

# The Case for Democracy in the EU

Version 3

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## 1. Introduction

Research on the European Union's "democratic deficit" usually operates within a strictly national-democratic framework of analysis. When evaluated in direct relation to a specific national model of democracy, the EU scores rather poorly on democratic quality. According to their own national hermeneutics, authors diagnose either a lack of majoritarian (Westminster) parliamentary democracy (Lord and Beetham 2001), a lack of a pre-political "Volk" (Kielmannsegg 1996), a lack of centralistic statehood and universal "citoyenneté" (Manent 2006; 2007), or a lack of direct democracy (Frey 1995). When compared with the state of democracy in international relations at large, the EU scores well as the most advanced structure of democratic government beyond the nation state (Weiler 1999; Moravcsik 2002). However, there is a large consensus among advocates of this position that the EU still lacks political mobilization of citizens on the EU level (Schmitter 2000). For many, this is due to an irreducible difference between domestic politics and any international order (Dahl 1999; Stein 2001).

We do not directly question the truth-value of these claims but before stating such conclusions about the EU's democratic quality one should realize that the EU is being evaluated from a point of view that is not necessarily adequate to the type of polity it represents. In this paper, we argue for a change in methodology. Rather than following a "gradualist" strategy, which extrapolates the nation-state model of democracy to the EU, we adopt a "transformationalist" perspective. According to this perspective, the fact that the EU is not a nation-state requires a rethinking of the appropriate model and criteria of democracy. Our thesis is that the EU is a "demoiocracy" – a polity of multiple *demoi* – and has to be evaluated as such. Demoiocracy represents an intermediary realm of political justice between national and international politics. The theoretical gap opened up by the national/international vs. global disjunctive needs to be filled by a further theoretical and normative exploration of demoiocracy. In order to determine the democratic quality of the EU, a freestanding benchmark for this form of polity needs to be established beforehand. In this paper we hope to make a contribution to such a method and we present a first attempt at a new form of evaluation of the EU's legitimacy and democratic quality.

The freestanding normative theory we propose is underwritten by a methodological choice that we hold to be the most adequate for a theory dealing with the problem of multiple *demoi*. According to this methodological choice the plausibility and normative substance of the idea of demoiocracy rests (1) upon the holistic constructivist insight, presented by Christian Reus-Smit (1999), that inter-subjective beliefs about the moral purpose of the state provide the justificatory basis and explanatory background for the fundamental institutional setting of an international society; and (2) upon the political constructivism of Rawls by which we can make the normative implications of liberal democracy explicit in view of a further development of international society's fundamental institutions or basic structure.

We modify both Reus-Smit's and Rawls' theory. Reus-Smit considers the rule of law and procedural justice as the explicatory normative core of modern international society. This is true for modern states in general, but we take this a step further. If holistic constructivism is correct, this means that the inter-subjective beliefs about the moral purpose of the *liberal democratic* state do not only imply the normative expectation of rule of law and procedural justice for the fundamental institutions of international society. They also imply normative expectations of democratic government in a society of liberal democratic states. The inter-subjective beliefs about the moral purpose of the liberal

democratic state will eventually filter through into the relational structure of liberal democratic states.

Holistic constructivism allows us to assume that the normative design of democracy is plausible with regard to historical realization in the EU and beyond. The intersubjective normative beliefs that determine the internal structure of liberal democratic states shape the shared institutional setting of liberal democratic *demoi*. In the light of holistic constructivism, understood in such a modified manner, the EU is thus not a unique and historically accidental construction. It represents a form of organization expected to emerge among liberal democracies under conditions of contiguity and increased interdependence.

Rawls' political constructivism (1993; 1999), as adapted to the EU's multilateral democracy in this and former papers (Cheneval 2008), enables us to formulate a freestanding normative theory for such a novel institutional setting of democratic multilateralism. Rawls non-foundationalist political constructivism and his normative devices underpin the justification of principles that answer the normative expectation of democracy and political justice for an international society of liberal democratic *demoi*. The application of this normative method avoids a circular theory, which considers the EU as its own normative standard. It also avoids direct normative projections of national models of democracy on the EU.

In the first part of the paper (Sections 2-4), we present an assessment of the transformation of democracy in the recent political context of Europe and beyond. We argue that this transformation links existing sovereign democratic statespeoples in a new form of joint government and that the EU corresponds to such a new type of democracy among multiple *demoi*. We also briefly review major contributions to the debate on the EU's democratic deficit but find that they do not adequately reflect the *demoi*-cratic quality of the EU. In the second part of the paper (Sections 5-6), we develop principles we think are specific principles of democracy and apply them to the evaluation of the EU. We present a first and admittedly incomplete attempt at evaluating the EU according to such democratic standards. We find that the constitutional development of the EU has approached these standards in general. By contrast, major *demoi*-cratic deficits remain at the national level. They result from the uneven and weak implementation of democratic norms in the member states and the uneven and weak adaptation of national democratic institutions to the tasks the need to fulfil in a democratic system.

## **1. Transformations of democracy**

The case for democracy in the EU rests fundamentally on three interlinked empirical assumptions: that the form of democracy changes and varies with the form of the polity; that we are currently witnessing the emergence of a new form of polity, which requires and generates a concomitant transformation of democracy; and that the EU is a prime example of this new kind of polity and transformation of democracy.<sup>1</sup>

The idea of "transformations of democracy" goes back to Robert Dahl (1989; 1994; 1999). Accordingly, democracy was transformed once in the past and may undergo another major

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<sup>1</sup> Sections 2 and 3 build on Schimmelfennig (2010).

transformation in the present.<sup>2</sup> The first transformation was the one from the classical assembly democracy of the Greek (and early modern) city-state to the representative democracy of the modern territorial state, whereas the current transformation affects the modern state under the impact of globalization and international organization. The main driving force of the transformations of democracy is a qualitative increase in the size of the polity. This leap in size is in turn a response to fundamental challenges to the autonomy and efficiency of the polity. Whereas the modern territorial state was militarily (Tilly 1985) and economically (Spruyt 1996) superior to the city-state, international organizations are designed to preserve the peace and to regulate economic, environmental, and other social interactions that transcend state boundaries and escape the authority of individual states.

The efficiency-driven expansion of the size of the polity involves two main trade-offs for democracy, however, one affecting citizen participation and influence (Dahl 1994: 27-31; 1999: 21-2), the other undermining collective identity and public spirit (Zürn 1998: 237-40; see also Dahl 1994: 32; Hurrelman and Debardeleben 2009). Whereas effective political authority requires large polities, participation and citizen influence as well as identity and public spirit thrive in small polities. As a general rule, the larger that the polity becomes, the more delegation of power it requires to function efficiently; the longer the chains of delegation between the citizens and their representatives and agents become; and the more indirectly and infrequently citizens participate in political decisions. Finally, the citizens' collective identity and sense of community thin out with the expansion of the polity. The citizenship is likely to become more culturally diverse and loosely connected.

At any rate, these processes develop on different time scales (Zürn 1992). Whereas the deterritorialization of social interactions occurs first and fastest, it takes time to establish new political organizations to regulate these interactions on a larger scale; and it takes even longer for a collective identity, a common political culture, and a dense political infrastructure to build in the new polity. Even in the longer run, however, participation and identity are unlikely to recover their previous levels. In the nation-state, citizen participation has never reached the close involvement of citizens in everyday decision-making that existed in the Greek polis. Instead, direct democracy has been transformed into representative democracy. Likewise, the tangible, local community of the city-state with its direct interactions and face-to-face communication between citizens has been transformed into the intangible, "imagined community" (Anderson 1991) of the nation-state.

