EU democratic deficit, Introduce a legislative referendum, but not a “constitutional” referendum, a “constitutional” initiative or a legislative initiative

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Introduce a legislative referendum, but not a “constitutional” referendum, a “constitutional” initiative or a legislative initiative

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Summary

By examining the case of Switzerland we observed that direct democracy can help develop a public sphere for diversified populations. The European Union could follow this example to develop a greater feeling of identity and legitimacy of its own.

Based on our analysis of the advantages and disadvantages of direct democracy, we suggest an optional legislative referendum be promoted on a European level.

We find this preferable to a “constitutional” referendum, to a “constitutional” initiative or to a legislative initiative. It is more in keeping with the hybrid nature of EU institutions, which characteristically lack a true European demos.
Annexed analysis

ACTUAL AND PERCEIVED DRIFT BETWEEN THE EU AND ITS CITIZENS

The crisis concerning the legitimacy of the EU has grown more intense since the rejection of the Constitutional Treaty in the 2005 French and Dutch referendums. The absence of an authentic European public sphere is a contributing factor. Yet considerable means have been mobilized in trying to create one. Huge sums of money have been spent. Many reports have been published. A wide array of scholarly colloquia has been organized. New communication tools have been developed (internet, blogs, television). Increasingly sophisticated polls have been invented. Greater transparency has been given (access to documents, information on voting in the Council).

There is no denying, however, that all this has had little, if any, impact. Most citizens still do not understand how the EU functions nor do they grasp the importance of the decisions adopted there. Voter turnout for the European Parliament remains far lower than that for national parliaments. And debate all too rarely is held on European themes.

Clearly, the political spill-over that logically should have occurred through economic integration has not happened. Contrary to forecasts by neo-functionalist political scientists, there has not been a transfer of policy locus from the national level to EU-level.¹

This can be traced to a myriad of well-known reasons. The main one is the absence of a single language. There are, of course, other explanatory factors that we cannot mention here, like the different cultures, the preponderant weight of the Council in the political system, the dull subjects, etc.

In order to overcome these obstacles a way must be found to arouse people’s interest and motivate their participation. Without question, electing part of the European deputies at the European level would be a meaningful contribution. The same holds true for the Lisbon Treaty provision allowing 1 million citizens to ask the Commission to draft new legislation. Even if such measures are a step in the right direction, unfortunately this is not enough. When it comes down to it, only the petitioners are truly engaged, most people remain apathetic since they do not participate in the final decision that will be made by the Council and the European Parliament.

It therefore seems to us that we must go even further. That is why, by our viewpoint on the Swiss experience² but also on France’s successful debate on the European Constitution, we advocate enhancing direct democracy within the EU. Direct democracy helps develop a public sphere³ that is shared by populations that have little in common. It arouses a greater

sense of identity. In this sense, direct democracy goes hand-in-hand with the citizen’s greater sense of responsibility and commitment to the res publica.

It can allow a common epistemic language to develop among peoples who do not share a common idiom, culture, or religion. It also comprises an exceptional tool for the integration of all sorts of minorities: linguistic, political, social, environmental, sexual, etc. At the same time referendums develop unity out of diversity.

Referendums are extremely useful in creating a public sphere that reflect a collective learning experience. When citizens are called upon to vote on a topic they get an overarching view and learn more about the issue as a whole. This participation helps develop a sense of identity. Direct democracy also has the virtue of narrowing the distance between citizens and politicians. It enhances political legitimacy and achieves a heightened sense of identification by all parties with the whole, resulting from the deliberative process.4

The idea of developing direct democracy at EU-level is not a new one. It has been promoted by a number of activists and academics. They, however, propose solutions involving constitutional referendums and popular initiatives, whereas we favour an optional legislative referendum.

ADVANTAGES OF A LEGISLATIVE REFERENDUM

Amongst all the instruments of direct democracy, we rank the optional legislative referendum as top of the list. In concrete terms, that means that a popular consultation would be organized if a certain number of citizens, let’s say 5 million, asked for it.\(^5\)

It could only cover Community legislation already adopted by the Council and the European Parliament. If 50% of the voters turned down a new law it could not enter into force.

We should note that in Switzerland referendums are organized after legislation has been adopted by parliament and before it enters into force. Whereas in Italy, referendums are held after the law has entered into force. That is why they are called abrogative referendums. Yet basically, it comes down to the same thing.

