Eur J Futures Res (2014) 2:51
DOI 10.1007/s40309-014-0051-8

ORIGINAL ARTICLE

Regional cosmopolitanism: the EU in search of its legitimation

Erik O. Eriksen

Received: 18 November 2014 / Accepted: 21 November 2014 / Published online: 4 December 2014

Abstract What could be the legitimation basis of the European Union (EU)? This article questions the idea of two constitution-making subjects in the EU and claim there is and can only be one constituting subject even in a multilevel configuration like the EU. The EU can thus not be seen as *a federation of nation states*. Rather it must be seen as a quasi-federation of states and citizens united under a common legal framework with a universalistic underpinning. The EU's commitment to basic human principles means that it has a communal vocation that is broader and more universal than that of a multinational federation.

Keywords Cosmopolitanism · Democracy · The EU · Constitution · Sovereignty

> Let us remember that the unity movement in Europe was precisely an attempt at creating a regional entity, and that its origins and its springs resembled, on the reduced scale of a half-continent, the process dreamed up by Kant in his *Idea of Universal History.*
> [14: 863]

Through establishing autonomous, powerful institutions, the states of the conflict-ridden European continent have domesticated international relations among themselves.[1] However, juridification and executive dominance prevails and the lingering question is whether the ensuing order can be legitimate. The EU is not a nation, nor is it a state. Nevertheless, the institutional complex of the Union, the competences, and the procedures it now harbours for participation, contestation, and representation testify to the fact that the EU has moved in the direction of a rights-based quasi-federation with democratic credentials. Even though it does not possess sovereign control in a clearly delimited territory, it claims to possess a legitimate authority based on entrenched principles of law as well as a set of representative political institutions for collective will formation. The multilevel constellation that makes up the Union does not possess the organisational powers of a state and is deficient in democratic terms. The citizens are not fully able to govern themselves through a self-appointed and accountable government. This deficiency is exacerbated by establishing intergovernmental treaties outside of the ordinary Lisbon procedure in order to deal with the Eurozone crisis.[2] I cannot deal with the potentially disastrous effect on EU's 'constitution' here, but see [7], chapter 1 and 6.

There is an *unfinished agenda* with regard to institutional reforms as well as with regard to what kind of competencies and functions should be 'communitarianized' in Europe [6]. Neither is it evident what the EU is or should aspire to be. I argue that the EU's normativity requires a wider cosmopolitan frame of reference in order to address the character of the entity as well as its legitimacy basis. This article therefore sets out the idea of the EU as a regional cosmopolitan entity. But how can the EU be sustainable when it has no monopoly on the legitimate use of force or final decision-making power? What would make up the finalité of the European integration project that could ensure the requisite commitment and loyalty needed for binding collective decision-making?

In order to shed light on these questions, I first address why there is a European context of justice beyond the nation state;

[1] This article draws on [7].

This article is part of the Topical Collection on *The Future of Europe*, guest-edited by Markus Pausch.

E. O. Eriksen (✉)
ARENA – Centre for European Studies, University of Oslo,
P.O. Box 1143, Blindern 0318, Oslo, Norway
e-mail: e.o.eriksen@arena.uio.no

[2] For the disastrous effect on the EU's 'constitution', see [7], chapter 1 and 6.

then I discuss the claim that supranationalism leads to competition over final decision-making authority. The solution to this problem is found in the fusion of constitutional orders and in a shared 'Grundnorm' in European normative orders. I take issue with Jürgen Habermas' idea of a "Federation of European nation states" and claim there is and can only be one constituting subject even in a multilevel configuration like the EU. This finally paves the way for seeing the EU as a non-state government with a universalistic foundation and vocation.

Power beyond the nation state

According to the 'sovereignists', norms of justice stem from the distinctive relations that people have towards each other in the obligatory and coercive frame of reference of a state. Without the 'enabling condition of sovereignty'—with 'some form of law, with the centralized authority to determine the rules and a centralized monopoly of power of enforcement'—there can be no justice and democracy according to [26: 116]. Nagel follows [32] whose political conception of justice is fully associative. It depends on the positive rights that we have towards our fellow national compatriots and not against other persons and groups. Beyond the nation state, democracy and justice do not apply.[3] There are no obligations of distributive justice among nations because citizenship rights do not apply. However, in the EU they do in fact apply.

