Towards a Cosmopolitan EU?

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Abstract

There is a tension between democracy, which is limited to the nation-state, and human rights, which are universal and point to the ideal republic. Human rights apply to all members of humankind and transcend the rights of the citizens. The constitutionalisation of the Charter of Fundamental Human Rights of the European Union is an important step in the process of institutionalising a framework of a cosmopolitan order where violations of human rights can be persecuted as criminal offences according to legal procedures. The principle of popular sovereignty is in the process of being transformed into a law for the citizens of the world. But the positivization of human rights protection represents juridification and is in need of democratization. The question is whether the reform processes of the Union itself enhances the possibilities for the citizens to give themselves their rights. We may also question whether EU's external foreign and security policy is consistent with cosmopolitan tenets.

This paper is on whether the parameters of power politics in Europe are changing and whether the EU can be described as a cosmopolitan polity in the making.

Key words: EU, democracy, human rights, cosmopolitanism

> The European view is that Europe seeks to create a genuine rule-based international order suitable to the circumstances of the post-cold war world. That world, free of sharp ideological conflicts and large scale military competition, is one that gives substantially more room for consensus, dialogue and negotiation as ways of settling disputes.
>
> (Francis Fukuyama 2002)

Introduction

It was in Europe the modern system of states was invented and it is Europe that has come farthest in changing it.[*] We witness a significant development of rights and law enforcement beyond the nation state. Processes of institution building at the European level are challenging the fundamental building blocs of democratic rule in Europe and constrain the will power of the states. Consider for example the sanctions imposed on Austria in 2000 by the fourteen other Member States for letting Haider's Freedom Party - a rightwing, 'racist' party - into government. It was the Member States that decided to impose sanctions against Austria, but the EU itself has now established procedures to ensure that breaches of fundamental principles are sanctioned. That a new order is underway is perhaps most clearly revealed in the initiative taken to incorporate a *Charter of Fundamental Rights of the European Union* into the new Constitutional Treaty of the EU.

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What is at stake with the institutionalization of human rights beyond the nation state is the sovereignty of the modern state as laid down in the Westphalian order in 1648. Prohibition of violence against sovereign states was here prioritized over the protection of human rights. The rulers' *external sovereignty* was safeguarded. The international order became founded on the principles of co-existence and non-interference among sovereign states. The latter principle, however, can not prohibit genocide or other crimes against humanity and can not be sustained in normative terms. But who is to be the guarantor of supranational rights in the absence of a world government?

The principle of state sovereignty, which international law after the Treaty of Westphalia 1648 warranted, is a principle that has protected the most odious regimes. It was only when Hitler-Germany attacked Poland that World War II broke out, not when the persecution of Jews started. This also indicates the limitations of nationally founded and confined democracy. While human rights are universal and refer to humanity as such, democracy refers to a particular community of legal consociates who come together to make binding collective decisions. The validity of the laws is derived from the decision-making processes of a sovereign community. The propensity to adopt rights, then, depends on the quality of the political process in a particular community. But a particular state may fail in respecting the rights and liberties of their citizens as well as other states' legitimate interests. Even though the contradiction between rights and democracy is, in principle, a false one, since there can be no democracy without the protection of individual rights, and since rights are not valid unless they have been democratically enacted; in practical terms there is a contradiction as democracy is only institutionalised

at the level of the nation state. That is in particular states with very different political cultures, and which are geared toward self-maintenance: the primary responsibility of the decision-makers are their own constituency. The state is so to say limited by the people:

> The individual may say for himself: "Fiat justitia, pereat mundus (Let justice be done, even if the world perish)," but the state has no right to say so in the name of those who are in its care.
>
> (Morgenthau 1993: 12).

Hence, democracies may be *illiberal* (Zakaria 2003). To resolve the tension between human rights and democracy the authors of the law must at the same time be its addressees. Cosmopolitan democracy where actors see themselves as citizens of the world and not merely of their countries is therefore required.

The question arises whether a Bill of Rights at the regional level, in the EU, can close the gap between abstract human rights and the need for democratic legitimation. Is it a means to resolve the tension between popular sovereignty and human rights? In addition to submitting national practices to supranational review, the EU has incorporated human rights considerations into its external relations. What does this tell us about the nature of the Union? But first, what is the problem with human rights politics?

Domesticating the state of nature

When people's basic rights are violated, and especially when murder and ethnic cleansing (ethnocide) are taking place something has to be done, our moral conscience tells us. The growth in international law ever since its inception and in particular the system of rights embedded in the UN, represent the transformation of moral rights and duties into political and legal measures. The purpose of such institutions was first to constrain the willpower

of nation states in their external relations to other states. The politics of human rights by means of systematic legalisation of international relations implies the domestication of the existing state of nature between states.

But institutions above the nation state are needed also to constrain the internal willpower of the state, i.e., the power exerted over its citizens. Article 28 of *The United Nations Universal Declaration of Human Rights* (1948) made it clear that there is a right to a lawful international order:

> Everyone is entitled to a social and international order in which rights and freedoms set forth in this Declaration can be fully realized.

