# Europe as a demoi-cratic polity

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**Summary:** The question of democratic legitimacy in Europe has resurfaced with a particular gravity after the French and Dutch rejection of the Treaty establishing a Constitution for Europe in 2005. By concentrating on the supranational or international level of governance in the EU, accounts of European democracy propounded since the early 1990s have diverted attention away from the national level. Since the latter remains the primary locus not only of national law-making, but also of European legal enforcement, however, it is important not to underestimate its importance in the European legitimation process. Of course, reverting entirely to traditional statist conceptions of democracy would be vain and theoretical models need to adapt to the post-national legal reality in Europe. The legitimacy gap in the European Union will not be filled before European constitutional pluralism is matched by a corresponding model of democratic legitimacy. The paper identifies three dimensions of a model of European democracy that is sensitive to the new post-national institutional reality in Europe: first, democracy should be understood as pluralistic both in the quantity of democratic subjects participating in European democracy and in the quality of their individual constituency; second, and this is a consequence of its pluralism, European democracy should not only be denationalized, but also deterritorialized so as to include all those affected in each and every single one of the many democratic subjects identified; finally, European democracy should be deliberative so as to be as flexible and dynamic as possible and match its inherent plurality and deterritorialization.

**Keywords:** European Union, political legitimacy, democracy, constitutional pluralism, deterritorialization.

> Our European demoi-cracy is neither simply a *Union of democracies* nor a *Union as democracy*. Our European demoi-cracy is instead one of the most innovative political machines ever invented to create and manage not only economic but also democratic interdependence. [...] Our European demoi-cracy is predicated on the mutual recognition, confrontation and ever more demanding sharing of our respective and separate identities – not on their merger. The EU is a community of others. In political terms, a demoi-cracy is not predicated on a common identity, European public space and political life. Instead, it requires informed curiosity about the political lives of our neighbours and mechanisms for our voices to be heard in each other's forums. In time, a multinational politics should emerge from the confrontation, mutual accommodation and mutual inclusion of our respective political cultures.
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> (Nicolaïdis, 2003, 5)

# Introduction

A polity is a political entity; it can be a state, but it need not be a state. The question whether the European Union (EU) may be regarded as a political entity, albeit a *sui generis* and complex one, equates to the question of its legitimacy. In turn, this legitimacy is usually taken to be democratic *par excellence*: there can be no *politeia* without *polites*, i.e. no polity without citizens and hence no polity without democracy.

True, there are many other dimensions to legitimacy than procedural legitimacy and to procedural legitimacy than democracy (see von Bogdandy 2004). However, recent developments in the European constitutional debate have shown that democracy is one of the most resilient and difficult questions pertaining to the legitimacy of the European project. Somehow, issues raised in the past few years with respect to the legitimacy of the Treaty establishing a Constitution for Europe, and of European constitutionalism more generally, always seemed to boil down to the existence or non-existence of a European *demos* able to constitute itself. In other words, one of the ways to broach the European constitutional question and openly face its current crisis might be to re-assess the fundamental question of democracy in Europe.

In fact, the recent constitutional turmoil has also revealed another important fact about the European polity and that is that the democratic legitimacy of the European Union is not all that matters. True, the EU suffers from a democratic deficit at the international and supranational level, but it would be wrong to want to remedy that deficit as one would at the national level by conceiving of the European polity as a state-like albeit supranational entity. Democracy in the complex European polity cannot be understood

properly without its national dimension. Recent discussions pertaining to the legitimacy of the European Constitutional Treaty have too often been uprooted from the soil of national constitutions and democracies, and the Treaty paid a high price for this in national referenda. While an important part of law-making processes takes place beyond the national state, the latter remains the central locus of transposition and implementation of European law and hence of its legitimation. After all, the European legal order is an integrated legal order in which European law is made an integral part of national law.[2]

Yet, reverting, as many suggest, to national democracy in national matters and to the distinct national *demoi* in abstracting from their common Europeanness would be throwing out the baby with the bath water. In a globalized Europe, democratic processes can no longer take place at different levels without regard to each other; legal pluralism implies indeed that many legal norms of different origins apply in each and every Member State without necessarily having been adopted in neatly territorialized democratic processes in which those to whom they apply have had a chance to take part. In other words, the legal and constitutional pluralism that has been observed and thematized in European legal scholarship (see e.g. Walker 2002) for quite some time now needs to be matched by a pluralism in legitimacy mechanisms in each and every single law-making process. This implies, I will argue, that the European polity should be conceived not so much as a democracy made of one single *demos*, whether as the international sum of many separate national *demoi* connected at the governmental level or as a supranational *demos* constituted in European parliamentary institutions, but as a *demoi*-cracy, i.e. a democracy of many European *demoi* connected vertically at many different levels, but also horizontally at the national level.