The strengthening of negative rights and constitutional protection can be seen as compensation for the weakening of direct political participation, citizen influence, and collective identity and for the increase in diversity among the citizenry. Whereas the classical city-state democracy was strong in positive political rights (and duties), negative political rights such as fundamental freedoms and civil liberties that protect an individual from the state have only become a basic feature of democracy in the liberal democracy of the modern nation-state.

As we move beyond the nation-state to regional or even global polities, diversity and distance increase further (see Table 1). Imagining the future of democracy can take two main routes in principle: gradualism and transformationalism.<sup>3</sup> According to the gradualist conception, larger

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<sup>2</sup> Dahl counts differently but his first transformation (from oligarchy and despotism to classical democracy) was a transformation *to*, rather than a transformation *of* democracy.

<sup>3</sup> On gradualism and transformationalism in democratic theory, see e.g. Held et al. (1999: 7-9) and Bohman (2007: 20-30).

polities will reproduce nation-state democracy at a larger regional or even global scale. There will be gradual differences, of course. Participation is likely to be more indirect to account for greater distance between the individual and government, and constitutional protection more elaborate to account for greater diversity. As the larger and more diverse community is unlikely to be constructed on the basis of (albeit imagined) common origins and cultural traits, its collective identity needs to be based to a larger degree on abstract, “cosmopolitan” values and norms. But in the gradualist view, democracy beyond the nation-state remains based on the assumption of a single *demos*: a community of politically equal individuals, deliberating about the common good in a single, transnational public sphere, and expressing their political will in a single global or regional political sphere.

Table 1: Transformations of Democracy

	<i>Local democracy</i>	<i>Nation-state democracy</i>	<i>Supranational democracy (Demoicracy)</i>
<i>Space</i>	City	Territory	Region and beyond
<i>Community</i>	Local, tangible	National, imagined	Civic, abstract community of national communities
<i>Participation</i>	Directly by citizens	Indirectly by citizen representatives (representative democracy)	More indirectly by citizen and community representatives
<i>Protection</i>	Weak	Protection of individuals (liberal democracy)	Protection of individuals and communities

By contrast, transformationalism rejects the idea that regional or global democracy can or will reproduce nation-state democracy. The model of “demoicracy” that we explore here starts from a questioning of the single-*demos* assumption inherent in gradualist conceptions. It builds on the premise that national *demos* will persist for the foreseeable future rather than being replaced or superseded by a regional or even global *demos*. They will continue to possess the strongest collective identities, public spheres, and political infrastructures and enjoy the strongest legitimacy and loyalty on the part of individual citizens. We further assume that a consolidated *demos*, based on a resilient collective identity, a common public sphere, and a developed political infrastructure, is a prerequisite of a legitimate and well-functioning democracy. In any democratic polity beyond the nation-state, multiple *demos* will therefore need to play an indispensable part as bearers of negative and positive rights of protection and participation. Participation through citizen representatives is complemented by participation through community representatives, and constitutional protection is not only accorded to individuals but also to *demos*.

**2. The European Union: a multinational polity in need of democracy**

European integration provides strong evidence for the assumptions of demoicracy. For one, it is a polity in need of democracy. In addition, it lacks a single *demos*.

We need only briefly recapitulate the arguments made pervasively in the literature to justify the appropriateness of democracy in the EU (see, e.g. Føllesdal and Hix 2005; Offe and Preuss 2006). First, the EU makes authoritative rules and decisions that are directly binding upon states and citizens. It is thus in need of legitimacy. Second, whereas the EU can be characterized as a predominantly “regulatory state” (Majone 1995), it does not only make and enforce rules that produce pareto-optimal outcomes from which everyone benefits. The EU makes redistributive policies or sets rules that constrain the redistributive policies of its member states, and thereby it creates winners and losers. It also makes or constrains constitutive rights- or value-based policies on which people tend to hold ideologically opposed views. Technocratic legitimacy (Majone 1998) is therefore not sufficient (Scharpf 1997: 21-22). Third, indirect democratic legitimacy is not sufficient either. Democratically elected member state governments that are defeated in majority votes (or consent in the shadow of the vote) are still obliged to comply with the rules and decisions. Even if intergovernmental decisions are made unanimously in the EU, they undermine the accountability of national governments to national parliaments and electorates. Moreover, weakly accountable supranational organizations such as the European Commission or the European Court of Justice have the power to make binding decisions and create new rules as well.

Whereas the EU requires democracy, it lacks a *demos*. If we define the *demos* as a political community that shares a purpose and possesses the institutional infrastructure of self-government, a single European *demos* does not exist. Rather, the political community of the EU polity is fragmented in terms of collective identity, public spheres, and intermediary political structures.

First, national (or subnational) identities and allegiances clearly predominate in the EU. Less than fifteen percent of the EU population identify themselves exclusively or primarily as Europeans, whereas around 40 percent have an exclusive national identity (Fligstein 2008: 141-142). Moreover, identification with Europe is a class issue. In contrast to national identity, European identity does not unite social classes but is primarily an attribute of the highly educated and well-to-do (Fligstein 2008: 156). This pattern of identification has proved extraordinarily stable in the past decades despite strong growth in institutional integration.

Second, an integrated European public sphere does not exist and is not regarded as a realistic scenario in EU research. Europe-wide transnational media are rare and limited to a small elite. According to a recent summary of research, “transnational, segmented European spheres have been identified in relation to relatively confined issues and time spans. Moreover these ‘bubbles’ of discourse primarily involve specific, elitist segments of society and can hardly be said to be a public sphere but rather an ‘elitist’ notion of a European public space” (De Vreese 2007: 11). In this respect, it resembles the European identity. At best, there is evidence for the “Europeanization”, i.e. synchronicity and mutual responsiveness, of national public spheres with regard to topics of Europe-wide importance – but even this Europeanization appears to be limited to quality newspapers rather than the popular press and audiovisual media used by most citizens (ibid.).

Third, intermediary political structures, through which the political preferences resulting from democratic deliberation are mobilized, aggregated, and represented in the political system, are weak in the EU. European parties do not exist. Parties as the most important intermediary political structures in nation-state democracies are rooted and organized at the national level. At the European level, we find only weak and loose party federations. In addition, there is no European electorate. According to the well-established finding (first suggested by Reif and Schmitt 1980) that

European elections are second-order national elections, national parties compete for national votes on national issues. Again, however, we can observe a partial “Europeanization” of national electorates in the sense that national parties and voters orientate themselves similarly along the left-right policy axis in all member countries (Mair and Thomassen 2010: 28-30).

In addition, the politicization that is taking place in the EU is resulting in the restructuring of domestic politics rather than political structuring at the European level. First, European integration has contributed to giving new prominence to the non-economic, cultural dimension of the political space dividing the traditionalist and nationalist proponents of cultural demarcation from those of cultural integration (Hooghe et al. 2002; Kriesi et al. 2006). Second, the increased salience of European integration has mostly benefited populist parties of the right which exploit the *cultural* Euro-skepticism (Hooghe and Marks 2009: 15-18; Kriesi et al. 2006: 929). Third, the new cleavage and related party contests and protest activities manifest themselves predominantly at the national level (Imig 2002; Kriesi et al. 2006: 922).

The evidence on collective identities, public spheres and “political structuring” (Bartolini 2005) in the EU suggests that the “European *demos*” is an elite affair, secondary to the national *demos*, and mediated by national identities, public spheres, and political structures. By contrast, national *demos* are not only dominant but also well entrenched. They are continuously reproduced by national public institutions such as schools and universities, the mass media, and parties, all of which have no equivalent at the European level (Cederman 2001: 158-9). Whereas there is evidence for the *partial* Europeanization of identities and public spheres (Risse 2010) as well as political structures, there are no grounds for concluding that we are witnessing a medium-term trend of *increasing* Europeanization eventually leading to a consolidated European *demos*. Rather, the coexistence of primarily national *demos* with a secondary and mediated European *demos* appears to be stable pattern for the foreseeable future. This basic fact about the EU needs to be reflected in the way we think about democracy in the EU.