In the last decades we have witnessed a significant development of rights and law enforcement beyond the nation state. Human rights are institutionalised in international courts, in tribunals and increasingly also in politico-judicial bodies over and above the state that control resources for enforcing norm compliance. Examples are the international criminal tribunals for Rwanda and the former Yugoslavia, The International Criminal Court, the UN and the EU. In addition, European states have incorporated 'The European Convention for the Protection of Human Rights and Fundamental Freedoms' and many of its protocols into their domestic legal systems. These developments are constrained by the limitations of the international law regime as it is based on the principle of unanimity and as it lacks executive power. The Charter of the United Nations prohibits violence but forbids intervention in the internal affairs of a state. However, this is not the only difficulty of the existing international human rights' regime.

The main problem with human rights as the sole basis for international politics is due to their non-institutionalized form. Human rights exhibit a categorical structure – they have a strong moral content: 'Human dignity shall be respected at all costs!' Borders of states or collectives do not make the same strong claim – 'they do not feel pain'. In case of violations of basic human rights, our human reason is roused to indignation and urge for action: When compared with crimes against humanity, and when all other options are exhausted, the international society should be enabled to act, even with military force. Human rights are universal - they point to an ideal republic; they appeal to humanity as such, to the interests of irreplaceable human beings. But human rights when conceived abstractly do not pay attention to the context – e.g. to the specific situation and ethical-cultural values – and may violate other equally valid norms and important concerns. As human rights do not respect borders or collectives, as they appeal to humanity as such, they may threaten local communities, deep-rooted loyalties and value-based relationships. When you know what is RIGHT, you are obliged to act whatever the consequences. This is among the problems of human rights politics. It stems from the cosmopolitan universalistic idea of doing good regardless of borders which set the European nation states on missions defending and proclaiming human rights across the globe, a mission that the USA sought to take over in the late twentieth century (Eder and Giesen 2001: 265).

This cosmopolitan mission faces significant difficulties. The general problem comes down to the following: in concrete situations there will be collisions of human rights as more than one justified norm may be called upon. To choose the correct norm requires interpretation of situations and sometimes the balancing and weightening of

rights (Günther 1993; Alexy 1996). Human rights, which can be correct by abstract moral standards, by the rational will of autonomous persons, require not only positivization and codificationan within a legal system of interpretation and adjudication, but furthermore democratic legitimation and public deliberation to be correctly implemented.

Another problem with the politics of human rights is its arbitrariness at this stage of institutionalisation. They are enforced at random. Some states are being punished for their violations of human rights while others are not. There are sanctions against Iran, Cuba and North-Korea, but not against Israel or USA. Some may violate international law with impunity. The politics of human rights is criticised for being based on the will-power of the US and its allies, not on universal principles applied equally to all. Human rights talk may very well only be window-dressing, covering up for the self-interested motives of big states. All too often ideals are a sham – they are open to manipulation and interest-politics and renewed imperialism. Human rights politics is often power politics in disguise (cp. Schmitt 1932).

The solution to the twin problem of the politics of human rights – the problem of norm collisions and of arbitrariness – is positivisation and constitutionalisation. Legally entrenched rights confer upon everybody the same obligations and connect enactment to democratic procedures.[1] Increasingly, this is actually taking place as human rights are incorporated both in international law and in the constitutions of the nation states. As a consequence human rights are no longer merely moral categories but are positivised as *legal rights* and made binding through the sanctioning power of the administrative apparatus of the states. This has changed the very concept of sovereignty. The growth of

[1] Otherwise the danger prevails that agents and "leading beneficiaries of globalisation will construct notions of world order and transnational citizenship which allow them to pursue their interests without much accountability to wider constituencies" (Richard Falk 1994: 127–140. See also Andrew Linklater (1998)).

international law limits the principle of popular sovereignty. Today for (at least some) states to be recognized as sovereign they have to respect basic civil and political rights. In principle, then, only a democratic state is a sovereign state and in such a state the majority can not (openly) suppress minorities. As states have become increasingly interdependent and intertwined the parameters of power politics have changed.[2]

The problem of arbitrariness in the enforcement of norms in the international order is not resolved. The urgent task is to domesticate the existing state of nature among belligerent nations by transforming the international law into a law of global citizens – cosmopolitan law. Thus there is a need for political institutions that are capable of non-arbitrary and consistent norm enforcement, and in the advent of a democratised and empowered UN, regional institutions like the EU are of the utmost significance. Does the Charter of Fundamental Rights contribute to a cosmopolitan order?

Chartering Europe

The decision to frame a Charter of Fundamental Rights was taken at the Cologne European Council in June 1999.[3] In October 1999, at the Tampere European Council, it was decided to establish a 62-member Convention (headed by the former German President Roman Herzog, elected at the first meeting) to draft a Charter of Fundamental Rights of the European Union. The Convention consisted of (a) representatives of the Heads of State or Government of the Member States, (b) one representative of the President of the European Commission, (c) sixteen members of the EP, and (d) thirty

[2] See Habermas 1997, 1999; but see further Apel 2001; Blanke 2000; Bohman and Lutz-Bachmann (eds) 1997; Brunkhorst 1999; Brunkhorst, Köhler and Lutz-Bachmann (eds) 1999; Eriksen and Weigård 2003; Doyle 2001; Gilbert 1999; Höffe 1999, Held 2002; Kelsen 1944; Luhmann 1995; Fassbender 1998.

