Europe at 50 – A Mid-life Crisis? 'Democratic Deficit' and 'Sovereignty Surplus'
Part Three of the Constitution Trilogy

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Abstract

The paper argues that the resilient democratic deficit of the EU is closely connected to its equally longstanding 'sovereignty surplus.' The division and competition of sovereignty between member states and the EU has created a more crowded space of overlapping polities, each requiring democratic legitimation but each also with the propensity to detract from the democratic capacity of the others. Secondly, the very gravity and divisiveness of what is at stake for the various parties involved and positions implicated in the sovereignty surplus renders the question of the proper diagnosis and treatment of the ensuing democratic deficit highly controversial and, indeed, sharply polarized. Thirdly and finally, and bringing us to the current constitutional controversy and mid-life crisis, the sovereignty surplus also makes the question of praxis - of how to secure the very ground of initiative necessary to develop and act on a more inclusively resolved diagnosis and treatment of the democratic deficit – whatever that may be, difficult if not intractable.

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The 50th Anniversary of the foundation of the EU in the 1957 Treaty of Rome was celebrated in March of this year. Coinciding as it has with a period of prolonged introspection and a recurrent search for new beginnings, of which the spectacular rise and fall of the 2004 Constitutional Treaty (CT) is only the most prominent example, this half-century landmark (and the heated debate over the Berlin Declaration[1] which was made in celebration of that landmark) has attracted many clichés and slogans. With regard to the early fanfare and subsequent tribulations of the CT, for example, there has been talk of Golden Weddings, but also of false seduction, empty promises, prolonged or broken engagements, uneasy co-habitation, polygamous unions (otherwise known as 'flexible integration'), trial separations, and even, in some quarters – especially after the formal announcement of the abandonment of the project by the June 2007 European Council - of divorce. And if we turn from relationship to aging metaphors, and so from Anniversaries to Birthdays, we also hear talk of growing pains, weariness, sclerosis, premature aging, and perhaps most aptly of all given the particular birthday we are celebrating – of mid-life crisis.[2]

Beyond the sound bites there is something substantial at stake. And if I am permitted one more cliché, that thing of substance involves the idea of the EU as somehow being a victim of its own success. However much lawyers, political scientists, international relations experts and economists may argue that the EU was or was not unique from the outset – and much ink has been spilled on this topic – it is certainly the case that it has grown into something different from what we have known before in the world of politics – a new beast, or at least a distinctive hybrid, in the polity-jungle previously dominated by states and their sub-state offspring. (Schmitter, 1996) As is well known, the EU has expanded from its post-war origins as a customs union and free trade area to a much broader and deeper framework of political integration with power over a range of social and security measures on top of its core economic competence. Its bureaucracy and distinctive political machinery has developed exponentially, as has its membership from the original 6 to the present 27. Its symbolic profile both within these 27 members and beyond is also much higher. More and more, it is viewed as, and presents itself as a qualitative departure from the international institutional norm, as a self-standing' three-dimensional' polity rather than just a 'two-dimensional' set of institutions or cluster of policy functions. One simple illustration of this 'thicker' understanding is that while events are typically described as happening 'at' the United Nations, the appropriate preposition for the EU (unless one is reading American newspapers!) is generally considered to be 'in'. But this exponential expansion has also precipitated new challenges in each of the three vectors in which the key relations of this fledgling polity are played out – externally, at the inside/outside boundary, and internally.

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[1] 25th March 2007

[2] See *The Economist* 16th March 2007. Interestingly, The Economist had used the very same terminology 10 years previously, on the occasion of the EU's 40th birthday. (see *The Economist* 29th May 1997) It seems that, even for institutions, 50 has become the new 40!

