

# The social construction of democracy in the European Union

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## Abstract

The Eurozone crisis has brought the imperative of democratic autonomy within the EU to the forefront, a concern at the core of democratic theory. The article seeks to move the scholarship on democratic theory a step further by exploring what we call the social construction of democratic reality. While the EU's legal-institutional infrastructure may imperfectly approximate a democratic structure, we need ask to what extent the 'bare bones' democratic character of a polity can actually be grounded in a full-flesh social construct that is or could be acted out in the democratic experience and the self-awareness of its peoples. Ultimately, such an enquiry should help us understand whether a polity like the EU is actually and potentially a stable or unstable political form. We develop a consistent theory of popular sovereignty drawing on John Searle and HLA Hart to conceive the constitutionalised people (*dêmos*) as a social fact and the sovereignty of the people as a status ascribed to the people. We use this construction of democratic reality as a conceptual framework to understand the possibility of popular sovereignty being exercised concurrently by several rather than just one *dêmos*.

## Keywords

Democracy, European Union, sovereignty, social ontology, Searle, Hart, stability, citizenship, identity

## Introduction

That the crisis of Europe's monetary union should have turned into a political crisis may seem inevitable with hindsight. But not that this political crisis would come to be used by the very architects of the initial blunder as the imperative cause for

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turning the EU into a polity approximating as closely as possible the democratic form found in federal states, in Europe and elsewhere. On what ground can we resist this logic? What alternatives can we realistically subscribe to? Are there other ways to balance the need for further integration with the need to preserve the diversity of democratic institutions of individual states?

The Euro-democracy conundrum of course is not new. Think only of the two decades-long angst suffered by Germany's constitutional court: according to the country's basic law, Germany is constitutionally barred from belonging to an EU that would become a state. At the same time, the Court also believes that to be legitimate the EU needs to be more democratic – and it tends to associate democratic legitimacy with the European parliament. But if it cannot separate state-like features from democracy-like features, the Court faces a true dilemma: more of the later (which it wants) brings it closer to the former and more of the former is a constitutional sin. The Eurocrisis has made this conundrum more acute than ever.

It is at this stage of the reasoning that democratic theory usually steps in to say something about democracy beyond the state for entities which are not themselves states. The problem is that democratic theory has traditionally been based on the overarching idea of a single *dêmos*, be it a national or global *dêmos*. A plurality of peoples coexisting within a single polity is seen as at best as a fundamental obstacle to the fulfilment of democracy within that polity and at worse as conceptual impossibility (Gauchet, 2007; Miller, 2000). Such a polity will necessarily be out of touch with citizens and collective political identity (Dahl, 1999), and needs to be redeemed by the formation a single *dêmos*, ideally on a regional and eventually a global scale (Archibugi, 2008; Held, 1995; List and König-Archibugi, 2010).

The problem of course lies with the fact that a plurality of peoples is what the EU actually is, a basic claim encapsulated in Weiler's famous formula of the EU as a community of others, and consistent with the starting assumption of a recent school of democratic thought, which calls such structure 'demoicracy' (Bellamy, 2013; Besson, 2006; Bohman, 2007; Cheneval, 2011; Nicolaidis, 2004a, 2004b, 2013; Weiler, 1999). Accordingly, the dilemma faced by the German Court – and more broadly Europe's democracy question – can best be addressed by conceiving of ways in which democracy that is not state-like is possible in Europe, that is democracy beyond the state that is compatible with the exercise of national popular sovereignty in a context of deep interdependence and dense interaction. At this stage, it is important to note that while the strong form of demoicratic theory rests on a 'no-*dêmos*' thesis, the soundness of the theory does not rest on this thesis – in its weak form, a demoicratic structure can be compatible with the emergence of polity-wide *demos* features (e.g. thin common public sphere, etc.) alongside the multiplicity of constitutive *dêmos* (Nicolaidis, 2015a).

In this article, we seek to move the debate a step further by exploring what we understand as the social construction of demoicracy. In part, our original impulse stems from the realisation that while the EU's legal-institutional infrastructure may imperfectly approximate a demoicratic structure, we need to understand what this

means for European peoples and the basic inter-subjective ideal of popular sovereignty. This is not primarily a practical or sociological question but a conceptual one, namely that of the extent to which the 'bare bones' demoicratic character of a polity can actually be grounded in a full-flesh social construct, a social reality of democracy that is or could be acted out in the democratic experience and self-awareness of its peoples.

Ultimately, the point of probing into the social construction of democracy is to assess the extent to which this is actually and potentially a stable or unstable political form. As a third way, and in contrast to both mere alliances of sovereign peoples or federal states merging previously separate peoples – a democracy like the EU seems to have to strike a permanent balance. In federal scholarship, we would speak of the need to avoid both federal over-reach (whereby the federal level takes on so many functions and exercises them in such centralised way so as to negate the popular sovereignty of the separate states) as well as individual state shirking (whereby the separate states deny or at least avoid the common disciplines they have committed to). But in a demoicratic context, we need to replace the reference to 'states' by a reference to 'peoples' and ask what happens to the integrity of peoples *qua* peoples rather than only *qua* states. Thus, in order to evaluate the stability conditions of the EU as a demoicratic polity, we need to keep both sides of the equation constantly in the balance *from the viewpoint* of the governed and not only of the federated and federal government.

We start by positing that democracy rests first on the construction of both popular sovereignty and of the interconnectedness of peoples as social facts. We then develop a consistent theory of popular sovereignty drawing on John Searle and HLA Hart to conceive the constitutionalised people (*dêmos*) as a social fact and the sovereignty of the people as a status ascribed to the people. In this first part, we use the term 'social construction' on the basis of a theory that distinguishes social from brute facts but presupposes brute facts as necessary for the construction of social facts. We consider institutional facts in the political sense, i.e. as a special category of social facts. The institutional facts we are interested in concern questions of political authority as opposed to non-political institutions such as tea parties, tango dancing, and the like. Institutional facts in the political domain have much in common with social facts but are construed by additional special constitutive principles and rules. Ultimately, our theory of social construction of democracy amounts to what John Rawls called institutional description: what a system or regime looks like when it is thought to work according to its principles (Rawls, 2001: 137). We then use this construction of democratic reality as a conceptual framework to understand the possibility of popular sovereignty being exercised concurrently by several rather than just one *dêmos* in the European Union. Based on these findings, we assess the stability conditions of the EU as democracy, basically arguing that the best way to assure the EU's stability is to consolidate its demoicratic structure. Attempts to transform the EU into a state or to regress towards national sovereignty increase instability.

## Democracy as the expression of joint sovereignty of peoples

Democracy is conceivable without a *dêmos*. That is, if one understands democracy only as a set of ideals or more pragmatically, a bundle of decision rules that we ascribe to all sorts of groups of humans and that we expect to permeate society at large. In this sense, any gathering, club, or association can be ‘democratic’ in its participatory procedures of decision making and in some manifestation of a minimal egalitarian ethos of mutual recognition of all those involved. We can say of a family, classroom or firm that they are ‘democratic’. But such an understanding of democracy tends to be procedural and applicable to societies in their various incarnations.