[3] For an analysis see Eriksen, Fossum and Menéndez (eds) 2003, in particular the chapters by De Schutter, Menéndez, Schönlau.

members of the Member State Parliaments (two from each of the Member States). It was led by a Praesidium of five. This was the first time that the EP was represented in the same manner as the Member State governments and the national parliaments in a process of a constitutional nature - based on the convention method. A convention is an assembly with constitutional overtones that proceed by the logic of deliberation and reason giving.

At the December 2000 Summit in Nice the Charter was solemnly proclaimed. The eventual incorporation into the Treaties was to be decided by the 'next' IGC. All articles on the rights of EU citizens in the Treaty of the Union have now been collected in one document of 54 articles, inspired by the ECHR (without replacing it), the Social Charters adopted by the Council of Europe and by the Community and the case-law of the European Court of Justice (ECJ). The Charter adds to the fundamental rights of Union citizens by expressing the principles of humanism and democracy. In the words of the preamble of the Charter:

> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Charter contains provisions on civil, political, social and economic rights. Put together, these are intended to ensure the dignity of the person, to safeguard essential freedoms, to provide a European citizenship, to ensure equality, to foster solidarity, and to provide for justice. The number and range of rights that are listed are comprehensive, and the protection of social rights is now included as a basic commitment for the Union. The Charter enumerates several 'rights to solidarity' even though the realisation of these

is not within the actual competence of the Union. They nevertheless constitute vital reasons for exceptions to market freedoms (Menéndez 2003: 192). Hence, the EU can no longer be seen merely as a market project, if it ever could.

In addition to provisions which most charters and bills of rights hold and which pertain to such clauses as the right to life, security, and dignity, there are numerous articles that seek to respond directly to contemporary issues and challenges. For instance, there are clauses on protection of personal data (Article 8), freedom of research (Article 13), protection of cultural diversity (Article 22), protection of children (Article 24), right to collective bargaining (Article 28), and protection of the environment (Article 37). The Charter also contains a right to good administration (Article 41). It contains several articles on non-discrimination and equality before the law. Article 21, section 1, states that

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Section 2 contains a clause banning discrimination on grounds of nationality. In the preamble it is also stressed that '(...) [i]t is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments (…)'. Its forward looking quality is perhaps most strikingly underscored in Article 3, which prohibits the cloning of human beings. It is an unequivocally modern set of rights directed to the problems of pluralist and complex societies in a changing environment. The Charter is sensitive to the problems of

globalised risk societies. It is a modern and up to date charter. But why does the EU need a bill of rights to bolster its activity in the first place?

Predictability and security

The Charter enhances the *legal certainty* of the citizens of Europe as everybody can claim protection for the same interests and concerns. As all are protected by the same rights, arbitrariness and uncertainty decrease. The principle of legal certainty is currently secured only in a limited sense at the Community level. The citizen can not be sure what rights she really is entitled to. The founding treaties of the European Community contained no reference to fundamental rights. As integration deepened, and as the Community came to have more far-reaching effects on the daily lives of citizens, the need for explicit mention of fundamental rights was realized. They came to the fore in 1964 when the European Court of Justice set out the doctrine of supremacy of EC law over national law. This was objected to by Italy and Germany because EC law, in contrast to their national constitutions, did not protect human rights. The Community is not bound by the ECHR in the same way as the subscribing Member States. The EU is not itself a signatory to the Convention.

Another source of initiative of making a charter of fundamental rights is the argument that the EU which is '(…) a staunch defender of human rights externally' (…) 'lacks a fully-fledged human rights policy'. And further, '(…) the Union can only achieve the leadership role to which it aspires through the example it sets' (Alston and Weiler 1999: 4-5). A constitutionalized bill of rights provides the EU with the legal competence required to carry on being a firm promoter of human rights worldwide. It is

difficult to be a champion of cosmopolitan law and urge others to institutionalize human rights when one is not prepared to do so oneself. When basic institutions are lacking in the EU with regard to human rights, it is difficult to *lead by example*. The ensuing document is intended to do something about this deficiency. The Charter substantiates the rights mentioned in Article 6(2) of the Treaty on European Union (TEU) by spelling out the specific obligations of the institutions.

Generally, bills of rights empower the judges to protect liberty and hinder that democracy by means of majority vote crushes individual rights (Brennan 1989: 432). A bill of rights, even one that is not more than the codification of existing law, decreases the room for discretion of the ECJ and national courts when dealing with EC law of fundamental rights. The EU Charter is, however, found wanting. It is weakly developed with regard to citizenship rights as a person must be citizen of a Member State to qualify as a citizen of the Union, and with regard to political rights. The Charter does not properly protect the public autonomy of the citizens (Fossum 2003). The onus is on human rights, which undoubtedly has been strengthened but it has not introduced '... any concrete policy changes nor altered anything significant within the existing legal, political and constitutional framework' (de Búrca 2001: 129).

There are other limitations of the Charter: It only applies to the actions of the EU institutions and the Member States' authorities, and it is not designed to replace other forms of fundamental rights protection. Section 1 states that the Charter will only be made to apply to the 'institutions and bodies of the Union' and only to the Member States 'when they are implementing Union law'. Article 51 (Section 2) states that the Charter does 'not establish any new power or task for the Community or the Union, or modify

powers and tasks defined by the Treaties'. But most importantly, it was not made binding. It was not included in the Nice Treaty - only solemnly proclaimed.

