

Legitimacy, Justice and Public International Law

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many other dimensions to international law's legitimacy than democracy, such as the *substantive* legitimacy of legal contents or other forms of output legitimacy. However, *procedural* legitimacy, and democracy in particular, are the most consensual sources of legitimacy in pluralist societies where reasonable disagreement about global justice is pervasive and persistent.²⁷ Democratic law-making procedures respect the minimal political equality of each participant²⁸ and hence allow for coordination under conditions that vest their outcomes with authority and reasons to abide by them. This coordination-based approach to legal legitimacy is even better suited to international law as the latter applies to very different subjects and in very different places.²⁹

True, this does not preclude the co-existence of other secondary sources of legitimacy of international law in certain cases, such as substantive justice, as in the case of *jus cogens* norms, or state consent in certain more limited cases. Nor does it imply that all sources of international law should become democratic to be vested with legitimacy; some simply cannot for reasons pertaining to the nature of their process or to their law-makers.³⁰ Finally, democracy requires a minimal guarantee of human rights to function properly and these are therefore an intrinsic part of the legitimating process of international law besides democracy;³¹ this is the case of the minimal right to political equality and of political rights such as freedom of expression and reunion.³²

²⁷ See Besson, *Morality of Conflict*, chs. 6, 13 and 14.

²⁸ See C. Beitz, 'Procedural Equality in Democratic Theory: A Preliminary Examination', in R. Pennock and J. Chapman (eds.), *Liberal Democracy, Nomos XXV* (New York University Press, 1983), 71.

²⁹ See Buchanan and Keohane, 'Global Governance Institutions'; Caney, Chapter 3, this volume.

³⁰ See Besson, 'Theorizing the Sources'.

³¹ See Buchanan and Keohane, 'Global Governance Institutions'; Buchanan, 'Legitimacy of International Law'.

³² Note, however, that pervasive disagreement about human rights is a reason why human rights cannot constitute a sufficient basis for the legitimacy of international law on their own (contra: Buchanan, *Moral Foundations*, chs. 5 and 7; Buchanan, 'Democracy and Commitment'; Buchanan, 'Legitimacy of International Law'; see, however, A. Buchanan, 'Human Rights and the Legitimacy of the International Legal Order', *Legal Theory*, 14 (2008), 39–70). See Besson, *Morality of Conflict*, ch. 9; J. Waldron, *Law and Disagreement* (Oxford University Press, 1999), chs. 11 and 13.

Theorising global *demoi*-cracy

Global democracy qua theoretical challenge

In a nutshell, democracy requires that all those whose basic interests are affected by policy decisions are able to participate directly or indirectly in the process of making them. Global democracy draws the consequences of globalisation for democracy. National states are no longer the only sources of decisions that affect their legal subjects;³³ many decisions are taken outside the reach of national political processes as for instance by international law-making processes, but also by other national political processes which can produce decisions that affect people outside their electoral constituencies. Globalisation thus generates a legitimacy gap that needs to be filled by globalising democracy.³⁴

Global democracy groups all democratic processes that occur within and beyond the national state and whose outcomes affect individuals within that state, but in ways that link national democracy to other transnational, international or supranational democratic processes. Thus, it is not simply about improving national processes, nor about legitimising international processes indirectly through those national processes.³⁵ Indirect international democracy models of this kind have to answer the famous dilemma they create for states between defending their citizens' interests at the expense of other states and their citizens, on the one hand, and following the rules of international democracy at the expense of their own citizens' interests, on the other.³⁶ Nor should global democracy be confused with the idea of a cosmopolitan state and supranational democracy.³⁷ The idea of a world state has long been regarded as neither feasible nor desirable given the resilience of the national state and its key role in the global law-making processes.³⁸

³³ See J. Habermas, 'The Postnational Constellation and the Future of Democracy', in J. Habermas and M. Pensky (eds.), *The Postnational Constellation – Political Essays*, (Cambridge University Press, 2001), 58; D. Held, 'Cosmopolitanism: Globalization Tamed?', *Review of International Studies*, 29 (2003), 465.

³⁴ See D. Archibugi, 'Cosmopolitan Democracy and Its Critics: A Review', *European Journal of International Relations*, 10 (2004), 438.

³⁵ See Archibugi, 'Cosmopolitan Democracy', 442.

³⁶ See D. Archibugi, 'The Reform of the UN and Cosmopolitan Democracy: A Critical Review', *Journal of Peace Research*, 30 (1993), 305.

³⁷ See, for example, D. Held, 'The Transformation of Political Community: Rethinking Democracy in the Context of Globalization', in I. Shapiro and C. Hacker-Cordon (eds.), *Democracy's Edges* (Cambridge University Press 1999), 84; Habermas, 'Postnational Constellation'.

³⁸ See Archibugi, 'Reform of the UN', 306.

Rather, global democracy amounts to a pluralist model that identifies different levels of legitimation and places national democracy at the core of global democratic processes.³⁹ Even though they have been deeply affected and somehow weakened by globalisation, national law-making processes are much more central to global law-making processes than some claim they are. Thus, they remain crucial to the ratification and implementation of international norms.⁴⁰ They have also become major channels of transnational and comparative law-making.⁴¹ In fact, the pluralist relationship between the national and international legal orders implies accommodating national democratic law-making processes within the international ones. Because they affect the same people normatively, the different law-making processes should be connected rather than hermetically separated and they should be coordinated rather than set in priority to each other.⁴² In revealing those beneficial connections between national democracy and transnational or post-national democracy and the need to open up national democracies to one another, global democracy proposes the implementation of a multi-layered and multi-centred democratic society not only *among* and *beyond* states, but also *within* states themselves.

Of course, if one understands global democracy as inclusive of a multitude of national and post-national law-making processes, it is important to adapt the concept of democracy to the new post-national constellation and its many layers of governance. Global polities cannot be governed in the same way as national ones. Democratic models need, moreover, to be revised at the national level as well. In a globalised world, indeed, national democracies themselves can be deemed deficient in many ways.⁴³ In fact, global democracy is a holistic process that

³⁹ See S. Sassen, 'The Participation of States and Citizens in Global Governance', *Indiana Journal of Global Studies*, 10 (2003), 5.