The political notion of democracy is different. Accordingly, the rules that constitute a specially designated group of individuals and determine the way in which this group take decisions matter in a qualitatively different way from all other social groups mentioned above: they lead to politically binding decisions, binding that is because they are bestowed ‘political authority’ which in turn is upheld by a ‘state’. We call the group of individuals that authorises such collectively binding decision making the sovereign *dêmos*, and the members of this group citizens (we do not need at this stage to invoke qualifiers such as ethnic or civic characteristics to define such a *dêmos*). This group of citizens is the holder of sovereignty *qua* state power, a superior political status which makes it the subject of the highest law making and law implementation powers.<sup>1</sup>

Few observers can doubt that the idea of a sovereign *dêmos* in monadic isolation as a self-enclosed singularity has run its course. In reality, *dêmoi* of such a monadic nature never existed anyway. But it is all too tempting to conclude from this fact that (a) the single *dêmoi* as units of democratic self-government have lost all reason to be, and (b) that popular sovereignty must be reconstituted at a higher level – where similar functions as at the lower level hold. These conclusions fall prey to a mimetic bias, which consists in dealing with change at one level (that of the state) but seeking to reproduce what is lost at another level (here, the European state). The alternative to fusing the *dêmoi* into ever larger sovereign units at ever higher levels of integration is a stable order of multiple *dêmoi* exercising popular sovereignty together on the basis of certain fundamental rules which the sovereign *dêmoi* accept provided they are revocable. Why should democracy only be conceived, either by the complete closure and separation of the *dêmoi*, or by their incorporation into a single *dêmos*? Besides being impractical and out of touch with political claims to collective political identity and representation on various levels of political integration in Europe and beyond, the disjunction is not necessary on an analytical level.

Here then lies the first building block in the construction of democratic reality. The superior political status enjoyed by a group of citizens referred to as *dêmos* does not require that this *dêmos* act alone as a self-sufficient decision-making entity. The sovereign *dêmos* has the competence to joint governmental action involving the use of state power with other sovereign peoples (Cheneval, 2011). This conceptual evidence leads to two questions: (1) how should we conceive of acts of sovereignty

of multiple peoples? (2) How can a ‘*demos*-cracy’ be constructed and entrenched as ‘a union of peoples who govern together but not as one’ or ‘government of the peoples’ in a way that is stable and sustainable? (Cheneval and Schimmelfennig, 2013; Nicolaidis, 2013). To address these questions, we first need to come back to the relationship between a people and sovereignty and ask how these two inter-related notions can be thought as ‘constructed’ in a social reality in the first place so as to lead to ‘joint sovereignty’.

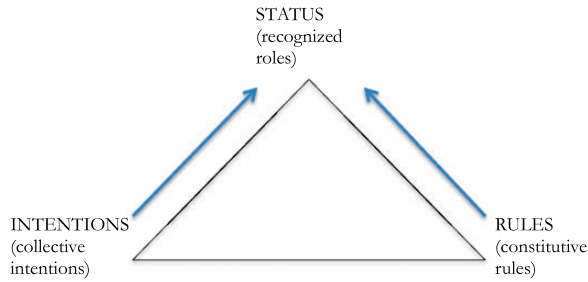
## **Democracy as social fact: Status, rules, intentions**

It is a widely accepted idea that the social facts, which together constitute the social world, only exist if humans enact them (Searle, 1995). Furthermore, institutional facts are social facts whose existence depends on social institutions. So, ‘X counts as the sovereign in country Y’ is an institutional fact of the social world, but bacteria, trees, stones, and so forth are not. The latter do not come into existence through rules whose efficacy depends on being ‘acted out’ by human beings. Things like trees and bacteria exist and can enter into causal relations with other beings independently of a shared act of recognition. Sovereigns, and thus the declaration of the people as the sovereign, only exist if humans create them as institutional facts.

That peoples, and on a higher order ‘popular sovereignty’, come to be socially constructed as collective political persons, or political communities, depends on relatively complicated historical and sociological iterations. But in the ex-post perception of human beings, these complicated iterations and incremental processes can be simplified and understood just like the result of a complicated mathematical operation can be memorised without going through the calculation every time. In this sense, a democracy in the making is a social fact (actual or potential) of even higher order complexity, which requires combining features of autonomy and jointness in our apprehension of popular sovereignty. Loosely building on Searle, we distinguish between three components in this social construction, namely status, rules and intentions, each of which appeals to a fundamental collective intuition about the constitution of social reality (Figure 1).<sup>2</sup>

### **Status**

Most fundamentally, social facts are forged out of brute facts by acquiring a status, that is the label given in the social world to a *recognised role*, a *raison d’être* that recognised by the collective.<sup>3</sup> ‘Things’ become social realities like money, figures of a chess game, flags, etc. Persons become husbands, wives, CEOs, citizens, bicycle owners, welfare recipients, members of parliament, etc. Moreover, institutional facts can turn into other institutional facts through the iteration of their status: university professors become deans, etc. The role of recognition distinguishes social functions from natural functions. The description of the function of the heart does not change its function. But if an actor is ascribed a certain social status this will change what she can mean and do socially – either alone or with others – thanks to



**Figure 1.** The social construction of democracy.

Note: The number of countries differs by year, depending on number of member states.

Source: FP7 bEUcitizens project, deliverable D4.2 (Cheneval/Ferrin, 2015).

a range of competencies or empowerments. Thus, a group of individuals can acquire the status of citizens and collectively acquire the status of a sovereign people. The status thus is an institutional role of an individual or group underpinned by a bundle of constitutive and additional competencies. A constitutive competence of the sovereign is for instance the competence to make the law. A person with a status can gain or lose competencies without losing its status. Persons with status can differ with regard to the thick or thin bundle of competencies they hold. For instance the owner of a car might only be allowed to drive at 30 mph on certain streets and still be the owner of the car. Similarly, the sovereign can be bound by legal and political constraints or disabilities that keep him from making certain laws and still be the sovereign law-maker (Hart, 1994). Citizens belonging to different peoples can have a different bundle of rights without thereby cancelling their status of citizenship. The sovereign can choose to interconnect its political actions (say an election, a vote, demonstrations, etc.) with that of other sovereigns or constrain the action of its state, without losing the status of sovereign peoplehood. Nevertheless, the status of a sovereign people is not the only relevant element but depends in turn on two additional features of social facts.

## Rules

All social facts require certain kinds of *constitutive rules* to come into being. These we can call with Searle ‘constitutive rules’ or rules of the games – whether the game is parliament, marriage, chess, tennis, and so on. In contrast, secondary rules can make the game fairer, more effective, more transparent, etc. but are not required for the game to exist in the first place. Thus, the political people exist as a collective that exercises law-making powers on the basis of constitutive rules that can be found either in a formal constitution or a functional equivalent. It is these rules that give it its status and the functions associated with it. Accordingly, these rules tell us that a certain ‘people’, becomes a ‘sovereign’ in a certain domain or jurisdiction through a process of internal and external recognition.<sup>4</sup> In a democracy, these rules come to be adopted and enforced expressing the interconnectedness between separate peoples.

