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## Three Generations of Participation Rights Before the European Commission

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# THREE GENERATIONS OF PARTICIPATION RIGHTS BEFORE THE EUROPEAN COMMISSION

FRANCESCA BIGNAMI\*

## I

### INTRODUCTION

Representation, delegation, and specialization pose enduring problems for democratic theory because they fly in the face of the simple and central ideal of self-government: the citizen who at one and the same time governs and is governed. The rise of the administrative state and the science of policymaking have both increased our complacency in the face of government by elites and heightened the threat to the republican ideal of the virtuous citizen engaged in the affairs of the polis. The right to participate in government administration is one way in which citizenship has been vindicated—and reinvented—in modern times.

Participation rights are perhaps even more important in the European Union, which was founded on the logic and ideology of neo-functionalism. In the view of Jean Monnet, the French official generally credited with launching European integration, political unity would not be achieved through grand endeavors such as military pacts or human rights declarations, but rather would be accomplished through collaboration among nations on small, discrete tasks.<sup>1</sup> What Monnet termed “psychological integration,” that is, the habit of seeing the common interest above the parochial, national one, could occur only gradually, through cooperation among civil servants on pressing economic matters of obvious mutual concern, and, once success had been achieved there, through cooperation on other, related policy issues.<sup>2</sup> In other words, European integration was to be achieved through administration.

Since the early 1990s, the technocratic understanding of Europe has come under attack—hence the attempts to render the political structure more democratic and to improve debate and awareness of Europe at the grassroots level through the Charter of Fundamental Rights, the Convention on the Future of Europe, and the Constitutional Treaty. But regardless of the outcome of Europe’s constitutional debates, administra-

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1. See FRANÇOIS DUCHÊNE, *JEAN MONNET: THE FIRST STATESMAN OF INTERDEPENDENCE* 186-87 (1994).

2. See JEAN MONNET, *MEMOIRS* 87, 300 (Richard Mayne trans., 1978).

tion and the rights available to individuals before administration will remain central to the definition of European government and citizenship.

This article offers a conceptual framework for analyzing the development of participation rights before the European Commission (“Commission”) from the early 1970s to the present day.<sup>3</sup> Process rights before the Commission can be divided into three categories, each of which is associated with a distinct phase in European Community (“Community”) history and a particular set of institutional actors.<sup>4</sup> The first set of rights, the right to a hearing when the Commission inflicts sanctions or other forms of hardship on individuals, initially emerged in the 1970s in competition (anti-trust) proceedings and was later extended to anti-dumping and customs proceedings. This phase was driven by the Court of Justice and, to some extent, the Commission, influenced by the English understanding of the importance to good administration of a hearing and a court-like process.

The rise of transparency in the 1990s marks the second stage in the development of procedural rights. The transparency principle applies to all Community institutions in all their activities but has particular relevance for the Commission because it enables individuals and their associations to follow more closely, and hence influence, the course of decisionmaking. The drive for transparency was led by certain member countries with long-standing traditions of open government—the Netherlands, Denmark, Sweden, and Finland—and by the European Parliament.

The third and most recent phase in the development of process rights is the debate over whether and under what conditions individuals, firms, and their associations, billed as “civil society,” should take part in Community lawmaking and rulemaking. The Commission and the Convention on the Future of Europe, which produced the Constitutional Treaty, have been the keenest proponents of giving citizens and their associations a right to participate in rulemaking and legislative proceedings. A number of normative justifications are advanced for this transformation of European ad-

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3. I use “procedural rights,” “participation rights,” and “process rights” interchangeably. For present purposes, the terms are taken to mean a legal right or emerging institutional practice that enables individuals to influence a specific administrative determination before a final decision is taken. This includes the following: notification of proposed administrative action and the rationale for such action; the right to object to the contemplated action; and administrative consideration of the individual’s objections, generally evidenced in a written decision. This definition is purely functional, and the normative justifications for allowing individuals or groups to influence specific administrative determinations vary from area to area. Procedural rights that are commonly understood as furthering rule of law ideals exclusively, such as publication of final decisions, have been intentionally excluded from this article.

