RECONSTITUTING DEMOCRACY IN EUROPE

WP 9 – Global Transnationalisation and Democratisation

Research Report

Global Transnationalisation and Democratisation Compared

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Introduction to the Conceptual Framework

Global Transnationalization and Democratization Compared

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Can democracy as we understand it in the constitutional state survive globalisation? Can globalisation processes be successfully exposed to demands that seek to ensure their compatibility with democratic standards? Is a democratisation of globalisation conceivable? These broad questions can be approached from many different angles. Within RECON the focus has been on three different, albeit complementary, angles. One is to focus on the development of the European Union (EU), how it shapes up as a political entity and is the main focus of the project. It is supplemented by efforts that avail themselves of other research angles, two of which are the foci of the two sub-projects of WP 9 and form the themes in this report.

The second angle is to explore the link between democratization in Europe and globalization in the wider international system. It combines focus on the broad question of whether democracy can survive globalization with specific focus on institutional mechanisms. What institutional mechanisms may ensure democracy's survival? Democracy's role and prospects in guiding international relations are uncertain indeed. Therefore, it is useful to consider whether other governance values and forms of institutional design that support these values may prevent or whether they instead may compensate for a democratic legitimacy deficit. To shed light on this it is useful to focus on the interaction between the EU and the World Trade Organization (WTO). We ask specifically: How do democratic structures in the EU interact with international market—driven structures in the WTO, and what role do constitutional processes and principles play in that interaction? What is the most likely outcome in terms of the substance and the procedures of democracy in Europe? The focus in RECON has been to confine this analysis to trade related governance and conflicts only. Trade policy has been selected because it is a field in which a great number of economically important and politically sensitive issues are on the agenda. The same applies to the issue of risk regulation, which helps to concentrate on pertinent problems such as highly divergent regulatory traditions, ethical concerns, economic expectations, and political considerations.

The third (and somewhat complementary) research angle is to consider the prospects for cosmopolitanism (the notion of individuals as morally ultimate, regardless of context). Many scholars see the European Union as a particularly relevant site, for the emergence of cosmopolitanism. This multidisciplinary cast of scholars draws variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a 'normative power' or 'civilian power'. Even though cosmopolitanism 'is not part of the self-identity of the EU…' (Rumford 2005: 5), scholars nevertheless recognize the EU as a part of, and as a vanguard for, an emerging democratic world order. European developments are well covered in other parts of the project which consider in detail what the prospects are for regional-European democracy along cosmopolitan lines (RECON's model III). The focus here is instead on situating the EU within a broader context by focusing specifically on developments both within and *beyond* Europe. But rather than proceeding 'vertically' through considering the development of a global system of cosmopolitan democracy, we here examine the prospects for cosmopolitan convergence among state and non-state entities in a more horizontal manner. In effect, we examine the prospects for cosmopolitanization of one of the most promising candidates (Canada) and compare this with the EU.

One point is that if established states can be cosmopolitanized, then the cosmopolitan pull may be considerably *stronger* than what is generally anticipated. How flexible and malleable is the state-centered model in terms of post-national democratic inclusion/cosmopolitanization? One point is the assumption that the constitutional democratic state is based on a set of principles that can be universalized such that the model of political community *both* between different states *and* between different 'polity' levels or sites (in particular, state and supranational sites) may show some tendency to converge around a cosmopolitan norm. Today, there are indeed elements of 'cosmopolitan law' that can further support and sustain such a process of universalization. The other point is that there may be systematic differences among states as to which are more prone to cosmopolitization. What would be particularly salient factors? A starting idea is that in a democratic state the degree of contestation over its character and (national) communal character may matter, because such a state has a greater onus on finding proper justifications; with such tending towards universal 'global' solutions which can be more easily embraced by all.

This report includes contributions that shed light on angles two and three presented above. It is structured along four distinct yet closely related parts. Part One contains three chapters and provides the overall conceptual framework. Chapter One, namely this introductory chapter, provides an overview of the theme, and a brief summary of the contributions. Chapter Two reproduces the basic RECON framework with the three democratic polity models as the obvious framing device for the workshop that the report is based on and for many of the specific contributions in this report. It is an important point of reference because it spells out in some detail how we envisage regional-European democracy with an explicit cosmopolitan imprint in more specific institutional terms. Chapter Three by Hauke Brunkhorst provides a comprehensive overview of cosmopolitanism, from its early origins to the present, with particular emphasis on the question of inclusion. He notes how the early cosmopolitanism's universalism was curtailed and effectively became the "cosmopolitanism of the few". The nation-state (interregnum?) represented the establishment of a political-constitutional constellation with significant socio-economic and democratically inclusive effects *internally* within each entity but with deeply entrenched constraints on patterns of inclusion between states and the universalism of the overall system. The subsequent transformation of the nation-state unleashes forces of variable effects, one of which is to reintroduce a cosmopolitanism of the few. In the concluding section Brunkhorst provides a set of interesting recommendations for how these problems can be addressed, so that the present global configuration can live up to the norms of democratic constitutionalism.

The second section focuses more specifically on transnational governance, deliberative supranationalism and constitutionalism. With reference to recent developments it looks at *how* globalization and transnationalization shape the conditions for democracy within and beyond Europe. More specifically, the focus is on global (and regional) legal-institutional developments which set framework conditions for human rights, democracy and economic allocation and redistribution.

Chapter Four by Jens Steffek is particularly concerned with one central aspect of democracy, namely the question of *public* accountability in an increasingly transnational context. This transnational context is marked by a turn to governance which raises special challenges for accountability, not only in terms of ensuring it but also in terms of how we understand accountability in the first place. Accordingly, Steffek discusses how best to conceive of public accountability in a situation of considerable 'conceptual creep from economics and management' and makes a strong case for the central role of publicness in the notion of public accountability.

Chapter Five by Alexia Herwig is concerned with how intrusive the WTO is as a system of governance. WTO intrusiveness is understood in terms of the effects it has on democracy, whether that is considered from the national or from the cosmopolitan

perspective. She identifies a range of features of the WTO that are democratically intrusive. There are also important dilemmas here. For instance, even when WTO norms are precise, with precision generally understood to heighten accountability (because we can trace them back to an initial democratic authorization), that very precision may also "reduce the potential for taking into account other legal norms that were generated outside the WTO framework." (p. 67) On the other hand, norm flexibility may open space for considering non-WTO norms but the feature of flexibility may at the same time also reduce democratic accountability. She finds that neither a model of nationally based democracy nor one of cosmopolitan democracy can adequately address these but argues for an approach that seeks to combine them.

Chapter Six by Christian Joerges contextualizes the European situation, from the standpoint of a careful reconstruction of Habermas' position. The focus is on Habermas' discourse theory of law and the kind of European configuration we can discern from this theory. An important consideration in this connection is the greatly neglected "presence of the past" in European affairs. This issue has long preoccupied Habermas and how it is addressed is critically important to the very future of the European project. Habermas' discourse theory offers one set of prescriptions. It also provides us with cues for how to address the question of European citizenship and what kind of bonds might tie Europeans together. Habermas' proposal has been the need to forge a kind of constitutional patriotism, a mode of allegiance that is steeped in the core elements of democratic constitutionalism but which is also sensitive to Europe's diversity. The discourse theory also highlights how the welfare state sought to devise a legitimate response to the competing demands of economic efficiency and social justice, a balance that the European project is about to revoke and which brings up the important question of what might replace it. Joerges ends by noting that "[t]he discourse theory of law needs to defend the constitutional democracy as institutionalized in nation states as a site of legitimate governance. It cannot envisage a reconstitution of European democracy in terms of the national constellation. It will have to live with non-juridified spheres of transnational governance. I respectfully submit that the conflict of laws approach ... has the potential to respond to these queries." (p. 90)

Chapter Seven by Jürgen Neyer deals with the issue of justice and its relation to democracy within the European context. Neyer starts by underlining that the EU basically lacks all the requisite vestiges of democracy. This situation is amplified by structural limitations on democratic governance in the international system. Neyer in this provocative piece then instead suggests that it might make sense to focus on justice understood as the right to justification. The supranational character of the EU with its lack of enforcement mechanisms but cooperative procedures offers a particularly favorable context for unleashing justice as justification processes and transforms intergovernmental bargaining into processes of juridification. This does not however translate directly into supranational democracy because the basic democratic preconditions are lacking. Instead, Neyer argues that democracy remains steeped in the member states and he further notes that "the normative promise of national democracy to foster self-governance will only survive globalization if it is supplemented by an organizational layer that fosters transnational justice. And vice versa, if transnational justice is to have a realistic chance, it must be established on strengthened domestic procedures of strong domestic control mechanisms, which guarantee that the executives remain closely connected to their constituencies and national parliaments." Neyer argues that supranationalism in his transnational trapping holds considerable promise towards these ends.

In the final part of this section, the substantive focus was shifted to Canada. In Chapter Eight Stephen Clarkson considers globalizing challenges with particular emphasis on the external legal-cum-constitutional constraints effected on Canada through NAFTA and WTO. In a sense this chapter builds a direct bridge between this and the next section on cosmopolitanism and cosmopolitanization. Clarkson argues that internally speaking

Canada has always had a strong cosmopolitan orientation. He argues that "it has become in the last fifty years – at least in its big cities – a highly multicultural, largely tolerant, generally inclusive, surprisingly successful post-modern society". Clarkson's topic is what he terms the 'dark' side, namely the manner in which Canada has been embedded in a highly constraining 'external constitution' made up of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) that liberate capital form domestic control. He argues that "these continental and global manifestations of global governance are so substantial that they constitute an external constitution that has significantly reorganized the Canadian state by adding external tiers to its legal order". This structure is clearly a dystopia or what Clarkson terms a "warning beacon for global democrats."

What then are the prospects for cosmopolitanism given the rather mixed messages that were provided in the previous parts? In this third and final section we look more closely at cosmopolitanism in the Europe Union and Canada. In Chapter Nine John Erik Fossum takes as his point of departure social science's methodological nationalism which easily removes from our attention patterns of cosmopolitanization. The vast and rapidly growing literature on cosmopolitanism has until recently been dominated by political theorists who have focused on questions of justice and not on empirics; thus there remains a strong need to discern how and the extent to which cosmopolitanism informs actual social and political practice. A central element here is to conceptualize cosmopolitanization as a process and also to be clear on what entities/types of polity that lends themselves to cosmopolitanization and which ones that do not. Fossum's concern is to spell out different possible cosmopolitanization paths beyond the establishment of global governing arrangements. He identifies and discusses two such, namely through regional non-state actors such as the EU and through (contested) vanguard states such as Canada.

In the final Chapter, Chapter Ten, Errol Mendes traces the historical origins to some of the central cosmopolitan components of Canada. He does not explicitly label these as such but instead speaks of Canada's "diversity gene". These components are however entirely compatible with a cosmopolitanism understood as a particular rights-based sensitivity to difference and diversity. Mendes argument is that these elements that have made Canada famous for its multiculturalism policy have deep historical roots. In a sense the fascinating historical account that Mendes provides can be construed as an example of how contestation over different conceptions of community manifested itself in an approach to managing difference and diversity that in recent times has been more explicitly subjected to the norms of democratic constitutionalism.

Europe's Challenge
Reconstituting Europe or Reconfiguring Democracy?

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Introduction

The European Union is widely held to harbor a democratic deficit. This raises the issue of *forging* a viable democracy at the supra-national level. This must however also be considered in relation to the question of *sustaining* national democracy within an altered European and global context. The point is that the European integration process has reshaped the workings of the member states' democratic orders to such an extent that we must take the EU's influence directly into account to understand the character and the quality of, member-state-based democracy. The EU, initially a creature of the member states, has contributed to transform them, directly through legally binding actions, and more indirectly, through unleashing processes of mutual learning and adaptation. European states' identities and even state-ness have thus come to resonate with their *European-ness*, as national law has become so entangled in EU law practice that the member states no longer operate as independent nation states. To dismantle the EU to forge a Europe of wholly independent nation states today will be a transformative project of near-revolutionary proportions.

How then to ensure democracy in Europe? Many supporters of integration argue that supranational democracy is necessary to handle the problems of interdependence. The standard solution they propose is for the EU to develop into a federal European state, where the nation states are transformed into member states akin to (German) *Länder* or provinces. Critics counter this by arguing that European integration is the problem, as it contributes to the hollowing out of national democracy. They see the issue as one of *rescuing* national democracy from the throes of European integration.[1] Both of these proposals see the issue of democracy in Europe foremost as a *political* challenge. The solutions are well-known; the issue is to find the will or the means to apply them.

But is the main challenge merely political? If we for instance look at the German Federal Constitutional Court's ruling on the compatibility of the Treaty of Lisbon with the Basic Law (June 30, 2009), the plaintiffs presented the EU as a state-based federation whereas the German Constitutional Court presented the EU as an association of sovereign states. From this we might at first glance assume that the debate is confined to familiar conceptions of democracy steeped in the sovereign state. But European integration reshapes sovereignty, a fact that was also recognized by the German Constitutional Court.

Much of the scholarly community has long argued that the European integration process reshapes state sovereignty and that this has profound democratic implications. Properly entrenching democracy in Europe is therefore not merely a political challenge; it requires explicit attention to democratic theory. But what kind of a theoretical challenge is this? Is it a matter of adapting state-based democratic theory to the more complex European setting, as would be the case with the intergovernmental and federal solutions that were mentioned above? Or does the EU require major changes in democratic theory? This is precisely what transnationalists and cosmopolitans claim: they argue that Europe's

[1] For a selection of Euro-sceptical writings, see Martin Holmes, *The Eurosceptical Reader* (Basingstoke: Macmillan, 1996).

experiment challenges democratic orthodoxy, which holds the nation state as *the* institutional-communal mainstay of democracy.[2] The question they pose is whether democracy in its nation-state trappings is an adequate foundation for Europe. To properly appreciate what a democratically viable EU entails in today's transnational world, James Bohman argues, requires revamping democratic *theory*.[3]

The question is whether we must abandon or whether we can still rely on state-based democratic theory. Is it possible to devise a democratically viable constitutional and institutional framework that continues to rely on state-based democratic theory? Such a solution could be labelled *reconstituting Europe* because it would entail changing the existing order in Europe. Or is it rather necessary to reconfigure a new theory of democracy that is either suitable to the particular transnational character of the EU or to an increasingly cosmopolitanized world?

In order to address this, we need to compare and contrast the main alternative democratic solutions. What are they? In the below we present three such, two of which are state-type and one of which is not a state-type configuration. To assess their respective democratic character and relevance to the EU, we need to find a way to compare them. This in itself represents a major challenge both in theoretical and methodological terms. Theoretically speaking it is a matter of appropriate democratic standards. If we rely on state-based standards, we rule out transnational options by definition. Our resolve has been to establish a set of minimum standards that retain core democratic tenets but is not confined to the organizational configuration of the state or to the mode of community steeped in the nation. We apply this model to the complex multilevel configuration that makes up the EU. But rather than ending up with one model of EU democracy, this yields three democratic polity models or representations of the EU (all of which are innovations on existing scholarship).

The first model-solution posits that democracy can be reconstituted as a combination of audit democracy at the Union level and representative democracy at the member state level. The second model posits that democracy can be reconstituted through establishing the EU as a *multinational* federal state. The third posits that European democracy can be reconfigured through the EU serving as a regional *post-national* Union with an explicit cosmopolitan imprint. Note here on the third model that when we apply our democratic criteria to the EU we end up with a democratic polity model that differs from the one that transnationalists propound. We then consider which of these models is the most robust in relation to the fundamental requirements of a democratic order; we also consider which of these is most feasible. We argue that the third model holds the greatest potential, notably because it is the model that the EU most closely resembles. This is however also the least known and institutionally developed model. Establishing its democratic merits requires further elaboration of the model; it requires a systematic mapping effort to establish the extent of EU proximity to the model and whether the EU is developing in this general direction; and it requires a resultant assessment of the overall democratic quality of this.

Democracy: Legitimation Principle and Organizational Form

Democracy is a contested concept, and notably so in a rapidly changing world. Every democratic system harbors an inevitable gap between principle and practice. Every actual institutional arrangement that claims to be democratic is at most an approximation. Real

[2] See for example James Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (Cambridge: MIT Press, 2007); Joshua Cohen and Charles Sabel, "Directly-Deliberative Polyarchy," *European Law Journal* 3 (1997): 313-42; Joshua Cohen and Charles Sabel, "Sovereignty and Solidarity: EU and US" in *Governing Work and Welfare in the New Economy: European and American Experiments*, ed. Jonathan Zeitlin and David M. Trubek (Oxford: Oxford University Press, 2003), 345-75; John S. Dryzek, *Deliberative Global Politics* (London: Polity Press, 2006).

[3] Bohman, *Democracy Across Borders.*

democracy has never been realized. The idea of democracy as a system of self-governing citizens does not come wrapped up in an explicit and exclusive institutional package, and democratic orders always contain non-democratic elements; hence, the quest for democratization through constant trial and error of institutional forms, rather than for conclusive settlement through embrace of one particular institutional form of democracy.

We therefore need to make a distinction between justifying reasons for political orders, and forms of institutionalization. This can be generalized into a distinction between democracy as *a legitimation principle* on the one hand, and democracy as *an organizational form*, on the other. Only by adhering to democratic procedures can power holders justify their decisions, and the citizens subject their rulers to critical tests; only by employing the democratic procedures can collective goals be achieved legitimately; and only through these procedures can laws be changed and new laws enacted correctly. In other words, democracy is not identical with a particular organizational form, but is rather a principle, which specifies what it means to get political results right. The democratic principle is operative as an ever-present critical standard. The *credo* of government by the people preserves its critical status as the principle through which proponents and opponents can come to understand and assess each other's claims.

Understanding democracy foremost as a legitimation principle has several important implications. First is the onus on justification. Second, is that the effective operation of the democratic principle has to take an organizational form, but the democratic principle can take *different* forms of institutionalization. This also helps explain why democracy has, historically, come in many different forms and shapes, even within the state-based frame (direct or participatory democracy, and indirect, representative forms, such as parliamentary and presidential democracy), and has also helped to pave the way for the transnational version of democracy.

In practice, democratic legitimacy cannot be based on the direct participation of all the citizens in the making of all the laws, as the people, is never present to make the choices. Hence, under modern conditions, representative democracy has been held up as key. It is however difficult to pin democratic legitimacy to voting, as it is virtually impossible to find a democratic method that allows for the just aggregation of individual preferences to a collective decision. The principle of majority vote represents the winners, not the common will. It does not guarantee full political equality as the prevalence of permanent minorities testifies to. The counting of votes is an effective method for reaching decisions, but this is a method that does not test the quality of the preferences. It is a poor substitute for deliberation.[4] Hence, we opt for deliberative democracy.

Deliberative democracy comes in several forms and trappings. In its epistemic variant (which is close to the transnational position), it 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.[5] From this perspective, the main argument for deliberative democracy is to be found in the presumption that a free and open discourse brings forth qualitatively better decisions, and that the decisions are justified to the affected parties. A form of *political autonomy* is constituted, when actors have to seek justification in relation to what others can approve of, that is, everyone who is subject to collective decision-making must be able to find an acceptable basis for such decisions. Deliberation thus carries moral weight, as a political system that guarantees conditions for autonomous public deliberation, gives us better reasons to believe that its decisions are

[4] Robert E. Goodin, *Reflective Democracy* (Oxford: Oxford University Press, 2005), 12.

[5] Joshua Cohen, "Procedure and Substance in Deliberative Democracy," in *Deliberative Democracy*, ed. James Bohman and William Rehg (Cambridge: MIT Press, 1997), 67-92, 67; David Estlund, "Making Truth Safe for Democracy," in *The Idea of Democracy*, ed. David Copp, Jean Hampton and John R. Roemer (Cambridge: Cambridge University Press, 1993), 71-100, 71.

correct. The theory of deliberative democracy is then an answer to the requirement that political decisions should be right.

We here operate with an alternative *institutional* variant of deliberative democracy.[6] Its point of departure is that democratic legitimacy derives from the public justification of the results to those affected. This constitutes the normativity of the democratic principles of *autonomy* and *accountability*. But we label our theory institutional because justification takes place according to standards the actors consent to and because we recognize that these standards can only be properly entrenched within certain institutional contexts. Consider autonomy which refers to the basic democratic principle that those affected by laws should also be authorized to make them. This criterion is more institutionally committing than what the transnationalists see it as. It posits that publicly authorized bodies of decision-making react adequately in the determination of the political community's development, insofar as the citizens can be seen as acting upon themselves. With regard to accountability it designates a relationship wherein obligatory questions are posed and qualified answers required. This principle also comes with distinct institutional requirements: It speaks to a justificatory process that rests on a reason-giving practice, wherein the decision-makers can be held responsible to the citizenry, and where, in the last resort, it is possible, to *dismiss*, incompetent rulers.[7] In other words, these principles, to be effective, presuppose representative democratic arrangements and explicit sanctioning mechanisms.

Thus, for a modern democratic order to be legitimate, given its scale and scope, it must *reconcile* the need for rational deliberation with proper representation of affected interests. Public discourse, inquiry, and criticism improve the knowledge basis, increase the level of reflection, as well as the responsibility and accountability of the decision-makers, and are, together with party-competition and periodic elections, the best means for realising popular sovereignty.[8]

A Democratic Political Order

Although there are many different theoretical conceptions of the EU in the literature,[9] these offer less guidance than what might have been expected to the task of clarifying

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[6] Erik O. Eriksen and John Erik Fossum "On EU Democratisation: The Representation – Deliberation Interface" (paper presented at the Conference 'Democracy as Idea and Practice', University of Oslo, January 14-15, 2010, on file with the authors).

[7] David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995), 16; Mark Bovens, "New Forms of Accountability and EU Governance," *Comparative European Politics* 5 (2007):104-20, 107.

[8] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: The Belknap Press of Harvard University Press, 1996), 144.

[9] Heidrun Abromeit, *Democracy in Europe: Legitimising Politics in Non-State Polity* (New York: Berghahn Books, 1998); Ulrich Beck and Edgar Grande, *Das Kosmopolitische Europa* (Frankfurt: Suhrkamp, 2005); David Beetham and Christopher Lord, *Legitimacy in the European Union* (London: Longman, 1998); Richard Bellamy, Dario Castiglione and Jo Shaw, eds., *Making European Citizens: Civic Inclusion in a Transnational Context* (Basingstoke: Palgrave Macmillan, 2006); Oliver Gerstenberg, "The New Europe: Part of the Problem – or Part of the Solution to the Problem?," *Oxford Journal of Legal Studies* 22 (2002): 563-71; Dieter Grimm, "Does Europe Need a Constitution?," *European Law Journal* 1 (1995): 282-302; Ernst B. Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-57* (Stanford, CA: Stanford University Press, 1968); Christian Joerges and Jürgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology," *European Law Journal* 3 (1997): 273-99; Giandomenico Majone, *Dilemmas of European Integration* (Oxford: Oxford University Press, 2005); Philippe C. Schmitter, *How to Democratize the European Union ... And Why Bother?* (Oxford: Rowman and Littlefield, 2000); Larry Siedentop, *Democracy in Europe* (London: Penguin, 2000). See also Lisbeth Hooghe and Gary Marks, "Unraveling the Central State, but How? Types of Multi-level Governance," *American Political Science Review* 97 (2003): 233-43; Markus Jachtenfuchs and Beate Kohler-Koch, eds., *Europäische Integration* (Opladen: Leske & Budrich, 1996); Keith

what is at stake for democracy in Europe. There is still a certain disconnect between general democratic theorising and the European case. Many of the innovative proposals to capture the EU's complex character are *not* properly attuned to democracy. Hence, proposals such as *consortio* and *condominio*,[10] *deliberative supranationalism*,[11] *cosmopolitan empire*,[12] *republican empire*,[13] *empire*,[14] and forms of *multilevel governance*,[15] such as *hierarchical and plurilateral*,[16] are mere descriptive categories.[17] None of the forms of consortio, condominio or empire is democratic, and adding "cosmopolitan" or "republican" to the latter makes it an oxymoron. Further, how deliberative supranationalism or multilevel governance can be democratic, remains to be demonstrated. Their democratic point of reference is either absent, or underdeveloped.

One contentious issue in this debate is how much "state-ness" a viable European democracy presupposes. Is it the exclusive type of territorial control and recourse to force that we associate with the modern state; or can deliberative democracy be ensured within a more general notion of political system, akin to for instance Easton's definition as "the authoritative allocation of values for society as a whole"?[18] As an organizational form, modern democracy, at a minimum, requires both a *polity* and a *forum*:

- authoritative institutions equipped with an organized capacity to make binding decisions and allocate resources; and
- a common communicative space located in civil society, where the citizens can jointly form opinions and put the power holders to account.

The *public sphere* located in civil society holds a unique position, because this is where everyone has the opportunity to participate in the discussion of how common affairs should be handled, and where decision-makers can be held to account. It signifies that equal citizens assemble into a public. It is constituted by a set of civil and political rights and liberties, where the citizens set their own agenda through open communication, and address an indefinite audience. Public discourse is the medium, through which members can reflexively address themselves, and form collective opinions. But this has little bearing

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Middlemas, *Orchestrating Europe* (London: Fontana Press, 1995); Alan S. Milward, *The European Rescue of the Nation State* (London: Routledge, 1992); Andrew Moravcsik, *The Choice for Europe* (London: UCL Press, 1998); Glyn Morgan, *The Idea of a European Superstate: Public Justifcation and European Integration* (Princeton, NJ: Princeton University Press, 2005); Johan P. Olsen, *Europe in Search of Political Order* (Oxford: Oxford University Press, 2007); Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999); Vivien A. Schmidt, *Democracy in Europe: The EU and National Polities* (Oxford: Oxford University Press, 2006); J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor? " and Other Essays on European Integration* (Cambridge: Cambridge University Press 1999).

[10] Schmitter, *How to Democratize.*

[11] Joerges and Neyer, "From Intergovernmental Bargaining".

[12] Beck and Grande, *Das Kosmopolitische Europa,* 81ff.

[13] Claus Offe and Ulrich K. Preuss, "The Problem of Legitimacy in the European Polity; Is Democratization the Answer?," in *The Diversity of Democracy: Corporatism, Social Order and Political Conflict*, ed. Colin Crouch and Wolfgang Streek (Cheltenham: Edward Elgar, 2007), 175-204, 175.

[14] Herfried Münkler, *Imperien* (Berlin: Rowohlt, 2005), 245ff.

[15] Hooghe and Marks, "Unraveling the Central State".

[16] Jan Zielonka, "Plurilateral Governance in the Enlarged European Union," *Journal of Common Market Studies* 45 (2007): 187-209.

[17] The most sophisticated assessment of the EU's democratic quality to date, Christopher Lord's book on auditing democracy in the EU, assesses "modified" consociationalism and concurrent consent. Neither of these complies wholly with the democratic idea of freedom as collective self-determination (Christopher Lord, *A Democratic Audit of the European Union* (Basingstoke: Palgrave Macmillan, 2004).).

[18] David Easton, *The Political System*, 2nd ed. (New York: Alfred Knopf, 1971), 134.

on will formation unless it connects to the polity; normally this takes place through different channels of communication. Further, a set of institutions and procedures equipped with the ability to convert goals into practical results is required. At a minimum, then, a democratic order requires a legally entrenched governmental system of *representation*; some version of a common *identity*; and popular *legitimacy* in order to approximate the criteria of autonomy and accountability.

The criterion of autonomy posits that legitimacy cannot simply mean acceptance or support for an order, but that there are good reasons for *why* a political order deserves obedience. Legitimation serves to make sure that a polity is fit to make binding decisions on behalf of a *demos*; that is, the policies and decisions chosen protect the integrity of the society and realize its vital values and goals in an adequate manner, and this is why the citizens have a duty to comply. A system of power is not legitimate only because actors believe in its legitimacy, but because it can be justified in terms of their beliefs.[19] In democratic states, there is a presumed link between the normative validity of a political order and the social acceptance of this order.

To function in accordance with the criteria of autonomy and accountability, a modern democratic polity also requires some form of collective identity, representation and governing capacity. In modern polities, public deliberation is wed to systems of representation, as no system can accommodate the participation of all the relevant stakeholders. Representation refers to procedures and processes for citizens to influence political decision making and the actions of public officials in manners generally considered to be legitimate. The modern conception of representation can be said to be parasitic on deliberation, as no person can consider herself to be legitimately represented unless the mandate and accountability terms are spelled out, and the represented are offered acceptable justifications for decisions that affect them. But representation may also be seen as a precondition for political rationality, as it secures institutional fora removed from local pressure, in which elected members of constituencies can peacefully and co-operatively seek alternatives, solve problems and resolve conflicts on a broader basis.[20]

To sustain a governmental entity a range of functions must be carried out. Such are resource acquisition and territorial control.[21] For ensuring *exclusive territorial control*, military and police powers are required. The question of democratic quality hinges on the communicative and justificatory relationship between the polity and the forum; on the character of this structure; and on citizens making use of it. In addition to the notions of

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[19] Jürgen Habermas, "Legitimationsprobleme im Modernen Staat", in *Zur Rekonstruktion des Historischen Materialismus* (Frankfurt: Suhrkamp, 1976), 271-303, 276ff.

[20] This principle of parliamentary representation can be stated as follows: "no proposal can acquire the force of public decision unless it has obtained the consent of the majority after having been subjected to trial by discussion" (Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997)), 190. See Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972); Jane Mansbridge, "Rethinking Representation," *American Political Science Review* 97 (2003): 515-28.

[21] Consider Stein Rokkan's model of state-formation and nation-building which is modelled on these two dimensions, Stein Rokkan, "Dimensions of State Formation and Nation Building: A Possible Paradigm for Research on Variations within Europe," in *The Formation of National States in Western Europe*, ed. Charles Tilly (Princeton, NJ: Princeton University Press, 1975), 562-600, 562; Peter Flora, Stein Kuhnle and Derek Urwin, *State Formation, Nation-building, and Mass Politics in Europe: The Theory of Stein Rokkan: Based on his Collected Works* (Oxford: Oxford University Press, 1999). Schmitter was the first to apply these to the EU, see Philippe Schmitter, "Imagining the Future of the Euro-Polity with the Help of New Concepts," in *Governance in the European Union*, ed. Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck (London: Sage, 1996), 121-50, 121. See also Stefano Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union* (Oxford: Oxford University Press, 2005), for a more detailed attempt to apply Rokkan's model to the EU.

legitimacy, identity and public sphere that pertain to the civic-democratic aspects of a political order; a modern democratic polity relies on functional requirements pertaining to sovereignty, coercive ability, authorization of collective decision-making, resource allocation, membership/border setting, and thresholds for territorial exit.[22]

Properly reconstituting democracy in Europe presupposes that the functional and normative requirements are fulfilled. But a major lesson from the European debate is that these can be combined in different institutional ways. In other words, when we apply the basic requirements of a democratic order to the complex "constitutional essentials" of the multilevel constellation that makes up the EU, we find considerable scope for variation. The EU multilevel constellation's essentials are made up of intergovernmental, supranational and transnational governing structures, which differ with regard to the main locus of the democratic unit. Intergovernmental structures point to the national level; supranational to the European level; and transnational to structures of civil society and cosmopolitanism.

Three Models for Reconstituting European Democracy

The EU is a dynamic and contested entity; hence to understand the debate and the choices facing Europe – notably whether what is required is reconstitution along familiar institutional-constitutional lines or rather along a reconfigured theory of democracy – we spell out three polity models. These have been developed from the three main positions in the debate on the EU: as an intergovernmental organization, as a federation or as a transnational system of governance, but are all innovations on existing scholarship.

Model 1 – Audit Democracy

The first model envisages democracy as being directly associated with the nation state. The presumption widely shared by Euro-sceptics is that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well-developed collective identity, the citizens can participate in opinion-forming processes and put the decision-makers to account at regular intervals, as well as continuously through public debate. The model implies that the EU must be such institutionally fashioned as to ensure that the institutions at the EU level are accountable to the member states, which continue to serve as the main vehicles for ensuring autonomy.

This model posits that the emerging structure at the European level operates as a regulatory regime deeply embedded in extensive institutional arrangements of public (or semi-public) character.[23] The model presumes that the member states delegate competence to the Union, a competence that can in principle be revoked.[24] Although this entails a form of self-binding on the part of the member states, such delegation can come with a powerful set of controls imposed by the member states, in order to safeguard that they remain the source of the EU's democratic legitimacy. The member states both authorize EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties, as well as through a set of institutions that permit each and every member state to exercise the power of veto. The model can thus be understood as a way of addressing the democratic problems that complex state interdependence and globalization bring forth, through establishing European institutions that are accountable to the national democratic systems. The Union's *own legitimacy* would be based on its ability to produce substantive outcomes in line with the principle of Pareto optimality, which states that only decisions that no one will find unprofitable and that will make at least one party better off, will be produced, and hence lend legitimacy to international negotiations.[25]

[22] See Table 1.

[23] Burkard Eberlein and Edgar Grande, "Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State," *Journal of European Public Policy* 12 (2005): 89-112, 97.

[24] Cp. Mark A. Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003).

[25] Scharpf, *Governing in Europe*, 237.

In accordance with the logic of democratic delegation, that is, which issues can be delegated without severe loss of democratic self-governing ability, the EU's conferred competences would be foremost in the operation of the Common Market. The scope for common action in other policy fields would be quite narrow, as would be the scope for redistribution. Further, the EU would have a very limited scope for foreign and security policy, and it would be entirely subject to member states' preferences. The EU's fiscal base would be limited; it would be based on member state contributions, not EU taxing powers.[26] The EU-level would be based on a problem-solving strategy and a consequentialist notion of legitimacy.[27] A problem-solving, derivative entity (from the member states) handles problems of a rather mundane, technical-economic nature and preferences that do not invoke moral claims or affect identities. Thus conceived, the EU would be a contractual order, an institutionally unique type of international organization or regime, where the member states are the contracting parties. The states not the citizens make up the "constituencies", and are the sole sources of legitimacy. They act internationally, either on their own, or through their conferring powers on the Union through delegation. The "constitutional arrangement" is a contract with the "pouvoir constituant", structured as a juridical relationship among separate parties. It would be akin to a "gentlemen's agreement", which presupposes individual membership and sovereignty. The signatories represent individual modalities of government, not a social pact among citizens. Contractually based orders do not put up normative criteria of political legitimacy.[28]

The standard model understands democratic authorization by member states to take the form of intergovernmental bodies in which the contracting partners strike bargains on behalf of nationally fixed preferences and interests.[29] This model is not without its own democratic challenges. One problem is the issue of *agency drift*: what assurances do member states have that the Union – whose decision-makers need decisional freedom to solve problems rationally – operates in accordance with their interests? Another problem is integration-fostered technocracy and executive dominance, that is, the bypassing of democratic institutions at both the Union and member state levels. Here many see the EU's attempt to combat executive dominance through developing and strengthening the European Parliament, as a part of the problem. They see it not only as unfit to curtail executive dominance and technocracy, but also to exacerbate these problems through furthering integration.

Is the development of the EP then simply an anomaly for the delegated democracy model? Or can we adapt the model to accommodate the present role of the EP? Our response is a qualified yes. We can extend the delegated democracy model in such a way as to include the EP, but with it serving a more delimited function as an agent of audit democracy.[30] That entails that it would, together with supranational institutions (such as a court and an executive), help member states – notably their parliaments – to supervise and control the Union's actions through providing an added forum for bringing forth relevant information on the Union's actions; launch Commissions of inquiry and include other bodies to undertake critical scrutiny of aspects of the Union's activities; and engage civil society actors. These institutions would be specifically mandated to hold supranational decision-

[26] See Table 1.

[27] Erik O. Eriksen and John E. Fossum, "Europe in Search of Legitimacy: Strategies of Legitimation Assessed," *International Political Science Review* 25 (2004): 435-59.

[28] Günter Frankenberg, "The Return of the Contract: Problems and Pitfalls of European Constitutionalism," *European Law Journal* 6 (2000): 257-76, 260f.

[29] Moravcsik, *The Choice for Europe.*

[30] See Erik O. Eriksen and John Erik Fossum, "Europe's Challenge – Reconstituting Europe or Reconfiguring Democracy?," in *RECON - Theory in Practice*, ed. Erik O. Eriksen and John Erik Fossum, RECON Report No 8 / ARENA Report 2/09, (Oslo: ARENA, 2009), 7-41. Available at: http://www.reconproject.eu/main.php/RECONreport0809.pdf?fileitem=4472902.

making bodies to account. They would be constitutionally barred from legitimising and authorising law-making, as well as from expanding Union competencies. In other words, this would be an EP that would be confined to a delimited audit function.

Within this model the EU-level structure would remain a *functional regime* set up to address problems that the Member States cannot resolve when acting independently. The ensuing model of the EU posits that the institutions at the Union level be mandated to act within a delimited range of fields. The relevant determinant for establishing which fields would reside in the EU's ability to offload and compensate for the declining problem-solving ability of the nation state in a globalising context. This pertains, in particular, to the ability to handle cross-border issues (such as economic competition, environmental problems, migration, terrorism and cross-border crime, etc.). According to Giandomenico Majone, such a regulatory regime does not need popular legitimation proper, as politically independent institutions, such as specialist agencies, Central Banks, judicial review, and the delegation of policy-making powers to independent regulatory commissions, would provide the required legitimation of a unit constructed to resolve the perceived problems of the members.[31] It remains to be seen whether this model can ensure democratic legitimation. That depends on how the surveillance and accounting mechanisms in place actually square with the ratio of delegated competencies.

Reconstituting Member State Based Democracy

The model's core presumption is member-state based and institutionally entrenched democratic will-formation approximating the criteria of autonomy and accountability. Member states must have the last word; they must be placed on the same line and have the right to veto. The requirement of unanimity prevails; there are neither trumps nor a supreme third party to resolve conflicts.

For this model to work, today's EU will have to go through a process of reconstitution, mainly through a significant *downscaling* of the system at the EU-level. It will have to roll back much of the legal order, including removing much of the protective apparatus of human rights and the constraints on aggressive nationalism that have been established in the post-war period.[32] Moreover, a down-scaled order would lack the organized capacity to make binding decisions, such as majority vote and court rulings. It would not be set up to solve deep conflicts, and it would be unable to reallocate resources. Within such a down-scaled order, the internal democracy of the nation states may increase, as the formal conditions for sovereignty would be re-established, but the states would have limited control over the *external* factors that shape their range and freedom of action – as congruence between the actual decision-makers and the recipients would decrease. Without *input congruence,* that is participation in the making of the decisions that affect someone, there can be no self-determination; and without *output congruence*, that is, overlap between the polity and the territory it controls, there can be no effective participation.

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[31] Giandomenico Majone, "Europe's 'Democratic Deficit': The Question of Standards", *European Law Journal* 1 (1998): 5-28.

[32] Today, Union transactions are about far more than functional problem-solving – they have turned "political". The EU has market-correcting or positive integration measures, such as certain redistributive schemes and means of standard-setting; there is increased use of qualified majority voting; and there is a constitutionalization process. These and other traits testify to the EU as revolving around more than the politics of the lowest common denominator. See e.g. Michelle P. Egan, *Constructing a European Market: Standards, Regulation and Governance* (Oxford: Oxford University Press, 2001); Christian Joerges and Ellen Vos, eds., *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999). On the role and status of European law and the European Court of Justice, see for instance Karen J. Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2001) and Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004).

It is difficult to strike a viable balance between autonomy/accountability and congruence within a setting of delegated sovereignty: Heightened interdependence among states means that to ensure autonomy, the scope of the constituency must be increased. But this comes at the expense of accountability: Effective democratic auditing requires supranational institutions that are able to "open up" and render transparent the workings of intergovernmental executive bodies. Confining supranational bodies to the role of agents of delegated sovereignty, based on a bound mandate, is notoriously difficult. The members of a supranational body will need leeway and discretion in order to facilitate cogent decision-making. The European Parliament started out as a body of national parliamentarians, and hence bore some semblance to a European-based agent of national audit democracy. Since direct elections were introduced in 1979, however, the EP has emerged as a legislative body proper, a body whose authority to act is not bound up in and confined to acts of delegation by the member states.[33]

It is also not clear that a process of rolling back the EU will adequately address the democratic challenge facing interdependent nation-states: creeping juridification (the expansion of jurist-made norms to new social domains), executive dominance, and technocratic governance. At a minimum, then, this model's proposal for reconstituting democracy in Europe presupposes that the member states upgrade their own political and legal institutions so as to ensure public scrutiny and democratic control of the EU.

The conundrum is that the act of rolling back the EU's political structures may not rescue national democracy under conditions of (economic) globalization where the nation-state's autonomy is diminished. The model of audit democracy may ensure procedural accountability, but not substantive accountability, as issue-complexity and issue-linkage always leave discretionary room for delegates. Audit democracy would also be prone to *input-output incongruence*. Since the fate of national democracy is intrinsically linked to developments at the EU level, the other reconstituting strategy is to argue for the need to entrench democracy properly at the European level.

Model 2 – Federal Multinational Ddemocracy

The democratic credo posits that all political authority emanates from the law laid down in the name of the people. The legitimacy of the law stems from the autonomy presumption that it is made by the people or their representatives – the pouvoir constituant – and is made binding on every part of the polity to the same degree and amount. 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 when the laws are enacted correctly, and the rights are allocated on an equal basis. The conventional shape of such a community is the democratic constitutional state, based on direct legitimation, and in possession of its own coercive means.

A federal European state would be institutionally equipped to claim direct legitimation, and entrench this in legally binding form. Federal state structures not only heighten autonomy and accountability, but can also greatly reduce the incongruence that globalization and complex interdependence produce.

A legally integrated state-based order is often seen as premised on the existence of a sense of common destiny, an "imagined common fate" induced by common vulnerabilities, so as to turn people into compatriots willing to take on collective obligations to provide for each other's well-being. In some contrast, the European Union is multinational. The federal model must therefore be modified to accommodate to the fact that nation-building at the EU level would be taking place *together with* nation-building at the member state (and partly even regional) level. The modified version would be a *multinational federal European*

[33] Berthold Rittberger, *Building Europe's Parliament* (Oxford: Oxford University Press, 2005), 2.

state. In its institutional design, such an entity would have to coordinate the self-government aspirations and the rival nation-building projects that would occur within the European space. In constitutional terms, a multinational federation presupposes that the principle of formal equality be supplemented with particular constitutional principles. These are intended to provide some form of "recognitional parity", for national communities at different levels of governance (in the EU at Union and member state levels). Wayne Norman cites seven such principles: (a) partnership; (b) collective assent; (c) commitment and loyalty; (d) anti-assimilationism; (e) territorial autonomy as national self-determination; (f) equal right of nation-building; and (g) multiple and nested identities.[34] This model is premised on the tenet that a uniform national identity is *not* a core precondition for the democratic constitutional state.[35] The multinational federal state requires citizens' allegiance in the form of a *constitutional patriotism*, which portrays loyalty in political terms; it hinges on the validity of legal norms, the justification of policies, and the wielding of power in the name of fairness.

The multinational federal model of democracy, as set out here, implies that the EU will be distinguished by a commitment to direct legitimacy founded on basic rights, representation and procedures for opinion and will-formation, including a European-wide discourse. The basic structural and substantive constitutional principles of Union law, as well as coercive measures required for efficient and consistent norm enforcement and policy implementation will be institutionalized at both core levels of government (member state and European). The model presupposes that schooling, symbolic measures and social redistributive means at both levels so as to render the process of socialising the people of Europe into "Europeans", compatible with citizens retaining distinctive national identities will be established; as will be a set of clearly delineated criteria for who are Europeans and who are not. There will be onus on positively identifying Europe, and on distinguishing Europeans from others so as to make up the requisite social basis and "we-feeling" for collective action – for regulatory and redistributive measures, and for a common European foreign and security policy. The EU will be legally recognized as *a state* with the right to police and military force for territorial control and protection of sovereignty, and with provisions for legal secession of any sub-unit from the Union.[36]

Reconstituting the EU as a Federal Democracy

The model's core tenet is for the Union to entrench in state-based form legally binding democratic will-formation. This requires authoritative institutions at the Union (and member state) level, organized along federal lines and equipped with final word on those matters that fall under each level's respective jurisdiction.

The EU's peculiar, and distinctive, institutional structure (with great asymmetries and polycentric features), has profound effects on its democratic legitimacy. In the EU, there is no real chance for an all-inclusive public debate among all citizens, as the civic-institutional infrastructure is deficient.[37] The "European people" is represented in "pseudo elections" (often also referred to as second-order elections)[38] – with low turnout and without a proper

[34] Wayne Norman, *Negotiating Nationalism: Nation-building, Federalism and Secession in the Multinational State* (Oxford: Oxford University Press, 2006), 163-9.

[35] Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press, 1998); Jürgen Habermas, "The Postnational Constellation and the Future of Democracy" in *The Postnational Constellation: Political Essays* (Cambridge, MA: Polity Press, 2001), 58-112.

[36] See Table 1.

[37] Grimm, *Does Europe Need a Constitution?*; Bernard Peters, "Public Discourse, Identity and the Problem of Democratic Legitimacy" in *Making the European Polity: Reflexive Integration in the EU*, ed. Erik O. Eriksen (London: Routledge, 2005), 84-123; Hans-Jörg Trenz, *Europa in den Medien: Die Europäische Integration im Spiegel Nationaler Öffentlichkeit* (Frankfurt: Campus, 2005).

[38] The main difference between first and second order elections is that there is less at stake in the latter. Since European elections do not produce executive changes, they are really second-order national elections. See Karlheinz Reif and Hermann Schmitt, "Nine Second Order National

European-wide party system – and a parliament that is not a fully-fledged and sovereign legislator. The upshot of all this is that the EU deviates clearly from the democratic nation state. In its present form the EU has some traits of a *multinational non-state-based federation*, with the important provisos that its "federalism" is organized around other issues and methods of territorial control than is the case with every state-based federation, and that the EU's own vocation is *post*-national as it is set up to fight aggressive nationalism.

For the EU to comply with the tenets of this model, it would have to be reconstituted as a polity. That would not only entail *increased* competencies, but also institutional revamping, including the *establishment of direct*, representative, links with the citizens in *all* relevant functional domains. This could make for a European democracy that complies with the criteria of autonomy and accountability, but the feasibility is low. Such a reconstitution requires the *consent* of every member state. The recent treaty processes show that it is not easily forthcoming. Any further move in such a statist, national direction, is likely to encounter strong resistance, as many are vehemently opposed to a federal "super-state". The German Constitutional Court, in its ruling on the Lisbon Treaty, made clear that the EU is not a nascent federal state; it also underlined that the German Basic Law cannot authorize a federal European state. In today's Europe, the resources required for such an order, for forging a common identity and for making us all good Europeans are in short supply. The model presupposes increased congruence through lifting tasks to the European level. Insofar as this has occurred, it has been in an uneven rather than in a coherent manner; it has not been properly democratically authorized; and it has not been matched with adequate measures of democratic accountability.

How close to statehood the EU will need to come to comply with the federal model, requires attention to the character of the states system, as this model is premised on a system of democratic states. The multinational federal state model posits a *democratically tamed* Westphalian states system, but where the democratic controls are still mainly internal to each state. In today's deeply interwoven world, where states are becoming increasingly interdependent, "democracy in one country" is not sustainable. The issue is whether democracy can be sustained through (horizontal) pressures from the system of states, or whether supranational bodies (above the state) that citizens can appeal to when their rights are threatened, are necessary. In today's world, a range of such bodies has emerged. The EU, albeit deficient, is the most elaborate case of supranational democracy.

To sum up, the EU's commitment to universal principles suggests that it has a communal vocation that is broader and more universal than even that of the multi-national state. The question brought up by the EU is whether the state model can still be seen as an adequate harbinger of democracy and solidarity in today's world. This pertains to the mode of allegiance, as well as to the institutional-structural make-up that democracy requires in a globalized world. Can a move beyond Westphalia, towards cosmopolitanism offer a better, more suitable, version of democracy?

Post-national Democracy

The normative yardstick that we have derived from deliberative democracy is not confined to the nation-state template and its presuppositions of sovereignty, demos, territory, and nation; it can therefore also be used to establish a non-state polity's democratic character. International law has changed in a cosmopolitan direction, and the EU has pooled sovereignty in a territory it does not fully control. These developments manifest

Elections: A Conceptual Framework for the Analysis of European Election Results," *European Journal of Political Research* 8 (1980): 3-44.

themselves in an altered conception of sovereignty: from denoting singular state territorial control to a more multi-dimensional and disaggregated conception.[39]

Transnationalists such as Cohen and Sabel and Bohman argue for the normative validity of a *polycentric system of directly-deliberative polyarchy* modelled on the European system of governance.[40] They see the EU as a multilevel, large-scale and multi-perspectival polity based on the notions of a disaggregated democratic subject and patterns of diverse and dispersed democratic authority. Their claim is that transnational civil society, networks and committees, NGOs and public forums, all serve as arenas in which EU actors and EU citizens from different contexts – national, organizational and professional – come together to solve various types of issues and where different points of access and open deliberation ensure democratic legitimacy. Local problem-solving, the institutionalization of links between units, and agencies to monitor decision-making both within and between units make this structure conducive to democratic governance. In his most recent work, Bohman seeks to reconcile this with the notion of the "democratic minimum".[41] This notion is intended to render a normatively viable, yet not confined to the state conception of democracy. But, as Rainer Forst has noted this is a minimum foremost in name, as its proper realization requires a comprehensive set of institutions.[42] Bohman does not spell these out, but it is clear that spelling them out would reshape his theory. The democratic minimum requires stronger institutional supports and is less foot-loose than what Bohman assumes. Barring such institutional supports, Bohman's conception of rule beyond the state cannot adequately deal with the challenge of weak coercive means. How can goals be realized and rights protected *without* the sanctioning capacity of the state? Would such a system be able to "deliver"; how can it bring about changes required by justice? Further, can it ensure equal access and public accountability in the complex multilevel constellation that makes up the EU?

The crucial question that this debate brings forth is whether the state form and a state based collective identity are necessary preconditions for democracy to prevail, or whether a leaner structure made up of legal procedures and criss-crossing public discourse can ensure democratic legitimation. In short, can democracy prevail without state and nation? However conceived of democracy requires some minimum institutional requirements, as deliberation in itself cannot bear the burden of democratic legitimation.

The minimum institutional requirements we have discerned in the above do not require a state-type structure but they clearly *exceed beyond* and are *different* from the transnational governance networks that Cohen and Sabel and Bohman put their trust in. They draw on the theory of deliberative democracy because they see it as particularly equipped to account for the particular experimentalist form of democratization that they identify with the EU. But this is a misnomer: the EU's democratization unfolds along representative democratic lines with clear resemblance to national arrangements.

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[39] Morgan, *The Idea of a European Superstate*; Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

[40] Bohman, *Democracy Across Borders*; Cohen and Sabel, "Directly Deliberative Polyarchy"; Cohen and Sabel, "Sovereignty and Solidarity".

[41] The central feature of this democracy as I understand it is that it is a reflexive order, an order in which people deliberate together concerning both their common life and the normative and institutional framework of democracy itself. Democracy in this view is popular control over decision making in a specific sense: it is the interaction between communicative freedom as it is manifested in the public sphere and the normative powers by which people create and control their rights, obligations, and deontic status (Bohman, *Democracy Across Borders*, 5).

[42] Rainer Forst, "Cosmopolitan Republicanism or Republican Cosmopolitanism? Comment on James Bohman," in *How to Reconstitute Democracy in Europe? Proceedings from the RECON Opening Conference*, ed. Erik O. Eriksen, RECON Report No 3 / ARENA Report No 8/07 (Oslo: ARENA, 2007), 91-4, 93. Available at: <http://www.reconproject.eu/main.php/RECONreport0307.pdf?fileitem=4473010>.

Model 3 – Regional-European Democracy

In a globalising world, the nation states suffer democratic deficits, as their citizens are in so many ways affected by decisions taken outside their borders, beyond national control. The agenda over which the body of citizens exerts exclusive control is greatly diminished. *Decreased output congruence* underpins the case for supranational government. As noted above, cosmopolitans and transnational governance scholars envisage democracy *beyond* the template of the nation state and the states' system. Europe is then also held up as a particularly relevant site for the emergence of cosmopolitanism.[43] This multidisciplinary cast of scholars draws variously on transnationalism; on the notion of the EU as a new form of Community; and on the EU's global transformative potential through acting as a "civilian power".[44] Even though cosmopolitanism "is not part of the self-identity of the EU",[45] scholars nevertheless recognize the EU as a part of, and as a vanguard for, an emerging democratic world order.

Little systematic effort has however been put on specifying *how* a European Union imbued with cosmopolitan norms can comply with the core democratic principles of autonomy and accountability. Our point of departure is that the core tenets of autonomy and accountability presuppose congruence between political and social space, but need not sum up to *exclusive territorial control.* According to R. M. MacIver, we should "distinguish between the government and the state and regard constitutional law as binding, not for the state, but the government.[46] It binds the legislator in the making of law itself." *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 notably also an expression of the common will and public opinion.[47] The characteristic feature of governmental power is not coercion, but the ability to act in concert and to be recognized. Political power emanates from citizens coming together in public forums and reaching agreement on the rules for social coexistence and the collective goals they should realize. Power is collective, communicative and inter-subjective by nature; it is created in the interaction between agents; it is only in operation and is only strong so long as the people are assembled and agree.[48] Thus, it is also possible to understand modern constitutions as disconnected from the state form, from a coercive Leviathan – insofar as they remain linked in with the project of modernity, whose normative telos is to make the addressees of the law also their authors.[49] A true republic presupposes democracy, but democracy need not presuppose the state. A non-state entity can make up a system of government insofar as it performs the functions of authorized jurisdictions. By government we therefore refer to a system of authorized rule which depicts the political organization of society, or

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[43] Daniele Archibugi, "Principles of Cosmopolitan Democracy," in *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, ed. Daniele Archibugi, David Held and Martin Kohler (Cambridge: Polity Press, 1998), 198; Beck and Grande, *Das Kosmopolitische Europa*; Gerard Delanty and Chris Rumford, *Rethinking Europe* (London: Routledge, 2005).

[44] Chris Rumford, "Cosmopolitanism and Europe: Towards a new EU studies agenda?," *Innovation* 18 (2005): 1-9; Ian Manners, "Normative Power Europe: A Contradiction in Terms?," *Journal of Common Market Studies* 40 (2002): 235-58.

[45] Rumford, "Cosmopolitanism and Europe," 5.

[46] Robert M. MacIver, *The Modern State* [reprint, 1964] (Oxford: Oxford University Press, 1928), 277.

[47] Georg W. F. Hegel, *Philosophy of Right* [reprint, 1967] (Oxford: Oxford University Press, 1821); MacIver, *The Modern State*; Hannah Arendt, *On Violence* (New York: Harcourt, Brace & World, 1969). See also Alexander Wendt, "Why a World State is Inevitable," *European Journal of International Relations* 9 (2003): 491-542.

