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The Unfinished Task of Constituting Europe: Democratic Logics and Dynamics of the European Integration Process

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Introduction

The Lisbon Treaties, comprising the Treaty on the European Union (TEU-L) and the Treaty on the Functioning of the European Union (TFEU) as well as the Charta on Fundamental Rights (which is put on the same legal footing as the two treaties) now together provide the consolidated source of European primary law and thus in many respects more or less exactly mirror the achievements of the former Constitutional Treaty. Nonetheless, it is to be expected that the dialectics between treaty-based and constitutional integration will not only not come to a halt, but will even more forcefully unfold in the post-Lisbon process for mainly two reasons: The first reason is that the treaties fails to address the task of providing for those institutional capacities the Union needs in order to address and shape itself as a Political Community; and the second reason is that the Union consciously did so in order to avoid confronting the decisive, but politically still divisive teleological question of its own finalité – and instead once again chose to rely on a working agreement on a hybrid institutional mixture of a regulatory regime on the one hand, and its foundational commitment to the rule of law and to a value-based community, among which the value of democracy prominently figures, on the other. This ends up in a particular complex scheme of juxtaposed different normative orders which, as I submit, will not tame but expose its normative and institutional tensions and will thus risk not only of failing to supply for its political efficiency and effectiveness, but of progressively dismantling itself from the legitimacy and public support it would need for its own justification.

Against this background, in the following I shall proceed in roughly three steps. In a first step I will have a short look at the acquis communautaire as it is established with the Lisbon Treaties on the European Union which, in spite of its major achievement and in opposition to its famous self-description as a post-national polity sui generis, mainly documents the unwillingness and inability of the EU to reflect and act upon itself as a polity in its own right (I). Against this tendency of the EU and its framers to more or less consciously hide it away from itself, not only from its aspirational goals, but from scrutinizing the normative logics and dynamics that might fuel the integration process, I shall then explicitly address the question of a possible future (re-) constitution with reference to three basic model accounts of its possible future shape (II). In order to provide for a choice between these models, I then in a more closely conceptual analysis introduce three sets of criteria with the help of which it will be possible to get a clearer

impression of the respective shortcomings and merits of these model accounts (III). Finally, and in conclusion, I shall opt for a model which we may call "Regional European Democracy with a Cosmopolitan Imprint" and which is based on an idea of "liberal political incorporation", recently introduced by Glyn Morgan (IV).

I

When measuring and judging the merits and possible achievements of the Lisbon Treaty[1] against these challenges we on a first glance may come to the conclusion that there are indeed some important steps that have been made in order to improve the democratic quality of the EU, and the effectiveness and internal coherence of the formerly even more fragmented system of its main international and supranational institutions and national institutional building blocks by:

- Establishing itself as a rights- and value-based community exceeding by far the needs of a merely functional and instrumental polity safeguarding the conditions of a mainly regulatory regime of negative integration (Art. 2 TEU-L);

- Overcoming the pillar structure of Europeanization of policies and legislative competencies and thus transferring the legal personality of the EC to the Union as a whole;

- Extending the reach of the majority vote in the Council (of ministers) according to the rule of the double majority;

- Extending EU competencies in exclusive, shared or complementary legislation and by establishing the co-decision procedure as the normal legislative mode of the EU;

- Confirming an EU citizenship based on the principle of equal concern (Art. 9 TEU-L);

- Committing itself to parliamentary democracy (Art. 10 TEU-L) and to civil society involvement and engagement as well as the introduction of popular referenda (Art. 11 TEU-L);

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[1] Cf. Klemens H. Fischer, Der Vertrag von Lissabon. Text und Kommentar zum Europäischen Reformvertrag. Baden-Baden: Nomos 2008; and Olaf Leiße (ed.), Die Europäische Union nach dem Vertrag von Lissabon. Wiesbaden: VS 2010.

- Democratizing itself along the lines of parliamentarization, direct, deliberative or subsidiary democratization (when considering the enhanced role of national parliaments in EU legislation).

