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Rethinking Interest Representation in the European Union[†]

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In 2004, the European Economic and Social Committee moved out of the grey cement building it had occupied in the old centre of Brussels, a building far removed from the European Union's other institutions. It moved into a modern glass and steel construction, right next to the European Parliament, the Council of Ministers, and the Commission. Did this change of abode represent anything more than the need for more office space after enlargement towards the East? The answer, judging from Stijn Smismans' recent book, is 'yes'.

The Economic and Social Committee, constituted of representatives of national employer federations, trade unions, and such other economic groups as farmers and the professions, gives opinions on proposed European legislation. It is one of the original institutions of the European Union, established in 1958, as was the Council of Ministers, the Commission, the Court of Justice, and the Parliament. Since then, a number of similar committees and agency boards have been created.¹ They resemble the Economic and Social Committee in that they give representatives of national (or pan-European) interest organizations the opportunity to advise on European policy. These committees and agency boards differ from the Economic and Social Committee in that their mandate is far more specialized: they advise on vocational training, occupational health and safety, social security, or any one of a number of other specific policy areas.

Now, almost 50 years after the inception of the Economic and Social Committee, most observers would agree that the Committee and many of these other bodies have disappointed their founders' expectations. The basic difficulty is that their never-ending stream of opinions rarely seems to make a difference. The policymakers with the power to decide—civil servants in the Commission, officials on the Council of Ministers, and European Parliamentarians—do not

[†] A review of Stijn Smismans, *Law, Legitimacy, and European Governance: Functional Participation in Social Regulation* (OUP, 2004).

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¹ These interest group committees should not be confused with the two other types of committees that permeate European governance: comitology committees and expert committees. The composition and purposes of comitology and expert committees are so different from those of interest group committees that Smismans wisely excludes them from his analysis.

appear to listen to what the Economic and Social Committee has to say. Why? It would be too easy to blame the Committee's irrelevance on its limited powers. Many institutions with only advisory powers have been able to exercise influence over European policymaking, including the European Parliament in its early days. Perhaps some of the difficulty can be ascribed to the marginal role of social policy in European politics. This is the area to which labour and business representatives on the Committee would be expected to contribute most and yet social policy—especially redistributive welfare policy—has never really taken off at the European level. In creating a common market, European policymakers have spent much more time setting common product-labelling requirements and fair advertising standards than deciding on a minimum wage or on a universal level of unemployment benefits. In other words, the prestige of the Economic and Social Committee has suffered together with that of European social policy. Another reason for the Committee's low standing might be the lack of market power to back up institutional power. Unlike labour representatives on similar domestic bodies, the labour unions that sit on the Economic and Social Committee cannot threaten strikes if their recommendations are ignored; it has been notoriously difficult to heed Marx's famous call to action and stage pan-European industrial action.

Lately, however, the Economic and Social Committee has set out to re-invent itself. Membership is no longer limited to economic groups—groups defined by their structural position in the market—but extends to 'civil society organizations' throughout Europe. Thus associations promoting the environment, human rights, charity, consumer interests, family life, religion, and all other aspects of social and civic life are to be included, together with the traditional economic groups. If the official documents are any guide, the Economic and Social Committee is to become an assembly of civic associations, not only a forum for economic groups.

Law, Legitimacy, and European Governance is part of this movement to reinvent the Economic and Social Committee and the form of routinized interest group politics that originated there—what Smismans calls 'functional participation'. Smismans argues that functional participation can contribute to the legitimacy of the European project and that this potential contribution has been largely neglected in the constitutional debates on how to construct a legitimate, supranational European polity. His book provides an impressive assessment of the full range of European bodies that were originally created to represent economic interests and that have since expanded to include other civil society actors. In doing so, the book reveals the potential of functional participation to a variety of audiences: to a political theory audience that speaks in the abstract of civil society without coming to grips with the institutional realities of interest groups; to a political science audience that engages in empirical analysis of interest groups without drawing out the normative implications of that analysis; and to a legal audience that understands constitutional democracy narrowly as elections, parliamentary assemblies and expert bureaucracies without considering the democratizing potential of civil society.

