

# Can the New European Constitution Remedy the EU "Democratic Deficit"?

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We could not even begin to answer the question posed in the title of the present paper, unless the European Constitution and the proverbial conundrum of “democratic deficit” are first put into a wider context of constitutionalism and democracy. In particular, it would be wrong to approach this dilemma by asking whether the Constitution will make the EU more just, more democratic and more people centred, since these descriptions amount to a tautology. First, we need to clarify what the term democratic deficit in itself means; what its roots and causes are; and according to which ideal it should be remedied. Only then, can we start answering the question of whether the emerging European Constitution is an appropriate means to achieve the desired end.

This paper will provide a brief overview of the origins of claims of the EU’s democratic deficit, analyse the components of such deficit, namely its formal and social character, and pose to what extent the new European Constitution is capable of remedying it.

## The Roots and Causes of Democratic Deficit

Although the notion of democratic deficit has been with us for a long time now, it was not an issue at the very beginning of the EU project. As is well known, the Community was in its foundations conceived as a mere economic enterprise [1], based on principles of international law and completely in the hands of the high contracting parties. Therefore, so long as the member states were *de facto* the *masters* of the founding treaties, “democratic deficit” did not pose a threat. This, despite the fact that the founding treaties originally did not provide for any system of checks and balances that would resemble those at the level of the member states. Nor were there any provisions for the protection of human rights, which, ostensibly, were not even thought of as being necessary in those types of economic treaties. [2]

However, in the following years some provisions of the founding treaties enabled the European Court of Justice (ECJ) - itself originally thought of as a lenient overseer of Community rules - to transform the nature of the founding treaties, and thus of the entire Community law, into an autonomous legal order. [3] The process of constitutionalisation of EU law thus began. It is this very process of constitutionalisation, driven by the Court, that would give birth to claims of the EU’s democratic deficit.

It was only when, in the mid-1960s, the Court proclaimed the two cornerstone principles of EU constitutional law, *direct effect* [4] and *supremacy* of Community law, [5] that the member states started to protest, and that the notion of democratic deficit came to the surface. The newly affirmed principles, allowing even individuals to bring their states to the Court for failure to comply with Community law, did away with previously unassailable sovereignty. The legal loophole was closed, and the member states attempted to retain at least the political voice. [6]

However, with the adoption of the Single European Act, which simultaneously opened the door to majority voting (thus significantly reducing the power of veto) and to the increased communitarisation of Community policies, even the political voice was lost, [7] and the democratic deficit – or claims thereof – started to progress.

The cause of the democratic deficit in the EU thus lies in this process of constitutionalisation. Constitutionalisation has gradually deprived the member states of many prerogatives that they would enjoy if the EU’s legal order was of international and not of *autonomous* legal nature. As a result, and notwithstanding that the formal democratic apparatus embodied in the core EU institutions has been developing progressively – the Commission ceased to be a mere secretariat and the Parliament has ended up being directly elected and having almost a full status of co-legislature – the notion of democratic deficit lingers with us.

A substantial loss of powers prompted implicit fear on the part of the member states of being governed by the “others”, i.e. by the supranational institutions which, due to the increasingly predominant majority voting, do not necessarily always mirror the interests of all the member states. It can, accordingly, be concluded that the conundrum of democratic deficit is generated, by and large, by the member states themselves rather than by an overtly undemocratic EU institutional constellation.

## Dual Nature of the EU’s Democratic Deficit: Formal and Social Components

This last argument does not suggest that the EU’s institutional framework is perfectly democratic and could not be improved; on the contrary, its bureaucratisation is a source of particular and growing concern. Rather, while admitting that the EU, as such, also suffers from its own democratic deficit, my argument stresses that the most

famous and loudest outcry about the democratic deficit was launched by the member states, and not by their citizens, to whom the democracy really pertains. This last statement calls for a two-pronged understanding of the democratic deficit – namely in its formal and social character. [8] In the next part of the paper I will assess the extent of the *formal* and *social* nature of the democratic deficit within the EU and analyse what the Constitution can possibly do for their diminishment.