Externally, the growing prominence of the EU and its gradual assumption of some of the functions of the state mean that the place of the EU in international relations has become more rather than less ambiguous over time. Many of its formal legal agreements with the outside world are so-called 'mixed' ones, and most of its informal foreign policy also operates in an indistinct and shifting framework of co-operation and competition with the foreign policy relations of its member states. (De Witte, 2007) To put it bluntly, Henry Kissinger's famous question – whom do we call when we wants to speak to Europe, remains unanswered today, and where once there was no viable candidate, in an age of increasing inter-institutional rivalry there are now perhaps too many. At the boundaries, Enlargement remains an explosive question despite, or perhaps because of the accession of 12 new members in the new century. For how precisely are we to understand the rationale and status of these new boundaries? Are these boundaries merely selfish and *pragmatic* - located just at the point of self-convenience where the club of the rich and comfortable decrees itself full up; or are they *territorial* – aligned to some sense of a geographic Europe; or are they *ideological*, linked to the Cold War invitation to membership in the original Treaty of Rome, extended towards all 'the other peoples of Europe' and towards the Soviet Bloc countries in particular; or are they *cultural* – a community of affinity that may not include our Muslim neighbors in Turkey or in parts of the former Yugoslavia; or do they retain a *missionary* openness, reflecting a willingness to spread the European message just wherever it finds a receptive audience. Clearly, this is a much conflicted question. And again, the very success of Europe makes it an ever more urgent question, just as the rapidity and reach of recent expansion now demands that it be asked in places which may well be presumptively excluded in terms of some of these definitions. (Grabbe, 2006)

However, the space I am directly concerned with in the present paper is neither the external nor the boundary space, but the internal space. For here the success of the EU has raised an even more fundamental question of legitimacy. If, as Jürgen Habermas has suggested, *democracy*, the idea of self-legislation, that those affected by decisions bearing in any significant way on their life-chances should get to have a say in these decisions - is the only political principle we can all agree on in a 'post-metaphysical' age where are no longer any pre-given moral certainties, then what happens when, as now, we have reached a certain critical point in the life of the EU at which its success means that it palpably does make decisions that significantly bear-upon the life-chances of its members?

This is, of course, the hoary old problem of the EU's so-called 'democratic deficit'. I want to argue that this democratic deficit is intimately related to a rather less well-known phenomenon, what I call the 'sovereignty surplus' of the EU – the fact that, as I explain in more detail in due course, sovereignty is no longer an exclusive attribute of the nation states that make up the EU, but that it can now in some measure be plausibly claimed by the EU itself without the states themselves having renounced or even significantly modified their own claims.(Walker, 2003) In particular I want to argue that the sovereignty surplus underscores the democratic deficit in three ways. It is, first, the deep cause of the democratic deficit. Secondly, the very gravity and divisiveness of what is at stake for the various parties involved and positions implicated in the sovereignty surplus renders the question of the proper diagnosis and treatment of the ensuing democratic deficit highly controversial and, indeed, sharply polarized. Thirdly and finally, and bringing us back to the current constitutional controversy and mid-life crisis, the sovereignty surplus also makes the question of *praxis* - of how to secure the very ground of

initiative necessary to develop and act on a more inclusively resolved diagnosis and treatment of the democratic deficit – whatever that may be, difficult if not intractable. So, to recap, with reference to the democratic deficit the sovereignty surplus is responsible for three aspects of the difficulty - the problem of *deep causes*, the problem of *diagnostic controversy*, and the problem of the ever disappearing ground of *transformative initiative*.

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Let us deal, then, with the various parts of this argument in turn starting with the definition of the democratic deficit. (Follesdal and Hix, 2006) The Democratic Deficit can be summed up alliteratively under the five 'A's

Alienation – Most obviously, and notoriously, the growth of the EU involves a shift from nationally autonomous parliamentary power to pooled executive power at the EU level in the Council (of ministers) and in the European Council. This refers, then, to a two-stage movement – first an internal state movement from parliament to executive and, secondly, through the national executives acting in concert, a more general hollowing out of state democratic authority.

Authority **–** There is a democracy-diminishing and democracy-obscuring mixture of different forms of authority at EU level. The Commission (bureaucratic), Court of Justice and, increasingly, Court of First Instance, (judicial) and Council (executive), all assume key responsibilities some of which might in other polities fall within the remit of directly elected institutions. The EU's own such directly-elected institution, the Parliament, has only a limited role in legislation. It does not propose new legislation and at the disposal stage, depending on the policy area in question, it is either joint-legislator or merely a consulted party.

Attention - Few people pay attention to the European Parliament – less than 45% turned out at the last elections in 2004. And those who do vote continue to treat these occasions as 'second order' national elections, a fact of which the very modest success and salience of the European wide political parties is both a symptom and a cause.

Abstraction –The specific density and gravity of each individual vote may be too little and too light in a community of almost 500 million.

