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JUSTICE, NOT DEMOCRACY
LEGITIMACY IN THE
EUROPEAN UNION

No. 01/08

Frankfurter
Institut für
Transformationsstudien
Abstract

The EU is often assessed against the standard of democracy, which it has no fair chance to fulfil. A new and attractive normative agenda is needed if the EU is to escape its deep legitimacy crisis. This article proposes the substitution of the discourse on the democratic deficit of the EU with a discourse on its contribution to transnational justice.

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1 New Solutions for New Problems

This article proposes to substitute the discourse on the democratic deficit of the European Union (EU) with a discourse on its justice deficit. It is justice, not democracy, which is the adequate concept for questioning and explaining the legitimacy of the EU. In contrast to democracy, the notion of justice is not tied to the nation-state, but can be applied in all contexts and to all political situations, be that global economic structures, domestic election procedures, or the EU. The proposal to analyse the EU in terms of justice does not lower the normative standard but corrects it. Justice is not less important than the idea of democracy but explains its normative thrust. Many of the arguments made in this article are taken from the literature on deliberative democracy, as they can be found in Habermas (1992), Eriksen and Fossum (2002), Nanz and Steffek (2004), and Dryzek (2006). Individual freedom, inclusive and discursive political interaction, and the role of the law as a facilitator of political integration are emphasized. The major contribution of this article is that it integrates deliberative arguments in the analytical language of justice, which is much better applicable to the post-national context than the language of democracy. Resetting the standard is more than a change in terminology. It relaxes the nation-state focus inherent in the language of democracy and opens the way for reflecting about new means for facilitating legitimate governance. It is a critique of methodological nationalism and asks for new solutions to new problems.Whilst the democratic discourse most often focuses on parliamentary competences and divided government, the discourse on justice minds for the people, puts primary emphasis on power asymmetries and on overcoming the obstacles to justifiable political outcomes. Resetting the standard from democracy to justice thus implies a shift in analytical emphasis and a readiness to try new ways and means.

In the next section, the article discusses the democratic deficit discourse and finds it wanting for analytical adequacy. Section three develops a realistic normative standard that is built on the concept of justice as a right to justification. It is a liberal understanding of justice which respects the normative heterogeneity of the peoples of the EU without denying that they all have a common ground in mutual respect for the right to freedom. Section four identifies three major obstacles to making the right to justification effective and explains how the EU can and does (to some extent) confront them. The concluding section summarizes the argument and interprets supranationalism as the constitutionalisation of justificatory discourses.

2 The Democratic Deficit Discourse

One of the dominant explanations for the rejections of the recent referenda in France, the Netherlands and Ireland, and the widespread popular critique of the EU, is that the proposed reforms did not go far enough. The EU still suffers from its so-called democratic deficit and therefore was rejected by its citizens. It is pointed out that the establishment of the EU has led to an empowerment of the national executives and a...
corresponding loss of the legislative and oversight powers of national parliaments (Moravcsik, 1994; Thomson, 1995; Wolf, 1999). The EU itself is criticized for its allegedly technocratic bias (Smith and Wallace, 1995), the weak role of the European parliament (Rittberger, 2003), its neo-liberal orientation and the dominance of business interests (Scharpf, 1999; Streeck, 1995). The proposition of a European democratic deficit and its causal role for the three rejections is not unchallenged, however. Some argue that the EU does not score that badly when compared to an average nation-state (Moravcsik, 2002) and underline that the people in the new Member States trust European institutions not less, but even more than their national democratic institutions (Kutter and Trappmann, 2006). It is also argued that the EU’s non-democratic character can even be perceived as a major strength (Majone, 1998). Non-majoritarian and technocratic agencies serve the preferences of the median voter far better than parliaments because they give no, or only limited access to special interest groups (McGillivray, 2000). A third prominent argument holds that the nation-state in inescapably caught in a “democratic dilemma” between citizen participation and system effectiveness: one can either have effective international organisations or democratic governance (Dahl, 1994). To have both at the same time is, however, impossible. If we want effective European governance, we will have to live with a limited influence of individual preferences on policy outcomes.

The debate on the pitfalls and merits of European governance dates back long before the rejection of the reform proposals and still no conclusion is in sight. A major reason for this inconclusiveness, so the argument of this article, is that the debate uses the wrong normative categories. The EU can only be assessed as suffering from a democratic deficit or as complying with the standards of democracy if it has the theoretical chance to become democratic. It is far from clear however, whether that is the case. The EU still lacks all those political competences which lie at the heart of any democratic state governance, and which have historically been the most prominent resources for the provision of public order: the powers to tax, to enforce sanctions by means of coercion, and to provide security against foreign powers. The EU has none of these competencies. It does not levy taxes, it commands no police, and its defence and security policy is embryonic, if not less. An additional structural problem is that the EU is established on the principle of difference, not of equality among citizens and states. The right of European citizens to participate in EU affairs is a function of their nationality. Due to the system of unequal representation as codified in Art. 190 ECT and Art. 205 ECT, citizens from small states generally have a greater say than citizens from the bigger states. Difference is also underlined by the principle of flexible integration which allows that not all Member States have a say in all European policies. Migration and asylum policy, foreign and security affairs, and monetary and financial policies are conducted among only some of the Member States. These provisions do not constitute derogations from the idea of democracy but stand for a different organisational idea. They are part of the very structure of the EU. The EU deliberately violates the idea of equal representation.

