THE FUTURE OF PORTUGAL AND OF THE EUROPEAN UNION MAY NOT BE TOTALLY DEMOCRATIC, BUT IT MUST BE COMPLETELY JUST

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1. THE DEMOCRATIC DEFICIT

here is the perception that the European Union (EU) suffers from what has been termed "a democratic deficit". Throughout the years, as Neil MacCormick says, "things [have been] improving somewhat", but, as the author tells us, in the not so distant past "all meetings of the Council of Ministers were held in private, indeed, in secret. Each would be preceded by even more impenetrable meetings of the Committee of Permanent Representatives (COREPER)", which "is the national bureaucracies meeting in confidential conclave in Brussels to prepare the ground for their Ministers", which makes it "almost impossible for the Parliaments of the Member States to have (…) any effective debating or decision-making process that secures effective answerability of their Ministers for the line they take on it." (MacCormick, 2005: 3-4) After the Treaty of Lisbon, article 16 (8) of the Treaty on European Union (TEU) states that "[t]he Council shall meet in public when it deliberates and votes on a draft legislative act", which means that, nowadays, only non-legislative activities of the Council are done behind closed doors.[1] Article 16 (7) TEU and article 240 (1) of the Treaty on the Functioning of the European Union

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[1] For the changes to the organization and functioning of the Council after the Treaty of Lisbon cf. Martins, 2012: 377-85

(TFEU), which are the only articles in both treaties that mention COREPER, do not indicate whether their meetings shall be public or not, but, according to Chalmers *et al.*, COREPER raises the concern of "government by 'moonlight'. Meetings of the COREPER are not public. Its minutes are not published and it is not accountable to any parliamentary assembly." Besides, "it is the unprecedented extent of COREPER's influence that raises particular concerns about accountability and transparency." (Chalmers *et al.*, 2014: 88) Therefore, as far as the COREPER is concerned, nothing has changed since the time MacCormick stated his concerns.

The complaints stated in the preceding paragraph stem from the idea that "publicity, constituted by transparent and participatory processes, is an essential part of any conception of global democratic practice." (Payne & Samhat, 2004: 76) Publicity's scope should thus include not only promulgated laws, but the legislative procedure as well. On the other hand, it may be justifiable, for security reasons, to hold meetings concerning non-legislative activities in secret even in a democratic framework.[2] These reasons apply to the COREPER as well, as its functions are to prepare the work of the Council; inasmuch as the work in question concerns non-legislative activities, the security reasons that apply in the case of the non-legislative activities of the Council also apply here. It is more difficult to justify this very same closed door policy when the work of the COREPER concerns legislative activities, as it will be publicly debated at a later date by the Council. It may be argued that public debate of the Council's legislative activities renders a hypothetical open door policy on the COREPER's activities that deal with the preparation of the legislative activities of the Council unnecessary. Be that as it may, the security reasons mentioned above do not apply to legislative activities or to

[2] For an overview of decision-making processes shrouded in secrecy in international organizations cf. Moynihan & Wyden, 2000.

their preparation, and, besides, it is always suspicious when the ponderation of which debates on legislative acts should or should not be open to the public falls on considerations of necessity. This argument is, therefore, not fitting in a democracy.[3]

The democratic deficit, however, runs much deeper than MacCormick's example (which is mainly concerned with the question of publicity) may, at first glance, show. A cursory view over the composition of the institutions of the EU shows that the European Parliament (EP) is the only institution which has legislative functions whose members are directly elected by the EU citizens.[4] The other two EU institutions that intervene in the making of legislation are the Council and the Commission.[5] The Council "shall consist of a representative of each Member State at ministerial level." (Article 16 (2) TEU) The members of the Commission "shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt" (article 17 (3) TEU) and, nowadays, "the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number", which is based on "a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States." (Article 17 (5) TEU) Because those who come into office are appointed, and not directly elected by the EU citizens, there is a democratic deficit, as these non-elected bodies exercise legis-

[3] For the contrary view cf. e.g. Oleszek, 2011: 2-5, who argues that sometimes the law-making process itself may need to be held under secrecy, always with reference to the United States reality.

[4] For the role of the EP in the making of EU Law, as well as an analysis of its (supposedly) democratic nature, cf. Lambert and Hoskyns, 2009.