[48] Hannah Arendt, *The Human Condition* (Chicago, MI: University of Chicago Press, 1958), 200; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law* (Cambridge, MA: MIT Press, 1996), 149.

[49] Günter Frankenberg, *Die Verfassung der Republik – Autorität und Solidarität in der Zivilgesellschaft* (Baden-Baden: Nomos, 1996).

construed in more narrow terms, as the institutional configuration of representative democracy and of the political unit.

From this we posit that whereas the Union can be set up as *a non-state entity*, it must nevertheless also retain some of the hierarchical attributes of government. The idea is that since "government" is not equivalent with "state", it is possible to conceive of a non-state, democratic polity with explicit government functions. Such a government-type structure can accommodate a higher measure of territorial-functional differentiation than can a state-type entity, as it does not presuppose the kind of "homogeneity" or collective identity that is needed for comprehensive resource allocation and goal attainment. Such a governmental structure is based on a division of labor between the levels that relieves the central level of certain demanding decisions.

The EU has then also obtained competencies and capabilities that resemble those of an authoritative government. It embraces democracy as a founding norm, has representative institutions, and the parliamentary principle has become more strongly institutionalized. Its institutional setup is complex but "still it legislates, administers and adjudicates. The legitimacy of these processes also has to be assessed according to the same standards that one would apply to any government."[50]

When further entrenched in this direction, the EU can be a post-national government, a system whose internal standards are projected onto its external affairs; and further, that it will be a system of government that subjects its actions to higher-ranking principles – to "the cosmopolitan law of the people".

The problem (currently experienced by the EU) is how an entity with a nascent government- order can be effective: implementing decisions against a dissenting minority, in the absence of state-type coercive measures. When it is the member states that keep the *monopoly of violence in reserve*, such an order can only be effective to the degree that actors comply on the basis of voluntary consent. But how to ensure compliance in a polity that lacks the enabling conditions of sovereignty that confer stability on social relations in the form of a "centralized authority to determine the rules and a centralized monopoly of the power of enforcement"?[51] Proper procedures are imperative: When decisions are properly made, when they follow the authorized procedures of the constitutional state, the likelihood that they be respected is high.[52] This model therefore seeks to graft the authorized procedures of the constitutional state onto the European level but within a more limited remit of action than the sovereign state. Precisely because it does not regulate some of the core state functions, it can operate with a broad repository of mechanisms to ensure compliance and consent. These include "soft" mechanisms, ranging from a 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 institutionalized procedures for *authoritative* decision-making in intergovernmental and supranational institutions, which come with direct sanctions.

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 (although the member states possess very significant military capabilities).[53] But whereas the

[50] Damian Chalmers, Christos Hadjiemmanuil, Giorgio Monti and Adam Tomkins, *European Union Law* (Cambridge: Cambridge University Press, 2006), 87.

[51] Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33 (2005): 113-47, 116.

[52] Tom R. Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990).

[53] Helene Sjursen, "What kind of Power? European Foreign Policy in Perspective," *Journal of European Public Policy* 13 (2006): 169-81.

institutions at the EU-level are equipped with far weaker coercive measures than those of states, it nevertheless wields quite substantial influence with notable effects, because the *member states* carry out the joint decisions. Collective decision-making and implementation in the EU take place within a setting of already legally institutionalized and politically integrated orders, which help to ensure compliance.

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

Two implications follow from how we apply these insights to the EU: first, that reconfiguring democracy in Europe entails decoupling *government* as the democratic form of rule, from the *state form* – as a coercive system of power relations that is sovereign due to the codes of international law. A post-national-type EU would be based on non-violent settlement of disputes, the entrenchment of institutions, rights and legal principles that subject actors to the constraints of a higher-ranking law – the cosmopolitan law of the people – and that empowers the citizens to take part in law-making processes at different levels. Policy-making, implementation and law enforcement would then take place through a variety of organizations, and the EU would be a sub-set of a cosmopolitan order that does not hold the means of legitimate violence in reserve, but is rather embedded in a system of multilevel commitments and constraints.

Second, the model posits that the borders of the Union are not drawn on essentialistic grounds. The EU can, therefore, only justify itself through drawing on the principles of human rights, democracy and rule-of-law – even when dealing with international affairs. 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.

Regionally situated authoritative government within a cosmopolitan, non-state-based framework raises questions pertaining to institutional design and make-up. One particularly tricky issue is how to ensure democratic autonomy and accountability within such a system. The short answer is that this requires a polity with a *pyramidal* structure of autonomy and accountability, i.e., where the global level contains certain fundamental legal guarantees, the EU level handles a limited range of functions over which it has final authority, and the member states the rest. Autonomy has a different status in this model than in the previous ones, as it cannot simply refer back to a delimited democratic constituency but must always balance the requirements of a given constituency with the universal principles embedded in cosmopolitan law. The accountability issue is also very complicated here. The "many accounts" that such a system necessarily fosters, presupposes a more central role for civil society and the public sphere in demanding and ensuring proper justificatory accounts; hence locates democracy more explicitly in civil society/public sphere than is the case in the previous two models.

Reconstituting the EU as a Regional Democracy

This model's core presumption is that European citizens will be able to consider themselves as self-legislating citizens within the functional domain that is the exclusive preserve of the European government, that is, human rights protection, risk regulation, environmental policy, and social security.[54]

The model requires reconfiguring democratic theory. But for the EU to fully comply with this model, it needs to be reconstituted. Present-day EU does not fully comply with the standards of a proper *government*. Its enforcement mechanisms might still be too weak to qualify as a government proper. On the other hand, 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 EU not become an unchecked entity – an eventual "world despotic Leviathan".

Present-day EU does not contain the balance between economic rights and social protection (understood as a set of minimum standards) that the cosmopolitan model sees as required for effective citizenship: to approximate such a balance there is a need for retrenching market integration and drawing clear bounds on the operation of the market; whilst *extending social guarantees* across Europe. In this sense the cosmopolitan model presupposes clear bounds on integration, whereas the Union is marked by problems of democratically unauthorized "creeping competence"[55] and *juridification*.

The debate on the EU's bounds and who should be offered EU membership reflects on the one hand that reminiscences of primordial ties are weakly reflected at the European level, and a similar argument holds for collective identity. On the other hand, the debate on where to draw the borders of the EU pits cosmopolitans against communitarians, where some of the latter argue for the need to *confine* the Union to European Christendom. The debate on Turkish membership offers one important take on the Union's value-basis.[56] There is clearly no political consensus on a cosmopolitan vocation for the EU.

The instantiation of a regional-European version of democracy along cosmopolitan lines raises questions for cosmopolitan-democratic theorising: viable regional-European democracy requires a form of re-balancing of the membership in a community of compatriots with the inclusive requirements of the cosmopolitan society. Cosmopolitanism holds individuals as morally ultimate in both domestic and global contexts; they are the only legitimacy basis of political orders. But democracy presupposes some form of distinction between members and non-members. Democratic sustainability requires some form of identity, and identity thrives on exclusion, boundary-drawing and distinction. Identities are both a condition of, and a constraint on, justice. Boundary construction, the dual processes of inclusion and exclusion, aims at establishing a particular balance between contextualized identities, democratic practice and global justice. Further, the outline of a given functional constituency must be considered in light of a collective identity's key role in instilling allegiance and loyalty. What is valuable to us, what we share with one another and not with all the others, is what makes us special; something that arouses feelings and emotions, that we are committed to and that can motivate us to collective action, trust and solidarity. 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 shared "humanity".[57]

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[54] See Table 1.

[55] Mark A. Pollack, "Creeping Competence: The Expanding Agenda of the European Community," *Journal of Public Policy* 14 (1995): 95-145.

[56] Helene Sjursen, ed., *Questioning Enlargement: Europe in Search of Identity* (London: Routledge, 2006).

[57] Habermas, "The Postnational Constellation," 108.

We have seen that the EU holds traits suggestive of a nascent sub-type of cosmopolitan order. However, its effectiveness in pursuing cosmopolitan principles hinges not only on internal resources but also on external. There are no equivalent orders established in the world. Insofar as the EU is an agent for a cosmopolitan world order, the EU faces the problem of becoming overburdened with tasks and normative expectations.

Conclusion

The basic question that this article has addressed was that of ensuring democracy in today's Europe. Our main concern has been to clarify what kind of a challenge this is. What is clear simply from a cursory look at the EU and the scholarly debate is that this is not simply a political challenge in the sense of applying a set of established and well-known solutions to the complex EU. This is not to deny that political factors figure centrally in every conceivable effort to entrench democracy across Europe. But the question of ensuring democracy in Europe today is clearly also a major intellectual challenge: it pertains both to how we understand democracy and to how we understand political rule in today's world.

The tight interweaving of states in Europe under the two headings of Europeanization and globalization underlined the need to think of this as a major intellectual challenge. But what kind of intellectual challenge was this: Was it that of modifying established theory of democracy to suit the complex European Union, or was it more radical, namely that of coming up with a new theory of democracy? We found the basic choice to be that of either somehow reconstituting democracy in Europe or that of somehow reconfiguring democratic theory to suit the complex multilevel European configuration.

The former option was tailored to an understanding of democracy as basically tied to the constitutional state but which still had to be modified to suit the EU. This option we found encompassed two democratic polity models (audit democracy and federal multinational democracy). The first audit democracy model implied retrenching the EU in order to re-equip the member state as the stalwart of democracy within an intergovernmental (rather than a supranational) context. It sought to reconstitute democracy, through installing a system of *audit democracy* at the EU-level coupled with representative democracy at the nation-state level. The basic intention was to rescue nation-state democracy. Doing so would require a significant element of EU retrenchment, a major transformation, of the current European political landscape. The problem was that even if such a transformation were to be successfully carried out, it would bring up the question of what would guard against Europe becoming privy to the limitations in nationalism and the Westphalian order. In complying with this model Europe might yet be saddled with the problem that helped spark the European endeavour in the first place. The second possible way of reconstituting democracy was through *multinational federal state* democracy. But we found that even this model could not accommodate Europe's institutional diversity, the asymmetries built into its institutional configuration, and its polycentric character. The Union does not only fall well short of this model in territorial control and contiguity; in its present form, it has also entrenched a set of institutions that clearly deviate from key tenets of this model.

This left us with the second more radical option, namely the need to somehow reconfigure democratic theory to suit the complex EU. Transnationalists argue that the question of democracy in Europe requires a new conception of the presuppositions of democracy, in effect, a new democratic theory tailored to the European circumstance of multiple demoi. This required decoupling democracy from the presupposition of a state and a fixed *demos*. But when doing so, we found that the minimum requirements for democracy that we spelled out above both exceeded and differed from what the transnationalists pinned their hopes on. Our ensuing conception of democracy, the third model labelled regional-European democracy, is configured not as a system of transnational networks but rather in the procedures of the modern form of *government* within authorized jurisdictions. This can

be understood as a regional cosmopolitan arrangement because its viability hinges on accommodating global developments of which there are some today: post-war legal developments in the wake of the UN which have helped to make state sovereignty conditional on compliance with basic human rights. The post-national regional-European *government* model configuration retains much of the core tenets of the democratic constitutional state, albeit in a somewhat reconfigured form: it retains authorized jurisdiction but relaxes sovereign territorial control.

The upshot is that the search for democracy in Europe need not preoccupy itself with a radically new democratic theory but rather opt for a better specification and spelling out of what it takes to realize democratic principles under post-national conditions.

Table 1. Requirements for Three Democratic Orders in Europe

Requirements	Audit democracy	Federal multinational democracy	Regional-European democracy
Sovereignty	The Member States are formally sovereign entities The Union is derived from the Member States	The Union is recognized as a sovereign state, in accordance with international law	Polity sovereignty is multi-dimensional and shared among levels, subject to cosmopolitan principles of citizens' sovereignty
Coercive capabilities	The Union level has no own coercive capabilities Military and police forces are controlled at the Member State level	The Union level has state-type military and police capabilities The Member States have police functions	Military and police authority shared among all levels.
Authoritative decision-making	• Constitutional limits on Union-level competencies • Union-level: Problem-solving on the basis of delegated authority; • Union-level: Decision-making and sanctioning ability confined to Common Market matters • Member-States: Sustain final authority in all matters, in accordance with national constitutions	• State-based constitution delineating the competencies of the Union and the Member States. • Institutions for authoritative decision-making at both core levels (Union/member states) within their respective areas of competence • Sanctioning ability available for norm enforcement and policy implementation, at both core levels of government (member state and European)	• Constitutionally entrenched delineation of powers and responsibilities along both horizontal and vertical lines, • Union sanctioning ability is limited; • Union subjects its actions to higher-ranking principles • Authoritative law-making through democratically regulated deliberative procedures
Resource acquisition and allocation	• EU-level: no independent taxing powers and limited scope for redistribution • Member States decide autonomously over tax and redistribution within their territories	• EU-level: redistributive measures; independent fiscal policy and taxing ability • Member-state level: redistributive and taxing powers	• EU level: no independent taxing powers and limited redistributive powers • All levels: committed to global redistribution
Membership/ border-setting	The Union is open to all European states that qualify in functional terms	The Union's borders are set in accordance with designation of Europeanness	The Union's borders are drawn in accordance with democratic criteria for a self-sustainable democratic entity and with regard to the development of similar regional associations.
Territorial exit	Provisions for exit – subject to approval from Union (majoritarian support required)	Provisions for legal secession of any sub-unit from the Union – subject to constitutional provisions	The Union has provisions for territorial exit for sub-units (subject to the constraints of cosmopolitan law)
Mode of legitimation	Audit (derivative) democracy at Union level Representative democracy at Member State level	Popularly elected bodies based on representative democracy at all levels; competencies divided in bi-polar federal manner	Popularly elected bodies within a system of legally "hierarchicalized" competences
Public sphere	Public sphere confined to the nation state	European-wide public sphere	Multiple overlapping (European and global) discourses

Cosmopolitanism and Democratic Freedom

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Introduction

Cosmopolitanism Cosmopolitanism can be defined as the global extension of the *polis* or *res publica* (Cicero, Seneca), the construction of a *civitas maxima* (Wolff, Kelsen), the constitution of a cosmopolitan citizenship or *Weltbürgerschaft* (Kant, Parsons), or the unlimited inclusion of the other (Dewey, Habermas). In ancient political theory this idea was based on a universal idea of man as being a rational and political animal (*zoon politicon*), and "universal" did not only mean to extend the human *res publica* to a *human* cosmopolis but also to reunite the human *civil society* and *civic law* with *nature* and *natural* (and *divine*) *law*. This ides of a unification of the *polis* with the whole *cosmos* in a single *cosmopolis* was at least the reason why Kant called it a *sublime* idea.[1]

Yet, different from Kant, in classical political philosophy (Plato, Aristotle, Cicero) all men are designed with a *potential* to perform a *rational life plan within a political community*, whereas Kant only presupposed that all men are born with *equal rights of freedom*, and that everybody any time (without exception) *can* form a *good will* only, if he or she wants it, and try to *act* in accordance with morally universal claims.[2] The crucial difference between classical and modern political philosophy, between Aristotle and Kant, Plato and Hegel, Cicero and Marx is that in classical (or old-European) theory only the human *potentia* or competence to perform a rational and political life is universal and a competence of *all* men (including women, children, slaves, strangers, peasants etc) but not its *actual* performance. Some are born without the ability to actualise their *potentia*, others prove in the course of their life that they cannot realize it (because they are living on the country side in small villages, lost their leadership over a household or *oikos*, are not virtuous and rich enough, are barbarians from the east, etc.).[3]

The *realization* of the universal competence of all men already *logically* (or conceptually) was restricted to the happy few. Although everybody *can be* perfect, only a few *can realize* this competence because only a few *are* – by birth or socialization – perfect enough for true citizenship or nobility. It belongs to the *meaning* of words like "perfection" or "virtue" that they are related to a hierarchy of more or less perfect, more or less virtuous persons, groups, classes, people(s), cities, kingdoms etc. The *Gattungswesen* (or idea) that *potentially* exists within *any* individual *actually* comes to existence if *some* perform it with perfection, and only the most perfect ones come close enough to the ideal form of the *zoon politikon*. If (for sake of the argument) all others would be kept as slaves, this would change nothing because the *Gattungswesen* cannot be damaged by its bad (slavish) performance. Hence, the *conceptual dualism* of essence and appearance, *Gattungswesen* and its performance is deeply obliged to *social stratification* and *class-rule*.[4]

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[1] Immanuel Kant, Die Religion innerhalb der Grenzen der bloßen Vernunft, in: Werke VIII, Frankfurt: Suhrkamp 1977, 873. Kant here calls the "Vereinigung aller Menschen", the *unification of all men* which is the very meaning of the ritual of public adresses to God, a "erhabene Idee", a *sublime idea*.

[2] Kant, Grundlegung zur Metaphysik der Sitten, Werke VII, Frankfurt: Suhrkamp 1974; Kant, Metaphysik der Sitten, Werke Bd. VIII, Frankfurt: Suhrkamp 1977, 345.

[3] Robert Fine, Cosmopolitanism, London: Routledge 2007, 110.

[4] This is criticism originally goes back to John Dewey and Max Horkheimer, see: Hauke Brunkhorst, "Rorty, Putnam and the Frankfurt School", in: Philosophy & Social Criticism 5/ 1996, 1-16; Brunkhorst, Dialectical Positivism of Happiness: Horkheimer's Materialist Deconstruction of

The universal idea of a political and rational man functioned as an *ideology* for the self-justification of class-rule which was reinforced and stabilized by the *societal structure* of stratified societies. Even if we counterfactually suppose that originally the ruling classes came to power by virtue and perfection, once they were in power they tried – and *had* to try if they did not want to loose their power – to preserve it for themselves and their families and children by *any* means that worked for self-preservation of the power of the new ruling class, be it virtuous means or not. On penalty of decline they were bound to the logic of the *symbolically differentiated medium of power* that does not care for perfection and virtue.[1] Consequently, virtue became an ideology, and the intellectuals of the ruling classes experimented with the teleology of happiness which became in its most sophisticated version a philosophy of *eudaemonia* and the good life.[2]

The structurally stabilized aristocratic ideology of *virtue and perfection* was closely related with the idea of *representation*.[3] Only the most perfect political animals should represent the true rational and political essence of all people of a polity, and even more universal of the political and rational essence of all men. Hence, *Representation was structurally coupled with perfection, stratification and centralization*. Only the best at the *top* (kings/ nobles/ high ranked citizens) of the societal hierarchy and in the (*urban*) *centre* of the world (Rome as the one and only city: *urbs*) or a specific world region should represent not only their subjects essence but also the substantial essence (or the universal ideas) of the whole cosmos. In this, and only in this elitist and ideological way, already classical political thinking was inherently cosmopolitan. Hence, classical cosmopolitanism was "cosmopolitanism of the few".[4]

The social structure of old-European stratified societies like the Roman Empire consisted in a tremendous number of social, political, economic and cultural inequalities not only *between* classes but also *within* the social classes and sub-classes, and this was a kind of inequality which today nearly has become incomprehensible.[5] Even the idea of a political *isonomia* (of the best!) was conceived not as an order of equal rights but as an order of competition (*agonia*) for *privileges*. A good and stable political or civil society (*koinia politike*, *societas civile*) was conceived as a system of asymmetric and hierarchical social relations, and symmetric relations between equals (*inter pares*) were regarded as deviant or unstable, even among lovers and friends.[6] The same was true of "international" relations between cities or between princes. Equal legal sovereignty of princes or states

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[1] Paradigmatic: Macchiavelli, Principe; from a modern functionalist perspective: Niklas Luhmann, Macht, Stuttgart: Enke 1988.

[2] Max Weber, Religionssoziologie I, Tübingen: Mohr 1978 (1920)., 246.

[3] On the history of the idea of *representation*: Hasso Hofmann, Repräsentation, vierte Aufl. mit einer neuen Einleitung, Berlin: Duncker & Humblot 2003; excellent in particular on the turn to modernity: Harvey C. Mansfield, "Modern and Medieval Representation", in: J. Roland Pennock/ John W. Chapman, Hg., Representation, New York: Atherton Press 1968.

[4] Craig Calhoun, "The Class Consciousness of Frequent Travelers: Toward a Critique of Actually existing Cosmopolitanism," *The South Atlantic Quarterly* 1001, 4/ 2002, 869-897; see also: Calhoun, "'Belonging' in the cosmopolitan imaginary," *Ethnicities* 3 (4), 531-553. Further: Calhoun, Nations Matter. Culture, History, and the Cosmopolitan Dream, London: Routledge 2007, and my critical review in: American Sociological Review 2008.

[5] Michael Stolleis, "Diebstahl an sich selbst", in: Frankfurter Allgemeine Zeitung 120/ 24. Mai 2006, N3: "Bezieht man noch die halbfreien Kolonen, Hörigen, Zinsbauern und die Freigelassenen in das Bild ein, dann sieht man eine vielfältig gestaffelte Gesellschaft vor sich. *Ungleichheit war ihr Zeichen*, selbst unter den Sklaven." (My emphasis). More comprehensive: Stolleis, "Historische und ideengeschichtliche Entwicklung des Gleichheitssatzes", in: Rüdiger Wolfrum, Hrsg., Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz, Heidelberg 2003, 7-22.

[6] Michel Foucault, Der Gebrauch der Lüste. Sexualität und Wahrheit 2, Frankfurt: Suhrkamp 1986; Paul Veyne, Ed.: *History of Private Life: From Pagan Rome to Byzantium*, Cambridge: Harvard University Press, 1992.

was a late invention, not earlier than the 16th Century, the time of the first Protestant Revolution.[7]

Even if Roman cosmopolitanism was much more universal and individualized than Greek cosmopolitanism, the price of this double progress was a complete de-politicization of the cosmopolis into a mere *bios theoreticos*, a fictious global community of philosophers that did hardly represent anything more than an ideological glorification of a superstructure suitable for the Roman Empire.[8] Roman cosmopolitanism transformed all human beings into free members of the cosmopolitan order of nature, and Roman *ius naturale* for the first time described all men as born free and equal ("…everyone would be born free by the natural law…", Ulpian, Dig I, 1,4; "…with regard to the natural law, all men are equal…", Dig 50, 17, 32) but the free and equal nature of all men (including all animals) was not at all in contradiction with slavery (or eating animals) and all the other social inequalities, regulated by *ius gentium* and *ius civile* in all its brutal details. Natural law even was the last justification to treat slaves like animals, pets or – as in Roman law – things (*res*).[9]

Classical Roman cosmopolitanism functioned as a method of ruling through agreement only in the fictitious cosmopolis while in the real *Imperium Romanum* the usual methods of *leges pacis imponere* supervene: execution, deportation, and mass-enslavement.[10] On the other hand, one must admit that even these natural laws which were designed as a *description* of nature (and not as a prescriptive legal rule) and had no *normative* meaning within the Roman Empires positive law, set off an extraordinarily progressive "effective history" [*Wirkungsgeschichte*]. It's *symbolic* meaning in the course of a long history of *legal and political revolutions* and *radical reinterpretations* was transformed into normative constitutional meaning in particular during the Enlightenment and the Constitutional Revolutions of the 18th and 19th century.[11]

The Cosmopolitan Right

For Kant the "cosmopolitan right" (*Weltbürgerrecht*) "of universal hospitality" should constitute a world citizenship and a rudimentary international legal subjectivity of individual human beings. Kant's *supranational* universal hospitality is a matter of "right,"

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[7] On the Protestant Revolution see now: Harold Berman, Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition, Cambridge MA 2006; John Witte, Law and Protestantism: The Legal Teachings of the Lutheran Reformation, Cambridge UK: Cambridge University Press 2002.

[8] Women certainly fared better with the Roman Stoics than with the Greeks, but even there the real value of the new ideals of the loving couple were hardly higher than the "edifying style" of its philosophical and poetic champions: "When Seneca and Pliny speak of their married lives, they do so in a sentimental style that exudes virtue and deliberately aims to be exemplary. One consequence was that the place of the wife ceased to be what it had been. Under the old moral code she had been classed among the servants, who were placed in her charge by delegation of her husband's authority. Under the new code she was raised to the same status as her husband's friends.… For Seneca the marriage bond was comparable in every way to the pact of friendship. What were the practical consequences of this? I doubt there were many. What changed was more than likely the manner in which husbands spoke of their wives in general conversation or addressed them in the presence of others." (Veyne, "The Roman Empire," in: Veyne, History of Private Life, 42f.

[9] For a different of Ulpian natural right of freedom in the more narrowed context of *lex mercatoria*: Otfried Höffe, Demokratie im Zeitalter der Globalisierung, München: Beck 1999, 236.

[10] See also Alexander Demandt, *Der ideale Staat* (Cologne: Böhlau, 1993), 263f; Luciano Canfora, "Der Bürger", in: Jean-Pierre Vernant, ed.: Der Mensch der griechischen Antike, Frankfurt: Campus 1993; Egon Flaig, "Europa begann bei Salamis", in: Rechtshistorisches Journal 13/ 1994; Moses I. Finley, Das politische Leben in der antiken Welt, München: Beck 1991.

[11] See Martha Nussbaum, "Kant and Cosmopolitanism," in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, ed. J. Bohman and M. Lutz-Bachmann (Cambridge: MIT Press, 1997).

not "philanthropy." Kant's point is strictly anti-hierarchical and egalitarian. The "right to visit" is an equal entitlement to unhindered and free movement of citizens, and *not of their rulers and the armies they commanded*, in order to be able to enter into a "possible commerce [*Verkehr*]" with any human being at all, hence, gives "no one more right than another to be on a place on the earth".[12] The right to hospitality for Kant is a basic right that legally constitutes a (rudimentary) *global civil society* and *cosmopolitan citizenship*. It is no longer only a human right but becomes by its use a civic right.

This idea was very familiar in the philosophy of European Enlightenment. Francois Quesnay already had suggested, to complete the new and border transcending freedom of markets, the freedom of *laissez-faire* with the other border transcending freedom of *laissez-passer*.[13] A similar radical move was taken in the famous French *Declaration of Human and Civic Rights* from August 1789. Different from the later constitutional text books the *Declaration* refers to the universal idea of an original social contract and, consequently makes *no difference* between the universal extension of men as bearers of human rights and citizens as bearers of civic rights. Transformed from the state of nature into the state of society only the *meaning*, not the *extension* of rights is changing. Men are becoming citizens and human rights are replaced by civic rights. The idealism of the *Declaration* which Hannah Arendt strikingly has called "Jacobin patriotism of human rights"[14] was not only an ideology.

Since the democratic revolutions of the 18th century we can observe an impressive progress of social and institutional learning which regularly led to the inclusion of formerly excluded voices, persons, groups, classes, sexes, races, countries, regions etc. In the words of Rawls: "The same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women."[15] The experience of a successful learning process of social inclusion can be, and has been stretched to former silenced voices of the western societies as well as to the oppressed voices of non-western cultures.

Yet, the reality of western democracies often looks different. The story of impressive normative learning is not the whole story. If we tell the whole story then we have to accept that in many cases (and in some way in all cases) the *expansion of social inclusion was with the price of new exclusion*, or new forms of latent or manifest oppression. The history of western civilization and western democracy is not only a Rawlsian success story of *expansion through the inclusion of the other*. It is at the same time a Foucaultian or Anghien story of *expansion through imperialism*, a story from the "heart of darkness".[16] Since the first European division of the world in the Treaty of Tordesillas 1494 between Spain and Portugal imperialism vanished and reappeared with ever new means, and under ever new covers and labels, even anti-imperialist labels.[17] Even the present state of inclusion of the other within an emerging cosmopolitan civil society sometimes appears to be nothing else than the expression of a highly exclusive "class consciousness of frequent travelers."[18]

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[12] Kant, Kant, "Toward Perpetual Peace," in *Immanuel Kant: Practical Philosophy*, Mary Gregor, ed., Cambridge: Cambridge University Press, 1996, 328f.

[13] Quesnay quoted from *Paul Streeten*, Globalisation – Threat or Opportunity? Copenhagen: Business School Press 2001, 25.

[14] Hannah Arendt, Elemente und Ursprünge totaler Herrschaft, München: Beck 1991, 170.

[15] John Rawls, *Political Liberalism*, (New York: Columbia 1993), XXIX.

[16] Joseph Conrad, Heart of Darkness, Norton Critical Edition, New York 2005.

[17] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Harvard Univ. Press 2004).

[18] Craig Calhoun, The Class Consciousness of Frequent Travelers, in: The South Atlantic Quarterly 4/ 2002, 869-897; Calhoun, 'Belonging' in the cosmopolitan imaginary, in: Ethnicities 3 (4), 531-553; Calhoun, Cosmopolitism and Belonging, Vortrag 37. World Congress Int. Inst. Sociology,

The Western Legal Tradition

But the reproduction of social structures of class rule and relations of domination, exclusion and silencing does not change the *normative facticity* (Joerges) that all modern democratic constitutions since the 18th Century are relying on the universal legal principle of the *inclusion of all human beings* and the *exclusion of inequality*.[19] The normative meaning of these two principles becomes manifest when communicative power appears as the (deeply ambivalent) "power of revenge," as *rächende Gewalt* (Habermas). To take only relatively harmless examples: Woken up in Seattle.[20] "Voi G8, Noi 6 000 000 000". Yet, also with less noise: People, who are listed as terrorists by the Security Council on a more than doubtful legal basis, are deprived of nearly all their rights and legal remedies, but some years later some of them try successfully to apply before an regional court in Luxemburg, and things begin to change. Even the SC now seems to come under legal pressure.[21] Legal text books, and in particular constitutional text books are not only talk, they are "objective spirit" (Hegel), hence "can strike back".[22]

If there is anything specific with the "Western legal tradition"[23] then it is this dialectical double structure of law that is on the one hand a *medium of repression* and *stabilization of* (counterfactual) *expectations* (Luhmann) but on the other hand is an instrument to *change the world*, to "begin with the establishment of the *civitas dei* on earth" (Berman), or in more secular terms: Law as a *medium of emancipation*, hence Kant and Hegel even have identified law with egalitarian freedom or defined law as the "existence of freedom" (*Dasein der Freiheit*).[24] What now is so specific with Western constitutional law is that the deep tensions, even contradictions between these two faces of repression and emancipation (Habermas speaks of a *Janus*-face) have been "reconciled" by legal institutions which have learned to *coordinate conflicting powers*. Harold Berman speaks of a *dialectical reconciliation of opposites*[25], but one must add that it is a dialectical (and

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Stockholm 2005. Yet as true as it is, in many other cases one must be very careful with criticism of cosmopolitanism. Hegel once wrote that the "hatred of law is the shibboleth whereby fanatism, imbecility and hypocritical good intentions manifestly reveals themselves." (Georg Wilhelm Friedrich Hegel, Philosophy of Right, Cambridge: Univ. Press 1991, § 258, fn) This is even more, true of the hatred of the idea of cosmopolitan law (from which Hegel himself was not completely free). In the 20th Century it was this hatred related closely to the disastrous ideologies of fascism and other totalitarian (e. g. Stalinist) movements. It was the "rootless cosmopolitan Jew" who heated the killing fantasies of all right wing nationalists. Anti-Semitic criticism of cosmopolitanism, at least until the end of the Second World War, had a strong backing in nearly all kinds of conservative and neoconservative thinking (Fine, Cosmopolitanism, 21).

[19] Thomas H. Marshall, Bürgerrechte und soziale Klassen, (Frankfurt: Campus 1992), 33ff; Rudolf. Stichweh, *Die Weltgesellschaft*, (Frankfurt: Suhrkamp 2000), 52.

[20] Michael Byers, "Woken up in Seattle", in: London Review of Books, 1/ 2000, 16-17.

[21] Jochen von Bernstorf, "Procedures of Decision-Making and the Role of Law in International Organizations", e-man (draft version), Heidelberg: MPI Völkerrecht 2008, 16f; Colin Warbrick, " The European Response to Terrorism in an Age of Human Rights", in: European Journal of International Law Vol. 15, 5/ 2004; Iain Cameron, "European Union Anti-Terrorist Blacklisting", in: Human Rights Law Review 2/ 2003, 225-256.

[22] Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie* VI, (Berlin: Duncker & Humblot 1997), 54.

[23] Berman, Recht und Revolution, Frankfurt: Suhrkamp 1991.

[24] Kant, Metaphysik der Sitten, Rechtslehre 345, 434, 464; Hegel, Grundlinien der Philosophie des Rechts § 4, Werke 7, Frankfurt: Suhrkamp 1970, 46; Hegel, Philosophie des Rechts (lecture-course 1819/ 20, Frankfurt: Suhrkamp 1983, 52; dem folgend: Karl Marx, "Verhandlungen des 6. Rheinischen Landtags. Debatten über das Holzdiebstahlsgesetz (Oktober 1842)", MEW 1, 1972, 109-147, 58.

[25] Berman, Law and Revolution II, 5f.

procedural) reconciliation of *lasting* opposites, of *lasting* conflicts, differences and contradictions.[26]

The constitutional *spirit* of the revolutions of the 18th century became *objective* for the first time within the borders of the modern nation state. This state always had many faces, and they include the Arendtian face of violence, the Habermasian face of administrative power, the Foucauldian face of surveillance and punishment, the faces of imperialism, colonialism, war on terror and so on. But the nation state, once it became democratic, had not only the *administrative power of oppression and control* but at the same time the *administrative power to exclude inequality* with respect to *individual rights*, *political participation* and *equal access to social welfare and opportunities*.[27] Only the modern nation state had not only the normative *idea* but also the administrative *power* to do that. This from the very beginning was the hard core of Enlightenments utopia. Up to now all advances in the reluctant *inclusion of the other*, hence all advances of cosmopolitanism are more or less advances of the modern nation state. National constitutional regimes have solved the *three basic conflicts* of the modern capitalist and functionally differentiated society. If we put it in a historically very rough way that leaves a lot of empirical questions open, then we can say that the formation and the democratic development of the nation state has solved:

(1) The (motivational) *crises of religious civil war* (Protestant Revolutions) of the 16th and 17th century by the *constitutional reconciliation of lasting conflicts* between religious, agnostic and anti-religious belief systems.[28] This was – very schematically – the result of a two-step-development, in a way that was (a) *functionally* and (b) *normatively* universal.

   (a) The *functional* effect of the formation of a territorial system of states consisted in the transformation of the uncontrolled atomic explosion of religious freedom into a controlled chain reaction that kept the productive forces of religious fundamentalism alive and its destructive forces (more or less) under control.[29] In the beginning this was the repressive effect of the *confessionalisation* of the territorial state.[30]

   (b) Yet during the long and reluctant process of *democratization* of the nation state, repressive confessionalisation was replaced by *emancipatory legislation* which, finally lead to the implementation of the equal freedom *of* together with the equal freedom *from* religious and other belief systems.[31]

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[26] *Law of collision* or *"Kollisionsrecht"* (Joerges, Teubner, Fischer-Lescano) has deep roots in Western constitutional law. One can discribe this with Chantal Mouffe also as transformation from *antagonism to agonism* – if one keeps in mind (against Mouffe) the constitutive role of constitutional law in this transformational process.

[27] Thomas H. Marshall, Citizenship and Social Class, 33ff.

[28] This was the very achievement and the specific advance of the Western legal tradition since the 11th and 12th Century Papal Revolution: Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983. On the distinction of different types of crises (motivational, legitimisation, etc.) see Jürgen Habermas, Legitimationsprobleme im Spätkapitalismus, Frankfurt/M.: Suhrkamp 1973.

[29] In this way Max Weber tells the story in his *Protestant Ethics*.

[30] Wolfgang Reinhard, Geschichte der Staatsgewalt, München: Beck 1999; Heinz Schilling, Die neue Zeit, Berlin: Siedler 1999; Horst Dreier, "Kanonistik und Konfessionalisierung. Marksteine auf dem Weg zum Staat", in: Georg Siebeck, Ed.: Artibus ingenius, Tübingen: Mohr Siebeck, 133-169: M. Stolleis, "Konfessionalisierung" oder "Säkularisierung" bei der Entstehung des frühmodernen Staates, in: Ius Commune XX (1993), S.l ff. (7); W.Reinhard/H.Schilling (Hrsg.), Die katholische Konfessionalisierung, 1995: H. Schilling, Die neue Zeit. Vom Christenheitseuropa zum Europa der Staaten. 1250 bis 1750, 1999.

[31] *Talcott Parsons*, The System of Modern Societies, Englewood Cliffs: Prentice Hall 1972.

The emerging nation state has also solved:

(2) The (legitimisation and) *constitutional crisis* of the public sphere, of public law and public power of the old European *Ancient Regime* (Constitutional Revolutions) of the 18th and 19th Centuries. Constitutions have transformed *antagonistic class fights into agonistic political fights between political parties, unions and entrepreneurs, civic associations etc*.[32] Bloody Constitutional Revolutions became in the (better) course(s) of (Western) history *permanent and legal revolutions*.[33] Again the effect was twofold:

(a) A *functional* transformation of the destructive and oppressive potential of a highly specialized politics of accumulation of power for powers sake into a (more or less) controlled explosion of all the productive forces of public *and* administrative power[34] was accompanied by;

(b) *democratic emancipatory legislation* which finally led to the implementation of the freedom *of* public power together with the freedom *from* public power.

At least even the:

(3) *Social class conflicts* (Social Revolutions[35]) of the 19th und 20th Centuries could be solved through the emergence of a regulatory social welfare state which transformed the elitist bourgeois parliamentarism of the 19th Century into egalitarian mass-democracy. The social class fight was institutionalized[36], and the violent social revolution became a legally organized "educational revolution".[37]

(a) It was the great *functional* advance of social democracy to keep most of the productive, and get (more or less) rid of the destructive forces of the exploding free markets of money, real estate and labour[38] by overcoming the fundamentalist bourgeois dualism of private and public law.[39] This in the first decades of social welfare regimes was more or less an achievement of *administrative law* and *bureaucratic rule* in a regime of *low intense democracy*.[40]

(b) The ongoing *democratic* Rights Revolution[41] that was directed against low intense democracy, finally led to the implementation of the freedom *of*

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[32] Chantal Mouffe, Laclau.

[33] Justus Fröbel, quoted from: Habermas, "Ist der Herzschlag der Revolution zum Stillstand gekommen?", in: *Die Ideen von 1789*, Frankfurt 1989.

[34] In this respect three very different approaches, the one historical, the other power-theoretical the third from systems theory comply: Alf Lüdtke, "Genesis und Durchssetzung des modernen Staates", in : Archiv für Sozialgeschichte, 20, 1980, 470-491; Foucault, Überwachen und Strafen; Luhmann, Verfassung als evolutionäre Errungenschaft.

[35] Usually the narrative of the social revolutions is told as a gradual transformation of the nation state (Marshall, Citizenship and Social Class; Talcott Parsons, The System of Modern Societies, Englewood Cliffs: Prentice Hall 1972). This seems evident, but the story can also be told as part of the global legal revolution of the 20th century (see below).

[36] Dietrich Hoss, Der institutionalisierte Klassenkampf, Frankfurt: EVA 1972.

[37] Parsons, System of Modern Societies.

[38] Karl Polanyi, The Great Transformation, Frankfurt: Suhrkamp 1997.

[39] Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts 1920, zit. n. d. Nachdruck: Aalen 1981.; Kelsen, Reine Rechtslehre (1934) Wien 1967; Kelsen, Demokratie und Sozialismus, Darmstadt 1967.

[40] On low intense democracy: Susan Marks, The Riddle of all Constitutions, Oxford: Oxford University Press 2000.

[41] Cass Sunstein, After the Rights Revolution, Cambridge: Harvard 1993.

> markets together with the freedom *from* markets, and transformed the system of individual rights which was based on the freedom of property into a comprehensive system of welfare *and* anti-discrimination norms.[42]

Yet, the impressive normative *and* functional advances of the western democratic nation state were with the price of its original cosmopolitan claims.

Cosmopolitanism and the Modern Nation State

The modern nation state until 1945 was the state of the regional societies of Europe, America and Japan, and the rest of the world was either under their imperial control or kept outside. The *exclusion of inequality* until the mid of the 20th century did mean internal equity for the citizens of the state, and external inequality for those who did not belong to the regional system of states. There was even no serious or legal claim for a *global* exclusion of inequality.

When Kant proposed the "cosmopolitan condition" of linking nations together on the grounds that in modern times "a violation of rights in one part of the world is felt everywhere"[43], his notion of (political) *world* (in difference to *globe*) was more or less reduced to Europe and the European system of states.[44] When Hegel wrote of the "infinite importance" that "a human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc.", Hegel at the same time and already with the same words reduces the legal meaning of human rights to male citizens, biblical religions and European nations.[45] He further explicitly limits human rights to national civic law (of the *bürgerliche Gesellschaft* and its *lex mercatoria*) that looses its validity when it comes to the essential concerns of the executive administration of the state (*der Staat*) and its particular relations of power (*besondere Gewaltverhältnisse*, *justizfreie Hoheitsakte*). Therefore Hegel condemns any "*cosmopolitanism*" that opposes the concrete *Sittlichkeit* of the state.[46] Some decades later, when one of the "gentle civilizers of nations" (Koskenniemi) – Johann Caspar Bluntschli – declared the implementation of a "humane world order" (*menschliche Weltordnung*) to be the main end of international law[47], he never saw any contradiction between this noble aim and his (and his colleagues) identification of the modern state with a male dominated civilization: "*Der Staat ist der Mann*"[48], and he also saw no

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[42] On the emergence of anti-discrimination norms during the legal revolution of the 20th Century: Berman, Recht und Revolution, 46ff, 51f, 57, 63f, 66f, 69f; Berman, Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition, Cambridge MA 2006, 16ff; Berman, Justice in the USSR, Cambridge MA: Harvard Univ. Press 1963. On the dialectic of anti-discrimination norms in particular if they are dissolved from the social welfare state (as it is the case with the EU): Alexander Somek, "Das europäische Sozialmodell: Die Kompatibilitätsthese", e-man., Berlin 2008.

[43] Kant, Perpetual Peace.

[44] Whereas the *Globe* for Kant was not much more than a logical or transcendental category that limited in particular our practical reason (Reinhard Brandt, "Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre," in Brandt, ed., Rechtsphilosophie der Aufklärung, Berlin: de Gruyter 1982) the *world* (*mundus*) was the historically existing world order, and that in political term for Kant did mean the world of European states and the European ruling class (Höffe, Gerechtigkeit - Eine philosophische Einführung, München: Beck 2001, 53f.).

[45] Hegel, Philosophy of Right, § 209

[46] Hegel, § 209. For a more differenciated reading in particular of Hegel: R. Fine, "Kant's theory of cosmopolitanism and Hegels critique", in: Philosophy of Social Criticism 6/ 2003, 611-632.

[47] Johann Caspar Buntschli, Das moderne Völkerrecht 1878, 59. Compare: Andreas Fischer-Lescano/Philip Liste, "Völkerrechtspolitik", in: zeitschrift für internationale Beziehungen 27 2005, 209-249, 213f.

[48] Johan Caspar Bluntschli, "Der Staat ist der Mann", in: Gesammelte kleine Schriften 1, 284, zit. n. Martti Koskenniemi, The Gentle Civilizer of Nations, Cambridge MA 2001, 80.

contradiction to his latently racist thesis that all law is Aryan.[49] The liberal cosmopolitanism of the "men of 1873" who founded in the same year the *Institut de droit international* and invented a cosmopolitan international law, was completely Eurocentric, relying on the basic distinction between (Christian) *civilized nations* and *barbarian people*, the rough states of the 19th and early 20th Century.[50] The generous tolerance of the men of 1873 was from the very beginning paternalistic and repressive.[51] Hence, it is no surprise that the liberal cosmopolitan humanists who wanted to found a humane world order became in no time apologists of Imperialism,[52] who defended King Leopold's private measure state in the heart of darkness by drawing a strict legal distinction between *club-members* on the one side, *outlaws* (Bluntschli) on the other.[53] Following this line of argumentation article 35 of the Berlin Conference on the future of Africas (1884-85) offers "jurisdiction" for *us* civilized nations of Europa, "authority" for *them* in the heart of darkness.[54] Guantánamo has a long Western pre-history.

Yet, during the time from 1945 to the present day, classical imperialism (not a more and more de-territorialized and flexible kind of hegemony[55]) vanished, euro-centrism was completely decentred, state sovereignty was legally equalized, the state went global, and together with the globalization of the modern constitutional nation state all functional subsystems which – from the 16th century until 1945 – were bound to state power and to the international order of the regional societies of Europe, America and Japan, became global systems. The last square meter of the globe became state-territory (at least legally[56]), and even the moon became an object of international treaties between states.[57] The rational and secular, *regional culture* which originally was the specific *occidental rationality* (Weber) of Europe and North America has become a rational and secular *culture of the world*, and it constitutes the basic orientations of all main actors of the global society – of states, organizations and human individuals.[58] The not yet sufficiently understood consequence is that now Western rationalism, functional differentiation, legal formalism and moral universalism *no longer are something specific western*, and Eurocentrism has been *completely decentred*.[59]

At the end of the 20th century human rights violations, social exclusion of global and local regions and tremendous inequalities, hegemony and imperialism (that still divide the North-West from the rest of the world) did not disappear. But now (and this is a major

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[49] Koskenniemi, Gentle Civilizer, 77ff.

[50] Nathaniel Bermann, "Bosnien, Spanien und das Völkerrecht - Zwischen 'Allianz' und 'Lokalisierung'", in: Brunkhorst, Hg., Einmischung erwünscht? Menschenrechte und bewaffnete Intervention, Frankfurt: Fischer 1998, 117-140.

[51] Koskenniemi, Gentle Civilizer, 69; on repressive tolerance: Herbert Marcuse, "Repressive Toleranz", in: Robert Paul Wolf/ Barrington Moore/ Herbert Marcuse, Kritik der reinen Toleranz, Frankfurt: Suhrkamp 1973.

[52] Koskenniemi, Gentle Civilizer, 168f.

[53] Koskenniemi, Gentle Civilizer, 83.

[54] Koskenniemi, Gentle Civilizer, 126.

[55] The best point of a poor book: Hardt of Negri on Empire. For a much better account the systemic transformation of hegemony: Andreas Fischer-Lescano/ Gunther Teubner, Regime-Kollisionen, Frankfurt: Suhrkamp 2005; Sonja Buckel, Subjektivierung und Kohäsion. Zur Rekonstruktion einer materialistischen Theorie des Rechts, Weilerswist: Velbrück Wissenschaft 2007.

[56] Stefan Oeter, "Prekäre Staatlichkeot und die Grenzen internationaler Verrechtlichung", in: Regina Kreide/Andreas Niederberger, Hg., Verrechtlichung internationaler Politik. Ende oder Neubeginn der Demokratie? Frankfurt: Campus 2008, 90-114.

[57] Petra Dobner, Konstitutionalismus als Politikform, Baden-Baden: Nomos 2002.

[58] On global culture: John W. Meyer, "World Society and the Nation-State," *American Journal of Sociology* Vol. 103, 1/ 1997, 144-181; Meyer, *Weltkultur*, (Frankfurt: Suhrkamp 2005).

[59] Brunkhorst, Solidarity. From Civic Friendship to a Global Legal Community, Cambridge: MIT-Press 2005, 107-113.

difference between the beginning of the 20th and the beginning of the 21s Century) they are perceived as *our own* problems, and they are perceived not only politically and economically but also from the point of view of *universal equal rights* as a problem that concerns every citizen of the world. These rights never existed before the mid of the 20th Century as a *global system of positive legal norms*. We now *have* serious and legally binding claims for a *global exclusion of inequality*.

May be, one should describe this development, and at the same time re-describe the history of the 20th Century – the time of extremes (Hobsbawn) – as the result of a great and successful *legal revolution* which began at the end of the First World War with the American onset of war (and not to forget the tragic Russian Revolution) in 1917.[60] President Wilson forced the Western allies to claim revolutionary war objectives, and from this moment the war (and later the Second World War, again after the American intervention) was fought not only for self-preservation and national interest but also for global democracy and global legal peace: "To make the world safe for democracy" (Wilson). The legal Revolution ended in 1945 with the constitution of the United Nations in San Francisco. A new system of system of basic human rights norms together a completely new system of inter-, trans- and supranational institutions and organisations were created during the short period from 1941 to 1951 – including international welfarism which was invented *before* the great triumph of national welfare states.[61]

The development of international law has deeply changed since the founding of the United Nations, the turn from a law of coordination to a law of cooperation[62], the European Union, the Human Rights Treaties from the 1960s, the Vienna convention on the law of the Treaties, the emergence of international *ius cogens* etc. The old rule of equal sovereignty of states became the "sovereign equality" *under* international law (Art. 2 par. 1 UN), individual human beings became subject to International Law, democracy became an emerging right or a legal principle that is valid also against sovereign states, and the right to have rights which Arendt missed in the 1940s is now a legal norm that binds the international community.[63] All these legal rules are broken again and again, but this is not specific for international law but happens with national law as well. What today is new is *that international and cosmopolitan equal rights have become binding legal norms*, and hence, can be taken seriously. There is no longer any space open for any actions outside the law or the legal system.[64] Hence, if there was once any difference in principle between national and international law, there is no such a difference any longer, and this is what Hans Kelsen, Alfred Verdross and other cosmopolitan international lawyers already had claimed during the First World War.

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[60] For a first account of this thesis: Brunkhorst, "Die Globale Rechtsrevolution. Von der Evolution der Verfassungsrevolution zur Revolution der Verfassungsevolution?, in: Ralph Christensen/ Bodo Pieroth, Hg.: Rechtstheorie in rechtspraktischer Absicht, FS Müller, Berlin: Dunker & Humblot 9-34; Brunkhorst, "Kritik am Dualismus des internationalen Recht – Hans Kelsen und die Völkerrechtsrevolution des 20. Jahrhunderts", in: Kreide/ Niederberger, Verrechtlichung internationaler Politik, 30-63.

[61] Lutz Leisering, "Gibt es einen Weltwohlfahrtsstaat?" in: Matthias Albert/ Rudolf Stichweh, Hg., Weltstaat und Weltstaatlichkeit, Wiesbaden: VS 2007, 185-205.

[62] Jürgen Bast, "Das Demokratiedefizit fragmentierter Internationalisierung", in: Brunkhorst, Ed.: Demokratie in der Weltgesellschaft, Soziale Welt Sonderheft 2008 (forthcoming).

[63] For a more comprehensive overview: Brunkhorst, "Die Globale Rechtsrevolution. Von der Evolution der verfasungsrevolution zur Revolution der Verfassungsevolution?", in: Ralph Christensen/ Bodo Pieroth, Hg.: Rechtstheorie in rechtspraktischer Absicht, FS Müller, Berlin: Dunker & Humblot 2008, 9-34.

[64] Byers, Preemptive Self-Defense in: The Journal of Political Philosophy, 2/ 2003, 171-190, hier: 189.

The New Dialectic of Enlightenment

Yet, the international (and national) legal and revolutionary progress is deeply ambivalent and fragile as everything in a highly accelerated and complex modern society.[65] There are now on the one hand the basic legal principles of the *global inclusion of the other* and the *global exclusion of inequality*, but on the other hand there are global functional systems, a global public and global spheres of value emerging expeditiously which *tear themselves off from the constitutional bonds of the nation state*. This is a double edged process that has caused a *new dialectic of enlightenment*. The most dramatic effect of this process of the formation of the global society is the decay of the ability of the nation state to exclude inequalities effectively – even within the highly privileged OECD-world. This becomes very significant first with the *economic system*. Here we can observe the complete transformation of the

(1) *state-embedded markets of regional late capitalism* into the *market-embedded states of global Turbo-capitalism*.[66] The negative effect of economic globalization on our rights is that the freedom *of* markets explodes globally, and together with heavy, sometimes war-like competition: *There will be Blood*.[67] At the same time the freedom *from* the negative externalities of markets decays rapidly.

Surprisingly enough, when it comes to the religious sphere of values, we can make a similar observation. The global society makes the same proposition that is true for the capitalist economy, true for the autonomous development of the religious sphere of values. We now are confronted with the transformation of

(2) *state-embedded religions of the western regional society* into the *religion embedded states of the global society*.[68] Since the 1970s, everywhere religious communities crossed borders and were escaping from state control. Again the negative effect on our rights is that the freedom *of* religions explodes, even sometimes so much that it leads to religious war: *There will be Blood*. Yet, at the same time the freedom *from* religion everywhere comes under pressure from religious fundamentalism and from (neo-conservative) public and administrative power.

Last but not least the (internally fragmented) executive bodies of the state have decoupled themselves from the state based separation, coordination and unification of powers under the democratic rule of law, and went global.[69] The more they are

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[65] Hartmut Rosa, "The universal underneath the multiple: Social acceleration as the key to understanding modernity", in: Sérgio Costa/ J. M. Domingues/ W. Knöbel/ J. P. da Silva, eds, The Plurality of modernity: Decentering Sociology, München: Hampp 2006, 22-42.

[66] Fritz Scharpf, in: Offe; Wolfgang Streek, "Sectoral Specialization: Politics and the Nation State in a Global Economy", paper presented on the 37th *World Congress of the International Institute of Sociology*, Stockholm 2005. As we now can see, the talk about *late* capitalism was not wrong but has to be restricted to state-embedded capitalism, and state embedded capitalism indeed is over. But what then came was not socialism but global disembedded capitalism which seems to be as far from state embedded capitalism of the old days as from socialism.

[67] One-sided but in this point striking the neo-Pashukanian analysis of international law by China Mieville, Between Equal Rights: A Marxist Theory Of International Law, London: Haymarket 2005.

[68] Brunkhorst, Globalizing Solidarity: The Destiny of Democratic Solidarity in the Times of Global Capitalism, Global Religion, and the Global Public, in: Journal of Social Philosophy 1/ 2007, 93-111.

