Political Legitimacy and Democracy in Transnational Perspective

Rainer Forst and Rainer Schmalz-Bruns (eds)

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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.

The present report is part of RECON's work package 1 'Theoretical Framework', which seeks to develop an overarching theoretical approach to the study of European democracy. The report contains the proceedings of a RECON workshop convened by Rainer Forst (Johann Wolfgang Goethe University) and Rainer Schmalz-Bruns (Leibniz University of Hannover). The workshop, entitled 'Political Legitimacy and Democracy in Transnational Perspective' was held in Frankfurt am Main 24-25 October 2008.

Erik Oddvar Eriksen
RECON Scientific Coordinator

Acknowledgements

The moments in which political theorists are witnesses to and participants in processes of the formation of new political orders by way of constitution-making are very special, and when we reflect on such moments we usually think of the great debates between Federalists and Antifederalists during the formative era in the United States, or of the General Assembly in France after 1789. Admittedly, the process of European integration is less heroic than these events, and it stretches over a much longer period of time. Still, it is a fascinating development of world-historical importance, and its analysis is essential for anyone who wants to understand the challenges to the construction of transnational polities.

Since 2007, the RECON project has been studying the principles, policies, and prospects for democracy within the EU. We have had the pleasure of being part of this research and developing the theoretical framework with other colleagues. In that context, we organized a conference on the theme of 'Political Legitimacy and Democracy in Transnational Perspective' in Frankfurt in October 2008, where we gathered the people whom we thought did some of the most interesting and innovative work on our theme in various disciplines such as philosophy, political science, and law. This volume documents the papers and comments if not, unfortunately, the lively debates that took place.

Our heartfelt thanks go to all the participants for their superb contributions as well as to ARENA, especially Erik Oddvar Eriksen, John Erik Fossum, Marit Eldholm, and Hanna Karv, for their support of the publication - and a special thanks to the latter two for their excellent work in the final stages of preparing this report. Many thanks also to Jonathan Klein from the Frankfurt RECON group for his help in getting the manuscripts ready. But most of all, we are indebted to Heike List, researcher in the Frankfurt RECON group since 2008. Her help and extraordinary skill in organizing the conference and in preparing this publication were invaluable.

We are aware that engaging in the political theory of the EU is a complicated matter, for here empirical and normative perspectives are especially mixed and sometimes confused. We trust, however, that the contributions to this volume will prove productive in distinguishing the issues, the arguments, and the ideals in play.

Rainer Forst and Rainer Schmalz-Bruns
Frankfurt am Main and Hannover, March 2011

Table of contents

Introduction
Rainer Schmalz-Bruns and Rainer Forst 1

Part I: Justice and democracy in the postnational constellation

Chapter 1
Justice, not democracy
Legitimacy in the European Union
Jürgen Neyer 13

Chapter 2
Justice and democracy
Comment on Jürgen Neyer
Rainer Forst 37

Chapter 3
The great chain of legitimacy
Justifying transnational democracy
Frank Nullmeier and Tanja Pritzlaff 43

Chapter 4
Transnational democratic legitimation and the nature of political normativity
Comment on Frank Nullmeier and Tanja Pritzlaff
Rainer Schmalz-Bruns 63

Part II: Institutions of democratic legitimation beyond the state

Chapter 5
Postnational democracies without postnational states?
Some skeptical reflections
William E. Scheuerman 75

Chapter 6
Two kinds of transnational democracy
Comment on William E. Scheuerman
Peter Niesen 105

Chapter 7
Legitimacy, supranationalism and international organizations
Stefan Kadelbach.....113

Chapter 8
How will constitutionalism and the idea of law-mediated legitimacy survive in postnational constellations?
Comment on Stefan Kadelbach
Christian Joerges 135

Chapter 9
Political legitimacy and democracy in transnational perspective
'Democracy and or beyond the state'
Volker Röben 145

Chapter 10
Transnationalism beyond the statist paradigm
Comment on Volker Röben
Tanja Hitzel-Cassagnes.....167

Part III: Democratic legitimacy and the finalité of European integration

Chapter 11
Power without arbitrariness?
Some reflections on attempts to use indirect legitimacy to justify the EU as a 'restrained yet capable' form of political power
Christopher Lord 181

Chapter 12
Finding a zoo for European polecats, lions and foxes
Contexts of democratic empowerment
Comment on Christopher Lord
Heike List.....203

Chapter 13
How desirable is further European integration?
Glyn Morgan.....217

Chapter 14
The constitutional dimension
Comment on Glyn Morgan
John Erik Fossum 235

Chapter 15
Democratic legitimacy beyond borders
Government without a state
Erik Oddvar Eriksen.....245

Chapter 16
The process of legitimation as a large scale experiment
Comment on Erik Oddvar Eriksen
Franziska Martinsen 281

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Introduction

The EU as a legitimate polity?

Rainer Schmalz-Bruns and Rainer Forst
Leibniz University of Hannover and Johann Wolfgang Goethe University

Looking at the European integration process at the stage it has reached with the ratification of the Treaty of Lisbon, what is still most puzzling is the fact, as one observer recently put it:

> […] that a large number of partly autonomous processes of incremental change have fostered integration with a consistent direction over half a century […] in spite of considerable political, economic, social and cultural diversity; disagreement about the kind of Europe and political community that is desirable; incomplete means-end knowledge and control; ambiguous compromises, uncertain effects, and surprise events and developments.
>
> (Olsen, 2010: 109-110)

One way to make sense of this astonishing feature of European integration is to think that there must be a specific 'genetic soup' made up of important ingredients that are to be found in European political traditions which fuel an autonomous logic of institutionalization. Analysing European integration from the perspective of historical institutionalism, one could therefore get the

impression that the grammar of political ordering, built into the concepts of democracy, legitimacy, constitutionalism and (formal) statehood, is still in place and operative. However, this view stands in marked contrast to the uneasiness that emerges when confronting the return of state-oriented conflicts and crises resulting from the disembedding of European politics from the normative networks of communal life, leading to the alienation of political power from its roots in the political life of citizens (see Brunkhorst, 2011). Such alienation resurfaced with the failure of the ratification of the constitutional treaty and found its temporary and unstable solution in the Treaty of Lisbon. Jürgen Habermas, speaking for many contemporary observers, judged this outcome to demonstrate that '[…] European politics at the turning-points of the integration process has never been so consciously and blatantly elitist and bureaucratic' (Habermas, 2008: 96-127; our translation).

What causes such uneasiness is not just the detached and elite-driven mode of European integration and constitutionalisation and the failure to provide the structural conditions for a general democratic decision regarding the question as to which shape the European Union should ultimately take.[1] This is significant in itself, for it runs counter to the meaning and importance citizens attach to international organizations and especially to the EU as an institutional building block of a global political order (cf. Nullmeier et al., 2010; Zurn, 2011). Yet the doubts about the unifying processes may reach even deeper, because they also express an uncertainty about the sources on which trans- or supranational normative orders can really draw. At issue is the question of whether the claim to the legitimacy of a normative political order must ultimately be made good by democratic procedures (adequately redefined) or whether its legitimacy follows other imperatives apart from democratic legitimacy - such as higher-order considerations of economic welfare, legal security, constitutional coordination, political effectiveness or, even more abstract, 'public reason' or some notion of material justice.

The contributions to this volume essentially take up this question - or rather, this host of questions. For even in the event that one thinks the question of political legitimacy need be answered democratically for

[1] These are the two complaints which Habermas originally raised against the Treaty of Lisbon, cf. Habermas (2008: 98).

principled reasons of political autonomy or procedural justice, it is not clear what exactly that means on a transnational level or, more concretely, with respect to the EU. And in the case in which one believes that other principles and forms of legitimacy are required and valid in transnational contexts such as the EU, a host of normative and institutional issues arises.

The contributions to this volume can be divided into three groups along this axis. Frank Nullmeier and Tanja Pritzlaff as well as Jürgen Neyer address the question of the normative sources on which political authority in the transnational constellation can draw by either shifting the emphasis from the idea of democratic legitimacy to an ademocratic reliance on the normative force of justice (Neyer) or by relocating the sources of democratic legitimacy from an institutionally mediated 'chain of legitimation' to a subject-less web of practices of will-formation and decision-making (Nullmeier and Pritzlaff). The contributions of Stefan Kadelbach, Volker Röben, and William E. Scheuerman discuss the prospects for democratic legitimation, investigating its institutional implications by establishing a conceptual link between democratic legitimacy and the notion of statehood (Scheuerman) or by exploring the robustness of democratic legitimacy as an institutional principle in comparing the preconditions that are given at the national, regional, or international level through the perspective of legal or constitutional theory (Kadelbach and Röben). Finally, Christopher Lord, Erik Oddvar Eriksen and Glyn Morgan analyse the consequences this has for the question of the finalité of the European integration process by (a) insisting that democratic legitimacy must be tailored and institutionally entrenched so as to provide for the double task of negatively restricting political power and of safeguarding the Union´s capability to act (Lord); (b) by substantiating a more truly transnational account of the normative force of the European integration project (Morgan); or (c) by finally designating the Euro-polity as a form of government which is not premised on statehood in its classical sense, but downplays coercive elements and upgrades normative institutional elements for a future democratic cosmopolitan order (Eriksen). In order to complete this picture of a lively debate of contested issues and to broaden the scope of approaches, each of the aforementioned contributions will be followed by a commentary.

In chapter one, Jürgen Neyer proposes a new way to conceptualize and assess the legitimacy of the political system of the EU. Based on a particular interpretation of Rainer Forst´s idea of a basic moral right to justification as the core of a political theory of justice, Neyer argues for a shift away from the – in his eyes unrealistic – expectation that the EU be transformed into a transnational democracy. Instead he suggests to use a notion of justificatory justice as an appropriate standard to both explain and evaluate the EU system in the light of which it should be possible to tame the anarchy that still exists between the more or less powerful member states and to establish legal procedures and institutions to challenge and overcome horizontal and vertical power asymmetries. Against this attempt to construct a gap between democracy and justice in order to establish and defend a vision of the EU as a just supranational polity without being a democracy, Rainer Forst stresses the essential conceptual connection between his notion of the right to justification and democracy as a practice of justification in his comments. Since, according to his view, justice is a constructive and creative human force tracking relations of domination in order to transform them into justifiable political and legal relations, the first task of justice is to establish a 'basic structure of justification' in which those subjected to certain norms or institutions can become their authors.

Starting from the idea of a link between the notion of justification and the reflexive character of political processes, Frank Nullmeier and Tanja Pritzlaff try to pave a conceptual path for understanding transnational democratic legitimacy as not (at least not exclusively or primarily) tied to an uninterrupted chain of legitimation according to which political decisions derive their legitimacy from democratically elected representatives of the people. Rather, the claim to legitimacy emerges from sources of political normativity which are nested in political practices and interactions at the micro-level of the political process. The authors conclude that democratic legitimacy can only be ascribed to rule-making to the degree that context-sensitive performances which prevent acts of exclusion are guaranteed – a contention that is illustrated with reference to the basic fact that political power and privileges are incorporated into political practices because they originate from more basic structural characteristics of social co-operation. Against this vision, Rainer Schmalz-Bruns raises two points concerning the relationship which exists between implicit normativity and the claims to legitimacy derived from it on the one

hand, and the external legitimating link between authors and addressees of political regulations on the other. He criticizes that this leaves us with no answer to the question of the relation between normative forces implicit in performances at the micro-level of political practices and the authority of the content of explicit norms on which the expectations of the collective binding-ness of political decisions rest. Furthermore, this invites us to address the question of the context-transcendent force that can be ascribed to implicit forms of normativity more generally.

Continuing this theme, William E. Scheuerman reminds us of an important dimension of our notion of democratic legitimacy not adequately grasped in post-statist accounts of democracy, i.e. the aspects of force, violence, or, as he himself puts it, ´muscle´. Scheuerman insists on the Weberian intuition that in order to make sense of the idea of democratic self-determination we must not forget the decisive role that the political system´s monopoly of force as well as issues of sovereignty and hierarchical order connected to it play in providing means for resistance to external and internal threats to political autonomy. Thus, his position is that it is impossible to even think of post-national democracy on a transnational, global scale without at the same time thinking of new forms of post-national statehood – a form of statehood which, as it were, has to provide for a stable and robust institutional skeleton even for global politics. In his comments, Peter Niesen tries to loosen the ties which Scheuerman establishes between the monopoly of violence and the fairness of democratic procedures, the effective enforcement of policies, and the possibility of re-distributive welfare regimes. Most importantly, he urges us to ask whether it is really true that we need a state-like structure to safeguard the fairness of democratic procedures with respect to the allocation of civil and political rights, or whether we might also project that promise on a decentralized and plural structure of legal adjudication in which courts take over the role of reframing and solving rights conflicts that may emerge horizontally between different parts of a political system or vertically between different layers of that system.

In this same line, the commentary of Christian Joerges on the chapter by Stefan Kadelbach reminds us of the function of European law as a means for the 'inclusion of the other'. It concerns itself with the supervision of external effects of national laws and thus seeks to

compensate for the failings of the solipsism of national democracies. Thus it can operate to strengthen democracy within a contractual understanding of statehood and without needing to establish itself as a democratic constitutional state. In his contribution, Kadelbach puts his finger on the democratic shortcomings of such a solution by combining the structural features of the European system of fragmented sovereignty with the enshrined principle of legality which says that law can become legitimate only in so far as it guarantees the conditions under which the addressees of law may rightly consider themselves its authors. But this juxtaposition leads him to suggest not only that there is a lack of autonomous democratic responsibility on the European level, but that this is due to the democratic will of the member states who insist on having the final say – from which he concludes that 'the democratic deficit is not only democratically legitimate, but constitutionally mandatory'. Seen in this light, the legal and constitutional pluralist solution to the democratic deficit amounts to a paradox, and unless we establish autonomous democratic responsibility on the upper levels of legally integrated political communities, law as such cannot serve as a device of narrowing the legitimation gap as Niesen and Joerges imagine.

In a similar vein, Volker Röben considers the complementary development of democratic structures at the national and the international levels. Relying on the chain-metaphor of the idea of democratic legitimacy mentioned above, he starts from the assumption that (at least for the time being) there is no viable alternative to the idea of statist democracy and that therefore we are confronted with a marked difference in the level of democratic legitimacy to be achieved at the respective levels of political decision-making. This difference he captures via the distinction between 'institutionalism writ large' on the one hand (referring to traditional matters of institutional design such as the allocation of functions and distributions of power among the branches of government, together with mechanisms of establishing electoral accountability) and 'institutionalism writ small' which compensates for the lack of legitimacy-saving devices at the national level by relying on what he calls 'working methods of the international institutions' such as accountability, deliberation, and transparency. Commenting on Röben, Tanja Hitzel-Cassagnes is concerned with the rigidity of his conception of democracy, as shown in particular by his overemphasising the institutional template of the democratic state as

an archetype of democratisation, or as the sole model of constitutionally secured checks and balances, or as a motor for the external stabilisation of state-centred democracy via international bodies. Counter to this, as she sees it, all too narrow picture, she alludes to a more fine-grained phenomenology of inter- or transnational legal developments and specifically asks whether one could not also consider juridification, transnational legalisation, and judicial enforcement in their democracy-triggering and enhancing functions.

In order to clear the ground for further investigation into the issue of the finalité of the European Union, Christopher Lord engages in a thorough criticism of approaches which deny that there is a legitimation deficit, arguing that the EU does not exercise political authority in need of additional justification since it must transform its commands into national law or because it is focused on those regulations from which everyone profits and which therefore do not call for legitimation. Its power is therefore hardly visible or coercive. But such Coasian judgments do not apply according to Lord, who presents an account of the neo-republican idea of non-domination, which he takes to have the advantage of providing an account of the internal relationship that exists between two pillars of legitimate government – i.e. that it is restrained but capable of acting. Against this background, Lord sets out to show that the Coasian test of legitimacy with respect to the EU suffers from two major restrictions in that it cannot make adequate sense of two important structural features of the EU polity: The majority decision-making rules and the fact that European integration is reallocative of values. Following Lord, we need to ask whether indirect legitimacy can be reliably non-arbitrary in allowing the addressees of Union law to see themselves as its authors and in establishing a fair scheme of cooperation. But if we move beyond indirect legitimacy, Heike List asks in her commentary, do we not also have to move beyond the very conceptual confines of the republican principle of non-domination from which Lord himself starts out in order to make sense of the principle of legitimacy as combining normative restrictions on the use of public power with the justification of the empowerment of strong governing institutions capable of acting? This challenge arises from the ambiguities built into the concept of arbitrary non-domination, a concept which remains caught between a substantial and a more

procedural account and unsettled in its relation to the notion of democratic self-determination.

The question Glyn Morgan raises in his contribution is whether we can conceive of attractive visions of EU finalité if we shift the focus away from the supranational features of a democratically integrated, regional polity to a more transnational pattern of civic integration which he calls 'Liberal Political Incorporation'. According to this vision, the reference point is not integration as such, but integration as conducive to and providing for the preconditions for further enlargement, which he takes to be a demand of a universalist notion of human equality. This he takes to be a vision which applies not only within Europe but also beyond, so that liberal political incorporation can also be used as a development strategy for areas outside of Europe, as he urges us in a provocative turn. However, as John Erik Fossum reminds us in his commentary, the normative substance of that vision depends on understanding liberal incorporation as a process of reciprocal adaptation and thus raises a question about the democratic quality of the EU: If incorporation is to serve democracy in democratising acceding states, it can only do so provided that the EU itself is properly democratic.

Finally, Erik Oddvar Eriksen addresses the central question of whether there is an internal conceptual relationship between the idea of democratic legitimacy and the notion of statehood. He begins with a set of reasons why democracy requires a state: Rights must be enforced when there is illegitimate opposition or non-compliance; a legal community has a need for collective self-maintenance to stabilize expectations in the coherence of law and for a hierarchically organised judiciary to ensure that higher courts are able to correct subordinate rulings; and it must be ensured that political decision-making leads to programs which can be rationally and authoritatively implemented. In a second step, he argues that these are mere functions and proposes a conceptual distinction between ´statehood´ and ´government´: Government is not premised on organized violence but is based on the communicative powers of a self-organized citizenship and motivates compliance with reference to a normative authority nested in legitimate procedures. He takes the notion of stateless government to be in accord with important structural features of the EU system and thus regards it as a building block of a future cosmopolitan order. In her commentary, Franziska

Martinsen agrees that the EU, though not fully democratized at the present moment, is nonetheless involved in an unfinished journey toward democracy and that one of the most promising aspects in this regard lies in the decoupling of *ethnos* and *demos*. But she reminds us that this too is a hope that has to be democratically redeemed in that the idea of self-determination has to be grasped and pursued by the diverse European *demoi* themselves.

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Part I

Justice and democracy in the postnational constellation

Chapter 1

Justice, not democracy
Legitimacy in the European Union

Jürgen Neyer
European University Viadrina

The European Union (EU) is often assessed against the standard of democracy, which it has no fair chance of fulfilling. A new and attractive normative agenda is needed if the EU is to escape its deep legitimacy crisis. This chapter proposes to substitute the discourse on the democratic deficit of the EU with a discourse on its contribution to transnational justice.

New solutions for new problems

It is justice, not democracy, which is the appropriate concept for questioning and explaining the legitimacy of the EU. Hence it is here suggested that the discourse on the democratic deficit of the European Union should be replaced with a discourse on its justice deficit. In contrast to democracy, the notion of justice is not tied to the nation-state, but can be applied in all contexts and to all political situations, be they global economic structures, domestic election procedures, or the EU. The proposal to analyze the EU in terms of justice does not lower the normative standard, it corrects it. Justice is

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not less important than the idea of democracy, but explains its normative thrust. Many of the arguments made in this chapter are taken from the literature on deliberative democracy, as found in Habermas (1992), Eriksen and Fossum (2002), Nanz and Steffek (2004), and Dryzek (2006). Individual freedom, inclusive and discursive political interaction, and the role of the law as a facilitator of political integration are emphasized. The major contribution of this chapter is to integrate deliberative arguments in the analytical language of justice, which can be applied much better to the post-national context than the language of democracy. Resetting the standard is more than a change in terminology. It relaxes the nation-state focus inherent in the language of democracy and opens the way for reflecting about new means to facilitate legitimate governance. It is a critique of methodological nationalism and asks for new solutions to new problems. Whilst the democratic discourse most often focuses on parliamentary competences and divided government, the discourse on justice centers on the people, puts primary emphasis on power asymmetries and on overcoming the obstacles to justifiable political outcomes. Resetting the standard from democracy to justice thus implies a shift in analytical emphasis and a readiness to try new ways and means.

In the next section, the chapter discusses the democratic deficit discourse and finds it analytically inadequate. Section three develops a more realistic normative standard that is built on the concept of justice as a right to justification. It is a liberal understanding of justice which respects the normative heterogeneity of the peoples of the EU without denying that they all have a common ground in mutual respect for the right to freedom. Section four identifies three major obstacles to making the right to justification effective and explains how the EU can and does (to some extent) already confront such obstacles. The concluding section summarizes the argument and interprets supranationalism as the constitutionalization of justificatory discourses.

The wrong discourse

One of the dominant discourses in recent integration theory is the claim that the EU suffers from a democratic deficit. It is pointed out that the establishment of the EU has led to an empowerment of the national executives and a corresponding loss of the legislative and

oversight powers of national parliaments (Moravcsik, 1994; Thomson, 1995; Wolf, 1999). The EU itself is criticized for its allegedly technocratic bias (Smith and Wallace, 1995), the weak role of the European parliament (Rittberger, 2003), its neo-liberal orientation and the dominance of business interests (Streeck, 1995). Whilst most of these analyses pinpoint important deficiencies of the EU, it is far from clear whether they are built from the appropriate normative standard and whether they propose the right recipes. The EU can only be assessed as suffering from a democratic deficit or as complying with the standards of democracy if it has the theoretical chance to become democratic. The EU, however, still lacks all those political competences which lie at the heart of any democratic state governance, and which have historically been the most prominent resources for the provision of public order: the powers to tax, to enforce sanctions by means of coercion, and to provide security against foreign powers. The EU has none of these competencies. It does not levy taxes; it commands no police; and its defense and security policy is embryonic if not less. An even more serious obstacle to the prospects of democratizing the EU is that its very structure is built on the principle of difference, and not of equality, among citizens. Due to the system of unequal representation as codified in Article 190 of the Treaty Establishing the European Communities (ECT) and Article 205 ECT, citizens from small states generally have a greater say than citizens from bigger states. It is true that this critique applies to all federal states with a chamber in which the states are represented according to the principle of one state one vote. The EU, however, differs from all federal states in that unequal representation is not only a matter of its second legislative chamber but is well institutionalized in both chambers, the European Parliament (EP) and the (European) Council. Difference, and not equality of citizens, is an organizing principle of the EU. Inequality thus not only constitutes a deficit in the organizational structure of the EU but gives expression to an emphasis on intergovernmental equality which is alien to the emphasis of democracy on individual equality. The EU is thus not undemocratic by mistake, but it deliberately violates one of the constituting principles of democracy. It is the price that is paid for the legacy of the European history and the resulting emphasis of protecting the small states against domination by the bigger ones.

Disputing the capacity of the EU to become a democratic entity in its own right is a contested issue. It is a statement about the future and

therefore remains to some degree speculative. Since we do not know what will happen tomorrow we also cannot know for sure whether the EU will become a democratic entity. It is also true that any speculation about the capacity of the EU to become a democratic entity depends on what we understand democracy to be. It would be hard to deny the EU democratic credentials if democracy were merely to signify free elections, the rule of law, freedom of speech and a system of parliamentary control. All this already exists and makes liberals wonder what the whole debate is about (Moravcsik, 2002). From the perspective of deliberative democracy, however, formal criteria do not suffice. A deliberative understanding of democracy refers to a process of self-governance of a people. It centers on free and unconstrained discourses among the individuals and groups of a society, and emphasizes equality and an unrestricted public sphere (Habermas, 1992). Governance institutions have no normative standing of their own but are merely supportive devices for fostering the free discourse of citizens. The heart of democracy is not institutions but the *demos*, or, in modern terminology, the free and unconstrained discourse of citizens conducted in an unlimited public sphere. Democracy without a *demos*, as Joseph Weiler has put it bluntly, is impossible: 'If there is no *demos*, there can be no democracy' (1999a: 337). It is not surprising therefore, that many recent efforts at formulating a theory of post-national legitimate governance limit their analyses to the institutions of governance (Zürn, 2000; Heinelt, 2008) or are hesitant to use the term 'democracy' at all (Beck, 2006; Dryzek, 2006).

It is against this crucial role of the *demos* and an unlimited public sphere that the statement of a structural incapacity of the EU to facilitate democracy becomes plausible. As yet, we have no significant processes toward the establishment of a European *demos*. The EU has only transnational epistemic communities, expert networks, and sporadically emerging publics (Eriksen and Fossum, 2002), which disappear as soon as the latest scandal moves from the first to the last page of the newspaper (which most often takes no more than three days). There is neither a European wide media which is regularly consulted by more than a narrow elite nor a relevant political movement, either on the European or on the national level, which works towards overcoming the existence of multiple *demoi*. For the foreseeable future, the EU thus will have to live with more than twenty national *demoi* and national democracies.

From all we observe today, there is neither a demand for, nor a supply of, a European super-*demos* or a European super-democracy.

Resetting the standard is also important for overcoming the political crisis of the EU. The French, the Dutch and the Irish people have rejected proposals to renovate the EU's institutional architecture and to provide its decision-making machinery with more effectiveness, efficiency and – so the Commission, the Parliament and most Member State governments claim – more legitimacy. It is not unlikely that referenda in Germany, the UK, the Czech Republic and a number of other Member States would have yielded similar results. The three rejections have left most of academia and politics puzzled. It is common sense in both communities that the proposals would have softened many of the deficiencies of the EU. Transparency of decision-making and the participation of the European Parliament would have been extended, and the internal and external security policies would have been made more coherent and probably more effective. A major reason for the widespread critique is that the intellectual hegemony of the democratic discourse leads to permanent public assessments of the EU against a standard which it has no fair chance to fulfill. The broad public frustration with the EU will not be overcome by further expanding the competences of the EP, by additional mechanisms of transparency, a catalogue of competences or any other means of institutional engineering. This has already been voted down three times by the French, the Dutch, and the Irish citizens. If the European peoples continue to cherish their domestic democratic standards and practices, they will neither accept a supranational technocracy nor welcome a European super-democracy. What is needed is an attractive, new normative agenda that highlights the achievements of the EU and looks for ways to further improve it. This agenda must respect domestic democratic traditions while at the same time tying European governance to demanding norms that are nevertheless possible to implement.

Many recent contributions share this skepticism. It has become a widespread conviction that the EU is in need of a normative orientation *sui generis* that is better suited to its specific social and political structures. This insight has motivated a new generation of normative literature to follow the traits of Majone (1998) and to look for a solution to the EU's deficits in emphasizing accountability (cf. Benz et al., 2007). Accountability has become a new analytical focus

for much of the literature because it promises to combine an emphasis on input-legitimacy without unduly limiting the problem-solving capacity of the EU. It underlines the need for transparent decision-making, legal oversight and good administrative procedures without necessarily imposing participatory requirements that would endanger the efficiency of decision-making. It is a normative concept that is very much in accordance with the practices of the EU. Its analytical precision and, thus, its normative thrust, however, have their limits. Accountability has recently been described as a 'dustbin filled with good intentions […] and vague images of good governance' (Bovens, 2007: 449). Without being explained by reference to an external normative standard, it remains an elusive concept that does not answer the most pressing questions such as who should be accountable to whom, when or for what reasons.

Justice and the right to justification

Many of the open questions inherent in the concept of accountability can be answered if the concept is complemented by a theory of justice that focuses on the right to justification (cf. Forst, 2007). The idea of justice as a right to justification has the important strength that it is both empirically and normatively sound. It is established on the assumption that we have a human right to demand and receive justification from all those individuals or organizations that restrict our freedom. This does not necessarily imply that no limitations of our freedom are legitimate, but only holds that the legitimacy of any such intervention depends on the reasons that are given to explain it. If, therefore, we concede the basic right of anyone who might be affected by the consequences of our actions to be considered in our choice of actions, and if we therefore only regard rules as being potentially just that have taken the concerns of the others into proper consideration, then it is likewise plausible to assume a right to justification as a core element of justice. As a person (or organization), I therefore have the right to have any restriction of my individual freedom justified by whoever causes that restriction or has the intention to do so. This argument takes the freedom of the individual from domination as a starting point, and places all restriction of this freedom under the reservation of good reasons. It is a procedural understanding of justice which emphasizes not only individual freedom but also the duty of the community to produce the material conditions under which individual freedom can exist (cf. Sen, 1999).

The right to justification puts high demands on any act with the capacity to limit someone's freedom. In crafting the argumentative design of a justification, the justifying person or organization must not only explain its actions (i.e. explicate motives) but must follow the reservation of good reasons. In doing so, only reasons that fulfill the two minimum conditions of reciprocity and universality are to be understood as good reasons. Reciprocity means that nothing more is demanded from anyone than we are willing to concede ourselves. Universality demands that the reasons given must be acceptable to all parties and that the outcomes of discourses are binding on all parties to the same degree.

Understanding justice as the right to justification gives the notion of justice an intrinsically procedural and discursive character. Any question regarding the specific implication of justice in a specific situation is answered with reference to a normatively demanding discursive procedure. All parties concerned, be they individual or governmental, must be given the chance to voice their concerns and to have them properly respected in the formulation of binding rules. In this way, the search for justice becomes an inclusive, discursive and always only temporarily concluded project. Though those concerned by a regulation may temporarily agree upon a specific accord, they often will only do so with the reservation of possible later changes.

The right to justification is not only a defensive right against illegitimate infringements of our freedom but includes an activating component. It comes into play also if political institutions neglect to take action which would have had positive effects on our freedom. The inactivity of the EU to harmonize the taxation of companies is no less in need of justification than any of the legislative proposals of the Commission. The activating component of the right to justification is also put in practice in the duty of Member States to give reasons in case of alleged non-compliance with European regulations. Although the right to justification is universal in its claim to normative validity, it is nevertheless open to different cultural contexts. It thus combines insights from communitarian and from universalistic theories of justice. Its formal requirements are limited to complying with the logic of public reasoning and legal arguing and are silent on the specific substantial implications of the resulting discursive process. The broad space for interpretations that is left allows for adaptation

to cultural and historical contingencies, and guarantees that its claim to provide an overarching discursive logic does not degenerate into the dictatorship of a narrow and technical rationality.

Justice and power asymmetries in the EU

Is the right to justification just another fancy utopia of normative theory without any fair chance to be realized? Or does it comply with the requirement of normative realism to explicate how the 'ought' and the 'is' relate to one another and how and by what means the normative idea can be fostered? This section applies normative realism to the EU and to the idea of justice as justification. It starts with an analysis of the EU that highlights the significant difference between the 'is' and the 'ought', between the idea of a transnational justificatory discourse and the reality of the EU. In the remaining parts, the section explains how the idea of justice as justification is already rooted in the practice of the EU and how it controls horizontal and vertical power asymmetries. The idea of justice as justification thus is a normative but nevertheless realistic approach to justifying and criticizing the EU.

Power asymmetries in the EU

Justificatory discourses are about relationships of power (Grant and Keohane, 2005). To demand justification from someone is to ask someone to do something he or she would otherwise not have done, or to keep someone from doing something. A justificatory practice demands that the capacities of individuals are sufficient to successfully demand and receive justification from powerful governmental institutions. It also entails the capacity of weak states to make more powerful states comply with the force of good arguments. None of this can be taken as a given. Vertical power asymmetries between individuals and governments result from the fact that the latter act as gatekeepers for political proposals and that they often have a monopolistic say over the setting of the European political agenda via the European Council. The problem of executive empowerment is aggravated by an informational advantage regarding the positions and scopes of other executives. The executives are much better able than the public or any parliament to assess what is politically viable (Moravscik, 1994). Horizontal power asymmetries among the Member States lead to a similarly crucial problem. The more powerful Member States dominate the policy-

making process in the European Council, irrespective of whether they have the better arguments or not (Tallberg, 2007). Due to the unequal ability of states to upload their preferences onto the European level (cf. Börzel, 2002) and to compete in the regulatory competition (Genschel and Plümper, 1997), European norms are often based on bargaining processes (i.e. exchange of threats and promises) only and reflect the preferences of only a limited number of powerful states. Political deliberation is seriously hampered by the fact that speakers from different cultural backgrounds carry different understandings about what the relevant problems are and how they are properly dealt with. Making a political community of domestically responsive Estonian, Sicilian, Swedish and Romanian delegates and representatives agree on adequate criteria for justifying political (in-)activity is a difficult task. Many political debates such as those on harmonizing corporate taxation or on directives that touch upon issues of gender equality provide clear evidence of these difficulties. A third crucial obstacle for the right to justification is the anarchical character of international politics. At the end of the day, the EU cannot coerce Member States into compliance with its regulations but must rely on some degree of willingness to implement its law. Compliance with European law always remains an 'autonomous voluntary act' (Weiler, 2000: 13) on the part of the Member States. Centralized control- and enforcement mechanisms are lacking, and the EU's institutions can hardly guarantee that the outcomes of justificatory discourses apply to all addressees to the same degree.

Reducing horizontal power asymmetries

European law considerably reduces all three obstacles to justice. It enables the European political community to engage in normatively meaningful deliberations by distinguishing between legal and illegal behavior and by providing normative standards for political action. European law and the highly legalized Euro-speak are often criticized for their technocratic character and inaccessibility. That critique tends to overlook that the technical language of law provides an interface for the discourse among the multiplicity of national cultures without imposing a particular supranational political culture above the Member States.

The European law also has an important role for the transformation of bargaining into deliberative interaction. In European legal

discourses, good arguments not only have the (sometimes rather small) probability of convincing other governments of the adequacy of one's own position, but (often far more importantly) of making the Commission, the Court or the Parliament willing to join forces with that same position. Good arguments can be tools for tapping the support of institutional actors, just as bad arguments can prompt their opposition. If the government of a Member State imposes trade barriers against imports from another Member State, it is well advised to produce argumentative justification and give convincing explanations for its actions. If it does so, its measures will be supported by the Commission (and, if necessary, by the Court). However, if it acts without justification and without convincing arguments, it will have to face the opposition not only of the affected government but also of the Commission (and, if necessary, the Court), and be confronted with the corresponding costs. Whilst international politics allows for intrinsically legitimate governmental preferences, supranationalism forces governments to refer to constitutionally codified material and procedural norms and to explain how their preferences relate to these norms. Horizontal legal integration forces the Member States to abstain from simply issuing threats and promises, and requires them to reformulate their preferences in the language of law. In this way, legal integration transforms bargaining into legal reasoning (cf. Kratochwil, 1995), and provides the basis for justificatory discourses.

The need to reformulate preferences in the language of law has relevant consequences for the content of political interaction. The law acts as a filtering mechanism against openly selfish proposals and facilitates discursive interaction. Elster refers to this effect as the 'civilizing force of hypocrisy' (Elster, 1998: 111). In order to have their proposals accepted as arguments, speakers must hide their base motives. Hiding base motives, however, requires proposals to be subjected to a number of constraints which may modify them quite substantially. The first constraint is the 'imperfection constraint', which implies that proposals must show less than a perfect overlap between private interests and impartial arguments in order to be perceived as good arguments. Arguments must also be in accordance with positions that have been formulated at an earlier point in time and must be maintained even if they no longer serve the speaker's interests (consistency constraint). Otherwise, a speaker will easily be viewed as acting opportunistically and thus loose his or her

credibility. And, finally, arguments must abstain from making claims which can easily be shown to be incorrect (plausibility constraint). Together, all three constraints work as a filter against openly selfish claims and thus civilize interaction by forcing the disputants to engage in argumentative interaction. Legal reasoning is, therefore, a deliberative mode of interaction which forces actors to perform in accordance with shared legal norms even if they only have self-minded interests. Supranationalism is about the representation of arguments, and not about power and preferences. Under conditions of anarchy, states bargain. In an ideal supranational structure, states deliberate.

It is true that legal reasoning does not provide any guarantee against injustice. If the law is founded on an original bargaining process, and reflects the outcome of an asymmetrical distribution of power, then its products can hardly suffice the standards of justice. The founding of the World Trade Organization (WTO), for example, reflects to some degree a blackmailing process in which the Northern states threatened to conclude a mini-WTO among themselves if the Southern states would not accept the inclusion of Trade Related Intellectual Property Rights (TRIPS) and a General Agreement on Trade in Services (GATS) into the legal framework of the new WTO (Steinberg, 2004). Thus, it is the procedural and material norms dictated by the powerful Member States that are applied in the WTO legal reasoning. A normatively meaningful transformation of bargaining into deliberation requires that the founding deal of a community reflects the values and preferences of all of its members.

Reducing vertical power asymmetries

In international relations, the right to demand and receive justifications is most often exercised by governments. It is governments that negotiate treaties and ask their contracting partners for justification and explanation in cases of alleged non-compliance or in cases where actions taken by other governments collide with a country's own interests or with the interest of a domestic constituency. Vertical legal integration in the EU has put an end to the member governments' monopoly of legitimately demanding and receiving justification. Vertical legal integration ties supranational, national and individual actors together by means of legal provisions so that justifications can and must be exchanged. Vertical legal integration safeguards that governmental and supranational actors

comply with the requirement to justify their actions and that their policy discretion via their national constituencies is not expanded beyond a degree which can be justified towards their respective principles.

Vertical legal integration must start with the individual. Following the European Court of Justice (ECJ) decision 'Costa vs. ENEL' of 1963, individuals can today ask a national court to check whether their national government is limiting access to rights guaranteed by European law. In the European Union, the human right to justification has thus returned to where it belongs. The individualistic perspective that is adopted by applying the idea of justice as a right to justification does not dispute the legitimacy of democratic governments to demand and receive justification from other governments. All democratic constitutions invest governments with that right for good reasons. It underlines however, that the right to justification is an individual human right and that governments only act as trustees of their citizens' human rights. Any such trusteeship must always remain non-exclusive and may not reduce the individuals' right to demand justification. The governmental right to justification only complements the individual right but, from an ethical point of view, can never substitute it.

The extension of the EP's rights in the European political process has made another successful inroad into the member governments' former monopoly of demanding and receiving justifications. The EP has become an important co-legislator and today critically follows the Commission's and the Council's legislative work. It is true that the EP still looks very different from most national parliaments. It lacks the right to set the political agenda, it is only the second and not the first legislative chamber and it does not even have the right to submit legislative proposals. Comparing the EP with the German *Bundestag*, the British House of Commons or the French *Assemblée Nationale* would be misleading, though. In the perspective of the right to justification, the major task of the European Parliament is not to represent the people of Europe. That is already facilitated by the national Parliaments of the Member States and needs no duplication. The most important task of the EP is to critically accompany the working of the Commission and the Council and to demand justification and explanation in all cases in which citizens' concerns are not met. The EP's most important function is not to represent a

non-existing European people but to guard against any legal activity which cannot be justified publicly or which does not meet the expectations of the citizens of the European Member States (cf. Auel, 2007).

The justificatory discipline imposed by vertical legal integration also covers relations between the EC's supranational institutions and its Member States. The delegation of competences to the Commission is in most cases only conditional, and it is also subject to control mechanisms. The provision of Article 202 ECT is a typical example. It stipulates in its first sentence that the Council delegates all competences to the Commission to implement its legislative acts. The second sentence, however, adds that the Council may establish certain modalities for the execution of these competences. In practice, the second sentence has been a major reason for the huge growth of the European comitology system, which acts as a safeguard against the Commission becoming a 'run-away bureaucracy' (Pollack, 1997). Even in an area such as external trade, where the Commission has had broad competences already codified in the Treaty of Rome, it must justify its international policies towards the Member States. According to Article 133 ECT, the Commission can act only after it has presented recommendations to the Council of Ministers, and after these recommendations have been authorized. In addition, every international legally-binding agreement that has been concluded by the Commission on the part of the EC is subject to critical scrutiny in the Council.

In a multi-level system such as the EU, vertical legal integration cannot stop at the Member States borders but must encompass their domestic political structures. An often cited example of how domestic political structures can counter a government's effort to escape domestic control is provided by the Danish *Folketing*. The *Folketing* exercises its control over the Danish government in European affairs by clearly outlining in advance which positions the governmental delegate may present and which are beyond his or her mandate (Dosenrode, 2000). The responsible minister has to present his or her proposal in person to a specialized European Affairs Committee of the *Folketing* and must obtain a supportive majority. The members of the committee not only vote on the proposal but also have the right to propose amendments. The minister has no right to enter into any negotiations in Brussels if he or she fails to convince the majority of

the committee of his/her proposal. Likewise, if the negotiations in Brussels seem to make it necessary to change the Danish position, and if he or she wants to go beyond the authorizations given by the mandate, he or she must present new suggestions to the committee and wait for new instructions. The integration of the *Folketing* into the daily decision-making in Brussels is an important element which explains the high political awareness in Denmark toward European affairs. European politics is not limited to executive discretion but an essential part of domestic legislative politics. Although this awareness may, from time to time, lead to a critical stance of the public towards the EU, it is attractive from the perspective of a justificatory discourse because it bridges the gap between democratic and European publics (cf. Nehring, 1998).

It is true that all of these mechanisms do not provide any guarantee for the complete neutralization of vertical power asymmetries. Organizational procedures never determine actions. They merely provide incentives to act according to prescribed rules. It is also true, however, that the list above is far from complete and only presents selected parts of a picture which – in reality – is much more complex and imposes a much more rigid discipline than the four examples imply. The very existence of these procedures provides evidence that supranational legal integration is not only a means of expanding governmental discretion, but that it simultaneously imposes additional needs for justification. Supranationalism not only expands or limits governmental discretion; it also provides an argumentative discipline according to which political authority is to be exercised.

Taming anarchy

One of the great success stories of the EU is that its legal regulations are nearly always complied with by the Member States. The EU is one of the very few non-coercive authority structures which expect their Member States to comply with rules even if they explicitly oppose them. Understanding the success story of the taming of anarchy in the EU demands a nuanced explanation which has much to do with the right to justification. An important part of the story lies in the shared interest of both weak and strong states in a well-functioning international legal system (cf. Hurrell, 1993). For weak states, an international legal order is a pre-condition for having their concerns heard and taken seriously. In an anarchical environment without binding legal norms and reliable state practices, the weak

states have little guarantees that their interests and legitimate concerns are taken seriously by their more powerful peers. The binding character of European law is the first best guarantee for Luxembourg that its interests count in European negotiations. Without the compulsory character of European law, the big powers Germany and France would make it much harder for Luxembourg to maintain its low capital taxation scheme, or for Ireland to uphold its low level of corporate taxation. It is the legal norm of unanimity which makes controversial harmonization so difficult and which provides a degree of security to smaller states that would otherwise be difficult to realize. Legalization is not only in the interest of weak states but also serves the interests of the more powerful states. France and Germany have a prime interest in the stability of the European order because they are the ones who have had the biggest say in the writing of the rules and who can be assumed to benefit the most. Not complying with European law would signal to the weaker states that they must not take the discipline imposed on them too seriously. Non-compliance with European law therefore is not associated with either the big or the small powers but most often is related to insufficient administrative capacities (Chayes and Chayes, 1995).

A second part of the explanation is the preliminary ruling procedure according to Article 234 ECT (cf. Alter, 2001). It directly connects governments to control exerted by their citizens and instrumentalizes national courts as agents of supranational law. Article 234 ECT provides that any national legal person may sue his or her government if that government has violated a legal provision of the EU and inflicted damage on that legal person. Governments are thus not only liable to each other by means of an international legal obligation, but have likewise adopted responsibilities towards their citizens.[1] A supranational legal order is thus categorically different from a merely international legal order because individuals may use their Member State's courts against political decisions taken by the government or parliament of that state. It is not surprising that the direct linkage between the EC's supranational institutions and its citizens is often interpreted as a major constitutional step towards the establishment of a European political order *sui generis*.

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[1] See Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

A third part of the explanation is offered by the so-called 'management school'. It holds that inclusive and reflexive management of rules is a most important factor for eliciting compliance. The Chayeses have put it concisely: '[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public' (Chayes and Chayes, 1995: 25). Enforcement through interacting measures of assistance and persuasion is less costly and intrusive and is certainly less dramatic than coercive sanctions, the easy and usual policy elixir for non-compliance. The European committee system and its permanent reformulation and adaptation of legal norms to changing political preferences, public problem awareness and the technical progress is most important in this process (cf. Bergström, 2005). It not only gives expression to bureaucratic governance and it is more than the 'underworld of the EU' (Weiler, 1999b). Without it, European law would never be flexible and adaptive enough to live up to the political needs of a multicultural and highly complex political entity of twenty-seven Member States.

All three mechanisms are of crucial importance for taming the international anarchy that existed for centuries in Europe. They have contributed a great deal to establishing an effective legal order that is accepted by all Member States to be binding on their external relations and their internal law. It would be naïve however, to believe that the effectiveness of the three mechanisms is not established on a rather demanding precondition. All three mechanisms would be of only limited effectiveness if the legal order that they are part of was not accepted by the member states as reflecting a basically fair deal. In contrast to the WTO, the European bargain is accepted by all of its Member States. It built on the original deal agreed by the six founding Member States that has been adapted to the needs of new Member States with every new round of accessions. The system of structural funds and the resulting financial compensation for the economically weaker Member States have opened opportunities for catching up with the more developed ones. The Irish success story would not have been possible without the financial support of the EU. In addition, the ECJ established a practice of independent jurisprudence that has hardly ever been dominated by the preferences of the more powerful Member States. It has issued a long series of decisions that were in open conflict with the preferences of

France, Germany, or Britain. Burley and Mattli (1993) have explained the incomplete political control of the Member States over 'their' Court with reference to the argument that the law acts 'as a mask and shield' against politics. It is only against this background that European law can indeed be interpreted as promoting the cause of justice. A full explanation of the puzzle of Member State compliance with European law thus must acknowledge the 'power of legitimacy' (Franck, 1990). The technical project of legal integration could only take hold and tame anarchy because the European Treaty law can be explained as promoting the cause of justice. The big states' power play always maintained a balance with deliberative processes. This is probably the most important difference between the EU and the WTO.

Multi-level legitimacy: Justice and democracy

What would an EU that gives full effect to the right to justification look like? It would guarantee the individual's right to freedom and safeguard that any restriction of that freedom is subjected to good reasons. It would guarantee transparent decision-making procedures by providing permanent public access to all institutions with law-making competence. Neither the European Council nor the Council or the Commission would conduct their deliberations behind closed doors but would have to work under full scrutiny of the media. The practices of blame-shifting and scape-goating on the part of Member State governments would thereby be ended. National parliaments would have the administrative capacities and legal rights to keep their governments under close control and demand regular reports about their (non-)activities in Brussels. The Danish *Folketing*'s European Affairs Committee provides a helpful suggestion for such a provision. Supranational structures would tie individuals, governments and supranational organizations together in a multi-level legal structure in which the legal requirement to justify and give reasons is codified and can be enforced by both supranational and domestic courts. In this structure, weak states would no longer be only negligible participants in a big powers' game and individuals not only subjects of governments. Weak states and affected non-governmental actors had enforceable rights which carry as far as good arguments can be produced.

The sections above have listed a number of examples how the EU already today works towards that ideal. Their purpose was to give

evidence that the right to justification is a political concept of justice. It builds on the idea of normative realism and is characterized by holding up the link between 'ought' and 'can'. It not only specifies something theoretically desirable, but combines this specification with the claim that it is achievable in the sense that its underlying normative principles are already well institutionalized. This chapter started with the diagnosis of a categorical mistake often made when reflecting upon the adequate normative foundations of the EU. The EU neither has the capacity for democratic governance, nor will it acquire in the foreseeable future political competences which cover more than narrowly defined policies. It is inadequate, therefore, to assess the EU's legitimacy in categories taken from the analysis of democratic statehood. It is more appropriate to analyze its contribution to legitimate governance in the terms of transnational justice.

Although this argument seems to put primary emphasis on justice and to downplay democracy, it is ultimately oriented at explaining the relationship between national democracy and transnational justice. Legitimacy in the multi-level system of the EU can only be properly understood if it encompasses the domestic and the international level. The normative promise of national democracy to foster self-governance will only survive Europeanization if it is supplemented by an organizational layer that fosters transnational justice. Only if interdependent national democracies are supplemented by a supranational level of justificatory discourses can we expect them systematically to respect the external effects of their decisions as a relevant factor for domestic decision-making (cf. Joerges and Neyer, 1997). Democracy entails that the rulers and the affected parties of rules are identical. If this standard is to be respected, i.e. if we are not ready to accept the effects of other nation-states' decisions without having had the chance to make our concerns heard in 'their' decision-making processes, and if we are not willing to make other citizenries subject to our decisions, then we have to work for a system of collective multi-level governance, in which national democracies open themselves to the concerns of foreigners. Otherwise, the external effects of the internal practices of our democracy will impose illegitimate costs on foreigners, or, if foreign democracies do so, on us. Under conditions of interdependence, therefore, it is clear that transnational justice and national democracy mutually support and necessitate each other.