Affinity – This refers to the so-called 'no-demos' problem. (Weiler, 1999, ch.10) Arguably, this is the deepest, and unarguably the most complex, predicament of supranational democracy. The 'no-demos' argument comes in different variants, but in its fullest form it is about both the 'inputs' and 'outputs' of democracy (Scharpf, 1999) and the intimate connection between them. It asserts that there is a set of social preconditions *to* democracy which also, crucially, happen to be amongst the most important benefits (re)produced and consolidated *by* democracy, and where these are non-existent or insufficiently present, as is presumptively the case in the post-national EU, then we struggle to contrive them into existence. At sociological root, what we are talking about is the existence or otherwise of a minimum level of 'we feeling' – wherever such a feeling may come from and however it may be constructed - that is required in order both to be able to put in place the mechanisms and to enjoy the benefits associated with

democracy as a system of collective decision-making that pays equal basic concern to each of its member's interests and preference when coming to particular collective decisions. If we do not possess that threshold 'we feeling,' then either the mechanisms of democratic decision-making will not be forthcoming or, even if they are, they will remain empty promises. The relevant elements that in this 'demos' model are simultaneously dimensions of the we-feeling and benefits of democracy are four in number – let us then call them, the 'constituent goods' of democracy in acknowledgment of their dual aspect as generative sources and standing features of the democratic 'good.'. First, without the relevant minimum sense of membership of a common political community, we may, not *respect* others enough to be prepared to treat them as political equals and so to abide by our binding common commitments; secondly, and reciprocally, we may not *trust* others enough to expect them to respect and treat us as political equals and so to abide by our binding common commitments; thirdly, as an extension of this lack of mutual respect and trust, we may not be sufficiently invested in the idea of our long term common commitment to accept *sacrifices* in the name of some common good or pressing particular interests of other constituencies within the community; and fourthly, we may not be confident enough of what we do or can possess in common to be able to provide and accept means for respecting what we can also afford *not* to have in common, and which should therefore remain an area of *tolerable difference*. In sum, we may lack the trust, respect, solidarity and mutual sympathy that allow democracy to emerge and help it to work properly when it does emerge.

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If we turn now to the sovereignty dimension of our equation, in what sense does the surplus of sovereignty provide the deep cause of the democratic deficit? Sovereignty in its modern sense, the sense associated with Westphalian system of states – *refers to the idea of a politically enabled and legally recognized coincidence of people, territory and authority*. As a framing idea of global relations, sovereign statehood does not and never have required empirical perfection. That is to say, it does not require that authority is *in fact* monopolized in discrete territorial populations, but just that states should retain a plausible claim to be and to remain the *predominant* authority over their own territory and population in an everyday sense, as well as the ultimate authority in *extremis*, and that the logic of this arrangement be respected precisely in the mutual exclusivity of the sovereignty claim between states. The development of the EU threatens both of these ideas – both the everyday pre-eminence of the state as the source of authority across the plenitude of policy sectors in a particular territory and over a particular population – call this substantive sovereignty – and the final claim to ultimate authority in circumstances of challenge – call this the categorical form of sovereignty. As recently abandoned Constitutional Treaty would have made explicit, but as has in any case been taken for granted within the Treaty system, the EU has shared competence over many policy sectors once monopolized by the states and, indeed, exclusive competence over a few key areas such as the common commercial policy and economic and monetary union. Accordingly, the substantive sovereignty of the states has long been subject to erosion. What is more, under the effective tutelage of the ECJ, this challenge of substance has from an early stage been underpinned by a more categorical challenge, through legal claims of supremacy and direct effect, and more

generally, through its confident pursuit of "small-'c'" constitutional self-definition and self-sufficiency. In combination these claims question whether the states retain even last-analysis sovereignty to impose their will (or, indeed, to recover the competence and capacity to do so).

The net effect of these challenges to the substance and very form of state sovereignty is that sovereignty is progressively understood as split and spread around in a quite unprecedented manner. It is not or no longer best conceived as merely redistributed in a mixed or multi-layered or federal 'system', for that would still presuppose a single final authority for the system in question and an overarching principle or rule for deciding the hierarchy of norms within that system. In other words, it would assume that all the problems could be 'domesticated' as questions of divided power contained within an unquestionably statist or state-like frame. Rather, sovereignty is now more persuasively conceived as distributed across a plurality of overlapping sites whose relations are finally heterarchical rather than hierarchical.