⁴⁰ See Paulus, 'Comment'; Sassen, 'Global Governance', 10 and 15.

⁴¹ See, for example, A. M. Slaughter, 'Government Networks: The Heart of the Liberal Democratic Order', in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), 199; A. M. Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', *Government and Opposition*, 39 (2004), 159; J. Delbrück, 'Exercizing Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?', *Indiana Journal of Global Studies*, 10 (2003), 29.

⁴² See Besson, 'Theorizing the Sources'.

⁴³ See e.g. Archibugi, 'Cosmopolitan Democracy'; V. Schmidt, 'The European Union: Democratic Legitimacy in a Regional State?', *Journal of Common Market Studies*, 42 (2004), 976; J. M. Guéhenno, *La fin de la démocratie* (Paris: Champs Flammarion, 1999).

integrates these different layers in such a way that their democratic quality can no longer be judged in an isolated fashion and depends on their imbrication with other layers.⁴⁴ Hence, the model of global democracy proposed needs to take into account the existing institutional reality beyond the state and accordingly reassess democratic normative requirements developed in the national context.

In what follows, I would like to argue that there are three main key dimensions that a model of global democracy should have in order to be able to both accommodate and further challenge global institutional developments: first, the who-question: it should have a multitude of democratic subjects, hence the concept of *demoi*-cracy; second, the where-question: global *demoi*-cracy should be conceived of as deterritorialised, hence the concept of deterritorialised *demoi*-cracy; and, finally, the how-question: global *demoi*-cracy is best understood as based on deliberation, hence the concept of deliberative *demoi*-cracy.

Three dimensions of global democracy

Global *demoi*-cracy

The absence of a global demos is one of the main objections to global democracy. According to this objection, government representatives are still the primary participants in discussions relative to global politics, rather than the whole community of global stakeholders.⁴⁵

The problem is that there is no agreed set of criteria as to how to judge what makes a multitude of people a demos or a political community. Self-rule or self-legislation which lies at the core of democracy also implies self-constitution; the community which binds itself by the laws it generates defines itself at the same time as a democratic subject by drawing its own boundaries.⁴⁶ True, these boundaries usually match pre-political and cultural or ethnic boundaries.⁴⁷ Comparative politics and history

⁴⁴ See J. S. Dryzek, 'Transnational Democracy', *Journal of Political Philosophy*, 7 (1999), 30; Archibugi, 'Cosmopolitan Democracy'; J. Bohman, 'From *Demos* to *Demoi*: Democracy across Borders', *Ratio Juris*, 18 (2005), 293; S. Besson, 'Deliberative *Demoi*-cracy in the European Union. Towards the Deterritorialization of Democracy', in S. Besson and J. L. Martí (eds.), *Deliberative Democracy and its Discontents* (Aldershot: Ashgate, 2006), ch. 9.

⁴⁵ See N. Urbinati, 'Can Cosmopolitical Democracy Be Democratic?', in D. Archibugi (ed.), *Debating Cosmopolitics* (London: Verso, 2003), 67.

⁴⁶ See S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2004), ch. 4.

⁴⁷ See, for example, M. Canovan, *Nationhood and Political Theory* (Cheltenham: Edward Elgar, 1996); D. Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000).

have shown, however, that this is not always the case. All it takes often is some kind of 'we-feeling', a form of solidarity among different 'stakeholders'.⁴⁸ In fact, solidarity need not necessarily be pre-political at all; it can be generated by the political exercise itself. This minimal requirement of a solidarity feeling should also apply at the post-national level, therefore. There is no reason why solidarity need respect state boundaries,⁴⁹ as recently exemplified in the European Union.⁵⁰

In fact, this global or at least post-national solidarity need not be exclusive of pre-existing democratic solidarities at the national level. In many transnational areas of governance, one finds different *demos* represented in the same political processes, and even being 'civilised' in this shared political process to borrow an expression used in the European Union.⁵¹ If communities of fate already overlap *de facto*, it would be regressive to try to identify this pluralistic global community in a static manner as a single and territorially delimited global polity.⁵² As a consequence, it is not only the congruence between pre-political and political boundaries of the *demos* which is put into question at the post-national level, but also the single nature of the post-national *demos*.

Global democracy is the outcome of the imbrication of many national, transnational, international and supranational democratic processes in which the democratic subjects are many and do not necessarily constitute a single overarching *demos*. Thus, rather than seek to identify a unitary global *demos*, be it national or supranational, the alternative to an indirectly democratic global polity *qua* union of democratic states should be a directly *demosi*-cratic global polity *qua* union of peoples.⁵³

⁴⁸ See Archibugi, 'Cosmopolitan Democracy'.

⁴⁹ See C. Calhoun, 'The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism', in D. Archibugi (ed.), *Debating Cosmopolitics* (London: Verso, 2003), 86.

⁵⁰ See Besson, 'Deliberative *Demosi*-cracy'; S. Besson, 'The EU and Human Rights: Towards a New Kind of Post-national Human Rights Institution', *Human Rights Law Review*, 6 (2006), 323.

⁵¹ See J. Weiler, 'To Be a European Citizen: Eros and Civilization', in J. Weiler (ed.), *The Constitution of Europe* (Cambridge University Press, 1999), 324; Held, 'Cosmopolitanism: Globalization Tamed?'.

⁵² See Archibugi, 'Cosmopolitan Democracy'.

⁵³ See in the EU context, Besson, 'Deliberative *Demosi*-cracy'; J. Bohman, 'Constitution Making and Democratic Innovation: The European Union and Transnational Governance', *European Journal of Political Theory*, 3 (2004), 315; Bohman, '*Demos* to *Demosi*'; K. Nicolaïdis, 'The New Constitution as European *Demosi*-cracy?', *The Federal Trust Constitutional Online Paper*, 38 (2003); K. Nicolaïdis, 'We, The Peoples of

That is after all what some have read in the maybe not so rhetorical 'We, the Peoples' of the Preamble to the UN Charter.

