Founding Democracy in the European Union
Defending Habermas against Habermas

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Abstract

Is democracy beyond the nation state possible? How to give a justificatory account of the European Union? This paper takes issue with Jürgen Habermas' plea for a constitutionalised rule-of-law regime at the international level and the idea of the EU as a federation of nation states based on a *mixed constituent power*. The basis for the criticism is Habermas' original theory on constitution making, which has strong cosmopolitan implications. The EU is already more than what the justificatory template of 'originally shared' popular sovereignty allows for. The European Treaties have achieved the function of a superior legal structure, which establishes both a unitary European citizenry distinct from national ones and a set of autonomous European bodies. The template of 'originally shared' popular sovereignty risks pre-empting democracy. The paper also questions Habermas' revision of the concept of solidarity in light of his original conceptualisation as well as in light of the present crisis of the EU.

Keywords

Introduction

Democracy among states is the Achilles heel of democratic theory.[1] Extending democracy to more states offers no assurance of democracy *among* states. States are geared towards *self-preservation,* as the primary responsibility of the decision makers is their own constituency. The state is, so to speak, limited by the people. Is then democracy beyond the nation state possible?

Jürgen Habermas has been a proponent of European integration and the constitutionalisation of world order. He has pleaded for overcoming the past, for reconciliation (through the public use of reason) and collective action at the supranational level; for catching politically up with economic globalisation (Habermas 2000, 2001a). He has proposed the EU as a candidate for post-national democracy and both his discourse theory of law and politics and his idea of constitutional patriotism have left lasting imprints on the debate of the European *sonderweg*. The EU is an unprecedented experiment in establishing a democratic vanguard for a rightful world order. It is a voluntary, although powerful, entity that respects the identities of its constituent parties.

European states have domesticated international relations among themselves and created a union for peaceful and prosperous cooperation united under Community law. The EU has, so to say, taken the defining characteristic of sovereignty away from the nation states, namely that of being able to act egoistically on their own action norms. Because of its depth and reach, the EU should not be seen merely as an intergovernmental order based on treaties among states and their bargaining power. The EU, which itself is based on treaties that function as a proxy for a constitution, wields power over its constituent parties. There are hardly areas of *core state powers* left. The European Treaties have achieved the function of a superior legal structure, which establishes both a unitary European citizenry distinct from national ones and a set of autonomous European bodies.

However, the EU was not fit to handle 'the worst financial crisis in global history', which commenced in the USA but hit Europe and the Eurozone economies hard (see Tooze 2018). Due to the weakness of the present arrangement under the Lisbon Treaty, the sovereign debt crisis was allowed to unfold for a long time. The crisis arrangements of the Eurozone transgressed competences and defied legal procedures. They are accused of undermining the very legitimacy of Europe's political order and of putting the whole integration project at risk (Offe 2014; Scharpf 2014). The weakness of the Lisbon Treaty concerns among other things the lack of supranational competences and the veto rights of the member states. They are the Masters of the Treaties who from time to time behave as kings under absolutism. Treaty changes require unanimity: when not everyone agrees, no change will be made. According to Habermas, the choice is now between *post-democratic executive federalism* and transnational democracy. The question is, however, whether Habermas' own model for the legitimation of the EU is fit to handle such a crisis. In order words, does it provide the necessary justification

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[1] I am grateful to Markus Patberg for comments to an earlier version of this paper.

for the competences needed for an empowered Union? Can Habermas' model handle the crisis, enable requested collective action and deliver European democracy?

Habermas is mainly known as a champion of European federalism and cosmopolitanism, but his democratic ambitions have weakened over time. Neither post-national, nor cosmopolitan democracy is on the agenda. Already in the early 2000s, at a time when Habermas was still toying with the idea of a United States of Europe, his model of the EU constitution was one of a federation of nation states (Habermas (2000; 2004). In his later writings, the quest for democracy beyond borders has continued to be watered down. This is reflected in his idea for a liberal rule-of-law regime beyond the nation state and in his recent suggestion of a double sovereignty as a justificatory account of the EU.

In this paper, I commence with the plea for a constitutionalisation of international law and then spell out Habermas' idea of the EU as a federation of nation states. Thereafter, I address the proposal for a *mixed constituent power,* which I find wanting, as it risks curtailing citizens' political autonomy. In the next section, I discuss Habermas' original constitution making theory, which has strong cosmopolitan implications. Lastly, I question his revision of the concept of solidarity in light of the present crisis of the EU.

A constitutional regime beyond the nation state

There is a distinction to be made between the liberal *rule-of-law principle* which aims at 'a juridification of political power […] [that is,] the domestication of power through the division and channelling of *existing* power relations', and *republican constitutionalism* 'grounded in the rationally formed will of the united citizenry' (Habermas 2006: 138). In a democratic republic, citizens are subject only to co-authored law. Freedom entails, according to Rousseau (1994[1762]), not being subject to the will of another as well as not ruling over another. The antonym of freedom, of democratic autonomy, is heteronomy in the form of arbitrary rule, viz. dominance.

