



European Transformation

A pragmatic approach

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Abstract

Europe has been transformed from an order of largely independent nation-states to an integrated order with some capacity to rule in the name of all. The European integration process has resulted in a set of institutions premised on a complex mixture of supranational, transnational and intergovernmental principles. It is difficult to understand how this could have happened voluntarily when the Union lacks important enabling conditions, such as a collective European identity based on a common language and culture. The pragmatist approach depicts cooperation as a response to problematic situations, and institution formation as a response to the indirect consequences of such, which increasingly catches on and has polity consequences. The effect is more legal regulation, which triggers claims to democracy. The integration process is to a large degree driven by contestation and opposition. The paper also addresses 'the nature of the beast'. What could the EU possibly amount to? A regional subset of an emerging larger cosmopolitan order?

Introduction

In the 19th century, Europe experienced the rise of relatively homogeneous and powerful nation-states.¹ This system has been facing change. Partly driven by exogenous forces such as globalisation and partly spurred by internal dynamics, the political order in Europe is being transformed. Processes of institution building at the European level, adaptation at the domestic level, and co-evolution of the two levels, are challenging the fundamental building blocs of democratic rule in Europe. As states have become increasingly interdependent and intertwined, the parameters of power politics have changed.

Europe has been transformed from an order of largely independent nation-states with their divergent identities and interests to a supranational order with some capacity to rule in the name of all. Hence, the transformation of Europe not only testifies to Europeanisation of the nation states but also to new forms of political rule emerging beyond the international system of state relations. This system now envelops most of Europe. Europe has been integrated within 'the multi-level constellation' that makes up the European Union (EU). While international affairs traditionally are conducted through diplomacy and intergovernmental bargaining between the executive branches of government, we are now witnessing problem-solving in policy networks and transnational institutions as well as collective goal attainment and conflict-resolution in supranational institutions such as the European Parliament (EP), the European Court of Justice (the ECJ) and the European Commission. The EU has emerged beyond that of international regime and is a major force in the reorganisation of political power in Europe. It constitutes a new type of political order that does not fit into the traditional dichotomy of intergovernmental versus nation state regulation.

There is confusion and disagreement about the core characteristics of the EU as well as about its future design. Currently, there are different notions of what the EU is (or should be) and there are different theories of how to explain the integration process. This paper deals first and foremost with the latter problem. Integration is a process where actors shift their loyalties and activities towards a new centre with the authoritative right to regulate interests and allocate resources. How to explain that supranational institutions circumscribing the autonomy and sovereignty of the nation states have been

¹ A shorter variant of this paper appears in G. Delanty and S. Turner (eds) (forthcoming) *Handbook of Contemporary Social and Political Theory*, London: Routledge.

established? Supranationalism entails the consolidation into multi-lateral institutions with the potential to override the preferences and interests of the nation-states and to transform identities (Schmitter 1969: 166; Haas 1968). The nation states have surrendered some of their sovereignty for the sake of collective European action. That powerful supranational institutions have been established represents an explanatory problem for conventional approaches – be they rational choice or communitarianism – because they would require either the presence of force or (bargaining) power in order for some to impose their will or a common identity strong enough to override particular (national) interests. Power based explanations do not suffice as voluntarism prevails. Compliance is always optional on the part of the member states (Weiler 2003). Also the other requirement, that of a collective European identity, is widely held to be missing. How can one account for the voluntary relinquishment of sovereignty when a collective identity is lacking? To approach this puzzle I suggest a pragmatist approach which revolves on problem-solving through deliberation and experimental inquiry. It depicts cooperation as a response to ‘problematic situations’, and institution formation as a response to the indirect consequences of such. In this perspective democracy is a condition for intelligent problem solving as well as for alleviating legitimacy problems.

I start by outlining the characteristics of European integration processes, the move beyond intergovernmentalism and the ensuing legitimacy problem. Thereafter I spell out some elements of a pragmatist approach to the integration process and a provisional solution to the puzzle that integration can take place absent of a collective identity. This endeavour requires attention to the nature of the EU – and to what legitimacy problem it represents.