4. In Community law, the classic definition of whether an act is “administrative” or “legislative” turns on whether the determination is aimed at a particular individual or at a set of individuals, or whether it is a generally applicable rule. While this might be appropriate in national parliamentary systems in which the legislative body retains some authority over so-called “delegated legislation,” it is ill-suited to the Community’s system of separated powers. An administrative proceeding is therefore defined here as any determination of rights and duties made individually by the Commission or the Council in furtherance of powers conferred by the EC Treaty or by European laws. This definition turns on the exercise of powers in the absence of the full legislative process, which, depending on the policy area, can involve the Commission, Council, and Parliament, or just the Commission and the Council. It is also important to recognize for purposes of understanding the true scope of procedural rights that, even though the Commission is the formal author of most administrative determinations, it acts together with expert committees, comitology committees, and/or European agencies. The crux of decisionmaking power—Commission officials or national civil servants—varies depending on the substantive matter under consideration and the personalities involved.

ministrative law. Democracy and representation—not expertise or good management practices—are the most persuasive rationales for allocating power to individual citizens and their organizations within the Community policymaking process. Yet there is no consensus in Europe, where different traditions of interest group representation flourish, on the legitimacy of representation outside of political parties and the electoral process. Without wider agreement, voluntary associations and interest groups should not be given a court-enforced right to participate, regardless of their size and aims, in Community policymaking.

## II

### THE FIRST GENERATION: THE RIGHT TO A HEARING

Procedural rights were first established in competition proceedings, one of the few areas in which the Commission, as opposed to Member States, is empowered to directly impose sanctions or other burdens upon individuals in administering Community law.<sup>5</sup> In most systems of administrative law, fairness requires that the defendant have the right to contest vigorously administrative determinations that inflict sanctions or other forms of individual hardship. Nonetheless, the stage at which the defendant may contest the determination, the forum before which she may vindicate her rights, the scope of the rights, and the range of hardships believed to warrant such rights, differ considerably from one country to another. This is one of the major fault lines generally believed to separate common law from civil law systems of administrative law: in the common law, the defendant can challenge the decision before the administration itself, but, in the civil law, she must wait until the administrative process has been completed and then apply to the courts for judicial review.<sup>6</sup>

The fairness of an administrative act in the English common law tradition turns on the ability to engage in a quasi-judicial process at the time of its adoption. This highly procedural conception of rights is tied to the institutional practice of administrative tribunals, which are charged with making decisions that in other countries would be made by government ministries, or which serve as an appeals mechanism within a ministry.<sup>7</sup> In the English tradition, once the determination becomes final, access to the courts is restricted, the grounds of review are limited, and the types of remedies available are narrowly defined. By contrast, in many continental administrative law traditions, fairness is guaranteed through the possibility of stringent review in an independent, judicial forum. Individuals have a right to contest an adverse administrative determination at some point, but not always before the administration has decided.

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5. For present purposes, competition law includes only trade-restrictive agreements, abuse of dominant position, and mergers. State aids are not included because, in such proceedings, governments distributing the aid, not individuals, are considered the relevant parties, and therefore individual rights are not as extensively developed. On the more limited procedural rights in state aids cases, see Case 367/95, *Commission v Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval)*, 1998 E.C.R. I-1719, and Council Regulation (EC) 659/1999 of 22 March 1999 Laying Down Detailed Rules for the Application of Article 93 of the EC Treaty, 1999 O.J. (L 83) 1.

6. See MARCO D'ALBERTI, *DIRITTO AMMINISTRATIVO COMPARATO* 35 (1992) (comparing Anglo-Saxon proceduralism with checking of administrative decisions by the French Conseil d'État).