However, just as constitutional pluralism cannot be identified with constitutional anarchy and has given rise to all sorts of coherence mechanisms, understanding the pluralism in European sources of legitimacy implies, first, identifying the many democratic processes at work in Europe and, second, accounting for their coordination mechanisms in practice. Although the theorizing of European democracy has been at work for quite some time now, most publicized accounts fall short of an institutional proposal, i.e. of an account of how to turn their normative proposal into a complete institutional setting. Some of them do not even provide a normative proposal that takes into account current European institutional circumstances. And this shortcoming is one of the reasons for their failure to convince as they deserve to (Buchanan 2004).

In order to theorize an institution-sensitive model of European *demoi*-cracy, one needs, first, to unpack and understand one of Europe's best-kept institutional secrets and, second,

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2    ECJ, Case 26/62, Van Gend en Loos v. Nederlandse Tariefcommissie, [1963] ECR 1, 23 and Case 6/64, Costa v. ENEL, [1964] ECR 1141, 1158-1159.

to make the most out of it theoretically.[3] That secret is the pluralistic and deterritorialized nature of democracy and generally of politics in Europe. Whether post-national[4] or national, many democratic theories suffer nowadays from a territorial bias that prevents them from accounting properly for the new democratic reality in Europe. True, most theories have realized the necessity of post-national democracy in a world where national processes no longer issue the norms that apply to them. However, although they have acknowledged the tyranny of national paradigms of democracy and hence developed new models of post-national democracy, the relevant democratic polity and hence the relevant democratic subjects in most cosmopolitan democratic theories remain territorial ones whether national or supranational. The problem is that the territorial boundaries of democracy exclude many non-national citizens' interests, which are affected by domestic decisions, and therefore conflict more and more with political equality and with the inclusive nature of democracy. This is the case of most accounts of democracy in the European Union which focus on the co-operation of territorially delineated national *demoi* or on the constitution of a pan-European *demos* which encompasses all the national *demoi* and hence simply overterritorializes national democratic boundaries (see Thompson 1999).

It has become crucial therefore to examine the institutionalization of European *demoi*cracy more closely.[5] Scope precludes, however, focusing both on theorizing an institution-sensitive model of European democracy and further institutionalizing this model. The present paper will as a result concentrate on the former only, leaving the latter to future research (see Besson 2006a and 2007b). After a discussion of the contours of post-national democracy in general, the paper will identify and discuss the answers one should give to

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3   From a methodological perspective, the paper purports, starting from the evidence of deterritorialization of democracy in Europe, to discuss its theoretical underpinnings, then suggesting in return ways in which the institutionalization of European democracy may develop this deliberative potential. A combination between a "top-down" and a "bottom-up" approach is required that allows for a certain influence of the post-national political and legal reality on normative considerations (Gutmann and Thompson 2004, 37), while also in turn constraining that institutional reality with those very normative considerations. All this explains how the EU can be used as an example against which one should test institutional considerations of post-national democratic theory, without, however, necessarily being taken as an absolute model and an optimal outcome, given the constant need for institutional reform (Nicolaïdis and Lacroix 2003, 137; Besson 2006a). On these methodological issues, see Besson 2007b.

4   I refer to the term 'post-national' as a generic term to mean non-strictly national, whether supranational or merely international. It should not be taken to mean that post-national law supplants and replaces national law; it can well coexist with it.

5   The term 'institutions' is used here in a broad sense to refer to all official bodies in charge of law-making in a globalized legal order, whether at the international, supranational, transnational or national level. They include states as much as international organizations, and these bodies as much as their own (sub-)institutions (e.g. the EU and its institutions).

the three keyquestions raised by the theorization of democracy in Europe: whose democracy, where and how.

## 1. Post-national democracy in general

Democracy requires that all those whose basic interests are (normatively) affected by policy decisions are able to participate in the process of making them or at least have an influence on that process. Global[6] democracy draws the consequences of globalization for democracy. Similarly European democracy is a consequence of the Europeanization of law-making for democracy. National states are no longer the only sources of decisions that affect their legal subjects (Habermas 2001); many decisions are taken outside the reach of national political processes by European law-making processes, but also by other national political processes which themselves produce decisions that affect people outside their electoral constituencies. Europeanization thus generates a legitimacy gap that needs to be filled by Europeanizing democracy and extending it beyond the national state (see Archibugi 2004, 438 in the global context).