## Intentions

Ultimately, social facts are only conceivable as expressions of the collective orientation or intentions of human action. Marriage for instance, is founded collectively and publicly and is unthinkable as the outcome of some invisible hand process, as an unintended consequence of individual actions directed towards other ends.<sup>5</sup> Similarly, the people and the sovereignty of the people involve collective intentionality. Leadership can articulate such collective intention, render it visible as it were, anticipate, reflect or betray it but not replace it. The ‘ultimate’ act of political collective intentionality is expressed in the formula ‘we, the people’. Obviously, theorists have endlessly debated whether the formula expresses the pre-existence of a sense of the collective or whether it is the rules – the constitution or otherwise – which in turn invent as it were the story of a collective intention. We do not need to enter this debate but simply state that it is consistently conceivable to enact the expression of a collective intention of various peoples as including the intention of being constrained by each other as peoples that we can translate as ‘we, the peoples’. Joint democratic sovereignty is thus a legal disability of the sovereign peoples. It constitutionally constrains them not to perform certain acts of sovereignty alone but only in accord with all the other members of the polity of *démoi*. The legal disability needs to fulfil the following conditions in order not to be inconsistent with a strong notion of sovereignty: (1) it has to be authorised and appropriated by the sovereign peoples; (2) it has to be revocable by the sovereign peoples, (3) the sovereign peoples mutually recognise each other as equals in matters of co-sovereignty.

How do these three categories relate to each other and help us think through the social possibility of democracy in Europe?

## Citizens as ‘national’ vs. ‘European’: Bringing horizontality back in

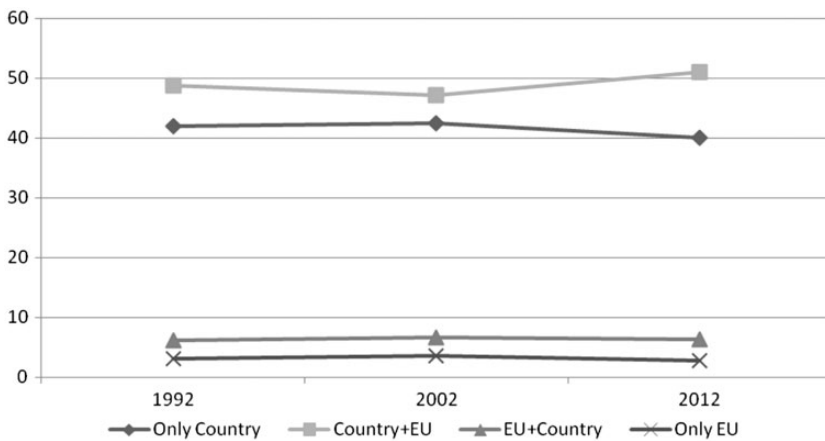
There are various conceivable ways of constructing a socio-political reality around the dual social fact of sovereign autonomy and jointness or democratic interdependence among peoples. One such and perhaps the most mainstream simply consists in the juxtaposition of the ‘national’ and the ‘European’. In his recent book, *The Crisis of the European Union* Habermas seems to have moved away from his prior insistence on pure supranationality and now speaks of shared sovereignty (*‘geteilte Souveränität’*) and of a plurality of peoples as *pouvoirs constitutants* with regard to the European Union (Habermas, 2011). Such plurality is indeed what we see as the premise of democracy.

But how are citizens in such a democracy supposed to construct their status as part of a sovereign people, a role defined by a bundle of rules which organise their *joint* sovereignty with other peoples as well as overlapping intentions to act as Europeans, taking other Europeans into account in the myriads of political and legal acts which they authorise?

The role of identity and more precisely, self-identification in explaining the support for and maintenance of political regimes has been the subject of long-standing

scholarly debate (Castiglione, 2009; Checkel and Katzenstein, 2009; Wiener, 1998; Risse, 2001; Herrmann, Risse and Brewer, 2004; Deutsch, 1966), long framed by the debate between essentialist and modernist versions of national identity formation. In the EU context, mainstream socio-political scholarship analyses with much sophistication the various ways in which EU citizens 'feel' or 'identify' both as European and national and how this may vary across states, class, age groups, as well as diachronically (Carey, 2002; Cram, 2012; Duchesne, 2013). Clearly, national identity is not an obstacle to European integration. The fact that a majority of EU citizens combine national and European identities in different proportion rather than either only national or only European identities suggests an a priori democracy political outlook. According to Eurobarometers, 20 years after the Maastricht Treaty, around 50% combine both, 40% only national, and less than 10% primarily 'European' (either only or in combination with nationals) (Figure 2).

To be sure, this dichotomous way of framing (European/national) has been much contested for failing to distinguish between the many different meanings of 'feeling European' or 'feeling national.' 'European' can be understood in cultural or religious terms, or it can be understood as a political culture; and identifying oneself as European in whatever sense does not mean that one supports the EU; and even identification with the EU or feeling that one's country 'rightly belongs in the EU' does not mean support for its specific policies. Moderate Eurosceptics on the continent don't question the EU's existence or even their country's membership in it but systematically oppose most of its policies, a disjuncture widened with the Eurocrisis; both Irish and British citizens tend to feel more 'national only' than other nationalities but the former identify with the EU dramatically more than the latter and while we increasingly hear the rhetoric 'I feel European but oppose the EU', there are others who may support the EU without labelling themselves



**Figure 2.** Identification with each of the territorial levels.

Note: The number of countries differs by year, depending on number of member states.

Source: FP7 bEUcitizens project, deliverable D4.2 (Cheneval/Ferrin, 2015).



as Europeans. Moreover, interrelated as they are, these self-ascriptions should not be taken at face-value given the importance of implicit identification in creating a latent political community in the EU (Cram, 2012).

While these distinctions are critical from a democratic viewpoint, we suggest an additional reason why the label 'European' may not always capture what we are after, namely a certain *quality* of national consciousness, the propensity for adopting outward looking perspectives, what might sometimes be called cognitive (as opposed to affective) empathy. If citizens internalised the intentions that correspond to their status as joint sovereigns, they would identify horizontally as connected somehow with other European peoples, which may 'feel' different than to identify vertically as connected to a different realm called 'European'. In this sense, the political and even legal notion of 'European citizenship' embodies a norm of democratic belonging based on mutual recognition, a norm of transferable belonging capable of shifting its centre of gravity among the multiple *demoi* (Nicolaidis, 2012; Strumia, 2015). And this form of identification in turn has implications in terms of preferred rules or institutional design.

This is where we differ from Habermas' interpretation in *The Crisis of the European Union*. For him, in the EU constitutional process, each citizen opposes him or herself as 'European citizen-person' and as 'national citizen-person'. As if it was possible to divide humans into two persons who, as citizens hold two different functions. But what does this *really means*? how does this 'twin' feeling translate into the real citizen's self-perceived role, and as a consequence into *collective intentions*? Is it not problematic to oppose oneself in a constitutional process as national and European citizen? In our view, natural persons may and generally do have several and layered identities. But at the very same time, one holds and has to be able to express politically only one opinion regarding an identical subject matter. In other words, the *constitutive rules* of democracy need to foresee procedures in which the doubling or opposition of the two personhoods of the citizens (national, European) is reflected in a double aggregation of votes (of individuals or assemblies), whereas the citizens or representatives hold one single opinion on a given political issue and cast only one vote. The multifaceted status of a citizen in a democracy needs to be reflected in the constitutive rules of aggregation procedures that count votes several times in different entities (e.g. double majorities, etc.), not in constitutive rules that split the status of citizen into two opposing personalities. In terms of *collective intentionality* citizens as unitary persons need to be able to make a single and simple conscious act of appropriation of their *status* as members of a sovereign that rules with other sovereigns via common procedures through double aggregation of votes and co-decision-making procedures.

A theory of the duplicity of the citizen effectively opposing each other within the same citizen person reminds us of Dr B in Stefan Zweig's *Chess Story* who is driven insane by playing chess against himself. He can only escape from this condition by stopping to play. European citizens involved in a game in which they have to oppose themselves as national vs. EU citizens could only escape from the insanity of this project by stopping to be involved in politics or alternatively opting for

another game altogether as pro-exit political parties advocate across the EU. One cannot take part in a constitutional process of popular sovereignty against oneself, just like one cannot play chess against oneself.

