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**Legitimacy through norms: the political limits of  
Europe's normative power**

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## Introduction

This paper explores the concept of 'normative power Europe' through the framework of legitimacy. Legitimacy is a central preoccupation of those analysts and policymakers interested in the EU's normative power. A recent special issue on normative power in Europe was framed around the question of how to define normative power in order to enhance its legitimacy as a form of foreign policy. In that issue, Michael Smith noted that from whatever angle we study the question of the EU's foreign policy, "the subject raises major questions about the interaction between internal developments and external structures and processes, about the boundaries of 'civilian' and normative power, *and about the legitimacy claims of European foreign policy*".<sup>1</sup> Ian Manners recently listed no less than five definitions of normative power developed in order that the legitimacy of the EU's actions be judged according to an objective standard of some kind.<sup>2</sup> An ongoing research project inquires into whether or not European norms appear as legitimate in the eyes of non-Europeans.<sup>3</sup>

This paper starts off by situating the emergence of normative power Europe within the wider context of European integration. Various conceptions of the EU as a foreign policy actor were developed in an attempt to resolve a crisis in the 'Idea of Europe' that began in the early post Cold War period. The specific concept of normative power emerged in reaction to the perceived inadequacy of various other qualifying adjectives for European power. For all its popularity, the concept has been subject to criticism ever since Ian Manners first published his seminal article in 2002. Many felt that the very idea of normative power Europe needed its own sources of legitimacy: scholars and analysts refused to accept that the prefix 'normative' should automatically put the EU's power beyond critical commentary. As a result, in the academic debate scholars have focused on possible sources of legitimacy *external to the normative power concept itself*. This paper analyzes in detail three such sources: cosmopolitan law as argued by Helene Sjursen, a post-colonial ethos developed by Kalypso Nicolaïdis, and a set of European social preferences elaborated by Zaki Laïdi. The paper claims that each of these attempts to legitimize the concept of normative power draw upon different concepts of political community, authority and democracy. This is instructive in terms of our understanding of the EU as a political formation. It also demonstrates that definitions of normative power are never neutral - they put forward a particular vision of politics which should be properly identified. The paper compares these sources of legitimacy and limns their weaknesses. The paper concludes with the suggestion

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\* This paper is a reworked version of a chapter of a doctoral thesis exploring the ways in which the EU legitimizes its foreign policy.

<sup>1</sup> Smith, M. 2006. Comment: Crossroads or cul-de-sac? Reassessing European Foreign Policy. *Journal of European Public Policy*. 13(2): 322-327. p326, my italics.

<sup>2</sup> These five are the EU as self-binding, as a vanishing mediator, as deliberation, as reflexivity and as inclusion. Manners, I. (2007). European Union, normative power and ethical foreign policy. In D. Chandler, and V. Heins (Eds.), *Rethinking Ethical Foreign Policy: Pitfalls, possibilities and paradoxes*. Abingdon: Routledge. p119.

<sup>3</sup> On the connection between legitimacy and normative power, Nicolaïdis writes in a book on the EU's Mediterranean policies that "one may read a number of contributions in this volume as supporting the assumption that taking the EU as a 'normative power' provides a response to the effectiveness/legitimacy dilemma, making the EU's assertion of its influence more palatable and legitimate, and distinct from that of the United States" Nicolaidis, K., and Nicolaidis, D. (2006). The EuroMed beyond Civilizational Paradigms. In E. Adler, B. Crawford, F. Bicchieri, and R.D. Sarto (Eds.), *The Convergence of Civilizations: Constructing a Mediterranean Region*. Toronto: University of Toronto Press. p8. This project on Europe in a Non-European World is part of the EU-funded Garnet project on global governance, regionalization and regulation. Information on Garnet can be obtained via its website: <http://www.garnet-eu.org/>

that the lack of clarity concerning the identity of the EU as a political formation may be one of the major limitations the EU faces in its hope of becoming a central actor in world politics.

## 1. Europe as a "force for good"

Two features of the post Cold War period stand out in the discussion of normative power Europe. The first is a crisis in the 'Idea of Europe', which has been around since the early post Cold War period. The second is the increasing centrality of foreign policy to European integration, and the vastly expanded role of the EU in the area of foreign affairs. These two developments are connected: we can point to the expansion of the EU's international role, and the attempts at identifying its distinctive contribution to world affairs, as driven in part by the need to legitimize European integration in the post Cold War period. As Kalypso Nicolaïdis has argued: "Europeans are currently seeking for a new *raison d'être* for their continental project and many share the belief that such a *raison d'être* lies with its role in the world".<sup>4</sup>

Rarely has there ever been any consensus around the 'Idea of Europe'.<sup>5</sup> However, during the Cold War, various narratives underpinned European integration: Europe as a peace project, economic prosperity through integration, an integrated Europe as an anti-communist bulwark. Over the last couple of decades, the force of these narratives has waned. Anti-communism withered away with the collapse of the Berlin Wall. Few alive in Europe today lived through the World Wars. The heady days of the postwar economic boom (*les Trentes Glorieuses*) have long been replaced by more moderate growth and by long-standing concerns about European competitiveness.<sup>6</sup> More problematically, a veritable ideology of European integration - functionalism - was unable to justify the forward movement of the EU in the 1990s. Functionalism rests upon a technical rationale for integration, that cooperation in one area will beget further cooperation elsewhere by virtue of its own internal necessity. This fails as a historical account of European integration, but also does not give integration any deeper meaning or purpose. The contemporary crisis in the 'Idea of Europe' is, as Stefan Elbe has shown, above all a crisis in meaning. Elbe writes of the "pessimism that is frequently displayed by contemporary scholars and policy-makers in response to the perceived absence of a more meaningful vision of Europe".<sup>7</sup> Significantly, in the post Cold War period, we have seen a shift away from functionalism towards attempts to give the EU a more cultural identity.<sup>8</sup> This is driven in part by the awareness that the expansion of the EU into more politically sensitive areas of policymaking cannot be justified by wholly institutional arguments. As one scholar put it, "a political entity such as the European Union is inconceivable without the existence of a collective identity for its citizens".<sup>9</sup> However, for all the energy expended in providing the EU with an identity of some kind, the result has been meagre. As Elbe

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<sup>4</sup> Nicolaïdis, K. (2007). The 'Clash of Universalisms' (Or Why Europe Needs a Genuine Post-Colonial Ethos). Paper presented at *Faculty Seminar* in Oxford. pp5-6.

<sup>5</sup> See, for instance, Mazower, M. (1998). *Dark Continent: Europe's Twentieth Century*. New York: Vintage. and Judt, T. (2005). *Postwar*. London: Heinemann. Especially chapter thirteen. See also d'Appollonia, A.C. (2002). European Nationalism and European Union. In A. Padgen (Ed.), *The Idea of Europe: From Antiquity to the European Union*. Cambridge: Cambridge University Press.

<sup>6</sup> For a defence of Europe's role in the world economy, see Hutton, W. (2002). *The World We're In*. London: Little, Brown.

<sup>7</sup> Elbe, S. 2001. 'We Good Europeans...': Genealogical Reflections on the *Idea* of Europe. *Millennium: Journal of International Studies*. 30(2): 259-283. p259.

<sup>8</sup> There is an extensive debate on whether this is possible or not, and if possible whether it is in fact desirable. See, for a range of views, Smith, A.D. 1992. National Identity and the idea of European unity. *International Affairs*. 68(1): 55-76. and Laffan, B. 1996. The Politics of Identity and Political Order in Europe. *Journal of Common Market Studies*. 34(1): 81-102.

<sup>9</sup> Jacques Vandamme, cited in Elbe, *ibid*, p264.

remarks, "the growing debate on the European idea has... not so much culminated in the articulation of a more compelling vision of Europe as it has in a plethora of accounts of a culture unable to articulate a meaningful vision of itself".<sup>10</sup> As Agnes Heller put it, "European culture... can legitimately be considered the cadaver of its own self-image".<sup>11</sup>

Under such conditions, it has been tempting to turn away from internal integration and to try and find meaning in the EU's international role. Many factors of course explain the expansion of the EU's role. External events, from the wars in Yugoslavia in the early 1990s to the American war in Iraq in 2003, have often pushed member states towards closer foreign policy cooperation. An internal fixation with finding a purpose for the EU has, however, played its part, explaining why EU foreign policy resembles - to use Michael Smith's phrase - a "politics of self-absorption".<sup>12</sup> This began already in the late 1980s, with then president of the European Commission, Jacques Delors, discerning in the collapse of the Eastern bloc an opportunity for the EU to take on new responsibilities.<sup>13</sup> George Ross writes that Delors, since 1989, "had been training himself in imitable Jansenist ways in world statesmanship, while seizing every opportunity to advertise the Community as an international player".<sup>14</sup> Though expectations of the EU's role often outstripped its ability to act effectively<sup>15</sup>, EU foreign policy has become a central theme of integration. In recent years, we have seen this most vividly in the cottage industry of scholars and analysts working on inventing adjectival prefixes for the concept of European power. We have, *inter alia*, civilian/civilized/civilizing/civilizational power<sup>16</sup>, quiet superpower<sup>17</sup>, postmodern superpower<sup>18</sup>, neo-medieval empire<sup>19</sup>, responsible power<sup>20</sup> and even metrosexual power.<sup>21</sup> Manners' own concept of normative power was developed as a response to some of these terms and the ensuing debates. Manners claims that the concept of civilian power Europe was tied to the Cold War and

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<sup>10</sup> Elbe, *op cit*, p265.