Smismans' entrée into the world of functional participation is occupational health and safety policy. By examining occupational health and safety, he captures the extraordinary variety and the overwhelming number of official bodies that serve as vehicles for functional participation in European policymaking. A directive on, say, asbestos in the workplace goes through an impressive succession of interest group institutions. Before the European Commission drafts the proposal, it consults the Advisory Committee on Safety and Health at Work. The Advisory Committee is composed of three sections, one for national and European representatives of labour, another for national and European representatives of employers, and a third for representatives of national governments, i.e. national ministries or agencies responsible for occupational health. Before drafting the asbestos proposal, the Commission also consults European-level organizations representing labour and management in what is known as the Social Dialogue. After the Commission finalizes the draft, it consults the Economic and Social Committee. Once the asbestos directive is passed, implementation of the directive in the Member States will be monitored by yet a fourth institution with a significant interest group component: the European Agency for Safety and Health Protection at Work ('Bilbao Agency' after its location). Each of these institutions belongs to a different phase in the history of European social policy: the Economic and Social Committee to the Treaty of Rome of 1957; the Advisory Committee to the Paris Summit of 1972, where European leaders expressed their commitment to raising living standards; the Social Dialogue to the Delors Commission of the mid-1980s; and the Bilbao Agency to today's regulatory fatigue, soft law approach.

Key to the legitimacy inquiry are four qualities: representation of the socioeconomic groups implicated by policy choices, technical expertise, deliberation (understood in the everyday sense of discussion and debate), and transparency. To this list of normative qualities, add the network form of governance in the Bilbao Agency and balance—of resources and bargaining power—between labour and management in the Social Dialogue. Although most of these qualities are common to all these advisory bodies, each also has a distinct set of normative aspirations. The Economic and Social Committee is a chamber in which, ideally, members from different socioeconomic groups debate and reach consensus. As Smismans puts it, the Economic and Social Committee is a 'functional assembly,' 'functional' because the members are chosen not by virtue of where they come from, but by virtue of the socioeconomic group to which they belong, and 'assembly' because decisions are reached not through interest-group log-rolling but through deliberation and agreement on matters of substance. In theory, representation in the Committee is of the Burkean variety: members are to represent abstract categories of socioeconomic interests rather than the positions of their organizations on specific issues. By contrast, the Advisory Committee is to bring technical expertise to occupational health and safety regulation. Members are appointed to the Committee both because they are affiliated with national

trade unions and employer organizations *and* because they are experts on health and safety matters. The opinions of the Advisory Committee are supposed to represent consensus based on science as well as deliberation. This Smismans dubs 'tripartite expert deliberation'. In the ideal Social Dialogue, evenly matched peak organizations, representing all European labour and capital, bargain and agree on mutually acceptable terms and conditions of employment. Finally, the Bilbao Agency is to serve as the connective tissue for a network of national, governmental and non-governmental, occupational safety experts. Independence from the politicians directly responsible for social policy and the involvement of a plural set of actors with direct knowledge of the workplace—including government inspectors, trade unions, and employers—is believed to guarantee good, comprehensive information on worker health and safety.

According to Smismans, each of these institutions falls short of its normative aspirations, and he suggests a number of legal correctives. This review cannot do justice to the book's thorough catalogue of problems and their solutions. One, however, is so pervasive and intractable that it warrants discussion: representation. According to Smismans, the national labour unions, employer organizations, and other associations appointed by the Member States to serve on the Economic and Social Committee do not adequately represent all those interested in a healthy, safe work environment. What, he asks, about small and medium-sized enterprises, the disabled, and environmentalists? None has enough representatives on the Economic and Social Committee, yet all have very different concerns from big industry and mainstream labour. This same misgiving drives his analysis of all the other forums for interest group participation.

