasons, derived from the principle of reflexivity, always also implies a hierarchical component which still is best captured with the juridical notion of statehood – although this time the morality of statehood does not only reflect the conditions of the rational interplay of sovereign nation states, as in the case of the idea of internally moralised states figuring in classic international law, but

derives its cogency from warranting the structural conditions on which an inclusive, general will-formation in the international or transnational political realm, covering multiple levels reflexively tied to each other, depends. While this invites us to conceptualise the idea of statehood with reference to the idea of a moral principle of justification, which says that nobody may be subjected to norms, rules or institutions which are not reciprocally and generally justifiable to those affected by these norms, rules or institutions (Forst 2007b: 265), everything further depends on two moves. Firstly, we have to detach a more abstract notion of statehood from its more concrete ethical form of a nation state, which is only one form of the realisation of the idea of statehood. This is done by reference to a formal notion of statehood which understands stateness, like I suggest, as a principle of institutionalisation that derives its normative status from its internal link to the principle of democratic legitimation. But even, or just as we are more or less successfully able to bring this point home, justification cannot stop here, because we are then confronted with a second, equally important challenge – i.e. that the EU can conceive of itself as a convincing and normatively consistent form of democratic statehood only insofar as it additionally manages to project the internal reasons that lead to such a suggestion onto its external relations. This is so far obviously a task that has been more or less successfully circumvented in the contractarian tradition (up to Rawls), and it is a puzzle which can only be solved within the horizons of one of two broad visions. Either the vision that it understands itself as a building block of an emerging world order which gains additional legitimacy by establishing institutional means that provide for its internal globalisation; or if it understands itself in its institutional make-up as paradigmatic for an integrated form of a future world order and accordingly redresses its basic institutional features –the cosmopolitan model (Cf Eriksen 2009, chapter six). In either case, what is important to note is that the EU as a political order can gain legitimacy only from the anticipation of an even more encompassing and integrated political global order.

Where does all this leave us with respect to the three RECON models? In conclusion I would like to restrict myself to a short version of the practical message generated in the forgoing reflections: Firstly, because of the internal reflexivity of democratic practice, the principle of democratic legitimation urges us to constantly move

beyond – insofar as the EU is on the right track when establishing itself on democratic grounds beyond and above the national democracies from which it started; secondly, in order to be a democracy it also has to be a state or provide state-like features that are safely institutionalised; and finally, its legitimacy, as measured against the principle of democracy and the institutional principle of stateness, depends on its self-understanding as an instance of an emerging democratic world order – a requirement which may be spelled out in one of the two directions mentioned above.

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# Chapter 6

## Challenging the second model Can a regional supranational form of democratic statehood work?

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### Introduction

How do we know whether supranational integration can enhance democratisation in the form of a regional democratic order in general, and whether this is feasible in the historical context of Europe in particular? As political scientists we are generally empiricists for whom knowledge comes from experience. Thus, given that nobody has ever experienced a supranational democratic order, we tend to be sceptical as to the validity of a normative theory of supranational democratic statehood. Moreover, even in case of historical experiments such as the EU's constitution-making process that provided evidence to support the claim of an emergent regional-European democracy, political scientists would nevertheless assume that a supranational democratic theory can never be confirmed but only – at best – not be falsified.

Contrary to these traditional assumptions by positivist (or falsificationist) political scientists, I will discuss the issue of the norms and facts of supranational democracy here by adopting the social constructivist methodology of 'theory contest' (my term). This rests on an epistemological and an ontological assumption. First, 'the turn

to comparison as an approach to theory choice' (Bevir 2008) implies epistemologically that preference for a theory becomes a question of evaluating competing paradigms, where the criteria of comparison are generated for testing one web of beliefs in comparison to competing others. Second, as regards the ontological assumptions, the social constructivist methodology not only implies that the object of analysis here – the idea of a 'Regional-European democracy' (Schmalz-Bruns, chapter 5 in this report) – is conceptually constructed – that is 'as we recognise it, consists of things that we can observe and discuss only because we have the web of beliefs'. Moreover, it implies that we cannot properly model the normative idea of a supranational democratic order in empirical terms unless we also pay attention to social practices – that is whether, to what extent and how the relevant actors make this normative idea work by acting in their social worlds on their diverse and changing concepts and beliefs (Bevir 2008). As a consequence, the social constructive methodology of theory contest suggests that we comparatively evaluate the normative theory of regional supranational democracy (RSD) that Schmalz-Bruns proposes to social scientific accounts of how relevant agents think and act in the practices of the European integration process. In other words and from the perspective of social and political practices it requires that we will not reify the normative theoretical conception of RSD as a 'causal variable'. Rather, we will 'unpack' it as a social construction, treating it as a set of 'simplified terms for patterns of actions based on webs of subjective meanings' (ibid.).

Accordingly, the following provides reflections aimed at evaluating Schmalz-Bruns' normative theory of RSD as to whether the narrative it provides for the European Union's unfinished journey to democracy is in sync with some of our empirical social scientist accounts of relevant European agents' integration practices.

## The normative model

### 'Regional supranational democracy'

In the transnational theoretical debates on European integration and democratisation we find a broad range of competing ideas that can be mapped around three poles: the cherishing of unity by monistic ideas of Europe as democracy; the celebration of diversity by liberal ideas about democracy in Europe and beyond; and the search for 'third

ways' for reconciling diversity with unity (Liebert forthcoming). Situated close to this third one, ideas about European supranational integration through deliberation have made notable inroads. Starting with the plea for deliberation – understood as ensuring 'communicative processes where the force of the better argument sway people to harmonize their action plans' (Eriksen and Fossum 1999: 1) and, namely, conceived as a device for establishing legitimate integration (Eriksen and Fossum 2000), these ideas have provided norms for assessing the evolution of the EU towards a 'federal multicultural union founded on basic rights and democratic decision-making procedures' as compared to alternative logics of political integration and solutions to the EU's legitimacy problems (Eriksen and Fossum 2004). They have expanded into the full-fledged research program of RECON, including notably the conceptualizing of the 'EU's social constituency' (Fossum 2005); the conceptual development of the European Union's 'communicative space in the making' (Fossum and Schlesinger 2007), and the conceptual, normative and empirical consolidation of research fields on 'the new politics of European civil society' (Liebert and Trenz forthcoming), all of which are aimed at a full account of the necessity of and preconditions for – the hitherto unaccomplished mission of – European post-national democracy (Eriksen 2009). In this context, Schmalz-Bruns has constructed the model of RSD as one of three major competitors for re-ordering Europe. The most recent experiences of 'Europe, the faltering project' (Habermas 2009), including the defeat of European federalism and the Constitutional Project, notwithstanding, Schmalz-Bruns poses his utopian question: What are the conditions, under which a normative political order at the supranational level is likely to emerge? The ambition of his 'realist utopia' is precisely to map the presuppositions that he supposes will enhance this outcome. By taking this position, he challenges two opposed sides. On the one hand, Schmalz-Bruns is in disagreement with regulatory statist, but non-democratic conceptions of the EU (namely by Majone, chapter 3 in this report). Contrary to these he insists on the necessity of democratic legitimation that links the EU's authoritative decision-making directly to the citizens. On the other hand, differing also from cosmopolitan-democratic, but decidedly non-statist models (such as advocated by Brunkhorst, chapter 7 in this report), Schmalz-Bruns concedes that RSD is defined 'as a building block within an anticipated cosmopolitan political order', but claims that supranational statehood is a necessary precondition for

institutionalising RSD in the first place. Thus, against both major contenders who define the routes for the EU's institutional development in divergent terms, Schmalz-Bruns draws on four key mechanisms for modelling the patterns and dynamics of European political integration. Accordingly, RSD models 'justification' as a requirement for the supposedly necessary 'democratic legitimation', on the one hand, and 'institutionalisation' and 'statehood' as the two preconditions that will make a democratically legitimate European order work, on the other. In sum, Schmalz-Bruns argues, in a nutshell, that a 'supranational political normativity' with a self-engendering dynamic will be the contingent outcome of a positive correlation of all these four processes, namely 'justification', 'democratic legitimation', 'institutionalisation' and 'state building'.

Clearly, among the roadmaps for European integration, and even more narrowly, among those normative models that put deliberative democratic ideas centre stage, Schmalz-Bruns' 'realist utopia' does not necessarily appear to be the most likely theory choice. Presupposing that the system of domination that is in place in the European Union 'requires and aspires to direct legitimation', aren't the requisites for this normative model at the European level too shallow, namely regarding the EU's lack of direct territorial control, of a collective identity or of hierarchical law enforcement mechanisms (Eriksen 2009)? Lacking these essential prerequisites for a democratic state order, the viability of RSD seems doubtful: 'Since the institutional as well as the civic conditions under which a public justification process would be deemed legitimate are not in place, European post-national democracy remains an unaccomplished mission' (Eriksen 2009). Against this sceptical assessment, the social constructivist methodology adopted here will help evaluate the normative model by shedding light on the emergent features of the European polity in the making (Frieze and Wagner 2002). That is it will establish whether the patterns and dynamics of this normative model resonate sufficiently with the evolving social and political practices to justify the claim of a 'realist' utopia.

## European integration practices

In the contemporary constellation, any normative model for institutionalising a democratically legitimate European political order is faced with the challenge of how to come to terms with the

constraining mass public dissent. In fact, since Maastricht and especially due to EU treaty reforms between Laeken and Lisbon, 'heavy conflicts' have come to characterize EU decision-making within the member states. A process of 'politicization' has affected joint decision-making. This has become increasingly controversial, the more issues were drawn in that would determine the scope and level of political integration, and the more the 'audience or clientele interested and active in integration' has expanded (P. C. Schmitter, cited in Hooghe and Marks 2009: 6). In the 'multilevel European governance' setting, a turn to mass or identity politics, that is towards a new 'postfunctionalist game has pushed Europe into national politics and national politics into decision making on Europe' (Hooghe and Marks 2009: 14). In this post-functionalist perspective, contentious practices face us with the need for recasting 'the more substantial normative standards to which European integration, taken as a project, has to react' (Schmalz-Bruns, chapter 5 in this volume). That is, when taking constraining mass public perspectives on board, these will inevitably question the very normative principles that supposedly engender a stable political order.

In an attempt to probe these normative ideas in light of social and political practices, I will draw on empirical-analytical accounts of the new politics of 'civil society and the public sphere in reconstituting democracy in Europe'<sup>1</sup> and on 'citizenship and constitutionalisation: transforming the public sphere in European Integration' (ConstEPS).<sup>2</sup> More specifically, I will compare norms and facts – or theoretical vs. empirical accounts – with an eye to three criteria: (1) what democracy means normatively, that is which values are attached to it; (2) to which institutional forms these normative ideas are wedded and (3) what kinds of agencies are involved in putting such normative ideas into practice. Theory driven and comparative social scientific empirical research at the intersection of comparative political sociology and European integration provides us with – necessarily

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<sup>1</sup> For the RECON WP5 'Civil Society and the Public Sphere' project description and publication list, see <<http://www.reconproject.eu/projectweb/portalproject/WP5.html>>.

<sup>2</sup> 'Bürgerschaft und Verfassungsprozess: 'Zur Transformation politischer Öffentlichkeit in der Integration Ost-Westeuropas' (ConstEPS), International research project in the area 'Einheit in der Vielfalt? Grundlagen und Voraussetzungen eines erweiterten Europa', located at Jean Monnet Centre for European Studies, and funded by Volkswagen Foundation, May 2005 – September 2008.

historically contextualised – empirical evidence. Comparing these empirical accounts to the model of RSD, we find patterns of converge as well as divergence. Using the social science methodology of ‘comparative political discourse analysis’, our findings from mass media research, European election campaigns, national parliamentary debates and the analysis of citizens’ attitudes towards Europe lend at least partially support to RSD.<sup>3</sup>

### The European polity – an emerging transnational justification community.

As regards the meaning of legitimacy in relation to the EU, Schmalz-Bruns conceives the emerging European polity as a ‘justification community’. To what extent does this idea resonate with evidence about the patterns and dynamics of the evolving European public sphere from political communication and comparative mass media research? In several recent research projects, the national news media have been found critical for fostering transnational patterns and dynamics of European political communication (Weßler and Brüggemann 2008; Liebert et al. 2007; Statham and Trenz forthcoming).

To start with, political debates in the national media are more Europeanized today than they were two decades ago; national media do not merely look to Brussels more nowadays but are also debating issues across national borders more intensely (Weßler and Brüggemann 2008). Comparing national discourses in five EU countries – Austria, Denmark, France, Germany and the United Kingdom (covering the period 1982–2005) – the authors show the ‘as yet nationally segmented character of Europeanization in the media’, and at the same time how national public discourses in Western Europe have transnationalized and what this means for the legitimacy of the European Union. Subsequent research on different sites of the European public sphere in the framework of RECON (covering the period 2005–2009) indicate a significant expansion of these trends. Driven by the EU’s treaty reform processes, public discourses about the justifiability of issues of EU policy, politics and

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<sup>3</sup> See Liebert et al. (forthcoming); Liebert and Trenz (2009a), including a more detailed account of the method of comparative political discourse analysis (CompPDA) that we have applied in many of these analysis.



polity building have multiplied abundantly. These discourses are still fragmented by national boundaries, but over time more cross-national exchanges have occurred (Liebert and Trenz 2009; Trenz 2008).

Second, the mass media coverage of ratification debates about the EU 'Treaty establishing a Constitution for Europe' (TCE) have emphasised argumentation and justification, albeit with considerable context specific intra- and cross-national variation (Liebert et al. 2007). In all seven old and new EU member states that have been included into this comparative study – the Czech Republic, Estonia, France, Germany, Latvia, Poland, the UK – the mass media have become agents of political communication between public opinion and European political will formation. Moreover, they have turned into mechanisms of cross-border observation and translation between nationally differentiated public spheres. To be sure, the qualitative and quantitative comparative discourse analyses of print media coverage of the failed constitutional treaty suggest that given the diverse patterns of European political communication in old and new member states, the EU is unlikely to mutate into a novel kind of supranational political communication community. Yet, a paradigm shift has occurred, from nationally segmented communication about the EU to a pattern of transnational discursive exchanges between European publics. Contestation has become a catalyst that drives the transnationalisation of domestic public spheres. The mass media are pivotal in selecting, framing and structuring how societal and political conflict about Europe is articulated by political elites, civil society and the citizens.

Statham and Trenz (forthcoming) provide substantive evidence from cross-national research on transnational diffusion and resonance of mediated discourses in Britain, France, Germany and Spain on constitutional ratification, thus in the same period of intense politicization of the EU. They confirm that given the contested nature of the EU-polity and the social responsiveness of the citizens and people in Europe, media communication has proven central to comprehend the scope of legitimacy of the European Union and to understand how European constitutional politics is mediated. More specifically, they evaluate the main political actors and institutions in their role as public mediators of EU constitutional politics in as it is

covered by quality newspapers, critically discussing the pros and cons of the future prospects for a truly European public sphere.

