Banishing dominance in Europe

The case for regional cosmopolitanism

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ABSTRACT

How is arbitrary rule – dominance – to be avoided when political differentiation is on the rise in the multilevel constellation that makes up the European Union? The EU is a power-wielding entity, that, due to its democratic deficits, is an instance of arbitrary rule, which differentiation only serves to exacerbate. This article discusses which political framework prevents dominance under conditions of asymmetric and complex interdependence, and economic integration in Europe. Under these conditions, the framework of international law is deficient, as the agreements with the associated non-members - the European Economic Area Agreement (EEA) and Switzerland - document. Here dominance appears to be self-incurred but nevertheless in breach with political freedom. Another is the framework suggested by Jürgen Habermas, of a *pouvoir constituant mixte*. Also, this framework raises the danger of arbitrary rule, as there is a risk that the autonomy of citizens would be pre-empted by the sovereignty of their states. The article holds the framework of a regional cosmopolitan federation - a rights-based polity with a distinct territorial reach - as more promising.

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INTRODUCTION

Brexit has been a shock, awakening us to the instability of the present European political system.[1] However, it has also awakened us to the depth of economic, legal and administrative integration that has been reached, as well as the multifaceted ways that European states are interrelated. Their sovereignty is bounded and their free range of action curtailed. For some - e.g., Brexiteers - the EU is illegitimate, and a source of *dominance*. Can political differentiation be a cure?

A differentiated EU is not new. It has, in fact, been the case for most of the European integration process. The EU consists of multiple overlapping groupings: not all countries are members of the euro or the border-free travel area. Small groups of countries can join forces in defence, or decide to pass a new law because of flexibility in the EU rulebook.[2] However, until recently, this type of differentiation was to be seen as only temporary, as membership in the Economic and Monetary Union (EMU) and Schengen attest to. Brexit may change this. It may contribute to the *formalising of European differentiation*. Because of it, a more differentiated European Union with permanent different political statuses is foreseen. This brings the problem of power and domination caused by asymmetric interdependence back in.

Today, more EU policies than ever are marked by concentric circles of integration and a lack of uniform application (De Witte et al., 2017). At first glance, one might view the political differentiation of the European Union as a means to end dominance. It signals the autonomy of its Member States, and the flexibility and dispersion of democratic control.

[1] A preliminary version of this article was read at the 2017 ECPR conference in Oslo. I am grateful for comments from the participants and in particular to Markus Patberg as well as from three anonymous reviewers. Some parts of the article draw on empirical material also discussed in Eriksen (2018, 2019). The article is part of the ARENA coordinated project "EU Differentiation, Dominance and Democracy (EU3D)", funded by the EU's Horizon 2020.

[2] "Coalitions of the willing" may join forces and work together in specific areas (European Commission, 2017).

Political differentiation could reduce the need to use veto-power and bargaining-muscles to protect national interests, and could prevent the formation of *intense and persistent minorities* (Christiano, 2010: 132; Scharpf, 2015). In 2012, Jean-Claude Piris, a former chief legal adviser to the Council of Ministers, wrote a book advocating a two-speed Europe. However, the distinguished European legal scholar professor Joseph H.H. Weiler, in the preface of the same book, wrote that "[…] the two-speed Europe solution is the refuge not only, like patriotism, of scoundrels […], but normatively and technically scrap[es] from the bottom of the barrel" (Weiler, 2012: ix). How can this be?

My claim is that, under conditions of economic integration and complex interdependence, political differentiation does not abolish dominance, but rather exacerbates it.[3] This is so, I submit, because some types of differentiation *ceteris paribus* affect the fundamental conditions of a self-ruling republic. This is in particular the case for those who seek access to the Single Market without being an EU member. They experience the exercise of *arbitrary power*, as they are obliged to follow laws the making of which they cannot influence. Under such conditions, often less by design than by default, political differentiation can undermine the fundamental conditions of democratic self-rule, and can affect the political status of citizens and hence their political autonomy. There are different models of differentiation, including the *à la carte*-model, multi-speed Europe, a Europe of concentric circles, and the model of enhanced cooperation. They share a minimum common denominator, namely, that within the scope of EU competences, not all Member States are subject to the same uniform EU rules (Avbelj, 2013: 193).

[3] Complex interdependence describes the multifaceted ways that patterns of interconnectedness and affectedness have developed all over Europe (see Keohane and Nye, 1977). The term economic integration goes further and describes not merely interconnected and aligned economies, but that the Single Market participants are required to adopt all relevant EU regulations and accept the jurisdiction of the Court of Justice of the European Union (CJEU).

In the EU, differentiation is also an effect of the de-constitutionalisation of the EU caused by the crisis arrangements of the Eurozone. Rather than following the formal procedures of EU treaty amendments, there was resort to international treaties when the policy terms for debtor states were set.[4] Policy fields were sectioned out of the EU's policy-making architecture, and the terms for insolvent states were dictated by the major powers. Germany was the dominant member of the creditor club. The crisis arrangements led to a sharp increase in authoritarian rule, to wit, emergency politics and dominance (Chalmers et al., 2016; White, 2015; Eriksen 2018).

The ideal of freedom puts governments under the burden of legitimation. They must be able to provide reasons for their use of coercive power, hence the call for *a public coercive framework* for the justification of political power. However, *which kind of framework is needed to banish dominance* beyond the nation state? In this article, I argue that, because the EU is more than an international organisation, the framework provided by international law does not suffice. Nor does *the split sovereignty* framework based upon the idea of a "*pouvoir constituant mixte*" that Jürgen Habermas has proposed. Moreover, given that the prospects for a European federal state are bleak, and that such a framework would not contribute to a rightful world order, in the ensuing analysis, I propose the framework of the EU as *a regional cosmopolitan polity* – a rights-based polity with a distinct territorial reach.

I commence by clarifying the concept of dominance. There is a need to go beyond Philip Pettit's theory of freedom as non-domination in order to grasp the basic problem of political differentiation. [5] A public coercive framework is required to banish dominance. There is need for *institutional provisions* that allow actors to co-determine their common

[4] European Financial Stability Facility Treaty, European Stability Mechanism Treaty, Treaty on Stability, Coordination and Governance,

[5] I use the term "domination" when referring specifically to Pettit's theory of "freedom as non-domination" and "dominance" for the more general notion of subjection and arbitrary rule.

action norms. In order to shed light on the problem of dominance brought about by political differentiation, I will briefly examine the situation of associated non-members, in particular Norway, a signatory to the European Economic Area Agreement (EEA), and Switzerland. Both these states have chosen to organise their relationship with the EU under international law, where the public framework is located at the national level. Thereafter, I discuss the limitations of the "*pouvoir constituant mixte*" model as a justificatory account for the EU. A constitution of Europe based upon "originally shared" popular sovereignty does not banish dominance because the sovereignty of citizens will continue to be pre-empted by the sovereignty of their states. Lastly, I discuss some advantages with the framework of a *regional cosmopolitan democratic polity*.