Even though the EU is not a state with a monopoly on the legitimate use of violence, it amounts to a powerful *commanding height* to be seized by the citizenry. Compared to what is the case with ordinary regimes and international organizations in the transnational realm, the EU is 'more'. European states' self-help means of reciprocity and countermeasures have been removed, and the institutions of the EU affect the freedom, security and well-being of all the subjects – they benefit and threaten, reward and punish EU citizens as well as third parties. Hence, a particular context of social cooperation exists, which gives rise to obligations and legitimate claims. There are morally arbitrary sources of equality that are in breach with the principle of equal citizenship; and the European Treaties have achieved the function of a superior legal structure, which establish both a unitary European citizenry distinct from national ones and a set of autonomous European bodies. There is thus a comparable *context of justice and democracy* to that of the nation states. However, then there is a second claim of the 'sovereignists', that is that the establishment of supranational, coercive power would mean a *competition for final authority* – for control of centralised authority – with the nation states.[4] The case of the EU shows, as we shall see, that there need not be a struggle for final authority, when the legal basis is the same for all adjudicative bodies.

Globalisation, increased international cooperation and European integration have changed the basic conditions for democratic self-rule. Not only is there a context of justice and democracy beyond the nation state in Europe due to the particular circumstances of cooperation, there are also institutions and structures amounting to *dominance*. Dominance, which is rule without justification, is an expression of injustice and illegitimate government. Dominance is illicit because of the dominators' capacity to interfere in zones of freedom [31, 35]. The right not to be subjected to arbitrary power is fundamental [33] and so is the right to justification [8]. How can authoritative institutions equipped with an organised capacity to make binding decisions and allocate resources exist at the European level, claim to be legitimate?

The fusion of constitutional orders

It is widely held that there is in fact no constitutional *unity* in the EU in the sense that there is no willingness to contemplate the European Court of Justice (ECJ) as the sole judicial master of both legal orders. Constitutional pluralism prevails [2]. There is, however, a distinct constitutional tradition established by the EU, which, according to [9], can be seen to represent the first instance of establishing *a new constitutional order* out of a set of already existing state-based constitutional arrangements. The EU was initially established through a distinct and historically specific *constitutional authorization* in the sense that the member states' constitutions sanctioned supranational integration. The process originated with the 'synthetic constitutional moment' of The European Coal and Steel community (ECSC), which brought forth the regulatory ideal of a common constitutional law.

The construction comes equipped with a *conditional* license from the member states, viz., the established structure and further integrative moves must comply with human rights and democratic norms. The democratic character of the EU's constitutionalism hinges on this core requirement. On the one hand, the EU system must be compatible with the basic constitutional norms and principles shared by the constitutions of the member states. On the other hand, European institutions must be structured so that it is possible for the citizens to understand themselves as the authors of the laws to which they are subject. Direct popular authorization is not abolished but rather suspended so as to preserve

[3] John Rawls' [32] view is that since global citizens cannot be supposed to see themselves as free and equal human beings who should relate fairly to each other, we cannot build coercive social institutions that assume they do. This position comes close to a communitarian one as it holds that only according to a collective identity – to a self-image reasonable acceptable to them – could individuals be coerced [40: 63].

[4] On this debate, see also the contributions in [29].

peace and deal with economic growth. This in itself has legitimating force [39: 68].

However, the further the constitutionalizing process proceeds, the greater the need for direct popular authorization and sanction. This is in line with the so-called *Solange* judgments of the German Constitutional Court, which made further integration and ceding of sovereignty conditional on democratization. *Solange 1* from 1974 establishes that as long as European law does not protect fundamental rights equivalent to that provided by national law nor has achieved the similar level of democratic legitimacy for its law-making power, the Court would keep reviewing secondary Community law according to the standards of the national Constitution.

Even though there is no formal EU constitution, and the EU treaties do not meet the democratic standard, EU law, which stems from and is embedded in the member states' democratic constitutions, grounds the presumption of acceptability. Observance of this structure ensures not only that the EU structure is seen as constitutionally sanctioned but also that the EU structure has an element of popular authorisation. Compliance can be expected because

(a) the initial authorization of European integration, through the establishment of the ECSC was voluntary,
(b) the ensuing applications for membership by individual states have generally been supported by popular referenda and
(c) citizens' representatives are involved in the decision-making procedures through which EU law is made.