Habermas proposes, however, only a rule of law regime for the international level, complemented by a world parliament with meagre competences.[2] As there are no lawless areas left – as the Charter of the UN prohibits the threat or use of force by states – a constitutional order for the protection of peace and freedom already exists in principle. At the supranational level, it is then not a question of solving the problem of order in a state of nature, as was the case with the establishment of constitutional democracies. Rather it is about establishing *agency* for realising established norms, that is, organised capabilities for handling pressing problems that arise within already constitutionalised and politically integrated orders. Therefore, a *collective state subject* is not needed at the global level. Moreover, as the civic solidarity required for democratic procedures of legitimation cannot be extended at will, 'constitutions of the liberal type recommend themselves for political communities beyond states' (Habermas 2006: 139).

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[2] The UN General Assembly turned into a world parliament would have severely limited competences.

There cannot be a *democratic law-state* beyond the nation state because of the lack of civic solidarity, but there can be regimes complying with the *liberal principle of rule of law*. In this model, there is little space for democracy among states. The rule of law principle warrants non-intrusion, but not self-rule. These are legal norms of a special kind, 'ones which can be justified exclusively in moral terms' (Habermas 2012: 64-65). Human rights possess an exclusively moral content because they circumscribe precisely that part of universalist morality, which can be translated into the medium of coercive law. They are juridical and not political in nature, and can be positivised and turned into bankable basic rights.

The cosmopolitan community, learning from the European constitution building project, would not be 'a world republic but a supranational association of citizens and peoples in such a way that the member states' retain ultimate control (Habermas 2012: 58). Because a UN that is confined to security issues, to upholding international peace and to the protection of human rights needs limited legitimation, the order is relieved of the exacting task of providing legitimacy through collective will formation. 'The elections to the world parliament would only express the in essence justified "yes" or "no" to the supranational application of *presumptively shared* moral principles and norms' (Habermas 2012: 65-66). Proper democratic legitimation is confined to peacekeeping and human rights policies; consequently, there is a reduced legitimacy requirement.

With this conceptual move, Habermas avoids constitutionalising already constitutionalised orders, viz., the problems that arise from superimposing a constitution on already democratised orders - as an order of second nature (Schmalz-Bruns 2005: 80). However, how to prevent justifying depoliticised juridification at the supranational level? The constitutions of international organisations is *rule of law without self-legislation* (Brunkhorst 2014). Human rights, which are right by autonomous, rational reason, are faced with a legitimation problem as long as the world parliament is assigned such a limited role. One may wonder, as we will return to, how this move fits with Habermas' thesis of *co-originality* between constitution and democracy, between human rights and popular sovereignty. The democratic procedure is made up of rights that are at the same time constituted by the affected parties.

Arbitrary rule

The traditional interpretation of rule of law refers to *the generality of laws*, equal cases treated equally; *the predictability of the laws*, people must be able to foresee consequences; and *due process*, the ability of impartial judgement by an independent judiciary. According to Hayek, the rule of law limits the scope of government and 'restricts it to the kind of general rules known as formal law, and excludes legislation either directly aimed at particular people, or at enabling anybody to use the coercive power of the state for the purpose of such discrimination' (Hayek 1994[1944]: 62). In this reading, the constitution is prohibitive. It limits the legislative scope of government, and protects against legislators' interference in the private sphere of the citizens. The rule of law principle curbs dominance in one dimension, but is a principle that in fact causes dominance in another dimension, i.e. when it limits the law makers' scope

of action. Dominance is not only the case when there is arbitrary intrusion in private zones of freedom, but also when there is arbitrary intrusion in public zones of freedom, when political autonomy is limited.

The wielding of legitimate authority as such implies some change in the normative situation or status of another because it entails 'the power to bind' (Raz 1986: 24). This is not in itself dominance. Dominance only occurs when the power to change the normative situation of others is exercised arbitrarily. Power holders generally claim to be legitimate, hence that they exercise legitimate, non-dominating authority. When legitimate authority is invoked, the power holder has the power to obligate and thus to interfere in private zones of freedom. In a democracy, only citizens' consent confers legitimation on political order. The contrast to dominance is not non-domination, as Philip Pettit contends, but democratic autonomy.

Dominance is the dependence on others' arbitrary will and is the case when the political status of citizens is diluted, when they are not able to be law makers, when they are not able to wield influence, when they are living under alien law.[3] Dominance prevails in disenfranchised orders, because people live under rules made by others, by treaties and agreements made by the executives and judges and other experts. It takes democracy to banish dominance. Democracy comes with the promise of an association in which the wielding of power takes place under conditions of equal freedom for all members.