In its *formal* character, the democratic deficit is measured according to the ideal of a formal legitimacy which corresponds to legality understood in the sense that democratic institutions and processes created the law on which they are based [9] and comply with. In its social character, the democratic deficit strives for a social legitimacy that connotes a broad, empirically determined social acceptance of the system. [10]

As far as the formal character of democratic deficit within the EU is concerned, it can be claimed that there has been much progress made in the last years. The EU is based on the principle of rule of law jointly pursued by the ECJ and its counterparts on the national level. [11] The importance of the European Parliament (EP), which is the only institution directly elected by the people, has been growing. The Commission's position is strong, and while its independence from member states' influence increases it is becoming more and more accountable to the Parliament and thus mirrors the relationship between the executive and legislative branch on the level of the member states. The Council today already plays a role similar to that of the second chamber in countries with a federal organisation, whereas the Court has already long ago safeguarded its role of constitutional or supreme adjudicator. There is also European Ombudsman, the Court of Auditors, and so forth, which only adds to the conviction that, from the point of view of formal legitimacy, the EU is already as democratic as the member states. [12]

There are still some remnants of a formal democratic deficit at the EU level, but those will be comprehensively addressed by the Constitution. For example, the Constitution will formally incorporate the Charter of Fundamental Rights, [13] which will thus become legally binding and will provide a firm and so far lacking legal basis for the protection of human rights within the Union. This will significantly strengthen the principle of legal certainty and the rule of law and will thus add to the formal legitimacy of the Union.

In addition, the relationships between the EU institutions will be made more transparent; the titles of legal acts adopted by the institutions will be simplified and more systematically organised. [14] The power of the EP will increase further by widening the field of co-decision and, most importantly, the EP will be able to exercise more influence on the composition of the Commission. The president of the Commission will be elected by the Parliament on the proposal of the European Council, taking into account the results of the elections to the EP. [15] This means that following the adoption of the Constitution, the EU executive branch should mirror the ideological and political composition of the Parliament, which, as such, will make the importance of the latter - and of the EU democratic process (the elections) - more meaningful.

Speaking about the EU democratic process, it has to be mentioned that the Constitution devotes an entire title to the “democratic life of the Union”, where it stresses the importance of the principle of democratic equality; of the representative democracy; and even of the principle of participatory democracy. [16] According to the latter, the peoples of Europe will for the first time be able to exercise the citizens' initiative to invite the Commission to prepare a legislative proposal in the appropriate legislative field. [17] They will also be additionally integrated into decision-making in the EU via their national parliaments, whose role will increase under the amended principle of subsidiarity. [18] All in all, through the principles of subsidiarity and proportionality, which are thoroughly emphasised in the Constitution, it will be attempted to keep the decision-making as close to the people as possible and to take the decisions on the EU level only if absolutely necessary.

## Overcoming Social Deficit

This cursory survey of the provisions of the new Constitution that address the question of the formal democratic deficit shows that the EU's formal democratic deficit is not as large a problem as it is portrayed, and that the new Constitution in its present form can remedy most, if not all of it. The problem, however, lies in the *social component* of the democratic deficit.

As stated above, the social component of the democratic deficit is measured according to the degree of social acceptance of the system, i.e. how the people in fact perceive the European Union and its institutions. Unfortunately, however, much empirical data in this regard shows that the social component of the democratic deficit within the EU is huge; [19] the turnout at the last elections to the EU Parliament alone suffices to prove this case. [20] The people of Europe apparently do not know enough about the EU and its institutions, considered to be far too remote from

people. This ignorance in turn causes low motivation and lack of interest in taking part in EU affairs. Thereby, the vicious circle of a social democratic deficit closes.

How could the Constitution break this vicious circle? The task is extremely hard. As a legal document, the Constitution certainly cannot alone remedy the social component of the democratic deficit. This is especially so given that roots of this social component are again in the member states themselves: in the last decade the participation of the electorate at the elections has been persistently on decline, and public attitudes toward politics have been increasingly affected by various scandals and corruption allegations.