<sup>11</sup> Elbe, *op cit*, p265. For further accounts of the EU's problematical search for meaning in the post Cold War period, see Laidi, Z. (2001). *Un Monde Prive de Sens*. Paris: Hachette., Hoffmann, S. (1995). *Obstinate or Obsolete? France, European Integration and the Fate of the Nation State*. In S. Hoffmann (Ed.), *The European Sisyphus: Essays on Europe, 1964-1994*. Boulder: Westview Press. and Ash, T.G. (1999). *History of the Present*. London: Allen Lane/Penguin.

<sup>12</sup> Smith, *op cit*, p326.

<sup>13</sup> On the origins of the EU's role in the enlargement brief, see Nuttall, S. (2000). *European Foreign Policy*. Oxford: Oxford University Press. p6. See also McCormick, J. (2007). *The European Superpower*. Basingstoke: Palgrave Macmillan. p114.

<sup>14</sup> Ross, G. (1995). *Jacques Delors and European Integration*. Cambridge: Polity. p92

<sup>15</sup> On this problem, see Hill, C. 1993. The Capability-Expectations Gap, or Conceptualizing Europe's International Role. *Journal of Common Market Studies*. 31(3): 305-328.

<sup>16</sup> For a discussion of these terms, see Manners, I. 2006. Normative power Europe reconsidered: beyond the crossroads 1. *Journal of European Public Policy*. 13(2): 182-199. p184. On the original concept of civilian power Europe, see Duchene, F. (1972). *Europe's Role in World Peace*. In R. Mayne (Ed.), *Europe Tomorrow: 16 Europeans look ahead*. London: Fontana. and Duchene, F. (1973). *The European Community and the Uncertainties of Interdependence*. In M. Kohnstamm, and W. Hager (Eds.), *A Nation Writ Large? Foreign Policy Problems before the European Community*. Basingstoke: Macmillan.. For a critique of Duchene, see Bull, H. 1982. Civilian Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 21(2): 149-164..

<sup>17</sup> Moravcsik, A. (2004). Europe is the new role model for the world, *Financial Times*. London.

<sup>18</sup> McCormick, *op cit*, pp27-33.

<sup>19</sup> Zielonka, J. 2001. How New Enlarged Borders will Reshape the European union. *Journal of Common Market Studies*. 39(3): 507-536. and Zielonka, J. (2006). *Europe as Empire: The Nature of the Enlarged European Union*. Oxford: Oxford University Press.

<sup>20</sup> Mayer, H., and Vogt, H., Eds. (2006). *A Responsible Europe? Ethical Foundations of EU External Affairs* Basingstoke: Palgrave.

<sup>21</sup> Parag, K. (2004). The Metrosexual Power, *Foreign Policy*. Vol. JulyAugust.

had neo-colonial overtones. It was too closely associated with fixed assumptions about the nation-state, national interests and the role of military power. In Manners' words, "the EU and its actions in world politics demand a wider and more appropriate approach in order to reflect on what it is, does and should do".<sup>22</sup> His concept of normative power was designed to respond to this demand.

## 2. The limits of normative power Europe

For all its popularity, it became obvious very quickly that the prefix normative does not automatically make the EU a legitimate actor in international affairs. Since Manners' published his article in 2002, the debate around defining and judging the EU's normative power has grown and the critiques of normative power Europe have come from a variety of different sources. A particular concern was the close correspondence between normative power and the EU's vision of itself, which made many uneasy. In Helene Sjursen's words, "the fact that [normative power Europe] corresponds very closely to the EU's own description of its international role could be enough to set the alarm bells ringing".<sup>23</sup> Adrian Hyde-Price has echoed Sjursen's concerns. In his view, a problem with normative power is that "when the object of study is seen as embodying the core values one believes in, it is difficult to achieve any critical distance".<sup>24</sup> Another set of concerns have come from the growing militarization of the EU. This has pushed scholars towards a sharper definition of normative power which has proven contentious. Does it mean civilian power? If so, do the rise of ESDP and the beginning of military missions out of area and outside of NATO (Artemis in 2003) signal the end of the EU's normative project?<sup>25</sup> If normative power is not synonymous with civilian power, what does it mean exactly? Sjursen suggests that there is an inevitably coercive element to normative power i.e. the 'power' part must refer to something. As was obvious from the humanitarian intervention debates: an ethical foreign policy requires military hardware in order for ethical choices to be properly executed. Powerlessness inhibits acting normatively. The role of the US has also posed a problem for the concept of normative power. Robert Kagan's critique of normative power Europe was based around the idea that it made a virtue out of a necessity. Has the EU really chosen to be Kantian, he asked, or is it Kantian only because the US is resolutely Hobbesian?<sup>26</sup> Another important development challenging the concept of normative power was the rise of 'neoconservatism' in the US, interpreted by many as a remoralization of US foreign policy. Thomas Diez drew the conclusion that the US was as much of a normative power as the EU.<sup>27</sup> But if the US is a normative power, then normative cannot be synonymous with good, unless we agree with neoconservative interventionism. If we want to keep the term 'normative', some kind of differentiation between good and bad norms would seem essential. This has been Sjursen's response, who has argued for greater theoretical and empirical clarification of what standards we can use to judge the 'normativity' of the EU's power.

This paper focuses on three responses to the normative power Europe concept as originally formulated. These are Helene Sjursen's focus on cosmopolitan law, Kalypso Nicolaïdis' idea of a

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<sup>22</sup> Manners, *op cit*, p184.

<sup>23</sup> Sjursen, H. 2006. The EU as 'normative' power: how can this be? *Journal of European Public Policy*. 13(2): 235-251. p235.

<sup>24</sup> Hyde-Price, A. *Ibid.* 'Normative' power Europe: a realist critique. 217-234. p218.

<sup>25</sup> This is the kind of argument put forward by Karen Smith. See Smith, K. (2005). Still 'civilian power EU?' *European Foreign Policy Unit Working Papers*. London. Accessible at <http://www.lse.ac.uk/Depts/intrel/EFPUworkingpaperseries.html>

<sup>26</sup> Kagan, R. (2003). *Paradise and Power: America and Europe in the New World Order*. London: Atlantic Books.

<sup>27</sup> Diez, T. 2005. Constructing the Self and Changing Others: Reconsidering 'Normative Power'. *Millenium*. 33(3): 613-636.

post-colonial ethos, and Zaki Laïdi's attention to social preferences. The paper seeks will draw out the understanding of legitimacy that each of these three scholars have, and what light these understandings can shed on the nature of the EU as a political formation. Interestingly, each provides a very different picture of the political community to whom the EU's norms should be legitimized. This diversity is itself illustrative of the fact that there is little consensus around the nature of political responsibility and accountability in European foreign policy. The final part of the paper will draw out this argument, suggesting that a useful way of understanding both the nature and political limits of Europe's normative power is in terms of its sources of legitimacy and their respective weaknesses.

## 2.1. The legitimacy of cosmopolitan law

In her 2006 article on Europe's normative power, Sjursen explores the limits of two popular definitions of normative power: as 'civilian power' and as a pursuit of values and norms rather than interests. Equating normative power with civilian power leaves us with the same problem confronted by promoters of ethical foreign policy: are there not instance where coercive (i.e. non-civilian) measures are needed in order to defend or to promote a certain set of ethical standards? As Sjursen puts it, "the criticisms of the EU's role in the crises in former Yugoslavia... suggest that, for a putative 'normative' power, the incapacity to act is considered by many to be as problematic as the capacity to act".<sup>28</sup> Alternatively, focusing on the EU as a promoter of norms rather than interests cannot differentiate the EU from many other actors in the international arena. Many foreign policy goals are couched in normative terms. Sjursen argues that the problem lies in establishing whether or not these normative claims are merely self-interest dressed up as something else. She asks, "how to we know that 'normative power' Europe is not simply an expression of Eurocentric imperialism?" It is not good enough to point to norms; instead, "we must... be able to discriminate between different types of norms and their legitimacy and validity".<sup>29</sup>

This concern with the legitimacy of norms goes back to Sjursen's earlier work on EU enlargement. Writing in 2002, she explored how the EU legitimizes its Eastward expansion. Sjursen's starting point was that "the arguments and reasons provided in favour of enlargement have to be of a type that others can support: they must be considered legitimate".<sup>30</sup> Sjursen gave three justifications for EU enlargement, corresponding to three sources of legitimacy: a pragmatic justification locating legitimacy in utility; an ethical-political justification where legitimacy resided in a common set of values and a shared European identity; and a moral justification drawing legitimacy from an attachment to an abstract set of universal rights. In her empirical analysis of elite discourse on enlargement, Sjursen found that only the ethical-political justification could make sense of two features of enlargement: its normative rather than interest-based dynamic; the way in which applicant countries were not treated equally e.g. Poland favoured over Turkey. Sjursen's conclusion was that enlargement was driven by a sense of shared kinship between Western and Central Eastern Europe. The normative dynamic was therefore couched within a particularistic culturally-bound understanding of European identity.