Some, notably Joseph Weiler (2004), contends that there is a legitimacy problem with regard to the manner the Charter was forged. Although the Charter was not made by a specifically designated Constitutional convention and thus lacks legitimacy, it is *a public document* that was written by political actors, by parliamentarians. The deliberations were relatively open and inclusive and the Convention method was deemed a success. It is also a question of how much genuine popular participation is needed when the Charter is merely systematizing the existing legal material in Europe (Menéndez 2004a), when it can be seen as a result of the fusion of constitutional traditions in Europe which reflect a shared political culture (Habermas 2004).

Now one needs to know whether the EU actually subscribes to a cosmopolitan perspective, founded on the rights of the individual, her autonomy and dignity, and on her right to participate in a lawful order. *The French Declaration of the Rights of Man and Citizen* (1789), Article 6 reads:

> Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes. All citizens, being equal before it, are equally admissible to all public offices, positions, and employments, according to their capacity, and without other distinction than that of virtues and talents.[4]

The problem of establishing a perfect civil constitution depends, according to Kant (1797), on creating law-based external relations between states. Legal disputes should be settled by an impartial and powerful third party. 'For no-one can coerce anyone else other than through the public law and its executor, the head of state, while everyone else can

[4] Cited from Laquer and Rubin (1979: 119).

resist the others in the same way and to the same degree' (Kant 1797/1991: 75). The question as regards the EU is, first, whether cosmopolitanism actually feeds into the reform process of the Union itself – viz., whether the Charter is going to be binding and, secondly, whether it actually informs the external relations of the Union?

Constitutionalising Europe

As mentioned in the introduction, events in the aftermath of the sanctions imposed on Austria in 2000 by the fourteen other Member States for letting a rightwing, 'racist' party into government suggest that there is a willingness to turn the EU into an instrument for upholding democratic principles and respect for fundamental rights. As mentioned, the EU itself has now established procedures to ensure that breaches of fundamental principles are sanctioned. The Treaty of Nice includes an amendment of Article 7 TEU that further specifies the concrete procedures to follow in case of a 'clear risk of a serious breach' on the side of one Member State.[5] Moreover, when the Treaty of Nice will come into force, a qualified majority vote will be enough to take action against the recalcitrant Member State. This development of rights protection and polity-building is now carried further.

The Convention on the Future of Europe started its work in February 2002 and concluded its work in June/July 2003.[6] It is now widely depicted as *a Constitutional Convention.* Its membership was modeled on the Charter Convention, with a majority of parliamentarians. 46 out of 66 voting members, and 26 out of 39 from the candidate countries were parliamentarians. Its mandate was broader, its working method included

[5] Article 7 of the Treaty of the European Union, as amended by the Treaty of Nice.
[6] See Eriksen, Fossum and Menéndez (eds) 2004, especially the chapters by Closa, Fossum and Magnette.

working groups, and the applicant states had a number of representatives present, as active, participating, observers. The Convention succeeded in forging agreement on a single constitutional proposal 2003, which the IGC accepted (with some minor amendments) in June 2004, and which is going to be subjected to hard-won ratification processes in the Member States in the years to come.

The Constitutional Treaty[7] contains the following basic changes:

- Incorporation of the Charter of Fundamental rights into the Constitution (Part II, Articles 61-114)
- Recognition of the Union's legal personality (Part I, Article 7)
- The partly abolishment of the pillar structure[8]
- Recognition of the primacy of Union law (Part I, Article 6)
- Reduction and simplification of the legislative instruments and decision-making procedures, as well as the introduction of a hierarchy of legal acts (Part I, Articles 33-39)
- A clearer division of competences between the Union and the Member States (Part I, Articles 12-18)
- Decision-making by qualified majority as the main principle in the Council of Ministers (Part I, Article 25). Decisions to be adopted jointly by the Council of Ministers and the European Parliament on the basis of proposals from the Commission (Part I, Article 34-1, with reference to Part III, Article 396, though with important exceptions)
- The election of a President of the European Council for a term of two and a half years (Part I, Article 22)
- A Union Minister for Foreign Affairs (Part I, Article 28)
- A citizens' right initiative (Part I, Article 47-4)
- Voluntary withdrawal from the Union (Part I, Article 60)

Efforts have, thus, been taken to make the emerging constitutional structure comply with democratic principles. It is a document that not only creates a new EU president, a

[7] References to the Constitutional Treaty in this article are from the adopted version as published in the O*fficial Journal of the European Union*: OJ C 310/1-474, 16.12.2004

[8] Meaning the structure of three categories of cooperation with different areas of competence: the economic community (pillar I); the common foreign- and security policy (pillar II); and the cooperation in the fields of justice and home affairs (pillar III). This is evident from the following articles: Part I, Article 7 on the legal personality of the Union; Article 34 on legislative acts, with reference to Part III, Article 396 on decision-making procedures; and Part I, Article 25 on qualified majority.

foreign minister and enhances EU action in defense and foreign policy; the European parliament will have more power and national vetoes will be removed in several areas. The weakening of the pillars, the endowing of the EU with legal personality, the incorporation of the Charter of Fundamental Rights[9], the strengthened role of the EP and the generalization of co-decision and qualified majority voting as general principles means real democratization of the Union. And so does the strengthening of national (parliamentary) involvement in EU activities.[10]