Disputing the capacity of the EU to become a democratic entity in its own right is a contested issue. It is a statement about the future and therefore must remain to some degree speculative. Since we do not now what will happen tomorrow we also cannot know for sure whether the EU will become a democratic entity or not. It is also true that any speculation about the capacity of the EU to become a democratic entity
depends on what we understand democracy to be. It would be hard to deny the EU democratic credentials if democracy were merely to signify free elections, the rule of law, freedom of speech and a system of parliamentary control. All this already exists and makes liberals wonder what the whole debate is about (Moravcsik, 2002). From the perspective of deliberative democracy, however, formal criteria do not suffice. A deliberative understanding of democracy refers to a process of self-governance of a people. It centres on free and unconstrained discourses among the individuals and groups of a society, and emphasises equality and an unrestricted public sphere (Habermas, 1992). Governance institutions have no own normative standing but are merely supportive devices for fostering the free discourse of citizens. The heart of democracy is not institutions but the demos, or, in the terminology of deliberative democracy, the free and unconstrained discourse of citizens. Democracy without a demos, as Joseph Weiler, has put it clearly, is impossible: “If there is no demos, there can be no democracy” (Weiler, 1999a: 337). It is not surprising therefore, that many recent efforts at formulating a theory of post-national legitimate governance limit their analyses to the institutions of governance (Zürn, 2000; Heinelt, 2008) or are hesitant to use the term democracy at all (Beck, 2006; Dryzek, 2006). It can only be underlined, however, that democracy is not to be equated with good or legitimate governance, with checks and balances, efficient and effective institutions or any other institutional provisions. All this is important but has ultimately only the quality of supportive means which lack any normative status beyond their capacity to foster a free and unconstrained public discourses, to implement the outcomes of those discourses and to safeguard its pre-conditions. It is against this crucial role of the demos that the statement of a structural incapacity of the EU to facilitate democracy becomes plausible. As yet, we have no significant processes towards the establishment of a European demos. The EU has only transnational epistemic communities, expert networks, and sporadically emerging publics which disappear as soon as the latest scandal moves from the first to the last page of the newspaper (which most often takes no more than three days). There is neither any European wide media which is regularly consulted by more than a narrow elite nor a relevant political movement, either on the European or on the national level, which works towards overcoming the existence of multiple demoi. For the foreseeable future, the EU thus will have to live with more than twenty national demoi and national democracies. From all we observe today, there is neither a demand for, nor a supply of, a European super-demos or a European super-democracy.

Resetting the standard is important for overcoming the political crisis of the EU. The French, the Dutch and the Irish people have rejected proposals to renovate the EU’s institutional architecture and to provide its decision-making machinery with more effectiveness, efficiency and – so the Commission, the Parliament and most Member State governments claim – more legitimacy. It is not unlikely that referenda in.

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The importance of a European demos for a European democracy has been challenged by Habermas (1996) and others. Habermas claims that as soon as the European institutions have been equipped with enough authority, the peoples of Europe will re-orientate their political expectation and thus contribute to an emerging European public sphere. Habermas might be right. The same argument has been introduced already in the early 1960s by Haas (1961) as “political spill-over”. For the very reason, however, that we cannot be sure whether that indeed would happen, it would be a high-risk strategy which threatens to add to the legitimacy problems of the EU. Strong reasons for being sceptical about the emergence of a European demos have been raised, for example, by Greven (2000) and Offe (2001).
Germany, the UK, the Czech Republic and a number of other Member States would have yielded similar results. The three rejections have left most of academia and politics puzzled. It is common sense in both communities that the proposals would have softened many of the deficiencies of the EU. Transparency of decision-making and the participation of the European Parliament would have been extended, and the internal and external security policies would have been made more coherent and probably more effective. A major reason for the widespread critique is that the intellectual hegemony of the democratic discourse makes the EU being permanently publicly assessed against a standard which it has no fair chance to fulfil. The broad public frustration with the EU will not be overcome by further expanding the competences of the EP, by additional mechanisms of transparency, a catalogue of competences or any other means at institutional engineering. That already has been down-voted three times. If the European peoples continue to cherish their domestic democratic standards and practices, they will neither accept a supranational technocracy nor welcome any European super-democracy. What is needed is an attractive new normative agenda that highlights the achievements of the EU and looks for ways and means of how to further improve it. This agenda must respect domestic democratic traditions while at the same time tying European governance to norms that are high in aspiration but nevertheless possible to implement.

Many recent contributions share this scepticism. It has become a widespread conviction that the EU is in need of a normative orientation **sui generis** that is better suited to its specific social and political structures. This insight has motivated a new generation of normative literature to follow the traits of Majone and to look for a solution to the EU’s deficits in the notion of accountability (cf. Majone, 1998; Keohane, 2006; Boven, 2007). Accountability has become a new analytical focus for much of the literature because it promises to combine an emphasis on input-legitimacy without unduly limiting the problem-solving capacity of the EU. It underlines the need for transparent decision-making, legal oversight and good administrative procedures without necessarily imposing participatory requirements that would endanger the efficiency of decision-making. It is a normative concept that is very much in accordance with the practices of the EU. The strength of the concept, however, is also its fallacy. Although the concept is often accompanied by the attribute “democratic”, it does not by itself allow answering most pressing democratic questions such as who should be accountable to whom, when or for what reasons (cf. Bovens, 2007). Accountability is an attribute of good administrative procedures rather than a conceptual equivalent for democratic governance.