Smismans does not believe that the European Courts can do much about the representation deficit. The European Courts have been reluctant traditionally to interfere with European lawmaking through overly demanding judicial review. Even if they were to set aside their traditional judicial restraint, what set of principles would they employ to find an organization or a set of organizations representative? Smismans does not believe such criteria to be possible. In his view, lawmaking initiatives are more promising. The provisions governing the Economic and Social Committee and the Advisory Committee could be written more flexibly so as to allow for the appointment of a wider range of civil society organizations; the Bilbao Agency's regulation could require Member States to involve labour and management in information-gathering and information-diffusion at the national level. Smismans also suggests that the law could be amended to give the European Parliament a role in the appointments process, currently in the hands of the Member States sitting on the Council. European funding could be directed to weaker interests that, otherwise, cannot contribute on an equal footing to the development of European occupational health and safety policy. The weaker interests that Smismans has in mind are primarily labour, but he also points out that governmental and non-governmental representatives from poorer, southern Member States do not have the necessary expertise on health and safety issues.

This list of correctives is so sound that it is easy to overlook how, in their incrementalism, they are radical. Smismans rejects two wholesale reforms of Europe's byzantine system of committees that have become increasingly popular among academics: codification and proceduralization, in an American vein, of European administrative law. Yes, a single, comprehensive code of administrative procedure would be far more tidy than the current system. But Smismans does not believe that such a statement of the law would be suited to the complex system of European functional participation.

Neither does Smismans propose an American-inspired system of administrative procedure, in which all individuals and associations would have a legal right—on an equal footing with the Advisory Committee, the Social Dialogue, and the Economic and Social Committee—to comment on Commission proposals. While this might guarantee the participation of a wider range of groups, it would also undermine the praiseworthy features of the current European system. As Smismans explains, pluralist systems like the United States are political systems in which numerous, competing interest groups are guaranteed multiple points of access to policymaking. Competition among them is supposed to result in balance and the public interest. Neo-corporatist systems—from which the creators of the Economic and Social Committee, the Advisory Committee, and the Social Dialogue drew inspiration—do not subscribe to this essential premise. Their suspicion is that, in an unregulated system of interest group politics, resource-rich economic groups will win out at the expense of all others and public policy will be inequitable. Thus the attempt to ensure balance by creating committees on which *both* the strong and the weak, business and labour (and sometimes environmentalists and others), are guaranteed representation. Smismans believes that it is worthwhile preserving this aspect of European interest participation.

I agree with most of Smismans' prescriptions. The benefits of Europe's system of interest participation are significant. The representation deficit and the other inadequacies can be addressed through some of his book's suggestions. Moreover, some of the official efforts to allow for broader access to European policymaking, without giving interested parties the right to sue in court to enforce that access, appear promising. Today, the European Commission supplements the committee system with consultation procedures involving all civil society organizations that care to participate. The Economic and Social Committee conducts public hearings in which the civil society organizations not represented on the Committee can participate.

Smismans uses the methods of traditional legal scholarship. He exposes the normative aspirations and shortcomings of European functional participation using the law, not political theory or political science. It is clear from the book, especially the first chapter, that the author is fully conversant with the political science of interest group pluralism and neo-corporatism and the political theory of deliberative democracy. Yet, to his credit, he tells the reader early on that the

project employs the standard tools of the legal trade: the EC Treaty, European legislation, the rules of procedure of the different institutions, the norm production of those institutions, and the case law of the European Courts. Using these sources Smismans uncovers the normative aspirations and the legitimizing potential of interest group committees. The constructive part of the project also turns on the law: the book's prescriptions generally take the form of changes to the European Courts' case law or amendments of European legislation.

