

THE TRAPS OF THE EUROPEAN UNION GOVERNING: DEFICITS OF NORMATIVE AND SOCIAL LEGITIMACY

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Abstract. *The purpose of this essay is to investigate the various dimensions that indicate deficiency in the normative and social legitimacy at the level of the EU governing. The approach is structured on a theoretical framework defining the conceptual understanding of these notions and an analytical one where the focus will be on identifying different traps/impediments within the EU governance, which motivate these deficiencies.*

Keywords: *normative and social legitimacy, EU governance, EU identity, EU institutions*

Following the enlargement process, the EU has grown to become an impressive economic and political body able to define the major development prospects of its Member States. Nevertheless, the more its regulatory sphere has expanded to cover decisions concerning the allocation of key resources and the more it has come to challenge the dominance of the state in these matters, the greater the concern became with enhancing its normative and social legitimacies. Though founded on the principle of unity in diversity, the EU governance needs to be able to provide a coherent institutional framework and decision making mechanism in order to represent fully and fairly the range of constituencies affected by its actions. Defining the normative and social dimension of legitimacy across these lines, the purpose of this paper is to investigate upon their limits within the EU governance.

actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions¹.

1.1. The Normative Dimension of Legitimacy

Founded on jurisprudential ground, the normative dimension of legitimacy is concerned with the justifiability of laws / policies to the people who live under them. These norms of law are determined in accordance to external standards², such as the efficacy of their objectives, their teleological character being related to the effectiveness of the institutional environment. In other words, within a consolidated democratic system, such as EU, the institutional framework is responsible with providing the citizens with the necessary solutions to their requests, solutions which have a normative shape. These solutions should be the product not only of efficient decision making process reflecting power relations within the institutions themselves, but also of the

1. THEORETICAL FRAMEWORK

“Legitimacy is a generalized perception or assumption that the

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¹ Suchman, M. C. (1995) “Managing Legitimacy: Strategic and Institutional Approaches” in *Academy of Management Journal*, Vol. 20, No. 3, p. 574

² Neil Walker, *The White Paper in Constitutional Context*, paper presented at The Jean Monnet Programme,

consultation with the affected civil society groups.

At the same time, laws are insofar normatively legitimate as they impose a moral duty on their subjects to comply with them³. Hence, one can investigate whether the governance is able to secure a core of fundamental rights reflecting values and ideals which are the expression of broad consensus. Thus, according to Richard Bellamy, one can motivate the normative assumption that consensus over rights and public interest are generated by impartial procedures, fostering deliberation and openness among well-informed and motivated persons.⁴ Nevertheless, this theory implies the assumption that citizens do have a general understanding when it comes to assessing the normative legitimacy of their own political order.

1.2. The Social Dimension of Legitimacy

The social dimension of legitimacy refers to the social acceptance of a political system (i.e. EU), expressing to what extent this is rooted in popular consent and reflects the values, preferences and aspirations of its public constituencies⁵. According to Luhman, the efficient use of authority within a certain political arrangement can only be legitimized through an existing social order. Thus, social legitimacy represents the label for the procedures employed in order to obtain loyalty of the citizens with respect to decisions taken

within a political system⁶.

1.3. The Relation Between the Normative and Social Dimensions of Legitimacy

The interconnection of the normative and the social dimensions of legitimacy is motivated, on one hand, by the presumption that the latter is unsatisfactory unless it is grounded in the first one. The fact that social legitimacy is unlikely to develop in a coherent manner unless it embraces the product of normative legitimacy is motivated by the existence of a wide variety of individual preferences which need to be molded into justificatory discourses in order to form a collective will⁷. Hence, social legitimacy is democratically secured by criteria of normative legitimacy which are the creation of the political system. Consequently, they guarantee the self-legitimizing of the political system⁸.

On the other hand, normative legitimacy is unsatisfactory unless it is embedded in the outcome of social deliberation. Laws, as well as policies, are socially legitimate if the citizens are loyal and abide by them. As a general rule, social legitimacy requires that the population believes that the institutions producing these laws/policies are normatively legitimate. According to Weber, the fact that a valid social order is binding at the individual level is due to a system of social order where even if there are some who deny the legitimacy of norms most people would react to their violation.