However, the problem of the EU is even greater than that of the other member states. Whereas the latter are more or less homogenous and built on the legacy of the nation state, as characterised by a national ethnic *demos* with some historically inbuilt identity that largely helps to alleviate the problems of social legitimacy, the EU constitutional constellation is neither a nation state nor homogenous, and there is no European *demos* in the traditional ethnic terms, with an inbuilt identity. [21] That means that the EU and its Constitution face a challenge of remedying a social component of the democratic deficit in a multilayered, pluralistic polity with a non-uniform cultural setting. Having said that, I can think of only one possible way that the Constitution could at least try to embark on remedying the social democratic deficit. This is by taking the advantage of the constitutive role of the Constitution and thus using it as a tool for a common orchestration of the EU institutions and the member states in their engagement in the constitutional discourse. It is *the* constitutional discourse that could bring the peoples of Europe together, through a wide and argumentative public discussion when adopting the Constitution. A potential Europe-wide referendum, in which European citizens would simultaneously cast their votes against or in favour of the Constitution, would in the best way constitute the first outline of the European *demos* – by building a genuine constitutional polity with its own constitutional values, while at the same time remaining the citizens of the member states. Having the benefit of this dual complementary citizenship, and the widespread public discussion changing the existing elite-based political practice on the EU and member states level, could encourage people to participate in the public life and to take advantages of membership of both polities. At the same time, the national and supranational polity could – and would have to – each strive within its own borders of constitutional discourse and yet simultaneously act to diminish the widespread alienation of people from politics in its widest sense. However, there is to be no Europe-wide referendum. Apparently, only some member states have decided to engage in a wide public discussion followed by a referendum, while the others have opted for a parliamentary ratification [22] – in some cases a very swift one, in order to be the first to ratify – the European Constitution threatens to remain more or less a *Constitutional Treaty*. Without a foundation in any constitutional discourse the Constitution is very much apt to remain yet another EU founding treaty and thus a legal document without any significant prospects to remedy the democratic deficit in its social character.

## Conclusion

Returning to the original question posed in the title of this paper, the emerging European Constitution will likely remedy the *formal* aspect of the notorious EU democratic deficit, however prospects of alleviating its *social* component are only moderate.

The reason for this rather sceptical conclusion lies in the fact that the majority of the EU's stakeholders still have not asked, or perhaps lack the courage or intellectual strength to answer, the very foundational question of the European Project. Namely, according to which *ideal* should the EU democratic deficit be remedied, or in other words what the European Union ought to be? [23]

There is, of course, no easy answer to this question. The only conceivable way to find the answer is to engage in a genuine constitutional discourse, involving the broadest spectrum of stakeholders. The European Constitution, as an extremely value-laden document, [24] could serve as a starting point and pave the way on this long quest. However, only the time will show whether this indeed will be the case.

## References

[1] As the names of the three founding Communities show: the European Coal and Steel Community (ECSC), which came into force on 25 July 1952; the European Atomic Energy Community (Euratom) formed by the Treaty of Rome, which came into force on 1 January 1958, and the European Economic Community (EEC) created by the second Treaty of Rome and coming into force in 1958. For more on this historical development see, for example: Josephine Shaw, *Law of the European Union*, 3rd Edition, Houndmills, Basingstoke, Hampshire, Palgrave, 2000.