The proposed reforms will, short of making the Union fully democratic, make it more coherent, transparent and participatory. Increasingly the legal order of Europe confers rights upon the citizens and subjects law-making to the will of the citizens. The EU has achieved an element of supranational normativity based on the principles of fundamental rights, rule of law, and democracy. However, the Member States remain key players. Among other things they retain control of the Union's sources of funds, the Council structure is strengthened - unanimity is demanded as regards fiscal policy and CFSP and CSDP[11] - and they still control the power of constitutional amendment – '..also in future Treaty amendments will require unanimity and ratification by all the Member States' (Kokott and Rüth 2003: 1343). The Constitutional Treaty is an attempt to find a new balance between a Europe of states and a Europe of citizens. This double purpose and legitimacy basis of the EU is reflected in the framing of the first paragraph of the Constitutional Treaty:

[9] The content was not reopened but included unaltered as part II of the Constitutional Treaty.
[10] Deliberative democracy has also had its impact: Article I-47 of the Constitutional Treaty states that the Union institutions shall 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.'
[11] Common Foreign and Security Policy, Common Security and Defence Policy.

Article I-1: Establishment of the Union

1. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.

The Constitutional Treaty is not a concord among citizens, but neither is it merely a contract among states. The states continue to be the masters of the Treaties, but once it is ratified (if it ever is) this may change in so far it has been subjected to an inclusive European wide public debate and has been reflectively endorsed by the citizens. Only in this case can it live up to its name – a Constitution for Europe –as it can claim to embody 'the will of the people' and hence achieve a legitimacy basis superior to that of state interests. Thus, the prospects of a cosmopolitan Europe. But are EU's external relations consistent with such a view?

Cosmopolitan policies or just cheap talk?

For a long time the Community subscribed to democracy and human rights as the basic principles of membership. Portugal, Spain and Greece were not admitted before they had abolished totalitarianism and changed their form of government. In a report to the June 1992 Lisbon European Council, the Commission re-stated that there were certain fundamental conditions for membership: Only European states could become members of the EU; candidate states must have a democratic constitution and they must respect the principles of human rights. This is reiterated in the criteria for membership set by the Copenhagen European Council (1993). In order to become a member of the EU a state must be able to fulfil the following three conditions:

- it must have a functioning market economy with the capacity to cope with competitive pressures and market forces within the EU;

- it must have achieved stability of institutions guaranteeing democracy, the rule of law and human rights;
- and it must be able to take on the obligations of EU membership, including adherence to the aims of economic and political union.

Also when it comes to trade and international cooperation in general there is a commitment to democracy and human rights. The EU insists on the respect of minority rights in third countries – non-European Countries - and there is political conditionality on aid and trade agreements.[12] 'The offer of trade and association agreements, technical and development assistance, political dialogue, diplomatic recognition, and other instruments is now usually made conditional on respect for human rights' (Smith 2003: 111). Since 1995 the 'human- rights clause' is supposed to be incorporated in all cooperation and association agreements. So far more that 20 agreements have been signed (ibid. 112). There is more emphasis on the protection of civil and political rights compared to social and economic ones. The Union's initiatives from 1998 on the death penalty and torture testify to this.[13] Not only have all EU Member States abolished it, the EU has also raised the issue on a bilateral and multilateral basis worldwide, and through the UN. The list of countries having abolished capital punishment as a result of EU pressure is impressive. The EU has affected the human rights situation, the abolishment or reduction of capital punishment in Cyprus and Poland, Albania and Ukraine, Azerbaijan and Turkmenistan, Turkey and Russia through different kinds of means and

[12] 'To expand and deepen relations with other countries and regions, the EU holds regular summit meetings with its main partners like the United States, Japan, Canada and, more recently, Russia and India, as well as regional dialogues with countries in the Mediterranean, the Middle East, Asia and Latin America. Although these relationships focused mainly on trade issues at the beginning, they have expanded over the years to cover investment, economic cooperation, finance, energy, science and technology and environmental protection as well as political matters such as the global war on terror, international crime and drug trafficking, and human rights.' http://europa.eu.int/pol/ext/overview_en.htm

[13] 'In 1998 it launched an initiative to promote the abolition of the death penalty in third countries by using diplomatic instruments such as demárches, declarations and dialogue' (Smith 2003: 108).

measures (Manners 2002: 249-50). In Turkey there has been a political avalanche with respect to democratization and human rights, especially since 2002: 'Achievements included the abolition of death penalty, easing of restrictions on broadcasting and education in minority languages, shortened police detention periods, and lifting of the state of emergency in the formerly troubled Southeast' (Avci 2005:137-8). Further, the Union has cut direct budgetary support to Zimbabwe, to the Ivory Coast, to Haiti and to Liberia. The EU has stalled on deepening relations with Russia, Croatia, Pakistan and Algeria due to breaches of basic human rights. 'The "revamping" of the EU's foreign policy has already been translated into further, more specific guidelines. The Council has produced its "Guidelines on Human Rights Dialogue"[14]… The Commission has presented a Communication on EU Election Assistance and Observation[15] … and on conflict prevention[16] … …. the Cotonou agreement with the African, Caribbean and Pacific (ACP) states of 23 June 2000 has extended the human rights clause to a multilateral setting' (Menéndez 2004b: 246).