This approach has many benefits. It is wonderfully grounded. By looking to the law, the analysis is rooted not only in the commonly held ideals of those who drafted the law, but also in notions of what is, in practice, possible. Compared to political theory, this has distinct advantages. The political theory of liberal democracy can speak in a language so abstract that it does not inform those engaged in actual constitutional debates. When it does address concrete problems of institutional design, political theory can leave the audience wondering whether such a world would ever be possible, or if it were, whether anyone would really want to live in it. And as a strategy for persuading the audience that functional participation should be preserved and enhanced, the choice of the law is a good one. Both common-law and civil-law lawyers are familiar with this strategy: look, we did it before so we should do it again—just better.

But the legal method also has problems. It takes the law as it is, with all the inconsistencies and question marks that lawmakers leave in their wake. Take the four qualities that, in combination, emerge as critical to the operation of the interest group institutions in the book: representation of the socioeconomic groups implicated by occupational health and safety policy, technical expertise, deliberation (understood in the everyday sense of discussion), and transparency. Do technical matters and science really need deliberation? The American politicians who have decided to re-introduce creationism into the classroom in Kansas apparently believe that the issue of the origins of the human race should be debated. Most scientists, however, would say that evolution is the answer and that the current attempt to deliberate over origins is religious dogma triumphing over scientific truth. Or, again, take representation and technical expertise. Are those individuals selected because they are representative of European labour or business also going to be the individuals best placed to tell the Commission, say, how much benzene workers at gas stations can breathe without increasing their risk of cancer? Or, again, interest representation and deliberation. Deliberative democracy was developed as an alternative, not a complement, to utilitarian accounts of politics.² In utilitarian theories of democracy, individual preferences are fixed; collective outcomes are the result of preference aggregation. A number of institutions serve to aggregate preferences: interest groups like labour unions and employer associations, political parties, and, most importantly, majority voting

² See Amy Eutmann and Denis Thompson, *Why Deliberative Democracy?* (Princeton, Princeton University Press, 2004).

rules in the event of disagreement among individuals. Representation of socio-economic interests fits squarely with this utilitarian model of democracy. By contrast, in deliberative theories of democracy, individual preferences are malleable, a function of the collective, deliberative process of reason-giving and justification. Outcomes are consensual, based on agreement among the parties as to what is right and good. Which raises the question: can an individual, appointed to a governing body by virtue of his or her membership in a distinct interest organization, both represent a specific socio-economic reality and engage in democratic deliberation?

The book does not tackle the law's incoherence. For this reason, it is not as convincing as it otherwise might be as to the importance of European interest group institutions. To put it bluntly, the opinions of a body like the Advisory Committee might not be taken seriously because they are neither solid technically—because the opinions represent half-hearted compromises among slanted, interest-funded scientists—nor truly representative, because the Advisory Committee's members are paid scientists who are out-of-touch with the reality of labour and business in the Member States. And the members of the Advisory Committee may engage in neither representation nor deliberation: because of the premium placed on reaching scientific consensus, they cannot faithfully represent those citizens who have decided to join their interest organizations; yet, because they are sent by such organizations, they are not free to deliberate either. What is striking from Smismans's account is that the Advisory Committee appears to be a highly respected player in European health and safety policy. Thus the failure to explore the way in which these different *raison-d'être* might work at cross-purposes is also a missed opportunity. The empirical experience of bodies like the Advisory Committee could have offered some surprising insights into the political theory of interest representation, deliberation, and science in public policy.

A second difficulty with the internal legal perspective is that it inevitably reflects more than just the legal sources, yet the 'more' is never made explicit to those outside the legal circles debating and interpreting the sources. Traditional European scholarship often focuses exclusively on the law. This tendency still bears the trace of late-nineteenth century conceptualism, the idea that by looking at legal sources only, the scholar can separate law from politics. By looking at Roman law and now the Civil Code—for private law—and parliamentary statutes and constitutions—for public law—the scholar can construct a neutral, scientific edifice that will best regulate relations among individuals and between individuals and their governors.³ Smismans is definitely not part of what many would characterize as a questionable intellectual enterprise. In fact, his approach is, in some ways, the mirror image of the conceptualist method: by looking to the law to establish the normative foundations of functional participation, he brings

³ See Michael Stolleis, *Public Law in Germany, 1800-1914* (New York, Berghahn Books, 2001).

his analysis closer to, not farther from, the realities of European politics. But his analysis makes a logical leap similar to that made in conceptualist scholarship: just as the German Civil Code was not derived, mechanically, from the Institutes of Justinian, neither were representation, deliberation, technical expertise, and transparency etched deeply into the laws establishing European interest group committees.