Finally, accounts of citizens' attitudes and behaviours towards the EU's Treaty establishing a Constitution for Europe have highlighted the salience of cross-national shared patterns of justifications provided by citizens that are based on instrumental reasoning, on the one hand, and on value rationality or normative political conceptions of the EU, on the other.<sup>4</sup> Thus, different from what the literature suggests, citizens' turnout and voting patterns in referendums on EU treaty ratification do not wholly depend on idiosyncratic conditions, issues or diverse member state contexts. Instead, citizens' voting behaviour can be explained by cross-national patterns of cognitive predispositions.

### Contested supranational meanings of democracy in Europe

The second claim that Schmalz-Bruns advances – that 'democratic legitimacy' is a relevant mechanism for the political normativity of the EU – resonates with empirical accounts, namely with comparative analyses of subjective identity constructions, as well as with studies of national parliamentary ratification debates.

First, the research by Rosemarie Sackmann et al. contributes to closing the gap between theory and research on collective European identities (Sackmann and Liebert forthcoming; Brzezinska and Czajkowska 2010).<sup>5</sup> While normative democratic theorists have developed new and differentiated concepts, empirical identity researchers have been still constrained by traditional instruments that build on the assumption that collective political identities are wedded to the nation-state. Findings from an explorative cross-country project that we have specifically designed to uncover complex subjective identity constructions within the multilevel European political space suggest that European citizens from different member states do not share all but some important, normative democratic European

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<sup>4</sup> This analysis compares Spain, France, the Netherlands and Luxembourg, i.e. those four countries where ratification referendums for the Constitutional Treaty were held; see: Gattig and Blings, Citizens' vote in EU treaty ratification referendums: diverse contexts, shared patterns, in Liebert et al. (forthcoming).

<sup>5</sup> For more details about the methodology and the findings from the German case study, see Sackmann (2009); for empirical findings from the Polish case study, see Brzezińska and Czajkowska (unpublished manuscript).

conceptions, not only across national boundaries but also transcending the former East-West divide.

Second, Aleksandra Maatsch's analysis of discursive patterns underlying parliamentary ratification of the Constitutional Treaty and the Treaty of Lisbon contradicts the claim that the EU can be accurately portrayed as an emerging supranational democracy (Maatsch 2010). Analysing national parliamentary debates in six EU member states - Germany, France, Great Britain, Poland, Hungary and the Czech Republic - her comparative qualitative and quantitative analysis of patterns of support and rejection of the Treaties lends support to the established thesis that domestic conflict about the EU is structured along the left-right and the TAN-GAL dimensions. The analysis demonstrates, first, that opposition against EU treaty reform has reached the political centre represented by mainstream conservative and Christian-democratic parties that until now counted among supporters of the European integration. Second, the investigation identifies a second factor that accounts for support of the Treaties, namely membership of MP's in the governing party or coalition: governing parties, also the conservative ones, were more likely to overcome internal opposition in order to ratify the Treaty. Third, regarding democracy models, supporters of the Treaties were more likely to favour a polycentric European Union, whilst the opponents adhered to an intergovernmental model. The federal model of the European Union was present in the parliamentary debates, however, it received only negative evaluations. The cosmopolitan model of democracy was entirely absent in the discussions.

### **Institutionalisation of a self-propelling supranational democracy**

The third mechanisms proposed by Schmalz-Bruns' for modelling RSD - 'institutionalisation' - matters in the practices of the emerging European Polity to a certain extent, as well, but only to a limited extent. It is generally counted as a paradox that overall European election turnout has decreased while during the same period the European Parliament has steadily enhanced its institutional powers and symbolic centrality for the EU's democratic legitimacy. Analyses of mass public participation in EU elections and referendums yield evidence that institutional knowledge and trust are relatively salient

cues that do matter in political practices for mobilising support for participation in EU politics and polity building (Pawlak and Liebert 2010). However, depending on context, satisfaction with democracy and perceptions of the EU's democratic deficit adopt quite variable meanings.

In terms of European voting practices, less than a majority of Union citizens has turned out for voting in EU elections. However, to explain the complex patterns of cross-national turnout variation and gaps, a number of authors have argued that in addition to the 'second order election' model that accounts for negative turnout, a 'first order European election' model with a focus on 'the new citizen politics' (Dalton 2008) is needed. Pawlak, Gattig and Liebert have aimed at identifying and testing the factors on which positive turnout depends, including education and age as well as a range of cognitive predispositions towards the EU and the EP. More specifically, they seek to demonstrate that a qualified majority of better educated, more mobile, politically interested and active Union citizens can count as sufficiently knowledgeable about EU institutions in order to qualify as loyal supporters for – or critical opponents against – them. Qualitative empirical analyses of cross-national and intra-national configurations of conditions and outcomes account for complex patterns of citizens' participation in European elections – suggesting that for certain kinds of constituencies these continue to function as 'second order' or 'national by-elections', while for others they have become 'first order elections' (Pawlak, Liebert, Gattig 2010).

### **A limited case for European statehood**

Compared to the evolving practices of 'communicative justification', 'democratic legitimization' and 'institutionalisation', the by far most thorniest issue for a 'reality check' is the fourth mechanism on which Schmalz-Bruns' model of RSD rests, namely that of 'stateness' in the supranational realm. This projection appears as the most ambiguous, if not contested issue in the discursive practices involved in the emerging EU polity. Supranational institutions are welcomed as necessary instances for democratic self-legislation in the EU, such as the Council, the European Parliament or the Commission that embody authorised legislative power and legal regulation, legislatively mandated coordination and public services. By contrast, the idea of the supranational state conventionally conveys enforcement backed by coercion, bureaucratic routines and technical

power that condition people's actions by systemic imperatives. Throughout the various arenas of European political communication, from the mass media and national parliaments, over EP election campaigns, eurosceptic networks, and mass publics to national public intellectual narratives about Europe, it is difficult finding much resonance for the idea of a 'European Superstate' (cf. Morgan 2005). More easily than identifying support among mass publics or among national parliamentarians for the idea of a supranational statehood, we can find favourable predispositions for a self-engendering European statehood in the practices of some parts of European real civil society. These include private, civic and political associations that endorse the role of loyal partners in support of a European supranational democratic state (Liebert and Trenz forthcoming). Without being representative for the other member states, sympathy for a 'European superstate' appears relatively widespread among German civil society organisations (Trenz 2010).

### **Agency for engendering a Regional Supranational Democracy in Europe**

Among the candidates for propelling a self-engendering process of institutionalising a regional supranational democracy, political theory suggests looking at European citizenship, political parties and civil society. To what extent do these three perform as agents promoting a RSD from below?

First, legal integration of the EU has advanced the normative framework for a new kind of citizenship regime in a Union of states. Tatjana Evas and Ulrike Liebert (2009 and 2010) provide an account of this process, arguing that this has led to a new type of citizenship that can be depicted as a regime of mutually inclusive citizenships committed to unity amidst diversity. In the context of 27 diverse member state citizenship regimes, citizenship of the Union has not remained an empty shell nor has it become a Pandora's Box with ever expanding supranational regulations triggering harmonization. A third way for aliens to turn into members has emerged from commitments to universal rights, principles of non-discrimination and mutual recognition, promoted by social agency from below – cross-border mobile Union citizens and third-country nationals – and supported by the national and supranational judiciary.

Secondly, Kathrin Packham (2009) has explored political party engagement with EU constitutional treaty reform. Addressing the question how political parties contribute to (de-) legitimising EU constitutional development, many scholars as well as civil society organizations believe that political parties do not engage actively enough with EU politics. Packham's comparative assessment of party communication concerning EU constitutional treaty ratification presents a more complex picture: Political parties do cue the public on EU issues and, in part, do so in a highly successful manner, providing strong as well as clear cues on their respective positions. However, it is alarming that pro-European mainstream parties generally face more difficulties to convey coherent messages, thus leaving constituencies without clear alternatives and the public susceptible to populism.

Third, civil society participation in EU politics has gained prominence in theoretical discourses about democratic legitimacy beyond the state. However, in the practices of the self-engendering political normative order, the impact of civic associations has been quite negligible, if compared to governments, parliaments, the mass media and parties (Guasti 2008; Liebert and Trenz forthcoming). Due to difficulties of access to the public sphere, civil society has proven itself marginal for legitimating the EU's constitutional reform. As a matter of fact, most organisations from the new member states that held positions on constitutional issues of their concern lacked an effective voice, suffered from a lack of transparency of intergovernmental constitutional politics, had little or no access to the channels of communication provided by the mass media, by EU decision makers, or EU-level umbrella organisations. Thus, equal representation has been biased by selection procedures by consent rather than representativeness. It is unlikely that civil society will solve the EU's democratic deficit unless practices of EU politics will become more inclusive.

## Summary and conclusions

This chapter has provided reflections on the challenging question of whether a regional supranational form of democratic statehood can be expected to work. A contested field emerges from the practices of European integration. In light of comparative evaluations of norms and facts, a 'contest' between theoretical idea and social practices of

supranational statehood has become visible, from which two conclusions shall be drawn, an empirical, and a theoretical one.

In a critical empirical perspective, instead of submitting to the fact of anti-European statehood sentiments (for instance by national parliamentary minorities) – and for not prematurely abandoning the normatively compelling idea of supranational statehood as a prerequisite for democratic legitimacy or as a claim to justice beyond the state – we might want to scrutinize the social contradictions, limitations and pathologies reflected by public discourses and belief systems in relation to systemic contexts. In other words, pursuing a proposition by Iris Marion Young further, it is at issue here whether oppositional ‘voices’ articulate social injustices or systemic oppressions, that is infringements of the principle of freedom, for public debate, or whether, by contrast, contestation expresses personal or particularistic interests in profit or power (Young 1999). On the one hand, if the idea of democratic legitimacy grounded on supranational statehood is a source of problems rather than a solution from the point of view of people’s democratic freedom and self-determination, it should rather be abandoned. On the other hand, it might also be the case that particular political, social or economic groups or mass publics are misled to believe that either the nation state or European civil society (rather than a European state) will be capable of providing for social justice or fighting structural oppression (id.). After all, as Young has rightly pointed out, in a globalising world, the pursuit of justice cannot rely on the communicative and organisational capacity of real civil society alone; instead it requires positive state intervention to regulate economic activity (id.).

Taking a theoretical stance for narrowing the gap between the norms and practices of supranational political normativity, I suggest revising the model of RSD in the context of the EU and to systematically incorporate a ‘contestatory’ track to supplement the representative-majoritarian one. Adopting a reflexive perspective on the context of the would-be democratic multilevel European polity, the introduction of forums for contestation would open up sites ‘where civic and political associations and movements expose power in public discussion and demand that the powerful give an account of themselves’, as Philip Pettit contends (Pettit 2006). ‘Contestatory democracy’, here, would require the electoral majoritarian

institutions of democratic etatism at the national level to be complemented by inclusive deliberative forums within the supranational realm. Thus, I propose complementing the four processes which link citizens and authoritative power holders and institutions – justification; democratic legitimisation; institutionalisation; state-building – by including into each of these a track for ‘contestation’.

Summarising these comments, my aim was to assess from an empirical perspective how the theory of ‘Regional Supranational Democracy’ proposed by Rainer Schmalz-Bruns connects the idea of democratic legitimacy through justification to the institutionalisation of supranational statehood, that is how it models the normative political logics and dynamics of European integration. For that purpose, I have taken as the point of departure a social constructivist position, defined in terms of the postfunctionalist turn of European integration. From here, I have highlighted three areas of resonance where the model proposed by Schmalz-Bruns arguably fits emerging social practices to a significant, albeit not sufficient extent: the practices of communicative transnationalisation and justification; the diffusion of norms of democratic legitimisation beyond the state, and the practices involved in the constitutionalisation and institutionalisation of the EU polity. Regarding the theory of ‘supranational statehood’, thus, preliminary empirical evidence confirms considerable tensions between norms and facts. For reconciling these gaps – at mass public, national parliamentary, party political and civil society sites – I have suggested to either exclude this component from the model of RSD or to chose a slightly alternative theoretical route aimed at capturing the ‘contestatory turn’. To the extent to which these new concepts accommodate ‘bottom-up’ tendencies towards European positive integration (or towards a positive, EU regulatory regime), ‘contestatory democratisation’ would promise a valuable contribution to building novel forms of supranational statehood as a viable correlate to the contingent processes of justification, legitimisation and institutionalisation that have not yet been conducive to developing a legitimate would-be democratic EU polity.



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# Chapter 7

## EU as a cosmopolitan order

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Cosmopolitanism is an old project. From the very beginning it was closely linked with the emergence of highly rationalized religious and philosophical world views and, at the same time, the emergence of imperialism, social class stratification, and the *differentiation of urban centre and rural periphery*. Cosmopolitanism appears for the first time during the Axial Age between 800 and 200 BC, and has been used as a term since the late fifth century BC by Greek and later by Roman and Christian philosophers.<sup>1</sup> The concept was used as a description of the Christian Empires (universal monarchy) and in particular the Church state with its claim to be the one and only Universal Church (*Ecclesia universalis*).<sup>2</sup> Through different versions of a world republican state or a league of nations (*civitas gentium*), the Enlightenment of the 18<sup>th</sup> century developed the idea of a cosmopolitan order, or a *civitas maxima*. In particular Kant's famous distinction between *ius gentium* (international law, transnational law)

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<sup>1</sup> For a clear and brief overview, see Nussbaum 1997.

<sup>2</sup> Dictatus papae, c. 2, 8, 9, available at: <<http://faculty.cua.edu/Pennington/Canon%20Law/GregorianReform/Dictatuspapae.htm>>. See also Moore 2000: 72, 189f, 225; Wieacker 1967: 74f; Schatz 1990: 103, 107; Cantor 1969: 228, 273f; Berman 1983; Brundage 1995.

and *ius cosmopoliticum* (human rights, world citizens rights, world law), and his idea of a league of nations were especially during and after World War I further developed by political scientists, sociologists, international lawyers, and political leaders such as Woodrow Wilson.<sup>3</sup> The Kantian proposal for a league of nations (*Volkerbund*) became the blueprint for the first institutional implementation of such an organization (Beestermöller 1995). At the threshold of the 21st Century, the global legal order can be described as the first truly cosmopolitan order, consisting in:

- An autonomous system of 'world law', reaching from *Lex Mercatoria* and the universal common law to a full fledged system of *ius cosmopoliticum*,<sup>4</sup> and a rapidly growing system of international courts (and internationally acting national courts) at its centre.<sup>5</sup>
- A world public, with its own permanent agenda of topics affecting every single world citizen (Brunkhorst 2005b).<sup>6</sup>
- A global civil society of free associations, including about 27 thousand non-governmental organizations (Brunkhorst 2005b).
- A functionally differentiated system of world politics, with about 200 nation states and 250 global and regional inter-, trans- and supranational organizations at its centre (Albert and Stichweh 2007; Chimni 2004).