### 3. Debating the Democratic Deficit

Yet the scholarly debate on the EU’s democratic deficit does not adequately reflect this basic fact. This debate is extremely multi-faceted, of course.<sup>4</sup> Typically, however, contributors to the debate either neglect the multiple-*demos* condition or draw questionable conclusions from it.

A prominent example of neglect is the contribution of Andreas Føllesdal and Simon Hix to the debate (2006; see also Hix 2008). Whereas they provide a convincing analysis of the democratic deficit (and critique of contributions that dispute either the need for democracy or the existence of a deficit), the remedies they envisage assume that a latent European *demos* exists and can be easily awakened. To enhance democratic accountability and government responsiveness, they propose to establish competition for offices and policy programs at the EU level by offering Europeans the opportunity to vote for rival candidates and agendas. This is a clearly gradualist proposal, which transfers features of (majoritarian) nation-state democracy to the European level. In the analysis of Føllesdal and Hix, this is feasible even in the absence of a European *demos*. For one, they take the ubiquitous left-right cleavage and the left-right alignment of voting and parties in the European Parliament as an

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<sup>4</sup> For recent overviews, see Jensen (2009) and Rittberger (2010).

indication of a sufficiently structured and unified European political space. In addition, they contend that Europe-wide competitive democracy provides the best chance of fostering a European *demos* through politicization.

Both assumptions are highly risky. First, the analysis neglects the cultural, “demarcation/integration” dimension of the European political space and the experience that the politicization of European integration has strengthened this cleavage in past. Second, Europe-wide contestation would initially take place under conditions of national identity, national political debates, and the competition of national parties. It may therefore be that the Europe-wide democratic competition for offices and policies exacerbates constitutional conflict about integration and reinforces national identities and competition. Whereas some emphasize the dangers and adverse results of politicization (Bartolini 2005: 356), others put forward that the consociational features of the EU would undermine the accountability effects that Føllesdal and Hix hope for (Papadopoulos and Magnette 2010).

By contrast, those authors who take the absence of a European *demos* seriously dismiss gradualist solutions for democracy in the EU. The resulting alternatives can take a protective or developmental focus.<sup>5</sup> In a protective perspective, the implicit or explicit premise that democracy can only be established where a *demos* exists leads authors to question the feasibility of democracy beyond the nation-state in general and to focus on ways to protect national democracy from external encroachments. Fritz Scharpf, for instance, stipulates that “the EU must be seen and legitimated not as a government of citizens, but as a government of governments”, in which accountability and responsiveness to citizens is firmly located at the national level (2009: 181). He detects the core challenge to democracy in Europe not at the EU level but in the fact that European economic integration constrains the ability of member states to pursue democratically legitimate welfare state policies effectively (1997; 1999). For reasons of effectiveness, such policies would have to be made at the union level. They cannot be made democratically, however, in the absence of a European *demos* and a collective identity supporting Europe-wide redistribution. Scharpf therefore demands that European integration be pursued in a way that protects the national autonomy of redistributive and ideological policies as much as possible and that the autonomous rule- and decision-making by supranational organizations be checked by member state governments – in particular the ECJ’s judicial legislation (Scharpf 2009).

Scharpf’s demands are consistent with the diagnosis of a multi-*demoi* polity but also structurally conservative and intergovernmentalist. Scharpf’s suggestions are strongly focused on making indirect legitimacy work (again) by bringing supranational organizations back under intergovernmental control and by limiting majority decisions. Furthermore, he does not envisage a legitimate role for individual citizens at the EU level, or for their representatives in the European Parliament. Although Scharpf puts a pragmatic emphasis on community-friendly solutions to the European democracy problems, a strict implementation of the protective program may well imply an intergovernmentalist “rollback” of integration that would go against the thrust of the institutional reforms of the past two decades and appears hardly feasible. Finally, whereas Føllesdal and Hix arguably put their bets too optimistically on the identity-generating consequences of Europe-wide political competition, Scharpf’s solution does not seem to offer any prospects for endogenous community-building. It has no room for making use of and deepening the fragile and elitist beginnings of a European *demos*.

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<sup>5</sup> The distinction of protective and developmental versions of models of democracy is taken from Held (2006).



By contrast, the developmental version of democracy in a multi-*demos* polity combines a republican focus on protecting national *demos* and their citizens from external domination (above all legal domination in the EU case) with transnational deliberative elements. In general, advocates of deliberative democracy see deliberative, reflexive procedures as a viable transnational substitute for the competitive and majoritarian procedures of nation-state democracy in the absence of resilient common identities or values – either negatively as a way to contest claims (Dryzek 2000: 115-139) or positively as an opportunity to build identities and norms beyond the *demos* (e.g. Eriksen 2005). For the EU, Richard Bellamy and Dario Castiglione propose a constant “dialogue between different *demos* and different legal systems” that should also involve institutional actors such as courts and parliaments (Bellamy and Castiglione 2003: 21). Similarly, James Bohman envisages a deliberative, de-centred federalism (2005; 2007), in which power is dispersed across a plurality of institutions and communities that are, at the same time, linked through vibrant communication and effective public deliberation across borders.

These deliberative accounts have the advantage of moving beyond the mere protection of national democracy. They offer an active role to individuals and other non-governmental actors and a perspective for strengthening the *demos* qualities at the European level by promoting common identities, public spheres, and potentially political infrastructures through transnational communication and deliberation. For one, however, these accounts place too high hopes on transnational deliberation. The “thickly institutionalized space that includes various publics and civil associations” (Bohman 2007: 56) and the “robust interactions across diverse *demos*” (Bohman 2005: 313) that are required to sustain a deliberative European democracy exist at best at the level of bureaucratic and political elites.<sup>6</sup> In addition, they remain underspecified regarding the link between deliberation and procedures of decision-making and compliance in the EU. How is deliberation translated into authoritative decisions? And what if deliberation fails to produce a consensus? In other words, these accounts appear under-institutionalized and under-constitutionalized to us.

To sum up, contributions to the debate on democracy in the EU seek to overcome the no-*demos* problem in three ways: by seeking to bring about a European *demos* through Europe-wide political competition and contestation; by protecting the existing national *demos*; and by compensating for the absence of a European *demos* through deliberative procedures. All three alternatives are partly problematic. The competitive strategy assumes a kind of democracy, for which the EU is not ready. It risks overstraining and disrupting the EU. The protective strategy maintains that the EU is not ready for any kind of democracy. It restricts democracy to the national level and the EU to an intergovernmental organization. The deliberative strategy likely overestimates the potential for transnational deliberation and consensus.

By contrast, the concept of *demos*cracy that we present in the remainder of the paper starts from the fact that the EU polity remains for the foreseeable future a polity of multiple *demos*. It has irreversibly moved beyond an intergovernmental organization but is unlikely to develop into a nation-state. In a *demos*cracy, the national *demos* are not only passive entities to be protected from European integration but active democratic subjects, and they do not only participate in the deliberation of European political problems but also in the making of authoritative decisions at the European level.

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<sup>6</sup> See the comitology-based “deliberative supranationalism” of Joerges and Neyer (1997).

#### 4. Principles of Demoicracy

The findings and methodological reflections put forward so far imply that conclusions on the democratic deficit of the EU ought to be based on an adequate normative benchmark of *demoi*-cracy. The following section establishes the framework of such a benchmark.<sup>7</sup> Our justification depends on well-reasoned methodological choices. It is not a foundational justification. Two further points are relevant. First it is important to see where the advantages and deficits of the EU are located when evaluated against a standard that is adequate to its ideal-type as a multi-*demoi* polity. Equally important is the point that the composed nature of the EU polity implies that not only the EU but also some of its member states might have a demoicracy deficit. They might have institutional dispositions and entrenched practices that harm the well-functioning of the multi-*demoi* polity to which they adhere.