   Post-national democracy groups all democratic processes that occur beyond the national state or within the national state, but in ways that link national democracy to other transnational, international or supranational democratic processes. It is not simply, on the one hand, about improving national processes, nor about legitimizing post-national processes indirectly through those national processes (Archibugi 2004, 442). Nor should it, however, be confused, on the other hand, with the idea of a cosmopolitan state and supranational democracy (see e.g. Held 1999; Habermas 2001). It does not prejudge the nature of the post-national polities whose regime should be democratized (Beitz 1994; Gosepath 2002; Besson 2006a). In fact, the idea of a world state has long been regarded as neither feasible nor desirable given the resilience of the national state and its key role in the global law-making processes (Archibugi 1993, 306). The same may (still) be said about the project of a European federal state.

   Rather, post-national democracy follows a pluralist pattern: it does so both quantitatively in identifying different levels of legitimation and qualitatively in placing national democracy at the core of global democratic processes albeit in making it more inclusive

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6    In what follows, the term 'global' has been chosen to include all institutions and processes implicated in the production of global law, whether supranational, international or transnational, but also national institutions and processes which remain at the core of the former either for implementation or further legislative purposes. Global institutional design should not therefore be conflated with a brand of institutional cosmopolitanism. Nor should global law be identifed only with international law; the production of legal norms in a globalized world may no longer be clearly attributed in terms of their sources to one law-making forum in particular.

(see Sassen 2003). Even though they have been deeply affected and somehow weakened by globalization, national law-making processes remain much more central to global law-making processes than some claim they are (see e.g. Kumm 2004, 915-916). They remain crucial, for instance, to the ratification and implementation of international norms (Paulus 2004; Sassen 2003, 10 and 15). They have also become major channels of transnational and comparative law-making (see e.g. Slaughter 2000 and 2004; Delbrück 2003). In revealing the beneficial connections between national democracy and transnational, international or supranational democracy, post-national democracy proposes the implementation of a multi-layered and multi-centred democratic polity *within*, *among* and *beyond* states.

Of course, if one transforms democracy within, among and beyond states, it is important to adapt it to the new post-national constellation and its many layers of governance. Post-national polities cannot be governed in the same way as national ones. Moreover, democratic models also need to be revised at the national level, since, on the one hand, national democracies can be deemed deficient in many ways in a globalized environment (see e.g. Mény 2003; Archibugi 2004; Schmidt 2004, 976; Guéhenno 1992). On the other hand, post-national democracy is a global process that integrates all layers in such a way that their democratic quality can no longer be judged in an isolated fashion and depends on their imbrication with other layers (Dryzek 1999; Archibugi 2004). In short, the model of European democracy proposed needs to take into account the existing post-national institutional reality in Europe and reassess democratic normative requirements developed in the state context in this new light.

## 2   Deterritorialized and deliberative demoi-cracy in Europe

There are three main characteristics that a theoretical model of European democracy should have in order to be able both to accommodate and further constrain institutional developments in Europe: first, European democracy should be understood as comprised of a multitude of democratic subjects, hence the concept of *demoi*-cracy (the answer to the 'whose democracy' question); second, European democracy should not only be denationalized but also deterritorialized (the answer to the 'where' question); and, finally, European democracy should become more deliberative, hence the concept of deliberative *demoi*-cracy (the answer to the 'how' question).

### a   European demoi-cracy

*i   The existence of the European democratic polity*
The absence of a European *demos* has always been one of the main objections to European democracy (Urbinati 2003). It is also referred to as the *no-demos thesis*. It is crucial therefore to start by addressing this objection and identifying the relevant democratic subjects in the EU.

The problem is that there is no agreed set of criteria as to how to judge what makes a multitude of people and an 'overlapping community of fate' a political community, i.e. a *demos*. Self-rule and self-legislation which lie at the core of democracy also imply self-constitution; the community which binds itself by the laws it generates also defines itself at the same time as a democratic subject by drawing its own boundaries (Benhabib 2004, Ch. 4). All it takes therefore is some kind of 'we-feeling', a form of solidarity among different 'stakeholders' (Archibugi 2004). It is, in other words, a largely contingent question that often depends on historical events and developmental trends (see e.g. Canovan 1996; Miller 2000), but may also take place as part of an institutional establishment. In fact, solidarity need not necessarily be pre-political at all; certain national polities in Europe have only become such through their constitutionalization process.

This minimal requirement of a solidarity feeling can also apply at the post-national level, therefore; it can be generated by the political exercise of self-constitution of post-national institutions (Calhoun 2003). This explains why the European Union may be deemed as a democratic polity (see Besson 2006a and 2006b).

## ii  The constituency of the European democratic polity

The next question to arise is that of the European democracy's constituency. Among the different potential subjects, it is important to distinguish between the national *demoi* which subsist as a basic layer of European democracy and the European *demos* that is, depending on the conceptions, either independent or imbricated in national *demoi*, thus raising difficult issues pertaining to the nature of that imbrication.