[69] On transnational administrative during the last few years a whole industry of research emerged, see only: Christian Tietje, Die Staatsrechtslehre und die Veränderung ihres Gegenstandes, in: Deutsches Verwaltungsblatt 17/ 2003, 1081-1164; Möllers, Transnationale Behördenkooperation, ZaöRV 65/ 2005, 351-389; Nico Krisch/ Benedict Kingsbury, Symposium: Global Governance, EJIL 1/ 2006; Kingsbury/ Krisch/ Richard B. Steward, The Emergence of Global Administrative Law, available at: <http://law.duke.edu/journals/lcp>. Christoph Möllers/Andreas Voßkuhle/Christian Walter (Hrsg.), Internationalisierung des Verwaltungsrecht 2007; Andreas Fischer-Lescano,

decoupled from national control and judicial review, the more they coordinate and associate themselves on regional and global levels where they constitute a couple of loosely connected transnational executive bodies. Postnational ("good" or "bad") governance without (democratic) government is performed through partly formal and egalitarian *rule of law*, elitist *rule through law*, and informal *bypassing of (constitutional) law and democratic public* by a new regime of soft law legislation which normatively has no binding force yet, empirically it has a strong binding effect[70], a bit like the old Roman *senatus consultum* which had no legally binding force but every official was well advised to follow it.[71] Hence, the executive power seems to undergo the same transformation as markets and religious belief systems which goes

(3) from *state embedded power to power-embedded states*. This leads to a new *privileging of the globally more flexible second branch of power vis-à-vis the first and third one*, which jeopardizes the achievements of the modern constitutional state.[72] The effect is an accelerating process of a global *original accumulation of power beyond national and representative government*. Some examples: the Basel-Bank-Committee,[73] the so called Bologna process of the European reform of the university system,[74] the work of the Council of Europe's presidents, prime- and foreign-ministers, who (except from the one voice of the president of the *European Commission*) have a clear democratic mandate only for national foreign policies but not for what they are doing primarily: European domestic politics.[75]

The three great transformations of the world society have turned the democratically chosen and legally organized political power within the nation state into the power of a *transnational politico-economic-professional ruling class* – including high ranked TV- and BILD-/ SUN-/ etc.-journalists and media stars who function as a system of *bypasses* implemented to prevent the heart of political decision making from *any spontaneous formation of communicative power of an untamed and anarchic public sphere*. It seems as if the Habermasian filters that should transform public opinion into political decision making[76] now are working the other way round, to close the doors for public opinion. White-Paper-Democracy.[77] The new transnational ruling class hardly relies on egalitarian will-formation anymore. This class is (not so much different from the *national* bourgeoisie of the 19th Century) highly heterogeneous and characterized by multiple conflicts of interest, but it has a certain amount of *common class interests*, such as to increase its room for maneuver by withdrawing from democratic control, and as a comfortable side-effect to preserve and increase the enormously grown, individual and collective

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"Transnationales Verwaltungsecht", in: Juristen-Zeitung 8/ 2008, 373-383. On the globalization of executive power: Klaus Dieter Wolf, Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft, Baden-Baden: Nomos 2000; Petra Dobner, "Did the state fail? Zur Transnationalisierung und Privatisierung der öffentlichen Daseinsvorsorge: Die Reform der globalen Trinkwasserpolitik, available at: <http://www.dvpw.de/dummy/fileadmin/docs/2006xDobner.pdf>.; Gertrude Lübbe-Wolf, Die Internationalisierung der Politik und der Machtverlust der Parlamente, erscheint in: Brunkhorst (Hg.), Demokratie in der Weltgesellschaft, Sonderheft der Sozialen Welt 2008.

[70] Bernstorf, Procedures of Decision-Making, 22; Möllers, Transnationale Behördenkooperation.

[71] Uwe Wesel, Geschichte des Rechts, München: Beck 1997, S.163.

[72] Wolf, Neue Staatsräson.

[73] Möllers, Transnationale Behördenkooperation.

[74] Brunkhorst, "Unbezähmbare Öffentlichkeit. Europa zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung", in: Leviathan 1/ 2007.

[75] Brunkhorst, Unbezähmbare Öffentlichkeit; Phillip Dann, Looking through the federal lens: the Semi-parliamentary Democracy of the EU, Jean-Monnet working paper 5/ 02.

[76] Bernhard Peters, Öffentlichkeit, Frankfturt: Suhrkamp 2008.

[77] European Commission, White Paper...

opportunities for private profit generation.[78] This is the new *cosmopolitism of the few*: Instead of global *democratic government* we now are approaching some kind of directorial global *bonapartist governance* – soft bonapartist governance for *us* of the north-west, hard bonapartist governance for *them* of the south-east, the failed and outlaw states and regions of the globe.[79]

The deep divide of the contemporary world into two classes of people: people with good passports and people with bad passports, is mirrored by the constitutional structure of the world society. Today there exists already a certain kind of global constitutionalism, one of the lasting results of the revolutionary change from the 1940th. But the existing global constitution(s) is (are) far away from being democratic.[80] All post-national constitutional regimes are characterized by the *disproportion between legal declarations of egalitarian rights and democracy* and *its legal implementation by the international constitutional law of check and balances*.[81] Hence, the legal revolution of the 20th Century was successful but unfinished. The one or many global constitutions are in bad shape, based on a constitutional compromise (Franz Neumann) that mirrors the hegemonic power structure and the new relations of domination in the world society, as Inger Johanna Sand recently has described it:

"The treaties and the law-making are increasingly comprehensive, and the courts and dispute-settlement bodies are increasingly judicially organized and operatively effective. They are however still different than the similar forms of nation-state organized institutions in a number of ways. The treaties and the law-making are comprehensive, but fragmented and asymmetrical. Each treaty dealing with one set of problems or purposes – without the abilities of seeing the different types of problems in relation to each other. The organizations are not democratic in relation to citizens. They are generally based on states as members and many of them are dominated by internal secretariats and experts. They are set up as top-down tools for dealing with separate issues and areas of problems. They are dominated by different elites."[82]

Scientific and technical expertise, again have become an ideology[83] which obscure the social fact that "most regulatory decisions involve normative assumptions and trigger redistributive outcomes that can not be reduced to seemingly objective scientific inquiries; each time someone wins and someone looses."[84] Hence, what seems to be

[78] Klaus Dieter Wolf, Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft, Baden-Baden: Nomos 2000.

[79] Anghie, Imperialism, Sovereignty and the Making of International Law.

[80] For the thesis that the UN-Charter is the one and only constitution of the global legal and political order, see: Bardo Fassbender, "The United Nations Charter as Constitution of the International Community", in: Columbia Journal of Transnational Law 1998, 529-619. Different approaches in: Arnim von Bogdandy, Europäisches Verfassungsrecht, Berlin, 2003; Matthias Albert/ Rudolf Stichweh, Weltstaat und Weltstaatlichkeit, Wiesbaden: VS 2007; *Arnim v Bogdandy*, Constitutionalism in International Law, in: Harvard International Law Journal, 47, 1/ 2006, 223-242; Brunkhorst, "Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism", in: Millenium: Journal of International Studies" Vol. 31, No. 3, 2002, 675-690; Brunkhorst, Demokratie in der globalen Rechtsgenossenschaft, in: Zeitschrift für Soziologie. Sonderheft Weltgesellschaft 2005, 330-348; For the thesis of constitutional pluralism see: Gunther Teubner, Globale Zivilverfassungen, in: ZaöRV Bd. 63, Nr. 1/ 2003, 1-28.

[81] For the original version of this thesis: Brunkhorst, "Globalising Democracy Without a State; Brunkhorst, Demokratie in der globalen Rechtsgenossenschaft.

[82] Inger Johanna Sand, "A Sociological Critique of the possibilities of applying Legitimacy in Global and International Law", paper presented at Onati-School for Socilogy of Law, Onati (Spain) 2008.

[83] Marcuse, "On Science and Phenomenology", in: Boston Studies in Philosophy of Science Vol. 2, New York 1965, 279-291; Habermas, Technik und Wissenschaft als 'Ideologie', Frankfurt: Suhrkamp 1968.

[84] Bernstorf, Procedures of Decision-Making, 8.

necessary and out of reach in the present situation of, pessimistically speaking post-, optimistically speaking pre-democratic global constitutionalism is a Kantian *Reform nach Prinzipien*[85] or "radical reformism" (Habermas) as well as a new "democratic experimentalism" (Dewey/ Möllers) that operates on the same level as the power of the emerging transnational ruling class: Beyond representative government and national government.[86]

Radical Reformism Today

What could radical reformism or *Reform nach Prinzipien* mean today? I do not know. But before posing the hard questions of constitutional change and institutional design which often fail because they miss conceptually the level of complexity of modern society, we should start again with concepts and principles, and that means with a critique of *dualism* and *representation* in legal and political theory.

Dualistic and representational thinking already has been deconstructed completely by the revolutionary philosophy (and scientific praxis) of the 20th Century, in particular by philosophers like John Dewey, Ernst Cassirer (after his symbolic turn), early Heidegger, late Wittgenstein, or W. v. O. Quine.[87] Yet, representational thinking that is deeply based on dualism still prevails in political and legal theory. In particular in International Law and International Relations, dualism covers a broad mainstream of opposing paradigms. From IR-realism to critical legal studies, from German *Staatsrecht* to critical theory, from liberalism to neo-conservatism the state-centred dualism is tacit consent – dualism between *Staatenbund* and *Bundesstaat*, international and national law, constitution and treaty, public law and private contract, state and society, politics (or '*the* political') and law, law-making and law-application, sovereign and subject, people and representatives, (action-free) legislative will formation and (weak-willed) executive action, legitimacy and legality, heterogenous population and (relatively) homogenous people, *pouvoir constituant* and *pouvoir constitué* etc. All these dualisms hinder us already conceptually to construct European and global democracy adequately and finally, to join the *civitas maxima*.

Yet, what Dewey and the pragmatists did with classical idealistic and metaphysical dualisms in philosophy, Kelsen and his students did with the dualisms in political, legal and constitutional theory. They have replaced each of them by a *continuum*. Kelsen's and Merkle's paradigm case was the legal hierarchy of steps (*Stufenbau des Rechts*).[88] The doctrine of *Stufenbau* does transform the dualisms of legislative will and executive performance, of political generation and professional application of legal norms, of general law and specific judgment, and last but not least of international and national law into a *continuum of concretization*.[89] Hence, if on all levels or steps of the continuum of concretization, legal norms are (politically) created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fair and equally on all levels of their creation (in this or that, and to be sure, very different ways).

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[85] Claudia Langer, Reform nach Prinzipien, Stuttgart 1986.

[86] Marks, Riddle of all Constitutions, 2f.

[87] A paradigmatic account is: Richard Rorty, Der Spiegel der Natur, Frankfurt: Suhrkamp 1981; for recent developments: Robert Brandom, Making It Explicit. Reasoning, Representing & Discursive Commitment, Cambridge: Harvard Univ. Press 1994.; J. Habermas, Wahrheit und Rechtfertigung, Frankfurt: Suhrkamp 1997.

[88] Adolf Merkl, Allgemeines Verwaltungsrecht, Wien/ Berlin: Julius Springer 1927, 160, 169; Merkl, "Prolegomena zu einer Theorie des rechtlichen Stufenbaus, in: Hans Klecatsky/ René Marcic/ Herbert Schambeck, Hg.: Die Wiener rechtstheoretische Schule, Wien: Europa Verlag, (Ursprünglich 1931: Festschrift Kelsen), 1352ff.

[89] Bernstorff, "Kelsen und das Völkerrecht", in: Brunkhorst/ Rüdiger Voigt, Hg.: Rechts-Staat, Baden-Baden: Nomos 2008, 181.

Moreover, if we go (with Jochen von Bernstorff[90]) one step further than Kelsen, and drop the transcendental foundation of a legal hierarchy and the *Grundnorm*, then we are left with an enlarging or contracting circle of legal and political communication which has no beginning and no end *outside* positive law *and* democratic will formation.[91] Democracy only then could replace the last (highly transcendentalized and formalized) remains of the old-European *leges-hierarchy* and *natural law* that is higher than democratic legitimization, and that means to get rid of the last inherited burden of dualism which "weights heavily like a nightmare on our brains" (Marx). Moreover, we should read Kelsens 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 20th Century, and as a hopeful message, as an attempt to change our worldview and our vocabulary in a way that fits to a praxis that emancipates us from ideological blindness, and helps us to get rid of the old international law of "sorry comforters" (Kant).[92]

After the mirror of nature, and the mirror of the true nature of the people are broken, hence, after *representation* democratic institutions in general should be designed to enable the *expression* of political and individual self-determination in a great variety of different organs or legal bodies, like parliaments, courts, governments, administrations, federal, inter-, trans- and supranational regimes, and in different forms and procedures of egalitarian will formation like 'participatory', 'deliberative' 'representational' or 'direct' democracy (or…) which can be combined or replaced by one another. Even if Kelsen today sometimes is read as a strong defender of representational democracy and parliamentary supremacy (or at least priority), this reading is wrong because Kelsen like Dewey made a sharp and knock out criticism of the whole idea of representation and replaced it with the idea of a continuum of different *practical methods* to express political opinions and to make decisions that are egalitarian.[93] To avoid an obstinate misunderstanding: Radical criticism of *representational* democracy must not at all be critical with *parliamentary* democracy but leads:

(1) to a re-interpretation of parliamentary democracy as one (possible[94]) *part* of a comprehensive (procedural) *method* of egalitarian will formation, deliberation and decision making;[95]
(2) to a relativization of parliamentary legislation. Parliaments no longer can be interpreted as the highest organs of the state, the one and only true representative of the general will of the people or even the essential, higher or refined will of the better self of the people (the one that fits better to the ideas of intellectuals), or the representation of the *Gemeinwohl* or commonwealth (whatever that is). Hence, for pragmatic reasons parliaments may be the best method, of democratic will formation in a given historical situation, but this depends and may change.

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[90] Bernstorff, Der Glaube an das universale Recht: zur Völkerrechtstheorie Hans Kelsens und seiner Schüler, Baden.Baden: Nomos 2001.

[91] This comes close to Habermas normatively strong or Luhmanns normatively neutralized idea of circulations of communication without a subject (*subjektlose Kommunikationskreiläufe*). Habermas, Faktizität und Geltung, Frankfurt: Suhrkamp 1992; Luhmann, Legitimation durch Verfahren, Frankfurt: Suhrkamp 1983; combined by: Marcelo Neves, Zwischen Themis und Leviathan, Baden-Baden: Nomos 2000.

[92] Brunkhorst, Dualismus des internationalen Recht.

[93] Kelsen, Vom Wert der Demokratie, Tübingen 1929 (Erste Auflage 1920), zit. n. d. Nachdruck: Aalen 1981; Kelsen, Allgemeine Staatslehre, 1925; Kelsen, Reine Rechtslehre (1934) Wien 1967.

[94] Nothing is neccessary in a democratic legal regime except the normative idea of equal freedom: Kant, Kant, Metaphysik der Sitten, Rechtslehre 345; Ingeborg Maus, Zur Aufklärung der Demokratietheorie, Frankfurt: Suhrkamp 1992; Brunkhorst, Solidarity, 67-77; Möllers, Demokratie, Berlin: Wagenbach 2008, 13f, 16.

[95] Kelsen, Wesen und Wert.

To conclude: The double criticism of dualism *and* representation has far reaching implications for theories of democracy and constitutional design which are Kelsian but go far beyond Kelsens partisanship with parliamentary democracy:

(1) If on all levels or steps of a continuum of concretization, legal norms are (politically) created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fair and equally
   - On all levels of their creation – local, national, regional and global levels (in this or that, and to be sure, very different ways)
   - In courts as well as in administrations and parliaments, in state organs and political associations as well as in the societal community, cultural institutions and economic enterprises (hence, the whole Parsonian AGIL-schema is open for democratization[96] as far as it does not destroy either private or public autonomy[97]).

(2) The different (public and private) organs, forms and procedures of legislation, administration and jurisdiction are *all in equal distance to the people*, and no organ, and no procedure is left to represent the people as a whole: "No branch of power is closer to the people than the other. All are in equal distance. It is meaningless to take one organ of democratic order and confront it as the *representative* organ to all others. There exists no democratic priority (or supremacy) of the legislative branch."[98] Instead of any substantial sovereign, democracy only allows procedural sovereignty that must express itself in "*subjektlosen Kommunikationskreisläufen*" (circulations of communication without a subject).[99]

(3) Whereas the concept of the (higher) *legitimacy* of a ruling substantial subject (the king or the state as "*Staatswillenssubjekt*"[100]) is as fundamental for *power limiting constitutionalism* as it was for medieval Christian, Papist or later absolutist regimes with its "two bodies of the king"[101] – *democratic and power founding constitutionalism* replaces *legitimacy* completely by a legally organized procedure of egalitarian and inclusive *legitimization*.[102] The procedures of legitimization have no longer any higher legitimacy. They are themselves nothing else than products of democratic legislation, hence legitimization is circular, but not in the sense of a closed and *vitiosus* circle but in the sense of an open, socially inclusive hermeneutic circle or loop of *legitimization without legitimacy*.[103]

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[96] Möllers, Staat als Argument, München: Beck 2001, 423 (*Staat vs. Gesellschaft* as a dualistic distinction *excludes* democracy, and in particular fort he order of the *Grundgesetz*: "Auch jenseits des Staats ist Demokratie möglich" because "Art. 20 Abs. 2 Satz 1 GG den auf Demokratie verpflichteten Staat als *bestimmbaren* Teil der Gesellschaft behandelt."), 424 (democracy as a dynamic, border transgressing concept: "die Symbiose von Staat und Demokratie ist …keine notwendige").

[97] Maus, Aufklärung der Demokratietheorie; Habermas, Faktizität und Geltung.

[98] Möllers, "Expressive vs. repräsentative Demokratie", in: R. Kreide u. A. Niederberger (Hg.) Internationale Verrechtlichung.

[99] Habermas, Faktizität und Geltung, 170, 492f.

[100] Brunkhorst, Schatten des Staatswillenpositivismus.

[101] Ernst H. Kantorowicz, The King's Two Bodies, Princeton: University Press 1957.

[102] Habermas, Faktizität und Geltung; Möllers, Gewaltengliederung, Tübingen: Mohr 2005.

[103] Democratic legitimization is inclusive because it governed by the one and only constitutional principle of democracy, and that is the principle of self-legislation or autonomy. This principle is socially inclusive because it presupposes that a procedure of legitimization that is democratic has to include everybody who is concerned by legislation and jurisdiction, therefore all exceptions (e. g. babies) have to be justified publicly and need compensation through human rights. Friedrich Müller, Wer ist das Volk? Eine Grundfrage der Demokratie, Berlin 1997; Brunkhorst, Solidarity, Chap. 3; Marks, Riddle of all Constitutions.

(4) Democracy is not, as the young Marx once wrote, the "solved riddle of all constitutions" but, as Susan Marks has objected, democracy is the "unsolved riddle of all constitutions"[104], hence a constitution that is democratic, has to keep the riddle open. It belongs to the *necessary meaning of democracy that is modern* that the "meaning" of "democratic self-rule and equity" never can be "reduced to any particular set of institutions and practices".[105] Without the "normative surplus"[106] of *democratic meaning* or the *meaning of democracy* which always already transcends any set of *legal procedures of democratic legitimization*,[107] the people, the "subject" of democracy no longer would be a self-determined group of citizens, or a self-determined group of all men[108] who are affected by a given set of binding decisions. If they are not able to exhaust the meaning of democracy, and to experiment within an unlimited meaning-variance of key-words like equality, equity, freedom, constitution, rights or rule of law, if we the people are not able to determine, discover, construct or disclose new meanings of democracy (input-legitimization), then there is no democracy at all but only a heteronomous people of – may be happy – slaves (output-legitimization).

[104] Marks, Riddle of all Constitutions.

[105] Marks, Riddle of all Constitutions, 103, 149f.

[106] Tom McCarthy, Philosophy and Critical Theory, 21.

[107] ÜR 188 etc.

[108] 'All men' can mean a lot of things, e. g. all men in a bus, all men on German territory, all men with US passports (that is far less than all US citizens), all men on the globe, all men in the universe, all men who are French citizens, all men who are addressed by a certain legal norm. Democracy and democratic legitimization is only concerned with the last two meanings (and the possible tension between them).

Part Two

Transnational Governance, Deliberative Supranationalism and Constitutionalism

Public Accountability and the Public Sphere of International Governance

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Introduction

The internationalisation of policy-making, although still slower than the transnationalisation of market relations, has anticipated the creation of democratic forms of political input and control. While academic commentators have highlighted this threat to democracy more than three decades ago (Kaiser 1971), only in the 1990s it has become a major issue of public and scholarly concern. Particularly in the EU, calls for more democracy, legitimacy and accountability have proliferated since the ratification crisis of the Maastricht Treaty (De Bùrca 1996, Føllesdal 2006). One of the key symptoms of the democratic deficit that few authors fail to address is the problem of public accountability, which appears especially troubling after the turn from traditional intergovernmentalism to governance. 'Governance', both European and global, is characterised by a spread of decision-making competence over various levels of policy-making. At the global level, it is also notably fragmented (Picciotto 1997: 1021). It often takes place in networks that may include only public officials (Slaughter 2004) but quite often also private bodies, thus blurring the boundaries between public and the private realm. These networks rely heavily on informal contacts among the actors involved (Eberlein & Grande 2005).

Due to the diffusion of competences, the public-private mix, and informal modes of operation, the origins of political choices in governance networks are often unclear, and responsibility is at times hard to establish (Lord 2004: 195, Papadopoulos 2007: 473). And, despite the rhetoric of cooperative problem solving and joint provision of public goods, by which governance is often described and justified, '[t]he influence of governance networks is not inevitably positive, nor even benign' (Toope 2000: 96). Network governance also has a pronounced problem of external visibility. 'Networks are based on flexible and functional peer relationships. Their very informality and clubishness, however, invite exclusion and make monitoring and participation by non-state actors and other government officials often difficult' (Raustiala 2002: 24). For lay people at least, the operation of multidimensional policy networks is extremely hard to comprehend. Along with geographical distance and language barriers, the emergence of governance networks has blurred the citizens' picture of who is doing what in politics beyond the state. Therefore, '[n]etwork governance obscures the process of and accountability for public policy formulation, decision making, and execution' (Mathur & Skelcher 2007: 235). Hence, it would seem logical to argue that the core of the accountability problem of governance is a lack of *accountability towards the wider public*.

Interestingly, however, this notion of public accountability and the normative demands on governance networks that may be derived from it seem to be on the retreat. In the recent literature, we find public accountability in the guise of accountability to peers within governance networks (Benner et al. 2004), to markets (Grant & Keohane 2005) or towards Ombudsmen and courts (Harlow & Rawlings 2007). For a growing number of authors, public accountability is becoming an umbrella term, meant to describe a variety of accountability mechanisms that operate in the realm of public (as opposed to corporate) governance (Bovens 2007). Only for a minority, it seems, the term public accountability still pertains quite specifically to the opportunity of citizens to critically monitor proceedings of governance (Curtin 1996, Eriksen 2005, Papadopoulos 2007). What we observe here is a definitional contest between traditional notions of 'democratic

accountability' and of rival accountability concepts that have their origin predominantly in management and public administration.[1] This definitional contest mirrors some debates in public policy research about the accountability of new forms of public management or, indeed, governance, although it rarely refers to them (for an overview see Erkkilä 2007).

The aim of this paper is to make a strong case for the public in public accountability. The first section maps the definitional struggle over public accountability in the age of international governance. It substantiates the claim that there is an increasing conceptual creep from economics and management into definitions of public accountability. In particular, it identifies three features of recent discourse that are undermining the traditional view of public accountability as democratic accountability: a) the turn to the stakeholder concept; b) the principal agent framing; and c) the view of public accountability as an umbrella under which manifold instruments or mechanisms can be subsumed. Having mapped the definitional contest over public accountability I in section two defend the view that 'public accountability' should always mean accountability towards citizens. Public accountability is exercised in a non-governmental sphere in which a public debate about the flaws, merits and performance of governance takes place. In that section I also locate its place and importance in any system of governance that wishes to qualify as democratic. I contend that public accountability complements the other central mechanisms of electoral and legal accountability.

The third section of this paper takes issue with the idea of the public sphere, a concept that generally needs explanation, and especially so when it comes to international or global politics. In order to have public accountability as defined in this paper, international governance would need a transnational public sphere, but some would claim that it does not exist (yet). I therefore clarify my notion of a transnational public sphere and two crucial elements of it: first, a functioning media infrastructure and second, a transnational civil society. Organised civil society is instrumental in exposing current governance to wider public scrutiny and in detecting and denouncing pathologies of governance that some of the actors involved would prefer to silence; in translating the highly technical and specialised discourses of regulatory policies into a language accessible to lay people; in flagging new issues and formulating alternatives to the choices made by policy-makers. In short, I highlight the role of organised civil society as a critical *watchdog*, rather than representative of citizens' interests, or supplier of policy-relevant expertise. I conclude that such a public sphere of governance is not only desirable from a normative point of view, but also functionally important. External pressure on governance arrangements that originates from the public sphere is an important mechanism in switching governance arrangements from the routine mode to the 'crisis mode' (Peters 1993: 348) which is more amenable to reform and change.

What is Public in 'Public Accountability'?

The English term accountability, which has no direct equivalent in other languages, has long pedigree and dates back to the middle ages (Dubnick 2007). In contemporary usage the term describes a formal social relationship (Thomas 2003: 549) that is characterised by 'the giving and demanding of reasons for conduct' (Roberts & Scapens 1985: 447). Others, especially lawyers, would add the possibility to sanction misconduct to this definitional core (Mulgan 2000: 556). Moreover, as Bovens correctly insists, accountability is essentially a retrospective exercise (Bovens 2007: 453). Since accountability may apply to various types of social relationships, different types of accountability may be distinguished. A central and rather uncontroversial distinction has been made between managerial (or corporate) and political (or public) forms of accountability. 'The latter is assumed to apply particularly to governments who are accountable to their electors for the *authority* granted to them whereas the former

[1] This is obviously not true for accountability to courts that has a systematic place in conceptions of democratic accountability, as I will explain below.

applies to managers being made accountable for the *responsibilities* delegated to them' (Broadbent & Laughlin 2003: 24, emphasis in the original). Authority, which characterises the public domain, entails the possibility to make binding decisions that affect everyone. In the public domain the accountability exercise applies chiefly to the review of office holders' conduct, with a view to preventing abuses of power (Thomas 1998: 349); in the private economic domain the focus is on the output of the enterprise and the performance of the management in achieving it.

This section takes issue with the diffusion of managerial notions of accountability into the public domain, which, in particular with regard to 'new modes of governance', has led to a definitional contest between an established understanding of public as democratic accountability and new conceptualisation inspired by the management tradition. The disciplines of European studies and International Relations thus join in a discussion long underway among scholars of public policy and public administration about the publicness of public accountability and its implications for democracy (for various geographical and sectoral perspectives see Broadbent & Laughlin 2003, Erkkilä 2007, Haque 2000, 2001, Kettl 1997, Mattei 2007, Minow 2003, Thomas 1998).

In the conventional understanding, public accountability denotes a relationship in which the public, understood as citizens, is holding elected representatives, the government, and the administration to account. 'At its heart, the idea of public accountability seems to express a belief that persons with public responsibilities should be answerable to "the people" for the performance of their duties' (Dowdle 2006: 3). Thus, with its emphasis on citizens this understanding of public accountability comes very close to conceptions of 'political accountability' (Erkkilä 2007: 8, Mattei 2007, Sinclair 1995) or 'democratic accountability'. The touchstone of democratic accountability is the responsiveness of office holders to citizens' expectations and concerns. 'The principal political mechanism of democratic accountability is electoral, with politicians being called to account to voters at periodic elections in which the sovereign electorate has a possibility to sanction them' (Goodin 2003: 34).

However, citizens not only expect public officials to respond to their preferences but also to respect the law, to treat like cases alike, and to spend public funds parsimoniously. These criteria of good conduct may be assessed not primarily via elections but by judicial review, financial auditing, and hierarchical control within public administration. However, as Behn has suggested, political performance and responsiveness remain key to any conception of democratic accountability (Behn 2001: 22). With its emphasis on retrospect and assessment of performance, the term accountability also in the public-democratic context shifts the focus of analysis from the input dimension, which is the main concern of much of democratic theory, to the output dimension and ex post control of office holders. This emphasis on ex post performance assessment circumscribes the common ground with managerial types of accountability.

Managerial accountability, in fact, is centrally concerned with performance and results, but much less with input. With regard to 'new modes of governance', the orientation towards results and the versatility of the managerial accountability concept apparently is an attractive feature. The term accountability seems to be better applicable than, e.g., 'democracy' to new modes of governance within and beyond the state. For one, new modes of governance so obviously escape traditional conceptions of government and top-down steering (Wolf 2002). Second, they are functional arrangements of collective problem-solving, whose regulatory scope is quite narrowly circumscribed. Therefore, Keohane and Grant argue that we ought to get rid of traditional notions of democratic accountability in this context because they would not make us see that '[m]ultilateral institutions are, indeed, highly constrained by accountability mechanisms' (2005: 37). Some empirical studies, such as the 'Global Accountability Report', indeed have endeavoured to measure public and private organisations (IOs, NGOs, multinational corporations) to the very same yardsticks of accountability (One World Trust 2006).

There is no room here for extensive reflection on the differences between those types of organisations and the usefulness of cross-sectoral rankings. My point is just to illustrate that the 'public' in public accountability is increasingly becoming redefined in the context of international governance, if not disappearing altogether.

In the following paragraphs I identify three tendencies in the governance discourse that indicate the shift from traditional notions of public accountability towards managerial conceptions. First, the turn away from citizens and towards stakeholders. Second, the popularity of the principal-agent approach, which turns citizens into one principal among many others. And third, the tendency to conceptualise public accountability as an umbrella term that covers multiple accountability mechanisms, many of which do not contribute at all to popular control of governance. The literature on international governance hence is in the process of revising the established distinction between managerial and public/political/democratic accountability.

The Turn to Stakeholders

A first indicator of conceptual change is the advent of the stakeholder on the scene. Although ordinary citizens also retrospectively assess government there appears to be a tendency in the governance literature to replace citizens or the citizenry by stakeholders. 'Accountability refers to the fact that decision-makers do not enjoy unlimited autonomy but have to justify their actions vis-à-vis affected parties, that is, stakeholders. These stakeholders must be able to evaluate the actions of the decision-makers and to sanction them if their performance is poor (…)' (Held & Koenig-Archibugi, 2004: 127). The term stakeholder has its origins in the management literature and means a party that has an interest (stake) in a firm, to be distinguished from the shareholders who own the firm. The diffusion of this word into debates over public governance implies that public accountability is not for everyone but for those affected, insinuating that these can be recognised and defined objectively, maybe even a priori. The shareholder / stakeholder distinction also paves the way for the internal / external dichotomy to which I will return below.

The turn to stakeholders has not just discursive but practical political consequences. To increase accountability towards stakeholders it is often suggested that institutions of public governance should devise consultative forums in which stakeholders can exercise their right to hold decision-makers to account. While one would not object to consultations with interested or affected parties the (self-)selection of privileged partners bears the risk of exclusion. This has been highlighted with regard to consultative practices in the EU (Greenwood & Halpin 2005) as well as in the global setting (Ottaway 2001). New regulatory regimes in the United States that foresee extensive stakeholder consultation have given rise to similar concerns about access and publicity. 'For those who are not at the table, however, there is a severe problem of accountability' (Harrington & Turem 2006: 218). The turn from citizens to stakeholders of governance, or to consumers, may hence lead to manifest processes of social exclusion (Haque 2000).

The Principal-agent Framing

The conceptual move towards stakeholders is complemented by the framing of accountability relations in terms of principal-agent theory (PA). As is well known, the principal-agent concept does not have its origins in political science or democratic theory, but in organisational economics (Jensen & Meckling 1976, Laffont & Martimort 2002). The PA relationship was conceived as a contract under which one or more persons (the principal) engage another person (the agent) to perform some service and to that end delegate some decision making authority to the agent. PA thus is often described as a contractual approach to analysing governance and delegation. One of the fundamental problems that principals face (and that explains the conceptual vicinity to accountability) is the necessity to monitor the conduct of an agent that enjoys considerable leeway and may have a private agenda.

The PA framework has become popular in political science and also in the study of international and European governance, in which instances of delegation abound (e.g. Hawkins et al. 2006, Kassim & Menon 2002, Pollack 1999, 2007). There is nothing wrong with the transfer of analytical concepts from one branch of the social sciences to the other and the applicability of PA theory is obvious wherever explicit delegation of specific tasks to international organisations or functional agencies is at issue. We should be alerted, however, once the whole issue of public accountability of governance becomes dominated by the PA logic, as in one recent special issue (Benz et al. 2007: 443).

Framing accountability of public governance in terms of a PA relationship facilitates the dissolution of the democratic nexus between citizens and political decision-making. Although it is often applied to it (Strøm 2000), the PA concept does not work particularly well to describe delegation and accountability between citizens and political representatives or governments. First, the act of electoral delegation is extremely unspecific. 'Most electoral democracies present their voters with only two or three realistic choices, which means that a multitude of issues must map into a small decision set. (…) A small decision set means that even perfectly informed voters must make their choice on the basis of the few issues they regard as most important, and then accept their representative's decisions on the other issues, whether they approve of the decisions or not' (Rubin 2006: 70). Electoral choice, therefore, does not resemble a delegation contract. As the act of empowerment is so general and unspecific, citizens cannot retrospectively punish their agent for a single decision they dislike. To make things worse, electoral choice is not only an ex-post review mechanism but it is at the same time, and inevitably so, a bet on the future (Riker 1982). Finally, in democratic politics, standards for assessing the performance of the agent are notoriously unclear. The agent is faced with continually and often unexpectedly shifting expectations on the part of the principal, which clearly contradicts the original idea of a delegation contract in which expectations are stated.

When applied to international governance the PA concept also lends itself to a distinction between the internal and external accountability of organisations. In fact, national governments are often defined as the key principals who delegate tasks to international organisations, agencies, or courts. Therefore, accountability of governance institutions is owed primarily to them while citizens or 'the public' are relegated to the status of external stakeholders, along with interest groups, business, NGOs etc. The analytical distinction between internal and external dimensions of accountability is by no means 'wrong', but in a rather subtle way it undermines the idea that all democratic institutions of governance should be primarily accountable to citizens.

There also is empirical evidence to document that governments abuse their privilege as primary principals to prevent external accountability to the wider public. As Kahler argued with regard to the International Monetary Fund (IMF) advances in external transparency and accountability to a wider public were blocked by the internal principals (2004: 145/6). The same is true for the WTO in which governments are actively hampering increased public scrutiny of what is going on in the organisation ( ). Principal agent theorising is, of course, not causing these tendencies but the conceptual distinction between internal and (somewhat secondary) external accountability that it provides may be used to defend and justify them. This concern is not completely out of this world since PA theory has been demonstrably influential in shaping policies. It guided, for instance, public sector management reform in New Zealand (Scott et al. 1997: 359/60), which in turn has led to major concerns regarding public accountability and responsibility (Gregory 1998).

Public Accountability as Umbrella Term

One of the key questions with regard to the concept of public accountability is how many dimensions or mechanisms it actually entails. The traditional notion of public as political

or 'democratic' accountability is parsimonious in this respect. However, inspired once again by the management literature, it has become fashionable to use public accountability as an umbrella term covering numerous types of accountability relationships in the public domain. Bovens in an often-cited article argues that '[p]ublic accountability comes in many guises' (2007: 454) and subsumes five types of accountability under the umbrella: political, legal, administrative, professional (to peers), and social (to societal stakeholders) (455-7). Benner et al. distinguish five with regard to global public policy networks, crucially adding accountability to markets (2004: 199/200). Grant and Keohane in an article on accountability 'in world politics' count even seven (2005: 36). The term citizen has completely disappeared from their list and the public comes in as a 'diffuse public' that still has to divide its accountability mechanism of 'public reputational accountability' with peers. This testifies to the marginalisation of the citizen and the public in recent discourses on the accountability of international governance. The danger associated with advent of new accountability techniques in the public realm is that the public in the sense of all citizens together gets lost out of sight (Haque 2001: 77).

The recent work by Harlow and Rawlings (2007) on new forms of network accountability in the EU can illustrate this problematic. The authors 'take accountability to be essentially a *public* procedure, sited in an open forum or at least accessible to citizens' (Harlow & Rawlings 2007: 545, emphasis in the original). However, they move on to consider just two types of such public accountability in the European polity. First, legal accountability through the courts, in particular the European Court of Justice and the Court of First Instance. Second, they consider investigations by the European Ombudsman as a softer form of accountability that is more readily accessible to individual citizens. However, the ECJ is concerned with breaches of the law, and the mandate of the Ombudsman is restricted to inquiries into cases of maladministration by European institutions, such as capricious decisions, corruption, or inertia. I do not wish to argue against judicial accountability and critical review by an Ombudsman. But being held accountable by one citizen or one company at a time is different from being held accountable by the public as a whole. This version of network accountability cannot produce accountability for political agendas, programmes, and choices. And it thirdly does not resolve the 'government by stealth' problematic – remoteness, invisibility, and lack of public debate.

Neither is peer accountability within governance networks (Kickert 1993) likely to resolve this problematic. In the EU, the open method of coordination (OMC) was hailed as a novel democratic mode of policy-making due to its (allegedly) participatory and deliberative character. The OMC relies heavily on peer accountability, promising to stimulate a learning exercise and a cooperative strive for best practice. While this is clearly not the place to discuss the merits of OMC, some came to argue that it threatens public accountability by further weakening public debate and critical scrutiny by citizens and national parliaments (Benz 2007: 514-7). To put it provocatively: How publicly accountable is an OMC when '[a]part from those involved, there is little awareness of its existence' (De la Porte & Nanz 2004: 278)? By introducing and legitimating modes of accountability such as peer accountability in networks, the umbrella concept of public accountability obfuscates the relationship between public accountability and the public sphere. In the following paragraphs I will therefore try and rescue the public in public accountability and make the case for 'public accountability' as a specific type of accountability relationship that functions through critical debate in the public sphere.

Public Accountability as Accountability to the Public

Public accountability, as should have become clear so far, is often used interchangeably with the term political accountability, which in turn might become redefined as democratic accountability. I wish to make the case for 'public accountability' as a specific type of accountability relationship that functions through critical debate in the public sphere and that contributes to the broader task of democratic accountability. The

intention is to give public accountability a very clear and narrow meaning: 'Public accountability is understood as a more informal but direct accountability to the public, interested community groups and individuals' (Sinclair 1995: 225). Public accountability hence is the accountability of power holders towards critical questions and commentary arising from the public sphere. A similar understanding, though not always explicit, can be detected elsewhere in the literature (Papadopoulos 2007: 477).

Public accountability in this sense is not equal to democratic accountability but rather a necessary element of it that enables other accountability mechanisms, especially elections, to function smoothly. Public accountability here reinforces two other key mechanisms of democratic accountability: electoral and legal accountability. Political accountability means that power holders are subject to regular approval by their constituency. In democratic countries, focal points of political approval are elections. When their terms in office expire, decision-makers need to face confirmation through competitive elections.

Accountability through elections, however, builds on the presumption that citizens have had the chance to form a political will based on information about the conduct and performance of office holders. As Walter Lippmann famously said, '[t]he world that we have to deal with politically is out of reach, out of sight, out of mind. It has to be explored, reported, and imagined' (Lippmann 1997[1922]: 18). For electoral accountability to function there needs to be an intermediate sphere of public communication that enables citizens to review what is happening in government. In turn, public debate enables office holders to observe and react to changing expectations of their constituency. This is why public accountability taking place through public discourse is central for the functioning of a democratic polity.

Another key mechanism of democratic accountability is juridical in nature. Power holders are accountable not only to voters and parliaments but also to courts. In most democratic political systems constitutional courts have the possibility to subject legislative acts of the executive to judicial review, upon a complaint filed by citizens or upon their own initiative. This form of accountability qualifies as democratic because one of its major purposes is to protect the fundamental rights of citizens against unlawful decisions of the executive and against a 'tyranny of the majority'. In addition, citizens can challenge administrative decisions that affect them in front of administrative courts. Legal accountability thus complements electoral accountability; and it has been argue that as 'new modes of governance' proliferate, which include private actors that are removed from direct political control, the mechanism of legal accountability has become even more important (Jensen & Kennedy 2005). The relationship between legal and public accountability is certainly less intense than the one between electoral and public accountability. However, legal action might well be triggered by public reports of misdemeanour. Box 1 below now summarises the different mechanisms of democratic accountability as I conceptualised them here.

Electoral	– accountability directly to citizens, or to political bodies elected by citizens. The default sanctioning mechanism is voting.
Legal	– accountability to non-elected courts that protect the rights of citizens. The default sanctioning mechanism is judicial review.
Public	– accountability to the public in the sense of the public sphere. The default sanctioning mechanism is a loss of reputation.

Box 1: Mechanisms of democratic accountability

These three elements of democratic accountability function synergistically and mutually reinforce each other. In particular, the threat of elections or court proceedings lends

power to public accountability. In fact, public criticism or shaming cannot ultimately enforce changes in behaviour in the same way as electoral defeat or a court sentence. Compared to the 'hard' sanctions of the electoral and legal sort the sanctioning mechanism inherent in public accountability is a 'soft' one, if taken alone. It can only target the reputation of power holders and most persons affected will feel an urge to rectify, to clarify or to defend their position. In some cases, public challenges to a person's identity and self-esteem may be sufficient to bring about changes of behaviour without any threat of 'hard' sanctions. However, political office holders who face upcoming re-election should be particularly sensitive to public opinion. Therefore, public, political and legal forms of accountability are mutually reinforcing and effectiveness of public accountability is enhanced when electoral or legal sanctioning mechanisms are lurking in the background.

Public Accountability and the Public Sphere

With regard to institutional requirements, a key condition for public accountability to function is transparency (Dyrberg 2002: 83). Democratic self-governance requires that citizens are duly informed about the political agenda, the decisions made and alternative options not chosen (Curtin 1996: 95, Heritier 2003: 824-5). However, access to such information alone does not guarantee effective public control over governance arrangements. Public accountability presupposes a functioning 'public sphere' of governance. The remainder of this essay is dedicated to an exploration of the public sphere in the transnational context.

Since the notion of a public sphere is so central in this respect, a clarification of this term and its political significance is in order. The public sphere is conceived here as 'a realm of our social life in which something approaching public opinion can be formed' (Habermas 1974: 51). It 'can best be described as a network for communicating information and points of view' (Habermas 1996: 360). In Habermas's work a crucial distinction is made between the centre of a democratic political system, and the periphery. Situated at the centre are the sites of democratic decision-making and judicial review, hence parliaments, governments and the court system. The periphery consists of processes of public communication that surround and 'besiege' the formal institutions of democratic decision-making. This communicative space, in which opinions on governance are formed and demands articulated, develops in civil society, beyond the state and the economy (Bohman 1998). The existence of a non-governmental and non-for-profit realm is therefore essential for the functioning of a democracy. It is here that new issues and concerns arise, and it is here that new political demands are formulated (Habermas 1996: 367, Peters 1993: 340).

The emphasis on a public sphere is not confined to deliberative theories of democracy, such as Habermas's. Rather, it has a systematic place in many variants of democratic theory. 'There is a close link between theories of the public sphere and democratic theory more generally. Democratic theory focuses on accountability and responsiveness in the decision-making process; theories of the public sphere focus on the role of communication in facilitating or hindering this process' (Ferree et al. 2002: 289). The existence of national public spheres is rather uncontroversial and usually taken for granted. However, a public sphere conceived as a communicative space is not *a priori* defined by national boundaries but by the boundaries of communication flows. Those can, in theory, transcend national borders, although in practice they may do so only to a limited extent. Nancy Fraser gives a superb account of the challenges posed by the undeniable transnationalisation of political power and communication flows.

'In general, then, public spheres are increasingly transnational or postnational with respect to each of the constitutive elements of public opinion. The 'who' of communication, previously theorised as a Westphalian-national citizenry, is often now a collection of dispersed interlocutors, who do not constitute a *demos*. The 'what' of

communication, previously theorised as a Westphalian-national interest rooted in a Westphalian-national economy, now stretches across vast reaches of the globe, in a transnational community of risk, which is not however reflected in concomitantly expansive solidarities and identities. The 'where' of communication, once theorised as the Westphalian-national territory, is now deterritorialised cyberspace. The 'how' of communication, once theorised as Westphalian-national print media, now encompasses a vast translinguistic nexus of disjoint and overlapping visual cultures. Finally, the addressee of communication, once theorised as a sovereign territorial state, which should be made answerable to public opinion, is now an amorphous mix of public and private transnational powers that is neither easily identifiable nor rendered accountable' (Fraser 2007: 19).

The account given by Fraser raises a bundle of normative and empirical questions that cannot be addressed in the framework of this essay. Yet the task of this essay is much less ambitious than Fraser's who seeks to spell out problems of a normative democratic theory of post-national governance, such as democratic equality of access to processes of public opinion formation (many of which are far from being resolved in the national context). My question is more limited and essentially empirical: to what extent does a transnational public sphere already provide for the critical monitoring and review of governance?

Some authors, such as Bohman (1999), Eckersley (2007), Germain (2004), and Payne and Samhat (2004) already see such communicative arenas at work in international politics. It is beyond doubt that important challenges to international governance have arisen from these communications. Since the 'battle in Seattle' in 1999 many international organisations such as the World Bank, the World Trade Organisation (WTO) and the International Monetary Fund (IMF) have become subject to critical public review (Kaldor 2000, Steffek 2003, Woods 2000). Public campaigns have at least contributed to the failure of the negotiations of the Multilateral Agreement on Investments (MAI) in 1998. In addition, public pressure has been evidently brought to bear in cases of maladministration and abuse of power by officials in international organisations. The resignation of the Santer Commission in the EU in 1999 and of Paul Wolfowitz as President of the World Bank in 2007 have shown that mechanisms of scandalisation that are part and parcel of public accountability can function on the transnational level. Indeed, the Santer case, which is well researched, has shown that alleged nepotism and corruption in the Santer Commission were debated in the media throughout Europe in very similar terms (Meyer 1999, Trenz 2000, 2002). Similar phenomena have been observed in the European discussion about the participation of Jörg Haider's party in the Austrian government (van de Steeg 2006). Thus, the media public may still be segmented along national and functional lines but in critical cases transnational mobilisation seems to work. International governance can be exposed to public scrutiny and hence public accountability does exist, at least as ex-post review of office holders' conduct.

What is much less clear is whether or not the transnational public sphere can also generate a discourse in which 'something approaching public opinion' is formed on issues of much less salience. Empirical evidence is available only for the EU whose public sphere has attracted quite some scholarly interest. Koopmans and Erbe (2004) report that the 'Europeanisation' of media communication varies considerably among policy fields.[2] They argue that media reporting quite accurately reflects the Europeanisation of policy making, with an emphasis on policy fields in which a significant transfer of competencies to the supranational EU level has taken place. In a comparative study of newspaper

[2] There is quite some debate on what an Europeanization of public spheres should actually mean. Eder and Kantner have argued that we would need to find a common European 'frame of reference' (Eder and Kantner 2000). Others think that we would need to find an intensified 'discursive interaction' between different countries (van de Steeg 2002).

contributions in five member states, Sifft et al. (2007) find an increase in the monitoring dimension, that is, media reporting and comment on political events at the European level. However, they do not find evidence for an increase in what they call 'mutual observation' and 'discursive interaction' between national public spheres in Europe. This is what a strong, normative conception of a public sphere would require.

Most researchers on the European public sphere locate it in the mass media, because this is 'what the general public gets to see' (van de Steeg 2002: 507). Is, however, mass media reporting the only place where we might find an emergent transnational public sphere? Splichal has powerfully argued that equating the public sphere with the mass media is too restrictive and misleading (Splichal 2006). Historically, the emergence of the modern public sphere began in a culture of discussion in the public spaces of salons and coffee shops (Habermas 1962: 90-107). In the age of electronic communication we may be on the way back to forms of public communication that do not take place in the mass media (Bohman 1998, Fraser 2007). Weblogs, for instance, are turning into a locus of political criticism and societal debate that needs to be taken seriously. Weblogs are not just vehicles of private chatting and ranting. There is evidence that journalists use them as a source, link their online publications up to them, and that weblogs in turn link back to the content of professional media sites (Schmidt 2007: 25). There is an emerging electronic public sphere out there that seems to play an increasingly important role in flagging issues of political relevance which may in turn be taken up by the mass media and thus reach citizens as ultimate rule-addressees.

Another insight that needs to be stressed in this context is that public spheres, whether national or transnational, come in the plural. Habermas introduced the idea of a network of various public spheres as overlapping discursive arenas that taken together constitute the public sphere of modern societies (1996: 373). An emergent transnational sphere may hence not a unified, or general, public sphere but rather a segmented patchwork of sectoral publics that are interwoven (Eriksen 2005, Nanz & Steffek 2004). Sectoral publics converge around issues of interest to certain constituencies and to the extent that these issues are tackled by international governance arrangements, may become genuinely transnational in character. Next to individual activists, such as bloggers, these spheres are inhabited by organised civil society. The work of civil society, especially of NGOs and transnational social movements, is crucial for the emergence of a public sphere in global politics. The above-mentioned public scrutiny of international monetary institutions was in fact triggered by civil society and in turn publicised through the media. The empirical evidence suggests that non-governmental actors play a key role in triggering transnational public debates on global governance, thus rendering international governance more transparent and accountable (Scholte 2004: 217). Organised civil society is instrumental in creating public accountability in at least three different ways that will be discussed in the following:

(1) Monitoring public governance;

(2) Translating highly technical discourse;

(3) Flagging issues, framing issues, and formulating alternatives.

Monitoring

Monitoring the conduct of power-holders is one of the key problems associated with democratic accountability. Most citizens do not have the time, the capacity, and the specialised knowledge in order to follow the conduct of their policy-makers first hand. They therefore typically need to rely on the media to report problematic decisions and denounce misdemeanours of office holders. Media coverage alone, however, will hardly be sufficient for a close supervision of office holders. In addition, we rely on a broad variety of social actors, from social movements to religious congregations and organised interest groups to flag problematic topics and decisions. These organisations

communicate either directly to their membership base or seek to feed information and critical comment into the media channels. Therefore, a lively and attentive third sector is an asset to monitoring. Non-state actors act as watchdogs and thus expose power-holders, both political and administrative, to wider public scrutiny. The need for them is even more pronounced in the realm of internationalised policy-making, as media coverage is sluggish and many of the issues discussed at the European level are of a highly technical character.

NGOs do more than just briefing their members or journalists about events in international politics: they also directly publish conference reports or newsletters that expose the proceedings of diplomatic negotiations to wider public scrutiny. For example, the Canadian NGO *International Institute for Sustainable Development* (IISD) since 1992 has published an electronic newsletter to cover international negotiations related to environment and development, called the Earth Negotiations Bulletin.[3] The initiative was launched by three activists during the preparatory meetings of the United Nations Conference on Environment and Development (UNCED) and continued since then. The Bulletin is published in two ways. A one-page, two-sided leaflet is distributed each day to participants directly at the site of the conference. In addition to the hard-copy, the Earth Negotiations Bulletin is available in electronic format on IISD website and distributed by electronic mail. At the conclusion of each conference session, the Earth Negotiations Bulletin team writes a 10-18,000-word summary and analysis of the meeting, which is circulated in electronic format. The editors estimate that electronic distribution has expanded the readership of the Earth Negotiations Bulletin to an estimated 35,000 people worldwide.[4]

Another excellent example for the publicity-creating function of NGOs is the *International Centre for Trade and Sustainable Development* (ICTSD), established in Geneva in 1996.[5] The ICTSD aims to contribute to a better understanding of development and environment concerns in the context of international trade. It publishes a variety of periodicals on related issues, most notably the newsletter *Bridges* that comes as a weekly news digest and as a monthly review. While the weekly newsletter contains up to date information on on-going negotiations, the monthly review focuses on analysis and background stories. In order to reach readership in developing countries, in particular in Africa and Latin America, there are also editions in French, Spanish, and Portuguese.

To be sure, these specialised publications do not have an outreach comparable to the mass media. They cater to specialists all over the world, rather than lay people. However, many of these recipients most likely disseminate this information further by using it in their own publications, seminars or public speeches. In reporting and commenting on developments in international governance expert NGOs thus perform the function of journalists. They fill the void of a detailed reporting that most professional journalists of the mass media would not care about, as space available in their general interest publications is too limited.

Translating

As mediators linking the global with the local, social movements and grassroots NGOs with transnational connections are an important interface between states, international institutions and local communities (Randeria 2003: 11). They are especially important as translators between experts and citizens. Much of regulatory policy-making taking place in governance networks is extremely technical in character and definitely too technical for lay people to comprehend what is really at stake. A good example to illustrate this phenomenon is Ferretti's recent study of citizen participation in the authorisation of GMO

[3] <http://www.iisd.ca/voltoc.html> (accessed 20 April 2007).

[4] Source: <http://www.iisd.ca/enbvol/enb-background.htm> (accessed 20 April 2007).

[5] See: <http://www.ictsd.org/> (accessed 20 April 2007).

products for marketing in the EU (2006). Ferretti analyses comments in an online forum in which citizens are invited to contribute their opinions on the authorisation of GMO products, finding that citizens' comments are routinely dismissed by the authorities. They are regarded as 'not pertinent' to the authorisation process because they are not formulated in the highly technical jargon of scientific risk analysis. As a consequence

'[t]he *Gmoinfo* forum has been progressively colonised by specialised non-profit organisations, whose aim is to facilitate public participation, and to overcome the obstacles to people's engagement with questions relating to GMOs, namely the difficulty in collecting the necessary information from the various European Institutions involved (DG Environment, DG SANCO; EFSA etc.), in translating the technicalities of the official documents into a language widely accessible, and to voice potential citizen dissatisfaction about the ways in which the institutionalised spaces for participation are managed' (Ferretti 2006: 17).

Citizens often need an intermediary agent that is able to explain the relevance of issues and decisions for the daily lives of average people, and in turn translate the concerns voiced by citizens into the technical jargon of international governance.

Flagging Issues, Framing Issues and Formulating Alternatives

Social movements and NGOs obviously not only pass on information to their constituencies. They also critically discuss current political developments and highlight their own position on the subject. Civil society is thus instrumental in flagging and framing issues, and in formulating or highlighting political alternatives. Flagging issues means to draw public attention to problems and thereby creating pressure on policy-makers to deal with them. There is a vast literature on the role of individuals, social movements and NGOs in world politics that underscores and illustrates precisely this function (Finnemore and Sikkink 1998: 896-9). For example, individual members and organisations of civil society were crucial in triggering transnational concern with and eventually political action against anti-person landmines (Price 1998: 619). Transnational activism was equally crucial in the abolition of slavery and the discreditation of apartheid in South Africa (Crawford 2002, Klotz 2002). As especially the events of the 1990s have shown, efforts by NGO activists and transnational social movements have been quite successful in bringing the adverse consequences of globalisation and global governance into the media and onto the political agenda (Kaldor 2000, Tarrow 2005). Public protests triggered an unprecedented media debate on the defects and limits of globalisation. The critical reappraisal of global political institutions, and more generally the neoliberal tendencies underlying global governance and European integration, would just not have been thinkable without civil society actors. The flagging of issues, the articulation of grievances, and contestation of political and social practices is exactly the function that Habermas would assign to civil society. These strategies function through the mobilisation of public communication about them.

Framing is a discursive process through which meaning is constructed and many of these processes take place in civil society (Benford and Snow 2000). Framing is strategically employed by the campaigning parts of civil society, domestic or transnational, in order to change the public perception of certain issues and to trigger political action on it. Strategic framing thus is a way of demanding political action on marginal topics or suggesting alternatives to current policies. For example, Joachim (2003) has shown how activist NGOs have reframed the issue of violence against women as a human rights problem which proved to be a powerful frame for mobilising an international constituency.