Why not a federal republic

International powers with an unclear popular mandate affect the rights and duties of the citizens and make intrusions in zones of freedom. Also, the EU is a power-wielding system, which has the power to modify rights and duties, and whose actions affect the interests and identities of European citizens. Such an entity requires a constitution that establishes the basic normative conditions for its exercise. Laws do not justify themselves. The legitimacy of the law stems from the presumption that it is made by the citizens or their representatives and that it is made equally binding on every part of the polity. This is so to speak inherent in the legal medium itself, as it cannot be used at will. It has to comply with principles of due process and equal respect for all. A legally integrated community can only claim to be justified when the laws are enacted correctly; when the rights are allocated on an equal basis.

Constitutions assign competences, positions and powers. They specify fundamental procedural conditions for democratic legislation. Thus, they enable and warrant *government by the people*. A proper constitution has to include, in addition to a charter of inalienable rights, a competence catalogue delimiting the powers of the various branches and levels of government.

Habermas does not foresee a United States of Europe based on hierarchy and the unity of law directly emanating from an empowered parliament, because of the position and

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[3] 'Whether men are free is determined by the rights and duties established by the major institutions of society. Liberty is a certain pattern of social forms' (Rawls 1971: 63).

legitimacy of the nation-states (Habermas 2004: 31–2). The second chamber of government representatives – *the chamber of nations* – 'would have to hold a stronger position than the directly elected parliament of popular representatives, because the elements of negotiations and multilateral agreements between member states that are decisive today cannot disappear without a trace even for a union under a political constitution' (Habermas 2001b: 99; see further 2004: 32). To him, the EU can at most become a *federation of nation states,* not a federal republic. And in fact, in contrast to the American constitution, which makes amendments through a qualified majority vote among the states, amendments to the European treaties require unanimity. European states retain veto power.

Mixed constituent power

Habermas (2012) tries to solve the integrational problems in Europe (and of world citizenship) with the help of the idea of mixed constituent power ('pouvoir constituant mixte'). The concept of constituent power is well known from the writings Emmanuel Sieyes and James Madison, as well as Carl Schmitt. Habermas gives the idea mixed constituent power a new twist: The stateless euro polity – based on two constituent subjects; the citizens and the state – represents a new stage in the process of the constitutionalisation of international law. But can this work as the legitimation basis of an entity which is not a state but more than an international organisation? Would it equip the EU with the requisite organised capacity to act, to solve the problem of collective action - the assurance problem - that others will comply if I do?

Habermas (2012)[4] contends that the EU's basic 'constitutional' order represents two major innovations in the process of pacifying the international state of nature. First, supremacy of EU law is granted in the areas in which it has competences, but the binding effect of EU law is grounded neither in the monopoly of violence at the European level nor in the final decision-making authority of the EU. The second innovation has to do with *the sharing of the constitution-making power* between the citizens and the states (the European peoples). The 'constitution-founding powers' are shared by 'legitimating subjects' whose role is simultaneously national and transnational (ibid.: 34). 'Citizens are involved in a twofold manner in constructing the higher level political community – directly in their role as future EU citizens and indirectly as members of one national community' (ibid.: 36). The European legitimating subject is perceived as being split into 'two persona': both as a 'constitution-founding subject', and as a citizen of 'an already constituted national people' (ibid.: 38).

Democracy in the Union, as it is, rests on two pillars.[5] The EU is a union of states and of citizens – as epitomised by the role of the member state representatives in the European Council and the directly elected European Parliament (EP), representing the states and the citizens respectively. The treaties speak of *the peoples*, of the member

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[4] Habermas draws on the works of Peters (2001), Von Bogdandy (2006); Von Bogdandy and Bast (2006): and Franzius (2010).

[5] Cf. Arts. 9-12 and 19(2) Treaty of the European Union (TEU) (Official Journal of the European Union 2012)

states and of the citizens of the Union.[6] Therefore, one could, as a thought experiment, conceive of the Union *as though* from the very beginning, two different subjects were involved in the constitution building process (Habermas 2012: 38, 54).[7] The co-decision procedure (formerly the Community method) has become the ordinary legislative procedure of the EU. The EP and the Council participate on an equal footing in European law making in areas where the EU has competence, with the exception of foreign and security policy, which is still mainly intergovernmental. The European Council consisting of the heads of governments retain the upper hand in constitutional issues and it has played a central role in the crisis management of the Eurozone. The EU democratic procedures were sidestepped through a resort to international agreements between states,[8] and the opaque European Council assuming a far greater de facto role in EU decision making. From time to time, the European Council wielded extra-constitutional power comparable to the king in pre-democratic constitutionalism (Franzius 2010: 58).

Habermas builds on the EU's legal construction in foreseeing not a European federation based on an empowered Parliament and basic rights, but rather one that is contingent on the power of the member states, as is envisioned by the power of the European Council in the Lisbon Treaty (Habermas 2012: 44). The nation state is seen as the main container of solidarity and democratic legitimation. The achievements of the nation state, with regard to rights' protection, democracy, solidarity and welfare, must not be put at risk, but furthered by the integration process. Insofar as there is 'an element of institutionally consolidated political justice in these historical formations' there are reasons to insist on a constitutive role for the state at the supranational level (Habermas 2012: 59).