### 3 Justice in Political Theory

The concept of accountability becomes more useful if it is explained by referring to justice. Insights from theories of justice allow to specify the concept of accountability and to answer some of its most pressing open questions. Justice is the very reason why we put so much emphasis on accountability. Before explaining this argument in detail, this section will introduce the concept of justice itself. Justice is a central concept in both political theory and politics. It is the prime social virtue, the most important virtue of social institutions (Rawls, 1971: 3). No other quality can substitute for a lack of justice. Only conditions that are just, and never conditions that
are unjust, are acceptable. Everything which is unjust has to be rectified through practical political measures and improved upon. Notwithstanding the fact that most political theorists would subscribe to this statement, it is hard to find any consensus on what justice implies in the abstract, or when applied to European politics.

3.1 Communitarian and Universalistic Concepts of Justice

Much of the literature on transnational justice can be classified under the two broad (and somehow stylized) categories of communitarian and universalistic concepts of justice. Communitarians understand justice as those dominant prevailing normative conceptions that exist in a given society at a given point in time. No claim is advanced that this conception is more or less valid than any other conception because no neutral or superior position exists from where such a claim could be justified. For communitarians, the search for a universal concept of justice is elusive from the very beginning. Meaningful discussions about the proper substance of justice can only be conducted in the context of a specific community, and only give expression to a certain social system of continuing interaction and transaction. According to Franck, “[i]t is only in a community that the bedrock of shared values and developed principles necessary to any assessment of fairness is found” (Franck, 1990: 10). In very similar terms, Miller claims that nationality has an ethical significance which allows the members of a political community to discriminate against those who are outside the community. This significance is based upon the reciprocal acceptance of “a loyalty to the community expressed in a willingness to sacrifice personal gain to advance its interests” (Miller, 1988: 648). It is only in a nation-state that people develop a sense of community and therefore a shared sense of justice (Miller, 1995). The very idea of justice pre-supposes the existence of an integrated political community which can only be provided by the nation-state and inside the boundaries of a nation-state. By implication, transnational justice is an oxymoron, a contradiction in terms.

The communitarian approach is challenged by two arguments. Communitarians find it difficult to explain why most societies share an idea of justice which is expressed in the reciprocity principle of the famous “Golden Rule”. The Golden Rule refers to an intuition which can be found in the political cultures of all Member States. It holds that only those rules which do not impose more serious restrictions of freedom upon any other person than one would be willing to accept for one’s own self can claim to be just. It is true that every culture and society differs with regard to the specific interpretations that reciprocity entails when applied to specific circumstances. However, this should not redirect our attention from the fact that there is clearly some basic common normative intuition which is shared across all Member States.

A second objection to the assertion that any meaningful conception of justice is necessarily confined by national borders, refers to the problem of methodological nationalism. If it is true that we live in a world of increasing transnational exchange, and if it is also true that normative standards are, to some degree, a function of such interaction, then, it is clearly implausible to exclude the possibility of a transnationally shared meaning of justice categorically. As opposed to democracy, the applicability of the concept of justice does not presuppose the establishment of
common authoritative institutional structures or of a common public sphere. Already in the 1970s, authors like Bull (1977) and Beitz (1979) had no difficulty to describe the international system as a social context of its own, in which shared normative ideas impact on the actions of governments and in which the idea of justice has some regulatory power. Although the international system is anarchic, so Bull argued, it can nevertheless be understood as an “anarchical society” in which certain values, principles and norms are shared among governments. Similar assessments can be found in more recent contributions. Müller, for example, argues that diplomacy is generally conducted in an “artificial lifeworld, which provides a substantial background of shared rituals” (Müller, 2007: 210, own translation). The common social context fosters argumentative interaction even under conditions of massive conflicts. Thus, the communitarian insight that ethical standards are culturally and historically contingent does not imply that meaningful understandings of justice can only develop within the confines of a nation-state.

In contrast to communitarian approaches to justice, universalistic approaches assume that all individuals belong to one group with an identical set of inalienable rights and a common sense of justice. John Rawls established the Theory of Justice (Rawls, 1971) on the counterfactual idea of an “original position” in which people have no knowledge about personal attributes such as gender, race or wealth. Only such rules can claim to be just which do not reduce the status of those who are the worst off in a given group of affected parties. Universalistic reflections have produced a number of interesting institutional proposals (cf. Held, 2004). A general problem of all universalistic reflections, however, is that they are often quite utopian. Otfried Höffe, for example argues that a global democratic state is “obligatory in terms of law and ethics” (Höffe, 2002: 279, own translation) because it is a necessary condition for the global rule of law. Any such reasoning obviously collides with the fact that a global (or only European) monopoly of coercion is far beyond anything imaginable. It is a perspective which may be argued to be attractive in normative philosophy, but which lacks any real world significance because it neglects the insight that normative requirements must be practically feasible in order to become politically relevant. If normative categories are to escape the ivory tower of philosophy, they should be formulated with a view to the connection between “ought” and “can” and reflect an awareness that normative requirements will only be convincing to the degree that we provide evidence that they are, indeed, “fit for reality”. This idea of normative realism reflects Rawls’ suggestion that a “necessary pre-condition for a realist justice concept” is “that its major principles and instructions are practiced and can be applied to the existing political and social institutions” (Rawls, 1999: 15). Hence, a realistic and politically relevant concept of justice expands “the borders of what we usually consider practically-politically possible” (Rawls, 1999: 4) while, at the same time, remaining on solid empirical ground.
3.2 The Right to Justification