To summarise, there certainly is a transnational public sphere in the making that consists of two elements. A transnational civil society that formulates and promotes new political demands and thus triggers the emergence of sectoral transnational public spheres that

centre on a quite narrow range of issues; and a media sphere, still mainly organised along national lines, that may take up and further disseminate information and challenges regarding these issues. The boundaries between transnational sectoral and more general national public spheres are permeable and allow for the passage of information between the two. Both, the informal and the media public, are important for holding international governance networks to public account. There is good evidence to suggest that at least critical monitoring and scandalisation can already function transnationally. There is much less evidence for a transnational exchange of views among citizens, as envisaged by emphatic normative conceptions of the public sphere in political theory. Compared to an ideal public sphere in which all citizens have equal access to public opinion formation existent transnational public spheres are clearly deficient.

However, and this is the concluding point of my discussion, the existing transnational public sphere seems to be capable of exposing international governance arrangements to public scrutiny. They can effectively urge policy makers to justify and critically review their conduct and may indeed switch the operation of the political system from a 'routine mode' into the 'crisis mode' (Peters 1993: 348). In the crisis mode, issues and problems that have been consciously side-lined, or simply forgotten, move into the focus. There is, as Peters emphasised, no guarantee that such a crisis will bring about political change, but it at least opens up an avenue for it. In fact, the question of change brings us back to a critical question that Fraser raised in the transnational context. In comparing the transnational to the 'Westphalian' public sphere, Fraser worried about the efficacy of public challenges and the capacity of governance arrangements to respond to them. 'According to the capacity condition, the public power must be able to implement the discursively formed will to which it is responsible' (Fraser 2007: 22).

In the context of international governance the capacity problematic is a very sensitive point. As multilateral bargaining systems work under unanimity rule and include numerous veto players, change is much harder to achieve there than in national politics. Moreover, in the international setting there is no mechanism of electoral accountability in the background by which the public could force unresponsive power holders out of office. The synergies between public and electoral accountability that were outlined in section two above are significantly weakened. Therefore, transnational public accountability remains a rather soft mechanism of holding international network governance to account. Nevertheless, it is indispensable for international network governance to approach at least some minimum version of democratic self-governance.

Conclusion

The premise of this paper was that the key problem of international governance is not a lack of accountability but a lack of accountability to the wider public. This problematic, it was argued, is obscured by tendencies to re-define the 'public accountability' of governance as an umbrella term that covers a multitude of accountability mechanisms. In particular, the increase in managerial notions of accountability and respective instruments tends to relegate the public to the rank of one stakeholder or principal among others. This is a worrying tendency because academic accountability discourse is not just an observation of accountability practice but a potential source of inspiration for such practices. In this context, it is worth recalling an observation made by Broadbent and Laughlin with regard to British public policy. They argue that 'pressure on governments can change the level of specificity of the nature of political/public accountability in a manner that mirrors managerial accountability. Nevertheless this change still cannot provide the electorate with direct control of the day-to-day activities of government' (Broadbent & Laughlin 2003: 24). The proliferation of new accountability instruments in governance beyond the state may lead to similar results. It may increase control by peers, courts, markets, and ombudsmen without enhancing the possibilities of public scrutiny and oversight.

In this paper I defended a notion of public accountability as accountability of governance through the public sphere. Public accountability in this sense means that the choices of decision-makers are exposed to public scrutiny and become debated and criticised in public. I defended the view that this specific kind of accountability is indispensable for citizens to form an opinion about international and European governance, and that only if this kind of accountability is present we can reasonably speak of democratic accountability. Public accountability and a public sphere are therefore a precondition for the democratisation of global and European governance.

The second half of this paper took issue with the transnational public sphere, in which public accountability takes place. The crucial question in this respect was whether the transnational communicative infrastructure is already functioning. Research on the public sphere in Europe has shown, on the one hand, that the emerging transnational public sphere does not fulfil the high standards of political theorists who would demand universal and equal participation of citizens in a process of collective opinion formation. On the other hand, it is certainly capable of putting pressure on governance institutions in case of massive maladministration, and it is also capable of generating and promoting new political concerns and demands that in turn are taken up by the institutions of governance. Thus, we can rely on the transnational public sphere to switch the operation of internationalised policy-making from routine to the crisis mode and trigger processes of reflection and change. The weakness of public accountability at the transnational level is not an inability to mobilise criticism and resistance but rather the lack of complementary mechanisms of electoral accountability, or equivalent instruments of robust sanctioning. As electoral democracy beyond the state is not within sight, the challenge for the future is to ingenuously strengthen established instruments of accountability so as to make them responsive to demands and criticism arising from the transnational public.

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How Intrusive a System of Governance is the WTO?

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Introduction

An analytical inquiry into how World Trade Organisation (WTO) law impacts policies pursuing non-trade values is relevant if one is interested in the democratic quality of the WTO. Based on different normative models of democracy, this paper first discusses some problems with measuring impacts of WTO law under each model and suggests that a segmented political order would be preferable from the point of view of democracy (II). However, because WTO law is less coherent and determinate than national legal systems and lacks their enforcement mechanisms the question about the impact of WTO law is less straightforward to answer. This paper therefore proposes a conceptual framework that would be a useful first step for analysing the impact of the WTO (III). It then applies the analytical framework in an exemplary fashion to the impact of the General Agreement on Trade in Services (GATS) on social regulatory and distributive policies (IV). The analysis suggests that the GATS is more than a process of negotiation in which states decide autonomously whether to liberalise trade in services. While some of the legal rules in the GATS can be interpreted so as to reflect an allocation of jurisdiction between levels of governance that is consistent with the preferred model of democracy and not intrusive, the openness of the GATS towards cosmopolitan democratic governance in the form of international standards is less clear and recent interpretations of the GATS have also led to a greater intrusion into national and international democratic governance.

Why is the Impact of WTO Law on National Laws, Policies and Politics Relevant from the Perspective of Democratic Theory?

If one is interested in evaluating the democratic quality of the WTO an empirical analysis of the impact of WTO law on national and general international policies and politics is highly relevant. Depending on the strand of democratic theory one endorses, impacts of WTO law will be evaluated differently.

Some strands of democratic theory view national parliaments or national public spheres as the hallmark of democracy because they are sites of meaningful deliberation and debate and/or mechanisms of interest aggregation based on representation and fair and equal elections.[1] Nation states and not international organizations or governance mechanisms are seen as the important sites of democracy because they have functioning public spheres, a *demos* with shared democratic and other values or meaningful political cultures based on party allegiance. These scholars may differ, however, with respect to their assessment whether the WTO can be democratised through an increased involvement of parliaments or national publics in the negotiation and ratification of the WTO agreements.
Some are quite optimistic in this respect. To them, parliaments and notably the US congress can effectively control governments in the negotiation of WTO agreements by

[1] Bacchus, James, 'A Few Thoughts on Legitimacy, Democracy and the WTO', in Petersmann, Ernst-Ulrich (ed.), *Preparing the Doha Development Round,* Florence: European University Institute, 2004, 112.; Hudec, Robert E., 'Comment' in Porter, Roger B., Sauvé, Pierre, Subramanian, Arvind, and Zampetti, Amercico Beviglia (eds) *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, Washington: Brookings Institution Press, 2001 295.

giving negotiators a clear *ex ante* mandate.[2] At least domestically, this mandate can be controlled through the courts and the parliamentary principals can therefore control the executive agents. To adherents of this view, impacts of WTO law on national laws, policies and politics are unproblematic as long as they were endorsed by parliaments in the negotiating mandate.

Other things equal, precise, unambiguous and enforceable WTO law should be preferred by national proceduralists. It ensures that third-party adjudicators faithfully interpret and apply WTO law and that other WTO members can be held to the legal obligations that were agreed to. However, the picture becomes more complicated if one considers that internationally, there is not just one law-making forum but a multiplicity of treaties and international organisations with segmented but overlapping competences.

The problem this raises is that trade-offs involving new issues or overlapping but separate competences between different international organisations or treaties (e.g. the GATT and an MEA) may not have been subject to express parliamentary consideration. In this case, precise, unambiguous treaty rules may prove to result in an unwarranted incursion into democratically legitimated national or international balancing processes of conflicting values. More indeterminate legal rules would undoubtedly facilitate a balancing of conflicting values but do not sufficiently constrain extraterritorial effects of national balancing processes nor the WTO dispute settlement organs in their balancing of conflicting values.

Commentators who are less sanguine about the potential for democratizing the WTO through an enhanced role for national parliaments or publics in negotiation and ratification processes point to empirical difficulties with involving parliaments or the public in a meaningful way in international negotiations and the associated risks of delays and failures of the negotiation process.[3] On this view, international negotiations strengthen national executives at the expense of parliamentary or participatory deliberative democracy and impacts of WTO law on national or international policies and politics are *per se* problematic.

Even if one views the nation state as the principal arena for democracy, the democratic contribution to the WTO of greater involvement of national parliaments can be doubted. Thorsten Hüller and I have identified several reasons why this might be so.[4] Amongst them, the limited potential for modifying the WTO agreements is perhaps the most problematic. Parliaments or national publics may simply change their mind about what they had once consented to. Moreover, new members of a national polity – and for that matter any new member that accedes to the WTO – do not have an opportunity to re-examine and if necessary re-negotiate the WTO agreements. In addition, national proceduralism hinges on the ability of every WTO member to veto the negotiated drafts if necessary. This introduces an imbalance in two respects: the veto of a single member weighs more heavily than the positive endorsements of all the other members. It also becomes easier to reject proposals than to take positive action.

If one is sceptical about national proceduralism as an appropriate model for democratic governance at the WTO, precise and determinate WTO law produces undesirable impacts on national democracies because it is more easily enforceable than ambiguous, indeterminate law and because inconsistencies with WTO law will be readily apparent. Ambiguous, indeterminate law has an ambivalent status. While legal uncertainty about

[2] Bacchus, James, n. 1.

[3] Krajewski, Markus, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsordnung,* Berlin: Duncker & Humblot, 2001, 244-246, 272.

[4] Herwig, Alexia and Hüller, Thorsten, 'On the Normative Legitimacy of the World Trade Order', Arena Report, forthcoming.

potential "judicial" interpretations of WTO law may result in potential complainants shying away from starting a dispute settlement proceeding and generally raises the bar towards applying WTO law to novel contexts, ambiguous, indeterminate law can turn out to be a problem once a WTO dispute is initiated. Panels or the Appellate Body will be less constrained by legal text and may develop purposive-political solutions to legal disputes that are even worse from the perspective of a WTO member party to a dispute.

Some authors maintain that it is possible to democratise the WTO directly rather than doing so via nation states.[5] Creating a parliamentary element in the WTO through the establishment of a WTO-level parliamentary assembly or giving more direct and indirect participation rights to civil society organisations are both discussed as measures to democratise the WTO. Similarly, allowing individuals and civil society organisations to make *amicus curiae* submissions in disputes before WTO panels and the Appellate Body are viewed as positive steps towards inclusiveness and democratic participation in WTO norm-application and norm-generation processes.

Taking the WTO in isolation, precise, unambiguous rules that are legally enforceable would again be preferable from the perspective of cosmopolitan democracy because they ensure that the rules that were collectively agreed will be effectively applied. However, much the same problems plague approaches of cosmopolitan democracy as national proceduralism. The limited reversibility of WTO rules may unduly constrain policies or politics if opinion has shifted and a balancing of conflicting values in the competence sphere of different international organisations is generally difficult. Both are considerations against precise, inflexible WTO rules.

Moreover, as Thorsten Hüller and I have argued elsewhere, certain structural problems of the international order call into question the desirability of national or cosmopolitan proceduralism as a blueprint for democratic governance at the WTO.[6] In the present international order, the preconditions for a fair proceduralism hardly exist. WTO members and their constituents differ greatly in their capacity for influencing the outcomes of negotiations, regardless of whether one applies a model of national proceduralism or cosmopolitan proceduralism. We have therefore suggested that there is a need to supplement procedures with substantive standards.

Furthermore, it is unconvincing to argue that either cosmopolitan or national proceduralism produce the best outcome in every case. For some policies, such as cultural policies or the ideal model of democracy for a polity, there may be good reasons for differing approaches and for preserving the ability of nation states to regulate these matters.[7] On other matters, such as global environmental problems there are good reasons in favour of cosmopolitan solutions.

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[5] Charnovitz, Steve, 'Participation of Nongovernmental Organizations in the World Trade Organization', *University of Pennsylvania Journal of International Economic Law* 17 (1996), 331; Charnovitz, Steve, 'WTO Cosmopolitics', *New York University Journal of International Law and Politics* 34 (2002), 299: 329-344; Held, David, *Democracy and the Global Order,* Cambridge: Cambridge University Press, 1995, 40f., 219ff, 272ff..; Nanz, Patrizia, 'Democratic Legitimacy of Transnational Trade Governance: A View from Political Theory', in: Joerges, Christian and Petersmann, Ernst-Ulrich (Hg.), *Constitutionalism, Multilevel Trade Governance and Social Regulation,* Oxford: Hart, 2006, 59; Shell, Richard, 'Trade Legalism and International Relations Theory – An Analysis of the World Trade Organization', *Duke Law Journal* 44 (1995), 829: 915; Shell, Richard., 'The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization', *University of Pennsylvania Journal of International Economic Law* 17 (1996), 359.

[6] Herwig, Alexia/Hüller, Thorsten, n. 4.

[7] Id.

Finally, many nation states offer conditions favourable to the realisation of democracy that do not yet equally exist at the international level. For instance, Western nation states have developed public spheres with civil society organisations and ties of solidarity and culture amongst its members that are beneficial to democratic governance. We have therefore suggested that a segmented order with nation-state and international competences constitutes the ideal model of normative legitimacy for the WTO.

Other commentators have also argued in favour of a mixing of cosmopolitan and nation-state elements of democracy.[8] Christian Joerges for instance submits that the purpose of WTO law is to remedy deficits of national democracies.[9] These arise from the fact that national democracies systematically fail to take the transboundary effects of their actions into account. Robert Howse and Christian Joerges also emphasize that WTO law can enlighten national democratic decision-making.[10] In the area of food safety they view the requirement to base regulatory measures on a risk assessment as a mechanism that ensures that information will be comprehensively considered and justified in terms of the universally accessible language of science instead of national peculiarities.

For Howse, the SPS Agreement also respects national democracies because it perceives scientific evidence merely as one source of information that WTO members are also free not to use as the basis for their risk regulation if there are other important reasons.[11] To Joerges, the SPS Agreement should use scientific evidence as a minimum justificatory threshold for risk regulation but leave members free to decide whether or not they want to tolerate a risk.[12] To both, some impacts of WTO law on national politics, i.e. on the way decisions are reached are not a problem from the perspective of democratic theory but WTO law must on the whole respect national democratic governance.

A Conceptual Framework for Analysing the Intrusiveness of WTO Norms on Democratic Governance

To summarise the discussion in the preceding discussion, precise WTO norms have the advantage that they constrain panels and the Appellate Body in their interpretation and

[8] Attik, Jeffrey, 'Democratizing the WTO', *George Washington International Law Review* 33 (2001), 451; von Bogdandy, Armin, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship' in Frowein/Wolfrum (ed.), *Max Planck Yearbook of United Nations Law,* The Hague, London and New York: Kluwer Law International, 2001, 609: 632, 658, 666; von Bogandy, Armin, 'Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization', in: Griller, Stefan, (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order,* Wien, New York: Springer, 2003**,** 103: 126ff; Howse, Robert/Nicolaïdis, Kalypso, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity? ", *Governance: An International Journal of Policy, Administration and Institutions* 16 (2003); Joerges, Christian, 'Free Trade with Hazardous Products? The Emergence of Transnational Governance with Eroding State Government', *European Foreign Affairs Review* 10 (2005), 553; Joerges, Christian, 'Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO', in: Joerges, Christian/Petersmann, Ernst-Ulrich, (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart, 2006; Joerges, Christian., 'Freier Handel mit riskanten Produkten? Die Erosion nationalstaatlichen und die Emergenz transnationalen Regierens', in: Zürn, Michael and Leibfried, Stephan, (eds), *Transformationen des Staates*, Frankfurt a.M.: Suhrkamp, 2006; Joerges, Christian and Godt, Christine, 'Free Trade: The Erosion of National and Birth of Transnational Governance', in: Zürn, Michael and Leibfried, Stephan, (eds), *Transformation of the State,* Cambridge: Cambridge University Press, 2005, 93; Krajewski, Markus, n. 3, 261ff., 272f..

[9] See literature cited at n. 8.

[10] Id. and Howse, Robert, 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization', (2000) 98 *Mich. L. Rev*. 2329, at 2330, 2334-8, 2341-4.

[11] Howse, Robert 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization', (2000) 98 *Mich. L. Rev*. 2329, at 2330, 2334-8, 2341-4.

[12] See literature cited at n. 8.

application of WTO norms. This makes is less likely that judicial interpretation or the interaction of WTO norms will produce outcomes that were unintended by the constituents who gave democratic endorsement to the norms when they were agreed. However, precise, formalistic WTO norms reduce the potential for taking into account other legal norms that were generated outside the WTO framework. Conversely, the advantages and disadvantages of more ambiguous, flexible WTO norms are that it will be easier to take into account non-WTO norms but more likely that panels or the Appellate Body develop legal interpretations that would not have been endorsed by the constituents who legitimised the WTO Agreements in the first place. The considerations about the drawbacks of precise, formalistic WTO norms and more ambiguous, flexible norms suggest that from the perspective of certain strands of democratic theory, both types of obligations can be considered to unduly intrude upon democratic decision-making. They also suggest that intrusiveness of lack of intrusiveness is best measured by a different yardstick.

Mechanisms which make WTO reversible and open it to non-trade values while not giving unfettered discretion to panels or the Appellate Body to balance conflicting values are crucial from the perspective of democratic theory. It is suggested that the opening of WTO law to standards developed by international standardisation organisations can constitute such a mechanism. In the area of trade in goods, the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade recognise health, food naming and other technical standards of the Codex Alimentarius Commission, the International Plant Protection Convention and the Office of Epizootics as reference standards for judging the WTO conformity of national regulation. The mandate of these standardisation organisations generally involves the balancing of conflicting objectives. For instance, the mandate of the Codex Alimentarius Commission is to ensure fair practices in the food trade and safe foods for the consumer. The standards are developed through a political process and as they apply to single food substances, residues or types of risk, they are very precise.

Although the WTO members were unable to agree on a precise balancing of the conflicting values of trade liberalisation and protection against risk when they negotiated the agreements, the international standardisation organisations offer an on-going political process in which these values can be balanced in a manner that is adequate for the individual case. The recognition of international standards provides a way to reconcile the need for precise legal norms with the need for flexibility. The extent to which WTO Agreements do or do not recognise international standards can therefore be an indicator for the intrusion of WTO law into democratic governance.

A second indicator for the intrusiveness of WTO governance are cases where the judicial application of WTO norms results in an allocation of jurisdiction between levels of governance and between WTO members that is wrong from the perspective of a segmented democratic order. It has been suggested that respect for democratic governance calls for preserving it at the level of nation states and militates against transferring too many competences to the international level. As regards the substance of decisions, joint international solutions are required if the dimensions of the problem are similar globally.

The preservation of free international trade represents such a common problem because states may not consider the impact of their regulatory policies on foreign trading partners and the self-interest of states would lead them to adopt protectionist policies that undermine free trade. However, the great diversity of WTO members often prevents joint solutions. One example given above are cultural policies, others may be the freedom of speech and religion or public morals. The range of issues that require only a WTO solution is limited. It is suggested that it includes policies of a predominantly economic nature such as tariff increases in response to dumping or the regulation of quotas. In both cases, there are usually no good reasons for maintaining them as they hurt the

importing and exporting country and are often unsuitable instruments for regulatory policy.
Non-discrimination in WTO law will often raise issues of a mixed nature, that is, involve questions about free trade and the justification of social regulatory policy and require a mixed approach where WTO law controls the economic motives and spill-overs of regulation without interfering unduly with democratic choices about appropriate regulation. One way by which WTO law can achieve this is by examining whether the justification for regulatory policies is not specious while leaving members free to balance conflicting values. In the SPS Agreement, this is done by requiring members to provide some minimal evidence of plausible confirmed or unconfirmed hazard but granting them the autonomy to set levels of protection as they see fit as long as this is done consistently.

A third, if somewhat obvious indicator for the intrusiveness of WTO governance is the existence of the rule of law in international economic relations, i.e. the extent to which WTO law effectively constrains the behaviour of WTO members due to its enforceability. Of course, there is no direct effect and no supremacy of WTO law. Private parties cannot invoke WTO law before national courts and WTO law does not supersede national laws in domestic legal orders. Since home governments must espouse the claims of affected firms in order for a WTO dispute settlement proceeding to be started, a significant element of diplomatic-political discretion continues to persist. If the diplomatic costs of bringing a claim would be too high, a home government may prefer a negotiated solution or raise the matter only in bilateral diplomatic talks. The WTO Dispute Settlement Understanding even encourages negotiated mutually solutions to disputes. A government that had acted inconsistently with its WTO obligations may therefore not be sanctioned and continue its inconsistent conduct.

However, even if WTO dispute settlement is weaker compared to national or the EC legal order, the more or less automatic adoption of dispute settlement reports has strengthened the influence of WTO law over laws, policies or politics affecting trade. The possibility of raising specific trade complaints in many of the WTO committees also provides a way to persuade or pressure WTO members to remedy their inconsistencies with WTO law. WTO law is also used outside the context of the WTO and its dispute settlement system in bilateral relations between member governments or firms and a member government without ever reaching the WTO dispute settlement mechanism. Finally, WTO law can also interact with other dispute settlement fora and legal systems and produce impacts on national laws, policies and politics in this manner. For instance, the strong similarity of the GATS with bilateral investment treaties, which are enforceable by private investors against host governments, may lead to a diffusion of WTO jurisprudence into investor-state arbitration and would then effectively provide investors with the opportunity to enforce GATS obligations. As will be seen below, the interaction of WTO law with national constitutions or statutes can also strengthen the impact of WTO law.

Application of the Conceptual Framework to the GATS

At first blush, the GATS may be considered a bad case for analysing the intrusiveness of WTO law on democratic decision-making. It looks very much like a reflection of national proceduralism where WTO members are presumed to have the capacity to shape the content of WTO law and decide autonomously whether they want to accept the bargain or not.

The GATS leaves WTO members free to decide in which service sector and in which mode of supply they want to make liberalisation commitments. The GATS knows four such modes: foreign direct investment (called commercial presence in the GATS), the cross-border supply of services, the movement of service consumers and the movement of natural persons supplying services.

Liberalisation of services trade is differentiated into two concepts broadly similar to a familiar distinction in the GATT: treatment at the border and treatment behind the border. Treatment at the border is encapsulated by the concept of market access and refers for example to ceilings of foreign shareholding, quotas or nationality requirement. Treatment behind the border by is reflected in the national treatment concept familiar from the GATT and the GATS disciplines on domestic regulation.

WTO members can decide on the extent to which they want to grant market access and national treatment. For instance, they can decide to limit foreign shareholdings to five percent or even zero percent of the capital of firms or to apply stricter regulatory requirements to foreign service providers than to domestic ones. The only caveat for members is that if they allow market access or national treatment, any offending measures must be expressly listed as an exception to market access and national treatment. Otherwise, there is a presumption that members fully liberalised the service sector. The GATS therefore allows the grandfathering of discrimination and market access restrictions.

Even if the GATS enables members to fine-tune their liberalisation commitments, the GATS is also a system or rules that may constrain democratic choices reflected in national or international policies or politics. Even if one were to endorse national proceduralism as the appropriate model for democratic governance at the WTO, there would therefore be a need to analyse the interference of the GATS with national democratic decision-making.

First of all, the GATS only allows for the grandfathering of existing market access and national treatment restrictions. New measures, whether embodied in national laws or regulations or trade-restricting international treaties may be inconsistent with the GATS. Second, the GATS is very complex and fragmented. The interaction of the different GATS disciplines with each other may therefore lead to outcomes that members had not anticipated at the time when they negotiated the GATS. Third, members can make mistakes when scheduling their GATS commitments and end up having liberalised sectors that they wanted to close to foreign competition.

As the *US – Gambling* report shows, even a WTO-savvy country like the US can make the mistake of considering a particular type of service to fall under the wrong sector heading. The case turned on the issue of whether the US had made a market access commitment for the cross-border supply of gambling services. The US schedule included commitments for other recreational services except sporting and the US claimed that sporting covered gambling and betting services.[13] The panel found that "other recreational services" included gambling and betting services.[14] It found that sporting did not include gambling services and that the US had, consequently, committed to liberalise the cross-border supply of gambling services.[15] The Appellate Body obtained the same interpretative result but modified the panel's interpretative approach.[16]
As argued in the preceding section, a segmented democratic political order is the appropriate model for WTO democratic governance. The following sub-sections will therefore apply the corresponding conceptual framework developed above to the GATS with a view to analysing its intrusiveness into democratic decision-making.

[13] Appellate Body Report, US – Gambling, para. 162.

[14] Panel Report, US – Gambling, para. 7.2(a).

[15] Panel Report, US – Gambling, para. 6.93.

[16] Appellate Body Report, US – Gambling, para. 213.

International Standards and Minimum Requirements of Justification of National Measures in the GATS

Like the SPS Agreement and the TBT Agreement, the GATS contains language that suggests that it integrates international standards and requires some minimum justification of national regulations. The presence of both indicate that the GATS is open towards reversibility mechanisms carrying out a new balancing of trade liberalisation and non-trade values and attempts to correct deficits of national democratic decision-making. This, it has been suggested above, would not be unduly intrusive of democratic decision-making in a segmented political order. However, close legal analysis of the relevant provisions in the GATS is required and the interpretation suggested is only one among other possible interpretations. Moreover, recent WTO dispute settlement decisions have actually heightened the potential for conflict between the GATS and international standards.

The relevant provision to consider is Article VI of the GATS which applies to technical standards, licensing and qualification requirements and licensing procedures. A member has to ensure that these are not more burdensome than necessary to ensure the quality of the service and are based on objective, transparent criteria.[17] The GATS thereby requires members to consider the impact of their national regulations on foreign service suppliers and to provide justifications in universal terms, similar to obligations in the WTO SPS and TBT Agreement. The obligation in Article VI:5(a) is temporary, pending the entry into force of regulatory disciplines developed by the Council for Trade in Services and subject to the commitments a member has scheduled.[18] As the only regulatory disciplines that have so far been developed required lengthy and protracted negotiation and future work on regulatory disciplines seems stalled by deadlock,[19] it is unlikely that Article VI:5(a) will cease to be of relevance.

In assessing whether members comply with the necessity, transparency and objectivity test, Article VI:5(b) requires that account be taken of the international standards applied by that member.[20] The GATS might therefore take cognizance of international standards developed, for instance, by the International Telecommunications Union or the International Accounting Standards Board. Article VI:5(b) could suggest that compliance with international standards on these matters automatically affords a safe harbour to members under the GATS, while non-compliance creates a justificatory burden for members, similar to provision in the SPS and perhaps TBT Agreement.

On the one hand, Article VI:5(b) does not indicate whether the application of international standards by a member is to be considered as a factor in favour of, against, or neutral with respect to finding compliance with Article VI:5(a). The crucial textual difference between Article VI:5(b) and the SPS Agreement is that Article VI:5(b) does not contain language according to which compliance with international standards leads to

[17] GATS, Article VI:4.

[18] GATS, Article VI:5. So far, regulatory disciplines in the accountancy sector have been developed. These are more in the nature of framework principles than detailed international standards. See Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64.

[19] Wouters, Jan and Coppens, Dominik 'Domestic Regulation within the Framework of GATS', Working Paper – K.U. Leuven Institute for International Law, No. 93, (Leuven: 2006), 18 [with further references]. Wouters and Coppens point out that some WTO members want to await further liberalisation of service sectors as a condition for agreeing to disciplines on additional sectors, while other members prefer to establish regulatory disciplines as a condition for agreeing to the further liberalisation of trade in services.

[20] GATS, Article VI.5(b).

national regulations being deemed consistent with Article VI:5(a) nor a requirement to base national regulations on international standards.[21]

On the other hand, the text of Article VI:5(b) does not support the interpretation that international standards should be assessed for conformity with Article VI:5(a). Had this been the intention, drafters could have used much clearer language to express it. The provision also refers to 'international standards…applied by that Member.' WTO adjudicatory bodies can draw on this term as context for the interpretation of the words 'in conformity with', suggesting that what 'in conformity with' means is influenced by whether or not a member applies international standards. WTO adjudicatory bodies can also opt for is a pragmatic solution whereby they consider that use of international standards is one positive indicator amongst a list of several other ones for compliance with Article VI:5(a) while leaving open the issue of which indicator is decisive.

In short, Article VI can be interpreted in ways so that the law of the GATS can make use of the regulatory capacity developed through international standardisation organisations. On this interpretation, members would not be required to use international technical, licensing or qualification standards but non-use would entail the need to show necessity, transparency and objectivity.[22]

Two further considerations suggest that the status of international standards in the GATS is somewhat more precarious in the case of the GATS compared to the SPS and TBT Agreement. First, members can choose to avoid the obligations of Article VI by not opening a sector to foreign competition. In other words, the GATS allows free-riding because members that have not made GATS commitments for the sector concerned can use the GATS to try and hold other countries to international standards in respect of services supplied by their suppliers to these countries without having to apply these standards themselves.

It could be speculated whether the possibility of free-riding on international standards will not chill international standardisation activities in the long run. This view assumes that trade balance is always the most important consideration in international standardisation. However, often factors pushing in favour of common international standards, such as technical reasons or the potential for gaining widespread market access may be equally if, not more, important and it can be expected that international standardisation will continue to work.

This notwithstanding, the present uncertainty over Article VI:5(a) and (b) could itself be an impediment to the development of social regulatory governance since countries desiring greater legal 'bite' for international standards through the WTO dispute settlement system might be unwilling to commit to international standards that will be unenforceable while countries preferring optional international standards could refuse to sign on to them for fear that they will become amplified through the WTO dispute settlement system.[23]

Second, the WTO dispute settlement report in *US – Gambling* has created some conflicts between GATS law and international standardisation. The *US – Gambling* case concerned various pieces of US federal and state legislation prohibiting the remote supply of

[21] SPS Agreement, Article 3.1.

[22] Article VI :4 probably requires the complaining party to make a prima facie case that the national measures are not in conformity with its requirements but once such a case is made, the full burden of explanation is always borne by the defending member.

[23] Wouters, Jan and Coppens, Dominik, 'Domestic Regulation within the Framework of GATS', Working Paper – K.U. Leuven Institute for International Law, No. 93, (Leuven: 2006), 18.

gambling and betting services for reasons of public morals.[24] The panel and Appellate Body decided that this domestic regulation constituted a quantitative market access restriction since it limited the number of cross-border service suppliers to zero.[25] Both focused on the effects of the US ban, despite clear wording of Article XIV that only measures in the form of quantitative restrictions are covered by it.[26]

The decision has been criticised because the language about effects seems to blur the distinction between domestic regulation and market access restrictions. [27] Pauwelyn points out that any domestic regulation can produce quantitative effects.[28] He gives the example of requiring aspiring taxi drivers to pass a driving test.[29] This requirement will preclude market access for all those who do not pass the test.[30] This change in the scope and relationship of various GATS provisions to each other is important because market access restrictions that are not scheduled are *per se* violations that can only be justified on the limited grounds of Article XIV, XIV bis, and XII.[31] In contrast, Article VI on domestic regulation puts the burden of proof on the complaining member and has an open-ended list of regulatory objectives that could justify introducing domestic regulation.[32] Some measures based on international standards that have effects of quantitative restrictions might also now have to be justifiable under the limited general exceptions. The GATS would then in fact regulate these non-law governance mechanisms and require that the objectives pursued by international standards conform to the general exceptions. This would precisely mean that the potential for reversibility offered by international standards would be lost since measures with new regulatory objectives not contained in the general exceptions of the GATS could no longer be justified as GATS-consistent if they created effects similar to that of numerical quotas. For the reasons discussed further below, the actual scope of the *US – Gambling* decision is likely to be smaller than feared by Pauwelyn and the encroachment of the GATS on the activities of international standardisation organisations limited.

The Allocation of Jurisdiction between Levels of Governance in the GATS

The text of the GATS reflects in part an allocation of jurisdiction that is consistent with the division outlined above: the determination of when quotas are present falls within the competence of panels or the Appellate Body and the rules are relatively formalistic and precise. Article XVI defines several types of quantitative restrictions members cannot maintain in sectors and modes of supply for which they have made commitments unless they have scheduled them as exceptions.[33] If they are not scheduled, a quantitative

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[24] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R (hereafter referred to as *US – Gambling*). para. 6.221; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/AB/R, para. 43.

[25] Panel Report, *US – Gambling,* para. 6.355; Appellate Body Report, *US – Gambling,* paras. 238, 251.

[26] Panel Report, *US – Gambling,* paras. 6.330, 6.332, 6.338, 6.347; Appellate Body Report, *US – Gambling,* paras. 231-237. For a critique of the interpretative approach, see Pauwelyn, Joost; 'Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', 4 *World Trade Review* (2005), 131, *passim.* and Ortino, Federico, 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling: A Critique',* 9 *Journal of International Economic Law* (2006), 117, *passim*.

[27] Pauwelyn, Joost, n. 26, 132, 162-168.

[28] Id., at 166.

[29] Id.

[30] Id.

[31] Id., at 136, 138.

[32] Id., at 138.

[33] GATS, Article XVI :2.

restriction must be justifiable as a legitimate public policy under Articles XIV, XIV bis, and XII.

In contrast, regulatory measures fall under the concept of national treatment or under the necessity test of Article VI if they are technical regulations, licensing or qualification requirements. In both cases, regulatory measures must pass a precise test (there must be a difference in treatment or the measure must be a technical regulation, licensing or qualification requirement) and an additional, less precise test.

In the case of national treatment, there must be either like service or like service providers and the measure must treat foreign services or service providers less favourably than domestic ones. As the *EC – Asbestos* dispute shows, there are ample opportunities for respecting national regulatory autonomy in the application of these tests. In this dispute, the Appellate Body found that the clearly demonstrated risk of asbestos meant that asbestos fibres were not like crysotile replacement fibres because consumers could be expected to differentiate between these products on the basis of their risk. Applied to the GATS, this means that clearly dangerous services are not necessarily like non-dangerous counterparts and members enjoy exclusive regulatory competence over these former services.

An open question is whether attributes other than dangerousness can also confer the status of unlikeness upon services and whether panels or the Appellate Body will determine consumer preferences in reference to the preferences as they actually exist in a given market. If this were the case, services that might be in a competitive relationship in one market would not necessarily be so in a different market. For instance, stem cell research with specifically created human embryos might not be like stem cell research with embryos remaining after assisted reproductive technology if consumers of health services differentiate on the basis of strong ethical reasons. Similarly, surrogate motherhood might not be like other reproductive technologies in Germany but could well be in the US, where surrogate motherhood is allowed.

As already discussed above, a necessity test is at the heart of Article VI:5. Members that have made specific commitments for a sector must not apply measures that nullify or impair the value of their commitments and that are more burdensome than necessary to ensure the quality of the service and are not based on objective and transparent criteria.[34] The applicability of Article VI:5 does not hinge on a finding of likeness and discrimination. However, it is contingent on the nullification and impairment of specific commitments and on its unexpected nature for other members at the time schedules were drawn up. This suggests that a WTO adjudicating body would first have to ascertain the precise ambit of the member's commitments. If it finds that discrimination is foreseen through the application of a technical standard, there would be no issue of nullification or impairment of the commitment since the member engages in conduct consistent with its commitment. Moreover, if there is legislation in the pipeline at the time commitments were negotiated, a member might not have a reasonable expectation that a member will engage in reasonable regulation. The above considerations suggest that Article VI is not an instrument for domestic regulatory reform per se but rather remains concerned with safeguarding the commitments made.

The necessity test is also a flexible legal obligation as the Appellate Body has told us in *Korea – Beef.* When the regulatory objective pursued is important, necessity will be interpreted less strictly and a panel or the Appellate Body might, for instance, accept measures that are not indispensable. The fact that it is for the panel or the Appellate Body to judge the importance of the regulatory objective could suggest a considerable – and unacceptable – incursion into democratic decision-making about technical

[34] GATS, Article VI:4, 5.

regulations, licensing and qualification requirements. However, what the Appellate Body did not tell us was whether the importance of the regulatory objective would have to be judged in the context of the market the panel or Appellate Body actually deals with. The result of such an approach would be considerable deference to the regulatory objectives of WTO members because every democracy might evaluate the importance of regulatory objectives differently and these choices would be accepted by the GATS.

Very similar considerations apply in respect of the general exceptions in Articles XIV, XIV bis, and XII. These legitimate public policies include public morals, pubic order, human, animal or plant life or health, the prevention of fraud and deception, contractual liability in cases of default on service contracts, data privacy, safety, the equitable or effective imposition or collection of direct taxes, the avoidance of double taxation, national security and the maintenance of balance of payments. Members generally have to show that their measures are necessary for the achievement of the regulatory objective. However, this list of public policies is considered to be finite.[35] In respect of discriminatory regulation, members can only justify a limited range of policies. It is suggested that such a finite list represents an encroachment upon democratic decision-making since new regulatory objectives might emerge in the future.

The *US – Shrimp* dispute is a successful attempt by the Appellate Body to interpret Article XX(g) of the GATT in an emergent manner to be able to fit environmental protection of animal species under it. The rules on interpreting international treaties like the GATS of the Vienna Convention favour a contextual interpretation in the light of other international law but the extent to which this is possible still depends on the text of the provision to be interpreted. This intrusiveness is counterbalanced by the possibility to take into account regulatory objectives in the application of the national treatment provision but it is suggested that it would still be preferable to use an open-ended list of regulatory objectives.

To summarise the preceding discussion, the text of the GATS suggests an allocation of jurisdiction between the WTO and nation state level of governance in which the WTO enjoys clear jurisdiction over measures of a predominantly economic nature that are quantitative restrictions while the legal norms covering regulatory policies are less formalistic and can be interpreted in a way that the WTO would largely defer to democratic choices concerning regulatory policies. Unfortunately, the panel and Appellate Body's interpretation of Article XVI in *US – Gambling* failed to respect this allocation of regulatory jurisdiction.

The US – Gambling case concerned various pieces of US federal and state legislation prohibiting the remote supply of gambling and betting services.[36] Under the US prohibition on the remote supply of gambling services, the provision of gambling services over the internet or the telephone was prohibited in interstate commerce and from abroad into the US.[37] In other words, the qualitative regulation prohibited the cross-border mode of supplying the service altogether and produced the effect of limiting the number of cross-border foreign and domestic service suppliers to zero. The US alleged that the rationale for prohibiting the remote supply was to protect against underage gambling, compulsive gambling and fraud.[38] The case was brought by Antigua and

[35] Pauwelyn, Joost, n. 26, 131.

[36] Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R (hereafter referred to as US – Gambling).

[37] Panel Report, *US – Gambling,* para. 6.221, Appellate Body Report, *US – Gambling,* para. 43.

[38] United States' first written submission to the Panel, paras. 10-11, 12-13, 14-15, 16-18, 19-21; United States' second written submission to the Panel, paras. 46-49, 50, 51-56, 111 and 114.

Barbuda (Antigua) on behalf of a US citizen and provider of remote gambling services established in Antigua who was jailed in the US for violating US laws.[39]

The unique feature of the *US – Gambling* case in terms of GATS provisions was the issue whether the US prohibition on the cross-border supply of gambling services was a market access restriction, a national treatment violation or an instance of domestic regulation. Pauwelyn has aptly characterised this as the question of whether and when ostensibly qualitative regulation constitutes a qualitative restriction on trade.[40]

Article XVI sets out six types of quantitative restrictions. The ones that were relevant in US – Gambling were (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test, and (c) limitations on the total number of service operations or on the total number of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test. The panel found that the list of the six types of measures listed under Article XVI was exhaustive and that the definition of each of the six types of measures a - f was also exhaustive.[41] For Article XVI to apply to the US prohibition therefore had to fall under one of the six types of restrictions.

The panel found that the US prohibition was a limitation on the number of service suppliers in the form of a numerical quota and a limitation on the total number of service operations.[42] For the panel, it was decisive that the US prohibited the cross-border mode of supply altogether.[43] To the panel, a prohibition on using a mode of supply effectively limits the number of service suppliers and service operations using that mode of supply to zero.[44] In essence, the panel thus found that the effects of the US ban on remote gambling were enough to consider the ban a limitation in the form of a quota, even though the US laws never expressly set forth numerical limitations on the number of service suppliers.[45]

The Appellate Body upheld the panel finding and also attached decisive weight to the effects of the US prohibition. It considered that Article XVI:2(a) includes limitations that are in form or effect quotas, monopolies or exclusive service suppliers.[46] In order to justify its expansive reading of Article XVI:2(a), the Appellate Body first looked to the definition of exclusive service suppliers in Article VIII:5, which includes instances where a member, "formally or in effect, authorises or establishes a small number of service suppliers…."[47]

The Appellate Body then turned to the actual wording of Article XVI:2 and in a tour de force concluded that it was not clear that Article XVI:2 required the limitations to take a particular form.[48] To the Appellate Body, Article XVI:2 is not primarily about the form of measures but rather about their numerical or quantitative nature.[49] Based on this, the Appellate Body considered that the Article XVI:2(a) should be read to include measures

[39] Pauwelyn, Joost, n. 26.

[40] Pauwelyn, Joost, n. 26.

[41] Panel Report, *US – Gambling,* para. 6.298.

[42] Panel Report, *US – Gambling,* para. 6330.

[43] Panel Report, *US – Gambling,* para. 6.330.

[44] Panel Report, *US – Gambling,* para. 6.355.

[45] See also Pauwelyn, Joost, n. 26.

[46] Appellate Body Report, *US – Gambling,* para. 230.

[47] Appellate Body Report, *US – Gambling,* para. 229.

[48] Appellate Body Report, *US – Gambling* paras. 226, 231.

[49] Appellate Body Report, *US – Gambling,* paras. 227, 232.

that have the effect of the listed limitations.[50] Concerning the US prohibition, the Appellate Body in essence agreed with the panel that limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a).[51]

The potential legal consequences for WTO members flowing from the report in US – Gambling merit further discussion. At the outset, it is important to be as clear as possible about the scope of the finding. Several commentators are wary that almost all qualitative regulations could now be considered as limitations in the sense of Article XVI:2 since they will produce quantitative effects.[52] Pauwelyn provides a graphic example of this when he queries whether regulations that require taxi drivers to pass driving tests will be considered to be limitations because aspiring taxi drivers who did not pass the test are excluded from the market.[53]

Admittedly, the language about measures producing the effect of a limitation leaves it unclear whether "effect" refers to the trade effect on individual suppliers so as to catch nearly all mandatory qualitative regulation or the economic effects of quotas to fix supply to the importing country. It is submitted that the language of Article XVI:2 provides some guidance on this issue. Article XVI:2(a) refers to limitations on the number of service suppliers. Only regulations that actually impose a definitive limit on the number of service suppliers are thus caught by Article XVI:2(a). Under the taxi driver example, the number of service suppliers is not definitively limited since new taxi drivers that have passed the test can always enter the market and compete with existing suppliers.[54] It is therefore unlikely that the finding about the quota-like effects extends as far as to capture regulatory measures that make market entry subject to certain conditions but do not impose a number. This observation notwithstanding, qualitative regulations may be considered to be quantitative restrictions in certain circumstances that will be expounded just below but members will face considerable uncertainty over when this will be the case.

Several aspects of concern regarding the finding in US – Gambling persist. The panel seems to hold that even a prohibition on one of several ways of delivering services remotely will be considered to be a quota.[55] Don Regan argues that this finding is correct.[56] Consider the remote selling of insurance services as an example. A member might in principle allow the remote selling of insurances but only through the mail and not over the telephone or internet on the grounds that consumers need to be protected against making hasty and wrong decisions on insurances. According to the panel – and also Don Regan – this type of regulation would need to be scheduled as a market access restriction. It is submitted that this result is not warranted by the usual understanding of a quota – as fixing a definite number of suppliers. In the example given, foreign and domestic distant-selling insurance companies can still fully compete in the market and are in no way limited by numerical quotas. They merely cannot use certain selling

[50] Appellate Body Report, *US – Gambling,* para. 230.

[51] Appellate Body Report, *US – Gambling,* paras. 234, 237-239.

[52] Pauwelyn, Joost, n. 26; Trachtman, Joel, 'Decisions of the Appellate Body of the World Trade Organization', *European Journal of International Law* 16 (2005)801. 2005, 801. Markus Krajewski considers that the ruling leaves uncertainty whether other measures that effectively limit market access but are not prohibitions will be included in Article XVI. Krajewski, Markus, 'Playing by the Rules of the Game? Specific Commitments after US – Gambling and Betting and the Current GATS Negotiations', *Legal Issues of Economic Integration* 32 (2005) 417.

437.

[53] Pauwelyn, Joost, n. 26.

54 Regan, Donald H., 'A Gambling Paradox: Why an Origin-Neutral "Zero-Quota" in Not a Quota Under GATS Article XVI', 41 *Journal of World Trade* (2007) 129: 1302.

[55] Panel Report, *US – Gambling,* para. 6.338.

[56] Regan, Donald, n. 54, 1304.

techniques but that is a regulation and not a quota. It is also readily apparent from the example given that such an interpretation of Article XVI would constrain regulatory autonomy to a significant extent.

Commentators have also criticised the panel and Appellate Body finding for ignoring differences between zero and non-zero quotas and origin-neutral and origin-specific measures. Regan argues convincingly in my view that an origin-neutral quota should not be considered a quota at all on the grounds that when a member prohibits a service or mode of supply, it prohibits competition entirely and there is therefore no question of the member reserving market shares to domestic suppliers.[57] Under such an interpretation of Article XVI, WTO members would obviously enjoy much leeway in prohibiting economic activities on regulatory grounds.

The bottom line of the finding in US – Gambling is therefore that origin-neutral prohibitions will be considered as quantitative restrictions under Article XVI. Most qualitative regulations that make market access more difficult for some suppliers still fall outside of Article XVI. However, some qualitative regulations that work to limit supply to a number may well also be quantitative restrictions in the sense of Article XVI. However, this "effects" test in respect of qualitative regulations has created considerable uncertainty. What, for instance, about a qualitative regulation that imposes such demanding capital adequacy standards that only a handful of international financial service suppliers besides the domestic ones and maybe two other international suppliers are able to meet them? Would such a regulation not in effect operate like a quota? The economic quota-like effects of demanding qualitative regulations will also differ depending on the characteristics of the relevant market. Where entry costs for new suppliers in a particular service market are relatively low, even demanding standards that initially restrict the number of suppliers will not fix the number of service suppliers. The same could not be said about other service markets where the costs for new entrants are very high.

The economic effects of prohibiting a mode of supply also vary depending on whether competing modes of supplying the service remain allowed (through commercial presence, for instance). To the extent that supply through commercial presence remains a viable alternative, a prohibition on the cross-border mode of supply would not necessarily produce the effects of a quota within the importing market since the number of established service suppliers remains in principle unlimited. In comparison to domestic suppliers, it might, however, make it more difficult for foreign service suppliers to provide their services since commercial presence generally requires greater initial investments and will often subject the service supplier to host rather than home country regulation. Regan thus argues that such a situation is case of a national treatment violation but not a quantitative restriction.58 At first sight, this argument seems intuitive. However, consider the case where market entry for commercially present service suppliers is extremely difficult because of other regulatory requirements. Here, the regulatory regime of the member might indeed produce the effect of protecting the position of incumbents on the market and excluding any possibility for competition.

These considerations highlight that the "effects approach" of the Appellate Body in US – Gambling calls for a fairly detailed economic analysis and ultimately leads to considerable uncertainty for WTO members contemplating what to schedule since it amounts to a case-by-case analysis. From the point of view of safeguarding democratic choices, this uncertainty over which legal rules apply to domestic regulation is unacceptable. It would seem that the sole way of creating certainty is to return to a formal criterion for

[57] Id., 1306, 1308-1309.

[58] Id., 1308-1309.

distinguishing between quantitative restrictions and qualitative regulation and possible national treatment violations.

Finally, it has already been pointed out that the interaction between Articles VI and XVI could become problematic as a result of *US – Gambling.* As the regulatory objectives contained in Article XIV are limited, a broad application of Article XVI to qualitative regulations precludes a fully GATS-consistent justification of technical regulations and licensing and qualification requirements through the more open list of regulatory objectives in Article VI:4, 5. Another ironic result of *US – Gambling* will be that any regulatory disciplines that the Working Group on Domestic Regulation develops will not provide a safe haven of GATS consistency in respect of any regulations with quota-like effect since Article VI provides no defence for measures that violate the market access commitments.

In the final analysis, the interpretation by the panel and the Appellate Body in *US – Gambling* has intruded into democratic governance in three ways: (i) regulatory measures that produce the economic effect of definitely limiting the number of service suppliers to zero or a number above zero now fall under the *per se* prohibition of Article XVI; (ii) measures with such quantitative effects that are also technical regulations, licensing or qualification requirements, whether or not embodied in national or international standards now have to be justifiable under the limited list of public policies under the general exceptions rather than under the open-ended list of Article VI; and (iii) the uncertainty that the "effects" test under Article XVI has created might interfere with democratic decision-making about regulations in member states or international standardisation organisations.

The Interaction of the GATS with Domestic and Other International Legal Orders and Judicial Enforcement Mechanisms

The *US – Gambling* case is also telling concerning the interaction of the GATS with other legal orders and judicial tribunals, which could amplify the impact of the GATS and lead to domestic or international courts and tribunals interfering with democratic governance if they follow intrusive WTO dispute settlement decisions.

For the US, the gambling dispute comes with a further twist as its remote gambling ban might even violate the US constitution. In two US domestic criminal cases, defendants seek to dismiss criminal charges against them under the US Wire Act, which prohibits remote gambling. The lawyers argue that pursuant to the Charming Betsy Supreme Court decision, the US Act would have to be interpreted so that it does not conflict with the WTO GATS and DSU.[59] They also invite the court to find that the final decision in US – Gambling is self-executing, i.e. has direct effect, in the US legal order.[60]

In the Utah case, the District court failed to grant the motion to dismiss and found that the Charming Betsy doctrine only applies where the statute in question is ambiguous.[61] The court also found that the plain language of the Wire Act contemplates prosecution and that in such cases, the US Uruguay Round Agreements Act (URAA) which implements the WTO Agreements contemplates that US domestic law takes precedence over the WTO

[59] Motion to Dismiss in Case No. 4:06CR00337CEJ (MLM), *United States of America v. Gary Stephen Kaplan,* United States District Court, Eastern District of Missouri, Eastern Division, available at: <http://www.majorwager.com/articles/gk/7.pdf>, 14-20, 22, Case No. 2:07-CR-286 TS, *United States of America v. Baron Lombardo et. al.* United States District Court, District of Utah, Central Division, p.23-26.

[60] Motion to Dismiss, *USA v. Gary Stephen Kaplan,* n. 59, 29-32; *United States of America v. Baron Lombardo et. al.,* p.23-26.

[61] *United States of America v. Baron Lombardo et. al.,* p 26f.

Agreements.[62] Finally, the court found that WTO dispute settlement decisions are not binding on the US and that the provisions of the GATS cannot be relied on by defendants pursuant to the URAA.[63]

In another US domestic case, a US provider of on-line poker games has brought a claim in a Washington state court alleging that the US ban on remote gambling in interstate commerce and the permission of intrastate remote gambling violates the US commerce clause, as interpreted in light of US treaty obligations, because it favours established casinos and online horseracing bookmakers vis-à-vis providers of online poker games.[64] In an EC context, similar claims could be brought under the free movement provisions of the EC treaty. In addition, foreign investors could bring claims against the US under bilateral investment treaties. This shows that the GATS may also produce effects on national democratic governance through an interaction with domestic and other international law if only because of a potential chilling effect of impending suits on draft legislative proposals.

Conclusion

Notwithstanding some limited uncertainty over the status of international standards, the GATS can be interpreted in ways that avoid undue intrusion into democratic governance. The main problems have arisen in connection with dispute settlement decisions. As the GATS lacks supremacy and direct effect in national legal orders, members could take their chances and ignore dispute settlement reports for similar issues to which they might apply. They can also choose not to implement a dispute settlement report and pay compensation or suffer retaliation instead. On much the same lines, the GATS offers the possibility of withdrawing commitments after a dispute settlement report has been issued, and the US has taken this step. However, from the perspective of democratic theory, these mechanisms are imperfect as they might not be realistic options for developing country members, or, if used by a developed country, impose transboundary trade effects on developing countries.

It has also been suggested that the provisions of the GATS may become amplified through the interaction of the GATS with other legal orders and domestic courts. Overall, the effects of this interaction should not be overstated. If the domestic court applies simple statutory provisions in its findings, these could easily be modified by parliaments in order to set aside the judgment. However, when constitutional provisions or other international treaties like the EC treaties or multilateral environmental treaties are concerned, the high consensus requirements could prevent their modification in response to problematic judicial decisions. At least in these latter cases, there may be a need to create a mechanism whereby WTO panel or Appellate Body decisions can be reviewed as corrected, if necessary out or respect for democratic governance.

[62] *United States of America v. Baron Lombardo et. al.,* p. 28f.

[63] *United States of America v. Baron Lombardo et. al.*, p. 29f.

[64] Complaint *Lee H. Rousso v. State of Washington,* Superior Court of Washington County of King, 6-8. Available at:

<http://pokerplayersalliance.files.wordpress.com/2007/07/lee_rousso_complaint. pdf>.

The Discourse Theory of Law and the European Constellation

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Introductory Remarks

Jürgen Habermas' Discourse Theory of Law is more than just a famous contribution to the vast field of legal theory, as that notion is usually understood. His works on law continue the tradition of the grand theories of society (*Gesellschaftstheorie*), which sought to analyse and define the specifics of modern law in the context of the development of state and society. The importance of law within such wider contexts is certainly a German legacy. The law was of crucial importance in the works of so many of Germany's *maîtres penseurs* such as Kant, Hegel, Weber. It is therefore unsurprising that Habermas' most important critical interlocutor, Niklas Luhmann, whose systems theory rejects the idea of any hierarchical ordering among the subsystems of modern societies, has paid particular attention to the law and its functioning.

