

# Democratic deficit in the european union



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The 'standard version' of the democratic deficit formulated by Weiler, consisting of the increased role of the executive Commission in matters of legislation, the weakness of the European Parliament (hereafter the EP), the lack of 'European' elections, EU distance to public scrutiny and voters, and finally 'policy drifting' by the executive non-compliant to voter interests, has and continues to be a major target of criticism within the field of European Union (the EU) law.

The matter is of utmost importance in light of the implications of such in the EU legislative process involving the EP and its perceived lack of substantive necessity despite reforms seeking to remedy such. Since the establishment of supremacy in EU law by the European Court of Justice in Van Gend en Loos and Costa, it is primarily the law-making process of the EU itself that drives the debate on the perceived lack of democracy.

Central to all of this is the complexity of the process that casts doubt upon its democratic legitimacy. Despite the Treaty of Lisbon (Lisbon) remedying much of the loathsome deficit, effort is still required as overwhelming flaws in the democratic legitimacy of the EU persist to which no single remedy is available. The most significant feature of the complexity of EU law-making throughout its various stages concerns the intra-EU balance of powers which furthers the debate on the democratic deficit.

As such, focus must be placed upon the structure and function of the primary EU institutions which are undoubtedly interlinked to the claims of a democratic gap in the law-making process. Factors of representation, electoral politics and public scrutiny are also matters of importance and potentially propose a contrary account to the underlying grievances. It must

be accordingly contended that an effort to align the complaints composing the democratic deficit is necessary to provide proper analysis of this pressing EU issue.

First among the concerns is the excessive role of the Commission in law-making that raises questions on the democratic legitimacy of the procedure. The Commission has primary control over secondary legislation, mainly based on the Ordinary Legislative Procedure (OLP), allowing it to act as a policy-making director of EU law equipped with exclusive powers of initiating legislation, effectively ensuring its power to set the EU agenda. The Commission's monopoly of power over initiating this legislation extends to many areas of EU law-making.

Despite attempts to qualify this power by way of TFEU Article 241 in giving the EP or the Council of the EU rights to submit legislative proposals, the sole initiator remains the Commission which also retains the power to reject and scrutinise their proposals as it deems appropriate. Further to this are attempts by Lisbon to qualify the agenda-setting powers of the Commission by way of TEU Article 11(4) and the Protocol increasing national parliament participation in the law-making process. Following this, the Commission must consider the opinions, review proposals and take into account proposals by EU citizenry.

In practice though, the Commission is still the ultimate arbiter of decisions by retaining the final say on initiating legislation. The EP effectively plays a subsidiary role and this clearly places the Commission at the head of the OLP and makes the system useless without it. Aside from power initiating legislation, the Commission is active throughout the OLP. It scrutinises

Parliament's amendments in second readings for the Council to approve by Qualified Majority Voting (QMV) or unanimity, depending on the Commission's position.

Also, the Commission sits in the Conciliation Committee to attempt to reconcile disparate positions of the EP and Council. Although it seems on paper that Commission influence diminishes as the procedure drones on, as it does not actively partake in the Conciliation Committee, it in practice significantly influences the outcome since agreement is usually reached in first or second readings where it is difficult for the EP and Council to distance themselves from Commission proposals unless assented to. In 2008-2009, 203 proposals over 18 months resulted in only 6 going to the Conciliation Committee.

This gives dominant oversight to the Commission in the law-making process, a key factor in democratic deficit critique in EU law-making and somewhat undermining the notion that the EP is the vehicle for EU accountability. Further, the Commission's institutional structure is a factor putting great weight on perceptions of the democratic deficit since it lacks democratic credentials yet largely dominates EU law-making in spite of the presence of the EP as its democratic face. Commissioners are not elected, directly nor indirectly, as is with most sovereign executives.

Follesdal and Hix however argue that the exercise of these executive powers requires contestation of political leadership and policy. They also suggest that direct elections by citizens or national parliaments should be allowed for the contestation of the Commission President who holds the most powerful EU executive position, so as to increase democratic input. Contrary to this

position is that of Moravcsik, who discounts the idea of elections as a possible remedy and rejects the notion of a democratic deficit by holding the Commission sufficiently accountable.

He asserts Commissioners are dependant and accountable from MS national parliaments from which they are deployed. However, this argument is practically flawed as Commission officials are somewhat isolated from their national parliaments than domestic ministers making policy, not to mention the electorate back home. They effectively ignore their parent parliament when deliberating in Brussels as the level of control is distant and officials suffer no consequence for it at the ballot box.

Chalmers, going further, identifies Commissioners as lobbyists acting to realise client interests and consequently working independently of national governments. With regard to the Commission's purpose, it functions as a supranational institution to represent the overall 'European good' and not exclusively those of a MS. A relationship gap is consequently assumed. Doubts are furthered on democracy from an institutional perspective, with direct implications on law-making.

Alongside the Commission's disproportionate involvement in the law-making process at the expense of the EP, it is imperative to examine the role of the EP itself and Council of Ministers that constitute the rest of the three-fold process. Although EP powers have strengthened under Lisbon, it remains the weakest of the three institutions despite being the only directly elected EU institution. Lisbon remedied this in granting the EP further legislative powers and supervisory power over the Commission.