The national *demoi* are clearly some of the basic subjects of European democracy; they retain sovereign competences in many areas of European law-making. They are also the indirect source of the democratic legitimacy of all intergovernmental decision-making at the European level. It would be a mistake, however, to draw a clear distinction between the national *demoi* and the European *demos*. The European *demos* is plural in nature and hence cannot be detached from each single national *demos*. These national *demoi* are more together than the mere sum of many distinct democracies with their different national *demoi*, because all of them are distinctly European. Thus, even national law-making processes implicate all national *demoi* affected when they address European matters. This explains why the EU is often regarded as a Union of both states and peoples. Europe is not only a union of states in which *demoi* are connected indirectly through their leaders, but also a union of peoples in which these *demoi* are connected directly. This is exemplified by the fact that EU citizenship is dependent on national citizenship. One can only be a European citizen by also being a national citizen, but more importantly one can no longer be a national citizen without also being a European citizen.

If the European *demos* is more than the mere sum of national *demoi*, the question remains as to its exact identity. There may indeed be one or many subjects of European democracy, depending on whether there is a distinct and overarching European *demos* or, on the

contrary, a *demos* constituted of many European *demoi* in which the national *demoi* linked by European constitutional principles and values are imbricated.

According to some authors, there cannot be a European democracy without a single European *demos*. These authors group pure intergovernmentalists, who are sceptical of the European political construction, but also supranationalists, who believe in a European super-state. What they have in common is the statist model of post-national democracy, according to which there can only be one overarching *demos* in a democracy. Those who reject the statist model of the European polity do not look for a single *demos* in Europe. They acknowledge the existence of a complex European *demos*, but emphasize the plurality of European *demoi* constituting it. Rather than having a single subject, European democracy would have a plurality of subjects or *demoi* at its core (see Archibugi 2004; Bohman 2005). The latter can therefore retain their entire sovereignty and political diversity.

European democracy is a whole that cannot simply be assessed either from a purely national or a purely European standpoint. To quote Nicolaïdis, European democracy is neither a 'Union of democracies' nor a 'Union as democracy', but a 'Union as demoi-cracy' (Nicolaïdis 2003, 5; see also Besson 2006a and 2007b; Bohman 2004 and 2005; Nicolaïdis 2003 and 2004; Poiares Maduro 2002; Weiler 1999; Van Parijs 1998). European citizenship is not to be viewed as membership in an overarching *demos*, but as an additional European membership that is necessarily imbricated into every single *national demos* and turns each of them into a European *demos* (see Besson 2006a). This is, one may argue, the true meaning of being European, i.e. being *united in diversity* rather than being diverse in unity (Magnette 2006).

## b European deterritorialized demoi-cracy

### i The principle of deterritorialized demoi-cracy

Not only should European democracy be understood as a process connecting a plurality of democratic subjects, but it can only be effectively understood as such if it is conceived of as deterritorialized and as constituted of a European functional *demos of demoi*. Plurality is not only a quantitative characteristic of European democracy, but also a qualitative one *qua* functioning mode in each of these many subjects of European democracy wherever they are localized. According to Nicolaïdis, *demoi*-cracy in the European Union 'requires informed curiosity about the political lives of our neighbours and mechanisms for our voices to be heard in each others' forums' (Nicolaïdis 2003, 5).

On this model, different national *demoi*, either located separately at national level or together in different fora at the transnational, international or supranational European levels, constitute together a European functional and deterritorialized *demos*. For instance, national citizens elect and vote in national elections as European citizens, thus including other national interests in Europe and turning national polities into European ones. Similarly, in European institutions, national representatives deliberate neither as representati-

ves of their national *demos* only nor as those of a single European *demos*, but as representatives of a functional *demos of demoi* by factoring in other national interests in Europe.

Only so, can our democratic practices accommodate the rapidly increasing deterritorialization of law, which belies the basic democratic principle of inclusion of all those affected by democratic decisions. The progressive deterritorialization of politics (Held, McGrew, Goldblatt and Perraton 1999, 32; Held, 1995, 237) and law-making processes leads indeed to the erosion of the congruence between those affected by a law, i.e. the legal subjects, and the authors of this law. This growing gap violates the principle of political equality and of democratic inclusion (Dryzek 2001, 651, 662; Archibugi 2004, 439; Held 1995 and 2004). More precisely, there is a twofold *deficit* in territorial democracies: first, national citizens do not control many decision-making processes which impact on national polities, but take place outside their borders; and, second, national polities exclude from participation and representation many interests which are affected by their decisions.