From a normative point of view, the transformation of democracy in a setting of multiple statespeoples can be understood as the attempt to realize a potential added value inherent in democracy's normative core. We hold this to be true for a liberal as well as for a republican understanding of the demos (see Miller 2009). We think that demoicracy is able to consider both the liberal and the republican understanding of the demos as it grants rights to individual citizens as well as to statespeoples. Democratic statespeoples ought to recognize each other's institutions of freedom, most of all each other's popular sovereignty. However, as decent statespeoples they should also take into consideration the negative externalities their democratic decisions have on each other and on the fundamental rights of citizens of other statespeoples. Hence, they ought to coordinate their decisions and decision-making bodies accordingly. Furthermore, liberal democracies ought to respect the transnational implications of their constitutional framework, especially with regard to the individual rights of their citizens.<sup>8</sup>

In the normative theory of demoicracy the individualistic dimension is only one aspect of the normative core of liberal democracy. It is important to see that the transnational and pluralistic dimension of liberal democracy is upheld, guaranteed and enacted by the political authority of the statespeoples.

The consequence of the individual plus demos-based normative core of demoicracy is that political authority cannot be carried out simply on the basis of individual rights and pluralism. While it is wrong to disregard the individuals as the normative references of a theory of coexistence of liberal democratic statespeoples, it is equally wrong to disregard fundamental rights of statespeoples. Demoicracy is the idea of a specific political order that takes into account the two fundamental normative references of liberal democracy, citizens and statespeoples, under conditions of contact and interaction. It does not compromise on core fundamental rights of individuals but it balances the political rights of individuals and statespeoples.

Furthermore, the normative setting of demoicracy respects the criterion of domestic-compatibility and therefore limits the duties to reciprocate the enhancement of individual freedoms under the law to liberal democratic statespeoples.<sup>9</sup> In other words it does not suggest constructing transnational democracy among non-democratic states. Essential for the idea of demoicracy is a more complete

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<sup>7</sup> It is based on the framework developed in Cheneval (2007) and Cheneval (2011) and applies it to the EU.

<sup>8</sup> This is an important argument against Rawls' exclusively people-centred approach. See Caney 2005: 81, #1.

<sup>9</sup> For the "domestic compatibility" argument see Caney 2005: 82

realization of fundamental rights entailing a transnational dimension in their realization and therefore necessitating a corresponding coordinated action by statespeoples via common institutions.

The setting elaborated so far implies that the leap from national to cosmopolitan democracy is not only unrealistic; it is also potentially illegitimate. The normative core of liberal democracy entails that any concrete integration among *demos* will have to be approved by self-governing *demos*. The liberal democratic ideal holds that any political decision-making, post- and supra-national institution-building included, has to pass the test of individual and collective appropriation by *demos*, of open deliberation and decision making in concrete life worlds and political communities. Following this political logic of inter-subjective and democratic appropriation and ownership, Cheneval (2008) proposed a constructivist approach in which the simple question asked is on what principles of conduct and institutional design democratic statespeoples and citizens would agree upon under fair conditions and given the contextual incentives to seek common forms of government. This setting implies a merger of Rawls' separated citizen-based and people-based original positions into one democratic "original position".<sup>10</sup>

The principles of democracy have to apply to the basic normative framework of the institutional design of democracy as such. They have to be freestanding. They should not be directly deduced from a particular national or cosmopolitan model of democracy without being filtered through the original position of democracy representing the fundamental interests of citizens and statespeoples. The principles we seek to justify form the normative basis of such an order. Many fundamental principles are thus missing in the following list, (a) because they apply to the general normative framework of the national democratic order, (b) because they are presupposed as accepted by the democratic statespeoples independently of their entering into the multilateral order, (c) because they are not basic principles of the multilateral order as such, (d) because they form part of the international order recognized by democratic and non-democratic (decent) societies. We only seek to establish the principles that are specific to democracy as political order composed by liberal democratic statespeoples.

Basic acceptance of human rights and freedoms, universal representation, separation of powers and/or checks and balances, domestic vertical and horizontal accountability, rule of law, participatory rights of citizenship, recognition of minorities, etc. are thus not included in the list, but they form part of the "normative baggage" which the democratic statespeoples bring to the order of multilateral democracy and which they will seek to introduce in the new order through the filter of the multilateral "original position". Classical principles of international law such that the peoples are to observe treaties and undertakings (Rawls' second principle of a liberal law of peoples) or that international law is prior to domestic law are also presupposed and not further reiterated. It can be presupposed that the participating statespeoples of democracy honour all their obligations under the law of peoples.

The equality of statespeoples is not something we justify but presuppose as fairness condition of the original position (Rawls' third principle of the liberal law of peoples). It cannot be stated as principle resulting from the original position without circularity. Peoples' right to self-defence, their

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<sup>10</sup> A Rawlsian analysis of democracy and its application to the EU is the original contribution of this paper. For other conceptions of democracy, see e.g. Müller (2011).

submission to the *ius in bello* and rules of non-intervention in international law, the duty of assistance are considered as part of the general law of peoples and not of a specific set of principles of democracy.

We realize that the proposed principles depend on a reasoned methodological choice and on conceptual implications of liberal democracy. They are thus not first principles in a deep philosophical sense. Neither do they have the status of basic principles of law. They are principles of democracy, principles we think to be specific to and necessary for the legitimate realization of democracy (see Cheneval 2011, forthcoming):

1. Sovereignty of the statespeoples' *pouvoir constituant* regarding entry, exit, and basic rules of the political order of multilateral democracy
2. Non-discrimination of statespeoples and citizens
3. Reciprocity of transnational rights
4. Equal legislative rights of citizens and statespeoples
5. Supremacy of multilateral law and jurisdiction
6. Two principles of linguistic justice
7. Difference-principle for member statespeoples

At this stage of research, we are not in a position to propose definite results of evaluation of the EU regarding the above stated principles. In the following section we briefly present the principles of democracy as the result from a democratic "original position" and we make a first attempt of an evaluation of the EU regarding the principles.<sup>11</sup>

## 5. Principles of Democracy and the EU

**Principle 1:** Sovereignty of the statespeoples' *pouvoir constituant* regarding entry, exit, and basic rules of the political order of multilateral democracy

Behind the veil of ignorance, citizen- and statespeoples-representatives agree that the accession to a specific democratic multilateral order, the exit from such an order, and the design and change of the basic rules remain in the competence of the *pouvoir constituant*<sup>12</sup> of the statespeoples. No statespeople ought to be obliged to join or stay in a democratic multilateral order by (a) the decision of its executive or legislative branch of government only, (b) by majority decision of a group of states, (c) by majority decision with the participation of citizens that are not members of the democratic state in question. No member statespeople ought to be forced to accept a change of basic rules on the basis of a majority rule its *pouvoir constituant* has not agreed to in the first place.

Democracy cannot presuppose a common political *demos* as *pouvoir constituant*, it has to constitute the framework of decision making by agreement of the participating *demos* and accept that the *demos* may exit the political order or veto its further development. If this becomes unacceptable to

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<sup>11</sup> In later versions of this or other papers we and other members of our NCCR research project intend to produce a more complete picture.

<sup>12</sup> For the term see Dann and Al-Ali (2006: 425-426).

the others, the *demos* willing to move forward need to found a new democratic treaty order, member *demos* need to exit, or some sort of differentiated integration has to be agreed on.

This first principle also implies *legitimate constitutional difference*. All constitutional rules that are not specified by and do not violate a unanimously ratified multilateral treaty remain in the competence of the *pouvoir constituant* of the member states. Within the basic limits of democracy and rule of law the democratic order thus allows for the coexistence of different constitutional models. It also allows for different constitutional cultures and different models of democracy.