In approaching the question of the EU's normative power, Sjursen argues that such partiality cannot be considered legitimate. It transforms norms into expressions of cultural bias. What is needed instead is an understanding of norms that have a universal - as opposed to particularistic -

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<sup>28</sup> Sjursen, *op cit*, p239.

<sup>29</sup> Sjursen, *op cit*, p242.

<sup>30</sup> Sjursen, H. 2002. Why Expand? The Question of Legitimacy and Justification in the EU's Enlargement Policy. *Journal of Common Market Studies*. 40(3): 491-513. p493.

content. Following cosmopolitan theorists, and the work of Jürgen Habermas in particular, she focuses on the rationality of norms, that is to say those norms that can be openly debated - and perhaps rejected - in a rational interchange of views.<sup>31</sup> Sjursen's question to the EU, in order to determine the legitimacy of its norms, would be: "does the EU, in its external action, refer to reasons that can be expected to gain approval in a free and open debate in which all those affected are heard?"<sup>32</sup> The most obvious way in which we could observe this in practice would be whether or not the EU adheres to a set of rules that are common to all. As she puts it, "the law functions as a system of action that makes it possible to implement moral duties or commitments"<sup>33</sup>; therefore, "to 'act in a normative way' would be to act in accordance with legal principles".<sup>34</sup>

This focus on law obviously presents a problem. International law can as easily be derived from interests as from norms. Only a blanket Kelsenian assumption would equate law with norms. Sjursen recognizes this by differentiating between conventional multilateralism - an interest-based framework which rests upon the formal equality of sovereignty states - and a cosmopolitan legal system that aims to protect the rights of individuals, not the sovereign rights of states. Sjursen argues - drawing on Axel Honneth - that a transformation of international power politics is underway, towards a more cosmopolitan order.<sup>35</sup> The EU's normative power should be judged according to whether it promotes this transformation, and not in terms of its ability to inscribe itself into the existing international legal system.<sup>36</sup> A similar argument is made by Erik Eriksen, who claims that "it is only by subjecting its actions to a higher ranking law - to human rights and criteria of justice - that the EU can qualify in normative terms".<sup>37</sup> A legitimate foreign policy for the EU, according to Eriksen, is one which underscores the cosmopolitan law of the people.

This argument paints a picture of EU policy legitimized by a global community. As Manners has argued, Sjursen et al eschew "communitarian cultural identity" in favour of "rights-based normative justifications".<sup>38</sup> It is only when the EU can act in the name of an abstract universal humanity that Sjursen et al feel that it can escape the charge of bias and hypocrisy. The political community which is the source of legitimacy for the EU's normative power is therefore a global community of individuals, rather than any territorially bounded entity. Normative power Europe can be genuinely normative only if it is not European. In terms of legitimacy, Sjursen et al clearly assume that the more an action can be justified in terms of humanity as a whole, the more it will be perceived as legitimate. Legitimacy lies in the universal standards according to which an action is judged. This places Sjursen et al. firmly in the camp of cosmopolitan political theory.

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<sup>31</sup> On Habermas, Andrew Linklater argues that Habermasian norms "cannot be valid unless they can command the consent of everyone whose interests stand to be affected by them". Therefore, "the validity of principles can only be established through forms of dialogue which are in principle open to every human being". Linklater, A. (1998). *Citizenship and Sovereignty in the Post-Westphalian European State*. In D. Archibugi, D. Held, and M. Kohler (Eds.), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*. Oxford: Polity Press. p122.

<sup>32</sup> Sjursen, "The EU as 'normative power'", *op cit*, p243.

<sup>33</sup> Sjursen, "The EU as 'normative power'", *op cit*, p244.

<sup>34</sup> Sjursen, "The EU as 'normative power'", *op cit*, p245.

<sup>35</sup> For an extended critique of this sociological claim, see Chandler, D. (2004). *Constructing Global Civil Society: Morality and Power in International Relations*. Basingstoke: Palgrave. Part one.

<sup>36</sup> Sjursen, "The EU as 'normative power'", *op cit*, pp247-248.

<sup>37</sup> Eriksen, E. 2006. The EU - a cosmopolitan polity? *Journal of European Public Policy*. 13(2): 252-269. p253.

<sup>38</sup> Manners, *op cit*, p120.

## 2.2. The legitimacy of the non-European Other

In a recent contribution to the debate on normative power Europe, Kalypso Nicolaïdis is concerned with the legitimacy of the EU's norms (its "universalist discourse") "*in the eyes of the rest of the world*".<sup>39</sup> Picking up on a tendency in the recent debate to assert the EU's norms against those of the US (the "clash of universalisms"), Nicolaïdis argues that what is lost in attacking the "American other" is "the desire to appeal to non-American others".<sup>40</sup> Rather than define itself in terms of the contemporary US, Nicolaïdis argues that the EU should ground its norms in its own history and in opposition in particular to the colonial content of that history. In her words, the EU's normative power "ought to be based on the structural reality of what the EU is internally, a federal union of states, combined with full accounting of the colonial past of its members".<sup>41</sup> What the EU can really contribute to international affairs is "post-colonial wisdom or guilt".<sup>42</sup> In a chapter on the EU's Mediterranean programs, Nicolaïdis writes that "European unease with power is part and parcel of a compelling narrative still in the making: that of a Union of nation-states slowly and painfully constructing together the instrument of their collective post-colonial atonement".<sup>43</sup>

In specifying the source of legitimacy for this particular brand of European universalism, Nicolaïdis argues that the best judges are not the citizens of Europe, but rather "the citizens of the rest of the world". Legitimacy of the EU's normative power is rooted in the judgement of the non-European other. Nicolaïdis's understanding of post-colonial European universalism tries to situate it within other non-European universalist discourses. Being "cogniscent of the universalism of others" would make the EU's normative power "truly post-colonial".<sup>44</sup> This is a vision which brings "the other back in" and recognizes that the EU's does not have a *single story* to tell about itself. In Nicolaïdis' view, the EU is not born out of singularity, but rather out of its diversity: "the EU's real comparative advantage lies less in engineering convergence among its members' policies and more in its capacity to manage enduring differences between nations. At its core, the EU is about institutionalizing tolerance between states".<sup>45</sup> Asking what exactly a post-colonial ethos would look like, Nicolaïdis proposes a kind of Levinasian ethics of Other-regardedness, where the EU effaces itself as a subject of history in order to avoid objectifying others. Levinas believed that responsibilities to the Other should prevail over the freedom of the Self.<sup>46</sup> A post-colonial ethos would "accompany the proclamation of fundamental rights with a story about how we ourselves have historically trampled on these rights, displaying a self-reflective and self-critical attitude rather than a claim to universality". Nicolaïdis has developed this idea in the context of the Euro-Mediterranean Partnership (EMP). She argues that EMP ought to be reconfigured in line with a post-colonial agenda, with an emphasis on shared ownership, empowerment and an ethics of responsibility.<sup>47</sup> On the future of European and American universalisms, Nicolaïdis hopes that "they will be evanescent universalisms, making room for

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<sup>39</sup> Nicolaïdis, *op cit*, p1.

<sup>40</sup> Nicolaïdis, *op cit*, p2.

<sup>41</sup> Nicolaïdis, *op cit*, p2.

<sup>42</sup> Nicolaïdis, *op cit*, p3.

<sup>43</sup> Nicolaïdis, 'The EuroMed', *op cit*, p8. Note that all page numbers for this book chapter are taken from the version of the chapter accessible from Kalypso Nicolaïdis' webpage. See <http://www.sant.ox.ac.uk/esc/kNicolaïdis/publicationsbyauthor.html#DN>. Accessed on 7 May 2007.

<sup>44</sup> Nicolaïdis, 'The Clash of Universalism', *op cit*, p5.

<sup>45</sup> Nicolaïdis, 'The Clash of Universalism', *op cit*, p19.

<sup>46</sup> Chandler, D. (2007). The Other-regarding ethics of the 'empire in denial'. In D. Chandler, and V. Heins (Eds.), *Rethinking Ethical Foreign Policy: Pitfalls, possibilities and paradoxes*. Abingdon: Routledge. p164.