Although the chapter has started from the assumption that the EU has little chance to become a full-blown democracy in the foreseeable future, its main message is rather optimistic. The EU promotes the cause of justice by providing an effective remedy to horizontal and vertical power asymmetries, and to the arbitrariness of untamed anarchy. The constitutionalization of justificatory requirements transforms intergovernmental bargaining into transnational deliberations. In doing so, legal integration transforms the mode of representation from preferences and power to arguments and reasons. Legal integration has the capacity to provide mechanisms which safeguard against the impact of vertical power asymmetries on the justificatory discourse. Legal integration, finally, exerts a compliance-pull of its own by increasing the costs of non-compliance to both powerful *and* weak states.

The EU can not only be understood as a basic structure of justification (*Grundstruktur der Rechtfertigung*) but already has first elements of a 'completely justified basic structure' (*gerechtfertigte Grundstruktur*) (cf. Forst, 2007: 270-287). It not only allows for justification but is – to some degree – the product of a justificatory discourse. Since the Treaty of Maastricht, a growing number of people are demanding the right to vote on new treaty proposals and to be actively engaged in the reform of the EU. Further steps on the road to European integration have to pass through the bottleneck of a citizenry, which demands justification and explanation, and which does not hesitate to reject the proposals if the reasons given are not good enough.

It is true that legal integration has no built-in causal connection to justice. At the end of the day, even the best procedures only provide incentives. They will only be effective if the powerful actors realize that it is indeed in their best interest to accept the discipline that is imposed upon them by supranational legal norms. If powerful states prefer to go it alone, supranational organizations have nothing but economic and political incentives to change their course of action. Real-world supranational integration must be understood as a long-term learning process which may lead to a constitutionalization of effective justificatory discourses. It is also true, however, that the EU is moving slowly but steadily toward that goal. The EU embodies some significant elements of justificatory discourses and can well be understood as an (imperfect) approximation of this ideal. It is both to

be appreciated for the degree to which it has walked down the road already, and to be criticized for the long way that still lies ahead of it.

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Chapter 2

Justice and democracy
Comment on Jürgen Neyer

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In his challenging and original chapter, Jürgen Neyer proposes a new way to conceptualize and assess the legitimacy of the political system of the European Union (EU). Based on a particular interpretation of my idea of a 'right to justification' as the core of a political theory of justice (Forst, 2007; 2011), Neyer argues for a shift away from the – in his eyes unrealistic – expectation of transforming the EU into a transnational democracy. Rather, he suggests using a notion of justificatory justice as an appropriate standard to both explain and evaluate the EU system. The central notion of justice at work here is that of 'taming anarchy' between more and less powerful states and to establish legal procedures and institutions to challenge and overcome horizontal and vertical power asymmetries.

In what follows, I will make some brief remarks about this intriguing proposal and raise a few questions about it, and in that context I can only touch on the differences between our views. If I were to put it in a nutshell, I would say that whereas I have worked to bridge the all too wide gap between thinking about democracy and thinking about justice, Neyer is happily using this gap to argue that the EU is in part already and in part on its way to being a just supranational polity (my words, not his) but not a democracy.

Normative realism

I am not sure how to understand Neyer's 'normative realism', which is an interesting term. He could mean that democracy in the EU is an important goal to desire, yet argue that it is unrealistic and so we should settle for less, i.e. some form of justificatory justice within a complex supranational scheme. That would still leave the possibility open that that scheme could legitimately be developed further into a democratic one – and maybe should be. Or he could say, which is the stronger thesis, that democracy on the EU-level is indeed undesirable and the wrong goal and should be supplanted by a different 'justice' discourse. I take Neyer to argue for the stronger thesis, but then what are his reasons?

He argues that the EU does not have the 'chance' (Neyer, chapter 1 in this volume: 15) to become democratic, but what does that mean? The main reason he offers is that according to him a democracy – especially in its deliberative version – requires a national demos as well as a sphere of free and unconstrained public discourse (ibid.: 16f.). And on the EU level, we find neither of these. I have two questions concerning this: First, it seems to me that particularly the deliberative version of democracy Neyer himself favors presupposes a rather thin form of a *demos*, one precisely not bound to nationality but by common concerns, yet indeed presupposing a sphere of communication and discourse. So what is the notion of '*demos*' Neyer has in mind when he connects it to national boundaries? Second, he himself, after having completed his justificatory tour de force through Europe, suggests that the EU is (my term, cited by Neyer) a 'basic structure of justification' (ibid.: 31) which brings forth at least in part a 'justified basic structure', and he adds that 'a growing number of people are demanding the right to vote on new treaty proposals and to be actively engaged in the reform of the EU', and that what we have here is a 'citizenry which demands justification and explanation'. This sounds like speaking about a European deliberative *demos* to me, at least one which implies forms of political discourse and will-formation and common concerns. So it seems, if I am right, that the chapter in the end argues for what it denies in the beginning.

The right to justification

This brings me to the core issue of the relation between justice and democracy within a theory of justification. We both agree that the right to justification is a central idea when we think about justice, though I would not speak of 'the idea of justice as a right to justification' (ibid.: 20). Rather, I would define the concept of political and social justice as requiring a social normative order without arbitrary rule or domination, and I see the right to justification as the basic right of moral persons or citizens – depending on which context of justification we have in mind, moral or political – which grounds all further claims to certain rights or resources (see also Forst, 2011). It corresponds to the 'principle of justification' which says that all actions, norms or rules one is subject to must be justifiable to those affected (or subjected) by reasons that are reciprocally and generally sharable. Hence I do not think that only restrictions of freedom are in need of justification, as Neyer argues, but that all social arrangements to which one is subjected and which claim to have a certain legitimacy and authority have to be properly justified. Based on that I would say that according to this notion of justice 'right tracks down might,' or 'justice fights relations of domination' – such that wherever power is exercised by some over others it is in need of justification – and that justification is not just an idea but a *practice*. Thus the idea of establishing a 'basic structure of justification' in contexts in which social and political relations call for justification follows, and the right to justification is an 'agent right', a right to be part of justificatory practices – a right to be exercised in democratic procedures. Democracy then is the political practice of justice. Justificatory procedures, which involve everyone to the greatest possible extent, are required wherever relations of domination exist – to 'make things right' – which, I take it, is the case in the EU context in multiple ways.

So that is the direction I would take, but where does Jürgen Neyer go? In the beginning of the journey, he agrees with me: 'All parties concerned, be they individual or governmental, must be given the chance to voice their concerns and to have them properly respected in the formulation of binding rules.' (Neyer, ch. 1: 19) That is a little softer as compared to 'participation to the greatest possible extent' (as I said) but close enough. In a formulation that follows, however, the argument for political discourse and justification implies 'public reasoning and legal arguing' (ibid.), and from there on *legal* discourse takes center stage and *political* discourse recedes.

To be sure, Neyer's analysis of how European law counters horizontal and vertical power asymmetries is convincing, but it uses a very specific notion of justificatory discourse based on procedural and substantive legal norms that exist in the EU context: 'shared legal norms', as it were (ibid.: 23). This is fine as far as it goes, but I think there is a reduction at work here. First we started with justice based on the right to justification, now we move within established legal norms and a bounded realm of legal reasoning *between states*. But it seems that the *basic* question of justice is about how these norms came about and who is being ruled by them – and thus the question is about the power of setting up these norms in the first place and of changing them, not primarily the power of using and interpreting them (important as it is). Justice is a constructive and creative human force, not just an interpretive one. And where there are norms that bind all citizens equally, justificatory procedures have to be in place in which these citizens can be authors of these norms.

Neyer is well aware of that. There are various passages where he acknowledges that his argument is based on a fair 'founding deal' (ibid.) of the Union, the binding power of which, however, is the self-interest of powerful state actors and not justice (ibid.: 27-29). But then, it seems, the foundational character of justice as a result of practices of justification that establish justified political and legal relations has mostly vanished. For justice as a game of playing by the rules takes place only in so far as the rules have been laid down in a just way – and *that* is the primary dimension of justice. It seems that Neyer plays only the first game, not the second, more foundational one.

So if we took up Neyer's suggestion that the right to justification were realized in the EU, we would not just find 'a multi-level legal structure in which the legal requirement to justify and give reasons is codified and can be enforced by both supranational and domestic courts' (ibid.: 29), as he says. Rather, justice in the basic sense of the word is about the norms of constructing such a legal order, and that is first and foremost a *political* matter. This process requires powerful political actors, indeed states *as well as* citizens – yet justice requires that their power is transformed into justificatory and (ultimately) justified power. So we should not divide the European world into domestic democracy and supranational legal justice (ibid.: 30-32) – rather, we should see justice as tracking down domination, and what

that means depends on 'what is', i.e. which forms of domination we find nationally and beyond and between states. There is no conceptual either-or here, since justice is a right-making Goddess wherever she is needed. She always requires that those subjected will become authors of the norms they are subjected to, and wherever possible, that means that participatory practices of justification have to be established. There can be *demoi as well as a transnational demos of subjection* apart from conventionally formed *demoi*, and hence we should not cling to a reified notion of democracy which prevents people from understanding the powers-that-be. Normative realism, as I would like to redefine the term, starts from a clear understanding of justice and justification as requiring democratic practices, and it locates these practices where the norms that bind persons or states originate. Thus a just political order is a democratic normative order, and we should inquire about ways to think about a just European order along these lines – with and against Jürgen Neyer.

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Chapter 3

The great chain of legitimacy
Justifying transnational democracy

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Introduction

Apparently, there is a prevailing line of thought in German constitutional theory that democratic legitimation can only be established and sustained through an uninterrupted chain of legitimacy between the governmental body and the citizenry (Herzog, 1971; Böckenförde, 1991: 302).[1] Or, to put it another way, the idea of a 'chain of legitimation' can be characterized as a 'core concept of German constitutional law' (Bogdandy, 2004: 902). But a conception of legitimacy based on the idea that 'all public acts ought to be retraceable to the democratic will of the people' (Keller, 2008: 257) is faced with a serious problem when it comes to justifying transnational democracy. In the age of multi-level governance, the flow of legitimacy runs, or is expected to run, through channels that are long, winding and hardly retraceable.

[1] Ernst-Wolfgang Böckenförde introduces this idea referring back to Roman Herzog's *Allgemeine Staatslehre* (Herzog, 1971); see also Böckenförde (1982: 315; 2004: 438).

Starting from this diagnosis, our aim is to introduce an alternative conception of transnational legitimacy, a conception that focuses on the level of political interactions at the micro-level of the political process. This conception adds to rather than replaces the above-described first layer of legitimacy. In our view, the problems affiliated with long, rather abstract chains of legitimacy, as in the case of transnational political orders, can only be addressed by providing a second, complementary layer of legitimacy. By doing so, we also seek to suggest a comprehensive understanding of the normative forces inherent in the political process. To develop this understanding, we introduce a twofold concept of normativity that distinguishes between an explicit and an implicit dimension of normativity.

In the following, our first step is to outline why, from our point of view, it seems insufficient to base a concept of transnational legitimacy solely on the idea of a 'chain of legitimacy'. Our second step consists in presenting a second, complementary layer of legitimacy based on a theory of political practices. The presented two-layered conception, an approach that integrates the idea of a chain of legitimacy and a practice-based theory of legitimacy, comprises the entire political process as the object of legitimacy judgements: Instead of focusing on the creation of an institution and the production of collective binding decisions, we also take the implementation part of the political process into account, i.e. the process of securing collectively binding decisions of transnational authorities.

The aim is to show that, at the transnational level, democratic legitimacy can only emerge if the rather long and abstract legitimation chains are normatively backed by specific political practices.

The 'democratic chain of legitimation'

The idea expressed by the metaphor of an uninterrupted 'chain of legitimacy' or 'democratic chain of legitimation' rests on the assumption that public decisions derive their legitimacy from democratically elected representatives of the people. All governmental bodies acting with official authority have to be appointed directly or indirectly by the people; and – at least in principle – it must be possible to dismiss the appointed

representative. A particularly important feature of this metaphor is the postulate of the completeness of the chain. To secure the legitimacy of public authority, the chain has to be uninterrupted. Each individual government official must be connected according to the order of the chain. From each individually appointed government official, a chain of individual acts of appointment has to lead back to the people as the bearer of sovereignty. Only an uninterrupted chain guarantees the legitimacy of the institutional system (Herzog, 1971: 214; Böckenförde, 1991: 302).

The metaphor of the chain (or similar images like flow or channel) highlights the derivation of legitimacy from a specific source. A chain follows the principles of continuity and graduation. Arthur O. Lovejoy's (1936) 'The Great Chain of Being' renarrates the long history of the chain as a philosophical metaphor, the idea of the organic constitution of the universe from the platonic origins to the medieval theology and up to the modern philosophies of Leibniz, Spinoza and Kant. In this reading of the Western philosophical tradition, the universe appears as a series of links ordered in a hierarchy of creatures, from the lowest and most insignificant to the highest, following the principles of plenitude, continuity and graduation.

In the case of democratic legitimacy, the specific source and origin of legitimacy is the will of the people, the democratic electorate. If one tries to adapt this idea to the transnational level, an uninterrupted chain of legitimacy would have to run between national constituencies, their representative institutions on the national level and the political order on the transnational level. The idea of 'accountability through democratic state consent' (Buchanan and Keohane, 2006: 436) would still be the source of justification and the basis of legitimacy, but it would be necessary to transfer and translate its normative force to transnational authorities.[2] In normative terms,

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[2] Helen Keller sums up this 'unitarian model of legitimation' as follows: 'In essence, international law continues to be a system of rules that rest on the consent of the very states to which they apply. To the extent that international law is founded on state consent, then, the latter legitimizes the former. With regard to democratically organized states, a conceptual shift in the location of legitimacy may be assumed. As in these states all public acts ought to be retraceable to the democratic will of the people ('chain of

the acceptability of any political authority would still depend on the integrity of the chain of legitimacy. But there is a second important feature of the chain metaphor one has to take into account: The fewer links there are in the chain, the higher the legitimacy assigned to the system. In analogy to the way the chain functions on the national level, a genuine democratic legitimacy of transnational orders would require a long and rather abstract chain of delegation from the citizens of the world to representative bodies of these polities beyond the nation-state.[3]

Apart from the difficulties resulting from this 'ideal version' of a transnational chain of legitimacy, there are other points of criticism related to a mere adaptation of the chain metaphor at the transnational level: The theory of a democratic chain of legitimacy focuses exclusively on the macro-level of a polity. It is solely interested in the institutional design of transnational democracy. Therefore, it provides a judicial perspective that centres on the constitution of rules and norms and neglects the implicit normativity inherent in the political process. Furthermore, the chain concept contains an *ex ante* component: Whatever a democratically constituted political body does under the rule of law is considered legitimate. As a consequence, potential dynamics within the processes of rule-implementation are neglected. In addition, the democratic chain of legitimation seems to produce an overemphasis on the concept of legitimation by elections and appointments.

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democratic legitimation' […]), a two-level consent for international norms can be pictured: directly, through the role of states in the context of international norm creation (international legitimacy); indirectly, through the legitimizing effect of the state's popular will as warranted by the democratic principle (domestic legitimacy)' (Keller, 2008: 257-258).

[3] Or, as Thomas Franck puts it: 'The textbook solution to this would be a world governance through directly elected representatives. Since this is not about to happen, a second-best approach is to ensure that those who speak in global discourse themselves represent democratically elected governments. That way, the outcomes of diplomatic discourse may at least claim to manifest the valid consensus of all those at interest. Fortunately, the global system, of late, has begun to make some progress towards such secondary democratic legitimation.' (Franck, 1999: 261-262; see also Keller, 2008: 258).

Finally, the democratic chain of legitimation is based on specific criteria that democratic decision-making processes have to fulfil, i.e. it focuses on the establishment of bindingness and neglects the processes that secure the binding character of an approved regulation.

The securing of binding authority and the bindingness of rules at the transnational level are faced with a twofold problem of compliance: Compliance between the transnational order and the nation state, and between the states and their national constituencies. As already mentioned, the idea that the legitimacy of transnational institutions rests on democratic state-consent at the national level entails a very long chain of legitimacy – a chain that consists of a large number of chain links. The first part of the chain connects the citizens with the decision-making bodies and the head of the executive at the national level, and the national executive with organizations on the transnational level. This part can be referred to as the *democratic* part of the chain. The second part consists of the twofold process of implementation running from transnational institutions to national bureaucracies, and from national bureaucracies to the citizens of the respective nation state. This second part is a political process of securing compliance by bureaucratic order. It can be referred to as the *hierarchical* part of the chain. But what are the legitimation effects of this long chain of hierarchical orders? In our view, a normative theory of legitimacy has to develop a comprehensive understanding that includes the totality of the political process. This comprehensive understanding has to integrate the hierarchical part, i.e. the processes of securing political bindingness by bureaucratic order, into a conception of transnational legitimacy. In our view, a conception merely based on the idea of a democratic chain of legitimation neglects the question of how global governance affects the level of political interactions at the micro-level of the political process. More specifically, it neglects the problems that arise from the necessity of long-distance compliance. These problems can only be faced if one integrates the dimension of in-process or implicit normativity into a conception of transnational legitimacy.

To sum up, an alternative conception of legitimacy: (1) has to establish a set of criteria referring to the political process as a whole, ranging from the establishment of binding agreements to acts of securing the bindingness of collective decisions; (2) has to concentrate

not only on the creation or foundation of political institutions, but also on the quality of processes at the global/transnational level; and (3) has to focus on the micro-level of interaction. As a consequence, our proposition for an alternative conception of legitimacy can be stated as follows: A political order is legitimate only if and when the entire political process is taken into account – from the creation of institutions up to everyday acts of compliance.

A practice-based theory of legitimacy

Our suggestion is to develop an alternative conception of legitimacy that meets the above-described standards, and to base the idea of a second, complementary layer of legitimacy on a theory of political practices. Our conception rests on the assumption that legitimacy is also a product of specific sets of political practices, not only a system of legal rules. It identifies the micro-level of political interaction as the decisive level at which the willingness of the citizens to comply with their obligations and the everyday implementations of decisions made by the political system co-occur. As a consequence, the criteria that measure the legitimacy of a political order have to be located within the dimensions of explicit and implicit (or in-process) normativity.

The idea of a second, practice-based layer of legitimacy offers a process-oriented, interactionist perspective on legitimacy. It focuses both on political practices that establish bindingness and on practices securing the bindingness of collective decisions, i.e. practices that have the function to secure compliance with existing regulations. In addition, a practice-based theory of legitimacy provides a comprehensive understanding of the normative forces at play within the political process.

Establishing collective bindingness

The suggestions presented concerning practices of securing the bindingness of collective decisions have to be understood in the context of a practice-based approach that defines the establishment of collective bindingness as a tripartite sequence of interactions, the so-called P-A-C (Proposal-Acceptance-Confirmation) scheme. This framework rests on the assumption that collective decision-making consists of a sequence of three significant acts, i.e. on the acts of proposal, acceptance and confirmation.

In short, a proposal (P) can be defined as an act directed towards an institution as a whole. Proposals occur in the form of draft resolutions, suggestions, appeals, demands, opinions, wishes, etc., that are raised to serve as a basis for a collectively binding decision of the institution. An act of acceptance (A) signalizes approval (A+), refusal (A-) or other forms of response (even indifference, A0) to a proposal. Acts of confirmation (C) are acts that reaffirm the decision previously initialized by acceptance-acts. Confirmation-acts are reactions to acceptance-acts. While acceptance-acts (a-acts) are utterances expressed on one's own behalf, confirmation-acts are uttered in the name of the institution as a whole.

The three elements can be outlined in more detail in the following way: A *proposal* (1) refers to a proposing agent, (2) comprises a communication mode, i.e. a specific way in which the proposing agent directs his request to the institution (suggestion, demand, appeal, opinion, wish etc.), (3) needs to be addressed to all members of the institution, and (4) has to convey a proposal content.

Formulated as a speech act, a minimal version of a proposal has the following form:

> 'Agent/speaker A (1) asks (2) the addressees (3) to decide x (4).'

By making a proposal, the proposing agent provides a content basis for a potential decision. The addressees, on the other hand, have to identify and acknowledge the proposal as a proposal in order to ensure the transition to the next step of bindingness-production.

Acceptances can be characterized as *reactions* or *responses* to the content of a proposal. A distinction between *singular* and *accumulative* a-acts may lead to a deeper understanding of a-acts and their role within the process of establishing collective bindingness. While each individual's verbal or nonverbal response to a proposal may be classified as a singular a-act, accumulative a-acts are occurrences of temporal clusters of a-acts. Accumulative a-acts are simultaneously performed acts of self-positioning. They may appear in the mode of formal voting or a non-formal agreement, or at least may be an early stage version of one or the other. But the process of bindingness-production is not completed at this point. The mere result of accumulative a-acts is not identical with a binding agreement of the

institution as a whole. In other words: The *bindingness* of the result itself needs to be articulated in an additional step. In our view, the essence of its function lies in the proclamation of the result in the name of the institution as a whole. While acceptance-acts are uttered by individuals and from an individual perspective, confirmation-acts mark a shift in perspective. The process of establishing bindingness moves from more or less simultaneously expressed individual utterances to utterances that express the formation of a 'we'. The term *confirmation*, therefore, designates all verbal and nonverbal acts that reaffirm the approval previously expressed through individual a-acts by signalizing approval at the level of the institution as a whole.

By analyzing the micro-level of political processes in the suggested way, we are able to identify political practices – in the sense of typical sequences of interaction – that foster the achievement of binding agreements.

Through the actual performance of political practices, agents maintain, preserve and renew the implicit, in-process dimension of normativity. While the importance of explicit sources of normativity, like laws or regulations, is widely recognized, the second, in-process dimension of normativity is often neglected. Therefore, the following section serves to introduce a comprehensive understanding of normativity that includes two dimensions: explicit and implicit normativity.

Explicit and implicit normativity

The practice-based theory of legitimacy rests on the assumption that the binding forces at the basis of relations of legitimacy have two dimensions: Explicit references to normative sources, and an implicit, in-process dimension.

In our view, transnational decision-making practices can only be regarded as democratically legitimate if explicit references to the will of the people occur in combination with integrative, context-sensitive performances that prevent acts of exclusion.

Explicit normativity

If we think of the grounds of justification for political institutions and democratic processes, i.e. the sources of their normative binding character, laws and rules are the first things that come to our mind.

Political agents justify the legitimacy of political institutions, processes and decisions by explicitly referring to laws and formal regulations. Laws and regulations that are in force at the time a decision is made exert a binding force that is somehow conferred upon the newly established regulations. By referring to previously made regulations, a regulation gains its normative force. When thinking about the legitimacy of a decision, institutions and democratic processes that are judged as legitimate seem to be the pivotal sources agents explicitly refer to. By referring back to an institution or democratic process through which the binding decision was achieved – an institution or process that is recognized as legitimate – agents provide their claims and actions undertaken in relation to the decision with normative backing.

The term *explicit normativity* comprises a range of sources agents refer to in order to support and justify a claim or a performed action, to substantiate a claim if challenged, or to normatively underpin a proposed decision-option. Explicit references brought forward in discourse serve as argumentative backing for a position; they support objections in favour of or against a certain option. By explicitly referring to a source, agents promote the establishment of a common basis of commitment.

Following Christine Korsgaard (1996; 2008; 2009),[4] one suggestion would be to identify a range of fundamental sources agents explicitly refer to. A preliminary suggestion for a typology of explicit normative resources securing the validity of regulations consists of the following elements: will, institution, world, reason and transcendence (Pritzlaff and Nullmeier, 2009). While the notion of *will* comprises individual and collective agents and their interests and aims that are considered to be preeminent and legitimate, *institution*

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[4] 'We live under the pressure of a vast assortment of laws, duties, obligations, expectations, demands, and rules, all telling us what to do. Some of these demands are no doubt illicit or imaginary – just social pressure, as we say (as if we knew what that was). But there are many laws and demands that we feel we really are bound to obey. And yet in many cases we would be hard pressed to identify the source of what I call the *normativity* of a law or a demand – the grounds of its authority and the psychological mechanisms of its enforcement, the way that it binds you' (Korsgaard, 2009: 2).

refers to socially prevailing laws, rules and principles. A reference to institutions like rules or laws, as described above, 'transfers' the normative force of previously made regulations to newly established regulations. References to conceptions of the *world* relate to conditions of the world, to 'objective facts' or state of affairs that seem to lie outside the agents' will or attitudes. The normative source of *reason* encompasses references to logic, rules of argumentation, cognitive competences, judgment, sapience and rationality. A reference to sources of *transcendence* may imply a relation to God or to forms of the extramundane (ibid.).

The outline of a typology of explicit, normative resources that secure the validity of regulations opens up a broader perspective on the sources agents might refer to as grounds of justification – a perspective that exceeds the mere reference to legal norms or laws. These fundamental sources, as suggested in terms of the notions of will, institution, world, reason and transcendence, are normative resources agents *explicitly* refer to in order to support and to justify a claim, and to substantiate a claim if challenged.

As already mentioned, explicit references to compliance with existing rules and regulations constitute the prevailing type of reference employed to provide a political practice with legitimacy. In our view, though, democratic legitimacy can only be ascribed to a political practice that involves explicit references to the will of the people.

Although explicit sources of normativity other than legal norms or laws may be identified in the suggested way – for example if one analyzes the reasons and motivations uttered explicitly by agents participating in a decision-making context – they constitute only one component of a more comprehensive normative structure.

Conceptions that characterize normativity solely in terms of values, rules, regularities or preferences seem to identify normativity with a 'special kind of entity' (Rouse, 2007a: 48). And although the 'rule-following character' of a conception that identifies rules with legal norms seems to be more obvious than in the case of a conception that includes references to the will of the people, the idea behind it seems to be at least a similar one: Actual performances are 'linked' in one way or another to a rule or value standard that serves as an explicit reason and explanation for the correctness of a proposed decision

option, claim or performed action. This finding seems to be applicable to the Kantian tradition of philosophy. As Robert Brandom puts it, Kant's model of how to understand the normative status of correct and incorrect rests on the assumption that 'what makes a performance correct or not is its relation to some explicit rule' (Brandom, 1994: 18-19). For Kant,

> explicit rules and principles are not simply one form among others that the normative might assume. Rules are the form of the norm as such. This view, that proprieties of *practice* are always and everywhere to be conceived as expressions of the bindingness of underlying *principles*, may be called *regulism* about norms. […] According to this intellectualist, Platonist conception of norms […], to assess correctness is always to make at least implicit reference to a rule or principle that *determines* what is correct by explicitly *saying* so.
>
> (ibid.: 19-20)

What Brandom describes as regulism about norms might, in this context, be characterized as a one-dimensional conception of normativity, a conception comprising solely explicit sources of normativity.

Practices that aim at the establishment of bindingness, like political decisions, are often analyzed in this one-dimensional way. This finding also characterizes one of the crucial points in the debate about so-called 'practice theories' (Schatzki et al., 2001; Reckwitz, 2002; Stern, 2003; Rouse, 2007b). Stephen Turner, the most prominent critic of this school of thought, argued against conceptions of social practices as 'rule-governed or regularity-exhibiting performances' (Rouse, 2007a: 46; cf. Turner, 1994). But this criticism does not apply to all practice theories. Joseph Rouse (2007a), for example, introduces a conception of practice theory that incorporates the idea of an implicit dimension of normativity.

Implicit normativity

In Rouse's conception, 'a practice is maintained by interactions among its constitutive performances that express their mutual accountability. On this normative conception of practices, a performance belongs to a practice if it is appropriate to hold it accountable as a correct or incorrect performance of that practice'

(Rouse, 2007a: 48). Rouse's characterization of practices rests on the assumption that their performances are integrated within the practice by 'complex relations of mutual interaction' (ibid.: 50), and these patterns of interaction 'constitute something at issue and at stake in their outcome' (ibid.).[5] What is at stake in those practices is, as Rouse puts it, 'perspectivally variant or open-textured' (ibid.):

> On such accounts, the normativity of practices is expressed not by a determinate norm to which they are accountable but instead in the mutual accountability of their constitutive performances to issues and stakes whose definitive resolution is always prospective. […] Performances of a practice are intentionally directed toward and accountable to 'something' (an issue and what is at stake in that issue) that outruns any particular expression of what it is. […] Efforts to stand outside of an ongoing practice and definitively identify the norms that govern its performances are assimilated within the practice itself as one more contribution to shaping what it will become and how that future matters to present performance. […] Normativity on such a conception is an essentially temporal phenomenon. It amounts to a mutual interactive accountability toward a future that encompasses present circumstances within its past.
>
> (ibid.: 51)

Rouse's underlying understanding of normativity is very broad.[6] He conceives normativity in terms of 'how we hold one another accountable to what is at issue and at stake in ongoing practices' (ibid.: 54). His ideas about a normative conception of social practices are heavily indebted to the philosophy of Robert Brandom. Following

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[5] As Rouse puts it, 'what is at stake in those practices is the difference it would make to resolve the issue one way rather than another. But that difference is not already settled, and there is no agreed-upon formulation of what the issues and stakes are. Working out what is at issue in these practices and how the resolution of that issue matters is what the practice is about' (Rouse, 2007a: 50).

[6] 'I have in mind the whole range of phenomena for which it is appropriate to apply normative concepts, such as correct or incorrect, just or unjust, appropriate or inappropriate, right or wrong, and the like' (Rouse, 2007a: 48).

Brandom's approach, normativity is located at the level of discursive practices. Discursive practices as actual performances constitute changes of normative statuses – in the sense of social statuses – within the dynamic interactional relations of agents and processes. For Brandom, normativity lies at the heart of our day-to-day interactions, of our engagement in the use of language. His conception, therefore, rests on the assumption that 'it's normativity all the way down' (Brandom, 1994: 625ff.). According to Brandom, the relation between rules or norms on the one hand, and discursive practices on the other, can only be understood in a pragmatist order of explanation that locates the fundamental grounds of normativity in the actual practices themselves; an order of explanation that develops our understanding of the *meaning* of norms and concepts by an understanding of our *use* of those norms and concepts. The implicit, process-oriented dimension of normativity has, as Rouse describes it, to be maintained and updated in the actual processes of social interaction through 'complex patterns of mutual responsiveness' (Rouse, 2007a: 52). Performances respond to one another through acts of correction and repair, through the drawing of inferences, through acts of translation, feedback loops, reward or punishment of a performer, by trying to replicate an act in different circumstances, mimicking it, and so on (ibid.: 49).

If one adopts this idea of an implicit, process-oriented dimension of normativity, a typology of explicit sources of normativity has to be complemented by a conception of political practices as performative actualizations of implicit norms. A two-dimensional conception of the normativity of practices has to address the relation between sources agents explicitly refer to when justifying their actions or proposed decision options and the implicit normative force that becomes apparent in what they actually do, the norms they observe and perpetuate in their actual engagement in political practices.

Explicit normative resources constitute, in this sense, only one dimension of the normativity of political practices. Agents refer to explicit norms, but at the same time, and in the way they actually do this, they maintain, preserve and renew the normative forces at work at a second level, in the implicit, in-process dimension of normativity. By referring to sources of explicit normativity, like will, institution, world, reason or transcendence, agents provide options or positions stated or defended in discourse with argumentative backing. But they

do not only maintain, preserve and renew these explicit types of normative resources by referring to them in the above-described abstract, 'regulist' way. They also maintain, preserve and renew norms that are implicit in our day-to-day political practices and routines by what they actually do. By acting in accordance with these implicit norms that are actualized within a specific context, they provide a second layer of political bindingness.

With regard to the dimension of implicit normativity, democratic legitimacy can only be ascribed to integrative, context-sensitive performances that prevent acts of exclusion. As Iris Marion Young outlines, the model of deliberative democracy, for example, 'expresses conditions that often operate as implicit regulative norms guiding social co-operation, but which are never perfectly realized' (Young, 2000: 33). Aspects of power and privilege are, first and foremost, always already incorporated in political practices because they originate from more basic structural characteristics of social co-operation. One example Young provides in this context is the norm of articulateness that implicitly determines practices of public communication: Agents who exhibit 'such articulate qualities of expression are usually socially privileged. Actual situations of discussion often do not open themselves equally to all ways of making claims and giving reasons' (ibid.: 38-39). As Young points out,[7] many agents:

> feel intimidated by the implicit requirements of public speaking; in some situations of discussion and debate, […] many people feel they must apologize for their halting and circuitous speech. While all of us should admire clarity, subtlety, and other excellences of expression, none of us should be excluded or marginalized in situations of political discussion because we fail to express ourselves according to culturally specific norms of tone, grammar, or diction.
>
> (ibid.)

This is only one example of implicit norms guiding political practices, which often lead to performances that perpetuate asymmetric structures with respect to race, gender and social status. Therefore,

[7] On this point, see also Conradi (2009: 106).

the norms inherent in political practice have to be addressed at a broader level and cannot be reduced to mere compliance with laws or rules. A way of addressing and overcoming the acts of exclusion described in Young's example of articulateness would be to take up a stance of openness to others and to learn something from their different perspective and way of expression (Young, 1997: 354; James, 2003: 162).[8]

These – although very preliminary – ideas suggest that a comprehensive understanding of political normativity has to encompass two dimensions of normativity: an explicit and an implicit dimension. In this conception, the reference to explicit norms is complemented by an implicit dimension that is expressed through 'complex patterns of mutual responsiveness' (ibid.: 52). By picturing political normativity in this way, the reductive conception exhibited by a regulism about norms (Brandom, 1994: 20) can be underpinned by a normative base that is located in the performative, embodied dimension of actual political practices. Political practices, processes and agents thus have to comply with existing rules and regulations to meet the demand of democratic legitimacy. In addition to that, though, political practices have to display specific features at the level of explicit as well as on the level of implicit normativity: They have to include explicit references to the will of the people as well as integrative, context-sensitive performances that prevent acts of exclusion.

Securing collective bindingness

In analogy to the findings about practices that establish bindingness, we argue that practices that have the function of securing compliance with existing regulations, i.e. practices of securing the binding force of collective decisions, can be interpreted as significant elements of the relational framework of legitimacy.

We define practices that secure the bindingness of collective decisions as a quadripartite sequence of interactions, the so-called A-A-C-S scheme. This framework rests on the assumption that interactions

[8] From a theoretical perspective, approaches based on the model of deliberative democracy should include alternative forms of communication and not restrict deliberation to rational argumentation (Young, 2000: 52-80; James, 2004: 76-77).

that secure the bindingness of collective decisions consists of a sequence of four significant acts: acts of announcement, acts of acceptance, acts of compliance and sanctioning acts.

Acts of announcement are acts that communicate the content of a decision to the agents for whom it is binding (not only the agents affected by it). Acts of positive, negative or neutral acceptance are conscious, 'reflected' reactions to the announcement of a binding regulation. Acts of compliance or non-compliance are acts that are performed in accordance with the announced decision. Acts of positive or negative sanctions are acts that are performed as a reaction to a compliance-act.

The crucial point with regard to legitimacy can be stated as follows: The reaction to a binding decision does not consist merely of compliance or non-compliance (Chayes and Chayes, 1993; Raustiala and Slaughter, 2002. It is rather that the act of compliance has to be distinguished from the acceptance-act. These two types of acts may coincide, but they may also move in opposite directions. The term acceptance, on the one hand, designates a reaction or response to a binding regulation; approval or refusal of a decision. The term compliance, on the other hand, is defined in a more narrow sense: It designates the actual adherence or non-adherence to a binding decision. Acceptance and compliance have to be distinguished, since there can be either cases of approval followed by non-adherence or cases of refusal followed by adherence to a decision. Expressions of discontent, therefore, have to be classified as acceptances, while mere adherence to a binding regulation is to be understood as compliance. One may fake acceptance only to disregard a binding decision, but one may also express unwillingness and nevertheless comply with a regulation that is backed by sanctioning power. Legitimacy can only be ascribed if compliance is accompanied by positive acceptance. Mere compliance does not provide a decision with legitimacy.

For a decision to count as democratically legitimized, it is required that there are sufficient opportunities and resources to express approval or refusal at the level of implementation, i.e. the level of securing bindingness. In an institutional sense, only a level of implementation that is open for expressions of acceptance is democratically acceptable. Within the model of legitimation chains, though, the democratic production of bindingness is linked with

strictly hierarchical implementation. The securing of bindingness in terms of instruction and command, however, cannot fulfil the demand of democratic legitimacy, since there is no room for the articulation of acceptance. In a practice-theoretical sense, only the presence of practices that allow active expressions of approval and refusal generate the degree of normativity that is necessary for the securing of bindingness.

The legitimacy of transnational democracy

The expression of acceptance during the implementation process is crucial for the question of democratic legitimacy. This is especially true where legitimation chains are long, as in the case of transnational decision-making. Questions concerning the securing of bindingness have been discussed intensely within the theory of international relations. Under the heading of 'enforcement', various ways to strengthen sanction-based enforcement in international law have been debated. The rationalist compliance-school analyses incentive systems that may contribute to compliance with norms. The constructivist school focuses on the preference-changing cultural and legitimatory conditions that determine compliance with norms, interpretations of norms and the negotiation of norms. Within both lines of thought in compliance research, the relation between compliance and acceptance has not been addressed to the degree necessary with regard to democratic legitimacy. Against the backdrop of a two-level process of securing bindingness of decisions at the global level, though, i.e. compliance of nation states with the regulations of transnational organizations, and compliance of citizens with state policies, it is highly problematic to neglect expressions of acceptances. If the enforcement of international regulations manifests itself only in terms of hierarchical directives and instructions that are passed from the nation state to the citizens, there is no room for practices that allow the ascription of legitimacy to a decision made far away from the citizens. Therefore, a democratic deficit and lack of legitimacy may also emerge on the implementation side. Democratic legitimacy presupposes that there is room for expressions of approval and refusal on both levels, i.e., room for non-hierarchical communication. The latter, though, presuppose that there is room for expressions of approval and refusal on both levels, i.e. room for non-hierarchical communication. It is not until there is room for practices to express acceptance and dissent, accompanied by possibilities to adapt regulations to local or functional particularities – within the

relation between international institutions and nation states, on the one hand, within the relation between nation states and their citizens, on the other hand – that transnational law-making and regulations can be regarded as democratically legitimate.

Conclusion

The aim of the chapter has been to point out that although the idea of a 'democratic chain of legitimation' is a necessary element for a theory of transnational democracy, it is not sufficient as its sole source. When it comes to justifying transnational democracy, legitimation chains are rather long and very abstract. In our view, it is necessary to normatively underpin the first layer of legitimacy that is created through a democratic chain by a second, practice-based layer. By introducing a twofold concept of normativity that distinguishes between an explicit and an implicit dimension of normativity, we provided our practice-based concept with a deeper understanding of where to locate the normative forces at play within the political process.

The presented two-layered conception of legitimacy comprises the entire political process, i.e. the production of collective binding decisions as well as the implementation part, the process of securing collectively binding decisions. At the transnational level, democratic legitimacy can only emerge if the long and abstract legitimation chains are normatively backed by political practices that include explicit references to the will of the people as well as integrative, context-sensitive performances that prevent acts of exclusion.

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Chapter 4

Transnational democratic legitimation and the nature of political normativity Comment on Frank Nullmeier and Tanja Pritzlaff

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Addressing the question of the justification of transnational democracy is undoubtedly a timely as well as an especially challenging and demanding task. It is timely because the process of an uneven denationalization of politics, culture and economics together with the structural transformation of some of the constitutive patterns of legitimate political will-formation and decision-making – responsiveness, accountability, responsibility and bindingness that once were fused into the ideal of a 'statist democracy' – has led people not only to question the feasibility of democracy in the postnational constellation, but at an even deeper level has begun to undermine its normative status as an uncontroversial ideal on which politics is built and for which politics must necessarily strive. Seen in this light, the new conceptual currency of a postdemocratic order (alternatively based on ideas of justice, order or justification itself: See Neyer, chapter 1 in this volume; Morgan, 2005: 24-44) does not only analytically signify a factual institutional trend but at best tends to reduce democracy to a merely aspirational goal. And it is a challenging task because

democracy is not only what has to be justified with reference to these conditions, but at the same time is constitutive for the process of public justification as such. This is to say that democratic procedures and the epistemological role they play are an essential and irreducible part of what Rainer Forst calls 'relations of justification' (see Forst, 2011).

Now, it seems to me that it is precisely from this insight into the reflexive structure of political processes, which Nullmeier and Pritzlaff take as the starting point, from where they try to pave their conceptual way to the answer to the challenge of introducing a conception of transnational democratic legitimacy that should be able to draw on sources of political normativity that do not any longer (at least exclusively) spring from an idea expressed in the metaphor of an uninterrupted 'chain of legitimation', i.e. the idea that public decisions derive their legitimacy from the consent of democratically elected representatives of the people (Nullmeier and Pritzlaff, chapter 3 in this volume: 44). Instead, as they see it, this view has to be complemented by a view from political practices and interactions at the micro-level of the political process (ibid.: 48), which not only promises a more comprehensive account of the idea of democratic legitimacy and those normative credentials on which claims to the collective bindingness of political decision-making can be built, but which in the end consequently and decisively alters our understanding of the institutional make-up of the idea of a transnational democracy. Already this rough programmatic outlook indicates how ambitious this project necessarily is in simultaneously covering and internally linking conceptual explorations into the nature and sources of political normativity on the one hand with analytical and methodological concerns derived from what they call the 'practice turn in sociology and philosophy' which is intended to retrace the bindingness of political decision-making to the implicit kind of normativity that is tied to the corporeality and materiality of political practices (see Pritzlaff and Nullmeier, 2009: 7-11) on the other. What is remarkable then is the degree of intellectual inspiration and theoretical lucidity the authors display in forging their argument, which in spite of its complexity is presented in a very straightforward and forceful way. This allows me to restrict myself to a quest for clarification at some of the critical junctures of their practice theoretical approach and their account of the idea of transnational democratic legitimacy. In order to do so, I will first very

briefly characterize the two lines of argumentation, which leads us to the point where the authors´ differentiation between two kinds of 'explicit' and 'implicit' normativity shall allow them to investigate the normative sources and conceptual underpinnings of their alternative and, as they claim, more comprehensive account of transnational legitimacy.

Widening the scope of transnational legitimacy

The first line of argument then is about broadening the scope of a theory of transnational legitimacy. It starts from a fourfold critique of the concept of a 'transnational chain of legitimation', which basically contends that this conception only focuses on the establishment of binding regulations and neglects those processes of rule implementation that secure the binding character of an already approved regulation (Nullmeier and Pritzlaff, ch. 3 : 47f.). This in turn, in their view, decisively restricts our understanding of the establishment of the bindingness of rules at the transnational level because it loses sight of a critical, twofold problem of compliance that exists between the transnational order and the nation state, and between the states and their national constituencies (ibid.). What comes into view once one takes seriously the compliance issue as constitutive for any claim to bindingness, is what they call 'compliance by bureaucratic order', i.e. the fact that there necessarily is a hierarchical part to transnational legitimation whose specific kind of legitimacy inferring rationality cannot be derived from the will and consent of the people and the pattern of delegative authority as the chain metaphor would have it.

What instead comes into play at this point is the idea of an in-process or implicit normativity (ibid.), which they take to necessarily draw us into a practice theoretical account in order to compensate for the shortcomings of a perspective that more or less exclusively focuses on the institutional level of normatively ordering transnational political processes. The rationale of this move, then, is further underlined and developed by a second move, in which they now establish an internal link between the practice theoretical insight into the role actual behavior at the micro-level of political interactions plays in maintaining, preserving and renewing the social and political belief-systems from which the normativity of explicit political norms is derived (cf. Gosepath, 2009: 260-268) on the one hand, and the integrative, participatory design for arenas of political decision-

making and implementation on the other. With regard to the dimension of implicit normativity of the establishment of collective bindingness, they conclude, democratic legitimacy can only (!) be ascribed to rule-making to the degree that context-sensitive performances are guaranteed, which prevent acts of exclusion (Nullmeier and Pritzlaff, ch. 3: 50, 56). This contention is further illustrated with reference to the fact that, as Iris Marion Young has taught us, aspects of power and privilege are first and foremost always already incorporated in political practices because they originate from more basic structural characteristics of social co-operation.

While the notion of political practice is firmly anchored at the conceptual core of the solution to problems of transnational legitimation by these two complementary moves, everything further then obviously depends on their correlative account of the notion of implicit normativity and how this relates to or adds to our more conventional understanding of the idea of democratic legitimacy. What we should expect from such an account is an answer to the question of what exactly is the relation of 'implicit' normativity and the claims to legitimacy derived from it (so to speak from within political practices) on the one hand, and the external legitimating link between 'authors' and 'addressees' of political regulations on the other – a link which normally asks us to put addressees in a position where they can understand themselves as the authors of all those decisions they are exposed to. While this stance is normally used to delineate the kind of reasons (or at least their formal characteristics), which may theoretically turn to the idea of implicit normativity, it does provide us with an alternative or at least supplementary view of what these reasons and their characteristics are; and if so, how then does 'implicit' normativity make itself felt on the 'external' part of the addressees. In other words: How would this alternative view help them to understand themselves as 'authors'?

Now, as far as I can see the authors´ account of the notion of implicit normativity is unfortunately not directly tailored to meeting these challenges – an impression that is further underlined and substantiated once we turn our attention beyond the confines of their present chapter and take into view their account of the rationale of the practice turn provided in an article that sets out to delineate the contours of a 'theory of political practices' (see Pritzlaff and

Nullmeier, 2009). What here comes to the fore is a marked but implicit tension between their definition of political practices, which should be regarded as forming a unity of corporeal behavior, movements and speech acts directed at the establishment of political bindingness (Pritzlaff and Nullmeier, 2009: 12) on the one hand, and their formal description of the analysis of political practices as a series of individual acts of proposition, acceptance and confirmation (see also Nullmeier and Pritzlaff, ch. 3: 48-50) on the other, where these material dimensions of what constitutes a practice does no longer play any role (Pritzlaff and Nullmeier, 2009: 14-16). This, as I take it, is not by chance, because in the conception of implicit normativity they derive from Brandom and Rouse, normativity is located at the level of discursive practices only (Nullmeier and Pritzlaff, ch. 3: 55-56), which in turn are rooted in the mutual recognition of each participant´s commitment to responsibility and responsiveness from which the normativity of conceptual contents, according to this model, springs. So, what they finally wish to accentuate in following the practice theoretical path of the investigation into the sources of normativity is quintessentially (only) the role performative actualizations of implicit norms play in giving (motivational?) force to the content of normative claims derived, as it were, from the explicit normative sources of 'will, institution, world, reason and transcendence' by reference to which the validity of political regulations is established (ibid.: 51).

The quest for clarification

Notwithstanding the merits of the analytical approach to the micro-level of political interactions Nullmeier´s and Pritzlaff´s conceptual framework opens up, and explicitly acknowledging the constructive force of the institutional imaginaries they derive from it, the rest of my comment will focus on two crucial and interrelated issues. One concern goes back to a point, which is seriously missing in their account of implicit normative forces, i.e. the missing link between the normative forces and the authority of the content of explicit norms, on which the expectations of the collective (including third parties who are not directly involved in the practices of the establishment and implementation of regulations) bindingness of political decisions and regulations are built. The other quest for clarification will therefore once again raise the question of the context-transcendent force of implicit normativity and whether and to which degree it can

actually contribute to our understanding of what democratic legitimation in transnational contexts demands from us.

The bindingness of conceptual norms

In elucidating the conceptual foundations of their idea of implicit normativity, Nullmeier and Pritzlaff draw very much on the philosophy of Robert Brandom, to whom they attribute the insight that normativity is located at the level of discursive practices. According to that approach:

> the relation between rules or norms on the one hand, and discursive practices on the other, can only be understood in a pragmatist order of explanation that locates the fundamental grounds of normativity in the actual practices themselves, an order of explanation that develops our understanding of the *meaning* of norms and concepts by an understanding of our *use* of those norms and concepts.
>
> (Nullmeier and Pritzlaff, ch. 3: 55; emphasis original)

Now, everything depends on how we understand the character of these performative actualizations. As far as I can see, what Brandom has in mind in following Kant´s normative understanding of mental activity on both the theoretical and the practical side, is to say that '[…] judging and endorsing practical maxims both consist in *committing* oneself, taking on distinctively discursive sorts of *responsibility*' (Brandom, 2009: 58; emphasis original). He then goes on to explain that the centrality of normativity in understanding the nature of the bindingness of conceptual norms is a corollary to the idea of positive freedom or autonomy. But what is distinctive to autonomy (in Kant and Brandom) is that it is also a rational activity that '[…] consists rather just in being in the space of reasons, in the sense that knowers and agents count as such insofar as they exercise their normative authority to bind themselves by conceptual norms, undertake discursive commitments and responsibilities, and so make themselves liable to distinctive kinds of normative *assessment*' (ibid.: 59-60; emphasis original). What we can see from here is that although both Nullmeier and Pritzlaff, as well as Brandom, start from the enlightenment discovery of the attitude-dependence of normative statuses – i.e. that we are genuinely normatively responsible only to what we acknowledge as authoritative - according Brandom it is our commitment to the rules that reign in the space of reasons and not a

particular practice within that space that constitutes the authority of conceptual norms. This is to say that those 'performative actualizations' to which Nullmeier and Pritzlaff wish to attribute a specific normative force cannot be thought of as the property of a single discursive practice, but that this has to be thought of as originating from an encompassing discursive community.