The EU then does not represent a constitutionalization of already constitutionalized orders – *an imperio in imperium* – but a fusion of orders.

Two constitution-making subjects?

In line with such a perspective, [12][5] contends that the EU's basic 'constitutional' order represents two major innovations in the process of pacifying the state of nature between states: First, supremacy of EU law is granted in the areas in which it has competences but the binding effect of EU law is neither grounded in the monopoly of violence at the European level nor in the final decision-making authority of the EU. The EU does not have the competence to increase its own competences ('Kompetenz-Kompetenz') and does not possess coercive means, but can nevertheless count in compliance for the reasons mentioned. The second innovation has to do with *the sharing of the constitution-making power* between the citizens and the states (the European peoples). Democracy in the Union rests on two pillars.[6] The EU is a union of states and of citizens – as epitomised by the role of the Council composed of member states representatives and the directly elected EP, representing the states and the citizens respectively. The treaties speak of *the peoples* of the member states and of the citizens of the Union.[7]

Habermas builds on this construction in foreseeing not a European federation based on hierarchy and the unity of law directly emanating from an empowered Parliament and basic rights. Rather, his model is that of *a federation of nation states* founded on a shared sovereignty between 'the "citizens" and the "peoples" as the constitution founding subjects [12: 54]. The nation state is seen as the main container of solidarity and democratic legitimation. But the term 'a federation of nation states' sits uneasily with the idea of democracy as a self-governing citizenry as well as with Habermas' own claim that we should not substantialise 'the people' or 'the nation' [12: 48].[8] Hence, the people cannot be the'the unum' but must be "the plures or the plurality or the singular" [cp. 31: 301]. Popular sovereignty can only legitimately appear in pluralis – it demands access for persons, not groups or states, to a procedure of co-legislation.

Citizens' sovereignty cannot be divided or shared with another kind of sovereignty. A collective subject like 'a people' or a state cannot be put on par with popular sovereignty as this would blur the distinction between popular and state sovereignty. The following question arises: How to secure the autonomy of the citizens if there is also the autonomy of a collective (macro) subject – the state – to be safeguarded? This construction devaluates the democratic principles of citizens' self-rule. There would be no criterion for approximating the autonomy principle – citizens should only obey laws that they also have been the co-authors of – when it is discounted and weighed against the state principle. Therefore, there can be pooling of state sovereignty but not a disaggregation of political subject-hood – of popular sovereignty – which then can be shared between two constitutional subjects.

Moreover, even though the member states de facto are 'the Masters of the Treaties', over time intergovernmentalism has increasingly been countered by the struggle for 'a citizens Europe' (as is most salient in the assignment of EU citizenship in the Treaty of Maastricht and in the EU's Charter of Fundamental Rights linked to the Lisbon Treaty). Two constitution-making subjects have not only been cooperating but also *competing* in establishing the EU as it is. The European Communities may not initially have had much power or many

[5] He draws on the works of [36, 37, 10].

[6] Cf. Arts. 9 to 12 and 19(2) TEU, and compare with [30]. See further [38: 497].

[7] See also [22: 24ff] for the wording on 'Federation of Nation States' and 'European people' in the EU's Charter of Fundamental Rights.

[8] Supra-individual entities, such as a people, a majority or a state, are not self-authenticating sources of valid claims [23: 152]. The people is a bodiless category [19].

competences at their disposal, but with the aim of furthering integration and closer cooperation, accompanied with the attainment of requested means, they transformed the constituent parties into committed members. The Euro polity has in the last decades undergone a marked change – from a largely economic organisation whose legitimacy was derivative of the member states – to an entity that today asserts that it represents an independent source of democratic legitimacy. A struggle for a 'citizens Europe' has been going on in the form of a struggle for an empowered EP and a constitution based on basic rights.