<sup>47</sup> Nicolaïdis, 'The EuroMed', *op cit*, pp19-23



other visions to compete in an emerging global public sphere, where universalist narratives can no longer be conjured up unilaterally but must be the product of an international society where the taming of power encompasses the power of hegemonic ideas".<sup>48</sup>

Based on this reading of the EU's normative power, what understanding of the EU as a political community emerges from Nicolaïdis' preference for the post-colonial ethos? She identifies a tension between normative power as conventionally understood and the building of what she believes is the right kind of political community. Sticking with the example of the Euro-Mediterranean region, Nicolaïdis writes that

The EU's use of its normative power consists in the mobilization of instruments to affect the convergence of norms determining domestic conditions that ought in turn to be more propitious to stability in the region. But the logic is first and foremost that there are EU and non-EU members, that the community must be inclusive but that the EU is the one that defines normative appropriateness. It is fair to ask then under what conditions this other kind of logic of power can favour the emergence of a sense of 'we-ness'".<sup>49</sup>

If the EU's normative power involves building up new dividing lines between Northern Europe and the Southern shores of the Mediterranean, and if the EU monopolizes the content of the Euro-Mediterranean partnership, then the EU's normative power will have lost its legitimacy. Nicolaïdis argues that the EU must overcome both the monist and dualist understandings of the Euro-Mediterranean project that have dominated up until now. The monist vision focuses on the creation of a shared identity of EuroMed partners; the dualist vision sees the EMP as a mechanism for bridging North and South differences. Nicolaïdis styles this "the impossible choice between colonial nostalgia and integrative utopia".<sup>50</sup>

Her preferred alternative is to "give substance to the idea of a de-territorialized Mediterranean identity", which would build upon a "shared experiential basis for engaging in common projects for the future". Such an identity can be built up in two ways: through history, and through recognition of the mutual interaction and mutual dependence of all actors in the Mediterranean region. European atonement for its colonial past is crucial. Nicolaïdis writes that

European ex-colonial powers need to acknowledge more explicitly the fact that present relations with their Southern neighbours are conditions by their colonial heritage... Rebuilding ties among the people of the EuroMediterranean space requires uncovering this repressed knowledge and turning the subsequent emerging representation of the past into leverage for change in the present.<sup>51</sup>

Substantively, the 'actually existing' Euromed community that should be acknowledged and celebrated is based upon cultural interpenetration and the reality of Southern modernization via Northern methods. In Nicolaïdis' words, "the double process of penetration and influence, from North to South and from South to North, has already given a certain coherence to the EuroMediterranean region, understood not as a material space but as a new dimension of the European construction with its own proper dynamic".<sup>52</sup> The picture of the political community that serves to legitimize the EU's normative power is one that is overwhelmingly de-territorialized, that transgresses existing boundaries, is constituted by the movement of peoples and the transnational nature of beliefs. It is grounded not in the exclusivity of the national self but

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<sup>48</sup> Nicolaïdis, 'The Clash of Universalism, *op cit*, p21.

<sup>49</sup> Nicolaïdis, 'The EuroMed', *op cit*, p9.

<sup>50</sup> Nicolaïdis, 'The EuroMed', *op cit*, p14.

<sup>51</sup> Nicolaïdis, 'The EuroMed', *op cit*, p17.

<sup>52</sup> Nicolaïdis, 'The EuroMed', *op cit*, p18.

the inclusivity of a multiplicity of selves that recognize in others key features of their own past and present. Nicolaïdis argues that such a political community is as relevant for legitimizing the EU's normative power in the EuroMed region as it is for legitimizing the EU in general. In both the case of the EU and the EuroMed region, "a Community can only be progressively built through the mutual confrontation and accommodation of separate but intertwined identities".<sup>53</sup> In neither case is the emergence of a single identity either realistic or even desirable.

Nicolaïdis' understanding of normative power and of its legitimacy through the building of a de-territorialized political community has in fact much in common with postmodern theorists of Europe and European identity. Stefan Elbe's use of Nietzsche and his notion of the "good European" resemble Nicolaïdis' own conception of Europe as a constellation of different stories and experiences. Elbe writes that "a genealogy of contemporary European pessimism seeks to suggest that it might not be at all necessary to articulate a common and overarching *idea* of Europe in order to demonstrate one's spiritual vitality as a 'good European'".<sup>54</sup> For Nietzsche, the modern experience of meaninglessness - currently experienced in Europe as a *crisis in the idea of Europe* - should be taken as a sign of increased vitality: "there is no *prima facie* reason", writes Elbe, "why there should be a greater meaning underlying all events". For Nietzscheans, meaninglessness - or multiple meanings - means freedom and liberation from the burden of Europe's endless search for meaning. Elbe concludes that

what Nietzsche's notion of the 'good European' also suggests for our contemporary thinking... is that being a good European might well reside in resisting altogether the debate on the meaninglessness of the European idea and the concomitant desire to articulate an overarching idea of Europe commensurate with the times.<sup>55</sup>

In his own account of Elbe's argument, Manners draws out the vision of the political community that underpins the postmodern contribution to understanding the EU's normative power. In Jean Baudrillard's vision, the EU should strive to maintain its claim to universality but without rebuilding the boundaries and barriers of European chauvinism. According to Manners, "Baudrillard is fairly lucid in arguing that the EU runs the risk of developing into a 'transnational pseudo-federation' which re-particularizes culture, conscience and identity".<sup>56</sup> Jacques Derrida's message is that "Europeans and the EU have a responsibility towards memory which must manifest itself as a cosmopolitan response towards others". The image here is of a political community that is self-effacing - it does not assert itself as a subject but instead defines itself in terms of its duties to those outside of the political community. At the same time, the postmodern political community is positively defined by flux and by uncertainty over what constitutes the EU culturally, politically and socially. Manners paints from postmodern writings a political community "without finality, that is not fixed in time or space". He goes on to say that "the ambiguous nature of the EU's normative power seems to fulfil this open heading - is normative power Europe instrumental or ideological? Is it an actor or a structure? Is it a union of citizens or states? Is the Constitution for Europe the first or final constitution?"<sup>57</sup> Such visions correlate with the postmodern image the EU has of itself. In the words of a reflection group of experts convened by then president of the Commission, Romano Prodi, "there is no essence of Europe, no fixed list of European values... no finality to the process of European integration". In conclusion, Manners

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<sup>53</sup> Nicolaïdis, 'The EuroMed', *op cit*, p16.

<sup>54</sup> Elbe, *op cit*, p274.

<sup>55</sup> Elbe, *op cit*, p276.

<sup>56</sup> Manners, *op cit*, p126.

<sup>57</sup> Manners, *op cit*, p129.

argues that "if postmodern scholarship teaches us anything it at all, it is that there is no closure, finality or completeness to normative theory..."<sup>58</sup>

On these accounts of normative power Europe, its legitimacy lies in its transcendence of conventional political boundaries and frameworks, in its incorporation into the heart of the EU the regard of the non-European Other, and an ability to connect the exercise of normative power with a critical inward gaze at Europe's own past. We find echoes here of Sjurksen's cosmopolitanism, but without any of the ambition of building any unified legal system of individual rights at the global level. Legitimacy lies precisely in eschewing such grand designs, and emphasizing the role of alterity, difference, mutual recognition and diversity of values and world views.

### 2.3. Legitimacy and social preferences

In the discussion of the EU's normative power so far, its sources of legitimacy have been located outside of European society. One scholar who has expressed his scepticism on this idea is Zaki Laïdi. Laïdi's argument is that the EU's norms need to be properly grounded in a set of social preferences. In this way, the EU's norms are not free-floating, but rather serve the more concrete purpose of defending the EU's preferences. In grounding the EU's normative power in European society, Laïdi certainly provides us with some insights into the peculiarity of the EU's methods of interest intermediation and its aggregation of preferences. However, it is less clear whether he manages to make a case for social preferences as a source of legitimacy for the EU's normative power.

Laïdi's critique of normative power Europe is based on its divorce from any notion of interest. According to Laïdi, "European norms are seen as transcendental values, hovering over [*surplombant*] European societies".<sup>59</sup> Without rooting the EU's norms in European society, there is the risk of confusing normative power with "idealist power", or even with an "ideal power", "where everything would be about values and principles, and never about interests".<sup>60</sup> Laïdi's thesis is that "linking normative power to social preferences may help us get out of the idealistic trap and to cross the bridge between material power and social power".<sup>61</sup> In his formulation, normative power refers to the creation of norms that bind actors in ways that promote the public interest beyond the nation-state. In Laïdi's words, normative power can be defined as

capacity to produce and put in place on a global scale a framework as large as possible of norms capable of organizing the world, of disciplining the game of its actors, introducing predictability in their actions, developing their sense of collective responsibility, offering to those who embark on this path, and notably the weakest ones, the possibility at least in part of making sure that these norms apply to all, including the most powerful.<sup>62</sup>

The exercise of the EU's normative power amounts to an attempt to build at the global level a normative framework that corresponds to the EU's social preferences. Laïdi presents this in terms of a confrontation between two visions of world order: the EU's vision of governance through norms, and the United State's preference for an order based on the rights of sovereign states.

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<sup>58</sup> Manners, *op cit*, p30.

<sup>59</sup> Laïdi, Z. (2005). *La Norme sans la Force: l'enigme de la puissance europeenne*. Paris: Presse de Sciences Po. p56. All translations of Laïdi's 2005 work are my own.

<sup>60</sup> Laïdi, *ibid*, p56.

<sup>61</sup> Laïdi, Z. (2006). Norms: the European Smoking Gun. Paper presented at *Are European Preferences Shared by Others? The Fate of European Norms in a Globalized World* in Sciences Po Paris. p4.

<sup>62</sup> Laïdi, *Norme sans la Force, op cit*, p49.