[5] For the changes to the organization and functioning of the Commission after the Treaty of Lisbon cf. Martins, 2012: 385-92.

lative functions.[6] The Commission holds the right of legislative initiative over a number of matters (article 17 (2) TEU, articles 289 (1) and 294 (2) TFEU), whereas the Council exercises legislative functions jointly with the EP (article 16 (1) TEU and article 294 TFEU).

It may be argued that this is not a problem for democracy because, the argument would run, this feature of the institutional system of the EU – i.e. having legislative bodies whose members are not elected by the people – mirrors the constitutional system of government of most of its Member States, and those systems are, unquestionably, democratic. In the next section, the Portuguese constitutional system is analysed in some detail, and briefly compared with the constitutional systems of some of the other EU Member States, in order to see whether or not there is symmetry between the EU institutional system and the constitutional systems of government of at least some of its Member States.

2. THE UNDERLYING DEMOCRATIC DEFICIT OF THE CONSTITUTIONAL SYSTEM OF SOME OF THE EU MEMBER STATES – THE PORTUGUESE CASE

In Portugal, only the legislative branch of the State is directly elected by the people (cf. articles 147 and 149 of the *Constituição da República Portuguesa* (CRP)). The head of the executive, the Prime Minister, is appointed by the President of

[6] It is true that the President and the other members of the Commission are voted into office by the EP, but the selection of the candidates is wholly managed by both the European Council and the Council. Nevertheless, my point is that whenever members of an institution with legislative functions are not *directly* elected by the people (of any given polity) there is a democratic deficit. This deficit is somehow attenuated by the fact that representatives of the EU citizens have a say in the appointment process, but *attenuation* is not *elimination*. Hence there is a deficit of democracy because not all members of legislative institutions are directly elected by those who are to be governed by the legislation enacted by those bodies.

the Republic[7] (cf. articles 133 f) and 187 (1) CRP), who, before doing so, has to consult with the parties that are represented in the legislative branch, the Assembly, and, afterwards, make his decision while taking under consideration the electoral results. The other members of the executive are chosen by the Prime Minister and appointed by the President (cf. articles 133 f) and 187(2) CRP). There is some potential for a slight distortion of democracy, which can be shown if one considers the following hypothetical case: let us imagine that Party A wins the elections with 40% of the votes, whereas Party B gets 30% of the votes and Party C 25%. The remaining 5% are scattered among minor parties. If Parties B and C enter into a post-electoral coalition the President may decide to appoint as Prime Minister the head of the coalition, as the coalition will hold a 55% majority in Assembly. Formally, the President would be yielding to the electoral results. Nevertheless, the slight distortion of democracy can be seen if one considers that voters who have voted, for instance, for Party C might have done so in order to stop Party B from achieving Parliamentary majority and/or to impede its leader from being considered for the Prime Minister position. Voters may do this for any number of reasons; they may do this because their political ideology is the opposite of Party A's and, even though it is the same as Party B's, they might not trust Party B's current leadership and, therefore, would prefer Party C either to win or to steal enough votes to block the possibility of an absolute majority (of any party) in Parliament, even if that means victory for Party A. This reasoning would be defeated by a post-electoral coalition as the one from the example. From this perspective, pre-electoral coalitions would have more political and moral legitimacy because voters would have more information as to the possible consequences of their

[7] For the relations between the Presidency and the Portuguese Prime-Minister cf. Canotilho, 2014: 603-4.

vote.[8]

There is another observation that illustrates the (potential) slight distortion of democracy that results from the Portuguese constitutional system. The executive has legislative competencies[9] (cf. article 198 CRP). This is, in abstract, a problem for Portuguese democracy due to the fact that, as mentioned above, the members of the executive are appointed, not *directly* elected by the people. Since political power is held by the people (cf. article 108 CRP) the people are sovereign. It stands to reason that only the elected representatives of the sovereign have the power to make and enact laws. In Portugal, however, both the elected representatives and the executive hold legislative power. Nevertheless, the constitutional system of checks and balances which is in place prevents the executive from abusing its power, as the executive does not have the power to enact whatever laws it finds best. There is a set of laws whose subject-matter belongs exclusively to the purview of the Assembly (cf. article 164 CRP). There is a second set of laws whose subject-matter belongs equally to the Assembly's purview, which, nonetheless, can delegate the making and enacting of those laws to the executive (cf. articles 161 d), 165 and 187 (1 b)) CRP). Finally, there is a third set of laws whose subject-matter includes everything that is not discriminated in articles 164 and 165 CRP. Those laws can be enacted both by the Assembly (cf. article 161 c)) and the executive (cf. article 198 (1 a)) CRP). This means that, in order to make and enact laws other than the ones that have to do with its own structure and functioning (cf. article 198 (2) CRP), the executive has, in some cases, to have permission from the Assembly, whereas in the cases in which there is concurrent competence the Assembly can, if it disagrees with the political and social measures

[8] A situation similar to the one described in the example has actually occurred in the 2007 parliamentary elections in Timor-Leste. Cf. Higashi, 2015: 142-3.