But as you may immediately notice, Lisbon is also a decisive and conscious step back behind what was already achieved with the Draft Constitutional Treaty in generic, normative, legal and institutional terms. The main reasons for this less benign effect are, on the one hand, the provisions that still safeguard the basic allocative and delegative functions of the member states taken individually and separately (it remains a delegative democracy with strong incentives favoring negotiation and compromise over argumentation in legislation and shielding these processes away, as it were, from public scrutiny); and on the other, even in a more benevolent view, all these achievements at best amount to what may be called a hybrid form of democratization with a lot of inner conceptual and institutional tensions between the different models of democracy referred to by this agenda. Finally, the sheer complexity of the Treaties seems to be telling, for one of the most astonishing features of the elite-driven project of European integration is the paradoxical and still pervasive[2] fact that a large part of its success is due to the more or less successful attempt to consciously hide it away from the view of all those engaged and involved into the process. So it may seem as if the project as such were premised on and animated by effectuating a justificatory device on which for example John Rawls relied when confronting the similar task of outlining the conditions under which a contractual solution to the problem of establishing the basic institutional structure of a just and well-ordered society can be designed.[3] Yet, from another point of view[4] not only the outcome, but the intent of such a strategy must seem rather dubious especially when it is translated from an original position, designed to establish the moral point of view on which such an enterprise is premised, into a device which functions as a safe filter that keeps off public scrutiny all we can and should know in order to come to an enlightened judgment of the merits or failures of the project. For Majone then this pervasive feature can be thought of as rationally induced only under at least two conditions – the prevalence of a political culture which prioritizes "integration over all other competing

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[2] For a recent investigation into the mechanisms that are operative in the process of hiding European integration away from itself and thus lifting the self-imposed veil of ignorance see John Erik Fossum, Norway´s European ´Gag Rules´. In: European Review 18 (2010): 1, 73-92.

[3] Cf. John Rawls, Justice as Fairness: A Restatement. Cambridge/MA: The Belknap Press of Harvard University Press 2001, esp. Part III.

[4] Cf. Giandomenico Majone, The ´Referendum Threat´, the Rationally Ignorant Voter, and the Political Culture of the EU (RECON Online Working Paper 2009/4).

values, including democracy"[5] on the one hand, and the organized insensivity to this phenomenon on the part of especially the intellectual elites and students of European integration alike.[6]

Be that as it may, what is remarkable here is the conviction underlying this diagnosis that democracy as a normative principle is basically at odds with the process of European Integration which progressively decouples itself from its (if not its only, then surely its most prominent) value base. This is another way to say not only that the process of European Integration progressively undermines its normative credentials, but that it consequently acquires the status of a merely aspirational (and for that matter: contingent) political goal without any normative force or bite[7] - a force that could only fuel European integration if it in one way or the other can be seen to be internally linked to the moral promises of self-determination, self-legislation and self-realization. This kind of sorting normative issues which finds its basic expression in the strategy to decouple the question of integration from the democratic question seems to me the most fundamental contention of all those which find themselves in a progressively sceptical position towards European Integration, and this in spite of the fact that the recent financial crisis has provoked a growing awareness on the part of the European publics of the importance of building a common capacity to act, not only in economic or social policies, but also in policy domain such as security, science, environmental protection or energy – to name just a few.

II

These failures become visible once we try to get a clearer impression of the more clearcut models that might serve as a basis for future reconstitution of the EU as a coherent system of democratic government. The issue is one of forging a viable democracy at the supranational level where democracy is primarily understood as a distinct principle of legitimation based on justification, autonomy and accountability.[8] In

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[5] Majone, The Referendum Threat (fn 4), 4.
[6] Majone, The Referendum Threat (fn 4), 2.
[7] For this distinction between „merely aspirational goals" on the one hand and „matters of juctice" see Cristina Lafont, Alternative Visions of a New Global Order: What Should Cosmopolitans Hope for? In: Samantha Besson and José Luis Martí (eds.), Legal Republicanism. National and International Perspectives. Oxford: Oxford University Press 2009, 256-277 (here 259).
[8] For a more intensive exposition and discussion of these models see Erik O. Eriksen, The Unfinished Democratization of Europe. Oxford: Oxford University Press 2009 (esp. chapters 8, 9 and 10).

this light we may discern three basic models, and I restrict myself to a very rough sketch of its basic features:

Audit Democracy

Under this model the EU emerges as a functional and regulatory regime devised to solve problems which member states cannot solve when acting independently, so that

- Sovereignty rests with the member states for the normative reason that only at that level we find an ethically bound demos able to collectively act on itself;

- Autonomy rests with national demoi and EU policies and legislation is based on a delegative mechanism,

- While the EUs legitimacy is based on efficiency, effectiveness and outcome legitimacy in line with pareto optimality or superiority.