A PUBLIC COERCIVE FRAMEWORK

In a world in which the boundaries of nation states are crisscrossed by vast movements of people, goods, capital and cultures, and are increasingly contested from within and without, the question about the scope of democracy is at the forefront. But what is the defining criterion for claiming membership, and, hence, for demanding public justification of the coercive use of power? Generally, a criterion of boundary relates to being affected by coercive power.

Rule without justification

It takes democracy to cash in on the ideal of freedom, but who can claim membership? The problem with "the all-affected interests principle" is that it is hard to de-limit its scope of application, because of the indeterminacy of interests (Goodin, 2008: 136ff). Nancy Fraser suggests, instead, the "all subjected principle", as it is "the joint subjection to a structure of political rule that sets the ground rules that govern their interaction" (Fraser, 2010: 65). But

what if "the people", the *demos*, does not already exist or is up for grabs (see Dahl, 1989: 3)? While the all-affected principle is indeterminate, the all-subjected principle "takes the existence of a political unit for granted" (Näsström, 2011: 117; see also Cabrera, 2014: 226; Abizadeh, 2008). How then are we to establish those who are entitled to the public justification of the coercive use of power?

The concept of arbitrary rule, or dominance, offers a solution to the boundary problem. Affectedness is inescapable when dealing with democracy in unsettled orders, but it must be serious and significant (see Held, 2010: 304). Not all forms of inequality or affectedness are a problem of political injustice. Dominance is, I submit, a criterion for distinguishing those conditions that are deemed sufficient to trigger moral concerns from those that are not. It involves subjection, harms and humiliation related to forms of *exclusion* and *disenfranchisement.* Dominance is rule without justification and is in breach of the principle of *democratic autonomy.* This principle establishes the status of the citizen as a co-legislator, and requires symmetry between the addressees and the authors of the laws. Arbitrary rule is the case when this symmetry is diluted, and is an indicator of the need for democratic reform, for inclusion and enfranchisement.

Being subjected to the arbitrary wielding of power is dominance, and is the very essence of injustice (Shapiro, 2012), for the dominated find themselves at the mercy of others. Although often associated with hierarchies – as when states, in reducing the private abuse of *dominium*, interfere upon an arbitrary basis (*imperium*) – domination can also occur in networks or other less structured forms of governance that lack proper procedures of justification or participation (Pettit, 2010: 73-77).

Pettit understands "non-domination" as "the social status of being relatively proof against arbitrary interference by others, and of being able to enjoy a sense of security and standing among them" (Pettit, 1997: viii). According to this approach, a decision is arbitrary,

and a source of dominance, wherever or whenever it is chosen or rejected without reference to the interests or opinions of those affected. More precisely, domination is the *capacity* to interfere in the choice situation of others, without having to consider their avowable interests. It takes a non-discriminating - a non-dominating - state to register citizens' preferences, and hence to prevent domination among individuals. The condition of non-domination is that of "the free individual […] protected against the domination of others by the undominating and undominated state" (Pettit, 2010: 77). Provided it is subject to certain controls, such as checks and balances or non-majoritarian and contestatory institutions, which induce it to track the interests and opinions of citizens, the state's exercise of power is non-arbitrary, and therefore not a source of domination.

Democratic autonomy

The non-domination approach is an insufficient account, as freedom entails more than non-interference and respect for citizens' preferences. The wielding of legitimate authority as such implies some change in the normative situation or status of another - it involves interference and "the power to bind" (Raz, 1986: 24). This is not, by itself, dominance. All types of coercive interventions invade private freedoms, but, as long as adequate rights of political participation are in place, they do not denigrate the autonomy of individuals. Dominance only occurs when the power to change the normative situation of others is exercised arbitrarily; when rights and duties are decided in such a manner that the citizen cannot see them as the outcome of a legitimate process. The question of non-arbitrary rule is a question of the proper authorisation and execution of political power, not the abolition of power. Democratic autonomy entails not just respect for citizens' preferences, but also their revision. It implies self-rule in the form of *self-mastery*, as it is a matter of developing the capacity to put oneself under obligations (Richardson, 2002: 34). *Political autonomy* is constituted when citizens pull together, demand action and seek justification in relation to

what others can agree to. To be assigned the status of a legislator, a citizen is to be assigned the status of a person capable of acting on the common will: a person that is, "as part of a community, responsible *for* the law" (Forst, 2012: 134). Democratic autonomy implies the moral capacity to abide by the law and to take on obligations. It is a normative notion that relates to individuals' rights and obligations, whereas dominance is, as Richardson underscores, the capacity to "arbitrarily impos[e] duties on them" (Richardson, 2002: 34).

The question of freedom arises when there are changes in the choice situation, changes which affect what persons are permitted or required to do. Such changes may be required for protecting or amending rights, as well as for achieving ends. To do this in a freedom-protecting manner requires that laws be co-authored in a legally constituted, deliberative process of law-making. Only the involvement of the subjected parties (the citizens) in the legislative chain of power can establish the necessary conditions for non-arbitrary interpretation, application, and enforcement, of the rules. This is the Kantian constitutional mind-set of egalitarian democratic self-determination and self-legislation (Brunkhorst, 2014: 242). *A public coercive framework* with the separation of legislative, executive, and adjudicative functions is an enabling condition for democratic autonomy (Ripstein, 2009: 175). Each of these functions resolves the problem of arbitrary rule - of lawless interaction. Each represents a right that no private person can have. Together, these three public authorities establish the *institutional provisions* required for the legitimate forming of opinions and wills, and for the protection of basic rights.

Dominance is subjection to structures and acts that undermine the political status of citizens regardless of their consent. This structural definition of dominance moves beyond Pettit's theory. Whereas, for Pettit, a decision is arbitrary and a source of un-freedom whenever it is taken or rejected without reference to the interests or opinions of those affected, for Kantians, the freedom of individuals should be protected *regardless* of their

interests or opinions. In this latter perspective, non-arbitrary power is not foremost a matter of tracking the preferences of the affected, but rather a question of institutions securing the equal freedom of persons. Freedom can only be restricted for the sake of freedom itself, for freedom, according to Kant, is the capacity to make choices *without* deference to the opinions or wants of others, provided the choices are compatible with that of other people making free choices on the same terms (Kant, 1991[1797]: 30). Thus, freedom is not merely a question of non-intrusion, but is, more importantly, a question of political authorship.