Laïdi believes the result of this confrontation will depend upon the EU's ability to legitimize its own vision of governance through norms. Legitimacy, he argues, is critical to the success of the whole normative power enterprise. In his words,

Everything rests upon knowing [*Toute la question est de savoir*] what principle of legitimacy does this apparently superior [European and normative] rationality base itself on, especially if it aims implicitly to devalue the legitimacy of the national sphere which, after all, has the advantage of being validated by a democratic vote...<sup>63</sup>

In his answer to this question, Laïdi relies mainly upon sources of legitimacy that belong to the EU's complex mechanisms of governance.<sup>64</sup> The EU's vision of global governance is legitimized on the basis of three principles: norms are negotiated between asymmetric actors, making this kind of governance "a factor of equalization in terms of power"<sup>65</sup>; negotiations take place within the framework of international institutions, which confer upon their decisions a degree of legitimacy; and the norms that result from these negotiations are subject to all concerned, regardless of their relative power positions. Obviously, such principles also underpin the EU's own governance system. The projection of normative power is about recasting at the global level the system of governance that has proven successful at the regional level. In Laïdi's words, "[the EU's] priority is... not to export its values in the name of a messianism that is out of favour, but to recognize by the international system those preferences that are the basis of its own originality".<sup>66</sup> Laïdi's argument rests upon a belief that the distinctiveness and originality of the EU project is the basis for the legitimacy of the EU's norms over the "sovereignism" of the US. As we will see below, Laïdi's argument in fact rests upon privileging one vision of democracy and the aggregation of preferences over others. Drawing out the assumptions underlying his argument suggests that the EU's sources of legitimacy may not operate as direct substitutes for the legitimacy of nation-states. They imply a marked shift away from popular conceptions of legitimacy, towards a neo-corporatist model favoured by the EU and its institutions. This legitimizes itself both in terms of its performance and its ability to co-opt special interests into the policymaking process.

Laïdi relies upon a basic defence of the EU as a means of solving problems that have proven to be beyond the capacity of individual nation states. The *legitimacy of the EU* is thus a reflection of the growing *illegitimacy of nation-states*.<sup>67</sup> Laïdi makes this argument most clearly in his explanation of why Europe favours norm-based governance. The EU, he argues, was originally aimed at "decentring the honour of European nations".<sup>68</sup> However, doing away with intra-European rivalries was only part of the story. More generally, norms serve to restrain the egotism

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<sup>63</sup> Laïdi, *Norme sans la Force*, *op cit*, p59.

<sup>64</sup> Indicating the possible inadequacy of these sources of legitimacy, he does at one point hark back to more conventional sources of democratic legitimacy. Laïdi claims that the EU's norms - rather than being free-floating - are based upon a combination of heritages, lived experiences (*vécus*) and interests. The legitimacy of these norms, he claims, comes from "the fact that they emanate from democratic societies within which exist deliberative processes and representative institutions". Laïdi invokes here the indirect legitimacy which has been stressed by intergovernmentalist scholars such as Andrew Moravcsik, and European politicians - like Czech president Vaclav Klaus - who believe the EU's legitimacy is rooted in the democratic legitimacy of its member-states. Laïdi, *Norms sans la Force*, *op cit*, p67.

<sup>65</sup> Laïdi, 'European Smoking Gun', *op cit*, p6.

<sup>66</sup> Laïdi, *Norme sans la Force*, *op cit*, p66.

<sup>67</sup> An example of this argument can be found in Lamy, P. (2004). *La démocratie-monde: Pour une autre gouvernance mondiale*. Paris: Seuil.

<sup>68</sup> Laïdi, *Norme sans la Force*, *op cit*, p57.

of states in all areas of public policy. Laïdi gives the example of the Euro, where pan-European control of monetary policy needed to be complemented by a set of fiscal rules. This was done in order to avoid states pursuing inflationary public spending strategies intended to offset the consequences of entering the Euro zone. Norms, in such cases, appear as a kind of "meta-value destined to domesticate undisciplined states". In Laïdi's words, "the will to circumvent the political, or more specifically the constraints of politics, explains in large part the decisive role played by the norms in the political construction of Europe".<sup>69</sup>

Laïdi also makes a number of arguments concerning the EU's originality as a mechanism for aggregating preferences. In his words, "the [European] laboratory presents in effect three distinctive traits that enable us to understand why the EU manages perhaps better than other regional spaces to channel the social preferences of its citizens in addition to the intermediary of nation-states".<sup>70</sup> Firstly, he claims that the fragment of a public sphere that exists in Europe - best incarnated in the directly-elected European Parliament - makes the EU more receptive to non-state interests, promoted by economic, cultural and environmental groups.<sup>71</sup> Secondly, the European Commission - by virtue of its non-democratic mandate (i.e. its authority does not reside in the 'European people') - is constantly looking for sources of legitimacy that might offset the so-called 'democratic deficit'. According to Laïdi, this forces the Commission to demonstrate concretely that it acts "in the general interest and that [it] is capable of doing so in those areas where the social demand for norm-based governance is strong, such as the protection of the environment, food security and the precautionary principle".<sup>72</sup> Thirdly, the public financing of political parties in Europe results in political life that is relatively less dominated by private moneyed interests. Private interests, in other words, are more mediated in Europe than in America, which generates greater public trust in political actors.

### 3. Sources of legitimacy in comparative perspective

Laïdi's claim is that the EU's preference for norm-based governance is legitimized by the EU's mechanism for aggregating social preferences, which adequately substitutes itself for the egotism of national systems of interest intermediation. It is on this basis that we should accept the superior rationality of European norms, and be willing to support the extension of the EU's norm-based governance to the global level, in opposition to the US's proposal of a 'sovereignist' international system. Laïdi's illustration of the connection between the EU's norms and its social preferences does not, however, suggest that the EU has adequately managed to substitute itself for the nation state. The model the EU presents us with is of a peculiar type of political formation, whose mechanisms of interest intermediation resemble circumscribed and partial forms of what we find at the national level. The EU is best thought of as - in Vivien Schmidt's term - a "polity without politics". Examining in more detail this "polity without politics" will help us in comparing the EU's sources of legitimacy for its norm-based governance with those of nation-states. This third section will go on to consider how the other sources of legitimacy - cosmopolitan law and identity politics - fare up to closer scrutiny.

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<sup>69</sup> Laïdi, *Norme sans la Force*, *op cit*, pp59-60

<sup>70</sup> Laïdi, *Norme sans la Force*, *op cit*, p63.

<sup>71</sup> Laïdi, *Norme sans la Force*, *op cit*, p63.

<sup>72</sup> Laïdi, *Norme sans la Force*, *op cit*, p64.

### 3.1. Polity without politics

The work of comparative political scientists like Schmidt and Stefano Bartolini have gone some way to clarifying the ways in which interests are mediated and aggregated in Europe.<sup>73</sup> The key point about the EU's method of interest intermediation is that there is no formal institutionalization of interests that combines the interests of individuals and groups with power over the decision-making process. Interest intermediation, in other words is technical, not political; the EU opens up its decision-making to European citizens as organized interests, not as voters.<sup>74</sup> As Schmidt puts it, at the EU level we have government *for* the people ("through effective governance") and government *with* the people ("through consultation with organized interests"); at the national level, in contrast, such forms of government exist but tend to be overshadowed by government *of* and *by* the people ("through political participation and citizen representation").<sup>75</sup> What exists at the EU level is an open system of consultation, with the dominance of committee-based representation. Thus, the EU operates on the basis of consensus and compromise, and not in terms of partisan differences and political contestation; this is what Schmidt means when she writes of "policy without politics".<sup>76</sup>

The function played by interest-group participation is overwhelmingly to provide information to the Commission and its directorates. In exchange for influence over policy outcomes, the EU receives information and secures a measure of legitimacy by openly incorporating certain groups into its decision-making procedures. Laïdi claims that this process favours groups traditionally ignored by nation-states. In fact, interest groups active in the EU's extended committee system are not much different from what we see at the national level. Estimates in the early 1990s indicated that around 50% of group were industrial and commercial. Around 20% were agricultural, another 20% in the services, and only 5% were public interest groups (environmental, consumer, trade unions etc.).<sup>77</sup> Schmidt more recently noted that business interests make up around two thirds of all interests represented in Brussels, which is why one scholar labelled the EU's interest intermediation process as "elite pluralism".<sup>78</sup> The legitimacy that comes from such involvement with special interest groups should be clearly demarcated from the legitimacy of formal representation from below.<sup>79</sup> We can see parallels here with the relationship between global

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<sup>73</sup> Comparative politics more generally tends to assume that the EU *has* become a political system in its own right. See for instance the work of Simon Hix: Hix, S. 1998. The study of the European Union II: the 'new governance' agenda and its rival. *Journal of European Public Policy*. 5(1): 38-65., Hix, S. (2005). *The Political System of the European Union*. Basingstoke: Palgrave-Macmillan. and Bartolini, S., and Hix, S. 2006. La politicisation de l'UE: remede ou poison? *Notre Europe Policy Papers*(19): 1-52. Schmidt and Bartolini use the tools and concepts of comparative politics to argue a different position: that the EU is not *sui generis*, but nor is it a political system in its own right. It is a somewhat messy combination of various different forms of governance that we observe already at the national level.

<sup>74</sup> Schmidt, V.A. (2006). *Democracy in Europe: The EU and National Politics*. Oxford: Oxford University Press. p25.

<sup>75</sup> Schmidt, *ibid*, p5.

<sup>76</sup> Schmidt, *op cit*, p22.

<sup>77</sup> Bartolini, S. (2005). *Restructuring Europe: Centre Formation, System Building, and Political Structuring between Nation State and the European Union*. Oxford: Oxford University Press. p284.