The deterritorialization of law should therefore be matched by the progressive deterritorialization of democratic processes themselves (see e.g. Besson 2006a; Bohman 2005; Archibugi 2004, 445; Dryzek 1999, 44). If legal pluralism implies the possibility for legal norms of different origins to apply to the same person in the same place, there should also be a pluralism in legitimation; it is important indeed that this person can participate in the different law-making processes at the origin of these norms wherever they are located and this in turn implies including other affected *demoi* in each *demos*' deliberations, whether these take place at a national, international, supranational or transnational level. In other words, functional mechanisms of legitimation should be developed to match growing legal functionality and its gradual replacement of legal territoriality (see Teubner and Fischer-Lescano 2006; and an early comment by Paulus 2004).

True, the idea of deterritorialization raises the well-known paradox of the democratic polity, according to which the modern democratic polity is both constituted and constrained by contingent territorial boundaries and hence cannot by definition be as inclusive as it should (see e.g. Benhabib 2004, Ch. 4; Poiares Maduro 2002; Whelan 1983; Offe 1998). Territoriality is no fatality, however, and democratic iterations may gradually help fill the gap between those affected and those participating (see Besson 2006a). Thus, in understanding European democratic polities as closed territorial entities (see e.g. Pogge 1997; Habermas 2001 in the EU; and, to a certain extent, Held 1995, 154, 236), many theories ignore one of the most important components of European *demoi*-cracy: the functional imbrication of polities and the impossibility of assessing the democratic quality of one and every single polity in isolation of others' (Bohman 2005; Besson 2006a).

*ii  The fora of deterritorialized demoi-cracy*
What is specific about European *demoi*-cracy is that it takes place at the same time at many different levels of territorial governance: national, international, supranational and transnational (Sassen 2003; Held 1999). These different layers constitute a *network* of national, transnational and international agencies and bodies that match, cut across or group

spatially delimited locales (Held 1995, 237; Dryzek 1999). In fact, *demoi*-cracy is not only about being multi-layered and somehow overterritorialized (see Thompson 1999; Besson 2006a), but also multi-centred and imbricated at all levels; it is not only about taking decisions at different places and multiplying deliberative fora, but also and mostly about taking them together in a deterritorialized fashion in those same places (see Schmidt 2004; Nicolaïdis 2003, 6). In this sense, post-national *demoi*-cracy does not subvert national and other international or supranational sovereignties (see e.g. McGrew 2000), but on the contrary opens them to each other in each and every single locale.

Multiplying transnational or international decision-making authorities to further transnational deliberation may be necessary, but it also tends to undermine democratic accountability within national democratic processes themselves (see Gutmann/Thompson 2004, 62). As a result, and by reaction to a fear of disempowerment, national democracies tend often to become paradoxically the primary hindrance to the development of European democracy, both within national fora and beyond them (see Archibugi 1993, 313-314). This is deeply counterproductive given the pivotal role national processes still play in the implementation of European law and hence should have in their legitimation process; the national forum is the place where the plurality of legal norms applicable to an individual in a globalized world converge and hence the place where they can be made coherent normatively (on legal pluralism and normative coherence, see Besson 2004a; Besson 2007a). Moreover, the proximity of national institutions to individuals makes them a primary forum of direct legitimation in the European law-making process. It is thus central to start by enhancing the representation of foreign interests in national deliberations and thus by turning national democracy into a central forum of European democracy, before working on the inclusive quality of further law-making fora at EU level.

According to the proposed model, European non-national citizens of a national *demos* should be included in the deliberations of that *demos* in those domains in which they constitute with other non-national European citizens a further functional European *demos*. One may distinguish two phases in the progressive deterritorialization of national democratic processes in the EU: first, the inclusion of European non-national citizens in municipal and European elections in the territorially bounded *demos* and, second, the mutual internalization of other European interests in national deliberations even when those European citizens do not reside in the given Member State. The first step has already largely taken place thanks to EU citizenship rights, while the second is still to be made (see Poiares Maduro 2002 and 2003). If there is a right to choose one's polity independently of nationality in the EU, this leads to what I have called elsewhere 'democratic forum-shopping' in Europe (see Besson 2006a; Poiares Maduro 2002 and 2003). In turn, this forum-shopping and the denationalization of citizenship in Europe it implies will gradually lead to the latter's deterritorialization and the internalization of non-territorial interests (see Besson/Utzinger 2007). Addditionally, one may expect that national deliberations might gradually internalize the interests of those non-EU citizens affected by them, just as they internalize the interests of EU citizens who are nationals of other Member States and this whether these

third country nationals reside in the Member State in question – and hence benefit from quasi-EU citizenship rights[7] – or not (Nicolaïdis and Lacroix, 2003, 127 and 136).