But this is not the only consequence that seems to recommend itself once we start from a pragmatist order of explanation of normativity. The other is that we would run into a serious problem once not only the normative force, but also the contents of those commitments (of what we are responsible for) were up to us as participants to a specific regulatory practice. Then, as Brandom observes, whatever seems right to us would be right – and that would deprive the talk of right or wrong of any intelligible sense. This confronts us with the requirement of the relative independence of normative force and content because binding oneself does entail both, that one must bind *oneself* and that one must also *bind* oneself (Brandom, 2009: 63-64). Again it seems to me that this challenge of also accounting for the relative independence of normative contents is not easily mastered from within the notion of implicit normativity as Nullmeier and Pritzlaff conceive it, because while we must indeed recognize that the normative status of conceptual authority is at base a social status, we also have good reasons to acknowledge that it must be located somewhere beyond the narrow social confines of a practice as the authors describe it.

Transcending the trilemmatic constellation

These reflections at least indicate that we may have reasons to transcend the account of normativity provided by Nullmeier and Pritzlaff in two directions: One is that we should keep distinct and not too closely fuse the account of normative force and of normative content, and the other is that in both cases we also should transcend the social confines of practices too narrowly conceived and better refer to a notion of a space of reasons and a notion of an encompassing and ideally fully inclusive discursive community. Although we might be led to think that the authors have already acknowledged these claims at least implicitly by demanding 'integrative, context-sensitive performances that prevent acts of exclusion' (Nullmeier and Pritzlaff, ch. 3: 60), this move, as far as I can see, marks a still unresolved tension within their approach. And

it is this unresolved tension that finally introduces a certain ambiguity into their more comprehensive account of transnational legitimacy which, by reference to its hierarchical and bureaucratic element, reaches somehow beyond democratic legitimacy and which, by reference to the concept of implicit normativity, tends to underestimate the force of the expansive logic that is built into any claim to democratic legitimacy or legitimation, a logic that is best grasped with the all-affected principle. If we take this expansive logic of reflexive processes of democratic legitimation serious, the status assigned to implicit normativity may confront us with an uncomfortable trilemma: Either we adopt a perspective from within actually ongoing practices and then wonder how the normative force originating there makes itself felt on part of all those not directly involved; or we take normative force to be parasitic on the normative content of those rules and norms guiding also the more particular practice and consequently locate the authority from which bindingness emerges beyond any particular practice; or we try to overcome this error of misplaced concreteness and see normativity and bindingness primarily nested, as it were, at the macro-level of political processes in institutional systems of constitutional rules.

The theoretical task we thus confront when trying to avoid or to circumvent this trilemmatic constellation is to strive for a more integrated and balanced account of explicit and implicit normativity which only together produce the bindingness of political decision-making and regulation we are looking for. But this is a task that reasonably lies beyond the narrow confines of a single article which has great merits in opening just this perspective and debate.

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Part II

Institutions of democratic legitimation beyond the state

Chapter 5

Postnational democracies without postnational states? Some skeptical reflections

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A specter is haunting critical theory debates about global governance: The specter of democracy 'beyond the nation-state' *without* statehood. Unfortunately, like many specters, it remains more the product of fantasy than systematic normative or empirical analysis. Like most political fantasies competing for our attention today, this one is by no means harmless: The project of postnational democracy without postnational states distracts those of us who hope to advance democratization 'beyond the nation-state' from many of the difficult political choices we face. However appealing it may at first seem, critical theorists and allied defenders of robust democracy should remain skeptical.

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Global governance without global government?

As always, Jürgen Habermas has offered one of the strongest defenses of the argument. In recent writings on globalization, Habermas has defended a tripartite model of global governance, where decision-making at the national level would be supplemented by new forms of what he dubs *supranational* (e.g. global or worldwide) and *transnational* (regional or continental) authority.[1] At the supranational level, Habermas seeks a single world organization, for all essential purposes a reformed United Nations (UN), equipped more effectively than at the present with the capacity to protect basic human rights and consistently prevent war. An empowered and refurbished UN need not take the form of a global federal republic or super-state, however. At the transnational level, economic, energy, environmental, and financial policies, or what Habermas dubs 'global domestic politics', would be negotiated mainly by those global political actors (e.g. regional organizations like the European Union, or great powers like the USA or China) he alone considers muscular enough to implement policies across large territories and thus help tame globalizing capitalism. Only major global players of this type, he believes, are adequately equipped to realize far-reaching experiments in cross-border regulation beyond the negative (and primarily neoliberal) economic integration now advanced by existing multilateral organizations like the World Trade Organization (WTO) or the International Monetary Fund (IMF). Although some of the relevant actors might possess the characteristics of a state, others apparently would not. Nor would effective coordination between and among regional blocs and/or the great powers require subservience to a world state. Finally, at the *national* level, states would hold onto some core elements of sovereignty as classically conceived, though the right to wage war and the protection of basic human rights would now be primarily located at the supranational level. Both transnational and supranational governance would stay in decisive respects dependent on the nation-state: 'States remain the most important actors and the final arbiters on the global stage' (Habermas, 2006a: 176). Nation-states can apparently preserve some classical attributes of sovereignty *despite* the fact that constitutive

[1] The argument is developed in a number of Habermas' recent writings, but the clearest defense of it remains Habermas (2006a: 113-193). For critical engagements with it, see the essays collected in Niesen and Herborth (2007); also Lafont (2008) and Scheuerman (2008).

elements of decision-making would be transferred to postnational institutions.

Defending a dramatic augmentation of decision-making authority at the postnational levels, Habermas resists the intuition that doing so demands the institutionalization of state or state-like structures there. In short, we can achieve dramatically improved global security, the systematic protection of human rights, and even ambitious forms of politically progressive transnational social policy *without* having to build postnational states: The 'democratic constitutionalization of international politics' can thrive *without* traditional statist modes of political organization, and hence we can reasonably hope to achieve

> a politically constituted global society that reserves institutions and procedures of global governance for [nationally based] states at both the supra- and transnational levels. Within this framework, members of the community of states are indeed obliged to act in concert, but they are not relegated to mere parts of an overarching hierarchical super-state.
>
> (Habermas, 2006a: 135)

Those who believe that democratization beyond the nation-state ultimately requires the achievement of a global federal republic or some type of world state, Habermas counters, remain imprisoned in anachronistic early modern conceptions of state sovereignty. Outdated conceptual baggage, and especially the historically contingent but now obsolescent view that democratic constitutionalization relies intimately on state sovereignty, prevents many analysts from recognizing the possibility of achieved multi-layered global *governance* without global *government*.

The crucial conceptual move here is a sharp delineation of 'state' from 'constitution':

> A 'state' is a complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs; a 'constitution', by contrast, defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other.
>
> (ibid.: 131)

As Habermas openly notes, this conceptual distinction, and indeed much of the theoretical inspiration behind his overall account of global governance, derives directly from the recent work of Hauke Brunkhorst, one of contemporary Germany's foremost critical theorists, and arguably the most impressive present-day theoretician of a radical democratic version of 'global governance without government'. For nearly a decade now, Brunkhorst has been arguing forcefully that far-reaching democratization is possible beyond the nation-state, and that its proper conceptualization necessitates breaking with anachronistic ideas of state sovereignty. For all practice purposes, many of the key functions of the classical sovereign state are *already* operative at both the regional and global levels: '*World-stateness without a world state* already exists', Brunkhorst declares in a recent essay, in which he recalls the vast array of efficacious institutional and legal mechanisms which presently operate 'beyond the nation-state', none of which can conceivably be described as possessing a monopoly on legitimate violence or other attributes of state sovereignty as conventionally conceived (2007a: 101). The European Union (EU), he has similarly pointed out on many occasions, constitutes a poststatist polity in which complex legal and regulatory tasks are regularly and effectively undertaken: Europe represents a paradigmatic case, and indeed decisive evolutionary breakthrough, underscoring the normative and institutional advantages of building complex modes of non-statist, postnational decision-making.

Of course, Brunkhorst is hardly the first scholar to describe the EU as well as institutions like the WTO or even *Lex Mercatoria* in such terms.[2] What sets Brunkhorst apart is his embrace of two additional theses. First, he offers a normatively demanding view of democracy, according to which self-government requires not only free-wheeling deliberation and a robust civil society, but also the institutional realization of strict egalitarian organizational norms in which those impacted by decisions can participate in their determination in free and equal ways. To his credit, he has admirably opposed the tendency among some deliberative democrats to reduce democratic politics to little more than the free-flow of political argumentation; as he has astutely acknowledged, this standpoint risks obscuring the

[2] Glyn Morgan aptly describes this position as the 'postsovereignty' thesis, see Morgan (2005: 111-132).

centrality of strict institutional and legal devices alone capable of ensuring that popular preferences can be strictly translated into binding decisions.[3] Democratic self-government requires much more than the deliberatively-based *influence* on binding decisions, but instead a legally guaranteed free and equal opportunity to *participate* fully and equally in their making. Although the European Union, for example, can already be described as having undergone a far-reaching process of constitutionalization, and even though it contains important democratic potentials, its constitutional structure still lacks what he describes as 'revolutionary democratic integration', according to which Europeans might make a substantially reformed EU their own by means of a '*constituting* refoundation of the Union as a democratic community […] in fact derived from the will-formation of the citizenry' (Brunkhorst, 2006: 177). Insisting that binding EU decisions need to be traceable 'back along an unbroken and relatively short legitimating claim to the wills of the citizenry', he sympathizes with those who voted against the recently proposed constitutional treaty, worrying that it did too little to shatter the 'collective Bonapartism' which plagues the present-day EU (ibid.: 173-174). Unlike many more pragmatically-minded defenders of the EU status quo, he insists that postnational democracy not be permitted to regress below the level of existing national democracies, emphatically pointing out that democracy only obtains in the context of 'an egalitarian system of organizational norms […] that excludes no one' (ibid.: 177).

Second, Brunkhorst believes that the democratization of decision-making beyond the nation-state can be achieved by significant reforms to existing regional and global structures of decision-making *without* requiring the construction of sovereign states at the regional or global level. To be sure, existing postnational institutions are badly in need of reforms, and some of them need to be substantially strengthened; however, it would be a mistake to model reform on misconceived ideas of a world state or global federal republic. Like Habermas, Brunkhorst believes that not simply global governance, but global *democratic* governance, can be achieved without *global democratic government*. From this perspective, the main task at hand is figuring out how the emerging system of global governance can be

[3] See especially Brunkhorst (2004: 96-98). In a similar spirit see, Scheuerman (2006: 94-103).

reformed in accordance with a demanding vision of democracy, while respecting its integrity as a (non-statist) system of decision-making. Although state-building and democratic, constitutionalism has been closely linked in modern history, there is no reason to assume a necessary connection between them. Because of a widespread tendency to obscure the simple but decisive difference between state and (democratic) constitution, Brunkhorst believes, many defenders of postnational democratization wrongly presuppose that it must take on familiar elements of modern statehood. But why presuppose that democratic constitutionalism in the context of globalization necessarily has to reproduce the contingent and arguably irreproducible history of modern state building? For both Brunkhorst and Habermas, the point is not simply that postnational state or state-like capacities can be implemented in a piecemeal fashion, and that statehood should not be seen as an all-or-nothing affair. Instead, postnational democracies can thrive without statehood at the postnational level, and thus demands for postnational state construction (e.g. in the form of a world republic) are intellectually anachronistic and indeed counterproductive.

However attractive, this vision suffers from a number of flaws. I start with Brunkhorst's crucial reflections on the European Union, before turning to his theoretical critique of the concept of state sovereignty and then his Kelsenian views about the 'legal revolution' which allegedly has resulted in the supremacy of global over national law. To date, Brunkhorst has formulated the most impressive defense of the project of global democratization without global statehood. Nonetheless, it generates at least as many new and unanswered questions as it answers old ones.

The European Union as paradigmatic case

The experience of the European Union has clearly inspired Brunkhorst to develop a model of global democratization without global statehood. At times barely containing his enthusiasm, he repeatedly declares that the European Union represents a novel and in decisive respects path breaking institutional experiment with poststatist politics. The EU, he announces, already possesses a coherent constitutional structure, though still in an insufficiently democratic form, and it exercises 'the classic characteristics of sovereignty, albeit without a state' (Brunkhorst, 2005: 131). European law functions at least as reliably as national law; the EU is already

more deeply integrated in some ways than even the United States (Brunkhorst, 2002a: 530). In a recent essay, he goes so far as to prophesize that the future belongs to regional non-statist structures like the EU: The alleged failures of great powers like the US, Russia, and China to master recent political, economic, and military challenges shows that the EU model of a poststatist polity represents the 'only evolutionary alternative' in the face of globalization's manifold demands (Brunkhorst, 2007a: 93).[4]

To what then does the EU owe its evolutionary superiority? Developing an argument that has obviously influenced Habermas, Brunkhorst points to the existence of a new and creative version of the division of powers, in which most rule-making activity now occurs at the European level, while the enforcement and implementation of legislative and judicial decisions stays in hands of nation-states.[5] National courts implement European law, and nation-states maintain a monopoly over the legitimate use of force. However, that monopoly has now been effectively decoupled from the actual processes of rule-making. In addition, Brunkhorst points out the tasks of so-called 'positive' economic integration remain at the national level as well: Social policy is still fundamentally the prerogative of national governments. Indeed, 'there seems to be no need for any European monopoly of power, because the new division of powers does work' (Brunkhorst, 2004: 102).

If the EU has no need to aspire to traditional modes of statehood (in the form of a federal European Union, for example), *what* kind of political form might it then embody? For Brunkhorst, the European Union anticipates the possibility of a historically novel democratic *confederation*, a highly decentralized polity lacking a shared monopoly over violence. To be sure, this model has important historical predecessors, including the United States under the Articles of Confederation [1776-88], the German *Bund* [1815-66], and Switzerland, but unlike them, it is not simply a *confederation of states*

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[4] Adam Lupel astutely criticizes Habermas' tendency to see the EU as a model of sorts for global governance (Lupel, 2004). Brunkhorst's similar tendency to treat the EU as a paradigmatic case also risks underplaying the idiosyncrasies of European experience.

[5] The argument appears in many of Brunkhorst's recent writings, but a relatively early statement of it can be found in Brunkhorst (2002b).

but also a *confederation of citizens* (see most recently Brunkhorst, 2008a; also 2004: 100-102). In contrast to its historical predecessors, in short, we can conceive of the EU as an emerging *democratic* confederation committed to a demanding procedural ideal of *popular* sovereignty. Although no friend of democracy, Carl Schmitt, Brunkhorst adds, was nonetheless right to observe that the political unity of a confederation of this type need not rely on substantialist conceptions of the nation, but instead on a 'family resemblance of political principles' like democracy and human rights (Brunkhorst, 2004: 101).[6] Brunkhorst also endorses Schmitt's insight that a confederation need not embody the traditional attributes of state sovereignty. Even Schmitt, it seems, was at least implicitly willing to concede the possibility of an effective poststatist confederation along the lines, Brunkhorst apparently believes, now being constructed in Europe.

Many others, as noted, have similarly highlighted the EU's credentials as a novel postsovereign political order. But most of them lack Brunkhorst's robust radical democratic credentials. Unfortunately, this version of the 'postsovereignty thesis' sits somewhat uneasily alongside Brunkhorst's many worries about the EU's numerous democratic deficits: The EU, we are told, represents *both* the 'only evolutionary alternative' to existing statist political forms *and* a deeply undemocratic and indeed 'Bonapartist' system. Given Brunkhorst's observations about the EU's failure to achieve democratic or revolutionary integration, how can we be so sure that its novel instantiation of the division of powers seems 'to work' in any but a necessarily limited functional sense? Why indeed rely on the highly ambivalent story of the EU to posit the historically novel prospect of a robustly democratic poststatist polity, in light of the EU's own familiar pathologies? On Brunkhorst's own account, the EU can hardly be credited with constructing anything approaching a democratic polity beyond the nation-state. A hard-headed empiricist might legitimately wonder whether Brunkhorst's attempt to build on the EU experience to justify the possibility of a historically unprecedented marriage of radical democracy with postsovereignty makes sense. At the very least, a somewhat more cautious assessment of its prospects would seem no less defensible.

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[6] Brunkhorst is referring to arguments made by Schmitt in the final chapter of *Die Verfassungslehre* (Schmitt, 1928).

Illuminating in this context is Brunkhorst's admission that EU regulation thus far has chiefly been preoccupied with matters of (limited) negative economic integration. It remains, in many respects, a paradigmatic case of primarily neoliberal supranational governance; as Brunkhorst concedes, the EU has yet to develop ambitious varieties of cross-border social policy or far-reaching 'positive' economic regulation (see e.g. Brunkhorst, 2002a: 530-543). But this also means that it has perhaps yet to face what Hans J. Morgenthau once aptly described as the supreme task of any effective government, namely the proven ability 'to change the distribution of power in society without jeopardizing the orderly and peaceful processes upon which the welfare of society depends' (Morgenthau, 1954: 415). Possession of the monopoly on legitimate violence, of course, has oftentimes played a decisive role in allowing political communities to pass this test because 'without the chance to resort to force', it is difficult for 'governments to implement policies in cases where powerful political groups or individual citizens put up resistance to particular rules and regulations' (Funk, 2003: 1059). To be sure, a familiar mistake among Hobbesian and other excessively statist theories is to occlude the paramount role typically played by non-state mechanisms in resolving or at least mediating most political conflict; by the same token, we should avoid throwing the baby out with the bathwater and downplay the familiar fact that the state's monopoly on legitimate violence has repeatedly helped guarantee both the fairness of democratic procedures and the effective enforcement of the policies generated by them. In the language of contemporary social science: Wherever we face collective action problems we typically need 'some kind of authoritative regime that can organize common solutions to common problems and spread out the costs fairly', and then make sure that common solutions are rigorously enforced (Craig, 2008: 135). In social policy, as perhaps in few other political arenas, polities are likely to face resistance from 'powerful political groups and individuals', as the oftentimes bloody history of the rise of the welfare state dramatically documents: Crucial to U.S. state development, for example, was the willingness of the New Deal regime of Franklin Delano Roosevelt to place the sizable muscle of the federal state on the side of striking workers amid the social upheavals of the 1930s. As an historical matter, explosive political battles about social and economic policy have played a significant but sometimes overlooked role in the history of modern state making, with the augmentation not only of

the central state's taxing powers but also its capacity to redistribute economic resources, however modestly, working to augment both its effectiveness and legitimacy. Indeed, it remains difficult to see how controversial social and economic policies could ever be systematically advanced without some possibility of recourse to a common system of effective enforcement. If far-reaching redistributive measures are to be regularized and ultimately legitimized in the EU, and not simply undertaken as temporary ad hoc measures pushed through by political elites who remain insufficiently accountable, there are probably good reasons for suspecting that the EU will need to develop shared enforcement mechanisms which inevitably will require core attributes of statehood.

A decentralized system of enforcement, as we know from international law, suffers from relatively substantial doses of irregularity and inconsistency. At the very least, it too often founders in the face of opposition from powerful social groups or, as in the context of confederations and federal states, recalcitrant member-states: At such junctures, the threat of force can become essential to the enforcement of the common will.[7] Unless Brunkhorst can identify *a priori* reasons for presupposing that European political life is somehow necessarily destined to be less conflict-ridden and potentially explosive than what much of modern history suggests as the norm, it would seem premature to presuppose than an effective European-wide polity can do without recourse to common police and military power. The EU will never be plagued by violent secessionist movements, regions or social groups who refuse to make minimal financial contributions to the common good, or — as in the US,

[7] In a revealing contrast to Brunkhorst, in some of his initial writings on globalization Habermas seemed to suggest that Europeans should aspire for a democratic federal state *precisely* because controversial redistributive social and economic can only gain sufficient legitimacy on the basis of a rich common political culture: Without such a shared civic identity, Habermas has rightly inferred, it seems difficult to conceive of the possibility that well-to-do Europeans will be willing to go along with policies favoring their less-well-off compatriots. Even in *Divided West* he remains open to the possibility that regional blocs like the EU might evolve into 'complex federal states on a continental scale' (Habermas, 2006a: 141). The federalist strand is relatively strong in *The Postnational Constellation* (Habermas, 2001: 89-112) and also *Time of Transition* (Habermas, 2006b: 73-109).

localized racist movements which systematically violate the rights of racial, religious, or ethnic minorities? And thus the EU will never need to act quickly and expeditiously to squelch locally-based political tyranny or injustice by police or military force? On the contrary, given the deeply pluralistic and heterogeneous characteristic of the emerging European polity, in some contradistinction to what we find even in large continentally-based nation-states, a real European democracy will inevitably rely on a shared system of effective enforcement that requires a substantial augmentation of state capacities.

Quite legitimately, one might note that the dream of a European federal state remains 'utopian' today, in part precisely because the idea of a European police or military force able to enforce EU laws against individual member-states repels so many today. Yet this arguably remains a positive and thus constructive utopia, in contrast to the politically naïve and negative utopia of a European community that somehow has miraculously freed itself from the prospect of intense political conflict or potential political violence requiring resolution — as in the past — by a democratically legitimate *as well as* effectively equipped system of *common enforcement*.

Of course, Brunkhorst tends to argue that essential to the EU's novel division of powers is the fact that social policy can remain fundamentally in national hands. In other words, he sometimes appears to believe that a Europeanized social policy is neither desirable nor realizable. Yet how realistic is this assessment in light of the dynamics of contemporary globalizing capitalism, which indeed poses significant challenges to the possibility of effective social and economic regulation especially for small and economically peripheral states, many of which now make up the EU? Precisely such worries, by the way, inspired Habermas' initial reflections on the possibility of achieving far-reaching global governance 'beyond the nation state'. Habermas, in some contrast, has occasionally argued for a Europeanized system of social regulation and, indeed, for a global system of 'transnational' negotiation which the EU would be firmly equipped to challenge hegemonic neo-liberal policies as advanced by the US and others (Habermas, 2001: 58-112; 2006b: 73-88).

Brunkhorst's claim that the EU *already* exercises the essential functions of sovereignty without possessing the classical attributes of

statehood also seems odd in light of another familiar weakness of the EU, namely its widely noted lacuna in the sphere of foreign and military policy. Like many others both in Europe and abroad, Brunkhorst celebrated the massive peace demonstrations of 2003 opposing the US-led invasion of Iraq, seeing in them the harbinger 'of a social movement that could mobilize the power used to enforce a new, citizen-based European constitution' (Brunkhorst, 2004: 103).[8] In his view, the February 15th demonstrations served as concrete evidence for the possibility of a mobilized European public able to shape decisively the course of political affairs. In hindsight, however, the impact of the protests on the subsequent course of events was ultimately minimal: The United States of course not only blustered on with its invasion and subsequent occupation of a sovereign country, but also successfully played off European governments against each other in order to ensure the complicity of many of them in its illegal invasion and war crimes. Of course, one can only speculate about the likely course of events if the EU had been in possession of a more effective common foreign and military policy. Nonetheless, it remains striking that what undoubtedly was one of the most impressive shows of European-wide popular protest in history resulted in no common European policies able to stem U.S. aggression, while in the U.S. itself, a war that was only half-heartedly supported by a plurality of the population for a limited period of time nonetheless was launched and quickly impacted the lives of millions of people worldwide — most importantly, of course, the 94,000 innocent Iraqi civilians sacrificed and countless others displaced by it.[9] Part of this difference, of course, stems from the (purportedly obsolescent) state-like character of the United States in contrast to what Brunkhorst takes to be the (supposedly more advanced) non-statist model of the EU.

Like Habermas, Brunkhorst envisions the EU as potentially operating as a force able to check or 'counterbalance' the hegemonic aspirations of the United States, and thus as a potential impediment to U.S. imperialism as well as the dogmatic brand of neoliberalism aggressively advanced by Washington. If the EU is to take on this role, however, it will necessarily have to garner some traditional

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[8] In a similar vein, see Habermas (2006a: 39-48).

[9] I take this number from Lee Hamilton, former Democratic Congressman from Indiana.

attributes of statehood which it presently lacks. As Glyn Morgan has persuasively suggested, a coherent European defense policy along the lines sought by Brunkhorst and Habermas will demand of the EU not only that it shed its postsovereign form, but that it also develop a capacity for independent military action. Doing so will likely require the EU to develop a more centralized security apparatus. Without some decisive elements of state sovereignty, Glyn argues, the Europeans will inevitably remain excessively dependent on American power, an uncomfortable fact which those who tout the possibility of fusing democracy with postsovereignty tend to ignore (Morgan, 2005: 133-157). As long as Europe's one-sided relationship of dependency on the US remains unchecked, Europeans will simply not enjoy as much public and private freedom as those on the other side of the Atlantic: Residents in Germany or Italy in some policy contexts will not have the same chance to shape world affairs as those of Iowa or Indiana. Europeans can sign petitions and demonstrate until they turn blue in the face, but without a common system of state-like institutional devices by which those energies can be forcefully funneled, the US, and perhaps China and Russia will continue, *pace* Brunkhorst's claims, to shape disproportionately the planet's future. As Alexander Wendt has also observed in his provocative neo-Hegelian defense of the idea of a world state, the key problem with global governance arguments like those defended by Brunkhorst and Habermas is their weakness in the face of 'unauthorized violence by rogue Great Powers' (Wendt, 2003: 506). Unless the Europeans can thwart such violence, their political and private autonomy will remain impaired.

Indeed, some empirical evidence suggests that the Europeans are already moving towards a more robust form of statehood. Despite Brunkhorst's assertion that the monopoly over legitimate violence remains located at the level of the nation-state, under the auspices of NATO military policies have long undergone a process of supranationalization (a familiar fact, by the way, which his analysis curiously neglects), and even in the more down-to-earth arenas of policing, EU states 'no longer have total sovereignty over decision-making and implementation of policies in matters of internal security' (Occhipinti, 2003: 2). Especially in the last decade or so, anxieties about transnational criminal networks, drug trafficking, terrorism, and immigration have resulted in dramatic augmentations of shared and increasingly complex forms of policing and security

policies operating 'beyond the nation-state' (e.g. the European search warrant), with one scholarly commentator describing the movement towards supranationalized policing in Europe as 'one of the strongest expanding fields of activity' within the EU (Jachtenfuchs, 2006: 85). To be sure, Brunkhorst occasionally alludes to these trends, but he tends to neglect what may be most striking about them: Political elites are responding, albeit oftentimes opportunistically and irresponsibly, to widespread popular anxiety about globalizing crime, terrorism, and illegal immigration, all of which indeed arguably cry out for novel forms of postnational action. As elites try to deal with popular anxiety, they find themselves, like so many of their historical predecessors, enhancing the *state-like* capacities of those institutions which alone seem capable of providing a modicum of security and protection to the individual. In our globalizing age, those institutions are now increasingly located at the postnational level: Not surprisingly, we are witnessing a normatively ambivalent and in many respects troubling, but nonetheless irrepressible, augmentation of the state-like capacities of postnational institutions.

To pretend that this is not happening, or to suggest that we can have all the benefits of modern statehood without constructing state or state-like institutions well beyond those endorsed by Brunkhorst, obscures not only the tough questions we face, but also the real dangers as well. Taming the Leviathan at the level of the nation-state has proven difficult enough. Can we do so at the level of the European Union?

Beyond state sovereignty?

Brunkhorst's speculations about the idiosyncrasies of the European Union undergird another pillar in his theoretical system: A far-reaching critique of the idea of *state sovereignty*, which he employs to claim that defenders of a European federal state or other postnational states have succumbed to obsolescent and anachronistic political thinking. As noted earlier, Habermas has also taken up this feature of Brunkhorst's agenda, similarly describing advocates of global federalism or a world state as committed to outdated ideas about sovereignty.

Much of what Brunkhorst and Habermas say in this context is sound. To be sure, we need to break with ideas, like those pervasive in German political thought from Hegel to Hermann Heller, according

to which the sovereign state should be pictured as a more-or-less impermeable, supra-legal entity, a concrete substantial subject that somehow stands beyond and outside the communicative practices of democratic politics. As we have known at least since Harold Laski, too much of the conceptual paraphernalia of modern sovereignty derives from early modern absolutism (Laski, 1917); Brunkhorst is right to remind us of these old but neglected lessons. Under contemporary conditions, and arguably throughout much of modern history, so-called state sovereignty has been relativized by the interpenetration of national and international (and now postnational) law, at present especially manifest in the EU, but characterizing many other contemporary and earlier contexts as well. The idea of an impermeable and homogeneous sovereign nation-state, Brunkhorst persuasively notes, has *always* been a myth, existing at most only for rare moments in limited regions of the globe. *Pace* traditionalist models of state sovereignty in which the idea has been linked to a 'clear-cut distinction between autonomous legal self-determination and heteronomous determination by another's alien will', Brunkhorst recalls that even the borders between competing political units have to be accepted and recognized by both sides (Brunkhorst, 2006: 188; see also 2003; 2005: 108, 165-176; 2008a: 493-501). This not only contradicts the commonplace association of sovereignty with strict inviolability or exclusivity, but also provides support for his alternative view that the outdated notion of state sovereignty should be replaced with that of *popular sovereignty*, according to which sovereignty is best reinterpreted as meaning that 'those who are affected by binding legal decisions have to be included as free and equal members in the procedures of producing these decisions' (Brunkhorst, 2004: 99). It is the *people* who should be seen as outfitted with sovereignty, not their *states*, as state borders indeed decreasingly determine the range or even scope of those decisions which affect us. In short, historically and theoretically obsolete attempts to link sovereignty to the state as a concrete empirical subject need to be jettisoned for a normative model of democracy, in which strict procedures guarantee that those impacted by binding decisions freely and equally participate in their making.

Although much seems sensible about this argument, it moves too fast. First, even if Brunkhorst is right to reinterpret the concept of sovereignty in terms of a robust model of democracy, we still face the question of what form — if any — state institutions should play in

helping to realize popular sovereignty. Tellingly, one of the main inspirations behind Brunkhorst's own vision of popular sovereignty, the Frankfurt political theorist Ingeborg Maus, maintains at least some elements of the traditional discourse of state sovereignty, in part because she continues to see an integral link between democratic politics and the notion that in international affairs states should be treated as legally equal and independent entities (see e.g. Maus, 1998). Even if we seek fundamentally to disconnect the idea of sovereignty from the state, and surrender the outdated conceptual framework which rightly alarms Brunkhorst, popular sovereignty may require, as Rainer Schmalz-Bruns has suggested in an excellent critical response to Habermas' version of the argument, some familiar forms of state institutions. Relying on Thomas Nagel, Schmalz-Bruns argues persuasively that we need to see state or at least what for all effective purposes are state-like organizations as themselves *essential* to democracy and self-government. In other words, Habermas' (and Brunkhorst's) attempt to disconnect modern statehood from modern normative political and legal aspirations is overstated. Democratic equality and liberty are best guaranteed by fair and reasonable procedures which can realistically be expected to have a determinative influence or impact on action. Influence of this type can only be achieved by forms of institutionalization with which we rightly associate significant elements of statehood (Schmalz-Bruns, 2007). Democratic deliberation and participation only make sense if we can reasonably expect that our voices will result in some course of action which is effectual and binding on others: We need state institutions outfitted with administrative power and far-reaching coercive instruments, and thus at least something approaching what traditionally has been described as a monopoly on violence, to preserve equal participatory rights in the fact of potential violations, for example, and enforce democratically-achieved decisions even against powerful actors who may have a vested interest in resisting them. In his own ambitious democratic model, Brunkhorst underscores democracy's necessary dependence on strictly egalitarian decision-making procedures: As at the level of existing nation-states, preservation of those procedures at the postnational level will require an effective system of shared enforcement. Can we be so sure that even basic democratic rights can be ensured without state or at least state-like institutional devices necessarily playing a protective role? Acknowledging this admittedly conventional theoretical point hardly requires fidelity to absolutist conceptions of

sovereignty, visions of the state as supra-legal and undemocratic, or a secret passion for Carl Schmitt. It is not those who worry about the readiness to discard traditional elements of statehood that should be criticized for adhering to historically anachronistic forms of state organization, but instead Brunkhorst and Habermas, who risk downplaying the indispensability of state forms to the normative kernel of democratic politics (Schmalz-Bruns, 2007: 278).[10]

Brunkhorst is right, for example, to assert that a 'clear-cut distinction between autonomous legal self-determination and heteronomous determination by another's alien will therefore no longer implies the distinction between statehood and its absence', certainly not in the conventional sense that sovereign states can be seen as coterminous with autonomous self-determination. For residents of small and weak states, this has long been self-evident; now even 'global players' like the U.S. must recognize that their fate is shaped decisively by factors beyond their immediate control. The fact that even powerful nation-states are now embedded in complex networks of supranational lawmaking and adjudication only reinforces this point. Yet such trends still raise the question of how public and private autonomy is best guaranteed under the conditions of a globalizing capitalist political economy. As I hinted at in the first section of this essay, Europeans are unlikely to enjoy the same degree of autonomy as others elsewhere as long as they refuse to establish a shared monopoly on violence, today — as in previous moments of modern history — a central source of effective power. As long as the United States and other great powers can use their disproportionate state and military capacities to outmuscle the Europeans, their policy options will be disproportionately circumscribed. Of course, such 'hard' forms of power only represent one source of influence, as even

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[10] In response to an earlier version of the argument I develop here, Habermas accused me of implicitly advancing a notion of political power as having an 'impenetrable 'substance' along the lines perhaps of Schmitt's 'concept of the political' (e-mail correspondence to the author, 23 February 2008, on file with the author). It is unclear to me, however, why maintaining fidelity to some traditional attributes of modern statehood places anyone in Schmitt's camp. I am also unconvinced that my position echoes Thomas Hobbes' (absolutist) model of state sovereignty. On the contrary, in the spirit of Rousseau, Kant, and many others, I instead follow Schmalz-Bruns in seeing at least some elements of modern statehood as essential to a sufficiently robust conception of popular sovereignty.

classical Realists typically acknowledged. Yet if an effective balance of power is to obtain between the EU and its rivals, it seems naïve to believe that the Europeans can neglect the cultivation of such conventional forms of 'hard' power. At least one of the main justifications for moving towards European statehood, however politically unrealistic this may presently seem, is thus eminently democratic in character: If Europeans are going to enjoy influence and ultimately liberty proportionate to that of the Americans, and not instead be forced to bend their will to the latest occupant of the White House, they need to develop much more ambitious state-like capacities at the level of the EU. Even if they are to preserve influence even over what may appear to be purely 'internal' European matters, in our globalizing age this requires that they possess significant power resources to check the Americans, Chinese, and Russians. So rather than simply discard traditional notions of sovereignty, as Brunkhorst and Habermas argue, we might instead hold onto its rational kernel: If political communities are to preserve their autonomy in a political universe which remains a *pluriversum*, achieving an effective monopoly on coercive power remains indispensable.

The argument moves too rapidly in another respect as well: Brunkhorst never fully engages a rich scholarly literature which suggests persuasively that the discourse of sovereignty 'involves normative principles and symbols meanings worth preserving' (Cohen, 2004: 14).[11] Jean L. Cohen, for example, has argued that we can cleanse the discourse of sovereignty of its problematic absolutist connotations by reconceptualizing it as a *relational* concept which captures the 'mutual containment of law and politics': '[S]overeignty evokes both the public power that enacts law and the public law that restraints power' (ibid.: 14-15). *Pace* traditionalistic usages, we need not crudely juxtapose sovereignty to law or democratic politics, envision it as located in a single actor or institution, link it to hyper-centralized models of decision-making, or ignore its intersubjective character: As a claim to ultimate *authority* within a political community it requires recognition both domestically and internationally. Even if classical theorists mistakenly associated it with an idea of *exclusivity* according to which states were to tolerate

[11] For some of the recent debate on sovereignty in the context of the European Union, see Walker (2003).

no external interference in their internal affairs, we should hold onto a more nuanced understanding of the ways in which sovereignty remains tightly coupled to a legitimate claim for political autonomy. The discourse of external sovereignty, for example, should thus be reinterpreted as entailing the 'non-subordination and non-domination' of political communities by others, and hence as a useful conceptual device for thinking about political autonomy in the context of a pluralistic political universe. When properly interpreted, this feature of sovereignty discourse serves as a powerful check on imperialistic and hegemonic political pretensions, as well as a valuable way to begin thinking creatively about the unavoidable 'multiplicity of autonomous political communities and their interrelationship' (ibid.: 16). The mere fact that polities now oftentimes find themselves subject to competing jurisdictional claims does not *per se* constitute an attack on their sovereignty since not all such claims can be legitimately interpreted as generating subordination and domination. By the same token, a revised interpretation of the idea of sovereignty allows us to see why political communities have a right to resist attempts to undermine their non-subordination and non-domination at the hands of external powers as well as resist undemocratic forms of postnational regulation.

Not surprising perhaps, Brunkhorst's discussion of the historical prototypes for his model of Europe as a 'confederation of states and peoples' seems idiosyncratic as well. He tends, as noted above, to see the US under the Articles of Confederation [1776-87], the German *Bund* [1815-66], and Switzerland as forerunners. Yet it seems worth recalling that the Articles of Confederation was plagued by both internal disunity and external incompetence: Legitimate fears of civil war and foreign invasion helped generate the Federalist movement, spearheaded by young men who had witnessed at first hand on the battlefield the exorbitant human costs of ineffective government, and ultimately the more centralized federal republic established under the U.S. Constitution. Similarly, the German *Bund* was ultimately replaced by Bismarck's Prussia and its highly effective — albeit authoritarian — mobilization of power resources. So at least two of Brunkhorst's examples might be taken as confirmation of my anxieties that a highly decentralized poststatist polity is unlikely to secure a modicum of legal security or political autonomy. Despite its widely-discussed peculiarities, Switzerland seems an odd addition to the list — *unless* one implicitly and mistakenly presupposes, as

Brunkhorst perhaps does, that state sovereignty requires the extreme centralization of decision-making and enforcement capacities in a single institution or set of hands.[12] Yet this interpretation of sovereignty has long been discredited: Federal regimes deserve to be described as 'states' even in a rather old-fashioned sense of that term as long as they possess relatively clear mechanisms for mobilizing (economic, political, and military) power resources to serve common goals. The state's monopoly on legitimate violence is obviously consistent with a significant variety of state types: Not simply classical nation-states, but also relatively loose federal systems (e.g. Canada) can be aptly described as possessing it. Even more oddly, Brunkhorst has recently added the antebellum (e.g. pre-Civil War) US to his list, and in a recent essay in *Constellations* went so far as to suggest that the *contemporary* US may not be all that different from the EU in light of the fact that some interpretations of the American polity — along the lines advanced by the reactionary Supreme Court Justice Clarence Thomas — emphasize its deeply decentralized contours: '[T]he US today, the European Union, or Switzerland […] should not be equated with states' (Brunkhorst, 2008a: 495). But again, this only makes sense if one implicitly presupposes as a standard a (mythical) ideal of hyper-centralized sovereignty, like Brunkhorst himself elsewhere brilliantly criticizes, in which federal structures like those found in the US or Switzerland are somehow incongruent with it. Nor is it accurate to claim that in the US federalism sovereignty 'remains *durably suspended between the federation and the member-states*' (ibid.: 494-495). Despite the wisdom of Clarence Thomas, most U.S. citizens recognize that at the latest since the Civil War, the federal state has possessed preeminence in foreign, military, and many other decisive matters. And even before the Civil War, as Native Americans and the Mexicans quickly learned, the U.S. federal state, despite its many weaknesses, was able to mobilize substantial military muscle against 'internal' and 'external' foes. Can the same claim plausibly be made about the present-day EU?

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[12] Here as well, the 'realist' Morgenthau still makes worthwhile reading: As he points out, the Swiss experience was highly idiosyncratic and probably cannot be reproduced, and thus represents a poor model for thinking about global governance (1954: 482-484).

The Kelsenian world legal revolution

The final pillar in Brunkhorst's defense of (radical democratic) 'global governance without government' is his forthright endorsement of the Kelsenian thesis that the last century witnessed a 'legal revolution' in which the traditional dualism between nationally-based state and international law was overcome, and states have become subsidiary units of an overarching and ever more integrated global legal system to which they have become subordinate. To be sure, Kelsen's legal cosmopolitanism may have been ahead of its times when originally formulated. Yet Brunkhorst considers Kelsen to have been a prophetic thinker who accurately predicted the subsequent course of legal and political development: Kelsen was right to pummel traditionalistic models of state sovereignty and especially the anachronistic view that states can operate in 'law-free' (*rechtsfreie*) zones; he was also correct to recognize that nationally-based legal orders not only were merging with international law but rapidly becoming part of a novel global legal order; his frontal assault on the innumerable dualisms that still plague political and legal thinking (e.g. state vs. law, national vs. international, or even general legislation vs. particularized administrative application) remains path breaking. In this interpretation, 'we should read Kelsen's theory no longer primarily as a scientific theory of pure legal doctrine but as a practical oriented theory (and anticipation) of the global legal revolution of the twentieth century' (Brunkhorst, 2010).[13] Kelsen perceptively identified the prospect of a global legal order in which 'an enlarging or contracting circle of legal and political communication […] has no beginning and no end *outside* positive law *and* democratic will formation' (ibid.). Kelsen, in short, serves Brunkhorst as a convenient ally in the quest to advance a democratic vision of legal cosmopolitanism, allegedly able to dispense with obsolete ideas of state sovereignty and thereby problematic claims about the necessity of postnational state structures.

Here, as in Brunkhorst's analysis of the European Union, a critical and indeed radical critique of power relations at the global level coexists somewhat uneasily with a relatively optimistic diagnosis of recent legal developments. Since the Nuremberg Trials, Kelsen's legal revolution and especially his rejection of the view that states are

[13] See, more generally, for the Kelsenian argument, Brunkhorst (2007b; 2008b).

sovereign in the sense of possessing legal independence has gained a substantial footing in legal practice. Yet that revolution remains unfinished because existing global legal and constitutional systems remain insufficiently democratic. In fact, global law too often mirrors 'the hegemonic power structure and the new relations of domination in the world society' (ibid.) as countless critical analyses of institutions like the WTO and IMF readily attest. To his credit, Brunkhorst remains very much attuned to the inequalities and forms of exclusion generated by global capitalism and the 'world society' shaped by it. Yet he simultaneously wants to preserve Kelsen's insight that we can and indeed already *are* establishing an ambitious mode of poststatist legal cosmopolitanism. This leads Brunkhorst to resist attempts to explain many of the familiar pathologies of global law as resulting from practices legal and political scholars traditionally link to state sovereignty. In this assessment, one of Kelsen's great achievements was to have effectively dismembered the idea that state sovereignty conflicts with international law, and that international law too often remains subordinate to nation-states and their legal orders. The dualistic structure of such arguments, Brunkhorst asserts, is anachronistic and misleading, and Kelsen was right to discard them.

Unfortunately, this move leads to counterintuitive and sometimes implausible assertions. For example, especially the United States in recent years has made a mockery of international law, when it invaded Iraq and then proceeded to normalize torture and set up secret offshore detentions camps in flagrant violation of longstanding international legal norms. Such acts — and the history of international politics is littered with similar violations by both great and second-tier states — might readily be taken as corroboration for the old-fashioned view that state sovereignty still can conflict with international law, and thus that we are by no means unambiguously on the bright path to legal cosmopolitanism described by Brunkhorst. So how then does he interpret such acts? In his view, they by no means pose a fundamental challenge to Kelsen's diagnosis because they remain *illegal* but by no means *extra-legal* actions, meaning that they still operate under the auspices of our emerging global legal system, and not somehow *outside* it. Of course, the great powers manipulate international law in ways that lesser powers cannot, yet even they remain deeply enmeshed in international law. Pressing reasons continue to suggest that even hegemonic powers like the

United States will find themselves forced to respect international law: It exercises a powerful normative pull which even the White House will not prove able to resist. So even if the United States condones torture, practices indefinite detention, and violates international law to attack sovereign states, it acts illegally but not external to the legal code (Brunkhorst, 2007a: 80-81; 2007b: 20). In the systems theory language sometimes employed by Brunkhorst, US action remains enmeshed in the 'legal/illegality' code.

The immediate flaw with the argument is that it downplays the fact that when great powers act in this fashion, they typically make a mockery of even *minimal* rule of law standards. So the Bush administration indeed claims to be acting 'legally' while endorsing torture and indefinite detention, but its actions in these arenas are composed of stunning examples of arbitrary state power incongruent with the basic legal virtues of generality, consistency, and publicity. One might indeed go a step further with Jeremy Waldron and argue that horrific practices like torture are simply inconsistent with the most fundamental normative ideals of any decent legal order, and thus cannot be coherently rendered part of any legal order deserving to be described as such (Waldron, 2005). So, at the very least, Brunkhorst's argument rests on an extremely loose and arguably indefensible conception of law: If Abu Ghraib and Guantanamo Bay are still somehow consistent with US fidelity to the law or legal code, it frankly becomes hard to envision *what* state actions might *possibly* contravene it. But then the distinction between 'illegality' and 'extra-legality' on which the overall argument depends begins to seem rather tenuous, particularly in light of the substantial analytic weight it presumably is expected to carry.

Of course, a great deal of existing global law consists of exceedingly soft, vague and even unwritten norms, as Brunkhorst notes, which is one reason why even Kelsen's most sympathetic critics repeatedly argued that they remain susceptible to 'shifting conditions of power relations and power politics' to a vastly greater extent than domestic or municipal law (Herz, 1964: 112). A central source of the familiar weaknesses of international and now global law, of course, is that its application and enforcement at the international level remains — despite the achievements of the United Nations and many other valuable developments — highly decentralized, which necessarily conflicts with the quest for legal regularity and generality. Indeed, in

some contradistinction to his most recent disciple, Kelsen at least seemed to acknowledge the significance of this point, forthrightly describing the weaknesses of what he described as a 'primitive' system of international law, and openly suggesting that only the centralization of executive power at the global level might, for example, permit far-reaching disarmament (Kelsen, 1948: 155-156). So at least at some junctures Kelsen seemed to temper his own utopian legalistic aspirations with a hard-headed recognition of the fact that the legal revolution he hoped to bring about remained, to a great extent, a normative and political *aspiration* which ultimately might require the institutionalization of impressive state-like capacities at the global level.[14] Kelsen, in fact, arguably lacked Brunkhorst's fundamental hostility to ideals of global federalism or a world state, though he certainly considered — and was right to do so — its realization exceedingly unrealistic in the foreseeable future. Yet he remained more willing to concede its potential advantages.

Revealingly, in his discussion of U.S. torture and detention policies, Brunkhorst directly reproduces Kelsen's own unsatisfactory response to those who argued that the harsh facts of interstate warfare conflict with his liberal progressivist account of legal development. In opposition to those who saw recourse to war as an extra-legal abrogation of law and thereby — Kelsen claimed — misleadingly conceived of force and law as fundamentally inconsistent, he famously argued, we should treat all such acts either as (legally based) *delicts* or *sanctions*, and thus as attempts to violate or sanction the law. Even unilateral military reprisals, in this view, should be interpreted as fundamentally *legal* acts, albeit ones potentially *il*legal in character. As Kelsen reminded his readers, when states go to war even under suspect circumstances they typically appeal to legal norms to justify their actions.[15]

Yet this argument, like Brunkhorst's recent attempt to update it, obscures the deeply dubious character of many such legal appeals, as well as the fact that their fundamental source remains the unpleasant political facts of interstate rivalry and power competition. The intellectual danger here, as Kelsen's student John Herz many decades

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[14] This is how Herz and many others have said we should best read Kelsen.
[15] For useful critical discussions, see Herz (1964: 108-112); in a similar vein Bull (1986: 326-330).

ago pointedly noted, is that what for all effective purposes are indeed best described as 'extra-legal' practices misleadingly get dressed up in legalistic garb (Herz, 1951: 99-102). This position misconstrues the fact that as long as enforcement among states remains fundamentally decentralized,

> it is not the exceptional, but the normal case that there is no general agreement in treating acts of force as either a delict or sanction. It is not the case that there is normally agreement in international society as to which side in an international armed conflict represents the law-breaker and which the law-enforcer. There is commonly disagreement on this matter, or there is agreement that the conflict should be regarded as a political one in which each side is asserting its interest.
>
> (Bull, 1986: 329-330)

Like Kelsen, Brunkhorst is right to underscore many of the recent advances in international and now postnational law. Yet he ultimately downplays the *structurally-rooted* differences separating domestic from international and global law. To be sure, global law now arguably covers every imaginable political situation: Ours is indeed a deeply globalized legal order. Yet as the Bush administration has unfortunately reminded us, the extent to which norms are applied and interpreted uniformly, or even applied at all, still depends to a substantial degree on the 'sovereign' will of individual states. Recognizing that point hardly requires, by the way, subscribing to the thesis that states thereby possess a non-legal or extra-legal core, or a closet affinity for Carl Schmitt. However, it does entail acknowledging that especially — though not exclusively — the great powers continue to possess substantial discretionary authority when applying, interpreting, and enforcing international norms. Admittedly, even at the national level, general norms must be particularized, and the process by which this takes place often leaves much to be desired. But the deep structural differences that continue to distinguish domestic from global political and legal conditions means that typically we can expect their uniform application at the domestic level, whereas its achievement remains a vastly less certain matter 'beyond the nation-state'.

Many of Kelsen's criticisms of traditional ideas about the dualism of 'national' vs. 'international' law remain persuasive. Certainly, the

reactionary versions of this thesis articulated by Schmitt and other authoritarian German theorists offer no constructive guidance as we seek to reform the global order. But here again, we should perhaps hesitate before throwing the baby out with the bath water and simply discarding *any* version of this dualism, just as we might legitimately seek to reformulate traditional ideas about state sovereignty. Although I cannot sufficiently defend this thesis here, there may be some sound normative reasons for doing so (see Cohen, 2004).