On this background one may question Habermas' model. The idea of two constitution-making subjects makes the EU shaky with regard to foundational principles. For an order to achieve stability and legitimacy, agreement on the basic structure is required, as well as on the polity structure that corresponds to it. Systems of domination require justification with regard to the *relevant characteristics* of the political community to be regulated as well as with regard to the purposes and interests to be realised. In the capacity of what are Europeans equals? When the EU asks the individuals to see themselves as European and not merely national citizens – what could then be seen as *a trigger of equal concern and respect*? The question is what the constitutive norms – the common European weal – are that express the *distinctive relations* of European citizens, and which could be the basis for solidarity among Europeans. In what does *the political unversitas* of the EU consist and where does it reside [cp. 15: 346]? The weakness of Habermas' reconstruction of a legitimate EU is that the requisite unifying component of the European political order is lacking.

The European nation states are profoundly affected by accession to the European Communities and, as we have seen, the integration process has constrained their willpower and has Europeanised identities. Moreover, the EU is a polity in its own right, which contributes to global steering. It possesses higher-level political decision-making capabilities, but possesses neither a collective identity nor the coercive instruments of a state. We are witnessing a federation without a state, but how can it be cohesive and effective without competence to override the nation state, to constrain as well as enlarge national mentalities; and how can it be legitimate without a we-feeling and a sense of *finalité* that can provide the necessary foundation for collective European decision-making?

The constituting subject

Due to the pooled sovereignty of states and common constitutional traditions of European states, the question is not which level possesses the final decision-making authority, but rather whether the ruling complies with the law; whether the common legal norms are applied in a correct manner. It is only in the applicative sense that the EU enjoys primacy, and not when it comes to validity. Community law leaves 'inconsistent national law valid but unapplied' [36: 14]. The multilevel legal order in Europe, with national courts and the ECJ (and in some cases also the European Court of Human Rights) sharing jurisdictional power, ensures, in principle, the judicial monitoring of laws, the ability to handle 'conflicts of law', and to reach conclusions in hard cases within a time limit. But on what basis? What is the single unifying principle?

The constituting subject of treaties are states, and the constituting subject of constitutions is *the individual*. Both lines of authority have one single origin: the citizen as member of the Union and of one or more member states. Only the rights of the individual and the legal procedure and discipline that go with it, give unity and coherence to EU law in the multilevel constellation. At the foundational level, there is no competition between the member states and the European level; the basic unit for which both levels can claim legitimacy is the individual, her dignity and autonomy. There is and can only be one constituting subject even in a multilevel configuration like the EU.

When there is a common legal basis and the individual is the sole source of legitimation for the EU, it is not necessary to settle once and for all who has the final decision-making authority: the EU or the member states. Who has the competence-competence need not be settled because to be subordinate to supranational (democratically enacted) law is not to be dominated by an alien power but subjected to co-authored law. Joint European rule entails the capacity to co-determine the exercise of authority and not the final power of arbitration. Supremacy can be seen as *a collision norm*, which says that European law should prevail when there is conflict with national law.

But what could form the basis for establishing supremacy as a collision norm, if not the protection of human rights? Along these lines [38] suggest the *reversed Solange* aimed at protecting the fundamental rights against EU member states. Any member state's violation of human rights is infringing the 'substance of Union Citizenship'. On the basis of European citizenship and on the basis of the adopted European Charter of Fundamental Rights, which apply only when the member states are implementing Union Law, *reversed Solange* holds that 'Member States remain autonomous in fundamental rights protection *as long* as it can be presumed that they ensure the essence of the fundamental rights enshrined in the Article 2 TEU' [38: 491].

Dignity as basic norm

Both in a legal and in a normative sense, the individual citizen must be seen to constitute the sole source of legitimation of

modern constitutional orders. All modern legal orders are essentially individualistic orders as they universalise the legal principle of rights-based adjudication. They build on a procedural consensus – on the rules for inclusion, hearing, deliberation and decision-making. The right of the human being constitutes the foundation of modern law, which basically comes down to *a right to have its dignity respected* [cp. 24]. Also in the EU, the single authority which can give unity and coherence to the legal system in place is the individual in the form of a right-bearing subject. The German Federal Constitutional Court's 2009 judgment expresses the general point in the following manner:

> The constitutional state commits itself to other states with the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order.
> (par. 221)

The basic democratic criterion is autonomy in which *self* and *law* is conjoined. That is, autonomy has two roots: autos (=self) and nomos (=law). Autonomy is the basis for dignity and is, according to Kant, located in the law-making procedure. The law must be self-given and this is the core of dignity:

> For, nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all value, must for that reason have dignity, that is, an unconditional, incomparable worth; and the word *respect* alone provides a becoming estimate of it that a rational being must give. *Autonomy* is therefore the ground of dignity of human nature and of every rational nature.
> [17: 85][9]

Dignity resides in the law-making process: It places the law under the constraint of being 'self-given' and co-authored. The individual autonomy is being constrained by the fact that the autonomy of each must co-exist with the freedom of all. There is a right to have ones dignity respected which can only be ensured by being granted a right to participate in law-making [34: 62, 100]. Dignity is a value in itself, and is a basis for deriving rights. The right of the individual to have its dignity protected both links in with the cosmopolitan norm of equal respect for the individual and with democracy as it grants the individual right to participation in law-making. Cosmopolitanism implies the universalization of human dignity – all human beings possess it equally – but the right to have ones dignity respected requires democracy, that is, a *bounded territory* [cp. 20]). Dignity grants the human being membership in two communities, in the moral commonwealth – in the community of all human beings – and in a state.

The political universitas of the EU

On the one hand, the right to have ones dignity protected is a demand for democracy that can only be cashed in through membership in a particular political order – with borders. On the other hand, national democracies have incentives to take a free ride on others and impose negative externalities on third parties without compensation. A particular state can violate its own citizens' rights, can fail to respect individuals with no membership rights and other states' legitimate interests. Integration itself and democracy among states thus become categorical imperatives. Democracy requires that the citizens, when their rights to have their dignities respected have been infringed, can bring their grievances before a superior authority. Any 'people' can get it wrong, and needs correctives; majority decisions can violate the rights of individuals and minorities, and national, constitutional courts may be lacking or may not be able to protect them. For a true republic to be realised, it must be possible for citizens to appeal to bodies above the nation state when their rights are threatened. Thus, there are reasons for institutions beyond a particular state in which individuals have obtained membership and which protect the basic rights of the citizen.

For the dignity of the *world citizen – kosmou politês* – to be respected, human rights need to be institutionalised in bodies above the nation states that actually bind individual governments and international actors. Already the principle of negative peace requires a superordinate instance to safeguard the right to non-interference [28: 293]. Organizations at the intermediate level – between the state level and the world organization – reduce dominance, facilitate accountability across borders and provide the 'international community' with some agency.

Dignity is firmly entrenched in the UN charter, in international conventions and treaties; in national constitutions, in particular in the German Constitution. It is also referred to several times in the German Federal Constitutional Court's ruling on the Lisbon Treaty (pars 57, 147, 188, 122). It figures prominently in EU Treaties; in Article 2 of the Lisbon Treaty, and the EU Charter of Fundamental Rights. The latter places dignity-protecting human rights as core legitimating principles: In Article 1, it is stated that human dignity is inviolable. It must be respected and protected. Article 2 states the right to life and prohibits detah penalty. Article 3 specifies the right to the integrity of the person, and Article 4 the prohibition of torture and inhuman or degrading treatment or punishment. The Preamble of the Charter states that:

> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of *human*

[9] Cp. [13], who sees human dignity as constituting the moral source of human rights.

> *dignity*, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice. (Italics inserted.)

One may thus speak of an (underlying) *ground norm*, of having ones dignity respected in the EU. Human dignity is the real foundation of basic rights [22: 59]. It is a principle that digs deeper than the ordinary rights we live by in Europe and one that is in need of specification and institutionalisation. I see dignity as a foundational 'must' of European integration.[10] It constitutes the moral-affective basis for peace and rights-based democracy and has been an important unifying principle, enabling Europeans of different stripes to come to grips with their belligerent past. The ultimate aim of the integration process, and to which others like peace, justice and democracy speak, is to protect the dignity of the individual. This is a foundational norm that all, in fact, would agree to, despite all other disagreements over values and interests. It could not be rejected with mutually acceptable reasons, and in fact it was vigorously struggled for by Catholics, Protestants and Humanists and supported by liberalists, conservatives and socialists.