Orders of differentiation

The democratic principle applies to the EU, not only because it is written into the Treaties, but because the EU is a power-wielding entity, which, due to its legitimacy deficits, is a dominating entity. This is even more so in a politically differentiated order, in which not all those subjected to it have the same rights and duties.

There are three orders of differentiation, according to Avbelj (2013). The first refers to regulations that are explicitly authorised in EU primary law and executed in the form of secondary EU law. The second refers to those involving more profound legal arrangements in the form of derogations from EU primary law. This category comprises the safeguard clauses, instances of various opt-outs and opt-ins, and other derogations in favour of a selected Member State.

However, only the third type of differentiation, which is more general, and is envisaged for a larger number of Member States in broader policy sectors, raises serious questions with regard to justice. There are several types of differentiation models that can be placed within this order, including the *à la carte* model, multi-speed Europe, the Europe of concentric circles, and the model of enhanced cooperation, which is entrenched in the Treaty of Lisbon. The *à la carte* model subjects Member States to a limited set of uniform legal

regulations, and gives states room to pursue policies independently; the other models, in contrast, have a broader scope of uniform rules. The multi-speed and concentric circles models differentiate between states, while enhanced cooperation differs according to policy sectors. The concentric circles model is permanent, while the multi-speed and the enhanced cooperation models are temporary solutions. These models, including the idea of a Core Europe with a periphery of non-core members, involve degrees of exclusion and disenfranchisement, and represent instances of arbitrary rule.

The EU's internal differentiation is reflected in its relations with its non-members, ranging from the European Neighbourhood Policy to Turkey's Customs Union, Switzerland's bilateral approach, and the multilateral EEA Agreement for Norway, Iceland, and Lichtenstein. The EEA Agreement represents an extreme form of political differentiation.

VOLUNTARY SUBJECTION

Some states gain access to the EU through international agreements based upon a set of rules which regulates affairs of mutual interest. It serves as a framework for the practice of stable and organised relations. International law is prototypically founded on the principle of co-existence and non-interference among sovereign states; it is premised on the rulers' external sovereignty and does not aim at banishing dominance within states (see Morgenthau, 1993). The public coercive framework for democratic self-determination and self-legislation is located at the national level. However, political differentiation under conditions of complex and asymmetric interdependence and economic integration does not leave the democratic chain of rule intact. In Europe, the Single Market cooperation is not merely *pareto* optimal, it also has distributive effects. The EU's laws enjoy *direct effect and supremacy*, and the principle of legal homogeneity trumps sovereignty.

The force of legal homogeneity

The EEA Agreement, which provides access to the EU's Single Market for Norway, Iceland, and Liechtenstein, is an agreement under international law.[6] It regulates access to the Single Market for all goods, capital, services, and people, although Norwegian fisheries and agriculture are exempted. The core of the Agreement lies in the four freedoms of EU law, and the regulation of competition, public procurement and government subsidies. To ensure non-discrimination and legal harmonisation, the agreement has its own supranational court (The EFTA Court), and its own supranational surveillance body (the European Surveillance Authority). Integrated markets require consistent legal frameworks at the EU level, and national regulators to follow suit. Regulations and directives must be uniform and have the same effect for all EU Member States as well as for the EEA countries; hence, EU law must have the upper hand. Homogeneity is dynamic, as one must be prepared to change and update regulations whenever necessary, and this homogeneity requirement can be found not only in the Preamble of the EEA Agreement, but is also an "unwritten rule" governing the Schengen Agreement and other agreements with associated non-members. Thus, the EEA countries are obliged to adopt EU regulations and to interpret, uphold, and live by them, just as EU Member States do. The legal norms of EEA countries are excluded as a legal basis for interpreting EU market rules (see Fredriksen, 2015).

Switzerland, which rejected membership in the EEA Agreement, has concluded 120 free trade agreements with the EU.[7] In the unique Swiss form of sectorial bilateralism, there is no set of supranational arrangements to ensure coherence; the Swiss affiliation is less hierarchical compared to the EEA Agreement. However, sectorial bilateralism comes at the cost of greater uncertainty. In contrast to the dynamic EEA Agreement, the Swiss

[6] This section draws on material from Eriksen 2015.

[7] This is in addition to its 1972 free trade agreement with the European Economic Community (EEC).

arrangement is a static system, thereby allowing, in principle, the Swiss authorities to retain more autonomy and control than the EEA countries enjoy. However, in a comprehensive study, Vahl and Grolimund (2006: 108) nonetheless argue that "the relationship between Switzerland and the EU is highly dynamic". Since the late 1980s, the doctrine of *autonomer Nachvollzug* (autonomous adaptation) has been in place, ensuring voluntary alignment with the EU. Despite important formal distinctions, the practical implications are not very different from the EEA model (Lavenex and Schwok, 2015). As long as the homogeneity principle applies, adaptation takes place on the EU's terms; hence, there is dominance.

Vulnerability and subjectedness

At first, it seems strange to describe the associated non-members as being dominated by the EU. In fact, they can be portrayed as free-riders on European public goods, and as creating negative externalities for the Community. Moreover, these countries are stable, democratic and well-off. They are not generally seen as dominated, quite the contrary. Other states involved in partnership arrangements, for example, Ukraine and Turkey, are in a more vulnerable position, and are also affected by, and indeed dependent on, the EU. However, when the affected countries are not members of the Single Market, of the Eurozone or of Schengen, they are not subjected to EU's regulative framework.

In general, to be dominated entails some real element of subordination that either affects core values and life chances, or deprives persons of their power of free choice. People are more vulnerable to dominance in settings in which their basic interests are at stake. Moreover, this subjectedness must be one that cannot be evaded, countervailed, mutualised or controlled. Sometimes, actors have the possibility to "exit", counter or collectivise risk, and they may also create rules, laws, and institutions that they recognise as fair ways of managing affectedness and vulnerability. None of these things are able to guarantee the full removal of

risk and vulnerability, but they nonetheless warrant the possibility that people are not exposed to the decisions of others in an arbitrary manner.