[9] For the Portuguese executive's legislative competencies cf. Morais, 2008: 428-56.

that the executive's legislation aims to take, repeal the latter's legislation (cf. articles 162 c) and 169 (1) CRP).[10]

One can conclude, from these observations, that there is, in abstract, a democratic deficit within the Portuguese constitutional system as it permits a body which is not directly elected by the people to have legislative powers. This deficit, however, does not yield practical results, as the body whose members are directly elected by the people, the Assembly, can check the executive's legislative output, changing it and repealing it whenever it is deemed necessary. There is, furthermore, one additional guarantee against the possibility of usurpation by this non-elected political body, as the executive is politically and legally responsible before the Assembly, with the latter having the constitutional power to dismiss the former (cf. articles 163 e) and 195 (1 e) and f)) CRP).[11]-[12]

Not every EU Member State has a constitutional system in which non-elected political bodies have legislative powers, although this also happens, for instance, in Spain (cf. articles 82, 85 and 86 of the *Constitución Española*),[13] in Italy (cf. articles 76 and 77 of the *Costituzione della Reppublica Italiana*)[14] and in France (cf. articles 37, 38 and 39 of the *Constitution de la République Française*).[15] On the other hand, in the United Kingdom, in large part due to the doctrine of parliamentary sovereignty, only the Westminster Parliament, which is directly elected by the British people, has legislative powers.[16] Recent developments which culminated with the creation of devolved

[10] The Assembly can also repeal the executive's legislation which has been enacted following a previous authorization from the Assembly.
[11] The President also enjoys the power of dismissing the executive. Cf. articles 133 g) and 195 (2) CRP.
[12] For an analysis on the relations between the Portuguese Assembly and executive cf. Otero, 2003: 121-30.
[13] Cf. Rexach, 2012.
[14] Cf. Amorth, 1948: 127-31, 135-7.
[15] Cf. Luchaire & Conac, 1987: 787-814.
[16] Cf. Dicey, 1982: 37-81.

assemblies in Wales and Scotland do not affect the doctrine, as Parliament remains sovereign over these assemblies.[17] Furthermore, there are no democratic problems of an abstract order here as the members of both assemblies are directly elected by their respective constituencies. Germany provides another example of a constitutional system which places, at federal level, sole legislative power with a directly elected body, the *Bundestag* (cf. article 77 of the *Grundgesetz für die Bundesrepublik Deutschland* (GBD)). However, the fact that the *Bundesrat's* permission is needed so bills can become law poses some abstract problems for democracy as well, since the *Bundesrat* consists of members of the governments[18] (*Regierungen*) of the federated states (*Länder*). The federated states appoint those of their members who serve as members of the *Bundesrat* as well, and can recall them at will. The members of the *Bundesrat* are not, therefore, directly elected by the people (cf. article 51 (1) GBD). This means that, even though laws are made by the people's representatives, there is a non-elected political body which can, under certain conditions, veto the proposed legislation (cf. article 77 GBD).[19]

Some EU Member States have, therefore, a constitutional system which grants legislative powers, be it the power of enactment, promulgation or veto, to political bodies whose members are not directly elected by the people of those States. These same systems have, however, constitutional schemes of checks and balances similar to the one of the Portuguese constitutional system, analysed above, which prevent executives from usurping the legislative Assembly's powers. All in all, legislation may sometimes be created, enacted or vetoed by non-elected institutions, but there is a significant measure of

[17] Cf. Deacon, 2014: 226-34.

[18] "Government" is not used here in the sense of "State", but in the sense of "executive". Cf. regarding this issue d'Entrèves, 1969: 28-35.

[19] For an overview of the legislative Federal system of Germany cf. Dreier, 2006: 1546-912.

political and legal control by the directly elected bodies over the non-elected bodies.