<sup>78</sup> Schmidt, *op cit*, p106.

<sup>79</sup> In Von Bogdandy's terms, this is the difference between unitarian and pluralist models of legitimation. The unitarian model asserts that democracy can only be institutionalized through the choices of the electorate: "all public acts achieve a democratic quality only when they are either enacted (exceptionally) by the citizenry as such (through referenda) or can be traced back to the decisions of elected bodies ('chain of democratic legitimation)'. The involvement of any groups outside of this chain of legitimation represents a threat; participation of civil society groups and other organized interests undermine the unitarian model of legitimacy. The underlying premise of the pluralist model is that "enabling the

governance institutions and 'global civil society', where participation also occurs on the basis of organized interests lobbying state-level and international authorities. Whilst global civil society initiatives tend to emphasise the liberating opportunity for individual participation in global processes lying outside of national political communities<sup>80</sup>, the EU often presents a neo-corporatist version of governance. This was evident, for instance, in the landmark White Paper on Governance produced by the EU Commission.<sup>81</sup> Schmidt, however, is cautious about labelling the EU corporatist. In her view, the EU is "semipluralist in a macrosense of policymaking" and is a mixture of pluralism, statism and corporatism in sectoral policymaking at the micro level.<sup>82</sup> Generally though, the result is that the relationship existing between pan-European institutions and European public interest groups is not based on the political rights of the latter, but rather on the benevolence of the former and the scope of the privileges it is willing to accord to certain organized interests.<sup>83</sup>

In fact, we can say that interest intermediation in the EU is a mixture of forms found at the state level, but without the primacy of the political sphere - and the decisive claim to authority on the part of the populace. Bartolini articulates the point thus: in a democratic nation-state, in contrast to the EU,

The holders of different kinds of resources, the politicians and the voters, the bureaucrats and the interest representatives, the experts and the judges, continuously exchange their respective assets in a situation in which, ultimately, *none of them can substract itself from the collectivized decisions that fundamentally rest on the principle of political equality*. These 'sovereign' political decisions are... not the essence of democracy, nor are they the only source of legitimacy, but rather the guarantee of the convertibility of a plurality of resources and legitimacy principles.<sup>84</sup>

Bartolini notes that it is a hallmark of weak states that the provision of input in terms of requests and information is left to the interested actors. In his words, "the open, pluralist, fragmented, and consensual model of interest incorporation [in the EU] is the default result of a structural weakness of both the central bureaucracy (autonomous information gathering and technical evaluation) and of partisan structures (preference identification and aggregation)".<sup>85</sup> The Commission's need to secure legitimacy by co-opting specific interests is therefore far from being, as it is for Laïdi, another source of legitimacy for the EU. As Bartolini suggests, it is more a sign of the Commission's weakness. Vivien Schmidt gives the example of the five NGOs invited to speak directly to the Convention on the Future of Europe in 2003. These groups were brought in as a way of demonstrating the Convention's openness to civil society representatives, yet they were at the same time handsomely paid by the Commission. Such top-down cooption

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participation of non-governmental organizations (NGOs) as exponents of the international civil society, represents a prime strategy for furthering the democratic principle on the international plane". Bogdandy, A.v. 2004. Globalization and Europe: How to Square Democracy, Globalization, and International Law. *The European Journal of International Law*. 15(5): 885-906. pp902-903.

<sup>80</sup> See for instance Hardt and Negri's celebration of this. Cited in Chandler, *op cit*, p134

<sup>81</sup> Commission, E. (2001). European Governance: A White Paper: European Commission.

<sup>82</sup> Schmidt, *op cit*, pp113-114.

<sup>83</sup> On this point, Bartolini writes that "at the EU level, public interest groups do not control any resources whose withdrawal or withholding can generate any serious problems for either the effectiveness of public policy implementation or the electoral survival of political elite [sic]. The exchange that takes place between public interest groups and EU institutions is not based on any real threat of declining returns or increasing costs for the latter when no attention is given to the demands of the former. Only the perception of weak legitimacy by the EU elite in the Council, Commission and Parliament justifies their attention, which, therefore, is grounded on a 'benevolent' attitude". Bartolini, *op cit*, p285.

<sup>84</sup> Bartolini, *op cit*, p174. My italics.

<sup>85</sup> Bartolini, *op cit*, pp286-287.

reveals above all the Commission's own sense of its lack of popular legitimacy.<sup>86</sup> Viewed in terms of its system of interest intermediation, the EU's legitimacy is more a pale reflection of what exists at the national level than anything original to the Union.

Laïdi's focus on social preferences helps us determine why the EU opts for some norms and not for others, thus overcoming the indeterminism which is a problem for much constructivist theorizing.<sup>87</sup> Yet it does not work so effectively as a strategy for legitimizing the EU's normative power. Rather than serving as a substitute for national sources of legitimacy, the EU draws upon various components of national-level legitimacy, especially the semi-pluralist/corporatist model of interest intermediation, but without the supremacy of the political sphere. With the EU lacking the kind of *internal* political vertebration we find at the nation level, we must turn back to the *external* sources of legitimacy highlighted by Sjusren et al and Nicolaïdis - cosmopolitan ethics and de-territorialized political community - and ask if they are more effective in legitimizing the EU's normative power.

### 3.2. Ethics, politics and democratic legitimacy

Sjusren argued that the legitimacy of the EU's normative power should be located in its adherence to cosmopolitan law. This kind of legitimacy rests upon a thin set of universal principles, tied to Habermasian communicative ethics. This thin conception of universality is defined by Andrew Linklater as "the ideal that every human being has an equal right to participate in a dialogue to determine the principles of inclusion and exclusion which govern global politics".<sup>88</sup> Sjusren presents her argument in the manner of seeking a minimum of bias and partiality in the identification and operationalization of the EU's norms. However, she does in fact rest her argument upon a particular conception of democracy that relativizes the role of popular will and places great emphasis on various constraints and checks intended to keep political elites in line. At the same time, her focus on cosmopolitan law slips into reducing legitimacy to legality, which ignores the role played by both values and politics in generating legitimacy for any set of rules and procedures.

Sjusren's conception of democracy can be explored through a look at contemporary problems experienced by international law. Mattias Kumm provides a detailed account of the legitimacy problems that international law has experienced precisely as a result of its transformation from state-authorized treaties into a "firmly structured normative web". This normative web resembles to some degree Sjusren's vision of a cosmopolitan legal order and allows us to explore problems the EU faces in legitimizing itself. Kumm locates the origins of international law's legitimacy crisis in three developments. The first is an expansion in the subject matter of international law that has introduced uncertainty regarding the role and remit of national jurisdictions. In Kumm's words, "international law... has been the handmaiden of denationalization by having generated an increasingly dense set of substantive rules that directly concern questions traditionally decided by national legal processes".<sup>89</sup> The second problem is that the procedures through which international law has expanded its scope have weakened greatly the link between the consent of states and the obligations they face under international law. International law can no longer be

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<sup>86</sup> Schmidt, *op cit*, p27.

<sup>87</sup> On the problem of indeterminacy in constructivism, see Chandler, *op cit*, p51; see also Palan, R. 2000. A World of their Making: An Evaluation of the Constructivist Critique in International Relations. *Review of International Studies*. 26: 575-598. p592.

<sup>88</sup> Cited in Chandler, *op cit*, p137.

<sup>89</sup> Kumm, M. 2004. The Legitimacy of International Law: A Constitutionalist Framework of Analysis. *The European Journal of International Law*. 15(5): 907-931. p913.



understood as derived from the will of states i.e. through treaty-ratification or through customary international law that reflects the evolution of state practice over time.<sup>90</sup> Instead, powers are being delegated to treaty-making bodies in ways that mean international law is being made independently of states. Crudely, we can say that the *authors* of international law are increasingly becoming divorced from *those subjected to it*; law-makers and law-takers no longer coincide.<sup>91</sup> Thirdly, Kumm argues that there is less flexibility in the interpretation and enforcement of international law, making international law far more of a constraint on domestic political and legal processes than in the past.<sup>92</sup>

This expansion of international law is sustained by a normative consensus. The quasi-judicialization of global trade law within the WTO has been possible because of the normative agreement between states about the desirability in general of free trade and open markets. Disagreements on tariff rates and market access cannot obscure the overarching agreement on the merits of market capitalism. Major innovations such as the International Criminal Court (ICC) also rest upon a normative attachment to basic principles of human rights. In this respect, "international law as governance" as Kumm calls it has been possible only as a result of what Fukuyama dubbed "the end of history".<sup>93</sup> Legitimacy problems suffered by international law must therefore derive from a lack of participation and representation, so-called "input legitimacy".<sup>94</sup> Kumm writes that

International law as governance blurs the distinction between national and international law. Both with regard to the scope of its subject matter and the processes used to generate, interpret and apply it, it is no longer apparent what structurally distinguishes international law from national law, except of course, for one central point: international law is not generated within the institutional framework of liberal constitutional democracy and does not allow for a central role for electoral supervision. In this sense it lacks democratic pedigree.<sup>95</sup>

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<sup>90</sup> The famous Lotus case of 1927 provides a classical statement along these lines. The P.C.I.J. argued that "international law governs the relations between independent States. The rules binding upon States emanate from their own free will as expressed in conventions or by usages... in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed". See Lotus Case, P.C.I.J., Series A, No 10, 1927. For details of the case, see Harris, D.J. (2004). *Cases and Materials of International Law*. London: Sweet and Maxwell.