An illustration: the EC Treaty says that the members of the Economic and Social Committee should act independently. Under Article 258, '[members] may not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the general interest of the Community'. But does this provision, taken together with some of the Committee's Rules of Procedure and its *modus operandi*, mean that 'decisionmaking within the [Committee] is the outcome of a deliberative process in which the largest possible consensus is sought' (pp 133–4)? The Treaty articles governing the Commission and the Court of Auditors are identically worded, yet deliberation is not the foremost quality of either. One suspects that Smismans is informed by more than the legal provisions, perhaps an affinity for Habermas's deliberative democracy (which makes an appearance in the first chapter). However, the reader is not told that, behind the author's interpretive choice, lies deliberate democracy nor does she learn why deliberative democracy is so attractive as compared to other models of liberal democracy. The same can be said for the discussion of transparency. This is a legitimacy criterion used throughout the book and all except for the Economic and Social Committee come up short. Yet Smismans offers only a very brief discussion of why transparency is important, buried in his description of the good government reforms currently under way in the European Union. Both deliberative democracy and transparency reflect the consensus view of a certain group of European legal scholars on the pathologies of the old European Union and the way forward for constructing a democratic, supranational political order. For those inside that circle, there is no need to explain why one starts from deliberative democracy and transparency. But for those outside—European legal scholars whose work is principally national in orientation among others—these and other premises of the analysis would have to be exposed and explained if they are to be fully accessible.

Smismans's inquiry could have also have used greater assistance from some of the political science introduced at the beginning of the book. What measures should be used to gauge representation, transparency, balance, independence, deliberation, and expertise? And how does each institution fare empirically on these measures? This is a classic problem of descriptive inference in the social sciences.⁴ Some of these legitimacy criteria are susceptible to common sense assessments, and Smismans is right not to belabour the issue. Whether an

⁴ See Gary King, Robert O. Keohane and Sydney Verba, *Designing Social Inquiry* (Princeton, Princeton University Press, 1994).

institution is transparent is a matter of how easily the public can obtain information on its decisions. To understand the level of transparency, it is enough to go to the interest committee's website and see how much material can be obtained directly or by using the official channel of an access to documents request. But criteria like representation are different. How do we identify the full range of socio-economic groups implicated by occupational safety issues and whether they are adequately represented by the organizations and individuals that sit on Europe's interest committees? As a first cut, Smismans' common sense approach might satisfy. Small and medium-sized enterprises, the disabled, and environmentalists undoubtedly are interested in occupational safety matters, and traditional labour confederations and employer organizations probably do not represent such interests. But the reader would like to learn more about how the constellation of interested parties was identified and why the existing organizations fail to represent their concerns. Do national employer organizations have sections for small and medium-sized enterprises? Which trade unions fail to devote resources to helping disabled workers obtain equal access to the workplace? What proportion of the workforce, in which sectors of the economy, do trade unions organize? Smismans' conclusions are all highly plausible, but to be fully convincing, he would have to be more explicit about the evidence he used.

That being said, by shining light on functional participation, this book is a valuable contribution to European constitutional debates. The deep-seated malaise revealed in the French and Dutch referenda on the Constitutional Treaty has demonstrated, yet again, the difficulty of constructing a legitimate supranational order that will command the allegiance of European citizens. *Perhaps* old-fashioned European functional participation, reformed to come into line with some of the new thinking on good government, can help.