Constituent power

First of all, seeing the EU as a federation of nation states runs into a problem similar to that of Kant's conception of 'the cosmopolitan community' as a federation of states and not of world citizens. Kant warned against a world state; a constitution of an *organised* community of nations, as a potential *world despotic Leviathan*. For Kant the *ius cosmopoliticum*, the right of the individual, does not entail unbridled membership in a supranational organised community. It is balanced and mediated by the *ius gentium*, the right of states. Previously, Habermas found Kant's conception inconsistent:

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[6] See also Meyer (2003: 24ff) for the wording on 'Federation of Nation States' and 'European people' in the EU's Charter of Fundamental Rights.
[7] See also Habermas (2014a, 2014b).
[8] European Financial Stability Facility Treaty, European Stability Mechanism Treaty, Treaty on Stability, Coordination and Governance, see Eriksen 2018.

> Kant derived every legal order, and not just that within the state, from the original right that attach to every person 'qua human being' […] But if Kant holds that this guarantee of freedom […] is the essential purpose of perpetual peace […] then he must not allow the autonomy of citizens to be preempted even by the sovereignty of their states.

> (Habermas 1998: 180-181)

The term 'a federation of nation states' sits uneasily with the idea of democracy as a self-governing citizenry as well as with Habermas' own claim that we should not substantialise 'the people' or 'the nation' nor reify the nation state (Habermas 2012: 48; see Habermas 1996: 463ff). The people – the sovereignty – is artificially created and can only be understood in constructivist terms (see also Günther 2017: 214). 'The people' does not constitute a specific entity capable of action. Such a suggestion would be tantamount to asserting that the essence of democracy is the collective people as the absolute sovereign (Pettit 2006: 315). 'The people' is not an already existing bounded corporate entity.[9] Rather it is created when the subjected assemble, 'take to the streets' and demand action in the name of 'we-the-people'. The people is not a pre-political entity, is not an agent and appears only in the plural: 'the people' consists of many peoples. It is made up of several groups, each with its own collective consciousness.[10] Every nationality is territorially dispersed and every 'state people' is created by socialising, disciplining and centralising coercive powers.

The very concept of *constituent power* is problematic as it is pinned on the idea of a pre-legal or pre-political community of specific values and affiliations. It describes the people's uninhibited freedom in the making and amending of the constitution. The concept makes a conceptual link with popular sovereignty. It makes clear that the power to make the law is with the people:

> The people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which several branches of government hold their power, is derived.

> (Madison, Hamilton and Jay 1788)

However, who is the people, where is it to be observed, and how can we know it when we see it?[11] What if 'the people' does not already exist or is up for grabs (see Dahl 1989: 3)? Hence the boundary problem, that is 'the fact that democratic theory is unable to specify, in terms consistent with its own theory of political legitimacy, the boundaries

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[10] Likewise, 'supra-individual entities, such as a people, a majority or a state, are not self-authenticating sources of valid claims' (Michelman 1997: 152).

[11] How can we know the popular will? Ernest Renan once remarked that '[t]he general will would be nothing more than every moment's whim'. (cited from Rosanvallon 2011: 132).

of the people that forms its constituency' (Abizadeh 2008: 45-46). In liberal democracies, the constituent power is with the citizens, not the people as a macro-subject.[12] The concept of *pouvoir constituant* is autocratic in its origin with a contempt for popular judgement and participation.[13] The concept is associated with Carl Schmitt's authoritarian interpretation of the constitution as limiting citizens' legislative power. People are, according to Schmitt, related to the constitution in three different ways; 'they are prior and above the constitution, within the constitution and finally next to the constitution' (Kalyvas 2008: 85). The concept of constituent power allowed Schmitt to insist on strict limits to political and legal change (Schmitt 2008[1928]: 140-168). For Schmitt, it is the homogenous people as an extra legal entity that makes those fundamental 'existential' decisions of making and amending the constitution. One can only wonder why Habermas did not hold on to his own constitution making model.

The system of rights

Habermas, as is well known, has been an ardent critic of Schmitt and the idea of constituent power, which he saw as consisting 'of the plebiscitary force of a presumably homogenous, empirical popular will' (Habermas 1996: 184). It is through the legal medium that people have rights, can assemble and make claims and demand justifications, and hence amend the constitution. Habermas derives the immanent principles of higher law making from the illocutionary binding force of communication oriented towards understanding. When citizens regulate their living together – solve problems and resolve conflicts - with the means of positive law, they are, on the pain of performative contraction, compelled to give themselves rights (and hence duties), which terminates in a binding constitution. In the democratic law making process, parties only rely on the process itself and the presuppositions of understanding-oriented communication about symmetry, equally, inclusiveness etc.