Conclusion

To date, Hauke Brunkhorst has developed the theoretically most sophisticated interpretation among critical theorists of the position that we can and should aspire to achieve democracy beyond the level of the nation-state without having to construct postnational states. If some of my criticisms seem pedantic, it is only because the obvious virtues of Brunkhorst's theoretical achievement — which Habermas quickly and astutely recognized — require those of us similarly sympathetic to global democratization to scrutinize his ideas and proposals carefully.

So should we then instead try to construct postnational states or even a democratic world state? If so, does not my implicit programmatic alternative to the ideas of Brunkhorst and Habermas seem unrealistic and indeed probably utopian?

These are legitimate questions. Let me just conclude by noting that there clearly are many sensible reforms *short* of regionalized or globalized statehood which both nation-states and regional organizations like the EU might undertake in order to deepen self-government. As Phillip Schmitter has proposed, for example, nation-state might sensibly accord each other seats in their legislatures to representatives of other states with which they are intensely involved (for example, within free trade zones like the North American Free Trade Agreement, NAFTA) (Schmitter, 1999); Brunkhorst's own call for cross-border referenda in the EU and elsewhere has much to be said in its defense. So my point is *not* that strengthening democracy between and among nation-states is altogether impossible without the establishment of postnational states.

Brunkhorst and Habermas have not simply advanced the relatively uncontroversial thesis that existing states might cooperate in novel

ways in order to deepen democracy between and among them, however. Instead, they advance a significantly stronger thesis: They argue that what we might describe as the *robust* or *full-fledged* democratization of our emerging system of global governance is possible *without* the simultaneous achievement of postnational state institutions. It is this claim which deserves a skeptical reception. If we seek *substantially* augmented decision-making at the regional or global levels, as we understandably might, let us not deceive ourselves into thinking that 'global governance without (democratic) government' will ultimately do the job. Far-reaching democratization beyond the nation-state, in which egalitarian procedures of decision-making are effectively protected and the results of the political process systematically enforced, will ultimately require the realization of state institutions.

To be sure, the realization of a global federal republic, or even a federal Europe, seems politically unrealistic today.[16] By the same token, this is hardly the first time that we are forced to recognize that what remains normatively and politically desirable necessarily represents a long term political project. Better to look the many difficulties posed by that project directly in the eye than pretend that we can have meaningful democracy 'beyond the nation state' without the institutional prerequisites that remain indispensable to it. Ours indeed is a 'time of transition', as Habermas has aptly entitled one of his recent books. Rather than conceal the unattractive attributes of our transitional era, in which nation-states are in decline, but new state forms have yet to emerge, by dressing up ugly facts in misleading talk of global governance, we would do well to think hard about the awesome political and institutional challenges at hand.

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[16] Interestingly, there has recently been a revival of serious theorizing among international relations scholars about the idea of a world state. Much of the debate is motored by a matter that rarely gets mentioned in recent critical theory work on globalization: The horrific possibility of nuclear omnicide. See, for example, Deudney (2007).

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Chapter 6

Two kinds of transnational democracy
Comment on William E. Scheuerman

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I agree with William E. Scheuerman's remark that the version of post-state democracy he is criticizing in his chapter is one of the strongest versions currently available, not because it has been proposed in the most detailed or well-rounded form, but because it takes the democratic credentials of the resulting political order more seriously than most of its competitors. Hauke Brunkhorst's conception of democracy beyond the state is perhaps the version most aware of what would have to be the case in order to embrace a regional or global political order as 'democratic'. Neither Scheuerman nor Brunkhorst are in the game of reducing the democratic threshold for post-state contexts, nor are they involved in the characteristic 'democratic deficit' game that many commentators have engaged in in the past by spotting less-than-democratic features in rivaling conceptions. If there is one central commitment that both authors share, it must be one to an unabridged understanding of democracy at whatever political level it is to be realized. Like Brunkhorst, Scheuerman is not in principle skeptical about the possibility of democracy even in large territorial states; he is also on record as saying that he believes there is no obstacle in principle to developing post-national forms of democratic government in a recent critique of

Ingeborg Maus's work (Scheuerman, 2011). Both Scheuerman and Brunkhorst are keen anti-nationalists and discount the need for a *demos* to display a pre-political identity, be it cultural, linguistic, or ethical. Still, both authors end up with widely differing positions on democratic politics beyond the state.

In my brief remarks, I want to concentrate on two issues on which their positions differ: My first point is mostly critical, while the second point is made in an affirmative spirit to Scheuerman's proposal. The first concerns the relation between government and violence or coercion. Here, I find plausible what Brunkhorst says and want to press Scheuerman to be more explicit about his own understanding of the preconditions of effective political order. My question is: Is there a necessary and internal connection between political decision-making and the *immediate* disposal over means of violence, or is this connection contingent? The second issue concerns alternatives to the standard regional or global model for post-state democracy. Brunkhorst, although not a partisan of idealistic conceptions of cosmopolitan democracy, tends to conceive of democracy beyond the state almost exclusively along supranational lines. Here I side with Scheuerman's complaint that various alternative suggestions do not get their proper attention and hope to provide some more inspiration for an alternative form of democracy beyond borders below.

Government and coercion in supranational democracy

The central point in Scheuerman's critique could perhaps be labeled that of *Gewaltvergessenheit* in post-statist accounts of democracy: Their forgetfulness of force, violence, or, as Scheuerman himself puts it at one point, 'muscle' (Scheuerman, chapter 5 in this volume: 83). I share Scheuerman's Weberian intuition that the political system's monopoly in its capacity for organized violence is a central issue for the feasibility and viability of post-state democracy, but have a point of concern. Brunkhorst sometimes talks about a 'division of powers' or 'separation of powers' when what he means is that various political competences and resources are being stored at several level of multilevel government, e.g. between the European and nation state level, where unquestionably most executive resources have remained with the nation state (Brunkhorst, 2002). (The same distribution of

resources in principle holds on a global level, with the United Nations Security Council authorizing the use of coercive force in the form of armed forces of national governments.)

In this context, the notion of a division of *powers* may be misleading. In its classical understanding, 'division of powers' does not refer to a constellation in which some actors get to make decisions, and some other actors get to store the guns, but to a constellation in which some actors get to make decisions of type A and to some other actors get to make decisions of type B. Still, Brunkhorst's description of the distribution of competences and responsibilities appears to be basically correct: both the European Union (EU) and the United Nations (UN) are characterized by a central *lawmaking* authority combined with the lack of centralized police or military *forces*. He contends that nevertheless both organizations in principle have the means of organized violence at their disposal because member states hold the required capacities for them. According to Scheuerman, this division of labor neglects the fact that traditionally, three crucial democratic features have depended on the state having a monopoly of violence at its *immediate* disposal: The fairness of democratic procedures, the effective enforcement of policies, and, finally, the very possibility of a re-distributive welfare regime (cf. Scheuerman, ch. 5: 83ff.). The issue between Scheuerman and Brunkhorst is thus whether democratic government requires that lawmaking authority and coercive monopoly need be realized on the same level of government.

The most significant context of multi-level government on which to present a test case is that of the European Union. Scheuerman challenges Brunkhorst to come up with a reason taken from European institutions or collective psychology to account for the feasibility of violence-free integration. In my view, Brunkhorst can sidestep this challenge since he has always insisted on European *legal supremacy*, which gives a coherent account of pairing central decision-making powers with local enforcement powers. In order to show that Brunkhorst's conception is not vulnerable to criticism in *all* areas mentioned by Scheuerman (fairness of democratic procedures, effective enforcement and redistributive policies), I want to focus on the first area and illustrate it with an issue about democratic procedure in the sense of the allocation of civil and political rights. Imagine the United Kingdom chose to withdraw from the Union

altogether. Such a move would strip its citizens of their rights of residence and of political participation, for example in local elections, in other EU member states, and at the same time strip the citizens of other member states of their reciprocal claims in the UK. Clearly, the fairness of democratic procedures both in the UK and in those states would be at stake in a unilateral opt-out by the British government, and it is not unlikely it would be challenged by individuals at one or more national or European courts, as their basic civil and political rights would be on the line (cf. Brunkhorst, 2005: 163ff.). It is not clear to me that European Courts or the newly established UK Supreme Court would not be prepared to invalidate such a decision based on their commitment to the rights of European citizens. Let us assume for the sake of the argument that the UK government complied with the national or European adjudication of the case. This would show that in a situation of manifest conflict, an important issue of fair democratic procedure beyond the nation state could be safeguarded in the absence of centralized coercive resources. Other matters of fair democratic procedure, and perhaps the tough policy matters mentioned by Scheuerman, may prove more recalcitrant to resolution by a multilevel government locating lawmaking and implementation on various of its levels. But especially in rights-sensitive issues, assuming responsivity on the side of national executives to non-coercive court decisions on various levels of a multi-level system does not seem overly idealistic.

An alternative form of democracy beyond borders

The focus of debates on democratization beyond the state is currently provided by international organizations with supranational elements. This has justifiably been inspired by the post-WWII success story of the European Union, but has tended to overshadow alternative ways of transcending state boundaries in a democratic way. In closing, William E. Scheuerman alludes to one avenue that unfortunately has not been much explored in recent theorizing on postnational democracy, namely the possibilities of inter- and transnationalization of domestic politics *within* well-defined democratic states. He mentions in passing a suggestion made by Philippe Schmitter, namely that national parliaments should exchange some members with neighboring states, precisely in order to highlight and potentially avoid the externalization of costs, which, as defenders of global governance never tire to remind us, is one of the unsolved problems with traditional state-centered democratic politics

(Schmitter, 1997). Such an exchange would amount to a bilateral opening of nation-state borders of political decision-making, but would function in the absence of the creation of a new, third, polity. Schmitter here unwittingly takes up one of a whole number of similar proposals that were developed and fully formed already in the eighteenth century, by authors like Rousseau, Kant or Bentham. Taken together, they indicate what a non-supranational model of democracy transcending the nation state could look like. They sketch a vision of a cosmopolitically enlarged single state or, if you will, of cosmopolitanism in one country (Niesen, 2011). Let me briefly illustrate this alternative, largely neglected resource for democratic institutions that transcend state boundaries, by mentioning four of its features.

Most enlightenment authors, in designing elements of border-transcending democracy, refrained from going supranational and designing post-national democracies on a regional or global scale. In opening nation state borders to outside political influence, they attempted to solve problems of congruence – of the non-identity of governing and governed – without invoking more encompassing polities. While authors like Rousseau, Kant and Bentham were in favor of cosmopolitan developments, they argued for the realization of cosmopolitan principles within single states. Their political philosophies recommend inviting non-citizens and foreign representatives to share in republican political will- and decision-formation in at least four areas. The first area is in constitution-making, by inviting foreign experts. In Rousseau's and Bentham's model of constitutional design, foreigners are capable of helping citizens out because of their impartiality and superior expertise. The second area for non-citizen participation is in legislation. This is the 'reciprocal representation' model favored by Schmitter and, in the early 19th century, by Jeremy Bentham:

> Were the French and English legislature to interchange a few Members, there could not be a more powerful means of wearing away those national antipathies and jealousies which as far as they prevail are so disgraceful and so detrimental to both countries.
>
> (Bentham, 2002: 250)

The third idea, again, comes from Bentham. His early writings on electoral justice include the suggestion that the right to stand for election should be extended to foreigners (ibid.). The fourth idea comes from Immanuel Kant, who was perhaps the first author to realize that a republican understanding of political communication need not be restricted to communication within the confines of nation state borders and argued for open borders for political speech. All these suggestions, of course, would need to be modified according to today's political needs and complexities, but they seem in principle desirable and not inconsistent with commitments to strong cosmopolitan understandings of post-national democracy. Processes of constitution-making have been internationalized in response to the difficulty of transitions to democratic rule, although practices of Schmitterian 'reciprocal representation' have not caught on. The European Union has gone some way in awarding non-citizens civil and political rights, but the reciprocal allocation of participatory rights does not seem to necessitate a supranational setup. Some countries grant their citizens electoral rights, even if they have lived abroad for decades, have taken on a new nationality and do not intend returning (Owen, 2009). Other countries automatically extend voting rights, though not naturalization, after brief periods of residence. Finally, although free expression is perhaps best conceived of as a civil right, we have grown accustomed to non-citizens and non-denizens joining public debate. Countries that clamp down on border-crossing political speech like Russia or China have been forced on the defensive. Still, most research on democracy beyond the state is focused on overarching supranational collectivities that embrace several states, not on the less ambitious alternative sketched here. Whether cosmopolitan ideals are best served through political processes permeating, yet not replacing the decision-making powers of single states, or in the state-like transformation of ever larger polities, remains an open question.

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Chapter 7

Legitimacy, supranationalism and international organizations

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Introduction

Democratic legitimacy justifies authoritative decisions. It ensures that the social contract is observed since it means that the will of the people defines the conditions for the exercise of public power. Constitutional orders therefore aim at setting up procedures in which collective self-determination is transformed into political practice. Since individual autonomy does not simply merge, but may even be in conflict with majoritarian collective self-determination, norms must be developed on how such collisions are to be resolved and minorities protected. This is the role of the rule of law and fundamental rights.

International organizations dispose of a wide range of tasks and powers, which question these apparently trivial constitutionalist axioms. Some international institutions, such as the European Union (EU), the North Atlantic Treaty Organization (NATO) or the United Nations Security Council, take decisions that have more or less direct effects on basic rights of the individual, others are confronted with the administration of risks that are hard to assess, such as the treatment of genetically modified organisms (GMO) under the

system of the World Trade Organization (WTO). In certain cases, policies that are hard to negotiate or to decide simply by majority vote are at issue, in particular if they involve ethical or religious convictions. The ongoing debate on genetic engineering under the auspices of various international organizations, trade with traditional knowledge or internationalized concepts of education, as found in the frameworks of United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Organization for Economic Co-operation and Development (OECD), might serve as examples.

If the solution to conflicts of that kind is sought on the international plane, questions of how specific and significant decisions made on that level can be and how firmly the consensus found can be rooted arise. In negotiations preceding international norm-setting, differences in priorities between the participating states become apparent, for instance, between technical and economic progress on the one hand, and the protection of the environment or human health on the other (see e.g. Simitis, 2004: 167ff.). Conflicts of that kind do not only characterize policy-making within the EU, but also negotiations between the EU and global organizations, and between the EU and its members, especially as these conflicts often concern legal issues within the frameworks of the WTO or the International Labour Organization (ILO). Such examples remind us that the demand for democratic legitimacy, under conditions of global governance, must be addressed on three planes: The national, the European and the international level.

The peculiarities of international law-making are, however, a reason for caution when 'the' international level is considered as a single phenomenon. To put it differently, fragmentation of international law adds a dimension to the problem, which makes it more difficult to address the topic of legitimacy simply as a problem of the interrelationship between the three levels: The various organizations dispose of very different methods of standard-setting, and each sub-system has its own perspective on which norm-system takes priority.

In the following sections, the question of democratic legitimacy of norms produced beyond the state levels and of the respective law-making institutions will be addressed in four steps. First, it will be asked on a theoretical level which criteria may be used to assess

legitimacy. In the following sections, the two levels of European Union law and of public international law will be treated separately.

Legitimacy and legitimizing

According to Max Weber, an order is legitimate which presents itself with the prestige of exemplary and binding force (Weber, 1972: 16).[1] Its legitimacy consists in the chance to be treated as binding. The legality of an order is legitimate if it is imposed authoritatively or agreed upon. This so-called sociological concept of legitimacy, which refers to the factual recognition of authority, denominates extra-legal criteria for the binding nature of legal norms. However, it does not relate itself to the justice or worthiness of recognition. For the purposes of this contribution, therefore, a normative notion of legitimacy has to be considered.[2]

Such a concept would address the question whether a norm is 'right' or 'just'. In that regard, substantialist and procedural approaches are to be discerned. The first school of thought seeks to name values or principles whose violation would undermine the justified expectation that those subject to a norm will comply. The difficulty is to secure agreement on the underlying value judgments.

Procedural theories focus on the creation of rules and decisions. The input-oriented variants start from the assumption that self-determination is an end in itself. Depending on the author, procedural theories either claim participation for all who are parties to the social contract or for all who are subject to authoritative measures. Such demands are satisfied by the organization of general elections or by procedures of inclusive decision-making.

The relevance of procedures is also appreciated by a more output-based point of view. The necessity to transfer decisions to representatives, and to an executive controlled by them, enhances the prospect of rational decisions. It is submitted here that bodies of experts and ethics committees composed by a pluralist pattern may

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[1] See also Luhmann (1978: 27ff.); as to the relationship between law and legitimacy (ibid., 239ff.).

[2] For an excellent overview, see Petersen (2008: 8ff.)

further ameliorate the outcome, the more so if they can provide for more public participation and debate.

Such procedural concepts are suggested by discourse theories which put an emphasis either on the participative or on the deliberative aspect of decision-making (Habermas, 1992: 349ff.; Cohen and Sabel, 1997). The desired results are impartiality of the decisions and universality of their contents. Their advantage *vis-à-vis* substantialist value statements is that the outcome had been subject to justification in discourse. The power of the better argument, in turn, has an ethical foundation. However, procedural models are intuitively convincing only as long as there is consensus on the limits of what is negotiable. Subject-matters are conceivable where this is not the case, as, for instance, bio-ethical disputes seem to demonstrate. This kind of limit-questions often, at the same time, touch epistemic frontiers, which might explain the popularity of expert committees or similar institutions and the role they play in some legal systems with respect to the protection of fundamental rights.

The attractiveness of discourse theories is due to the fact that they correspond to law-making procedures in democratic constitutional states and that they convey the dignity of moral rightness to the law produced thereby. They are put to the test when the chain of legitimacy, which connects the law with the sovereign, becomes thin or even interrupted, as it is the case beyond state institutions on the inter-state level.[3] What follows from such concepts, however, is that there must be institutions and procedures also on the international plane where agreement on the contents of norms may be sought and where the interests involved can be articulated with a legitimate expectation to be heard (Buchanan, 2004: 73; Forst, 2007: 355f.).

Legitimacy, therefore, refers to the quality of a normative order. The procedure that provides legitimacy, against the background of the foregoing considerations, may be referred to as 'legitimizing'. Democratic legitimacy thus denotes an institutional principle, which guarantees the self-determination and participation of the people concerned in the creation of normative orders. Procedures which organize the citizens' input are complemented by procedures

[3] See contributions in Niesen and Herborth (2007).

oriented toward the result of the decisions made. These results are not necessarily without any moral connotation, since output may also be measured by the way it contributes to self-determination (Bogdandy, 2003: 864f.); however, their relationship to the democratic principle is an indirect one. Hence, a perspective is established from which the two levels of decision-making beyond the state may be analyzed.

The European Union

The democratic or legitimacy deficit of the EU is a topic whose discussion, even though passing through different phases, is still persistent. It has become more urgent the wider the initial economic objectives of the European Community have expanded. In the meantime, the EU has developed into a multilevel, if not a quasi-federal, system on which theories of federalism may supply knowledge and experience.[4]

European law-making

Impact is not a matter of quantity alone, but the quota of national legislation influenced by European Union law may serve as an indicator. Estimates vary significantly. According to the official statistics of the German Parliament, the *Bundestag*, 30 per cent of current legislation implement normative demands of the Union. Euro-skeptic statements hold that 80 per cent of all law, or of economic law, depending on the author, implement European legislation (Moravcsik and Töller, 2007: 6).

As in the German federal system, European law-making is a product of joint policy on the federal and state levels. The active role of government representatives, a general pattern of negotiation, mere indirect participation of parliaments of the lower layers, and diffusion of political accountability are common features of that type of compound legislation.

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[4] It is not the purpose of this article to re-launch the debate of the 1990s on the interpretation of the term 'federalism' in the EU context; it is suggested to use the concept as one of comparative constitutional law which may have a certain heuristic value in recognising characteristics of the political system of the EU. For a parallel analysis of German federalism and EU multilevel constitutionalism, see Kadelbach (2007: 7ff.).

Already in the draft phase, which is the responsibility of the Commission, member states and interest groups try to have their say in a way which is only rudimentarily spelled out by law, but nevertheless systematically organized. Deliberative democracy theories might deduce positive aspects from that procedure, but under a constitutional law perspective it is almost common ground that personal legitimacy of the actors and substantial legitimacy of the outcome may at best be improved, but not created by it. According to the prevailing opinion, the democratic legitimacy of the Union is twofold in that it rests on: (a) the national parliaments, which stand behind the Council members; and (b) on the European Parliament, which legitimizes the Commission and its activities. Both pillars are arranged in an asymmetric pattern since there are neither European election campaigns for the Commission's presidency nor positive legislative powers vested with the European Parliament. This lack of an autonomous democratic responsibility on the European level is due to the will of the member states who keep insisting on having the last word. According to the highest national courts in different member states, European integration is a constitutional objective, but the national constituencies are the decisive representatives to channel people's sovereignty.[5] Accordingly, the democratic deficit is not only democratically legitimate, but constitutionally mandatory.

In reality, however, the last word is not with the national parliaments. As in the German federal system, with the parliaments of the states (*Länder*), the national parliaments have ceded their powers to the governments accountable to them. This becomes apparent when EU directives are transformed into national law. Directives rarely leave substantial margins of appreciation, and transformation laws, also on the domestic plane, are basically prepared by the executive branch. The role of parliaments is confined to formally legitimizing governmental decisions and their general

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[5] *Entscheidungen des Bundesverfassungsgerichts* 89, 155 (Maastricht Treaty); ibid., *Neue Juristische Wochenschrift* (2009): 2267 (Lisbon Treaty); Danish *Højesteret*, Carlsen v Rasmussen, dec. of 6 April 1998, with annotation by Hofmann (1999); decisions which subordinate EU law to national constitutions point into the same direction, see Conseil d'Etat, Societé Arcelor Atlantique et Lorraine et al., dec. 287110 of 8 February 2008; with respect to Greece, Manganaris (1998).

control. It has been tried repeatedly to supply the national legislatives with instruments to exert more influence on an earlier stage of law-making. The German experience, however, is not encouraging. Members of parliament are not very active in using the margins left by European directives and framework-decisions, efforts of the German Federal Constitutional Court (FCC) to induce a change notwithstanding.[6] Whether the so-called early warning mechanism introduced by the Lisbon Treaty will provide for more attention is open to some doubt. In theory, this procedure would subject European legislation to a review under the subsidiarity principle to be initiated by national parliaments. However, it is not to be expected that these parliaments will very often have an interest in undermining the policies pursued by their governments.

It seems that the prospects for improvements within the system are limited. One of the few options is to further pursue the approach taken in the Lisbon Treaty and to extend the co-decision procedure (formerly Article 251 EC) to all subject matters. Thus, the fields where the European Parliament does not yet have the so-called veto position introduced in that process are under pressure. This need is more urgent the more unanimity voting in the Council is replaced by the majority principle since possible defeats of governments in voting automatically concern their parliaments as well (Petersen, 2005: 1517f.). The problem is mitigated by the fact that the Council in practice rarely casts a vote, but it does not change much with respect to the need for more democratic elements in the overall system.

Also in delegated law-making, options for more influence of the European Parliament have become more visible. This tendency is documented by the various generations of comitology procedure, where the European Parliament has recently gained a right to information and to re-claim responsibility, although the executive-friendly jurisprudence of the European Court of Justice (ECJ) did not precisely encourage such a step.[7] The Lisbon Treaty elevates this improvement to the level of primary law.[8]

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[6] With respect to the European arrest warrant, see *Entscheidungen des Bundesverfassungsgerichts,* 113, 273.

[7] Council Decision on Comitology. *Official Journal of the EU* [2006], No. L 200, p. 11.

[8] Article 290 TFEU.

An interesting phenomenon, which lies beyond formal law-making of the EU, is the methods of co-ordination of policies. They are envisaged for different fields, as for instance general economic politics and science policy. For the latter, as for others, the Lisbon Treaty explicitly provides for the so-called open method of co-ordination[9]. This means that the EU may act in certain areas where the member states have retained their powers by setting guidelines, time-tables, benchmarks and measuring standards and by evaluating and observing the results. The procedure does not create any legal obligations, but it establishes political incentives which should not be neglected. The so-called Bologna process, which aims at harmonizing time-frames and diplomas at university, may serve as a significant example. The question of whether this process needs a specific additional legitimacy and which role national parliaments ought to play, apparently, has not yet been identified as a topic of constitutional law.

European administration

Many activities of the EU are administration in a technical sense, for which the Commission or specialized agencies are responsible. As far as legitimacy is not derived from primary or secondary Union law, as is the case with the implementation of certain framework programs, a basis may be found in the budget passed by the Council and the Parliament. Supplementary legitimizing features may be seen in principles of good governance, such as good administrative practices, participation, transparency, accountability and external expertise.

European administrative practices do not always live up to such standards. With respect to research programs, for instance, deficits in transparency cannot be overlooked (see Kotzur, 2006: para. 38, notes 74 and 76). However, the problem appears to be identified, and with efforts to initiate public debate as well as with the setting up of ethics commissions, a traditional approach is taken which corresponds to strategies pursued on the national level. An outer limit is marked by the fundamental rights of the European Union.

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[9] With respect to science see Article TFEU, Lisbon version; see also Articles 148 (employment), 156 (social policy), 168(2) (health) and 173(2) (industrial policy).

In terms of democratic legitimacy, vertical and horizontal co-operation between administrative authorities is more of a challenge. Since European and national authorities produce administrative policies in many subject matters, the question to which entity such an administrative compound is accountable becomes difficult to address. It appears that the joint-policy-trap experiences in intra-federal relationships, as they have been made in the German, Austrian and Swiss systems, had to be made again.[10]

European judiciary

States legislation in a classical sense is not only limited and overarched by compound law-making, but also by the implementation of the objectives of the founding Treaties, in particular the fundamental freedoms of the Single Market as they are interpreted by the European Court of Justice.

The interdependence of wide scopes of the four freedoms on the one hand, and widely defined reasons for justification of limiting legislation of the member states on the other hand, has had considerable consequences, since any member state law, and be it only remotely related to the common market, may be subject to judicial review. Hence, the market freedoms operate like a dormant commerce clause of the European federal constitution.[11] With respect to ethically sensitive subject-matters, however, the Court has recognized that the concept of public order may have a different meaning, depending on dominant morals in the member states. Thus, in the Grogan Case, it refrained from declaring an Irish ban on advertising for abortion clinics in Great Britain to be in conflict with the EC Treaty.[12] In a German case, for example, the issue was the prohibition of an interactive computer game where the players could shoot at moving human targets with laser pointers; the Court accepted the value judgment of the German police law according to which such games were in conflict with human dignity and acknowledged this decision to fall under the public order exception

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[10] For an analysis, see Scharpf (1985: 323ff.).

[11] As to the relationship of fundamental freedoms jurisprudence with federal theory, see Maduro (1998).

[12] Case 159/90 *Society for the Protection of Unborn Children* [1991] ECR I-4685.

of what is now Article 36 TFEU.[13] In these cases, a convincing balance between European and local norms was found.

Interim conclusions

The legitimizing structure of the Union may well be compared to the institutional balance of other federal systems. Remaining deficits are obvious, but equally so in federal states. They are the result of the political will of the member states executives. At least in theory it is possible to identify paths along which remedy can be sought. To ethical questions, which at times seem to question the legitimacy of the democratic process itself, the European level has no other answers at hand than the constitutional state. That some legal rules may be considered as ethically questionable by some people, as might be the case with genetic engineering or certain priority judgments between market freedoms and other interests, is not a question of legitimacy, but of rightness of contents and thus not a level-specific problem.

European multilevel constitution and administrative co-operation have features which advocate for a specific polycentric structure of legitimizing as it has developed in the institutional framework of the Union. On the level above, such an architecture seems hard to design. The following section will deal with conditions of legitimacy and with possible elements of a democratic structure on the international law plane.

Public international law

For traditional international law doctrine, it does not go without saying that democratic legitimacy is a valid legal standard. This may be the case in some systems with a small number of participants. Depending on perspective, one might either think of specific international organizations like the Council of Europe, the OECD, or the Organization for Security and Co-operation in Europe (OSCE) or of groups of 'liberal peoples' (Rawls, 2003: 10) or 'liberal states' (Slaughter, 1995: 503ff.; also Benvenisti, 2006).

But also beyond the 'liberal' world, there are indicators that democracy, as a structural principle, has become a requirement

[13] Case C-36/02 *Omega* [2004] ECR I-9609.

which has gained increasing normative force.[14] For some regional organizations, a democratic system is a condition for membership. Democratic legitimacy is a guiding principle for nation-building and international observer missions when elections are held in crisis zones. It derives from recognized norms such as the right of peoples to self-determination and individual human rights. The right to vote and to stand as a candidate is enshrined in the Universal Declaration of Human Rights (Article 21), the UN Covenant on Civil and Political Rights (Article 25), the European Convention of Human Rights and Fundamental Freedoms (Article 3 Additional Protocol No. 1) and the American Convention on Human Rights (Article 23). More and more, it has been accepted also in non-Western regional systems.

These norms are primarily binding on states, but international organizations may be addressees as well. They have taken up elements of good governance which had emerged as principles of effective and accountable administration on the municipal plane. Even though an individual right to democratic participation would be hard to defend as a rule of customary law (cf. Franck, 1992; Fox, 1992; Crawford, 1993), legitimacy, understood as accountability, may be considered as a standard, if not as a general principle (Kadelbach and Kleinlein, 2006: 235, 255ff.), of public international law which applies to international organizations.

For the question of what requirements follow from that assumption, different approaches are conceivable. The first approach would be to require that international law is legitimate in itself (see section 'Legitimacy by consensus'; Franck, 1990: 25; Kumm, 2004: 917ff.). The second method would start from the perspective of international law and examine whether existing elements of democratic legitimacy in foreign politics still properly address the degree to which administrative compound decisions are taken in the international sphere (see section on 'domestic constitutional law' below; Wolfrum, 1997: 38ff.). Thirdly, the constitutional state might be taken as a paradigm as did idealist authors who demanded the establishment of

[14] For extensive accounts of treaty law and practice, see Wouters et al. (2003) and Petersen (2008: 79ff.).

global parliamentary assemblies[15] or more modest proposals which suggested a participative internal structure and more accountability (see section 'international institutional law' below; Kingsbury et al., 2005; Esty, 2006; Harlow, 2006; Krisch, 2006).

Legitimacy by consensus

International law is the result of a consensus which is widely regarded as the fundament of its specific legitimacy (Mosler, 1974: 31ff., 90ff.; Verdoss and Simma, 1984: §§77, 519; Reisman, 2005: 15ff.). For a classical understanding, this legitimacy would only be threatened if international law were not observed (Franck, 2006: 88, 93). It is hard to contest that agreement among states has always been the basis of its binding force. The question is whether it is still sufficient.

Some doubts appear to be appropriate. Formal consent provides for a plausible basis of minimum requirements for a legal order to be respected as such. Additionally, it may explain only the state of affairs as it is and thus induces us to equate legality and legitimacy. However, it is neither capable to include the notion of justice of the law, nor do theories of consent intend to do so. There are good reasons for such a thin concept of legitimacy. However, it becomes more problematic the more space there is for political and administrative decisions on the international level that used to be taken on the domestic plane (Weiler, 2004: 547ff.). In many fields, institutions were created which dispose of the power to enact secondary law, regulations and so-called soft law of all kinds which are formally based on a founding treaty of an international organization ratified by their member states decades ago. Examples are easy to find[16]: Technical standards of the International Telecommunications Union (Hinricher, 2004), guidelines of the International Civil Aviation Organization or the International Maritime Organization (Alvarez, 2005: 223f.; Edeson, 2005: 63f.), criteria of good governance, which guide the conditionality policies

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[15] This is an old idea; see Schücking (1912: 298), Wehberg (1926: 83) and Clark and Sohn (1966: xix ff., 20ff.). More recently, Archibugi (1995: 122); Held (1995: 278ff.); Falk and Strauss (2000).

[16] For a comprehensive analysis of various phenomena, see the contributions of Bogdandy et al. (2008).

of international financial institutions (Schlemmer-Schulte, 2005: 149, 168ff.), or framework conventions in international environmental law, which convey law-making capacities to member states conferences (Bodansky, 1999: 596, 609), are only some of the phenomena of interest.

A dispute before a WTO arbitration panel on genetically modified organisms exemplifies a further dimension of the problem.[17] The panel decision claimed all regulations of states (or, as the case was, the European Union), which in any way aimed at the protection from risks for human, animals or plant health and the environment, to fall within the scope of the agreement on Sanitary and Phytosanitary Measures (SPS), a specialized treaty within the WTO system. In a second step, the question was examined whether EC measures were justified by legitimate interests. Such a justification is possible if domestic or EC regulations, respectively, correspond to international standards. In the case at hand, two treaties, the Cartagena Protocol on Bio-Safety and the international plant protection convention addressed the matter. However, the panel refused to take them into consideration because these agreements had not been ratified by all WTO members. This arbitration encountered criticism, for it tends to under-valuate non-trade public interests and accelerates tendencies of fragmentation in international law since the approach taken makes it close to impossible to reconcile the diverging interests pursued by different sub-systems of international law.[18]

For the classical doctrine of consent, there are two challenges. Firstly, conflicts arise with the democracy-principle governing constitutional states since decisions of that type only have a peripheral connection with the legitimizing parliamentary assent given to the relevant founding treaties. Secondly, it is hard to detect exactly what the supposed consent should cover, since there is no unity in international law which would reflect a concept of homogeneous 'knowledge' or 'will'.

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[17] EC – Approval and Marketing of Biotech Products, WT/DS291 et al., Panel Report, adopted 21 November 2006.

[18] International Law Commission. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.* Report of the Study Group of the ILC finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682, 2006, paras. 448 ff.

Legitimacy by institutions and procedures

After the preceding considerations, it is proposed that the legitimacy of international orders ought to be improved where international institutions can take decisions autonomously. A dual concept of legitimizing structures as it is practiced in the European Union should serve as a starting point (cf. Slaughter, 2004: 231ff.). Even though this model can not be obligatory, it may provide for some experience. The structures of international organizations and their relation to the member states can be described as multilevel systems against which structural standards derived from a constitutional perspective can be projected. Thus, on both the state and the organizational levels it will be asked if participatory rights can be created which help to compensate for existing shortcomings.

Domestic constitutional law

On the domestic plane, two approaches present themselves. Firstly, the doctrine that foreign affairs were a prerogative of the executive branch and participation of parliaments a rare exception, which must be justified, should be abandoned. To classify parliamentary ratification of treaties as an 'act of government in the shape of a statute law', as done by the German Federal Constitutional Court,[19] is an anachronism. Parliaments narrow their freedom to act substantially by such an act of ratification. Therefore, it was more than questionable, for instance, to implement the change in the orientation of NATO from a regional Cold War system of collective self-defence into a modern entity of crisis management of a world-wide reach without any parliamentary participation.[20] That the FCC requires parliamentary approval for military missions on a case-by-case basis does not fully balance out that deficiency, but it indicates that, even in a particular sensitive area with arguably exceptional character, more involvement of the parliaments is inevitable.

Secondly, procedural safeguards are required to put parliaments in a position to fulfill their function as an instance of democratic control more effectively. Mere general information by the foreign office will not suffice. Systematic structuring of the material by both government and parliament is necessary, and an organization of

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[19] *Entscheidungen des Bundesverfassungsgerichts* 1, 351 (369); 90, 286 (357).

[20] *Entscheidungen des Bundesverfassungsgerichts* 104, 151.

parliament which reflects the subject matter competencies of the executive appears to be an efficient pattern. However, suggestions along these lines confront limits of political attention. Ways to induce members of parliaments to engage actively in all the matters concerned can not simply be designed by law, but are to a considerable degree a matter of political culture.

One does not have to look far for bad examples. Before ratifying the WTO agreements, for instance, the German *Bundestag* had two weeks time for consideration in order to decide on a document which was some thousand pages long and had not even been completely translated into German. Another example is the legitimacy of the WTO Codex Alimentarius Commission. This is a committee of experts appointed by the Food and Agricultural Organization (FAO) and the World Health Organization (WHO), which works out international food standards. Since national restrictions on trade can be justified if they comply with international standards, national and European Union food laws can be, and in effect were, checked against their guidelines. Germany, for instance, acceded to FAO and WHO by mere executive agreements, and the EU is not even a member of the WHO. The process in which the members are selected for the Codex Alimentarius Commission are little transparent and hardly known by experts, let alone the general public (Stoll, 1997: 83, 101ff.).

To be sure, a reform of state institutions with respect to foreign relations powers can not give much practical influence to national parliaments on specific measures which are commonly referred to as soft law, even though such law often develops in idiosyncratic processes and may, as political facts, have substantial limiting effects on state legislatures. Therefore, the law-making processes in international organizations deserve more attention.

International institutional law

On the level of international organizations, different suggestions have been made to enhance legitimacy. One method would be to expand the institutional framework of international organizations by parliamentary bodies (Schermers and Blokker, 2003: para. 564ff.), similar to the parliaments and parliamentary assemblies of the European Union, the European Economic Area (EEA) or the association of the EU with African, Caribbean and Pacific states. An

interesting variant is found in the ILO whose conventions are negotiated by representatives of the employers and of trade unions in the member states. It was a result of its own experience that the European Parliament suggested already a decade ago to introduce a parliamentary assembly of the WTO.[21] As the examples of NATO and European Free Trade Association (EFTA) demonstrate, for setting up a body with mere consultative functions a treaty amendment does not seem indispensable, but the status and the effectiveness of participation rights considerably depend on the formal constitutional setting of the organization. Revising the organizational charter of an organization, however, is a lengthy process and it involves many conflicts and trade-offs.

A second category of improvements is hoped for from organization-specific standards of good administration and good governance, which follow general principles. Even though initiatives in that direction were either programs imposed after political pressure or plans worked out by the organization itself to enhance functional efficiency, it seems to be generally accepted that they may entail side-effects for improvements in output legitimacy.

One such underlying general principle is the principle of transparency of procedures, i.e. publicity of decisions and its criteria as well as free access to documents. A further element is the inclusion of people whose interests are affected and of independent expertise into the decision-making procedure (Bryde, 2003: 1, 8ff.; Polakiewicz, 2005: 245ff.). Accordingly, many international organizations have accredited non-governmental organizations (NGOs) to participate in the programmatic and law-making processes to varying degrees. The problem with NGOs is their legitimacy; the difficulty with experts is their selection. Both questions can be confronted with generalized accrediting or selection criteria. At least in theory, such modifications of procedures promise to base decisions on arguments, to organize formal discourse and to make motives for activities public.

Finally, procedures of internal and external auditing are suggested which may either be laid down in the institutional constitution or introduced by implied powers. Thus, internal review mechanisms,

[21] In more detail, see Hilf and Schorkopf (1999).

complaint procedures or a re-evaluation of existing structures of checks and balances can be conceived which are often possible to be implemented below the threshold of formal treaty amendment.

Concluding remarks

The topic of legitimizing international decision-making, at second sight, resembles a series of different questions of legitimacy.

There are ethical questions which reach above or beyond the legal sphere, but which are decided upon in law-making procedures. As ethical problems, they do not raise problems which are markedly different from those encountered in the domestic political debate. When it comes to risk assessment, however, conflicts with other priorities come to the fore, as is illustrated by the GMO dispute and other cases brought before WTO arbitration panels. Not all these questions are consequences of globalization and internationalization. Which matters have to be decided by parliament and which are of such a technical nature that they are best delegated to administrative bodies is hard to say also on the domestic plane. The same holds true of the limits of the amount of information a parliament can sensibly process and debate.

However, as far as genuine parliamentary responsibilities are shifted to international law-making, administrative agencies and dispute settlement, democratic legitimacy has become an abstract one. There is a growing structural democracy deficit which ought to inspire the institutional imagination of law and political science. On the one hand, the democratic principle demands continuing efforts to retain and, where possible, to enhance collective autonomy, on the other hand it obliges us not to rely on output legitimacy alone.

Therefore, both pillars of a dual structure of legitimacy of international compound decisions must be strengthened. In the constitutional law of states, traditional doctrines is to be questioned, but the growing powers of international organizations also advocate for an improvement of existing mechanisms of good governance, guided by constitutional principles.

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Chapter 8

How will constitutionalism and the idea of law-mediated legitimacy survive in postnational constellations? Comment on Stefan Kadelbach

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'Where have all the lawyers gone?' The jurist should take up Pete Seeger's and Joan Baez' query and wonder about the law's vocation in postnational constellations. Is the law really taken seriously in academic debates on the 'Political Legitimacy and Democracy in Transnational Perspective'. It seems telling that Stefan Kadelbach and this commentator were the two out of three lawyers present at the RECON conference in Frankfurt am Main in October 2008. How comforting is it that the dominating discipline at this event was philosophyand politicall theory, but not political science, to which legal scholarship has lost so much terrain in particular in European affairs? Lawyers, at least those who are aware of Kant's remarks on the peculiarities of the faculty of law (Kant, 1971: 277ff., 287), will be plagued by some scruples when asked to take the floor under such conditions. What do they have to contribute? Why can they persuade their interlocutors, to repeat an old claim (Joerges, 1996), to take the law seriously?

Stefan Kadelbach is addressing these challenges through theoretical and methodological reflections, and through a comprehensive sketch of the law's understanding of democratic legitimacy and the law's potential involvement in its defense.

His theoretical messages are twofold. One concerns the functions of law in the generating of legitimate rule. In that respect Kadelbach's position looks essentially Habermasian,[1] at least akin to Habermas' defense of the interdependence of the rule of law and democracy (Habermas, 2001a), from which we can infer that legitimate democratic rule is conceivable only when mediated by law. The second concerns the autonomy of law and legal scholarship. Is has two dimensions. As Kadelbach first underlines in his discussion of the Weberian notion of legitimacy, lawyers must not, and cannot, disregard the normative claims inherent in any legal argument and invoked in each and every litigation (Kadelbach, ch. 7: 115f.). In this insistance there is a tension between the law's normative *proprium* on the one hand, and the second dimensions of the law's distinctiveness, which Kadelbach illustrates with the German Constitutional Court's judgments on the Maastricht and Lisbon Treaties,[2] on the other. Democracy and its essentials are in an authoritatively binding way defined by law. Oliver Lepsius (1999) has explored this type of tension in a critical discussion of Luhmann's sociological theory of constitutionalism. Udo Di Fabio, the reporting judge in the Lisbon judgment of 30 June 2009, has taken it up in a recent monograph (Di Fabio, 1998) and another work (Di Fabio, 2001). It is a question of fundamental importance and an unavoidable one. Lawyers cannot suspend their commitment to democratic essentials at transnational levels of governance without further ado. They have to acknowledge, however, that they cannot project notions developed by nation-state constitutionalism on these levels. The have indeed to contribute to what RECON is all about, namely a reconstitution of democracy in the postnational constellation. .

The implications to which Kadelbach points in the context of European Union (EU) and its infamous democracy deficit seem

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[1] See the reference to Habermas in Kadelbach, ch. 7: 116.

[2] See Kadelbach, ch. 7, footnote 6 . For the preliminary English translation of the Lisbon judgment, BVerfG, 2 BvE 2/08, 30.6.2009. Available at: <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>.

paradoxical if not tragic: '[…] the democratic deficit is not only democratically legitimate, but constitutionally mandatory' (Kadelbach, ch.7: 118). That statement seems to leave not only lawyers and social scientists, but the idea of democracy itself in a dead-end alley. How stringent is this conclusion really?

Constituionalization at all levels of governance

Kadelbach's position can probably be best understood as a legacy of both of his own legal sub-disciplines. No issue in international law is more topical today than its constitutionalization. And yet, nobody does envisage the advent of a world democracy that would be an equivalent to the democratic constitutional state. Kant's definitive articles continue to be, even at a distance of more than 200 years, in important respects our only realistic option: 'The civil constitution of each state shall be republican'; […] 'the law of nation shall be founded on a federation of free states' (Kant, 2005: 9ff.). As Kadelbach rightly underlines, even 'beyond the "liberal" world, there are indicators that democracy, as a structural principle, has become a requirement which has gained increasing normative force' (Kadelbach, ch. 7: 122-123). It remains also true, however, that 'international law is the result of a consensus which is widely regarded as the fundament of its specific legitimacy' (ibid.: 124). When contrasted with the rule within constitutional democratic states, the legitimacy of governance through international law has to remain 'thin' indeed. The way forward, as Kadelbach perceives it and recommends, resembles in methodological terms the recommendations of competition lawyers when confronted with the insight that 'perfect competition' is not an available option. Then they tend to tell us we can still take steps towards our unattainable model. International law and national constitutional law can work in tandem for 'more' democracy. International organizations could be infused with parliamentary elements, adopt standards of good governance, nation state democracies could and should[3] strengthen parliamentary participation in the cooperation with international organizations. Ever more bits and pieces of democracy here and there; is this the way forward?

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[3] See *supra* note 2 on the German Constitutional Court's (*Bundesverfassunsgericht*) judgment on the Lisbon Treaty.

Kadelbach's pragmatic suggestions are to a large degree inspired by the law and policy of the EU. The legacy of that model is not so different from that of international law. Transnational democracy was certainly not among the otherwise mostly noble objectives of the founding fathers of the European Economic Community. But the quest for democratization is getting ever more urgent with the widening and deepening of the integration project. The basic constellation and dilemma, however, has stayed with us: The 'lack of an autonomous democratic responsibility on the European level is due to the will of the member states who keep insisting on their last word. […] Accordingly, the democratic deficit is not only democratically legitimate, but constitutionally mandatory' (ibid.: 118).

Is it hence in the last instance the Member States, with their parochial defense of their role as 'masters of the Treaty', that stand in the way of transnational democracy? Then we would know the enemies but at the same time we would know that we have no chance to overcome their resistance in the foreseeable future. Caught in such a dilemma, all we can strive for are the type of pragmatic peace-meal innovations which Kadelbach discusses in the remainder of his essay. However, our prospect, at least in the EU, does not look too bright, This reservation holds true for both of his prime examples. In the realm of delegated law-making by the European Commission and in the implementation procedures where Kadelbach advocates steps towards better governance through more 'participation, transparency, accountability and external expertise' more 'efforts to initiate public debate', and we should not be too optimistic. In December 2010 and thereafter the European Commission has made it clear how it understands the new Articles 290 and 291 of the Treaty of Lisbon on delegated legislation and implementation. The role of Member States will indeed be weakened; but the winner seems to become the European Commission rather than the European Parliament.[4]

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[4] See the Communication of the Commission 'on the Implementation of Article 290 of the Treaty on the Functioning of the European Union', COM(2009) 673 of 9 Dececember 2010 and the Commission Proposal for a 'regulation laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers', COM(2010) 83 of 9 March 2010 which the EP has in

Similarly, the kind of sensitive balancing between economic freedoms and national regulatory concerns which Kadelbach observes and appreciates in the jurisprudence of the ECJ is no longer vsible in particular in the Court's recent case law which overrules national labour law and social rights. [5]

There is nothing inherently wrong with pragmatic improvements. In view of the difficulties we are confronted with we should also consider radically new perspectives.

Conflicts law as alternative constitutional paradigm

Are we to live with non-democracy *ad infinitum?* Is this really necessary or do we get these unsatisfying answers because we pose the wrong questions? This is indeed what I would like to submit in my three concluding remarks, albeit here very briefly.[6]

My first and most fundamental concern is with the debate on the democracy deficit. My argument is not interfering with the enormously rich deliberations of contemporary constitutionalism on the 'nature' of democracy. What it seeks to accomplish is a defense of democracy on different grounds. My argument starts from the schism between decision-makers and those who are impacted upon by decision-making. It was clearly elaborated in an essay Jürgen Habermas (1991) made public prior to the publication of his theory of the democratic constitutional state (1992: 632-330), and later explained in greater detail (2001b: 86ff.): Increasingly, constitutional states are unable to guarantee the inclusion of all of those persons

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the meantime endorsed; see the European Parliament legislative resolution of 16 December 2010 on the proposal for a regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, EP Plenary Report on texts adopted on 16 December 2010.

[5] See Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union* v. *Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05; *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case 346/06,;*Dirk Rüffert* v. *Land Niedersachsen* [2008] ECR I-1989, and the critique by Joerges and Rödl (2009).

[6] For an elaboration of the following argument, cf. Joerges (2010; 2011).

who are impacted upon by their policies and politics within their internal decision-making processes. The notion of self-legislation, however, which postulates that the addressees of a law are at the same time its authors, demands 'the inclusion of the other'. Why then, should we not understand European law as a possible means to 'include the other'? As a consequence of their manifold degree of interdependence, the member states of the Union are no longer in a position to guarantee the democratic legitimacy of their policies. A European law that concerns itself with the supervision of external effects of national laws and policies, i.e. which seeks to compensate for the failings of the solipsism of national democracies, may induce its legitimacy from precisely this compensatory function. With this European law can, at last, free itself from the critique that has accompanied it since its birth; a critique that states that it is *not* legitimate. It can thus operate to strengthen democracy within a contractual understanding of statehood, without needing to establish itself as a democratic state. This is not just a free-floating juridical construction. Often enough, European law has given legal force to principles and rules, which serve the purpose of supranational 'recognition' of foreign concerns. Suffice it here to point to the non-discrimination principle, the supranational definition and demarcation of legitimate regulatory concerns, the demands for justification for actions that are imposed upon national legal systems, the proportionality principle – which supplies a legal yardstick against which respect for supranationally-guaranteed freedoms may be measured – and the demand that all public exercise of power pays due regard to fundamental rights. All these principles and rules may be understood as a concretization of a supranational conflicts law, which guarantees that the actions of the member states are reconcilable with their position within the Community.