But there are problems with such a model which can be stated as

- The problem of agency drift;

- the problem of technical rule, and

- the problem of executive dominance which

- together lead to the problem of simultaneously hollowing out democracy on both levels – the EU as well as the national level.

As a solution to these well known problems of a regulatory regime the model then posits a representative body whose main function is auditory in nature and which is to help member states and its democratic institutions to supervise and control the Union´s actions.

Federal multinational community

This model is based on the idea of the fusion of statehood, the rule of law and democracy and its less conventional part is to be seen in its multinational character which on the one hand fuses the principles of sovereignty, legitimacy, and autonomy and accountability; but which amends institutional provisions to this conventional model that are aiming at what may be called "recognitional parity" of national member states based on seven principles of a) partnership, b) collective assent, c) commitment and loyalty, d)

anti-assimilationism, e) territorial autonomy as national self-determination, f) equal right of nation-building, and g) multiple and nested identities.[9]

This model comes in two variants, a supranational[10] or a transnational[11] one.

Regional European Democracy

The model is based on a distinction between government and statehood and opts for the possibility of a non-state form of an integrated system of government or governance.

The governance version then conceives of the EU as a cosmopolitan democracy which serves as a civilian power, as part and vanguard for a emerging democratic world order; while the government version of it insists on it being a non-state entity with governmental powers which are not primarily coercive but rest on the ability to act in concert and to be recognized. Moreover, it is important to note that while it establishes an internally integrated and distinct community bound by constitutional rules and where the integrative powers rest with a deliberative understanding of the forces of integration, it is added an important external dimension to its justification which may be aptly captured in the notion of liberal political incorporation.[12]

III

(*i*) The first set of criteria against which to measure and evaluate the normative merits, the coherence and stability of the three models just mentioned is then derived with reference to what might be called the problem of democratic heteronomy and the logics and dynamics that are involved in democratically determining the self of self-legislation. This is a set of criteria that highlights the necessity to explore the possibility of a post-national justification for further European integration and which speaks in favour of the telos of "widening Europe":

When pitted against the republican principle of non-domination, the lesson we have to learn in order to judge on the democracy-normative merits of a European polity and to

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[9] Cf. Wayne J. Norman, Negotiating Nationalism. Nation-Building, Federalism and Secession in the Multinational State. Oxford: Oxford University Press 2006, 163-168.

[10] Cf. Glyn Morgan, The Idea of a European Superstate. Public Justification and European Integration. Princeton: Princeton University Press 2005.

[11] Cf. Joshua Cohen and Charles F. Sabel, Directly-Deliberative Polyarchy. In: European Law Journal 3/1997 (4), 313-342.

[12] Cf. Glyn Morgan, Liberal Political Incorporation. In: Rainer Forst and Rainer Schmalz-Bruns (eds.), Political Legitimacy and Democracy in Transnational Perspective. Oslo: RECON Report (forthcoming).

establish the standards which it has to meet when it shall be considered as an exemplar solution to the problem of democratic heteronomy is much more complex than for example Scharpf or Majone in their concern to provide for safeguards against the legal superimposition of normative orders on already existing national democracies allow for. The pivotal question then is whether we need to interpret the principle of the sovereignty of the people in a more abstract way once we are confronted with the challenge to conceive of a situation which allows for democratic decision on the borders of democracies. Here we arrive at a point where the answer to the question of identifying the self of self-legislation is internally linked to the question of how we might arrive at such a decision – a constitutive circle then which cannot but be broken up by the same procedural means that are central to the legitimacy of democratic will-formation. Again I restrict myself to some conceptual remarks.