Partnership agreements, as well as international treaties, are contractual arrangements that do not principally affect the status of the signatories, nor do they affect the very political choice situation of the members. In contrast to such arrangements, the associated non-members have voluntarily, through referenda and parliamentary decisions, subjected themselves to the EU by seeking access to the Single Market and committing themselves to adopting all the relevant EU regulations and accepting the jurisdiction of the Court of Justice of the European Union (CJEU).[8] Thus, these countries are dominated by the EU because they prioritise access to the European common goods while not being EU members. They manage their relations with the EU through a contractual framework under international law, a framework that is based upon mutual advantage, the power of interest and the formal equality between the contracting states. In practice, however, the parties to the EEA Agreement are very unequal. The EEA Agreement is a contract between very different parties: a Union with 500 million inhabitants on the one hand, and certain very small countries that are dependent on the EU for economic reasons on the other. The EEA members are unable to back their claims towards the Community with credible threats – external sanctions or reciprocity – whereas the EU could unilaterally destroy the whole arrangement with negligible costs. The associated non-members are free to annul their arrangements with the EU, but have chosen not to face the costs of such an act. Exit options are not perceived as realistic.

The EEA agreement is an *asymmetric power relationship*. The associated non-members are dominated because there is no parity of power to render the use of threats and

[8] About 75 per cent of EU laws and regulations, none of which Norwegians have an opportunity to influence, apply to Norway. Since 1994, Norway has adopted 11,013 EU Directives, and rejected none (Norwegian Ministry of Foreign Affairs, 2016: 9).

counter-measures credible under international law, nor can they participate in joint decision-making to wield influence over, or demand justifications under, EU law. The arrangements curtail the sovereignty of their citizens, and infringe upon their right to self-determination. They arbitrarily change the choice situation of the citizens.

Unintended hegemony

The EU itself is an experiment in the domestication of international relations - in establishing a condition of "undominating and undominated" states in Europe. It is an experiment in curbing dominance among states. Differentiated integration, however, which is a pragmatic response to political challenges of a fundamental character, may itself reintroduce dominance. The associated non-members' self-subservience has unintentionally turned the EU into a *hegemon*, something the EU was never intended to become. The EU has invited the associated non-members to become members.

The development of an internally differentiated political order is a response to the difficulties of resolving problems within the common coercive framework, through the ordinary legislative procedure, which involves the European Parliament and the Council. In the literature, the causes of differentiation are located in Euro-scepticism and/or fear of popular resistance to supranational rule (Schimmelfennig and Winzen, 2016: 355). Prototypically, dominance is driven by necessity and functional need. But, for the associated non-members, their own choices have caused these predicaments. Dominance is an effect of the exercise of the right to self-determination. They have brought arbitrary rule upon themselves by prioritising access to the Single Market over democratic autonomy – to live by self-determined laws. This is self-inflicted harm, self-inflicted subservience, in breach of the Kantian approach, in which the means do not justify the ends, and freedom can only be restricted for the sake of freedom itself. The associated non-members have restricted their political freedom for economic reasons. This "violates Kant's central tenet that right must

never bend its knee before expediency by elevating considerations of advantage over the democratic order, which the idea of the original contract demands as a matter of right" (Weinrib, 2019: 16). Autonomy is premised on a right *not* to be dominated, which corresponds to a duty not to give it away. A person may be subjected or dominated irrespective of whether he or she has consented to it.[9] Dominance or subjection is the effect, regardless of how voluntary or beneficial the arrangement may be. One may also ask whether the EU is well advised to establish arrangements that transform it into a hegemon.

Under conditions of complex and asymmetric interdependence, political differentiation based upon international law obstructs collective action and undermines the idea of a political community organised so that citizens can be seen to act recursively upon themselves. Under conditions of complex interdependence, economic integration and power imbalances, the framework of international relations does not fare well. As *institutional provisions* that allow actors to co-determine their common action norms are absent, this framework premised on international law cannot prevent dominance.

A FEDERATION OF NATION STATES

Would the framework of confederations, of federal states, or that of cosmopolitanism ensure "*unity in diversity*" without arbitrary rule?

Why not a federal state?

On the one hand, the EU, unlike an international organisation, carries out its affairs not through diplomacy and crude bargaining, but through a set of institutions and procedures which claim primacy over national ones within the areas of competence. By this, the most

[9] Note that even a happy slave is not free. To will your own un-freedom is "irrational".

central element of international law, and the defining characteristic of international organisations - to wit, that of exclusive state responsibility - has been surmounted. The EU is beyond international law's self-help system with its tit-for-tat logic of reciprocity and countermeasures. The European states are not allowed to sanction European norm-breakers or the violation of contracts themselves, but must, instead, refer them to the CJEU.[10] The EU, which itself is based upon Treaties that function as a proxy for a constitution, wields power over its constituent parties. The Treaties have attained the function of a superior legal structure, which establishes both a unitary European citizenry, distinct from national ones, and a set of autonomous European bodies. The use of qualified-majority voting in the Council has eroded the ability of individual countries to postpone new legislation. Thus, they have accepted to be outvoted. Because of these features, the EU should not be seen as merely an intergovernmental organisation.

However, the EU is too complex and heterogeneous to fit the template of a federal state. The conventional shape of a federal community is the democratic constitutional state, based upon territorial and functional control, in possession of its own coercive means, a single "*pouvoir constituant*", and proper chains of representation. It is *a union of citizens* under coercive laws; it is based upon an institutional arrangement akin to that of a sovereign unitary state, albeit more complex. Federalism depicts a democratic system of government in which sovereignty is constitutionally divided between the central governing authority and the component political units (such as states or provinces) (see Fossum and Jachtenfuchs, 2017). The very structure of federations is made up of arrangements for protecting minorities and

[10] '[T]he most central legal artefact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its concomitant principles of reciprocity and countermeasures', are removed from the Community legal order (Weiler, 1991: 2422).

nationalities, through competence specification for constituencies, de-centralised self-rule, voting weights, and so on. There are majoritarian constraints through bicameralism, supermajority requirements, the separation of powers, and judicial review. The federal state establishes a public coercive framework capable of tracking the interests, views, and wills of the citizens, and of ensuring equal political rights. However, it presupposes a *demos*.

> "[T]he institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos,' a single *pouvoir constituant* made up of citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted." (Weiler, 2003: 8).

The requirement of a "constitutional *demos*" in the form of a unified *pouvoir constituant* is hard to bring to bear on the EU. Moreover, the asymmetrical size and powers of the EU's constituent Member States make it difficult to entrench the formal equality between the states as one representative principle (in addition to that of citizens). There are huge discrepancies in the size of the Member States (from Germany to Malta), and various levels (community, Member States, sub-national units) as well as various dimensions (territorial and "functional") of policy-making. The Euro-polity is unique in the sense that it is a complex entity containing different types of political entities within its own organisation with different systems of authorisation and accountability. It is made up of federal, *quasi*-federal and unitary states, and the EU's regions vary greatly.