Deterritorialised global *demos*-cracy

Not only should global democracy be understood as a process connecting a plurality of democratic subjects, but it can only be effectively understood as such if it is conceived of as deterritorialised and as constituted of a global functional *demos* of *demos*. Plurality is not only a quantitative characteristic of global democracy, but also a qualitative one qua functioning mode in each of these many subjects of global democracy wherever they are localised. On this model, different national *demos*, either located separately at national level or together in different fora at the transnational, international or supranational global levels, together constitute a global functional and deterritorialised *demos*. For instance, national citizens elect and vote in national elections as global citizens, thus turning national polities into more or less global ones depending on the topics addressed. Similarly, in international institutions, national representatives deliberate neither as representatives of their national *demos* only nor as those of a single global *demos*, but as representatives of a functional *demos* of *demos*.

This is the only way in which our democratic practices can accommodate the rapidly increasing deterritorialisation of law, which belies the basic democratic principle of inclusion of all those affected by democratic decisions. The progressive deterritorialisation of politics⁵⁴ and law-making processes leads indeed to the erosion of the congruence between those affected by a given set of laws, i.e. the legal subjects, and the authors of those laws. This growing gap violates the principle of political equality and of democratic inclusion.⁵⁵ The deterritorialisation

Europe ...', *Foreign Affairs*, 83 (2004), 97; M. Poiras Maduro, 'Where to Look for Legitimacy?', in E. O. Eriksen, J. E. Fossum and A. Menendez (eds.), *Constitution Making and Democratic Legitimacy*, ARENA Report 5/02 (Oslo: Arena, 2002); Weiler, 'Eros and Civilization'; P. van Parijs, 'Should the European Union Become More Democratic?', in A. Follesdal and P. Koslowski (eds.), *Democracy and the European Union* (Berlin: Springer, 1998), 287.

⁵⁴ See D. Held, A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations. Politics, Economics, and Culture* (Stanford University Press, 1999), 32; D. Held, *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge: Polity Press, 1995), 237.

⁵⁵ See J. S. Dryzek, 'Legitimacy and Economy in Deliberative Democracy', *Political Theory*, 29 (2001), 651, 662; Archibugi, 'Cosmopolitan Democracy', 439; Held, *Cosmopolitan Democracy*; D. Held. *The Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press, 2004).

of law should therefore be matched by the progressive deterritorialisation of democratic processes themselves.⁵⁶ If legal pluralism implies the possibility for legal norms of different origins to apply to the same person, there should also be a legitimisation pluralism; it is important indeed that this person can participate in the different law-making processes at the origin of these norms wherever they are located and this in turn implies including other affected *demoi* in each demos' deliberations, whether these take place at national, international, supra-national or transnational level.⁵⁷

True, deterritorialisation raises the well-known paradox of the democratic polity, according to which the modern democratic polity is both constituted and constrained by pre-political territorial boundaries and hence cannot be constituted and function as democratically as it should.⁵⁸ In fact, territory was traditionally used as a convenient indicator of affectedness and was therefore a democratic mode of delineation of the polity before law was globalised and started applying across functional rather than territorial lines. Territoriality is no fatality,⁵⁹ however, and democratic iterations may gradually help fill the gap between those affected and those participating.⁶⁰

If one extends democratic deliberation across territorial polities functionally to all those significantly affected by a decision, one may therefore count a new kind of political constituents or subjects, i.e. moral-political⁶¹

⁵⁶ See e.g. Besson, 'Deliberative *Demoi*-cracy'; Bohman, '*Demos* to *Demoi*'; Archibugi, 'Cosmopolitan Democracy', 445; Dryzek, 'Transnational Democracy', 44.

⁵⁷ This could not be done by mere reference to the principle of subsidiarity, for that principle can only be used within a hierarchical legal order to shift the decision-making top-down or bottom-up, rather than laterally across different legal orders. Moreover, the principle of subsidiarity is a principle of territorial governance par excellence.

⁵⁸ See, for example, Benhabib, *Rights of Others*, ch. 4; Poirares Maduro, 'Where to Look'; T. Pogge, 'Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit"', *Journal of Political Philosophy*, 5 (1997), 163; F. G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', in R. Pennock and J. Chapman (eds.), *Liberal Democracy, Nomos XXV* (New York University Press, 1983), 13; C. Offe, 'Homogeneity and Constitutional Democracy: Coping with Identity Conflicts through Group Rights', *Journal of Political Philosophy*, 6 (1998), 113.

⁵⁹ Contra: Pogge, 'Democratic Deficit'; Held, *Cosmopolitan Democracy*, 154 and 236; Habermas, 'Postnational Constellation'.

⁶⁰ See Besson, 'Deliberative *Demoi*-cracy'; Benhabib, *Rights of Others*; Delbrück, 'Exercizing Public Authority', 40.

⁶¹ See Besson, 'Deliberative *Demoi*-cracy'; contra F. Cheneval, 'The People in Deliberative Democracy', in S. Besson and J. L. Martí (eds.), *Deliberative Democracy and its Discontents* (Aldershot: Ashgate, 2006), ch. 8.

constituents, besides electoral or formal political constituents in each territorial entity.⁶² If the global functional demos of *demos* may be constituted on grounds of deterritorialised solidarity, one needs to determine what makes it the case that someone is a citizen of a functional demos rather than of another.⁶³ Most authors mention the fact of being 'affected' by a polity's decision as sufficient.⁶⁴ Stakeholders in these overlapping communities of fate are not, however, most of the time strictly speaking *bound* by the democratic decisions taken by other polities. They are at the most strongly affected by them and this is a purely factual criterion which anyone can fill and which does not therefore suffice to trigger normative consequences and democratic rights in particular. In practice, however, the difference is often moot, since very often stakeholders simply have to abide by the new factual or legal situation thus created. As such, their being 'affected' is already, albeit indirectly, normative and not only factual.