In a very instructive move Nancy Fraser[13] decisively altered our view on the kind of challenges that democratic thinking has to confront with respect to the changing basic structures of politics in the postnational constellation. What becomes visible when we look at things from the point of view of justice are not only the deep traces of all sorts of injustice by which the current system is marked – by the injustice of maldistribution, the injustice of misrecognition or the injustice of misrepresentation – , but that the very grammar which structures our claims to justice forces us to consider not only the question of what justice demands from us in substantial terms, but also to ask ´who´ is the subject of claims to justice and how we might come to terms with the problem of ´how´ to determine the who the subject should be. This once again brings to the fore the inherently reflexive structure of our settled answers to all these questions because claims to justice are more and more addressed to an international community which in some sense is a moving target and does not itself dispose of preestablished territorial bonds and a constituency that might legitimately and authoritatively answer these questions. [14] In other words, what is happening is that through this "metapolitical" form of the politicization of questions of justice that are triggered by the more or less free floating communications within a global public which in itself remains indetermined and does not, either in a functional or in a legal dimension, constitute a subject able to take or implement authoritative decisions, we are torn into a pyramidal process displaying the

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[13] In the following I refer to Nancy Fraser, Reframing Justice in a Globalizing World. In: New Left Review 36/2005, 69-88.
[14] Nancy Fraser, Reframing Justice, 72.

normative force of the ´all-affected-principle´ and a moral right to justification[15] and are confronting us with the issue of participatory parity and adequate representation:

> „Above and beyond their other demands, these movements are also claiming a say in a post-Westphalian process of frame-setting. Rejecting the standard view, which deems frame-setting the prerogative of states and transnational elites, they are effectively aiming to democratize the process by which the frameworks of justice are drawn and revised. Asserting their right to participate in constituting the 'who' of justice, they are simultaneously transforming the 'how' - by which I mean the accepted procedures for determining the 'who'".[16]

(*ii*) The second set of criteria then is derived from considerations on the issue of political normativity which do not contradict the results arrived at under (i), but add a decisive element to our picture and support the idea of conceiving of the future EU as an integrated system of government premised on a non-national kind of state:

What we immediately see is that with the issue of normativity in general or of social or political normativity in particular, we address a particular task when asking these kind of questions, i.e. to understand how it might be possible that we are reliably bound by norms (f.i. of reciprocity) although we know that they are socially or politically crafted and put into validity (and thus are changeable), and although we at the same very well know that the final decision about whether or not to act upon them is up to us. So social or political norms are not determinate in the sense laws of nature are, and this is why we often believe the bindingness of norms to be derived from an external authority able to effectively sanction compliance or non-compliance.[17] Although this is a phenomenon to be frequently observed especially in political relations, it can only serve as a preliminary answer to our problem for two reasons: One reason is that what we are dealing with when putting things in this way is not normativity, but the power of an authority external to us; and the second reason is that, by doing so, we miss the crucial link between our autonomy (autonomous will) and normativity – normativity then makes itself felt and can only unfold in a process where we rationally act upon justified norms which are forced on us because of the special character of the "ought" they display, i.e. an ought that

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[15] Cf- Rainer Forst, Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit. Frankfurt a.M.: Suhrkamp 2007.
[16] Nancy Fraser, Reframing Justice, 84.
[17] Cf. Gosepath, Zum Ursprung der Normativität (fn 29), 252-254.

articulates itself as a "must", as a kind of obligation or duty that is not within our reach and that, as in some sense implied in our practice and deeply rooted in our self-understanding, we cannot avoid to have or feel. What we are looking for then when looking for normativity is a threefold internal and safe relationship between an ought or moral command, our autonomous will and the "must" of a necessary condition which establishes the link between the content of a norm and our volition (or motivation to act upon it).[18]

These considerations finally lead us to a decisive point where it becomes obvious for political theory to provide an adequate account of normativity it is crucial to establish the fundamental role that institutions might play in this regard. Although building on the most fundamental idea that the sources of normativity cannot be detected but in the structures of a reflexive social (or political) practice of norm-generation or self-legislation, and although acknowledging that the more substantive norms derived from this fact must somehow be related to the inner forces that drive our search for recognition, in order to get a initial grasp of the reasons that might induce such a turn to what I preliminarily call institutional normativity we also have to see that institutions form an integral element of such practices and compensate for the motivational weakness and epistemic indeterminacy of sentiments and emotions that fuel our drive for self-realization:

> "And nonetheless, we do not exclusively rely on these forces. They are constrained in their scope, and sometimes they are only particular, they are, from time to time, not activated for lack of insight or prove not to be strong enough. Everyone, for these reasons, is therefore interested in being safely enabled to count on these inclinations and action orientations, i.e. interested in an additional element, that is not particular in nature, but equally important for all those involved […] and builds on something that can be generally presupposed. And it should be evident and so strong that its probability to decisively influence us in our actions is high. Thus everyone, for moral reasons must be interested in additional reasons for acting morally, and that is why any society [or political community] will try to artifactually establish such reasons for moral action".[19]

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[18] See Stemmer, Normativität (fn 29), 298-299.
[19] Peter Stemmer, Normativität. Eine ontologische Untersuchung. Berlin: De Gruyter 2008, 304 (my own translation).

Now, if we can safely presuppose that there is a necessary moral interest in institutions so understood, the reason for this does not solely and not even primarily rest in the idea that compliance to norms should be fostered by authoritative sanctions.[20] Instead, I submit, institutions are internal to a reflexive practice of self-legislation for basically four kinds of reasons: In a moral sense they, firstly, help to establish what we may call the visibility and mutual credibility of those norms that necessarily structure our practice and thus, through their moral integrity help to induce forms of a generalized mutual trust that are constitutive in forming a community of equals engaged in a practice of self-legislation;[21] they are, secondly, conducive to a sense of appropriateness which helps to constrain the more instrumental or prudential forms of rationality that inform our orientations towards other as well as our actions;[22] they, thirdly, procedurally articulate the epistemic link that exists between the principle of democratic legitimacy and the more substantial content of those norms and laws in the light of which we constitute ourselves as a self-legislating community of others; and they, finally, by chaneling and funnelling the flow of public communication serve as a mechanism of the normative self-irritation of political communities.

(*iii*) The third set of criteria then can be derived from a re-evaluation of the grammatical sense and meaning of a formal concept of statehood which addresses the conceptual link that exists between democracy and statehood and therefore gives us reason to prioritize supranational over transnational forms of post-national political integration:

This move consists in the attempt to provide a more abstract notion of statehood, more or less detaching it from the realization of any concrete and historically specific form of life and tailoring it to the demands of institutionalizing the conditions that must be given in order to provide for the reflexive acquirement of a collective form of life under the condition of the fact of pluralism – as a collective learning process.

Against this background we can now easily see that the presumption in favour of stateness is wedded to a procedural account of the rationality of the democratic process

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[20] Although this Hobbesian element in any account of normativity is important - see for example Stemmer, Normativität, 304-305 or Stefan Gosepath, Zum Ursprung der Normativität. In: Rainer Forst et al. (eds.), Sozialphilosophie und Kritik. Frankfurt am Main: Suhrkamp 2009, 252-254 – it is not, as I see it, constitutive of the way institutions work.

[21] Cf. Claus Offe, How can we trust our fellow citizens? In. Mark E. Warren (ed.), Democracy & Trust. Cambridge: Cambridge University Press 1999, 42-87 (esp. 65-74) and David Estlund, Democratic Authority. Princeton/NJ: Princeton University Press 2009 (esp. chap. 1).

[22] A paradigmatic account of such a view on how institutions work we owe to Johan P. Olsen: Cf. James G. March and Johan P. Olsen, Rediscovering Institutions. The Organizational Basis of Politics. New York: The Free Press 1989 and Johan P. Olsen, Europe in Search of a Political Order. Oxford: Oxford University Press 2007.

of self-determination. Remember that the important structural features of a democratic process that has to account for its own rationality in this regard cover several equally important dimensions that are not reducible to providing the organizational capabilities necessary for democratic self-intervention to become effective. Let me briefly note that beyond this the rationality, legitimacy and confidentiality (which holds that there should be no basis for doubting the justice of the outcomes on the basis of some palpable unfairness or other undesirable feature of the process that produced them[23]) of the democratic process is premised on principles such as

- the principle of deliberation: Part of the idea of the force of (better) reasons is the claim that we must allow them to be decisive;