Even though Jürgen Habermas represents a great tradition, his works display unique features. Two of such are clearly visible in his writings on both Europeanization and globalisation. One such feature is his effort to reconcile the tradition of social critique of the Frankfurt School with a theory of legitimate governance – his theory of deliberative democracy.[1] This reconciliation builds upon the integrative potential of law in capitalist societies under democratic conditions. The second specificity is the exposure of German anti-liberal traditions in social theory to Western counterparts, in particular to Anglo-American philosophy and theories of democracy. True, a broad interest in American law has been an important characteristic of Germany's post-war *Rechtswissenschaft* since the early 60s;[2] however, it was Habermas who also paved the way for an intense reception of the theoretical foundations of American jurisprudence and constitutionalism. A third dimension of Habermas' work, which he pursued via this focus on the West, is his deep concern for Germany's history. Throughout the many decades of his presence as a scholar and public intellectual, Habermas has continued to examine critically Germany's *mentalités*, the origins of its anti-liberal intellectual traditions and their impact; throughout the history of the Federal Republic he contributed prominently and intervened in public debates on the *Aufarbeitung*[3] of the German past.

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[*] This paper is part of a more comprehensive essay on the tensions between Jürgen Habermas' Discourse Theory of Law and the postnational constellation, which will include a discussion of Habermas' contribution to international law.

[1] See John P McCormick, "Habermas' reconstruction of West German Post-War Law and the *Sozialstaat* Controversy", in Jan-Werner Müller (ed.), *German Ideologies since 1945. Studies in the Political Thought and Culture of Bonn Republic*, New York: Palgrave Macmillan, 2003, 61-75.

[2] See Ch. Joerges, "The Science of Private Law and the Nation-State", in Francis Snyder (ed.), *The Europeanization of Law. The Legal Effects of European Integration*, Oxford-Portland: Hart 2000, 47-82, at 63 *et seq.*

[3] "*Aufarbeitung der Vergangenheit* (working through the past)": Theodor W. Adorno coined this term in his famous critique of *Vergangenheitsbewältigung;* see his "The Meaning of Working Through the Past", in Theodor W. Adorno, *Critical Models: Interventions and Catchwords*, New York: Columbia UP 1998, 89-103.

Europe's "Bitter Experiences"

Hardly any book on European integration and hardly any solemn talk at a public event concerning European matters fails to mention it: European integration symbolised peace after two devastating world wars; it made possible the re-admission and supervision of the defeated and divided Germany into the civilised world ; the commitment to an opening of Europe's national economies implied a not so trivial shift of national aspirations, namely the replacement of national power by national prosperity as a societal value (*Sinnstifter*).[4] At present, post-1989, this type of memory and reconstruction no longer represents Europe's self-perception comprehensively; the presence of the past modifies its form.[5] The past of the first post war decades no longer suffices as a basis for the promotion of the European project after enlargement and in the political environment of the 21st century.[6] However this is not to say that Europe would have by now, come to terms with its bitter past. Even its self-presentation can be Janus-faced. One side of the face was presented in the Preamble of the Draft Constitutional Treaty as elaborated by the European Convention.[7] The other side of the face constitutes a confrontation of Europe's history and its disquieting presence in Europe's presence which surfaced somewhat briefly and only for a historical, albeit unconstitutional moment after the signing of the Draft Constitutional Treaty. This face re-emerged when, following a Polish initiative, the Intergovernmental Conference changed the Preamble to the Draft Constitutional Treaty of the 18 July 2003 quite considerably.[8] The first two somewhat ostentatious passages[9] were dropped and the reference to "re-united Europe" was replaced by a "Europe, re-united after bitter experiences". More realism, to be sure, but still embarrassing. The "bitter experiences" do not make references to the European Jewry. As Tony Judt has put it in the concluding sentence of *Postwar:* "The new Europe, bound together by the signs and symbols of its terrible past ... remains forever mortgaged to that past… 'European Union' may be a response to history, but it can never be a substitute".[10] What he is referring to is clear. His *monitum* implies that Europe's identity can indeed be more clearly defined in a negative way, namely by the *Shoah*, the attempted genocide of the Jews of Europe. Judt knows of course that this diagnosis does by no means capture the conscience of the first year after World War II, during which as he notes in a recent essay, Europeans were doing their best to forget the atrocities that had just been committed.[11] Today however, as a result of long and painstaking processes, the Holocaust has become omnipresent and this presence is not going away. The young great grandchildren and the adult grandchildren of the war generation in Germany interrogate about the involvement of their ancestors,

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[4] See with particular emphasis on Germany as *Wirtschaftswunderland* Michel Foucault, *Naissance de la biopolitique.* Cours au Collège de France, Seuil/Gallimard 2004, in particular the lectures of 7 February 1979, at 105-134 and of 14 February 1979 at 135-164.

[5] "Italy's president, Giorgio Napolitano, has a vivid recollection of Mussolini's fascist regime. The president of the European Commission, José Manuel Barroso, grew up under Salazar's dictatorship in Portugal. The EU's foreign policy chief, Javier Solana, remembers dodging General Franco's police. Eleven of the 27 heads of government who [participating in June 2007 European Council], including the German Chancellor Angela Merkel, were subjects of communist dictatorships less than 20 years ago.", notes Timothy G. Ash ("Europe's true stories", in *Prospect Magazine* 131, 2007, available at: <http://www.prospect-magazine.co.uk/article_details.php?id=8214>.

[6] See on this debate Fabrice Larat, "Vergegenwärtigung von Geschichte und Interpretation der Vergangenheit. Zur Legitimation der Europäischen Integration", in Stefan Seidendorf and Matthias Schöning, (eds), *Reichweiten der Verständigung*, Heidelberg: Winter Verlag 2006., 240-262.

[7] For the text cf. OJ C 310/2004, 1 of 16 December 2004, available also at: <http:// http://european-convention.eu.int/>.

[8] OJ C 310/2004, 1 of 16 December 2004.

[9] Namely, the reference to Thucydides and the praise of Europe as the herald of civilisation.

[10] Tony Judt, *Postwar. A History of Europe Since 1945*, London: William Heinemann 2005.

[11] Tony Judt, "The 'Problem of Evil' in Postwar Europe", *The New York Times Review of Books* 55:2 (7 February 2008).

Europeans in the old and the new member states of the EU question received heroic stories about national resistance against the occupier which cover collaboration and involvement. This quite intense presence of the past is a burden of unknown weight because the unfreezing of national memories occurs in very different ways and is full of temptations. A political instrumentalisation of European pasts by nations, minorities, populist politicians and movements, seems simply unavoidable — memory politics has become a lucrative political business behind the facades and in the backyards doors of institutionalized Europe.

Why recall Europe's darker legacies in a reflection on Jürgen Habermas work on Europe's integration project? The trivial answer is that his work is more conscious of, and more responsive to, this problematic and its importance than that of any other proponent of European integration. Tellingly enough, Habermas' first systematic encounter with Europe, his essay on "Citizenship and National Identity"[12] does not simply contribute to the debate on the economic benefits and normative costs of the intensification of European integration, which was at the time dominated by the controversy surrounding the Treaty of Maastricht as agreed upon by the European Heads of States in 1991. It places these controversies in historical perspectives, addresses the historical accomplishments and failures of the European nation states,[13] develops on that background a vision for the construction of a unified Europe,[14] points to the most embarrassing failure in Europe's "*Vergangenheitsbewältigung*"[15] and makes a proposal aimed at attracting the productive potential of the European project through a new concept which reflects historical failures. We will resume discussions on this proposal in the next section. Suffice it here to underline that Habermas has in his essay managed *en passent* to overcome a deficit which the mainstream discourses in law and political science are not even aware of, namely the failure to address adequately the presence of the past in European affairs and the construction of a new polity.

The most dramatic of his interventions was the manifesto undersigned by Jacques Derrida and published simultaneously in leading European newspapers on 31 May 2003[16] against the American intervention in Iraq. In this text Habermas evokes the European past more intensely than ever;[17] however, the thrust of the manifesto is the divide within the Union between the "alliance of the willing" on the one hand, and the European wide mass manifestations of 15 February 2003 on the other. European unification is now portrayed as the heir to an endangered common Western heritage. This political vocation complements what Habermas had two years earlier in a lecture at the University of Hamburg outlined as the chance of a Europe unified by a common constitution "to counterbalance" the "undesired economic, social and cultural consequences" of

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[12] *Staatsbürgerschaft und nationale Identität. Überlegungen zur europäischen Zukunft*, Zurich: Erker 1991, reprinted as Annex II to *Between Facts and Normes,* Cambridge MA: MIT Press 1999, at 491-516.

[13] *Ibid.,* at 492-500.

[14] *Ibid.,* at 500-507

[15] See *ibid.,* at 507 *et seq*..; on the term see note 3 above.

[16] And subsequently in Jürgen Habermas, *Der gespaltene Westen*, Frankfurt a.M.: Suhrkamp 2004, 43-51 ["February 15, or What binds Europeans Together: a Plea for a Common Foreign Policy, Beginning in the Core of Europe", (2003) 10 *Constellations*, 291-97].

[17] "Contemporary Europe has been shaped by the experience of the totalitarian regimes of the twentieth century and through the Holocaust – the persecution and annihilation of European Jews, in which the National Socialist regime made the societies of the conquered countries complicit as well.... A bellicose past once entangled all European nations in bloody conflicts. They drew a conclusion from that military and spiritual intellectual mobilization against one another: the imperative of developing new, supranational forms of co-operation after the Second World War.", *ibid.* at 296.

globalisation and to defend European *Sozialstaatlichkeit*.[18] Not only the divided loyalties of the governments of an enlarged Europe, but also and even more so, the socio-economic disparities within the European economic space, have rendered a realisation of such visions extremely complex and unlikely. Habermas is aware of all that[19] and he has made it clear that in his view, the retreat of European "constitution building" to intergovernmental diplomacy in the aftermath of the failure of the Constitutional Treaty is irreconcilable with his hopes for a postnational European political culture – and nevertheless continues to defend his normative visions of a Europe united by a political constitution.[20] There is a gap between the diagnosis of divergent pasts filled with "bitter experiences" and the move towards a common polity. What else but a Europe working through its pasts can one expect to close this gap? Is it at all conceivable that such painful and delicate confrontations with history could be shielded against instrumental memory politics?[21] Habermas himself seems to consider such possibility:

> "Why should a sense of belonging together culturally and politically not grow out of these experiences – especially against the rich background of shared traditions which have since long achieved world-historical significance as well as on the basis of the overlapping interests of these networks of communication which have most recently developed in he decades of economic success of the European Community".[22]

European Citizenship

Habermas has submitted quite elaborate suggestions on the design of the European polity, and on the steps that should promote its realisation.[23] Both the envisaged institutional configuration and the suggested steps leading to that end are informed by the discourse theory of law.[24] One constructive core element of Habermas' visions, however, deserves particular attention, namely his idea of constitutional patriotism as the bond of a post national European citizenship. This category seeks to connect Habermas' theory of democracy with the European constellation. It is an essential of this theory, that the European citizen must ultimately be the author of the law of the Union, since, in the last resort, "only the united and consenting Will of all – by which each decides the same for all and all decide the same for each – can legislate";[25] and it is through the involvement of the citizen that the process of constitutionalisation can be accorded a legitimacy superior to the mix of bureaucratic routines, technocratic practices and intergovernmental bargaining that dominate European lower politics and the management of European affairs.

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[18] "Braucht Europa eine Verfassung?, in *Zeit der Übergänge*, Frankfurt a.M.: Suhrkamp 2001, 104-129 [Why Europe Needs a Constitution, in E. O. Eriksen, J. E. Fossum, A. J. Menéndez (eds), *Developing a Constitution for Europe*, London-New York: Routledge 2004, 19-34].

[19] See most recently his "Europapolitik in der Sackgasse. Plädoyer für einen Politik der abgestuften Integration", in Jürgen Habermas, *Ach, Europa,* Frankfurt a.M.: Suhrkamp 2008, 96-130. ("Seine Sprengkraft gewinnt der schwelende Konflikt über die Zukunft Europas freilich aus tieferliegenden Interessengegensätzen, die sich, wenn nicht schon aus Größe und Lage, aus den divergenten Entwicklungspfaden der Nationalstaaten und den kontrastreichen historischen Erinnerungen der Nationen ergeben.").

[20] *Ibid.*

[21] Cf., on this issue, Jan-Werner Müller, *Constitutional Patriotism,* Princeton-Oxford: Princeton UP 2006, 93 et seq.

[22] *The Inclusion of the Other. Studies in Political Theory*, Cambridge, MA: MIT Press 1998, at 152.

[23] Most important "Why Europe Needs a Constitution", note 17 above.

[24] The most careful and comprehensive reconstruction is John P. McCormick's *Weber, Habermas, and Transformations of the European State*, Cambridge: Cambridge UP 2007, esp. at 205-219.

[25] This reference to Kant's *Metaphysical elements of Justice* is on p. 496 of *Between Facts and Norms* (note 12 above).

In his 1991 essay, Habermas discussed the notion of citizenship, their republican and communitarian variants fundamentally. European citizenship, he pointed out, can only be envisaged if the historical connection between republicanism and nationalism can be disjoined. That essay was based on a lecture held in Switzerland – a country, which lends particular plausibility to the argument:

> "A liberal political culture is only the common denominator for a *constitutional* patriotism (*Verfassungspatriotismus*) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society".[26]

The notion of Constitutional Patriotism has constituted the forum for contentious discussions. According to a good number of critics, this notion is too abstract and thin to provide the type or degree of embeddedness on which constitutional concepts must build. Such comments often do not consider the very specific context of *Verfassungspsatriotismus.* Political theorist Dolf Sternberger who coined this concept in 1982[27] did so just because he sought to identify and define the difference between the democracy of the Federal Republic and the nationalist patriotism in Germany's past. In Habermas' adaptation, *Verfassungspatriotismus* became an integral element of his deliberative theory of democracy, which he retains as the normative yardstick for the institutionalisation of the European polity. It is exactly on the overcoming of ethnic and substantive notions of identity that his suggestion is founded.[28] One can of course still ask whether a concept designed for Germany's transformation into a constitutional democracy[29] is too "thick" to become a European concept, or, if deprived of its German connotation, too "thin" to represent Europe's *unitas*. Constitutional patriotism was never intended to be a fully elaborated theory of European multiculturalism and political pluralism,[30] and it is hardly useful to inquire empirically into the pertinent mind-set of Europeans.[31] It seems instead more reasonable to understand European citizenship as a procedural notion meant to underline an evolution. The European *finalité* cannot be defined conclusively in advance; it seems neither likely nor desirable that the Europeans would replace their national identities by a new European post-national one. Habermas' notion seems perfectly reconcilable with such provisos. He has only recently given a restatement in which he underlines on the one hand that constitutional patriotism is not so "thin" as to assume that citizens will identify with abstract constitutional principles. *Verfassungspatriotismus*, he explained, is a conscious affirmation of political principles as citizens *experience them in the context of their national histories*.[32] He emphasises this point in his discussion on the meaning of culture and also, the idea of guaranteeing

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[26] *Between Facts and Norms*, 500.

[27] "Verfassungspatriotismus". Rede bei der 25-Jahr-Feier der "Akademie für Politische Bildung" in Tutzing am 29.6. 1982, in Marie-Luise Recker (ed.), *Politische Reden 1945-1990*, Frankfurt a.M.: Deutscher Klassiker Verlag 1999, 702 et seq.

[28] *Ibid*. See also Jürgen Habermas, *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?*, Frankfurt a.M.: Suhrkamp 2004, 124.

[29] On the "militancy" and its credentials in this process cf. Günter Frankenberg, "Der lernende Souverän", in *id.*, *Autorität und Integration. Zur Grammatik von Recht und Verfassung*, Frankfurt a.M.: Suhrkamp 2003, 46-72; this example illustrates perfectly how problematic it would be to try to transmit social learning into another society – and how useful inter-societal observation and critique can be; see V.2 *infra*.

[30] See Jan-Werner Müller, *Constitutional Patriotism* (note 21 above).

[31] But see Mattias Kumm, "Why European will not embrace constitutional patriotism", 6 *International journal of Constitutional Law* 6 (2008), 116-136.

[32] Jürgen Habermas, "Vorpolitische Grundlagen des demokratischen Rechtsstaates?", in *id., Zwischen Naturalismus und Religion*, Frankfurt a.M.: Suhrkamp 2005, 106-118, at 111 (italics mine): "Entgegen einem verbreiteten Missverständnis heißt ‚Verfassungspatriotismus', dass sich Bürger die Prinzipien ihrer Verfassung nicht allein in ihrem abstrakten Gehalt, sondern konkret aus dem Kontext ihrer jeweils eigenen nationalen Geschichte zu Eigen machen".

cultures through collective rights which in his view, is misconceived: culture is of an intrinsic importance for our lifestyle; the human mind (*Geist*) is culturally constituted[33] – and culture is perpetuated only through an acceptance by those to whom it is addressed and their convictions that it be worthwhile to maintain this tradition.[34]

A European concept of citizenship which seeks to achieve deeper integration through some form of intentional "identity politics" would then be fundamentally misconceived. European citizens are not expected – by Habermas – to forget their national histories and cultural traditions. They cannot escape from them anyway, they should develop them further – and they should learn to live with this variety. These clarifications need not be interpreted as a deviation from his position. Back in 1991, Habermas opined: "By and large, national public spheres are still culturally isolated from one another….In the future, however, a common *political* culture could distinguish itself from the various *national* cultures."[35]

Is this a conceptually all-too-artificial and, sociologically speaking, unrealistic suggestion?[36] Answers to these questions have to vary according to the disciplinary background in which they are examined. Amongst the controversies surrounding the existence and functions of a European public opinion, a suggestion has been made to understand mutual observation and critique as specific qualities of that sphere.[37] Lawyers can, I submit, resort to the discipline, which is dealing with the challenge of bridging different legal systems, namely conflict of laws. To argue that European citizenship creates a bond committing Europeans to respect their various identities and to tolerate differences is to postulate a type of legal supranationalism which does not presuppose the emergence of some European homogeneity but seeks to realize what the Constitutional Treaty had foreseen as the "motto of the Union": unity in diversity.[38] As I have argued elsewhere: this motto can adequately be reconstructed in well-defined, if not so well known legal notions, namely in the language of conflict of laws. A conflict-of-laws approach would allow the differences persist, but subject these national

[33] "Kulturelle Gleichbehandlung – und die Grenzen des postmodernen Liberalismus", *ibid.*, 279-323, at 306.

[34] *Ibid.*, at 313.

[35] "Citizenship and National Identity", (note 13), at 507.

[36] Cf. Bernhard Peters, "Public discourse, identity, and the problem of democratic legitimacy", in Erik O. Eriksen (ed.), *Making the European Polity. Reflexive integration in the EU,* London: Routledge 2005, 84-124. See Jürgen Habermas, "Does Democracy Still Enjoy an Epistemic Dimension?", (2006) 16 *Communication Theory*, 411-426.

[37] Cf. Klaus Eder's intensive work on the Europeanization of public spheres, in particular Klaus Eder, "Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issue-spezifischen Kommunikationsgemeinschaft", (2000) *Berliner Journal für Soziologie* 167-184; Klaus Eder and Cathleen Kantner, "Transnationale Resonanzstrukturen in Europa. Ein Kritik der Rede vom Öffentlichkeitsdefizit in Europa", in Maurizio Bach (ed.), *Die Europäisierung nationaler Gesellschaften;* Die Europäisierung nationaler Gesellschaften, Wiesbaden: Westdeutscher Verlag 2000, 306-331. See also Hans-Jörg Trenz, "Einführung: Auf der Suche nach einer europäischen Öffentlichkeit", in Ansgar Klein *et al*. (eds) *Bürgerschaft, Öffentlichkeit und Demokratie in Europa*, Opladen: Leske und Budrich 2003, 161-168. – It is hardly necessary to underline that the conflict-of-law methodology does not pretend to offer ready-made recipes. "Diversity" is precious; but so are the advantages of communication and living together. Cf. on the particularly sensitive language problem Bruno de Witte, "Language law of the European Union: Protecting or Eroding Linguistic Diversity?", in Rachel Crawford Smith (ed.), *Culture and European Union* Law, Oxford: Oxford UP 2004, 205-241.

[38] See for an elaboration Ch. Joerges, "Working through 'Bitter Experiences' towards a Purified European Identity? A Critique of the Disregard for History in European Constitutional Theory and Practice", in Erik O. Eriksen, Christian Joerges and Florian Rödl (eds), *Law, Democracy, and Solidarity in Europe's Post-National,* London-New York: Routledge 2008, 173-193.

communities to rules and principles which ensure mutual respect and co-existence.[39] European citizenship would at the same time serve as a concept mirroring and promoting the transformation of the European "market citizen" (Hans Peter Ipsen) who enjoys private autonomy in the great European economic space into a political citizen who actively participates in the integration process – thereby stepping out of the protective and restraining umbrella of his or her nation state.[40] It should be added that this type of attitude and readiness could be a way, and maybe the only chance, of coming to terms with Europe's darker pasts.

Habermas' own views seem more demanding and optimistic.[41] There is, however, one *problématique*, which requires more caution, namely the survival of Europe's welfarist traditions under the pressures of globalisation and growing socio-economic disparities within the enlarged European Union.

Social Europe

The discourse theory of law endorses the legitimacy of constitutional democracies. However, Habermas has not severed ties with his origins. The strength of his discourse theory exists in the fact that it remains aware of the fragility of its sociological preconditions. It was the successful balancing of the dynamics of market economies on the one hand and the quests for welfare on the other which constituted the basis of what is in hindsight widely perceived as the "golden age" of the nation states of the OECD world.[42] The discourse theory takes this basis neither for granted nor does it attribute the success of welfare state to fortunate, albeit contingent, historical circumstances. The welfare states "deserved recognition" because they ensured through the guarantee of political freedoms and democratic procedures, the legitimacy of national compromises over the tensions between economic efficiency and social justice. Habermas of course, does not assume that democratic freedoms and their exercise would carry with them some inherent guarantees like Adam Smith's invisible hand or the taming of discretionary policy by the imposition of some pre-existing *ordo* via some decision of a strong state. Democratic constitutionalism remains instead linked to, and dependent upon, a political culture which is not only strong enough to defend itself but also inventive in finding appropriate responses to practical exigencies. It is not by chance that Habermas has underlined so often the epistemic dimension of deliberative processes in a constitutional democracy.

The dependence of the *Sozialstaat* on a specific political culture does by no means imply that the political system is powerful enough to cope with the challenges of social and economic change. This threat was a subtext not only of Habermas' early work, but also of his writing during the "golden age" of the democratic nation state in which he elaborated his legal theory. This subtext had a twofold agenda. One is of course Germany's historical experience, the downfall of the Weimar Republic, which proved to be unable to defend its democracy against anti-liberal political traditions, demagogic National Socialism, economic and social crises. This latter threat, was not, however, specifically German; in the tradition of the Frankfurt School whose leading exponent Habermas was to become in the 60s, economic and social crises were understood as an inherent "quality" of capitalist

[39] See the instructive study of Claudia Schmidt, *Das Staatsangehörigkeitsprinzip in Europa. Die Vereinbarkeit der kollisionsrechtlichen Staatsangehörigkeit mit dem gemeinschaftsrechtlichen Diskriminierungsverbot*, Baden-Baden: Nomos 2008

[40] For an examplary discussion of this vision see Ch. Joerges, "The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline" (Herbert Bernstein Memorial Lecture 2003), *Duke Journal of Comparative and International Law*, 24 (2005), 149-196; also at <http://www.iue.it/PUB/law04-12.pdf>.

[41] See, *e.g.,* Jürgen Habermas, "Why Europe Needs a Constitution" (note 19 above) at 29-31.

[42] See Stephan Leibfried and Michael Zürn (eds), *Transformation of the State?* Cambridge, Cambridge UP 2005.

societies. Habermas' sociological analyses led him to distance himself from the type of crisis scenarios Neo-Marxism in the Federal Republic and elsewhere in the West continued to produce and believe in. However, his sensitivity for, and interest in, the non-philosophical preconditions of his social philosophy remained very much alive. Small wonder, hence, that he did not content himself with praising the greatest merit of the European project, namely its contribution to the overcoming of the militancy of the nation states; he also examined the challenges posed by the integration process to the functioning of national democracies *and* its impact on the social achievements of European welfare states.

When Habermas introduced into the European arena in 1991, the essay cited above,[43] he immediately addressed all of these dimensions – and this quality of his work stands out amongst the literary mountains and molehills that have since then been produced by the students of European integration. This literature responds to the complexity of the European project by disciplinary differentiation – a reaction that is bound to disregard the interdependencies, which Habermas continues to reconstruct.[44] Historians study either national histories or the history of institutionalized Europe; Political theorists and philosophers enquire into citizenship and discuss the theoretical premises of constitutionalism. Political scientists analyse the techniques of governance etc. All of these disciplines are becoming aware of their "methodological nationalism", i.e. the difficulty of capturing Europe's post national constellations with the categories and methodologies they have at their disposal.[45] Habermas addresses all of these challenges – and an additional one. Like everybody else, he is aware of the tensions between Europe's commitment to democracy and the functional needs of the integration project. He remains concerned with the survival of the core of his discourse theory of law, the idea of law-mediated legitimacy of political rule (politische Herrschaft). Because of this latter concern, Habermas' writings on Europe's "integration through law", the legalisation tendencies in the international system and the constitutionalisation of international law differ so markedly from mainstream political *and* legal science.

One short and illuminating restatement of his trans-disciplinary approach can be found in an essay of 1994,[46] where Habermas characterises the typical division of labour between legal and political science in the treatment of the rule of law and democracy:

> Wir haben uns "daran gewöhnt, das Recht, den Rechtsstaat und die Demokratie als Gegenstände zu betrachten, die verschiedenen Disziplinen zugehören: die Jurisprudenz behandelt das Recht, die Politikwissenschaft die Demokratie, und die eine behandelt den Rechtsstaat unter normativen, die andere unter empirischen Gesichtspunkten".

In the light of the discourse theory of law, this kind of mutual neglect is bound toomit what modern law is all about, namely the mutual interdependence of law and democracy, a co-originality which complements and support the interdependence of private and

[43] Note 12.

[44] Ever since *Zur Logik der Sozialwissenschaften*, Frankfurt a.M. Suhrkamp 1982.

[45] See Michael Zürn, "Politik in der postnationalen Konstellation", in Christine Landfried (ed.), *Politik in einer entgrenzten Welt*, Opladen: Westdeutscher Verlag, 2001, 181-204.

[46] "Über den inneren Zusammenhang von Rechtssaat und Demokratie", in Ulrich K. Preuß (ed.), *Zum Begriff der Verfassung*, Frankfurt a.M.: Fischer, 1994, reprinted in Jürgern Habermas, *Die Einbeziehung des anderen*, 1996, 293-305, at 83-94. ('Social scientists take a distinct view of the legal system. They tend to perceive law from external perspectives. They do not engage in the business of a *lege artis* application of rules, but explore their impact on society, their effectiveness, or analyse processes of implementation. They thus tend to avoid the prescriptive dimension of law in general; normative issues, as dealt with by lawyers, are an aliud to truly scientific operations'. This observation can be well illustrated by the independence which exists between mainstream legal and social science and their international sub-disciplines).

political autonomy. How can this transdisciplinary quality be maintained in the postnational constellation, which Europe has embarked upon?

Habermas' response lends support to so many proponents of the intensification of European integration, lawyers, political scientists, and political actors. This, however, is a superficial if misleading convergence, because Habermas anchors his plea in a framework that the professional protagonists are rarely aware of. He set out this position back in 1990, defended it, developed it further but never changed the core argument. Having summarized the ambivalences of the nation state foundation of constitutional democracies and their historical failures, which European integration is to overcome, he commented on the new European *problématique*, taking up the dichotomy between systems integration and social integration which he had used in the Theory of Communicative Action.[47] Integration has moved forward through systems integration while the form of social integration which national democracies have accomplished lag behind.[48] This is an analysis, which is very close to what political scientists like Fritz W. Scharpf have called the decoupling of economic integration from their social policy complements at national level. Habermas concluded: "For the citizen, this translates into an ever greater gap being passively affected and actively participating. An increasing number of measures decided at a supranational level affect the lives of more and more citizens to an ever greater extent."[49] The validity of the diagnosis is unquestionable and the logic of the cure recommended by Habermas seems irresistible: Europe needs a constitution, which is able to rescue the democratic accomplishments of its nation states. The ensuing debate with Dieter Grimm[50]/[51]has become famous and deserves attention: Even if we establish at European level the type of institutions which we have at national level, a European democracy cannot come into existence and it is therefore better to protect national democracies against further erosion through European governance – this is the sceptics' *monitum*.[52] Such a strategy does not accord with Europe's postnational constellation. Democracy can no longer be institutionalised at national level; it needs to be rescued by a European federation, which aims at nothing more and nothing less than "unity in national diversity".[53] The debate between Grimm and Habermas is less about normative issues than about the likelihood of factual developments. Both protagonists can readily admit that they operate under uncertainty – and their later interventions document their awareness of this contingency.[54] It seems striking, however, that both protagonist do not try to overcome the "methodological nationalism" that is mirrored in the categories they employ. Europe as a federation, as a state, as some *ensemble* of states on the one hand, and its counterpart, the nation state, remains the implicit reference point of this debate, its frame and contents.

The need to progress beyond that framework seems most obvious in the problematic of Social Europe. Even in his latest interventions which mirror his disappointment with the state of the European Union after the failure of the Constitutional Treaty, Habermas again restated, albeit somewhat cautiously, that the defence of Europe's "social model" would have to be organised at the supranational level. Wouldn't it be preferable, he

[47] *The Theory of Communicative Action. Vol. 2: Lifeworld and System. A Critique of Functionalist Reason,* Boston: Beacon Press 1987.

[48] *Between Facts and Norms* (note 12), at 501.

[49] *Between Facts and Norms*, at 503.

[50] Grimm, "Does Europe need a Constitution?", 3 (1995) *European Law Journal,* 282-302.

[51] "Comment on the Paper by Dieter Grimm 'Does Europe need a Constitution?'", 3 (1995) *European Law Journal*, 303-307.

[52] See Dieter Grimm's restatement: "Can the 'Post-national Constellation' be Re-constitutionalized?", TranState Working paper 2/2004, Bremen, available at: <http://www.sfb597.uni-bremen.de/>.

[53] See Jürgen Habermas' response to Grimm (note 51 above).

[54] See Dieter Grimm (note 52) and Jürgen Habermas (note 19 above).

asked his social democratic audience, to respond to the risks of economic globalisation by searching for co-ordinated responses within the whole European economic space rather than through the means of the national welfare state?[55] Two observations seem to conflict with this suggestion. One is the finding that the diversity of welfare system in Europe is such that the institutionalisation of one particular social model at European level is simply inconceivable.[56] The second concerns the type of co-ordination, which Europe practices increasingly. This co-operation is characterised by "soft" new modes of governance, which are no longer subject to the discipline of the rule of law. This is particularly obvious in the field of social policy. Here the 2000 Lisbon European Council has opted for an "Open Method of Co-ordination" as an alternative to the traditional Community Method.[57] Executive governance and the replacement of parliaments and administrations by governmental political rule are well known in national political systems.[58] It is of more dramatic importance at transnational level because it "outlaws" constitutional democracies irrevocably. The debate on the soft modes of governance focuses mainly on empirical issues, namely the effectiveness of the new techniques. The prospects are good, argue many; the new method will be effective – not in the rescue of European *Sozialstaatlichkeit,* but in the destruction of the non Anglo-Saxon models, argue others. The issue presents a challenge for Habermas' constitutionalism, in particular where these efforts are undertaken outside a rule of law framework. The tensions between "the social" and the rule of law are not new in principle. They have been the object of heated debates ever since Max Weber's warning that the intrusion of values of social justice into the legal system (the turn to substantive rationality) will threaten the law's formal rationality and the rule of law as such.[59] Habermas has been an extremely important contributor to the pertinent constitutional debates in post-war Germany. What is new, however, is that in the postnational constellation the means that the nation state had at its disposal to manage those tensions are no longer available.

A Brief Epilogue: Europeanization in the Shadow of Globalisation

The challenges of Europeanisation had been addressed by Habermas prior to the publication of *Between Facts and Norms;* the challenges of globalisation "only" in 1998 in the seminal essay on "The Postnational Constellation and the Future of Democracy",[60] which Habermas had written in preparation of an encounter with Gerhard Schröder, then Chancellor of the Federal Republic, on 5 June 1998.[61] There he deals with both issues. He examines the eroding potential of the nation state in its "golden age" to establish a well-ordered society ("wohlgeordnete Gesellschaft") discussing first the globalisation process and the project of European integration only thereafter. The "postnational constellation" is hence to be understood as a concept, which comprises both dimensions. In Habermas'

[55] *Ibid.* and "Erste Hilfe für Europa", DIE ZEIT no.49/2007.

[56] Fritz W. Scharpf, "The European Social Model: Coping with the Challenges of Diversity", (2002) 40 *Journal of Common Market Studies*, 645 et seq.

[57] See the Conclusions of the Presidency, available at: <http://www.europarl.europa.eu/summits/lis1_en.htm#c>, in particular para. 37; for a critical examination cf., Armin Schäfer, "A New Form of Governance? Comparing the Open Method of Co-ordination to Multilateral Surveillance by the IMF and the OECD", (2006) 12 *Journal of European Public Policy*, 70-88.

[58] Armin von Bogdandy, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik,* Tübingen: Mohr Siebeck 2000.

[59] Max Weber, *Economy and Society*; Berkeley: University of California Press, 1978, 873-874;on socialism see his "Socialism", in Max Weber, *Political Writings,* Cambridge: Cambridge UP, 1994, 272-303.

[60] In his *The Postnational Constellation. Political Essays*, Cambridge: Polity Press 2001, 58-112.

[61] "Die postnationale Konstellation und die Zukunft der Demokratie", in Jürgen Habermas, *Die postnationale Konstellation. Politische Essays*, Frankfurt a.M.: Suhrkamp 1998, 91-169. (Cambridge, MA: MIT Press 2001).

account, globalisation is the much more problematic one. In his most recent work, he addressed its challenges and the prospects for rule bound governance and law-mediated legitimacy ever more intensively.[62] The framework which Habermas develops is again comprehensive and multifaceted: it is multidisciplinary, historically informed, descriptive and prescriptive, reflecting the present state of the international system, contrasting his theoretical considerations with ongoing developments and avoiding conjectures about admittedly contingent developments and political uncertainties. When contrasted with the challenges he identifies at international level, Europe presents the much easier case. Its deepened legalisation seems easier and more comprehensively accessible to an analysis in terms of the discourse theory of law. Europe is a hope and has a vocation: Its further integration may be an indispensable prerequisite for the taming of globalisation.[63] It would be futile to try to discuss all this *en passent.* I restrict myself to one suggestion: The discourse theory of law needs to defend the constitutional democracy as institutionalised in nation states as a site of legitimate governance. It cannot envisage a reconstitution of European democracy in terms of the national constellation. It will have to live with non-juridified spheres of transnational governance. I respectfully submit that the conflict of laws approach mentioned above[64] has the potential to respond to these queries.[65]

[62] See already his "Kants Idee des Ewigen Friedens: aus dem historischen Abstand von 200 Jahren", in Jürgen Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt a.M.: Suhrkamp, 192-236 and thereafter in particular: "Das Völkerrecht im Übergang zur postnationalen Konstellation", in Angelika Poferl and Natan Sznaider, (eds), *Ulrich Becks kosmopolitisches Projekt. Auf dem Weg in eine andere Soziologie*, Baden-Baden: Nomos, 159-168; "Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?", in Jürgen Habermas, *Der gespaltene Westen*, Frankfurt a.M: Suhrkamp, 113-193. "Eine politische Verfassung für die pluralistische Weltgesellschaft?", in Jürgen Habermas (ed.): *Zwischen Naturalismus und Religion*, Frankfurt a.M: Suhrkamp, 324-365. On all this see the analyses in Peter Niesen and Benjamin Herborth (eds), *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik* , Frankfurt a.M.: Suhrkamp 2007 and the reply of Habermas therein. ("Kommunikative Rationalität und grenzüberschreitende Politik: Eine Replik", at 406-459).

[63] See "Europapolitik in der Sackgasse. Plädoyer für einen Politik der abgestuften Integration", in Jürgen Habermas, *Ach, Europa,* Frankfurt a.M.: Suhrkamp 2008, 96-130.

[64] Text following note 36.

[65] For an outline see Ch. Joerges, "Conflict of Laws as Constitutional Form", contribution to Workshop: RECON models applied, Oslo, 25 April 2008.

Justice and/or Democracy?
Power and Justification in the EU and Other International Organizations

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The main task of international organizations is to provide a corrective mechanism to normative and functional failures of the nation-state under conditions of interdependence. Assessments of the legitimacy of international organizations should judge them to the degree to which they fulfill that task. The adequate normative yardstick to be applied is justice, not democracy. The article develops an understanding of justice as the 'right to justification' and identifies three major obstacles of realizing it under conditions of the international system. The main part of the article is devoted to explaining how supranational organizations help overcoming these obstacles and how they open up a new chance for transnational justice. The concluding section summarizes the argument and discusses its relevance for the debate on the legitimacy of international organizations.

Beyond the Democratic Deficit

Much of the debate on the legitimacy of the European Union (EU) and other international organizations is built on the assumption of a universal applicability of the concept of democracy. Conceptions of legitimate governance are exported from standard democratic theory and applied to the EU without systematically investigating whether the notion of democracy is the adequate standard at all. Democracy, so the implicit argument, is a value that cannot be meaningfully be disputed. It is a normative good in itself and therefore applicable always and everywhere, independently of whether the object under scrutiny is a city, a state, a region or an international organization. Such an approach is difficult to justify both for theoretical and empirical reasons.

On a theoretical level, it ignores the insight that all theories are built on abstractions and that they therefore only work under specific conditions. In positive theory, this insight is reflected in the use of scope conditions, i.e. the identification of conditions which limit the range of applicability of a certain statement. Scope conditions are of eminent importance in most positive theories, for example, in liberal intergovernmentalism or in neo-functionalism. None of these theories claims to offer a universally valid explanation but limits its propositions to certain specified conditions. The modesty that accompanies the notion of scope conditions is sometimes lacking in normative theory. It is not clear, however, why the logical nexus between abstract categories and a limited applicability of the theory (that is established on those categories) should not hold true for normative theory, too. The implication of this argument is that we should ask any normative theory of democracy to identify its analytical abstractions and to explicate in how far they limit the applicability of the argument.

There are also good empirical reasons to be skeptical about the analytical usefulness of the notion of democracy for justifying the EU. The EU lacks all those political

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competences which lay at the heart of democratic governance and which have historically been the most prominent resources for the provision of public order: the powers to tax, to enforce legally guaranteed freedoms by means of coercion, and to provide security against foreign powers (Tilly 1990). 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. In addition, even after the Treaty of Lisbon it still is the case that the supremacy of European law is not explicitly mentioned in the law of the Union and that every member state could by means of simple legislation revoke its "Anwendungsvorrang". The EU – or any other international organization – also has no *demos*. European-wide public discourses emerge only sporadically as responses to political scandals or soccer championships. The nations-state is still the primary locus of allegiance in Europe and the place where political discourse and democratic reflection take place. Democratic theory, be it in a Rawlsian (Rawls 1971), a Habermasian (Habermas 1992) or in a Dahlian (Dahl 1998) fashion, emphasizes that democracy necessarily entails a *demos* which identifies with a certain authoritative structure (even if only understood in the Habermasian term of *Verfassungspatriotismus*). There can be no democracy without a *demos*.

Democracy is also hard to imagine without firm borders. Although many speculate about the possibility of democratic governance in functionally specified policy networks, all established theories of democracy underline the importance of drawing a line between those who are insiders and those who are outsiders. It is common sense that democratic procedures are instruments for identifying and implementing those normative ideas as they are held by a people with a clear territorial and juridical distinction. If adopted, those ideas become formal rules and apply to all people inside the demarcated territory and to no one outside that territory. The EU does not only violate that principle, but follows an entirely different logic. It does not have fixed borders but consists of a set of functionally specified political regimes with changing memberships. Whilst some regimes like the Common Foreign and Security Policy (CFSP) accept only governments as members, others guarantee broad rights to individuals. In addition, some regimes cover all 27 member states of the EU whilst others are more exclusive. The EU does not limit its influence to its 27 member states but is proud to export its norms to its neighbors and to make close cooperation dependent on their compliance with the EU's standards of democracy, human rights and, last but not least, industrial products. In sharp contrast to any nation-state, the EU does not respect territorial boundaries but, in the words of the Declaration of Laeken, only those of "democracy and human rights".[1]

Transnational Justice as a Right to Justification

One option to avoid the categorical mistake of applying a normative concept to an empirical reality which is structurally incompatible with its empirical pre-conditions is to ensure that the analytical categories which we are using in normative theorizing are empirically explained. Normative categories should be formulated with a view to the connection between 'ought' and 'can' and reflect an awareness that normative requirements will only be convincing to the degree that we provide evidence that they are indeed "fit for reality". It is true that such evidence is often hard to collect. Any statement about the possibility to transform normative ideas into real-world conditions must always remain to some degree speculative and can be formulated only hypothetically. Nevertheless, in order to make the criterion operational we can consider all those normative ideas to be prima facie fit-for-reality, which build on some existing element of the empirical reality and merely expand its reach rather than invent something completely new. That idea reflects the insight of Rawls (1999: 15) that a necessary precondition for a convincing normative concept is "that its major principles and instructions are practiced and can be applied to existing political and social institutions". Hence, such a concept expands "the borders of what we usually consider

[1] "The European Union's one boundary is democracy and human rights", Declaration of Laeken 2001, European Council.

practically-politically possible" (Rawls, 1999: 4) while remaining at the same time on solid empirical ground.

An interesting possibility to move in that direction is offered by a concept of justice which focuses on the right to justification. An important advantage of switching from the democracy discourse to the justice discourse is that the notion of justice can indeed be applied to all political contexts. Justice is "the prime social virtue, the most important virtue of social institutions" (Kersting 1993: 31). No other quality can substitute for a lack of justice. Only conditions that are just, and never unjust conditions, are acceptable. Everything which is unjust has to be rectified through practical political measures and improved upon. Democracy and justice are closely related to one another. Democracy is cherished by most of us because of its contribution to the fostering of just politics. We cherish democracy because is the political procedure with the highest probability to produce just outcomes.

Following Rainer Forst, the right to justification is a most basic human right.[2] It is centered on the idea that any restriction of individual freedom must be justified by whoever causes that restriction or has the intention to do so. This argument takes the individual freedom from domination as a starting point and places any restriction of this freedom under the reservation of good reasons. In crafting the argumentative design of a justification, the justifying person or organization cannot act arbitrarily but must apply good reasons. Only those reasons are to be understood as good reasons which fulfill the two minimum conditions of reciprocity and universality, meaning that nothing more is demanded from anybody than we are willing to concede ourselves and that they apply to everybody to the same degree.

Understanding justice as the 'right to justification' gives the notion of justice an intrinsically procedural and discursive character. Any question about the specific implication of justice in a specific situation is answered with reference to a normatively demanding discursive procedure. A so-defined right to justification can well be applied to international relations. It resonates with the idea of self-determination and refers to the basic right of every society to choose, independent of foreign influence, its political status, its form of state and government and its economic, social and cultural development. As a matter of principle, restrictions of this freedom are acceptable only when a state either voluntarily complies with an international legal provision, when *ius cogens* is applicable, or when other good reasons can be articulated.

It is important to note that self-determination today cannot be equated with autonomy. The global condition of complex interdependence implies that one can neither pursue a successful unilateral money and currency policy nor conduct a sensible unilateral security policy. All these policy areas are characterized by a significantly reduced ability of single states to realize their preferences independently of the actions of other states. It is a generally shared insight therefore that complex interdependence among national societies has turned a purely national organization of politics into a problem for democratic governance itself: In a great number of issues areas, from environmental degradation to security affairs and migration issues, the single nation-states is increasingly inappropriate for the formulation and implementation of effective policies. The normative deficiency of the nation-state is not limited to its capacity as an effective problem-solver, however. It also applies to the related structural phenomenon that the political measures taken by individual states often have effects for other states. The decision to raise or lower the interest rates of a central bank may have the effect of making neighboring countries more or less attractive to capital. The easing or restricting of national provisions for immigration will likewise re-orient the decisions of individuals

[2] Cf. Rainer Forst 2007: Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit. Frankfurt am Main: Suhrkamp.

seeking refuge from violence or a better income and have an effect on the relative attractiveness of other states. The national establishment of certain requirements for legally sold products will make it more or less costly for producers in foreign states to import their products and may lead to losses or gains or employment opportunities. All these effects are structural phenomena under conditions of interdependence. Without being embedded in an international structure of policy coordination, the individual nation-state has little incentive to take the external effects of its actions seriously, i.e. to systematically integrate them as an important calculus into its own decision-making practices. The basic normative principle that those who are affected by a decision should have a say in its making, is therefore systematically violated by almost all interdependent nation-states if they are not embedded in an international structure that fosters the internalization of the external effects of domestic decision-making.

Thus, international organizations such as the EU, the World Trade Organization (WTO), the International Labor Organization (ILO) or even the United Nations (UN) derive their legitimacy first of all from their function as a correcting mechanism for this systematical nation-state failure. They foster the right to justification by making interdependent nation-states systematically aware of one another, by helping to pool resources that are necessary for tackling pressing cross-border problems and by providing an organizational setting, in which the responsibility to take the concerns of others states seriously is transformed into legal obligations (Joerges and Neyer 1997, Joerges 2000). International organizations, therefore, carry, first of all, the potential to remedy the structural shortcomings of the nation-state and should be seen as important and necessary devices for adapting the nation-state to the condition of complex interdependence. Today, insisting on a traditional form of self-determination that emphasizes the right and the ability to unilateral action (sovereignty and autonomy), leads not to more freedom, but runs into the paradox of self-chosen heteronomy. A modern concept of self-determination entails participation in the political discourses and justificatory practices of international organizations and of multilateral cooperation.

Obstacles to Transnational Justice

Even if the right to justification is a sound request from a normative point of view, it is clear that the practice of the most international organizations, including the EU, differs sharply from the normative ideal of a universal right to justification. It is three obstacles which are most serious:

1. The fact of asymmetrically distributed international power resources poses a major challenge to the idea of a transnational discourse on justification. From world trade politics to environmental politics to international security politics, we observe that the more powerful states dominate the policy-making process, while the smaller states have to subordinate themselves to the policies agreed upon by the bigger ones. Due to the unequal ability of states to transform their interest into international norms binding for other states, many international regimes reflect the particular interests of a limited number of powerful states only. Many international regimes produce heteronomy for weaker states instead of international justice. Within the WTO, for instance, the big member states until recently negotiated all important agreements among themselves in a so-called "Green Room Procedure" and announced their findings to the secretary general. He then presented the outcome as a "consensus" to the rest of the member states (Kwa, 2003; Steinberg, 2002).[3] Obviously, any such procedure leaves little scope for a justice-oriented discourse of mutual justifications.

2. Power asymmetries exist not only in the horizontal dimension of cross-border politics but also in its vertical dimension. In international politics, executives have

[3] For an analysis on power politics in the EU, see Tallberg (2006).

far more leeway to use their discretionary powers than in the domestic realm (Moravcsik, 1994). In democratic domestic politics, governments act as the legislature's executive organ and normally are delegated the task of implementing its decisions. By contrast, in international politics, executives generally act as gatekeepers for political proposals and decide which issues are discussed and being dealt with at all. The legislative branch can only ask its government to put an issue on the international agenda, thereby promoting the involvement of other governments. Unlike national politics, the legislative branch has no right to set the political agenda of an international organization or to call on a government, or, in this case, a group of governments, to actually implement a certain legal norm. Governments are by and large free to set the international agenda as they wish and to decide among themselves upon regulations. It is true that international rules concluded among executives become domestic law only after a national parliament has ratified the legal act, thereby transforming it into a national legislation. Thus the legislative branches retain a veto – formally. But at the same time, a parliamentary veto against a legal act concluded among executives is, for good reasons, very rare. Vetoing a legal act by refusing to ratify it is a massive declaration of mistrust from the parliamentary majority towards the government. This is unlikely to happen in parliamentary systems where the government can rely on a parliamentary majority. The problem of executive empowerment through international negotiations is aggravated by the fact that executives do typically possess better information about positions and scopes of other executives and are therefore able to assess the politically viable with greater accuracy. Through their membership in international organizations such as the OECD, the World Bank or the IMF they have access to a kind of specialized expertise that is not – or only with great efforts – available to MPs. Thus, a parliament arguing against an internationally negotiated regulation and denying its ratification implicitly arrogates to itself a better knowledge of the politically viable than the executive – despite being less informed. A denied ratification is also improbable because it is the executives themselves who decide on which information about the positions and scopes of other executives to pass on to the media and parliament. Thereby, the executives do not only have the possibility to determine the international agenda; they are also in a strong position to influence the perception of the respective legislative (and the national public) about what is politically viable at all.

3. A third crucial obstacle relates to the non-coercive character of the international system. Justice-oriented discourses presuppose that successful justification is a necessary condition for implementing a certain policy and that therefore any failure to explain and justify incurs costs for a policy entrepreneur. Costs, however, will only incur to a policy entrepreneur if the group toward whom the justificatory effort is directed has some enforcement capacity which it can exert in case of a failure, i.e. a non-convincing justification. Because the international system is a self-help system, however, the power to impose costs on other states is structurally limited to the powerful states. It is for this reason that the limited capacity of the international community to provide incentives to powerful states to comply with their legal commitment is often described as the *Achilles' heel* of effective global governance (Young, 1999, chap. 4). Some even dispute that international legal rules are proper legal rules. And indeed, in international relations it is only too often the case that weaker states have a formal right to some justification, explanation or even compensation but lack any means to enforce that right. Justice-oriented discourses therefore presuppose that not only strong but also weak states have access to effective enforcement capacities in order to give a significant incentive to powerful actors to take justificatory discourses seriously.

Supranationalism as a New Context for Justice

The considerations above are hardly apt to found great optimism with regard to the chances of a justice-oriented transnational discourse. The international polity is a space in which horizontal and vertical power asymmetries, and the inexistence of a global coercive power, are important factors in policy outcomes. Under conditions of supranational integration, however, much of the skepticism can be relaxed. Supranational structures combine a vertical and hierarchical legal order with a horizontal and non-hierarchical coercive order (Weiler, 1981).[4] They are neither state nor international politics. Supranationalism is established not on a monopoly of power but on an oligopoly of power. All member states remain in full command of their legitimate monopoly of coercion and none of that is transferred to the supranational level. Supranationalism is likewise different if compared with traditional international diplomacy. Vertical legal integration ties individuals, governments and supranational organizations together into 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 (Pernice, 1999). Law in a supranational setting therefore is similar to national law in that it distinguishes between basic norms (primary or constitutional law) and secondary law (statutory law) with the former more difficult to change than the latter. Individuals are not only subjects and affected parties as they are under international law but have domestically enforceable rights.

Transforming Bargaining into Legal Reasoning

A supranational context has important implications for the probability of effective justificatory discourses. In order to understand the difference that supranationalism makes, it is important to recall that power in international relations is most often exerted in the mode of intergovernmental bargaining. Preferences of states are treated as intrinsically legitimate reflections of domestic political processes. International negotiations are not about justifying governmental preferences but about bargaining the differences.[5] Under conditions of supranationalism, i.e. in a highly legalized setting, bargaining is in general an inappropriate mode of interaction. Highly legalized settings such as in the European Community (EC), prescribe both material and procedural norms against which the preferences of actors are to be weighted. Complying with theses norms necessitates justifying preferences by explaining how they relate to these norms. Legal integration forces actors to abstain from simply issuing threats and promises and requires them to reformulate their preferences in the language of law (by referring to material and procedural norms). Legal integration transforms bargaining into legal reasoning.[6]

It is true that legal reasoning is not immune to power asymmetries. Good arguments are often expensive arguments because they require good lawyers and must often refer to technical expertise or scientific evidence. It is also true, however, that reformulating preferences in the language of law acts as a filtering mechanism which limits the range of preferences that can be put on the table to those preferences which can be justified publicly. In his discussion of the analytical differences between arguing and bargaining, and their effects on political outcomes, Elster refers to this effect as the "civilizing force of hypocrisy" (Elster, 1998b: 104-105 and 111): In order to argue, speakers must hide 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 coincidence between private interests and impartial arguments in order to be perceived

[4] For a discussion of the *sui generis* character of the EC, see Jachtenfuchs (1997).

[5] According to Elster, bargaining refers to a mode of interaction in which an actor tries to change the behavior of other actors by promising or threatening consequences for certain actions taken by these actors (Elster 1998a).

[6] On the concept of legal reasoning, see Kratochwil (1989).

as good arguments. Arguments must also be in accordance with positions that have been formulated at an earlier point in time and 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 lose 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 both work as a filter against openly selfish claims and thus civilize interaction by forcing disputants to engage in argumentative interaction. Legal reasoning therefore is a deliberative mode of interaction which forces actors to perform in accordance to shared legal norms even if they only have self-minded interests.

By fostering argumentation in cross-border policy-making, supranationalism implies a change in the mode of representation. In international relations, states are in general represented by governments. International negotiations are in fact intergovernmental negotiations in which the weight of an argument depends on the power resources of the state that is represented by that government. The importance that is attached to good arguments in a supranational context significantly changes this. Under conditions of legal reasoning, it is no longer a state's vulnerability to a failure of negotiations which decides who gets what, but the quality of the argument which the opposing sides can make. Supranationalism therefore is about the representation of arguments and not of power and preferences. Under conditions of anarchy, states bargain. In supranational structures, states argue.

Although it is hardly possible to observe instances of purely legal reasoning in any real-world organizational context,[7] it is also true that most political discussions in close-to-supranational entities like the EC or (with even less approximation) the WTO show significant elements of such a justificatory balancing of arguments. Art. 28 and 30 of the European Community Treaty (ECT) describe the prohibition of discriminatory trade practices and list those reasons which can be brought forward in order to justify an exemption. The overwhelming majority of political disputes and decisions of the European Court of Justice (ECJ) in the EC fall under the rubric of these legal provisions. Even more important, most legal (and even most political science) scholars agree that the decisions of the ECJ are hardly ever motivated by the difference in size or wealth of the disputing parties (Alter, 2001; Burley and Mattli, 1993). It is arguments and justification not preferences and power which carry the day. Likewise, the Dispute Settlement Body (DSB) and the Appellate Body (AB) of the WTO most often have to decide on disputes that take issue with equivalent principles of non-discrimination and reciprocity as well as a multitude of exemptions that define and restrict the normative framework described. As in the EC, most scholars here agree that the DSB/AB's decision follow the logic of legal reasoning and are by and large immune to power concerns (Zangl, 2006; Hudec, 1999; Park and Umbricht, 2001).