A realistic conception of transnational justice can be developed by applying the idea of justice as a right to justification.\(^3\) The idea of justice as a right to justification is an understanding of transnational justice that is both empirically and normatively sound. It is established on the assumption that we have a human right to demand and receive justification on the part of all those individuals or organisations which restrict our freedom. This does not necessarily imply that no limitations of our freedom are legitimate, but only holds that the legitimacy of any such intervention depends on the reasons that are given to explain them. If, therefore, we concede the basic right to others to be considered in our choice of actions whenever these others might be affected by the consequences of our actions, and if we therefore only regard rules that have taken the concerns of the others into proper consideration as being potentially just, then it is likewise plausible to assume a right to justification as a core element of justice. As a person (or organisation), I therefore have the right to have any restriction of my individual freedom justified by whoever causes that restriction or has the intention of doing so. This argument takes the freedom of the individual from domination as a starting point, and places all restriction of this freedom under the reservation of good reasons. It is a liberal understanding of justice which emphasizes not only individual freedom but also the duty of the community to produce the conditions under which individual freedom can exist. These conditions include measures to enable the individual to develop its capacities (cf. Sen, 1999). A procedural understanding of justice therefore presupposes at least a minimal degree of substantial justice, i.e. public information and education, and the provision of sufficient material wealth to allow for political activism.

In crafting the argumentative design of a justification, the justifying person or organisation must not only explain its actions (i.e. explicate own motives) but must

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\(^3\) For a philosophical discussion of the right to justification, see Forst (2007). Although the concept of justice as justification builds on the work of Forst, it differs with regard to a number of issues: (1) Forst assumes that all human action is to some degree affected and constrained by a universal practice of justification (2007, p. 9). The idea of politics that is used in this paper is more sceptical. It assumes that justice is only a relevant aspect of political action if it is supported by strong institutions. The standard mode of action in the absence of strong institutions is self-minding individual interest maximization. (2) Forst nevertheless adopts a far more critical approach to political action in his analysis of international relations. He cites approvingly Thomas Pogge, according to whom the global order “aggravates international inequalities and makes it exceedingly hard for the weaker and poorer societies to secure a proportional share of global economic growth”. The claim of a universal relevance of justice for political action is here replaced by the idea of a “system of domination and exploitation” (2007, p. 367). As opposed to Forst, this paper assumes that the EU is based on a political bargain which in its core elements is accepted by most people as fair and adequate. The neorealists’ assumption of a sharp contrast between domestic justice and international exploitation is avoided (3). Correspondingly, the motivation (Erkenntnisinteresse) of Forst is very different. Whilst Forst tries to explain his personal outrage about real-world injustice, i.e. hunger and poverty in large parts of the world, this paper uses the concept for justifying the EU. (4) Forst does not distinguish between the relevance that the right to justification should have in domestic and in international politics. An unconstrained right to justification, however, is hard to harmonize with the democratic principle of majoritarian decision-making. If the majoritarian principle is made conditional on its backing by good reasons, parliaments must be subordinated to moral arguments and expert bodies with the competence to issue moral statements. Appointed experts, not representatives and their elected governments, then become the most powerful actors of democracy. Although it is admitted that the right to justification is a crucial right in domestic politics, it must be weighed against other values. Drawing the domestic balance between the two principles is, however, beyond the scope of this paper.
follow the reservation of good reasons. In doing so, only such types of reason are to be understood as good reasons which fulfil the two minimum conditions of reciprocity and universality. Reciprocity means that nothing more is demanded from anybody than we are willing to concede ourselves. Universality demands that the reasons given must be acceptable to all parties and that the outcomes of discourses are binding on all parties to the same degree.

Understanding justice as the right to justification gives the notion of justice an intrinsically procedural and discursive character. Any question regarding the specific implication of justice in a specific situation is answered with reference to a normatively demanding discursive procedure. All parties concerned, be they individual or governmental, must be given the chance to voice their concerns and to have them properly respected in the formulation of binding rules. In this way, the search for justice becomes an inclusive, discursive and always only temporarily concluded project. Though those concerned by a regulation may temporarily agree upon a specific accord, they often will only do so with the reservation of possible later changes.

The right to justification is not only a defensive right against illegitimate infringements of our freedom but includes an activating component. It comes into play if political institutions neglect to take action which would have had positive effects on our freedom. The inactivity of the EU to harmonize the taxation of companies is no less in need of justification than any of the legislative proposals of the Commission. The activating component of the right to justification is also put in practice in the duty of Member States to give reasons in case of alleged non-compliance with European regulations. Although the right to justification is universal in its claim to normative validity, it is nevertheless open to different cultural contexts. It thus combines insights from communitarian and from universalistic reflections. Its formal requirements are limited to complying with the logic of public reasoning and legal arguing and are silent on the specific substantial implications of the resulting discursive process. The broad space for interpretations that is left open allows for its adaptation to cultural and historical contingencies, and guarantees that its claim to provide an overarching discursive logic does not degenerate into the dictatorship of a narrow and technical rationality.