The global order of public communication, political action and legal juridification has now already become a world republic in the literal sense of the Latin notions of *res publica universalis* or *civitas maxima*. Insofar as it includes (1) permanently increasing juridification with a system of international courts at its centre, (2) the emergence of a 'hierarchy of norms' (Peters 2006), and (3) the structural coupling of the systems of world law and world politics, the present

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<sup>3</sup> See Eberl 2008; von Bernstorff 2001; Wüst 2007.

<sup>4</sup> Emmerich-Fritsche 2007; Berman 1995; Müller 2001; Teubner 2003.

<sup>5</sup> Fischer-Lescano 2005; recently von Bogdandy and Venzke 2009. This is due in particular to the last two decades when more than 75 per cent of all decisions (ca. 25.000) of supranational courts in history were reported (see also: Alter 2008).

<sup>6</sup> On world citizenship and the development of that concept since the 18<sup>th</sup> Century, see Stichweh 2000.

cosmopolitan order is already a constitutional order without a state, but with strong elements of statehood.<sup>7</sup>

## Cosmopolitanism as an 'evolutionary universal'

Cosmopolitanism is much older than the EU and the present global order, and it is even much older than democratic constitutional states. I want to assert that cosmopolitanism is an 'evolutionary universal' or an 'evolutionary advantage' (Parsons 1964).<sup>8</sup> As the eye, the brain, kinship, religious belief systems, social stratification, functional differentiation, empires, states, constitutions, or democracy – cosmopolitanism apparently is a multiple invention of the evolution (*Mehrfacherfindung*). Because they are evolutionary universals, kinship, universal norms, bureaucratic organization, cosmopolitanism, empires, or democracy are nothing specific European.<sup>9</sup> Because (and if) positive law, universal norms, rational bureaucracy, democracy, or cosmopolitanism are evolutionary universals, their existence in the world society does not and can not depend on the contingent hegemonic power structure of this society alone, even if the social, political and cultural differences between the particular institutional realizations of the different evolutionary advantages are depending on changing hegemonic and counter-hegemonic power structures, class fights, ethnic conflicts, political constellations etc.<sup>10</sup>

As an example, no Western hegemonic power has forced the revolutionary founded and totally anti-Western Islamic Republic of

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<sup>7</sup> See Parsons 1961. Now there is a broad discussion, see Peters 2006; Fassbender 1998; von Bogdandy 2006; Teubner 2003; Fischer-Lescano 2005. On global statehood see inter alia Albert and Stichweh 2007; Shaw 2000; Chimni 2004; Brunkhorst 2002, 2008b and 2009b.

<sup>8</sup> In Luhmannian terms one could speak of an *evolutionary advance* (Luhmann 1997).

<sup>9</sup> This is the case, even if some of them have been invented for the first time in Europe, or spread from Europe all over the world – thanks to the European conquerors, looters and robbers who have made the entire globe the stage for European wars, despoilment, exploitation and enslavement, and were accompanied by an ever-denser network of commercial routes and streams of emigrants, by humanists, lawyers and missionaries, by torturers and geometers, by naturalists and ethnologists who together have established the Western imperial hegemony, its discursive powers, its instrumental and communicative rationality, its disciplinary techniques, its know how and know that all over the world.

<sup>10</sup> For the latter, see Buckel and Fischer-Lescano 2009.

Iran to establish a constitution with an elected president and an elected parliament, and to design a constitutional theocracy which in its basic structure resembles the constitutional monarchies of the 19<sup>th</sup> Century (Brunkhorst 2005a). Because of its lack of democratic legitimization, which is another evolutionary universal, and only because of this lack of democratic legitimization, the ruling classes in Teheran now have to face the same category of legitimization problems as most of the undemocratic constitutional regimes of the 19<sup>th</sup> century had to face earlier.<sup>11</sup> Moreover, structurally speaking, the same that seems to be true for Teheran *cum grano salis* seems to be true for the EU. Again, we have a constitutional regime which is not sufficiently democratically legitimized – a kind of constitutional, collective and technocratic Bonapartism (see the role of the European Council)<sup>12</sup> – which has already led to considerable problems of legitimization (see for example the 2005 referendum), and probably will lead to further problems once we have a European president, or by the next deeper conflict inside the EU (Brunkhorst 2006, 2007b, 2009a).

The now already ‘existing idea’ (Hegel) of a cosmopolitan order is an evolutionary universal because it has been invented lots of times in different world regions, and in very different formations, first as an ‘abstract idea’ (Hegel), and sooner or later the idea came into different versions of existence. Cosmopolitanism is (1) not a specific European invention, and (2) should not be identified with democracy and democratic development from the outset.

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<sup>11</sup> The present manifestation of the long latent legitimization crisis of the constitutional regime is typical for such a type of constitutional regime. Even if the executive power is badly controlled by the constitutional bodies, it cannot manipulate election as it pleases. Once it surpasses a certain degree of manipulation practice it must face the outbreak of a legitimization crisis that can lead to total dictatorship or a democratic transformation of the whole regime.

<sup>12</sup> The open secret of its power is that it is largely informal, nearly invisible, not even mentioned in the former European treaties, now in the Lisbon treaty a bit better formalized. For non-specialists already the name is not really distinguishable from the very different other trans- or supranational councils in Europe, as there are the *Council of the European Union* (Ministers or Secretaries of State) and the non-EU *Council of Europe* (a council of members of parliament from 47 countries). Total confusion is produced once you translate it in other languages. Rightly the people who discovered its latent shaping power, Guiscard and Schmidt called it rule by fire-side chats. See also Dann 2002; Brunkhorst 2007b.



Already the old empires described themselves as the centre of the whole world, and claimed to be a kind of world government, or made claims for global governance, reaching from old Egypt, China and Rome to the modern Soviet Union of the 20<sup>th</sup> Century. In Ancient times, the Latin word *urbs* was only used in singular, and referred to Rome alone. Even the Pope today still follows these old cosmopolitan and imperial tracks when he addresses Christianity on Easter *urbis et orbis*. A cosmopolitan order could not only be a specific territorial political order, but also a legally organized combine of persons without a specific territory (*Personenverband*), which was as powerful as the Christian Church of the 13<sup>th</sup> and 14<sup>th</sup> Century.

All versions of cosmopolitanism are defined by the same set of basic ideas, and all of them have been articulated for the first time by the religious and philosophical world views of the Axe Age, by Buddhism as well as by Stoic philosophy, by Confucianism as well as by Judaism, by Taoism as well as by Zoroastrianism, by Brahmanism as well as by Christianity. Classical cosmopolitanism normally entails: (1) the idea of a universal community committed to the one universal basic law of the Golden Rule 'that is at the heart of all the major legal systems' of that age (Berman 2005: 69, 79); (2) a set of procedural rules for formal institutional settlements of conflicts; (3) a kind of (and maybe the first) subjective right of the hearing and being heard for all parties in a given case, and 'to present evidence to support their arguments pro and con' (in Roman law: *audi alteram partem*) (ibid.); (4) Universal basic laws, procedural rules and subjective entitlements (of hearing and giving reasons) constitute the institution of fair trial and impartial tribunals which could be expanded even to foreigners as in the Roman *ius gentium*;<sup>13</sup> (5) Universal principles, methods and entitlements furthermore implied that they were applicable not only to judicial proceedings *but also in legislative and administrative proceedings*; and (6) they were not restricted to official or public law but as well applicable in unofficial and informal 'settlements of conflicts within and between associations of all kinds' (families, neighborhoods, workplaces, professional associations, religious societies, ethnic groups, nations, cultures, and even entire civilizations) (Berman 2005: 78f) One could call this with Christian Joerges the emergence of a 'universal law of

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<sup>13</sup> See inter alia: Seagle 1951; Hattenhauer 1992; Höffe 1999.

collision' (Teubner and Fischer-Lescano 2004). From the very beginning of cosmopolitan thinking and acting this law could be stretched to the whole world, and all kinds of conflict and dispute wherever.

All the comprehensive world views of the Axe Age have developed and even implemented to a certain degree two kinds of norms which belong to the two words which are combined to *cosmopolis*, the *cosmos* and the *polis*: (1) A universal and hierarchically ordered normative system, designed for a universal community, and based on the principle of reciprocity (Golden Rule); and (2) a set of procedural rules to regulate the political and legal interpretation and concretization, application and implementation universal norms.

With these two sets of norms (stemming from the *Urgeschichte* of freedom) we already have reached the first level of normative differentiation that is needed to construct a modern democratic constitution that consists in a set of universal rights and principles on the one hand, and a set of procedural norms of check and balances (*Staatsorganisationsrecht*) on the other. Schmalz-Bruns speaks here of a 'turn to institutional normativity' that already from the very beginning of institutional social practices implies something like 'reflexive' self-legislation or self-determination (Schmalz-Bruns in this volume, chapter five). The double structure of law that *in nuce* is constitutional is nicely expressed by the Talmud: 'What is hateful to you do not to your fellowmen. That is the entire law: All the rest is commentary' (Shabbat 31a). The entire law here consists in the universal principle of the Golden Rule. The rest of it, the *commentary*, is nothing else than a formal method for the concretization, implementation and interpretation of the universal principle in terms of changeable positive law. What the Talmud and the other legal text books of the Axe Ages call the entire law, we now can address with Kant as the one and only human right of equal freedom, and the commentary now consists in the democratic legislation (or democratic politics). There is however a single but decisive categorical difference (to Kant and the Talmud) – now the one and only human right (despite its moral content) also has become positive

human law, which means its substance consists entirely in its changing legal concretizations.<sup>14</sup>

## Modern constitutions and cosmopolitanism

A legal order that combines the universal law with particular and changing commentaries is from the very beginning designed as a dynamic order that transcends itself. This still is true for all modern constitutions that are revolutionary and democratic (Möllers 2007: 202f).<sup>15</sup> The combination of a dynamic law of commentary, the procedural norms of federal and functional checks and balances with the invocation of the equal freedom of all men, and the universal right of all peoples to self determination,<sup>16</sup> is the very point of the American Declaration of Independence and the US Constitution. These from the very beginning fundamental legal inventions, for the good and for the bad, unleashed democratic experimentalism and democratic expansionism (John Dewey). They led to the imperial dynamism of the open ranges of the West (and the extinction of the aboriginal population of North-America); they led to the anti-monarchical Monroe Doctrine (on the one hand a document of defense of universal democratic progress against the European Holy Alliance, on the other hand a document of the foundation of the US Empire and US Imperialism); they led to the Gettysburg Address that combines the equal freedom of each – interpreted now for the first time in American history as *ius cogens* by Lincoln – with a universal claim for democratic self-legislation: '[...] that democracy shall not vanish from earth'; they led to the re-description of the two World Wars as revolutionary wars, fought out to 'make the world safe for democracy' (Woodrow Wilson) and to create a new and 'One World' (Franklin D. Roosevelt); they led to the tremendous expansion of subjective rights through the New Deal, the Atlantic Charter and international welfarism (that preceded national welfarism), and the transformation of equal rights into anti-discrimination norms since the 1960's. Because democratic expansionism not only is defined in

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<sup>14</sup> For three different attempts to conceptualize this circular structure between law and politics, law and democracy or the juridification of democratic law-making see: Luhmann 1990; Habermas 1992 and Kelsen 1925. See also: Möllers 2007:193f, 206.

<sup>15</sup> On democratic (federal) expansionism, see Brunkhorst (2008a) on Hannah Arendt's idea of a revolutionary foundation of the modern nation state and international law.

<sup>16</sup> People here simply defined as a population suffering from undemocratic rule, as the Americans themselves did at that time.

geopolitical terms (as in the ideologies of continentalism or globalism), but related to all dimensions of our worldliness or existing-in-the-world (*Lebenswelt, In-der-Welt-Sein*), it cannot be reduced simply to bloody imperialism.<sup>17</sup> Cosmopolitanism is closely linked with inner and outer imperialism of all kinds, but is at the same time the only effective weapon that can be used to defeat it.

The same dynamic (which Schmalz-Bruns calls the reflexive structure of self-legislation, see chapter five in this volume), can be observed in the history of French constitutional law right after the outbreak of the Great Revolution. Art. 16 of the famous French Declaration from 26 August 1789 implicitly declares war to all regimes that have no democratic constitution,<sup>18</sup> when it states that: 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.'<sup>19</sup> Because of the dynamic combination of universal law and political commentary (regulated and organized by the 'separation of powers'), cosmopolitan implications are internal to all democratic constitutions, and e. g. Art. 23 (1), 24 (1) and 25 of the *German Basic Law* from 1948 are only further steps that all go in the same direction of cosmopolitan democratic self-transcendence.

It is a characteristic of the inherently revolutionary dynamics of modern democratic constitutions that 'the most radical theories of popular sovereignty were invented at a time when census-vote was an unquestioned legal condition for the performance of voting rights' (Maus 2010). These theories were not abstract normative theories beyond real power-relations, but an expression of an already existing or emerging constitutional order. The point of Maus' observation is that constitutions which are in themselves (fully or partially) democratically designed, but implemented by deeply undemocratic census vote, have already internalized a contradiction that could be used by the excluded themselves (or in their name) as an instrument to articulate public protest, to build up public pressure, to construct organizational power, and to struggle for change legally and

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<sup>17</sup> See John Dewey in Boydston 1984; Brunkhorst 1998.

<sup>18</sup> At that time this included France and all other countries of the world, with the one exception of the United States.

<sup>19</sup> See also Hofmann 1988: 847.

politically. Not only the American and French constitutions from 1778 and 1791, but also less well-functioning constitutions as the *Charte constitutionnelle* of 1914, the Iranian constitution of 1979, or the *Charte constitutionnelle* of the European treaties,<sup>20</sup> do contain a latent potential for radical egalitarian, inclusive and cosmopolitan self-transcendence that is activated in the use of communicative power, insurgencies or even revolutions (as successfully in Paris 1830, or probably less successful in Teheran 2009). Constitutions, even if they are not 'normative' but only 'nominalistic' (Loewenstein 1959: 151ff) can enable the social struggle for equal rights within the already existing claim of rights (what does not exclude self-radicalizations of communicative power and its change into the violent power of revenge that goes far beyond the claims of right).

If we apply Maus' observation of the self-transcending power of democratically designed constitutional law to the Lisbon Treaty of the European Union, with its still existing deep gap between democratic claims, declarations, rights and institutions on the one hand, and their poor implementation of democracy on the other hand, then we immediately see how far away the Lisbon-judgment of the German Constitutional Court is from the utopian spirit of the theories of popular sovereignty of the 18<sup>th</sup> Century, which still are effective within the highly inchoate parliamentary democracy of the European Union, and how close to the 'undead' (Oeter) and 'nightmares' (Marx 2007) of the 19<sup>th</sup> Century German *Staatsrecht* it comes.<sup>21</sup>

The Lisbon judgment is in particular negatively interesting because it is such a striking and completely unfounded rejection of these cosmopolitan implications of democratic politics (Halberstam and Moellers 2009; Schönberger 2009; Bogdandy 2009). It is unfounded because it does not recognize that the very point of all democratic constitutions is that democratic self determination of a people is not at all bound to, or depending on, the organizational form of the modern state. To confound the nation as a self-determining subject with statehood, it should be enough to remind of the old mistakes of the pre-democratic German 19<sup>th</sup> century statutory positivism

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<sup>20</sup> ECJ case 294/83, *Les Verts* (1986); ECJ Opinion 1/91 (1991).