It is important to reflect upon a final caveat: even if supranational organizations have the capacity to transform bargaining into legal reasoning, they are nevertheless founded on an original bargaining process and often reflect to some degree the outcome of an asymmetrical distribution of power. The founding of WTO, for example, is described by some as reflecting a blackmailing process in which the Northern states threatened to conclude among themselves a mini-WTO if the South world would not accept the inclusion of trade related intellectual property rights (TRIPS) and a General Agreement of Trade in Services (GATS) into the legal framework of the new WTO (Kwa, 2003, Steinberg, 2004). One is tempted to assume thus that even an ideal mode of transnational legal reasoning only applies those procedural and material norms which have been dictated by the powerful actors. If that were true, then legal reasoning would

[7] For an empirical research project that tried to describe instances of international arguing, see Nicole Deitelhoff/Harald Müller (2005).

only perform as if it were a neutral and fair language but in fact would express nothing but the hidden dominance of the powerful. It is also the case, however, that the law is a living thing which adopts its own dynamic once it has been established. The practices of the ECJ and the DSB give clear evidence that Courts are only to a limited degree under control of the member states and have some leeway in interpreting the law in a way which is compatible with shared notions of fairness. Burley and Mattli 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 (Burley/ Mattli, 1993). It is also worth mentioning that intergovernmental bargaining hardly ever takes place in a normatively void environment. International customary law provides a distinct normative environment that encompasses compelling formal and informal norms such as the ideas of reciprocity, sovereignty, *pacta sund servanda*, and *ius cogens*. International law is thus not only the product of intergovernmental bargaining but also the normative frame in which negotiations are conducted.

Safeguarding Executive Responsiveness

Legal integration in a supranational context is not limited to the horizontal level of intergovernmental relations but also applies to its vertical dimension. In abstract terms, vertical legal integration can be understood as connecting supranational, national and individual actors by means of legal provisions so that justifications can and must be exchanged. Legal integration thus is not limited to relations among supranational organizations but covers the whole range of relevant political actors in a multi-level structure. Supranational legal integration is highly relevant for establishing the preconditions of transnational justificatory discourses since it has the potential to safeguard that governmental and supranational actors are compelled to comply with the requirement to justify their actions and that their policy discretion is not expanded beyond a degree which can be justified towards their respective principles.

At member states level, legal integration can tie executive discretion to a mandate formulated by a parliamentary committee. The Danish Folketing, for example, 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 (cf. Dosenrode, 2000; Nehring, 1998). The responsible minister has to present his proposal in person to a specialised European Affairs Committee of the Folketing and to reach a supportive majority. The members of the committee do not only vote on the proposal but have the right to propose amendments. The minister has no right to enter any negotiations in Brussels if she does not convince the majority of the committee of his proposal. Likewise, if the negotiations in Brussels seem to make it necessary to change the Danish position and if she wants to go beyond the authorisations given by the mandate, 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 for explaining 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 toward the EU, it is obviously highly attractive from the perspective of a justificatory discourse.

The justificatory discipline of supranational legal integration also covers relations between the EC's supranational institutions and its member states. The delegation of competences to the Commission is almost always only conditional, and subject to control mechanisms. The provisions of Art. 202 ECT are a typical example. The article stipulates in its first sentence that the Council delegates all competences to the Commission to implement its legislative acts. The second sentence, however, immediately 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 like 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 Art. 133 ECT, the Commission can act only after it has presented recommendations to the Council of Ministers and after these recommendations have been authorised. In addition, every international legally binding agreement that was concluded by the Commission on the part of the EC is subject to critical scrutiny in the Council.

It is true that all of these mechanisms do not provide any guarantee for the complete lifting of vertical power asymmetries between the supranational bodies of the EU, the member states and individuals. Organizational procedures never determine action but only 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 three mechanisms imply. In addition, the very existence of these procedures gives evidence that supranational legal integration is not only a means to expand governmental discretion but that it imposes at the same time additional needs for justification. Supranationalism therefore does not just expand or limit governmental discretion but provides an argumentative discipline according to which it is to be exercised.

Healing the Achilles Heel

It is an often cited conclusion that "[a]lmost all nations observe almost all principles of international law and all of their obligations almost all of the time" (Henkin, 1979: 47). This observation has recently been rediscovered by scholars endeavouring to understand why and when international regulations are complied with.[8] According to their findings, good legal management of rules is a most important factor for eliciting compliance. Chayes and Chayes (1993: 205) have put that finding quite clearly: "Enforcement through these 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." It is the power of the legitimacy of legal norms, the way legal norms work once they are established, and the smart management of cases of alleged non-compliance, which leads to compliance.

The reasoning of Henkin and Chayes/Chayes is based on the insight that a rule which is part of a broader legal system usually has a far stronger compliance-pull than an individuated legal rule, because the former is part of a larger normative design and embodies basic principles which are generally perceived as being legitimate or just. Even in the light of explicitly opposing interests, specific international legal norms have a high probability to be observed because they are perceived by the members of the international community as being part of an encompassing normative superstructure. The blatant, unexcused transgression of rules that are founded on broader ethical principles is thus deemed to be synonymous with a general repudiation of the normative fundaments of international cooperation.

It is also important to underline that a well-functioning international legal system is both in the interest of weak and strong states (Hurrell 1993). For weak states, an international legal order is an important precondition for having any chance at all that their concerns are being heard and taken seriously. Weak states will only then have a chance to succeed in international negotiations against more powerful states if they have enforceable rights. Likewise, powerful states are normally those states which have a prime interest in the stability of an international order. Any such stability, however, depends on rules which are accepted by most, if not all, states. Acceptance for rules presupposes that they are not the product of purely arbitrary decisions but are based on commonly agreed ethical standards and part of an overarching normative superstructure (see above). In short,

[8] For an overview see Mitchell, R. B. (1996).

stability requires law. In this sense, it is indeed appropriate to argue that legal rules possess a compliance pull of their own (Franck, 1990).

It follows that the more a rule is considered part of a legal system, or, to put it differently: the more an international organization is legalized, the more likely compliance with the rule becomes. Empirical evidence is highly supportive of the legalization hypotheses:[9] The impressive compliance record of the EC is hard to explain without referring to its character as a legal community (Zürn and Neyer, 2005). The strongest single procedure with regard to compliance enforcement is the preliminary ruling procedure according to Art. 234 ECT. It directly connects governments to control exerted by their citizens and instrumentalizes national courts as agents of supranational law. Art 234 ECT provides that any national legal person may sue its 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 towards each other by means of an international legal obligation but have likewise adopted responsibilities towards their citizens.[10] 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* (cf. Dehousse, 1998).

Multi-Level Legitimacy: Justice and Democracy

My talk started with the diagnosis of a categorical mistake often made when reflecting about the adequate normative foundations of international organizations. International organizations have neither the capacity for state-like governance nor will they acquire in the foreseeable future political competences which cover more than narrowly defined policies. It is inadequate therefore to assess their legitimacy in categories taken from the analysis of democratic statehood and more appropriate to consider their contribution to 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: the normative promise of national democracy to foster self-governance will only survive globalisation if it is supplemented by an organizational layer that fosters transnational justice. And, vice versa, if transnational justice is to have a realistic chance, it must be established on strengthened domestic procedures of strong domestic control mechanisms, which guarantee that the executives remain closely connected to their constituencies and national parliaments. Legitimacy in the new international system can only be adequately conceptualized if it is explained as a normative multi-level structure in which the domestic and the international level are closely interwoven.

Only if interdependent national democracies are supplemented by a transnational layer of justificatory discourses, can we expect them to systematically respect the external effects of their decisions as a relevant factor for domestic decision-making. Democracy entails that those who rule and who take the decisions are identical with those who are addressed by those decisions. If that 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, where national democracies open up to the concerns of foreigners. Otherwise, the external effects of the internal practices our democracy will

[9] See the contributions in the special issue on Legalization of International Organisation (54:3) and in Zürn/ Joerges (2005).

[10] See Rs. 26/62, van Gend & Loos (N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos gegen Niederländische Finanzverwaltung), Urteil vom 5. Februar 1963; Slg. 1963, 1, 24.

impose illegitimate costs on foreigners, or, if foreign democracies do so, on us. Under conditions of interdependence, transnational justice and national democracy mutually support and necessitate each other.

The good news of this article is that supranationalism can deliver some of the functions which we traditionally attach to democratic procedures. Supranationalism promotes the cause of justice by providing an effective remedy to horizontal and vertical power asymmetries, and to the problem of non-compliance. Legal integration transforms intergovernmental bargaining into transnational deliberations by providing incentives to governments to reformulate preferences in the language of legal reasoning. In doing so, legal integration transforms the mode of representation from preferences and power to arguments and reasons. In addition, 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.

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. In addition, it must be underlined that 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 on them by supranational legal norms. If powerful states prefer to go it alone, supranational organizations have nothing but economic and political incentives to change those states' 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 two real-world close-to-supranational entities that we know, the EC and the WTO, are moving slowly but steadily toward that goal. Both the EC and the WTO embody some significant elements of justificatory discourses and can well be understood as (imperfect) approximations of that ideal. They are both to be cherished for the degree to which they have walked down the road already and to be criticized for the long way that is still ahead of them.

Cosmopolitanism or Cosmo? The WTO and NAFTA as Canada's External Constitution

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It is both heartening and alarming that this conference is using Canada as the case with which to explore the normative potential for the democratization of globalization and the spread of cosmopolitanism. Heartening, because what we might call the *bright* Canada, the subject of my colleague — Will Kymlicka's — reflections, was a post-national state long before that term was invented. Never fully sovereign politically, economically, culturally, militarily, or technologically, it has always been highly open to economic and demographic flows. Notwithstanding the intolerance and racism of its early 20th-century Anglophone and Francophone populations, it has become in the last fifty years — at least in its big cities — a highly multicultural, largely tolerant, generally inclusive, surprisingly successful post-modern society.

But it is also alarming when I consider the object of my analysis — what we might call the *dark* Canada — which represents the underside of the uplifting version which my political theory friends dissect. Normatively, my Canada has less to do with cosmopolitanism than with *Cosmo* magazine. The social actors it includes are the representatives of transnational corporations. Those it excludes are all the rest of civil society. Its ideology is not one of global democracy but of corporate economic growth and global greed which are institutionalized, legalized, sanitized, and mediatized under the label of "free trade."

I was invited by John Erik Fossum to analyze Canada's external constitution. While I am happy to comply with this request, I can only relate my argument to the thrust of this conference by presenting it as an anti-model, an explication of the legal-institutional context into which Canada's economic and political elites have inserted their country over the last twenty years explicitly to restrict the sway of democratic norms in the interests of liberating big capital from domestic controls. My text will be primarily descriptive. In the first part it will explain the meaning of the external constitution by analyzing the legal-institutional framework created for Canada by its federal government's negotiation and signature of the Canada-United States Free Trade Agreement (CUFTA, 1988), the North American Free Trade Agreement (NAFTA, 1994), and the World Trade Organization (WTO, 1995). With this background, the second part will return to the normative issues raised by this conference in order to assess the obstacles that this anti-model places in the way of the project to democratize globalization and spread cosmopolitanism.

External Constitution: the Concept [1]

The negotiation of supranational trade regimes may well be considered by historians as one of the most pregnant developments which brought the twentieth century to a highly polarized close. At one extreme, the specialized community of trade experts haled the treaties that set up global and continental institutions as giant steps forward in establishing the universal rule of economic law which had a direct, trade- and investment-expanding impact on the world's economy (Jackson 2000; Trebilcock and Howse 1999; Ostry 1997). Global theorists who welcomed the cosmopolitan possibilities

[1] This section draws on "Locked In? Canada's External Constitution under Global Trade Governance," *American Review of Canadian Studies* 33:2 (Summer 2003), 145-72.

opened up by globalization embraced the new realities with enthusiasm and imagination (Held 1995).

At the other pole, the prime consequence of economic liberalization was seen in its power-constraining effects on the world's nation states. Environmental non-governmental organizations, for instance, took to attacking the WTO or NAFTA as powerful forces sapping the capacity of national policy regimes to achieve ecological sustainability (Shrybman 2002). In the minds of the identifiable political minority that is overtly hostile to globalization, a deep distrust of global institutions segues to a sense that they release transnational corporations (TNCs) from democratic control (Klein 2000).

This section takes Canada as exemplary of states in the middle of the power hierarchy that can be called semi-peripheral since they are neither completely dominant nor completely dominated. To understand how the special characteristics of semi-peripheral countries such as Canada have been affected by the intergovernmental economic agreements that transformed the meaning of global governance in the 1990s we first have to differentiate the old from the new in the international political economy.

"Old" was the way that international relations were determined by the power disparities – structural, financial, military, scientific, and ideological – that differentiated those who made the rules by which the rest of the world operated from those who had to follow them. Old also included the world order comprised of hundreds of international organizations (IOs) established by intergovernmental treaty to deal with specific transnational functional problems. Some of these IOs formalized the power ascendancy of the United States in the global distribution of forces after World War II, a situation that was particularly true of the major international financial institutions (IFIs) that made up the Bretton Woods system (Moon 2000, 343).

Canada's semi-peripherality in this second half of the twentieth century could be seen in its ambidextrous behaviour, illustrating the broad border zone it occupied between the very strong and the very weak. In one mode it participated actively in writing the formal rules by which all these IOs were to operate. Here it punched well above its weight thanks to the substantial role it had played in the Anglo-American triangle during and immediately after World War II. Although a small if significant *rule maker* in the creation of a the Bretton Woods system of regulation that supported the emerging regime of capital accumulation centred on the largely autonomous Keynesian welfare, Ottawa was mainly a major *rule taker* that then had to play by the rules it had participated in fashioning.

With this sketch of the post-World War II order as context, the "new" experienced by Canada during the 1990s can be understood as a transnational mode of regulation put in place by governments which were responding to the perceived needs of their economic actors in a regime of capital accumulation that was becoming increasingly global. The basic template for Canada's position in this new regulatory regime was forged in tough negotiations with Washington in 1987 and came into force on January 1, 1989 as CUFTA, a document with a broad constraining impact on the kinds of policies that Canadian governments, provincial as well as federal, could adopt thereafter (Rotstein 1988, 401). Given that TNCs in North America were increasingly taking advantage of Mexico's low labour costs when redeploying the various facilities in their production processes, it was but a small step to expand a bilateral CUFTA into a trilateral NAFTA which came into effect on January 1, 1994 and extended "free trade" and Mexico as a continental mode of regulation for what was becoming a continental regime of accumulation.

NAFTA was just a stopgap in a process with a much broader horizon, because corporations were not simply transnationalizing in North America. Whether involved in producing physical goods or less tangible services, those TNCs, which had developed a global regime of accumulation, had expressed an urgent need for a global mode of

regulation. These global corporate players were not intellectually isolated. Their desire for freedom from national regulations was theorized and articulated by an epistemic community of neoclassical trade economists, international trade lawyers, and business-financed think tanks in the major capitalist economies arguing for deregulated national economies within a re-regulated global economy that would generate greater efficiencies and so promote greater global welfare.

A decade of difficult negotiations on an enormous agenda driven primarily by the United States was accepted ultimately by the European Union (EU) and Japan, but was resisted anxiously by major third-world states such as India and Brazil. Just over a year after NAFTA's implementation, the powerful new WTO was in place, its thousands of provisions accepted holus-bolus as a "single undertaking" — however reluctantly and however uncomprehendingly — by peripheral and semi-peripheral states alike (Ostry 1997).

For this argument, I want to explore the governance implications for Canada of the WTO and its continental counterpart, NAFTA by analyzing the various powers that have been devolved to these international economic regimes in terms of the notion of "external constitution." In the main, the political-science use of "constitution" has been reserved for the rule book prescribing the internal organization of territorial states. It has also been applied to such international organizations as the United Nations. This paper links these two usages by showing how international regimes restructure their member states' domestic legal orders. Specifically it will describe how NAFTA and the WTO impinge on the Canadian polity. I argue that these continental and global manifestations of global governance are so substantial that they constitute an external constitution that has significantly reorganized the Canadian state by adding external tiers to certain aspects of its legal order. If in this logic Canada remains semi-peripheral, it is because its legal order has neither been totally transformed (as is the case in heavily indebted third world countries on whom the IFIs have imposed radical structural adjustment programs) nor left virtually untouched (as is the case with the United States., because, as chief international rule maker, the rules that it has caused to be made tend to universalize such US domestic norms and institutions as intellectual property rights and administrative law processes).

Generally understood, an organization's constitution lays out a set of principles that prescribes how it is to function and assigns rights plus obligations to its members. A constitution in a contemporary liberal democracy generally demonstrates seven principal attributes.

1. It may entrench certain *norms* that are inviolate, that is above the reach of any politician to alter. Following a civil or foreign war, the victorious side often tries to lock in rules to defend their interests by embedding them in a constitution.
2. A liberal constitution also establishes *rules* that limit what governments can do in exercising their powers.
3. As the corollary to limiting government, a state's constitution establishes specific *rights* for its citizens, whether individual or collective.
4. Norms, limits, and rights are dead letters unless there is a *judicial system* to interpret the constitution's texts in the light of conflicts over their meaning.
5. Legal judgments are in turn dead letters unless the constitution provides mechanisms for the *enforcement* of the courts' judgments to ensure the observance of all laws and regulations.
6. A constitution structures the political game by establishing decision-making (executive) and law-making (legislative) *institutions* that will have authority over the territory and establishes the government (administrative) structures needed to apply the laws and regulations they create.
7. Finally constitutions, which are initially legitimized by some form of *ratification*, need procedures for *amending* or abrogating them in response to systemic changes.

This is not the place to analyze the constitutions of the WTO and of NAFTA seen as organizations in their own right. My objective is rather to explain how membership in these global and continental economic regimes adds an extra, external constitutional matrix to Canada's domestic constitution.

Canada's participation in NAFTA required it to accept limits on its internal autonomy but gave its corporations certain rights in the United States and Mexico, rights which are supraconstitutional in those jurisdictions. Membership in the WTO gave a state's companies in 147 other countries supraconstitutional rights that parallel the limits it accepted for itself. Following this section I will lay out the value abroad of Canada's supraconstitution for its companies. But first I will examine how these continental and global trade regimes act constitutionally in Canada's domestic legal order.

Norms

The norms in the WTO and NAFTA establish principles such as *national treatment* that are not necessarily incorporated into domestic legislation. There is no Canadian law saying that the federal government must treat foreign-owned furniture companies at least as well as it treats Canadian-owned furniture firms. But since the trade agreements extended the national treatment principle from goods to investments and even to services, if any federal or provincial or municipal government subsidizes a nationally or provincially owned firm without offering these benefits to foreign companies as well, Canada is liable to legal attack by another government belonging to NAFTA or the WTO that deems one of its companies in Canada to have suffered from that discriminatory treatment.

Practically speaking, national treatment for investment spelled the end to a whole generation of industrial development policies centred round the promotion of domestic corporations or sectors to improve their competitiveness in order to boost their exports. National treatment also called into question the capacity of the Canadian state to bolster its cultural industries through favouring, for example, domestic publishers. In this way supraconstitutional norms have had direct impacts on Canada's domestic legislative and administrative order.

NAFTA's and the WTO's trade principles are thus supraconstitutional because they give legal grounds to foreign corporations — which, for instance, might consider a northern territory's demands on investors in the Arctic to be too onerous or the subsidization of only Canadian firms unfair. If they do, they can press their home government to launch a suit against the federal government of Canada through NAFTA's dispute settlement panels or the WTO's dispute settlement board.

Limits on Government Powers

By the very act of signing CUFTA, NAFTA, and the WTO, Canada undertook to make immediate changes in a wide range of legislation and regulations. CUFTA's investment chapter raised the minimum size of a corporation whose takeover by a foreign corporation is under review from $5 to $150 million. Canadian implementation legislation made the appropriate amendment to the Investment Canada Act. The WTO's and NAFTA's rules are so comprehensive that, in their implementation legislation, their members had to change hundreds of existing laws.

These changes to laws and regulations mandated by the WTO and NAFTA were supraconstitutional not just because they had to be made but because they were irreversible. Unlike normal amendments to statutes made by legislatures, which can further amend or revoke their acts in response to changing electoral considerations, statutory amendments incorporating international trade norms can only be amended if the external regime changes its rules by international agreement. In this respect not only has the *political* order been changed by the amendments, but the *legal* order has been

altered by accepting regulatory changes over which Parliament no longer exercises sovereignty. This is what defenders of free trade allude to when they described NAFTA as "locking in" the neoconservative policy paradigm (Clark 1997). As another example, CUFTA prohibits Canada from charging US importers of Canadian oil a price higher than what Canadians pay domestically.

To be precise, these standards do not actually *prevent* governments from imposing performance requirements on foreign investors or subsidizing domestic firms. But any federal or provincial government that violates a NAFTA or WTO rule is vulnerable to a partner state initiating a legal action that could result in economic sanctions to restore the damage from which its corporations claim they have suffered. When Brazil lodged a complaint at the WTO on behalf of its regional airplane builder, Embraer, the WTO dispute panel in Geneva found Canada to have acted illegally by providing state aid so that its regional jet manufacturer, Bombardier, could export more competitively. Ottawa was obliged to mend its ways.

Rights

The corollary of a limit on government may be a right for its citizens. Whereas the EU created direct rights for citizens in member states – for instance to sue their own governments before the European Court of Justice — the only 'citizens' whose rights in Canada were expanded under NAFTA were corporations based in the United States or Mexico. Under the WTO, rights were also created for corporations, not citizens. National treatment and the right of establishment made it easier for firms owned in one country to do business throughout the world. What makes NAFTA supraconstitutional in this regard was its creation of corporate rights through NAFTA Chapter 11's provision for foreign corporations to take member governments to international commercial arbitration in alleged cases of expropriation (Levin and Martin 1996).

Many of the WTO's agreements also contained rights for international corporations but none for citizens. Its agreement on Trade Related Aspects of Intellectual Property Rights required that all member states amend their intellectual property legislation and change their judicial procedures in conformity with the stipulated norms (Kent 1994). The external and constitutional quality of these rights can be seen in their giving transatlantic pharmaceutical firms the legal justification to have the EU successfully take a case to the WTO against Ottawa because its drug legislation did not give European firms the full patent benefits that they claimed were now their due (WTO 2000).

Adjudication

A constitution's norms, limits, and rights are of little value unless it also establishes arbitral processes so that its texts can be interpreted in case of conflicts over their meaning.

The judicial capacity of global governance — the ability on the part of one state to discipline another of violating some supraconstitutional norm — varies widely depending on the IO's own constitution. Global *environmental* governance is notably bereft of adjudicatory muscle. The superior strength of inter-governmental *economic* agreements that establish limits and create rights is due to their more effective dispute settlement mechanisms. Whereas the WTO was endowed with an impressive apparatus for adjudicating intergovernmental disputes, NAFTA was created without a supranational judiciary. Instead , North American governance is distinguished by some precarious dispute settlement processes whose supraconstitutional impacts vary from minor (for general disputes between member states) to negligible (for trade disputes between exporting and importing states) to substantial (for disputes between transnational corporations and host states).

NAFTA

General Disputes

Continental dispute settlement was meant to depoliticize conflicts between the three governments by having their differences resolved by neutral arbitrators applying common rules. In this spirit, NAFTA's Chapter 20 provides for binational panels to be struck when the member-states have been unable to resolve their differences related to issues arising out of the agreement. Although "Chapter 20" dispute settlement was considered expeditious at first, (Davey 1996, 65) later decisions have proven unable to settle conflicts without resort to power politics (Loungnarath and Stehly 2000, 43). For example, when it lost a panel decision to Canada in a wheat case (CDA-92-1807-01), Washington responded by threatening to launch an investigation into Canadian wheat exports. Closure was only achieved when US pressure caused the Canadian government to give way by agreeing to limit wheat exports during 1994/95 to 1.5 million tons (Davey 1996, 56). If such Chapter 20 rulings are unable to constrain the continental hegemon so that it becomes futile to submit general issues to NAFTA arbitration, continental governance appears judicially unable to deliver for its weaker members the rights for which they "paid" when negotiating the original compact. In this respect the judicial function of NAFTA is faulty as a constitution for North America by failing to have supraconstitutional effect in the US legal order.

Trade Disputes

Had NAFTA created a true free trade area, its members would have abandoned their right to impose anti-dumping (AD) or countervailing duties (CVD) on imports coming from their partners' economies and dealt with problems of predatory corporate behavior by establishing continental-wide anti-trust and competition policies. The United States refused such a real leveling of national trade barriers to create a single continental market. It simply agreed to cede appeals of its protectionist rulings to binational panels which were restricted to investigating whether the administration's AD or CVD determinations properly applied *domestic* trade law (Trakman 1997, 277).

NAFTA's chapter 19's putatively binding judicial expedient turned out to be as disappointing as its critics had predicted. When the United States' CVD against Canadian softwood lumber exports was remanded for incorrectly applying the notion of subsidy as defined in US law, Congress simply changed its definition of subsidy to suit the Canadian situation. Beyond softwood lumber's long-lasting evidence (Howse 1998, 15), Canada has had an unsatisfactory experience in using Chapter 19 to appeal other American trade determinations. In 1993, for instance, there were multiple remands in five cases, which led the panels to surpass their deadlines significantly. Further problems have arisen over the lack of consistency in Chapter 19 panel decisions, which have shown widely differing degrees of deference to agency decisions (Trebilcock and Howse 1999, 83).

Although AD and CVD jurisprudence may have been ineffective in helping the peripheral states constrain their hegemon, the opposite is not necessarily true. Canadian trade agencies have had to become more attentive to American interpretations of the standards they apply in AD or CVD determinations out of a concern for what the binational panels, which necessarily include American jurists, may later decide on appeal.

Thus Chapter 19 confirms the experience of Chapter 20, that NAFTA's judicial function is asymmetrical in its impact. On the one hand it does not have supraconstitutional clout over the hegemon's behaviour. On the other it is used to enforce NAFTA rules in the periphery but has some effect on Canadian administrative justice. When these processes do not satisfy Washington, it can still exercise its raw power to achieve its objectives.

Investor-State Disputes

Although barely noticed when NAFTA was debated in the public domain before its ratification, an obscure dispute mechanism buried deep in Chapter 11 has established a powerful new zone of adjudication to enforce Article 1110's corporate rights. Under these investor-state tribunals, an American or Mexican corporation with interests in Canada can initiate arbitration proceedings against a municipal, provincial or federal policy that harms their interests on the grounds of expropriation. These "investor-state" disputes are taken for arbitration before an international panel operating by rules established under the aegis of the World Bank's International Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) or the United Nations Commission on International Trade Law for settling international disputes between corporations (Horlick and DeBusk 1993, 52). Since these forums operate according to the norms of international commercial law, Chapter 11 disputes actually transfer the adjudication of disputes over government policies from the realm of public law to commercial law (Dunberry 2001) .[2]

Beyond shrinking the scope of the Canadian judicial system, Chapter 11 arbitrations overlay it with a supraconstitutional process that conflicts with many of its historic values. *Transparency* is the first victim in this secret world of commercial arbitration whose hearings are held behind closed doors. *Neutrality* is the second legal value that falls by the wayside. Since the plaintiff investor has the right to appoint one of the three arbitrators, the defending government already faces a bench that is substantially weighted in favour of corporate rather than public values. *Judicial sovereignty* is a third victim of this extraordinary addition to the Canadian legal order. As the corporate plaintiff and the defendant state choose the panel's chair by consensus, it is likely that there will be just one Canadian in tribunals adjudicating suits launched against Canadian governments. This suggests that, when a norm of international corporate law comes into conflict with a Canadian legal standard, it is the latter which is likely to be overridden.

The WTO

In contrast with NAFTA's judicial processes, which are weak at the governmental level and strong at the corporate level, the WTO's dispute settlement body excludes corporations from directly using its services and gives member governments a powerful tool with which to enforce the global regime's economic rules even against the most powerful non-compliant state. Indeed, the key to the WTO's unprecedented importance lies in the power and neutrality of its dispute-settlement mechanisms. Unlike NAFTA's Chapter 19 and 20 panels, WTO panellists are chosen from countries other than those involved in a particular dispute. Their rulings are not based on the contenders' own laws, as they are in NAFTA's AD and CVD cases, but on the WTO's international rules. They make their judgments quickly on the basis of the WTO's norms that they interpret in the light of the international public law developed by prior GATT jurisprudence.

The sociology of its dispute panels enhances the WTO's legalistic rigidity (Weiler 2001, 194). Panellists adjudicating WTO disputes are either trade lawyers and professors of international law who tend to stick very close to the black letter of the WTO's texts they are interpreting, or they are middle-level diplomats who take their cues from the Secretariat's legal staff. In either case they know full well that their judgment will be appealed by the losing side and that the judges on the Appellate Body will be responding to highly refined legal reasoning (Bhala 1999, 847; Palmeter and Mavroidis 1998, 405).[3]

[2] For example in the Metalclad case, the tribunal ruled that the local municipality had exceeded its constitutional authority – a judgment that hitherto only the judges of the Supreme Court of Mexico had the power to make.

[3] Robert Howse, personal communication. It might also be said that while formally speaking, Appellate Body rulings are not precedent setting, it is generally recognized that the logic of one panel's decision can be carried over from case to case as the situation dictates. Palmeter and

Under these conditions, "soft" arguments defending cultural autonomy or environmental sustainability hold little weight against the "hard" logic of the WTO's rules.

The WTO's supraconstitutional norms create considerable uncertainty for member governments. In referring to one contentious concept in trade law, the WTO's Appellate Body memorably compared the notion of "likeness" to "an accordion, which may be stretched wide or squeezed tight as the case requires." This conceptual flexibility did not guarantee cultural sensitivity, as Canadians discovered when the WTO ruled that *Sports Illustrated Canada* was "like" *Maclean's* magazine (WTO 1997). This case resulted in several key policy instruments, which had successfully promoted a Canadian magazine industry for several decades, being declared illegal (Schwanen 1998). Facing such a broad approach to the adjudication of the WTO's rules, national policy makers can only be sure that they will never know what this supreme court of commercial law will decide until a trade dispute concerning this policy is heard (Howse and Regan 2000, 268).

Whether the WTO rulings' supraconstitutional superiority over their own constitutional norms will be accepted by Canadian courts remains to be seen. As any student of federalism knows, a system containing more than one order of jurisdiction creates conflicts between the cohabiting authorities. No case has yet been brought to Canada's Supreme Court to test whether a ruling by a global or continental dispute panel necessarily has precedence over a Canadian norm.[4] The introduction of a supraconstitution with judicial muscle suggests that continuing clashes between the external and internal constitutional orders must be expected.

Conflict can also be anticipated between the global and continental orders. The United States, for instance, challenged in a NAFTA panel Canada's tariffication of its agricultural quotas as a violation of its NAFTA obligations (Trebilcock and Howse 1999, 267). The panel ruled that the WTO's tariffication imperative prevailed (CDA-95-2008-01). Other conflicts between the two regimes' norms are bound to occur, complicating their constitutionalizing impact on their members. The WTO may be superior to NAFTA in many respects, but multilateralism does not necessarily present Canada with a real escape from US-dominated continentalism. Indeed much of the constraint that the WTO has imposed on the Canadian state in the first few years of its existence has been an application of US-driven demands that Canada comply with US-inspired WTO rules on behalf of US-based pharmaceutical and entertainment oligopolists.

Enforcement

As with other trade treaties, NAFTA has no enforcement capacity other than the parties' sense of their long-term self-interest. If one member state does not comply with the judgments of disputes that it loses, it cannot expect its partners to do the same. Under the extreme asymmetry prevailing in North America, the hegemon is largely unconstrained by prudential considerations. The United States remains able to flout the trade agreements' rules as interpreted by its judicial processes. Washington has repeatedly done this with both Canada and Mexico.

Mavroidis (1998, 405) also note that the Appellate Body "operates on a 'collegial' basis." While only three of the seven members sit on any one 'division' to hear a particular appeal, and the division retains full authority to decide the case, views on the issues are shared with the other Appellate Body members before a decision is reached. Consequently, members of the Appellate Body, in confronting prior decisions, are far more likely to be confronting their own decisions, or those of their close colleagues, than are WTO panelists. This relationship seems likely to lead to a stronger attachment to the reasoning and results of those decisions.

[4] 'WTO decisions generate international governmental rights/obligations but not necessarily for judicial arms of government at the national level.' Communication from Howard Mann, trade lawyer, to the author, January 2001.

Like NAFTA, the WTO has no police service capable of implementing its judicial decisions. But unlike NAFTA, the enforcement provisions supporting its dispute settlement rulings are significantly stronger.[5] Once the final decision on a trade dispute has been handed down in which a signatory state's laws or regulations have been judged in violation of a WTO norm, the offending provisions are supposed to be changed or compensation paid. A non-compliant state is much more likely to be brought to "justice" by a litigant state because failure to abide by a WTO dispute ruling gives the winning plaintiff the right to impose retaliatory trade sanctions against the disobedient defendant. This retaliation can block any exports of the guilty state. The amount of the damage inflicted by the retaliation can equal the harm caused to the complainant by the violation. Although compliance is far from universal, this self-enforcement system works better in the WTO where there is greater symmetry among the major powers. This confirms that the WTO has a far more substantial supraconstitutionality for its members in its judicial dimension than does NAFTA (Howse 2000).

Enforcement is contingent on foreign complaints being adjudicated. Without legal attacks from foreign governments on behalf of their corporations, the prohibition of governments from imposing performance requirements on foreign investors, to make export commitments, to find local sources for their manufacturing needs, to transfer technology to domestic partners, or to guarantee set levels of employment would remain a dead letter (Chang 1998).

Institutions

With the major exception of the European Union, whose various institutions' decisions can directly affect the behavior of individuals and corporations in its member states, global governance acts indirectly by affecting the behaviour of the nation states that have constructed its various organizations by treaty. It would be surprising if, in Canada's case, the WTO and NAFTA would not have some indirect effects on its political institutions as well as their relationship with civil society.

By causing federal and provincial governments to amend the legislation in various policy fields, NAFTA and the WTO may also have altered Canadian federalism's distribution of powers between the two levels of government. Having made Ottawa responsible for ensuring the provinces' conformity to its provisions, NAFTA may have restored to the Canadian constitution a federal power of disallowance that had fallen into disuse. In this way it may possibly alter — to a potentially dramatic degree — the country's delicate constitutional balance (Petter 1988, 141-7). For example in the Doha round of WTO negotiations, should the federal government agree to let education and health care be brought under the General Agreement on Trade in Services (GATS) rules on services, it would be taking a step that affects the provincial constitutional order more than the federal. This action might also be of questionable constitutional validity, since it would lead to a change in the norms governing the provinces without the appropriate amendment having been made in the Canadian constitution. Provincial government powers are already affected by NAFTA and the WTO. For instance, because only the federal government may launch a trade dispute and appear in its hearings, even when a provincial grievance or measure is the issue, Ottawa has considerable discretion in deciding whether and how the province's problem is addressed.

NAFTA norms also create constitutional abnormalities at the level of interprovincial relations. The application of national treatment and investor-state conflict resolution to subcentral governments creates the anomaly that provinces, territories, and municipalities have to give NAFTA investors non-discriminatory treatment, whereas they may still discriminate against Canadian investors from other provinces.

[5] Indeed, Ostry (2001, 6) has called the DSU "the strongest dispute settlement mechanism in the history of international law."

Amendment

Formal changes to the WTO's or NAFTA's own constitutions can only be effected through these regimes' members reaching a consensus about a new rule.[6] This means that Canada has a veto power to block rule changes to which it objects. It also means in principle that the government of Canada's role in making new rules, which could alter its external constitution, would be proportional to its effectiveness in representing its interests in these regimes. Both these regimes have weak legislative capacities.

The WTO's principal legislator is its biennial ministerial council meeting which can alter the organization's institutions (Krajewski 2001, 167-186). It can also mandate negotiating rounds, which can create whole new sets of limits on governments and rights for corporations. The Uruguay Round was dominated by the triad of the US, the EU, and Japan, with Canada playing a booster role in the wings. With the Third World having successfully blocked the launch of the putative Millennial Round at the 1999 ministerial meeting in Seattle, the Doha Round will give the South far greater voice.

NAFTA's legislative capacity is limited to the minor annual or emergency meetings of the North American Free Trade Commission, which is made up of the three countries' trade ministers who are empowered to make whatever changes they deem appropriate. This authority includes the power to make "interpretations" which Chapter 11 investor-state tribunals are bound to accept. This means that NAFTA's own constitution can evolve, though without any direct accountability to the Canadian public. These changes in NAFTA's rules would then affect Canada's external supraconstitution.

Because of the uproar over the Ethyl, S. D. Myers, and Metalclad cases among Canadian environmentalists, the Canadian government has lobbied its NAFTA counterparts since 1998 to amend the investor-state dispute feature of Chapter 11. Mexico was opposed to the change — on the grounds that Mexico's attractiveness to foreign capital lay in offering iron clad guarantees of investor rights — so Canada could not obtain a trilateral consensus to make this change. Finally, on July 31, 2001, the three trade ministers were able to agree on the meaning of "international law" in Article 1105 (declaring that it means international customary law) for use by Chapter 11 arbitrators. The clarification is unlikely to have much effect.[7]

Informal change in state constitutional systems can be brought about through a number of channels, chief of which is through the adjudication function. Decisions by judges "make" law and in practice amend constitutional meaning through their rulings. In NAFTA, it is Chapter 11 tribunals which have shown the greatest supraconstitutional capacity for making law in Canada. More accurately, the cases launched by Ethyl and S.D. Myers Corps. resulted in *un*making legislation that had been passed. In the first instance Ottawa settled privately by withdrawing the law forbidding the trade of the alleged neurotoxin MMT when Ethyl initiated an investor-state dispute process. In the second Chapter 11 affair, the tribunal ruled that a federal law banning the export of PCBs expropriated the waste disposal company's property (even though its processing plant was in the United States). In affirming the notion that S.D. Myers had suffered action tantamount to expropriation, the tribunal was both invalidating a federal law and amending the notion of expropriation previously employed in the Canadian legal order.

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[6] Barfield (2002, chapter 2) has recognized this principle as a serious deficiency of the WTO. He argues that it encumbers the legislative function of the organization to the extent that most of the rule-making is done through litigation rather than legislation. He regards this as a serious problem with respect to the democratic nature of the regime.

[7] Todd Weiler, "NAFTA Investment Arbitration and the Growth of International Economic Law" *Canadian Business Law Journal* 26 (2002): 405-35.

Another kind of informal amendment derives from pressure exerted from other countries or global governance institutions themselves over member states' regulatory behaviour. This external oversight keeps the Canadian state's behaviour under transnational scrutiny. The United States Trade Representative's Office makes regular reviews of federal and provincial policies, reporting annually to Congress about Canadian compliance with the obligations it assumed in NAFTA and the WTO.

The WTO's Trade Policy Review Mechanism also reviews Canada's policies every two years. This surveillance mechanism presses governments to ever greater transparency before the epistemic community of trade liberalizers. At these encounters Canada's trading partners cannot force it to make changes, but they ask about governmental measures that interfere with their investments or trade and so put Canada's governing elite on the defensive if it is caught practicing discrimination.

The general thrust of dispute settlement under NAFTA and the WTO has been to validate corporate rights and declare illegal conflicting environmental or labor rights norms. This bias of the global trade regime towards purely economic values helped trigger the protests against globalization that have marked the turn of the century. These denunciations of judicial actions have themselves had some effect on the judicial process. Judges have two audiences in mind when they deliver their judgments. They are making determinations that are scrutinized by their legal peers, but their rulings are also addressed to the general public. And if the public finds them overstepping the normative system to which it is attached, they can be repudiated.

The WTO's asbestos judgment, which allowed the French public's concerns about health to weigh in the balance, may herald an incorporation of civil society's values into the trade adjudication process. Moreover in making its Shrimp/Turtles decision the Appellate Body adopted what Barfield calls a "dynamic interpretation" of Article XX, arguing that it must look at the text in light of "contemporary concerns of the community of nations about the protection and conservation of the environment (Barfield 2002, 92).[8] The point for our analysis is that neither constitutional nor supraconstitutional elements are fixed in stone. They can evolve through the informal alteration of the trade arbitrators' normative framework.

The way the rules are interpreted by economic tribunals is no more critical than the ways states behave in complying with or resisting the international judgments. We have seen that the hegemon's behaviour can be decisive. But the system's functioning can also be influenced by the behaviour of mid-sized powers like Canada. Were Ottawa to have declared that considerations of national security prevented it from accepting the WTO's ruling on the question of the split-run edition of *Sports Illustrated,* it could have set limits to the trade regime's capacity to undermine not only its own carefully constructed cultural policy but other countries' domestic priorities.

Exercising Supraconstitutional Rights Abroad

In transnational global governance the super constitution's norms, rules, rights, and institutions have external as well as internal implications. When Sweden joined the EU it accepted an array of limitations on its government's internal autonomy. By the same token, it joined fourteen other members whose governments were limited by identical constraints and in whose economies the EU gave Swedish corporations and citizens new external capacity. These limits on other members can be seen as external rights belonging to the citizens of the trade regimes' member states.

[8] See also World Trade Organization. 1998. UNITED STATES IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS, Report of the Appellate Body, para. 129. Geneva: World Trade Organization.

Similarly for Canada, the relationship between the domestic and external constitutional orders is not a one-way street in which autonomy is only lost to transnational institutions or markets. A balancing of political power can be seen when its loss of *internal* autonomy is offset by its corporations' *external* capacity to exercise power outside its national boundaries. This trade-off was visible when Ottawa participated in the deliberative process at the global level that established the norms, regulations, and disciplines it subsequently imposed on itself.[9]

In principle, participating in a rules-based system should have given the semi-peripheral state the capacity to have the hegemon play by the same book. In practice it was the hegemon that played the major role in writing the new rules which it has respected only when it suits its interests. When Canada, along with the EU prepared to invoke the WTO's dispute settlement system to overturn the extra-territorial implementation of the US Helms-Burton law on Canadian and European assets in Cuba, Washington threatened to boycott the proceedings by invoking the higher norm of national security. When the game was going to go against it, the USA refused to play.

On the other hand, Canada's own unequal relations of dominance vis-à-vis weaker states have been accentuated. Although Ottawa complained about the unfairness of NAFTA's Chapter 11 clauses on investor-state dispute settlement, it imposed similar provisions on South Africa. However unsuccessfully Ottawa tried to retain the power to impose performance requirements on foreign investors in Canada, Canadian mining companies are nevertheless profiting in several African countries from just such bans on domestic performance requirements. With other semi-peripheral countries of its own size, Canada's use of the global constitution has produced balanced results. When Brazil was able to use the WTO to discipline Ottawa's subsidies for Bombardier, Canada was able to use the same supraconstitutional reality to discipline Brasilia's subsidies for Embraer.

Canada has been quite energetic in proactively using NAFTA's and the WTO's supraconstitutional status in other countries to defend its corporate interests there. It joined the United States in using the WTO's sanitary and phytosanitary measures to prevent the European Union from banning the import of beef raised with the growth hormone commonly used by North American ranchers. It also tried, though without success, to get the WTO to stop France from prohibiting the import of Canadian asbestos for insulation. The WTO appellate body's ruling on the asbestos case leads us to a consideration of how Canada's supraconstitutional framework could change, whether through formal or informal processes.

Normative Implications for Cosmopolitanism of the External Constitution

Canada's external constitution has more relevance for the debate about extending cosmopolitanism to the global stage than to the discussion about reconstituting democracy at the European level.

Canada, NAFTA and the European Union

Far from sustaining a national democracy, global economic governance systems have diminished and may diminish further the scope of domestic government — the sphere over which Canadian citizens once exerted exclusive control through their representatives. This is threatening Canadians' sense of national identity and cohesion which is highly dependent on their publicly funded health system. If the commercialization of publicly provided services is the product of the services provisions in NAFTA and GATS, Canadian society may risk losing a prime social institution that has

[9] Streeck (1996, 299-315) has suggested a similar hypothesis for the member states of the European Union.

played a major role in defining its identity and so sustaining its cohesion.[10] Should the impact of continental and global free trade norms cause the accelerated privatization of health care with consequent increases in inequality of treatment between the rich and the poor, a central element of Canadian political culture would be jeopardized and its domestic democracy weakened.

Its external constitution has already had distorting effects on Canada's political system. Take the country's two geographically determined types of agriculture. To the extent that the prairie provinces are exporters of grains and livestock, their farmers can expect to benefit from the WTO's agreement on Sanitary and Phyto-Sanitary (SPS) standards whose supraconstitutional norms affect *other* member states' capacity to use health regulations to impede imports. As the North American dispute with the European Union over its refusal to allow the import of beef raised with a growth hormone illustrates, the SPS norms, if successfully applied, should make it easier for Canadian cattle ranchers to find export markets. In contrast, farmers in central Canada, who supply a protected market of national consumers thanks to government-enforced marketing boards for eggs, milk, and poultry, can be expected to suffer as their quantitative barriers are turned into tariffs, which are subsequently cut to allow more competition from abroad in the Canadian market.

Although NAFTA has no capacity to act as a protective shield, intermediating between the forces of globalization and the nation state, it corresponds most closely to the first Fossum model, "Delegated Democracy." With neither collective symbolism; nor common currency; nor flag; nor parliamentary legislature, executive, or administration; nor sense of membership, citizenship or "we feeling"; nor a common foreign policy, North America has little positive sense of community. It does have something of a common security policy, but this has been imposed as a result of Washington's antiterrorism obsession since 2001. As a result, its member states are the sole sources of whatever the legitimacy it may claim.

Indeed, the reinforcement of each state's police and border surveillance powers in the wake of the U.S.-led reaction to al-Qaeda's coup of September 11, 2001 against the Pentagon and New York City's trade centre reconstituted some of the state's steering power, at least in security measures. New domestically monitored limits on financial flows that might support terrorist groups, new controls on immigration, new authority for surveillance of the internet are indications — in particular — that the three nation states have recaptured some of their powers and — in general that the external constitution is not immutable.

Canada's External Constitution and a World Wide Cosmopolitanism

In the light of this conference's optimistic view of an expanded cosmopolitanism that extends democratic norms to the level of global governance, Canada's external constitution must be considered a dystopia, an anti-model that acts as a warning beacon for global democrats.

Take, to start with, the notion of democratic legitimacy which requires the public justification of results to those affected by decisions. Instead of developing its social and community cohesion, Canada appears to be polarizing into a society of those who can succeed in the globalized system and a society of those left behind. If this perception is linked to the norms and practices of the global economic governance regimes, serious repercussions may be felt in the legitimacy not just of neoconservative globalism but of the country's own representative system (McBride and Shields 1997). If global institutions have 'hollowed out' the Canadian state to the point that it risks being seen as

[10] Arup (2000, 96) writes that "the main thrust of the GATS is deregulatory: it attacks non-conforming national government measures."

incapable of defending its citizens' interests, (Arthurs 2000) the Canadian political system will lose credibility at the same time as NAFTA and the WTO lose legitimacy.

The issues involving the public's acceptance of and commitment to its institutions lead us to consider the prospects for change generated by the interaction between global and domestic modes of governance. Canadian participation in polarizing world opinion about globalization also impinges on the Canadian constitutional order. When protesting at the "wall of shame," the link-fence barrier erected in Quebec City in April 2001 to keep opposition groups away from delegates to the Summit of the Americas, Canadian citizens and NGOs were not just making the point that global governance was unfairly privileging the interests of business over the interests of labor or the environment. They were also contributing to the aggravation of attitudes within Canada that are delegitimizing the Canadian constitutional order. If Canadian leaders are seen to be complicit in the imposition of reviled supra-constitutional norms on environmental regulation, for instance, the amount of deference accorded them by the public diminishes further. In short, the constitutional fallout from global governance's democratic deficit may be worsening the democratic deficit from which the domestic legal order suffers.

Accountability is central to this legitimacy in the sense that decision-makers should be held responsible for their decisions by giving reasons for their actions. Apart from a federal election in 1988 which focused on CUFTA and in 1993 when NAFTA was involved peripherally, the ongoing application of the external constitution proceeds with virtually no accountability. Rhetorical praise for NAFTA and the WTO by their proponents does little to paper over the democratic deficit that cannot help but grow. For instance, the WTO has the capacity to be developed much further in successive multilateral negotiations, such as the WTO's Doha Round launched in 2001. The United States is pressing for public services such as health and education to be included in states' commitments under the General Agreement on Trade in Services so that the global market can be broadened by their privatization and the scope of TNC investment expanded accordingly (Sinclair 2000). Expanding the role of transnational capital in its public health and public education systems could seriously delegitimize the Canadian state.

Congruence — another central component of democratic legitimacy — demands that those affected by a law should make it. In the case of the external constitution, it is those who benefited from the new norms who took part in negotiating the treaties, big business representatives famously monitoring negotiations from the "room next door." In the failed negotiations for a Free Trade Area of the Americas, the steel industry was overtly engaged in the preliminary negotiations, and the Canadian government consulted various interest groups through its consultative mechanisms. Outside these privileged interests, the secrecy required by diplomatic norms for international negotiations kept all other civil society groups and citizens in the dark.

One result was CUFTA's Article 1605, which provides that no government may "directly or indirectly expropriate or nationalize", or take "a measure tantamount to expropriation or nationalization" except for a "public purpose," on a "non-discriminatory basis," in accordance with "due process of law and minimum standards of treatment" and on "payment of compensation". NAFTA contained an identical provision. In the face of Canada's constitution, which had been amended in 1982 to incorporate a Charter of Rights and Freedoms that deliberately excluded property rights (on the grounds that they would excessively enhance corporate power), this provision created a property right for foreign corporations that neither the government nor the public had at first understood. Unlike rights in their internal constitution, this right was not available for Canadian corporations in Canada where it could only be exploited by American and Mexican companies.

It is not surprising that, in contrast with a national constitution, the empowerment accorded by NAFTA to transnational corporations subjects them to no balancing obligations enforced by continental-level institutions with the clout to regulate, tax, or monitor the newly created continental market that has proceeded to emerge (Blank and Krajewski 1995). NAFTA's Chapter 11 expanded the scope of investment rights without requiring TNCs to promote the public interest by protecting the environment or public health.[11] In other words NAFTA supported a regime of continental accumulation less by creating a new institutional structure for it than by reducing civil society's capacities to control corporations which were given both greater freedom to operate transcontinentally and a means to discipline governments that stood in their way.

The new global governance regimes of the 1990s had another effect on the domestic democratic deficit due to their being constructed without even their designers fully understanding the consequences of their creations. Necessarily, their publics had little knowledge of the WTO's or NAFTA's contents, let alone a capacity to understand their implications. As the passing years revealed these implications, civil society discovered that there is nothing neutral about rules which reflect the demands of the continental hegemon and transnational capital.

The discourse on cosmopolitanism emphasizes inclusion and democracy. NAFTA was acclaimed by its negotiators for having "locked in" the neoconservative norms and rights which were *ipso facto* immunized from partisan political reversal. In this light, NAFTA and the WTO can be understood as enabling their negotiators to exclude not just present but also future generations who have been disenfranchised preëmptively from pursuing certain legislative goals through the democratic process (Schneiderman 1996). Even if more activist political parties were to win power, they would find their hands tied by these internationally negotiated and domestically implemented political limits to which their predecessors had committed them.

The hope for uploading democracy to the global level resides in the notion of deliberative supranationalism and a supranational democracy that could handle the problems of interdependence. But NAFTA has no legislative capacity to deal with these externalities, and the WTO's largely secretive negotiations are aimed at liberating corporations further from governments, not liberating people from economic exportation. With the decrease in the scope for participating nation states' policymaking, decisions are taken elsewhere, generally in secret. A new North American steering mechanism, the Security and Prosperity Partnership (2005) gave big business organizations from the three countries privileged access to the three executives. Opposition to the SPP by left-leaning nationalists in Canada and by right-wing extremists in the United States coincided with the vilification of NAFTA by the Democratic presidential candidates in 2008 — two recent examples of the external constitution's legitimacy deficit which has attenuated the SPP's legitimacy as a trilateral decision-making innovation.

If a sense of fatalism permeates much of current discourse on globalization – to the effect that democratic governments are no longer capable of improving the lives of their citizens or that globalization is irreversible, this is because these remote, invisible organizations are presented as having arrogated to themselves vast powers which they are proceeding to expand in the name of a self-regulating market. But, as Karl Polanyi showed six decades ago, 'laissez-faire was planned' (Polanyi 1957) by dominant governments in the late nineteenth century which took specific legislative steps to create free markets. When this laissez-faire was perceived by national publics to be creating

[11] Steven Shrybman (2002) notes that Athe powerful private enforcement machinery of international investment treaties has now been invoked by several transnational corporations to assail water protection laws, water export controls, and decisions to re-establish public sector water services when privatization deals have gone sour.

social misery, a "double movement" generated reaction by civil society organizations such as labour unions, which successfully pressed their governments for protection against job insecurity and ultimately achieved the Keynesian welfare state.

The civil society organizations working in the labour and environmental movements or militating for human security and civil rights may become a sufficiently powerful force to create a new double movement that rebalances global economic rules. That nation states themselves constructed the globalized market made possible by late-twentieth-century trade regimes suggests that they can also play a role in modifying them. For those who would reverse globalization's tendency to increasing inequalities within and among states, the supraconstitution created by global governance must be taken seriously.

Constitutional theorists recognize that popular will is the binding agent in such a social contract as a domestic constitution. This implies that, should a constitutional order lose legitimacy, the societal will required to sustain it could collapse. That the will for global governance is at best shaky is suggested by the spectacular demonstrations that have been mounted since 1999 to protest not just the global WTO and the IMF but the hemispheric Organization of American States, the Free Trade Area of the Americas, and now the SPP. Canadian civil society organizations, such as the Council of Canadians, have been amongst the most active within the semi-periphery in mounting vocal opposition to manifestations of global or continental governance (Ayres 1998).

How the global supraconstitution evolves will depend on the continuing international struggle of interests, among which Canada's role will continue to be of some interest. In this situation, it remains a classic power in the middle. Semi-peripheral in its partly hegemon-owned, partly resource-based, partly manufacturing, and partly service economy, it is also semi-peripheral in remaining suspended somewhere between the powerful centre as rule maker and the weak periphery as rule taker. Its interest in the evolution of a multi-tiered system is clear from its active negotiation stance in all trade organizations. Whether it will shift from endorsing a continual expansion of neoconservative economic norms cannot yet be known. Neoconservatism may be locked in but it is not cemented in. The development of a more humane form of globalizing capitalism and the resultant reorientation of Canada's external constitution will depend on the action of its global partners and conflicting domestic forces which are also organized transnationally.

I hope I have demonstrated that the external constitution created by new forms of global economic governance has become something of an anti-model that seriously challenges the bright model represented by the multicultural, postmodern reality that can still be discerned in Canada. Indeed, under the most right-wing government in Canadian history, the dark is encroaching on the light as can be seen from much toughened restrictions on the acceptance of refugees, the increase of temporary migrant labour bereft of citizen rights, and the general securitization of the state.