3. THE UNDEMOCRATIC PREMISES OF THE EU

As both the analysis of the Portuguese constitutional system and its comparison with the constitutional systems of some of the other EU Member States show, it is not uncommon for systems which are correctly perceived as democratic to grant legislative functions to bodies whose members are not directly elected by the citizens. Even if this situation can be described as one in which there is a democratic deficit, this deficit does not seem sufficient to threaten democracy. Therefore, it may be plausibly argued that the democratic deficit of the EU institutional system mirrors the democratic deficit of at least some of its Member States. However, the type of checks and balances that exist at the EU level only grant limited supremacy to the political body whose members are directly elected by the citizens, the EP, over the non-elected political bodies. The EP enjoys supervisory powers over both the Council and the Commission, but can only dismiss the latter, not the former (cf. article 17 (8) TEU and article 234 TFEU). There is thus political and legal control by the directly elected institution over one of the other institutions which enjoys legislative powers (the Commission, which holds the right of initiative), but not over the other (the Council).[20]

The reasons for the existence of a deficit in democracy are not the same for both Member States and the EU. The system of government which is currently in force in the countries in which a democratic deficit of an abstract order can be said to exist is an inheritance from the seventeenth and eighteenth century ideas whose practical application was made possible by the French Revolution. In the aftermath of the French Revolu-

[20] Cf. Martins, 2012: 369-72.

tion, many European countries had to contrive systems in which parliamentary sovereignty could coexist within a monarchy, and such systems were built on the ideas of authors such as Jean-Jacques Rousseau,[21] Montesquieu,[22] Immanuel Kant[23] or John Locke,[24] among many others, who, before the French Revolution, had written (among other themes) extensively on the relations between the parliamentary assembly and the executive headed by the monarch. The common idea which the philosophers of the time called attention to was the necessity of having different institutions responsible for the making and for the implementation of legislation. Philosophers disagreed has to whether the monarch should have veto power of legislation, or whether he could take over parliament's legislative functions in emergency situations, but it is a common thread of seventeenth and eighteenth century political philosophy the idea that those who are responsible for enacting the law cannot have the responsibility of implementing it in society as well, as such a concentration of powers was apt to breed absolutism and tyranny.[25] The legislative and the executive powers had thus two different sources of legitimacy: the former drew its legitimacy from the fact that it was yielded by an assembly made up of representatives of the people; the latter never enjoyed democratic legitimacy. Monarchies have historically drawn their political legitimacy from theology, as the monarch used to be perceived as God's representative on Earth.[26] By the nineteenth century theological legitimacy had somehow started to wane, but it proved impossible to jump directly from monarchy to republicanism, as the French experience has demonstrated.[27]

[21] Cf. Rousseau, 1762.
[22] Cf. Montesquieu, 1979: 131-370.
[23] Cf. Kant, §45 to §49.
[24] Cf. Locke, 1824: 394-439.
[25] For a detailed discussion of the political ideas of Rousseau, Locke and Kant cf. Abramson, 2009: 197-278.
[26] Cf. Ullmann, 2010: 117-37.
[27] Cf. Waresquiel and Yvert, 1996.

Nevertheless, the point is that the countries which nowadays are Member States of the EU enjoy a political and legal tradition based on the fact that there always has been at least one non-elected institution in their political systems which plays a significant role in the process of making and promulgating legislation. In time, the power of veto and promulgation shifted from the monarch to a president (wherever republicanism substituted monarchy), whereas the power of implementation of legislation (which includes the making of special regulations and decrees) changed into the hands of an executive which stopped being headed by a monarch and started being led by a Prime Minister appointed according to the electoral results of parliamentary elections, which happens in both republics and monarchies. There is thus an easy explanation for the democratic deficit which EU Member States nowadays still have, which comes from their own political tradition.

It is tempting to conclude from this that the EU model, hybrid as it is, is just an international implementation of the political tradition of its Member States. This political tradition certainly does have some impact on the model, but the main reason for the EU democratic deficit comes from elsewhere. It comes from the fact that the EU is not a state, but a confederation of states. Therefore, there is no "European people" to which the EU as a whole is responsible, unlike what happens with its Member States. Thus, the reason the EU is undemocratic stems from the fact that democracy is not possible when sovereignty is not held by the people and, in order for sovereignty to be held by the people, there has to be *a* people. EU sovereignty is held by its Member States. Therefore, it is logical that some of those who are responsible for legislation at the EU level are either appointed by, or members of, the executives of the Member States, in so far that in modern politics (again, as a result of tradition) executives are the state institutions responsible for conducting foreign policy. From this perspective,

the existence of a European Parliament whose members are directly elected by the peoples of the EU Member States is an anomaly in the model, as the EU has initially been thought of as an organization of States, not of peoples. This is what makes the EU model a hybrid model.