4 Justice in the European Union

Normative realism is an intellectually modest approach to normative theorizing. It accepts that norms and facts hang together and that it is intellectually arrogant to construct an “ought” outside of, and completely unconnected to, the everyday practices of society. Normative realism uses a non-utopian and self-disciplining methodology that explicates not only ends but also the ways and means for realizing those ends. It describes the “ought” as being based on either empirical facts or at least an idea that already exists in the practices of society. Normative realism is an approach which is very sceptical about any culturally insensitive institutional engineering. It emphasises that the normative foundation of institutional developments must be rooted in the political culture of a given polity. It is an approach which the US government is learning the hard way in Iraq.
This section applies normative realism to the EU and to the idea of justice as justification. It starts with an analysis of the EU that highlights the significant difference between the “is” and the “ought”, between the idea of a transnational justificatory discourse and the reality of the EU. In the remaining parts, the section explains how the idea of justice as justification is rooted in the practice of the EU and how it reduces horizontal and vertical power asymmetries. The idea of justice as justification thus is a normative but nevertheless realistic approach to justifying and criticizing the EU.

4.1 Power asymmetries in the EU

Justificatory discourses are about relationships of power (Grant/Keohane, 2005). To demand justification from someone is to ask someone to do something he or she would otherwise not have done, or to keep someone from doing something. A justificatory practice demands that the capacities of individuals are sufficient to successfully demand and receive justification from powerful governmental institutions. It also entails the capacity of weak states to make more powerful states comply with the force of good arguments. None of this can be taken as a given. Vertical power asymmetries between individuals and governments result from the fact that the latter act as gatekeepers for political proposals and that they often have a monopolistic say over the setting of the international political agenda via the European Council. The problem of executive empowerment is aggravated by their better information about the positions and scopes of other executives. They are much better able than the public or any parliament to assess what is politically viable (Moravscik, 1994).

Horizontal power asymmetries among the Member States lead to a similarly crucial problem. The more powerful Member States dominate the policy-making process in the European Council, irrespective of whether they have the better arguments or not (Tallberg, 2007). Due to the unequal ability of states to upload their preferences onto the European level (cf. Börzel, 2002) and to compete in the regulatory competition (Genschel and Plümper, 1997), European norms are often based on bargaining processes (i.e. exchange of threats and promises) only and reflect the preferences of only a limited number of powerful states. Political deliberation is seriously hampered by the fact that speakers from different cultural backgrounds carry different understandings about what the relevant problems are and how they are properly being dealt with. Making a political community of domestically responsive Estonian, Sicilian, Swedish and Romanian delegates and representatives agree on adequate criteria for justifying political (in-)activity is a difficult task. Many political debates such as those on harmonizing corporate taxation or on directives that touch upon issues of gender equality provide clear evidence of these difficulties. A third crucial obstacle for the right to justification is the anarchical character of international politics. At the end of the day, the EU cannot coerce Member States into compliance with its regulations but must rely on some degree of willingness to implement its law. Compliance with European law always remains an „autonomous voluntary act“ (Weiler, 2000: 13) on the part of the Member States. Centralized control- and enforcement mechanisms are lacking, and the EU’s institutions can hardly guarantee
that the outcomes of justificatory discourses apply to all addressees to the same degree.

4.2 Reducing Horizontal Power Asymmetries

European law considerably reduces all three obstacles to justice. It enables the European political community to engage in normatively meaningful deliberations by distinguishing between legal and illegal behaviour and by providing normative standards for political action. The European law and the highly legalized Euro-speak are often criticized for their technocratic character and inaccessibility. That critique tends to overlook that the technical language of law provides an interface for the discourse among the multiplicity of national cultures without imposing an own supranational political culture above the Member States.

The European law also has an important role for the transformation of bargaining into deliberative interaction. In European legal discourses, good arguments not only have the (sometimes rather small) probability of convincing other governments of the adequacy of one’s own position, but (often far more importantly) of making the Commission, the Court or the Parliament willing to join forces with that self-same position. Good arguments can be tools for tapping the support of institutional actors, just as bad arguments can prompt their opposition. If the government of a Member State imposes trade barriers against imports from another Member State, it is well advised to produce argumentative justification and give convincing explanations for its actions. If it does so, its measures will be supported by the Commission (and, if necessary, by the Court). However, if it acts without justification and without convincing arguments, it will have to face the opposition not only of the affected government but also of the Commission (and, if necessary, the Court), and be confronted with the corresponding costs. Whilst international politics allows for intrinsically legitimate governmental preferences, supranationalism forces governments to refer to constitutionally codified material and procedural norms and to explain how their preferences relate to these norms. Horizontal legal integration forces the Member States to abstain from simply issuing threats and promises, and requires them to reformulate their preferences in the language of law. In this way, legal integration transforms bargaining into legal reasoning (cf. Kratochwil, 1995), and provides the basis for justificatory discourses.

The need to reformulate preferences in the language of law has relevant consequences for the content of political interaction. The law acts as a filtering mechanism against openly selfish proposals and facilitates discursive interaction. Elster refers to this effect as the “civilising force of hypocrisy” (Elster, 1998: 111). In order to have their proposals accepted as arguments, speakers must hide their base motives. Hiding base motives, however, requires proposals to be subjected to a number of constraints which may modify them quite substantially. The first constraint is the “imperfection constraint”, which implies that proposals must show less than a perfect coincidence between private interests and impartial arguments in order to be perceived as good arguments. Arguments must also be in accordance with positions that have been formulated at an earlier point in time and must be maintained even if they no longer serve the speaker’s interests (consistency
constraint). Otherwise, a speaker will easily be viewed as acting opportunistically and thus loses his or her credibility. And, finally, arguments must abstain from making claims which can easily be shown to be incorrect (plausibility constraint). Together, all three constraints work as a filter against openly selfish claims and thus civilise interaction by forcing the disputants to engage in argumentative interaction. Legal reasoning is, therefore, a deliberative mode of interaction which forces actors to perform in accordance with shared legal norms even if they only have self-minded interests. Supranationalism is about the representation of arguments, and not about power and preferences. Under conditions of anarchy, states bargain. In an ideal supranational structure, arguments are balanced.