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Part Three

Cosmopolitanism in the European Union and Canada

Cosmopolitanization in the EU and Canada

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Introduction

There is a widely held sense today that states have become far more closely linked together than before. What is also notable is that this covers a broad range of domains: political, social, cultural, economic, and legal. Tight links are amplified by the revolution in microelectronics, in information technology, and in computers. New international and transnational actors have emerged. States are faced with a whole range of boundary-spanning problems pertaining to environmental degradation, international crime, terrorism, tax evasion, and so forth. In response to the recent financial crisis and the ensuing economic downturn, states all around the globe have been compelled to take drastic measures to face a crisis that is clearly global in character and whose global character has exacerbated its severity and effects.

Many analysts conclude on the basis of the developments spelled out above that today's process is *unprecedented* in both spatio-temporal and organizational terms. The argument is that global flows are far more extensive, intensive, and have a far higher velocity and impact than was the case in earlier processes of globalization. Contemporary globalization is also more strongly institutionalized than before, through international organizations, treaties, regimes and conventions, and networks and patterns of interaction and contact. The upshot is that the present situation is unique, notably in its *confluence* of factors and processes (Held et al. 2000).

These processes have helped to re-ignite scholarly and political interest in that age-old doctrine of *cosmopolitanism*, a doctrine with roots as far back as the ancient Greeks and the Roman Stoics (Seneca, Marcus Aurelius and Cicero). The contemporary process of globalization is not only broad and encompassing; the focus on universal human rights makes it quite natural to consider this process in a cosmopolitan light. Further, because many of the states that are becoming globalized are democracies, today's discussion has taken on a distinctly modern tenor in that cosmopolitanism is generally considered in relation to and with direct reference to *democracy* (Archibugi et al. 1998; Beck 2006; Beck and Grande 2007; Held 1993, 1995; Held et al. 2000;).

The contemporary debate on cosmopolitanism was initially dominated by political theorists, but in recent years a broad range of academic disciplines have become engaged (Holton 2009). This has extended the focus of debate from cosmopolitan principles and their normative merits to the type of practical arrangements that might sit with cosmopolitan principles, and this again has become coupled with a focus on the extent to which practical arrangements *actually* work according to cosmopolitan principles. Nevertheless, as Holton (2009) concludes, based on his comprehensive multi-disciplinary survey of the many different strands of cosmopolitanism, precisely where we stand today in relation to a cosmopolitan world requires far more systematic attention. The research on the *cosmopolitan imprint* on actual practice is still in its infancy. One problem is that the increased interest in cosmopolitanism has not taken people closer to an agreement on what cosmopolitanism is; rather "(p)aradoxically, the idea of cosmopolitanism has now expanded in so many different ways that it cannot be easily identified with an explicit philosophical outlook or political theory enshrined in a set of formal principles to which adherents must sign up or commit."(Holton 2009:5)

The other problem which is hardly rendered more manageable by the proliferation of approaches is that much of what is going on and might be understood as cosmopolitan

has not been couched in or justified as cosmopolitan, whether by decision-makers or by analysts. This also applies to the European Union where most EU integration scholars have paid scant, if any, attention to cosmopolitanism. There are some exceptions (Beck and Grande 2006; Delanty and Rumford 2005; Eriksen 2006). Beck (2006: 114) sees the EU as a case of 'institutionalized cosmopolitanism'. As such, it is a central ingredient in the emergence of second – cosmopolitan - modernity (Beck 2006). Cosmopolitanism, to Beck, is thus both a recent phenomenon and a defining feature of (second) modernity. From this we could say that one response to the lack of explicit cosmopolitan articulation referred to above is instead to claim that cosmopolitanism is effectively everywhere.

RECON is well set up to explore the actual salience of the cosmopolitan dimension. It operates with several model configurations of the EU and the broader global context in which the EU exists. RECON's two first models enable us to consider in a systematic manner how resilient the vestiges of the state-based (Westphalian) system are, and through comparison with the third regional-cosmopolitan model we get a better sense of the overall cosmopolitan thrust.

RECON WP 9 on global transnationalization and comparison of EU democratization with other relevant entities contains two-subprojects that deal with these two themes, respectively. This chapter falls under the heading of subproject two which looks at post-national convergence through examining the prospects for convergence between the EU and states along cosmopolitan (Model III) lines. This raises the question of how to compare the EU with the states that are most prone to cosmopolitanism. The EU is a supranational organization that not only sits on top of a collection of states but also transforms these. The EU is a multinational and poly-ethnic entity and is uniquely complex in both institutional and cultural terms. These features suggest that the EU's cosmopolitanism and its cosmopolitan thrust will reflect its distinct features and may not resemble the processes whereby individual non-EU states become cosmopolitan. Any effort to compare the EU with non-EU states must therefore take proper heed of the differences between these types of entities.

This chapter devises an analytical-comparative framework to study the cosmopolitanization of different political entities. It starts by defining what is meant by cosmopolitanism and outlines the core components that we need to look for in any process of cosmopolitanization. But the differences between the EU and non-EU states suggest that cosmopolitanization can proceed along several distinct paths, and through different conveyors. The main categories we find in the literature are global, regional, state-based and societal. That there are different paths also suggests that the indicators to measure cosmopolitanization will vary depending on which path is considered. We therefore need to: (a) identify the main paths and spell out the relevant criteria for cosmopolitanization; (b) test these out on the most relevant states and the EU; and (c) look for patterns of post-national cosmopolitan convergence across paths.

This chapter outlines three main cosmopolitan 'paths'. There is as noted above a growing academic interest in the EU as a cosmopolitan entity but thus far little systematic effort has been undertaken to compare and contrast the EU with cosmopolitanising states. RECON model III (see notably Chapter One above) represents an effort to spell out what a regional-cosmopolitan EU might look like. This chapter complements that work through outlining a (alternative or complementary) state-based cosmopolitanising path, which will help us establish how flexible and malleable the state-centered model is in terms of post-national democratic inclusion/'cosmopolitanization'. In this chapter the focus is on one state, Canada, which as we shall see is an interesting state to compare the EU with in terms of cosmopolitanization. There are important parallels between the EU and Canada that add to the relevance of such a comparison, namely that both are fundamentally contested entities; both are multinational and poly-ethnic in character; and both have been involved in long and protracted processes of constitution making.

What is Cosmopolitanism?

Cosmopolitanism's structuring normative intuition is moral universalism (Habermas 1997:135; 2006). The modern version of cosmopolitanism is generally associated with Immanuel Kant, notably his *Zum Ewigen Frieden* which was first published in 1795. Kant's vision is that of the emergence of a global legal order, which unites all peoples and abolishes war. Jürgen Habermas, in his reformulation of the Kantian cosmopolitan ideal, aimed as it is at rendering cosmopolitanism relevant to the contemporary world, underlines how cosmopolitan restructuring pertains to: (a) the external sovereignty of states; (b) states' internal sovereignty; and (c) the very meaning of peace. On the first point, each world citizen has rights which have to be such institutionalized as to be able to bind individual governments. The overarching community thus needs sanctioning powers. Within such a construction: "The external relationship of contractually regulated international relations among states, where each forms the environment for the others, then becomes the internally structured relationship among the members of a common organization based on a charter or a constitution."(Habermas 1997:127) The second point, that of internal sovereignty, pertains to a world community that is made up of citizens rather than a world made up of sovereign states: "The point of cosmopolitan law is … that it goes over the heads of the collective subjects of international law to give legal status to the individual subjects and justifies their unmediated membership in the association of free and equal world citizens."(Habermas 1997:128) The third and final requirement speaks to the reciprocal democratization of individual states and the community of states. The ensuing conception of war and peace then also changes: the cosmopolitan notion does not simply refer to crimes committed *during* war; war itself becomes a crime: the crime *of* war can be prosecuted.

We see from this that cosmopolitanism presupposes a major process of transformation wherein all states succumb to a global order, either by ceasing to be states or by transforming so much as to cohere with the core tenets of cosmopolitanism. This takes us to the notion of cosmopolitanization, which is best understood as a process of entrenching cosmopolitanism. It is obvious that such a process must focus on moral universalism. Core elements of moral universalism notably pertaining to human rights must be legally entrenched in positive – cosmopolitan – law. Moral universalism is not necessarily footloose; all cosmopolitan arrangements are steeped in distinct institutional-cultural contexts. The cosmopolitan thrust then hinges on compliance with the requirements of basic human rights, inclusion (or openness), and reflexivity. With inclusion I refer both to the physical inclusion of others (non-nationals, members of other cultures etc.), as well as to the taking into account of the interests and concerns of non-nationals. Further, the institutional and cultural setting must leave space for or be compatible with reflexivity, which as Habermas underlines is closely connected with moral universalism.

Reflexivity here refers to the extent to which the polity is open to challenge, reinterpretation and amendment. It entails a process that is open to deliberative challenge, a process of critical self-examination on who we are, who we should be, and who we are thought to be. Rights that ensure individual autonomy – private and public – are critical institutional preconditions for reflexivity.

Precisely how a process of cosmopolitanisation can take place – along which possible paths or routes it can unfold - requires closer scrutiny.

Cosmopolitanization: Different Paths of

Some scholars distinguish between a top-down and a bottom-up approach to cosmopolitanization (Holton 2009). The former is then understood as a process of forging cosmopolitanism through entrenching norms and institutions in a formal and hierarchical manner; the latter refers to how societal factors and actors foster cosmopolitanism through lived practice, as a way of life. If we disaggregate these notions we find that the

top-down approach can have carriers or paths at different levels of governance: the global, the regional, and the state level, whereas the latter mainly has a societal (global and transnational) path. All depend on certain basic legal preconditions best associated with cosmopolitan law but the paths differ in how they stand in relation to this law. Most states, albeit hierarchical and able to impose their will in a top-down manner will nevertheless also be norm-takers (bottom-up relation) in a global system of law. This suggests that the top-down/bottom-up distinction is less useful to discern similarities and differences between cosmopolitanization paths. A more apt distinction is the one between three different paths: global, regional and state-based.

Note that states will figure in all of these three paths, but their 'stateness' and roles will likely vary considerably. The paths are analytical constructs; what is important to establish is the salience of each and whether they are distinct or complementary – in a mutually reinforcing manner. How they relate to each other matters a lot to the overall cosmopolitan thrust.

Cosmopolitanization through the 'Global Route'

The most obvious global route would be to establish a global polity, which of course transcends the Westphalian state-based order. This first path can thus be conceptualized through the manner in which a global structure is erected. This could manifest itself in the emergence of cosmopolitan law and the cosmopolitanization of the UN system. It would then also entail provisions for uplink to this norm-set in the constitutional arrangements of states (some states such as Germany already contain such provisions).

This process presupposes a transformation of the *system of states*, where states renege on their sovereignty and submit to a set of global cosmopolitan norms, rules, and institutional arrangements. The global arrangement is thus the main carrier of cosmopolitan norms, although the norms permeate the entire structure, which is thus transformed so as to help sustain this global arrangement. David Held and associates have in numerous writings provided a clearly elaborated cosmopolitan model (Held 1993, 1995; Archibugi, Held and Köhler 1998; Held et al. 2000).

A (institutionally weak) global route might be Kant's conception of a *federation of nations*. This notion envisages cosmopolitanism through the emergence of cosmopolitan law and a world made up of constitutional states which together sustain the arrangement through voluntary yet 'permanent' compliance (Habermas 1997:117). Kant's weak notion of federalism was intended to protect against the oppressive potential built into the strong concentration of power within such a global system.

Another (also likely institutionally weak) possible route to cosmopolitanism with a more recent vintage goes through the emergence of a global public sphere and civil society (cf. Bohman 1999; 2007; Dryzek 1999). This does not need to be made up solely of civil society but can also include governmental bodies. In that sense it can be a necessary supplement to the global-institutional route.

A number of global-cosmopolitan visions (differently institutionally entrenched) are available. How far has the world moved in this direction? A very brief sketch would include the UN system and developments in international and cosmopolitan law. Of particular importance to the role of states is that state sovereignty is challenged by major transformations in the realm of international law. The first is the recognition of individuals and groups as legal subjects of international law. Second, the realm of international law is shifting from primarily being focused on political and geopolitical matters to an increased focus on regulation of economic, social, communication and environmental matters. Third, is the change in the sources of international law – which far more than before include international treaties or conventions, international custom and practice, and "the underlying principles of law recognized by 'civilized nations'".

(Held et al. 2000:63) This has also led to an increased focus on the relation between the individual and her own government. "International law recognizes powers and constraints, and rights and duties, which have qualified the principle of state sovereignty in a number of important respects; sovereignty *per se* is no longer a straightforward guarantee of international legitimacy. Entrenched in certain legal instruments is the view that a legitimate state must be a democratic state that upholds certain common values."(Held et al. 2000:65) These legal developments are not uniform across the globe and have been carried further in Europe than anywhere else.

One obvious problem with this global strategy is that of fashioning a global structure without it becoming oppressive. The main problem here is of course the lack of democracy but many also hold up the problem of scale: even when a global system of government is entrenched in democratically accountable institutions, this might produce a pattern of centralization that is insensitive to difference and diversity.

The fear of oppression has made many analysts, including Habermas and even Held to argue that cosmopolitanism does not entail abolishing states but rather to reconfigure state sovereignty to suit a system based on cosmopolitan law. The legal developments that have already taken place lend some credence to such approaches. But there are also clear limits to the effective reach of these legal provisions because they all depend on states for their proper effectuation.

Another problem stems from the requirement that the global process must be universal in the sense of being applicable to all states at the same time and at the same magnitude. The pattern of globalization that drives much of this process is highly asymmetric (Bohman 2007:13); hence it offers limited assurance of sustaining a *global* or universal pattern of transformation.

The problems that beset global solutions have prompted many analysts to cast their glance below the global level and focus on those parts of the world that hold the greatest potential to cosmopolitalize. This takes us to what I would label as the second, the regional-cosmopolitan path. The focus here is on the EU exclusively; it is the only trans/supranational regional entity with explicit cosmopolitan traits.

Regional Cosmopolitanization

Cosmopolitanism 'is not part of the self-identity of the EU…' (Rumford 2005:5); many scholars nevertheless recognize the EU as a part of, and as a vanguard for, an emerging democratic - cosmopolitan - world order.[1]

A number of analysts argue that it is possible to make the EU into a regional-cosmopolitan entity. This is normally seen to occur through states entering into binding co-operation which in turn transforms this system of states into a regional-cosmopolitan entity. This presupposes: (a) a set of states that are willing to embrace cosmopolitanism and by implication rescind state sovereignty; (b) the development of a set of regional institutions with an explicit cosmopolitan vocation, and powers to hold the states to the cosmopolitan creed; (c) a pattern of transformation of the states into subunits of the regional-cosmopolitan entity; and (d) a commitment and active measures on the part of the regional entity to foster cosmopolitanism across the globe.

Ulrich Beck and Edgar Grande provide the most elaborate position here. But Beck also goes further. To him, Europe forms a central ingredient in his attempt to forge a cosmopolitan sociology wherein methodological cosmopolitanism replaces methodological nationalism. Beck also devises an analytical framework with a set of criteria for discerning how

[1] Habermas (2001, 2006), see also some of the constitutional proposals submitted to the Convention. Consider for instance The Altiero Spinelli Institute for Federalist Studies (2002).

cosmopolitanized a given society is. The distinction between normative cosmopolitanism and concrete patterns of cosmopolitanization is devised so as to permit normative evaluation of the cosmopolitan practices that are uncovered, although it should be added that the normative position is greatly underspecified (Smith 2008). Beck and Grande understand the EU as a case of institutionalized cosmopolitanism, and the most promising case of cosmopolitanism around, albeit one that is also deformed by technocracy, inadequate democracy; stubborn national self-assertiveness and other deficiencies.

Beck and Grande see this process of cosmopolitanization as largely compatible with states; at stake is whether states are inclusive and tolerant or accepting of difference/diversity. To Ian Manners, however, the EU's normative potential stems from its having transcended the state. 'Normative power Europe' depicts the EU as distinctly different from the nation-state. The term helps to highlight the normative – cosmopolitan - merits associated with this. He argues that "the central component of normative power Europe is that it exists as being different to pre-existing political forms, and that this particular difference predisposes it to act in a normative way."(Manners 2002:242).[2] The EU's normative propensity, Manners argues, stems from (a) the particular historical context within which it was forged, which highlighted the need to entrench *peace* and move beyond aggressive nationalism; (b) the EU's hybrid and less bounded and more permeable post-Westphalian form; and (c) its legal constitution, which highlights human rights. Understood from this perspective, the EU forms a fledgling regional-cosmopolitan entity. The idea here is that (a) there is a system of global-cosmopolitan norms; and (b) these are supplemented and reinforced by regional entities such as the EU. The advantage of this conception is that cosmopolitanization need not be a globally-uniform process; it can be driven by regional-cosmopolitan vanguards.

One of the central issues thus refers to how distinct from a state-type entity a cosmopolitan EU will be. Many analysts understand the EU as the most explicit case of transnational governance (Bohman 2007 and Cohen and Sabel 1997, 2003). This position highlights how states are transformed and tightly interlinked in various networks and modes of interaction. This suggests that the cosmopolitan drivers are found not in state-based hierarchical structures but in modes of interaction that tie states in with transnational society within the ambit of an emerging global public sphere.

Another position on EU cosmopolitanization goes through the supranational government – or deliberative democratic supranationalism model (associated with Eriksen and Fossum 2004, 2007) - propounded as RECON Model III. It also understands the EU as a vanguard and forerunner for a more comprehensive global transformation, which reconfigures sovereignty in a procedural-democratic and less territorially exclusivist manner, but at the same time also emphasizes the cosmopolitan potential embedded in some of the state-based organizational and institutional features (understood under the heading cosmopolitan *government* – not governance).

We have seen that analysts differ in how they understand the state's role to be in a cosmopolitan Europe (and world). An important consideration for the distinctness or the complementarity of the different paths is whether the nation-state is foremost a brake on/barrier to, or conducive to cosmopolitanization.

Cosmopolitanization through Individual 'Vanguard' States

The third path posits that individual states can become cosmopolitanized; they can serve an active *generative* function. This stems from the notion that the transformations we see taking place in today's world are not only driven by centralizing processes or supranational/global dynamics, outside of the purview of states; they are also actively propelled by states. The process is uneven because far from all states are

[2] For a thorough criticism of this notion see Sjursen 2006.

'cosmopolitically disposed', but the idea here is either that there are aspects of the state that lend themselves to cosmopolitanism or that there are certain states that are willing and able to act as *cosmopolitan vanguards*. This path shares with the regional-cosmopolitan one listed above that there might be a significant cosmopolitan thrust 'from below' the global level, but also assumes that such a thrust can emanate from within and be carried forwards by states.

The most obvious such thrust could presumably emanate from *vanguard states.* There are several relevant categories of such vanguards. One is the Dutch notion of *gidsland* which roughly speaking refers to 'guiding nation'. Joris Voorhoeve links this notion up with what he labels Mundial Policy which is really a global orientation and shares much in common with cosmopolitanism. More specifically, with gidsland is meant "a nation that progressively guides other countries, locked up in pitiful nationalist struggles for power, dominance and religious zeal, to the proper international behavior that consists of respect for the international legal order, rights of men and free trade as the best way of ensuring prosperity for all. The Netherlands as a gidsland saw itself as a role model for other states by teaching them how to behave properly on the international scene, how to become 'good' states."(Herman 2007:863) Other relevant labels are: Canada as a model citizen; the EU as a normative power; and Sweden as a moral superpower. They are all normative in the sense that they speak to certain core principles and standards. One aspect is whether such a state is able to lead by example. Another and closely related is that such a state situates itself within a particular norm-set, which it commits itself to comply with. How consistent a state is, is relevant in terms of whether it contributes to foster a cosmopolitan world by fully submitting to a system of norms, or whether it is simply a state that sets up standards it uses to moralize over others, but does nothing to comply with itself. In this latter case the resort to normative language may be mere cheap talk or may be a case of normative language being used in a strategic self-serving manner.[3]

The other proposition here is that we may not need to go beyond the statist framework to look for cosmopolitanism and cosmopolitanization processes. The state itself may contain traits that are able to sustain a greater-than-anticipated cosmopolitan thrust. Why could that be? First is because the constitutional democratic state is based on a set of principles that can be universalized *both* between different states *and* between different 'polity' levels or sites (in particular, state and supranational sites), such states may converge around a cosmopolitan norm. Second, is that state sovereignty has changed in today's world; thus leaving more space than before for states to tone down their exclusionary attributes, and to rely on more inclusive conceptions of community and (national) identity. Of interest here is also the cosmopolitan status of cases with possibilities for territorial exit through democratic means that Canada has established and the provisions for voluntary withdrawal from the EU (first formalized in the now defunct European Constitutional Treaty and in the yet-to-be-fully-ratified Lisbon Treaty).

Indicators of Cosmopolitanization

This effort to devise and to test out specific indicators of cosmopolitanization differs from those of for instance Beck (2006) and Holton (2009), because my focus here is more specific, namely state-based cosmopolitanization. However, the relevant criteria must reflect the presence of the other paths; they must be such designed as to take heed of the fact that in today's world the state's external environment is made up of global institutions which contain elements of cosmopolitan law (Habermas 2006). Further it of course also implies that the study of cosmopolitanization of states in Europe must necessarily take the developments in the EU properly into account. In today's world,

[3] All the notions presented here have proven prone to double-talk and hypocrisy (see the contributions by David Bosold and Wilfried von Bredow; Ann-Sofie Dahl; Robert Thomsen and Nikola Hynek Fossum 2007).

then, state-based cosmopolitization is a matter for states of linking up to and enforcing, a set of global human rights, not inventing such.

What, then, would be the most salient factors to look for? Since my main concern is with the state, the focus is naturally on doctrinal, political and structural factors, not social or societal ones. The latter are of course important but they are at a minimum mediated by — encouraged or stymied by — the dimensions that are focused on here. The three central dimensions that appear particularly relevant are: (a) doctrinal/programmatic cosmopolitan commitments; (b) structural cosmopolitan orientation/propensity; and (c) reflexivity-inducing features. In order to capture the cosmopolitan dimension properly, I use the terms 'outside-in' and 'inside-out'. The first speaks to the degree to which cosmopolitanism is entrenched in global doctrines, universal principles, as well as legal rules and provisions. In a system of states these take on an external character. Their combined strength and effectiveness hinge greatly on the other dimension, that of inside — out, which reminds us that any state orientation will be reflective of the domestic context in which it was forged — of the values, world-views and structured considerations of what is good and valuable, just and fair that are operative in that context. How the inside-out links up with the outside-in is therefore important, as it tells us about the degree of consistency in norm embrace- and enforcement (and alerts us to hypocrisy, cheap talk and double standards).

The first set of factors is the most obvious and refers to the explicit embrace of cosmopolitan norms and principles. This can either occur, through the state developing cosmopolitan doctrines on its own, or it can occur through the state simply downloading and applying a set of cosmopolitan principles from global arrangements. This latter version we may label as 'outside-in', that is, straight adoption of external cosmopolitan norms, rules, and principles.

The second set of factors refers to the structural-institutional entrenching of cosmopolitan principles and arrangements in the basic state setup. Entrenching these and applying them in a consistent manner also outside the state would be a strong case of 'inside-out').

Bills of rights are important here insofar as they contain fundamental (individual) rights that lend themselves to universalization. The cosmopolitan imprint here would be apparent for instance in the range and character of rights that are offered to non-citizens within the state's territory, as well as such provisions as dual citizenship. Insofar as such a process is the result of copying or diffusion across states or through the embrace of regional (ECHR) or global (UN) cosmopolitan principles, this can also be seen as a case of 'outside-in'. But for it to be cosmopolitan proper, we would also expect the state to propound those very same rights consistently also outside of the state's boundaries. This could then be referred to as a case of 'inside-out', that is, the external projection (of internally embedded) cosmopolitan norms, rules and principles.

The third set of factors starts from the recognition that cosmopolitan democracy is premised on *reflexivity.* With reflexivity, is meant the extent to which the polity is open to challenge, reinterpretation and amendment. As noted above, it pertains to openness to deliberative challenge, critical self-examination on who we are, who we should be, and who we are thought to be. Rights that ensure individual autonomy – private and public – are critical institutional preconditions for reflexivity. An interesting question is to establish what institutional-constitutional conditions best ensure reflexivity. As part of this we should also consider the role of contestation notably constitutional contestation over the polity's basic constitutional make-up and (national) communal character – *provided* the contestation takes place through democratic means, and there is an onus on finding proper justifications. When recourse to violence is somehow ruled out (by common understanding, or sanctions, or both), efforts at handling deep tensions over different conceptions of justice and the good life, will tend towards universal 'global' solutions,

which can more easily be embraced by all. This might also be the only way in which to hold such a state together.

The following are a set of provisional criteria for how a state may cosmopolitanize (and encompasses all three dimensions listed above):

(a) *doctrinal*: the strongest case would be explicit embrace of cosmopolitanism but cosmopolitanization can also be found in more inclusive and reflexive doctrines that are set out to replace nationalism and which are meant to apply both internally and in the state's external relations.
This includes a new *terminology of association*: a new semantics that forms an alternative to nationalism and speaks to a more inclusive form of association and mode of community.

(b) *constitutional-institutional*: the post-national doctrine and the cosmopolitan terminology of association make up constitutional essentials.
This includes a set of basic rights that ensure citizens' private and public autonomies. It also includes a *global uplink:* the state willingly submits to supranational or international legal bodies or arrangements founded on basic rights; seeks to harmonize its own provisions with these (outside-in); and actively propounds these in its external relations (inside-out). Consider for instance the German Constitution's articles 23-26 that are effectively cases of 'outside-in', where Germany's legal order is tied in with international law and organizations (UN and EU), in accordance with normative requirements.[4]
It also includes the relevant *legal-institutional* provisions and arrangements so as to entrench the cosmopolitan doctrine in policy programs and legal-institutional arrangements. This encompasses inclusive provisions for access; low thresholds for acquiring socio-political recognition of outsiders on a par with citizens; provisions for voicing dissent that are available to insiders and outsiders alike; and arrangements for responding to such in a systematic and ongoing manner.

(c) *a different configuration of exit, voice and loyalty*: Relevant provisions are those that induce or compel the state to fixate less on instilling loyalty than would the nation-state; such a state would encourage voice; and be open for different forms of exit.

This list of criteria specifies some of the elements that we may discern from the three dimensions that were singled out above (doctrinal, structural and reflexive). Their relative weight and importance will vary depending on whether the state has an explicit commitment to cosmopolitanism as doctrine, or harbors internal tensions that for their handling require cosmopolitan-type solutions.

In the next section I will develop and apply these criteria to the case of Canada.

[4] The German Constitutional Court in its ruling on the Lisbon Treaty notes that "The German constitution is oriented towards opening the state system of rule to the peaceful cooperation of the nations and towards European integration. Neither the integration *pari passu* into the European Union nor the integration into peacekeeping systems such as the United Nations is tantamount to submission to alien powers. Instead, it is a voluntary, mutual commitment *pari passu*, which secures peace and strengthens the possibilities of shaping policy by joint coordinated action."(BVerfG 2009: Section 220)

Canada – Cosmopolitan Vanguard or a Case of 'Stumbling into Cosmopolitanism'?

Canada has often been presented as a political system with a more collectivist political culture than the more individualist U.S. (Lipset 1990); thus a less likely candidate for cosmopolitanism. From this comparative U.S.-Canada perspective it would appear to be Canada's handling of difference/diversity and not its stance on moral universalism that would hold out the greatest cosmopolitan promise. But the U.S. melting-pot shaping of community has a clear nation-building objective, which can be turned inward, become introvert and defensive and evade/undermine global norms and obligations (such as what happened notably during George W. Bush's presidency).

A closer look will also reveal that most of the cosmopolitanization criteria (a through c) sit well with Canada. Hence, to establish the salience of this statist route we will assess Canada against these criteria, in order to establish how cosmopolitanized Canada has become.

Doctrinal

Canada, noted Stephane Dion, former Minister of Intergovernmental Relations and present leader of the federal Liberal party, a few years ago, is "a country that works in practice but not in theory".[5] This certainly is the case when considered in relation to nationalism, but not necessarily with regard to cosmopolitanism.

Nevertheless, it is probably fair to say that *historically speaking* many of the unique traits of Canada that appear to dispose it in a cosmopolitan direction stem from the country's historical onus on accommodation of difference and diversity (cf. Mendes 2008), rather than from any conscious or programmatic effort to promote cosmopolitanism. To understand its cosmopolitanism, careful excavation of ongoing practice is thus required. But this effort is greatly aided by the many efforts to understand Canada in more principled and theoretical terms. What is also interesting in this connection is that the Canadian experience with accommodating diversity has generated a sense in Canada (however contested this may be) that its uniqueness and its struggles have brought forth something valuable, and this is distinctly different from traditional nationalism: "The Canadian approach to diversity strengthens Canada's reputation as a just and fair society. Canada is renowned for its rich cultural mosaic and the Canadian model has become an example for the rest of the world."[6] The general principles that are used to depict Canada are cultural and linguistic tolerance, inclusive community, federalism, interregional sharing, democracy, rule of law, and equality of opportunity, as well as respect for and accommodation of difference.

Federalism has played a key role in the accommodation of difference, but has been 'stretched' or extended, precisely to accommodate deviations from the nation-state model.[7] Federalism, as principle and as mode of attachment, is distinct from nation, and a federation need not be a state: "the federal principle represents an alternative to (and a radical attack upon) the modern idea of sovereignty."(LaSelva 1996: 165) In no other country is this tension more apparent than in today's Canada. Analysts use the term federation and confederation almost interchangeably, with few attempts to differentiate between them. They also supplement the federal component with other terms such as 'multinational federation' (Resnick 1994; Gagnon and Tully 2001), 'asymmetrical

[5] <http://counterweights.ca/content/view/215//>

[6] "Foreword by the Prime Minister", in Department of Canadian Heritage 1999, *10th Annual Report on the Operation of the Canadian Multiculturalism Act*, Ottawa: Minister of Public Works and Government Services Canada.

[7] Federalism is distinct from nationalism and a federation need not be a state. Daniel Elazar has observed that "the federal idea and its applications offer a comprehensive alternative to the idea of a reified sovereign state and its applications."(Elazar 1987: 230).

federalism'(Webber 1994), and pluralist federalism, executive federalism, and federalism as cultural compact.

To Sam LaSelva, the Canadian experiment has been that of creating a political nationality through federalism. The existence of a French-Canadian (mainly catholic) and an English-Canadian (majority protestant) community meant that the essential challenge was to create a sense of common allegiance, whilst also respecting the uniqueness of each group. This was a very different challenge from that facing the American founders. "Canadian nationalism presupposes Canadian federalism, which in turn rests on a complex form of fraternity that can promote a just society characterized by a humanistic liberalism and democratic dialogue."(LaSelva 1996: xiii) To address this, Canada had to develop its own special version of federalism. La Selva attributes this to one of the founders, George-Étienne Cartier, and argues that this notion is based on federalism as a way of life. "For Cartier, the justification of federalism was … that it accommodated distinct identities within the political framework of a great nation. The very divisions of federalism, when correctly drawn and coupled with a suitable scheme of minority rights, were for him what sustained the Canadian nation." (LaSelva 1996: 189) Such accommodation of difference presupposed tolerance, co-operation, mutual accommodation, and minority justice. The requisite sense of attachment is not nationalism but *fraternity*. Nationalists appeal to the value of fraternity but confine it to one group, or culture or language community, whereas federalists *expand* it: "the idea of fraternity looks two ways. It looks to those who share a way of life; it also looks to those who have adopted alternative ways of life."(LaSelva 1996: 27) Intrinsic to this idea of fraternity are a reflexivity and other-regard that break down the distinction between us and them intrinsic to nationalism.

The idea of *fraternity* can be seen to have structured inter-cultural relations within Canada. It marks those that seek to hold the country together, as well as those that seek to separate from it. What gives Quebec nationalism its strength, as Charles Taylor (1993) has noted, is *recognition*. The quest for recognition revolves around the need to ensure recognition of the special status of Quebec, as a distinct nation or society *within Canada*. Even most Quebec sovereignists insist on a formal arrangement with Canada *after* Quebec independence. They have opted for *sovereignty-association*, or some other close relationship with Canada, rather than complete independence. For instance, on June 12, 1995, 5 months before the second Quebec referendum, the key proponents for sovereignty signed an agreement which would commit the Quebec government to propose "a treaty on a new economic and political Partnership" with Canada after a successful referendum on sovereignty.[8] A significant aspect of Quebec separatism is the redefinition of the terms of communion rather than outright separation from Canada.

The practice of accommodation of difference has spawned efforts to develop more inclusive doctrines of community than that of nationalism. Canada has officially embraced multiculturalism[9] and multilingualism; it has developed specific provisions on aboriginal self-government; and it has been committed to a cosmopolitan-oriented notion of human security. These doctrines and policy stances may be seen as efforts to give meaning to and to offer more principled justifications for an ongoing practice, rather than serve as

[8] Cited in McRoberts 1997:225. Lucien Bouchard, leader of the Quebec separatists in the federal parliament proposed that the nature of this partnership could be inspired by the European Community.

[9] The Canadian multiculturalism policy was introduced in 1971 and in 1988 it became officially enshrined in the Multiculturalism Act. The policy had four objectives: "to support the cultural development of ethnocultural groups; to help members of ethnocultural groups overcome barriers to full participation in Canadian society; to promote creative encounters and interchange among all ethnocultural groups; and to assist new Canadians in acquiring at least one of Canada's official languages". (Kymlicka 1998: 15).

self-standing programmatic doctrines that have by their adoption served to reorient policy or institutional arrangements.

The way these have been adopted, that is, largely from an ongoing practice, does not mean that they are devoid of inspirational content or principled orientations. Consider multiculturalism: understood *as doctrine* it is premised on the notion of integrating immigrants from diverse cultural backgrounds into society - without eliminating their characteristics. Multiculturalism as doctrine is about the just integration of immigrants. It seeks to avoid the twin evils of assimilation and ethnic separation or ghettoization. It is also an ideology that speaks to interethnic tolerance and the benefits that accrue to society from its diversity (Norman 2001). This doctrine is premised on the notion that integration or incorporation of people from different backgrounds is a two-way process, which places requirements on those that integrate, but also on those who are already there. The essence is to heighten social inclusiveness as well as self-reflection on the part of both the arriving minority(ies) and the receiving majority, to ensure a process of mutual accommodation and change.

The many attempts to grapple with the whole complex of identity politics and the accommodation of multiple forms of difference have led to a whole new vocabulary to properly depict the types and forms of difference that make up Canada. In addition to the ones mentioned above, we might add the effort to depict the entity through the notion of *cultural mosaic* (as opposed to the American notion of melting-pot), *pluralistic civilization* (LaSelva 1996: 165), and *poly-ethnic society*. Charles Taylor has argued that Canada is marked by 'deep diversity' and James Tully has talked of the need for 'diversity awareness'.

In other words, we see that the practice of accommodation in Canada has spawned efforts at establishing alternative, more inclusive doctrines than nationalism as well as a whole range of concepts to depict the more complex conceptions of community and composite ways of living together that mark Canada.

Constitutional-institutional

Canada's original constitution, much of which is still retained today, was the British North America Act, 1867. It was a British statute that was formally amended by the UK Parliament until the patriation in 1982. A central theme in Canada's constitutional history is the gradual transition from colony to nation, a process that was greatly complicated by the fact that Canada was the offspring of *two* colonial settlers in North America, Britain and France. This produced two important historical traits with significant long-term effects on Canada's cosmopolitan vocation. As part of a cosmopolitan British Empire many British-Canadians felt a strong tension between imperial and national belonging, which heightened the sense of communal ambiguity: "The unending debate over the appropriateness of any particular boundary between imperial and domestic always had one set of protagonists arguing, in effect, for a transnational definition of community that encompassed United Kingdom kin."(Cairns 1995:104) Further, Quebec's insistence on distinct community status effectively thwarted any effort to establish a Canadian nation based on an ethnic homogeneity.

Canadians could not reach agreement on the mode of community and instead sought to handle the tensions that the competing visions brought. The main effort to break the deadlock was the patriation of the Constitution in 1982. The foremost element here is the Charter of Rights and Freedoms (1982). The Charter spoke to every citizen as a rights holder and a stake-holder in the constitution and the process of constitutional change. The Charter institutionalized and constitutionalized reflexivity through rights. There was also a clear political purpose associated with introducing the Charter, namely to deflect political attention away from Quebec nationalism and federal-provincial concerns. To this end the Charter included provisions that gave special constitutional attention to minority

language rights, aboriginal rights, gender rights, and rights for ethnic minorities. These provisions have later been called group-based rights and have been touted as vehicles to weaken territorially based nationalism, and notably governments' – in particular provincial ones' – hold on the population.

The introduction of the Charter contributed to the mobilization of a great number of self-conceived constitutional stake-holders, in particular women's groups, gays and lesbians, Aboriginals, immigrants and disabled people. Some of the groups given special attention in the Charter issued demands for direct participation in the process of intergovernmental negotiations, and Aboriginals or First Nations groups later obtained such. The Charter as it has been handled by the courts has been handled in a manner that shows great sensitivity to Canada's diversity; thus this institutional mechanism represents a clear case of injecting a cultural dimension to the rights-based universalism we normally associate with Charters and Bills of Rights. But the Charter also reconfigured legislative-judicial relations. It contained a mechanism for fostering dialogue between the Court and legislatures. The system of competitive parliamentary government referred to above was made to co-exist with — to compete with and to be harmonized with — Court-based litigation. The argument here is that two sections of the Charter (section 33, the notwithstanding clause, and section 1, the reasonable limits provision) both inject an element of deliberation between courts and legislatures. (Hogg and Thornton (2001:106); Kelly (2001:321) On section 1 Hogg and Thornton note that:

> [W]hen a law is struck down because it impairs a Charter right more than is necessary to accomplish the legislative objective, then it is obviously open to the legislature to fashion a new law that accomplishes the same objective with provisions that are more respectful of the Charter right. Moreover, since the reviewing court that struck down the original law will have explained why the law did not satisfy the s.1 justification tests, the court's explanation will often suggest to the legislative body exactly how a new law can be drafted that will pursue the desired ends by Charter-justified means.
>
> (Hogg and Thornton 2001: 108-9)

The Charter spurs legislative sequels in which Charter dialogue takes place between the legislative and judicial branches of government. Thus, the Charter also fosters an element of "institutional reflexivity," in that it encourages an inter-institutional dialogue on the relationship between individual rights and collective goals (established through democratic procedures). This is one of a number of mechanisms that seek to reconcile rights-based universalism with sensitivity to difference.

Canada has never succeeded in reaching an agreed-upon constitutional arrangement. Even the 1982 Constitution Act, which the country abides by, has not been signed by the province of Quebec. This set the country off on a process appropriately labeled as 'mega constitutional politics', which

> goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. Mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic. The second feature of mega constitutional politics flows from the first. Precisely because of the fundamental nature of the issues in dispute - their tendency to touch citizens' sense of identity and self-worth - mega constitutional politics is exceptionally emotional and intense. When a country's constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns.
>
> (Russell 1993:75)

Mega constitutional politics can take place within an established constitutional framework, but is more appropriately labeled as constitution-making, as in principle the entire constitutional system is 'up for grabs'. This process has touched on virtually all aspects of the Canadian political system and society and has produced a wide array of radical proposals for how to address these challenges.

One way of interpreting this process and its results is to label it as a 'constitutional catharsis' (Fossum 2007). This has three facets: The first is a reconfigured conception of justice and constitutional recognition: weak and disenfranchised groups received some form of constitutional recognition. Canada's constitutional contestation and Chartered transformation have helped to shift the political and popular conceptions of what justice requires from a strong pre-Charter concern with accommodating Quebec nationalism to the present onus on rectifying historical injustice wrought on Aboriginals, as well as the accommodation of demands from other groups in Canadian society (*i.e.,* women's groups, gays and lesbians and disabled people). The second feature of constitutional catharsis pertains to heightened constitutional reflexivity: the Canadian political system appears to have developed a more principled approach to the settlement of issues that have not gone away (one element of this is dealt with below on exit). The third aspect refers to more inclusive democratic norms permeating the political system. Quebec separatists for instance have increasingly justified separation in more inclusive terms, to the extent of labeling Quebec a multicultural society and hence echoing the multicultural character of Canada. Some separatists now argue that a future independent Quebec will have to be a multicultural state.

These brief comments on the constitutional-institutional structure show the country's historical background has predisposed it to a difference-accommodating cosmopolitanism. In recent years, through constitutional and other institutional changes we can discern a stronger onus on moral universalism through individual rights entrenched in such legal-institutional mechanisms as the Charter of Rights and Freedoms, the legal provisions and policy measures underpinning its multiculturalism program, and the human security program.

These traits are clearly manifestations of the country's particular historical experiences but also reflect its place in the world. The introduction of the Charter was of course shaped by the strong international rights-consciousness in the post-war period. As such this was a case of 'global uplink' (or outside-in), modified to suit local conditions.

Global Uplink

In terms of official foreign relations, the clearest manifestation of a cosmopolitan-inspired 'global uplink' was Canada's official embrace of the notion of *human security*. "For Canada, human security is an approach to foreign policy that puts people – their rights, their safety and their lives - first. Our objective is to build a world where universal humanitarian standards and the rule of law protect all people; where those who violate these standards are held accountable; and where our international institutions are equipped to defend and enforce those standards. In short, a world where people can live in freedom from fear."[10] This doctrine bespeaks a notion of global responsibility. It highlights the need for a *consistent pursuit* of justice, a pursuit that does not stop at the state's borders. The same commitment is found in that one of the core aims of Canadian foreign policy since 1995 has been to project Canadian values and culture abroad. These values are: "respect for democracy, the rule of law, human rights, and the environment."[11] This can therefore be understood as a case of 'outside-in', the internal

[10] DFAIT Human Security Programme. Available at: <http://www.humansecurity.gc.ca/psh-e.asp> (Accessed 16.07.02). Canada was active in the development of ICC. The president of the International Criminal Court and its chief architect, Phillippe Kirsch is also a Canadian.

[11] Canada, *Canada in the World: Government Statement* (Ottawa, 1995). See also Nossal (2003).

embrace of a set of global cosmopolitan norms. It must be noted that the operational commitment to human security has abated in recent years but Canada is still a major player within the UN system, for instance in peace-keeping missions. It has also consistently sided with the UN (rather than with the Bush-US).

Further, when we talk about the global context from the perspective of outside-in it is also a point to consider the effects of a post-war development, namely the First-World boomerang effect of global decolonization, which saw 'internal colonies', notably aboriginals claiming recognition and compensation for historical oppression, marginalization and outright exclusion. This process took place in a world marked by a far more pluralist and critical global public opinion: "Ours is a world in which memories of racism, of European imperialism and its accompanying humiliation, generate critical international scrutiny of the manner in which all of the European countries treat their domestic, especially non-white minorities. Political executives now operate in the glare of an international public opinion sensitive to rights, racial inequalities, to women, and to indigenous minorities."(Cairns 1995:116) In Canada today the question of aboriginal self-government raises a number of thorny questions pertaining to openness and inclusion-exclusion.

A Different Configuration of Exit, Voice and Loyalty

Cosmopolitanism presupposes reflexivity; this can be effectively fostered through individual rights, as noted. How then to ensure that the state's ability to instill loyalty does not impede the critical reflexive thrust? Every state has numerous means for instilling loyalty. In the cosmopolitan polity citizens' allegiance to the polity is grounded on the universal principles' constant embedding in institutional form, a form of allegiance that is constantly subject to deliberative challenge, and as such is marked by considerable ambivalence. As the character of this grounding varies, allegiance is also always necessarily conditional. Every state offers a set of tools for reducing such conditionality. This suggests that all polities need provisions for exit for persons and arguments; the question is whether this should also be extended to territorial sub-units. Canada has done so and done so more explicitly than the EU the only other polity with such a provision (explicitly set out in the yet-to-be-adopted Lisbon Treaty but actually exercised in 1984 when Greenland left). To install democratic provisions for territorial exit (which may result in the break-up of a state) has profound implications for community and identity; the option of territorial exit through democratic means greatly reduces the state's ability to instill loyalty and allegiance, notably where there is a penchant to leave. Can such procedures then be cosmopolitan? For one, the procedures must be consistent with basic human rights; democratic; such set out as to be properly reciprocal; and open and subject to global scrutiny as to legitimacy. Unilateral provisions or provisions that do not include proper consultation and reciprocity are of course entirely incompatible with cosmopolitanism. I will now briefly spell out how these provisions have been set out in Canada.

In Canada the issue of territorial exit has its roots in the spectre of Quebec separation which has been high on the political agenda since the 1970s. Two secession referenda have been held in the province of Quebec. The latest referendum in 1995 saw 49.4 per cent voted Yes, whereas 50.58 percent voted No (the No side won by a mere 54,288 votes). In the aftermath of the referendum, the question of Quebec separation was taken to the Supreme Court, which handed down its advisory opinion in 1998.[12] It stated that Quebec has no legal right – under Canadian or international law – to unilaterally secede from Canada. But it went on to note that:

> Our democratic institutions accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the

[12] *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

> federation to initiate constitutional change. This implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favor of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.[13]

The federal government in 1999, through the so-called Clarity Act (An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference) established a set of more specific procedural guidelines for how secession might proceed. Canada is thus the only country in the world to have spelled out a set of *democratic* procedures for separation or break-up.[14] These apply not only to Quebec, but to any province. These provisions coupled with the obligation to negotiate (subject to certain conditions) ensure at least some central elements of reciprocity. Actual negotiations with a province would not be bilateral –between the federal government and the relevant province - but would be conducted among all the governments of the provinces and the federal government.[15]

Provisions for territorial exit can spur reflexivity, because the very availability of a set of procedures for exit makes it more important for those seeking to hold the entity together to justify the merits of staying together, in order to ensure that exit remains a distant prospect. Further, in line with what has been said before on cosmopolitanism's onus on openness to the world, it should be clear that provisions for territorial exit should only really be considered under the cosmopolitan heading insofar as the world community is asked to serve as an impartial referee. This point figured in the Canadian Supreme Court secession reference: "The ultimate success of [an unconstitutional declaration of secession leading to a *de facto* secession] … would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession, having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition."[16] This statement can be construed as a warning not to proceed unless the condition of reciprocity is complied with. But its emphasizing legitimacy can also be seen as a powerful reminder of the need to act in a manner consistent with global standards of legitimacy.

Conclusion

This chapter has shown that in order to compare the EU to other instances of cosmopolitanization, it is useful to consider cosmopolitanization in the contemporary world as unfolding through different paths or routes. One such is through the development of a global legal-political order that transcends the states. The other pertains notably to the EU as a case of a regional-cosmopolitan entity, where the states that come together to form the entity, set up one that transcends those very states. The third is through individual states. Three possible categories of states were listed here. The first was cosmopolitan vanguards, that is, states that propounded cosmopolitan doctrines. The second category was that of constitutional democratic states that ensured a certain 'fusion' between their constitutional systems and those of higher-level units (cf. Germany in relation to the EU and the UN). The third category was states with historical-cosmopolitan traits brought about through internal conflicts and disagreements, which they sought to handle peacefully and democratically and which therefore compelled them to forge more universal justifications for why they should continue to exist as individual states.

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[13] *Ibid.*

[14] Note that the Draft Treaty establishing a Constitution for Europe contains a provision (Article I-60) that permits voluntary withdrawal from the Union..

[15] Bill C-20:3.1. <http://www.canlii.org/ca/as/2000/c26/sec3%2ECg00087/en04.html>.

[16] Canada, Supreme Court *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

These three paths (global, regional, and state-based) are not distinct today; they are complementary. How complementary they are in overall terms is important to establish. Consider the EU here: Germany has played a central role in entrenching the EU's fundamental rights-driven cosmopolitan thrust, and part of this again relates to Germany's constitutional uplink to global cosmopolitan law.

It would appear that the degree of complementarity will vary with region; with Western Europe and North-America at the top. Overall we might argue that the paths operate at different speeds, which would render significantly varying cosmopolitan thrusts across the globe.

The fact that it might be possible to single out a distinct statist path is nevertheless interesting in a world where so many scholars underline that cosmopolitanization is best carried out through transnational and other non-state-based structures. It suggests that if established states can be cosmopolitanized, then the cosmopolitan pull may be considerably *stronger* than what is generally anticipated. Does this also mean that the state-centered polity is more flexible and malleable than what is generally assumed with regard to its propensity for post-national democratic inclusion/'cosmopolitanization'? The discussion provided here would suggest a guarded positive response. Canada as I showed might not be a case of doctrine guiding practice, but rather one where history and practice are important in driving doctrine. The conflicts facing Canada required more inclusive and universal responses. These responses we should note could most easily be universalized in a sustainable manner when and insofar as the world itself was conducive to such more universal solutions. That is probably also why Canada's cosmopolitan imprint is stronger now than it was before. So the state-based cosmopolitan route, for its sustainability, is dependent on at least a modicum of cosmopolitanism institutionalized at the global level. One of the issues brought up by the Canadian case is that it is important to consider more closely the role of contestation for cosmopolitanization: Can a non-contested state obtain an equally strong cosmopolitan thrust? Further, can a cosmopolitan thrust be sustained if contestation abates? Does contestation produce the same effects in cosmopolitanization terms within the EU as within states?

In this article I have identified three possible cosmopolitan paths. The relative cosmopolitan salience of each of these three paths requires attention; the same applies to how they interact. This subproject will address this through a deeper comparison of Canada and the EU. The next general RECON task is to establish the democratic implications of this.

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Canada's "Diversity Gene" and its Constitution
An Evolving Global Template for Reconciling Diversity, Collective Rights of National Minorities and Individual Rights?

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This article suggests that the lineage of the minority rights and the multiculturalism provisions of the Canadian Charter of Rights and Freedoms[1] goes back much further than April 17, 1982. It is the culmination of the development of the "diversity gene" of the Canadian peoples and Constitution that even pre-dates the founding of Confederation.

This author argues that multiethnic federal states like Canada can only ensure social stability if the federal model offers substantive equality within the notion of collective rights to its minorities. This is especially important where historically settled national minorities not only form the majority in a part of the territory of a federal state, but also where their communities are dispersed across the geographic boundaries of the federal state. Canada could be providing an emerging global template for federal states with multinational and multi-ethnic populations to develop such substantive equality minority rights frameworks to prevent social and ethnic conflict and the breakdown of federal states. Canada's judicial and socio-political experience under the Constitution and Charter of Rights and Freedom are hunching out principles and frameworks of distributive justice to balance the collective rights of minorities and individual rights while protecting and enhancing the multicultural heritage of Canada. Principled parameters for dealing with unilateral secessionist attempts by a minority group are also being set down by the Supreme Court of Canada.

Introduction: The Canadian "Diversity Gene"

On April 17, 2007, Canada celebrated the 25th anniversary of the establishment of the *Canadian Charter of Rights and Freedoms.* Many have explained the lineage of the *Charter* as originating in the post-Second World War international human rights movement and the desire of former Prime Minister Pierre Trudeau to counter Quebec nationalism and separatism with a new Pan-Canadian identity based on a recognition of the nature of Canada as a diverse and multicultural nation while establishing the primacy of fundamental rights. A deeper analysis of Canadian history and its peoples may reveal a much longer lineage for the collective rights and pluralist personality of the *Charter*, in particular it is the aboriginal rights, official language minorities and multiculturalism provisions whose lineage can be traced even before the birth of Confederation.

Given time and space limitations, this article will deal primarily with a brief politico-juridical analysis of the lineage of the linguistic rights of historically settled official language minorities in Canada and the inclusion of the interpretive provision on multiculturalism in Section 27 of the *Charter* as indications of the collectivist and pluralist lineage of this constitutional document. A separate detailed work remains to be done on

[1] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.), 1982, c.11* [*Charter*].

the constitutional lineage and present day analysis of the collective rights of Canada's aboriginal peoples based on section 35 of the *Constitution Act, 1982*[2] that recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada and section 25 of the *Charter* which states that *Charter* rights do not abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada.

At the outset of this discussion, I suggest that collective rights can only be claimed by four groups in Canada namely, the First Nations, official language minorities belonging to historically settled communities, denominational minorities and the Francophone majority in Quebec, which constitutes a minority within Canada as a whole. As shall be discussed, these minorities are part of the constitutional bargain that resulted in Canadian Confederation and whose rights were entrenched into Canada's several constitutional documents, including the *Charter*. As other leading experts have pointed out, these minorities base their collective rights on the original bargain of Confederation that the Constitutional framework, treaties and jurisprudence would seek to protect their cultural identities and provide institutional supports against assimilation by the dominant majority.[3] In contrast, what the non-historically settled ethno-cultural groups are entitled to seek are rights to substantive equality as Canadian citizens as will be discussed below.

My starting point will be to examine what, until recently, was regarded as the flagship of Canadian diversity, its fabled multiculturalism policy. In 1982, the policy was integrated into the Canadian Constitution by an interpretive clause in Section 27 of the *Charter,* which will be discussed below.

When Canada's multiculturalism policy was first developed and promoted some thirty-four years ago as a world class model for the integration of ethno-cultural communities into the mainstream of Canadian society, it was a product more of political necessity and expediency than one of global leadership. The origins of our multiculturalism policy were in the backlash by these same communities against the mandate and the findings of the 1963 Royal Commission on Bilingualism and Biculturalism (the title gave it away), whose goal was to provide a response to the demands of French-Canadian nationalism. The demands against second class citizenship and for equal treatment by the so called "Third Force" lead to the Trudeau government proclaiming, on October 8, 1971, the official policy of multiculturalism within a bilingual framework, the first of its type in the world.[4] This was later followed by the federal 1988 *Canadian Multiculturalism Act*[5] whose goal was the promotion of cultural diversity, sensitivity and awareness in federal institutions and agencies.

There is no doubt that the growing electoral strength of the Third Force was a major motivator for the Trudeau government. However, the official goal of the new policy was to promote unity among different ethno-cultural groups while combating both discrimination against these groups and ethno-cultural rivalries. The underlying philosophy of some of the promoters of the new policy was that State promotion of

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[2] *Canada Act 1982* (U.K.), 1982, c.11.

[3] For an interesting discussion of this distinction between the collective rights of these "constitutional minorities" and ethno-cultural groups in Canada, see Joseph Magnet, "Multiculturalism and Collective Rights" in Gerald-A Beaudoin & Errol Mendes, eds, *The Canadian Charter of Rights and Freedoms*, 4th ed. (Toronto: LexisNexis/Butterworths , 2005) 1261 at pp.1267-1280.