The EU is thus built on undemocratic premises, and has been so since its foundation, as Andrew Moravcsik makes patently clear:

> [T]he democratic deficit has been a characteristic of European integration since the beginning, and its roots are primarily found in domestic polities. (…) Jean Monnet and Charles de Gaulle, whose diametric visions bounded the spectrum of intellectual debate during the EC's founding decades, agreed on one thing: the elitism of the domestic political process that supported integration. The major institutions of the EC – the Commission, the Council, and the Court – were deliberately constructed without direct democratic mandates. Pascal Lamy, Delors' *chef de cabinet*, in an allusion to Saint-Simon, the early 19th-century French technocratic utopian, observes that "Europe has been built in a St. Simonian way from the beginning; this was Monnet's approach. The people weren't ready to agree to integration, so you had to get on without telling them too much about what was happening." (Moravcsik, 1994: 54)

There is thus a deficit of democracy in the EU simply because it was "deliberately constructed without direct democratic mandates". This may be distressing as it may be argued that the St. Simonian way bears a striking and alarming resemblance to something that Mao Tse-tung says about the Chinese revolutionary war:

> The masses of China's peasantry and urban petty bourgeoisie wish to take an active part in the revolutionary war and to carry it to complete victory. They are the main forces in the revolutionary war, but, being small-scale producers, they are limited in their political outlook (and some of the unemployed masses have anarchist views), so that they are unable to give correct leadership in the war. Therefore, in an era when the proletariat has already appeared on the political stage, the responsibility for leading China's revolutionary war inevitably

> falls on the shoulders of the Chinese Communist Party. In this era, any revolutionary war will definitely end in defeat if it lacks, or runs counter to, the leadership of the proletariat and the Communist Party. (Mao, 1965: 191-2)

Even though Lamy's speech dispenses with the rhetoric that pervades the whole of Mao's work, the former's allusion to an intended St. Simonian Europe on the part of Monnet is dangerously close to the thought of a ruler whose type of government is democratic only in name. Both Mao and Monnet believed that the people were not prepared to govern themselves, and therefore a higher power had to intervene and substitute for the people. This higher power, which is, in China, the Communist Party, and, in Europe, the institutions established first under the European Coal and Steel Community (ECSC), and a short time later the ones established both under the European Economic Community (EEC) and the European Atomic Energy Community (EAEC), had the responsibility of governing for the people, whether the people were in favour of, indifferent to, or against the methods used. Thus, in China, "the main forces in the revolutionary war (…) are limited in their political outlook", and therefore "the responsibility for leading China's revolutionary war inevitably falls on the shoulders of the Chinese Communist Party"; in Europe, "[t]he people weren't ready to agree to integration, so you had to get on without telling them too much about what was happening." If one ignores the inflamed rhetoric of Mao's speech, the bottom-line both in the case of China and Europe is the same: the people do not know what is best for them, so the government ought to tell them what that is.

4. JUSTICE

The EU is a type of international organization which brings with it a set of issues which did not exist in classic International Law. The issue which concerns this essay is the

following: the EU has the legal power to modify the internal legal order of its Member States. In classic International Law, international treaties and custom bind the states, but the provisions of both treaty and custom do not directly modify a state's internal legal order. International Law was traditionally thought of as the law of nations, and what is binding about it is the fact that states that breach it are liable to sanctions, but it has never been argued that the provisions of an international treaty, for instance, automatically modify the internal legal orders of the parties to the treaty. The EU yields thus a so far unprecedented power, which is cause for much concern due to its undemocratic features.

It is unnecessary to explore the legal grounds for this difference between EU Law and the rest of International Law, as they are well known and have to do with the provisions of the several treaties which have been signed since the inception of the international organizations which have evolved into today's EU. For the remainder of this essay, I want to discuss why the scenario so far presented (i.e. that of a EU founded on undemocratic premises, which nowadays still suffers from a democratic deficit, with the legal power to modify the internal legal order of its Member States, which are closer to full-fledged democracies than the EU is) is not a bad scenario. It may, in fact, be a good thing if EU Law remains within the confines of Justice. If Justice keeps orientating EU legislation, and being realised through it, then Portugal, as well as the other EU Member States, would do well in keep fighting for European integration. In order to see in what sense it is possible to realise Justice even within a system which suffers from a democratic deficit, let us go back to the comparison between what occurred in Europe and in China in the last century.