The normativity of co-legislation

Dignity-protecting rights go to the core of modern constitutions – as they set the rules for a free and equal association of self-ruling citizens – and of the procedural arrangements of modern representative orders. Equal human rights, enfranchisement, one man one vote, freedom of expression, rules for deliberation, voting, and fair bargaining, make up the normative core of modern representative democracies, and have left a strong and lasting imprint on the European integration process.

Having ones dignity protected requires the abolition of dominance through participation in a co-legislative procedure. Dignity and the moral package that goes with it is reflected in the clauses for inclusion and for equal-treatment that are entrenched in present-day political arrangements as well as visible in the contestation, critique and opposition to power structures. They are salient standards for critique and validation. These rights and rules are consensual principles protecting the internal dignity and external freedom of individuals. They are moral in nature and command the observance of all. The rules for inclusion and for equal treatment personify the principles of equal citizenship and membership in a body that inclusively and continuously engages in processes of collective self-determination – in processes of opinion and will formation. Only bodies that tie representatives into a structure of political accountability – of contestation and public deliberation – can claim to have institutionalised political equality and protected individuals' dignity.

The moral standard of having ones dignity respected is a higher-ranking principle that does not have the same sort of validity as the constitutional principles we live by; it is constitutive for the concept of basic individual human rights and for *political equality*. Generally, the power and agency of the state is needed for rights' protection. How close to statehood the EU needs to come, requires attention to the character and future of the states' system.

Conditional sovereignty

In the Westphalian order, states are sovereign with fixed territorial boundaries and are entitled to conduct their internal and external affairs autonomously, without external actors checking their protection of human rights. But, as seen, legal developments over the last century have been remarkable, and one of their main thrusts has been to protect human rights. Both persons and groups have become recognised as subjects of international law. There are no lawless areas left. The Westphalian condition of organised anarchy is replaced by *conditional* state sovereignty; conditional in compliance with *citizens' sovereignty*. The very concept of sovereignty has thus changed, from denoting the state's supreme legal authority to uphold the law within a certain territory and being independent from any external authority [25: 321], to one that subjects state power to higher-order principles. In principle, states enjoy the rights of political sovereignty and territorial integrity only as long as they are governed in a morally tolerable way. However, the duty to intervene or to help cannot fall on the international community as a whole as it does not possess *agency*.

Accordingly, there is 'a general moral argument for international government – at a minimum, for establishing and developing political institutions to prevent violence not only between but within states' [27: 458, 463]. But what could be the right form of such a government? While communitarians run the risk of seeing the nation state as the only possible form for a people's union, and thus of conceiving of the nation state as an end in itself, cosmopolitans run the opposite danger of glossing over all distinctions and differences. For the latters, borders have only a derived status, and no independent value: assignment of responsibilities follows from *the institutional division of labour*. Lower-level communities – local, national, and regional governments – are thus merely needed for functional and prudential reasons. In this perspective, the freedom and welfare of human beings will best be secured by

[10] It has both a religious/catholic origin and a secular/human one, see [34, 16].

organizing the human population into different societies, each with its own political institutions specialised in realizing the interests and rights of the citizens. For cosmopolitans and liberals, borders have no intrinsic value. In a rights-based (as well as in an instrumental) perspective, cosmopolitanism is seen as providing 'support for a multi-level system of governance in which supra-state authorities monitor the conduct of states (and powerful economic and social institutions) and seek to ensure their compliance with cosmopolitan ideals of justice' [4: 182].

However, democracy is a demand of dignity, as well as of justice. Democracy is an inalienable right which requires borders to be cashed in. The right to collective self-determination requires delimitations of territory, membership rights, institutions, and procedures. As integration is required by practical reason when power is wielded arbitrarily internationally, there is a call for democracy beyond the nation state. But for orders to be legitimate, democratic conditions pertaining to representation, voting, public debate and political competition must be met. They are required to meet the autonomy criterion, viz., that the citizens should be able to see themselves as authors of the law they are to abide by.