My second claim concerns Kadelbach's queries with the administering of Europe. The need for a 'common' European administrative level of governance is obvious and uncontested in principle. For the architects of the internal market, however, it was never really an option to institutionalize some hierarchically-structured bureaucracy. Instead, to continue the path on which Europe had from early on established a level-transcending, continuously active, 'political administration', i.e. the committee system as first developed in agricultural policy. In official parlance, this institutional arrangement is termed 'comitology' (for details, see

Falke, 2000; Vos, 2009). Its obscure sound equals the complexity of its task to reduce the functional and structural tension of the Internal Market project and so many spheres of European politics. As Kadelbach correctly observes, often enough, the implementation of pertinent regulatory policies touches upon politically-sensitive topics (Kadelbach, ch. 7: 121f.). The comitology system has then to mediate between functional requirements and normative concerns. The composition of committees will therefore mirror the task of taking different strands of expertise into account before coming to a practical synthesis. Thus, comitology more or less succeeds in adequately mirroring the given plurality of interests and political diversity which have to be balanced in the implementation process. This is why comitology can and should be understood and practiced as a mode of conflict mediation rather than as merely an 'application' of law to the problem at hand. The 'third way' we are advocating here are transnational substantive provisions which are neither identical with the provisions of one of the concerned jurisdictions nor represent prerogatives a super-ordinate federal legal level and hence retain the function of collision norms as 'material norms in the conflict of laws' (*kollisionsrechtliche Sachnormen*) (see earlier Steindorff, 1958). In contrast to the norms of public and liberalistic conflict of laws, such substantive solutions cannot emerge in strictly and exclusively legal operations. Instead, these substantive responses have to be generated in procedures which mirror their political implications and mediating functions. It is precisely for this reason that comitology is an appealing institution. Some significant pieces of evidence indicate that the considerations of problems are usually conducted in an objective-deliberative manner, which is, unfortunately until today, overly insulated from the broader public – comitology needs, and deserves, as Jürgen Neyer and I have asserted a long while ago to be 'constitutionalized' (Joerges and Neyer, 1997a; 1997b). As has just been underlined, the understanding of the new Articles 290 and 291 in the Treaty of Lisbon which the European Commission promotes are not in line with such perspectives. The readiness to re-conceptualise the challenges opf Europe's 'political administration' is, however, an indispensable prerequisite in the strive for an instutional design which would deserve recognition.

The third remark is in practical terms very much in line with the concern Kadelbach illustrates with politically highly sensitive cases, like international tribunals, and in particular the dispute on

genetically modified products.[7] It is simply not true, that the duty to hand down a decision would empower the ECJ, let alone a Panel of the World Trade Organization (WTO), to hand down substantive decisions on issues beyond their competences. The proper response in such situations is to avoid irreversible answers.[8]

As a concluding remark I would like to underline that the conflicts law approach to European law and to international economic law does by no means guarantee or envisage that definite and 'harmonious' responses to the many problems of the Union and international disputes can be found. Such statements tend, at least in the European context, to be perceived as indicating some 'failure' of the European project. That is a misperception. A Union of 27 member states, in which social and economic diversity is deepening rather than fading away, has to learn to manage its diversity peacefully and constructively. It should not expect, and it should not impose, uniformity.

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[7] *European Communities – Measures affecting the approval and marketing of biotech products* DS291, DS292 and DS293. Findings and conclusions available at: <http://www.wto.org/english/tratop_e/dispu_e/291r_conc_e.pdf>. Full panel report available at: <http://www.wto.org/english/news_e/news06_e/291r_e.htm>.

[8] On the GMO litigation, see Joerges (2009).

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Chapter 9

Political legitimacy and democracy in transnational perspective
'Democacy and or beyond the state'

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Introduction

Within the overall subject of 'political legitimacy and democracy in transnational perspective', I interpret the topic 'democracy and or beyond the state' to be primarily concerned with democracy beyond (or above) the state, which, however, may be closely interconnected with democracy in the state. The 'space above the state' (Halpin and Röben, 2009) is occupied by two levels of governance: The universal and the regional (of which the EU commands the greatest interest).

In his conceptual chapter on 'Democratic legitimacy beyond boders – Government without a state' (chapter 15 in this volume), Eriksen argues for an institutional variant of discursive democracy, which holds that power must be justified by those subject to it, he identifies the possibility of government without the state, and he posits that the competencies conferred on an international organisation determine how we think about its democratic legitimacy. Democratic legitimacy can pertain to the way decisions are made, the input, or they can relate to the content of the decisions, the output. There is therefore

input and output legitimacy. Eriksen is concerned with input legitimacy.

I share the view that democracy both on the regional (EU) level and – and, I add, the universal level — is epistemologically possible. It can and must be conceived in a novel fashion freed from the cognitive dominance of the state-centred democracy model. The chief reason is that only states are sovereign — i.e. hold the *Kompetenz-Kompetenz* — and thus it is only states that need that specific form of primary legitimacy which democracy in its parliamentarian or presidential varieties provides. I also share the view that a combination or reconstitution of the institutional, the discursive and possibly further elements of democracy is called for when thinking about democracy above the state.

Before embarking on the journey of sketching a model of institutional democracy above the state, however, a stance must be taken on the concept of democracy that will be used. There certainly are many conceptions of democracy, but it may safely be said that a certain core understanding is shared by most, namely that democracy comprises at least the values of representativeness, accountability, deliberation and transparency (Vermeule, 2007: 4-8). These values relate to any given concentration of power. This is admittedly a highly aggregate definition but it has the distinctive advantage of capturing both the vertical power relation of a sovereign state towards individuals and the horizontal power that sovereign states exercise when making policy and law cooperatively as international community (of states). Critically the values are contextualised, in other words, the normative demands of democracy are commensurate to the concrete instantiation of public power.

These democratic values may relate to and be fostered through law or through institutions. I will focus on the institutional option. The lead question of this chapter will therefore be: How ought institutions be shaped in order to further democracy above the state? In this respect, a useful distinction may be drawn between institutionalism writ large — concerned with traditional matters of institutional design, allocation of functions and distribution of power among the branches of government, and electoral systems — and institutionalism writ small — the working methods of the institutions (cf. ibid.: 1-4). When thinking about democracy above the state, both institutionalism writ

large and institutionalism writ small need to be taken into consideration.

In thinking about the overall institutional design, or institutionalism writ large, one must first gain clarity about the power in need of democratic legitimation. This is not to ignore the structural differences between the state, one the one hand, and the space above the state, on the other, in terms of the effectiveness of public authority accumulated. The sovereign state is a singular actor excluding all other sources of power and authority and including all people on its territory, disposing of central legislative, executive and adjudicative organs, and capable of generally enforcing its law. The space above the state, by contrast, remains a horizontal and decentralised world, in which power is diffused among all the sovereigns, a hierarchical legal order is absent, and where (international) law evolves in a fragmented rather than in a coherent and consistent manner. Fundamentally, power exercised above the state addresses states, which are the subjects included, and which mediate individuals (their citizens). Even the European Union, despite its evident supranational powers, retains strong elements of traditional international law. These structural differences cannot mask, however, the insight that in both instances one is in the presence of public authority albeit of a different nature. Harnessing and legitimising public authority (that is authority with the power to make formal law), as can be learned from the national experience, may require the identification and separation along functional lines of certain institutions: A functional legislature and a functional executive power which are broadly representative and accountable, and effectively able to set policy. Moreover, demands of including those subject to this authority in its exercise must be met. In the nation state this is achieved primarily through representation of the people. Above the nation this requires representation of states and the peoples if the constituted public authority reaches them.

Without falling prey to the cognitive dominance of the sovereign state, the institutional template of the democratic state still is relevant. Under a comparative approach, the constitution of legislative function and a policy setting function and the vesting of these functions in specific organs are the distinctive institutional features of the democratic state. This institutional structure, so it will be argued, can be transposed to the space above the state when

adjusted for the different context. This chapter will argue that this reconstitution primarily needs to further the core democratic values of representativeness through institutional developments — writ large or writ small — at the universal, the regional and the state levels.

I will first test this by looking at the regional (EU) level and the universal level in turn. The chapter will then point out that any such institutional developments above the nation state remain vertically interconnected with the democratic institutions in place in the nation state. Concluding observations will pull together the insights gained. The chapter's methodological interest is exploratory theory of institutional design, albeit theory that is fully cognisant of the need to be rooted in the existing (mainly legal) data.

The regional level: Democratic institutionalism writ large and small in the European Union

Regional integration at least as manifest in the EU, means that the density of organisation achieved over its more than 50 years of evolution has shaped an institutionalism writ large that can serve as an illustration and test of the issues raised initially.

The EU is, even, after Lisbon not a state, but a *Staatenverbund, an* association of sovereign states.[1] It remains governed by the states members who as states parties to the founding treaties are also their masters. As a *Staatenverbund* the EU wields powers to make law that is — always — binding on the member states and — sometimes — binding on the individuals in the member states. The demands of democratic legitimacy pertain to these powers of the Union, and they are largely met under the Lisbon amendments. These demands amount to having a legislature that reflects the subjection of both states and individuals with majority rule in both instances. And a governmental executive that reflects the agenda setting power of each member state.

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[1] See Federal Constitutional Court of Germany, Judgment of the 2nd Senate, 30 June 2009, 2 BvE 2/08. Available at : <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html?Suchbegriff=staatenverbund>.

Institutionalised parliamentary democracy within the EU

For our purposes, the most striking feature of the European Union is that it has large powers to make directly applicable law, i.e. law that reaches private actors without any interposition from the respective member states. In terms of concentrated power opposing itself to the citizen, the EU thus substitutes the sovereign state within its areas of competence. And this squarely puts the question of representation of the citizens and the Union's accountability to them. Institutionalism writ large would seek to remedy this by providing a parliament as an essential feature of representative democracy. In line with this presumption, Article 10 TEU now provides that in all its activities, the Union shall be founded on representative democracy. This is first a matter of institutionalism writ large. Indeed, the powers of the European Parliament (EP) have grown broadly in step with the expansion of the EU's overall competences over the course of the successive revisions of the foundational EU treaties, most recently through the Lisbon Treaty. This is true for the three hallmarks of parliamentary democracy: Powers of legislation, the purse, and the election of the head of government. The EP has now acquired these powers through the Lisbon Treaty amendments but it has to share them with the organs representing the member states. Under the so-called co-decision procedure, the European Parliament has acquired broad legislative powers shared with the Council of Ministers. Under the Lisbon Treaty, the EP is able to 'elect' the Commission president and to take a 'vote of consent' on the Commission as a whole (Article 17 TEU) but can act on a proposal from the European Council only. The electoral system of the European Parliament remains its Achilles' heel as it is does not allow the people to make a choice between political alternatives (embodied by an individual) through a general election, which is the hallmark of both presidential and parliamentary democracies. This ideal is only indirectly being realised within the EU to the extent that EP elections come to be seen as reflecting broad voter preferences among the political spectrum across member states. Institutionalism writ small is addressed by Article 11 TEU, which impugn the institution to improve its working methods with a view to more effective citizen representation and accountability to them.

The Council of Ministers, while composed of members of national governments, and thus representative of the member states, is best understood to be one part of the uniquely bi-cameral legislature of

the EU, with the European Parliament forming the complementary part.

Issues concerning inclusion and thus representation of states in the international lawmaking process arise, first and foremost, as a consequence of the institutionalisation of international relations. Representation of states in this sense has at least two elements: Membership of all states in the decision-making organs, and unanimity as the default voting procedure. International organisations deviate from one or both elements in the interest of effectiveness, and such deviation presents challenges for the representativeness of these institutions. Organisations that provide for substantial majority voting profoundly modify the basic principle of unanimous decision-making in the name of effectiveness. The legitimating effect of each state being represented in the decision-making process and consenting to the exercise of international power is thus considerably diluted. Given the far reaching powers of the EU and its wide use of Qualified Majority Voting in the Council of Ministers where member states are represented, state consent alone will not provide democratic legitimacy to EU decisions. To close the resulting gap, a number of institutional responses may be identified. In the case of the EU, the main response has been a development of institutionalism writ large, i.e. the prominent addition of the European Council to the decision-making process of the Union which again operates on the basis of unanimity.

A functional governmental executive of the EU: The European Council and the European Commission

Also, while the Commission disposes of the monopoly of drafting legislation, it ultimately lacks the legitimacy to exclusively set a policy agenda for the EU. Into this vacuum steps the European Council, increasingly acting as a government of the EU in a functional-institutional sense. The European Council — acting in part jointly with the European Commission — can lay claim to fulfilling the role of a functional governmental executive of the EU. Through its composition, but mainly through its voting procedure, the European Council provides full representation of the member states and thereby an accountability to their citizens that the Council of Ministers does not have. The European Council will remain outside of Parliaments' powers.

The European Council was not part of the original scheme of the treaties of Paris and Rome, yet it has become the key player in the decision-making process of the Union. It is composed of the heads of state or government of the member states (and the Commission president) and it requires unanimity in its decision-making, counter-balancing the trend of (qualified) majority voting in the Council of Ministers. The European Council assumes responsibility for highly visible and comprehensive policy-making (Article 15 TEU). As the European Council has gained in stature, its presidency has taken to setting out a political agenda of things that it wants to accomplish during its six-month tenure. These presidency programs reflect the distinct priorities of the member state holding the presidency. It bears mentioning that the power of the European Council to set the long-term planning of Union action creates a tension with attempts by the European Commission to set the overall agenda for the European Union. This indicates one of the fault lines of EU constitutionalism. The European Council and the European Commission — or more precisely the Commission president — may in fact be best understood as together forming the policy-setting governmental executive of the EU.

In response to the increased political weight of the European Council, the European decision-making process has become a dynamic circular process, moving through four stages: A programme of action is developed by the Commission, submitted for approval to the European Council, implemented through manageable pieces of legislation, usually a framework directive to be adopted by the Council of Ministers and the European Parliament and implementing legislation to be taken by the Commission pursuant to the regulatory committee procedure. The regulatory committee procedure allows for input by the member state administrations, through which the national political systems feed their preferences. The European Council may take up any controversies arising during the implementation phase.

The EU institutional set-up is thus a curious mixture of the parliamentary and the presidential democratic models. In respect of the election of the Commission president resembles the former, in respect of the separate legitimating of the legislature and the executive (European Council), the current and the future European set-up is reminiscent of presidential democracy rather than the

parliamentarian variant. Overall the institutional set up of the Union after Lisbon approximates but does not equate that found in each of the democratic member states. It is commensurate to the Gestalt of the Union as a *Staatenverbund* at this particular time. As a consequence the Union must respect the limited competences conferred on it by the treaties

Democratic institutionalism at the universal level?

Perhaps surprisingly, and more controversially, this institutional governance model is already relevant also in the global context. Although not concentrated to a single organisation, such a model may be seen to be emerging in fragmented way, as it befits the fragmented or polycentric international (legal) order.

Institutionalised power is being wielded at the universal level. The demands of effective law-making both of a legislative type and and and executive type are increasingly being met. The addressees of such action broadly remain the states and as such concerns of representation relate to them. To the extent that individuals are or will be subject to direct international governance different demands of inclusion or representation will need to be answered.

The United Nations Security Council and the problem of representation

Broadly legislative powers are increasingly being vested in conferences of States parties to a multilateral treaty and also in international organisations (Röben, 2011a; 2011b). Legislation adopted under these auspices will generally be binding on the States Parties to the treaty only. But there is also the UN Security Council, which for matters of international peace and security, is capable of playing the role of a functional legislature and/or executive at the global level for all states. The UN Charter entrusts the Security Council with the primary responsibility for the maintenance of international peace and security and, for that purpose, the Security Council under Chapter VII and Article 25 UN Charter enjoys exclusive powers to take decisions that are legally binding on all member states of the organisation. In recent practice, the Security Council has assumed strong legislative or quasi-legislative powers in areas as diverse as anti-terrorism and non-proliferation (Wolfrum,

2005), in addition to its established power to decide on repelling threats to international peace and security.[2]

The UN Security Council is, of course, the most important case of only a selected group of states being represented on a powerful international body. For there are only 15 states represented on it at any time, of which five are permanent members and a further 10 are elected for a two-year term. The relevant UN regional groupings have a pre-determined number of seats of the non-permanent members. Problems with the limited representation of all states explain, however, the limits that the UN Security Council is confronted with when it comes to its ability to set policy, legislate and execute

The Security Council therefore raises particularly interesting legitimacy questions. As a limited membership body, the Council's composition reflects overriding considerations of effective decision-making (Cogan, 2009). This puts the issue of representation (inclusion) in full focus. That does not mean, however, that the drafters of the UN Charter were unaware of the need for legitimacy through inclusion. The main device of the Charter itself for broadening the inclusive reach of United Nations Security Council decision-making in matters of threats to the peace or international security pursuant to Chapter VII is the involvement of the regional security system concerned. This is the main purpose of Chapter VIII of the Charter. Chapter VIII provides for regional systems of collective security that are modelled on the universal collective security system. It also makes extensive provision about the relationship between the universal collective security system and the

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[2] The International Court of Justice recently acknowledged in the Kosovo Advisory Opinion that the Security Council may also impose obligations on non-state actors (Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion 22 July 2010, paragraph 116). This turns on the intent of the Security Council and the determinacy of the class of addressees (paragraph 117). This power of the Council currently is used exceptionally. It raises, however, the issue of the inclusion of these additional addressees in the Security Council decision-making process parallel to what was discussed *supra* in respect of the European Union.

regional systems. The underlying idea may be captured as subsidiarity, to borrow terminology from EU law. Articles 52-53 provide that the crises shall be dealt with at the regional level whenever and to the extent possible. Article 52(2) explicitly provides that Member States of the UN shall make 'every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council' (emphasis added). Correspondingly, Article 52(3) obliges the Security Council to 'encourage the development of pacific settlement of local disputes through such regional arrangements of by such regional agencies either on the initiative of the states concerned or by reference from the Security Council'. It is clear that a reference of a situation by a regional arrangement to the Security Council will provide any further decisions by the UN Security Council with the respect to the situation with heightened legitimacy.[3] Article 53 UN Charter even envisages that the competent regional organisation may even carry out enforcement action — including forcible measures within the meaning of Article 42 — upon authorisation of the UN Security Council.

Essentially, the issue remains whether membership, either permanent or temporary, of the Security Council itself should be expanded beyond the current formula. The main argument for such an expansion is that the current membership formula reflects the power realities of the immediate post-war period but not that of the 21st century, and that it does not reflect current post decolonization membership of the UN as a whole. These considerations relate to the effectiveness of the Security Council and its legitimacy or lack thereof due to a perceived lack of equitable geographical representation of States capable of shouldering the burdens of Security Council memberships. These considerations overlap. The High Level Panel on Risks and Challenges, entrusted by the UN General Assembly with reflecting on UN reform needs in the 21st century, recommended institutional reform of the UN Security Council. The suggested reforms were meant to broaden the Council's membership in an effort to make it more inclusive and thereby strengthen both its

[3] See UN Doc S/RES 1973 (2011) on Libya.

effectiveness and its legitimacy,[4] but when the heads of state and government of the UN member states were presented with the proposal at the review conference in 2005, they demurred. However, in 2008 the UN General Assembly decided to take up the issue again and convene a working group on it. In the past, matters like this were always negotiated within the Security Council itself and the decision by the General Assembly thus reflects the strength of the feeling about the issue of Security Council membership across the UN.

However, avenues of institutionalism writ small concerning the working methods of the Council may be, at least partially, help address the inclusion matter. To an extent, the Security Council has in fact taken up the core ideas of the Panel's recommendations, revolving around making the Council more legitimate. It has moved in two respects at least on its institutionalism writ small. In order to be more representative, the Council has taken practical steps, involving UN member states not currently represented on the Security Council in its crisis management on an *ad hoc* basis, if and to the extent that such states are ready to take on an increased responsibility for the management of a given international crises and display a specific capability; in other words: If the self-selected informal group can effectively contribute to the management of the crisis (cf. Röben, 2008). This mechanism developed through practice partly compensates for the current lack of representativeness of UN Security Council permanent membership. Furthermore, the Council has acknowledged that discourse legitimacy has a strong complementary role to play in the shaping of international institutionalised democracy. Thus with regard to the decision-making of the UN Security Council, there is ample scope for improvements on its institutionalism writ small, i.e. its working methods, as evidenced by the World Summit Outcome resolving on the Security Council:

> We recommend that the Security Council continue to adapt its working methods so as to increase the involvement of States not represented on the Council in its work, as appropriate,

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[4] *A More Secure World: Our Shared Responsibility* (2004), Report of the Secretary General's High-level Panel on Threats, Challenges and Changes. Available at: <http://www.un.org/secureworld/>.

> enhance its accountability to the membership and increase the transparency of its work.[5]

The Security Council itself seems to accept this point. The evidence of this can be found in resolutions, requiring the SC to modify its procedure to enhance effectiveness and transparency, *inter alia*, as a lesson learnt from the procedural breakdown in the Council during the deliberations concerning Iraq in 2003.[6]

A complementary mechanism to further representative and transparent deliberation is the regionalism at work within universal membership organisations such as the UN. Much of the deliberation on the salient topics on the agenda of this organisation actually needs to take place in the smaller groupings formed by states hailing from the same region of the world. The results of such deliberations can then be taken to the full membership of the organisation. It is one, if not the only, practical way to ensure that deliberation effectively takes place in such organisation. Regionalism is thus a feature of the institutionalism writ small of all universal organisations.

UN General Assembly, G7(8) and G20: A functional government?

At the universal level, no functional governmental executive power could establish itself for a long time. The UN Security Council does not have the broad subject-matter mandate. The UN General Assembly comes closes to assuming such a role since it represents all the UN member states. And in certain areas the UN General Assembly has played precisely this role, for example in putting the codification of the law of the sea or sustainable development on the international agenda. However, the need for states to cooperate effectively in a world characterised by growing interdependence has actually produced an institutional set-up that is designed to fulfil the role of a governmental executive, setting policy rather than implementing it. This has been the role first of the G7, later of the G8, and most recently of the G20, for matters of a truly global concern, such as climate change and — recently — the global (financial) economy. A remarkable feature of this institutional development is

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[5] UN Doc A/RES/60/1, para. 154.

[6] UN Doc S/2007/749.

the relative expansion of membership of the policy-making body, corresponding to the notion of representativeness as applied to states.

Initiatives are therein taken by states at the global level. After political agreement in principle has been secured in these fora, further implementation and law-making then takes place in more conventional settings, such as Conferences of States Parties to an international treaty (e.g. the United Nations Framework Convention on Climate Change and the Kyoto Protocol) or involving international organisations with the relevant remit (like the International Money Fund), and ultimately regional organisations such as the EU.

The role of state-based democracy

Any model of democracy above the state needs to take account of, and in fact comprise, democracy in the state (cf. Von Bogdandy, 2003). The state is increasingly interacting with the space above the state to form vertical processes or channels of interaction. Both cannot be disassociated: Democracy at the international level cannot survive without support from democracy at the national level and *vice versa*.[7] Four elements are worth mentioning in this respect:

1) the linkage between national governments and the functional executives above the state;
2) integration of national parliaments into the decision-making at the international level;
3) the adaptation of state-internal processes to better involve parliaments in the conduct of international affairs; and
4) the external stabilisation of state-centred democracy .

The linkage between national governments and functional executives above the state

As we have seen, it is a defining feature of the functional governmental executives emerging (universally G7/8 and G20) and existing (European Council) that they consist of the heads of state or

[7] It may be said that any democratic legitimacy problem arises at the national level and it needs to be dealt with at this level as well, cf. Wolfrum, 2007.

government, depending on whether the national constitution vests principal executive power in a president or prime minister. The European Council is the institutional set-up that most conspicuously captures the dynamic of this 'constitutionalism of inverse hierarchy' (Röben, 2004), where member states through a quasi-government seize the initiative and decide on the overall direction and course of action of the EU and its organs. Decisions in the European Council are made by the members of the national executives who are conspicuously accountable either to the people or to the national parliaments - the heads of state or government. And the unanimity decision mode ensures that each member of the European Council can effectively be held accountable by the relevant national constituency. The effectiveness and legitimacy of the European Council is closely linked to a dominant structural-institutional element in the working of most European democracies. Most western democracies vest the specific function of comprehensive political leadership in a monolithic one-person office, be it a prime minister or a president. The European Council involves that office-holder of each member state, recognisable by the broadest national constituencies, who embodies the national political leadership, thus legitimising both the European polity and re-legitimising the national polities. Public opinion may more easily focus on these meetings of the heads of state and governments, not least because they enjoy extensive media coverage.

Involvement of national parliaments in the EU law-making process

In the EU, member states retain control of the treaties and thus of the highest authority in the Union legal order. Amending the treaties is a well-established way to either expand or to limit the competences of the Union. Such changes require ratification according to the respective procedures of each member state but not by the European Parliament. All member states vest the ratification power in their national parliaments; the federal or decentralised member states also involve the intra-federal level. National parliaments have also been directly involved in the process of drafting such treaty amendments.[8]

[8] Both the Charter of Fundamental Rights of the European Union and the Constitutional Treaty (abandoned as a result of French and Dutch referenda but still inspirational for the Lisbon Treaty) were drafted by so-called conventions. National parliamentarians were members of both conventions.

Moreover, the Treaty of Lisbon gives the parliaments of the member states a role in secondary EU law-making. The parliaments will be monitoring that the EU complies with the principle of subsidiarity pertaining to the exercise of its competences.

Adaptations of state-internal processes

Reasonable people may differ on the extent to which the state's powers are diminishing in the age of globalisation. This is an imprecise science. But there are indications that the extent or speed of the disappearance of the state must not be overestimated. The financial crisis in September 2008 and the bailout of the private and much globalised financial sector put in stark view that the state retains its '*Letztverantwortung*', i.e. the ability and responsibility to act when things turn sour. But even if this is true, it is also undoubtedly true that the pressing issues of the day – migration, climate change, global financial market regulation – can effectively be tackled only through international cooperation between states. While such cooperation enhances each state's effective action, it also dilutes each state's democratic accountability.

This effect is aggravated when the executive conducts international cooperation to the detriment of the role of parliaments. It is only recently that national constitutions have begun to react to this factual development in the separation of powers by shoring up parliamentary control over the conduct of foreign policy. As a result, national parliaments are becoming involved in the process of making secondary EU law, i.e. infra-treaty legislation directly applicable in the member states.[9]

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[9] Thus, e.g. under revised Article 23(3) of the *Grundgesetz* (GG), or Basic Law, the German government has to consult the German Parliament before taking a position on a legislative proposal submitted by the European Commission to the Council of Ministers. The government must act faithfully on Parliament's opinion during the different phases of decision-making in the EU Council of Ministers. Furthermore, Parliament can enforce the discharge of this obligation incumbent on the government in the Constitutional Court. Cf. Federal Constitutional Court, 2 BvE 2/08, 30.6.2009. Available at: <http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html>.
There is also a Statute that specifies the rights of Parliament vis-a-vis the executive in the European primary and secondary law-making process (Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union, BGBl I 2009, p.

External stabilisation of state-centred democracy

But the emergence of a sphere above the state not just threatens state-centred democracy, rather that sphere also increasingly stabilises state-internal democracy.

Most clearly is this on display in the case of the EU. It probably was always understood that the European Community and then the EU was a club of democracies. But that requirement was made explicit only quite recently in the process of European integration as a result of the massive enlargement of the EU to Central and Eastern Europe. Article 7 TEU now allows the EU to enforce democratic standards in the member states, both old and new. As it is well known, this power was actually used against Austria. It may be questioned whether and to what extent such a power would indeed by effective against any serious threat to the democratic structure of any member state. But it remains a fact that the EU displays elements of a '*Wehrhafte Demokratie*' employing itself to stabilise the internal democracy of the member states.

Universally, the international community is also heavily involved in the business of external stabilisation of state-centred democracy. Different from the case of the EU, however, this does not concern the established democracies but post-conflict situations in states emerging from civil war or striving for self-determination (Wilde: 2008).

Concluding observations

In concluding, democracy above the state can be conceived and assessed in institutionalist terms. This requires three steps. A concentration of power to which the values of representation and accountability can relate, the framing of this power as executive-type and legislative type, and their allocation to separate institutions. This may be labelled institutionalism writ large. Institutionalism writ large and writ small — the working methods of this institutional set-up — complement each other to provide the degree of democratic

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3026). The same rationale of parliamentary participation in international law-making underlies the Article 24(2) GG and the implementing *Parlamentsbeteiligungsgesetz*, that regulates the rights of Parliament over the deployment of German armed forces.

legitimacy concordant with the powers vested in international organisations and other actors.

There exists a correlation between the intensity of institutionalist demands writ large and the powers allocated to the respective international organisation to which these demands are being addressed. The more closely an international organisation resembles the powers held by a constitutional nation state, the more the need arises to legitimise these international powers democratically through institutionalism writ large as opposed to mere state consent. The EU, on the one end of the spectrum, and the UN, on the other, provide an illustration of this correlation. Thus, the institutionalisation, not just of a functional executive but of a parliament representing the people, has gained relevance on the regional level of governance epitomised by the European Union. At the universal level, international organisations still dispose of considerably less powers. As a result, institutionalism writ large has been limited to ensure that as many states as possible are included in the relevant policy-setting and through them the peoples that the states in turn represent. Different from the EU context, the internal democratic structure of the state does not matter at the universal level. But there have been no calls for direct institutionalised representation of the peoples in order to democratically legitimise the UN or any other universal international organisation. This does not mean, however, that demands based on democratic values have been absent from the debate about these universal organisations. Rather, they have taken another form. The concern here is more with improving the inclusiveness of the institutionalism writ large and the mechanisms of the existing institutions — the institutionalism writ small.

Representation and accountability must of course be seen in context. It is obvious that no institution has emerged that could claim parliamentarian legitimacy at the global level. This is not to change any time soon. This fact does not, however, signify an irremediable loss of democratic legitimacy. It — or more precisely the values of representation and accountability that support it — needs to be contextualised. As already indicated above, this context is provided by a world above the state, which remains a horizontal and decentralised world, in which power is diffused among all the sovereigns, a hierarchical legal order is absent, and the law evolves in a fragmented rather than in a coherent and consistent manner.

Representation and accountability in this world of international politics and law consistently relate to sovereign states, which in turn represent individuals — their citizens. The starting point for understanding representation and accountability, then, is that states can be expected to obey international law depending on them being included — represented — in the making of this law. Inclusion in principle is ensured because sovereign equality requires that states need to consent in order for any international law to become binding for them. International lawyers refer to this when they identify state consent as the basis of legitimacy in international law. Of course, if state-consent is the basis of the legitimacy of international law, this is genuinely democratic legitimacy only to the extent that each state consenting to a particular rule is itself a democracy. In terms of democratic legitimacy, therefore, state-consent suffers from an asymmetry.

However, this traditional understanding of state-consent as being co-extensive with representation has come under increasing strain. Modern international law is not only branching out into regulating large swathes of the global economy, environment, etc. but it is also structurally changing. It seeks to determine legal situations and rights and obligations that used to be located in domestic legal orders (Weiler, 2004). It provides for a review and assessment of domestic law and domestic decision-making, for instance in investment protection and international human rights law. There is also a proliferation of relevant actors: International organisations, treaty bodies, so-called conferences of states under the major multilateral treaties, and non-governmental organisations (NGOs) form a non-exhaustive list of such actors.[10] These structural developments

[10] Non-state actors — individuals, the private sector and non-governmental organisations — becoming more visible internationally present a fundamental challenge to the above described legitimacy code characterized by the operation of exclusion and inclusion. This works on several levels. For one, non-state actors are emerging from being mediated by their states. To be sure, there is no reason to exaggerate this point. The instances where significant political influence is exercised by — here mostly — NGOs are still rather few. Other specific issues are raised by the regulation of the global economic system. In as much as economically relevant standardisation is entrusted to non-state actors they are directly included in the exercise of international public power. This direct inclusion ensures individual self-determination of these actors. Such individual self-

increase the weight and depth of decision-making at the international level reaching into national legal orders and diluting the impact that each individual state has on the process of international decision-making. More demanding conceptions of democracy may thus become relevant for the international sphere in the future, including the need for institutionalised representation of the people(s) through parliaments.[11] Also public opinion, an indisputable and indispensable element of all mature democracies, may move beyond subjects of national interests to global matters. To the extent this is or will be happing, the several 'national publics' are converging and becoming one international public, thereby ensuring accountability of international public power. Part of this context is, however, also that neither of the constitutive concepts — state and democracy — may be universally shared and desired goods. In fact widely shared assumption about universally shared political values may not hold up to closer scrutiny if one moves beyond the confines of the West and glances at the universal situation. So while the concept of the sovereign state probably does enjoy universal acceptability and thus legitimacy, democracy may not, which is as startling as disquieting an insight, at least for the universal level.[12]

In addition, democracy beyond the state requires a combination or reconfiguration of these new strands of democracy with democracy at the state-level, working vertically bottom up (inversing the top-down hierarchy between the international and the national levels).

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determination complements the collective self-determination of peoples or states (in the sense of sovereignty). However, here too, the states currently still determine much of the substantive borders of that autonomy and the procedural avenues for dispute resolution.

[11] Crawford has pointed to the nexus between the effectiveness of international law, its ever growing scope of application and, combined with this, the growing impact that international law has in the domestic legal orders of rule of law based states as calling for adequate if not equivalent guarantees of rule of law control over international law and the international political process (see Crawford, 2003). By extension, this argument also applies to democratic control.

[12] A thoughtful questioning of this assumption was, however, launched by Rein Müllerson at the 2008 meeting of the European Society of International Law. Müllerson posited that the evidence of state practice outside of the West did not at all support the general acceptance of democracy.

State-internally, this presupposes an extension of the established democratic instruments and processes to international matters. Fundamentally, this involves an adaptation of the traditional constitutional state-internal conception of politics and law to state-external politics and law.

A full picture of the theme would thus strive to encompass and integrate the horizontal and the vertical aspect of institutionalised democracy encompassing the space above the state and the state itself.

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Chapter 10

Transnationalism beyond the statist paradigm
Comment on Volker Röben

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Volker Röben's contribution is dedicated to the rather complex task of rendering public authority beyond the nation state more democratic — especially at the regional level of the European Union (EU), and the universal level of the United Nations (UN) and international law — and of figuring out a mode of vertical checks and balances between nation states, regional and global governance structures. His starting point is that these three levels are 'closely interconnected' (Röben, chapter 9 in this volume: 145) and hence have to be regarded as complementary elements of a compound when dealing with issues of democratic legitimacy and democratic constitutionalism. Accordingly, he rightly claims, while democracy within and beyond the state are interwoven and to a certain extent interdependent, we have to look at a rather complex institutional variety within a multi-level governance model. Analytically Röben understands the principle of democracy in 'values of representativeness, accountability, deliberation and transparency' (ibid.: 146). He presents these as common denominators of democracy, which are useful not only for figuring out democratic reconstitution of transnational and international institutions but also

for capturing 'both the vertical power relation of a sovereign state towards individuals and the horizontal power that sovereign states exercise when making policy and law cooperatively as international community (of states)' (ibid.). While I perfectly agree with his starting point, especially with regard to the claim of an interdependency of democratisation at different levels of governance, I would question the rather state-centric consequences of Röben's proposal in terms of democratising supra-, trans- and international institutions. One could therefore expect the author to undertake a discussion on different paths and modes of democratisation in term of empowerment, participation, representation and inclusion. However, the author, to my mind, overemphasises the relevance of 'the institutional template of the democratic state' (ibid.: 147) during the course of the argument, be it as an archetype of democratisation, or as the sole model of constitutionally secured checks and balances, or as a motor for external stabilisation of state-centred democracy via international bodies. Accordingly, I would like to focus my comment on the explicit as well as more implicit rigidities of his conception of democracy and his state-centred view of cooperation beyond the nation state.

Regarding democratisation at the institutional level, the author differentiates between 'institutionalism writ large' and 'institutionalism writ small'. Inspired by classical ideas of constitutionalism as embedded in the nation-state structures, institutionalism writ large is concerned with core matters of institutional design, allocation of functions and distribution of power among branches of government. In his view, constitutionalism beyond the state benefits from national constitutionalism and the model of the sovereign state as the 'singular actor excluding all other sources of power and authority and including all people on its territory, disposing of central legislative, executive and adjudicative organs, and capable of generally enforcing its law' (ibid.). Insofar as supra-, trans- and international institutions are characterised by the 'presence of public authority' (ibid.), national constitutionalism figures out patterns that 'may require the identification and separation along functional lines of certain institutions: A functional legislature and a functional executive power which are broadly representative and accountable, and effectively able to set policy' (ibid.).

The central democratic values of representation and accountability are embodied in the framing, allocation and separation of executive-type and legislative-type of power. Institutionalism writ small, on the other hand, is dedicated to the 'working methods' (ibid.: 146) of institutional settings, i.e. institutional practices furthering democratic values, and is meant to complement the degree of democratic legitimacy at the level of institutionalism writ large (cf. ibid.: 155f., 161f.).

In order to illustrate my scepticism regarding the rigidities of Röben's model of democratisation, I would like to raise three conceptual questions with quite challenging normative implications, in particular with regard to possible modes of democratisation beyond the nation state and to — perhaps even more importantly — the scope or depth of such democratisation. The first question concerns the systematic relationship between democracy and law, the second the more specific notion of democracy that is applied by Röben, and the third the 'writ large'/'writ small' ratio.

The relationship between law and democracy

Questions concerning the systematic relationship between law and democracy are touched upon insofar as the author refers to discussions about the potential cosmopolitan outlook of a democratic order, as for instance highlighted by Eriksen, Fossum and Menéndez (2004; cf. also Eriksen, 2009; Eriksen et al., 2006; as well as Eriksen and Menéndez, 2006). In short, they argue that any political authority and public rule has to be legitimised at two levels: Internally towards the citizens, both as objects and (for reasons of democratic legitimacy) as subjects of the law, and externally towards all those potentially concerned and affected (in this respect, matters of inclusion and exclusion are internalised in the notion of democratic rule). At the same time, they argue, the notion of citizenship has a universalising tendency because of the interdependency of the rights of citizens and individual and human right. Röben, on the other hand, emphasises the need to keep elements such as human rights and rule of law separate from democracy. He is also rather sceptical as to how far we could get when structuring political institutions by cosmopolitan principles, especially if one separates (as he wants to) questions of human rights and the rule of law from democratic principles more narrowly, which are the only ones able of providing primary legitimacy: 'It is only states that need that specific form of primary

legitimacy which democracy in its parliamentarian or presidential varieties provides' (Röben, ch. 9: 146). A kind of secondary legitimacy, then, seems to derive from the rationalising effects of the rule of law on the one hand and the limiting effects of fundamental rights (ibid.: 152ff.). Surely, one might agree with the notion of law's secondary legitimacy flowing from its rationalising effects, foremost in the shape of human rights, individual legal standing and legal certainty more generally. Apart from questions as to the relationship between the two *prima facie* hierarchically ordered modes of legitimacy, I wonder whether this perspective is not too rigid and too limited in scope, especially against the background of various forms and levels of transnationalisation of law and 'public rule'. Certainly, one does not necessarily have to make such strong assumptions about the mutual relationship between democracy and law in the sense of a co-originality between the 'rule of men' and 'the rule of law' as favoured by, for instance Habermas (1996) and Michelman (1988), but one might claim that democracy and law are mutally enforcing in a way that is not captured by the abovementioned hierarchy of primary and secondary legitimacy. Particularly in a structural context of power-dilution, fragmentation and disaggregation it might be worth interrogating conceptual and normative nexuses between democratisation and legal developments in more detail. Many of the phenomena labelled as juridification, transnational legalisation and judicial enforcement play a democracy-enhancing and democracy-enforcing role, i.e. they might even condense into structural elements of democratisation. Transnational jurisgenesis, litigation and arbitration, and especially the universalisation of jurisdiction for the sake of enforcing individual human rights and of strengthening the stakes of those negatively affected by and subjected to public authority have inclusionary effects, underpin representation and as such work for the empowerment of individuals, i.e. for democratisation.[1] In this perspective, Habermas and Michelman quite convincingly claim that law — besides securing individual rights and freedoms — is the *lingua franca* of democracy, because law is also a medium of democratic practices and a vehicle for democratic processes, at least in the sense of rendering inclusion of those who are concerned possible.

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[1] Cf. the International Law Commission's 'Third Report on the Obligation to Extradite or Prosecute "*aut dedere aut judicare*"', 2008 A/CN.4/603.

Taking this into consideration, quite a different picture could be painted with regards to both constitutionalisation beyond the nation state and institutionalism writ large. In this perspective, the focus would shift from models of institution-building that mirror traditional nation-state separation of powers, forms of representation and checks and balances, to models where the individual is represented more directly as a citizen — with justified capacities to participate and be represented.

The application of democracy

My second remark concerns the more specific notion of democracy that Volker Röben applies. This notion seems too restrictive both in a context of complex institutional variety and overlapping orders of public authority, i.e. in a context of *(neue) Unübersichtlichkeit*, and in a context where the status of a state centred view becomes precarious within a more and more state de-centred world.

The answer to the question of why reconstitution for the sake of institutionalising democracy is needed, is traced back to the normative credit of state-embedded democratic constitutionalism, in particular to the 'specific form of primary legitimacy which democracy in its parliamentarian or presidential varieties provides' (Röben, ch. 9: 146). Against this background, the author reconstructively identifies those institutional structures beyond the nation state that are able to operate, as I understand it, as functional equivalents to the traditional state branches and institutions. In this spirit, he emphasises, with regard to the European Union, first, the emergence of a functional-institutional 'government' (ibid.: 150) of the EU[2]; second, voting procedures that strengthen majority rule; and third, institutionalised parliamentary democracy. Although he critically mentions that the 'electoral system of the European Parliament remains its Achilles' heel as it [...] does not allow the people to make a choice between political alternatives (embodied by an individual) through a general election, which is the hallmark of both presidential and parliamentary democracies' (ibid.: 149), he is quite positive about the development of the European Parliament's

[2] In this context he notes that the European Council and European Commission with its president 'may in fact best be understood as jointly together forming the policy-setting governmental executive of the EU' (Röben, ch. 9: 151).

powers, which 'have grown broadly in step with the expansion of the EU's overall competences. […]This is true for the three hallmarks of parliamentary democracy: powers of legislation, the purse, and the election of the head of government' (ibid.). Apart from these functional equivalents, he sees state-based democracy in terms of a vertical model of checks and balances and institutional separation of powers conserved. Besides mechanisms of competence allocation and the principle of subsidiarity, it is by representation of nation-state branches and corporate actors at the EU-level, by various linkages between national governments and functional executives above the state (ibid.: 157ff.), by inclusion of executive branches and national parliaments in EU decision making processes and by strengthening national parliaments *vis-à-vis* executive branches in foreign policy more in general that the ideal of vertical as well as horizontal checks and balances is being realised.

With regard to the international level a similar model is applied (ibid.: 152ff.). Röben starts with the observation that, '[p]erhaps surprisingly and more controversially, this institutional government model is also already relevant in the global context' (ibid.: 152), continues to exemplarily sketch the UN Security Council (UN SC) and G8/G20 as executive institutions that foster 'matters of a truly global concern' (ibid.: 156), and concludes: '[T]he need for states to cooperate effectively in a world characterised by growing interdependence has actually produced an institutional set-up that is designed to fulfil the role of a governmental executive, setting policy rather than implementing it' (ibid.). Although the author is at one point critically concerned with matters of limited membership and problems of (mis)representation (for instance in the UN Security Council, which also has strong legislative or quasi-legislative powers), he deals with the problem of inclusion and representation only in terms of state representation. If his goal is to touch upon problems of inclusion and democracy at the global level, then this, in my opinion, is a too restricted perspective. By now, political and legal practice, social movements, transnational mobilisation as well as academic debates go much further in questioning this restriction; either by demands of including various corporate actors and social groups or of acknowledging the individual as a subject of international law (cf. Ashwani et al., 2009). Conversely Röben then notes with regard to parliamentarisation at the universal level, that the fact of a lack of parliamentarian legitimacy 'does not, however,

signify an irremediable loss of democratic legitimacy [...]. Representation and accountability in this world of international politics and law consistently relate to sovereign states, which in turn represent individuals — their citizens' (Röben, ch. 9: 161-162). So, the issue of inclusion is in fact boiled down to the inclusion and representation of states and, accordingly, state consent is the sole basis of the legitimacy of international law. The only concession, the author makes in this respect, is that '[m]ore demanding conceptions of democracy may [...] become relevant for the international sphere in the future, including the need for institutionalised representation of the people(s) through parliaments' (ibid.: 163).

Contrary to his introductory remarks, he nonetheless — although hesitantly — names certain restrictions to the predominance of the state within altered trans- and international structures. In this he emphasises that the state is the central mechanism for inclusion and the main basis for legitimising international law. But before immunising the state as the sole and uncontested legitimising force of international law — and especially before implicitly de-legitimising other forms of representation and legal subjectivity (of the individual most pressingly) — it would have been helpful to specify the structural conditions of its superiority. Legalisation and juridification at the trans- and international level are frequently invoked and developing beyond the state, i.e. against state consent exactly for normative reasons. Insofar as trans- and international institutions establish cooperative structures of a higher order, state consent might be a rather deficient mode of warranting legitimacy. Because the reason for and justification of transnational law might be either related to the fact that the state has originally provoked the need for regulation at a higher level (because it lacks problem-solving capacities or produces negative externalities) and thus carries a 'normative' duty to cooperate; or to the fact that states are simply not always able to guarantee representation of those who are concerned and affected — in this case there would be an obligation to find institutional remedies to representing the appropriate 'constituencies'.[3]

[3] Cf. Fraser (2005; 2007) on the issue of misrepresentation.

‘Writ large’ or ‘writ small’: Röben’s notion of democracy

My last remark is dedicated to the notion of complementarity between institutionalism writ large and institutionalism writ small (or likewise, between constitutionalism writ large and constitutionalism writ small), and concerns the normative fit of different modes of democratisation in these two respects. In discussing the deficits of democratisation at the level of institutionalism writ large, the author points to possibilities of compensating these deficits at the level of institutionalism writ small, for instance by rendering institutional practices more transparent and by securing discursive interaction. Regarding intra-institutional practices, he highlights that ‘[d]iscourse legitimacy has a strong complementary role to play in the shaping of international institutionalised democracy’ (Röben, ch. 9: 155). For instance, with regard to the UN Security Council he notes that a lack of representation and inclusion can be offset by ameliorating internal working methods and concludes that:

> [T]he Council has taken practical steps, involving UN member states not currently represented on the Security Council in its crisis management on an *ad hoc* basis. [...] This mechanism developed through practice partly compensates for the current lack in representativeness of UN Security Council permanent membership.
>
> (ibid.)

While efforts to render institutions more democratic by changing their internal structures towards transparency, discursiveness and responsiveness is a promising path in multi-level governance contexts, I wonder whether the author is conscious of the conceptual tensions between such efforts and modes of state-mediated legitimacy of governance beyond the state. At the level of what the author calls ‘institutionalism writ large’, he emphasises the need to institutionalise mechanisms guaranteeing state consent firstly as a means to institutionalise traditional elements of democratic inclusion, representation, participation and accountability and secondly, as a devise for identifying as well as evaluating functional, organisational or constitutional structures. ‘Institutionalism writ small’, on the other hand, refers to an institutional level beyond the nation state, where

democratic values (such as representativeness, accountability, transparency and discursiveness) can be advanced, both with respect to concrete institutional structures as well as with respect to inner- and inter-institutional practices ('constitutionalism writ small'). Now, coming back to the relationship between institutionalism writ large and institutionalism writ small, he admits that 'state consent alone will not provide democratic legitimacy' (ibid.: 150). Solutions combining state-consent and institutionalism writ large might then provide democratic legitimacy of international decision-making. For that sake, 'a number of institutional responses may be identified' (ibid.: 150). This admission is, conversely, quite demanding insofar as one has to specify the possible restrictions and normative tensions between the different principles and modes of legitimisation. Because after all — or at least in the worst case — the notion of legitimacy that is relying on state consent and the notion of legitimacy relying on transparent, accountable, representative institutions and discursive institutional practices might be contradicting each other. The risk might be that legitimacy writ large is countervailing legitimacy writ small, and hence the challenge, as I see it, is precisely to specify the structural conditions under which constitutionalism writ large and constitutionalism writ small can in normative terms be complementary and compatible. Or in another terminological framing: Apart from the scepticism whether such an implicit Ackermanian differentiation between constitutional and ordinary politics — which seems to inspire Volker Röben's categories 'writ large' and 'writ small' — is deserving in terms of democracy, the most challenging task would be to render legal developments that are induced by institutional practices, i.e. incremental processes of constitutionalisation, more legitimate, inclusive and representative.