Habermas reconstructs the entire system of rights – the democratic constitution – from procedural presuppositions of the law making process; that is, from what free and equal citizens must presuppose when they set out to handle common affairs peacefully through the artificial medium of law. The system of rights is the outcome of a horizontal association of citizens mutually according rights to one another and recognising one another as equals (Habermas 1996: 457).

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[12] That is, the people as an ethno-ethical community in the state of nature where it has a natural right to constitute itself as constituent power. The people need not legitimation when it acts as a sovereign (Schmitt 1932).

[13] For de Sieyes, who first made the concept *pouvoir constituant* famous, representative government has only to do with choosing and changing experts (Urbinati 2006:147).

> The performative meaning of this constitution-making practice already contains in nuce the entire content of constitutional democracy. The system of rights and the principles of the constitutional state can be developed from what it means to carry out the practice that one has gotten into with the first act in the self-constitution of such a legal community.

> (Habermas 1996: 453)

The democratic principle entrenched in modern constitutions refers to the manner in which citizens are involved in public deliberations, collective decision making and law making through a set of rights and procedures that range from freedom of speech and assembly to eligibility and voting rights. These political rights, and their attendant institutions and procedures, are to secure the *public autonomy* of the individual. They ensure that the addressees of the law can also participate in the making of the law.

However, are rights and principles then not constitutive of the democratic process, hence prior to the procedures? Can proceduralism be sustained all the way down or does not discourse theory have to reckon with substantive, normative elements, which open for de-politicisation? Habermas' co-originality thesis is a forceful antidote to technocratic politics and undue de-politicisation as it conceives of individual freedom, which is guaranteed by basic rights, as both a condition for and a result of the legislation process. Habermas' constitution making model provides a solution to the boundary problem – defining criteria for claiming membership - as 'the democratic principle of legitimacy simply requires replacing coercive relations with relations of discursive argumentation' (Abizadeh 2008:48).

Human rights cannot be conceived of as supra-positive norms that oversee and sanction the law; rather, they must be understood as embedded in the procedures that give the laws their legitimacy. Moreover, the alleged problem of the so-called infinite regress between rule of law (rights) and democracy disappears,[14] according to Habermas, once the constitution is conceived in generational terms. Even though the people are constrained by the constitution authored by their ancestors, the current understanding and the full use of the constitution depend on the agency of the present generation. As a self-correcting learning process 'the allegedly paradoxical relation between democracy and the rule of law resolves itself in the dimension of historical time, provided one conceives of the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations' (Habermas 2001b: 768).

The concept of constituent power sits uneasily with Habermas' own view of constitutional politics as a dynamic, possibly self-correcting, historical learning process. It is a continuing, open-ended project where the contributions of present and future generations remain as important as those of the constitutional framers (Habermas 2001b). Hence, 'his theory arguably leaves little room for a neat delineation of constituent from constituted powers' (Scheuerman 2019:16).

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[14] See Michelman (1997).

Pre-empting autonomy

At the face of it, it is strange to use 'the concept of constituent power in the context of a supranational political entity based on international treaties' (Patberg 2013: 227, but see Patberg 2018). Treaties, which are agreements reached by states, refer to state sovereignty – to *Willkür* and *Staatsraison*. State sovereignty designates the status states are granted under international law, and which regulates their external affairs. States control the borders, admission, exclusion and naturalisation. Treaties, unlike constitutions, do not spring from the united will of the people but from states' will and bargaining power. Hence, the roles of governments and that of parliamentary assemblies are distinct: the first exercises executive and representational functions, and the latter legislates and holds the executive to account.

Sharing sovereignty raises concerns as it blurs the distinction between popular and state sovereignty; between the rights of the citizens to autonomous participation in collective opinion formation processes, and the rights of the states conferred on them by international law concerning the conditions for external action. In such a blurred system of constitution making, the following question arises: how can we protect the autonomy of citizens if the autonomy of a collective (macro) subject – the state – is also to be protected (Eriksen 2014: 92)? Habermas' thought experiment is a construction that devaluates the democratic principles of citizens' self-rule. There would be no criterion for approximating the autonomy principle – citizens should only obey laws that they also have been the co-authors of – when this is discounted and weighed against the principle of state sovereignty. It risks exactly what Habermas saw as the problem in Kant's construction, namely the pre-empting of citizens' autonomy by the sovereignty of their states. Therefore, there can be pooling of state sovereignty but not a disaggregation of political subject-hood – of popular sovereignty. That would entail the danger of arbitrary rule – of subjection to alien rule. There is a risk that the autonomy of European citizens would be pre-empted by the sovereignty of EU member states. There is and can only be one constitutional subject in democracies.