**The realization of principle 1 in the EU:** At first sight, the EU corresponds quite well to this principle. No statespeople is forced into membership, exit is possible and every statespeople has a right to veto new treaty rules. The EU requires that all of its member states are democracies (Art. 49 TEU) but does not require any specific democratic model. The fact that the EU lists values such as freedom, respect for human rights and national minorities, and the rule of law alongside the principle of democracy (Art. 2 TEU) demonstrates a commitment to liberal democracy. Given that liberal democracy is the generally accepted form of democracy in the contemporary nation-state, however, this qualification can hardly be construed as an illegitimate constraint.

A potential problem of the EU lies, however, in the lack of coordination of the provisions of inclusion of the *pouvoir constituant* of the member statespeoples regarding the revision of the treaties (Cheneval 2007). Some statespeoples have institutional provisions for required and binding referenda in order to determine the will of their *pouvoir constituant*, others give referenda the character of a plebiscite called by the government or the parliament. In some member statespeoples non-required referenda are consultative. Some member statespeoples of the EU, e.g. Germany and Belgium, have provisions against referenda and ratify by parliamentary decision only.

On the one hand, these differences in ratification procedures can be justified by the principle of legitimate constitutional difference. They are articulations of variation in constitutional cultures and do not violate EU treaty provisions. In practice, however, the plurality of norms and procedures regarding entry, exit and design of basic rules in the EU has at least two negative implications. First, the referenda are strategic tools in the hands of the government or government party. They do not constitute a right to political participation of the citizens. They do not really respect the *pouvoir constituant* although their populist attractiveness might indicate otherwise. Plebiscites aggrandise the strategic room for manoeuvre of the government rather than the rights of the citizens. Second, government held referenda are a plebiscite on the government rather than a vote on the issue at stake. They lead to second order voting rather than to a precise judgement of the people on a specific subject matter.

Under principle 1 a further question needs to be discussed. According to what procedural standards are new members accepted? Who decides according to what criteria? Can democracies reject a membership application of a well functioning democracy? This set of problems actually brings us back to the question of the design of the “original position” of democracy and the limits of the Rawlsian method (Cheneval 2008). Contractualism, Rawls original position included, does not solve the demos-problem.<sup>13</sup> In a situation in which the political order already exists, principle 1 seems to locate a veto power to new membership with the *pouvoir constituant* of every member statespeople. The EU’s procedure corresponds to the standard but is equally susceptible to strategic distortions as

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<sup>13</sup> For this problem see Arrhenius (2005); Goodin (2007).

the treaty revision procedure. The announcement of the Austrian and French governments in 2004 and 2005 to subject the accession of Turkey to a referendum in their countries – a procedure that has never been chosen before – is a case in point.

**Principle 2: Non-discrimination of statespeoples and citizens**

Behind the veil of ignorance, citizen and people representatives agree on the principle of non-discrimination of member states and member citizens. (1) States or the multilateral order as such will not give preferences to some member states without granting them to all. (2) States will respect and ensure to all persons within their territory and subject to their jurisdiction the rights recognized in the basic agreement or treaty without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Dispositions of the democratic political order have to be enforced following a principle of equality of treatment. In sum, representatives agree that special rights not stipulated by a Treaty but extended by one member state to another or to its citizens ought to be extended to all. Special rights, benefits, or duties not stipulated by a Treaty extended to individual citizens (and/or legal persons they choose to form collectively) of another member state, ought to be extended to all members of the multilateral democratic order under the same conditions.

***The realization of principle 2 in the EU:*** The EU seems to deserve high scores on non-discrimination. It has a solid normative framework in the Treaties and directives, the EU Commission and the Court are making ample use of competencies of implementation by engaging in and deciding numerous infringement procedures against member states that violate the principle of non-discrimination, be it regarding competition policy or regarding the rights-based dimension of the non-discrimination directives. Article 14 of the ECHR states that the rights and freedoms laid down in the Convention should “be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Long before the Lisbon-Treaty, the article has been ratified by all EU Member States without reservations. The consolidated TEU knows similar non-discrimination articles (Art. 2; Art. 18; Art. 19). The Council of ministers has approved the Racial Equality Directive in June 2000. It opened up new territory for the EU further explored in The Employment Equality Directive (2000/78/EC). Council Directive 2000/43/EC implemented the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2000/78/EC established a general framework for equal treatment in employment and occupation. The EU *Charter on Fundamental Rights*, officially proclaimed in December 2000, lays down the equality before the law of all peoples (Art. 20). It prohibits discrimination on any ground (Art. 21), and requests the EU to protect cultural, religious and linguistic diversity (Art. 22). On July 2, 2008 the EU Commission has approved a new social agenda containing an anti-discrimination package.

Problems with the non-discrimination principle in the EU occur regarding the statespeoples themselves and the different standards regarding the implementation of the protection of minorities. The quality of democracy critically depends on the democratic qualities of its member statespeoples, that is to say the compatibility of internal rules with the general principles of democracy. Regarding minority rights, the problem is not that the so called European standard does not include a definition of “national minority” or “minority” in general, nor is it a problem that there

an attempt to draw a list of minorities in Europe. This is coherent with the political conception of the nation and with the conception that belonging to a minority culture is a question of individual self-ascription, thus also of first person plural intentionality. This has the certain advantage that the EU does not define minorities authoritatively and thereby exclude the minorities who do not happen to be on the official lists. Nor does the EU standard lock people into a minority they do not want to be part of.

Problems occur from another source. The European Union's normative points of reference are states and individuals. However, the EU operates under a statist presumption insofar as it leaves to the states everything that is not explicitly put under EU authority or the shared authority of the EU and the member states. The EU as a process of cooperation and integration of modern territorial states was and continues to be based on the idea of the sovereignty of the modern territorial states, the main protecting factor of cultural diversity remaining the principle of territory. This leads to two problems with respect to minority protection in the EU. First, there is a difference with respect to status and rights of cultural groups who are represented on the EU level and those who are not. The Estonians and their language are represented in the EU, because there is an Estonian state member of the EU. The much more numerous Catalans are not directly represented and their language has no official status in the EU, simply because there is no Catalanian state. Second, in the context of the European Union, it is still first and foremost the states that have to deal with the autonomy claims of minorities within their boundaries. Regarding its members, the EU does not reopen the Pandora's Box of territorial claims of non-territorialized peoples or of state peoples over territory inhabited by members of its nation outside its national borders.

Thus, the state-based structure of the EU explains some of the deficits regarding the realization of the principle of non-discrimination. But it also puts a number of constraints on the scope of claims that can be made vis-à-vis the EU in a meaningful and politically responsible way. The process-guiding principle of European integration is not the remaking of nation-states according to the principle of the self-determination of all peoples understood as ethnic groups. The normative finality of the EU is the cooperation and integration between consolidated territorialized statespeoples. This means that the individual as embedded in a specific culture and collective is, first and foremost, assumed to be represented by the member-state. Every human person holding EU citizenship is represented through direct universal representation in the EU parliament and protected by the ECHR, the constitutional provisions of the states, and the non-discrimination regime as well as the four freedoms within the EU. The EU is therefore an effective organ for minority protection on the level of individual rights, but not for the transformation of minorities into majorities by territorial change. This is a matter of internal politics of member states unless there are transborder problems affecting the EU.

Another set of problems results from the fact that stricter standards are being imposed on new member states. Thus, the European Union has compelled the new members from Eastern Europe and is forcing the candidate members to adhere to European standards regarding the treatment of national minorities. The problem is that some member states clearly do not meet these standards, because the "old" members didn't have to comply with such strict standards when founding or joining the EU (or its equivalent at the time). A legal double standard as well as a double standard in

the factual treatment of minorities between old and new EU member states becomes apparent.<sup>14</sup> The double standards in the EU regarding the respect for non-discrimination minority rights (and not just minority rights) is a serious and delicate problem and puts into question a meaningful realization of the principle of non-discrimination of citizens and statespeoples. We see that this is mostly caused by the democratic deficit of member states and not of EU institutions. Democracy critically depends on internal institutional dispositions and policies of member statespeoples.