Europe is held up as a particularly relevant site for the emergence of cosmopolitanism as well as post-national democracy by many academics. [11] A multidisciplinary company 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*. According to official documents, cosmopolitanism is part of the self-identity of the EU as it places the individual at the core; and scholars increasingly recognise the EU as a part of, and as a vanguard for, an emerging democratic world order. But the cosmopolitan condition, which requires the constitutionalization of international law, cannot draw its legitimacy from the international law regime itself or from the putative validity of humanitarian norms. Human rights do not in themselves make up an actionable and meaningful social order [11]. The number and content of rights must be ascertained [18: 399], and they must be rooted in culture and practice. The right-bearing world citizens have not much in common except for their common humanity [21]. But the EU is, as we have seen, a heavily embedded rights-based polity and one with a distinct regional reach. It is embedded in a political culture and premised on a common constitutional complex; on the values and democratic practices in Europe. This normative infrastructure lends legitimacy to the proceedings and collective decision-making of the post-national Union and constitutes a vital part of the common self-understandings of the citizenry.

When embedded in such a legally regulated sphere, we could conceive of the state not as a dichotomous variable but in terms of degrees of stateness – on a continuum with the autarchic state and the world society as end points. Means of coercion for protecting rights and realizing collective goals would be shared between levels. Within such a framework, the EU could claim legitimacy for its decisions by reference to the legal form they are dressed in, rather than with reference to some form of collective identity and superiority.

A regional subset

The upshot is that organizations at the intermediate level come to the fore not merely as policy instruments following the institutional division of labour requested by cosmopolitanism but as vital means to realise the inalienable right to self-rule – to democracy. The EU is the most prominent example of such regional organizations – and is the only political organization beyond the nation state equipped with a democratic mandate and some capacity to act collectively. It performs some state functions and possesses some representative structures. An intermediate order which 'places the individual at the heart of its activities' can be conceived of as a *regional subset* of an emerging larger cosmopolitan order. In such a perspective, the borders of the EU could be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity and with regard to the support and further development of similar regional associations in the rest of the world—that is, with regard to the viability of regional cooperation such as the African Union, the post-Soviet states, Mercosur, the Association of South East Asian Nations (ASEAN), and the North American Free Trade Agreement (NAFTA). The borders of the EU could thus be drawn with regard to functional requirements both for itself and for other regions, all within the framework of a reformed global system.

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

[11] See e.g. [1, 3, 5].

yesterday's answers to yesterday's problems. It should moderate rather than replicate the state.

This model would conceive of the EU as a government based on differentiating state functions, downplaying the coercive elements and upgrading the normative-institutional elements. As such, it presents us with an organisational template that possesses a limited set of measures for ensuring implementation and compliance. An organisation properly set up according to these model tenets can accommodate a higher measure of territorial-functional differentiation than can a state-type entity. It does not presuppose the kind of 'homogeneity' or thick collective identity that is widely held to be needed for comprehensive resource allocation, redistribution and goal attainment. It is based on a division of labour between the levels, a sharing of sovereignty that relieves the central level of certain demanding decisions.

Conclusion

One may question the sustainability of this template when it comes to handling crises and hardships, but it is an answer to the quest for a correct institutionalizing of human rights under conditions of globalization. The EU can be conceived of as a polity in its own right based on an *authorised government*, which I depict as the political organization of society, viz., the institutional arrangement of the political unit. A non-state entity can make up a system of government in so far as it performs the functions of *sanctioned* jurisdictions. The EU is then not seen as *a federation of nation states*, but as a quasi-federation of states and citizens united under a common legal framework with a universalistic underpinning. The EU's commitment to basic human principles means that it has a communal vocation that is broader and more universal than that of a multinational federation.