Of course, the line must be drawn somewhere.⁶⁵ The first criterion must be one of degree of affectation of the interests which must be comparable to a *de facto* obligation. Thus, for instance, what makes the national *demos* in Europe part of a functional European demos is the fact that they mutually influence each other's normative orders not only through the primacy of European law *stricto sensu*, but also indirectly through their respective national laws and the latter's future impact on European law.⁶⁶ A second criterion besides the quasi-normative character of the affectedness is that the interests affected must be basic or fundamental interests, i.e. interests in the conditions for self-development or self-determination. This is an objective element that is distinct from how

⁶² See A. Gutmann and D. Thompson, 'What Deliberative Democracy Means', in A. Gutmann and D. Thompson (eds.), *Why Deliberative Democracy?* (Princeton University Press, 2004), ch. 1, 37–8; D. Thompson, 'Democratic Theory and Global Society', *Journal of Political Philosophy*, 7 (1999), 120.

⁶³ As to the identification of those who are normatively affected, it is part of the ordinary process of law-making to assess the impact of each decision or law and this should also encompass an appreciation of its extra-territorial impact.

⁶⁴ See, for example, C. Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press, 2004); Gutmann and Thompson, 'Deliberative Democracy'.

⁶⁵ See Thompson, 'Democratic Theory', 120. See for a detailed discussion of this test: S. Besson, '*Ubi Ius, Ibi Civitas*: A Republican Account of the International Community', in S. Besson and J. L. Martí (eds.), *Legal Republicanism: National and International Perspectives* (Oxford University Press, 2009), 204.

⁶⁶ See S. Besson, 'From European Integration to Integrity – Should European Law Speak with Just One Voice?', *European Law Journal*, 10 (2004), 257; Besson, 'Deliberative *Demos*-cracy'.

the impact on one's interests is actually felt by each individual. A third element relates to the degree of affectedness of the interests; the normative or quasi-normative impact on the interest must be direct and unmediated.⁶⁷

A common and difficult objection to the deterritorialisation of democracy lies in national sovereignty and more precisely the concept of popular sovereignty.⁶⁸ It seems *prima facie* counter-intuitive indeed to argue that a polity's democratic process should be concerned with the interests of another and vice versa. This objection relies on an outdated conception of sovereignty, however.⁶⁹ Contemporary state sovereignty can no longer be equated only with a sovereignty of competence or immunity, but has also become a sovereignty of responsibility towards one's state's population, and towards others' whose interests it might affect. In circumstances of increasing global interdependence, sovereignty can only be exercised in cooperation,⁷⁰ whether this takes place at the national, international, supranational or transnational level. As a result, the exercise of sovereignty becomes reflexive and dynamic; it implies a search for the best allocation of power in each case, thus questioning and potentially improving others' exercise of sovereignty as well as one's own.⁷¹

Since democratic rule is one of the values protected by popular sovereignty, the correct exercise of sovereignty implies, on the one hand, looking for the best level of decision to endow those affected by that decision with the strongest voice and hearing.⁷² Often, this will imply giving priority to the level of governance closer to those affected, but not necessarily as EU decision-making has demonstrated.⁷³ Functional

⁶⁷ See Caney, Chapter 3, this volume.

⁶⁸ See, for example, Goldsmith and Posner, *The Limits*, ch. 8.

⁶⁹ See Buchanan, 'Democracy and Commitment'; Buchanan, 'Legitimacy of International Law'; R. Falk and A. L. Strauss, 'On the Creation of Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', *Stanford Journal of International Law*, 36 (2000), 209.

⁷⁰ See S. Besson, 'Sovereignty in Conflict', *European Integration Online Papers*, 8 (2004), online, available at: <http://eiop.or.at/eiop/texte/2004-015a.htm>; S. Besson, 'Sovereignty: From Independence to Responsibility. On Asking the Right Question in Switzerland', in T. Cottier (ed.), *Die staatspolitischen Auswirkungen eines EU-Beitritts der Schweiz* (Zurich: vdf, in press (2009)); P. Magnette, *L'Europe, l'Etat et la Démocratie* (Bruxelles: Complexe, 2000), 161–6.

⁷¹ See Besson, 'Sovereignty in Conflict'; N. Walker, 'Late Sovereignty in the European Union', in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), 22–3.

⁷² See Poiaras Maduro, 'Where to Look'.

⁷³ Note that the national level may itself be decomposed into different municipal, regional and national *stricto sensu* levels. See V. Schmidt, 'The Effects of European Integration on National Governance: Reconsidering Practices and Reconceptualizing Democracy', in

sovereignty also leads, on the other hand, to a change in the nature of the democratic process itself and in the scope of those included, whether at national, transnational, international or supranational level; this is particularly important at national level where all affected interests cannot always participate or even be represented. This functional inclusion is not only democratically beneficial to non-national interests included, but also to pre-existing national interests. Thus, minorities who were previously underrepresented or social groups whose inclusion was not sufficiently guaranteed in certain EU member states have been empowered by the broader inclusion of all European interests affected in national decision-making processes.⁷⁴

Deliberative global *demosi*-cracy

Extending the idea of a community of multiple stakeholders beyond territorial boundaries has recently been made much easier by reference to deliberative democracy theories. According to these theories, the essence of democracy is not to be found only in voting, but also in deliberation before and after the vote.⁷⁵

Deliberation can cope with fluid boundaries and allows for transnational communication, in each and every location whether national, transnational, international or supranational.⁷⁶ What matters for deliberative democracy is indeed the character of political interaction, rather than its locus. As such, deliberative democracy broadens the scope of democratic accountability beyond national borders. This is the true meaning of *demosi*-cracy, i.e. democratic deliberation across different territorial *demosi* with citizens of these different *demosi* deliberating with each other, thus constituting one *demos* along different functional lines

J. Gröte and B. Gbikpi (eds.), *Participatory Governance* (Opladen: Leske and Budrich, 2002), 141; Schmidt, 'Democratic Legitimacy'.