Habermas' model of *originally split sovereignty* prioritises the already constituted nation states and is protectionist and conservative. It deprives the constituting authority of constitution making power; it 'sacrifices part of its sovereignty in order to conserve the revolutionary constitutional achievements of the past' (Habermas 2015a: 554). This model raises the problem of whether there are group rights – collective rights – that request unconditional protection and political status. Minority groups as well as member states may need protection from hierarchical intrusion through majority rule – and modern constitutions and federal orders are set up exactly to accommodate such concerns –'[…]but do not in themselves justify claims to the comprehensive exercise of political autonomy' (Niesen 2017: 188).

There is thus a risk of pre-empting democracy by including the peoples organised as states – premised on *collective rights* and with external action as a prerogative of the executive – as the constituent power of the EU. Habermas himself, who tries to re-join this criticism by seeing the democratic states as a 'distributive totality', concedes that

with this construction, an alien element is introduced in the shape of collective rights (Habermas 2017: 176). This construction would not be able to banish dominance.

Ius Publicum Europaeum

Although the EU is not a state with a monopoly on the legitimate use of force, it is in possession of extensive powers compared to ordinary international organisations in the transnational realm. The EU amounts to a powerful *commanding height* to be seized by the citizenry (Eriksen 2014: 87). European states' self-help means of reciprocity and countermeasures have been removed, and the institutions of the EU affect the freedom, security and well-being of all the subjects – they benefit and threaten, reward and punish EU citizens, as well as third parties. There is free movement and an economic system with distributive effects, there is European citizenship and European political rights. Hence, a particular context of social cooperation exists, which gives rise to obligations and legitimate claims.

As the European integration process has redistributed power and resources, it has affected the interests and identities of Europeans. The Eurozone has brought its members into a community of fate, in which all are dependent on all, and where some are profiting and some are suffering from the same economic regime. There is thus a comparable *context of justice and democracy* to that of the nation states. Moreover, by creating or consenting to the EMU, the members have taken on obligations to level out disparities in living conditions and creating a political union.

However, Europeans are not only jointly affected by causal interdependence, they are also jointly subjected to a public coercive structure that sets the basic rules for their interaction. There is a common legal structure – an *Ius Publicum Europaeum* – constituted by European Union law and the common constitutional traditions of member states, as well as other relevant legal sources. Through its fundamental principles, laws, and an *EU citizenship*, the EU equips individuals with rights across borders (cf. TEU article 2, 9–12, Official Journal of the European Union 2012). While originally tied to the creation of the internal market and an integrated European economy, rights are now protecting important individual interests. The EU is a rights-based and rights-enforcing polity.

How to stabilise expectations and ensure compliance when there are two constituent powers; and how to justify the dual character of the supremacy and the direct effect of EU law? The actual competences already in place, which makes the EU very efficient in ensuring compliance, are left unjustified by Habermas' proposal. The use of qualified majority voting in the Council has eroded the ability of individual countries to post-pone new legislation. What is more, the EU has already achieved the status and com-petence of a supranational union with legislative power akin to *Kompetenz-Kompetenz* as not only the 'primary law' of the Treaties but also the 'secondary law' of European regulations and directives are posited over all national law. As Fritz W. Scharpf argues; when the Court of Justice of the European Union (CJEU) has the authoritative inter-pretation of European law, it also has the power to legislate (Scharpf 2006: 852).

Compliance is a condition of justice – to solve the assurance problem – and this is why European law must have direct effect and rank higher than national law whenever there is a conflict of application. The principle of legal homogeneity trumps sovereignty. The competences of the EU has expanded over time intruding into what once where *core state powers* such as monetary policy, migration and defense (Genschel and Jachtenfuchs 2018). There is hardly any portion of sovereignty that the member state can invoke against the EU (de Witte 2017:60).

> EU law does not provide for effective limits on the creeping integration of areas of core state powers as such, a conclusion to which the notion of national constitutional identity does not make much difference - despite the stipulations of Article 4(2) TEU. EU legislation can be challenged on the basis of Article 4(2) TEU, but the CJEU is unlikely to annul a measure applicable to the whole EU in light of the constitutional idiosyncrasy of a single Member State.
>
> (Garben 2019: 20)

This speaks to the argument that the EU is more – have more competences – than what the model of split sovereignty allows for.

One may thus question Habermas' model. The idea of two constitution-making subjects makes the EU foundationally shaky and not equipped to tackle its problems nor to enable a democratic government that the citizens will find worthwhile to vote for. One may also ask, when given constitutional status, how the 'pouvoir constituant mixte' can be changed democratically. This idea may in fact be an instrument in the hands of EU sceptics who deplore European integration. Moreover, how could this model lend legitimacy to a supranational union with the power and financial muscles required to solve Europe's common problems? 'What room, for example, is really provided those who seek a more cosmopolitan, federal Europe as, in fact, Habermas himself did, until recently? Habermas seems to foreclose this option: those who might pursue this strategy simply misunderstand what Europe's hypothetical constituent power must have had in mind (2012: 38-40)' (Scheuerman 2019: 18).