It is true that legal reasoning does not provide any guarantee against injustice. If the law is founded on an original bargaining process, and reflects the outcome of an asymmetrical distribution of power, then its products can hardly suffice the standards of justice. The founding of the WTO, for example, reflects to some degree a blackmailing process in which the Northern states threatened to conclude a mini-WTO among themselves if the Southern states would not accept the inclusion of trade related intellectual property rights (TRIPS) and a General Agreement on Trade in Services (GATS) into the legal framework of the new WTO (Steinberg, 2004). Thus, in the WTO legal reasoning applies the procedural and material norms which have been dictated by the powerful Member States. A normatively meaningful transformation of bargaining into deliberation requires that the founding deal of a community reflects the values and preferences of all of its members.

4.3 Reducing Vertical Power Asymmetries

In international relations, the right to demand and receive justifications is most often exercised by governments. It is governments which negotiate treaties and which ask their contracting partners for justification and explanation in cases of alleged non-compliance or if actions taken by other governments collide with own interests or with the interest of a domestic constituency. Vertical legal integration in the EU has put an end to the member governments’ monopoly of legitimately demanding and receiving justification. Vertical legal integration ties supranational, national and individual actors together by means of legal provisions so that justifications can and must be exchanged. Vertical legal integration safeguards that governmental and supranational actors comply with the requirement to justify their actions and that their policy discretion via their national constituencies is not expanded beyond a degree which can be justified towards their respective principles.

Vertical legal integration must start with the individual. Following the ECJ’s decision Costa vs. ENEL of 1963, individuals can today ask a national court to check whether their national government is limiting access to rights guaranteed by European law. In the European Union, the human right to justification has thus returned to where it belongs. The individualistic perspective that is adopted by applying the idea of justice as a right to justification does not dispute the legitimacy of democratic governments to demand and receive justification from other governments. All democratic constitutions invest governments with that right for good reasons. It underlines however, that the right to justification is an individual human right and
that governments only act as trustees of their citizens’ human rights. Any such trusteeship must always remain non-exclusive and may not reduce the individuals’ right to demand justification herself. The governmental right to justification is only complementing the individual right but, from an ethical point of view, can never substitute it.

The extension of the EP’s rights in the European political process has made another successful inroad into the member governments’ former monopoly of demanding and receiving justifications. The EP has become an important co-legislator and today critically follows the Commission’s and the Council’s legislative work. It is true that the EP still looks very different from most national parliaments. It lacks the right to set the political agenda, it is only the second and not the first legislative chamber and it not even has the right to submit legislative proposals. Comparing the EP with the German Bundestag, the British House of Commons or the French Assemblée Nationale would be misleading, though. In the perspective of the right to justification, the major task of the European Parliament is not to represent the people of Europe. That is already facilitated by the national Parliaments of the Member States and needs no duplication. The most important task of the EP is to critically accompany the working of the Commission and the Council and to demand justification and explanation in all cases in which citizens’ concerns are met. The EP’s most important function is no to represent a non-existing European people but to watch out against any legal activity which cannot be justified publicly or which does not meet the expectations of the citizens of the European Member States (cf. Auel 2007).

The justificatory discipline imposed by vertical legal integration also covers relations between the EC’s supranational institutions and its Member States. The delegation of competences to the Commission is in most cases only conditional, and it is also subject to control mechanisms. The provision of Article 202 ECT is a typical example. It stipulates in its first sentence that the Council delegates all competences to the Commission to implement its legislative acts. The second sentence, however, adds that the Council may establish certain modalities for the execution of these competences. In practice, the second sentence has been a major reason for the huge growth of the European comitology system, which acts as a safeguard against the Commission becoming a “run-away bureaucracy” (Pollack, 1997). Even in an area such as external trade, where the Commission has had broad competences already codified in the Treaty of Rome, it must justify its international policies towards the Member States. According to Article 133 ECT, the Commission can act only after it has presented recommendations to the Council of Ministers, and after these recommendations have been authorised. In addition, every international legally-binding agreement that has been concluded by the Commission on the part of the EC is subject to critical scrutiny in the Council.

In a multi-level system such as the EU, vertical legal integration cannot stop at the Member States borders but must encompass their domestic political structures. An often cited example of how domestic political structures can counter a government’s effort to escape domestic control is provided by the Danish Folketing. The Folketing exercises its control over the Danish government in European affairs by clearly outlining in advance which positions the governmental delegate may present and
which are beyond his or her mandate (Dosenrode, 2000). The responsible minister has to present his or her proposal in person to a specialised European Affairs Committee of the Folketing and must obtain a supportive majority. The members of the committee not only vote on the proposal but also have the right to propose amendments. The minister has no right to enter into any negotiations in Brussels if he or she fails to convince the majority of the committee of his proposal. Likewise, if the negotiations in Brussels seem to make it necessary to change the Danish position, and if he or she wants to go beyond the authorisations given by the mandate, he or she must present new suggestions to the committee and wait for new instructions. The integration of the Folketing into the daily decision-making in Brussels is an important element which explains the high political awareness in Denmark toward European affairs. European politics is not limited to executive discretion but an essential part of domestic legislative politics. Although this awareness may, from time to time, lead to a critical stance of the public towards the EU, it is attractive from the perspective of a justificatory discourse because it bridges the gap between democratic and European publics (cf. Nehring, 1998).