⁷⁴ See Besson, 'Deliberative *Demosi*-cracy'; J. S. Dryzek, 'Deliberative Democracy in Divided Societies. Alternatives to Agonism and Analgesia', *Political Theory*, 33 (2005), 218; Schmidt, 'Effects of European Integration'; Schmidt, 'Democratic Legitimacy', 980–1; F. Duina and P. Oliver, 'National Parliaments in the European Union: Are there Any Benefits to Integration', *European Law Journal*, 11 (2005), 173; Poiaras Maduro, 'Where to Look'.

⁷⁵ See S. Besson, 'Democracy and Disagreement – From Deliberation to Vote and Back Again. The Move towards Deliberative Voting Ethics', in M. Iglesias and J. Ferrer (eds.), *Globalization, Democracy and Citizenship* (Berlin: Duncker & Humblot, 2003), 101; Besson, 'Deliberative *Demosi*-cracy'; Gutmann and Thompson, 'Deliberative Democracy'; Dryzek, 'Divided Societies'.

⁷⁶ See, for example, Thompson, 'Democratic Theory'; Gutmann and Thompson, 'Deliberative Democracy'; Besson, 'Deliberative *Demosi*-cracy'.

in each case. Another benefit of the deliberative model of global democracy lies in its reflexivity. Deliberative democracy allows indeed for widespread disagreement and deliberation over the legitimacy of the polity and its regime, which is important in the global polity. A final and connected reason lies in the dynamic nature of deliberation. It is a long-term process in which discussions may constantly be re-opened.⁷⁷

Nevertheless, one finds strong resistance to the idea of deterritorialised *demoi*-cracy within certain deliberative democracy theories. Among the practical and ethical reasons for limiting deliberative democracy to territorially bound democratic polities are, on the one hand, the complexity of transnational deliberation and, on the other, the absence of the grounds of reciprocity that underlie the duty of justification in public deliberations.⁷⁸ The practical limitations of transnational deliberation need not, however, be higher than national ones. In fact, the European experience shows how the interests of national citizens may be beneficially protected and the equality among them may be re-established through the consideration of non-national EU citizens' interests.⁷⁹ As to the ethical grounds for limiting deliberative democracy to territorial entities, the objection does not cut any ice. The mutual influence of national decisions on each other in a pluralistic legal order provides the grounds for reciprocity required in deliberation.

Institutionalising global *demoi*-cracy

Global democracy qua institutional challenge

The final and main question in this chapter is how the institutional reality-sensitive normative model of global *demoi*-cracy proposed in the previous section may be translated into institutional requirements. The key element in a global *demoi*-cracy is not so much quantity, but its functional quality; it pertains to the interests included and hence deliberated and decided upon in each forum and according to existing processes. In this respect, the proposed account does not (yet) require transposing state-like democratic institutions on a global level, such as a world legislature or global assemblies.⁸⁰

⁷⁷ See Gutmann and Thompson, 'Deliberative Democracy', 6.

⁷⁸ See Gutmann and Thompson, 'Deliberative Democracy', 36.

⁷⁹ See Schmidt, 'Effects of European Integration'; Schmidt, 'Democratic Legitimacy'; Besson, 'Deliberative *Demoi*-cracy'.

⁸⁰ See, for example, Archibugi, 'Reform of the UN'; T. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995); Falk and Strauss, 'Global Peoples Assembly'.

Of course, any account of the institutionalisation of global *demoi*-cracy, however minimal, will be too blunt and general to be able to reflect the constant fine-tuning there should be in reality. A few caveats are in order therefore. First of all, one should emphasise that, as in the national state, every single *type of law-making process* should be matched by different democratic procedures.⁸¹ Thus, the transactional, the legislative and the regulatory types of international law-making processes should be institutionalised differently to gain in democratic legitimacy, just as different sources of national law are legitimised in different ways. Second, *official* channels of deliberation and decision need to be complemented by *non-official* ones that account for the civil dimension of the international public sphere. This is the case at national level, but these channels are even more important to put into place at the global level; indeed, accountability mechanisms are spatially and chronologically deferred in a deterritorialised democracy and need to be complemented by strong and interconnected public spheres.⁸² Finally, *different law-making agents* should be distinguished in the global law-making process besides individuals, and in particular international organisations, states and non-governmental organisations. The democratisation of law-making processes implicating each of these agents, whether at national, transnational, international or supranational level, calls for the development of different decision-making mechanisms.⁸³

In this section, I shall concentrate on the quasi-legislative and multi-lateral modes of international law-making, as they are constantly increasing in importance and affect other non-conventional legal sources such as custom, and because their legal subjects are also individuals and hence the largest group of international law's subjects. Scope precludes, however, going into all the necessary details.⁸⁴ For the time being, the

⁸¹ See Weiler, 'Geology'; Besson, 'Theorizing the Sources'.

⁸² See, for example, J. S. Dryzek, *Deliberative Democracy and Beyond* (Oxford University Press, 2000); M. Reisman, 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application', in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Berlin: Springer Verlag, 2005). It is important, however, to distinguish the democratisation of international law-making from its privatisation (contra: Reisman, 'Democratization', 21–2; and presumably G. Teubner and A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, 25 (2004), 999). See Besson, 'Theorizing the Sources'.

⁸³ See Stein, 'International Integration'; Buchanan, 'Democracy and Commitment'.

⁸⁴ See, however, A. McGrew, 'Democracy Beyond Borders?', in A. McGrew and D. Held (eds.), *The Global Transformations Reader: An Introduction to the Globalization Debate* (Cambridge: Polity Press, 2000), 405; Stein, 'International Integration'; Delbrück, 'Exercizing Public Authority'.

proposals of international institutional design I will make here focus on two main connected issues: first, the fora of deliberative *demosi*-cracy and, second, the latter's different modalities.