If one extends democratic deliberation across territorial polities functionally to all those significantly affected by a decision, one may count with a new kind of political consti- tuents or subjects, i.e. moral-political constituents, besides electoral or formal-political constituents (see Gutmann/Thompson 2004, 37-38; Thompson 1999, 120). It is impor- tant to distinguish the subject of democracy, the European functional *demos of demoi*, from the territorial entities in which the national *demoi* are located. The functional link between the different territorial national *demoi* is indeed a political one albeit not necessarily an electoral one, and not only a moral one (e.g. Cheneval 2006; contra: Besson 2006a). If the functional *demos of demoi* is constituted on grounds of deterritorialized solidarity, however, one needs to determine what makes it the case that someone is a citizen of a functional *demos* rather than of another. Most authors mention the fact of being 'affected' by a polity's decision as sufficient (see e.g. Gould 2004; Gutmann/Thompson 2004). Stakeholders in these overlapping communities of fate are not, however, always strictly speaking *bound* by the democratic decisions taken by other polities. They are at most strongly affected by them and this is a purely factual criterion which anyone can fill and which does not there- fore suffice to trigger normative consequences and democratic rights in particular. In prac- tice, however, the difference is often moot, since stakeholders simply have to abide by the new factual or legal situation thus created. As such, their being 'affected' is already, albeit indirectly, normative and not only factual.

Of course, the line must be drawn somewhere (Thompson 1999, 120). The first crite- rion must be one of degree of affectation of the interests which must be comparable to a *de facto* obligation. Thus, for instance, what makes the national *demoi* in Europe part of a functional European *demos* is the fact that they mutually influence each other's normative orders not only through the primacy of European law *stricto sensu*, but also indirectly through their respective national laws and the latter's future impact on European law (Besson 2004a and 2006); for instance, a national legal principle like privacy or proportio- nality may gradually become a European principle and hence affect all other national legal orders in Europe. Another criterion besides the quasi-normative character of the affected- ness is that the interests affected must be basic or fundamental interests of the individual, i.e. interests in the conditions for self-development or self-determination.

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7   See e.g. the recent extension of previously exclusive political rights to third country nationals resi- ding in EU Member States: C-300/04, M.G. Eman, O.B. Sevinger v. College van Burgemeester en westerns van den Haag, 12 September 2006, unpublished; and T-49/04, Hassan v. Council and Commission, 12 July 2006, unpublished.

### iii   The objection to deterritorialized demoi-cracy

A common objection to the deterritorialization of democracy lies in national sovereignty and more precisely the concept of popular sovereignty (see Goldsmith and Posner 2005). Neither the idea of national sovereignty, residing at least in part in the national parliament, nor that of popular sovereignty *tout court* are easily compatible with the idea of deterritorialized democracy. It seems *prima facie* counterintuitive indeed to argue that a polity's democratic process should be concerned with the interests of another's and vice-versa. This objection relies on an outdated conception of sovereignty, however (see Buchanan 2006 and 2008; Falk and Strauss 2000, 209). Contemporary state sovereignty can no longer be equated only with a sovereignty of competence or immunity. It has also become a sovereignty of responsibility towards one's state's population, but also towards others' whose interests it might affect. Sovereignty is after all a normative concept which encompasses one or many values such as democracy and human rights and this explains the idea of sovereignty *qua* responsibility (Besson 2004b and 2007a). In those conditions, sovereignty can only be exercised in coordination, whether this takes place at the national, international, supranational or transnational level. This presupposes, in other words, a cooperative understanding of sovereignty (Besson 2004b and 2007a; Magnette 2000, 161-166). As a result, purely territorial sovereignty has gradually been replaced by a differentiated and overlapping functional form of sovereignty (Walker 2003, 22-23). On this account, the exercize of sovereignty becomes reflexive and dynamic as it implies a search for the best allocation of power in each case, thus putting into question and potentially improving others' exercise of sovereignty as well as one's own.

Since democratic rule is one of the values protected by popular sovereignty, the correct exercise of sovereignty implies, on the one hand, looking for the best level of decision to endow those affected by that decision with the strongest voice and hearing (see Poiares Maduro 2002). And this in turn may imply deterritorializing democracy to match the deterritorialization of law-making. Often, this will imply giving priority to the level of governance closer to those affected, but not necessarily as EU decision-making has demonstrated (Besson 2004b). More importantly, functional sovereignty also leads, on the other hand, to a change in the nature of the democratic process itself and in the scope of those included, whether at national, transnational, international or supranational level; this is particularly relevant at national level where all affected interests cannot always participate or even be represented. This functional inclusion is not only democratically beneficial to the non-national interests included, but also to the pre-existing national interests. Thus, minorities who were previously unheard or social groups whose inclusion was not sufficiently guaranteed in certain EU Member States have been empowered by the broader inclusion of all European interests affected in national decision-making processes (Besson 2006a; Dryzek 2005; Schmidt 2004, 980-981). This has contributed greatly to enhancing the inclusiveness and accountability of national democratic processes in EU Member States. When viewed in this new light, popular sovereignty is reinforced rather than undermined by the deterritorialization of the democratic process.