Integration and the problem of legitimacy

The EU has sustained a rapid expansion of political regulation in Europe and has over a period of fifty years transformed the political landscape in a profound manner. Integration has deepened as a wide range of new policy fields have been subjected to integrated action and collective decision-making. This has taken place not only with regard to trade, monetary and business regulation, fishing and agriculture but also with regard to foodstuff production, gene- and bio-technology, labor rights, environmental protection, culture, tourism, immigration, police and home affairs, and now also with regard to foreign and security policy. The EU has succeeded in entrenching peace and it has established a Single Market, a Monetary Union – the Euro – a European citizenship and a Charter of Fundamental Rights. The EU has widened and has successfully managed to include new members, by 2010 a

total of 27. Even though the powers of the Union in many policy areas – such as social and tax policy – are severely restricted, a significant amount of laws and amendments in the nation states emanate from the binding EU decisions.

The present supranational state of affairs is due to a protracted process of integration since its inception with the Paris (1951) and Rome (1957) Treaties, through the Single European Act (1986), Maastricht (1992), Amsterdam (1997), Nice (2000), up to the Laeken declaration (2001) and the work on forging a Constitutional Treaty (2002-2005) and the Lisbon Treaty (2007). The supranational character of the Union's legal structure started with the constitutionalisation of the Treaty system, which transformed the EC from an international regime into a quasi-federal legal system based on the precepts of higher law-constitutionalism. All legal persons and not just states, have now judicially enforceable rights. Further, the progressive strengthening of the 'doctrines of supremacy and direct effect' is coupled with the growth of the number of EU provisions and Court rulings, where the Court acts as a trustee of the Treaty and not as an agent of the member states. The EU differs from the nation state hierarchical structure of representation and power. The non-hierarchical, multilevel constellation that makes up the EU reflects a peculiar separation of powers: Under the regulation of the *acquis communautaire* (and the authority of the ECJ) legislative power is shared between the Commission (which has the right of initiative), the Council, and the Parliament; executive power between the Commission, the Council, and the member states; and judiciary power between the European Court of Justice, the Court of First Instance (CFI), and member-state courts.

Not only does this peculiar form of powers' separation pose legitimacy problems, so does the fact that the EU can not be boiled down to a distinct type of international organisation. As long as the EU is only an instrument for the nation states to realise their mutual interests, it would leave the integrity and the identity of its constituent parties intact. It would be the lowest common denominator politics that do not challenge state sovereignty or core national interests. However, when the EU is a power-wielding system which establishes 'domination relations', the electoral authorisation of ministers at the national level, and their accountability to national parliaments, cannot provide for democratic legitimacy. The EU's legal basis is international treaties, but its competence and law making power reaches so deep into the working conditions of the member states, that the EU can not be legitimised on this basis alone. Majone, who advocates delegating policy making power to non-majoritarian institutions – not directly elected or accountable agencies, acknowledges the ensuing questions of accountability and legitimacy but maintains that these could be solved by sectioning off particular policy areas.

He argues:

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

(Majone 1996: 5)

This is problematic, first of all because the decision to institutionalise certain issues as technical, subjected to efficiency considerations only, is essentially a political one. An issue is never merely technical and 'output oriented legitimation' as Scharpf (1999) famously coined it. To leave e.g., the monitoring of free trade and competition, of currency stability, to agencies withdrawn from the control of affected parties, is a political decision of vital importance. Secondly, the European Union has emerged, from humble beginnings into an entity whose policies cover virtually all areas of public policy. The EU does not merely regulate. It also re-regulates and performs some market-redressing functions, through standard-setting and rule-making. The EU has become a polity which performs functions that affect interests and identities all over Europe. It establishes domination relations: its decisions impinge on national priorities, influence the domestic allocation of resources and constrain the sovereignty and autonomy of the states. Hence, the level and scope of European integration indicates that there is something to be legitimised at the European level beyond what efficiency can provide for.

Less than a state

The EU has supranational dimensions but does not fit the customary concept of state, as it does not possess the required means, such as monopoly of violence and taxation, and a well developed collective identity necessary for majority vote, to enforce its will. It is not sovereign within a fixed, contiguous and clearly delimited territory. There are no European jails, no army and no police force. Clearly the EU is something less than a federal state but more than an international organisation, where the member states are the contracting parties. To the latter, democratic criteria do not apply. It is the states and not the citizens that make up the 'constituencies'; states are the sole sources of legitimacy and they act internationally on indirect and delegated powers on governance functions. Here, 'constitutions' are *contracts*; and contractually based orders do not put up normative criteria of political legitimacy (Frankenberg 2000: 260-1).