The ECSC was established in 1952, both the EEC and the EAEC in 1957, and the People's Republic of China (PRC) in 1949. Mao's and Monnet's ideas are contemporary. Never-

theless, roughly 65 years after the implementation of these ideas, what is now the EU is, even with a democratic deficit, a space of freedom. There is freedom of movement, freedom of opinion, freedom of establishment. Even though blatant inequalities exist among different sectors of the population, it is overall a prosperous place. The recent financial crisis might have put a dent on the prosperity, but it certainly did not collapse it. The citizens of the Union enjoy a host of legal rights that are considered fundamental which prevent both the Member States and the Union to encroach unduly on their lives. The EU and its Member States govern themselves, and their people, under the rule of law. This is not the case in China. Not all of the fundamental rights and liberties which exist today in the EU exist in China. China may be a wealthy country, but its overall population is poor. Its government does not operate under the rule of law, and its citizens do not enjoy any legal rights against the state, either fundamental or of any other kind.

This leads one to wonder exactly how these two rather distinct states of affairs came to be, since both the PRC and the EU are admittedly built on undemocratic premises. One possible answer is the fact that, even though the EU is not a completely democratic institution, its components, the Member States, are democratic and their respective governments operate under the rule of law. Constitutional checks and balances which are held in place at the Member State level are sufficient to create a "self-proclaimed democratic system of law-making and norm interpretation at the European level" which "has built-in assurances that the multilevel constellation that makes up the EU does not become an unchecked entity – one that runs the risk of turning into a power usurping *world despotic Leviathan*." (Eriksen, 2011: 269-70) As it is not made up of component parts which are democratic and enjoy sovereignty, the PRC does not have the EU's political and legal constraints, and that, in fact, has allowed it to turn into a "despotic Leviathan".

For the reasons outlined in section 2, it is easy to see that most EU Member States are not yet fully-fledged democracies. Therefore, the argument that the undemocratic EU is not a despotic Leviathan due to its Member States being democracies is partially incorrect. It is however partially correct because those who defend this argument have observed that Law plays an important role in checking undemocratic impulses. Even if there is a constitutional democratic deficit in a given polity, the fact that Law protects rights of the individual which are deemed as fundamental and irrevocable stops the not completely democratic system from tyrannizing the polity's citizens. What is interesting about this observation is that it shows that complete democracy (i.e. a system in which the members of every institution with the power of enacting, vetoing and promulgating legislation are directly elected by the people) may be incapable of protecting citizens' lives and well-being without the existence of legal fundamental rights at the constitutional level. In other words, if a parliamentary majority can enact and repeal whatever laws it finds best, without the limits imposed by constitutionally recognized fundamental rights, then there is nothing to stop democratically elected institutions from acting the way tyrants do. The differences would be in the numbers, the method of appointment and the duration of office, as in traditional tyrannies the tyrant is a hereditary institution made up of one member who holds office in perpetuity, whereas in tyrannical democracies the tyrannical institution would be composed of many democratically elected members who would be regularly elected by the people. Such a state of affairs has been termed "the tyranny of the majority";[28] in a democratic system of government without the constitutional protection of legal fundamental rights those in the (albeit circumstantial) minority would have no legal remedies to defend themselves from a (equally circumstantial) majority.

[28] Cf. Mill, 1977.