<sup>91</sup> Von Bogdandy puts the point thus: "National law, once considered the expression of the will of a people, accordingly implements ever more international rules resulting from an international process that is necessarily different from processes under domestic constitutions. National law is hereby de-nationalized". Von Bogdandy, *op cit*, p889.

<sup>92</sup> In Von Bogdandy's resume, we can speak of "the deepening of the ethical dimension of international law, its expansion and more effective enforcement, and its partial emancipation from the will of the individual state". Von Bogdandy, *op cit*, p894.

<sup>93</sup> For evidence of this consensus, see Franck, T. 1992. The Emerging Right to Democratic Governance. *American Journal of International Law*. 86: 46-91. Von Bogdandy writes that "on first glance it would seem that the fall of the Berlin Wall and the dissolution of the Soviet bloc resolved all fundamental issues over the core contents of the principle of democracy with respect to the organization of public power. There is an almost universal and increasingly legally based consensus regarding the necessary requirements for a state to qualify as being democratic. International law, comparative law as well as political and constitutional theory all agree upon the elements deemed necessary: officers of government must ultimately derive their power from citizen-based elections that are general, equal, free and periodic. Moreover, all public power has to be exercised in accordance with the rule of law and has to be restricted through a guaranteed possibility of change in power". Von Bogdandy, *op cit*, pp889-890.

<sup>94</sup> On input versus output legitimacy in the context of the EU, see Scharpf, F. (1999). *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press..

<sup>95</sup> Kumm, *op cit*, p915.

The implications of Kumm's argument for the legitimacy of the EU's normative power is clear. Notwithstanding the normative consensus that might exist concerning the basic rights embodied in cosmopolitan law, it suffers from the same problem as contemporary international law in general. It appears as an imposition from above - as an alien force - since there is no way in which those subject to the law can also be the authors of the law. Defining the EU's normative power in terms of cosmopolitan law therefore raises the same questions of "democratic deficit" that have become a central issue in the debate around the constitutionalization of Europe. European law, particularly since the ground-breaking decision of the German Constitutional Court in 1993, has been troubled by its lack of democratic legitimacy.<sup>96</sup> As Kumm notes, "there are striking similarities between contemporary international law and European law that go right to the legitimacy issue".<sup>97</sup> Looking at Sjursen's argument, we find that she resolves this problem by making explicit her understanding of the cosmopolitan legal framework as external to the EU, operating as a constraint (a mechanism of "self-binding") that forces consistency in elite rhetoric and action.<sup>98</sup> Legal principles thus serve the purpose of disciplining and constraining the action of the EU. On a Rousseauian reading of democracy, this argument is anti-democratic. However, it is consistent with a liberal view of democracy as a system constructed around the need to constrain political power and ensure the responsiveness of political elites and state bureaucracies to their constituents/clients. This constitutionalist view relativizes the importance of political self-determination, in favour of an emphasis on checks and balances. For all her commitment to value-neutral theory, we can see that Sjursen resolves the tensions at the heart of her attachment to cosmopolitan law by privileging a liberal reading of democracy over those more closely aligned to the concept of popular sovereignty.<sup>99</sup>

Another difficulty in this particular enterprise of legitimizing the EU's normative power lies in the content of the universalism Sjursen identifies as the right standard against which to judge the EU's actions. Sjursen opts for the "thin universalism" of Habermasian communicative ethics mentioned above. She argues that anything other than the higher order norms of equality, freedom, solidarity, self-realization and human dignity brings cultural bias into the normative equation. Sjursen distinguishes between norms as values and norms as rights. The former are culturally bound, the latter universalizable. The trouble with this distinction is that it empties universal categories of much of their content. Instead of thinking of universalism in terms of concrete outcomes and visions for the future that demand a transformation of society, Sjursen's thin universalism is essentially procedural. It is about how individuals should relate to each other, rather than about what individuals can achieve when they act in concert. Such is the message from another member of the ARENA group of Habermasians, E. Erikson, who argues that the EU should follow a principle of universalization that is deontological instead of axiological. In Erikson's words, this "question of fairness... is concerned with what we are obliged to do when our actions have consequences for others". In his own account of Habermasian discourse ethics, Andrew Linklater draws out the meaning of the distinction between deontology and axiology. He argues that "discourse ethics sets out procedures to be followed... it does not offer putative

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<sup>96</sup> For details of the German Court's decision and its implications, Bellamy, R., and Castiglione, D. (1998). *Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union*. In D. Archibugi, D. Held, and M. Kohler (Eds.), *Re-imagining Political Community: Studies in Cosmopolitan Democracy*. Oxford: Polity Press. see pp169-172

<sup>97</sup> Kumm, *op cit*, p916.

<sup>98</sup> Sjursen, *op cit*, p244.

<sup>99</sup> On these different conceptions of democracy, and on the shift from popular sovereignty to constitutionalism, see Mair, P. 2006. *Ruling the Void? The Hollowing of Western Democracy*. *New Left Review*. 42: 25-51.

solutions to substantial moral debates, envisage historical endpoints or circulate political blueprints".<sup>100</sup> Linklater adds that in this normative framework, "the emphasis shifts away from universalisable conceptions of the good life to the procedural universals which need to be in place before true dialogue can be said to exist in any social encounter". Erikson's distinction between deontology and axiology fits with Sjursen's distinction between rights and values. Fighting over what meaning we give to the good life and what plans we have for the future is relegated to the realm of political partisanship and zero-sum games between competing interests; Sjursen's "higher order norms" are concerned not with specific values but the framework that can accommodate different values and ensure mutual respect and recognition.

Such a thin universalism, however, is unlikely to generate much legitimacy. By reducing universalism to a set of procedural rules, Sjursen falls into the trap of equating legitimacy with legality. However, rules do not have any legitimacy of their own: their legitimacy depends upon an underlying set of values. The legitimacy of the law, we can say, is performatively generated. As Claus Offe has argued, it is not laws themselves which are legitimate but the purposes which underlie them. In his words, "their acceptance must depend not upon what *they* are, but what the *consequences* or likely *results* of their application are". Thus, "the ability of governments actually *to produce ends*... may consequently be considered as one major determinant of what we have called the acceptance of the legitimating rules that, as formal rules, have themselves to be legitimized".<sup>101</sup> Sjursen's distinction between rights and values thus isolates law (rights) from its own source of legitimacy (values).

Put another way, the higher order norms Sjursen cites (equality, freedom etc.) only become meaningful when they are situated within society. However, as soon as we do this, it becomes clear that such concepts are highly contested, with social forces lining up against different interpretations of these rights. As Martha Finnemore has argued, it is hardly realistic to imagine that a term such as equality can be defined without disagreement over its meaning. When we speak of equality, do we mean equality of opportunity, or of outcomes? The historical confrontation between social versus liberal conceptions of democracy hangs in part on what meaning we give to equality.<sup>102</sup> As Finnemore argues, such contestation over the meaning of "higher order norms" is the essence of politics: "normative contestation is in large part what politics is all about; it is about competing values and understandings of what is good, desirable, and appropriate in our collective communal life".<sup>103</sup> The legitimacy accorded to these rights, and the procedural rules that accompany them, thus inheres not in the rules themselves but in the political sphere that gives content to these rights. Only by situating the rights of equality, liberty etc. within a particular vision of the social order do they become meaningful, and serve as sources of legitimacy. The stability of Western liberal democracies rests upon a normative consensus around what meaning we give to these basic rights. The vitality of political life depends upon the extent to which these meanings are contested. By confining her notion of legitimacy to the sphere

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<sup>100</sup> Linklater, *op cit*, p123

<sup>101</sup> Offe, C. (1975). *The Theory of the Capitalist State and the Problem of Policy Formation*. In L. Lindberg (Ed.), *Stress and Contradiction in Modern Capitalism: Public Policy and the Theory of the State*. Lexington: Lexington Books. p249, my italics. On the social consensus that underpins law and determines its legitimacy, see Beetham, D. (1991). *The Legitimation of Power*. Basingstoke: Palgrave-Macmillan.; Coicaud, J.-M. (2002). *Legitimacy and Politics: A Contribution to the Study of Political Right and Responsibility*. Cambridge: Cambridge University Press. and Kratochwil, F. 2006. On Legitimacy. *International Relations*. 20(3): 302-308..

<sup>102</sup> For an account of this, see Bobbio, N. (2005). *Liberalism and Democracy*. London: Verso. Especially chapter seven.

<sup>103</sup> Finnemore, M. 1996. Review: Norms, Culture, and World Politics: Insights from Sociology's Institutionalism. *International Organization*. 50(2): 325-347. p342.

of cosmopolitan law, Sjursen is able to avoid the sphere of interest-based politics which she views as biased and culturally bound. However, in doing so, she reduces legitimacy to legality. How much legitimacy can be gained for the EU from the "thin universalism" of communitarian ethics is thus open to some doubt.