What this new sovereignty configuration means, presumptively at least, is that the need for democracy is also split and spread around in the trail of these new sites of sovereignty. Yet, to put it mildly, and in an agnostic and empirically contingent way, there can be no guarantees that the institutional means and cultural resources necessary for democracy will be sufficiently abundant and sufficiently flexible and mobile to meet the spreading need. Or to put it strongly and in a categorical way, just as sovereignty under the state system was based on a logic of exclusivity, the bonds and commitments that make democracy viable may also operate on the basis of a logic of exclusivity and thus become simply inconceivable at a plurality of levels simultaneously, and so at levels and places beyond the state. Whether in the mild or strong version, therefore, the surplus of sovereignty tends towards a deficit of democracy.

If we now move on to the second way in which the sovereignty surplus underpins the democratic deficit, this concerns the importance and divisiveness of what is at stake in the specific diagnosis and treatment of the democratic deficit. For we can identify a variety of different diagnoses and treatments of the democratic deficit, each of which leads to different conclusions – and may, furthermore, flow from different premises - as regards the proper allocation of sovereign power. For the sake of simplicity, we may reduce these approaches to six somewhat stylized variants. These can sometimes be combined, but some variants, as we will see, are also quite clearly incompatible and so mutually exclusive. Again, we will make use of an alliterative device, referring to the six 'D's.

Denial - This assumes or holds that nothing of much import has changed, and that, contrary to many views, the work of the EU remains mundane and - at least in high political terms – inconsequential, and so the threshold norm of democratic significance at the EU level has not or barely been reached. To the extent that the denial view still exists, this is simply decayed or nostalgic thinking, although no less powerful for that.

Delegation - This approach, which is often accompanied by some degree of denial, holds that the problem of democratic reach and accountability can or should be taken care of through a theory of delegation – of national principal and supranational agent. (Moravcsik, 2005) But the actual institutional conditions of the EU stretch our sense of the institutional plausibility of this. In particular, the paradigmatic supranational decision rules of unanimity and Qualified Majority

Voting, the best gatekeeping argument for the principal-agent characterization *prior* to supranational initiatives, becomes the strongest objection to any robust thesis of ongoing principal control *after* such initiatives have taken place, as they have now done progressively over 50 years.

Demarcation - This is based on the idea that, whether or not we view it as necessary and inevitable, we can represent the democratic deficit as a virtue rather than a vice, since the core areas of EU's activity are just those that we should in any case cordon off and insulate from democratic passions and preferences. Two major sub-options have presented themselves here, each of which has been extremely influential in the history of EU integration. First, there is the ordo-liberal tradition, which asks for the basic structure of market-making and market-enhancing 'four freedoms' and competition law to be protected from EU-level legislative and executive interference concerned with particular socio-economic interests – an activity that should instead be left to member states. (Mestmacker, 1994) Secondly, there is the perspective which views the EU as a so-called 'regulatory state.' (Majone, 2005) In contrast to the ordo-liberal approach, it is recognized that the EU does and should get involved beyond its core market-making activity, but still not in key distributive questions or questions of deep value difference. Rather, the domain and style of 'positive integration' measures at the EU level should be restricted to precise matters of risk regulation in areas such as environmental or product standards. These should be left to experts and administrators concerned with protecting and finessing the Pareto-optimal solutions available on the basis of the general wealth enhancement of an expanded European market, rather than becoming the play of partisan political forces.