The fora of deliberative demoi-cracy

Literally, a democratic forum is the institutionalised place in which the agent of deliberation, i.e. the people or *demos*, deliberates.⁸⁵ In principle, fora of deliberation correspond to the territorial boundaries of the polity and do not transcend them. When democracy is deterritorialised and its agents are not only a *demos* but many *demosi*, the forum of deliberation remains largely that of the relevant existing territorial polities, be it the supranational entity, its member states or other international or transnational frameworks. In this sense, global *demosi*-cracy does not subvert national and other post-national sovereignties, but on the contrary opens them to each other in each and every single locale.⁸⁶

What is specific about global democracy is that it takes place *at the same time* at many different levels of territorial governance: national, international, supranational and transnational.⁸⁷ These different layers constitute a *network* of national, transnational and international agencies and bodies that match, cut across or group spatially delimited locales.⁸⁸ Moreover, deterritorialised *demosi*-cracy is not only about being multi-layered, but also multi-centred and imbricated at all levels; it is not only about taking decisions at different places and multiplying deliberative fora, but also and mostly about taking them together in a deterritorialised fashion in those same places.⁸⁹ This will come more naturally when all are present or at least represented in larger fora such as supranational, international or transnational fora, but it is also important to ensure sufficient inclusion in national fora despite the lack of physical presence of all those affected.

The national forum of deliberative *demosi*-cracy

The first forum of deterritorialised deliberation one may think of is that of national deliberations. Non-citizens of a national *demos* are included

⁸⁵ See Bohman, '*Demos to Demoi*'; Gutmann and Thompson, 'Deliberative Democracy', 62.

⁸⁶ See, for example, McGrew, 'Democracy Beyond Borders?'

⁸⁷ See Sassen, 'Global Governance'; Held, 'Transformation of Political Community'.

⁸⁸ See Held, *Cosmopolitan Democracy*, 237; Dryzek, 'Transnational Democracy'; Held, 'Cosmopolitanism: Globalization Tamed?', 475–8.

⁸⁹ See Schmidt, 'Democratic Legitimacy'; Nicolaidis, 'European Demoi-cracy', 6.

in the deliberations of that demos in those domains in which they constitute, with other non-national citizens, a further functional global demos because they are affected by the latter's decisions.

Multiplying transnational, supranational or international decision-making authorities to further transnational deliberation may be necessary, but it also tends to undermine democratic accountability within national democratic processes themselves.⁹⁰ As a result, and by reaction to a fear of disempowerment, national democracies often become paradoxically the primary hindrance to the democratisation of international law, both within national fora and beyond them.⁹¹ This is deeply counterproductive given the pivotal role national processes still play in the ratification, reception and implementation of post-national legal norms and hence should have in their legitimation process; the national forum is the place where the plurality of legal norms applicable to an individual in a globalised world converge and hence the place where they can be made normatively coherent.⁹² Moreover, the proximity of national institutions to individuals makes them a primary forum of direct legitimation in the global law-making process. It is thus central to start by enhancing the representation of foreign interests in national deliberations and thus by turning national democracy into a central forum of global democracy, before working on the inclusive quality of further law-making fora beyond the state.

The inclusion of non-national interests in national fora may take place, in a first step, through special tribunals in which all affected foreign interests are discussed.⁹³ In the long run, however, the aim should be to include these interests in ordinary democratic deliberations, even in the absence of those whose interests are included. By reference to the EU, one may distinguish two correlative elements of the progressive deterritorialisation of national democratic processes.

First of all, and most importantly, non-national Europeans have now become part of the European demos that is a functional layer of all national *demoi*. As such, they are true functional citizens of each territorially-bound national demos. For instance, every single European

⁹⁰ See Gutmann and Thompson, 'Deliberative Democracy', 62.

⁹¹ See Archibugi, 'Reform of the UN', 313–14.

⁹² On legal pluralism and normative coherence, see Besson, 'European Integration'; S. Besson, 'The Concept of Constitutionalism in Europe: Interpretation *in lieu of* Translation', *No Foundations* 1 (2007), online, available at: www.helsinki.fi/nofol/; Besson, 'Theorizing the Sources'.

⁹³ See Thompson, 'Democratic Theory', 121–2.

citizen may vote and be eligible in municipal and European elections in any other European country. There is, in other words, a right to choose one's polity in the EU and this leads to what I have called elsewhere 'democratic forum-shopping' in Europe.⁹⁴ The effective denationalisation of EU citizenship will most probably trigger its further deterritorialisation in a second stage.⁹⁵ The ability to choose one's polity, and the advantages this generates for the chosen polities (economic but also political), might indeed lead, secondly, to the preventive *internalisation* of the interests of members of other European *demoi* potentially affected by national decisions in the national political processes at stake, even when the latter are not residents in that member state.⁹⁶ This might be the case in particular in the increasing number of areas where national decisions affect European ones and thus eventually all other national decisions.⁹⁷ Eventually, one may hope that the inclusion of non-national citizens' interests in national deliberations fora will result in the mutual internalisation of those interests, thus leading to a certain emulation among national democratic processes.

The supranational and international fora
of deliberative *demoi*-cracy

There is another group of fora in whose deliberations non-national citizens may be included: supranational and international deliberations in which different national *demoi* are represented and in which most affected interests will thus be represented by representatives of their respective national demos.

International fora of deliberation group global or at least regional *demoi* that are as territorially delineated as national *demoi* and allow therefore for an overall representation of affected interests. This is a straightforward way in which foreigners, whose interests cannot actually be included in national deliberations, may still exercise some influence over national decisions; public officials are indeed often to some degree

⁹⁴ See Besson, 'Deliberative *Demoi*-cracy'; Poiares Maduro, 'Where to Look'; M. Poiares Maduro, 'Europe and the Constitution: What if this is as Good as it Gets?', in J. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), 74.