In his final remark, Röben comes to terms with his basic intuition, when he states that:

> State-internally, [the reconfiguration of new strands of democracy] presupposes an extension of the established democratic instruments and processes to international matters. Fundamentally, this involves an adaptation of the traditional, constitutional state-internal conception of politics and law to state-external politics and law.
>
> (ibid.: 164)

But even after this remark, there rests an uncertainty as to whether this can be the sole solution to legitimacy problems beyond the state and whether the suggested solution is not too one-dimensional — more than ever as even consolidated democratic states seem to be far away from institutionally having resolved problems of inclusion and (mis)representation.

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Part III

Democratic legitimacy and the finalité of European integration

Chapter 11

Power without arbitrariness? Some reflections on attempts to use indirect legitimacy to justify the EU as a 'restrained yet capable' form of political power

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Introduction

One of the most famous arguments for non-arbitrary rule is to be found in John Locke's objection to Thomas Hobbes'. To recall, Locke objected to Hobbes' argument that 'the ruler ought to be absolute' and that laws ought to hold only 'betwixt subject and subject', not ruler and subject. Locke reads Hobbes as supposing that in putting themselves under government individuals agree 'that all of them but one (the ruler) should be under the restraint of laws' and thus the ruler alone 'should retain all the liberty of the state of nature, increased with power, and made more licentious with impunity'. This, Locke objects, 'is to think that men are so foolish that they take care to avoid what mischiefs can be done them by polecats and foxes, but are content, nay, think it safety, to be devoured by lions' (Locke, 1924: 163).

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If, then, it is hard to see how individuals would rationally consent to a form of rule that would expose them to harm, it follows that the restraint of power is a condition for its legitimacy. At first sight, the observation that constraint may contribute to the legitimacy of the constrained seems unlikely to help us understand the problem of European Union legitimacy. It may only beg the question of why a polity that so often appears constrained to the point of incapacity is seen to pose a problem of legitimacy at all.

One response is that we seriously underestimate the challenge of legitimation if we understand it as one of merely restraining power *tout court*, rather than one of identifying a form of political power that is at the same time 'restrained yet capable'. How the challenge of justifying political power as 'restrained yet capable' can be used to make more sense of established notions of legitimacy, whilst also clarifying their shortcomings, is something I hope to demonstrate during the course of this chapter. I will do this through a critical examination of the still widely held assumption that indirect legitimation by Member States is – and should continue to be – the main justification for Union powers.

Turning to definitions, the argument will move more quickly if I offer some preliminary thoughts on the following: power, legitimacy, consensus and arbitrariness.

Power. I deliberately assume one of the oldest and crudest definition of political power, namely, that A exercises power over B where A makes B do something (s)he would sooner not have done. This is not to deny that power may be exercised through less than overt restrictions on choice (Lukes, 1974); nor, even that it may be hard-wired into our very 'archaeology of knowledge' through those things our assumptions and definitions admit or preclude (Said, 1986). Rather, I work with an understanding of power as a visible form of command-giving for the simple reason that those who doubt the Union needs more than indirect legitimation often assume that it is at most only indirectly coercive.

Legitimacy. Polities are legitimate where the governed have moral obligation to obey their rule. It is worth laboring the point that mere support or approval is not enough. Political legitimacy is more demanding than that. It consists of a series of institutional rights – to

decide some matters collectively and in certain ways – which the addressees of those institutions must acknowledge on account of their own moral obligations. This sets the hurdle high. Yet, as Habermas puts it, it is only by requiring that they should have 'moral force' that we can confine legitimate 'orders' to those to which 'addressees [...] bind' themselves of their 'own free will' (Habermas, 1996: 67), rather than for external reasons of interest or coercion that need have nothing to do with the perceived rightfulness or justifiability of the polity.

Consensus. In setting out the foregoing understanding of legitimacy I deliberately avoided specifying how many of the governed need feel a moral obligation to obey or how far they need to be agreed on the nature of that obligation. One famous answer is that the only shared belief the governed really need is one in the probability that sufficient of the others will recognize a system of rule as valid for that system to secure the purposes of its laws (Weber, 1993: 37). Alignment of the laws with the norms and values of the governed may well contribute to a belief in that probability. But so may a whole series of other factors including confidence in the capacities of the very laws and institutions that are in need of legitimation, expectations of shared interest in compliance, habit and convention. This formulation has the huge advantage that it does not presuppose an absolute consensus on values that societies based on value pluralism would find hard to sustain. But it does imply that some of the reasons some of the people have for compliance are based on prudence and calculation, as well as empirical understanding of the concepts of legitimacy that are 'out there' in the rest of society, rather than on their own feelings of moral obligation.

Yet, even those with contrasting values, need not really depart from an understanding of legitimacy as a pure matter of mutual obligation, unpolluted by considerations of prudence or interest. To do this, they need only agree that at least some obligations are antecedent to their holding of particular values. Thus Rawls asks what would be a fair 'scheme of co-operation' between those who recognize one another as having contradictory but equally reasonable values (Rawls, 1993). Rawls' answer, however, contains suppositions about an 'overlapping consensus' between values which Habermas argues can be further dissolved into a purely procedural understanding of legitimacy with the help of his discourse principle that: 'just those

norms are valid to which all possibly affected persons could agree in rational discourses' (Habermas, 1996: 107).

What Habermas means here is that individuals 'put themselves under' political obligations through the very propositional logic of making moral claims. This sounds forbidding, but, in reality, it is quite straightforward and hugely familiar. We cannot demand rights for ourselves whilst withholding those same rights from others. We cannot say that we should rather like something to be a moral obligation – which we do almost every time we claim a right for ourselves – without, implying, that all like placed people, including our 'future selves', should act in the way we suggest. To the extent, then, rights apply to more than ourselves, and directly imply obligations to others, we quickly spin an elaborate web of implied obligation in our daily 'rights-speak'. If it turns out that we need to act with those others to realize or safeguard rights – to interpret and enforce them – the very act of demanding rights also implies obligations to institutions.

Arbitrariness. Arbitrariness might seem a peculiar addition to a list of definitions that includes such core concepts as power, legitimacy and consensus. Yet, we will see in the next section that it is on account of the value that the governed are assumed to place on avoiding 'arbitrary forms of domination' that political power may need to be 'restrained yet capable' – and not just restrained – if it is to be legitimate. Philip Pettit defines arbitrariness as those acts that depend purely on the '*arbitrarium*' of the perpetrator: that are 'chosen or not chosen' at the 'pleasure of' the actor 'without reference to […] those affected' (1997: 55). Before it is assumed that this adds little to Habermas' discourse principle, it is worth pointing out that Pettit is not just interested in the formal characteristics of social norms and public institutions that would render them non-arbitrary and thus a justifiable form of domination. He is also, as we will see in a moment, concerned with empirical conditions that have repeatedly persuaded individuals to put themselves under non-arbitrary forms of political power in preference to suffering more arbitrary forms of domination.

With the help of the foregoing views on legitimacy, consensus and arbitrariness, I intend over the course of a wider project than this chapter to compare, contrast and evaluate three approaches to the specific problem of justifying the Union as a 'restrained yet capable'

form of political power: Namely, indirect legitimation by Member States, legal constitutionalism and political constitutionalism in the form of a system of democratic politics at the European level.[1] After a section setting out why it is important to ask how the Union should and could be legitimated as a restrained yet capable form of political power, the chapter develops just one of the four studies that will make up the eventual work: That of indirect legitimation. As will be my method with the other three studies, I will begin by evaluating belief in the indirect legitimation of the Union against standards that its own advocates set for the restrained yet capable employment of political power. I will then go on to broaden the discussion to include standards that are more generic to the challenge of exercising restrained yet capable political power over societies governed by liberal democratic values. Given the literature on indirect legitimation, the first of these steps will require a focus on public choice arguments. The second step will, however, permit a return to political philosophy.

Legitimacy, power and non-arbitrary domination

So why is it not enough that power should be merely restrained? Why is it that it should also be capable if it is to be legitimate? The answer that is usually given is that it is by no means clear what motive the governed would have for acknowledging the rightfulness of a polity that did not serve at least some of their needs and values through one of the classic ends of government; namely, by solving collective action problems, by providing justice or by acting as a marker for some shared identity. If, moreover, in achieving any of these ends, a polity did not from time to time compel the governed to do what they would sooner not do, it is unclear that it would stand in any kind of a relationship to anyone else that would be in need of legitimacy.

However, I want to go beyond the familiar argument that for there to be legitimacy there also have to be outputs, rule and power of some kind. What interests me in particular is the application to the EU of the republican argument that legitimate power needs to be 'capable yet restrained' because there is an internal relationship between restraint and certain forms of governing capacity. Put another way,

[1] See Bellamy (2007) for the distinction between legal and political constitutionalism.

the same values that justify restrained rule commit us to certain kinds of capable rule.

If, as Pettit argues, we seek to minimize arbitrariness in human relations, we cannot confine ourselves to restraining public institutions, since arbitrariness derives from other sources than politics and from other political sources than single political systems. Rather it also originates in private power – economic and social relations – and in the largest residue of human relations that remain ungoverned, namely the international system (Pettit, 1997: 287-288). Thus a need to control the arbitrary power of the monopoly producer to extract rents, the arbitrary power of the bad neighbor to impose negative externalities on others, the arbitrary fury of human passions (Hobbes), the arbitrary judgment of the victim who turns out to be a 'poor' and disproportionately vengeful judge in his own case (Locke) or, indeed, the arbitrary power of the bully in international relations, all these can and have been used to justify the empowerment of strong governing institutions. In short, we look to political institutions to provide countervailing forms of non-arbitrary power and consider them legitimate in so far as: (a) they in fact 'countervail' and (b) they do so in ways that fit whatever happen to be our standards for non-arbitrariness; they are duly authorized, duly controlled or whatever. Together (a) and (b) imply that polities are legitimate if and only if they are 'capable yet restrained'.

Power and arbitrariness in the European arena

An understanding that legitimate power needs to be 'restrained yet capable' is already implicit in the tools that have been developed to study of the Union's own legitimacy (or lack thereof). What else does the widespread practice of analyzing the Union's legitimacy into its output and input components (Olsen, 2008: 14; Scharpf, 1999: 2) signify than a recognition that for EU institutions to be legitimate they must be capable enough to produce outputs the governed find useful; and yet constrained enough to satisfy agreed procedural conditions for the rightful exercise of Union powers? Moreover the need for the Union to be 'capable yet restrained' is unaffected by the possibility that the 'output' and 'input' components of EU's legitimacy refer to two quite different things: the first to a condition for even considering the Union in need of legitimacy; the second to a consequence of defining legitimacy as that set of procedures that create moral obligation on the part of the governed.

Not all commentators, however, are persuaded that we can get beyond the first of these steps to establish that the Union is sufficiently in need of any original form of justification for the study of its legitimacy to be worthwhile. Like the British rail announcements that the trains were running late on account of the 'wrong kind of snow' it may just be that the Union has the 'wrong kinds of policy outputs' to be classified as a polity in need of legitimacy, at least not in a form that we do not understand well enough already, such as indirect legitimation by other bodies that are themselves legitimate (Beetham and Lord, 1998: 11). Rodney Barker provides one of the most eloquent and engaging statements of this position. As Barker puts it 'legitimacy is a concept which can usefully be applied to rule or challenges to rule. It cannot usefully be applied where rule is absent, hypothetical or so indirect as to be invisible to the ruled'. The difficulty in his opinion is that whilst 'the EU may govern, it does not follow that it has subjects in the way a state has'. That is to say, 'subjects' who have 'any substantial or significant consciousness' of being ruled by the Union (Barker, 2003: 159-160).

Of course, an important reason why 'subjects' may lack 'significant consciousness' of the Union as a system of rule is that in so far as EU law is ever 'hard' it is only after it has been wrapped up in the commands and enforcement mechanisms of national law. Before it is put into that wrapping it is, arguably, soft to the point of only being an 'invitation' to Member States to obey (Weiler, 2002).

It is not, however, only on account of the nature of its rule – the kind of commands it issues to its addressees — that we may need to enquire into the nature of the Union's policy outputs before specifying its legitimacy requirements. Consider the understanding of legitimacy implicit in the following answer Giandomenico Majone gives to the question 'which policies could be legitimately included in the agenda of a European federal state'?

> Aside from foreign and security, the public agenda would mostly include efficiency-enhancing, market preserving policies […]. Unlike redistribution – zero-sum game – efficiency issues may be thought of as positive sum games where everyone can gain. Hence, efficiency-enhancing policies do not need a strong

> normative foundation: output legitimacy (accountability by results) is generally sufficient.
>
> (Majone, 2005: 191)

The assumption here is that policies that are 'pareto' efficient in achieving the preferences of all their addressees without leaving any worse off are their own source of justification.

In sum, then, the following have been given as alibis why the Union may not require direct legitimacy in the sense of needing to establish its own claims on the moral obligations of the governed: Its policy is pareto-improving and thus vanishingly objectionable; its rule is indirect and thus vanishingly visible; and its law is soft and thus vanishingly coercive (Barker, 2003; cf. Scharpf, 1999: 21-25). Moreover, these alibis may cohere into one. It may only be possible for the EU to operate through soft invitations to obey – that Member States then have every incentive to harden up through their own laws – because it is pareto-improving in relation to all its Member States. But would such an account remove all risk of arbitrariness in the exercise of Union powers?

The EU as a Coasian scheme of co-operation?

At first sight the notion that the Union operates as a pareto-improving relationship between its Member States is a most implausible claim indeed. A whole number of Union policies seem to reallocate values between winners and losers, be they net contributors or beneficiaries from the budget, holders of particular identities and ethical views, advocates of particular economic and social models, and so on.

Yet, these individual reallocations do not exclude the possibility that the Union is pareto-improving in the round. Indeed, those public choice theories that predict conditions where co-operation will emerge through self-interest alone – if need be, without institutions and by unanimous agreement – do not assume anything as crude as pareto-improvement in relation to single decisions, as opposed to package deals (log-rolls) and compensations across decisions (side payments).[2] This incidentally is a fairly simple point which Simon

[2] See for example condition (d) under those identified by Inman and Rubinfeld below.

Hix and Andreas Føllesdal miss in their reply to Majone (Føllesdal and Hix, 2006).

Since public choice theories which claim that pareto-improvement is a sufficient condition for the justifiability of collective choice purport also to identify conditions for 'non-dictatorial' decision-making – where collective choices can also be understood as individual choices – they are a useful starting point for my own discussion of conditions for avoiding arbitrariness. It would seem sensible enough to say no one exercises power over any one else – and there is therefore no relationship in need of legitimation – where the common decision not only leaves all its addressees better off, but is a choice they all make individually for themselves.

Thus, for Buchanan and Tullock (1962), who famously introduced the earlier Coase theorem (1960) to political science, consensus and pareto-improvement go together both normatively and causally. At a causal level, Buchanan and Tullock predict that a polity that is unable to decide on any other basis than consensus will, under the right conditions: (a) only make decisions that would leave all addressees better off; and (b) end up exploiting all possible opportunities for mutual gain. But let there be no mistake they also thought they had discovered features of the normatively most defensible polity: One that would, as it were, be doubly non-arbitrary – at once consequentially optimal (all would gain) and deontologically optimal (the autonomy of all would be respected, since all would choose for themselves).

Moreover, a Coasian framework seems a promising tool for understanding the legitimacy of international co-operation. Those with whom the decisions of international bodies need to be legitimate in the first instance – participating states – are often few enough in number for unanimity to be possible. Even if we then go on to assume that the decisions of international bodies also need to be legitimate with the citizens of the participating states, we can still use a Coasian framework to do much of the heavy lifting work of legitimating international co-operation by assuming the latter will be legitimate where: (a) they are pareto improving and taken by consensus of states; and (b) each of the participating states acts as a satisfactory agent of its constituents according to its own internal standards of legitimacy. For example one contribution to the political

economy literature proposes the following as conditions for the application of the Coase theorem to inter-state co-operation: (a) low transaction costs in concluding or enforcing agreements; (b) widespread knowledge of the preferences of all states and thus of the 'full range of possible trades' between them; (c) states operate as good 'agents' of their 'constituents'; (d) gains can be divided, if necessary through trades across issues (log-rolling) or compensations to losers on any one issue (side payments) (Inman and Rubinfeld, 1997: 76-80).

Yet any attempt to justify the EU as a 'Coasian scheme of co-operation' would have to contend with at least the following two features of its polity which, at first sight, do not fit the assumptions of such a scheme at all.

First, the Union's majority decision-making rules would need to be justified as themselves dependent on the continuing consensus of the Member States. Whilst this is by no means impossible it would require an understanding such as that set out in the following paragraphs of how the Union works in practice:

In a structure of executive federalism (Dann, 2006) – in which it is the executive branches of the Member States themselves that exercise many of the Union's powers and on whose active co-operation the whole structure so manifestly depends – departures from consensus decision-making between Member Governments are rare (Mattila and Lane, 2001); and, where they do occur, they may be better understood as procedural conveniences – as closure devices for the timely and efficient pursuit of objectives that are themselves supported by a consensus – rather than as means of bringing about serious reallocations of value. If this is correct, we would expect Member States not only to be reluctant to use voting to bring about large-scale re-allocations of value. But, even in the event of majority voting, we would also expect them to continue the search for consensus, maybe at subsequent stages of implementation. Thus, comitology committees may allow for some real-time alignment of collective obligations with individual state preferences (Sabel and Zeitlin, 2007: 12) so also, it is worth noting, tempering the further difficulty that the EU is constantly at risk of being experienced as an oppressive form of 'rule by ancestors' by governments whose

obligations were mostly agreed by their predecessors and political opponents.

Even, the empowerment of European Parliaments can be seen as only a limited departure from a consensus of states. Not only is its main impact to add one further veto point to a system that already seems to tread softly in over-riding the veto of any one state, but it is even possible to interpret the exercise of the EP's veto as a means of broadening the consensus *within* states for Union policies, rather than as a means of raising up some European-level majority opinion in opposition to that consensus of states. The domestic character of European elections – the fact that they are not obviously about the institution that is, in fact, being elected or even the Union itself – means that the Parliament has little claim to speak for some European-level 'majority opinion'. The continued role of national parties in structuring voter choice in European elections, and thus in peopling that Parliament with national party delegations that form even more cohesive voting blocs than the transnational groups in which they co-operate (Hix et al., 2007), means that the Parliament aggregates cleavages more or less common to Member States. It is therefore limited in how far it can contribute to the autonomy of the Euro-polity by developing a structure of competition and choice that differentiates the Union from domestic arenas (Bartolini, 2005). As if to reinforce this effect, the structural over-representation of national parties of opposition (itself the product of the second-order European elections) in a Parliament that often decides by a consensus that sometimes seems almost as careful as that in the Council – to the point at which most groups in the Parliament participate quite a lot of the time in the formation of winning majorities – arguably provides some opportunity for Member Governments to include domestic opponents in the cross-institutional majorities (of the Parliament and the Council) that decide those obligations by which their Member States will eventually be bound.[3]

But any attempt to justify the EU as 'a Coasian scheme of co-operation' would not only need to contend with the Union's majority features. It would need to be able to answer those who believe that European integration is re-allocative of values.

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[3] Cf. all of this with the concept of 'audit democracy' at the European level set out in Eriksen and Fossum (2007).

One possible answer to that concern might be to claim that a fair scheme of co-operation at the international level needs only to be pareto improving *between* states. It can be re-allocative, and anything but pareto-improving, *within* states, provided it can be legitimated by whatever internal arrangements each state employs for authorizing redistributive decisions. Another possible answer, however, is less formal, less procedural. It again would begin by assuming that co-operation is pareto-improving between all states. It would then go on to point out that each participating society could decide to spend its 'co-operation surplus' in different ways. This might amongst other things include more spending on social and environmental policies. Only, once account is taken of this secondary effect, would it really be possible to conclude that even a European Union that, for example, did negative integration and nothing but negative integration would be 'ideological biased'. European integration could – in other words be ideologically extremely narrow – and yet still expand the overall choice set of those with a wide range of different ideological preferences.

In sum, then, any attempt to use a Coasian framework to justify the Union as a 'fair scheme of co-operation' would probably presuppose: (a) that its decision majority rules are themselves governed by consensus of its participating states; and (b) any ideological non-neutrality in Union policy is either illusory or legitimated within Member States. In providing these two forms of reassurance the Union would, however, have to cope with at least the following difficulties inherent to both the Coasian framework itself and its application to a multi-state setting:

A 'restrained yet capable' form of political power?

One difficulty relates to the determinacy of the pareto-criterion. Even if it were technically possible for the Union to make pareto-improving decisions that would not in itself remove all risks of arbitrariness. A well-known problem is that the search for pareto-improvement may produce more than one solution that leaves all participants better off in terms of their own preferences, yet each one of which distributes the gain in different ways. In so far as preferences on EU questions are multi-dimensional – involving at the very least left-right choices as well as choices between more or less European integration itself (Hix, 1999) – the Union is just the kind of arena where multiple equilibria are likely. In polities with more than

one dimension of conflict and choice, any departure from unanimity – including those which Coasians might want to explain away as purely technical procedural concessions to speedy decision-making – will threaten problems of cycling. A wide range of outcomes will be possible. Some would say any outcome will be possible (McKelvey, 1976). Procedure will then be decisive to determining which outcome is chosen, exposing choice to the arbitrary manipulations of those who happen to control procedure (Riker, 1982), unless comprehensive agreement can be reached in advance of what would amount to a non-manipulative administration of decision rules. But, even if feasible, this clearly departs from any that, in a pareto improving world, the main weight of legitimation in the European arena can be put on the intrinsic qualities of policy outputs, so lightening the need for procedural consensus.

A second difficulty is that even if it can be agreed that a process of pareto-improvement is unambiguously fair it does not automatically follow that all allocations will be accepted as fair. Precisely because it is almost tautological to describe as fair any process that leaves everyone feeling better off in terms of their own preferences, that on its own really does not get us very far. As is often observed, only a process of pareto-improvement – and not the point from which that process starts out – can ever be considered to be both chosen and fair from all points of view. Rawls, moreover, links this point and the last: if we have to choose between multiple ways of leaving everyone better off, we may well want to take the initial distribution – including its perceived fairness – into account in allocating the increment (Rawls, 1973: 334-335). Other commentators point out that even if all participants in a scheme of co-operation were to accept some starting point as fair, agreement would be likely to erode over time. As long as humans think for themselves – and find themselves continuously replaced by further generations who likewise think for themselves – preferences will drift away from solutions that were widely accepted as fair sometime in the past (Shapiro, 1996). As long as the technologies of collective choice continuously change – removing earlier choices and creating new ones – there can likewise be no guarantee that what is widely accepted as a fair starting point today will be so accepted tomorrow. Once, however, we allow for the possibility that factors affecting the perceived fairness of the starting point may shift over time, the argument that consensus decision-rules ensure freedom – by automatically aligning collective choice with

individual choice in a scheme of mutual improvement – breaks down. To the contrary, consensus can become an iron cage rather than a guarantor of the autonomy of each and every actor; a means of holding everyone else to the arbitrary domination of single veto-holders able to insist on the *status quo*.

A third difficulty concerns discontinuities. The more we depart from a situation in which all values are 'continuous' – they can be infinitely divided into ever smaller amounts – the more difficult it will be to satisfy the assumption of the Coase theorem that all values can be traded so as to leave everyone better off in terms of their own preferences. Yet there seem to be a great many values that are anything but continuous: They can only be enjoyed if an 'all or nothing' – 'one-size fits all' – choice is made to provide them in the same way for everyone. Kenneth Arrow puts the point thus: '[Some] actions being collective or interpersonal in nature, so must the choice amongst them […]. The individuals in a country cannot have separate foreign policies or legal systems.' (1973: 123) He might have added that there are also limits to how far they can have separate different political systems, varied assumptions of political community or association, different market structures, separate institutions of macro-economic management, separate opportunities to breathe clean air, or separate welfare states. Note that all these items are affected by European integration. Some are even within the active competence of the European Union. To decide moreover on any of these questions is quite probably to take a decision on a quite distinctive kind of value allocation, one that quite probably involves conflicting yet equally reasonable claims as to what is good and/or what is right. Again, we will return to this difficulty in the conclusion.

A fourth difficulty relates to agency. Amongst the conditions proposed by Inman and Rubinfeld above for the application of the Coase theorem to inter-state bargaining was that participating governments should act as satisfactory agents of their publics. Principal-agent analysis has long discussed conditions under which the supranational institutions may operate as more or less well-supervised 'agents' of Member State governments (Pollack, 2003). But no coherent account of indirect legitimacy can rest there. Put simply, it cannot amount to a claim that the consent of governments can be sufficient or be exempt from a need to justify the Union to publics. At

the most it can only function as a claim that the Union is best justified to publics *via* governments. It faces precisely the same challenge as any other understanding of legitimacy where the body in need of justification makes laws and the societies to which the laws in question are applied are liberal-democratic: namely, one of demonstrating how citizens can see themselves as authoring their own laws as equals. If, then, it can at the most only be a claim that Member State governments can mediate and organize legitimacy, proponents of indirect legitimacy have to be able to show that the governments of all Member States can somehow get together to make laws in the European arena in ways that satisfy whatever standards their several publics require for seeing themselves as authoring their own laws as equally entitled citizens. The difficulty, as James Bohman puts it, is that governments may be able to 'reverse' the principal-agent relationship (Bohman, 2007: 70). Instead of always behaving in the European arena as the loyal agents of their domestic publics, governments may be able to use the European arena to free themselves from standards and mechanisms of public control to be found in domestic arenas. Space does not permit more than a superficial discussion of this familiar difficulty here. But, to mention two examples, separations between the exercise of executive and legislative powers – already reduced in many Member States by the executive domination of parliaments – may disappear almost altogether in those cases where the executive branches of national governments 'reconstitute themselves as the (sole) legislator' in the European arena (Weiler, 1997). Second, electoral choice and competition may be reduced in the domestic arena (perhaps intentionally so) through the assignment of policy responsibilities to the Union (Blythe and Katz, 2005; Mair, 2005).

In this section, then, I have argued that one of the most ambitious attempts to set out conditions for non-arbitrariness – the Coase theorem – is most unlikely to provide a means of legitimating the Union as a 'restrained yet capable' form of political power. Whilst this might sound technical, it is of fundamental importance. Contributions to the literature that suggest the Union can be 'legitimation light' often seem to assume something like a Coasian world;[4] and such a world – in which all Member States consent and all gain – would surely be needed if the Union is to be indirectly

[4] See the Majone quotation above.

legitimated in ways that do not require it to establish its own claims on the moral obligation of the governed. I have suggested four reasons why such a scheme of co-operation may be difficult to deliver in practice: indeterminacies, the arbitrariness of any starting point for co-operation, discontinuities, and imperfect agency. To understand the full toxicity of at least the first three of these difficulties it is useful to turn to the scholar who has reflected most on reasons why the conditions for the Coase theorem do not apply easily to the Union. Fritz Scharpf (2006) argues that the key difficulty is that the Union is a 'compulsory negotiating system' and not a 'voluntary' one. Member States cannot, as it were, just dip in and out of the co-operative framework when pareto-improving opportunities happen to come along. Rather, many values of great importance to their citizens can only be achieved legally and practically through the Union (ibid.). As Scharpf shows, a failure of any of the conditions for the Coase theorem will have quite different consequences in the two kinds of negotiating system. He invites us to imagine that 'transaction costs are far from zero; side payments and package deals are often not feasible; and […] complete information about true preferences […] hard to come by' (ibid.: 848). If any of these problems arise in voluntary negotiation systems, Member States may none the less have other options to achieve their objectives, either unilaterally or in alternative co-operative frameworks. If, the same problems arise in compulsory negotiating systems, the self-interested bargaining of all parties will no longer be enough to search out and secure all opportunities for pareto-improvement. To the contrary, consensus decision-rules may lead to cumulative divergence away from any efficiency frontier, as it becomes difficult to remove vetoes to change. Nor, indeed, will consensus automatically equate to autonomy, since single veto holders may be able to hold the rest to choices they have come to find undesirable.

As a footnote it is worth mentioning that just as ingredients of indirect legitimation (pareto-improvement, consensus, absence of constraint and low visibility) may cohere, so they may unravel together. Not only may consensus turn out to be constraining. It may also fail to slip under the threshold of political visibility, where decisions taken by consensus of Member States are used to absorb the legitimacy deficits of national institutions as well as *vice versa*. Once, moreover, consensus can no longer be relied upon to produce both justice and efficiency, the obvious question to ask is what decision-

rule would treat veto-holders and supporters of change 'symmetrically'? The answer, of course, is majority decision-making (Scharpf, 2006: 848).

Conclusion

In his Arrow lectures, Amartya Sen remarks that 'ways out' of certain problems of public choice are 'ways in' to 'moral philosophical issues' (Sen, 2002: 328). It is in the hope that it might clarify larger shortcomings in the use of indirect legitimacy to justify the Union as a non-arbitrary form of political power, that I have discussed limits to the application of the Coase theorem to the EU. It seems to me that the two very large issues that are left over are those of how far indirect legitimacy can be reliably non-arbitrary in: (a) allowing all addressees of Union law to see themselves as autonomous authors of the obligations by which they are themselves bound; and in (b) establishing a fair scheme of co-operation. A Consensus of governments may not be enough to guarantee autonomous and unconstrained choices on the part of each of those governments, given the compulsory nature of the negotiating order and the possibility that governments may be held to unwanted obligations by veto-holders who are difficult to compensate in practice. On top of that governments may operate as imperfect agents of their publics in the European arena. Either of these difficulties would be sufficient to question any simple belief in the core assumption of the indirect legitimation model: Namely, that the approval of a Union law sometime in the past by the elected government of their Member State will always allow citizens to see themselves as authoring that law through representatives.

The second point – that any failure in the Coase conditions will make it harder to see the Union as a fair scheme of co-operation is worth elaborating. At this point I want to return to the seemingly technical point that there may be large indivisibilities in choices that need to be made about European integration. What may make non-compensable – all or nothing choices – particularly vulnerable to problems of arbitrariness is that they may need to be made between 'contradictory but equally reasonable' views of what is right or good (Rawls, 1993). Moreover, it may not be possible to avoid this difficulty by simply deciding not to choose at all. As seen, even non-decisions – to maintain the *status quo* – may privilege or prejudice some of the very views of the right and the good that are at issue.

My own hunch is that there are several choices that are made in the course of European integration that: (a) involve significant indivisibilities; and (b) decisions between equally reasonable and contradictory values. Value pluralism will be increased by integration wherever the range of cross-country variation of contradictory but equally reasonable values is greater than within-country variation. It may well have just such an effect in relation to welfare states (Esping-Anderson, 1990; Offe, 1998), the practice of democracy itself (Schmidt, 2006) and emotional ties of political community. All three are saturated with assumptions of the right and the good that remain to some degree specific to their national arena of origin. All three are affected by European integration, if only through the lowering of boundaries between Member States (Bartolini, 2005). All three are affected by 'gross choices' (Dunn, 2001: 203) that cannot be infinitely decomposed into different measures for different addressees of Union policy and law.

The difficulty we have repeatedly seen during the course of this chapter is that the Union is not just a polity in which territorial units more or less retain decision rights as would be expected under an indirect model of legitimation. It is also one in which ideological values – usually of a left-right nature – get allocated. If after all the tortuous attempts in this chapter to explain the problem away, we are still left with the impression that the very structural conditions presupposed by indirect legitimation – notably consensus between Member States – favor some ideological outcomes over others, then we have surely identified one more limit to how far that model can justify Union policies as non-arbitrary. This will be aggravated by problems of value pluralism to the extent that a scheme of co-operation between those with contradictory but equally reasonable values cannot be fair if it presupposes any of the values in dispute. It will be aggravated by the compulsory nature of the negotiating order to the extent that it will be impossible to avoid unjust decisions by simply not making decisions. It will be aggravated by the identification of certain values of non-arbitrariness with a search for capable, as much as restrained, forms of political power.

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Chapter 12

Finding a zoo for European polecats, lions and foxes
Contexts of democratic empowerment
Comment on Christopher Lord

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Political theory has a longstanding tradition of asking the question of how we can control as well as justify the empowerment of political institutions. For John Locke it was clear that individuals would never consent to a government which was likely to expose them to harm. Locke, who holds that any form of political power is only legitimate if natural rights and liberties of individuals are retained, therefore criticized Thomas Hobbes' notion of an absolute Leviathan. As Locke famously put it, it seems absurd to let loose a lion in order to be protected from polecats and foxes. With reference to this Lockean analogy, Christopher Lord applies the classical question of how to justify political legitimacy as a 'restrained yet capable' form of political power to the current EU context.

While a prominent school of thought in the literature on the European Union (EU) claims that a consensus between the member states will sufficiently balance the legitimacy demands of capacity and constraint, Lord reveals the shortcomings of such notions of indirect legitimacy. Moreover, after so many decades of research on

European integration without finding an adequate normative theory of legitimacy for political responsibility and democratic participation in multilevel governance systems, Lord's chapter provides insights into obstacles and challenges of conceptualizing the legitimacy of the EU. In his discussion of the Coase theorem, he bridges the gap between different disciplinary 'camps' – the political philosophers on the one side, and the public choice theorists on the other. Lord convincingly demonstrates that the application of the Coasian framework to the EU fails technically as well as normatively when discussed with regard to the republican ideal of non-arbitrariness. Even if we let ourselves in for some methodological assumptions and pre-conditions of a Coasian scheme of justified cooperation hypothetically, Lord provides sufficient evidence for how arbitrary decisions would be unavoidable in such a framework. For this reason he holds that the main justification for the Union's powers can no longer be indirect legitimation by pareto-improvements and consent between member states only.

The first part of my commentary will critically discuss some core ideas of Lord's argument, such as the concept of arbitrariness as well as the methodological approach. The subsequent part will focus on democratic politicization as a necessary requirement and tool for direct legitimation and effective contestation. The consequences for conceptualizing democratic legitimacy in the multilevel context of the EU will be considered before I come to a conclusion about the appropriate arena in which to institutionalize direct legitimation and where to locate legitimate political power. In my view, the pluralism of already existing mainstays of democratic empowerment within the EU, which is marked by integrated as well as autonomous political entities, interacting at various supranational, international or sub-national levels, needs to be considered more systematically.

The concept of arbitrariness and procedural legitimacy

To analyze the problems of indirect legitimation, Lord discusses the Coase theorem, which assumes that pareto-efficiency and consensus are conditions of legitimacy. With regard to what he calls the difficulty of 'multiple equilibria', he notes that even if pareto-efficiency is technically possible, a wide range of outcomes will appear which will be exposed to the possibility of arbitrary

manipulations. He thus criticizes this approach by showing that the Coasian concept of legitimacy does not prevent arbitrariness, which he defines with Philip Pettit as 'those acts that depend purely on the "arbitrarium" of the perpetrator: [T]hat are "chosen or not chosen" at the "pleasure of" the actor "without reference to those affected"'(Lord, chapter 11 in this volume: 184). [1]

I agree with Lord that there is a risk of arbitrary manipulations of 'multiple equilibria'. If, when choosing between options, one takes value pluralism seriously, it implies that there is always a danger of favoring certain values over others. However, since it is impossible to know if a policy is pareto-improving without evaluating the preferences of all affected, there is always a non-arbitrary, if not democratic, anchor in the calculation of the pareto-optimum. All affected must have had a say in order to find out if none of them would be worse-off than before. In opposition to Lord, one could therefore argue that outcomes cannot be called illegitimate regardless of the procedure they were formed in or without further consideration of the actors they were developed by. In this regard open results are legitimate enough, as long as will-formation and decision-making procedures were non-arbitrary.

Against this procedural notion of non-arbitrariness, Lord operates with an outcome-oriented idea of non-arbitrariness without explicitly justifying it. Just as the definition of arbitrariness is an unsettled issue in republican literature in general (Lovett, 2006), so is the relationship between non-arbitrariness and democracy. This is also relevant here. By demanding to avoid arbitrary outcomes, Lord also tends to implicitly discriminate against open-ended results and flexibility in general; crucial elements in democratic processes. For democratic prosperity, a certain amount of unpredictability of outcomes is part of the game and its dynamic nature. The acceptance of fallibility is a core feature of democracy.

To conclude, it is not the mere fact of possible multiple outcomes which renders them illegitimate; it is in fact the absence of democratic

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[1] It remains open how 'reference' is defined here. What are the normative requirements of such a 'reference' to be fully democratic? Is a reference enough to avoid arbitrariness? Or does this reference entail a 'right to justification' (Forst, 2007)?

contestation. From that perspective one could hold the view that in the EU context the existence of arbitrariness at a supranational level is not a sufficient criterion for evaluating its legitimacy, unless one does not take the member states' potential contestation into account. One needs to test whether such contestatory powers with the ability to control or revise political decisions exists – be it at supranational or subsidiary levels, i.e. the member states. Contrary to Lord's argument, multiple equilibria are therefore legitimate if those affected have contestatory power.[2]

Public choice approaches and the political

The critique sketched out here might be motivated by some more general objections against the methodological framework of public choice theories, within and against which Lord develops his argument. Public choice approaches seek to explain collective agency and social orders by reference to individual choices and preferences. Individual cost-benefit evaluations of utility maximization and optimization of policy outcomes are of interest. Although contemporary approaches of public choice theories are more sensitive to contexts ('bounded rationality') and see rationality only as one feature of decision-making amongst others, their methodological individualism still forms a contrast to more structural and institutional approaches that are concerned with the impact of institutions on individual agency as well as with collective agency. As a consequence, public choice approaches tend to focus more on decision-making processes, while neglecting processes of political empowerment and the collective and interpersonal character of political activity as highlighted i.e. by Hannah Arendt (1998).

As I have argued above, the dominance of decision-making instead of will-formation processes in public choice approaches helps us to explain some fundamental problems of the Coasian framework in political contexts. The concept operates with some preconditions, such as a specifically defined set of those actors whose preferences

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[2] Philip Pettit offers an elaborated theory for this approach. To him, two dimensions of democracy are relevant when discussing future prospects of international democratic legitimacy: an electoral and a contestatory aspect. While there is a 'democratic deficit in decision-making at international centers of power', a structural deficit, there is also'a deficit that we can do something about: a contestatory deficit' (Pettit, 2006: 321).

are taken into account. This makes it too static and hard to apply to a dynamic society, where preferences as well as the set of participating and affected actors may change or develop during a political process. The Coasian framework presupposes a static environment, absolute information and a fixed set of affected actors, opportunities, interests and political contents. Lord mentions that agreements over starting points may erode and 'factors affecting the perceived fairness […] may shift' (Lord, ch. 11: 193). In my view, however, these difficulties reveal the underlying normative conceptions about the nature of politics in public choice theory, which can be criticized as one-sided. In my opinion, this requires closer consideration as a strong and independent line of argument against the applicability of the Coase theorem than given in Lord's chapter. This leads us to a broader discussion of the problems of a feasible political concept of democratic legitimacy – particularly in the EU context – and the question of how Lord addresses this challenge.

Conceptualizing the democratic legitimacy of the EU

For Lord, the decisions of the EU authoritatively allocate goods and values and have identifiable winners and losers. This powerful 'European lion' should thus be subjected to the democratic process and requires direct legitimacy. Lord's understanding of this legitimacy is one 'where the body in need of justification makes laws and the societies to which the laws in question are applied are liberal-democratic: Namely, one of demonstrating how citizens can see themselves as authoring their own laws as equals' (ibid.: 195f.). As to this demand, he is not very optimistic about the EU's democratic legitimacy. He writes that the 'EU is constantly at risk of being experienced as an oppressive form of "rule by ancestors" by governments whose obligations were mostly agreed by their predecessors and political opponents' (ibid.: 190-191). With regard to the most promising institution for democratization, the European Parliament (EP), he highlights the problem of the 'continued role of national parties in structuring voter choice in European elections'. Therefore the EP still has 'little claim to speak for some European-level "majority opinion"' (ibid.: 191). In order to change this, a Europeanized political public and European parties are needed. In his chapter, Lord presents ideological competition as a necessary tool of empowerment against the risk of arbitrariness. It is unclear,

however, how and where this process of politicization could be triggered and where it could take place. The final part of the commentary will therefore sketch out remaining difficulties in Lord's argument with regard to the infrastructural context of democratic empowerment.

Politicization and other conditions of democracy

Politicization can be understood as the emergence of political and ideological cleavages between people which generate patterns of conflict as well as patterns of cooperation in political struggles. Politicization equally refers to the spreading of information about these conflicts and to the triggering of polarization about political issues. It is therefore a requirement for an active citizenship and a key element of will-formation and political identification (see also Rittberger, 2010).

From a historical perspective, ideological competition and the evolution of political movements and parties have had many structural, socio-economical, cultural and institutional preconditions (Kielmansegg, 1996). The democratic aim that citizens must be able to author their own laws as equals, as Lord defines his understanding of legitimacy, is therefore highly path-dependent. With neither informed nor interested citizens, without solidarity, conflict and political identification, democracy could not work. Concluding from the infrastructural and historical path dependencies of politicization and the emergence of a political culture, the question arises whether the powerful re-distributive competences of the Union alone will politicize the Europeans. This view is held by e.g. Rainer Maria Lepsius (2004), who sees a growing impact by the European institutions and predicts conflicts and politicization as their outcome. According to him, institutional reforms will make it easier for the Europeans to identify themselves with the EU. Contrary to that, Achim Hurrelmann (2008) holds a more skeptical view. While the competences of the European Parliament have grown continuously, he argues, the participation in elections have declined in most member states. (Hurrelmann, 2008: 7) Beside this empirical evidence, he also adds an important theoretical argument: The majority and the minority of a decision-making process need a sense of 'togetherness' in order to interpret decisions by the majority not as domination but as self-rule. The EU, however, does not yet provide such a common identity. Hurrelmann doubts that decisions of the European

Commission based on the majority principle would find acceptance. Following that, he consequently criticizes the break with consensus-oriented procedures and sees it as having a destructive potential for the integration project as a whole (ibid.).

Beside institutional incentives, many efforts are made by the EU in order to activate a vital Europeanized political discourse. There have been strong attempts to reveal – i.e. (re)construct – a collective European identity, just as it has always been the strategy in the still ongoing nation-building processes of the member states. The EU manifests its own nation-building strategy by introducing classical symbols such as a flag or an anthem and by defining the EU against its neighbors and 'the other' (Benhabib, 2004a)[3], whether politically, territorially or culturally – beyond as well as within EU borders.

The ambiguity, which historically accompanied the emergence of a politicized society, becomes obvious also in the EU. It can be explained in terms of an intrinsic tension within the idea of democracy: Whenever a people claims democratic self-legislation it is always connected to a self-definition – and to a definition of those who do not belong to it, whether the markers are ethnic, social or civic in nature. Benhabib (2004a) describes this as an expression of the ambivalent tension between the universalistic principle of democratic equality and inclusion, on the one side, and the particularistic cultural and national identity of a people, which is exclusive, on the other. She understands this intrinsic 'paradox' of democracy as being constitutive for all real democracies (Benhabib, 2004a: 51f). As a consequence, there are reasons to be skeptical about the role of politicization for the European integration project. It is the general awareness that processes of politicization and democratization always result in both: Integration as well as fragmentation; cooperation as well as conflict. The two trends of supranational integration and differentiation also co-exist in the EU. The strengthening of cleavages and the deepening of interest-based conflicts about European affairs could – from a functionalistic perspective – result in an unknown complexity, which would render the consensus-based consociational system of the EU and its existing

[3] See Benhabib (2004b) where she addresses the human rights of persons who reside within a state but who are – as legal and illegal aliens – excluded from its polity.

decision procedures technically impossible. This difficulty was pointed out and analyzed by Cees van der Eijk and Mark Franklin (2004; for an overview see Rittberger, 2010). The general question for institutional designers as well as for political theory is therefore: How can we accommodate the potential complexity if all differentiations in European affairs are supposed to be adequately represented? Here we are confronted with the classical question about the functional limits and boundaries of democracies with regard to their diversity, be it geographically, socio-culturally or institutionally – a question not enough considered by Lord.

For institutional designs to be democratically justified, i.e. by those affected, they have to be legitimated by a politicized European *demos*. However, as Lord points out, the consociational character of the EU, with its consensus-oriented institutions of decision-making, does not really provide institutional incentives for a transnational politicization through polarization: For him '[e]ven the empowerment of European Parliaments can be seen as only a limited departure from a consensus of states'(Lord, ch. 11: 191). Also as a communicative process, European-wide politicization is not only a transnational but a trans-lingual challenge. In his theory of democratic citizenship in multiethnic states, Will Kymlicka has prominently shown where there might be some strong linguistic obstacles to a deliberating European public. He argues that participation in social and political institutions is also based on shared language (Kymlicka, 2001: 312f and 326). Beside empirical findings, it is a normative issue inasmuch as the necessity to learn new languages (i.e. one of the three official administrative languages of the EU) is a task which in fact structurally disadvantages most Europeans.

As a conclusion, the empowering function of democratic institutions which is to ensure just processes of will-formation and decision-making through inclusiveness, equal chances to participation and the institutionalization of a 'right to justification', is very demanding and not yet existing at the transnational level (Forst, 2007: 379; Schmalz-Bruns, 2002: 279f). In contrast to that, the member states of the EU all provide a basic infrastructure and institutionalization of democratic empowerment. This horizontal and vertical pluralism of democratic structures (Bauböck, 2007) manifests each member state's unique ways to democracy and to particular institutional designs to

accommodate and regulate specific challenges. However, these structures and the political integration of each member state are path-dependent historical products, which have been developed in terms that were most of the time not democratic and peaceful at all. As such, they cannot be repeated easily or serve as a clear-cut template for the new nation-building project at the EU level today. The cultural and linguistical diversity in Europe highlights infrastructural challenges of democratic participation, which need to be considered when discussing the potential of a European democracy and the legitimacy of new institutions.

Contrary to this view, which explains why the member states (still) function as the mainstays of democratic deliberation and decision-finding, Lord discusses the shortcomings of the EU's legitimacy mainly as a problem of imperfect agency of the member states who do not act as satisfactory agents for their publics (Lord, ch. 11: 194f.). Instead of Lord's argument for EU-wide forms of direct legitimacy, in which member states could be at best only mediators (ibid.: 195f.), one could outline another standpoint, from which member states act as representatives which are legitimate participants in European affairs and which require room for maneuver in order to be 'restrained yet capable', to use Lord's own formula. Without doubt there is the necessity to improve the democratic agency of member states. Contrary to Lord's intention, the democratization of the EU could alternatively be conceptualized and realized through a continuing democratization of its members (e.g. by increasing the transparency and accountability of each member state's involvement in European affairs to their particular citizens as suggested by Hurrelmann, 2008). This optimization of democratic agency would have to be accompanied by actively promoting and widening the principle of democratic inclusion within the member states. The excluded 'others', such as long-term residents from non-EU countries, would have to become democratically empowered citizens with equal political rights. This alternative conceptualization of the EU's democratization has several advantages: It is sensitive to the infrastructural and pluralistic conditions of politicization and democracy; it is pragmatic and realistic as it operates with already existing structures of democratic empowerment from which a Europeanized politicization will benefit as well, and it is broader in scope as it demands democratic inclusiveness and direct legitimacy also and first of all with regard to the powerful member states.

Democratic legitimacy and other dimensions of legitimacy in the EU

Beside the EU's democratization, another obstacle is a challenging task for conceptualizing the legitimacy of the EU. It is the multilevel notion of legitimacy: With regard to the legitimatory beliefs democracy is only one among other objectives. From the very beginning the institutionalization of peaceful cooperation and the prevention of war between the European states have both been core principles and motivational forces of European integration. Liberalization and harmonization of markets with their positive effects on economic welfare and freedom of movement for the Europeans within the EU were also huge achievements and legitimatory factors. Democracy as a standard of legitimacy of European integration completed these other relevant dimensions of the EU's legitimacy. The initial question of how to bridge the gap between the European countries and former enemies in order to make the relations peaceful shifted to the question of how to bridge the gap between Europe and its citizens in order to democratize this relation. The main objectives of the Lisbon treaty consequently had to do with the democratization of what has been established so far. The standards of openness, transparency, accountability and democratic participation marked a shift from functional to more normative considerations of the EU's legitimacy again.

Although there has been a re-balancing between the values, all these dimensions of EU-legitimacy still co-exist today. To a certain extent they are also implicit in Lord's definition of legitimacy, where he highlights political capability as a core element of legitimacy. Capability was defined as serving needs of the governed, such as 'solving collective action problems', 'providing justice' and 'acting as a marker for some shared identity'(Lord, ch. 11: 185). The co-existence of European values, however, is still underdeveloped in political theory. What is the normative relation between these dimensions? What follows from this multilevel system of legitimacy *sui generis* for conceptualizing the EU's democratic legitimacy?

Conclusion

From a democratic perspective, the European Union is still the most developed system of regional cooperation and governance. It resembles Lord's idea of a restrained yet capable political body to a

large extend as supranational institutions were empowered by transfer of sovereignty as well as limited by developing democratic institutions (Bauböck, 2007: 104f.). Nonetheless, these democratic institutions do not sufficiently represent and empower those affected. The few existing mechanisms of indirect legitimation cannot, as Lord shows, prevent the risk of arbitrary power.