### 3.3. Identity politics: power without purpose?

Somewhat similar problems are confronted by attempts to legitimize the EU's normative power either through a post-colonial agenda of other-regardness and atonement, or via the open-endedness and lack of finality distinctive of postmodern approaches. However, the main problem here is that the concept of normative power is stripped of any transcendental purpose. From the perspective of postmodern theory and identity politics, this is a step forward. Yet it makes it impossible for normative power to function as a solution to the problem it was meant to address - the crisis in the Idea of Europe and the ongoing search for meaning in the process of European integration.

Returning briefly to the discussion of democracy, it is worth noting some overlap between Sjursen and Nicolaïdis. In Nicolaïdis' vision of post-colonial atonement, European citizenship is recast not as a right of participation but as a set of duties to others. And by implying that non-European others have a right to judge European actions, we can guess that Europeans, to paraphrase Andrew Linklater, are not at liberty to decide the extent of their moral duties.<sup>104</sup> The freedom of the political community to determine its own ends is in this case foreclosed by the ethical injunction to atone for past wrongs. We can see this ethical injunction also at work with cosmopolitan theory. Sjursen waters down her conception of universalism in such a way as to ensure that her norms are fully universalizable. However, the equal application of a set of norms is quite different from a consideration of their origins and what relationship they have with a given political community. Even the most egalitarian of norms can be imposed from above in a tyrannical manner - this is what Kant meant when he wrote of the possible tyranny of ethics.<sup>105</sup> Both Nicolaïdis and Sjursen privilege the content of norms over the manner by which they are constituted. Yet as the German Constitutional Court warned in 1993, this can present real problems of democratic legitimation.

On the question of normative power and its purpose, Nicolaïdis' project of legitimizing the EU's normative power by recasting it as a "post-colonial ethos" can be thought of in terms of *identity politics*. The basic tenets of identity politics are threefold: the "hybridization" of identity, the underlying contingency of all identities, and an emphasis on practical - as opposed to theoretical - identity.<sup>106</sup> Much of what passes for identity politics is closely tied to Habermasian reasoning, and

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<sup>104</sup> Linklater, *op cit*, p127.

<sup>105</sup> This point forms the basis of Laïdi's critique of what he terms the project to "constitutionalize world politics". See chapter five of Laïdi, *Norme sans la Force*, *op cit*.

<sup>106</sup> This account of identity politics is largely based on Tully, J. (2003). *Identity Politics*. In T. Ball, and R. Bellamy (Eds.), *The Cambridge History of Twentieth Century Political Thought*. Cambridge: Cambridge University Press.. "Hybridisation" is Homi Bhabha's term, and refers to the way that many members of a minority who seek recognition will themselves be marked by a series of cross-cutting allegiances and identities of their own. This sociological fact is theorized by the likes of Jacques Derrida and William Connolly. See Derrida, J. (1992). *The Other Heading: Reflections on Today's Europe*. Bloomington, IN: Indiana University Press. and Connolly, W. (1991). *Identity/Difference: Democratic Negotiations of Political Paradox*. Ithaca, NY: Cornell University Press.. The contingency of identity refers to the way in which it will be open to question and is renegotiated and redefined over time. Practical identity Tully defines as "a structure of strong evaluation in accord with which humans value themselves, find their lives worth living and their actions worth undertaking, and the description which they require, as a condition of

so overlaps with cosmopolitanism. However, the emphasis on contingency and a deep-seated rejection of any finality or definitiveness in the process of identity formation and mutual recognition has much in common with the postmodern perspectives cited here. Derrida's famous claim that identity is never quite identical with itself, and always contains within itself its own alterity/otherness, is in fact a central tenet of identity politics.<sup>107</sup> The problem of normative power Europe as a kind of politics of recognition inscribed into the EU's foreign policy is that it ultimately fails to respond to the search for meaning which is what drove scholars, analysts and policymakers towards the idea of normative power in the first place. In this way, it fails in its quest for legitimacy since legitimacy is closely bound up with this search for meaning. Identity politics refuses the idea - integral to political life as we came to understand it in the twentieth century - of creating from scratch new collective identities which subsumed individuals entirely. What we see is the promotion of one kind of politics over another. In order to draw out the consequences of this, it is useful to briefly sketch a comparison of these two kinds of politics.

The modern politics of representation was dedicated to the creation of something new, of bringing into existence that which did not exist previously. This kind is the politics of the 'New Man' which so marked the twentieth century and which dominated political theory and philosophy from the thirties to the sixties. As Alain Badiou has written, what defined this epoch and this type of politics was the belief in the "non-naturalness of the human subject", and that "a subject is of the order not of what is but of what happens".<sup>108</sup> In the famous words of the *Internationale*, "the earth shall rise on new foundations". The postmodern politics of recognition, otherwise known as identity politics, is concerned with recognizing that which already exists. It refers above all to "struggles to overcome an imposed identity and to gain recognition of a non-imposed identity".<sup>109</sup> These two kinds of politics are obviously opposed to each other: identity politics sees the politics of the New Man as the embodiment of totalizing identities imposed on marginal groups through violent acts of coercion and assimilation. We can see some of this opposition at work in Nicolaïdis' notion of post-colonial atonement. European imperialism is conceived of as the imposition of Europe's identity onto the rest of the world; European thought is dominated with the search for singularity and all the attendant risks of domination and objectification of others that this entails. The EU's normative power is therefore conceived as the assertion of a politics of recognition over the erstwhile politics of the 'New Man' that wrought such havoc across Europe during the twentieth century.

The trouble with the concept of normative power is that it was conceived as part of an attempt to generate meaning for the European project; it was an attempt to make post-Cold War European integration meaningful. Legitimacy is crucially about *providing justifications for the exercise of power*: it is power *with purpose*.<sup>110</sup> These justifications can take the form of narratives, often teleological, such as functionalism in the case of European integration. They can also come in the form of projects to create something new: the purpose of power understood in terms of the achievements that are within the reach of humans acting in concert. This creative desire for meaning, for making something in the world and of the world, which is the anthropological core of modern political life from Marx to Malraux, is rejected by identity politics. It is even more explicitly rejected by postmodernists who refuse to conceive on any finality, any boundary, and

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self-worth, that others (both those who share the identity and those who do not) recognize and respect them". Tully counter-poses this to, for instance, identity defined as a matter of theoretical reasoning in the way that autonomy is in the Kantian tradition of political thought. Tully, *ibid*, p520.

<sup>107</sup> Derrida, *ibid*, p9. Cited in Tully, *op cit*, p518. See also Connolly, *ibid*.

<sup>108</sup> Badiou, A. (1997). *The Century*. Cambridge: Polity. pp99-101.

<sup>109</sup> Tully, *op cit*, p522.

<sup>110</sup> Cited in Nicolaïdis, 'The EuroMed', *op cit*, p9.

anything definitive at all. In the words of Jean-Francois Lyotard's postmodern rallying cry: "we have paid a high enough price for the nostalgia of the whole and the one... let us wage a war on totality; let us be witnesses to the unrepresentable, let us activate the difference".<sup>111</sup> Tully states explicitly that the difference between identity politics and what came before it is that the former does not involve "struggles for the definitive recognition of an authentic, autonomous or self-realizing identity... no such fixed identity exists". He goes on: the "ideal of a definitive recognition... is just as much a chimera as the former impartial liberal identity and the uniform national identity".<sup>112</sup> Yet in so far as legitimizing the EU's normative power means providing an account of the EU's role in the world i.e. in giving a 'normative' *purpose* to the EU's *power*, identity politics does not provide the EU with the requisite ideational and political resources. Its version of legitimacy undercuts its own foundations and leaves the normative power Europe project adrift in a sea of meaningless flux.

## Conclusion

This paper has explored the question of the EU's normative power through the concept of legitimacy. It has argued that normative power Europe has had difficulty in justifying itself on its own terms, with both scholars and analysts noting that what passes for 'normal' in the EU's eyes might not be normal for everyone else. The result of this has been a search for new sources of legitimacy for the EU's normative project. This paper has analyzed three sources in detail - cosmopolitan law, identity politics and a set of European social preferences. Each source of legitimacy draws upon different understandings of political community, authority and democracy, which signals an underlying lack of clarity concerning the EU as a political formation. The paper has also sketched out very briefly some of the problems confronting the sources of legitimacy relied upon by these various approaches. These problems are threefold: (1) the notion that the EU's "polity without politics" can be a distinctive source of legitimacy for the EU's vision of governance-through-norms; (2) the conflation of legitimacy with legality and a disregard for political processes of contestation that any set of norms must undergo in order to be legitimized; (3) a rejection of the purpose attached to power in the name of eschewing totalizing visions of European singularity and finality. If these sources of legitimacy are indeed so weak, then this poses a problem for the EU in its desire to assert itself as an actor in world politics. As David Beetham has argued, legitimacy is not the "icing on the cake of power" applied after the baking is over; legitimacy is the yeast that enters the dough and makes the bread what it is.<sup>113</sup> If legitimacy is constitutive of power, as Beetham suggests, then it is perhaps in its sources of legitimacy that we find the limits of the EU's normative power.

(10,481 words excl. footnotes)

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<sup>111</sup> Cited in Ruggie, *op cit*, p176.

<sup>112</sup> Tully, *op cit*, p533.

<sup>113</sup> Beetham, *op cit*, p39.