⁹⁵ See, for example, S. Besson and A. Utzinger, 'European Citizenship across Borders', in A. Epiney, T. Haag and A. Heinemann (eds.), *Challenging Boundaries, Festschrift Roland Bieber* (Zurich: Schulthess, 2007), 257; Sassen, 'Global Governance', 20.

⁹⁶ See Poiares Maduro, 'Where to Look'; Poiares Maduro, 'Europe and the Constitution'.

⁹⁷ See Besson, 'European Integration'; Poiares Maduro, 'Where to Look'; Poiares Maduro, 'Europe and the Constitution'.

more accountable to representatives of those foreigners' interests in international fora than they would be in national debates.⁹⁸ The difficulty here lies in the modalities of such functional deliberations, although they are technically easier to overcome than in national deliberations. Most of the time, indeed, intergovernmental organisations are dominated by government officials rather than by elected representatives.

Supranational fora may correct these shortcomings of international deliberation in representing non-territorial interests in more directly democratic ways. This may be demonstrated by deliberations in the European Parliament, for instance. The latter functions indeed like a national parliament, with universally elected representatives representing the interests of all European citizens whatever their nationality. As such, supranational fora favour the development of a functional global public sphere. This is evidenced by the modalities of defence of European interests which are no longer only grouped and represented along territorial lines and national polities, but increasingly across transnational groupings of interests. Interestingly, the development of cooperation between the European Parliament and national parliaments and, more generally, the latter's inclusion in a number of important decision-making procedures in the EU in the Lisbon Treaty, are evidence of a third form of democratic representation that may be experimented at the supranational level: the representation of peoples besides that of states and of citizens.

The transnational forum of deliberative *demos*-cracy

Finally, the deterritorialisation of democracy also takes place at the transnational level, whether it is through the interconnection of national or infranational levels of governance. The difficulty with transnational deliberation is that the locus of deliberation does not match any of the territorial boundaries of existing polities, and it takes more effort to implement therefore.⁹⁹

In fact, more and more transnational networks of cooperation have been developed both at the European and global level in the past few years; some link official authorities, such as legislative, executive or judicial networks. For instance, one should mention the democratic deliberations that take place through transnational interparliamentary cooperation in the European Union. These exchanges contribute to the

⁹⁸ See Gutmann and Thompson, 'Deliberative Democracy', 39.

⁹⁹ See Held, 'Cosmopolitanism: Globalization Tamed?'

development of a global public sphere qua transnational network of national public spheres that goes deeper than the surface of parliamentary deliberations at global level.¹⁰⁰ Other transnational networks are purely private or, as in most cases of global administrative governance, mixtures of both.¹⁰¹ The difficulty lies therein that these networks are not usually democratic in their functioning and are rather technocratic,¹⁰² and need therefore to be perfected in this respect; various measures have already been taken to conceive of and improve the accountability and transparency of those transnational fora of deliberation and decision-making.¹⁰³

The modalities of deliberative demoi-cracy

There are two constitutive modalities of democracy one should be concerned about when institutionalising global *demoi*-cracy: participation, on the one hand, and representation, on the other. Scope precludes discussing them by reference to the different fora presented before, but they should clearly be implemented differently in each case. Our concern here will mostly be the national forum of deliberative *demoi*-cracy, as it is the pivotal locus of deterritorialised democratic legitimation of law in a globalised world.

Deliberative *demoi*-cratic participation

In principle, democracy implies that all those affected by a decision be able to participate in the decision-making process. It should be clear from the outset, however, that not all global stakeholders can participate equally in all the democratic processes in which the decisions that affect them will be taken, whether supranational, international, transnational or, even worse, national. Direct participation need not, however, be required at all levels in a global democracy. It suffices that those whose

¹⁰⁰ See L. Blichner, 'The Anonymous Hand of Public Reason: Interparliamentary Discourse and the Quest for Legitimacy', in E. O. Eriksen and J. E. Fossum (eds.), *Democracy in the European Union. Integration through Deliberation?* (London: Routledge, 2000), 141; Besson, 'Deliberative *Demoi*-cracy'.

¹⁰¹ See, for example, Slaughter, 'Government Networks'; Slaughter, 'Disaggregated Sovereignty'; N. Krisch, 'The Pluralism of Global Administrative Law', *European Journal of International Law*, 17 (2006), 247; Teubner and Fischer-Lescano 'Regime-Collisions'.

¹⁰² See Buchanan, *Moral Foundations*, chs. 5 and 7; Besson, 'Theorizing the Sources'.

¹⁰³ See, for example in the EU, D. Curtin, 'Framing Public Deliberation and Democratic Legitimacy in the European Union', in S. Besson and J. L. Martí (eds.), *Deliberative Democracy and its Discontents* (Aldershot: Ashgate, 2006), ch. 7.

basic interests are normatively affected by global decisions be able to have an influence on them. In fact, democratic deliberation may take place through different channels despite physical absence and these provide promising alleys for global *demoi*-cracy. As Dryzek argues, it may even be beneficial in divided polities to establish a distance between deliberation and decision-making and this both through a deferral of the decision in time and a delocalisation in space.¹⁰⁴

In any case, direct participation has already become secondary to representation in most national democracies. Democratic representation may even be seen as an enhancer of democratic *participation* and deliberation thanks to the distance it creates between deliberation and decision-making and to the relationship of election and accountability it launches between representatives and their constituencies.¹⁰⁵ Not only can representation enhance democratic participation, but it can also increase the protection of *political equality* within a polity. Simple majorities cannot exclude minorities as easily in a representative democracy as in a purely direct democracy; it takes a majority to elect and authorise representatives, another for these to act and still another to make them accountable. The deferred nature of the decision and the increased scope of deliberation also leave more time and space to diverging opinions and perspectives to make themselves heard and maybe to convince and change majorities until the decision-making stage.¹⁰⁶ In short, although the representation of non-national citizens' interests cannot be as inclusive as the direct participation of all of them, this incomplete inclusion is compensated by the participation-enhancing effect of representation and the correctives representation provides to the excesses of majoritarianism.