In our view, a minimum number of votes, a quorum, should not be required to validate a referendum. This is the case in Italy, but not in Switzerland. It is true that a quorum helps prevent a minority of voters from imposing their will on the majority of citizens. But it has the enormous shortcoming of encouraging non-participation. The political parties that had the law passed felt that it was easier to avoid the success of an abrogative referendum by relying on a coalition made up of people who normally abstain and people who back the legislation, rather than just the latter. Such a negative effect clearly runs counter to the goal we are seeking: to encourage participation and debate. The main paradox is that it is the majority parties in the parliament that encourage citizens not to fulfil their civic duties. In fact, quorums have the effect of de-legitimising the very process.

We acknowledge that the Swiss system, without a quorum, has the shortcoming of potentially allowing a minority of citizens to impose their will on the majority of those who abstained and on opponents. All the more so since the turnout rates for referendums are, in general, lower than for parliamentary elections. This is true, but depending on the subjects, turnout rates may at times be high.

The postal vote has been generalized and has significantly increased the percentage of voters. And the introduction of e-voting, particularly voting on the internet, could have a still greater influence. Electronic voting enables voters to cast their ballots from home, so they don’t have to physically go to voting stations. Lastly, we should note that whatever the case may be, even if only 50% of the citizens of EU member countries participate in a referendum, that would mean that already hundreds of millions of people would be taking part in the debate Europe-wide. This represents a huge leap forward in relation to the current situation.

Optional legislative referendums should be legally binding. They should not be advisory. It so happens that in some countries, above all in the Nordic countries, referendums are legally

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\(^5\) We could also envisage, like Astrid Epiney, that a legislative referendum would only be organized upon the request of a certain number of parliamentarians or States. Yet we fear that might create a situation of continuous blackmail within the Council and the European Parliament. See Astrid EPINEY, “Le référendum européen” in AUER Andreas & Jean-François FLAUSS (eds.), *Le référendum européen*, Bruxelles : Bruylant, 1997, pp. 287-315.
advisory but politically binding. That can work in societies where such systems are part of an old political tradition. Yet it would be preferable for the EU to avoid ambiguity as it may generate conflict. Additionally, if the outcome of the vote is legally binding, there should be no further discussion; which is, in fact, our very goal.

The unfinished (from a purely federalist viewpoint) nature of the European construction should be respected. The Council’s importance in decision-making is an undeniable fact that is not the case in archetypical federal states like the United States and Switzerland. Nevertheless, this reality should be a starting point. Lastly, we believe it is crucial to fully include the European Parliament in the decision-making process. Representative democracy is a prerequisite for European legislation to be designed by competent and well-informed elected officials.

We also find it positive that the referendum only intervenes at the end of a decisional process and not at the beginning like the initiative. It actually acts like a safety valve, enabling the people to intervene if they are not satisfied with laws formulated by the political elite. The fact that the referendum can bring everything back into question at the end of a decisional process means that a plebiscite democracy is avoided. Yet it still allows a negotiating democracy\(^6\) in that the Parliament and the Council are obliged to have a sword of Damocles hanging over their heads representing the potential launch of a referendum.

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**DISADVANTAGES OF A “CONSTITUTIONAL” REFERENDUM**

Concretely speaking, a constitutional referendum consists of organizing a referendum the same day throughout the EU on a new constitutional treaty that would complement member State ratifications.

The argument that voters should only be consulted on fundamental issues at constitutional level is not satisfactory either. Were this to be the case, overly abstract questions would be raised by jurists and constitutionalists, addressed to people who on the contrary prefer to explore concrete economic, environmental, societal and social matters.

Furthermore, a negative vote on a constitutional matter would generate a series of crises, paralysis and psychodramas, whereas a negative vote on legislation adopted by the Council and the Parliament would merely elicit token grumbling.

In actual fact, a referendum on a new constitution may only be held very rarely, at the very best, every ten years. Whereas a European legislative referendum could be organized at least once a year.

The legislative referendum’s main advantage is it respects the sui generis nature of the EU’s institutional architecture. Contrary to the constitutional initiative, the legislative referendum does not artificially create a European demos. This demos doesn’t exist and it is anti-democratic to wish it to be imposed by stealth.