## c European deliberative demoi-cracy

### i The principle of deliberative demoi-cracy

Extending the idea of a plural community of stakeholders beyond territorial boundaries has recently been made much easier by deliberative democracy theories. According to these theories, the essence of democracy is not to be found only in voting, but also in deliberation (Besson 2003 and 2006; Gutmann/Thompson 2004; Dryzek 2005).

Deliberation matches the plural and deterritorialized nature of European democracy in many ways. First of all, deliberation can cope with fluid boundaries and allows for transnational communication (see e.g. Thompson 1999; Gutmann/Thompson 2004; Besson 2006a). What matters for deliberative democracy is indeed the character of political interaction, rather than its locus. As such, deliberative democracy broadens the scope of democratic accountability beyond national borders. This is the true meaning of European demoi-cracy, i.e. democratic deliberation across different territorial *demoi* with citizens of these different *demoi* deliberating with each other, thus constituting one *demos* along different functional lines in each case (see e.g. Bohman 2005; Cheneval 2006; Besson 2006a).

Another benefit of the deliberative model of European democracy lies in its reflexivity. Deliberative democracy allows indeed for widespread disagreement and deliberation over the legitimacy of the polity and its regime (Gutmann/Thompson 2004). As such, it can preserve the diversity of perceptions of the European polity on the part of its many *demoi*. A final and connected reason lies in the dynamic nature of deliberation. It is a long-term process in which decisions may constantly be re-opened (Gutmann/Thompson 2004, 6). This applies particularly well to the European legal process in which the same decisions are taken in iterated fashions by different authorities.

### ii The modalities of deliberative demoi-cracy

This approach to deliberative *demoi*-cracy in Europe has been contested, however (Gutmann/Thompson 2004, 36 seq.). Among the practical and ethical reasons for limiting deliberative democracy to territorially bound democratic polities are, on the one hand, the complexity of transnational deliberation and, on the other, the absence of the grounds of reciprocity that could underlie the duty of justification in public deliberations.

To start with, the practical limitations of transnational deliberation need not, however, be higher in Europe than in national settings. As I have already explained, indeed, transnational deliberation relies greatly on national democratic processes and the latter's complexity need not be enhanced by transnational participation. As a matter of fact, *demoi*-cratic deliberation is best guaranteed by a combination of participation and representation (Besson 2005a, Ch. 10 and 2005b) and the latter is easier to secure in a complex multi-layered and multilateral polity. Democratic representation may even be seen as an enhancer of democratic participation and deliberation thanks to the distance it creates between deliberation and decision-making and to the relationship of election and accountability between representatives and their constituencies. Not only can representation en-

hance democratic participation, but it can also increase the protection of political equality; it takes a stronger majority in a representative system to impose a decision on a minority due to the many layers and length of the process. This applies not only among citizens and European non-national citizens who are equally affected, but indirectly also among citizens themselves. In fact, the European experience shows how the interests of national citizens may be beneficially protected and the equality among them may be re-established through the consideration of non-national EU citizens' interests (see Schmidt 2002 and 2004; Besson 2006a). Although the representation of non-national citizens' interests cannot be as inclusive as the direct participation of all of them, this incomplete inclusion is compensated by the correctives representation provides to the excesses of majoritarianism.

As to the ethical grounds for limiting deliberative democracy to territorial entities, it finds its limitations in those decisions which affect and constrain significantly and hence bind, albeit *de facto*, people in other polities as much as citizens themselves. This mutual influence, whether normative or quasi-normative, of national decisions on European non-national citizens, and vice-versa, as might be the case in the context of environmental or health issues, provides the very ground for reciprocity in deliberation and justification. Moreover, there is a form of representation that has been developed for diverse and divided societies where not all citizens can be represented descriptively and which might contribute to the representation of non-national citizens' interests in deliberation: reflective representation. This institution may help represent moral-political constituents despite their electoral absence and conceive of *demoi*-cratic deliberation in the EU. Reflective representation requires from each representative that she projects herself into the place of others in her own internal deliberation, rather than leave the confrontation with diversity to external and interactive deliberation. It corresponds to Kant's idea of 'enlarged mentality' and to Arendt's idea of 'representative thinking' (Arendt 1970 and 2001).