Symposium: *Mountain of Molehill? A Critical Appraisal of the Commission White Paper on Governance*, available at: <http://www.jeanmonnetprogram.org/papers/01/011001.rtf>

³ Beetham, David (1991), *The Legitimation of Power*. London: Macmillan, p.46

⁴ Richard Bellamy (2006) 'Still in Deficit: Rights, Regulations and Democracy in the EU', in *New Modes of Governance*, Project no CITI-CT-2004-506392

⁵ Walker, op.cit

⁶ Luhman, Niklas (1981) *Politische Theorie im Wohlfahrtsstaat*. München

⁷ Walker, op.cit

⁸ Luhman, op.cit

2. ANALYTICAL FRAMEWORK

2.1. The Vertical Approach: Insufficient Indirect Legitimacy as a Consequence of the Relation between the Member States and the EU

Despite its relative novelty, the EU has emerged as an extensive entity with significant normative and social influence. Nevertheless, its rapid development has yet to reflect a corresponding consensual understanding of its democratic quality. The difficulty in comprehending its numerous dimensions is a consequence of the predominance of the economic aspects of its policies. Although it promotes policies like European economic integration, single market or monetary union as dominant for the EU identity, these are nothing more than aspects that are directly influenced by the national interests of the Member States. Furthermore, one of the basic principles of the EU governance is the principle of subsidiary. The vertical approach is reflected through the assumption that the EU, being conceived as a functional organization that offloads the Member States of difficult tasks, grounds its legitimacy on its ability to provide services and solve problems at the national level. Therefore, one could advance the statement that the source of the EU legitimacy is not represented by a common democratic political identity but by the transfer of legitimacy from the national level to the EU level.

It is true that today's EU governance is built on an extremely wide variety of policies covering all aspects of life of the Member States in a uniform manner, thus trying to create a common political identity with equal rules applying to everyone; through measures aimed at redistribution, through regulation of social, environmental and health policies,

through police and judicial co-operation it affects all its citizens in the same manner. Nevertheless, its legitimacy does not rely on a collective identity or common set of European values that provide a sense of community attachment and that can be readily drawn upon to settle grievances.

At the same time, it is true that its institutional configuration reflects the structure of a supra national regulatory body determined by a single jurisprudence. Still, the only way in which representative institutions or majority rule can provide legitimacy for the EU governance is through a collective identity which is absent in Europe. According to Abromeit Heidrun there are "triple deficits [...] lack of a pre-existing sense of collective identity, the lack of Europe-wide policy discourses, and the lack of Europe-wide institutional infrastructure that could assure the political accountability of office holders to a European constituency."⁹ Bearing these considerations in mind, we can now concentrate on clear aspects that are relevant for furthering the idea of the insufficiency of the EU normative and social dimensions of legitimacy.

2.1.1. Insufficient Indirect Normative Legitimacy

Should we consider the standards of normative legitimate governance (i.e. the principles of the democratic *Rechtsstaat*), we may assume that the EU aspirations are becoming increasingly clear and apparent. According to Erksen and Fossum, the EU can be perceived as "building on [...] principles and rights that are uniquely European and normatively uncontroversial since every Member State subscribes to them and since these moral norms are increasingly spread worldwide".¹⁰ This statement implies the

⁹ Abromeit Heidrun, (1998), *Democracy in Europe*. Oxford: Berghahn Books, p.32.

¹⁰ Erik Oddvar Erksen and John Erik Fossum (2004), "Europe in Search of Legitimacy: Strategy of Legitimation

presumption that “public support will reside in a constitutional patriotism which emanates from a set of legally entrenched fundamental rights”.¹¹ However, the EU deficiencies in relation to these principles relate to different practices that will be discussed as it follows.