The Commission has adopted several cooperation instruments for regional and bilateral relations and the EU holds regular summit meetings with its main partners. It has developed so-called partnership and co-operation agreements, 'aiming to establish an area of prosperity and good neighborliness',[17] with many countries and it has prompted a new regionalism.

> New regionalism appear to constitute a relatively safe space within which Europe can display identity and norm difference from the US: The EU can lay

[14] 'Council guidelines on human rights dialogue, of 13 December 2001, available at: http://europa.eu.int/comm/external_relations/human_rights/doc/ghd12-01.htm

[15] 'Communication from the Commission on EU election assistance and observation', European Commission, 11 April 2000.

[16] 'Communication from the Commission on conflict prevention', European Commission 11 April 2001.

[17] Constitutional Treaty, Article I-57, 1, see also Communication from Commission, European Neighbourhood Policy, Strategy Paper, Brussels, 12.5. 2004 COM8(2004) 373 final.

> down an identity marker of what it perceives to as a more humane governance model in its relations with the developing world, without have to confront or contradict US power head-on
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> (Grugel 2004: 621).[18]

The EU whose biggest members have been colonial powers, exports the rule of law, democracy and human rights: 'It is perhaps a paradox to note that the continent which once ruled through the physical impositions of imperialism is now coming to set word standards in normative terms' (Rosecrance 1998: 22).

These policies are reflective of the value basis of the Union. However, one may ask whether this is mainly cheap talk. Is the EU consistent, does it apply the same principles on themselves and their members, and do they apply them consistently on third countries – or merely in places where it is not very costly? To the latter, the EU certainly is not consistent as non-European Countries are being treated differently. For example, Russia is merely marginally sanctioned for its wars in Chechnya (although it threatens with imposing stronger sanctions). Israel is being threatened of being sanctioned because of its policies towards the Palestinians, but sanctions have not been carried out (yet). Uzbekistan is another example of countries where 'the "essential elements' clause" is not upheld rigorously despite of widespread torture and lack of reform' (European Voice 18 – 24 March 2004: 15). These examples indicate the lack of consistency in EU external policies, hence the criticism of hypocrisy and the allegation of window-dressing. There is also the complaint that there is more emphasis on the protection of civil and political rights compared to social and economic ones and that the commercial interests take precedence, which the present urge for lifting the embargo on China seems to

[18] For the debate on the nature of the EU compared to the US see e.g.: Haseler 2004; Lieven 2004; Lindberg (ed.) 2005; Nicolaidis and Howse (eds) 2001; Reid 2004; Rifkin 2004.

substantiate. But it is beyond doubt that the human rights politics of the Union costs and is not without sacrifices, as e.g., the Enlargement and the support to former Yugoslavia testify to. While Enlargement reveals a common value-base in Europe, the establishment of a common foreign and security policy demonstrates the salience of rights, viz., the proclivity to let ones actions be subjected to higher ranging principles (cp. Sjursen 2002, 2003, 2004).

However, it is also a question of whether punishment is the best way of promoting change of development. 'The inclusion of an essential elements clause is not intended to signify a negative or punitive approach. It is, instead, meant to promote dialogue and positive measures' (External Relations Commissioner, Chris Patten in European Voice op.cit). The EU prefers positive and soft measures. But when compared with crimes against humanity, and when all other options are exhausted, the international society should be enabled to act, even with military force, we are, as mentioned, instructed by moral reason. Needless to say, the EU is not a borderless organisation.

Bounded Justice?

Citizenship is a means for setting the conditions for inclusion / exclusion of any given society. A European citizenship was inaugurated by the Maastricht Treaty (1992) and comprises a right of residence in other Member States, voting rights based on residence in local and European parliamentary elections, diplomatic protection in third countries, and the rights to make petitions to the European Parliament and to make complaints to the European Ombudsman. It was strengthened in the Amsterdam Treaty in order to democratize the Union and is firmly stated in the Constitutional Treaty but still premised

on national membership. More than 10 million individuals are ‘third country nationals’ in Europe and cannot get a Union citizenship. In reality Union citizenship increases exclusion of large groups. It was strengthened in the Amsterdam Treaty in order to democratize the Union and is firmly stated in the Constitutional Treaty but still premised on national membership. More than 10 million individuals are ‘third country nationals’ in Europe and cannot get a Union citizenship. In reality, the Union citizenship may increase exclusion of large groups. One should, however, be aware of the dynamic aspect of European citizenship as it has been extended with every Treaty change and is co-evolving with national developments. It is held to be reflecting an ongoing process of establishing a more open, just and democratic community of citizen: ‘the dynamic of citizenship results from the cross-application of norms so that membership becomes more inclusive by extending rights, and rights become instrumental for securing equal membership’ (Bauböck 1994: 207, cited in Shaw 2000: 75).