### **Principle 3: Reciprocity of transnational rights**

Behind the veil of ignorance, citizen and people representatives agree on the realization of the transnational dimension of individual rights and freedoms. They are to be granted or restricted on the basis of the principle of non-discrimination. In such a system the fundamental liberal right to exit will thus be reciprocated by all member statespeoples by a fundamental right to entry and corresponding rights that gradually re-establish a migrant's status as full member of society. Every citizen of a member statespeople as such is recognized as a person benefiting from entry rights and political rights.

**The realization of principle 3 in the EU:** The EU is a model of democracy when it comes to mutual recognition of citizenship among sovereign states. The same is true regarding its multilaterally managed regime of enhanced transnational rights (Magnetite 2007). In many respects the EU's regime concerning individual rights goes beyond reciprocity and tends toward the guarantee of a common citizenship as a fundamental status.

At first sight, Articles 17 and 18 EC might not have added anything material to the previous law regarding the right of free movement and residence. But the anchoring of certain rights in EU citizenship as a fundamental status established by the Treaty has encouraged the ECJ to interpret the provisions of free movement and residence more generously, stating in *Grzelczyk* that Union citizenship was 'destined to be the fundamental status of nationals of the Member States.'<sup>15</sup> The link of this status to Article 12 EC<sup>16</sup> entitles them to be treated equally irrespective of their nationality. The exceptions to this rule have to be expressly provided for. EU law imposes equal treatment for the rights it expressly grants to EU citizens. Regarding this basic principle the democratic quality of the EU as a democracy again depends on the legal dispositions of the member states.

Belgium is a case in point regarding the realization of the voting rights of citizens of EU member states in local elections. It took Belgium until 1998 to adopt a national constitutional provision to grant this right to other EU nationals, required by Art. 19 EC, and an enforcement action of the Commission before the ECJ.<sup>17</sup> But this case is exceptional and it proves that the EU institutions

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<sup>14</sup> Greece is the best example of the double standards within the EU concerning minority rights. The country falls short of the standards imposed on candidate states. Together with France, Greece is the only of the 25 EU Member countries that has not signed the COE's *Framework Convention for the Protection of Minority Rights*. Greece has been convicted over ten times by the COE's European Court on minority issues. It has constantly refused to cooperate internationally on minority issues.

<sup>15</sup> C-184/99, *Grzelczyk* [2001] ECR I-6193 at para. 31.

<sup>16</sup> C-184/99, *Grzelczyk* [2001] ECR I-6193 at para. 30.

<sup>17</sup> Case C-323/97, *Commission vs. Belgium*, 1998 E.C.R. I-4281



managed to enact the democratic standard of citizenship. Similar constitutional adjustments in other countries passed with relative ease (O'Leary 1996: 219-233).

More serious problems regarding democratic citizenship based on mutual recognition and transnational rights arise in recent EU enlargement contexts in which, in previous and recent history, it was more the borders than the people that "migrated". Individuals became nationals or minorities in function of the rise and fall of Yugoslavia or the Ottoman, the Austro-Hungarian, the German and the Soviet empires. New diasporas and so-called kin-states were formed and they are today part of the EU system. The EU's regime of mutual recognition of rights is distorted by extraterritorial recognition of citizenship. These represent a positive discrimination of citizens of other member states residing in that other member state. The latter are declared citizens of their so-called kin-state (Tóth 2003).

#### **Principle 4:** Equal legislative rights of citizens and statespeoples

Statespeoples as well as citizens are equally entitled to participation in the secondary, legislative rule making of the multilateral democratic order. According to principle 1, the constitutional process, i.e. treaty making or the making of the most basic rules is a matter of the sovereign statespeoples and their *pouvoir constituant*. Principle 4 thus declares the necessity of a democratic process of legislation, unusual for classical, non-democratic international organizations. Furthermore, as in federal arrangements, the material political equality of statespeoples and the material political equality of all citizens of the federal system are two conflicting values that cannot be fully realized at the same time under conditions of unequal size of the statespeoples. Principle 4 thus formulates possibly countervailing claims and thereby expresses a dilemma of the human *conditio politica*: humans claim political rights as individuals and as groups through which they enhance their capacity to protect freedom collectively. If they want to collaborate on the individual as well as the group level, the two goods of individual and collective political freedom come into conflict. We could call this the circumstances of democracy. The attempt to deny these circumstances by repressing either individual or collective representation would not be solution but a simple negation of basic conditions. It would be like trying to solve the problem of distributive justice by assuming that there is no scarcity of resources.

So principle 4 is not contradictory. It expresses that behind the veil of ignorance, i.e. from a normative point of view, the elimination of universal or collective representation is not an option. A centralist and purely individualist-universalist notion of democracy is not legitimate under the circumstances of democracy. It would be the very negation thereof and unacceptable behind the veil of ignorance. On the other hand, classical international law making by statespeoples and statespeoples only implies the negation of the political rights of citizens on the multilateral level. This is unacceptable for citizens behind the veil of ignorance. Both, the people-centred and citizen-centred idea of representation have thus to be upheld at the same time. In sum, the principle holds that there is a necessity to find an institutional and procedural arrangement balancing the representation of statespeoples with the representation of citizens. This can be done by the institution of two procedurally linked governing bodies or by balancing two forms of counting votes in direct citizen voting, one of all citizens and of the citizens as grouped by statespeoples.

This double representation requires linking intergovernmental decision-making with supranational parliamentary decision making on the multilateral level and restricting the competencies of these institutions to areas approved by the *pouvoirs constituants*, the member peoples in basic agreements or treaties.

The justification behind the “veil of ignorance” reveals a clear difference between the contractualist and the rational choice approach. In principal-agent or functional analysis, the citizen representation in the parliament is an outlier for which there is no rational function.<sup>18</sup> The contractualist model here applied is able to give a reason for universal representation on the multilateral level. It would be unacceptable to citizen representatives to delegate all rule making authority to statespeoples representatives. For rule making on the multilateral level democratic statespeoples and citizen representatives of liberal peoples will only agree to a balanced representation of both statespeoples and citizens behind the veil of ignorance.

***The realization of principle 4 in the EU:*** The EU’s legislative procedure is characterized by co-decision making of the Commission, Council, and Parliament. Over the past, the initially limited competencies of the European Parliament have been steadily increased with every treaty (Rittberger 2005; Schimmelfennig et al. 2006) and through interinstitutional bargaining between treaty revisions (Héritier 2007). The Lisbon Treaty makes no exception. The co-decision procedure is now the “ordinary legislative procedure” applied to the vast bulk of the EU’s legislation. Under this procedure, the European Parliament (EP) is put on an equal footing with the Council in deciding legislation. Budgetary decision-making is now similar to co-decision insofar as it requires the consent of the EP and envisages a conciliation process in case the Council and the EP do not reach agreement. In the new Article 10, the Treaty now stipulates that “the functioning of the Union shall be founded on representative democracy”. It creates a roughly balanced bicameral legislature, in which one chamber – the EP – represents the individual citizens, the other – the Council – the member states. Because member states are democracies, both chambers of the Union legislature are democratically legitimated. In general, the principle of double representation of citizens and statespeoples is thus recognized in the EU.