The assumption that the EU principles and rights are “normatively uncontroversial” is limited by the fact that, although the Member States adhere to common judicial bodies (i.e. The European Convention on Human Rights) their national jurisprudences are of various kinds and their valuations are consequently divergent.¹² Thus, their perception of certain rights may be embodied in different constructions. For instance, Belgium and the Netherlands regard the principles of “protecting the integrity of the individual” or of “private freedom” such as right to life in a different manner than the other Member States. Currently they are the only to allow certain forms of euthanasia and they even define and regulate them according to their own perceptions. Furthermore, the Member States may unanimously acknowledge and respect the same democratic rights but they have different political and electoral systems. Hence, their ways of interpreting i.e. citizenship rights are often divergent.¹³ Therefore, we may advance the idea that although the aspiration was to see rights as

transcending national differences, the Member States now seem to be shaped by them.

2.1.2. *Insufficient Indirect Social Legitimacy*

Requiring a sense of belonging, a sense of solidarity and common identification, the concept of social legitimacy at the level of the EU is held to be the achievement of a politically integrated system, such as the state nation. Thus, due to its deeper ties of belonging and trust, it makes possible the transformation of a collection of disjunct individuals and groups into a collective capable of common action.¹⁴

The fact that the EU suffers from the absence of an EU demos demonstrates low levels of popular identification with the EU, an issue that can easily lead to apathy and antagonism towards its politics. Even if one may argue that the EU created a transnational legal system which is guided by international norms of rights or that the EU citizenship is a platform to anchor an EU identity, the national influences are too strong and overrule the common identity.¹⁵ The reason lays in the fact that citizens have the tendency of justifying their claims for rights and regard them as constraints on their compatriots and politicians.¹⁶

¹¹ Ibidem p. 446

¹² Nic Shuibhne, “The Values of Fundamental Rights” in M Aziz and S Millns (eds), *Values in the Constitution of Europe*, Dartmouth 2005, Ch 8

¹³ Richard Bellamy, “Still in Deficit: Rights, Regulations and Democracy in the EU”, in *New Modes of Governance*, 2006, Project no CITI-CT-2004-506392, available at http://www.eu-newgov.org/datalists/deliverables_clusters_detail.asp?Cluster_ID=5

¹⁴ Mauricio Viroli notes that “The language of patriotism has been used over the centuries to strengthen or invoke love of the political institutions and the way of life that sustain the common liberty of a people, that is love of the republic; the language of nationalism was forged in late eighteenth-century Europe to defend or reinforce the cultural, linguistic, and ethnic oneness and homogeneity of a people.” In Viroli, Maurizio (1995), *For Love of Country An Essay on Patriotism and Nationalism*. Oxford: Oxford University Press

¹⁵ One of the most important exponents of the view is Jurgen Habermas (1992) in *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 Praxis International, 1 and *Why Europe Needs a Constitution*, 2001, 11 New Left Review, 5

¹⁶ Richard Bellamy, op.cit

Insufficient social legitimacy is not only due to the absence of a common identity, but it can also be perceived at the institutional level. The European Parliament is weaker and more inadequate than the national parliaments if we are to consider the means of ensuring popular input. Moreover, its role in treaty making is marginal, a fact that greatly limits popular inputs into the process. The weakness of the EP is proven not only through the underdeveloped nature of intermediary bodies (i.e. European parties) but through the absence of a consolidated European public sphere as well.¹⁷

The EU citizens are limited in having a clear perception on which institutional practices the EU officials will adopt and to which degree these are to reflect their interests. For instance, due to the closed, executive-driven, and technocratic nature of the process of constitution making¹⁸, France and the Netherlands rejected its body after having submitted it to a referendum, thus reflecting the insufficient social legitimacy of the EU governing. On the other hand, due to the requirement for unanimity certain Member States may use their voting in order to leverage national interests, instead of paying the political price of having rejected the document.¹⁹ Therefore, the social legitimacy of the European Constitution can be minimized by the tendency of the Member States to promote their national ambitions.

2.2. The Horizontal Approach: Limited Legitimacy as a Consequence of the Power Relations

The EU has grown into a huge political and economical superstructure that has the power to define the terms of sustained development which is purposively directed for its new members. Within its policies of enlargement, the fact that the EU insists on standards completely inappropriate²⁰ to the present stage of economic growth of the Central-Eastern European countries will eventually result in their suboptimal progress²¹. Following this argument, we may further the idea that the differentiated levels of development which delimitate different influential powers in the European policy building mechanism results in an unbalanced economic distribution, if we are to consider the position of the newly entered members.