<sup>21</sup> To the latent democratic potential of the EU, see Maus 2010.

(*Staatsrecht* and *Staatswillenspositivismus*) (Brunkhorst 2003). The 'etatist reduction of the revolutionary tradition' that binds democratic self-determination to the borders of the nation state is an unconstitutional misjudge of 'the radical-democratic content of the doctrine of the *pouvoir constituant*' (Möllers 2007),<sup>22</sup> precisely because it subsumes popular sovereignty *under* the sovereignty of the state. In their stubborn Hegelian etatism the judges have forgotten that it was from the American and French Revolutions cosmopolitanism 'received its strongest impulses' (Kleingeld and Brown 2006). Cosmopolitan self-transcendence is – against Carl Schmitts influential, but substantial and irrational interpretation of Sieyes in his *Verfassungslehre* – an internal implication of the revolutionary construction of the *pouvoir constituant* (Brunkhorst 2000 and 2005b).

An important consequence of these considerations for RECON models one, two and three is that there is no categorical difference between the intergovernmental model one, the federal state model two, and the cosmopolitan model three, as long as we do not reduce or subsume popular sovereignty to or under state-sovereignty. If we keep on the logical track of the normative model of the revolutionary *pouvoir constituant* the borders between all three models become fluid, and the differences will only be different developmental stages of the same (procedural, formal and normative) kind of constituent power that constitutes the nation state, as well as the European Unions citizenship and the people of the United Nations.

## Cosmopolitanism and the nation state

Cosmopolitanism, and especially European cosmopolitanism, has not only existed since long before the birth of the European Union. Even during the high tide of the European nation state in the years between 1850 and 1914, cosmopolitanism did not disappear, but was only repressed. It is not simply an accident that the beginning of modern cosmopolitan international law goes back to the years 1868 and 1873, when the first volume of the *Revue de droit international et de législation comparée* was published and the *Institut de droit international* was founded in Gent (Netherlands) (Koskenniemi 2004: 39ff). This was already a reaction against the repression of cosmopolitanism and

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<sup>22</sup> For a profound criticism of this terrible judgment see Halberstam and Möllers 2009; Schönberger 2009.

popular sovereignty by the increasingly more statist oriented concert of the major European powers of the 19<sup>th</sup> century. Yet, even at that time, the classical centralized nation state was not at all spread all over Europe (if we think on the British, the Russian and the Habsburgian Empires). When the great crisis of the nation state model finally began in 1914, the sovereign nation state was already denounced as a myth by the leading theorist of law of the 20<sup>th</sup> Century, the then 33 years old Hans Kelsen, a critique later repeated powerfully by Ernst Cassirer.<sup>23</sup>

Already the nation state itself, as a unity of people, territory and power, always was a myth. Even the German *Kaiserreich* did not fulfill Jellinek's criteria at the time when he invented them (Fassbender 2007). In the USA today there is no monopoly of power but *Blackwater* and the *Rifle Association*, backed by the 2<sup>nd</sup> Amendment. Canada legally is divided into several nations. The constitution of Switzerland does not refer to a single nation but to 'Das Schweizervolk und die Kantone'. Towards the middle of the 19<sup>th</sup> century it was not at all clear if the sovereign nation state, or different forms of political association, in particular *Bünde*, confederations and (decentralized) federal regimes, like the *Deutsche Bund* (1815-1866), the *Northamerican Confederation* (1778/81-1788), the *Schweizerische Eidgenossenschaft* (1815-1848), or the early United States<sup>24</sup> – would prevail. Even today it is not so clear if (in legal terms) the United States is one nation or many, one sovereign people or many (Schönberger 2004: 68f). In the *Term Limits* decision of the U.S. Supreme Court, five judges argued that the member states have no right to impose term limits for members of Congress (and the Court made no distinction here between the two Houses) because the Constitution constitutes one single people of the United States. Still four judges strongly dissented and argued that in all elections for Congress, the U.S. citizens do not act as one people of the Union, but as the different people of the member states: 'When the people of Georgia pick their representatives in Congress, they are acting as the

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<sup>23</sup> Hans Kelsen 1960, anticipated already in Kelsens *Habilitationsschrift*, see Schoenberger 2004; Cassirer 1982.

<sup>24</sup> Before the Civil War, the introduction of federal taxes, the reconstruction period, the New Deal and the expansion of administrative power and administrative law at the federal level etc.

people of Georgia, not as the corporate agents for the undifferentiated people of the Nation as a whole.’<sup>25</sup> This is in a way very similar to the discussions in the EU.

Federal unions like the United States before the Civil War, the *Deutsche Bund*, the open federation of the *Bismarck-Reich* (Fassbender 2007), (which only in the end became more centralized), but also the U.S. today, the European Union, or Switzerland, are all more or less equally distant from the sovereign nation state as France or pseudo-federal states as the Federal Republic of Germany. They have certain state-like elements and several characteristics of statehood in common with the pretended ideal type of the sovereign nation-state, but should not be equated with that ideal type. The question here is who should? Non-state federal regimes penetrate the member-states with their legal order and intervene in their sphere of sovereignty, so that it loses its character as an impermeable legal person if it ever had such a unique character. On the other hand, in the early 21<sup>st</sup> Century there are increasingly more international organizations that do not only supplement state functions but substitute one or more of them (Albert 2005; Brunkhorst 2007a). Today, an increasing number of former intergovernmental organizations (RECON model one) are performing more and more classical state functions. These are no longer only the EU or the Security Council (SC), who have the legal competence to substitute state functions in certain affairs of peace, human rights, economic issues etc. The Lisbon-Treaty even regulates secession as a process under EU Law. There are more and more international (and non-governmental or private) actors (or dense networks), who do not legally but *de facto* substitute state functions. Hence, they make more and more global or regional domestic politics, to mention only the classical ones like the International Monetary Fund (IMF), World Bank, SC, Basel Bank Committee, G8, World Trade Organization (WTO), their regimes act in a state-like way, especially in the non-western regions of the globe.<sup>26</sup> A particularly interesting case besides the EU is the WTO where we now can observe that a *de facto* substitution of state functions by a

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<sup>25</sup> *U.S. Term Limits, Inc. v. Thornton* (514 U.S. 858), Justice Thomas dissenting.

<sup>26</sup> From this perspective Chimni (2004) speaks of global imperial statehood.



global economic regime has been legalized and even constitutionalized.<sup>27</sup>

The closer we look to the empirical phenomenon of the nation state, the more it disappears in reality, and what's left are a couple of nice theories that gives one the impression that the sovereign nation state only existed in the books of Hobbes, Austin, Laband, Jellinek, Weber, Triepel, Schmitt or Heller. What is at stake in particular from a historical perspective is a paradigm shift in the classification of constitutional regimes.<sup>28</sup> The ideal type of a modern (democratic or non-democratic) constitutional regime seems to be an organization of systems of states (federations or confederations) *and* citizens (peoples), whereas the sovereign nation state now appears as a marginal and not very stable case of a political regime that is modern.

A consequence, in particular for the three models of RECON, is that we should drop the notion of a sovereign nation-state and replace it with a continuum of globally operating regimes which have realized more or less statehood (Germany more than the USA or China, the USA and the EU more than the WTO etc.).<sup>29</sup> The continuum of statehood includes all inter-, trans- and supra-governmental organizations and all nation-states as special cases within the continuum of statehood. With this conceptual move that follows the latest evolution not only of the EU but of all global systems, the old fundamentalist or dualistic break between (supposedly sovereign) national and (non-sovereign) international organizations completely disappears.

## The difference between cosmopolitanism and democracy

Let me come back to the crucial difference between cosmopolitanism and democracy (or cosmopolitan democracy). Before it could come to the construction of democratic constitutions with cosmopolitan implications in history, much more was needed than the simple, and at best 'abstract idea' (Hegel) of universal law and procedural norms

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<sup>27</sup> Art. 17, para. 14, Dispute Settlement Agreement (WTO). See further: Langer 2004.

<sup>28</sup> For a similar idea of a paradigm shift in international law, see Kumm 2008.

<sup>29</sup> All states today belong to that category of globally operating regimes, and in particular failed states which are now a threat to and a major problem of the whole international community because of the unforeseeable global effects of their actions.

of implementation, which are as old as the Axe Ages. First, a long and often disastrous history of struggles for emancipation was needed, together with a couple of bloody revolutions that can be reconstructed as a normative learning process.<sup>30</sup> These revolutions further led to a couple of radical reinterpretations of the abstract idea of freedom in the categorical (e.g. from corporative to individual freedom, from property-rights to anti-discrimination norms); and the expansive (or inclusive) dimension (e.g. from civil to human rights, from national to universal rights). Secondly, it needed highly unlikely evolutionary advances such as functional differentiation and formal organization.

Before it could come to the specific combination of democracy and cosmopolitanism, which is at the core of all modern and democratic constitutional text books: (1) The (highly unlikely) juridification and constitutionalization of imperial power was a necessary precondition, and it was as necessary as; (2) the often overseen,<sup>31</sup> co-evolution of universal and particular and plural statehood that goes back to the Papal Legal Revolution of the 11<sup>th</sup> and 12<sup>th</sup> Century.

During the following time, the doctrinal and professional reconstruction of canon law on the basis of the newly re-discovered Roman Law of Justinian became the seedbed of modern constitutional law.<sup>32</sup> I cannot go broader into this subject here, and

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<sup>30</sup> Within this learning process classical *stoic cosmopolitanism* together with *Roman legal scholarship* has made explicit for the first time in history the idea of the equal freedom of each, and its legal character as a natural subjective right: 'Everyone would be born free by the natural law', Ulpian, Dig I, 1,4, Institutiones (Corpus Juris Civilis). 'With regard to the natural law, all men are equal', Dig 50, 17, 32. But because this was only one of the first steps of the long learning process from the *Golden Rule* to democratic self-legislation, even the identical formulation is far away from the meaning of universal equal freedom in modern constitutional text books. As a category of *ius naturale* universal freedom was not only completely compatible with the *equally universal* acknowledgement of the institution of slavery as part of the *ius gentium* that is the common law of the peoples. Classical Roman cosmopolitanism functioned as a method of ruling through agreement only in the fictitious cosmopolis while in the real *Imperium Romanum* the usual methods of *leges pacis imponere* supervene: execution, deportation, mass enslavement. See Alexander Demand 1993: 263f; Canfora 1993; Flaig 1994; Finley 1991.

<sup>31</sup> In particular from the Schmitt-Kosellek school.

<sup>32</sup> Berman 2006; Brundage 1995; Luhmann 1993: 25, 263, 265; Fried 1974; Brundage 1994.

will only mention that the so called Papal Revolution caused an accelerated evolution of a functionally differentiated legal system that was autonomous (or self-referentially closed).<sup>33</sup> The functional differentiation of the legal system enabled the construction of the first universal constitutional law of Europe. It particularly consisted in a specific combination of universal law supremacy (at that time Papal law supremacy) with the equal sovereignty of its major subjects (the Pope, the Emperor, the increasingly more mighty kings, and the newly invented and juridificated republican city-states) (von Schulte 1956: 93f, 96, 99, 101f, 168f). This basic structure was later copied over and over again on all levels of legal and political self-organization in Europe, latest in the European law and its creative and teleological interpretation by the European Court since the 1960s.

However, the most important event for the development of cosmopolitanism in Europe was the beginning of a lasting co-evolution of universal and plural statehood with the foundation of the medieval church state (Strayer 1956, 1970; Holister and Baldwin 1978). From here modern inter-, trans- and supranational law and organizations emerged, as well as the very specific invention of the modern nation state that is a state of law. My very point here is that even after the decay of the Papal Church during the Protestant Revolutions, neither the complementary evolution of universal and national legal systems did disappear nor did the supremacy of universal and international law.<sup>34</sup> Still, universal statehood has experienced a regression during the great time of the territorial nation state. Even after the protestant revolutions, universal statehood did not completely disappear, but was, as Kelsen rightly has argued, replaced by a more primitive kind of a universal legal order, in which the nation states were the only organs of legislation, jurisdiction and execution, though still under the 'constitution' of the *Jus Publicum Europaeum*, as even Schmitt acknowledges.<sup>35</sup> Kelsen can address the Westphalia order of international law as a primitive universal state because of his total demystification of the state (see chapter three

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<sup>33</sup> Besides the path-breaking work of Berman see Brundage 1995: 34f, 39f, 53, 55f, 111, 154ff 164ff (positivization of law), 119 (Modernität), 98ff (constitutional law), 62ff (professionalization), 80, 165ff (subjective rights), 152 (functional differentiation); Landau 1996; Tierney 1982: 1, 16ff; Brundage 1994; Fried 1974.

<sup>34</sup> On the protestant legal revolutions, see Witte 2002 and Berman 2006.

<sup>35</sup> Kelsen 1960, also cf. Schmitt 1988.

above). Kelsen's formal identification of state and law already introduces the democratic constitution as the paradigm case of a legal state or rule of law, because only the democratic constitution requires all aspects of the state to be created by the legislative subject of legitimization. This means that there cannot any longer be a state beyond the law (*ibid.*). If a constitution of a state is democratic, there is not only the sociological observer from outside who can identify the state with the law (as in Luhmanns 'structural coupling'), but also the citizens as a political actor must now identify the state by the law, and from within the constitutional order. Therefore the one and only legal condition of the performance of popular sovereignty is that there is no state at all (or presupposed as being) beyond (or even above) the law (Möllers 2000). Every step beyond this limit of state power is at best what Kolja Möller defines as '*etatistischer Rationalismus*'.<sup>36</sup> As long as democracy and democratic legitimization are possible, a democratic legislator cannot be bound to any substantial statehood or other substantial limits of democratic self-legislation. This implies besides others that a democratic legislator neither can be bound on German (French, Italien etc.), nor on European territorial borders. The debate on the finalization of the EU therefore only reflects the wrong search for substantial limits of democratic will formation.

A further implication of RECON Model 3 is that because modern democracy is internally cosmopolitan, democracy cannot be finalized (as long as it is democratic).

## Concluding remarks

Yet, democratic cosmopolitanism still is an utopian project in a world that since the End of World War II again has experienced the astonishingly quick evolution of a comprehensive constitutional regime of 'world law'. Europe, as well as the entire system of law, politics and economy of the world, underwent an enormous push of juridification and constitutionalization after 1945. The good news is that the new world order is a state of law, but the bad news is that it is not at all democratic. We are bearers of international human rights, but we do not interpret and concretize them. This has become very

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<sup>36</sup> On *etatistischer Rationalismus*, see Möller (2009: 12).

clear once the SC has taken not only states but also individual human beings as equally serious subjects under international law provisions, like that of Chapter VII of the UN-Charter. With this unconstitutional violation of the UN-Charter we are really acknowledged as world citizens, and interesting enough the existing constitutionalization and juridification of 'world law' now gives us some first legal remedies and some (indirectly articulated) subjective rights, even against actions of the SC. Now, for example, those affected by the SC-listing of terror-suspects have taken legal action before the European Court and are going through its stages of appeal, which they can do because the EU-Commission must enforce the SC-decisions. Yet again, even though we to a certain amount have quasi-constitutional rights on the international level, we have no (or far too little) democracy: 'Before women and slaves became democratic citizens they enjoyed legal remedies and direct effect' (Weiler 1997: 503).