It is true that all of these mechanisms do not provide any guarantee for the complete lifting of vertical power asymmetries. Organisational procedures never determine actions. They merely provide incentives to act according to prescribed rules. It is also true, however, that the list above is far from complete and only presents selected parts of a picture which - in reality - is much more complex and imposes a much more rigid discipline than the four examples imply. The very existence of these procedures provides evidence that supranational legal integration is not only a means of expanding governmental discretion, but that it simultaneously imposes additional needs for justification. Supranationalism not only expands or limits governmental discretion; it also provides an argumentative discipline according to which political authority is to be exercised.

4.4 Taming Anarchy

One of the great success stories of the EU is that its legal regulations are nearly always complied with by the Member States. The EU is one of the very few non-coercive authority structures which expect their Member States to comply with rules even if they explicitly oppose them. Understanding the success story of the taming of anarchy in the EU demands a nuanced explanation which has much to do with the right to justification. An important part of the story lies in the shared interest of both weak and strong states in a well-functioning international legal system (cf. Hurrell, 1993). For weak states, an international legal order is a pre-condition for having their concerns heard and taken seriously. In an anarchical environment without binding legal norms and reliable state practices, the weak states have little guarantees that their interests and legitimate concerns are taken seriously by their more powerful peers. The binding character of European law is the first best guarantee for Luxembourg that its interests count in European negotiations. Without the compulsory character of European law, the big powers Germany and France would give Luxembourg a much harder time to maintain its low capital taxation scheme, or the Irish to uphold their low level of corporate taxation. It is the legal norm of
unanimity which makes controversial harmonization so difficult and which provides a degree of security to smaller states which would otherwise be difficult to realize. Legalization is not only in the interest of weak states but also serves the interests of the more powerful states. France and Germany have a prime interest in the stability of the European order because they are the ones who have had the biggest say in the writing of the rules and who can be assumed to benefit the most. Not complying with European law would signal to the weaker states that they must not take the discipline imposed on them too seriously. Non-compliance with European law therefore is not associated with either the big or the small powers but most often is related to insufficient administrative capacities (Chayes/Chayes 1995).

A second part of the explanation is the preliminary ruling procedure according to Article 234 ECT (cf. Alter, 2001). It directly connects governments to control exerted by their citizens and instrumentalizes national courts as agents of supranational law. Article 234 ECT provides that any national legal person may sue his or her government if that government has violated a legal provision of the EU and inflicted damage on that legal person. Governments are thus not only liable to each other by means of an international legal obligation, but have likewise adopted responsibilities towards their citizens.4 A supranational legal order is thus categorically different from a merely international legal order because individuals may use their Member State’s courts against political decisions taken by the government or parliament of that state. It is not surprising that the direct linkage between the EC’s supranational institutions and its citizens is often interpreted as a major constitutional step towards the establishment of a European political order *sui generis*.

A third part of the explanation is offered by the so-called ‘management school’: It holds that inclusive and reflexive management of rules is a most important factor for eliciting compliance: The Chayeses have put that concisely “…[T]he fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public” (Chayes/Chayes, 1995: 25). Enforcement through interacting measures of assistance and persuasion is less costly and intrusive and is certainly less dramatic than coercive sanctions, the easy and usual policy elixir for non-compliance. The European committee system and its permanent reformulation and adaptation of legal norms to changing political preferences, public problem awareness and the technical progress is most important in this process (cf. Bergström, 2005). It not only gives expression to bureaucratic governance and it is more than the “underworld of the EU” (Weiler, 1999b). Without it, European law would never be flexible and adaptive enough to live up to the political needs of a multicultural and highly complex political entity of twenty-seven Member States.

All three mechanisms are of crucial importance for taming the international anarchy that existed in Europe for centuries. They have contributed a great share to establishing an effective legal order that is accepted by all Member States to be binding on their external relations and their internal law. It would be naïve however, to believe that the effectiveness of the three mechanisms is not established on a rather demanding precondition. All three mechanisms would be of only limited

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effectiveness if the legal order that they are part of were not accepted by the member states as reflecting a basically fair deal. In contrast to the WTO, the European bargain is accepted by all of its Member States. It is established on an original deal among the six founding Member States that has been adapted to the needs of new Member States with every new round of accessions. The system of structural funds and the resulting financial compensation of the economically weaker Member States have opened opportunities for catching up with the more developed Member States. The Irish success story would not have been possible without the financial support of the EU. In addition, the ECJ established a practice of independent jurisprudence that was hardly ever dominated by the preferences of the more powerful Member States. It issued a long series of decisions that were in open conflict with the preferences of France, Germany, or Britain. Burley and Mattli have explained the incomplete political control of the Member States over “their” Court with reference to the argument that the law acts “as a mask and shield” against politics (Burley/Mattli, 1993). It is only against this background that European law can indeed be interpreted as promoting the cause of justice. A full explanation of the puzzle of Member State compliance with European law thus cannot do without taking recourse to the “power of legitimacy” (Franck, 1990). The technical project of legal integration could only take hold and tame anarchy because the European Treaty law can be explained as promoting the cause of justice. The big states’ power play always maintained a balance with deliberative processes. This is probably the most important difference between the EU and the WTO.