Furthermore, the EU does not have the competence to increase its own competence (*Kompetenz-Kompetenz*). The EU does not possess a monopoly on violence and tax. As it has no treasury, no army, no prison, and no intelligence service, it lacks the defining

characteristics of a state. Moreover, there are, as I will return to, normative reasons as to why the EU should not develop into a state.

However, to conceive of the EU as a federation of nation states is also problematical. Such a federation, or *Bund*, encounters the problems that the League of Nations faced, that of legitimacy, and, hence of instability. How can a multilateral federation, one that is not integrated by a covenant with *one governing head representing the citizens* (as in federal states), be legitimate? For a power-wielding entity like the EU, which claims supremacy and direct effect for its legal acts and has different mechanisms to ensure compliance, the first principle of justice requires an agreement on its *constitutional essentials*, one which is acceptable from all the subjected parties' points of view. To speak with Rawls (1993), what is required is the "consent of the governed" on the "higher" ranking law and the institutional framework – that is, the constitutional essentials and the "basic structure". How can a coercive political order, one which does not warrant the equal freedom of all parties, be stable?

Pouvoir constituant mixte

Jürgen Habermas defends the EU as *a federation of nation states*. Indeed, it is his preferred notion of the multilevel constellation that makes up the EU.[11] This is surprising, given his critique of Kant's idea of a federation under international law. Kant opts for "the cosmopolitan community" as a federation of states, not as world citizens, because a world state raises the spectre of arbitrariness. "I(i)t may lead to fearful despotism", he states, and adds that this "distress must force men to form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful federation under a commonly accepted international right" (Kant, 1991[1792]: 90).

[11] See Habermas (2000, 2001, 2012, 2015a,b, 2017).

Kant's conception is inconsistent in that he derives every legal order, and not just that within the state, from the original *right to freedom* that attaches to every person *qua* human being. "But if Kant holds that this guarantee of freedom […] is the essential purpose of perpetual peace […] then he must not allow the autonomy of the citizen to be pre-empted even by the sovereignty of their states" (Habermas, 1998: 180-81). In an international organisation as well as in a confederation, the constituent subject is the state, not the citizen. International relations, as a discipline, is premised on the assumption that it is the states and their bargaining power that decide which norm is to prevail – not the autonomous will of the citizens.

In 2012, Habermas suggested a new model as a justificatory account of the EU, which, in fact, re-iterates Kant's worries about world despotic power. According to this model, the EU's democratic legitimacy stems from a dual subject: the community of European citizens on the one hand, and the communities of nation state citizens on the other. Habermas' notion of *pouvoir constituant mixte*, takes it cues from Anne Peters' work on the EU's dual constituent power (Peters, 2001). However, Habermas' model does not support the thesis that there is a deceptive opposition between popular sovereignty and state sovereignty in the EU's constitutional order, as Peters once alleged (see Peters, 2001: 391; Patberg, 2017a: 166). Rather, what he has in mind is a "popular sovereignty split at the root", warranting that the individual plays a role both at the Member State level and at EU level (Habermas, 2015: 554).[12] The stateless euro polity – based upon two constituent subjects, the citizens and the peoples - represents a new stage in the process of the constitutionalisation of international law without abolishing the achievements of the nation state.

[12] Habermas draws on the works of von Bogdandy (2006); von Bogdandy and Bast (2006); and Franzius (2010); see aslo Schönberger (2004).

According to Habermas (2012), the EU's basic "constitutional" order has brought about two major innovations in the process of pacifying the state of nature between states: first, the 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 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.[13]

The question is, however, whether Habermas' proposal of a double sovereign of European citizens and peoples can work as the legitimation basis of an entity which is not a state, but more than an international organisation.[14] The question is whether this framework prevents dominance under conditions of complex interdependence and economic integration.

Autonomy and co-originality

Habermas' proposal faces a problem, as the sovereignty of citizens cannot be divided or shared with another sovereign subject without losses. A collective subject such as "a people" or a state should not be conceived of in terms of popular sovereignty. The latter refers to the rights of the citizens to participate on an equal basis in collective opinion- and will-formation processes, which require autonomy and the absence of the necessity to act. State sovereignty, for its part, refers to the rights conferred to states by international law, and concerns the conditions for external action. Putting those two sovereignties on a par in a system of constitution-making prompts the following question: How can the autonomy of the citizens

[13] Cf., Arts. 9 to 12 and 19(2) in the Treaty on European Union(TEU), and compare with Peters (2001). See further von Bogdandy et al. (2012: 497).

[14] The many merits of this proposal are underscored by Niesen (2017); Patberg (2013, 2017a, 2017b); Günther (2017) and also by Rasmussen (2014), who raises the question of implementation. Scharpf (2015), raises concerns about socio-economic justice. Patberg (2017c), questions whether there must in fact be a concept of constituent power in Habermas' original theory of constitution-making. However, with the exception of Scharpf, these commentators pay little attention to the nature of the "beast", the actual reach and depth of European integration.

be secured if there is also the autonomy of a collective (macro) subject – the state – to be safeguarded?

Habermas' thought experiment is a construction that devalues the democratic principle of the self-rule of citizens. When the autonomy principle - that citizens should only obey laws that they have also been the co-authors of - is discounted and weighed against another principle, that of state sovereignty, there is a problem. There can be a pooling of state sovereignty, but not a disaggregation of political subject-hood - of popular sovereignty - which then can be shared between two constitutional subjects (Eriksen 2014:92). The model of "originally shared" popular sovereignty raises the spectre of dominance - of subjection to alien rule. There is a risk that the sovereignty of citizens would be pre-empted by the sovereignty of their states. Minority groups as well as Member States premised on collective rights may need protection from hierarchical intrusion – and modern constitutions and federal orders are set up precisely to accommodate such concerns - "[…] but do not in themselves justify claims to the comprehensive exercise of political autonomy" (Niesen, 2017: 188).

Moreover, the very concept of constituent power is problematic, as it is pinned on the idea of a pre-legal or pre-political community of specific values and affiliations. It describes the uninhibited freedom of the peoples in the making and amending of the constitution. The concept makes a conceptual link with popular sovereignty. It makes it clear that the power to make the law is with the people. But who, precisely, is the people? Where can "the people" be observed? And how can we *know* the popular will? In liberal democracies, the law-making power is with the citizens, *not* the people as a macro-subject.