In a polity of interconnected peoples, the challenge to individual citizens is exactly to integrate constantly and to various degrees depending on issues, his or her interests as a national and as a European, to buy into a logic of positive sum game where solutions are found that might require giving up something today in the expectation of payback tomorrow, in other words institutionally driven trust, diffuse reciprocity and the sense of belonging to a community of overlapping interests (Nicolaidis, 2007). For a democracy to work, we need *collective intentions of togetherness and co-sovereignty* among all its peoples – but the modes and extent of internalisation of such intentions can of course vary widely among them.

Bringing horizontality more centrally into our thinking about multilayered citizenship therefore leads us back from the citizens to the meaning of popular sovereignty and the territorial rule of multiple *démoi*. Is it possible to make any sense of the claim that peoples are sovereign separately if together they are part of a larger political unit with shared or overlapping *rules* at the same time? We think this is the case because sovereign peoples are finite entities in the real world and they can be bound by legal disabilities in a non-contradictory manner. A popular sovereign that is not bound to constitutive rules is unthinkable. Sovereigns can be authors of constitutive rules regulating their common acts of sovereignty. They remain sovereign as long as these rules are revocable, as long as sovereigns can formally exit the system or veto the change of the constitutive rules. This feature, we believe, is the most basic principle underlying a democratic order.

Sovereign people in the international community are constituted both by internal recognition of its members' *status* and external recognition by other peoples. In circumstances of multiple *démoi* coexisting within one political order, the nature of this double-faced recognition of status changes. The very fact of democratic interdependence of the multiple peoples creates a new kind of deeper mutual recognition, while internal recognition is increasingly about distributing the costs/benefits of internalising the circumstances of such external recognition. While state sovereignty is by definition constituted by mutual recognition in the international system, in this story, it is popular sovereigns who ultimately constitute each other; from a political and legal point of view, they are only possible in a group.

It is only against this backdrop that constitutive *rules* take on their full import. In the EU context, they hold that the peoples are the *pouvoirs constituants* of the larger political unit, whose competences must be delegated case by case and unanimously by the peoples. The sovereignty of the peoples is respected and its pooling codified in an evolving mutual dependency. Firstly, this means that entry, exit and basic rules are in the competence of each people participating in the larger political unit. What exactly this entails procedurally can be debated, but at its core it means that their existence as sovereign peoples cannot be undone in the name of political incorporation into a larger unit – not against their own choice (Viehoff and Nicolaidis, 2015). Secondly, this means that the individual sovereign peoples hold the right to sit at the table of the sovereigns and to participate in common rule making. 'To sit at the table

of the sovereign peoples' is a metaphor for common democratic rule-making in the areas delegated to the higher level by representative and direct democratic instruments. The term 'sovereignty of the peoples' (plural) expresses a procedural link of sovereigns constituting a common political unit. Other units, such as corporations, no matter how powerful in economic terms, are not possible members and co-deciders at the table of the sovereigns.

The key to such a construct is to sustain the tension between two concurrent requirements: legitimacy of separate, self-determined *démoi* on the one hand, and openness and interconnectedness implied in the notion of liberal democratic *démoi*, on the other hand. Democracy, in short, stands for the idea that separate sovereign peoples *can* freely affirm common political institutions and exercise political authority together within the institutional arrangement they have set up. In such a construct, citizens will vary widely in the manner in which they identify with what is in common but such identification needs to be analysed as horizontal – with other peoples – rather than purely vertical – with the EU. In our view, the Eurocrisis constitutes a critical test for the democratic character of the Union precisely because it puts into question both these requirements at one and the same time. Before delving into how this is the case, we need to ask why overturning these requirements would be a problem.

## **Democracy and boundedness: Law, territory and authority**

There is of course considerable debate on the extent to which the status of sovereign people has lost relevance in today's interdependent world or conversely is bestowed with the kind of permanence which precludes simple incorporation within bigger units – the kind of incorporation which many mainstream analysts of the EU call for as a response to the Eurocrisis: why not simply argue that if only the EU could set up mechanisms of resource transfers and shared decision making present in federations like the US, thus calling a European people into existence, it could then become a full-fledge economic and not only monetary union, truly viable in the long term?

It would appear self-evident that no political construct can last, especially if grounded on popular sovereignty, without the magic ingredient that is authority, or more precisely 'de facto authority', which, according to Weber amounts to legitimate domination, i.e. domination in which obedience is motivated by a sense of the moral appropriateness of obedience (Rosen, 2013; Weber, 1968). In turn, popular sovereignty expresses itself authoritatively through two other socially constructed institutions: the law and bounded territorial jurisdiction. The fundamental question in a law abiding society is who is authorised to create institutions and their *modus operandi*, institutions that are in turn authorised to make binding constitutive rules within a certain domain and territory. In other words, who, ultimately, is authorised to govern society and what are the boundaries of this authorisation. To the question, we answer: a people whose status is that of a sovereign people. In the EU context, sovereign peoples may be constantly negotiating the interconnected character of their respective boundedness, but not this

boundedness itself. If the EU's democratic character is to be maintained, national legislators and executives may be monitored on 'imbalances' of all kinds but they are the only ones who can legitimately adjudicate the budgetary trade-offs between, say, school and pensions (Nicolaidis and Watson, 2015).

For the sake of argument, we adopt HLA Hart's view that the idea of law and the respect due to the law can be explained without addressing the actual substantive justifications, moral or otherwise, for deference to law (Hart, 1994).<sup>6</sup> Without entering debates in legal theory, we can acknowledge with normative positivists that the moral and political context in which the core ideas of positive law were first articulated do matter, to the extent that what one cares about is indeed the question of durability of human social arrangements to entrench social peace. As Hart aptly argues:

The proposition that settled law should be respected, until it is duly changed . . . is itself an ethical concept, resting on the recognition that defiance of institutional settlements touches or may touch the very foundations of civil order, and that without civil order, morality and justice in anybody's view of them are impossible. (Hart and Sacks, 1994)

But there is no need to refer to moral legitimacy beyond this foundational rationale. With Hart, one could simply say that the status of being the sovereign refers to the power to authorise those that make and enforce law as rules of obligation (Hart, 1994). Accordingly, the authority of law stems from such authorisation and is directly connected to social legitimacy. In the absence of social recognition, there is constant legal uncertainty and struggle. Laws may be proclaimed and reasonable, but if the authority that proclaims the laws is not recognised as legislator due to the illegitimacy of the rules conferring power of legislation, the law will not be able to do what it is supposed to do in the first place: stabilise expectations, allow for rule-based societal competition and cooperation and ultimately guarantee social peace. If there is to be generally binding collective action, there needs to be a rule of law, and if there is to be such rule of law, there needs to be sovereignty understood as the fundamental settlement of the question of authorisation on a specified territory.<sup>7</sup>

There are good reasons to limit the scope and territory of the power of the sovereign in both space and time and to avoid having the same sovereign for all domains. In order to solve the fundamental problem of authorisation one needs either a generalised habit of obedience to a sovereign with minimal rules-conferring powers, or constitutive rules that determine who are the sovereigns for distinct domains or territories (Hart, 1994). In the latter case, there need to be rules that determine how the sovereigns are separated from each other and how they can act in a collectively binding way if they so desire. With popular sovereignty, we are dealing with a collective sovereign, the people, that is a procedural aggregate of the 'will' of the many real human beings to whom the status of citizen is conferred. Any process of aggregation requires rules. These rules may confer power but not unlimited power. On the contrary, they both establish and limit what the sovereign can do or authorise. Indeed, the idea of sovereign with absolute powers is in contradiction

with the institutional fact that any sovereign comes into social existence as sovereign by constitutive rules regarding its status that are themselves subject to *continued* intentionality. The arbitrary and unbounded exercise of political power by an absolute sovereign does not solve but reproduce the problem of authorisation.