While the demarcation approaches do rightly remind us that not all of political decision-making can or should be subject to democratic will formation, they fail to the extent that they overstate the propensity and the capacity of the EU to stay clear of everyday distributive 'winner and loser' politics that *do* require democratic will formation. This is most obviously true of the ordo-liberal tradition which is unable to cope with any type of market correcting European re-regulation in areas of socially relevant standards or processes – from food safety to health advertising to labor market discrimination. But it is also true of the regulatory state approach, to the extent that it is prepared to rely on disinterested expertise in such re-regulation in a way that ignores two things. First, it ignores the pervasiveness of win-lose situations where decisions which may be of general public good and of benefit to everyone (food safety, environmental protection) nevertheless create sharp secondary divisions between winners and losers in the cycle of production, exchange and circulation – producers versus consumers, workers versus capital investors, domestic versus foreign customers etc. And secondly, it ignores the extent to which European-wide jurisdiction, even when not itself concerned with large distributive choices, can in the name of what it is primarily concerned with and competent over, namely market-making and regulatory forms of market-correction, create a decision-making gap by undermining the economic or legal capacity of states to undertake their own distributive policies. (Scharpf, 1999) Economically, this would, for example, concern the need for states to keep direct taxes down in order not to put off mobile capital investment. Legally, this would, for example, include the side-effects of monetary union - carried out in the name of removing market inefficiency born of fluctuating exchange rates - in removing domestic mechanisms for influencing domestic public revenue such as currency devaluation; or the prohibition for reasons of competitive equality of forms of preferential or compensatory distributive treatment such as regional or sectoral

subsidies, or the strategic use of public procurement, or the employment buffers of subsidized public sector industries.

Disaggregation **-** Here democracy becomes an adjective rather than a noun – a mobile virtue of particular arrangements in domains or policy communities of discrete practical engagement where people have the knowledge and motivation to put things in common rather than a holistic virtue of the large community of the 'demos' What we need, on this view, is not mass ballot-box democracy and preference formation, but a multiplicity of finely grained engagements of knowledgeable and mutually responsive constituencies aimed at providing context-specific optimizations of the common good. And if we look we can find just such contexts in abundance in the EU across many different policy areas and mediated through such deliberative mechanisms as Comitology and the Open Method of Co-ordination. (Sabel and Zeitlin, 2007)

But there is a level of analysis problem here. Democracy can indeed be disaggregated, and often does its best work in local micro-contexts. However, unless we are prepared to say that there are no mutual effects or 'externalities' between these discrete policy areas and communities which need trans-contextual evaluation, that there is and should be no broader conception of the public interest (distributive fairness, equal rights protection etc) which guides individual sectoral choices rather than merely emerges as their cumulative and serendipitous effect, and that, crucially underpinning these other concerns, there is either no need for or no danger to and depreciation of the constitutive public goods of trust, respect, solidarity and mutual tolerance in this disaggregated approach, then there is something deficient in this analysis. In particular, it is in danger of forgetting the twofold nature of the 'demos' problem we discussed earlier – that it represents a shorthand for certain constitutive goods - equal respect, trust, solidarity and mutual tolerance - which not only make the broader democratic framework possible, but which are also among its greatest virtues and outputs. So the fact that we find an alternative route, or series of cris-crossing routes, in the input sense, in order to make democratic practice possible at disaggregated sites in the absence of these constitutive goods at the input stage, still will not cure their absence in the output sense.

Displacement - This is the inverse of denial. If democracy is fated to be unitary, then perhaps we should fast-forward to EU democracy and leave behind state democracy as outmoded or, at least, as now subordinate. As in the case of its opposite, the fact that this strong Euro-federalist view is held implicitly much more than it is expressed explicitly and rests on unlikely assumptions about the readiness of the forces of social and political transformation, does not make it any less powerful for that.

Dualism - This is the view which says that we need not endorse either the state-centric or the Euro-centric, unitary-sovereigntist view of the deniers and delegaters on the one hand and the displacers on the other. Equally, we should not be satisfied by the democracy-diminishing view of the demarcation approach – often itself tending towards a closet vision of European-centered unitary sovereignty - nor by the view of the disaggregater, which tries to oppose the whole idea of a polity-monolithic logic and the ideas of holistic democracy and sovereignty which accompany that logic. Rather, on the dualist view, we can have a dual or multi-level democracy with each level holistic and demos-presupposing in its own terms.

In principle, this promises the most attractively 'pro-democratic' solution to the extent that it does not allow democracy under conditions of plural sovereignty to be defeated by the assumptions of the unitary sovereigntist frame – neither forcing it backwards into a statist nor fast-forwarding it into a superstatist mould, nor side-stepping the issue by denying or disaggregating some of democracy's virtues at any site Yet this approach is of no value if it simply presents the problem-diagnosis as a sufficient condition of its solution, so ignoring the resilience of the unitary sovereigntist frame. It has to face up to and overcome the abiding challenges of this frame, which, in conclusion, are for the dualist model threefold.