There are two ways of ensuring a more effective representation of non-national citizens' interests through reflective representation despite the lack of deliberative presence. First of all, *diverse representation*. Without some kind of minimal descriptive representation, reflective representation cannot be as diversified as required by the representation of non-national citizens. It is necessary to give representatives the incentive to make other perspectives imaginatively present. Ideally, therefore, it is a mixture of both the descriptive and reflective forms of representation which should be used to represent the views of non-national citizens affected by national decisions (Eckersley 2000; Goodin 2003, 171). Although minimal descriptive deliberation is required, it is very unlikely that moral-political constituents will be represented as fairly as electoral constituents in national deliberations. In Europe, the solution lies in granting to European albeit non-national citizens municipal and European electoral rights at national level. The problem of representation in national authorities remains the same, however. Nevertheless, it might actually be better for the quality of deliberations not to have a full descriptive representation of all non-national citizens as people tend to cut deals in such circumstances (Goodin 2003). If, on the contrary, representatives realize the existence of moral-political constituents who are not citizens

through their minimal descriptive representation, but also understand at the same time that not all perspectives in conflict are represented, they might be more inclined to be cautious and respectful of others' interests (see Sunstein 2002).

Secondly, the reciprocity of affected interests in European national polities might actually also trigger an *electoral sanction* against those representatives who do not include non-territorial affected interests in their deliberation and votes. The success of democratic accountability greatly depends on the moral capacities of citizens and public officials. As such, the support of elected representatives by their electoral constituents will in principle follow their championing the cause of moral-political constituents (Gutmann/Thompson 2004, 39). Besides sanctioning the moral capacities of their representatives, national citizens might also want to make sure, through (re-)electing representatives who represent all those affected's interests, that their own direct interests are well protected. More and more, this might only be the case when non-national interests are also taken into account in the decision-making process. Representatives who do not include all affected interests fail to contribute the way they should to the delegated exercize of cooperative sovereignty and hence to the mutual inclusion of interests in their respective democratic fora. Such failure might in turn trigger electoral sanctions at national level for those representatives who do not play by the rules, as this omission might result in reverse effects on the inclusion of national interests elsewhere. In Europe, the development of this electoral sanction will match the process of gradual internalization of other Europeans' interests in national decisions and the competition between national democratic processes alluded to before.

### iii   The objection to deliberative demoi-cracy

Of course, any *demos* whether territorial or functional cannot be conceived of as entirely independent from existing political institutions be they national, transnational, international or supranational. In some institutional contexts, sharing common institutions has even given birth to a *demos*. To think that democratic deliberation could be independent from institutions would therefore be equal to thinking that the *demos* could ever be independent from history (Archibugi 2004).

Institutions no longer depend only on territorial boundaries, however; many are established to fulfill certain cross-border functions and this is the case of many transnational bodies. After all, it is history that made territorial boundaries the relevant boundaries of modern democracy. Ancient democracy and citizenship did not depend on nationality and territory and there is no reason why migration and globalization might not put this linkage into question (Preuss 1995; Benhabib 2004). It is deliberative democracy itself that will help to mend retrospectively the democratic deficits in its constitution and institutional boundaries. Political equality commands inclusion and respect for all affected interests, and political constituents need not be restricted to electoral ones.

Defining the identity of a democratic people is an ongoing process of constitutional self-creation. While we can never eliminate the paradox of the democratic polity, according to which those who are excluded will not always be among those who decide (see e.g. Benha-

bib 2004, Ch. 4; Whelan 1983; Offe 1998), we can and should render these distinctions fluid and dynamic through processes of continuous and multiple democratic iterations and new institutional arrangements (see Buchanan 2004, 324; Benhabib 2004; Delbrück 2003, 40).

## Conclusion

The question of democratic legitimacy in Europe has attracted a lot of attention since the French and Dutch rejection of the Constitutional Treaty. By concentrating on the supra-national or international level of governance in the EU, accounts of European democracy propounded in recent years have diverted attention away from the national level. Since the latter remains the primary locus not only of national law-making, but also of European legal enforcement, it is important not to underestimate its importance in the European legitimation process.

Reverting entirely to traditional statist conceptions of democracy would be vain, however. It is this traditional conception of constitutional democracy that might actually explain why the constitutionalization of Europe was perceived as a threat by a majority of the European population. The legitimacy gap in the European Union will not be filled before constitutional pluralism, that has become the European legal order's trademark, is matched by a corresponding model of democratic legitimacy. The paper identified three dimensions a more institutional reality-sensitive model of European democracy needs to have: first, it should be pluralistic both in the quantity of democratic subjects and in their inclusive quality; second, it should not only be denationalized, but also deterritorialized so as to include all those affected in each and every single one of the many democratic subjects identified; finally, it should be deliberative so as to be as flexible and dynamic as possible and match its inherent plurality and deterritorialization.

While developing such a theoretical model that reflects the unique post-national institutional developments in Europe is an important step, overcoming easy rhetoric is even more crucial in this period of deep questioning of the European project. Without institutional mechanisms to further the deterritorialization of national, international and supra-national democratic processes, truly transnational deliberation cannot take place in Europe. It is high time therefore to give our unique European *demoi*-cracy real institutional teeth.

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