Now, if not only cosmopolitanism, but also democracy is an evolutionary universal, then the lack of democratic legitimization, and by that a lack of legislation that is democratic, probably should lead into a serious crisis of legitimization that comes closer with every step of increasing legislative power that is inter-, trans- or supranational (Majone, chapter three in this volume). Here the crucial difference between the cosmopolitan legal order of Europe in the 13<sup>th</sup> Century and the present constitution of the cosmopolitan world order becomes obvious. Different from the 13<sup>th</sup> century, present cosmopolitanism of the world society, as well as in Europe, stands under the strong and even legal claim of democratic self organization, and has expanded the formerly nationally restricted legal principle of the exclusion of inequalities to the whole world and all its citizens.

To face the coming crises of legitimization, the EU no longer needs what now apparently has become unchangeable in Europe: technocratic politics that hides away the real power that already has been transferred from the national to the European level and cheats the European citizens (Fossum, chapter 9 in this volume). Instead of an endless prolongation of technocratic politics it needs political leaders who take the risk of bringing the serious but still latent, repressed and 'in green glass rooms' negotiated conflicts and collisions of European politics where they belong: to the public sphere. It needs leaders who take the side of the *pouvoir constituant*,

begin to fight technocracy and take the risk of democratic politics. There are enough occasions, the French referendum from 2005 being one, and where the reaction of technocratic politics were changing nothing and silencing the public over two years. Yet, the appointment of the new European President could become the next opportunity. Then it could happen that the conflicts between coalitions of member-states, which still are handled in the usual technocratic fashion as fire-side chats and smart television management, become public conflicts on the European level – fought out as conflicts between the European branches of power and within these branches (as in the United States right after the ratification of the constitution).

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# Chapter 8

## Challenging the third model

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La conséquence est que la fidélité aux principes n'existant en politique que dans l'idéal, la pratique devant subir des transactions de toutes sortes, le gouvernement se réduit, en dernière analyse, malgré la meilleure volonté et toute la vertu du monde, à une création hybride, équivoque, à une promiscuité de régimes que la logique sévère répudie, et devant laquelle recule la bonne foi. Aucun gouvernement n'échappe à cette contradiction.

(Proudhon 1921: 92)

In this chapter, it will become obvious to the reader not only that I agree with the main thrust of Brunkhorst's chapter, but that indeed the main lines of his approach have been used to build up the conceptual map with which to navigate the straits of the constitutional transformation of the Union (RECON's work package two) and the European socio-economic law and policy (RECON's work package seven). This explains why there is not much of stark contrast and debate to be found in the comment. The first section is indeed understood as an extension of the chapter, as it fleshes out how the third RECON model, and especially Brunkhorst's rendition

of it, is indeed already influential and practically relevant in some work packages of the project. Still, and precisely on that basis, I claim in the second section of this paper that the cosmopolitan vision needs to take a closer look to some of the problematiques that emerge from work on legal and political 'specifics'. This leads me to some more critical comments in the third section of this paper concerning the issue of political agency and the vexed question of the need of the Union becoming more state-like. On both accounts, it seems to me that while the cosmopolitan model can account better than the federal state model (RECON model two), for the actual state of the European Union and its constitutional law, it is less convincing as a normative blueprint for the development of the Union. As long as it is found that economic policy entailing supranational taxation and redistribution of economic resources is necessary, and that the Union should become more engaged in transforming the international world order away from its present imperialistic stage, there are strong prudential reasons that require the Union to acquire state like traits.

### Three theoretical keys stemming from model three

RECON model three affirms that the European Union should be modeled as a cosmopolitan Union, as a non-state constitutional union which aspires to integrate European society and to be a promoter of international integration. Both in his chapter of this report, and in many previous writings,<sup>1</sup> Brunkhorst has contributed decisively to shape the theoretical contours of this conception of the EU. It seems to me that his contribution has provided us with three key theoretical insights of high relevance to the work of RECON.

First, even though we are not sure of what kind of political animal the European beast is, we can be fairly sure that the process of integration has managed to establish forms of political power that are different from those of the classical nation-state and from those of the classical international organization. The tension between international form and constitutional substance in the founding Treaties can be seen as muddled constitutional thinking,<sup>2</sup> but was also in my view a genuine reflection of the novelty of the process and of the resulting Union. To

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<sup>1</sup> Recently in Brunkhorst 2006, 2008, 2009a, b.

<sup>2</sup> And partially it was, although Majone would immediately – and partially rightly – sense here the smell of cryptofederalism (see Majone 2009).

make use of the standard phrase, the Union is a constitutional polity but not (at least not yet) a state.<sup>3</sup> This historical achievement (La Torre 2002), can only be properly explained and made sense of from the *cosmopolitan* understanding of the EU; as Brunkhorst has reminded us, it is within such a tradition that the embryonic ideas that we relate now to constitutionalism emerged (and in that regard, it is clear that the relationship between natural law and human law is a forerunner of the Kelsenian – pace the other Merkel – hierarchical understanding of the law), and such an idea predated by far the rise of nation-states. Indeed, leaving aside for a second question of causal links, it can be said that from a historical perspective the wide popularity of the nation-state as a political community is a very recent fact. It is only with the consolidation of the *Sozial Rechtsstaat* in the post-war that a stable social consensus emerges in Western European countries, and the urge of a revolutionary or counter-revolutionary upheaval of political institutions fades away.<sup>4</sup>

Second, the central role of law, and for that matter constitutional law, is in the process of European integration closely connected to both the promise and the danger involved in the process of enlarging the boundaries of the political community. Brunkhorst correctly calls to our attention this double dimension of law; as the means of exerting hegemonic power,<sup>5</sup> but also as carrier of political principles with a clear emancipatory potential. He reminds us again in this chapter, as he also did so masterfully in his book on *Solidarity* (Brunkhorst 2005). Indeed, as he also points out, the golden and iron souls of law are even more obvious at times where the political community is structurally transformed, especially when this transformation is unprecedented. This motivates us to look for and unmask hegemonic aspirations disguised under nicely sounding rhetoric. In that regard, the cosmopolitan conception of the EU is more alert because it is more conscious of the promise but also of the risks of integration. To

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<sup>3</sup> Or if it is a state, it is a state in a Kelsenian sense, and perhaps also in a Kantian formal sense, to which Schmalz-Bruns points in his chapter.

<sup>4</sup> As my home university (Universidad de Oviedo) was burnt down not once, but twice by Franco, who made his name suppressing the 1934 revolution, and which gives name to Camus' first play (*La révolution de les Asturies*), I must repress myself not to digress on this.

<sup>5</sup> If the reader allows me to use a Gramscian terminology rendered very apt again by the way in which Bush II's or for that matter Berlusconi's court lawyers manipulate the law (see Menendez 2009a; see also Nader and Mattei 2008).

this I will only add that this Janus-faced character is only proper of law, and not of all means of integration, some of which come under the cover of law.

Third, the cosmopolitan perspective is one which has truly abandoned the idea that political stability can be achieved by solving or sedating political conflict. This is also why it is genuinely more interested in creating harmony out of pluralism than in establishing unity.<sup>6</sup> This was part and parcel of the cosmopolitan perspective from its very roots, and is also reflected in Brunkhorst's mildly optimistic approach to the future, a future in which a revolution on human scale (to use a Arendtian term which I guess is dear to him) would be sparked by the inner contradictions of the *constitutionalism octroyé* of Lisbon.

## Back and forth from specifics

Still, there are two aspects on which I think it is necessary to push the cosmopolitan perspective further, if only to distinguish what may perhaps be different 'variants' within it, and in doing so perhaps render specific work in the different work packages easier.

Concerning the constitutional politics of the EU, it seems to me that we are in urgent need of fleshing out the third model. In that regard, it seems to me that neither model one nor model two can actually reconstruct in a normatively acceptable light the process of legal integration in Europe. The first model must simply leave in denial the key structural principles of Community law (its primacy and its direct effect), and blissfully downplay the implications of its substantive principles.<sup>7</sup> The second model must suppress as far as it can the question of how what formally was an international legal order was transformed into a constitutional one without a proper authorizing act, was very much required by national constitutions. It is simply off putting for a serious constitutional discourse to assume that the Court of Justice did it and everybody assented. A five-minute

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<sup>6</sup> We are here back to the concern of recognize politics as conflict, as Schmalz-Bruns in his chapter has reminded us is a key point of Honneth's theory.

<sup>7</sup> Especially the radical change of the constitutional identity in member states once economic freedoms are interpreted as self-standing constitutional standards; not as operationalisations of the principle of non-discrimination, but as realizations of the normative ideal underpinning the single market; some call it the European citizen, I guess in Norway it is more properly called 'the Harry'.



coup d'état by invitation, with tea and pastries served in a civilized manner afterwards is no serious explanation. Then, there is much more promise in the third model, especially if it is acknowledged that European constitutional law is the first instance of *synthetic constitutional law* (See Menendez 2009b; Fossum and Menendez 2009). The legitimacy role which in state democratic constitutions is traditionally played by the *constituting act* or by the slow and steady development of a supporting constitutional convention was in Community law played by the collective secondment of national constitutions as the common constitutional law of the EU. This would explain why the Union could be created in a legitimate manner from a democratic standpoint, even without a democratic constituting act or a long developed costume. As long as it is plausible to say that the common constitution reflects national constitutions, then national constitutions, themselves democratically legitimized, can radiate such legitimacy to the European constitution, and by this to the whole set of Community norms.<sup>8</sup> But the synthetic perspective does not only better account for the origins, it also makes sense of the plight of the EU as it stands, i.e. the 'legitimation crisis' it has experienced, by pointing to the structural causes of the growing process of legitimacy erosion. The end of the socio-economic consensus brought by the two oil crises and the rise of neo-liberalism, led to a process of 'emancipation' of European constitutional law from the common constitutional law. The turn in the interpretation of economic freedoms, i.e. their transformation in *self-standing* freedoms, has exacerbated the process (see Letelier and Menéndez 2009). But the weaker the legitimacy radiated by the common constitutional law, the weaker the legitimacy of European law, given that no compensatory legitimacy source has been established. This opens up the question whether, even if model three can account better in a more normatively sound way for the development of European constitutional law, it contains a viable and stable blueprint for the future of the European constitution. In my own terms, that would require exploring how constitutional synthesis can indeed be turned into a permanent and stable process. Can the Union be stabilized without becoming in one way or the other a state? Can it take seriously its normative vocation and twist some ankles in the other

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<sup>8</sup> En passant; this is why I find the comparison with the Pope wrong, because European constitutional law is not autonomous from national constitutional law.

side of the Atlantic without becoming a state? I will go broader into these questions below.

The other area where there is a need of working out the third model is the socio-economic constitution of the EU. If constitutional issues clearly show both the potential and the limits of the third model, socio-economic questions reveal the *ambivalent* nature not only of law, but also of the cosmopolitan approach.<sup>9</sup> In that regard, there is a rather dark side to the way in which the European Court of Justice has justified the transcendental redefinition of economic freedoms by referring to the cosmopolitan impulse behind European citizenship. Nota bene that what is being said here does not deny the normative impulse of European citizenship, or the desirability of the political development of European integration. It only refers to the jurisprudence of the Court. *Martínez Sala*<sup>10</sup> and *Baumbast*<sup>11</sup> have indeed been cherished up as ‘epocal’ transformations of Community law,<sup>12</sup> from being the law of Ipsen’s market citizen to being the law of the political citizen.<sup>13</sup> But the actual consequences of that jurisprudence are a bit more complex. Structurally speaking, the ECJ has pushed into the realm of review of European constitutionality (and thus subject to the biased yardstick of European constitutionality formed by the four economic freedoms) areas of national law until then outside such scope (such as non-contributory benefits).<sup>14</sup> The result has been the colonization of areas of law which were exclusively decided according to a solidarity logic. At the same time those most likely to gain from the new case law are the better off in society (a constant in European integration, as Fligstein (2008) has over and again reminded us). Certainly, this opening to Community law may have cleansed these areas of very nasty discriminatory purposes. But if it is the right of Schwarze’s sons as European citizens to get tax breaks on account of being sent to a 33,000 euro school in Scotland, (which at the same time as the Court’s decision had to close

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<sup>9</sup> Which is also historically rooted: love to the world polis can be rooted in a very atomistic, privatistic perspective; in their own ways, Berlusconi and Topolaneck are indeed very cosmopolitan.

<sup>10</sup> Case C-85/96, [1998] ECR I-2691.

<sup>11</sup> Case C-413/99, [2002] ECR I-7091.

<sup>12</sup> For the ECJ judgement, see Menéndez 2010.

<sup>13</sup> The original expression was introduced by H.P. Ipsen, here quoted from Stefan Kadelbach (2003). Ipsen’s phrase was elegantly repropounded by Everson (1995).

<sup>14</sup> See Menéndez, *supra*, note 12.

down after the tabloids published Her Majesty Inspector reports on the school), then humanity comes at the price of solidarity.<sup>15</sup>

## Agency and state form

The question of the political nature of the EU is at the heart of the RECON project. But the debate certainly predates RECON, even if the project might have indirectly contributed to invigorate it. Indeed, the two chapters by Schmalz-Bruns and Brunkhorst contained in this report continue a central discussion on whether supranational integration can avoid the state form.<sup>16</sup> I am neither going to rehearse that debate nor to take part in it on one side or the other. Still, the research being undertaken in RECON to me seems capable of clarifying some aspects of the debate, and in a way, mediating between the two positions.

Firstly, whether the EU is or is not a state, and whether it should or should not be more state-like, it is still possible to say that as long as EU law is law in a meaningful sense, the EU must be a state in the restrictive Kelsenian sense with the necessary assumption which makes it possible to reduce the congeries of legal norms to a system (Somek 2006). By law in a meaningful sense I refer to law as a 'specific social technique' (Kelson 1941),<sup>17</sup> which solves conflicts and coordinates action in view of the achievement of collective goals, and in doing so is respectful of the freedom of its addressees. In that regard, it seems to me that there is a very plausible argument to be made, supporting that European law is law in the same sense as German or Spanish law is law, and in a different sense from say the law of the United Nations, and even more of international economic law as resulting from the contracts drafted and imposed by big multinational law firms (or for that matter, the legal forms which come hand in hand with several forms of multilevel governance, and which are most definitely not law, and correspond to a different integration medium). Even if such a conclusion should be

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<sup>15</sup> Case C- 76/05, [2007] ECR Rec. I-6849.

<sup>16</sup> That debate revolved around the constitutionalisation of international law, and Habermas' thesis on that matter (Habermas 2006, 2008). Scheuermann played also a central role in the discussion See Scheuermann 2009.