The OLP does allow the EP to co-legislate with the Council and theoretically exercise veto powers at the second reading or at the Conciliation Committee. It should however be contended that it is more appropriately the threat of veto that gives the EP legislative input as it has only been used 3 times between 1999 and 2009. The EP also now enjoys amendment powers, of which most have been successful. It is still the Council however that serves as a legislature under the OLP as measures only become law if the Council consents.

It has substantive power to delay approval of amendments made by the EP in first readings and equal veto powers in the Conciliation Committee. This is quite clear when presented with forms of legislation other than by way of OLP. For example, the Consultation Procedure is based on the activity of the Council and the Commission whereas the EP is merely 'consulted' thus demonstrating dominance of the executive. Thus the EP is mostly passively active in EU law-making, with Dann considering it a 'controlling parliament' due to its policy-shaping rather than actually policy-making characteristics.

On the other hand the Assent Procedure permits the EP greater power initiating legislation, but this procedure is rarely used. As such, even post-Lisbon, the EP as the presumed legislative body of the EU is too marginalised in law-making for the EU to claim true democratic legitimacy. The baser concern determining the law-making legitimacy of the EU remains constitutional in nature. The indirectly-elected Council consists of the respective ministers of MS governments who are individually democratically elected.

However, the electorate is only nominally involved as these ministers are chosen on a domestic level for unrelated to EU legislative functions. Also, ministers in the Council in exercising EU legislative functions indirectly burden their national parliaments with their laws where they do not exercise similar powers of independence in the Council. This stresses the supranational institutional framework which is already too distant from national parliaments and voters, as with the Commission above. By the same token, the EP also lacks institutional democratic credentials in composition.

Although the lone directly-elected EU institution, smaller MS's are disproportionately over-represented. Doubts exist concerning whose interests EP members represent, especially given the comparatively low interest and involvement in the institution. This is the fundamental issue behind democratic deficit allegations and the EP despite nominal participation as legislators vis-a-vis the Commission and the Council in the overly-complex law-making process. Unfortunately, any increase in EP legislative powers would not eradicate democratic deficit problems, much as Lisbon purportedly does.

In short, the entire EU institutional makeup is designed to be inherently undemocratic. Other matters wedded to the legislative process exacerbating the democratic deficit are the accountability and transparency of it. Public scrutiny is elusive and the law-making process is carried out behind closed doors, leading commentators like Majone to refer to a 'credibility crisis' rather than a democratic deficit. Low EU election turnout averaging 43% reinforces this notion and arguably contributes to a self-perpetuating status quo.

Public confusion and resulting disinterest due to the institutional structure and state of the EU is somewhat justified given the seemingly permanent process of constitutional review that guarantees the electorate will not easily understand a political system drastically changing every 8-10 years in contrast to domestic systems, such as the United Kingdom which have remained relatively static for several centuries. Such an atmosphere though may actually be advantageous in achieving the technocracy-based Monnet method of European integration by stealth. It is doubtful any EP reform can alter this unenviable status quo.

Finally, formalistic legislative procedures have been marginalised by increasing use of trilogues, a mechanism corresponding to a notion of 'mutual sincere cooperation' of the EU institutions rather than the separation and balance of powers typical of most national systems. Trilogues exist at almost every stage of procedure and boldly challenge democratic legitimacy by focusing on strategic negotiation of interests that lack meaningful representation. Trilogues are limited to those actors representing the institutions in the discussions, omitting other interested parties such as smaller EP parties, defeating its institutional purpose. This illustrates and contributes to the overall lack of decision-making transparency in these informal arrangements. Follesdal and Hix label this one of the biggest deficits and advocate for institutions that are more responsive to citizen participation and expression and involves greater public awareness and scrutiny to increase the European democratic input. In conclusion, the most critical matters concerning the democratic deficit and the EU law-making



process rely on the function of the major institutional actors: the Commission, Council and Parliament.

Institutional design determines much of this and is fundamentally to blame for the democratic deficit. Analysis further concludes that the EU is far from what it considers itself to be and what most nation-states are predicated upon: representative democracy modelled upon TEU Article 10. This problem continues as it lacks fully representative bodies that dominate the law-making process and has an executive that routinely operates outside of its boundaries by way of operation. No recourse is available to the citizens and their interests, who consequently do not fully participate by virtue of their distance to the EU.

Additionally, transparency, scrutiny, diversity of opinion and their purpose in the law-making process are thoroughly subrogated through the trilogue method. As overlapping competences exist amongst the EU institutions and therefore requires some degree of executive and legislative consensual co-decision-making, the EU therefore falls along more of an executive federalist model as demonstrated in analysis on the operational and occasionally overbearing role of the Commission in legislation at the expense of the expressly-elected Parliament, as well as the Council.

However, the EU is a legal entity actively trying to achieve the concept of representative democracy closely aligned along the lines of the modern nation-states, but this may not be the appropriate means to measure it by as that would inappropriately infer the EU as a proper federal superstate. Additional democratic credentials like an open, lively, public forum with the

system at the centre are necessary to fully apply the term ‘ democratic’ to the EU and its institutions.

Currently, unnecessary complications, specifically the institutional structure and the placement of the European Parliament within it, denies the EU that claim. Ultimately, the question of affording greater power to the Parliament is unnecessary, as the goal should be in stripping away the undue concentration of such from other institutions which should not wield it in any event.