At the same time, the centralization of political and economic decision making in the hands of the unelected bureaucracy in Brussels is often incompatible with the aspirations of the EU citizens. For instance, despite continuous complaints related to the "opaqueness of the EU law"²² and its huge volume of regulations that bar economic prosperity, very little has changed due to the fact that the bureaucracy in Brussels sees regulation as a means of furthering its political goal of European unity only. As a

¹⁷ Erik Oddvar Eriksen and John Erik Fossum, *The EU and Post-National Legitimacy*, Arena Working papers, available at http://www.arena.uio.no/publications/wp00_26.htm#FOOTNOTE_6

¹⁸ See Curtin, Deirdre (1993), "The Constitutional Structure of the Union: A Europe of Bits and Pieces." *Common Market Law Review* 30, pp 17-69.

¹⁹ Carlos Closa Monteros, *Ratification of the Constitution of the EU: A Minefield*, available at <http://www.realinstitutoelcano.org/analisis/570.asp>

²⁰ An example of ridiculous regulation that damages economically: regulation 2257/94 specifies the size and shape of bananas that can be sold in EU. The size is limited to at least 14cm it should be free of "abnormal curvature"

²¹ Marian Tupy (2003), *EU Enlargement. Costs, Benefits and Strategies for Central and European Countries*, Cato Institute, p.2

²² "EU Legislation Unnecessarily Complex" in *EU Observer*, Sept 13, 2002, available at www.euobserver.com/index.phtml?aid=7541

consequence of these factors, the normative and the social legitimacy of the EU governance are limited by the differentiated levels of economic development and expectations of its members.

2.2.1. Limited Normative Legitimacy

Due to their different level of economic development, to which we may add a culture for democracy that evolved along with the European communitarian experience, the influence the Member States exert on the policy building in Brussels, as well as on the financial distribution is highly diversified. Therefore, the degree of justifiability of the EU regulations to the EU citizens is limited to the national dimension. As it follows, two aspects of this phenomenon will be discussed, namely the normative deficiencies observable at the levels of the EU budget and of the *acquis communautaire*, within the strategies of enlargement.

Evidence of this fact is to be easily perceived at the level of the EU budget, considering both its configuration and distribution. Firstly, the Maastricht convergence criteria for monetary union which had several negative effects on the members' economic stability engendered an atmosphere of fiscal stringency. Consequently, many of the major net contributors (i.e. Germany, Austria, Sweden, The Netherlands) to the EU budget have little desire to allocate more money and are trying to reduce the level of their payments. Secondly, the principles of budgetary distribution seem biased. Though the budget for 2000-2006 was agreed in 1999 in Berlin, the hard decisions regarding long term financing arrangements for the enlarged EU were postponed, especially the CAP²³. We

should consider that the main components of the budget are the CAP and the structural and cohesion funds, accounting for approximately 80% of the total expenditure. Furthermore, the enlargement process would provoke an annual rise in spending which was to reach in 2006 a sum of approximately €225 per head for the new members. At the same time, the budget gives Portugal and Greece €400 per head from the structural and cohesion funds in 2006²⁴. Another aspect of the budgetary policy that limits the normative legitimacy of the EU governance is the fact that it promotes catch-up opportunities. In other words, the ones with a better possibility to seize the advantages are the richer members and not the others. To be more specific, the total receipts for the new members after accession are capped at 4% of their GDP. The pervasive outcome of this ceiling is the fact that more money go to the richer countries because they have a higher GDP, while the amount increases as their economies grow. Therefore, though promoting policies of sustained economic development, the EU undermines the Member States where investment needs are greater²⁵.

Regarding the second aspect, the EU legislation is embedded in a set of regulations concerning the majority of the social and economic aspects of the European life regulations which are embedded in the *acquis communautaire*. Among these regulations, it promotes the four fundamental freedoms of movement (i.e. capital, goods, persons and services) which were officially stated in the Treaty of Maastricht, in order to further the European goal of political and economic unity. Nevertheless, the policies applied to the newly entered members seem to disregard these aspects.