<sup>17</sup> The article translates into English key ideas what Kelsen had developed in extenso in his 'European' years.

surrounded by caveats and qualifications,<sup>18</sup> it seems to me to be proved plausible by the *general acceptance* of the constitutional practice of acknowledging the primacy of Community law over any conflicting national norm. Such a practice implies in structural legal terms that the unity of law is established in Europe by assuming a supranational constitution (and thus, Kelsen would claim, a European state) where both supranational and national norms are reduced to a system (and thus, are considered to be of the same integrative nature). Assuming that the hypothetical norm which grounds the legal system points to the European constitution (and no longer to the national one) is indeed the only way of reconciling the aspiration to integrate through law, to render Europeans equals before a single law, by the constitutional pluralism which is implicit in the institutional structure and in the decision-making process enshrined in the European material constitution.<sup>19</sup> But if the EU is a state in this Kelsenian sense, it is immediately proven that the connection between constitution, constitutional law and nation-state is not necessary, but contingent, because we can observe a mature and sophisticated constitutional order which 'center of imputation' is not a nation-state, but another type of political community. However, if the EU is a state in a Kelsenian sense, European law is also a *state-like* type of law in the sense of relying on coercion (even if the sanctioning is to be found exclusively – or perhaps more accurately, mainly – in the 'national' layer of the legal order) to create the conditions under which individual freedom can be respected.

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<sup>18</sup> What if we do not have an hegemonic use of law, but the hegemonic use of the shell or the sham of law? What happens when the very form, and not only the substance of law, is instrumentalised? Then we have not only a democratic deficit, but a legal travesty, a Rechtsstaat deficit covered up with what look like legal norms, but are not. Somek (2008) make a plausible claim in *Individualism* that this is the line of evolution of Community law. But that is still a relatively recent development which has not transformed the ADN of Community law. The transformation had to do with the *emancipation of Community law from national constitutional law* and with the widespread understanding of governance as nothing less than the *new grammar of law*. I may add that perhaps even the liberal and the anarchist in us will agree that when what is subverted is the very form of law, we need something, perhaps a state, as a reference point to know it, and as an institutional structure to stabilize the polity.

<sup>19</sup> Parts of which are to be found in the founding Treaties of the Union, in national constitutions, and also expressed in numerous constitutional conventions and reflected in decisions of the European Court of Justice and of national constitutional courts.

Thus, as I already have indicated, it seems to me that the fact that Community law has managed to become the specific social technique through which integration is achieved in Europe, implies the transcendence of the state paradigm in a meaningful and significative sense. In particular, Community law became a constitutional legal order through a legitimate path alternative to both revolutionary and evolutionary constitution-making. What I labeled as synthetic constitutionalism can be understood not only as an idiosyncratic and odd constitutional path, but as the first instance of a mode of constitutionalism *beyond* the nation-state.

Additionally, we must emphasize that being a state in a Kelsenian sense is the closest thing to not being a state in the standard definition of the term.<sup>20</sup> Still, that does not mean that the EU *should not* become a state, or more like a state. In that regard, it seems to me that the debate between Habermas and Brunkhorst on the one hand, and Schmalz-Bruns and Scheuermann on the other is more conflictive than what perhaps is the case. And this for the following two reasons. First, if what we are considering as regional integration anywhere else than in Europe – or global integration beyond Europe – forms of synthetic constitutional integration should be strongly favored in the early stages of the process of integration. The evolutionary achievement of the Union in overcoming nation state constitutionalism though synthetic constitutionalism seems much more attractive than old-fashioned colonialism, or post-modern imperialism, or for that matter the ineffective model of token intergovernmentalism under which the cold-war, the Clintonian pax Americana and the war on terrorism keep us ten minutes away from the midnight of atomic catastrophe. This is why, against all odds, and despite present European leaders, European synthetic constitutionalism is regarded as a role model by political activists in many regions, especially in South America and in Africa. In that

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<sup>20</sup> 'A complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs', to use the definition employed by Habermas (2006: 136) in this context. Indeed, it would be a good subject for another day to consider the extent to which the identification of law and state, the reduction of the state to law, does not only entail the affirmation of the logical priority of law over state (a normative stand against a sociological stand, if you wish) but also reflects the paradoxical 'anarchical' foundation of the idea of integration through law understood genuinely, and not merely as a trivial form (see Klug 1989: 35-41).

specific sense, it seems to me that Habermas and Brunkhorst have a clear point.

The second reason is that whether the Union *should* acquire more or less state like traits is a practical question, by which the answer has to be sufficiently attentive to prudential considerations. In that regard, it seems to me that the rectification of the 'liberist' trajectory that the EU has followed since the Single European Act can only be altered by political action aimed at invigorating the state-like capacities of the Union, especially on what concerns socio-economic redistribution. It is not proper here to consider which specific political and constitutional strategies should be followed (for reasons of space and of *genre*), but it is necessary to add that it to me seems to be a hollow hope to expect the cunning of history *on its own* to deliver the propitious circumstances and the institutional means to transform the socio-economic constitution of the EU. There is a need of political agency applied to build the taxing and spending pulls and levers at the European level that can render European citizens not only equal opportunities to freely move their capitals, but actually to have access to a decent level of public services and of economic resources with which to make sense of their political freedom. Similarly, regarding the situation, mobilizing the political power of the Union to transform the international world order in a cosmopolitan direction necessarily requires political agency aimed at making the Union more like a state. The European Parliament (echoing the old Parliamentary Assembly of the Council of Europe, itself the seedbed of the European Parliament) made a very respectable contribution to the investigation of the criminal conspiracy orchestrated by the Bush II administration to surrender persons to be tortured in places such as Egypt and Syria. The Fava report may one day be regarded as essential in building a criminal case against those responsible for abominable crimes in both sides of the Atlantic.<sup>21</sup> Still, the convoluted non-state-like institutional structure and decision-making processes of the Union are part of the reason why no political responsibility has been assumed by European political leaders, not even by the Community political leaders. It is pertinent to keep in mind that Mr. Barroso was Prime Minister of Portugal at the time that several

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<sup>21</sup> See the non-legislative resolution adopting the report, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2007-0032+0+DOC+PDF+V0//EN>.

rendition flights made stopovers in Portugal; while Mr. Hubner was a member of the Polish government at the time that a secret prison was established by the CIA on Polish soil. Should they not be forced to explain whether they knew, and if not, how this can be possible given their political duties? Can we make sure that this type of responsibility is made real without making the European political process closer to that of a state? In that regard, it seems to me that Schmalz-Bruns and Scheuerman's arguments are hard to escape. To paraphrase Altiero Spinelli, *L'Europa non cade dal cielo*,<sup>22</sup> it should be upon European citizens to build it; and to do so, it would be necessary to curb the resistance of the vested interests against it. How the socio-economic constitution can be rendered fairer without state-like capacities (if only to redomesticate capitalist forces) is unclear to me. How Europe can contribute to cosmopolitanise the world order without become more state-like is also far from obvious.

Finally, I have some doubts regarding that a constitutional understanding of law, closely associated to the dual move of positivising moral principles as constitutional principles and fully recognizing legal status to such constitutional principles,<sup>23</sup> is the only candidate to nurture the democratization of political power. Firstly, because it empowers social actors to mobilize the moral potential of moral principles (of freedom, equality and solidarity) through legal actions, and secondly, because it turns what could be easily labeled as acts of disobedience into acts of defense of the Constitution. Without really questioning that this Arendtian reading of the spirit of the pre-Nixon US Constitution is proper and sound, I think that this still overinflates the case for 'constitutionalising' the legal order. While I think that Dworkin (1978, chapter II and III) clearly revealed the shortcomings of the Hartian understanding of law as exclusively composed of rules,<sup>24</sup> there is still something to be said in favor of a political order where democratic politics needs no Talmud and no constitutional law (even if it will not be me wholeheartedly sustaining that position). Hart's concept of law is perhaps no longer attractive, but the idea of the political steering of a political

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<sup>22</sup> Bologna: Il Mulino, 1960

<sup>23</sup> Which brings into the core of law a critical dimension, and turns constitutional reasoning in a special case of general practical reasoning, even if we can disagree on what that means, as Habermas and Alexy have disagreed in what could be seen as family quarrels (On their disagreements, see their contributions to *Ratio Juris* in 1999.)

community through rules, and confining the process of interpretation of principles to politics was historically a matching candidate to the *constitutional model* (or perhaps I have been too unconsciously sympathetic to Scandinavian legal realism).<sup>25</sup> Indeed, it partially inspires the 'continental' model of constitutional review which, even if more 'judicial' than the referee legislative cherished by Habermas, acknowledges explicitly the political character of constitutional review.

## Conclusion

Integration through constitutional law can be placed at the service of very different political agendas. Still, the reflexive character of constitutional law entails that the door remains open to an emancipatory use of law, if only because law is irrepressibly stateless in the sense of logically and normatively prior to the state, and for that matter to power. This is perhaps the central message of the cosmopolitan perspective, and indeed a central insight which helps us making legal and political sense of how European integration has been possible and has indeed proceeded. Still, if I may again repeat Spinelli, neither Europe nor democratic Europe are going to fall from the sky, so even if there is cunning in history, and citizens' capacities are going to unfold themselves, perhaps European citizens would be well advised to exercise their democratic will and avoid the too long run by agency, and agency here calls for a state in the post-state constitution.

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<sup>25</sup> On the political context of Hart's positivism, see Lacey 2004. Actually that is what really renders the book deeply interesting, and not the forays into Hart's existential troubles.



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# Chapter 9

## Concluding reflections

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The midterm conference, as noted in the Introduction, offers a special occasion to take stock of where the project is at this point in time. We have pointed out that the contributions in this report are but one part of this broader exercise. These contributions offer broader lessons of value for the further work on the project, but it is useful to keep in mind how the context in which they were devised also shapes what there is to discern. It might be noted that the format of the midterm conference itself contained limitations of relevance to lesson-drawing: each presenter was asked to speak to one model only – the three main presentations in this report were not programmed to offer overall assessments of the entire project; only portions of it. Further, when the presenters (at least the outsiders) made their assessments they only really had access to more general portions of the project, especially those set out by Eriksen and Fossum. The depth and breadth of findings that the WPs have produced is not – it is fair to say – well reflected in what they had ready access to.

In that connection it should be clear that the ensuing reflections here are based on the presentations in this volume, and as such are conditioned by the limits that the presenters were subjected to. The

reflections I provide here are shaped in response to these presentations and should not be seen as broad reflections on the project as such. My point is that a proper assessment of the project as a whole requires a systematic assessment of the project as elaborated and as worked out in all the WPs. We have been working on this (for a preliminary version see RECON Report No. 8, 'RECON: Theory in Practice').

In the following, I will first present some lessons for the project that I have discerned from the contributions in the report and thereafter bring in some items/considerations that I think warrant greater emphasis than what they have been given here.

The first lesson is an important negative clarification: all contributors (presenters and commentators alike) agree that the EU is beyond intergovernmentalism – in its orientation, as well as in its structural-institutional make-up. They differ in their views on how far the EU has proceeded, in the implications they discern from this in democratic terms, and in what they understand as a desirable end-result of the integration process. Majone sees positive EU integration as increasingly problematic and underlines the need to scale back the process of – notably positive – integration, whereas basically all the others underline the need to reinforce EU-level – and cosmopolitan – democracy.

The second lesson is a clear confirmation to the effect that RECON is asking the right questions: What democracy for what Europe is the appropriate question in today's open and contested European context. Majone argues that there is a clear and growing disjuncture between integration and democracy: the conundrum facing the EU is that further integration will exacerbate rather than ameliorate this. The other contributors disagree with this and instead see the need and merits in a continued effort to strengthen supranational democracy. They do not agree or at least have not yet set out clearly enough what the shape of this form of supranational democracy should be.

The distinguishing feature of RECON is that the two questions: form of democracy and form of polity are asked simultaneously and are considered to be intrinsically linked. We cannot come up with a convincing answer to the question of democracy in Europe unless we

have a clear sense of the type of polity that is supposed to carry this. And vice versa: in today's world and given the broad acceptance of democracy as the only form of legitimate rule it is difficult to establish the character of the polity unless we have a clear sense of its democratic vocation and how the concerns of citizens are to be dealt with. It might also be added that we are not very much aided by the EU in this undertaking. There is great uncertainty and contention over the character of the Union, among analysts and participants alike. The frequent invocation of the Union as a *sui generis polity* serves as a convenient cover to avoid clarification of the character of the polity and its constitutional vocation. This gives rise to strategic manipulation of symbols and designations. To give a concrete example: the Lisbon Treaty is a clear case of constitutional double-talk. It has been emphatically stated by the self-declared constitutional chaperon, the European Council, that the status of the Lisbon Treaty is a treaty and not a constitution (and the constitutional label and all the terms that could be associated with 'state' were removed). But this treaty is in substantive terms also very similar to the Constitutional Treaty that was rejected by French and Dutch citizens in popular referenda in 2005.

The contributors to this report clearly differ on the answers they give to the question of what democracy for what Europe. But precisely because they differ, they also implicitly confirm that there is a clear need to unpack these two dimensions and see how they may be configured together. Once we start unpacking we may end up with a broad range of configurations with different conceptions of what democracy entails. Should the accent be on deliberation or on representation, or some systematic combination of the two? If so, what is the character of the combination and what are the procedures and institutions to carry it? Where is democracy to be located – is it to be ultimately anchored in global institutions, in the EU multilevel configuration, or at the national level? We see many of these positions (more or less explicitly articulated) in the contributions to the report. In a similar manner, is democracy foremost the preserve of the nation-state, to be understood as closely associated with the distinct mode of community and belonging that makes up the nation? Does democratic self-governing presuppose the state form as a hierarchical form of rule?

This takes us to what I see as the third lesson, namely that the question of what democracy for what Europe is also clearly a matter of the role and salience of the state as the carrier of democracy. If there is as Schmalz-Bruns asserts an internal relationship between the principle of democratic legitimation and European integration what does that tell us about the role of the state in sustaining democracy under modern conditions? Note that this is not simply an empirical question. The state is not a physical entity, it is a social construction whose assumed character, status and functions hinge on the concepts in use and on the social agreement that exists or can be mustered on their usefulness and appropriateness. This is also at base a normative issue. Any system of rule that claims to be democratically legitimate raises normative claims that it must redeem. The issue to Schmalz-Bruns is therefore whether there is something in the type of *hierarchical rule* that we associate with the state form that is fundamental to democratic self-determination. His approach is to establish the conceptual link between the principle of justification and statehood. Based on that he highlights those structural properties of statehood that are fundamental to democratic self-determination. With this apparatus in place we can see where the EU figures. It is clear that Schmalz-Bruns does not talk about a historical state; his concern is deeper and broader: it is the state form. As he notes, 'the existing link between the principle of democratic legitimation and political authority – so far only safely institutionalised at the level of the democratic nation-state – is severely weakened as long as we are unable to identify and think of new forms of political authority or new configurations of statehood beyond the nation state, on an international, a transnational or a supranational basis' (Schmalz-Bruns, chapter 5 in this volume, at p. 190).