Similarly, the interaction of sovereigns and how they can act together ought to be regulated under rule of law precepts thus widening the scope of the action of the sovereign in relation to other sovereigns. Just as there is nothing contradictory about legal disabilities of the sovereign, there is nothing contradictory about rules of common action of the sovereigns to which the sovereigns have given their approval individually under a condition of revocability. Democratic popular sovereignty adds to this that the approval has to be given by the *pouvoir constituant*, the collective of citizens and not a body of representatives or a king.

It is in this sense that European democracy continues to rely on the permanence of legislative authorisation by its individual peoples acting as constituent powers for primary law. In these cases, the bypassing of state vetos poses a fundamental problem (e.g. resorting to signing the fiscal compact outside the Treaties to bypass the potential British veto). Secondary law and even more, regulations and programmes, raise more difficult questions. Does shared law at the EU level allow for troika designed conditions for lending to programme countries to bypass national parliamentary authorisation? The question of legitimate authority therefore boils down to the coerced (or not) character of authorisation, not the need for authorisation itself within each bounded jurisdiction.

Coming back to the status of a sovereign people, we can imagine that there be different views on the scope of validity of its status: the group defined by the criteria of membership, the subject matter in which a sovereign is competent, or the territorial boundaries within which the governmental acts of the people are enforced. The rules conferring powers can exempt certain subject matters from the competency of the sovereign or the community of sovereigns, legally disabling it or them from acting in a certain sphere. The status of sovereignty implies a delimitation of the scope of competence of the sovereign whoever the sovereign might be.

As an alternative to territorialised democracy, we can ask if non-territorial functional democracy would be a viable option of social construction by constitutive rules (Besson, 2006). Is it possible to ascribe different highest competencies to legislate and govern to different sovereigns without any delimitation of territory and only on the basis of a delimitation of functional competence? For instance, A would be sovereign in matters of environmental protection, B in matters of social welfare, C in matters of financial regulation, D in matters of police, etc. Each of these sovereigns could be competent over the same or different but overlapping territories. In its purest form, this vision would be the democratic version of post-war functionalism, the most famous being David Mitrany's, who believed that the entire globe could and should be rationally governed by functional organisations dedicated to maximal effectiveness in the achievement of their allotted sphere. This leads to two questions: (1) is functional sovereignty, defined by the scope of competence of a sovereign (*ratione personae* or *ratione materiae*), sufficient to establish

the status of sovereignty as previously defined? (2) Could functional sovereignty exist without territorial sovereignty?

We answer both questions negatively, but with important qualifications. If one affirms only functional sovereigns according to sectors of government, this begs the questions of prioritisation, trade-offs, coordination and resolution of conflicts, as well as that of allocation of scarce resources in a given society. It is quite plausible to think that the areas of legislation corresponding to these functions are very much interlinked and ultimately not divisible. Hence, there will likely be conflict between the functional areas and unclear delimitation of the areas of competence already on the conceptual level, let alone on the level of practical realisation. There would necessarily need to be a shared sovereignty above the functional 'sovereigns', otherwise the problem of authorisation would not be resolved. In other words, the competence of the sovereign cannot be determined by separate functionality alone as it encompasses all interrelated functions of government. Functional organisation of government cannot replace the territorial delimitation of sovereignty. Even a global functional state would have territorial boundaries in the sense that the territory in which the sovereign counts as sovereign is determined by the extension of the globe.

Democracy then can be distinguished from both federation and confederation by the 'open boundedness' of its collective decision-making processes. The decisive difference between a democracy and a federal state lies first and foremost in the greater permanence of territorial boundedness in the former, reflected in constitutive rules enshrining the right of veto and the right to exit which the sovereign peoples enjoy vis-à-vis the system and more generally in horizontal, informal and decentred modes of decision making (Nicolaidis, 2014, 2015a). In contrast, traditional confederal schemes are driven by intergovernmental centralism, whereby common government implies that governments represent the state at the centre while in a democracy, such common government is supposed to be carried out via all institutional manifestations by which a peoples enact popular sovereignty. A fully fledged democracy involves peoples checking peoples, through checks and balances among parliaments, the supreme-courts, the executives and direct democratic voting. The institutional design of democracy holds that all peoples involved are institutionally interconnected in various modes of co-decision making. Democracy, as opposed to international relations among democracies, is the shared exercise of popular sovereignty among the institutions to which this power has been conferred by each people. In this (democratic) light, the so-called rules-based system created by EMU cannot simply be remedied by handing over more sovereignty to a common institution. Instead, shared sovereignty needs to be exercised at all levels of interaction between peoples sharing a common currency.

## **The stability of European democracy**

If the social facts that make up our political reality are defined by status created by some sets of constitutive rules and shaped by some recognisable collective

intention, we need to ask under what conditions these constructs are stable – built to last due to self-sustaining processes. Historically, many single-demos states are unstable (think of Germany in the Weimar republic) and many democracies, if they come into being at all, will be so as well. A concrete system's correspondence to the formal institutional structure of either statehood or democracy as such will hardly guarantee stability, independently of additional conditions. Indeed, we argue here that the Eurocrisis has put into question the emerging equilibrium achieved in the EU in the preceding decades.

We know that the fabric of social reality is both transient and sustained, both a constellation of fixed objects such as walls or collective memories, and a combination of on-going processes amenable to countless forces which interact in unpredictable ways to effect change. What is the comparative advantage of status conferred by rules regarding stability as opposed to supremacy conferred by physical struggle? To be sure, the alpha-male leader of the baboons has to defend his supremacy in a constant fight and will not be able to argue with reference to be agreed upon rules conferring power. A president, dean, etc. can do that but s/he can potentially lose his or her job. At the same time, the social status as such is conferred by rules for a certain amount of time and the sense is that during this time the function can be exercised without constant fighting for the status and its rules. Obviously, the stability of a status changes in society according to circumstances. But what does not constantly change is the fact that the status is conferred according to collectively recognised rules, and valid until revocation according to rules. Deans, presidents, CEOs, etc. come and go, but the function remains relatively stable.

In the case of the state, the desired stability of the status is expressed in the very name. The Latin word 'status', the English word state, or German 'Staat', French 'état' all nominally mean what they say. The state is supposed to be an institutional fact of the greatest possible stability and durability, the stable institutional fact *par excellence*. The status of the people as the sovereign, which lends its authority to the state within a territorially recognised jurisdiction, is part of this design of greatest possible durability. Establishing the people as the sovereign is supposed to guarantee the continuity of generally binding rule making. The very meaning of the political status of the sovereign is to transform constant struggle for power into a stabilised and predictable process that allows for stable government representing 'popular sovereignty' irrespective of contingent patterns of majorities and minorities.