The EU, in contrast, puts up normative criteria of political legitimacy and is based on a *status contract* aiming at changing the identity of the contracting partners – from nation states to member states. The EU is a particular kind of order, which originated through treaties, and which not only created a ‘distinct political entity – a union or *Bund* – but which at the same time transformed the political status of the parties to this treaty’ (Offe and Preuss 2007: 192). The supranational character, the democratic vocation, the status contract and the ‘organised capacity to act’ are what make the European form of cooperation stand out in marked contrast to international cooperation in general.

This also means that the requisite legitimacy can not be provided by the deliberative, transnational structures of governance that the so-called neo-madisonians² put their trust in. According to them, policy networks consisting of private actors, interest groups, NGOs and governmental actors constitute a kind of ‘transnational civil society’; and deliberation in spontaneous and horizontally dispersed polyarchies can deter legal domination and solve problems rationally. However, this can not possibly provide for democratic legitimacy as there is no chance of equal access and popular control.³ Rather, the new structures of governance mystify and confuse authority lines so that the citizens may be left in baffling wilderness with regard to who exercises control and influence. In legitimacy terms, such an order is clearly deficient, as popular sovereignty is not brought to bear on the processes. It is steering without democracy, and governance without government. There is a marked difference between the kind of legitimacy and accountability that can possibly be provided for by policy networks and the type of legitimacy required by the domination relations of the EU, which to a certain degree mirrors the ones that prompted the democratic law-state.

A set of autonomous European bodies make European-wide law devoted to the Union itself. This is underscored by extended use of qualified majority vote – after the Amsterdam Treaty entered into force – which in most cases, however, goes hand in hand with co-decision with the European Parliament. Co-decision and qualified majority vote are now the standard decision-making procedures. Co-decision, which requires the consent of the majorities in the Council (qualified majority) and the European Parliament (absolute majority), rules out national vetoes. Both developments weaken the position of member states as masters of European integration. Thus one cannot understand the

² See Bohman 2005. See further Bohman 2007; Cohen and Sabel 1997; Gerstenberg 2002.

³ See Schmalz-Bruns 1999; Eriksen 2009: 155ff.

EU's institutional structure merely as a dependent variable; as a product of member states bargaining at IGCs. Institutions are logically prior to institutional choice. They determine the translation of policy objectives into outcomes. (Tsebelis and Garrett 2001: 386-87). Instead of the narrow focus of intergovernmentalism on treaty-negotiations, one should according to Tsebelis (2002) look at interactions among the European Unions' four primary institutions and their role as 'collective veto-players'. In addition to the Commission, and the (big) member states which have the upper hand - through the Council - in many legislative issues and which through IGCs control Treaty changes; the role of the ECJ and the increasing power of the EP must be adjusted when understanding who have the agenda setting power. But how does one account for the establishment of European post-national, supranational institutions in the first place?

Integration through deliberation

In Europe, the nation-states have voluntarily circumscribed their sovereignty and reduced their autonomy. In many areas, the nation-states have surrendered their veto powers. As noted by the European Court of Justice (ECJ):

By creating a community of unlimited duration, [...] having its own institutions, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.⁴

How is this possible when the European Union is a polity that does not itself have direct control of a given territory; when it lacks a collective identity; truly hierarchical principles of law and powerful enforcement means? Without a collective identity symbolised by a people, there can be no authority conferred upon a government to rule in the name of all. Such identity makes up the so-called 'non-majoritarian sources of legitimacy' that make collective decision making possible. Majority rule rests upon allegiance and civic solidarity that is only conceivable in terms of the symbolic establishment of a demos - a people - founded on a sense of unity and allegiance. This is held to be a precondition for a democratic sovereign capable of collective decision making; for the outvoted minority to abide by the law and for the willingness of the citizens to pay for the misfortune of their compatriots. A solidaristic substrate is required for the formation of a collective identity strong enough to ensure that the

⁴ Case 6/64, *Costa v Enel*.

compatriots not only see themselves as members of a society based on liberty but also of one based on equality and solidarity (Offe 1998; Grimm 2004).