7. See ROBERT BALDWIN & CHRISTOPHER MCCRUDDEN, *REGULATION AND PUBLIC LAW* 17-19 (1987).

After British accession in 1973, the European Court of Justice (“Court”) imposed a highly proceduralized blueprint of administrative action on the Commission, influenced by English administrative law.<sup>8</sup> *Transocean Marine Paint Association v. Commission* is one of the first in this line of cases and illustrates nicely the way in which the distinctly English conception of rights—here regarding notice—led the Court down the road of proceduralization.<sup>9</sup> The plaintiff, an association of marine paint manufacturers, operated a worldwide sales network for its members. Transocean notified the Commission of the network agreement; the Commission in turn conditioned its approval on the disclosure by Transocean’s members of any cross-holding patterns between their directors and other firms in the paint sector. The condition was imposed without notifying Transocean in advance and without giving Transocean the opportunity to object.

Although the Commission’s procedure was perfectly consistent with the letter of the applicable regulation, the Court held in favor of Transocean based on a “general rule” that “a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known.”<sup>10</sup> But where did the general rule come from? The Court itself did not elaborate on the source, but it had the benefit of the opinion of the British Advocate General, who had concluded that the right to be heard was part of Community law after an extensive discussion of the English “rule of natural justice,” under which, “although there are not positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.”<sup>11</sup> The Advocate General also drew upon the traditions of other Member States, but remarkably, or perhaps simply with remarkable frankness, he found that only a minority of Member States recognized the rule. In his tally, only England, Scotland, Denmark, Germany, and Ireland clearly embraced the principle, while France, Belgium, and Luxembourg were arguably evolving in that direction, and Italy and the Netherlands clearly rejected it.

The Court has expanded the procedural boundaries in competition cases in a number of other respects.<sup>12</sup> The right of access to the Commission’s evidentiary record, which enables economic operators to challenge effectively the Commission’s position, was developed in a line of cases and is now recognized in the Commission’s rules of procedure. In early cases such as *Boehringer Mannheim*,<sup>13</sup> *ACF Chemiefarma*,<sup>14</sup> and *Imperial Chemical Industries*,<sup>15</sup> the Court established that the duty under the competition regulations to allow parties to “make known their views” included the duty to set

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8. See Jürgen Schwarze, *Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation*, 51 INT’L COMP. L. Q. 17, 21 (2001).

9. Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 E.C.R. 1063.

10. *Id.* at 1080, para. 15.

11. *Id.* at 1088.

12. See generally PAUL CRAIG & GRAINNE DE BÚRCA, *EU LAW* (3d ed. 2002); R.H. Lauwaars, *Rights of Defence in Competition Cases*, in II INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION 497-509 (Deirdre Curtin & Ton Heukels eds., 1994); Loïc Azoulay, *The Court of Justice and the Administrative Governance*, 7 EUR. L.J. 425 (2001).

13. Case 45/69, *Boehringer Mannheim GmbH v. Commission*, 1970 E.C.R. 769.

14. Case 41/69, *ACF Chemiefarma v. Commission*, 1970 E.C.R. 661.

15. Case 48/69, *ICI v. Commission*, 1972 E.C.R. 619.

forth “the essential facts on which the Commission relies,” as well as the duty “in the course of the administrative procedure [to supply] the details necessary to the defence.” However, the Court permitted the Commission to summarize the evidence—and only that which it deemed relevant to the case—rather than allow the parties to examine all of the documents in the Commission’s file directly.