Furthermore, by the most recent treaty the ratifying statespeoples have tried to accommodate the claim to involvement of the national parliaments in decision making by giving national parliaments a right to check whether competencies of the EU have been overstepped by new EU legislation (Art.3b3; Art. 8c; Art. 61B; Protocol on the Role of National Parliaments in the EU). These new institutional dispositions, enhancing the vertical checks and balances between parliamentary bodies of different levels of political union, can be seen as steps in the direction of achieving a better connection between the national and EU level of democratic government.

Whereas Principle 4 has been increasingly realized in the course of the EU’s constitutional development, several specific deficits remain. First, the Commission still enjoys the formal monopoly of legislative initiative. Second, the EP’s legislative powers are still inferior to the Council’s in the security-related issue-areas of foreign and defence policy as well as justice and home affairs. Under the assumption that the parliamentarization of the EU will continue on its incremental path in the future, these shortcomings are likely to be remedied in due course.

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<sup>18</sup> Moravcsik 1998: 376; Pollack 2003: n. 27. 203f.

By contrast, the biggest deficits can be found at the national level. If the governments meeting and deciding in the Council are to represent the individual statespeoples, it must be ensured that they follow the preferences of, and can be held accountable, by the national *demoi*. According to the principles of representative democracy, this function requires adequate mechanisms of participation and control by national parliaments. Comparative research shows, however, that the competences of national parliaments regarding EU legislation vary vastly across the member states and tend to be weak in a majority of member states (Raunio 2005).

**Principle 5:** Supremacy of multilateral law and participatory jurisprudence

Behind the veil of ignorance, citizen and people representatives agree on the primacy of multilateral law and the creation of a common realm of jurisdiction by a highest court exercising judicial control over all aspects of the democratic order within its competencies stipulated by the basic agreements and secondary laws, established according to the above mentioned principles 1 and 4. However, the composition of this highest court and the decision making procedures have to follow the principle of equal representation of statespeoples and citizens.

***The realization of principle 5 in the EU:*** The EU is probably at its best when considered as an autonomous legal rather than as a positive democratic order under the grasp of politics (Bogdandy 2010). It is also beyond any doubt that the ECJ has promoted European integration by “judicial incrementalism” or “judicialization” beyond the expressed will of the member states but in legitimate use of judicial discretion (Stone Sweet 2010).

But the legitimacy of a legal order and of its jurisprudence does not emerge automatically from autonomous doctrinal coherence and principle based deduction. The epistemic coherence of law and the affirmation of justice are without foundation when disconnected from political authorization. Principle 5 is therefore not to be read in the sense of a general principle of law. Rather, it is to be read as a principle of political legitimacy of the EU judiciary. It understands the application of EU law as an autonomous process, albeit one that is based on cooperation with the courts of the member states. Furthermore, the authorization of the court and the composition of the court have to follow the idea of shared representation. Since the Treaties establishing the ECJ are approved following the rule of member state unanimity, since all judges of the ECJ are appointed by unanimous member state consent, it is fair to say that the authorization and the personal composition of the court follow the principle of equal representation. In fact each member state appoints a judge who is then accepted by all the other member states. The appointment rules of the 8 (or 11, if the ECJ uses its new competencies under the Lisbon Treaty) advocates general try to balance demographic size and formal equality as the biggest five (or biggest 6, thus including Poland) EU states have the right to appoint an advocate general whereas the other 3 (or 5) are appointed through an alphabetical rotation system.

The political tension between constitutional jurisdiction of the highest courts of the member states and the ECJ will hardly ever be resolved in substance under the given structural conditions. Democracy would probably no longer be democracy if this tension were resolved in favour of one side or the other. Principles of democracy indicate that there should be a constitutional co-

jurisdiction exercised by the ECJ and the constitutional courts of the member states regarding the treaties. This jurisdiction is necessary regarding the most fundamental questions related to sovereignty.

In practice, this co-jurisdiction is being exercised in the EU. Various constitutional courts of EU member states have delivered decisions on the compatibility or collision of European treaties or directives with their national constitutions (Slaughter et al. 1998). And they made pronouncements on the status of EU law in national jurisprudence in general. The Hungarian Court considers EU law national law once the treaties are ratified and enacted, but it evaluates new amendments as international law. Hence it evaluates them as a sovereign court that is a member of a democracy.<sup>19</sup> The protection of popular sovereignty and of reasonable political autonomy of the member states is the most fundamental issue of judgements of high courts of member states. The German Constitutional Court agreed to the possible ratification of the Lisbon-Treaty because it found that the treaty did not substantively alter the structure or the EU as a union of sovereign statespeoples. The Court assumed what it considers its primary responsibility: guardianship of the popular sovereignty of the German people. Furthermore, and in accordance with this position, it demanded a higher proportional weight of the German parliament (Bundestag und Bundesrat) in the European legislative decision-making process.<sup>20</sup>

The German Constitutional Court, and any court assuming the same role, thereby exercises a democratic control in two respects. First of all, by its evaluation of the EU treaties from the point of view of popular sovereignty of a member statespeople, the Court enacts the constitutional co-jurisdiction process foreseen by the above-mentioned principle 5. Unlike in a federal state, in democracy the constitutional courts of the member statespeoples retain highest jurisdiction regarding sovereignty in the sense of competence-competence (which should not be confused with the delegation of competence). Secondly, the German Constitutional Court defends democracy by its evaluation of the adequate presence of national democratic representatives on the European level. It thereby seeks to balance universal representation of the citizens in the supranational parliament with statespeople representation.

## **Principle 6: Two principles of linguistic justice**

### **A. Principle of Linguistic Territoriality and of Legitimate Restriction of Positive Linguistic Rights**

Behind the veil of ignorance and taking into consideration the adoption of the principle of mutual recognition of citizenship including freedom of movement, citizen and people representatives agree on the right of the statespeoples to restrict positive linguistic rights on their territory – such as the right to public education and information in a specific language – to the languages recognized in the constitutional order of the statespeoples in question and/or its sub-units. This principle implies an imperative to recognize linguistic territoriality of long standing territorialized linguistic sub-groups of the statespeoples.<sup>21</sup>

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<sup>19</sup> Declared in Decision 61/2008 (IV. 29.) of 29 April 2008 of the HCC.

<sup>20</sup> BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), available at:

[http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html)

<sup>21</sup> Kraus 2004; Van Parijs 2006: 238

## B. Linguistic Justice

Behind the veil of ignorance, citizen and people representatives agree that the common political and legal institutions of the multilateral order recognize all official domestic languages of member statespeoples as official languages. If the number of official languages is so high that it can *de facto* no longer be accommodated by translation, citizen and people representatives agree on the most commonly used language as *lingua franca* of the common multilateral institutions and on a burden-sharing of language training according to the principle of equalization of cost-benefit ratios.

***The realization of principle 6A and 6B in the EU:*** The normative framework of democracy demands the recognition of existing linguistic constellations by the migrant. The migrant has no right to claim positive linguistic rights (e.g. to get public information and education in his or her language of origin on the territory of another statespeople) but should not be discriminated in the use of his or her language otherwise. The EU's normative framework of multilingualism, confirmed by the EU parliament<sup>22</sup>, and the EU's normative framework of non-discrimination and freedom of movement exclude discrimination on the basis of language.<sup>23</sup> The question is whether that framework grants the right to restrict positive linguistic claim rights of migrants to the statespeoples, and whether it guarantees a principal of linguistic territoriality. The affirmation of multilingualism does not solve the question as the politics of multilingualism are a double-edged sword, both from a descriptive and normative point of view. From a descriptive point of view, the EU promotes the learning of several languages by citizens (Art. 165 (2) EC) and at the same time makes it superfluous by guaranteeing every citizen positive language rights in dealing with the EU institutions, i.e. the right to an answer in their own language. Normatively, the EU promotes individual linguistic rights and forbids discrimination on the basis of language. At the same time it promotes multilingualism under the idea of protecting and respecting the languages of the member statespeoples. This regime mix can potentially undermine the principal of linguistic territoriality if the latter is not specifically upheld and if no distinction is made between negative and positive linguistic rights in the general normative framework of freedom of movement.