Both positive political science and political theory are struggling to comprehend the genesis and nature of this creature. Whilst positive political science searches for new ways of conceptualising political order 'above' intergovernmentalism and 'below' statism, normative theory is struggling with the yardsticks of democracy when assessing a polity which is more than an international regime but less than a state. 'The pragmatist approach' is interesting because it is not confined to the nation-state template and its presuppositions of sovereignty, demos, territory, and identity. A collective identity is held to be missing and civic solidarity has often been in short supply in Europe, but this has not prevented the EU from growing in size and competence over time. In Europe, one must therefore look for another basis than pre-political agreement on substantial values, we-feeling and common interests to explain the integration process. The pragmatist perspective, which turns on the regularised use of knowledge for solving common problems – experimental inquiry combined with free and full discussion – offers an interesting perspective on transnational and supranational decision-making systems, which to a large degree lack forceful compliance mechanisms as well as identitarian personification. The argument is that experimental inquiry and political deliberation – free opinion and will-formation processes – can ensure justification and sway actors to adopt a common position without a pre-existing value consensus. In Dewey's concept of democratic experimentalism actors faced with problematical situations only deal with them cogently as far as they make full use of the available knowledge through 'intelligent experimentation, reflection, and discussion' (Putnam 1991: 2276). Democratic societies learn and develop through conscious deliberation and experimentation. Without democracy the full application of intelligence to solving social problems will be hampered and legitimation problems will arise.

In this perspective, polity building is seen to stem from simple forms of cooperation on resolving problematic situations through the collective inquiry of the citizens. Notions of the common good and of justice are not a function of values and convictions that exist prior to processes, but something that is created through these processes. Deliberation is problem-solving discussion. It is an error-detecting and a truth-finding as well as justificatory device. (Eriksen 2009: 170). Deliberation is a cognitive process for the assessment of reasons in a practical situation in order to reach fair and binding decisions. There is no postulation of a collective identity or common interest at the outset, but these are established during the process of attending to and solving

the problems facing the actors: 'Recognition of evil consequences brought about a common interest which required for its maintenance certain measures and rules, together with the selection of certain persons as their guardians, interpreters, and, if need be, their executors' (Dewey 1927: 17). When consequences are recognised and deliberated upon indirect and wide ranging interaction lead to the formation of public spheres. Subsequently, a polity becomes organised and establishes regulative schemes of action.

In this perspective, the spontaneous self-organisation of a European civil society stems from the indirect effects of cooperation. This approach is relevant for the EU, as European cooperation started out as piece meal collaboration on coal and steel, which increasingly caught on and had polity consequences. In causal terms, we may conceive of integration beyond the nation-state as a process where states and non-state actors cooperate in joint problem-solving sites across national borders in Europe in solving problematic situations, thereby creating a 'transnational society'. As the activities increase, common standards, rules, and dispute resolution mechanisms – regulation and coordinating mechanisms – are needed, which, in turn, trigger reflexive and self-reflexive processes conducive to the establishment of authoritative institutions that can control and command obedience in the name of all.

Procedural self-reference

In the EU, voting and threat-based bargaining are difficult to make use of, as the non-majoritarian resources of democracy – the common values – are weak, and bargaining chips are few. Generally, transaction costs are low, information and ideas are abundant and widely distributed among states (Moravcsik 1998: 479f). Because formal instruments of power are weak, ensuring agreement is an essential part of the nature of EU decision-making. This system is set up as, and functions as, a 'consent-based system', where unanimous voting procedures go together with more complex processes and procedures for deliberation and sounding out. Very substantial resources are expended to foster and ensure consensus. Non-agreement is difficult for such joint-decision systems, as it leads to loss of control and reduces the '[...] independent capabilities of action over their member governments' (Scharpf 1988: 258). It leads to loss in efficiency, as well as in legitimacy. The requirement of consensus is apparent in the institutional structure, and in the relations among the institutions. For instance, 'resort to explicit majority voting is often viewed as something of a political failure [...]'. The undertakings and procedures employed prior to decision-making indicate that the EU practises a kind of 'extreme consensus democracy' (Lord 1998: 47-8). Although unanimity

decreases efficiency and sometimes also rationality in decision-making, it may heighten legitimacy, and is seen as a necessary price to be paid.