That approach changed in the late 1970s, starting with *Hoffman-La Roche v. Commission*.<sup>16</sup> For the first time, the Court held that the “right to be heard” was a “fundamental principle of Community law” and found that the principle had been breached because Hoffman-La Roche, a manufacturer of vitamins, had not been allowed to inspect the documents underpinning the Commission’s case.<sup>17</sup> A few years later, in 1982, the Commission issued a policy statement setting down procedures for exercising the right to examine the evidence. Then, in 1997, the Commission adopted an internal rule of procedure that further specified the procedure for consulting documents and outlined the types of documents that would be routinely available and those protected from disclosure by various privileges.<sup>18</sup> Moreover, in the 1980s, the Court recognized a series of limits on the Commission’s powers of investigation, including a privilege for attorney-client communications,<sup>19</sup> a privilege against self-incrimination,<sup>20</sup> and a duty to respect national search warrant requirements and collect evidence only related to the specific ends of the investigation.<sup>21</sup>

The procedural principles established in the competition area can be summarized as follows. In gathering evidence at the investigation phase, the Commission must respect national warrant requirements and limited versions of the attorney-client privilege and privilege against self-incrimination. At the decisionmaking phase, the Commission must set forth a preliminary statement of the evidence and the legal conclusions drawn from the evidence (statement of objections); the parties have the right to contest the statement, both through access to the file to scrutinize the evidence and in a written reply to rebut the evidence and challenge the Commission’s arguments.<sup>22</sup> An oral hearing is conducted, presided over by an independent officer, in which the parties have the opportunity to develop further their objections to the Commission’s case.<sup>23</sup> Lastly, an exhaustive written decision, often running hundreds of

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16. Case 85/76, *Hoffman-La Roche v. Commission*, 1979 E.C.R. 461.

17. *Id.* at 521, para. 11.

18. See Commission, 12th Report on Competition Policy (1982); Commission Notice 97/C 23/03 on the Internal Rules of Procedure for Processing Requests for Access to the File in Cases Pursuant to Arts. 85 and 86 EC, Arts. 65 and 66 ECSC and Council Regulation (EEC) 4064/89, 1997 O.J. (C 23) 3.

19. Case 155/79, *Australian Mining & Smelting Europe Ltd. v. Commission*, 1982 E.C.R. 1575, para. 23 (covering communications between an independent lawyer and a client for the sole purpose of defending the client in the competition proceeding at issue).

20. Case 374/87, *Orkem v. Commission*, 1989 E.C.R. 3283 (allowing firms to refuse to answer questions that go directly to the question of guilt or innocence).

21. Cases 46/87 & 227/88, *Hoechst AG v. Commission*, 1989 E.C.R. 2859.

22. See Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the Conduct of Proceedings by the Commission Pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 123) 18; Council Regulation (EC) 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

23. See Commission Decision 2001/462 of 23 May 2001 on the Terms of Reference of Hearing Officers in Certain Competition Proceedings, 2001 O.J. (L 162) 21, art. 3.

pages, sets forth the facts and reasons for the finding of a competition infringement and the resulting sanction. In the written decision, the Commission must give a complete enough statement of the facts and considerations underlying the final decision so that the parties and the Court can discern whether the Commission has adhered to the substantive requirements of European administrative law.<sup>24</sup>

Competition proceedings represent the “Rolls Royce” of administrative adjudication and have influenced the development of procedural rights in other areas of Community administration.<sup>25</sup> In deciding whether to recognize a right to a fair hearing, the Court examines whether the Commission can impose a “penalty” or “adverse effect”<sup>26</sup> on an individual or a discrete set of individuals. In anti-dumping determinations, for example, the Commission directly assesses the functional equivalent of a fine—the anti-dumping duty; and thus, the Court was willing to recognize hearing rights early on.<sup>27</sup> About twenty years later, in 1998, the Court held that the right to a hearing before the Commission also applied in a limited class of customs cases.<sup>28</sup> Under the European Customs Code, an importer may apply for the repayment (the duty has already been paid) or remission (the duty is owed but has not yet been paid) of a customs duty due under the Code.<sup>29</sup> In those instances in which the national authority does not make the final determination, but is instead uncertain and sends the application to the Commission for a final decision, the Commission must give the importer access to the evidence in the file and the opportunity to respond—but only in writing, in contrast with competition and anti-dumping proceedings—to the Commission’s allegations.<sup>30</sup>

The Court has sporadically imposed procedural guarantees in other instances, generally policy areas in which enforcement is almost exclusively in the hands of national authorities and in which the Commission intervenes under only exceptional circumstances. In one case, the exclusion of a Swedish fishing company from a Community

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24. See Case 322/81, *Michelin v. Commission*, 1983 E.C.R. 3500; Case 41/69, *ACF Chemiefarma v. Commission*, 1970 E.C.R. 661, 690.