- the principle of publicity: It is important to note that the idea of the public use of reason by itself puts a premium on collectively general (in contradistinction to distributively general) forms of opinion and will formation;

- the principle of public equality: It is important for people to engage in common affairs upon the presumption that they only mutually recognize each other as equal, but that they can see themselves as equally treated in processes of collective self-determination;

- the principle of civic trust: While the moral plausibility of institutions and procedural rules is important for civil trust to emerge, it can only be sustained and further nurtured to the degree that they can effectively alter the conditions (political, social, economic) which are crucial for them understanding and recognizing themselves as free and equal; and finally

- the principle of the rule of law which asks from us that we must not only be able to effectively sanction non-compliance, but that we must be able to understand the sanctioning force as itself legally constituted or domesticated.

This suggests that legitimate democratic will-formation and decision-making is premised on structural properties of these processes and capabilities related to agency that fuel an understanding of stateness that is not tied to the historical formation of the (nation-) state. In more abstract terms then the notion of stateness signifies those structural

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[23] See David Estlund, Democratic Authority.

properties of the democratic process that are directed at funnelling and channelling the public flow of communication toward the common good, and at providing the features necessary to that end, such as authority, bindingness, responsibility and accountability.[24]

IV

What all this suggests is that our understanding of normative orders for normative reasons (derived from the principle of reflexivity) always also implies a hierarchical component which still is best captured with the juridical notion of statehood – although this time the normative content of the idea of statehood does not, as in the case of the idea of internally moralized states so prominently figuring in classic international law, only reflect the conditions of the rational interplay of sovereign nation-states, but derives its cogency from warranting the structural conditions on which an inclusive, general will-formation in the international or transnational political realm, covering multi levels reflexively tied to each other depends. While this invites us to conceptualize the idea of statehood with reference to the idea of a moral principle of justification which says that nobody may be subjected to norms, rules or institutions which are not reciprocally and generally justifiable to those affected by these norms, rules or institutions,[25] everything then further depends on two further moves: Firstly, we have to detach an more abstract notion of statehood from its more concrete ethical form of a nation-state which is but one form of the realization of the idea of statehood – this is done by reference to a formal notion of statehood which understands stateness, as I suggest, as a principle of institutionalisation that derives its normative status from its internal link to the principle of democratic legitimation. But even (or just) when we are more or less successfully able to bring this point home, justification cannot stop here because we are then confronted with a second, equally important challenge – i.e. that the EU can conceive of itself as a convincing and normatively consistent form of democratic statehood only insofar as it manages to project the internal reasons that lead to such a suggestion onto its external relations, too. This is obviously a task that has been more or less successfully circumvented in the contractarian tradition so far (up to Rawls), and it is a puzzle which

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[24] See Philipp Genschel and Bernhard Zangl, Die Zerfaserung von Staatlichkeit und die Zentralität des Staates. In: Peter Stiller and Gerhard Pilz (eds.), Politik der Gerechtigkeit. Baden-Baden: Nomos 2009, 345-354 (here: 346).

[25] Rainer Forst, Dialektik der Moral. Grundlagen einer Diskurstheorie transnationaler Gerechtigkeit. In: Peter Niesen and Benjamin Herborth, Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik. Frankfurt a.M.: Suhrkamp 2007, 254-268 (here: 265).

can only be solved within the horizons of the vision of a "Regional European Democracy" which is premised on its internal globalization as well as on the idea of liberal political integration which both react to the normative fact that the EU as a political order can gain legitimacy only from the anticipation of an even more encompassing and integrated political global order:

This justificatory vision rightly starts from the tension that exists between the EU´s pronounced commitment to universal natural equality and the necessary particularism of political equality – a tension which can only be managed if the EU as a paradigm case of a non-national state conceives of its own enlargement in the service of postnational political equality by means of a liberal political incorporation, where the term "liberal" is significant in a double sense: "First, the offer of membership is freely extended – whether a state takes up membership is its voluntary choice; and second, the incorporating entity is itself a liberal, democratic regime"[26] so that it is safeguarded that political incorporation means sharing and mutually forging an integrated system of government.

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[26] Glyn Morgan, Liberal Political Incorporation, 14.

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