Until recently, developments have expanded the size of – and the scope for – problem-solving through deliberation within the institutional nexus of the EU. Students of European governance underscore the salience of experimental inquiry and expert based deliberation within the EU and its conduciveness to trust, learning and collective decision-making (Gerstenberg 2002; Zeitlin and Trubek 2003). Transnational networks have increased the ability to coordinate rule-development and implementation through argumentation and learning. These observations support the notion of the EU as a ‘non-coercive deliberative system’, and also one that has re-regulative and market-redressing effects. Comitology committees have managed to combine market integration with social measures, such as the protection of health and safety; has raised the standards of environmental protection; and has fostered consent and integration. It is a setting for *learning* and long-term socialisation into common European norms. Here, solutions have been found that are more than the politics of the lowest common denominator. Committee deliberation has made for the pooling of competences and knowledge to the 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.⁵ Hence the possibility for Pareto improvements. Science figures prominently as the basis on which agreements can be reached. In knowledge-based systems there is an incentive to exploit asymmetrical information to identify positive-sum solutions (Haas 1998). Transgovernmental actors who have no formal authority to ‘initiate, pass or strike down legislation’ work through informal mechanisms to ‘shape agendas, mediate disputes and mobilise support’. These actors possess a ‘wealth of first-hand experience’ that is of interest to policy-making bodies, and may use this to ‘frame issues to overcome objections to proposals’ (Newman 2008: 120-1). The cooperative use of competencies and expertise in identifying and solving problems under conversational constraints fosters trust. Informal and entrusted modes of social coordination are needed to solve numerous collective action problems, and hence prepare a move beyond intergovernmentalism.

However, only under certain conditions will deliberation compel decision-makers to explain and justify their preferences to the citizens; and revise them when criticised. Under conditions where criteria of ‘freedom and equality’ apply, double standards and cognitive dissonance will be problematic and have behavioural effects. The EU’s institutional nexus includes mechanisms

⁵ Joerges and Neyer 1997; Joerges and Vos 1999; Marks et al. 1996; Neyer 2003.

that compel reason-giving and the handling of claims to justification. Critical scrutiny, judicial review, an ombudsman arrangement, transparency and openness clauses have been put in place, so as to ensure inclusion and the hearing of different interests and their grievances. Moreover, the existence of a 'higher-ranking' European law and authorised decision making bodies induces a deliberative logic on the proceedings. The justification of power as well as of particular standpoints must be conducted with reference to law. Actors depend on reaching agreements under unanimity rules or being able to establish a viable coalition under QMV, and must therefore be able to explain and justify their preferences with regard to material and procedural norms. Legal orders force the actors to abstain from simply issuing threats and warnings. The language of law so to say replaces the language of power (Kratochwil 1995).

Supranationalism changes the interaction game and the parameters of power politics in cooperative settings. By sanctioning non-compliance, it raises the costs for defectors, and removes some of the incentives for strategic manoeuvring. Law is a reflexive mechanism for solving conflicts in modern societies through which coordination and action problems can find a peaceful solution. It is through democratic, legal procedures that legitimation problems can be alleviated. Of the long-established authorities, religion, law, state and tradition, it is only law that has survived the corrosion process of modernity (Frankenberg 2003). Legal procedures represent the institutionalisation of communicative processes for the selection of problems and solutions for a community. Reflexivity is here taken to depict the actor's rational monitoring of the circumstances of their activities. Procedurally regulated interaction entrenches agreements and serves as a launching-pad for further justificatory demands and actions.⁶ Such 'procedural self-reference' entails communication over communication and reflection over the selection of selections, to talk with Niklas Luhmann (1987: 601).