25. For a comprehensive overview of this category of rights, see HANS PETER NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* (1999).

26. Case C-395/00, *Distillerie Fratelli Cipriani SpA v. Ministero delle Finanze*, 2002 E.C.R. I-11877, para. 51; Case C-48/96, *Windpark Groothusen v. Commission*, 1998 E.C.R. 2873, para. 47.

27. Case 264/82, *Timex Corporation v. Council & Commission*, 1985 E.C.R. 849; see also Case C-49/88, *Al-Jubail Fertilizer v. Council*, 1991 E.C.R. I-3241, para. 15 (relying upon the right to a fair hearing and “equality of arms” in competition area to establish the right to a fair hearing in the international trade domain). For the more recent cases defining the scope of the right to a hearing in anti-dumping proceedings, see Case T-88/98, *Kundan Industries Ltd. & Tata International Ltd. v. Council*, 2002 E.C.R. II-4897, para. 132; Case T-121/95, *EFMA v. Council* 1997 E.C.R. II-2391, para. 84; Cases T-159/94 & T-160/94, *Ajinomoto & Nutrasweet v. Council*, 1997 E.C.R. II-2461, para. 83; Case T-147/97, *Champion Stationery v. Council*, 1998 E.C.R. II-4137, para. 55.

28. See Case T-42/96, *Eyckeler & Malt AG v. Commission*, 1998 E.C.R. II-401; Case T-50/96, *Primex Produkte v. Commission*, 1998 E.C.R. II-3773. The Customs Code was amended to reflect the Court’s holding.

29. See Council Regulation (EEC) 2913/92 of 12 October 1992 Establishing the Community Customs Code, 1992 O.J. (L 302) 1, arts. 236-39.

30. Commission Regulation (EC) 1677/98 of 29 July 1998 Amending Regulation (EEC) 2454/93 Laying Down Provisions for the Implementation of Council Regulation (EEC) 2913/92 Establishing the Community Customs Code, 1998 O.J. (L 212) 18. In two pending cases, the Court has been presented with the question of whether the right to be heard in the customs area also includes the right to submit oral representations. Cases T-134/03 & T-135/03, *Common Market Fertilizers v. Commission*, 2003 O.J. (C 158) 24, 25.

fishery zone because of allegations of illegal fishing activities was enough to trigger a hearing right;<sup>31</sup> in another case, the reduction of financial assistance did the same.<sup>32</sup> However, the scope of the hearing right is far less extensive in these situations than in the core areas of competition, anti-dumping, and, now, customs law. The litigants have the right to a brief description of the facts and reasons supporting the contemplated decision, to make their arguments and advance their evidence in a written submission, and to receive a succinct reply in the Commission's statement of reasons.

Notwithstanding this extension of procedural rights into areas in which the Commission imposes particularized hardship, the Court has been reluctant to do the same when the determination results in an individual benefit. For instance, in *Windpark Groothusen*, the Commission denied an application for Community aid under a program promoting energy technologies.<sup>33</sup> The Commission based the decision exclusively on the information submitted in the initial application, without allowing the applicant to submit observations before the final funding decision was made. The Court of First Instance, upheld by the Court of Justice, found that the applicant had no such right because it "had merely been placed on a reserve list of possible beneficiaries of Community financial support."<sup>34</sup>