This brings up three related issues. The first is the question of whether the form of government (as authorised jurisdictions) that we set out as the hallmark of RECON model III and which Eriksen outlines in his chapter contains sufficient hierarchical elements to qualify as a state in the manner of Schmalz-Bruns. The broader question this raises is: How encompassing and compelling do the structural properties of statehood need to be to sustain democracy? And conversely, given the cosmopolitan component, at what point – if such can be established – may they become so strong as to confine or stymie democracy – hem it in and render it subservient to a given culture or ethnies? The second question is how this fits into the

broader scheme that Brunkhorst establishes. How easily can the three positions be reconciled?

The third issue refers to the level of abstractness of this discussion: Is it a matter of establishing positions with limited empirical resonance or can it be discussed with direct reference to the specifics of the European context? I believe these contributions show that it is far less abstract than what it might seem. I will explain this by taking a cue from Menéndez and Eriksen, namely that European integration takes place in a setting of already established constitutional-democratic states. What this entails is that the genetic raw material or building blocks so to speak that the Union can and to a large extent must draw on derive from states (which are also core actors and drivers of the processes). It is no wonder that state-based vocabulary and symbolism creep into the European construct; it is also no wonder why there is this constant obsession with – and opposition to – a European state. The *sui generis* label has been an important means to avoid confronting this problem. However, states are not static entities: the weight of the supranational structure contributes to transform them. How the member states respond to integration is an important reminder of to the Union's broader cosmopolitan vocation and prospects. This has direct bearings on Schmalz-Bruns's approach: for the cosmopolitan inversion to work the member states must abandon their character as nation-states and support the system of government at the EU-level. Is that the case? I will get back to that.

The fourth lesson is that the general thrust of the report confirms the need to work with models and notably the repertoire of models that covers the entire range of possible and relevant options. Having said that not all contributors (and explicitly so Curtin) agree with the need to work with models and also why we should use these particular models. Instead, Curtin urges us to start from the here and now. But even her response to Majone suggests that they may not start from the same 'here', as their conceptions of what the Union is and where it is heading do not entirely correspond. That particular disagreement may be breached, but there is still a question of where we should start. The contributions give us quite different clues on this. Of course some of that stems from the fact that they were asked to talk to different models but there is a deeper disagreement here.

In fact I believe that one of the most critical issues in EU studies is the deep disagreement over where 'the here' is, a disagreement that we also find among our contributors: The 'here' of our contributors can be pinned down to very different EU configurations. Majone's chapter, and his thinking in more general terms, is that the world is still made up of and steeped in relatively sovereign states. Majone clearly recognizes that states are closely tied together but in his line of reasoning it is hard to see a systemic transformation of the system of states afoot, certainly not at the level of Brunkhorst. Brunkhorst then on the other hand argues that the world already has undergone a major systemic transformation. His argument is that we already are within the cosmopolitan constellation. Cosmopolitanism is an evolutionary universal – a special methodology! A dynamic order capable of transforming itself and embedded in the revolutionary constitutional tradition.

The etatist reduction of the revolutionary tradition that binds democratic self-determination to the borders of the nation state is an unconstitutional misjudge of the radical-democratic content of the doctrine of the *pouvoir constituant*. [...] *Cosmopolitan self-transcendence* is [...] an *internal implication* of the revolutionary construction of the *pouvoir constituant*

(Brunkhorst, chapter 7 in this volume, at p. 142)

This does not mean that states are abolished; it does however mean that they are dramatically transformed notably due to the development of cosmopolitan law. From this perspective the different RECON models do not speak to qualitatively different entities, but are instead different gradations of stateness.

With these two qualitatively different assessments of the status of the entire range of the polity options that RECON works from it is clear that what is 'the here' is far more tricky to establish with certainty.

It should be added and will be further developed below that the sheer presence of so different positions also implicitly confirms the need for a rather open-ended research framework: RECON operates with several EU democratic polity models precisely because as the interventions show there is no agreement on where we are and where we should go. In this situation it is important to keep the options



open and that can only be ensured through operating with several 'models' that speak to distinct developmental paths.

A further justification for the use of several models and also models that problematise the question of state is that this permits us to sustain a more precise and accurate conceptual vocabulary. The point is that when there is a transformation afoot this will occur in the most drastic fashion in the development of a new vocabulary; in less drastic terms it produces new terms (but not an entirely new vocabulary); or it may occur in the redefinition of existing terms. This latter case is a more subtle and less apparent change that is best captured when we systematically contrast different polity configurations and their vocabularies. Consider what the state signifies in the classical sovereign sense and what it entails in Brunkhorst's configuration: the first-ever global legal order with clear cosmopolitan traits. In this latter case our understanding of statehood has to change to take in the central role of popular sovereignty. The state's sovereignty is subject to and subsumed under popular sovereignty. This also means that we should drop the notion of the sovereign nation-state and instead talk of a *continuum of globally operating regimes which have realised more or less statehood* – in other words what is at issue is different degrees of stateness. Brunkhorst underlines the implications for the RECON framework: rather than three separate configurations, we have a structure made up of three different scenarios of cosmopolitan-European uplink. An interesting question is therefore how far such a development has proceeded. But rather than start from this it appears more useful to devise the models in the manner we have done and then look for traces of cosmopolitan convergence across models.

I may add what I consider as one final justification for the systematic development and use of democratic polity models: they increase intellectual accountability with direct political implications. I say this also because Majone (see chapter 3 in this volume, p. 65) argues that RECON does not devote sufficient attention to accountability. With accountability is meant the obligation that decision-makers have to explain and justify their actions to those affected and where they may also face consequences should those affected not find the explanations and justifications convincing (Bovens 2006). I think RECON does so for several reasons: First is that accountability is definitionally central to the deliberative conception of democracy that

we operate with: accountability is one of the two components in the definition of democracy, the other is autonomy. Second is that it is precisely to ensure that the accountability relation is taken care of that we spell out the models in institutional detail. Third is that by operating with several models, each of which will contain a set of distinct accountability relations we are in a better position to capture both known forms and whatever innovations on existing practice (whether positive or negative) have emerged. Finally, I think there is one aspect to RECON that makes it uniquely situated to deal with what is presently a profound accountability deficit in the EU, namely the failure to spell out what kind of polity it is. What this failure entails is that the explanations and justifications that emanate from the EU cannot be traced back to a set of uncontroversial polity and constitutional fundamentals. In that sense all explanations and justifications are partial and lack uplink or situating in a polity meta-narrative. I would wager that it is precisely the presence of this structure that permits nation-states to get away with as much as they presently do. Explanations and justifications of specific acts, policies and institutional changes refer back to these as beneficial or compatible with the familiar and trusted national community. In the EU there is no such fall-back; it is a matter of contested and contestatory accounts. If we for instance consider the recent constitutional process we find that decision-makers provided systematically different accounts of what kind of constitutional project the EU was – the accounts did not sum up into a uniform set of standards that Europe's citizens could hold the decision-makers up against. RECON's systematic development of three models is able to expose these discrepancies in a more effective manner. Further, insofar as the three models can be spelled out clearly this provides a grid or map that we can hold the explanations and accounts up against.

## Back to the national

The contributors are strangely silent on the national dimension. Among the contributors there is a clear propensity to refer to the post-national. One obvious question is whether we can have stateness without nationhood. In principle, this is possible but nationalism is institutionally embedded across Europe (and much of the world, for that matter). Therefore, whereas the EU-level may be a post-national harbinger, it is not clear that this reality is reflected on the ground

across Europe's nation-states. There are good grounds to see Europe as still composed of a multitude of 'banal nationalisms' (Billig 1995). I believe that Europe has not escaped what may be referred to as the statehood – community closure conundrum: nationalism appears to have been genetically encoded in the very gene structure of today's states. What is also important to note is that national identity figures prominently in the recognition order (which Schmalz-Bruns depicts so well in his chapter). It offers clear clues for how to live an *authentic* life as a member of a given national community, and as such figures as an important source of self-esteem. In that sense nationalism becomes an important source of normativity. Here we should not be deceived by the fact that in today's Europe, nationalism's manifestation in struggles for recognition is most clearly expressed in (sub-national) nationalist movements. But the fact that it does not manifest itself as an instigator of struggles for recognition across Europe's states is partly because of the modifying effects of the EU but also clearly because it is so deeply entrenched already in established recognition relations (and symbolically recognised also in the EU treaties).

It might be added in relation to what Brunkhorst says about evolutionary universals that nationalism, perhaps somewhat ironically, is embedded in a set of concepts that have become universally known and also very broadly accepted but clearly without a built-in universalising proclivity. That is why there is such a ready acknowledgement of it.

When activated as a struggle for recognition it also I believe is a clear example of what Schmalz-Bruns refers to as the 'structural gap between [on the one hand] emotions of misrecognition and psychologically induced claims to social recognition of the particular traits of one's own identity resulting from them, and the justification of such claims [on the other]. The gap occurs because the structure of general and reciprocal justification introduces a kind of selectivity that asks us to evaluate individual claims from the perspective of a collective (social or political) identity that reflects the scheme of reflexive cooperation we are engaged in as members of a society or political community' (Schmalz-Bruns, chapter 5 in this volume, at p. 98). National identity, in other words, is a key source of such selectivity.

The problem in today's Europe is that this form of selectivity is so deeply engrained and sustained through institutional systems of socialisation and inculcation. With this in mind we can also examine Brunkhorst's contention to the effect that there is no categorical difference between the RECON models 'as long as we do not reduce or subsume popular sovereignty to or under state sovereignty.' I agree with this point insofar as the relationship between democracy and stateness is concerned. But as far as I see, the argument only works if the popular sovereignty we talk about under each model contains the same underlying notion of nationalism. This is where I will likely differ from Brunkhorst: I understand nationalism not simply as a communal mode of attachment or some pre-political phenomenon which symbolically reflects an ethno-culturally homogeneous community. Instead my understanding of nationalism is as a much more institutional-structural phenomenon: as something that in the cases of banal nationalism is deeply embedded in the institutional make-up of the modern state. The state furnishes the main socializing agents: a school system, an official language policy, a system of territorial defense, and a set of public symbols. The point is that all the institutions that bring people up and make them into citizens and officials, and expose them to all sorts of activities and tasks – including entertainment such as sports – are being nationally encoded and operate as vehicles for the constant flagging of nationalism and national identity. The mechanisms' constant effectiveness is ensured through the state's regulation of entry and exit to the territory. The nation-state typically contains high thresholds against group-based and collective (territorial) entry; reconfigures possible entrants (as individuals rather than as members of groups/collectives); and contains a whole host of institutions and arrangements to inculcate the host culture and their way of life in the new entrants. Similarly, it operates with high thresholds against group-based/collective and territorial exit, and nationalism is premised on mechanisms to sustain a living memory of a reading of the past that is nationally suitable/conducive. The upshot is that the nation-state is imbued with a largely taken-for-granted – banal nationalism – that is steeped in a distinct constellation of exit-entry-loyalty. The first RECON model is explicitly steeped in this banal nationalism mode because it does not envisage any changes to these mechanisms and entry/exit controls. The second RECON model is set up to modify albeit not abrogate nationalism – it is an attempt to subject multiple nation-building projects to federalism's more

complex sense of community, based as it is on the combination of arrangements for shared rule and self-rule. It is then only the third RECON model that is properly post-national. I think this framework is useful because it gives us a good vantage point to consider whether the mechanisms that sustain national identity are really changing in Europe of today so that we may confidently assert that Europe is in the post-national constellation.

## Reconfiguring representation

In the previous section I urged caution in jumping too fast over the national dimension. In this section I would like to bring up how the changes brought about by the EU require theoretical reconsideration, notably pertaining to the theory and practice of representation. The point of departure is the increased role of national parliaments in EU decision making and the close patterns of interparliamentary interaction that is referred to as the EU's Multilevel Parliamentary Field (Crum and Fossum 2009). This notion captures the distinctive traits of the EU's representative system and accommodates recent advances in the theory of representation, with direct bearing on the EU – notably the stress on *how* the representatives construct the represented and the *dynamic* interaction of representative and represented. Representative theory, as Saward (2006) has noted, has generally taken the constituency of the represented *as a given*. Representative theory has therefore mainly concerned itself with how well the representatives reflect the represented, without questioning who and what may be represented politically. As an alternative, Saward introduces the notion of

‘the Representative Claim’ – ‘seeing representation in terms of *claims to be representative* by a variety of political actors, rather than ... seeing it as an achieved, or potentially achievable, state of affairs as a result of election. We need to move away from the idea that representation is first and foremost a given, factual product of elections, rather than a precarious and curious sort of claim about a dynamic relationship’

(Saward 2006: 298)

This critique may be particularly apposite within an EU context, marked as it is by the forging of a representative-democratic system on top of already existing representative democracies; a highly

dynamic process of integration; underdeveloped representative channels (EP – citizens); European ‘second-order’ elections; overlapping EU-level viz. national powers and competences; and national parliamentary involvement in EU affairs.

From the standpoint of representative theory, precisely because the European integration process takes place in a setting of existing representative systems, it is also a process wherein a broad range of representatives from European, national and regional levels seek to construct – both in substantive and symbolic terms – their respective constituencies, that is, *who* they represent, and *in what sense* they represent them. This process is not only a matter for the institutions at the EU-level, with the representatives in the European Parliament and the Council of the Union defining whose Europe they represent and in what sense they represent this Europe; it is also a matter of national (and regional) parliamentarians defining whose nations (or regions) they represent and in what sense they represent this nation (or region) within a tightly interlinked European setting. The process is therefore a complex blend of construction (EU) and *re*-construction of (national and regional) constituency. Precisely because the field notion is so strongly focused on interaction, it is a particularly useful analytical device to capture the overall character and effects of these processes of construction and reconstruction.

The field understood as a collection of (competing/overlapping etc.) representative claims helps to make sense of some of the distinctive features of the EU. One such is European integration’s interweaving of levels (European and national). This heightens uncertainty as to the nature and the character of the relevant democratic constituency – the represented – that each representative body speaks to. In Europe, national parliaments do not only handle national issues; they also address issues that are to be decided at the European level. What is then the relevant constituency – is it the national *or* is it the European? The notion of EP elections as ‘second order elections’ (Reif and Schmitt 1980) speaks to the dynamic interaction between representatives and represented; how representatives frame the European elections (and fail to do so) and how voters pick up on this: EP elections as second order elections implies that the European constituency is activated, but the processes are such structured as to encourage the citizens in each member-state to use the European-level elections to send signals to their national leaders; hence the

elections lose much of their *European* orientation. This is suggestive of a broader tendency, where issues that are formally dealt with at the European level are framed as national concerns and vice versa. These processes can thus be understood as intrinsic features of the ongoing dynamic construction and reconstruction of European and national constituencies. In this connection it could be argued that the greater the ambiguity pertaining to constituency, the more merit there is in assessing representative arrangements through the notion of 'field', because the field is not premised on a given constituency and is thus able to grasp the nature of and the interaction among these processes of construction and reconstruction of constituency.