Habermas' (1996) own theory of constitution-making and his co-originality thesis of rule of law and democracy is an antidote to essentialist, extra-legal claims. The co-originality thesis conceives of individual freedom, which is guaranteed by human rights, as both a condition for, and a result of, the legislation process. Here, legal norms are not natural in

character, but artificial; they yield reflexive action norms. "Hence the principle of democracy must not only establish a procedure of legitimate lawmaking, it must also *steer the production of the legal medium itself*" (Habermas, 1996: 111; see also Günther, 2017).

Habermas (1996) re-constructs the entire system of rights - the democratic constitution - from procedural presuppositions of the law-making process. He derives the immanent principles of higher law-making from the illocutionary binding force of communication oriented towards understanding. When citizens will regulate their living together - solve problems and resolve conflicts - with the means of positive law, they are, on the pain of performative contraction, compelled to give themselves rights (and hence duties), which terminate in a binding constitution. In the democratic law-making process, parties only rely on the process itself and on the presuppositions of understanding-oriented communication about symmetry, equally, inclusiveness, *etc*. The system of rights is the outcome of a horizontal association of citizens mutually according rights to one another and recognising one another as equals (Habermas, 1996: 453).

As long as jointly affected actors intend to solve their common problems peacefully, they will have to make use of a reciprocal process of reasoning to make and institute an inclusive constitution. In this model of constitution-making, "constituent power" cannot claim extra-legal validity, as the people itself has only come about upon the basis of basic law.[15] It is the law that assigns citizenship to the inhabitants of the territory, and concomitantly the right to assemble, to speak, to represent, and to decide.

The concept of constituent power thus meshes uneasily with Habermas' own theory that conceives of constitutional politics as a dynamic, possibly self-correcting, historical learning process. It is a continuing, open-ended project in which the contributions of both the

[15] See Urbinati (2006: 147), for constituent power as a conservative, pre-modern concept. See also Patberg (2017c: 52).

present and the future generations remain as important as those of the constitutional framers (Habermas, 2001). Habermas' "theory arguably leaves little room for a neat delineation of constituent from constituted powers" (Scheuerman, 2019: 16).

Justifying the status quo

Habermas' proposal of a double sovereign of European *citizens* and *peoples* calls for reform of the EU in order to abolish its well-known democratic deficits.[16] It does not render the form of political differentiation that the associated non-members experience legitimate. Neither the states nor their citizens, who are subjected to EU regulations, are represented in the EU's decision-making bodies. Yet, this proposal would probably make the differentiation between Core Europe and the periphery of hesitant Member States, which can join the core at any time, defensible. This would entail arbitrary rule, albeit only temporarily, in the advent of future membership (Habermas, 2016; Eriksen 2019: 219ff).

The crisis-management regime of the Eurozone attests to a profound need for EU reform. Does Habermas' proposal allow for the necessary change? As already mentioned, the euro-rescuing regime was created by sidestepping the democratic law of the EU, and hence the EP. It entailed resorting to international agreements between states and the opaque European Council. The euro-rescuing regime initiated by the European Central Bank, the Commission and the International Monetary Fund caused dominance. The debtor states were compelled to accept conditions imposed by the financial assistance programmes because of their unbalanced budgets. These troubled states faced a "take-it-or-leave-it" situation established by European heads of state and governments: "the present euro-rescuing regime is institutionally entrenched as an extremely asymmetric intergovernmental negotiation system in which debtor governments have practically no bargaining power" (Scharpf, 2014: 11). In

[16] See Habermas (2015b) and Patberg (2017b) on the need for a democratic upgrade of the EU in the form of a stronger role for the EP.

this regime, loans and credit are conditional on reforms that are not initiated by citizens' representatives or justified to them. Thus, European citizens were excluded and disenfranchised.

The required democratic reform would entail curtailing the power of the states, and hence of the European Council. However, the model of "originally shared" popular sovereignty gives states veto power, as it precludes the possibility of supreme constitutional authority at the European level (Habermas, 2012: 39). It does not allow for competence-competence and will prevent profound EU reform. One may also wonder how this model fits with the actual workings of the Union, where there is direct effect and the primacy of EU law. When the CJEU has the authoritative interpretation of European law, it also in reality has the power to legislate (Scharpf, 2006: 852). The CJEU is famous for its judicial activism and, as I return to, it has final arbitrator power when EU law is applied. In fact, the EU is more than what the mixed sovereignty model provides a justificatory account of.

Including the peoples organised as states, as constituent powers of the EU, runs the risk of pre-empting democracy and preventing necessary reform. Notwithstanding the democratisation of modern states, they are structurally poised to forge and carry out the political will of the constituency. They are premised on external action as a prerogative of the executive, and should not be given a constituent status. Habermas himself, who tries to counter criticism on this point by seeing the democratic states as a "distributive totality", concedes that, with this construction, an alien element is introduced in the shape of collective rights (Habermas, 2017: 176).

Why this concession to the authority of the peoples? Habermas thinks *the peoples* should be protected in the EU in order to ensure that what has been achieved is not lost. The modern nation state has succeeded in integrating large populations and ensuring large-scale democracy, welfare and solidarity at an unprecedented level. The results of their past

struggles should be preserved, even though it means democratic losses: "[T]he constituting authority, in founding a supranational polity, sacrifices part of its sovereignty in order to conserve the revolutionary constitutional achievements of the past" (Habermas, 2015b: 554).

The split sovereignty model prioritises the protectionist over the enabling function of the constitution, and reflects the fear of supranational encroachment. This proposal not only reifies the state and leaves the nation states unaltered, it also falls prey to the danger of justifying the status quo, namely, an incoherent political and legal system. The idea of two constitution-making subjects makes the EU shaky with regard to foundational principles. This construction would not be able to banish dominance, given the purported ability of the EU to affect rights and duties.

The constituting subjects of treaties are states, and the constituting subjects of constitutions are individuals. Both lines of authority have but one single origin: the citizen as member of the Union and of one or more Member States. Although the Treaties speak of *the peoples* of the Member States and of the *citizens* of the Union, at the foundational level, there would be no competition between the Member States and the EU. The basic unit for which both levels can claim legitimacy is the individual, his or her dignity and autonomy. There is, and can only be, one "constituting" subject even in a multilevel configuration such as the EU. Could, then, the cosmopolitan approach, which locates the public coercive framework at the supranational level, offer a justificatory account of the EU that avoids the problem of dominance?

A REGIONAL COSMOPOLITAN POLITY

As an alternative to both the frameworks of the federal state and the split sovereignty model, I suggest one that is based upon an embedded rights-based polity with a distinct regional

reach. Only the rights of the individual, and the legal procedure and discipline that go with it, can give unity and coherence to EU law in the multilevel constellation.