The key then to the historical stability of status depends in turn on the permanence of constitutive rules, which determine when this status is accorded or recalled. And such permanence is in turn a function of the collective understandings or intention that binds individuals to a given collective social order. The president of the United States is not more or less the president of the United States according to fluctuations of conditions such as influence, performance, opinion polls, etc. Although all these conditions are contingent and submitted to constant change, the status as such and the formal competencies attached to the status remain stable by the recognition of the rules that constitute the status. There might also exist

many people who all have the same or maybe even better talents to exercise the function of a status, but only the person has the status to whom it has been conferred according to constitutive rules.<sup>8</sup> Optimally, the selection procedure is set up in such a manner to guarantee that there is a high probability that the person who will be chosen as president, dean, CEO, etc. actually has sufficient talent and preparation. But in this regard, human institutions are never beyond doubt. All the same, the purpose of the durable status of given institutions according to collectively recognised rules is to stabilise rule-based competition and cooperation among individuals and groups. Referring back to our reflexions at the beginning of the paper on the status of citizen in a democracy, we can say that not only enduring factual recognition of rules is a criterion of stability of status but also the internal coherence of the rules that constitute the status.

Stability in turn is a paramount – for many *the* paramount – requirement of international order. Indeed, the very notion of ‘order’ expresses such a requirement. The European Union was historically the institutional expression of a collective will to transform the European system of states to move away from the deep instability of traditional power politics that had plagued the European continent for centuries. The EU was meant to give the European system of states a stable status as a peace union. Hence, the overriding requirements of stable social order within and stable inter-societal order among states have come to be intrinsically connected in Europe over the last half century.

But what do we mean by stability? Political institutions can change and undergo reform without instability and political institutions can remain but be undermined by deviant behaviour. So it makes sense not to define stability by lack of change but rather by continued recognition of institutions and by lack of deviant status behaviour. We therefore define political stability as the continuity of acceptance of changing or unchanging political institutions and the relative regularity of the flow of political exchanges that take place within the framework of a given political institution.<sup>9</sup> From a behavioural point of view, this corresponds to a generalised restriction of members of a political society to the limits imposed by political role expectations and institutional constraints.

Can democracy fulfil the stability requirement or does it need to be dismissed as inherently unstable in the way James Madison dismissed pre-modern and pre-democratic confederations? We argue that to adopt a Madisonian frame for the EU is misguided, supposing as it does that a confederation either develops into a federal state in due time or is condemned to disintegrate. This is a misleading analogy which fails to take into consideration the specific features of inter-democratic integration, i.e. the features of differentiated integration of peoples’ and states’ participatory procedures. We start with formal theory and then ask whether it is empirically plausible that the EU withstands its current crisis to return to the trajectory of a stable democracy.

From a theoretical perspective, states can be highly unstable if their people do not broadly and explicitly recognise the constitutive rules by actively upholding institutions and by participating in common institutional action. But this recognition, internal to states, is hardly a sufficient condition of stability, especially not on



a European continent with a multitude of competing states. Stable states are thus quickly entangled in all sorts of collective action problems, which in turn can jeopardise their internal stability. Internal recognition therefore has to be put into relation with the recognition of and by others. From the very beginning, i.e. with the creation of the Coal and Steel Community, European integration was conceived as a way to overcome the security dilemma of international relations without creating a new security dilemma on a higher level of integration. The (mimetic) logic of gradualism, of creating centralistic statehood at ever higher levels by moving the comprehensive monopoly of identity and power up the ladder of integration was to be overcome by partial, horizontal or multicentred integration. Internal recognition would be strengthened, not made redundant, by external recognition. This was to create some centralistic pressures, but was sufficiently differentiated to constrain delegation of sovereignty to a centre. The European system was created as an ensemble of horizontally and vertically cross-cutting cleavages and bonds of power and interests, upheld by the recognition of common institutions and the status interconnected sovereignty of the peoples involved. In other words, a demoicratic system tries to achieve stability by integrating internal *and* external recognition into one institutional setting. This European-wide institutional setting of democratically accepted national and common institutions and procedures is a far cry from a minimally institutionalised, pre-modern and small confederation trying to survive in a Westphalian state system dominated by imperial and monarchic powers.

The result has been an incipient demoicratic EU that has been around for quite some time, stabilised at different equilibrium points of incentive to cooperate along the way. These successive equilibria did not necessarily need to be collectively intended *ex ante*, but they needed to correspond to societal imaginations of what interdependence implied.

This leads us to the objective theory of demoicratic stability in the EU. To start with, if we recognise that unlike the ideal-type nation, a demoicratic EU does not need to approximate the 'imagined community' described by Benedict Anderson (1991) it must accommodate a diverse range of imaginings among its citizens of what it is, might be or should be (Cram 2009; Lacroix and Nicolaidis, 2010). Allowing for the coexistence of these diverse perspectives has long represented a kind of narrative 'constructive ambiguity' which has helped avoid entrenched teleological struggles among European political actors. If the neo-functional bet that political habits of loyalty could be shifted to the European level on the basis of cost-benefit calculations – what loyalty to what polity pays most – has largely failed, there is not one single alternative story out there. If we live in a post-functionalist EU we also need to probe harder the constellations of identity within which interest calculations are embedded (Hooghe and Marks, 2008). Elite-driven, supranational and technocratic progress in integration has reached a point where it no longer flies underneath the radar of public debate. If citizens understand themselves as living under the rules of a democracy, there is of course a deeper sense of loyalty, that which makes us continue to try to stay together *in spite* of cost-benefit calculations, which is not an obligation to agree, but a commitment to try. Citizens will

progressively internalise such a commitment, assume that their politicians are bound by it. And they will understand ‘the EU level’ as less whatever happens and is decided in Brussels, than as what is acceptable to majorities in other European polities.

The EU has shaped national economies and overtaken core state powers such as monetary policy, and it covers identity-sensitive issues such as immigration. In the course of this process, Euro-skeptic mobilisation has increased whereby failure to support a set of policies is conflated with failure to support the very existence of the polity. This may, however, provide an opening to the extent that the crisis has greatly contributed to the social construction of democracy by raising the level of mutual awareness of national politics across Europe. While the populist character that drives the politicisation of European issues pits peoples against peoples in a race to mutual closure, there exists countervailing forms of mobilisation of publics across Europe. Similarly, that the permissive consensus that was a key to the EU stability as an incipient democracy is now shattered may be a good thing for our democratic aspiration and the authorisation by the *démoi* all the way down.

If this is the case, then democratic stability depends today more than ever on democratisation. What do we mean by this? We mean that the continued equilibrium that has characterised EU integration until now must be supplemented if it is to be sustained under increased centralisation of competences. If largely unintended stability conditions have to date shaped a status-cum-rules institutional system, the EU requires an intentional transformative dynamic reflecting a genuine democratic ideology or ethos.

Let us take each of these propositions in turn.

First then, and this is the bread and butter of integration scholarship, democratic equilibrium depends on *democratic institutions* – or the rules component of social construction. To simplify, we concur with mainstream scholarship which analyses EU institutions as the ongoing balance between two dynamics, neo-functional supranationalisation and intergovernmentalism. It is not enough for democratic theory to observe this balance analytically, but we need to justify it normatively. If neo-functionalist centralisation were the only or dominant force, European integration would increasingly reduce the manoeuvring room for national *démoi* in favour of supranational democracy. However, the countervailing forces of reaffirmation of democratic self-government mitigate this centralisation process and encourage the development and strengthening of the *démoi* at the centre of power and of EU-related competences of national democratic institutions. If the two countervailing dynamics keep each other in check and strengthen both democratic institutions at the EU level and the EU-related powers of national-level democratic institutions, *démoi*-cratic consolidation obtains. By contrast, if one of the dynamics gains the upper hand, either disintegration or over-integration will occur, and the realm of *démoi*-cracy will move towards international politics or national politics. In the language of theories of federalism, the EU will succumb to either federal overstretch or state free riding (Kelemen, 2007).