In my argument I followed the republican idea that processes of opinion-building and will-formation are integral conditions of democracy and democratic empowerment. So far I agree with Lord that politicization is a necessary requirement and tool for direct legitimation and effective contestation. However, direct legitimation is a demanding concept as to the infrastructural contexts and historical path-dependencies of politicization. This context is relevant to evaluate Lord's argument. Direct legitimation and democratic empowerment are affected by normative and functional ambiguities of politicization. In Lord's chapter it remains open if and where politicization as a precondition of direct legitimation is realizable. As to the project of conceptualizing legitimacy of the EU, the pluralism of already existing mainstays of democratic empowerment within the EU needs to be considered more systematically. This pluralism is marked by integrated as well as autonomous political entities, interacting at various supranational, international or sub-national levels.

One way to analyze this multilevel democratic structure would be to continue conceptualizing the EU as a unique type of consociationalism. Lijphart's democratic theory (Lijphart, 1999), originally developed for deeply divided and diverse societies, is a promising analytical tool for further outlining a concept of EU's democratic legitimacy. Still, when applying Lijphart's findings to the EU context, we continue to be confronted with the same questions, which remain to be addressed also by Lord: How can the different existing democratic structures as well as legitimatory beliefs be integrated and coordinated at various levels in the member states and the EU? Where do we locate the justificatory and contestatory power as direct legitimation in this multilevel context? Or in other words: Which is the right zoo for the European polecats, lions and foxes?

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Chapter 13

How desirable is further European integration?

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Introduction

The project of European integration has clearly lost some of the luster of its earlier years. Some commentators now even speak of a renationalization of Europe, a return to a Europe of nation-states.[1] Along similar lines, others envisage the European Union (EU) turning into a loose confederation of states rather than becoming a more integrated political federation.[2] Faced with such scenarios, we can pose two rather different questions: (i) Is further European integration likely?; (ii) Is further European integration desirable? The

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[1] There is plenty of recent evidence that lends support to the thesis of a renationalization of Europe, including, to list three recent developments: (i) the referenda defeats of the European Constitutional Treaty in France (2005), Netherlands (2005), and Ireland (2008); (ii) the failure of the leading European states to find a common response to the military conflicts between Russia and Georgia in 2008, and Israel and Palestinians in 2009; and (iii) the failure of the leading European states to find a common response to the financial credit crisis of 2008. For a harsh critique of these European failures, see Ash (2009); and for a gloomy prediction of Europe's long-term political prospects, see US National Intelligence Council (2008).

[2] For a provocative argument along these lines, see Majone (2005).

second of these two questions — the question that I examine in this chapter — raises a normative question. This question forces us to consider our political values and how those values might be furthered or thwarted by the project of European integration.

A normative take on integration

Normative questions — that is to say, questions about the desirable — are tricky, because such questions are not obviously scholarly questions at all. Indeed, for many social scientists, normative questions fall outside the boundaries of legitimate scholarly inquiry; they appeal to values, a matter, so some believe, of subjective preference rather than science. And yet a moment's reflection should be enough to convince us that values are not exactly like subjective preferences either. Indeed, there seem to be at least three ways that our values, in particular our political values, are wrongly described as subjective preferences.

First, we argue about political values in a way that we do not argue about, say, our subjective preference for a particular flavor of ice-cream. In the course of such arguments, we are expected to exchange reasons. This practice suggests that political values have a cognitive dimension unlike our subjective preferences. Second, when we argue about political values we typically draw upon the lessons of experience — lessons drawn either comparatively from other countries or historically from our own. The political values that any given society embraces possess, in short, roughly calculable consequences. Even if we cannot point to any law-like generalizations, we can make rough generalizations about what follows when a society embraces one political value rather than another. The third difference between political values and subjective preferences concerns, what might be termed, the facticity of political values, by which I mean that our political values are typically not chosen *de novo* but are already present in our culture, institutions, and practices. Thus as members of a modern European society, we face a set of authoritative political values (democracy, liberty, equality, etc.) that form part of our society's public culture and its collective identity. Typically, political arguments take the form of a persuasive interpretation of one or more of these political values coupled with some account of how a chosen policy or institution furthers these political values.

It would be wrong, however, to assume that the facticity of our political values necessarily entails evaluative conservatism. Political arguments can and do sometimes take a transvaluative form: They can challenge the authority of prevailing political values; they can seek to replace prevailing political values with alternatives. When prevailing political values actually lose their authority, this can sometimes bring about a change of political regime. Alexis de Tocqueville had this idea in mind, when he linked the rise of a new idea of social and political equality ('democracy' in Tocqueville's own terminology) with the new type of political regime that had emerged in the United States (Tocqueville, 2004).

For many observers, the European Union, much like eighteenth century USA, represents a radically new type of political regime, a type very different from the modern nation-state.[3] Yet even if this view is correct, it is not obvious that the EU is supported by a different set of political values than that which supported the nation-state. At the very least, it is possible to distinguish two different views of the EU. On one view, the EU is supported (or justified) by a different set of political values to those that support the nation-state. From this perspective, Europeans have embraced a set of cosmopolitan or post-national values that has led them to perceive the nation-state as an anachronism. These post-national values now support the EU and other international laws and institutions.[4] Yet on another view, the EU is supported (or justified) by roughly the same political values that once supported the nation-state. It is only that the world confronting Europeans has changed — societies and economies are now more open to movements of labor, capital, people, and manufacturing goods — so that these values cannot be secured by the nation-state but only by the EU.

Whichever of these two views (postnational or traditional, as they might be termed,) one adopts, it will still be necessary to show how they bear on the question of further European integration. Here people who share the same values can draw different conclusions.

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[3] For one influential observer, the EU is 'the only fundamentally new macropolitical form to emerge and prosper in nearly a century' (Moravcsik, 2006: 590).

[4] For a sophisticated statement of this cosmopolitan perspective, see Archibugi (2008).

Indeed, it is possible to distinguish four different ways of arriving at the two different conclusions concerning the merit of further European political integration.

	Further political integration	No further political integration
Postnational values	1	2
Traditional values	3	4

Position 1 —Drawing upon one or more postnational values, there is a valid argument for **further European political integration**.

Position 2 – Drawing upon one or more postnational values, there is a valid argument for **no further European political integration**.

Position 3 – Drawing upon one or more traditional values, there is a valid argument for **further European political integration**.

Position 4 — Drawing upon one or more traditional values, there is a valid argument for **no further European political integration**.

There is no space here for a full treatment of each of these four positions. The reminder of this chapter presents a version of position one: It seeks to show that there is a postnational justification for further European political integration. Needless to say, the idea of further European political integration remains, at present, very unpopular. For many people in Western Europe, the EU has gone too far; it performs functions that would be better left to national and sub-national political units. I hope to show that this conclusion is unwanted. Yet first, I want to take up the objection that the EU in its present institutional form must be assessed (i.e. judged desirable or undesirable) wholly independently from any broader discussion of further European integration.

Examining European political integration

At least part of the difficulty in assessing either the future likely direction or the desirable direction of European integration derives from the problematic nature of European Integration itself. What type of political entity is the European Union? And how is the European Union (in its present political form) related to the more general project of European integration? In an effort to resolve these

ambiguities, it would be useful to distinguish 'the project of European integration' from 'the current product of European integration.'

The project of European integration

The *project of European integration* refers to the efforts of intellectuals, political elites, and popular movements to create some form of European polity. Until Joschka Fischer raised the topic in a controversial speech in June 2000, Europe's political leaders tended to remain rather silent about *the project of European integration* (Fischer, 2000). So while the preamble to the Treaty of Rome speaks of 'an ever closer union of the peoples of Europe', it was never clear whether the emphasis was to be placed on *union* — which suggests unity — or 'peoples'—which suggests diversity.

For much of Europe's postwar history, this ambiguity was functionally useful. It allowed the project to proceed without too much attention to the ultimate destination. At Europe's current juncture, however, this ambiguity is no longer functionally useful. Many European citizens now want a clearer sense of where Europe is heading. Notwithstanding a general reticence of proponents of the European project to specify and defend the *telos* of their efforts, it is possible to distinguish three possibilities:

1) *a Federal Europe* (a sovereign entity something akin to the United States of America). While a federal Europe would not resemble a French-style republic, *une et indivisible,* it would transfer core political functions — including foreign and defense policy — from Europe's nation-states to Brussels.[5]
2) *a Postsovereign Europe* (a political entity that would disperse decision-making at multiple different sites on a policy by policy basis).[6]
3) *a Widening Europe* (a political entity that makes 'widening' [i.e. geographical expansion] its *modus operandi*.) On this view, the European project's greatest achievement has been the

[5] For proponents of this view, see Collignon (2008); Habermas (2001); Morgan (2005) and Verhofstat (2006).

[6] For a philosophical argument in support of a unitary sovereign Europe, see Morgan (2005).

democratic modernization of (first) Southern and (then later) Central and Eastern Europe. Proponents of a Widening Europe envisage further enlargements to include Turkey, the Middle East, and North Africa (among other regions.)

The product of European integration

The product of European integration is the EU itself. Historically, this product has changed – both institutionally and geographically. There is no reason to think that the current product will not change in the future. From a normative standpoint, it is worth noting that someone deeply critical of the current product of European Integration — perhaps because of, say, the EU's agricultural policies or because of its structural and cohesion policies — could nonetheless support various conceptions of the project. Conversely, someone quite content with the current product could conceivably reject the very idea of a project to construct a Federal, a Postsovereign, or a Widening Europe.[7]

It is helpful to keep in mind the distinction between project and product when passing judgment on the referendum decisions of the Dutch and French electorates in 2005 and the Irish in 2008. At first glance, these electorates were required to assess the institutions and policies of the EU and to pass judgment through their vote on whether the Constitutional Treaty was likely to improve or make worse the functioning of these institutions and policies. Much to the annoyance of some of the architects of the Constitutional Treaty, the electorates instead chose to vote on the basis of a broader range of considerations. Yet to the extent that the electorates focused less on the EU (the current product of European integration) and more on the more open-ended project of European integration, the electorates were acting quite sensibly. Indeed, it is now implausible to expect national electorates to view the EU exclusively in its present institutional form. The EU (i.e. the product of integration) has changed so much in the past, it is reasonable to assume that it will change in the future. For better or worse, assessments of the current product of European integration cannot now be separated from assessments of the project of European integration, even when the nature and goal of that project remains obscure. If the EU is to bolster

[7] For an example of this line of argument, see Weiler (2004).

its legitimacy, more attention must be paid to the desirability of the various destinations proposed for the project of European integration. In short, the question of the desirability of further European integration is inescapable.

A postnational justification of further integration

If the argument of the two preceding sections is correct, then a proponent of further European integration confronts a specific task. To show that further European integration is desirable, we require a two-stage argument:

- a specification of the values, whether traditional or postnational, in terms of which further European integration can be judged desirable; and
- an account of the institutional changes needed to secure — or *better secure*, to be more precise — these values. This account needs to do more than merely show that a more integrated Europe can secure these values just as well as the EU in its present form. What is needed is an argument that shows that a more integrated Europe can achieve something positive with respect to these values that the EU in its present form cannot achieve.

I now want to make a postnational (position one above) argument in support of further European integration.

Modern western liberal democracies are committed to the idea of civil and political equality. Modern democracies assume, in short, that all adults are, from the perspective of the law, equals. Officially (if not always in practice), the law hears the evidence and punishes alike men and women, rich and poor, the devout and the unbelieving. Modern democracies are no less committed to the idea of political equality; all adult citizens, in short, have an equal right to vote. Democratic societies now tend to look back with some embarrassment at their recent history, when women, religious and racial minorities were disenfranchised. Democracies typically see their own history of widening the franchise as a story of progress. They teach this story of progress in their schools. They enshrine their commitment to civil and political equality in their foundational documents and constitutions. In short, civil and political equality are

among the core, defining values of modern democracies; they constitute a central part of their collective identity.

The ideas of civil and political equality draw at least some of their justification and persuasive potency from the idea of natural equality. Take, for instance, the famous lines of the US Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.

The reference here to natural equality — a common feature of modern democratic constitutions — does, however, raise a problem that poses both theoretical and practical difficulties for modern western democracies. These democracies are committed to the equality of all human beings, not merely to the equality of their own particular citizens. And yet while they treat their own citizens as equals; they do not treat non-citizens in the same way. To the extent that modern democracies reconcile the tension between the equality of their own particular citizens and the equality of all humans everywhere, they typically do so by invoking a conception of national citizenship. Yet national citizenship — which defines a community bounded by special ties of solidarity to each other — coexists uneasily with ideas of the natural equality of all mankind. This coexistence becomes especially uncomfortable, when the ties of national community involve redistribution between members of relatively affluent societies with no comparable redistribution to non-nationals. National citizenship appears, in short, to allow western democracies to privilege social justice above global justice, notwithstanding their ostensible commitment to the natural equality of mankind.

These tensions between the universalism of natural equality and the particularism of the nation-state, between the commitment to global justice and to social justice, are present, if in a slightly different form, in the European Union. The EU is not — at least as it is presently constituted — a sovereign state, still less is it a nation-state. Nonetheless, it possesses many state-like attributes, including a set of founding documents that includes some account of what the EU stands for and how it tends to proceed. At the moment (January

2009), the EU is yet to ratify the Draft Constitutional Treaty that emerged from the European Convention in 2004. Nonetheless, this Constitutional Treaty contains the clearest and most authoritative statement of Europe's political identity. This statement, not surprisingly, singles out certain core political values — including 'equality of persons, freedom, [and] respect for reason'. Indeed, 'equality' (in one or another of its dimensions) forms something of a *leitmotif* of the Constitutional Treaty. The EU is not alone in its commitment to the equality of persons. Yet the EU is atypical in its emphasis both upon the social dimension of equality — 'equality between men and women', and a concern for 'the weakest and most deprived' — and the global dimension of equality — 'peace, justice and solidarity throughout the world.' Indeed, the EU professes to follow the same political values externally as internally.

> The Union's action on the international scene shall be guided by, and designed to advance in the wider world, the principles which have inspired its own creation, development and enlargement: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, equality and solidarity, and for international law in accordance with the principles of the United Nations Charter.[8]

It would be a mistake to make too much of the evaluative commitments located in a state's founding constitutional documents. It would be an especial mistake in the case of the EU, which has not yet ratified its own Constitutional Treaty. Nonetheless, we can detect in the EU's commitment to equality at home and abroad the rudiments of a distinctive commitment to some form of postnational values. As a multinational political entity, the EU cannot appeal to national citizenship in the same way as can the nation-state. The EU's borders are more fluid; and they are not constrained by an antecedent conception of 'the nation.' Though being untethered from national citizenship causes the EU certain problems, it also allows the EU to embrace postnational values — the idea of the universal community of mankind, in short — in a way that no nation-state can replicate.

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[8] Draft Treaty Establishing a Constitution for Europe, Article III-193. Available at: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>.

More importantly, the EU's commitment to postnational values allows it to overcome some of the tensions noted earlier between the natural equality of mankind and the particular equality of national citizens.

European enlargement as Liberal Political Incorporation

Nowhere is the significance of the EU as a non-national state more important than in the context of European enlargement. A striking feature of the process of European integration is that it has involved a series of 'enlargements' or incorporations of new members. Thus the European Union (or European Economic Community, as it then was) began with six members (France, Germany, Italy, and the Benelux countries) and added new members: Ireland, Denmark, and the UK in 1973; Greece in 1981; Spain and Portugal in 1986; and Austria, Sweden and Finland in 1995. A particularly momentous decision was taken in 1993, when the European Council decided to admit a large number of Central and Eastern European states. The upshot of this decision was that in 2004 ten new countries entered the EU (the three Baltic states, Cyprus, the Czech Republic, Hungary, Malta, Poland, Slovakia, and Slovenia). Bulgaria and Romania followed in 2007. This decision was momentous, not only in the number and size of the countries admitted, but, perhaps more importantly, because many of these countries had weak or non-existent liberal democratic institutions and inadequately functioning market economies. Indeed, a focus on institutions has been the hall-mark of this most recent process of enlargement. In this respect, the EU approach to (what John Rawls has termed) 'burdened societies' stands in marked contrast to the Washington Consensus pursued until recently by the International Monetary Fund (IMF) and the World Bank, which demanded only 'stabilization', 'liberalization' and 'privatization', while remaining relatively silent about the institutional reforms necessary to implement these policies.

Taking the 1993 decision to enlarge as our point of reference, it is possible to identify four key features of the European enlargement process: conditionality, multiple stages and monitoring, transfer of funds, and intolerance of institutional and policy difference.

Conditionality

Following the decision of the European Council meeting in Copenhagen in 1993, it was decided that '[a]ccession will take place

as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.' In other words, a country could gain admittance to the EU only if and when it had satisfied certain conditions. The 'Copenhagen Criteria', as they were subsequently named, specifies these preconditions as follows:

- Political Criteria — which state that membership of the European Union requires stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities.
- Economic Criteria — which state that membership of the European Union requires the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the union.
- Membership Criteria — which require evidence of the ability to assume the obligations of EU membership; and, more specifically, the administrative ability to implement the so-called *acquis communitaire* (i.e. the legal and administrative rulings expressed in the pre-existing EU Treaties, secondary legislation, and prior policies of the EU).

These three criteria are very demanding, especially the requirement that the acceding member show the ability and willingness to transpose all preexisting EU legislation. In practice, this requires the acceding member to abolish all of its laws and practices that conflict with EU law. More important still, the acceding member has to establish all the institutions and offices that are necessary to implement these laws effectively. In theory, this requirement allows the EU to fashion in its own image every public and many private organizations in the acceding state.

Multiple stages and monitoring

Given the demanding nature of the Copenhagen criteria, most states face a long wait before they can gain full membership. The EU acknowledges this difficulty, by treating the membership process as a multi-stage qualification. States that want to become EU members must first sign a pre-accession agreement, which opens up negotiations and monitoring of that state's ability to meet the Copenhagen Criteria. In return for some financial assistance, the

applicant state must agree to have the EU monitor compliance in some 33 different areas (or 'chapters'), including: free movement of goods, workers, services and capital; public procurement; company law; intellectual property law; competition policy; national media; taxation policy; the judicial system; science and education policy; and so on. Only when the acceding country can meet negotiated benchmarks can the process of admission go forward.

Transfer of funds

The process of admission involves some small financial assistance from the EU right at the outset. As a full member of the EU, a relatively poor member-state stands to receive a considerable amount of money. This was certainly the case for some of the members who joined the EU in the 1970s and 1980s. Perhaps the best example here is Ireland, which at the time of its admission in 1973 was a poor country with a large and inefficient agricultural industry. EU funds helped transform Ireland into a highly successful post-industrial society. Economists disagree about the relative importance of EU membership compared to other factors (such as its educational reforms, low corporate taxes, wealthy diaspora, cooperative trade unions, etc.). Nonetheless, in the EU budgetary period between 1989 and 1993, Ireland was receiving roughly five per cent of its GNP in the form of EU subsidies.

Given the small size of the EU budget (about 1.5 per cent of EU member states' total GDP), it would be wrong to exaggerate the role of financial subsidies in attracting members and controlling their actions. Yet money certainly matters. Furthermore, the EU used its subsidies to reward and punish new acceding states. Bulgaria, for instance, has recently seen its agricultural subsidies slashed by EUR 500 million, because the EU does not think the Bulgarian government has done enough to fight corruption and organized crime. Faced with street protests by Bulgarian farmers, the Bulgarian Prime Minister has had to issue a *mea culpa* to both his own citizens and his Brussels paymasters.[9]

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[9] See the *Euractiv* article from 24 July 2008. Available at: <http://www.euractiv.com/en/enlargement/bulgaria-mea-culpa-eu-moves-suspend-funding/article-174462>.

Intolerance of institutional and policy difference

Although this point is not emphasized by EU authorities, it follows from the preceding three features that the enlargement process seeks to establish a high degree of policy and institutional uniformity within the EU. There is a low level of tolerance for institutional difference. True, some states have successfully negotiated various opt-outs — the UK has opted out from a range of EU policies, including (at one stage) from both the EU Social Charter and the European common currency; Ireland has a special negotiated right to maintain its abortion laws. New member states — especially poor and small states — are unlikely to fare so well. Croatia, a country that is now a candidate for EU membership, is currently having to modify its gun laws to bring them into accordance with the *acquis*.

The process of European enlargement represents a unique strategy for transforming societies burdened with poor institutions. If we accept recent arguments of development economists, then national poverty is primarily a function of poor domestic institutions. It follows that any development strategy that can improve institutions deserves further attention. To this end, it would be initially helpful to rename the process of European enlargement in a less geographically specific way. Thus European enlargement might be understood as a species of the political genus *Liberal Political Incorporation*. The term 'liberal' here has a two-fold significance: First, the offer of membership is freely extended — whether a state takes up membership is its own voluntary choice; and second, the incorporating entity (the European Union, for example) is itself a liberal, democratic regime. It is possible, in contrast, to imagine various forms of non-liberal political incorporation. Thus an independent state might be incorporated non-voluntarily into a liberal regime. In such a case, we might speak of *liberal imperialism*. Alternatively, an independent state might be non-voluntarily incorporated into a non-liberal regime. And then we might speak of conquest.

The term 'political incorporation' highlights the extent to which the process of European enlargement involves the sharing of a common system of government. Political incorporation transforms the institutions of the acceding member state; it also allows the acceding state to exercise some (admittedly highly attenuated) political influence over the original member states. This point is important,

because it explains why political incorporation impels original member states to impose strict conditionality requirements and to monitor institutional compliance. If Bulgaria (to cite an example) is to send elected representatives to the European parliament — a parliament with legislative authority over all people in Europe — it is important that these representatives share certain liberal democratic values. If Bulgaria becomes the frontier between Europe and the outside non-European world, it is important that Bulgaria have properly trained border guards who follow European-wide rules. In short, political incorporation exposes the incorporating member states to certain risks that will encourage them to ensure that the acceding member state meets certain minimal standards. None of this holds true when the relationship between states involves a mere alliance or a free trade zone.

Given the success of European enlargement, it might be argued that *Liberal Political Incorporation* is a policy that eventually deserves wider application. Clearly, Europe has too much on its plate at the moment with ensuring the success of the accession process in Bulgaria, Romania, the former Yugoslavian states and possibly (although there are special difficulties here) Turkey. In the much longer term, however, Europeans might extend membership to a number of countries in its wider neighborhood. In this context, it is worth noting Europe's so-called 'neighborhood policy', which covers Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia, and Ukraine. This neighborhood policy does not involve anything like the conditionality requirements that are necessary to be considered for full membership. Yet there is no reason why (again in the very long run) Europe cannot use the promise of *Liberal Political Incorporation* to transform the political cultures of some of these states. It might be possible to make a security-based prudential argument why Europe might want to incorporate some of these states.

Liberal Political Incorporation as a development strategy?

A more radical suggestion is for Europe to pursue *Liberal Political Incorporation* as a development strategy in Africa. It is unlikely that security-based prudential argument would work here. Nonetheless, it

might be possible to make a moral argument for such a policy. Clearly, there is something distressing at the facts of global poverty and inequality. At one time, it might have been possible to ignore these facts, reflecting on them only when a famine or natural catastrophe forced them on our attention. But we now live in a more interconnected world. It is easier for people to cross land and sea boundaries. Every summer Europeans must confront images of Africans washed up drowned or semi-drowned on Mediterranean beaches — a disturbing reminder that Europe constitutes an oasis of affluence. Many Europeans feel that on moral grounds, they ought to do something to diminish the poverty of sub-Saharan Africa. Yet the size of the problem seems insurmountable. Sub-Saharan Africa has so many development problems; its population is so large; its degree of poverty so extensive.

Liberal Political Incorporation offers a radical solution. Following the experience of postwar European enlargement, the European Union might announce that it would consider offering full membership coupled with a large transfer of funds to any African state that would be willing to work towards meeting its conditionality requirements. Furthermore, the European Union would be willing to work with countries to prepare an application. On this approach, the European Union would encourage a competitive application bid; membership would be offered, at least initially, to one country alone. The successful applicant would, however, be set on the path to full European membership. Of course, the conditionality requirements would be strictly enforced; and the successful applicant state would have to allow European officials to supervise a thoroughgoing transformation of that state's political culture and institutions.

The solution proposed here assumes that an African state would be willing to put itself through this process. Perhaps no state would sign up. Nonetheless, once the prospect of European membership is announced, it would clearly attract the attention of ordinary African citizens whose economic well-being would stand to improve greatly. The solution proposed here also assumes that the European Union could (even in the very long run) incorporate an African state. Many of these states are simply too large or too poor to become even candidate members. Yet there are some possible candidates (Ghana or Cameroon, for example). And if institutions could be improved in

these states, it would exercise a powerful example and incentive for all other states in the region.

Conclusion

To show that further European integration is desirable, we require, as noted earlier, a two-stage argument: (i) a specification of values; and (ii) an account of the institutional changes needed to secure — or *better secure than the existing status quo in Europe* — these values. The postnational justification for further European integration defended in this chapter meets this two-step requirement in the following way. One, it rests upon the postnational value of natural human equality. In contrast to nationalists who are happy to draw the boundaries of solidarity at the borders of the nation-state, postnationalists recognize that any bounded political entity must do justice not only to those within its boundaries but also to those outside. The obvious objection to this 'justice for outsiders' position is that no state can open its borders to outsiders nor redistribute equally between outsiders and its own citizens. To do so would destroy the legitimacy of the state in the eyes of its own members.

Yet the process of European enlargement shows that a bounded political community — in this case the EU — can do justice to outsiders and insiders (i.e. its own citizens) alike without ceasing to exist as a bounded political community. European enlargement can be seen as an example of a more general approach, which I have termed 'Liberal Political Incorporation'. This form of incorporation responds to one of the most important causes of global poverty: poor domestic institutions. For proponents of Liberal Political Incorporation, it is pointless to increase foreign aid, when the root causes of poverty are institutional. Indeed, foreign aid is like pouring more water into a leaky bucket. If global poverty is to be addressed, then the problem of poor domestic institutions must be solved.

Through their experience with past enlargements, the Europeans have come close to implementing a successful form of Liberal Political Incorporation. True, they have not always seen their own enlargements in this light. Both the enlargements to Southern Europe in the 1980s and to the East in the 2000s were motivated as much by self-interested considerations as by postnational values of global justice. Nonetheless, there is no reason why a Europe motivated by

postnational values could not offer enlargement to at least one sub-Saharan country. In doing so, Europe would serve as an exemplary model of a postnational polity that took seriously its global duties.

The second step of any postnational justification for further European integration requires, as I have noted, some specification of the institutions needed to secure postnational values. The big challenge here is to explain what it is that a more integrated EU can do that cannot be done either in the EU as it is presently constituted or in a Europe of Nation-States. Clearly, any single Europe nation-state is ill-suited to adopting a policy of Liberal Political Incorporation, not least because it would entail the incorporating state 'nationalizing' the incorporated state. It is unlikely that the incorporated state would find this form of nationalization desirable. Likewise, a loosely integrated Europe of nation-states would also find it difficult to implement a strategy of Liberal Political Incorporation. In order for Incorporation to solve the problem of poor domestic institutions, Incorporation needs to transform these institutions through a policy of institutional intolerance.

The institutional shape of a Europe able to implement Liberal Political Incorporation should now be clear. Europe needs to see itself as 'a Widening Europe'. Its social and political institutions should be designed with this overarching goal in mind. Whether the EU needs more or less centralization is a question that must be settled with reference to the requirements of 'a Widening Europe'. This brings us back to the question posed at the start of this chapter — and the question of the present volume — is further European Integration desirable? My answer is 'yes.' As a new and unique postnational political entity, Europe can build on its successful record of enlargement by offering membership to at least one African state. In doing so, the Europe project can acquire a new status in the eyes of its own members and the world.

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Chapter 14

The constitutional dimension
Comment on Glyn Morgan

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Introduction

In this interesting article Glyn Morgan's main concern is, as the title says, to clarify how desirable further European integration is. This is related to the kind of values the European Union (EU) builds on, as well as the way in which these are pursued. Here it is possible to distinguish between traditional and post-national values. The former category is associated with the nation-state, whereas many see the latter as distinctly designative of the EU (but also inform international law and other institutions).

Morgan rightly notes that to establish the desirability of further European integration it is necessary to clarify the character of the EU. This is best done by distinguishing between the project and the product of integration. In terms of project, he spells out three different conceptions of the EU: federation, post-sovereign Europe, and widening Europe. On product it is underlined that this cannot be properly addressed without due attention to the desired project of integration. Therefore to establish the desirability of further integration we need to consider the type of values that the EU espouses, and how these are embedded in institutional form.

Rather than investigate the range of possible values being bandied about, Morgan's more specific purpose is to put forth a postnational justification for further integration, which highlights the value of equality, as an inclusive form of equality that does not stop at the borders but includes those inside as well as those outside. A critical element here is the EU's many rounds of enlargement. Morgan underlines that enlargement is of central importance to the desirability of further integration.

The best way of depicting the EU's enlargement strategy is, according to Morgan, through the notion of *Liberal Political Integration* (LPI). Morgan identifies two conditions: First is that 'the offer of membership is freely extended'; second is that 'the incorporating entity (the European Union, for example) is itself a liberal, democratic regime.' LPI is a central ingredient in ensuring post-national values, notably human equality. It is a matter of ensuring justice for outsiders. Further, LPI is a unifying device, it 'allows the EU to fashion in its own image every public and many private organizations in the acceding state' (Morgan, chapter 13 in this volume: 227).

Morgan argues that enlargement's role can continue to justify the EU. LPI has not only been an important vehicle to ensure equality in present-day Europe; it can in the long run also be used to states currently part of the EU's neighborhood policy. This applies within but also beyond Europe, and LPI can be used as a development strategy in Africa. This is because LPI can solve the problem of poor domestic institutions, since LPI is a (unidirectional) means of ensuring institutional convergence.

The EU as project and product

Morgan's argument is interesting and provocative. I will try to discuss it with specific reference to the RECON framework. In that sense I find the distinction between project and product instructive and useful, but I am not convinced that the way it is set out here is the most effective or persuasive. First is the issue of project, which is actually quite ambiguous. The federal option is quite clear because it is based in a familiar form (a federation akin to the US). Why the proper model for the EU should be more akin to the US than to multinational federations such as Belgium or Canada or India is not made clear. The postsovereign option, which to me appears akin to

Schmitter's notion of *condominio* (see Schmitter, 1996; 2000) requires further specification. It is also not made clear precisely what values it embodies. A similar argument applies to the third option, that of widening Europe. Here the focus is really more on the effects of European integration, rather than on the type of entity that gives the distinct widening character to the process. There is no spelling out of the type of entity that is becoming widened.

Second is the question of value ambiguity. The options are not clear on the actual values that are associated with each project; thus it is difficult to assess the relative merits of each option in guiding the integration process. Further, how different are the options in value terms? Does the federal option build on qualitatively different values than the latter two? This goes back to the values we associate with statehood. Are these confined to the state form or are they also compatible with a post-national configuration, whether in a postsovereign or in a widening trapping? This is important for establishing the difference between the three projects. If the same set of values can be embedded in all three projects, then they are not really alternative projects in value terms. A critical question left open by Morgan is whether a multinational federal state might exhibit post-national values. I would argue that Canada is an interesting case to consider in that regard (see Fossum, 2005).

Third, with the options so vaguely spelled out we do not know much about the democratic quality of each. Can a post-sovereign condominio-type entity qualify as democratic? Is a widening-type entity founded on EU-level democracy or nation-state democracy? The point as I shall get back to is that one of the conditions of LPI is that the EU is democratic. Therefore, it is necessary to clarify in what sense the latter two projects can comply with democratic norms to establish the quality of LPI.

Fourth, there is no reference to where the EU locates itself in relation to these three projects. Since the projects are so vaguely spelled out, Morgan's opting for a post-national justification does not necessarily mean privileging any one of the projects listed above. We are also left uncertain as to whether LPI is confined to the widening option or whether it might be compatible with all three. If so would it still qualify as LPI as spelled out here?

Liberal Political Incorporation

There are two main issues here. The first is to clarify what LPI is. Is it a strategy of widening the membership of a given entity, or is it rather a matter of reconstituting the entity as part of the adoption of one or several new Member States? We can discuss this in abstract terms from the basic principles set out under LPI, or we can discuss it with direct reference to the EU. This takes us to the second main issue, namely whether LPI, as formulated by Morgan, is reflective of how the EU conducts its rounds of enlargement. If LPI as set out by Morgan is not properly reflective of the EU might it still be useful as a development strategy? Morgan underlines the political incorporation aspect of this and envisages that it can also be applied in relation to those states that are currently addressed through the EU's 'neighborhood policy' and in the future even as a development strategy in Africa.

A critical point regarding the post-national dimension of LPI is that it is a strategy for including *outsiders.* In what sense does LPI include outsiders? The argument is correct in the sense that the EU has come to include an ever greater number of previously EU-outsider Europeans, through a series of expansions of its membership. It is also correct to say that this serves justice in the sense that notably the latest rounds have included some of the poorest states in Europe. But the argument runs into problems when it comes to the distinction between insiders and outsiders. Does LPI serve broader cosmopolitan goals? One way of looking at this would be to consider more closely how or in what sense the notion that LPI breaks down the distinction between insiders and outsiders would manifest itself in EU citizenship. Does it mean entirely equal rights to everyone, or might it be compatible with differentiated rights? If the latter, how differentiated can they be and still remain compatible with LPI? In other words, how far does equality extend under LPI? LPI as formulated by Morgan does not offer clear guidelines for establishing this.

If we then approach this instead from a different angle, through looking at the actual practice of EU citizenship, with emphasis on political rights, we see that such rights are conferred on persons who are already citizens of the Member States. Here we see an important distinction between how the EU treats citizens in those states that are incorporated as opposed to how it treats persons who have entered

the EU from outside (so-called third country nationals).[1] Citizens of new Member States are granted EU citizenship on equal terms with citizens of old Member States. There is no differentiation between new and old members; all enjoy the same rights. At the same time, the actual terms of incorporation will vary because the acquisition of EU citizenship takes place on the basis of the particular incorporation rules that apply to that particular member state. But is this incorporation of Member States really about cosmopolitan values? Would not cosmopolitan incorporation speak to the inclusion of individuals as equals? Here we see the contrast to third-country nationals who are not included in the sense that they are not granted EU citizenship rights. They are still outsiders both in relation to the Member States and in relation to the system at the EU-level. They enjoy to various degrees socio-economic rights but are politically excluded.

What are the implications of this for LPI? Is this compatible with LPI? On the one hand Morgan sees LPI as breaking down the distinction between insiders and outsiders. We see that this is the case at the level of collectives but not at the level of individuals. Third-country nationals are politically excluded and all member state citizens are equally incorporated. It would seem to me that for LPI to qualify as a cosmopolitan strategy, it would presuppose that the EU be able to offer citizenship rights and then also extend the category to third-country nationals. That would at least remove distinctions within the EU and be more compatible with post-national inclusion.

On the other hand, the focus in LPI on institutional homogenization or uniformity has clear constitutional overtones. It is about incorporating new Member States under a common set of constitutional rules and within a structure based on unilateral institutional adaptation. LPI then directs us to the notion of the EU as a constitutional regime. If so, then any inclusion of new members as prescribed by LPI is a matter of re-constitutionalization (Eriksen, Fossum and Sjursen, 2005). This also relates to the fact that the EU

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[1] European citizenship reflects the *explicit inclusion of non-nationals* into the operations of every Member State. This applies foremost to 'SCNs' (second country nationals) and somewhat less to 'FCNs' (first country nationals), but to some extent also to 'TCNs' (third country nationals, who are not EU citizens) (see Bauböck, 2007).

already has a material constitution. Because the EU is constitutionally embedded, every inclusion of a new Member State has constitutional implications for the EU. Consider the doctrines of direct effect and preponderance of EU norms. This EU institutional-constitutional structure is amended and updated with every bout of enlargement. But as Morgan also notes, in the EU this process is quite unilateral and unidirectional: in overall terms it is the acceding state that must adapt its institutions to the EU. This is to ensure legal-constitutional similarity. At the same time, it is also clear that the EU adapts its institutions to fit in the new member: Members of Parliament, voting rights in the Council, Commissioners, etc. All those bodies where Member States are directly represented will be modified to include the new member. In that sense it is a reciprocal process of adaptation. We should expect such reciprocal adaptation from a process of re-constitutionalization but the same does not appear equally to apply to a process of widening.

Once we think of this as a constitutional process we also bring to the process more explicit expectations for how LPI ensures justice because democratic constitutionalism comes with structured expectations pertaining for instance to citizenship rights. When a state is included as a new member its citizens are citizens of the EU and are no longer outsiders. Further they live under a constitutional arrangement with systematic expectations to the values and institutions therein.

Since Morgan is unclear about the basic values embedded in the different projects he spells out, his argument about LPI as a unidirectional process is vulnerable to criticism. If the system that transfers values and institutions to new members is found wanting, what assurance do we have that the process will serve democracy and justice? In other words, is Morgan's faith in the unidirectional aspect of LPI warranted? There are two closely related dimensions here: The first is the constitutional; the second is the democratic. On the first, in my mind, LPI is most effective when it is a process that is understood and conducted as one of re-constitutionalization. Why adapt or rescind domestic institutions to an entity – in the sense of affording them the status of direct effect and preponderance – unless you can be assured of being a constitutional stakeholder? Anything less smacks of imperialism. It is the mutual recognition afforded by the democratic constitution that is the best vaccination against this.

The legitimacy of the enlargement process hinges on the democratic quality of the EU. This as Morgan notes is a fundamental component of LPI. But what needs to be emphasized is that it is not enough that the EU is a collection of democracies because the process of adaptation is a process of mutual adjustment. Both the acceding state and the EU are transformed in the process. It will only serve democracy if the EU itself is properly democratic. This is clear when we consider that the EU monitors the democratic quality of the acceding state. If the EU's own democratic credentials are lacking or deficient how can it credibly monitor and ensure that the acceding states comply with democratic conditions?

Liberal Political Incorporation refers to a process where the EU sets the terms for incorporation and monitors for compliance. This is very much a one-way process wherein the acceding state accepts the EU's requirements. This means that the quality of the process – how desirable it is in Morgan's terms – ultimately hinges on the democratic character and quality of the EU.

Here the constitutional ambiguity of the Lisbon Treaty becomes problematic (see Fossum and Menéndez, 2011). Morgan talks about Laeken and Lisbon as if they were both about the Constitutional Treaty, but that is not the case. Lisbon is a de-caffeinated version of Laeken in the sense that the constitutional label and every reference to stateness were removed. There are also important substantive differences between the two. Also, the highly secretive process through which Lisbon was forged stands in considerable contrast to the relatively open and transparent manner of forging Laeken. In that sense with Lisbon we have seen increased constitutional ambiguity which weakens the constitutional credibility of LPI and in doing so also renders less clear what kind of justification there is for the democratic arrangements that the EU has already put in place.

Concluding reflections

Morgan has chosen the important aspect of EU enlargement as a means to justify the EU. I agree that the conditions under which a political entity adopts new members is a fundamental issue which is revealing not only in terms of who and how it incorporates but also how it understands itself as polity and community. LPI is an innovative approach to how we may think of this process. I have sought to show that this strategy is more encumbered –

institutionally and constitutionally – than what Morgan appears to think. I have argued that the way it is conducted in the EU is best understood as a strategy of re-constitutionalization. This has bearings on its applicability within as well as beyond Europe. I also think it has overall bearings on the main gist of Morgan's argument pertaining to desirability of integration. In so far as my argument about this being a matter of re-constitutionalization has merit, then we are back to the notion that the desirability of integration is ultimately linked to the character and quality of the EU as a constitutional democratic undertaking.

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Chapter 15

Democratic legitimacy beyond borders Government without a state

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Introduction

The European Union (EU) has sustained a rapid expansion of political regulation in Europe and has over a period of 50 years transformed the political landscape in a profound manner. What started out as piecemeal problem-solving for the member states – underpinned by the peace motive – has ended up in a supranational order able to make collectively binding decisions. This order has developed into a *government-type entity* stemming from the fusion of European constitutional and democratic traditions, and one in which collective decision-making takes place within a trusted setting of already legally institutionalized and politically integrated orders. The EU subscribes to democratic norms and human rights and has established procedures for securing broad debates, as well as for making binding decisions in institutional settings with decisional

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autonomy. It possesses legislative, juridical and executive branches of government. However, it does not meet with the democratic criterion, as the European citizens are not able to see themselves as subordinate to a superior power whose agenda they are in control of. But can an order that is more than an international organization but less than a state become democratically legitimate?

I would like to inquire into this problem from the vantage point of discourse-theory and relate to what model of deliberative democracy can account for post-national legitimacy. The problem has in the first place to do with the relationship between an *epistemic account* of democratic legitimacy revolving on a rational consensus and a *participatory variant* that turns on substantive morality and egalitarian procedures of law-making. The point made is that the presumption of a rational debate and that the outcomes are rational or fair can not bear the full burden of legitimation. Rather it is the political process based on equal rights including universal suffrage, elections, majority vote, representation etc. that is the main container of democratic legitimacy. An institutional variant of deliberative democracy is therefore suggested. This directs us to the organizational and constitutional make-up of the multilevel constellation and the conceptual possibility of a political order that is deprived of the ethno-national as well as coercive presuppositions of a state, an order which can be termed *a stateless government*. Characteristics of such an entity shed light on the putative legitimacy of EU's governmental system; that is the actual level of compliance with EU regulations. Compliance, which is an *autonomous voluntary act* of the member states, prevails even when they disagree with the rules. This conceptual solution is also a response to the claim that one should not replicate at the supranational level what went wrong on the nation state level and what necessitated the European integration process in the first place.

I start with the problem of deliberation as stand-in for democracy. Then I address the need for a state and why the term government should be disassociated from statehood. Some stylized facts about the EU and its aspirations speak to the claim that it should be compared to the tenets of a proper government but that it falls short of such due to the so-called democratic deficit. This discussion makes up the last part of the chapter.

Epistemic or moral justification

How can public deliberation be both moral and epistemic, in the sense that features of the process can justify the outcome at the same time as it has good effects?

Throughput legitimation

Even though integration started with the institutionalization of a 'High Authority' with some regulatory competence, the legitimacy of the EU was initially derived from the member states; in democratic terms the legitimacy of the EU was indirect, depending on its ability to produce outcomes. Intrinsic to this mode of legitimation has been dense transnational networks and administrative systems of co-ordination – amounting to transnational constitutionalism – which assert to be legitimate, serving the public interest (see Möllers, 2004: 329ff.). These structures of governance may constitute a distinct mode of legitimation as they raise the information level and contribute to rational problem-solving. They include different parties and adhere to arguing as a decision-making procedure rather than voting and bargaining. Deliberation in such bodies has epistemic value even if the demanding requirements of a rational discourse have not been met, because the participants have to justify their standpoints and decisions in an impartial manner in order to obtain agreement. They inject the logic of impartial justification and reason-giving unto the participants. It has been demonstrated that deliberation in committees has made Pareto improvements possible: They make for the pooling of competences and knowledge to such a degree that there is no basis for collective decisions other than an outcome that leaves all better or at least as well off as before (Joerges and Neyer, 1997a, 1997b; Joerges and Vos, 1999; Marks, Hooghe and Blank, 1996; Neyer, 2003; Wessels, 1998). In knowledge-based systems there is an incentive to identify positive-sum solutions. Concurringly, *neo-Madisonians* conceive of the EU as a polycentric system of transnational governance with no apex of authority but with inter-institutional checks and balances. Deliberation in spontaneous and horizontally dispersed polyarchies can deter legal domination and solve problems rationally (see Bohman, 2005, 2007; Cohen and Sabel, 1997; Gerstenberg, 2002).

The epistemic interpretation of deliberative democracy generally holds that deliberation is a cognitive process for the assessment of reasons in order to reach just decisions and establish conceptions of

the common good. For neo-Madisonians, deliberation is seen primarily as a cooperative activity for intelligent problem-solving in relation to a cognitive standard and not as an argument about what is correct because it can be approved by everyone. In other words, democratic legitimacy is not merely a matter of congruence between the addressees and the authors of the law, but that *the reasons* for political decisions are of a certain quality, that is that they corresponds to criteria of efficiency and justice. Only decisions that have been made and critically examined by qualified and entrusted members of the community through a reason-giving practice can claim to be legitimate. In this variant of deliberative democracy it is the *institutionalized opportunities for discursive challenge* (Warren, 1996: 55), which warrant the presumption of acceptable results. Procedurally regulated deliberation makes sure that view-points and interests receive due consideration. The deliberative mode, which transnational governance structures foster, entails the cooperative use of competencies and expertise in identifying and solving problems under conversational constraints. Thus decision-makers may maintain that their solutions are fair or in everybody's interest, as far as they have managed to talk themselves into consensus and as far as the results endure a public, critical scrutiny. It compensates for the lack of influence brought about by globalization, but is *no substitute for democracy*. When deliberation is seen as a cooperative activity for intelligent problem-solving in relation to an independently defined cognitive standard, it is not an argument about what is correct in the sense that it can be approved by everyone. This amounts merely to deliberation without democracy, to *technocratic deliberation*. There is no chance of equal access and popular control (Schmalz-Bruns, 1999; Eriksen, 2001). Thus, how can we make for the epistemic account of the moral value of democratic procedures without egalitarian procedures of law making in place through which the citizens can influence the laws that affect them, and effectively determine whether the reasons provided are good enough? Even an optimal decision may be opposed to, if it has not been made in a procedurally correct manner.

In legitimacy terms transnational governance structures become dependent on intergovernmentalism, as in this set-up it is only the member-states' democratic structures that can confer legitimacy on public-private arrangements and regulatory regimes beyond the nation state. However, the multilevel constellation that makes up the

EU does not merely consist of intergovernmental and transnational structures but also supranational institutions, which make decisions devoted to the Union itself. Before addressing this we may ask why, on a deeper level, deliberation is not enough.[1] Why are the epistemic merits of deliberation not sufficient to generate democratic legitimacy?

Discourse and correctness

There is no assurance that transnational, deliberative governance will amount to more than governance without government, but democracy in the form of full parliamentarization of the EU is not possible according to many analysts.[2] It is widely held that this would exceed the limits of the democratic resources available in Europe and the question is whether discourse theory, that directs us to the deeper basis of democratic legitimacy, provides an alternative. It digs deeper than conceiving of democracy as institutional manifestations – as e.g. a parliamentarian or presidential democracy – and it disconnects *ethnos* and *demos* as the basis for democratic rule. Discourse theory embodies, according to Habermas, the basic principles of self-government and conceives of rights as instruments for *ensuring equality and freedom in the realization of the idea of people's sovereignty.* Thus the discourse-theoretical conception of autonomy and public accountability embodies an alternative standard to conventional representational solution, viz., electoral democracy based on majority vote. The latter does not guarantee full political equality. A majority decision based on the aggregation of preferences represents an arithmetic artifact and not a common will. Discourse theory calls attention to democracy as a legitimation principle: only the political process, governed by certain procedures, can lend legitimacy to outcomes.[3] In the desubstantialized, proceduralized version of popular sovereignty legitimacy is seen to depend on the manner in which political decisions can be vindicated and justified in

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[1] The following draws on Eriksen (2007).

[2] '[…] parliament without a demos is conceptually impossible, practically despotic' (Weiler, Haltern and Mayer, 1995: 4). See further Bellamy and Castiglione (2000), Bohman (2005) and Peters (2005).

[3] 'The procedures and presuppositions of justification are themselves now the legitimating grounds on which the validity of legitimations is based' (Habermas, 1979: 185).

a public debate due to their *epistemic quality*. Deliberation contributes to the rationality of decision making by the pooling of information and by argumentatively testing the reasons presented. According to Habermas the legitimating force of the democratic procedure is not merely to be found in participation and preference aggregation but in the access to processes that are of such quality that rationally acceptable decisions presumably can be reached (Habermas, 2001: 110). Hence, the thrust of deliberative democracy is to be found in the fact that a free and open discourse brings forth qualitatively better decisions.

To Habermas the rational consensus is the standard by which the correct outcome can be defined. By observing the ideal conditions for argumentation – the demanding requirements of a rational discourse – one should be able to arrive at the just or correct decision – one that everyone can approve of. In moral discourses there has to be one single correct answer. Discourse theory offers a procedural account of justice and defines *moral rightness* as what rational agents could agree to under ideal conditions: 'An agreement about norms or actions that has been attained discursively under ideal conditions carries more than merely authorizing force: it warrants the rightness of moral judgments' (Habermas, 2003: 258).[4]

The ideal deliberative procedure is constitutive for correctness as long as certain conditions are met. But if correctness is seen as what the actors will support under ideal conditions, it will be difficult to prove the epistemic qualities, i.e., that actual deliberation leads to better and fairer decisions. Under non-ideal conditions the problem with justifying the epistemic value of deliberation arises. Actual deliberations will not generally meet ideal requirements: they will be marked by, for example, ignorance, asymmetric information, power and strategic action. One may therefore question whether the reasons that can be stated publicly also are good (convincing or correct) reasons (Estlund, 1993; Gaus, 1997).

In order to defend the epistemic qualities of deliberation, process-independent standards are needed. An epistemic justification of

[4] And further, '[s]ince the "validity" of a norm consists in that it would be accepted, that is, recognized as valid, under ideal conditions of justification, "rightness" is an epistemic concept' (ibid.).

outcomes will in that case become independent of ideal deliberative conditions but dependent on what the deliberation leads to with regard to rational decisions – independently defined. We are therefore faced with the following paradox: If deliberative democracy defends its claims on moral qualities via an ideal process, it cannot justify its claims on epistemic value. On the other hand, if deliberative democracy claims to have epistemic qualities, it can only be defended by standards that not only are process-independent, but also independent of deliberation (Bohman and Rehg, 1997; Bohman, 1998).