[4] For a history of the policy and the establishment of the interpretive clause in Section 2, see Joseph Magnet, *supra* note 3 at pp.1267-1280. For other insightful and critical analysis of the evolution of Canada's multiculturalism policy from leading Canadian social science experts, see A. Cairns & C. Williams, eds, *The Politics of Gender, Ethnicity and Language in Canada* (Toronto: University of Toronto Press, 1986).

[5] R. S., 1985, c. 24 (4th Supp.)

inclusion and recognition of the equal worth and value of each culture would lead to greater tolerance and respect of other cultures in the growing cultural mosaic into which Canada was evolving.

I suggest that what happened in 1971 was primarily the establishment of multiculturalism as an *ideology* of the State, not the origin of the "diversity gene" that allowed the notion of multiculturalism to be entrenched in Canadian society.[6] That occurred through trial and much error throughout much of the relatively short history of the country.

I suggest the origins of our diversity gene started as early as 1763 with the Royal Proclamation[7] that granted the status of protected nations with the right to their own form of governments to the First Nations of British North America, a treatment very different from that meted out to First Nations in the Americas by the Portuguese, the Spanish and later the Americans. In Canada, the Proclamation became the basis of the legal nature of Indian title and an historical root of the treaty process. The Proclamation described the Aboriginal nations as autonomous political units living under the Crown's protection against the "great frauds and abuses" that had been meted out to them in other parts of British North America. The Proclamation portrayed the links between Aboriginal peoples and the Crown as broadly 'confederal' in nature that would respect their diversity. Its provisions underlie the surrenders and designations of reserves for the First Nations of Canada.[8]

This early manifestation of the constitutive fact of diversity continued with the *Quebec Act*[9] of 1774 that, unlike the results of military conquests anywhere else in the world at that time, bestowed to the French colonists the most fundamental of diversity rights that protected their religion and legal systems. In part this was a realisation of the inevitable failure of the assimilationist policies of the British against the French population in the Royal Proclamation.[10] The impending American Revolution and the fear that the "Canadiens" might join them in the revolt led the British government to entrench the French fact in British North America. The *Quebec Act* was a unique recognition of diversity in the British Empire. Roman Catholics were emancipated in Quebec a full half century before Catholics in Britain received similar benefits. The concessions made in the *Quebec Act* persuaded the "Canadiens" from not joining the American Revolution; had Britain not granted the Quebec Act it is possible to imagine that Canada would not exist today, which would also have meant that Canada would not be celebrating the 25th anniversary of the entrenchment of the *Charter* in 2007.[11]

While some historiographers would argue that these diversity rights given to the First Nations and the conquered French populations were done for reasons of fear of new conflicts with First Nations and conquest from the South rather than for profoundly

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[6] For further analysis of this ideology of Canadian multiculturalism, see L. W. Roberts & R.A. Clifton, "Exploring the Ideology of Canadian Multiculturalism," (1982) 8:1 Canadian Public Policy, 88.

[7] George, R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. 11, No. 1.

[8] For a historical analysis of the treatment of First Nations in Canada, the United States and Mexico, see Curtis Cook, *Aboriginal Rights and Self-Government*, (Montreal and Kingston: McGill-Queen's University Press, 2003).

[9] 14 George III, c. 83 (U.K.)

[10] George, R., *supra* note 7.

[11] For the factors that lead to the protection of the French settler's distinctiveness and diversity, see Alain G. Gagnon & Luc Turgeon, "Managing Diversity in Eighteenth and Nineteenth Century Canada: Québec's Constitutional Development in Light of the Scottish Experience", (2003) 41:1 *Commonwealth & Comparative Politics*, 1-23.

valuing diversity, these actions nevertheless established the beginnings of what I term *"the Canadian diversity gene"*.

My primary thesis is that without the collective rights of Canada's constitutional minorities and the interpretive multicultural principle building on the Canadian "diversity gene", the entrenchment in the *Canadian Charter of Rights and Freedoms* of provisions that recognize the collective rights of linguistic minorities, aboriginal peoples and the promotion of the multicultural heritage of Canada would not have the force that they have today.

The Canadian diversity gene was further strengthened by the underlying rationale and structure of Canadian confederation as established by the Quebec resolutions in 1864 and at Charlottetown in 1867. The guiding principles behind the 1867 *British North America Act*[12] were the protection and promotion of regional and cultural differences while ensuring a strong enough central government to be the glue of that diversity. The goal was to give the central government sufficient resources and powers to expand the new state westwards and deal with regional disparities. As a constitutional lawyer, I have long argued that diversity and indeed the protection of the distinct society in Quebec was written into the fundamental constitutive document of this country. The *BNA Act* was based on the seventy-two 1864 Quebec resolutions strongly influenced by the francophone founding architects of Confederation. The goal of these architects of Canada, such as George-Ėtienne Cartier, was to ensure "la survivance" of the French population living in Quebec by keeping their control over their language, schools and laws. The Act enabled each province to have their own specified powers to control their own distinct societies. The Provincial legislatures were given under the *BNA Act* the power to make their own laws in fifteen specific subject categories that allowed provincial diversity to flourish, especially through the provincial jurisdiction over all matters dealing with property and civil rights in section 92(13) of the Act.[13] These provisions were designed to entrench the pre-existing diversity gene in the fundamental constitutional document of the new country. The genius of the founding architects of Canadian nationhood was to entrench asymmetry up to the limits of the politically possible, but then to permit differences to flourish under other symmetrical provisions I suggest that this constitutional diversity gene is also the historical origins of the desire for what is termed "asymmetrical federalism" by Quebec federalists today and also the foundations of the language rights of minorities under the 1982 *Charter*.

However, the foundational constitutive facts of diversity in Canada were greatly undermined since 1867 by vicious and overt governmental and societal acts of racism and discrimination against aboriginal peoples, racial minorities and indeed women from the dominant culture. The litany of such acts has filled the pages of Canadian history from the abuses of Indian residential schools, to racist immigration laws, including the Chinese head tax, and the denial of the equal occupational rights and the franchise to Asian immigrants, First Nations and women. Added to these shameful annals of the antithesis of diversity are the expropriations and internments of the Japanese Canadians and other immigrant communities whose only sin was to have origins in an enemy country and the denial of European Jewish refugees before and during the Second World War due to rampant anti-Semitism.[14]

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[12] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. 11, No. 5 [*BNA Act*].

[13] *BNA Act, supra* note 12, s.92(13). For an excellent description of the historical evolution of the structure of the *British North America Act*, see Edgar McInnis, *Canada, A Political and Social History,* 3rd ed. (Toronto: Holt, Rinehart and Winston of Canada, 1969) c. 13 at 342-361.

[14] For further description of the history of rampant racism in Canada see W. Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* (Montreal and Kingston: McGill-Queen's University Press, 2002); R.W. Winks, *The Blacks in Canada: A History* (Montreal and Kingston: McGill-Queen's University Press, 2000); A. Grant, *No end of*

Has this tragic record of racism and xenophobia from the earliest beginnings of the Canadian state undermined its diversity gene and rendered any entrenchment of multiculturalism in the *Charter* "more of a rhetorical flourish than an operative provision," as Professor Peter Hogg once predicted? [15] The Supreme Court of Canada has not agreed, as will be discussed below. It is safe to say that the reinforcement of the diversity gene that underlies both the multiculturalism policy and the interpretive clause in Section 27 of the *Charter* has come from a more recent non-discriminatory immigration policy.

13.4 million immigrants have come to Canada since 1901.[16] In one decade alone, between 1991 and 2000, the arrival of 2.2 million immigrants constituted the highest number of immigrants recorded in the previous century.[17] From the end of the 1990s, the annual number of immigrants has totaled approximately 230,000.[18] If these numbers hold, Canada has the record of accepting more immigrants and refugees than any other country, in terms of a percentage of total population.[19] According to Statistics Canada, as of May 15, 2001, 5.4 million people, or 18.4 percent of the total population, were born outside the country.[20] In 1996, the proportion was 17.4 percent, the second highest in the world after Australia.[21] In contrast, only 11 percent of the population is foreign born in the U.S. [22]

The ethnic composition of the Canadian populace has also changed rapidly, reinforcing the diversity gene of the country. In 1957, European countries accounted for the top ten sources of immigrants, with the United Kingdom proving one-third of all immigrants. Forty years later in 1997, non-European countries accounted for the top ten sources of immigration.[23]

According to Statistics Canada, of the 1.8 million immigrants who arrived between 1991 and 2001, 58 percent came from Asia; 20 percent from Europe; 11 percent from the Caribbean, Central and South America; eight percent from Africa; and three percent from the United States.[24] In comparison, individuals born in Asia represented 47 percent of immigrants during the 1980s, and 33 percent of those who arrived during the 1970s.[25] Just three percent of immigrants who came to Canada before 1961 were Asian-born.[26]

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grief : Indian residential schools in Canada (Winnipeg: Pemmican Publications, 1996); I. Abella and H. M. Troper, *None is too many: Canada and the Jews of Europe, 1933-1948* (Toronto: L. & O. Dennys, 1986.

[15] See Peter Hogg, *Constitutional Law of Canada and Canada Act Annotated,* 2nd ed. (Toronto: The Carswell Company Limited, 1982)

[16] Metropolis, "20th Century Immigration Facts," online: Security and Immigration, Changes and Challenges at: <http://atlantic.metropolis.net/security/twentycimmigration.html>.

[17] *Ibid*. For more details on historic immigration patterns, see the Metropolis website at: <http://atlantic.metropolis.net/security/twentycimmigration.html>.

[18] *Ibid*

[19] *Ibid.*

[20] Statistics Canada, "Canada's Ethnocultural Portrait: The Changing Mosaic," online: Statistics Canada (2001 Census). Available at:

<http://www12.statcan.ca/english/census01/products/analytic/companion/etoimm/canada.cfm>.

[21] *Ibid.*

[22] *Ibid.*

[23] Jeffrey G. Reitz, *Warmth of the Welcome: The Social Causes of Economic Success for Immigrants in Different Nations and Cities* (Boulder, CO: Westview Press, 1998).

[24] Statistics Canada, *supra* note 20.

[25] Statistics Canada, *supra* note 20.

[26] *Ibid*.

It is interesting to note that the multicultural interpretive provision in Section 27 of the *Charter* mandates not only the interpretation of the other provisions in the document consistent with the preservation of the multicultural heritage of Canadians, but also requires that such interpretation enhance such heritage. As is clear from the dramatically changing diversity of the Canadian population described above, the enhancement of that diversity is an uncontestable reality whether accepted by the courts or not. Such a reality could require governments and the courts to apply a "dynamic" interpretation of the provision that may include the need for positive action according to one leading expert.[27]

Federalism and Substantive Equality within the Concept of Collective Rights of National Minorities

Recent history would seem to offer up a stunning paradox that federal states may not be the best form of human governance for societies with multi-ethnic populations. The former Soviet Bloc had nine states, six of which were unitary states while three were federal in structure. With the unification of Germany, the six unitary states are now five, but the three federal states, Yugoslavia, the Soviet Union, and Czechoslovakia are now 22 independent states, perhaps 23 if we include Kosovo.[28] Most of these newly independent states were forged by minorities who did not feel that their human rights were sufficiently protected by the federal structures they previously existed in. It is not an adequate counter argument to suggest that this spectacular break up of Eastern European states, the Soviet Union and the Balkan multiethnic federal states was due to the ending of the oppressive authoritarian state after the end of the Cold War and the return of the historic ethnic hatreds and conflicts let loose without the restraints of the strong man and his overwhelming security forces. I suggest that ethnic identities are not predetermined to be in conflict with other groups and that the causes of ethnic conflict are not only influenced by history, but also by the way in which such groups are treated. As one Bosnian Muslim teacher is reported to have said: "We were Yugoslavs. But when we began to be murdered because we are Muslims, things changed. The definition of who we are today has been determined by our killing."[29]

At first sight, this does not bode well for the idea of federations being particularly good structures for the protection of minority rights. Yet, the orthodox thesis is that it is federations rather than unitary states that can best protect minorities across diverse populations or across large territories. Perhaps this view is outdated and should be replaced with the thesis that it is only multiethnic societies, whether federations or not, that develop the appropriate constitutional and legal framework on substantive equality that can hope to remain united and avoid the human rights catastrophes that we see in multiethnic societies around the world today.

I suggest the value of substantive equality may be even more important than having a formal democratic system in a multiethnic society. For example, Sri Lanka, a democratic multi-ethnic state, has stood accused of violating the human rights and equality rights of its Tamil minorities and found itself in a seemingly intractable civil war that has left more

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[27] See Magnet, *supra* note 3 at 1267.

[28] See A. Stepan, "Federalism and Democracy: Beyond the U.S. Model" (1999) 10:4 Journal of Democracy19-34. For an excellent analysis of how federal structures in the Former Republic of Yugoslavia (FRY) did or did not contribute to the breakup of the FRY, see S. Malesevic, "Ethnicity and Federalism in Communist Yugoslavia and its Successor States" in Yash Ghai, ed., *Autonomy and Ethnicity, Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000) 147. The author's thesis is that regarding the value of federal arrangements for the maintenance of multiethnic societies, "a great deal depends on the historical, political and social conditions of the particular society. What is crucial is the way in which the agreement between the constituent units is reached."

[29] See B. W. Jentleson, "A Responsibility to Protect: the Defining Challenge for the Global Community" (2007) 28:4 Harvard International Review 19.

than 65,000 dead.[30] Similarly, other theoretically democratic multiethnic states, such as Russia,[31] and most currently, the debacle that is Iraq, are, in practice, refusing to go down the road of a democratic federalism based on respect for substantive equality—with potentially similar disastrous consequences.

The future for authoritarian non-democratic multi-ethnic states is even bleaker. We only have to look at the genocidal carnage in Sudan to understand this horrible future.

What Does Substantive Equality Mean in the Context of Minority Collective Rights?

At the core of the concept of substantive equality is the thesis that sometimes treating minorities,[32] regions, or, indeed, citizens identically can sometimes lead to unequal treatment. Substantive equality, I suggest, would promote treating all groups in a multiethnic society with equal concern and respect, which often requires differential treatment, while formal equality would promote identical treatment of all minorities, regions, and citizens. [33]

The foundational act of the Canadian state, the *British North America Act, 1867*[34] is replete with provisions related to constitutional symmetry and asymmetry. However, what is particularly interesting about the evolution of the Canadian Constitution is that it contains critical constitutional provisions that are sometimes asymmetrical and sometimes symmetrical and that allow differences to flourish. Examples include: the guarantee of 75 seats for Quebec in the Canadian Parliament (Section 37), a critical asymmetrical provision; the entrenchment of the provinces symmetrical jurisdiction over property and civil rights in Section 92(13), a critical symmetrical provision that allows differences between the provinces to flourish; the protection of denominational schools in Ontario and Quebec (Section 93), and the official use of English and French in the Canadian and Quebec legislatures (Section 133), both important asymmetrical provisions. The 1870 *Manitoba Act*[35] bringing Manitoba into Confederation imposed similar obligations on that province's legislature, found in Section 133 of the *BNA Act*. Likewise, the maintenance of the Civil Law system in Quebec is another example of asymmetrical federalism entrenched in the constitutional history of the country. The genius of the founding architects of Canadian nationhood was to entrench asymmetry up

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[30] See Neelan Tiruchelvam, "The Politics of Federalism and Diversity in Sri Lanka" in Ghai, *supra* note 28 at 198. The author, a friend and colleague, was a moderate Tamil scholar and jurist who paid with his life for his belief that constitutional reform in the direction of regional autonomy could resolve Sri Lanka's ethnic conflict. He was killed by a suicide bomber on July 29, 1999.

[31] The annual reports of Amnesty International and Human Rights Watch continue to condemn the gross human rights violations and lack of effective democratic institutions in both countries. See the respective websites of Amnesty International at <http://www.amnesty.org> and Human Rights Watch at <http://www.hrw.org>.

[32] For a discussion of equality and the accommodation of differences between minority groups and majorities, see W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 108-116.

[33] For further discussion of this hotly contested view, see D. Milne, "Equality or Asymmetry: Why Choose?" in R. L. Watts & D. M. Brown, eds, *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 285-307.

[34] *BNA Act, supra* note 12. For a detailed discussion of the early pre- and post-Confederation history of Canada, see J. L. Finlay, *Pre-Confederation Canada: The Structure of Canadian History to 1867* (Scarborough, ON: Prentice-Hall, 1990); P. B. Waite, *The Life and Times of Confederaion, 1864-1867* (Toronto: University of Toronto Press, 1962); S. B. Ryerson, *Unequal Union: Confederation and the Roots of Conflict in the Canadas, 1815-1873* (Toronto: Progress Books, 1973); A. I. Silver, *The French Canadian Idea of Confederation, 1864-1900* (Toronto: University of Toronto Press, 1982).

[35] 33 Victoria, c. 3 (Can.)

to the limits of the politically possible, but then to permit differences to flourish under other symmetrical provisions.[36]

Leading American federalism theorists such as the late William H. Riker[37] argued, as did opponents of the Meech Lake Accord and the Charlottetown Accord,[38] that it is only symmetrical federalism that is truly compatible with democratic federalism. The federal bargain that created the United States, according to many American federalism theorists like Riker, would deem asymmetrical arrangements incompatible with the fundamental principle of equality of citizens and equality of states. I suggest that the promotion by some American federalism theorists of symmetrical federalism proposes a vision of constitutional formal equality based on their particular revolutionary history. In the evolution of American federalism, the overwhelming political imperative was to minimize differences to create a national identity based on the supremacy of individual and economic liberty. This imperative is protected and safeguarded by a strong central government and a Supreme Court empowered with the strongest remedial mechanisms inherent in the power of judicial review.[39]

However, where multi-ethnic nations have large dominant ethnic populations and historically settled national ethnic, linguistic, or religious minorities, an insistence on symmetrical federalism would be a denial of the substantial equality and therefore the collective rights of these minorities. Symmetrical federalism and formal equality can often lead to the assumption of uniformity where it does not exist and could lead to the coercive institutions of the federal state imposing such uniformity and assimilation. The result can be disastrous, as we have seen in the case of the Balkans. Asymmetrical federalism in multi-ethnic federations is especially important to promote the essential features of cultural self-determination of such minorities in areas such as language, education, culture, religion and, as in the case of Canada, the legal traditions and systems. Effective participation in decision making at the central level which may be asymmetrical to the proportion of the minorities' percentage of the federation's population is essential to protect against the "nationalizing" tendencies of the dominant population in a multi-ethnic federation.[40] This is the chief rationale of providing a permanent 75 seats to Quebec, regardless of what percentage of the Canadian population the Quebec population comprises.

It is suggested that asymmetrical federalism within a democratic multi-ethnic federal state is a fundamental requirement of substantive equality and the collective rights of these national minorities. To reiterate, substantive equality differs from formal equality in that it recognizes that identical treatment can lead to discriminatory treatment of minorities and impose uniformity and coercive assimilation that would threaten the

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[36] For the landmark text that discusses and analyzes how the division of powers under the *Constitution Act, 1867* allows for asymmetry, even while symmetry predominates, see G-A. Beaudoin, *La Constitution du Canada: institutions, partage des pouvoirs, droits et libertés* (Montreal: éditions Wilson & Lafleur, 1990).

[37] See William H. Riker, "Federalism" in F. Greenstein and N.W. Posby, eds, *Handbook of Political Science*, vol. 5 (Boston: Addison-Wesley, 1975) at 93-172.

[38] For further discussion of the equality/asymmetry arguments that took place in these constitutional rounds, see P. Monahan*, Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991); K. McRoberts & P. Monahan*, The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).

[39] There are a plethora of sources that advance this theme. See, for example, P. A. Freund, "The Judicial Process in Civil Liberties Case" in V. Stone, ed., *Civil Liberties and Civil Rights* (Chicago: University of Illinois Press, 1975); A. Cox, *The Role of the Supreme Court in American Government* (Oxford: Oxford University Press, 1976); M. Kammen, *Sovereignty and Liberty* (Madison, WI: The University of Wisconsin Press, 1988).

[40] See Will Kymlicka, ed., *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) for a collection of essays by some of the leading experts in the world on this theme.

existence of such minorities and deny them any real content of collective rights.[41] Democratic multiethnic federal states such as India,[42] Canada, and Spain,[43] have learned that asymmetrical federalism has been critical to the survival of their federations.

I argue that the entrenchment of asymmetrical federalism in Canada in the *BNA Act* laid the foundations for the entrenchment of the linguistic rights of French and English minorities in Canada under Section 23 of the *Charter,* which will be more fully discussed below.

Both majority populations and minority populations who form the majority in their territory, inevitably also have "nationalizing" or assimilationist tendencies and it is crucial that within both majority and minority populations, historically settled national minorities are afforded the ability to combat intended or unintended assimilation, particularly in the area of language and education. Examples of these "nationalizing tendencies" have been evident throughout the history of Canada, including the failure of the Manitoba legislature to follow the bilingualism mandate from 1890 until ordered to do so by the Supreme Court of Canada in 1979 in two major decisions.[44] Ontario provided another example of majority intolerance when it passed Regulation 17 prohibiting the teaching of French in schools and making English the exclusive language of instruction from 1913 until 1944. The Francophone majority in the Quebec National Assembly demonstrated similar tendencies in attempting to make French the exclusive language of the Assembly under that province's *Charter of the French Language*,[45] until it too was struck down by the Supreme Court of Canada in 1979.[46] Such precedents would ultimately be seen as going against the very heart of the Canadian diversity gene and would soon be regarded as permanently unconstitutional under the language provisions of the 1982 *Charter*.

It is not therefore surprising that in sections 16 to 23, the *Charter* entrenched minority language rights provisions that mirror those in the original *BNA Act* and extended them. In sections 17 to 19 there is a virtual re-enactment of the provisions of Section 133 of the original *BNA Act*, although, rather curiously, reference to the Quebec legislature is excluded. Following the desire of the province of New Brunswick to have a similar status as regards the bilingual nature of its legislature, these sections also apply to that province. Finally, it is suggested that the rights of the Canadian national minorities to be

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[41] See *Kymlicka, supra* note 40.

[42] See Stepan, *supra,* note 28 at 53.

[43] In some respects, Spain has shown the greatest creativity among multiethnic or multinational societies in designing a constitutional framework to promote substantive equality through asymmetrical arrangements. Although in strict constitutional theory Spain is not a federal state, it demonstrates many of the most important features of a federation. In the quasi-federal Spanish framework there is constitutional recognition that there are differences in the desire, especially of the historic national communities of the Basque Country, Catalonia, Galicia, Navarre and Andalusia, for different levels of autonomy. After the 1978 Constitution, all regions gained the possibility of becoming autonomous communities. Thereafter, each autonomous community was granted its own statute of autonomy reached by negotiation between the Autonomous region's leadership and the central government and Parliament in Madrid. There is also asymmetry in the different financial arrangements and the size and nature (conditional or unconditional) of the fiscal transfers from the national government. Such Spanish constitutional creativity is also courageous as it risks the possibility of creating ever greater demands for asymmetry from either the most advanced autonomous region or from the region(s) with the most radicalized national identity. However, the risks may well be worth taking as a way of ensuring the survival of a complex society with so many national communities each with their own unique historic identities.

[44] See *Forest v. Manitoba (Attorney General),* [1979] 2 S.C.R. 1032 and *Reference Re Manitoba Language Rights,* [1985] 1 S.C.R. 721.

[45] R.S.Q. c. C-11

[46] See *Blaikie v. Quebec (Attorney General),* [1979] 2 S.C.R. 1016.

educated in their own language in Section 23 of the *Charter* was also a historic outcome of the way in which the "diversity gene" developed before and after Confederation.

Justifying the Collective Rights of Minorities within the Context of Liberal Democratic Federalism

As Professor Stephan has also pointed out, leading American federalism theorists, such as Riker, also claimed that an essential feature of democratic federalism is the protection of individual rights against encroachments by central or state governments or by the will of the majority.[47] This is accomplished by a number of classic federal structures such as an entrenched *Bill* or *Charter of Rights and Freedoms*, a bicameral legislature where the will of the majority in the lower house can be restrained by an upper house based on regional representation, and, most importantly, a federal Supreme Court that protects the fundamental rights of all citizens of the federation and whose remedial orders are backed by the coercive powers primarily, but not exclusively, of the central government.[48]

The fundamental problem posed by this classic American model of the role that rights play within democratic federalism is that the U.S. Constitution and American jurisprudence, particularly that of the U.S. Supreme Court, has not acknowledged the existence of collective rights, which some would assert is the very marrow of minority rights.[49] While some liberal thinkers have attempted to downplay this denial of collective rights legitimacy by pointing out that what may seem to be collective rights can be exercised by individuals and are thereby transformed into individual rights,[50] a major theoretical and practical challenge still exists. In many multi-ethnic federal states, individual citizens of a group can participate effectively in a "group benefiting right" only if the group obtains the effective collective right to education and access to cultural, religious, or legal institutions that are specific to their particular forms of cultural self-determination.[51] As will be discussed below, this is a fundamental aspect of distributive justice within a democratic federalist state.

The dilemma of how to fit minority rights within a federalism framework that is liberal and democratic is being developed in theory and practice by Canadians and within the Canadian constitutional framework. Will Kymlicka argues that "group specific" rights are compatible with liberal fundamental tenets that uphold the supremacy of individual rights. Liberal think tanks like the Friedrich Naumann Foundation of Germany, linking up with Canadian political philosophers and legal experts like Kymlicka and this author, together with other experts and minority representatives from around the world, have developed a liberal manifesto on "The Rights of Minorities" that upholds the group specific rights of minorities while proclaiming the supremacy of individual or universal

[47] See Riker, *supra* note 37.

[48] See the literature, *supra* note 36 for discussion on this point also.

[49] It should be noted that U.S. law and jurisprudence has offered protection to several collective interests including under the 14th Amendment relating to, *inter alia*, the positive duty to accommodate language minorities in the areas of voting, education and judicial proceedings. Likewise, there has been judicial notice of the collective interests of Native American tribes, including their declaration as "domestic dependent nations" in *Cherokee Nation v. The State of Georgia,* 30 U.S. 1, 5 Pet. 1 (1831). Finally, the position of Puerto Ricans, who have Spanish as the official language in their federated Commonwealth status as well as the rights of the indigenous inhabitants of Guam and Hawaii over land use and language should also be noted as departures from the American focus on individual rights.

[50] It is ironic that one of the main architects of the modern Canadian constitutional order, the late Right Hon. Pierre Trudeau, seemed to have held this perspective of collective rights. See K. McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997) at 60-64.

[51] See Kymlicka, *supra* note 32 at 75-106.

rights.[52] The fundamental premise of these new liberal democratic federalists is that it is because the rights and liberties of individual citizens include the right to associate that most such rights have a group related or specific dimension. Thus, belonging to a minority based on common cultural, linguistic, or religious heritage is indeed an important factor of identity and indeed of human dignity for most members of such minorities. Where individuals thus freely associate, no central or state government or majority, however large, may deny the right of such groups to cultural self determination within the limits of the supremacy of individual and universal rights and the Rule of Law.[53]

Indeed, it is unlikely that the majority francophone population in Quebec or the minority francophone communities outside Quebec or the Catalans in Spain would ever feel comfortable as equal citizens in their democratic federal states without the "group specific" rights enshrined in the respective federal constitutions of their countries.[54]

As with all things, the devil is in the details. The way in which national minorities are settled can often determine the way in which democratic federal states can afford them such group-specific rights. Where such minorities are living in contiguous and compact settlement areas and form a majority, granting some form of territorial autonomy to allow them to fully exercise their right to cultural self-determination can be accomplished most effectively in democratic federal structures through the establishment of a state or province where they form the majority. The province of Quebec in Canada and Catalonia in Spain are examples of such territorial autonomy.[55] Liberal democratic federalists would insist that such territorial autonomy granted to such minorities should not come at the expense of the rights of individuals or other minority groups within the territory granted autonomy. There is thus a need for an entrenched Bill or Charter of Rights enforced by an independent federal judiciary.

Where minorities live dispersed among the majority population within a federal structure, other functional forms of protecting the essential areas of cultural self-determination in areas such as language, education, etc., are needed. Examples include the constitutional guarantees for minority language education for dispersed minority francophone communities outside Quebec, which will be discussed below.

This is where fundamental conceptions of distributive justice that underpin the concept of collective rights and substantive equality must enter the picture to set the context for the human rights framework of individual and collective rights within a democratic federalism framework and to help in adjudicating conflicts between different sets of rights.

A Canadian Conception of Distributive Justice

By the above discussion, I have tried to show that distributive justice must also be at the core of any democratic federalism attempt to entrench substantive equality to protect

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[52] *A Declaration of Liberal Democratic Principles Concerning Ethnocultural and National Minorities and Indigenous Peoples*, adopted by members of 38 indigenous peoples, national and ethnocultural minorities from 26 countries at the 2nd Minorities Conference of the Friedrich Naumann Foundation held at Berlin from September 13-16, 2000. Copies can be obtained from Liberales Institut der Freidrich-Naumann-Stiftung, Postfach 90 01 64, D-14437 Potsdam or online from Freidrich-Naumann-Stiftung at <http://www.fnst.de/libinst/publikationen/minoeng.pdf>.

[53] See Kymlicka*, supra* note 32 at 75-106.

[54] For an extensive discussion of how important language is with such "group specific" rights from a historical and international perspective, see F. de Varennes*, Language, Minorities and Human Rights* (Boston: Martinus Nijhoff Publishers, 1996).

[55] For a comparison of these two types of territorial autonomy, see M. Pares & G. Tremblay, eds*, Catalunya, Quebec: Dues Nacions, Dos Models Culturals,* Ponencies del Primer Simposi, Barcelona, maig, 1985. (Barcelona: Generlitat de Catalunya, 1988).

minority rights. It is time for me to explain what, then, is the conception of distributive justice that I advocate.

Distributive justice encapsulates every aspect of all human societies because all human societies are also institutions of distribution. Different political and legal systems promote different distributions of society's most valued assets, such as power, knowledge, wealth, security of the person, health, and education. The judiciary also is an instrument of distributive justice. Different interpretations of rights, especially collective rights, lead to different distributions of power and access to public goods. The decisions of the Supreme Court in the area of linguistic and aboriginal rights most clearly demonstrate this.[56]

In human history, some societies have either expressly (*e.g.,* the former apartheid regime in South Africa) or *de facto* (including many so-called Western liberal democracies) allowed full and equal access to the above-mentioned societal goods only to those who conform to a singular and dominant racial, ethnic, linguistic, or cultural paradigm. This has been the root cause of much of the racial and ethnic strife that we have seen and continue to see around the world today, from the civil rights movement in the United States to the ethnic strife in the Balkans and Sri Lanka. Conceptions of distributive justice found within democratic federal systems deny that such societal distributional criteria can ever be just. Democratic federalist and pluralist conceptions of distributive justice must acknowledge that all manifestations of race, language, ethnicity, or national origin are worthy of equal concern and respect. Distributive justice in democratic federalist societies must aim at the establishment of a society where no one segment of society can claim that they have the singular and dominant racial, cultural, ethnic, or linguistic paradigm and, on that basis, have the predominant access to society's most valued goods. This concept of distributive justice does not exclude the rights of historically settled national minorities or aboriginal peoples to seek to preserve their cultural traditions and seek protection against assimilation. As discussed by Kymlicka, the freedom to associate with other members of these national minorities with the goal of preserving their cultural traditions is a fundamental issue of human dignity. If the state robs members of these national minorities of this aspect of human dignity, it robs them of their intrinsic worth as human beings. Nothing is more critical to a fair system of distributive justice than the preservation of human dignity and self-worth.

It is readily acknowledged that this is one conception of distributive justice. As others have so well stated, distributive justice is one of most hotly contested battlegrounds for different political, philosophical, and moral perspectives.[57]

It is suggested that this approach to distributive justice is also the predominant value behind the equality guarantee in section 15 of the *Canadian Charter of Rights and Freedoms* as confirmed by the jurisprudence of the Supreme Court of Canada.[58]

Again, the Canadian constitutional order is "hunching" out a theoretical and practical framework for the human rights framework of individual and collective rights while

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[56] For support on this point relating to aboriginal rights, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

[57] See the debate that continues today over other theories of justice that include distributive justice, including Michael Walzer, *Spheres of Justice, A Defense of Pluralism and Equality,* (Basic Books, Inc., 1983); John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) and Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977). I draw on all these seminal works (but reject some of the ideas contained in them) for the proposed conception of distributive justice as a framework for adjudicating collective and individual rights.

[58] For a discussion of the recent jurisprudence of the Court, see E. P. Mendes, "Taking Equality into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12:3 *National Journal of Constitutional Law* 3.

respecting the multicultural interpretive principle that seems to be based on unarticulated notions of distributive justice.

The collective rights of Canada's constitutional minorities and juridical respect for the growing diversity of Canadian society have been guaranteed in the *Canadian Charter of Rights and Freedoms* entrenched in our Constitution in 1982.[59] In the Constitution, we recognize the collective rights of our Aboriginal people, and the interpretive multicultural principle in section 27 supports the preservation and enhancement of our multicultural and multiracial communities. Through court decisions and provisions of the original Constitution and the *Charter*, we recognize the collective rights of our French-speaking population.

The wording of some of the provisions in the Canadian Constitution and *Charter*, which recognize collective rights of Canada's constitutional minorities and support the interpretive multicultural principle in section 27, pose some interesting dilemmas for those who are steeped in classical liberalism in the American legal tradition. In what follows I briefly discuss two examples, namely, sections 23(3) and 27 of the *Charter.*

Distributive Justice and the Education of Linguistic Minorities

Section 23(3) of the *Canadian Charter of Rights and Freedoms* entrenches the minority linguistic education rights of French speaking minorities outside Quebec and English speaking minorities within Quebec. The Section states:

> *The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province*
>
> > *(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision of them out of public funds of minority language instruction; and*
> >
> > *(b) includes, where the number of those children so warrants the right to have them receive that instruction in minority language educational facilities provided out of public funds.*[60]

This is a curious type of right to be found in a constitutional document in a Western liberal democracy, where the exercise of the right is contingent on the number of people who wish to exercise it! Imagine a similarly contingent right related to the freedom of speech. This entrenchment of linguistic rights in Canada points to the fact that collective rights require an examination of the sociological, economic and cultural backgrounds from which they arise.[61]

The Supreme Court of Canada, in *Arsenault-Cameron* v. *P.E.I.*,[62] handed down a profound example of the critical role distributive justice, on a conscious or unconscious level, plays in setting the context of the human rights framework for protection of the collective rights of minorities within a democratic federal system.

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[59] For one of the most comprehensive analyses of the provisions of the *Charter*, see, G.-A. Beaudoin & E. Mendes, eds, *The Canadian Charter of Rights and Freedoms,* 3rd ed. (Scarborough, ON: Carswell, 1996).

[60] *Charter, supra* note 1, s.23(3).

[61] See M. Bastarche, ed., *Les droits linguistique au Canada* (Montreal: Les Éditions Yvon Blais, Inc. : 1986).

[62] [2000] 1 S.C.R. 3 [*Arsenault-Cameron*].

In that case, the individual francophone parents entitled to have their children schooled in French under section 23 of the *Charter* sought to have their children schooled at the primary level in a school located in their local community of Summerside, P.E.I. The provincial Minister of Education insisted that such minority language education could be provided at an existing French language school, approximately 57 minutes away by school transportation services. The Supreme Court ruled, in a judgment delivered by Mr. Justice Major and Mr. Justice Bastarache, the former academic expert on linguistic rights, that section 23 was not meant to uphold the status quo by adopting a formal vision of equality where the majority and minority language groups were treated alike. The Court held that the purpose of section 23 was to remedy past injustices and provide minority language communities with equal access to high quality education in circumstances where community development is enhanced. The reference to "where numbers warrant" in the section must take into account community development and the desire of the minority community to use institutions such as minority schools to prevent assimilation, even where the numbers in the Summerside area were at the low end 49 and 155 at the higher end of the number of potential minority students.

In a clear expression that Canada has taken a different liberal democratic route from the United States, the Court held that focusing on the individual right to instruction at the expense of the linguistic and collective rights of the minority community effectively restricts the collective rights of the minority community. Here the Minister had failed to realize that the existence of a local minority language school was the single most important institution for the survival of the linguistic minority and to prevent the assimilation of minority language children. The Court also held that the local management and control by the minority language community was critical to the enjoyment of the section 23 rights.

It is suggested that the *Arsenault-Cameron* decision of the Supreme Court of Canada is a paradigm example of the need to strive for substantive equality based on conceptions of distributive justice within the context of democratic federalism to protect the rights of minorities within a democratic federal system. I suggest that the Supreme Court in the *Arsenault-Cameron* decision moved much closer to a distributive justice conception of the rights of linguistic minorities than the previous decisions of the Court in this area. In particular, I argue that the Court in the previous *Mahe v. Alberta*[63] decision failed to recognize the need for linguistic minorities to have a say in what constitutes sufficient numbers of minority students to qualify for their section 23 rights. Instead the Court interpreted section 23 to be based on a numerical "sliding scale" of entitlements which could have resulted in the small numbers of minority students in the *Arsenault-Cameron* situation not being entitled to any program of minority language instruction.

Protection of minorities has been confirmed as one of four foundational principles of Canadian federalism by the Supreme Court in its landmark ruling on the right of Quebec to unilaterally secede from Canada. In *Reference re Secession of Quebec,*[64] the Court held that neither the Canadian Constitution nor International Law gave the government of Quebec the right to effect secession unilaterally. However, in a landmark ruling, the first of its kind in any multi-ethnic democratic federalist state, the Court went much further. The Court advised that there would be a constitutional duty on all parties to negotiate if the legitimate goal of secession was supported by *"the clear expression of a clear majority"* of Quebecers.[65] Such negotiations would have to address the interests of all provinces and the federal government and the rights of all Canadians wherever they live. Most relevant to this discussion, the Court stipulated that such negotiations would

[63] [1990] 1 S.C.R. 342. The "sliding scale" of entitlements was followed in the Supreme Court decision in *Re Public Schools Act (Manitoba),* [1993] 1 S.C.R. 839.

[64] [1998] 2 S.C.R. 217.

[65] *Reference re Secession of Quebec, supra* note 64 at para. 100.

have to proceed with respect for "*the same constitutional principles that give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities".*[66]

The Supreme Court related this fundamental principle to the *Charter* in the following manner:

> The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities.[67]

I suggest that the Canadian Supreme Court has advised all democratic multi-ethnic federal states that the breakup of such federations are subject to much the same fundamental values as the preservation of such states as I have argued above. I also suggest that because Canada has striven hard to observe these fundamental values, there will never be a clear expression of a clear majority of Quebecers to leave the Canadian federation.

Distributive Justice and Section 27 of the *Charter*

As discussed above, in section 27 of the *Charter*, one finds an interpretive section that reinforces the view that racial and ethnic minorities who derive their existence from both longstanding and more recent immigration into Canada have a different sort of protection under the *Charter* than the collective rights of Canada's aboriginal peoples and the historically settled national minority communities of French and English found across Canada. The section states:

> 27. *This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.*[68]

This section requires that all rights and freedoms in the *Charter* be interpreted in a manner that not only ensures the preservation of what I have called the Canadian diversity gene or the multicultural heritage of Canada, but also promotes its actual enhancement. Does it not seem paradoxical that individual rights found in other sections of the *Charter* must be interpreted in a way that not only preserves but enhances a country's long history of diversity together with linguistic and cultural pluralism?

I turn to an examination of what the interpretive principle of multicultural heritage of Canadians consists of as set out in section 27. For the purpose of the ensuing discussion, I am assuming that the concept of multiculturalism is equivalent to the concept of multicultural heritage of Canadians. It is imperative to define multiculturalism first. Attempts to define multiculturalism have usually set out an historical evolution of Canadian nationhood accompanied by what the concept means or should mean today. The 1987 House of Commons Report entitled *Multiculturalism: Building the Canadian Mosaic*[69] arrived at what I have summarized as the following essential features of multiculturalism:

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[66] *Ibid.* at para. 90.

[67] *Ibid.* at para 81.

[68] *Charter, supra* note 1, s.27.

[69] House of Commons, Standing Committee on Multiculturalism, "Multiculturalism: Building the Canadian Mosaic," 2nd Sess., 33rd Parl. (1987) at 22-23.

- Multiculturalism is a principle applicable to all Canadians and it seeks to preserve and promote a heterogeneous society in Canada. The principle refutes the idea that all citizens should assimilate to one standard paradigm over time.
- Multiculturalism is today most fundamentally concerned with ensuring substantial equality for all Canadians regardless of what cultural groups they belong to.

If this is correct, then the interpretive rule in section 27 is a mandate for Canadian courts and governments to interpret all rights and freedoms in the *Charter*, even those focused on individual rights, in a manner that preserves cultural pluralism and substantive equality among all citizens in Canada while taking into account the historical bargain that established the collective rights of the aboriginal peoples and the national linguistic minorities of the country. This again involves applying a uniquely Canadian principle of distributive justice.

The most relevant and controversial conclusion from this analysis of section 27 is that there will be situations when the exercise of individual rights and in some cases the exercise of the collective rights of national minorities will, in some circumstances, have to give way to or reasonably accommodate the multicultural interpretive principle, where the exercise of such rights crushes the equal access by members of ethno-cultural groups to the most important goods in our society. This has been illustrated in the area of hate propaganda in the *R.* v. *Keegstra*[70] decision of the Canadian Supreme Court, where the Court, in upholding the hate propaganda provisions of the Canadian *Criminal Code*[71] ruled that the freedom to willfully disseminate hate propaganda against identifiable minority groups in our society cannot crush the rights of such minorities to equality and full citizenship in our society. The Court ruled that these rights are protected both by section 15, (the equality guarantee) and section 27 of the *Charter* in the context of balancing individual rights against the multicultural and equality provisions of the *Charter* under section 1 of the same document. In this decision, the Court held that section 27 could be a used in the context of the balancing test under section 1 to give legitimacy and enhance the government's legislative objective in the Criminal Code to prohibit the willful promotion of hatred against an identifiable group. The Court viewed such willful promotion of hate propaganda as an attack on the targeted individual's connection with their culture and thereby also constituting an attack on the process of self-development and human dignity of members of such identifiable groups. As suggested above, the ability to preserve one's human dignity should be regarded as perhaps the most valued good in a free and democratic society.

Other decisions of the Supreme Court have reinforced the thesis that section 27 is a buffer against governments establishing legislative objectives that regard some religious, cultural or ethnic groups as less worthy of equal concern and respect. n particular, section 27 will play a part where governments are seen to regard some religions as dominant and therefore others as less entitled to being treated as an equal. In the *R. v. Big M Drug Mart Ltd.*[72] decision, the Court struck down the Sunday closing law that clearly had the Christian Sabbath as its main rationale. Chief Justice Dickson asserted that "*to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians*".[73] Likewise in the *R. v. Edwards Books and Art Ltd.*[74] decision of the Supreme Court in validating Sunday as a secular day

[70] [1990] 3 S.C.R. 697 [*Keegstra*].

[71] R.S.C. 1985, c. C-46 [*Criminal Code*].

[72] [1985] 1 S.C.R. 295.

[73] *Ibid*., at para. 99.

[74] [1986] 2 S.C.R. 713.

of rest, Chief Justice Dickson took the opportunity to stress that Section 27 mandated an interpretation of the freedom of religion guarantee in section 2 of the *Charter* to ensure that the multiplicity of religions in Canada's pluralist society was protected from both direct and indirect coercion.

At a later stage, both lower courts and the Supreme Court in the criminal and civil contexts seem to be applying the multicultural principle in section 27 to ensure that a dominant society affords to ethno-cultural and aboriginal minorities an equal chance of obtaining justice in the criminal context and to be reasonably accommodated in the provision of or access to public services or education. In *R. v. Punch,*[75] the Supreme Court of the Northwest Territories mandated the use of a 12-person jury in the Northwest Territories, instead of a six person jury as permitted by the *Criminal Code,*[76] as the larger number of jurors were more likely to reflect the multicultural heritage of the local population. Likewise in *R. v. Tran*[77], the Supreme Court applied section 27 to the right to an interpreter guaranteed under section 14 of the *Charter*. The court held that the multicultural society in Canada is a multilingual one, therefore requiring, if necessary, language interpreters for those who speak languages other than English or French if they are to be given "real and substantive access to the criminal justice system."[78]

In a controversial decision regarding the extent to which minority religions should be accommodated in a non-criminal law context, a majority of the Supreme Court in *Syndicat Northcrest v. Amselem*[79] held that a religious practice of a minority can be protected under the *Charter* even if that practice was not necessarily an obligatory part of an established belief system or shared by others, if it was a voluntary expression of faith and the claimant sincerely believed the practice was of religious significance.[80] On the facts of that case, expert evidence indicated that orthodox Jews were under no obligation to build personal "succahs" (hut-like temporary dwellings) on their condominium balconies where they would live for a nine day period during an annual Jewish festival. Nevertheless, the Court held that a subjective desire to carry out this religious duty overrode the contractual duty of the condominium owners not to act in violation of the building's by-laws.

More recently, the Supreme Court of Canada has sent a strong signal that those who administer, control access to or teach in Canada's public education institutions have a duty to embrace diversity, which includes promoting a culture in public education institutions that respect the freedom of religion of Canada's multicultural society. In its decision in *Multani v. Commission scolaire Marguerite-Bourgeoys,*[81] the Court concluded that the *Charter* protected the right of an orthodox Sikh student to wear his ceremonial dagger called a "kirpan" at school. A majority of the Court[82] also ruled that the *Charter*

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[75] [1986] 1 W.W.R. 592 (N.W.T.S.C.).

[76] *Criminal Code, supra* note 71.

[77] [1994] 2 S.C.R. 951.

[78] *R v. Tran, supra* note 77 at para. 37.

[79] [2004] 2 S.C.R. 551. There were two strong dissents by Justice Bastarache and Justice Binnie in the case that indicated that the Court may have gone too far in attempting to accommodate this subjective religious practice despite the evidence that the practice was not obligatory and the practitioners had voluntarily agreed to the by-laws.

[81] [2006] 1 S.C.R. 256 [*Multani*].

[82] Two of the Supreme Court Justices, Madam Justice Deschamps and Madam Justice Abella disagreed on this point. They concluded that recourse to a constitutional law justification is not appropriate where, as in this case, what must be assessed is the propriety of an administrative body's decision relating to human rights. Whereas a constitutional justification analysis must be carried out when reviewing the validity or enforceability of a norm such as a law, regulation or other similar rule of general application, the administrative law approach must be retained for reviewing decisions and orders made by administrative bodies.

establishes a minimum constitutional protection for freedom of religion that applies both to all legislatures and administrative tribunals. In this context safety concerns must pass the constitutional standards laid down by the *Charter* and jurisprudence emanating from it, if an infringement of the freedom of religion is to be justified. The Court followed its earlier decision in the *Amselem* case and ruled that the freedom of religion guarantee in the *Charter* protected this practice even though it was not obligatory for orthodox Sikhs to wear a metal kirpan at all times. The student's desire to do so was based on a reasonable religiously motivated interpretation and a sincere belief that he adhere to this practice to comply with the requirements of his religion. Because this sincerely held belief would force the student to choose between adhering to the practice or not being allowed into the public school system, the Court held that the decision by the Quebec School Board to prohibit the wearing of the metal kirpan on the premises of the school was an infringement of the freedom of religion guarantee in section 2 of the *Charter*, which was not trivial or insignificant and could only be justified under section 1 of the same document.

Applying the section 1 test, the Court held that a total prohibition of the kirpan "undermines this religious symbol and sends students the message that some religious practices do not merit the same protection as others."[83]

While acknowledging the sufficiently important objective of safety in the schools and the rationality of the ban on kirpans, the Court concluded that the total prohibition of the kirpan was not a minimal impairment of the freedom of religion guarantee. Even though she did not specifically refer to section 27, Madam Justice Charron writing for the majority of the Court stated:

> The respondents submit that the presence of kirpans in schools will contribute to a poisoning of the school environment. They maintain that the kirpan is a symbol of violence and that it sends the message that using force is the way to assert rights and resolve conflict, compromises the perception of safety in schools and establishes a double standard.
>
> The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.[84]

The Court completed its analysis that the total ban on the wearing of the kirpan could not be justified under section 1 by ruling that the deleterious effects of a total ban outweighed the salutary effects. The Supreme Court supported the Quebec Superior Court's decision to allow the student to wear the kirpan under certain conditions (it had to be carried in a wooden case, wrapped in fabric, and sewn into his clothes). The Supreme Court concluded that applying such a less restrictive approach "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities."[85]

These decisions, which were quite controversial in Quebec, together with other demands for reasonable accommodation by minority groups in Quebec, have created, in my view, an unreasonable and growing antipathy to the accommodation of ethnocultural minorities in that province. An opinion poll by the CROP organization found that 61 percent of

[83] *Multani, supra* note 81 at para. 79.

[84] *Multani, supra* note 81 at paras. 70-71.

[85] *Ibid*. at para. 79.

Quebecers are concerned about reasonable accommodation and 73 percent fear that such accommodation has gone out of control.[86] Behind this concern and fear is the worry that such reasonable accommodation may start to undermine the cultural identity of Quebec. What must be discussed and debated in that province is that while Canada's national minorities, including the Francophone majority in Quebec, have collective rights to maintain their cultural and linguistic identities, the substantial equality rights of ethnocultural minorities to full participation and access to the critical societal goods such as public education in these societies cannot be sacrificed where reasonable accommodation can take place. It will take wise and courageous leadership to pursue that debate rather than succumbing to or, worse still, exploiting these unjustified fears.

The Ultimate Distributive Justice Challenge: Balancing Individual and Collective Rights

It cannot be disputed that both the *Charter* and Canadian society recognize the equal value of civil and political rights based on the dignity of the individual human being. Many of the civil and political rights are stated in absolute terms that seems to allow little room for abridgement. For example, section 2 of the *Charter* states:

> *Everyone has the following fundamental freedoms:*
> *(a) freedom of conscience and religion;*
> *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communication;*
> *(c) freedom of peaceful assembly; and*
> *(d) freedom of association.*[87]

The jurisprudence of the Canadian Supreme Court has imposed a two-step approach to interpreting rights such as these in any litigation process. First, the complainant who is alleging that his or her rights have been infringed must establish a *prima facie* case that the government has violated the guaranteed right. No governmental justification for abridgement of the right is permitted at this stage. For example, even the curtailment by government action or legislation of the vilest forms of hate propaganda and more recently, child pornography, have been ruled a violation of section 2.[88] The Supreme Court has held that any form of communication has expressive content and government restriction of any such form of expression is a violation of section 2(b).[89]

However, despite this initial, seemingly absolutist, approach to civil and political rights, we do not place the collective rights of the national or constitutional minorities described above or the multicultural interpretive principle in section 27 at risk of being trumped by individual rights and freedoms, no matter how they are being used. Rather, we attempt to balance the categories of rights by the distributive justice principles that have been enunciated in the Supreme Court of Canada case law interpreting section 1 of the *Charter*.

The need to develop some fundamental principles of distributive justice is introduced in the first section of our *Charter.* This section states:

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[86] See Daphnée Dion-Viens, "Accommodements raisonnables: les Québécois preoccupies" *Le Soleil* (27 August 2007), online: Le Soleil (Cyberpresse). Available at:
<http://www.cyberpresse.ca/article/20070827/CPSOLEIL/70826140/-1/CPSOLEIL>.

[87] *Charter, supra* note 1, s.2.

[88] See *Keegstra, supra* note 70. See also *R*. v. *Sharpe,* [2001] 1 S.C.R. 45, S.C.C. 2.

[89] See *Irwin Toy Ltd*. v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].

1. *The* Canadian Charter of Rights and Freedoms *guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*.[90]

The section comes into operation after the plaintiff has proven that there is a *prima facie* violation of his or her rights, as described above. The burden of proof then switches to the government to show that it can justify such a violation on the basis of the criteria set out in section 1, which makes all the guaranteed rights subject to reasonable limits demonstrably justified in a free and democratic society.

I suggest that section 1 was a mandate given by the people of Canada to the judiciary, in particular the Supreme Court of Canada, to work out a framework of distributive justice within which an appropriately Canadian rights adjudication process concerning the collective rights of Canada's national minorities and the multicultural interpretive principle could take place.

During the relatively brief period of the existence of the Canadian *Charter* since 1982, there have been cases where, I suggest, the Supreme Court of Canada has courageously met the challenge of creating this uniquely Canadian framework of distributive justice for collective and individual rights adjudication.

The landmark decision of the Canadian Supreme Court in *Ford* v. *Quebec (A.G.)*[91] is, I suggest, the paradigmatic example. In this case, five businesses operated by English speaking Quebeckers sought a declaration that sections 58 and 69 of the Quebec *Charter of the French Language*[92] infringed the individual right of free expression as they required exclusive use of French on exterior commercial signs. The Court held that this total prohibition was too heavy an infringement of the individual right of free expression and so struck down the law. The Court even suggested a different legislative scheme that would be constitutionally acceptable. The Court suggested that requiring the predominant display of the French language, even its marked predominance, would be proportional to the legitimate goal of promoting and maintaining a French "visage linguistique" in Quebec. Distributive justice requires that collective rights maintain a sense of proportionality in impairing the individual good of free expression and other individual freedoms and liberties that enhance the value of human dignity. Ultimately, even a subsequently elected separatist government in Quebec accepted this suggestion by the Court as a just way to deal with cultural self-determination while respecting the individual rights of all the province's citizens.[93]

In the rather complex interpretations of section 1, it should never be forgotten at this time of celebration of the 25th anniversary of the *Charter* that one of the most pre-eminent jurists in Canadian history, Chief Justice Dickson, in *R.* v. *Oakes*[94] focused upon the final words of section 1 as they were seen as "the ultimate standard against which a limit on a right or freedom must be shown, despite its effect... ."[95] Chief Justice Dickson argued that because Canada is a free and democratic society, the courts must be guided in interpreting section 1 by the values inherent in concepts such as:

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[90] *Charter, supra* note 1, s.1.

[91] [1988] 2 S.C.R. 712.

[92] *Charter of the French Language, supra* note 45.

[93] For a detailed discussion of this case, see E. P. Mendes, "Two Solitudes, Freedom of Expression and Collective Linguistic Rights in Canada: A Case Study of the Ford Decision" (1991) 1:3 *The National Journal of Constitutional Law* 283.

[94] [1986] 1 S.C.R. 103.

[95] *Ibid*., at para. 64.

> ...respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[96]

There can be no better conclusion as to what are the fundamental values that must underpin the historical and present day Canadian "diversity gene" than these words of Chief Justice Dickson. There can be no better description of the values of democratic pluralism and substantive equality based on Canadian perceptions of distributive justice that can prepare Canadians, Canadian lawyers and the Canadian judiciary for the next 25 years of the *Charter's* existence.

[96] *Ibid.*