However, there is no sign of the EU developing a borderless cosmopolitan entity because immigration is strictly regulated and third country nationals have only limited protection as the asylum policy of the Union as well as the actual level of protection of citizenship rights of minorities testify to. Critics find the EU extremely bounded when it comes to immigration and the rights of third country nationals. According to Schengen II the ‘internal borders may be crossed at any point without any checks on persons being carried out’, but the fact remains that non-EU (and non-EEA) citizens are not granted the same right to free movement. Minority issues have been high on the agenda during the enlargement process, but it is contested whether they are yet part of the ‘aquis communautaire’ – the total corpus of EEC/EU law; treaty provisions, regulations and

policy directives. It is covered by the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE). The 'respect for and protection of minorities' has been one of prominent EU-imposed Copenhagen criteria which the candidate countries have had to fulfill in the last decade. Some analysts fear they vanish from the EU-scene once the candidate states acquire full EU membership (cp. Kveinen 2000). This fear is due to the lack of institutionalization of a human rights policy in the EU.

> The real problem of the Community is the absence of a human rights policy, with everything this entails: a Commissioner, A Directorate General, a budget and a horizontal action plan for making effective those rights already granted by the Treaties and judicially protected by the various levels of European Courts.
>
> (Weiler 2004: 65)

The EU is not cosmopolitan in the sense that it aspires (or could aspire) to a world organization – a world state – but in the sense that it subscribes to the principles of human rights, democracy and rule of law also for dealing with international affairs, hence underscoring the cosmopolitan law of the peoples. In a cosmopolitan perspective the borders of the EU are to be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity and with regard to the support and further development of similar regional associations in the rest of the world.[19] In this perspective the borders of the EU should be drawn with regard to functional requirements both for itself and for other regions all within the constraints of a reformed and rights-enforcing UN. The latter needs to be democratised and made into a polity with sanction-based means of law-enforcement.

[19] See Beck and Grande for a different take on what a cosmopolitian Europe means. Their 'kosmopolitische Europa' is not confined to the EU but stretches from Los Angeles and Vancouver to Wladiwostok (Beck and Grande 2004: 23).

> The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.
>
> (Kant 1991: 47)

Hence, the need for a law-based supranational order. But why is such an order really needed – what does exactly the action coordinative effect of the law consists in?

The true republic and the rule of law

According to cosmopolitans, the urgent task is to domesticate the existing state of nature between countries by means of human rights, the transformation of international law into a law of global citizens. The EU is the most promising example of a post-national powerful regional organisation and one which increasingly becomes a role model for other regions (in Asia, South America and Africa). The effort to include the EU Charter of human rights in the new Constitutional Treaty is a strong indication of heightened consistency between externally projected and internally applied standards. The principle of popular sovereignty is, thus, in a way in the process of transformed into a law for the citizens of the world. We witness the abolishment of force through right, to talk with Kelsen (1944), a development that was initiated by modernity. But what is the role of force in such an order? Presently there are no European prisons, no European army and no European police corps, but is the eventual establishment of such detrimental to cosmopolitanism? There is an internal link between coercion and morality in a law-based order. A real republic depends on bodies above the nation state that citizens can appeal to when their rights are threatened.

From the Enlightenment stems the trust in written constitutions and judicial review as a means to civilize the relations among men as well as among nations. Law is a functional complement to politics and morality as it stabilizes behavioural expectations and solves the collective action problem. In general terms the problem of collective action has to do with overcoming the problem of *contra-finalité,* in which each actors' egoistic behavior leads to results devastating to everybody's interest, and the problem of *suboptimality*. The latter designates the situation in which all members opt for a solution aware that all the others members will do as well and that all would have benefited from another strategy. If another solution had been chosen all would have come out better. Game theorists model this as a Prisoner's Dilemma game in which strategic action leads to collective action problems. When the consumption of a public good can not be restricted actors have an incentive not to co-operate because they may risk contributing more than they receive, and hence be in a 'sucker' position (Axelrod 1990: 8). This is why legal norms with attendant sanctions are needed in order to coordinate actions in case of conflict over outcomes. The law is a system of action that transforms agreements into binding decisions. It is the means through which political goals can be realized also against opposition.

Pure agreements on their hand do not warrant collective action or the delegation of sovereignty. There may be reasons to oppose even a rational agreement, and nobody is obliged to comply unless all others also comply. Due to weakness of will, and as long as citizens are not reassured that the violation of norms will not be left unsanctioned, general and spontaneous compliance is endangered. Without the treat of force there will

be no political association! The medium of law stabilizes behavioural expectation in two ways. First, it alleviates *coordination problems* by signaling which rule to follow in practical situations (Luhmann 1995: 136). In this way it is also a functional complement to morality as the latter can not tell what one should do in particular contexts. Many justified norms may apply, but which is the correct one in this particular situation can not be inferred from the bare existence of moral agreements. Even angels need 'a system of laws in order to know the right thing to do' (Honoré 1992: 3).

Secondly, sanctioning of non-compliance and defecting make it less risky for actors to act in a morally adequate manner. People may comply with the law out of self-interest because it is expensive not to do so. Law is then not merely a constraint on morality, but is in fact enabling such while it makes it possible for actors to behave correctly without personal losses. By sanctioning non-compliance and preventing violence, law-based orders make it possible for its members to act in accordance with their own conscience, out of a sense of duty (Apel 1998: 755).