- [2] See: A. Cassese et al. (eds.), *Human Rights ad the European Community: Methods of Protection*, Baden Baden, Nomos Verlagsgesellschaft, 1991.
- [3] For more on the transformation of EU law by the ECJ, see: J.H.H. Weiler, "The Transformation of Europe", in *Yale L.J. V.* 100, 1991, p. 2403 (hereafter, Weiler)
- [4] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 1963 E.C.R 1, [1963] 2 C.M.L.R. 105 (1963).
- [5] Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425 (1964).
- [6] For the explanation of this theoretical interplay between the exit and voice see: Weiler. A concrete manifestation of the wish to retain the political voice was the French policy of an empty seat. The policy of the empty seat was stipulated in the Luxembourg accord, which however has never been recognised as legally binding.
- [7] See: Weiler at p. 2455.
- [8] Id.
- [9] Id. at p. 2469.
- [10] Id.
- [11] On the principle of rule of law in the EU see, in particular: Case C-294/83 ECR 1986-4, p. 1365, Opinion 1/76 of 28 April 1977, ECR 1977-I, p. 758, point 12; Order of 13 July 1990, Case C-2/88, *Zwartfeld*, ECR 1990-7 I, p.3372; Case C-134/91, *Beate Weber vs. European Parliament*, ECR 1993-I, str.1093, para. 8.
- [12] Indeed, some authors concede that there is no (formal) democratic deficit in the EU at all. See, for example: Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messeina to Maastricht*, Ithaca, Cornell University Press, 1998.
- [13] See: Part II of the European Constitution.
- [14] See Title V of the European Constitution, art. I-33, which provides: "In exercising the competences conferred on it in the Constitution, the Union shall use as legal instruments, in accordance with the provisions of Part III, European laws, European framework laws, European regulations, European decisions, recommendations and opinions".
- [15] See Title IV of the European Constitution, art. I-27.
- [16] See Title VI of the European Constitution, art. I-45 to I-47.
- [17] See Title VI of the European Constitution, art. I-47, para. 4.
- [18] See Title III of the European Constitution, art. I-11, para. 1, and the *Protocol on the application of the principles of subsidiarity and proportionality*, annexed to the Constitution.
- [19] See for example various Eurobarometer surveys, especially the very recent one, *The Future Constitutional Treaty: First Results*, available on [http://europa.eu.int/comm/public\\_opinion/archives/ebs/ebs214\\_en\\_first.pdf](http://europa.eu.int/comm/public_opinion/archives/ebs/ebs214_en_first.pdf) (accessed 25 February 2005).
- [20] The election turnout trends to the European Parliament show that the turnout has been on decline, at the last election, however, reaching the lowest point so far (i.e. 45.7 percent). Source: [\*\*title?], available at [http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout\\_ep/turnout\\_table.html](http://www.elections2004.eu.int/ep-election/sites/en/results1306/turnout_ep/turnout_table.html) (accessed 18 January 2005).
- [21] For a discussion on the European citizenship and European demos, see: J.H.H. Weiler, "To be a European Citizen – Eros and Civilization", Working Paper Series, in *European Studies*, Special Edition, Spring 1998, at pp. 31, 37. Weiler proposes supranational normative concept of the European citizenship (as opposed to a statal concept of nationality), relying on the concept of "multiple *demos*", which is enabled by decoupling of nationality and citizenship. Citizens of the EU by definition do not share the same nationality, but they (have to) constitute a *demos* – an origin of all legitimacy for the Community action. European citizens should be regarded as members of the European demos in civic and *political* terms, rather than in ethno-cultural terms characteristic of a statal concept of nationality and citizenship. See also Kalypso Nicolaidis, "The New Constitution as European Demoi-crazy?" *The Federal Trust Online Paper*, 38/03, December 2003. For the opposite view, which perceives the debate on demos and *demos* as nationalistic, see N.W. Barber, "Citizenship, Nationalism and the European Union", *European Law Review*, Vol. 27, Sweet and Maxwell Limited and Contributors, 2002.
- [22] Presently, the following countries have opted for, or are considering, a referendum on the Constitution: the Czech Republic, Denmark, France, Ireland, Luxembourg, Germany, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. See: at [http://europa.eu.int/futurum/referendum\\_en.htm](http://europa.eu.int/futurum/referendum_en.htm) (accessed 18 January 2005).

[23] This question was recently raised also by Professor Giuliano Amato during his Inaugural Annual Emile Noel Lecture at NYU School of Law. He pointed out the main question that the EU should answer: "What do we (i.e. EU) want to be? (and not how!)". For the same line of thought see: M. P. Maduro, "Where to Look for Legitimacy?" in Erik Oddvar Eriksen et al. (eds.), *Constitution-Making and Democratic Legitimacy*, Oslo, 2002. For a general critical assessment of the Commission's White Paper, see European Communities, *The New Europe: Governance in a Union up to 30 Member States*, EU Paper, DG for Research Working Paper in Constitutional Affairs Series, AFCO.

[24] See especially *Preamble* to the European Constitution, art. I-2, I-3, which provides for the values and objectives of the Union; and *Preamble* to the Charter of Fundamental Rights.