It is true that Law cannot protect individuals' fundamental rights if democracy is totally absent from a political system. My point though is simply that democracy and Law are not the same thing, despite the very obvious truism that Law can only realise its function (the administration of Justice) with the help of democracy. This means that democracy without Law is useless, and that Law without democracy is not possible. This does not mean, however, that the Law needs a fully-fledged democratic system in order to administer Justice. Democracy serves the purpose of legitimizing the power some people hold as a result of having been nominated into office. Law's objective is simply to administer Justice, and the core part of Justice is the protection of the life, liberty and dignity of every human being. Law is a tool to protect people, democracy is a way of justifying the reasons why some people are in charge while others are not. When a political system has a democratic deficit that simply means that some of the officials who are in charge do not enjoy democratic legitimacy, but those officials do certainly draw their legitimacy to be in office from some other source. The Council and the Commission are instances of such a situation; if the EU is an organization of states, and not a state itself, it stands to reason that certain members of the executives of the Member States are, precisely because they are ministers, members of an institution such as the Council. The legitimacy, in this case, is not, and need not be, democratic. Members of the executives are not directly elected by the people at state level for the reasons outlined in section 2 and, therefore, as representatives of the executive of a Member State their membership in the EU institution "Council" cannot be justified under democratic terms. Democracy is not the sole ground for legitimacy in holding an official post, an idea which goes at least as far back as Plato and Aristotle. For these reasons a completely democratic system is not something that is necessary for Law to administer Justice, although

any state, or confederation of states, that wants to order its affairs through Law and Justice needs to be democratic to some extent, as it happens with the EU and its Member States.

To sum up, democracy is not a good in itself, but rather a means to achieve Justice, which is a good in itself. This may seem like a counterintuitive or naïve stance, but the fact is that democracy without Justice is as conducive to tyranny as a monarchical, oligarchical or any other type of government. Justice is a value without which civilization cannot progress. The fact that democracy is currently as high-valued as Justice is justifiable for the simple fact that other forms of government are incredibly less apt to allow for the administration of Justice. Hence, as a means to an end, democracy is not a value that the EU and its Member States can do without, but the level of democracy need not be increased; in other words, there is no need to correct the current deficit in democracy so long as multilevel decisions, both at EU and Member State level, produce legal rules whose objective is to administer Justice, i.e. to protect the life, liberty and dignity of every human being. The future of the EU and its Member States may or may not be more democratic than it currently is, but it certainly must be as just, if not more just, than it nowadays is. It is necessary to stress, once more, that democracy is important because EU regulations and directives do change its Member States internal legal orders, and that is certainly inadmissible, because it is unjust, if it is done without the citizens of each Member State having any kind of say, namely through elections to nominate representatives at EU level. There is room to bring the current democratic deficit to more acceptable democratic standards if the EP's competencies are enlarged so as to allow the EP to scrutinize every kind of political and legal action which the EU undertakes. This means that not every EU institution must have its members directly elected by the EU citizens, but the institution whose members are so elected must at least have coercive supervisory

powers to control these non-elected bodies' activities. More important than this, however, is that every EU institution, be its members directly elected or not, as well as the EU's Member States, must keep treading the path of Justice, as unjust democratic institutions have as much capacity to tyrannize a population (or several populations) as unjust non-democratic institutions.

To conclude, I would like to elaborate a little further on my conception of Justice. It is easy to argue that every kind of legal or political action must be done with a view do administer Justice, and that democracy is but a means to achieve the goal of Justice, but it is very difficult to determine what Justice is. This difficulty can be attested by the observation that 2500 years of philosophical discussion on the subject have not exhausted the issue. Nevertheless, there are common features of what philosophers say Justice is which come up in almost every account of Justice which has been provided. As I have hinted above, these features form a core. The core of Justice is the protection of every human being's life, liberty, and dignity. No one has ever argued (at least in good faith) that it is just to deprive someone of these values arbitrarily. The discussion gets controversial from the moment one tries to ascertain exactly what kind of reasons are valid to lawfully deprive one of their life, liberty and dignity. The fact that discussions of this tenor exist just proves that everyone agrees on what Justice aims to protect; disagreements are about when to either protect (and how to protect) of forfeit protection. For the future of the EU, what is inherently necessary is to guarantee this kind of protection, which is the core of Justice. This is the reason why one has to conclude that democracy is just a means to an end. The end is to ensure that every human being's life, liberty and dignity is protected. The means to do this are the Law and the recognition of individual fundamental rights. Democracy, even with a deficit, is just the form of government which best allows

the Law to fulfil its role, which is the administration of Justice. For these reasons, if there ever is a conflict between democracy and Justice, in the sense here defined, Justice is to be preferred. This is how Monnet's ideas in the fifties of the twentieth century should be regarded. Faced with a conflict between democracy (the will of the people of France, Germany, etc.) and Justice (i.e. the guarantee of peace, which is certainly conducive to the protection of the life, liberty and dignity of every human being), Monnet preferred Justice, and the results of this decision are there for all the world to see.

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