The weakness of Habermas' justificatory account of the EU is that the requisite unifying component of the European political order is lacking. How can it be legitimate without a we-feeling and a sense of *finalité* that can provide the necessary foundation for collective European decision making? Moreover, as his proposal basically leaves the nation states unaltered and takes the very imperfect Lisbon Treaty at face value, it falls prey to the danger of justifying status quo – an incoherent political and legal system. How to mobilise for change, for new competences and capabilities at the European level that are needed to the solve crises of the Union?

Political or civic solidarity?

The growing inequality between Eurozone members is one of the least welcome outcomes of the euro and sovereign debt crisis. The idea that the less well-off member states would catch up with the better-off in terms of GDP per capita was one of the promises

of the Maastricht Treaty, although very little emphasis is given to it whenever Euro-zone reforms are discussed. The economic meltdown after the financial crisis makes it clear that a monetary union without a political union is futile and undemocratic and makes a country fiscally fragile. The crisis also makes the need for solidarity evident in the functional sense: solidarity is needed to solve the Eurozone crisis. If all stood for one, all would be better off.[15] But solidarity is hardly an administrative category. Solidarity is a virtue reflecting a shared sense of responsibility for the welfare of others.

In addressing the current crisis in Europe, Habermas has changed his mind about solidarity as the reverse side of justice conceived deontologically.[16] Habermas' new concept of solidarity is less demanding 'than the deeper sort of solidarity that he once saw as a necessary complement to any defensible conception of justice' (Pierce 2017: 547). The kind of solidarity that Habermas suggests is a purely political solidarity. It refers to the obligations that arise in cooperative schemes, where it is a question of the will and the onus of compatriots to pay for each other's misfortune. Solidarity involves a specific moral motive of ensuring social cohesion and mutual recognition. Being jointly involved in 'a network of social relations', the actor understands his action as help, which he believes he is obligated to provide (Wildt 1998: 212, Habermas 2015b: 23). But if solidarity can be reduced to obligations, how can it then be the source of rights and obligations in the first place?

Solidarity cannot be accounted for only with reference to individual rights and duties because solidarity in the form of ethical-political dispositions is what makes them possible in the first place. It so to say refers to *the non-contractual element in the contract*, to talk with Durkheim (1933[1893]). Primordial values – a pre-political *Sittlichkeit* – may not be needed but an ethical-political culture cherishing freedom and equality is a pre-condition for individualistic principles of justice. Solidarity has to do with civic virtues, the socio-culturalist value substrate, which gives force and motivation to concerted action. The type of solidarity that gives rise to liberal rights and duties is one that from time to time involves normative convictions strong enough to rally people to collective action.

Habermas has always distanced himself from the communitarian credo of a pre-political agreement as the basis for solidarity. Still, he claimed that justice is 'permeated by ethics':

> Because ethical-political decisions are an unavoidable part of politics, and because their legal regulation expresses the collective identity of a nation of citizens, they can spark cultural battles in which disrespected minorities struggle against an insensitive majority culture. What sets off the battles is not the ethical neutrality of the legal order but rather the fact that every legal community and every democratic process for actualizing basic rights is inevitably permeated by ethics.

> (Habermas 1998: 218)

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[15] For example, the borrowing costs of debt-ridden countries decrease when the ECB declares its liability.
[16] I 'no longer uphold the assertion that "justice conceived deontologically requires solidarity as its reverse side" because it leads to a moralization and de-politicization of the concept of solidarity' (Habermas 2014c, footnote 8).

Solidarity has to do with a *lifeform* that is worthwhile to protect. However, if it is so that 'abstract, individualistic principles of justice arise out of concrete, intersubjectively shared forms of life', (as Habermas contended in 1990[1983]), how can it at the same time be purely political (Pierce 2017: 546)? 'Whereas "morality" and "law" refer to equal freedoms of autonomous individuals, ethical expectations and appeals to solidarity refer to an interest in the integrity of a shared form of life that includes one's own well-being' (Habermas 2015b: 23). The problem is how solidarity can be purely political, delinked from 'pre-political' social forces, from the articulation of common interests and a we-feeling that reflects commonality and shared values. Inevitably, solidarity refers to ethical-political discourses of self-clarification and self-determination in a community of values and obligations.

Solidarity is the building block of every democratic community. It expresses a norm of equal membership. Solidarity springs from commitments to care for affected parties; from the common interests that can be articulated; from the social forces that mobilise collective action for a better future. Solidarity sustains the value of the victims and invites a common struggle against injustice – to end the misery, hardship and un-fairness. It is this stronger, *civic concept of solidarity* that is called for in the reform process of the EU. It is needed to mobilise for the putative valuable European project and for the redistributive measures that are necessary to solve the Eurozone crisis (see also Habermas 2015b: 28).