The first is the *structural* challenge. Does the idea of holistic democracy – with the associated virtues of respect, trust, solidarity and mutual tolerance, not after all, as the state and super state unitarians alike hold, simply possess a strong and perhaps exclusive 'elective affinity' with the structural idea of unitary sovereignty? The short empirical answer would be no - that federal and devolved and other pluri--national and pluri-community systems show us many examples of multi-level holistic democratic loyalty – and indeed that the possibility of secure communal living in a number of the federalized or devolved states that make up the EU – including the UK, Belgium and Spain - depends on this being so. So why should the EU system be any different, especially given the significant long-term institution-constructive work that has gone into developing the European Parliament in particular as a support and forum for the wider level of European democracy? But this analogy rather begs the question, since one key remaining difference lies precisely in the idea of these examples all being of state-framed systems. Accordingly, the division of powers and even of demos-creating cultural identities occurs *within* the context of a single last-analysis sovereignty (or, at least, as in the British-Irish conflict, between discrete and mutually exclusive last-analysis sovereigns). Is this possible in a multi-sovereign, territorially and jurisdictionally overlapping configuration such as the EU, which does not subserve to the discipline of internal hierarchy and system-integrity, and where identities and loyalties are not nested within one overall system which provides both the ordering mechanism and inter-cultural traditions for managing and resolving these issues?

In turn, this refocuses a second *cultural* challenge, no longer about the impossibility in principle of split-level holistic democratic commitments, but now about the social backdrop. In particular, how do we nurture this dual sense of loyalty in unfavorable ideological circumstances? These are circumstances often dominated, or at least distorted and shadowed by the contradictory extremes of unitary sovereignty and democracy at state and supranational level, or, in more minor key, characterized by the institutionalized prevalence of solutions of the demarcators and disaggregators that also tend to exclude or marginalize any dualist way for robust democracy at the European level.

This, finally, brings us to the protracted tribulations and aftermath of the constitutional debate. For, quite apart from, but arguably more importantly than, any of its particular provisions, the constitutional project could be seen both, at the *procedural* level, as a mechanism for bringing together these different and incompatible diagnoses and treatment of the democratic deficit problem within the same decision-making matrix with a view to removing or easing - or at least confronting and engaging - the ideological blockages to such a solution; and, at the *expressive* level, through the mobilization effect of the process itself and the symbolism of

constitutional commitment, as an independent stimulus to the strengthening of holistic democracy at the secondary supranational level. Yet this runs into the third and final problem of sovereignty surplus and a third, practical challenge to the idea of dualist democracy. *Crucially, it is the present sovereignty frame – and in particular the principle of the requirement of unanimous state consent or 'common accord' - that provides the necessary but presumptively disabling conditions of initiative of any constitutional solution seeking to unblock the problems of democratic deficit which, as we have seen, are themselves a product of the very same structure of unitary sovereignty.* The whole constitutional project, indeed, from the supposedly state-sovereignty transcending initiative of a multi-constituency Constitutional Convention in 2002-3 to the current strange combination of protracted but ultimately doomed struggles over national ratification on the one hand, and an obstinate and surprisingly widespread commitment to keep the process of holistic reflection and commitment seamlessly afloat even in the formally post-constitutional phase of the new so-called 'Reform Treaty' initiative on the other, can be seen as an attempt to come to terms with this final and potentially paralyzing paradox of the sovereignty frame.

Whether, when, and on what terms such a process may succeed, remains to be seen. It is a topic, I suspect, not just for the next few months as the current European political elites would prefer, but for the second 50 years of European integration. What can be said in anticipation, however, is that the only genuine hope for Europe to overcome its mid-life crisis lies in the continuing and potentially self-reinforcing strength of the democratic ideal itself. In particular, this depends upon continuing appreciation and stubborn pursuit of the possibility that while, as we have seen, any particular grounded system of democratic *practice* is unable to specify its own 'who decides what' framework conditions in a democratic fashion and must therefore rely on a prior 'sovereign' frame to answer this question, the democratic *principle* of self-government need not be the docile prisoner of that frame and can instead rise above its context. In so doing, in Europe, just as we have often required of it and continue to ask of it elsewhere, 'democracy' can provide an ongoing basis of self-critique and an iterative force for self-transformation (Benhabib, 2006) – one whose form and outcome cannot be, and should not be, entirely predictable.

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