References

1. Archibugi D (2008) The global commonwealth of citizens: towards cosmopolitan democracy. Princeton University Press, Princeton
2. Avbelj M, Komárek J (eds) (2012) Constitutional pluralism in the European Union and beyond. Hart Publishers, Oxford
3. Beck U, Grande E (2007) Cosmopolitan Europe. Polity Press, Cambridge
4. Caney S (2005) Justice beyond borders: a global political theory. Oxford University Press, Oxford
5. Delanty G, Rumford C (2005) Rethinking Europe: social theory and the implications of Europeanization. Routledge, London
6. Eriksen EO (2009) The unfinished democratization of Europe. Oxford University Press, Oxford
7. Eriksen EO (2014) The normativity of the European Union. Palgrave Macmillan, Basingstoke
8. Forst R (2011) The right to justification: elements of a constructivist theory of justice. Columbia University Press, New York
9. Fossum J.E, Menéndez AJ (2011) The constitution's gift: a constitutional theory for a democratic European Union. Rowman and Littlefield, London
10. Franzius C (2010) Europäisches Verfassungsrechtsdenken. Mohr Siebeck, Tübingen
11. Habermas J (1996) Between facts and norms: contributions to a discourse theory of law. MIT Press, Cambridge
12. Habermas J (2012) The crisis of the European Union in light of a constitutionalization of international law – and essay on the constitution for Europe. In: Habermas J (ed) The crisis of the European Union: a response. Polity Press, Cambridge
13. Habermas J (2012) The concept of human dignity and the realistic Utopia of human rights. In: Habermas J (ed) The crisis of the European Union: a response. Polity Press, Cambridge
14. Hoffman S (1966) Obstinate or Obsolete? The fate of the nation-state and the case of Western Europe. Daedealus 95(3):862–915
15. Jackson RH (2000) The global covenant: human conduct in a world of states. Oxford University Press, Oxford
16. Joas H (2011) Die Sakralität der Person. Eine neue Genealogie der Menschenrechte. Suhrkamp, Berlin
17. Kant I (1785/1996) Groundwork of the metaphysics of morals. In: Gregor M (ed) Practical philosophy. Cambridge, Cambridge University Press
18. Koskenniemi M (1991) The Future of Statehood. Harv Int Law J 32(2):397–410
19. Lefort C (1988) Democracy and political theory. Polity Press, Cambridge
20. Macedo S (2004) What self-governing peoples owe to one another: universalism, diversity, and the law of the Peoples. Fordham Law Rev 72(5):1721–1738
21. Maus I (2006) From nation-state to global state, or the decline of democracy. Constellations 13(4):465–484
22. Meyer J (2003) Kommentar zur Charta der Grundrechte der Europäischen Union. Nomos, Baden-Baden
23. Michelman FI (1997) How can the people ever make the laws? A critique of deliberative democracy. In: Bohman J, Regh W (eds) Deliberative democracy: essays on reason and politics. MIT Press, Cambridge
24. Mirandola P (2012) Oration on the dignity of man. A new translation and commentary, by Francesco Borghesi, Michael Papio, Massimo Riva. Cambridge University Press
25. Morgenthau HJ, Thompson KW (1993) Politics among nations: the struggle for power and peace. Mc-Graw-Hill, New York
26. Nagel T (2005) The problem of global justice. Philos Publ Aff 33(2): 113–147
27. Nardin T (2006) International political theory and the question of justice. Int Aff 82(3):449–465
28. Niederberger A (2009) Demokratie unter Bedingungen der Weltgesellschaft. Walter de Gruyter, Berlin
29. Niesen P, Herborth B (eds) (2007) Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik. Suhrkamp, Frankfurt
30. Peters A (2001) Elemente einer Theorie der Verfassung Europas. Duncker und Humblot, Berlin
31. Pettit P (2006) Democracy, national and international. Monist 89(2): 301–324
32. Rawls J (1999) The law of peoples: with 'the idea of public reason revisited'. Harvard University Press, Cambridge

33. Richardson H (2002) Democratic autonomy. Oxford University Press, Oxford
34. Rosen M (2012) Dignity: its history and meaning. Harvard University Press, Cambridge
35. Shapiro I (2012) On non-domination. Univ Tor Law J 62(3):293–336
36. Von Bogdandy A (2006) Constitutional principles. In: von Bogdandy A, Bast J (eds) Principles of European constitutional law. Hart Publishing, Oxford
37. Von Bogdandy A, Bast J (eds) (2006) Principles of European constitutional law. Oxford, Hart Publishing
38. Von Bogdandy A, Kottmann M, Antpöhler C, Dickschen J, Hentrei S, Smrkolj M (2012) Reverse Solange – protecting the essence of fundamental rights against EU Member states. Common Mark Law Rev 49(2):489–520
39. Weiler JHH (2001) Federalism without constitutionalism: Europe's Sonderweg. In: Nicolaïdis K, Howse R (eds) The federal vision. Oxford University Press, Oxford
40. Wenar L (2002) The legitimacy of peoples. In: De Greiff P, Cronin C (eds) Justice and transnational politics: essays on the moral and political challenges of globalization. MIT Press, Cambridge