In order to ensure justice at the world level, or at least to be able to sanction norm breaches such as human rights violations and crimes against humanity there is, thus, need for a system that lays down the law equally binding on all. It is a rather thin normative basis for such an order as it must be based only on what human beings have in common, viz., their right to freedom, equality, dignity, democracy and the like that are listed in human rights declarations and basic rights stipulations of modern constitutions. The question is how much power the custodian of such an order – the EU, the UN – should have and what kind of organization it should be. It follows from the preceding analysis that the threat of sanctions is an intrinsic part of the law. That is, even though the law

should comply with moral tenets so that it can be followed out of insight into what is right, and which is required for it to be a means for justice, it cannot achieve legitimacy unless it is connected with sanctions so that every subject can be sure that the same rules apply to all (Habermas 1996: 107ff).

The legitimacy of the laws, then, paradoxically stems from the very fact that they are obligatory and coercive. The law is a means to compel compliance, but it can only do so without unleashing the potential threat of force when it applies equally to all and when it is in compliance with moral principles, which, under modern conditions, means that it must have been made by the people. An association is only democratic to the extent it relies upon the putative legitimate use of force to ensure compliance with its norms and only democratically made law can claim to be legitimate. Also an organization above the nation state level equipped with mechanisms to enforce compliance – viz., military capacity to make threats credible – can rightly do so only in so far as its actions are democratically regulated. The positivisation and legal codification of human rights represents juridification and is in need of democratization. Hence, no humanitarization without representation!

In the Kantian perspective the coerciveness of the law is intrinsically linked to the ideal of equal liberties for all (Kant 1785). It is a means for compelling compliance but it cannot itself establish the required legitimacy basis for such. The authority of the law stems from the fact that it is made by the people and hence claims to be just or in the public interest, and that it is made binding on every part to the same degree and amount. The legitimacy of the laws then, paradoxically also stems from the very fact that they are obligatory and coercive. The law is a means to compel compliance, but it can only do so

without unleashing the potential threat of force, when it applies equally to all and when it is in compliance with moral principles, which, under modern conditions, means that it must have been made by the people. Hence only democratically made law can claim to be legitimate.

Correct implementation of common action norms requires concrete institutions and procedures. Proponents of a world state with far-reaching competencies – with an executive government – face severe difficulties.[20] The principle of rule of law – das Rechtsstaat – requires the government to act on legal norms that are general, clear, public, prospective and stable in order to safeguard against states' infringement of individual liberties and rights. In concrete situations of norm violations often more than one justified norm may be called upon. Norms, also legal norms, are contested and require argumentation and interpretation with regard to concrete interests and values in order to be properly applied, as mentioned earlier. Individuals' rights are limited by others' rights and concerns of other kinds of 'goods', and the abstract law enforcement by a world state runs the danger of glossing over relevant distinctions and differences. There is a problem with cosmopolitan law in contrast to the existing 'international law' with regard to *legal protection* (Scheuerman 2002: 448). The cosmopolitan mission faces significant difficulties with regard to legal protection when it is not properly institutionalised. How can the rights of the citizens be protected at the post-national level?

The idea of the constitutional state is not only to protect against encroachment but also to make sure that the regulation of interests as well as the realisation of collective

[20] There is no uncontested blueprint of the design for a cosmopolitan order as the argument over the proposal of David Held & co testifies to (Held 1995), see e.g., Habermas 1998, 1999, 2001; Eriksen and Weigård 2003: 240ff.

goals can be rendered acceptable from a normative point of view by taking stock of a whole range of norms, interests and values. But as the EU is not a cosmopolitan order that aspires to be a world organization, but rather one that subjects its actions to the constraints of a higher ranking law. What is also interesting about the EU is that it does not have a system for norm implementation of its own but is relying on national political systems - national administrations - in order to put its measures into effect. This diminishes the tremendous leeway for both legislators and courts at the supranational level. Moreover the putative democratic system of lawmaking and norm interpretation at the European level imply that the EU does not run into the well-known risks of a despotic Leviathan at the world level. It does not grant the citizens unmediated membership in a world organization but rather respect the allegiance to particular communities – the nation states – and represent a constraint upon brute state power and excessive nationalism.

Conclusion

A true republic is based on the legal protection of basic rights. In fact legal developments over the last century have been remarkable and one of their main thrusts has been to protect human rights. Rights entrenchment has been outstanding world wide. Almost nobody can any longer be treated as a stranger devoid of rights. These rights are no longer only present in international declarations and proclamations. Increasingly they are entrenched in power wielding systems of action and in the actual policies pursued. Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized.

Even though naked power is tamed by law, and legal orders are orders of peace and the position of human rights is strengthened internationally this is a development that is not without difficulties. Human rights transcend the rights of the citizens of a state, because they apply to all human beings. But with their expansion within international law they have gained an authority that limits the state's self-legislation. Further, the problem of arbitrariness in the enforcement of norms in the international order is not resolved. For a true republic to be realised it must be possible for citizens to appeal to bodies above the nation state when their rights are threatened. This is so because a particular state can fail to respect human rights as well as other states' legitimate interests. Human rights are ensured by non-democratic bodies such as courts and tribunals or, what is more often the case, enforced by the US and its allies. Only with a cosmopolitan order – democracy at the supranational world level – can this opposition finally find its solution. The constitutionalisation of the Charter of Fundamental Rights is an important step in the institutionalisation of a framework of a cosmopolitan order where violations of human rights can be persecuted as criminal offences according to legal procedures. Hence, the parameters of power politics have already changed in Europe.

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