From the point of view of democracy the question is how deep the deliberative commitment should run, whether it can bear the whole burden of legitimation, or whether non-procedural, substantial elements are needed. If it is the procedure itself that legitimates results, what, then, justifies the procedure? There is a problem with a purely procedural conception of deliberative democracy (Christiano, 1997: 265; Lafont, 2003). Independent standards may be required in order to evaluate the process or the outcome. Discourse theory cannot totally do away with substantial elements. Procedural-independent standards are needed for securing a fair process.[5] '[D]estruction of the relevant liberties would be illegitimate even if it had been decided by the proper procedure' (Estlund, 2007: 88). Substantive morality is reflected in the fact that we do not expect a minority that have lost their case in a fair process to use only procedural arguments when they complain about the outcome. Procedure-external standards are used when procedures are justified, criticized, or reformed. How then can public deliberation be both moral and epistemic, in the sense that features of the process can justify the outcome at the same time as it has good effects?

Collective self-determination

In most cases, it is unclear what is a correct or optimal decision, the level of conflict is too high for there to be any prospects of consensus, and the truth relation therefore is problematic (McCarthy, 1994, 1996; Warnke, 1996). If deliberation cannot ensure correctness, another

[5] The discourse principle is itself normatively charged – it contains a certain normative content as it 'explicates the meaning of impartiality in practical judgments' (Habermas, 1996: 107). It builds on moral premises – on premises of a moral person who possesses certain rights and competences.

formulation of the legitimacy principle is required. Habermas insists that the inclusion of affected parties is as important as enlightening deliberation (Habermas, 2007: 434). The problem is how to square the circle between participation and rationality.[6] In order to reconcile these two dimensions I would like to suggest two different versions of deliberative democracy's basic tenet that the laws should be justified to the ones bound by it.

Version A is premised on the *epistemic notion* of moral rightness. Deliberation is held to lead to improvements in information and judgment conducive to a rational consensus and where the quality of the reasons makes for acceptability. Norms are only legitimate when they can be approved by all potentially affected in a rational debate.

This is an unattainable ideal and can amount only to a critical, contra-factual standard for the test of legitimacy – it is mainly a thought device for the representation of free and equal citizens. The discourse principle guarantees the citizens autonomy in a very powerful manner. Those laws that the citizens cannot accept in a rational debate, are illegitimate! Unfortunately, this weakens the realism of the theory, as most laws do not satisfy such a criterion. There is a *missing link* in discourse theory as we are faced with the problem of knowing the quality of reasons in non-ideal situations. If we cannot know whether norms really are in the equal interest of all because the demanding requirements of a rational discourse cannot be approximated – even under ideal conditions it is impossible to include all affected (or their advocates) – there is a case for the participatory reading of the deliberative ideal – version B.

Version B, the 'participatory' reading, conceives of the democratic procedure as a set of basic rights that set the conditions for justifying the laws in processes of collective self-determination. The equality of the participants constitutes the threshold for the legitimacy of a collective will-formation process aimed at an outcome that all can agree to and regard as reasonable.

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[6] The democratic procedure entails 'two components – first the equal political participation of all citizens, which guarantees that the addresses of the laws can also understand themselves as the authors of these laws; – and second the epistemic dimension of a deliberation that grounds the presumption of rationally acceptable outcomes' (Habermas, 2006a: 6).

In this version, deliberation has first of all *moral merit* as an action or condition is not permissible unless the affected could consent. In this variant consensus is not the criterion of correctness of norms.[7] Deliberation is attuned to collective self-determination: In the last instance, only the actors themselves can know what is in their best interest – and what is the(ir) common good (cf. Tugendhat, 1993b: 306, 309, 312). The role of deliberation is here not to warrant correctness, but: (a) to ensure the inclusion of everyone's viewpoints and contestation among them, and (b) to clarify wants and beliefs, to correct errors and increase the knowledge base in order to improve the reason-giving process and hence the (epistemic) competence to decide what is equally good for all. The upshot is that citizens must be offered justification for the exercise of political power that has convincing force *in light of standards that are accessible to them.* Qualified acceptance then presupposes a concept of justice, and one premised on *egalitarian morality*.[8] Charles Larmore contends that *respect for persons* is basic to liberalism as it is 'what impels us to look for a common ground at all' (1999: 608). This speaks to an institutional variant of deliberative theory. Deliberation itself cannot bear the entire burden of democratic legitimation because it is impossible to meet the requirement of having the legal norms accepted in a free and open debate by all affected parties. Only with law-making procedures and political institutions in place can the citizens effectively influence the laws that affect them, and determine whether the reasons provided are good enough.

The quest for justified orders

If rational consensus does not constitute a viable criterion of legitimacy we must look to the way the moral authority of procedures engender non-coercive compliance.

Equal procedures of decision-making

The democratic rights not only enable but also constrain the will-formation process and hence establish criteria for its legitimacy. The missing link between discourse and the democratic organizational

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[7] A condition is not legitimate because people consent to it, but because it is right (Tugendhat, 1993a: 174-175).

[8] On basic rights ensuring *respect for persons*, the *conditio sine qua non* for the *autonomy and dignity* of the individual, see Luhmann (1999).

practice are institutions and procedures of a certain quality which confer legitimacy on outcomes.

Version B allows for equal procedures of decision-making that revolve on the actual preferences of the citizens discounting their normative quality. In this perspective, majority vote can be seen as mechanisms that make collective action possible when consensus has not been obtained, and constitutional rights, legal protections, separation of powers, checks and balances etc., as control forms to hinder technocracy and paternalism – to block that rationality shall put aside all other concerns. Constitutional barriers are to prevent lapse into ethnocentrism and that political power can be camouflaged as rationality. This is important as also an intellectual instrumentalization is an instrumentalization after all. Only the possibility to block and to revise on the basis of a popularly enacted government can redeem the claim of moral value of democratic procedures.[9] Moreover, the effective promotion of dispute and contestability in the citizenry require a variety of institutions and procedures, among them are participatory ones which ensure hearing of all voices and which guard against unaccountable authority and illegitimate domination (cf. Pettit, 1997).

The participatory reading of the deliberative principle thus renders many institutional and even aggregative arrangements of representative democracy justifiable. The institutions of the democratic law state[10] are there, however, not only to prevent tyranny, corruption and power usurpation, but to ensure rational rule-making through a fair process of deliberation premised on critical review and the inclusion of a broad set of views, as well as through contestation and the institutionalization of fair bargaining procedures which ensures equal treatment of the members' preferences. Short of fulfilling the demanding requirements of a rational consensus, deliberation may function, due to its moral and epistemic merits, to compel reason giving and justification and to increase the level of knowledge and judgment in such a way that

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[9] 'If democracy is rule by discussion, then it is not only discussion but also ruling; and if ruling is not organized by egalitarian procedures, then there is no democracy at all' (Brunkhorst, 2004: 97; cp. ibid., 2002: 218ff.).

[10] On 'law-state' as translation of *Rechtsstaat*, a 'state-under-law', see MacCormick (2007: 3).

different reasons become understandable and mutually acceptable; hence, establishing a *working agreement*, which is more than a compromise but less than a rational consensus. It denotes an agreement that is based on *reasonable reasons.* Such agreements are, so to say, incompletely grounded as they depict agreements at a certain level leaving the deeper, principled questions unclarified (see also Sunstein, 1995). They warrant the legitimacy of outcomes and authorize collective decision-making when complying with discursive constraints of impartiality, reciprocal reason-giving and publicity. However, the fallibility and decisional uncertainty of communicative processes need to be compensated for.[11] Deliberation is empirically indeterminate and needs to be complemented with the institutions of law and power that can sanction non-compliance and mobilize resources for goal realization. Institutions compensate for lack of motivation and give actors incentives to comply even when they disagree. The upshot is an institutional variant of deliberative democracy, which entails offering justifications to citizens, in light of agreed-upon standards.

State based legitimacy

The EU is a power-wielding system, whose structure and policies affect the interests, identities and preferences of both the citizens and the states of Europe. It amounts to a system of domination (see Eriksen, 2009). Such an order requires democratic legitimation and thus a constitution that establishes the principle of legitimacy of political rule and the basic normative conditions for its exercise (cp. Grimm, 2004: 71). Whoever says constitution says state as it forms the enabling condition of sovereignty.[12] The legitimacy of the law stems from the presumption that it is made by the citizens or their representatives – the *pouvoir constituant* – and is made binding on every part of the polity to the same degree and amount. This is so to say inherent in the legal medium itself, as it cannot be used at will, but has to comply with principles of due process and equal respect for all. A legally integrated community can only claim to be justified

[11] One should however recall Hanna Pitkin's observation that institutional differentiation, and the indeterminacy of institutions for substantive policy outcomes, is an important precondition for the effective working of representative democracies (Pitkin, 1967).

[12] A 'constitutional demos' is presupposed in the institutional framework of the modern state (Weiler, 2001: 56).

when the laws are enacted correctly; when the rights are allocated on an equal basis. The state thus comes as a logical consequence of a shared will of a community to grant each other rights and to solve collective problems by means of positive law. Norms of justice stem from the distinctive relations that people have towards each other in the obligatory and coercive frame of reference of a state, which in this way is *a trigger of equal concern and respect*. The equal worth of persons constitutes the ultimate basis for the justification of force as well as the state form because the coerciveness of the law is intrinsically linked to equal liberties for all – it is to ensure compliance with such that a polity can legitimately use force.

Democratic accountability requires that the assignment of subjective rights is specified with regard to the explicit duties of the power-wielding bodies, that is, legislative, adjudicative and executive bodies. This implies that democracy requires a state – an accountable and empowered polity that is able to protect the *demos* and make rights effective. *Sanctioning, organizing* and *executive powers* are needed because:

- rights must be enforced when there is illegitimate opposition or non-compliance;
- the legal community has need of both collective self-maintenance to stabilize expectations and the coherence of the law; and of an hierarchically organized judiciary to ensure that higher courts can correct subordinate courts' rulings;
- political decision-making issues in programs, which have to be rationally and authoritatively implemented.[13]

The *state* is a political institution and an organizational form whose basic function is to establish and maintain order and security. The defining characteristic of a state is that is has the instruments for mobilizing resources, be they economic, military or social, to realize collective goals. Intrinsic to this is the capacity to sanction non-compliance and overcome the problem of collective action.

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[13] Modified list of Habermas (1996: 134); Schmalz-Bruns discusses six propositions why there is a need of statehood for hierarchical forms of self-intervention (2005: 80-81).

The state is sovereign and autonomous. It is in charge of its own agenda; it has competence-competence and controls the territory through a hierarchical system of communication, command and control. Its sovereignty is encoded in international law; hence the world is divided into a *system of states.* The state is the organizational structure of an autonomous, self-organized community that is needed to ensure the freedom, security and welfare of the citizens. But these are merely functional and pragmatic arguments as are the ones given for justifying the legal form underpinning statehood. 'The legal form is in no way a principle one could 'justify,' either epistemically or normatively' (Habermas, 1996: 112). If the state is only needed for instrumental or prudential reasons, one may think of functional equivalents.

To Weber the state is 'a human community that (successfully) claims *the monopoly of the legitimate use of physical force* within a given territory' (Weber, 1946: 78). In line with this the state is seen as a recognizably separate institution(s), or the supreme power, within its territory. It is the ultimate authority for all law, viz., binding rules supported by coercive sanctions. But it has neither 'natural existence' nor any moral value in itself. It is seen as a functional requirement for realizing goals and protecting rights. It has no intrinsic value as the protection of rights through ensuring the equal bindingness of the laws can be undertaken by other entities. The state is not a goal in itself but an instrument, defined by its ability to rule and whose mandate and authority stem from its relations to its society. Under modern conditions its legitimacy stems from a system of popularly authorized rule, from the way the polity complies with features of a democratic rule. The latter goes to the heart of the concept of government. Can government then be disassociated from state?

Government beyond the state

As far as the European integration process has moved beyond intergovernmentalism, the question becomes whether the institutional make-up of the EU, which contains well developed legislative, juridical and administrative functions, fits the concept of ordered governing.[14]

[14] This part of the chapter draws on Eriksen and Fossum (2008).

State and government decoupled

Modern constitutions are faced with the double task of ensuring *legitimate authority* and *social integration*, and one may therefore disconnect them from the state form and instead link them in with the project of modernity, whose normative *telos* is to make the addressees of the law also their authors (see Frankenberg, 1996). A true republic presupposes democracy, but democracy does neither normatively nor legally presuppose the state. [15] By laying down the fundamental rights that free and equal founders mutually grant each other, a constitution establishes *a horizontal association of citizens* (Habermas, 2006b: 131). It embodies the concept of the right of the *demos*, that is, an inclusive communicative will and action community of affected parties that mutually give one another rights to participate.

According to MacIver, we ought to 'distinguish between the government and the state and regard constitutional law as binding, not for the state, but the government. It binds the legislator in the making of law itself' (MacIver, 1964: 277; cp. Arendt, 1969). *Government is the overall holder and regulator of power, maintaining order by limiting all other expressions of power and thereby turning permitted powers into rights.* 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 definition alludes to, but also an expression of the common will (cf. Hegel, 1967). Accordingly, a properly constituted government goes beyond a 'mere monopoly of legitimate force'; it is based on 'mutual recognition of equality' (Wendt, 2003: 513). *Government* depicts the condition of *ordered governing,* viz. the functions of law-making, the interpretation and application of law, the execution and implementation of collective decisions. One may in this regard recall, with some hesitation, Foucault's term *governmentality* which entails 'the ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has at its target population' (Foucault as cited in Shore, 2006: 721).[16] This type of historically specific ordering

[15] 'Constitution and democracy are not legally tied to the state' (Brunkhorst, 2002: 223).

[16] On this terminology, see also Wallace (1996).

describing the rationality and population control of modern government is important. However, the crux of government is not an organization in its coercive nor in its collectivistic reading, but *democracy*. Government refers to the democratically authorized body within a system of rule that has the power to make and enforce rules, laws and regulations. The power upon which it can draw, emanates from the ability to forge a common will on the rules for social coexistence and the collective goals the polity should realize. A government can claim to represent 'the public will' as reflected in a developed and reflective public opinion (Manin, 1997). Government is conceived of as a specific organizational principle, as the institutional configuration of representative democracy and of the polity. It depicts the political organization of the polity and its societal legitimacy basis.

Not only should we untie government from penalizing connotations of state, we should also disentangle it from nation. The inclusive procedures premised on an egalitarian morality, on the rights of the citizens to participate and hold to account, bear the burden of legitimation alone, and not primordial values. The constitutional and institutional make-up of the nation states is the only viable normative resource basis for a post-national political order in Europe. The legitimacy emanating from contestation and deliberation on the basis of a basic structure ensuring rule of law, popular sovereignty, human rights, and citizenship stand out in sharp contrast to the pre-political we-feeling and allegiance making up the *existential common ground* of nationhood, of love of country, the negative effects of which the European integration process was set up to combat in the first place. Such a politico-legal structure does not express the norms of justice of an ethical community premised on pre-political identifications. It does not articulate a group identity. Rather the constitutive and regulative norms express the *distinctive relations* of the citizens in a polity, their shared membership as equal compatriots in a collectivity. A democratic government depicts then not a community of fate that autonomously governs itself, but an association of free and equal citizens that govern themselves through law and politics and which are held together in the mutual recognition of fair structures of contestation and law-making. It signifies that each and every one contributes to, and receives their fair share of the cooperative scheme. Hence, a system of popularly authorized rule – government – can be

constructed in such a way as to be freed of 'nationalistic' and coercive presuppositions. But does it fit the EU?

A governmental system

The EU lacks the nation states' capacities for authoritative rule such as:

- a fixed, contiguous and clearly delimited territory;
- a single rightful power and entrenched hierarchical principles of law;
- a collective identity derived from a common history, tradition or fate;
- a cultural substrate associated with the nation;
- a public sphere that performs catalytic functions for identity formation.

The Euro polity thus does not itself have direct control of a given territory; it lacks a collective identity and an undisputed organizational capacity to act. Hence it is not a state. However, stateness comes in different variants and shapes.[17] There is a variable development of statehood and its explanatory potential is questioned. John Peter Nettl maintained in 1968 that '[...] the traditional European notion of state and its structural application in practice may not be adequate for the tasks of goal-setting and goal-attainment in a modern, fully industrialized society' (Nettl, 1968: 587). Even more so at the European level.

Nevertheless the Euro polity has over time expanded its realm of competence and has developed into an order (however defined) in its own right. Unlike an international organization it carries out its affairs not through diplomacy and crude bargaining but through a set of institutions and procedures. The EU system is endowed with an *authoritative dispute mechanism* – the European Court of Justice (ECJ), which bases its rulings on recognition of the primacy of Union law and on the rule-of-law principle. All legal persons, and not only states, have judicially enforceable rights, and legitimacy established through domestic channels, through national democracy, has been

[17] For the analytical use of state as an explanatory variable in political science, see Nettl (1968). See also Evans et al. (1985) and the ensuing debate.

supplemented with direct chains of influence. Legitimacy is no longer only accomplished indirectly, through the member states – by bodies that are themselves legitimate (Beetham and Lord, 1998: 11). It is also brought about through *direct legitimization,* from the citizens of Europe.

The European Parliament (EP) has obtained more power over time. It has now achieved *co-decision making power* with the Council in many areas, and is increasingly curtailing the power of the Commission. Today, the predominant legislative procedure with regard to first-pillar legislation is co-decision. Under this procedure, a final legislative act requires Parliament's explicit approval in order to pass. Legislation needs to be shored up by the Commission, by Qualified Majority Voting (QMV) in the Council and by a majority of the MEPs. The Council, which is the most powerful law-making EU body, is endowed with the right to propose treaty change. The use of qualified majority voting – the waning of veto rights – in the Council has, however, eroded the ability of individual countries to postpone new legislation.

With regard to the institutions in the EU, then, is not merely an intergovernmental organization which harbors sites for bargaining oriented towards a compromise between different interest groups' and between member states' preferences, but an entity with a legal structure under which common problem-solving and authoritative conflict resolution take place. The EU has taken the shape of a *political system* of collective decision-making for the authoritative allocation of values, with input, throughput and output relations of its own. Legally institutionalized procedures and mechanisms of reason-giving and decision-making are entrenched. In the working groups and committees, as well as in all authorized decision-making bodies, the members must deliberate in the shadow of the law; they must justify opposing views with reference to European law – the European common good. One may therefore compare the constellation that makes up the EU to the standards of a government:

Even if the Union's institutional settlement has to accommodate a particularly broad array of interests, it still 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)

The EU has obtained competences and capabilities that resemble those of an authoritative government, which, as mentioned, depicts the political organization of society, or in more narrow terms, the institutional configuration of representative democracy and of the political unit. The system of representation and accountability in the EU gives the citizens at least a minimal input in the process of framing and concretizing the rights to be enacted. Taken together, this implies the adoption of those prescriptions that are associated with government rather than with governance. The upshot is a structure with democratic features:

- an institutional arrangement with representative qualities;
- an organization with competences and capabilities of its own;
- a material constitution with basic rights protection;
- transparency provisions and popular consultative mechanisms;
- an (admittedly weak) intermediary structure of civil and political organizations.

The legitimizing principle of a sovereign authority in the form of a citizenry – a people – or a properly elected assembly symbolizing the people is not in place in the EU. But what may be counted on as a legitimizing principle is a system of rule underlying as well as emanating from a constitution-making process. The EU is a government-type entity stemming from the fusion of European constitutional and democratic traditions. The standards of democratic government are brought to the fore through the principles and values adopted by the EU. Democracy came to the fullest expressions so far through the decision in 1976 to elect the representatives of the European Parliament by direct universal suffrage. The Treaty of Maastricht (TEU, 1992) established a European Union citizenship and mentions democracy in the fifth recital of the Preamble. Through the Amsterdam Treaty democracy was made a founding principle.[18] It makes democracy a constitutional principle of the Union (Bogdandy, 2007). Further, the Lisbon Treaty (2007) states that '[t]he functioning of the Union shall be founded on representative democracy' (Art. 10 TEU). The Charter of Fundamental Rights of the European Union

[18] 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States' (TEU Art. 6.1).

(2000) applies, with some opt outs, to all citizens of Europe and strengthens the protection of the citizens at the supra-national level. Hence, the EU is a Union both of *states* and of *citizens*.

Less than a state

The EU has, in contrast to the state, inordinately weak coercive measures. It depends on the national governments for resources, legislative approvals, compliance, and also for the requested update of Treaty authorizations (cp. Pollack 2003; Lord 2006). This is not to say that the EU lacks power. The EU's effects are quite substantial. National and EU administrative orders have become integrated and have been 'layered around existing orders so that the result is an increasingly compound and accumulated executive order' (Curtin and Egeberg, 2008: 639; see also Egeberg, 2006; Olsen, 2007). No matter where implementation takes place, the Community Method holds that the Commission can oversee it, bring infringement proceedings to the ECJ, and be put to account by the EP. Law-making and law enforcement take place within a structure that combines hierarchical and horizontal procedures. Whereas a central body with superior resources is clearly absent, the system has developed a well-established legal hierarchy and consented authority relations. The EU is an authoritative system that works without having to wield the threat of violence. It does utilize mechanisms of horizontal enforcement, which depend in their effectiveness on the nationally established shadows of brute force. The EU's own institutions for territorial control are at their weakest in the core state functions: military security, taxation, and police. The EU is still first and foremost a humanitarian-type power, as its own military capabilities are almost non-existent (Sjursen, 2007). In the EU it is more 'low politics' than 'high politics', more 'soft law' than 'hard power'. Hence, the EU is neither an empire nor a hegemony.

In considerable deviation from the state model, the EU is based on an incoherent system for control of territory.[19] The EU is a compound polity – a multilevel constellation – characterized by:

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[19] Consider border control: the UK and Ireland are associate members, not full members of the Schengen-based system, whereas the non-member state Norway is. Denmark has many 'opt outs' as has the UK, and far from all the member states have adopted the euro.

1) Huge discrepancies in the *size* of the member states (from Germany to Malta);
2) Various levels (community, member states, sub-national units) as well as various dimensions (territorial and 'functional') of policy-making;
3) Significant *vertical institutional incongruence*, through federal (Germany, Belgium and Austria), quasi-federal (Spain and the UK) and various forms of unitary arrangements at the member-state level;
4) A great amount of horizontal institutional heterogeneity, highly complex formal (institutionalized) ways of decision-making; at the Union level through different systems of representation and accountability (entrenched in supranational and international structures), and far more so at the member-state level (various forms of presidential systems and parliamentary systems).
5) Complex informal ways of decision-making among actors of various degrees of institutionalization, acting in policy areas of different degrees of Europeanization and with different numbers of participants, agreeing policies under different decision-making rules (see also Abromeit, 1998: 8).

The asymmetrical size and powers of the constituent member states make it difficult to entrench the formal equality between the states as one representative principle (in addition to that of citizens). The Euro polity is unique in the sense that it is a complex entity containing several federations within its own organization. The EU has weak enforcement mechanisms. It is especially weak in the classical state-type functions: The powers to tax, to coerce and to protect its inhabitants against foreign intrusion are minimal: It has neither a police force, nor an army of its own, and there are no European prisons. This reduces both European legislators' and courts' leverage at the supranational level but reveals a *democratic problem* insofar as it raises questions about their ability to uphold a system of rule in which the law can be made effectively binding on every one to the same amount and degree. The multi-level constellation that makes up the EU represents a unique institutional configuration with a considerable amount of authority and consigned competences. But how can rights be protected, and the law be effective and legitimate,

and apply to all in the same way, without state-like power to unilaterally sanction norm breaches?

Deliberative supranationalism?

When the EU is lacking the coercive instruments and the collective identity of the nation state model, and when deliberation in transnational governance structures alone can not bear the burden of legitimation, the actual authority (the relative de facto legitimacy) of the Union becomes puzzling.

The state as a variable

The EU is effective in eliciting compliance with regard to the implementation of legal rules. Though the compliance is voluntary, member states comply even when they disagree.[20] But 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)?[21] The answer, I suggest, is that as European integration takes place among already constitutionalized and politically integrated states where the coercive functions are taken care of at the member-state level, the EU can manage to stabilize behavioral expectations and achieve collective bindingness for its laws *with reference to the legal form in which they are dressed*. The multilevel constellation that makes up the EU can ensure compliance and consent through a series of 'soft' mechanisms, ranging from a worldwide moral consensus on the protection of human rights; via consultancy and deliberation in transnational structures of governance and their concomitant civil society mechanisms of shaming and blaming; to the institutionalized procedures for authoritative decision-making and monitoring in

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[20] See Börzel (2001), Tallberg (2002), Weiler (2001) and Zürn and Georges (2005). Also: 'One of the great success stories of the EU is that its legal regulations are nearly always complied with by the member states. The EU is one of the very few non-coercive authority structures which expect their member states to comply with rules which they explicitly oppose. Compliance with European law therefore is never an automatic process but always remains an 'autonomous voluntary act' on the part of the member states' (Neyer, 2008; also ch. 1 in this volume).

[21] See also Habermas (2006b); cf. Cohen and Sabel (2006), Schmalz-Bruns (2007).

intergovernmental and supranational institutions, which are similar to the ones that at the national level confer legitimacy upon results.

Generally it holds that when decisions are properly made, when they follow the authorized procedures of the constitutional state, the likelihood that they be respected is high.[22] This observation is in line with the basic assumption of the institutional variant of deliberative democracy: Legitimacy, which sets 'a ground-level criterion for basic structures' (Wenar, 2002: 60), depicts a quality of a rule-making institution. This quality exerts a pull toward compliance on those addressed because they hold that the institution 'has come into being and operates in accordance with generally accepted principles of right process' (Franck, 1990: 24). Decision-makers' compliance with valid norms – or fair procedures – engenders approval from the subjects. It is the form and quality of the pre-established procedures, which generate legitimacy. They make actors comply even when political decisions or laws are in conflict with their preferences or interests.

Collective decision-making at the European level takes place within a setting of already legally institutionalized and politically integrated orders which are largely trusted. Hence, the requirement of 'the monopoly of coercion' at the supranational level may not be needed to ensure compliance, and statehood appears to be a variable more than a rigid category.[23] It is a reflection of the varying empirical reality within which European integration takes place, and the divergent dosage of statehood and authority relations that are required for initiatives to be converted into practical results. A stateless government designates differentiating state functions, downplaying the coercive elements and upgrading the normative-institutional elements. In this manner we get to an organization that possesses a limited set of measures for ensuring implementation and

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[22] Cp. Tyler (1990); and likewise, when the norms or rules are contested, the formal compliance mechanisms fail at the international level (Zürn and Neyer, 2005).

[23] On the other hand, as mentioned, the absolute power of the nation state is abolished and the monopoly of coercive means is decreasingly the distinguishing characteristic of modern political systems as they have become conditional on the respect for human rights, rule and law and democracy.

compliance. 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 labor between the levels that relieves the central level of certain demanding decisions.

The peculiar structure of the EU, in which complex rounds of decision-making and implementation involve the constituent parts to such a degree that the actual power of the EU appears rather weak and indecisive, has to be taken into consideration when dealing with the legitimacy problem. Thus, in order to account for the putative legitimacy of the EU, one should take into consideration the *hybrid nature* of this order, which at the outset might not require the same kind of democratic authorization that constitutional states do. The multilevel organization of European integration lends legitimacy to supranational processes of collective decision-making through shared competences and powers as well as through reflexive mechanisms conducive to deliberation and contestation. The member states have surrendered sovereignty and are subjected to European-made law, but they still are *the masters of the Treaties*. The de facto legitimacy of the EU does not merely stem from the performance of the system,[24] but moreover from the saved up trust in the institutional arrangement of compounded decision-making processes. It is an arrangement that to a large degree mirrors the one found at the national level. The EU is, above all, a political system that extensively utilizes law to create order and purpose. As a rights-based order, the EU can draw on the common constitutional-democratic make-up of the member states' authoritative systems of decision-making, norm interpretation and law enforcement. In the multilevel constellation that makes up the EU, sovereignty is pooled, power is shared, and *statehood is a variable* more than a fixed status. Hence there may be a plea for *deliberative supranationalism*. It is not the hierarchy of norms, or the legal coercive hierarchy, that characterizes EU's supranationalism[25] but their ability to establish proceedings in which

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[24] 'Output oriented legitimacy' to speak with Scharpf (1999).

[25] 'European constitutional discipline does not enjoy the same kind of authority as may be found in federal states where federalism is rooted in a classic constitutional order. It is a constitution without some of the classic

a common ground for concerted action can be achieved through deliberation.

Stateless cosmopolitanism

Unpacking the components of statehood makes it possible to account for the putative legitimacy of a polity that is less than a state but more than a structure of transnational governance. The EU shares its means of enforcement as well as its means of legitimation with the member states, and can also bolster its justification with humanitarian principles, that is, with commitments to higher-ranking law. Hence, the citizens of the Euro polity can also be addressed as citizens of the world. This is first of all reflected in the initiative taken to make a *Charter of Fundamental Rights of the European Union*[26], whose preamble states that:

> [T]the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.
>
> (Charter of Fundamental Rights of the European Union)

The EU's supranationalism does not reflect a group identity. EU citizenship is a package of legal rights and duties constraining national behavior. This normative basis is also reflected in the early decisions of the ECJ on direct effect and supremacy, in the conditionality clause (all aid and trade agreements are conditional on respect for human rights), in gender-equality and citizenship-rights policies. On this basis the EU's normativity may be seen to stem from the anticipation of a rightful world order.

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conditions of constitutionalism. There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of normative authority or in a hierarchy of real power. Indeed, European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power' (Weiler, 2003).

[26] Charter of Fundamental Rights of the European Union, *Official Journal*, 2000, C 364/1.

Is such a stateless, regional cosmopolitan entity sufficient or should the EU develop into a state in order to be an effective political system? The EU is weak in terms of actual power and may need more competences and resources in order to realize humanitarian goals. There are, however, some reasons as to why the EU should not, or will not, aim for more than a regional cosmopolitan entity in which supranational authorities monitor the conduct of lower levels on the basis of a set of basic normative principles (see Eriksen, 2006).

First of all, 'democracy in one country' is not sustainable, as it requires that the citizens, when their rights are infringed, can bring their grievances before a superior authority. Any 'people' can get it wrong, and needs correctives; majority decisions can violate individuals and minorities, and national, constitutional law do not always protect. The nation state is accused of war mongering, of homogenization of diverse populations, of exclusion and the suppression of minorities and also for making democracy into a 'community of fate' that autonomously governs itself self-regardingly without much concern for others' legitimate interests. The nation state produces externalities for others that it is not held responsible for. Hence, supranational orders are required for real democracy to prevail.

Secondly, a solution in the form of a stateless government would be an answer to the claim that one should not *replicate* at the supranational level what went wrong on 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. The EU is a large-scale experiment searching for binding constitutional principles and legitimate institutional arrangements, and one in which the idea of democracy is detached from both nationhood and statehood.

Thirdly, the self-proclaimed democratic system of law-making and norm interpretation at the European level, constrained by the member states, has built-in assurances that the multilevel

constellation that makes up the EU does not become an unchecked entity – one that runs the risk of turning into a power usurping *world despotic Leviathan.* The borders of the EU are to be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity, and with regard to the support and further development of similar regional associations in the rest of the world – namely, with regard to the viability of the African Union, MERCOSUR, ASEAN, etc. The EU's boundaries would then be set with reference to functional requirements both for itself and for other regions, all within the framework of a democratized, rights-enforcing UN. The ensuing order would not aspire to become a world organization, but would be cosmopolitan in the sense that its actions would be subjected to the constraints of a higher-ranking law and be committed to the fostering of similar regions in the rest of the world.

Fourth there is the problem of feasibility with regard to forging European statehood. Among the citizens of Europe there is not much support for a European super-state. European citizens are not only citizens of nation states but also to a large degree of welfare states with claims to material benefits. Hence they have not only their chains to loose. Moreover, at the supranational level it is not a question of solving the problem of order in a state of nature, or the domestication of authoritarian rule through the constitutionalization of state power, as was the case with the establishment of constitutional democracies.

In contrast to individuals in the state of nature, citizens of competing states already enjoy a status that guarantees them rights and liberties (however restricted). The disanalogy is rooted in the fact that citizens of any state have already undergone a long process of political formation and socialization. They possess the political good of legally secured freedoms which they would jeopardize if they were to accept restrictions on the sovereign power of the state which guarantees this legal condition. The pre-social inhabitants of the state of nature had nothing to lose but the fear and terror generated by the clash of their natural, and hence insecure, freedoms (Habermas, 2006b: 129-130).

The conditions that once existed for fusing statehood, law, constitutionalism, democracy and solidarity into a whole are not in place in the Europe. But how can a system of domination such as the

EU be stable, in the absence of a signifier of who the Europeans are: in the capacity of what the Europeans are equal? There is a problem with stabilizing legitimate expectations that is not plainly ensured by the liberal principle of rule of law.

On the co-originality of rights and democracy

The unity of European law is lacking in the sense that the citizens have not been able to jointly have a say in its making, and, with Hauke Brunkhorst, *law without democratic justification is hegemonic.*[27] It is not legitimate according to the credo of the modern democratic *Rechtsstaat*, which requires public legitimation beyond the mere rule-of-law regime. Self-government entails that the citizens have final control of the public agenda; the authority to decide which issues are and which are not to be subjected to collective decision-making (Dahl, 1982: 6). Hence the claim to democratic self-rule cannot be redeemed via the assignment and protection of subjective rights, which, as it were, amount to a rule-of-law regime, and can only protect the private autonomy of the citizens – in the court. Juridified orders do not meet the co-originality criterion of rights and democracy. The idea that there already is a constitution at the international level, for example in the form of the UN Charter, is dangerous. It gives the false impression that the power of the state already has become a servant of international law, hence it runs the risk to 'dress up strategic power-plays […] in a universalistic garb' (Cohen, 2004: 10).

Systems of domination require justification with regard to the relevant characteristics of the political community to be regulated as well as with regard to the purposes and interests to be realized. That is the characteristic in virtue of which systems 'create obligations of justice and presumptions in favor of equal considerations of all those individuals' (Nagel, 2005: 142; see also Schmitt, 1992: 11ff.). Proper justification can only be accomplished when it is possible to refer to a shared notion of a delimited community that establishes *the criterion according to which members of a polity are equal* and hence establish why the citizens should observe the law. In other words, without an agreement on *telos*, purpose or *demos*, it will be hard to find one or more such legitimating principles that can establish the normative

[27] Cp. Brunkhorst (2008); see also Eriksen (2009).

foundation conducive to stability. When burdens must be shifted and resources redistributed, a civic solidarity is required, which can motivate a minority to obey a majority; a collective identity strong enough to ensure that the compatriots not only see themselves as members of a community based on liberty but also as one based on equality and solidarity. When it is not clear who the people (or peoples) are, it is hard to establish *in what capacities the citizens are equal* and hence what political equality requires.

In the EU there is no constitution making subject, hence deliberation has not only to do with collective self-determination in a given *demos* but must also establish the relevant collectivity, hence the criterion in light of which the members are equal. This underscores the need for rational consensus as a critical standard, as it points us to the conditions for full political equality. As the ultimate test of the legitimacy of the law-making procedure, the rational consensus unavoidably provides the standard, because the reasons must not only be reasonable but *convincing in the same manner* for the order to be stable, and this can only be accomplished by establishing what is in the equal interest of all. It is such that can test the substantive moral standards constitutive of variant B. It is a rather thin normative basis for this as it must be based only on what human beings have in common, viz., their right to freedom, equality, dignity, democracy and the like. However, this depicts what the citizens have in common in the moral commonwealth, as world citizens, and not as citizens of a territory with collective responsibilities and with a collective identity as members of the same group. To have things in common requires that other things are excluded. A rational discourse can not establish the distinguishing characteristics in the capacity of which a bounded set of actors are equal, but can set the minimum criteria which should not be violated, a threshold that should not be transgressed by a legitimate political order.

Conclusion

The democratic problem is due to the fact that the members of the European community – the European citizens – are not able to see themselves as subordinate to a superior power that they have jointly constituted and whose agenda they are in control of. As long as it is not clear who are the legitimate subjects of the polity, popular sovereignty according to which all political authority emanates from the law laid down in the name of the people – is not ensured. When

disconnecting *ethnos* and *demos* as basis for democratic rule, there are no intrinsic reasons as to why the EU could not be democratic. But in order to settle how much popular authorization and what kinds of reforms would be needed, one needs to take into consideration the actual competences allocated to the EU as well as multilevel and power sharing structure that is in place.

The actual level of legitimacy of the EU may be seen to be 'free-riding' on the established structures and norms of the democratic law state, as the moral authority of this multilevel structure of law-making, adjudication and implementation confers legitimacy on the outcomes. Its legitimacy is so to say parasitic on the common democratic constitutional complex; the values and democratic practices in Europe. This basic normative structure lends legitimacy to the proceedings and collective decision-making of the Union and constitutes a vital part of the common self-understandings of the citizenry. However, the constellation suffers, as the conditions for popular authorization have not been established. The EU will continue to face the allegation of a democratic deficit, and hence the problem of instability.

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Chapter 16

The process of legitimation as a large scale experiment
Comment on Erik Oddvar Eriksen

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In his chapter, Eriksen raises a number of issues, revolving around the central question of whether or not the European Union (EU) can become democratically legitimate. The core of this topic concerns the characteristics of a discourse-theoretical approach to the rationally founded justification of a political order. Eriksen begins his reflections by connecting the analysis of epistemic and moral justification to both an exploration of collective self-determination concepts and to an exploration of decision-making, particularly by majority vote.

Eriksen further deals with the conceptual decoupling of 'state' and 'government' with regard to the EU's supranationalism. He is, after all, concerned with terms such as 'stateless cosmopolitanism', which is linked to the idea of political authorship of citizens beyond the nation state. Although it would be fruitful to respond to each of these particular themes, I prefer to concentrate on a vital issue, which in itself is complex enough: The question of whether, in thinking about the democratic legitimacy, one needs to ask what kind of political entity the EU is. Eriksen refers here to the common view that the EU

is a new political order; more than an international organization, but less than a state. The EU does in fact lack the important characteristics of a nation state, such as a single rightful power and entrenched hierarchical principles of law, as well as a more or less homogenous collective identity or a cultural substrate associated with the nation (cf. Eriksen, chapter 15 in this volume: 260f.). Moreover, in comparison with the state, the EU has only weak coercive powers (ibid.: 263). From this institutional perspective, the question concerns whether or not the EU can become democratically legitimate. Such an issue could be understood in various ways. In this context, it is can be asked if such a non-state entity is normatively sufficient or whether the EU should rather develop into a state in order to be an effective political system (ibid.: 269f.). However, the peculiar nature of the EU lies in the expansion of competences as its processes of integration continued over time, resulting in the EU's development into an order in its own right: Today, it is a union of both citizens *and* states. Assuming that there is a level of actual compliance with EU regulations by the member states, the EU can be described as a 'stateless government', and thereby plausibly be conceived as a 'system of domination'.

The EU is not lacking power. On the contrary, it is an authoritative system. In addition, the EU's political and judicial effects are quite substantial, due to its grounds of legal hierarchy and mechanisms of horizontal enforcement.

Questions regarding the democratic legitimacy of the EU have a particular connection to the *kind of democracy* the EU should be identified as. Addressing the multilevel organization that the EU is as a hybrid order, one can ask whether it may require the same kind of democratic authorization that constitutional states do. Due to the fact that the legitimacy of the EU was derived from the member states, and that its legitimacy is dependent on the outcomes of democratic processes, the epistemic aspect of democracy has been emphasized in the theoretical discourse on democratic legitimation. Thus, the concept of deliberative democracy has been broadly discussed in regard to the EU's supranationalism (cf. Schmalz-Bruns, 1999). In this context, we observe a shift from the voluntary to the epistemic orientation within democratic processes (see e.g. Dryzek, 2000). Many scholars agree that political decision-making has to be made dependent on the quality of reasons. Thus, the ideal of public

justification has become a central point of the legitimacy of political processes. Referring to this ideal of rational outcomes, firstly, the realm of political publicity gains its importance. Secondly, politics is communicated and mediated by horizontal, not hierarchical, structures. And last, authors and addressees of political activities are connected by the exchange of reasons (Schmalz-Bruns, 2005: 93-94). With regard to the discussion about the differentiation of epistemic and participative aspects of democracy, the more epistemic interpretation of deliberative democracy assumes that procedurally regulated deliberation yields reasonable results of decision-making. The concept of deliberation meets here the common objection that since the idea of democracy is constitutively bound to the welfare state, it is respectively bound to the idea of national solidarity insofar as it emphasizes the universal idea of reciprocity and rationality. The theory of deliberative democracy provides key elements, which can, for well-known reasons, be applied to the EU. One core idea of deliberative democracy consists of the disconnection of *ethnos* and *demos*, namely the disentangling of democracy and the nation state (Eriksen, ch. 15: 249). Consequently, it seems that political practice within the EU is proof of the thesis that post-national politics is to be achieved through deliberative democracy (cf. Schmalz-Bruns, 2005: 95).

However, I am skeptical whether the answer to the initial question of legitimacy could be found in this particular conception of deliberative democracy. Eriksen, at one point, claims that this version of deliberative democracy, with its focus on reasonable outcomes of procedures, involves the risk of merely technocratic deliberation. Despite the fact that I agree with Eriksen on the matter of 'deliberation without democracy' (Niesen, 2008) while not holding it to be a substitute for legitimation *par excellence*, more emphasis could have been placed on the argument so that it is not legitimacy *per se*, but *democratic* legitimacy which is to be justified.

Eriksen could have been more lucid in clarifying that the EU cannot be legitimated simply by the rationality of the procedural outcomes or by legal compliance with regulation. It is all too necessary to emphasize the very idea of *democratic* legitimation, for the idea of democratic legitimation itself contains the concept of public authority, which can only be constituted by collective self-determination. And from this perspective, we can comprehend why

Eriksen tends to ask more precisely: 'What *model* of deliberative democracy can account for post-national legitimacy?' (Eriksen, ch. 15: 246, emphasis added) Apparently, Eriksen postulates a mutual relationship between *both* deliberation *and* democracy, when he asks, 'Why, on a deeper level, [is] deliberation [...] not enough […]? Why are the epistemic merits of deliberation not sufficient to generate democratic legitimacy?' (ibid.: 249). Since pure deliberation could even lead to a non-democratic and expertocratic form of reason-bargaining, the lack of an integrative aspect within the concept of democracy seems to be implausible and inapplicable to Eriksen. Referring to Habermas, he therefore insists on the assumption that the inclusion of all concerned parties is as important as the deliberative character of democratic processes (ibid.; see also Habermas, 2007: 434). The general problem, however, is: 'How to square the circle between participation and rationality?' (Eriksen, ch. 15: 252; see also Habermas, 2006: 6). Hence, Eriksen offers an alternative reading of the conception of deliberative democracy, which concentrates also on the participative aspect of democracy. This interpretation conceives the democratic procedure as a set of basic rights assigning the conditions for justifying the laws by collective self-determination. It is therefore rather the political process itself, based on equal rights and equal liberties, that is the main container of democratic legitimacy (cf. Eriksen, ch. 15: 246, 252-253). In this context, Eriksen refers to the conception of discourse theory. In his view the discourse theory exhibits a fitting grasp of democracy itself, because it embodies the basic principles of self-government. Thus, it is not just the institutional manifestations (parliamentarism versus presidential democracy), but the conception of rights which realizes the idea of people's sovereignty and which accounts for democratic legitimacy. It seems apparent that this account of discourse theory resembles the idea of 'deep democracy' (Young, 2000: 5) as it has been brought to the fore by Iris Marion Young or the Forstian conception of an 'Ethos of Democracy' (Forst, 2001: 346). As Rainer Forst puts it:

> Deliberative democracy is […] a self-correcting institution, but self-correction means that the authority to question its authority always remains within the realm of reasons among citizens. There is no rule of reasons apart from the self-rule of citizens by justified reasons.
>
> (ibid.: 374)

Here we find an emphatic definition of both epistemic and participative democracy that might be fruitful for the attempt to justifying the EU as democratically legitimate. For Eriksen, it is the idea of the authority to question authority which is linked to the universal idea that all concerned parties must have the right to resist arguments with which they, due to rational reasons, cannot agree. This well-known Habermasian line of argument is further developed by Forst, who states: '[S]ince the norms that have to be justified by reasons will turn into reciprocally and generally binding and legally enforced norms, the reasons that confer legitimacy upon them must themselves be reciprocally and generally justifiable' (ibid.: 362). In other words, the idea of *democratic* legitimation would be met only if public participation does not end up in a compromise, but rather results in a real agreement (cf. Habermas, 1996: 166).

Is there really a chance for any form of equal participation by citizens within the realm of the EU? Eriksen seems to deny that the Habermasian postulate could be taken seriously. Consider how he points out that a 'proper justification' can only be accomplished when a 'criterion according to which [the] members of a polity are equal' (Eriksen, ch. 15: 271) can be found. Moreover, Eriksen also shows that although the EU citizens have obtained rights, political structures and institutional arrangements, they have not yet been able to give these rights or institutions to themselves (Eriksen, 2007). In conclusion, Eriksen's assessment matches the famous so-called democratic deficit diagnosis. This classical diagnosis holds that the EU does not meet with the democratic criterion because the European citizenry lacks authorship of the political agenda. Due to the multilevel order of the EU, the normative relationship between *demos* and *telos* is not self-evident nor can it be justified by democratic criteria. As long as member states and individuals are rivals, so to speak, with regard to public authority, Eriksen is certainly right that, in the case of the EU, citizens cannot be the authors of political power as required by the idea of democratic legitimation. Thus, he conceives the current level of legitimacy as 'free-riding' on the established structures and norms of the democratic law state, because the moral and political authority of the multilevel order (including law-making, adjudication and implementation) confers legitimacy on the outcomes (Eriksen, ch. 15: 273). Eriksen concludes that the EU's legitimacy is 'so to say parasitic' on the common democratic constitutional complex. Eriksen sounds less optimistic about the

future prospects of the EU than he did in former statements about the same. He pessimistically concludes that the EU will continue to face the allegations of a democratic deficit (ibid.).

I would draw different conclusions from Eriksen's overall work. The particular circumstances of the EU's political reality are characterized by a Blochian 'contemporaneity of the noncontemporaneous'; under these circumstances, the realization of democratic legitimacy might be just a matter of time. Provided that the EU is actually on its way to proper democratization, it can be comprehended in terms of an experiment in transnational constitutionalism and thus , as emphasized by Eriksen in an earlier text (cf. Eriksen, 2007), the EU's integration process can be seen as a 'large scale experiment'. The EU could provide the opportunity to overcome the conceptual corset of the state. In the EU context, there is a chance to think of alternative models, i.e. different types of government with some of the advantages, but without most of the disadvantages, of the nation-state. One of the most relevant aspects lies in the decoupling of *ethnos* and *demos*. In addition to this, the requirement of reason-giving (as the central criterion of the discourse-theoretical approach to deliberative democracy) is vital for a reciprocal cultural communication – as well as for the transnational political interaction. A closer look at the EU undeniably shows that the individual is becoming more and more significant. The power of nation states has been constrained by supranational law. It is Eriksen himself who reminded us that the basis for the legitimacy of supranational law is 'the constitutional developments in Europe that emerged in the wake of the French revolution, and which for more than 200 years now has contributed massively to the stabilization of nation states' (Eriksen, 2007: 18; cf. ibid.: 2009). It may be thatthe EU is not fully democratized at the moment. However, the EU can nevertheless be viewed as still being involved in the so-called 'unfinished' process of democratization. From this perspective, we can conceive a constitution as at least the precondition for respecting the equality and the autonomy of the individual in terms of the realization of the idea of popular self-government. Yet, we must admit that the idea of self-determination has to be pursued by the diverse European *demoi* themselves.

What would the idea of a large scale experiment mean then? The EU would be a large scale experiment 'searching for binding

constitutional principles and institutional arrangements beyond the mode of rule entrenched in the nation state.' (Eriksen, 2007: 18) The promise of the European integration process might lie in a more encompassing and comprehensive constitutionalizing process. However, we are just witnessing the beginning of this process. The result of it still remains open.

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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

In the words of Jürgen Habermas, and speaking for many contemporary observers, the outcome of the Lisbon Treaty demonstrates the 'consciously and blatantly elitist and bureaucratic' character of European politics. Part of this critique is founded on the detached and elite-driven mode of European integration and constitutionalisation, as well as the failure to establish a general democratic agreement on the future shape of the European Union.

The doubts about the unifying processes also express an uncertainty about the normative sources on which trans- or supranational orders can draw. Must the legitimacy of a normative political order rely on democratic procedures or could there be other sources, such as higher-order considerations of economic welfare, legal security, constitutional coordination, political effectiveness or, even more abstract, 'public reason' or some notion of material justice? The contributions to this volume address this question - or rather, this host of questions. For even if one believes that the question of political legitimacy must be answered democratically for principled reasons of political autonomy or procedural justice, it is not clear what this would entail at a transnational level or, more concretely, with respect to the EU. And if one believes that other principles and forms of legitimacy are required and valid in transnational contexts such as the EU, a number of normative and institutional issues arises.

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