²³ Marian Tupy, op.cit

²⁴ Heather Grabbe (2001), *Profiting from EU enlargement*, Centre for European Reform, available at http://www.cer.org.uk/pdf/p254_enlargement.pdf

²⁵ ibidem

The insistence on a transitional period for Central European workers not only restricts economic integration, but it also reduces labour mobility, which is one of the prerequisites for a single currency area in order to function efficiently and effectively. Although the applicants cannot join the Eurozone immediately after accession, the introduction of more restrictions on workers runs counter to Commission and OECD recommendations that labour mobility in the single market needs to be increased. The reasons why many EU “leaders” actively required a transition period are firstly grounded in their national experiences, disregarding the community's interests. For instance, part of Germany's sensitivity²⁶ results from public and media perceptions that the country had taken an unfair share of the refugee burden from south-eastern Europe. To this, a general fear for losing jobs and wage competition can be added²⁷. However, factors like market potential and productivity are often forgotten. Many countries, especially the ones to enter the EU in 2007, have low productivity, to which one may add high labour cost, factors that are major deterrents to investment²⁸. Due to similar factors, to which we may add the economic price that is to pay for the harmonization of taxes, these countries are unlikely to become direct competitors to the more developed EU countries unless their experience and skills develop.

2.2.2. *Limited Social Legitimacy*

The limited nature of social legitimacy represents the consequence of the fact the EU enlargement policies are not sufficiently inclusive as to respond to the needs of the

newly entered members as well as of the expectations of older ones. Thus, the overprotective tendency of the latter does not facilitate the adjustment of the first and consequently draws their disappointment and frustration. Although the general perception of the EU enlargement process is generally positive, discussions have been marked by the accession negotiations where the EU has sometimes appeared in an unfavorable light in the agricultural or budgetary chapters, as well as on its restrictive position in free movement of workers. Therefore, the citizens of the new Member States had the feeling of having somehow been misled about the terms of accession.

As the date of accession neared, the public opinion in the 10 members to join the EU in 2004 became ever more critical. For example, the EU Commission's own poll in 2002 found that only 32% of Estonians, 35% of Latvians, 43% of Slovenes and Czechs thought that joining the EU was a “good thing”²⁹. Nevertheless, the enlargement is considered to be a “fait accompli” mainly due to the fact that, despite being part of the EU may result in suboptimal growth, remaining outside the EU could be much worse. The disappointing nature of accession was emphasized by a British commentator, John O'Sullivan: “Under the EU accession package, the 10 new members are supposed to receive the headline figure of \$41 billion in adjustment subsidies. But when various dues and unforeseen items have been deducted, the actual amount they will get is a mere \$10.6 billion over the next four years (2003-2006). Their poor but risky economies will have to absorb job-killing regulations designed for much richer societies. And to add insult to injury, their citizens will not

²⁶ “Enlargement Dispute Solved”, *EUobserver*, June 1, 2001, www.euobserver.com

²⁷ Grabbe, op.cit

²⁸ *ibidem*

²⁹ EU Commission, *Candidate Countries Eurobarometer 2002: First Results*, http://europa.eu.int/comm/public_opinion/archives/cceb/2002/cceb_2002_highlights_en_pdf.

be allowed to migrate to existing EU members until seven years after enlargement in May 2004. All in all, the net economic benefits to the new members may be small to non-existent³⁰. Therefore, questions to the legitimacy of the EU's governance seem to grow more and more intensive. In order for Europeans to take decisions together on common policies there is need for a common understanding of the European interest and openness to cooperation.

Conclusion

Normative and social legitimacy in Europe should be based on a culture of acting together, an effort on understanding and representing each other's interests. Due to its

predominantly economic policies that embed national interests the EU lacks a background presumption of settled political form supported through normative legitimacy. Despite the general understanding of the EU as promoting unity in diversity, at the level of identity, it is well-known and much discussed that it lacks strong cultural ties, traditions, history, affective symbols, and developed civil society and public sphere.

In order to cope with these legitimacy deficiencies the EU needs an economic and social model to combine the best elements from the older and the newer countries. Its aim should be to facilitate adjustment rather than protection. Measures should be prepared to take care of all members within a European framework.

³⁰ John O'Sullivan (2002), "Burdensome Regulations Will Strain New EU States" in *Chicago Sun-Times*, December 17, 2002

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