It follows from this that we cannot establish the democratic quality of this construct by relying on standard conceptions of representation and accountability. On the one hand, the dynamic process of construction and reconstruction of constituency opens up scope for manipulation: through shifting blame to others, and avoiding criticism of self. On the other hand, this process may also open scope for parliaments to capitalise on their unique deliberative qualities, which may be enhanced through such systems of interparliamentary interaction. This also has bearings on the conception of accountability, both understood as making accounts and as holding to account.

I think RECON model III is particularly suited to address these complex challenges (see Fossum and Crum 2009), including the more complex representation and accountability relations involved.

## Conclusion

The debate has underlined the need to take the RECON approach seriously: what is needed is a systematic assessment of all three options because they are based on very different underlying configurations. This also breeds innovation and may help establish an improved analytical framework. Through undertaking the analyses and through the kind of feedback that we have reported on here we should hopefully end up with a clearer sense of the EU's democratic legitimacy and a better sense of the status of democracy in today's world.

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# Appendix

RECON Midterm Conference  
Prague, 9-10 October 2009

## Programme

Friday, 9 October 2009

- |       |  |
|-------|--|
| 08:30 | <i>Registration and coffee</i>   |
| 09:00 | <b>Opening speech</b><br><b>Vladimír Špidla</b><br><i>EU Commissioner for Employment, Social Affairs<br/>and Equal Opportunities</i>   |
| 09:30 | <b>Welcoming remarks</b><br><b>Zdenka Mansfeldova</b><br><i>Academy of Sciences of the Czech Republic</i><br><b>Angela Liberatore</b><br><i>European Commission, DG Research</i> |
| 09:45 | <b>RECON half way</b><br><b>Erik O. Eriksen</b><br><i>RECON scientific coordinator, ARENA, University of Oslo</i>  |
| 10:00 | <b>Keynote speech: EU as a regulatory regime</b><br><i>(RECON model 1)</i><br><b>Giandomenico Majone</b><br><i>Emeritus Professor, European University Institute</i>             |

- Discussant: Deirdre Curtin**, *University of Amsterdam*
- 10:45 *Coffee*
- 11:00 **Keynote speech: EU as a multinational federal state**  
(*RECON model 2*)  
**Rainer Schmalz-Bruns**, *University of Hannover*
- Discussant: Ulrike Liebert**, *University of Bremen*
- 11:45 **Keynote speech: EU as a cosmopolitan order**  
(*RECON model 3*)  
**Hauke Brunkhorst**, *University of Flensburg*  
**Discussant: Agustín José Menéndez**, *University of León*
- 12:30 *Lunch*
- 13:30 **Introduction**  
**John Erik Fossum**  
*ARENA, University of Oslo*
- 13:45 **The problem of delegation / Democracy and accountability**  
*Roundtable on RECON model 1*  
*Chair:*  
**Christopher Lord**, *ARENA, University of Oslo*  
*Participants:*  
**Christian Joerges**, *ZERP, University of Bremen*  
**Berthold Rittberger**, *MZES, University of Mannheim*  
**Vivien Schmidt**, *Boston University*  
**Wolfgang Wagner**, *VU University Amsterdam/ Peace Research Institute Frankfurt*
- 15:00 **Identity, community and justice**  
*Roundtable on RECON model 2*  
*Chair:*  
**Hans-Jörg Trenz**, *ARENA, University of Oslo*  
*Participants:*  
**Yvonne Galligan**, *Queen's University Belfast*  
**Zdzislaw Mach**, *Jagiellonian University*  
**Agustín J. Menéndez**, *University of León*  
**Jana Reschova**, *Charles University/University of Economics, Prague*
- 16:15 *Coffee*

- 16:45      **The state/non-state dimension**  
*Roundtable on RECON model 3*  
*Chair:*  
**John Erik Fossum**, ARENA, University of Oslo  
*Participants:*  
**Rainer Forst**, Johann Wolfgang Goethe University  
**Beate Kohler-Koch**, University of Mannheim  
**Claire O'Brien**, Danish Institute for Human Rights  
**Philippe C. Schmitter**, European University Institute
- 18:00      *Coffee*

## Saturday, 10 October 2009

### Parallel work package sessions

<i>Room</i>	<i>Vienna</i>	<i>Prague D</i>	<i>Prague C</i>
09:00	<b>WP 2</b> Constitutional politics  <i>Chair: John Erik Fossum</i>	<b>WP 6</b> The Foreign and Security Dimension  <i>Chairs: Helene Sjursen, Wolfgang Wagner</i>	<b>WP 4</b> Gender, Democracy and Justice  <i>Chair: Yvonne Galligan</i>
10:30	<i>Coffee break</i>		
11:00	<b>WP 9</b> Global Trans- nationalisation and Democratisation Compared  <i>Chairs: Christian Joerges, John Erik Fossum</i>	<b>WP 3</b> Representation and Institutional Make-up  <i>Chair: Christopher Lord</i>	<b>WP 8</b> Identity Formation and Enlargement  <i>Chair: Zdzislaw Mach</i>
12:30	<i>Lunch</i>		

13:30	<b>WP 1</b> Theoretical Framework	<b>WP 7</b> The Political Economy of the EU	<b>WP 5</b> Civil Society and the Public Sphere
	<i>Chairs: Erik O. Eriksen, John Erik Fossum</i>	<i>Chairs: Agustín José Menéndez, Raul Letelier</i>	<i>Chairs: Ulrike Liebert, Hans-Jörg Trenz</i>
15:00	<i>Coffee break</i>		
15:30	<b>Plenary session</b>		
	Roundtable on 'EU with Lisbon: From a RECON perspective' <i>Open discussion</i>		
17:00	<i>End of conference</i>		

# ARENA Reports

- 10/3: Erik O. Eriksen and John Erik Fossum (eds): "What democracy for Europe? Proceedings from the RECON Midterm Conference" (RECON Report No 11)
- 10/2: Maria Martens: "Organized administrative integration. The role of agencies in the European administrative system"
- 10/1: Anne Elizabeth Stie: "Co-decision – The Panacea for EU Democracy?"
- 09/7: Raúl Letelier and Agustín José Menéndez (eds): "The Sinews of European Peace: Reconstituting the Democratic Legitimacy of the Socio-economic Constitution of the European Union" (RECON Report No 10)
- 09/6: Ingrid Weie Ytreland "Connecting Europe through Research Collaborations? A Case Study of the Norwegian Institute of Public Health"
- 09/5: Silje Gjerp Solstad: "Konkurransetilsynet – et sted mellom Norge og EU?"
- 09/4: Nina Merethe Vestlund: "En integrert europeisk administrasjon? Statens legemiddelverk i en ny kontekst"
- 09/3: Carlos Closa (ed.): "The Lisbon Treaty and National Constitutions: Europeanisation and Democratic Implications" (RECON Report No 9)
- 09/2: Erik O. Eriksen and John Erik Fossum (eds): "RECON – Theory in Practice" (RECON Report No 8)
- 09/1: Rainer Nickel (ed.): "Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification" (RECON Report No 7)
- 08/8: Savino Ruà: "The Europeanization of the Ministry of the Foreign Affairs of Finland"
- 08/7: Dirk Peters, Wolfgang Wagner and Nicole Deitelhoff (eds): "The Parliamentary Control of European Security Policy" (RECON Report No 6)
- 08/6: Ulrike Liebert and Hans-Jörg Trenz (eds): "Reconstituting Democracy from Below: New Approaches to Civil Society in the New Europe" (RECON Report No 5)
- 08/5: Christian Joerges and Poul F. Kjaer (eds): "Transnational Standards of Social Protection: Contrasting European and International Governance" (RECON Report No 4)
- 08/4: Agustín José Menéndez and John Erik Fossum (eds): "The Post-Sovereign Constellation: Law and Democracy in Neil D. MacCormick's Legal and Political Theory"

- 08/3 Andreas Heskestad: "Fra nasjonale enklaver til multinasjonale enheter? En kartlegging av Europakommisjonens kabinetter 1995-2007"
- 08/2: Nina Fredrikke Meyer Stensholt: "Between Norms and Interests - EU Democracy Promotion in the Mediterranean Neighbourhood"
- 08/1: Martine Matre Bonarjee: "Primus inter pares? The Parliamentarisation and Presidentialisation of the European Commission: between European integration and organisational dynamics"
- 07/8: Erik O. Eriksen (ed.): "How to Reconstitute Democracy in Europe? Proceedings from the RECON Opening Conference" (RECON Report No 3)
- 07/7: Joakim Parslow: "Turkish Political Parties and the European Union: How Turkish MPs Frame the Issue of Adapting to EU Conditionality"
- 07/6: Jonathan P. Aus: "Crime and Punishment in the EU: The Case of Human Smuggling"
- 07/5: Marit Eldholm: "Mot en europeisk grunnlov? En diskursteoretisk analyse av Konventet for EUs fremtid"
- 07/4: Guri Rosén: "Developing a European public sphere - a conceptual discussion"
- 07/3: Hans-Jörg Trenz, Maximilian Conrad and Guri Rosén: "The Interpretative Moment of European Journalism - The impact of media voice in the ratification process" (RECON Report No 2)
- 07/2 John Erik Fossum, Philip Schlesinger and Geir Ove Kværk (eds): "Public Sphere and Civil Society? Transformations of the European Union"
- 07/1: Agustín José Menéndez (ed.): "Altiero Spinelli - From Ventotene to the European Constitution" (RECON Report No 1)
- 06/2: Even Westerveld: "Sverige eller svenskenes EU? " - hvordan ulike oppfatninger av EU kan påvirke valget av prosedyre for ratifisering av EU-grunnloven.
- 06/1 Erik Oddvar Eriksen, Christian Joerges and Florian Rödl (eds): "Law and Democracy in the Post-National Union".
- 05/9: Camilla Myhre: "Nettverksadministrative systemer i EU? En studie av det norske Post- og teletilsynet"
- 05/8: John Erik Fossum (ed.): "Constitutional processes in Canada and the EU compared"
- 05/7: Espen D.H. Olsen: "Mellom rettigheter, kultur og *cosmopolis*: En teoretisk og empirisk analyse av europeisering og statsborgerskap"
- 05/6: Marianne Takle: "From Ethnos to Demos? Changes in German Policy on Immigration"
- 05/5: Ingvild Jenssen: "The EU's minority policy and Europe's Roma: Cultural differentiation or cosmopolitan incorporation?"

- 05/4: Grete Berggård Feragen: "Europeisering av norsk gasspolitikk"
- 05/3: Erik O. Eriksen, John Erik Fossum and Agustín José Menéndez: "The European Constitution: the Rubicon Crossed?"
- 05/2: Helene Sjursen (ed.): "Enlargement in perspective"
- 05/1: Gitte Hyttel Nørgård: "Mod et netværk-administrativt system i EU? Et studie af den danske IT og Telestyrelse"
- 04/9: Agustín José Menéndez and Erik Oddvar Eriksen (eds): "Fundamental Rights through Discourse. On Robert Alexy's Legal Theory - European and Theoretical Perspectives"
- 04/8: Geir-Martin Blæss: "EU og Habermas' diskursteoretiske demokratimodell. Et prosedyremessig rammeverk for et postnasjonalt demokrati?"
- 04/7: Veronika Witnes Karlson: "EU - en normativ internasjonal aktør?. En analyse av Russland i EUs utenrikspolitikk"
- 04/6: Frode Veggeland: "Internasjonalisering og styring av matpolitikk. Institusjoners betydning for staters atferd og politikk"
- 04/5: Carlos Closa and John Erik Fossum (eds.) "Deliberative Constitutional Politics in the EU"
- 04/4: Jan Kåre Melsæther: "Valgt likegyldighet. Organiseringen av europapolitisk informasjon i Stortinget og Riksdagen"
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- 03/2: Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.): "European Governance, Deliberation and the Quest for Democratisation"
- 03/01: Maria Hasselgård: "Playing games with values of higher importance? Dealing with 'risk issues' in the Standing Committee on Foodstuffs".
- 02/11: Tommy Fredriksen: "Fra marked til plan. Europeisering av norsk lakseeksport".
- 02/10: Thomas A. Malla: "Nasjonalstat og region i den nye økonomien. En studie av hvordan betingelsene for politisk regulering av næringslivet i EU endres gjennom utbredelsen av markeder for elektronisk handel".
- 02/9: Anne Elizabeth Stie: "Preconditions for Democracy: National Identity Versus Constitutional Patriotism. A Theoretical Analysis of the German Federal Constitutional Court's Maastricht Judgement".
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- 01/3: Svein S. Andersen (ed): "Institutional Approaches to the European Union - proceedings from an ARENA workshop"
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- 00/8: Ulf Sverdrup: "Ambiguity and Adaptation-Europeanization of Administrative Institutions as Loosely Coupled Processes"
- 00/7: Helene Sjursen (ed): "Redefining Security? Redefining the Role of The European Union in European Security Structures", Proceedings from an ARENA Workshop
- 00/6: Christian Henrik Bergh: "Implementering av EU-direktiv i Norge, Postdirektivet - Nasjonal tilpasning i forkant"
- 00/5: Morten Dybesland: "Til felles nytte? Interesser og verdier bak nordisk utenriks- og sikkerhetspolitisk samarbeid"
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- 00/1: Various contributors: "Nordic Contrasts. Norway, Finland and the EU." Proceedings from the ARENA Annual Conference 1999
- 99/5: Elin Kristine Karlsson: "Babel i Brussel og Oslo? Flerspråkligheten i EU og respons i norske institusjoner"
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- 97/1: Jon Erik Dølvik: "ETUC and Europeanisation of Trade Unionism in the 1990's"
- 96/2: Tom Christensen: "Adapting to Processes of Europeanisation - A Study of the Norwegian Ministry of Foreign Affairs"
- 96/1: Various contributors: "Enlargement to the East". Proceedings from 'European Thresholds' - ARENA Conference Series



RECON is a five-year research project that seeks to clarify whether democracy is possible under conditions of pluralism, diversity, and complex multilevel governance. RECON spells out three different models for democratic reconstitution in Europe. The first posits that democracy can be reconstituted as a combination of audit democracy at the Union level and representative democracy at the member state level. The second model posits that democracy can be reconstituted through establishing the EU as a multinational federal state. The third posits that European democracy can be reconfigured through the EU serving as a regional post-national Union with an explicit cosmopolitan imprint. The project has contributed to frame the debate on democracy in Europe by seeking to bridge the broad international debate on democratic theory with due attention to the specifics of the European integration process.

In 2009 the project reached halfway in its project period, and a two days conference in Prague marked the occasion. The first conference day was dedicated to three keynote speeches and prepared comments on each of the three RECON models. This was followed up by roundtable panel debates, which allowed for more in-depth discussions on the models and on preliminary findings from the project. In this report we have collected the papers and comments from the first day of the conference.

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Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research. The project has 21 partners in 13 European countries and New Zealand and is coordinated by ARENA – Centre for European Studies at the University of Oslo. RECON runs for five years (2007–2011) and focuses on the conditions for democracy in the multilevel constellation that makes up the EU.