This view suggests that as an institutional construct, *démoi*-cracy is the unintended outcome of two opposing institutional and political dynamics triggered by

the deepening of European integration rather than a goal pursued for its own sake. Whereas Euro-skeptics aim to strengthen national democratic institutions and regard the EP with suspicion, integrationists favour democratisation at the EU level and view the empowerment of national institutions as cumbersome. EU-level institutions focus on supranational democratisation, whereas national institutions seek to increase their own EU-related competencies. Put differently, it suggests that EU *demos*-cracy is '*demos*-cracy without *demos*-crats'. But as marriage cannot be the unintended outcome of an invisible hand process between two individuals, so democracy cannot be an unintended outcome of the processes just described, because it would be missing the intentional recognition and approval of its constitutive rules by the peoples as constituent parties. There needs to be a public and mutually recognised act of appropriation of the status-cum-rules of democracy by the peoples.

This assertion takes us to the second analytical plane, that of collective intentions, which we refer to as *demos*cratic *ethos*. Unintended stability conditions alone will not make a stable democracy. They are the necessary conditions but need to be appropriated by the conscious affirmation of the EU's democratic structure by its constitutive peoples. Otherwise, the two dynamics discussed above will be ungrounded as it were, and create destabilising countervailing social forces, in short, nationalist sentiments at the national and European level. On one hand, an idealist or messianic technocratic drive to fulfil what is perceived as the overriding project of unity; on the other hand, resistance to supranationalism either simply due to the yearning for local control or more darkly to the resurgence of narratives of national exceptionalism.

In order to escape this conundrum, individual peoples as collectives of citizens would need to mobilise collective political ethos to reflect their de facto democratic *status*, each as a people committed to internalising the externalities stemming from their interdependence. And this in turn requires national political communities to learn to manage their democratic interdependence – to discuss the ways in which the functioning of their respective democracies and their associated pathologies affect each other. What are the resources for such mutual engagement?

It could be the case that some forms of 'nudging' on the part of EU institutions, leaders and other opinion makers can play a role, at least if they fall short of disastrous top-down efforts to Europeanise citizens' identity. Following Billig, Laura Cram speaks of banal Europeanism as opposed to heroic nationalism, that is 'the day-to-day, low-level reinforcement of a shared consciousness, albeit passive, which is crucial to the maintenance of the regime' (Billig, 1995; Cram, 2012). In this spirit, we could observe that as a social fact, the democratic construct that is the EU is reflected in part in the symbols and practices through which citizens experience the EU (open borders, single currency) to the extent that these symbols tend to show the EU as complementary to, rather than in competition with the nation-states (Cram, 2012; McNamara, 2015). Accordingly, even the continued use of the very term 'Member State' could be viewed as an unremarkable but constant reminder of belonging to the EU. But in her analysis of the EU's

cultural infrastructure, and infrastructure she sees as endowed with a kind of banal authority, Mc Namara argues that such modes of legitimation are intrinsically fragile, as if stability required choosing sides, landing on the cognitively easier life on either shores of the demoicratic rubicon.

Ultimately, demoicratic brings us back to the characteristics of Europe's transnational public sphere (Risse, 2010). We need to better assess how much is lost in translation when EU citizens communicate across borders. In this regard, we see an absence of demoicratic attitudes among EU citizens and demoicratic frames in public discourse (Hurrelmann, 2015). Much of the media has a hard time distinguishing democratisation of the EU from access to its supranational structures and, at least discursively, tends to consider the existence of a European people (whatever it may mean for them) as a precondition – whether to applaud or regret its evanescent character. The idea that the EU might constitute a third way rather than a waystation between an old fashion intergovernmental and an emerging federal Europe hardly seems to exist in the European public sphere (Nicolaidis, 2015b). Instead, the tyranny of the dichotomy constituted by these two poles is alive and well.

We should not be too quick to assert, however, that demoicratic principles are simply an academic construct. EU citizens often seem to subscribe to a view of Europe combining multiple *demoi* and a single *kratos* without drawing the logical consequences regarding the requirement of openness of the respective *démoi* (Beetz, 2015). They *act as* if they understood that the constitutive rules establishing the citizenship and peoplehood of demoicracy cannot work without ongoing demoicratisation, consisting in anchoring common rule-making in national political processes (Cheneval et al., 2015: 15). It is of no use therefore for the Greek and German governments or the Portuguese and Latvian prime ministers to invoke the authority given by their respective 'people' when bargaining with each other. How are we to balance these democratic mandate (short of secretive backroom deals appropriate in classic intergovernmental settings) if these respective people are not given or do not demand cognitive tools for managing their common demoicracy citizenship? A common European public space is not meant to bring about a unique European people but rather to serve as the setting providing each political arena with resources to address questions such as: how should we share the blame (of the crisis) and therefore the burden? How should relative national wealth be translated in relative contributions? How should we think about the distributional impact on others of the rules we promote at the EU level and sometimes the rule we contribute to enforcing on citizens in other member states? In other words, demoicratic national conversations informed by interconnecting democracies.

## Constructing demoicracy through crisis?

Throughout this essay, we have asked more questions than provided answers. We end with one last hypothesis which would need to be tested empirically. That is that the demoicratic nature of the EU project may eventually be strengthened through crisis, even while Eurocrisis has exposed the normative vacuum underpinning the EU project on numerous counts (solidarity, inter-generational justice, freedom,

civilisation beacon, social model). As the constitutive rules and institutions of democracy are being put to test, we may yet witness the reaffirmation and collective recognition of the EU's democratic ethos.

There is of course a tension between democracy and the constraints and necessities induced by economic conditions and external shocks. To a large extent, this is not a specific problem of democracy but of democracy *tout court*. The necessities and *Sachzwänge* of economics sit awkwardly with a doctrine of free choice by the people. Specifically, it could be argued that monetary union in the EU is simply incompatible with democratic requirements of self-determination, if it did require full-fledged fiscal and political union which would transform the EU into federal state. One could also argue that terrorism and external pressure on borders require centralised solutions that undermine the democratic project in favour of the creation of a federal state. But these are hypotheses that are by no means corroborated a priori. Federal states 'suffer' from asymmetric shocks, illegal immigration and terrorism, these problems do not simply vanish by the existence of a centralised government. It is by no means obvious that the problems facing Europe today cannot be dealt with by the joint exercise of sovereignty.