Constitutionalising international law

Law no longer comes only in "state sized bites" (Dworkin, 2013). The tradition of quoting international legal sources in national court rulings allows norms that have not been explicitly accepted by the citizens of a state to become part of *de lege lata*. The question of cosmopolitan democracy is therefore a question both of de-centralising *and* centralising political power (Held, 2010: 305). Today, cosmopolitan democracy is a question about dispersing political authority over nested territorial units, and should therefore be thought of in a multilevel context.

All cosmopolitan positions share the following three basic features:

- individualism: the ultimate units of concern are persons;
- universality: the status of ultimate unit of concern attaches to every living human being equally;
- generality: this special status has global force (Pogge, 2010: 114).

In this perspective, supranational institutions are important, as: "by design they are generally the ones best able to:

1. reliably provide comprehensive rights coverage for individuals, and
2. routinely obtain compliance from individuals with duties to contribute to rights protections and to avoid violating rights" (Cabrera, 2014: 235).

However, supranational institutions cannot be constructed at will. Cosmopolitanism, premised on individual autonomy, on equal worth and dignity, appeals to us as members of

humanity, but faces the problem of moralisation and the overburdening of politics and risk bypassing: "[...] the major problem of how to tame, channel and civilize political power in legal terms even beyond the empire or the modern nation-state" (Habermas, 2014: 5). Hence, cosmopolitanism should be linked to the ongoing process of constitutionalising international law. From this vantage point, the political coercive framework of federations, which come with basic rights protection, is tailored to avoid the danger of both minority and majority tyranny. It is also a solution to the problem of political legitimation in cosmopolitanism.

The cosmopolitan condition 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 a meaningful social order. The number and content of rights must be ascertained, and they must be rooted in culture and practice. The rights-bearing world citizens do not have much in common except for their common humanity. Moreover, the idea that there already exists a constitution at the international level, for example, in the form of the UN Charter, is dangerous. It gives the false impression that the power of the state has already become a servant of international law, and hence it runs the risk of "dress[ing] up strategic power-plays […] in a universalistic garb" (Cohen, 2004: 10).

There is, nonetheless, an ongoing constitutionalisation process of international law which underscores that law, in general, is founded upon human rights; it privileges individuals as the bearers of rights. All modern legal orders are individualistic, and, in pluralistic contexts, the liberal principle of *respect for persons* is "what impels us to look for a common ground at all" (Larmore, 1999: 608; see also Beitz, 1989: 218). In line with this, the cosmopolitan principle states that all persons have a right to autonomy. However, the principle must be embedded in law and in the proper contexts of rights specification and legitimation to make it bankable. Cosmopolitanism must, then, be of a multilevel, federal kind (see Benhabib, 2011: l31, 138ff; 2012).

As mentioned, federal constitutions offer sub-unit constituencies a final say over consigned issues and special voting weights for smaller units. The federalist template would thus handle the danger of persistent and intense minorities that Thomas Christiano (2010) sees involved in supranational democracy based upon majority vote. "The federal principle of self-rule and shared rule acknowledges the importance of non-imposition on fundamental matters by a simple electoral majority" (Cohen, 2012: 99).

In federations, the power to govern is divided and shared between national and provincial/state governments within a unified order premised on one source of legitimation. Federalism is a system of rule and rights' protection in which the members are integrated by a covenant with *one governing head representing the citizens*. The individual foundation of federations, which reflects the modern constitutional basic norm of dignity-protecting rights, does not gloss over differences and particular identities. Instead, it reflects *the division of moral labour*, namely, that constitutions protect human rights through higher-ranking law, as well as regional and "national" constituencies with a consigned right to self-determination. A super- or mega-state is not what is foreshadowed by the federal framework, but rather a legal and political structure that is de-limited in order to protect the integrity and equality of all the parties, while being equipped to attain collective goals.

One may conceive of a multilevel world order from the vantage point of the universalisation of individual rights. This is so because nation states, based upon shared sentiments and attachment, are also, thanks, in particular, to the incorporation of human rights clauses into their constitutions, linked to cognitive-universalist features, which are shared by international and supranational political organisations. The universalist core of the constitutional state corresponds to the normative infrastructure of the EU as a regional power (basic rights, rule of law, democracy), as well as to a world organisation limited to security issues, to upholding international peace and the protection of human rights. In this model, the

individual constitutes the unit of ultimate moral concern; the individuals as national, EU and world citizens alone are the subjects of legitimation. The chain of legitimacy would, with proper communication, representation and election systems in place, stretch from national states *via* regional regimes, such as the EU, to a world organisation – with two assemblies comprising representatives of the citizens and of the states.

The fusion of orders

Europe is held up, by many, as a particularly relevant site for the emergence of cosmopolitanism, as well as of supranational democracy.[17] 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*. They recognise the EU as a part of, and as a vanguard for, an emerging democratic world order. Since its inception, the EU has proclaimed an ambition to promote justice at the global level (Sjursen, 2018). According to official documents, cosmopolitanism is part of the self-identity of the EU, and dignity figures prominently in EU Treaties, for example, in Article 2 of the Lisbon Treaty, and the EU Charter of Fundamental Rights (Official Journal of the European Union, 2012a, 2012b). The latter places dignity-protecting human rights as core legitimating principles.

A European subset of a rightful world order counters the two main worries about cosmopolitanism, to wit, the lack of *legal constraint* and the lack of *identification*. With regard to lack of constraint, there is the worry that a world state would lack any peer to relate to and hence be an unconstrained sovereign (Scheuerman, 2009). However, a regional cosmopolitan federation would not face this problem. The putative democratic system of law-making and norm interpretation at the European level, constrained by the power of the

[17] See e.g. Archibugi (1998, 2008), Beck and Grande (2007), Habermas (2003), Held (2010), Delanty and Rumford (2005), Eriksen 2006, 2009, Held (1995), and Kamminga (2017).

Member States and the UN, would prevent such a usurpation of power. This system warrants that the EU does not become an unchecked entity – one that runs the risk of being *a world despotic Leviathan*. The EU does not represent a constitutionalisation of already constitutionalised orders – *an imperio in imperium* – but a fusion of orders, in which different levels have a share in decision-making power, and whose legal structure prevents its self-empowerment.

With regard to lack of identification, in other words unrooted individualism,[18] the EU is a heavily embedded rights-based polity with a distinct regional reach. It is embedded in a shared political culture and premised on a common constitutional complex: on the values and democratic practices of the Member States. This normative infrastructure allegedly lends legitimacy both to the proceedings and to the collective decision-making of the transnational Union.[19] But how can it be effective when it does not keep the monopoly of power in reserve?