The dynamics of integration

In Europe, what began as piecemeal problem-solving for the member states – underpinned by the peace motive – has ended up in a supranational order subjecting the constituent parts to collectively binding decisions. The unbridled sovereigns authorised by the Westphalian order are now brought

⁶ Hence, we may speak of *institutional reflexivity*, which Giddens (1991: 20) defines as '[t]he regularised use of knowledge about circumstances of social life as a constitutive element in its organization and transformation'.

under the rule of a supranational polity which disposes of an authoritative dispute resolution mechanism. World War I and II profoundly affected the states and citizens all over Europe, and all depended on each other for a peaceful restoration of post-war Europe. Cooperation was initially problem-solving for the members caused by their intense *interdependence*. The solving of common problems led to learning and more cooperation, the building of trust relationships and to the discovery of new problems of common concern. Increasingly, supranational polity formation took place with conflict resolution and goal attainment institutions of its own, which, however, spurred new questions about the legitimacy basis of such a polity.

In the beginning, [the European Union] was more of an economic and technical collaboration. [...] At long last, Europe is on its way to becoming one big family, without bloodshed, a real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead.

(European Council 2001b)

The pragmatist approach depicts cooperation as a response to social problems, and institution formation as a response to the indirect consequences of such, which increasingly catches on and has polity consequences. Polity-building is thus seen as the result of deepened integration driven by intelligent problem-solving, but problem-solving leads to juridification; to the imposition of a legal scheme upon subjects who can not change its terms.

More legal regulation triggers claims to democracy or to 'reflexive juridification'. Hence the integration process is not a linear mono-causal process driven by unintended consequences as analytical functionalism suggests, nor by 'the hidden hand' of Jean Monnet who foresaw a federation as the necessary outcome of closer cooperation (Monnet 1978: 392f). The integration process is to a large degree driven by 'contestation and opposition' as it came to be seen as a technocratic, elite-driven project conducted in isolation from the people. The inclusion of affected parties is biased, the transnational communicative infrastructure is deficient and criticism thrives.

The obvious answer from the power holders was democratic reforms, which, however, implied more integration and supranationalism. The answer is also obvious because in democratic states there is a presumed link between the normative validity of a political order and the social acceptance of this order. One can expect that when integration has reached a point where the supranational institutions wield influence over the citizens and the states – when the EU is not merely an international organization – there is a

requirement of democracy because this is the only justifiable standard of political legitimation available in Europe (cp. Rittberger 2005: 5).

The Maastricht popular referenda which marked the *end of the permissive consensus* are important. Then people (in particular, but far from only, the Danes and the French) removed their 'tacit consent to integration' (Abromeit 1998), with the effect that the Union's power-holders were increasingly subjected to profound criticisms of the EU as a technocratic and elite-driven juggernaut (Siedentop 2000). The cry for more openness and democracy became ever-present as during the 1990s 'democracy struck back' (Smith and Wright 1999). In the words of one key analyst: 'It is the public reaction, frequently and deliciously hostile, and the public debate which followed which almost sunk Maastricht which count in my book as the most important constitutional "moment" in the history of the European construct' (Weiler 1999: 4). Public opinion came to acknowledge and embrace the notion that the Union harbours a democratic deficit. Politisation and contestation took off (Hooghe and Marks 2009). The leaders recognised that the strong opposition and the many vociferous criticisms of this state of affairs were threatening the viability and stability of the integration process and therefore that remedial action was required.

The post-Maastricht politicisation of the integration process has, if anything, been driven by resistance to Brussels-driven 'homogenisation', a fear that draws some of its impetus from the experience with national nation-building processes. Europe's recognition of diversity is reflected in a subtle shift in the Union's credo: from the 'ever closer union' of the Rome and Maastricht Treaties to Laeken's *unitas in diversitas* – 'united in diversity'. But this raises the question of how societies can hang together 'in diversitas'? What is the cement of Europe? There is an unsettled issue, even in a pragmatist perspective, with regard to the social or cultural substrate required for integration. A minimum level of trust and confidence is needed to square contestation with the need for consensus: a 'modicum of non-egoistic commitment' is necessary for cooperative goal attainment and conflict resolution to come about – for fair play and promise-keeping. Absence of trust paralyzes collective action (Offe 1999).