Addressing the Eurocrisis, we believe that it is possible to imagine a governance system for EMU that is true to the idea of democracy (Nicolaidis and Watson, 2015). This would require amending at least some of the measures adopted since the beginning of the crisis, and perhaps more importantly amending the ways in which they have been implemented.<sup>10</sup> Indeed, it is not the rules by themselves that make the system work but the ways they are enacted by the participating sovereign peoples. In order to reflect the status and rules of shared sovereignty of peoples, a democratic EMU would minimise both the disciplinarian nature of relations between the Union and its member states and the extent of centralised mechanisms put in place to hold the union together. It would allow for some debt mutualisation and it would match the single market with a financial union that falls short of fiscal and political union in the traditional statist sense while doing justice to the increased interdependence of financial markets and mitigating the need for federal transfers (Jones, 2015). In such a Union, insurance on sovereign debt would not need to be radically pooled. Instead, it would require the introduction of an insolvency statute for member states of the Eurozone that includes the responsibility of private creditors, thus reasserting the credibility of the non-bailout clause, bringing the private market of financing public debt in line with the real fiscal situation of states, and taking pressure away from the ESM. Ultimately, there would need to be a much more institutionalised exit clause for the Eurozone than the uncertain messy option that we have today. But in light of the Greek case specifically, it seems necessary to have some form of long run bail-out mechanism in exceptional circumstances. Creditors may continue to insist on consensus decision making; and the associated conditionality may need to be intrusive, if domestic vested interests in a crisis-affected economy are jeopardising recovery; but it needs to come as a last not first resort after all domestic-grounded policies have been allowed to enfold.

This set of institutional approaches, however, is predicated on the capacity and willingness of European publics to support the empowerment of other-regarding

institutions and actors on the domestic scene. We cannot expect most EU populations to passively accept being governed at a distance not only regarding the fact of austerity but also its form, content and timing. Domestic policies must remain accountable to the peoples of Europe, but peoples who feel responsible for the system of rules they are meant to follow. The implication of this democratic imperative has become politically acute in the EMU context. But they ought to hold for the EU as a whole, allowing for an ever deeper social elucidation of its democratic character.

The same diagnosis can apply to the so-called ‘refugee crisis’ which has morphed from a policy challenge to a threat to the nature of the EU project in the course of 2015. The narrative of democratic European citizenship can be considered as a bridge across disconnected national visions of inclusion in Europe that affect in particular the treatment of third country nationals, be they migrants or refugees, it infiltrates the domain of immigration and nationality with logics of rights, where logics of state power otherwise prevail (Costello, 2012; Strumia, 2015). Short of shared immigration competences, this bridge has been imperfectly translated into law through the ‘Dublin Regulation’ that hold that asylum seekers should be received and processed in the first EU country they enter. The flaw of the system has been to rely on negative recognition (refused in one country, refused everywhere) instead of the positive mutual recognition of asylum status between member states. It is the absence of such recognition European governments and their publics have not been accountable to each other. And it is the absence of such recognition that led to Angela Merkel’s *Willkommenskultur-in-one-country*, a grand collective gesture on the part of the German people – as well as others including the Swedes and in their way Greeks and Italians – which has come to compensate for retrenchment elsewhere: peoples checking peoples.

The system may be in disequilibrium, but its porous and decentralised nature leaves open potentials for the bottom up enactment of a fairer and more sustainable asylum policy as cities and communities mobilise across Europe either bypassing or lobbying their respective states. In this perspective, a democratic interpretation of European citizenship is that it grounds state obligations towards those outside the core circle of membership through a commitment to no othering, sustainable inclusion and shared obligation whether the other is a EU national or not. Concretely, this could provide the potential for such a European citizenship narrative to speak to the first-line actors in immigration, administrators and courts triggering processes of socialisation from below and pushing back against nationalist discourse (Strumia, 2015). And these actors will progressively internalise the understanding that each member state administering inclusion and exclusion, acts on behalf of all other Member States and should incorporate their perspectives too.

European citizenship may be derived from nationality in the EU proper, but in fact, it infiltrates a (supranational) discourse of rights into processes of inclusion of third country nationals contrasting with a competing national one, which rather exalts the power of nation states to manage borders and administer admission. Accordingly, territorial sovereignty is tamed, not superseded by the right to cross borders, exercised in a way conscious of the implications of that right. A pan-European welcome imperative progressively replacing the logic of relocation

from within with that of resettlement from outside would not strip the Member States of their powers but rather call for the exercise of their power in mutually respectful way.

## Conclusion

In this paper, we address the question to what extent the democratic character and political authority of a polity like the EU can actually be grounded in a full-flesh social construct, a social reality of democracy that is or could be acted out in the democratic experience and the self-awareness of its peoples. We explore this possibility in accordance with the three components of all social constructs, namely, status, rules and intentions, embedded in turn in strong legal notions of sovereignty and territory. There is no need and indeed there are strong arguments against the idea that a democracy and the EU for that matter are a postmodern and post-sovereign construct.

On this basis, we hope to provide the initial building blocks for a consistent theory of joint popular sovereignty drawing on John Searle and HLA Hart. We delineate the stability conditions of a democracy and argue that the EU can be stable as a democracy. Forced centralisation towards statehood, epitomised in the more recent history of the common currency, is what makes the EU potentially unstable. Instead, the social construction of democracy conceives the constitutionalised peoples (*démoi*) as a social fact and the sovereignty of the peoples as a status ascribed to the peoples via legal disabilities to act alone in certain prescribed areas. We use this construction of democratic reality as a conceptual framework to understand the possibility of popular sovereignty being exercised concurrently by several rather than just one *démos*. Both a common currency and a common refugee regime are compatible with a democracy EU to the extent that they occur within the boundaries set by shared responsibility. If democracy can be socially constructed in Europe in decades to come, we believe that the European project can be rebuilt to last.

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## Notes

1. There are those who argue that the concept of popular sovereignty is itself a fiction and that the popular authorship of laws or self-government is not necessary to democracy which only needs to rely on equal and impersonal rights. In our view, however, the latter is unlikely without the former. See Catherine Colliot-Thélène. *La démocratie sans 'demos'*. Paris: PUF, 2013.

2. Note that while we draw on Searle's categories, we differ in the order and emphasis put in these categories.
3. This dimension is akin to what Searle refers to as 'status-function', although we choose to highlight the primacy of status here.
4. This understanding is consistent with the idea of recognition of sovereignty as constitutive of the sovereign state and its people rather than as purely declarative. For a discussion, see special issue of *International Theory*, March 2013.
5. There is the possibility to understand the origin of some institutional facts as result of an invisible hand process of private interactions directed towards other ends. Carl Menger (*On the Origins of Money*, *Economic Journal*, 2/1892, pp. 239–255) for instance explains the origin of money as result of trade without a special convention or legal act that establishes money. But there exists no such model to explain the origin of a sovereign or of the sovereign people. Public recognition and collective intentionality are constitutive of the people and the conferring of highest law-making powers to a sovereign.
6. To be sure, this view has been harshly debated and contested by the likes of Lon Fuller, John Finnis, or Ronald Dworkin for whom law cannot be separated from the moral evaluation we have of it. On the normative/positive divide in legal philosophy, see *inter alia* the debate between Hart and Fuller (Hart, 1957; Fuller, 1957). For a commentary, see Dworkin, 2004.
7. For a summary on the rule of law literature and the crucial distinction between laws and the rule of law, see Nicolaidis and Kleinfeld 'Rethinking Europe's Rule of Law and Enlargement Agenda: The Fundamental Dilemma' Jean Monnet Working Paper 12/12.' Jean Monnet Working Paper 12/12, NYU School of Law.
8. Similarly, we would argue that the authority of the law depends on its authorship not on its substantive characteristic. See Jeremy Waldron, *The Concept and the Rule of Law*, 43 *GEORGIA LR* 1 (2008)
9. For the latter, see Claude Ake, 'a definition of political stability', *Comparative Politics* 7, no. 2 (1975): 271–283.
10. These measures all consisted in revisiting and supplementing EMU's original stability pact, including the 'Sixpack' and the 'European Semester' (2011), the 'Two-pack' (2013), and the Fiscal Compact (2013).

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