5. Multi-Level Legitimacy: Justice and Democracy

How would an EU look like that gives full effect to the right to justification? It would guarantee the individual’s right to freedom and safeguard that any restriction of that freedom is subjected to good reasons. It would guarantee transparent decision-making procedures by providing permanent public access to all institutions with law-making competence. Neither the European Council nor the Council or the Commission would conduct their deliberations behind closed doors but had to work under full scrutiny of the media. The practices of blame-shifting and scape-goating on the part of Member State governments would be ended. National parliaments would have the administrative capacities and legal rights to keep their governments under close control and demand regular reports about their (non-)activities in Brussels. The Danish Folketing’s European Affairs Committee provides a helpful suggestion for such a provision. Supranational structures would tie individuals, governments and supranational organisations together in a multi-level legal structure in which the legal requirement to justify and give reasons is codified and can be enforced by both supranational and domestic courts. In this structure, weak states would no longer be only negligible participants in a big powers’ game and individuals not only subjects of governments. Weak states and affected non-governmental actors had enforceable rights which carry as far as good arguments can be produced.

The sections above have listed a number of examples how the EU already today works towards that ideal. Their purpose was to give evidence that the right to justification is a political concept of justice. It builds on the idea of normative realism
and is characterised by holding up the link between “ought” and “can”. It not only specifies something theoretically desirable, but combines this specification with the claim that it is achievable in the sense that its underlying normative principles are already well institutionalised. This article started with the diagnosis of a categorical mistake often made when reflecting upon the adequate normative foundations of the EU. The EU neither has the capacity for democratic governance, nor will it acquire in the foreseeable future political competences which cover more than narrowly defined policies. It is inadequate, therefore, to assess the EU’s legitimacy in categories taken from the analysis of democratic statehood. It is more appropriate to analyse its contribution to legitimate governance in the terms of transnational justice.

Although this argument seems to put primary emphasis on justice and to downplay democracy, it is ultimately oriented at explaining the relationship between national democracy and transnational justice. Legitimacy in the multi-level system of the EU can only be properly understood if it encompasses the domestic and the international level. The normative promise of national democracy to foster self-governance will only survive globalisation, if it is supplemented by an organisational layer that fosters transnational justice. Only if interdependent national democracies are supplemented by a supranational layer of justificatory discourses can we expect them systematically to respect the external effects of their decisions as a relevant factor for domestic decision-making. Democracy entails that the rulers and the affected parties of rules are identical. If this standard is to be respected, *i.e.*, if we are not ready to accept the effects of other nation-states’ decisions without having had the chance to make our concerns heard in “their” decision-making processes, and if we are not willing to make other citizenries subject to our decisions, then we have to work for a system of collective multi-level governance, in which national democracies open themselves to the concerns of foreigners. Otherwise, the external effects of the internal practices of our democracy will impose illegitimate costs on foreigners, or, if foreign democracies do so, on us. Under conditions of interdependence, therefore, it is clear that transnational justice and national democracy mutually support and necessitate each other.

Although the article has started from the assumption that the EU has little chance to become a full-blown democracy in the foreseeable future, its main message is rather optimistic. The EU promotes the cause of justice by providing an effective remedy to horizontal and vertical power asymmetries, and to the arbitrariness of untamed anarchy. The constitutionalization of justificatory requirements transforms intergovernmental bargaining into transnational deliberations. In doing so, legal integration transforms the mode of representation from preferences and power to arguments and reasons. Legal integration has the capacity to provide mechanisms which safeguard against the impact of vertical power asymmetries on the justificatory discourse. Legal integration, finally, exerts a compliance-pull of its own by increasing the costs of non-compliance to both powerful and weak states.

The EU can not only be understood as a basic structure of justification (*Grundstruktur der Rechtfertigung*) but already has some elements of a “completely justified basic structure” (*gerechtfertigte Grundstruktur*), which is a basic structure which itself is the product of a justificatory discourse (cf. Forst, 2007: 270-287). Since the Treaty of Maastricht, the European integration project has started to escape the glass and steel
towers of the bureaucratic elites in Brussels and the other European capitals. A
growing number of people are demanding the right to vote on new treaty proposals
and to be actively engaged in the reform of the EU. Further steps on the road to
European integration have to pass through the bottleneck of a citizenry which
demands justification and explanation, and which does not hesitate to reject the
proposals if the reasons given are not good enough.

It is true that legal integration has no built-in causal connection to justice. At the end
of the day, even the best procedures only provide incentives. They will only be
effective if the powerful actors realise that it is, indeed, in their best interest to accept
the discipline that is imposed upon them by supranational legal norms. If powerful
states prefer to go it alone, supranational organisations have nothing but economic
and political incentives to change their course of action. Real-world supranational
integration must be understood as a long-term learning process which may lead to a
constitutionalisation of effective justificatory discourses. It is also true, however, that
the EU is moving slowly but steadily toward that goal. The EU embodies some
significant elements of justificatory discourses and can well be understood as an
(imperfect) approximation of this ideal. It is both to be cherished for the degree to
which it has walked down the road already, and to be criticised for the long way that
still lies ahead of it.

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International Institutions’, *European Journal for International Relations* Vol. 6, pp. 183-221.