A cosmopolitan subset

Trust functions to absorb the risk of social disintegration that may arise when political orders are reproduced only through the mechanisms of law and deliberation. Under modern conditions, the proclivity to let oneself be bound by reasons '[R]ests on specific kinds of trust that are supposedly rationally motivated' (Habermas 1984: 302). The sources of trust must rest on solid

grounds as it vegetates on the possibility of being tested in a rational discourse (Luhmann 1979: 55-6). Trust is thus both the pre-requisite for cooperation or deliberation and the result of cooperation. The research problem has to do with squaring the following circle: How much trust is needed for cooperation to come about, how much cooperation is required before common commitments become obligatory commitments?

What could a rationally motivated trust consist in at the European level if not in the conviction that the inclusive procedures constituted by the rights of the citizens to participate and hold to account can bear the burden of legitimation? This refers to the bare bones of the democratic law state's cognitive rational principles – rule of law, democracy and citizenship – in contrast to the pre-political we-feeling and allegiance making up the 'existential common ground' of nationhood, of love of country. As the Union is not existentially grounded, it can only justify itself through drawing on the principles of human rights, popular sovereignty and law – even when dealing with international affairs – underscoring the cosmopolitan law of the people. There is no intrinsic reason why reflexivity should be confined to the hermeneutical clarification of the primordial self-understanding of a particular 'European community of fate' because common constitutional traditions that span territories are in place. What is more, eventual disagreement over the meaning of principles does not mean that they cannot constitute the core reference point of a common identity. The discourse on procedures, on citizenship and participation, and not on substantive values, could provide the requisite normative frame for identification.

It is a rather thin normative basis for this type of allegiance, as it must be based only on what human beings have in common, viz., their right to freedom, equality, dignity, democracy, and the like. But how does this square with the fact that to have things in common requires that other things are excluded? Collective identity stems from membership in a community of compatriots. Such is rather weak in an all-inclusive society. The world citizens do not have much in common apart from the shared 'humanity' (Maus 2006; Habermas 2001: 108). However, there is no reason why the universality of an ideal can not also be rooted in a life-world and be the ideal for a specific community. Moreover, the question of Europeanisation of identities is not about creating a 'new supra-identity' but should rather be seen 'as a growing reflexivity within existing identities' (Delanty 2005: 140). Hence there is a plea for a European cosmopolitan identity.

Even though cosmopolitanism 'is not part of the self-identity of the EU' (Rumford 2005: 5), scholars nevertheless recognise the EU as a post-national political community and part of, and as a vanguard for, an emerging

democratic world order (Archibugi 1998; Beck and Grande 2007; Eriksen 2009). It is seen to connect to the changed parameters of power politics through which sovereignty has turned conditional upon respecting democracy and human rights. The EU can be posited as one of several emerging entities that intermediate between the nation-state and the UN, and which become recognised as a legitimate independent source of law. The EU can be seen as a 'regional subset' of an emerging larger cosmopolitan order, and one which provides the 'international community' with some agency. In such a perspective the borders of the EU could 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.

This notion implies that the Union would be a political order whose internal standards are projected onto its external affairs; and further, that it would be a polity that subjects its actions to higher-ranking principles - to 'the cosmopolitan law of the people' in the advent of a reformed and democratised UN. The law-enforcement capacity, as well as the democratic mandate, is weak although the moral salience of such an order is high. In other words, such a regional subset of the cosmopolitan order may be strong in terms of legitimacy as it can draw on a far-reaching consensus on moral individualism and human rights protection. Such an entity would be an answer to the claim that one should *not replicate the state model* at the European level as the 'system of states' is what makes necessary international organisations in the first place. Nations create problems for each other as well as for the universal protection of human rights, and to upload the state model to the European level would only replicate the problems at the global level.

Conclusion

Hostility and harsh competition has been replaced by peaceful cooperation in Europe. For the first time in human history, we witness the development of a supranational political order that recognises the difference of its constituent parties. The EU is not brought about by brute force nor is it based on a culturally homogenised people. However, democratic sustainability requires some form of identity - a criterion according to which Europeans are equals. Boundary-construction, the dual processes of inclusion and exclusion, aims at establishing a particular balance between contextualised identities, democratic practice and global justice. This balance has not been established in the multilevel constellation that makes up the EU. Nevertheless, the EU testifies to a 'large scale experiment' searching for binding constitutional principles and institutional arrangements beyond the mode of rule entrenched in the nation

state. It testifies to the fact that learning processes have taken place and been institutionalised.

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