Justice and solidarity

In the aftermath of the financial, economic and social crises in Europe, there is a rallying cry for reform – for democratisation. As long as the European integration project could be portrayed as advantageous for everyone, as Pareto improving, the citizens of Europe were not called upon in the name of solidarity. However, the persistent portrayal of the EMU as a mutually beneficent arrangement was definitively rubbed out with the Eurozone crisis. As social protest and political claims making also attest to, the financial crisis has rendered the integration project visibly moral. European inte-gration is not a win-win arrangement and it is not merely a matter of joint convenience and choice; instead, it is a matter of collective responsibility – of justice and solidarity.

The rigid rules for the Eurozone regarding debt and balanced budgets, without com-pensatory competences at the EU level, punishes the poor and favours the economically stronger members. The euro area, with its centralised monetary policy and de-centralised fiscal policy, lacks the resources to establish a countercyclical fiscal policy, and to redistribute income across different levels of economic development. It also lacks fiscal instruments fit to handle sudden demand shocks. Likewise, the refugee crisis documented lack of harmonised national asylum standards and of a supranational burden-sharing mechanism. Reforms are needed and collective action is required to handle present glitches. Solving the economic crisis and compensating those harmed by economic globalisation require social welfare policies to be pursued at the Union level.

However, this is hardly possible as long as the states have the right of veto. The frame-work of *pouvoir constituant mixte* is said to reveal a substantial need for EU reform, in

the form of more power to the EP (Habermas 2012: 43; 2015a: 554–5, Patberg 2017: 208). However, who should undertake the requested reform of the EU when, as Habermas (2012: 39) underlines, the concept of 'originally shared' popular sovereignty precludes the possibility of supreme constitutional authority (Kompetenz-Kompetenz) at the European level? The member (nation) states would continue to be the sovereigns – the Masters of the Treaties, not the European citizenry. The latter does not take the shape of a democratic sovereign. As mentioned, only the European Council consisting of the Masters of the Treaties can amend the treaties.

The preconditions of a European democratic republic are not in place, according to the 'no-demos' thesis and now also Habermas. In other words, there is no common identity produced by a nation-like culture. Still, the founding fathers created institutional arrangements to foster such an identity. This type of undertaking rested on the thought that one cannot bemoan the lack of civic solidarity as long as the political institutions necessary to bring it about are not in place. One should not give up on the identity-forming effects of institutions: what happened at the national level can also happen at the European level, i.e. supranational political institutions precede and create the requisite underlying basis of solidarity. Through the formative role of political institutions, through media and communication, through social movements and political mobilisation, a shared basis for collective action could come about.

Solidarity relates to the very nature of equal citizenship in Europe – of equal standing, of equal human worth – and is basic to the idea of the EU as a regional cosmopolitan entity (Eriksen 2009: 200ff; Eriksen and Fossum 2012: 32ff). Solidarity and justice belongs to the same class of virtues (Eriksen 2019: 209-10). The struggle for EU reform is the struggle to discharge the promise of equal citizenship, which is intrinsic to the European unification process. Therefore, the point is not simply deeper fiscal integration, but rather political integration. A true political framework of the Eurozone would abolish today's problem of inadequate solidarity and risk-sharing, stemming from the perceived danger of encouraging budgetary indiscipline in fiscally unsound countries, as well as allowing for freeloading on the back of taxpayers' money in fiscally sound countries. Deeper fiscal integration with an empowered European Parliament, a Eurozone budget, a treasury and a finance minister, would constitute the components of a political structure that has authority to rule in the name of all. A true political Union would allow for macroeconomic adjustment, redistribution and, hence, socio-economic justice, and it would put an end to forms of dominance caused by a lopsided political system.

Conclusion

The EU is a polity in its own right, which contributes to global steering. It possesses higher-level political decision-making capabilities, but possesses neither a collective identity nor the coercive instruments of a state. To overcome the crisis, the EU must solve its collective action problem, viz. ensure that all do their due part in the European cooperative scheme. The question is whether Habermas' model can provide a proper legitimacy basis for the Union, as well as an organised capacity to act. The European

context is one of justice in the sense that its cooperative scheme affects interests and gives rise to claims for assistance or remuneration. The reason why the Eurozone crisis was not solved, and why the Commission's plan for allocation of refugees in 2015 was not implemented, is due to lack of political power at the European level. Habermas' justificatory account of the EU, which assigns constituent power to the nation states, gives a weak basis for assigning new European competences and capabilities. It is questionable whether his revised conception of solidarity is equipped to handle the challenges facing European citizens under the present circumstances of injustice in Europe.

Moreover, the proper answer to right wing populism, xenophobia and rising nationalism, is to do something with the underlying problems, not to downscale ambitions. Complacency and status quo hardly has the power to mobilise anyone. Rather, there is the risk with the strategy of preserving achieved results, that the integration process is reversed and that the whole European political order is dismantled.

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