Compliance and applicative supremacy

How is compliance to be ensured and conflicts over power prevented when 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? Here, we may draw on an interpretation of the public law of the European legal area.

Due to the pooled sovereignty of states and the common constitutional traditions of European states, the question is not which level possesses the final decision-making authority, but rather whether the actual ruling complies with the law, whether the common legal norms are applied in a correct, impartial manner. It is only in the applicative sense that

[18] See Hegel (1967[1821]: 134) criticising Kant's formalism in conceiving of cosmopolitan rights, and see Sandel (1982) on liberalism's " unencumbered self".

[19] In fact, non-compliance is seldom and not very serious. The compliance record in Europe is impressive.

the EU enjoys primacy, but not when it comes to validity. Community law leaves "inconsistent national law valid but unapplied" (von Bogdandy, 2006: 14).

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 to decide who has the competence does not need to be settled, because to be subordinate to European common supranational law is not to be domineered by an alien power. Rather, enabling and constraining laws are co-authored by the members. Joint European rule entails the capacity to co-determine the exercise of authority and not the final power of arbitration. Compliance is, however, a condition for justice; this is why European law must have direct effect and rank higher than national law whenever there is a conflict of application. Supremacy, in this reading, can be seen as *a collision norm*, which says that European law should prevail whenever there is conflict with national law.

> "Community law must prevail insofar, but only insofar, as such primacy is necessary to organize the coexistence of national legal orders effectively; such primacy is not unconditional and must indeed be graduated by reference to the 'regulatory interest'" (Fossum and Menéndez, 2011: 74).

When there are conflicts of law, what could form the basis for establishing supremacy as a collision norm, if not the protection of human rights? Along these lines, Armin von Bogdandy et al. (2012) suggests the *reversed Solange procedure* aimed at protecting the fundamental rights against EU Member States.[20] Any Member State's violation of human rights is infringing the "substance of Union Citizenship". Upon the basis of European

[20] 'Solange' refers to The German Constitutional Court's position of not striking down EU legislation as long as it does not violate basic rights.

citizenship and the adopted European Charter of Fundamental Rights, which apply only when the Member States are implementing Union Law, "*reversed Solange*" holds that "[M]ember 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" (von Bogdandy et al., 2012: 491).

Embedded cosmopolitanism

The EU is not a state, but an emergent powerful federation. How close to statehood the EU will come, depends on the character and future of the state system. Under international law - in the Westphalian order - states are sovereign with fixed territorial boundaries, and are entitled to conduct their internal and external affairs autonomously, and hence without any possibilities for external actors to sanction human rights violations. There is, however, a dualism in international law: the protection of the sovereignty of states, and concern for human rights. In the wake of the UN, the main thrust of post-Second World War legal developments has been to protect human rights.

At the intermediate level, the EU is the most prominent example of a regional federation and is the only political organisation beyond the nation state equipped with a democratic mandate. It provides the world community with agency and capabilities. A transnational, federal order, which "places the individual at the heart of its activities",[21] can be conceived of as a *regional democratic subset* of an emerging larger cosmopolitan order.

The cosmopolitan public framework tracks the interest and opinions of citizens and protects rights. It banishes intergovernmental dominance and domesticates international relations by referring conflicts to supranational bodies. The internal sovereignty of the

[21] Cited from the preamble of the Charter of Fundamental Rights of the European Union (Official Journal of the European Union, 2012b).

Member States is limited by constitutional rules and would be tailored to ensuring self-determination. In Europe, even though the EU falls short of meeting the cosmopolitan condition (see Brown, 2014; Thym, 2016; Pye, 2018),[22] the international law regime has, in fact, been transformed with profound significance for the statutes of European states. They are no longer sovereign nation states but members of a supranational union that possesses institutional provisions aimed at ensuring the fair value of political rights. The actual power of the polity is embedded and circumscribed, and is also balanced by the power of the states in Europe. In the multi-level constellation, power is shared and *statehood is a variable*, rather than a fixed, status – it is a continuum between national and supranational orders.

This notion implies that the Union would be a political order whose internal standards were 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". Such an entity would be an answer to the claim that one should *not replicate the state model* at the European level, as it is the "system of states", which makes international organisations necessary 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 be to replicate the problems at the global level. Hence, it represents yesterday's answers to yesterday's problems.[23] A regional cosmopolitan union should serve to moderate, rather than replicate, the state, and to banish dominance not only regionally, but also globally. Thus, it should contribute to global political justice.

A rights-based polity with a distinct regional reach would establish a public coercive framework for registering opinions and will, and protecting rights. It would ensure a

[22] Among other things, initiatives undertaken to protect EU's borders work against cosmopolitan open-endedness (see Tocci, 2018).

[23] One cannot, to paraphrase Einstein, solve our problems with the same means that produced them.

condition in which persons are neither dominated by others, nor can they wield dominating power.

CONCLUSION

To be politically free means to be subjected to political rules and, at the same time, be their author. In order to banish dominance, there is need for a public framework capable of tracking the interests, views, and wills of the citizens, and ensuring equal political rights. Political differentiation is, from this vantage point, a second best solution. Under conditions of economic integration, and complex and asymmetric interdependence, political differentiation raises the spectre of arbitrary rule - of dominance. Encompassing agreements, made under international law, for ensuring the access of non-members to the EU's common goods, do not prevent dominance. The conditions for a fair bargaining process are not in place. There is a lack of balanced relationships that could ensure symmetry and parity of power. The international law framework does not ensure the fair value of political rights due to the absence of *institutional provisions* that allow actors to co-determine their common action norms.

Nor does the split sovereignty framework prevent dominance. It gives the peoples organised as states, and not just the individual, a constitutional role. Hence, collective rights may trump the rights of individuals. This proposal runs the risk of reifying the nation state and justifying the status quo.

A more promising framework for preventing dominance in the multi-level constellation that makes up the EU is that of a regional subset of an emerging cosmopolitan order. It is a framework that corresponds to the Kantian constitutional mindset. Here, the EU is seen as a polity in its own right, one that possesses neither a collective identity nor the coercive instruments of a state. It amounts to a *state-less government*. The EU is thus a large-

scale experiment searching for binding constitutional principles and legitimate institutional arrangements, one in which the idea of democracy is detached from both nationhood and statehood, and one whose normative thrust stems from the anticipation of a rightful world order. As it is not premised on group identity, the Union would be able to accommodate a high measure of variance with regard to territory and function. It would accommodate difference within a unified legal framework.

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