In this manner, by introducing a legislative referendum the European demoi would be taken into account and we would move along the path towards a more democratic public sphere, one which included its citizens in the decision-making process.

By dint of debate on concrete issues, citizens will find it natural to place political confrontation at the European level. The European public sphere will not result from abstract discussion on the finality of the EU, on its constitution and its institutions. It will result from an almost daily debate on questions of general interest.

Regardless of the importance and the level of the subject under discussion, regardless of the rationality of the debates and the occasionally disconcerting results of “popular wisdom”, at the end of the day, it is the deliberation in and of itself that creates a feeling of belonging.

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8 Jürgen NEYER, op. cit.
DISADVANTAGES OF A “CONSTITUTIONAL” INITIATIVE

Regarding the initiative, this allows a given number of citizens; let’s say 10 million- to organize a vote to amend a provision in basic treaties. Or even to propose a new law. In this case the referendum would be called without the States (the Council) and the European Parliament being empowered to participate in the decision.

Supporters of the constitutional initiative prefer it to the legislative referendum because in their view it seems more progressive, more apt to shake up the establishment. It takes place at the beginning of the political process. It allows a group to place an issue on the political agenda. Groups and organisations representing them are given greater value. The popular initiative forces the political elite to reflect upon a problem. The legislative referendum is therefore ill-appreciated as it is perceived as a favourite tool of the conservative right since it provides the opportunity to defend the status quo.

Supporters of the popular initiative are purists\(^9\) who wish to set up a true European demos. They are often also federalists who wish to eliminate the sui generis nature of the Unidentified Political Object that the EU represents. They also sometimes claim to be followers of Jürgen Habermas and of his concept of “constitutional patriotism”, supporting only constitutional referendums.\(^10\)

Habermas’ supporters often close ranks with jurists and constitutional experts who propound that the electorate should only be called upon to vote on issues of great importance such as these: a constitution or a constitution-like treaty. Considering their professional background, their position is logical. Moreover, it is based on a Rousseau-type of democracy according to which a decision is legitimate to the extent that it constitutes a debate resulting from the general will, one shared by the wider population.\(^11\)

Their error is to think that the people wish to vote on the finality of Europe, that they would need a Constitution in order to feel European and that they really do feel concerned by abstract considerations. This misconception stems from his theory, according to which the Germans have allegedly adopted “constitutional patriotism” and that this success story should be transposed to Europe as a whole. In fact, the Germans, overall, have not developed a patriotic slant to their complex, legal text, the Grundgesetz. On the other hand they have identified with a rejection of the Nazi and Soviet brands of totalitarianism, and have adopted values connected to democracy, federalism and social market economies. The same holds true on a European level. Citizens want to reject war and other forms of dictatorship and enjoy prosperity and social equality.

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9 This is particularly the case in The Initiative & Referendum Institute Europe: [http://www.iri-europe.org/](http://www.iri-europe.org/).

10 This is particularly the case in Jean-Marc FERRY’s French-speaking world in *La question de l’Etat Européen*, Paris : Gallimard, 2000.

DISADVANTAGES OF A LEGISLATIVE INITIATIVE

Could the legislative initiative be an alternative to the constitutional initiative? This proposal aims to allow a certain number of citizens to ask the European Commission to draft a legislation which would be submitted to a popular vote (referendum) at the European level after submission to the Council and Parliament.

The competences of these two institutions are however not clear. Could they modify the proposed legislation? If yes, how much and on which aspects?

In any case, the Swiss experience shows that such a method is simply unworkable. Indeed, despite the fact that the Swiss people formally approved this method of legislative initiative by referendum February 9, 2003, one realized that it was a headache and it has been withdrawn in November 2009 (after a referendum …).

Broadly speaking, the problems arising from the legislative initiative are the following: impracticable, too complicated, too long process, lack of political transparency, threat to political stability.  

Obviously, if the legislative initiative does not work in Switzerland, it is not logical to propose to propose such an idea at the European level.


DIRECT DEMOCRACY : CONS AND PROS

Over the years much criticism has been levelled against direct democracy. Although we cannot explore all of it, we will pick up the main points.¹⁴

1- First of all, for some people it creates a problem of the legitimacy of such a system in the absence of a true European federation and of a European demos.