Deliberative *demoi*-cratic representation

If global *demoi*-cracy is best understood as both indirectly participative, when possible, and representative, it remains to see how *demoi*-cratic representation can work effectively in a globalised democracy. In principle, a decision-making process is properly inclusive if the interests, opinions and social perspectives of all those affected by the decisions are represented in the decision-making process.

¹⁰⁴ See Dryzek, 'Divided Societies', 223; Besson, *Morality of Conflict*, ch. 10.

¹⁰⁵ See S. Besson, 'The Paradox of Democratic Representation', in L. Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legislation* (Aldershot: Ashgate, 2005), 125.

¹⁰⁶ See Besson, 'Democratic Representation'; N. Urbinati, 'Representation as Advocacy', *Political Theory*, 2 (2000), 758.

In current systems of international, supranational and transnational level decision-making, however, individuals are indirectly represented primarily by their national states and in most cases by members of the executive, who are not always elected and only very indirectly accountable to the general public. True, there are exceptions as in the case of the European Parliament. All these mechanisms remain largely separate from national political channels, however, at the price in particular of transparency and accountability overall, on the one hand, and of coherence of the decisions taken at the different levels, on the other. Once more, it is clear therefore that before multiplying representative fora at the transnational, international and supranational levels, the focus of institutional measures should be on enhancing the democratic quality of representation *at the national level first*.

The challenge, however is that this implies representing the interests of all those affected by national decisions in national deliberation and decision-making, even when they are not part of the electoral constituency. There is a form of representation, however, that has been developed in diverse and divided societies where not all citizens can be represented descriptively and which might contribute to the representation of non-national citizens' interests: *reflective representation*.¹⁰⁷ In a nutshell, reflective representation requires from each representative that she project herself into the place of others in her own internal deliberation, rather than leave the confrontation with diversity to external and interactive deliberation.

The problem with this approach, however, is that, without minimal representation or means of asserting a voice in the making of the decision, it is too easy to assume that a decision will benefit non-national citizens simply because national representatives use reflective means of deliberation. There are two ways of ensuring a more effective representation of non-national citizens' interests through reflective representation.

First of all, *diverse representation*. Without some kind of minimal descriptive representation, reflective representation cannot be as diversified as required by the representation of non-national citizens.¹⁰⁸ Although minimal descriptive deliberation is required, it is very unlikely that moral-political constituents will be represented as fairly as electoral

¹⁰⁷ See R. E. Goodin, *Reflective Democracy* (Oxford University Press, 2003).

¹⁰⁸ See R. Eckersley, 'Deliberative Democracy, Ecological Risk and "Communities of Fate"', in M. Saward (ed.), *Democratic Innovation: Deliberation, Association and Representation* (London: Routledge, 2000), 117; Goodin, *Reflective Democracy*, 171.

constituents in national deliberations. A solution might lie in foreigners' tribunes or, as in certain post-national polities like the EU, in granting to non-national citizens political rights at national level. In fact, it might actually be better for the quality of deliberations not to have a full descriptive representation of all non-national citizens as people tend to cut deals in such circumstances.¹⁰⁹

A second, and more efficient way of ensuring the effective reflective representation of non-national citizens' interests lies paradoxically in the *electoral system* itself, and more precisely the electoral sanction of those representatives who do not include all affected interests in their deliberation and decision-making. The success of democratic accountability greatly depends on the moral capacities of citizens and public officials. As such, the support of elected representatives by their electoral constituents will in principle follow their championing the cause of moral-political constituents.¹¹⁰ Moreover, national citizens might also want to make sure, through (re-)electing representatives who represent the interests of all those affected, that their own direct interests are well protected abroad. Increasingly, this might only be the case when non-national interests are mutually taken into account in the decision-making process. Representatives' failure to do so might trigger electoral sanctions, as this omission might result in negative effects on the inclusion of national interests elsewhere.

Conclusion

The legitimacy of international law has attracted increasing attention in recent years. So has one of the most important dimensions of legitimacy: global democracy. Although different theoretical models of global democracy have been developed, very few proposals have been made as to how to implement them in practice. Nor have those proposals, as a matter of fact, factored an institutional dimension in the theoretical model propounded. This has resulted in a certain lassitude among theorists vis-à-vis the desirability and feasibility of global democracy, but has also brought the threat of a backlash in national democratic practice and has led to the rejection of important global legitimacy-enhancing institutions precisely on grounds of democracy. This has been exemplified

¹⁰⁹ See Goodin, *Reflective Democracy*; C. Sunstein, 'The Law of Group Polarization', *Journal of Political Philosophy*, 10 (2002), 175.

¹¹⁰ See Gutmann and Thompson, 'Deliberative Democracy', 39.

recently in the European Union following the popular rejection in some member states of the Constitutional Treaty in 2005 and of the Reform Treaty in 2007.¹¹¹

In view of this theoretical and practical situation, the purpose of this chapter was to look more closely into the institutionalisation of global democracy. The chapter proposed a theoretical albeit institution-sensitive model of deliberative *demoi*-cracy that matches the deterritorialisation of law-making in practice thanks to its three constitutive elements: its pluralist subject, its deterritorialised process and, finally, its deliberative nature. It also discussed ways of further institutionalising deliberative *demoi*-cracy and focused more particularly on the fora of global *demoi*-cracy, and in particular on national fora, and its specific modalities in terms of participation and representation.

Prima facie, the qualitative change required in this chapter amounts to very little by contrast to what would be required by the implementation of the kind of supranational and cosmopolitan democracy propounded in other accounts of global democracy. At the same time, however, and this is quite paradoxical, this proposal is often perceived as radical in terms of change in national democratic habits and practices. While the international community might not yet know it is a community, national societies have obviously not yet taken the full measure of their internationality. Understanding why this is the case might provide one of the keys to address the international legitimacy crisis.

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¹¹¹ See S. Besson, 'Europe as a Demoi-cratic Polity', *Retfaerd – Juridisk Tidsskrift*, 1/116 (2007), 3–21.

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