It is debatable whether national democracy needs a common language, this question is beyond the remit of this paper. However, we think it is fair to say that democracy certainly does not necessarily need a common language. Since the Treaty of Rome of 1958 the issue of language in the EU is explicitly in the competence of the Council and the member statespeoples (Art. 8). The post-Lisbon consolidated version of the Treaty on European Union repeats this principle explicitly and states the unanimity principle for votes on matters of language in the Council (Art. 342). In the consolidated version of TEU positive linguistic claim rights towards the EU institutions (e.g. the right to get an answer from the institutions in one's own language) are explicitly restricted to the so-called treaty languages, hence the official languages of the member statespeoples (TEU Art. 20d; Art. 24).

However, it has been stated that EU community law's protection of the rights of persons belonging to minorities (Art.1a EU Treaty) implies the protection of linguistic rights in the positive sense (Urrutia&Lasagabaster 2007: 489-492). If this were true, EU law would fundamentally put into question the right of a member statespeople to restrict positive linguistic claim rights, such as the

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<sup>22</sup> P6\_TA(2009)0162

<sup>23</sup> For a comprehensive study see Kraus 2004, 2007; Wright 2000; 2004

right to public education in a language other than the official language of the constitution. This in turn would be in contradiction to one of the principles of democracy as we have established. However, things are not so clear. First the invocation of values, questionable in legal terms at any event, does not establish directly applicable legal rules. Second, the Lisbon treaty states that human rights will be general principles of EU law on the basis of Art. 6(3) which does not refer to the minority protection treaties of the Council of Europe (Schilling 2008: 1231). Third, general principles in EU law are only directly applicable if there are lacunae in the law. It has been argued that the EU has a well-developed system of rules regarding language and therefore there is no scope for a general principle of Community law concerning the respect of language rights (Schilling 2008: 1232-1234). However, one might argue that this system does have lacunae regarding the statespeoples' right to restrict positive language rights in their own relations with new linguistic minorities. But this lacunae concern a matter in which the EU has no competence at all, i.e. the EU has no right to interfere into a member statespeoples language regime and submits all relevant decision on the EU level to the principle of unanimity among statespeoples. The human rights framework in which the EU and its statespeoples are integrated points in the same direction: no positive linguistic claim rights are granted on fundamental rights or human rights basis, even if one were to include the minority protection treaties into the analysis (Schilling 2008: esp. 1237). Fundamentally important for our purposes is the clause that the positive language rights which can be claimed (in restricted areas) are to be languages of nationals of the state (ECRML, Art. 1a). This clearly is an attempt to exclude the so-called new minorities or migrants from the protection regime of "old" minorities who might be minorities not because they have migrated but because, as so often in European history, the borders have migrated. Overall, the normative framework seems not to forbid the restriction of positive linguistic rights of intra-EU migrants on the national level and does not infringe upon the "linguistic territoriality" of member statespeoples.

#### **Principle 7:** Difference-principle for member statespeoples

Behind the veil of ignorance, citizen and people representatives agree that general economic inequalities among member statespeoples are to be to the greater benefit of the least advantaged statespeople of the multilateral democratic order. Some statespeoples' economic performance might decline due to their own inadequate policy choices. Democratic justice does not demand transfers among statespeoples to systematically go where the inadequate policies are. The principle states that the economic conditions of democracy must be designed in such a way that the least advantaged statespeoples gets the highest possible benefit from membership. The maximin principle is applied because we can presuppose close-knitnes for the relation among the member statespeoples of a democracy (for this condition see Van Parijs 2003).

In other words, all other things being equal, the sustained and sustainable growth rate of the least advantaged member statespeoples (GDP per capita) ought to be the highest. One has to insist that principle 7 is not a directly applicable rule, it is a norm guiding optimization, in this case the optimization of economic inequalities under the perspective of democratic justice. In its institutional design, democracy ought to realize this normative goal by creating general conditions of growth, by granting the least advantaged statespeoples access to opportunities, infrastructure, information, and rule of law.

This is not the place to offer an in-depth analysis of the EU regarding principle 7. However, a brief look at the figures shows that the EU has done quite well with regard to inequality and convergence among member states. The question here is not whether economic integration produces a permanent and general growth effect. There is some disagreement on this point amongst economists. Nevertheless, according to one study the EU member states' GDP per capita would be 20% lower without economic integration (Baldinger 2005).

Overall and until the economic crisis beginning in 2007, the least advantaged member states have enjoyed considerably higher sustained growth rates than their richer counterparts in the EU. The poorest have done especially well. Latvia has topped at 11% emulating China. Similar tendencies can be observed in earlier accession rounds with remarkable and above average economic growth rates in poorer new member countries (Crespo-Cuaresma et al. 2002). So, although the map of growth shows huge inequalities between member states of the EU, the robust and sustained economic growth of the least advanced member countries indicates that the EU system, in the past, has fulfilled principle 7 to a reasonably large extent. Overall it is fair to say that the economic conditions for democratic justice have been positive in the EU.

One might add that the EU does well with regard to general inequality. It has a Gini-coefficient of 0.31 even though it performs almost no authoritative income redistribution among member states. A federal state like the US scores at 0.46.<sup>24</sup> We should add that it is not a normative condition of democracy to have a common currency. Whether Principle 7 is better served by one or several currencies depends on the context and is a matter of economic analysis. It is not implied in the normative structure of democracy.

## 6. Conclusion

In this paper we have argued in favor of the establishment of an independent, transformationalist normative standard of democracy, adequate to the common government of statespeoples. We have argued that the EU corresponds to such a specific form of polity and therefore needs to be evaluated according to the particular normative standard of democracy. We have chosen a method of normative analysis and identified seven principles we believe to be specific to democracy. Based on these findings we have given some examples of a substantive analysis of the democratic quality of the EU. Our results are preliminary and to be read as hypotheses for a more extended research agenda.

As a second important insight we add that instead of looking only at the EU, the democratic quality of the EU is to be assessed on the systemic level of interaction of all *demoi* in connection with the EU. The democratic quality of the EU is established by all institutional dispositions of the EU and of all the member states. In a selective and by no means comprehensive manner we have assessed this quality by also looking at the member states' and the EU's basic institutional dispositions and policies.

Even our cursory overview has revealed two important insights, however. First, some strongly criticized democratic deficits of the EU appear less severe in a democratic perspective. The weakness

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<sup>24</sup> [www.eurofound.europa.eu/areas/qualityoflife/eurlife/index.php?template=3&radioindic=158&idDomain=3](http://www.eurofound.europa.eu/areas/qualityoflife/eurlife/index.php?template=3&radioindic=158&idDomain=3)

of a Europe-wide *demos* and (federal) statehood constitute core features of democracy rather than fundamental obstacles to it. In addition, the supranational level does not and, indeed, ought not to bear the full burden of ensuring democratic participation and accountability. Despite some formal and many practical shortcomings, the EU heeds the core principles of democracy generally well. Second, some of the most problematic deficits of democracy in the EU result from deficits at the national level (or the relationship between the EU and the national level) rather than the supranational level. This is true for the uneven and uncoordinated ratification procedures in the member states; the uneven and partly deficient implementation of non-discrimination and transnational rights; the uneven and mostly weak competences and practices of national parliaments regarding participation in European policies and control of national governments; and the uneven checks and balances applied by national constitutional courts on the European courts. As a consequence, when the EU is properly understood as a democracy, calls for democratic reform should not be addressed predominantly to the supranational level. Constitutional reform in the EU has gone a long way and established most of what is required in a democracy. Rather, the democratic deficits of the EU at the national level merit higher attention, more scholarly analysis, and - ultimately - political reforms.

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