This is true but the EU has forged a kind of third path between a federal State and a confederation of democracies. In Kalypso Nicolaidis’ words, the EU has developed a “democracy”.¹⁵

2- Next, direct democracy is accused of establishing a kind of dictatorship of the majority over the minority. More specifically, we could imagine domination by highly-populated countries over smaller ones, or the North over the South, etc.

True enough but this criticism holds for democracy in general. Furthermore the Swiss experience, where the German-speakers represent 70% of the population, shows us that this only rarely occurs even though differences in Weltanshauung most certainly exist in the diverse communities in the country. Let us also note that the Community system already offers many safeguards, particularly for the less-populated countries. These countries are already relatively overly-represented in the European Parliament and, above all, in the Council which saves them from being crushed by the majority of demographically stronger ones.

3- Another objection is that it is possible to organize a referendum in Switzerland as it is a small country but this is not practical in bigger entities. The large size of the EU would prevent it from organizing a real debate amongst all citizens. Moreover, organizing large segments of the population to vote frequently would pose seemingly insoluble problems.

Without denying these objections, as the problem of size is a real one, it nevertheless seems to us that this would not be a nullifying obstacle to direct democracy. Italy has more than 60 million inhabitants and this system works there. Furthermore the development of inter-European public transport and new electronic media have given a new fillip to communications. Additionally, generalizing postal voting and introducing e-voting could remedy in part the difficulties engendered by the large number of voters (financial savings through reducing paper costs limiting staff size at polling stations, greater participation in elections).¹⁶


4- Another common criticism is the issue of the **level of competence** of the citizens. Voting for each law presupposes that all citizens have the necessary time and education necessary to understand all the ins and outs of the texts, if they are to avoid being manipulated. Is this criticism justified? What actually is the **level of competence** of the citizenry? In a study conducted on the decision-making capability of the Swiss citizenry, Erich Gruner and Hans Peter Hertig arrived at the pessimistic conclusion that, on the average, only one sixth of all citizens correspond to the ideal, well-informed citizens who can provide sound justifications for their decisions.\(^{17}\)

On the other hand Hanspeter Kriesi found that almost half of them (48%) can be considered capable of decision-making based on full knowledge of the facts.\(^{18}\) Thus, even if the problem of civil competence remains a crucial problem, it is **not insurmountable**. We should also note that people’s decision-making abilities vary greatly according to the issues.

5- It is also argued that direct democracy **favours the most affluent lobbies** and by extension the most **conservative political parties**.\(^{19}\) In fact political parties, lobbies, and civic associations, play an important role in drafting proposals and collecting the signatures needed to trigger the referendum procedure.

Consequently, rules must be enacted so as to avoid unjust campaigns. **Transparency** and equitable distribution of moments of reflection **must be established** so that citizens can form their own opinions.

6- Here we will mention a final problem, the **threat of paralysis**, which might result from a large number of negative votes at a referendum. The political elite does not, in fact, have control over the political process and a certain number of projects fail when brought to a vote. In the eyes of some critics of direct democracy, this is detrimental to the political system.

In Switzerland, for example, nearly **half of optional legislative referendums have been successful**. In other terms, when a law is attacked the opponents enjoy an almost 50% success rate.\(^{20}\) On the other hand, this observation should be qualified by the fact that nearly 95% of laws are not challenged by a referendum and thus are simply adopted by parliamentary procedure.

Lastly, the problems raised by **negative votes** at referendums should be **de-dramatized**. Electoral failures can also be positive. They bring into question the omnipotence of technocrats and politicians. Even if the electorate gets it wrong sometimes, it has not at all been shown to do so more often than it leaders do. In any case, it is by losing referendums without turning it into a psychodrama that one learns how to become true democrats.

\(^{17}\) Erich, GRUNER & Hans-Peter HERTIG, *Der Stimmbürger und die "neue" Politik*, Bern : Haupt, 1983.

\(^{18}\) Hanspeter KRIESI, & al. (sous la dir. de), *Citoyenneté et démocratie directe. Compétence, participation et décision des citoyens et citoyennes suisses*, Zurich: Seismo, 1993.

\(^{19}\) Erich GRUNER & Hans-Peter HERTIG, *op. cit.*

\(^{20}\) A complete list is available on the website of the Swiss federal administration: [http://www.admin.ch/ch/f/pore/va/vab_2_2_4_1.html](http://www.admin.ch/ch/f/pore/va/vab_2_2_4_1.html)