The most recent chapter in this history is the Charter of Fundamental Rights of 2000,<sup>35</sup> which would be given binding legal force under the Constitutional Treaty of 2004.<sup>36</sup> Article II-101 codifies the extensive case law of the Court of Justice on individual rights in European administration, including the right to a hearing chronicled above:

**Article II-101 Right to good administration**

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies, offices and agencies of the Union.
2. This right includes:
  - (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.<sup>37</sup>

Thus, Article II-101 gives constitutional status to the long and steady trajectory of the Court of Justice's jurisprudence that started with *Transocean Marine Paint Association* in 1974 and continues to this day.<sup>38</sup>

31. Case C-135/92, *Fiskano v. Commission*, 1994 E.C.R. I-2885; *see also* Case T-46/00, *Kvitsjoen v. Commission*, 2000 E.C.R. II-3713.

32. Case T-450/93, *Lisrestal v. Commission*, 1994 E.C.R. II-1177.

33. Case C-48/96, *Windpark Groothusen v. Commission*, 1998 E.C.R. 2873.

34. Case T-109/94, *Windpark Groothusen v. Commission*, 1995 E.C.R. II-3007, para. 50; *see also* Case C-48/96, *Windpark Groothusen*, 1998 E.C.R. at 2873, para. 47 (affirming reasoning of Court of First Instance).

35. CHARTER OF FUNDAMENTAL RIGHTS, 18 Dec. 2000, 2000 O.J. (C 364) [hereinafter CHARTER OF FUNDAMENTAL RIGHTS].

36. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, 2004 O.J. (C 310) 3 [hereinafter CONSTITUTIONAL TREATY].

37. CONSTITUTIONAL TREATY, *supra* note 35, art. II-101.

## III

## THE SECOND GENERATION: THE RIGHT TO TRANSPARENCY

Transparency is a general duty applicable to all European institutions. Legislators and government officials are to conduct their business as openly as possible, allowing the press and members of the public to scrutinize their decisionmaking. As a legal right, transparency refers mainly to the individual right of access to documents. By allowing individuals to follow closely the work of the institutions, including administrative decisionmaking, transparency enables individuals, both through informal, political means and through formal, legal means, to exert greater influence over legislative and administrative proceedings.

The history of transparency began in the early 1990s with the Danish rejection of the Maastricht Treaty and the attempt to dissipate popular distrust of Brussels through a series of open government measures focused largely on the right of access to government documents. Following the Inter-Institutional Declaration on Democracy, Transparency, and Subsidiarity issued in 1993, the Council and Commission each adopted decisions granting individuals a general right of access to their documents, subject to numerous exceptions.<sup>39</sup> In the first years of litigation under these decisions, the Court of First Instance gave significant bite to the right of access by showing a willingness to interpret the exceptions narrowly<sup>40</sup> and by requiring, when an exception was justified, that access be denied line-by-line, redacting if necessary, rather than excluding entire documents or sets of documents.<sup>41</sup> This was followed, in the Treaty of Amsterdam, by the important inclusion of a “right of access to European Parliament, Council, and Commission documents,”<sup>42</sup> by the guarantee of a “right of access to documents” in the Charter of Fundamental Rights,<sup>43</sup> and, finally, after a long, bitter set of negotiations, by the Regulation on Public Access to Documents of all three institutions.<sup>44</sup>

The impetus toward transparency continues in the Constitutional Treaty.<sup>45</sup> In the first part, the duties incumbent upon the European institutions are set down.<sup>46</sup> The

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38. See Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 E.C.R. 1063, *supra* note 9 and accompanying text.

39. Decision 93/73/EC, Council Decision of 20 December 1993 on Public Access to Council Documents, 1993 O.J. (L 340) 43; Decision 94/90/ECSC, EC, Euratom, Commission Decision of 8 February 1994 on Public Access to Commission Documents, 1994 O.J. (L 46) 58.

40. Case T-309/97, *The Bavarian Lager Co. v. Commission*, 1999 E.C.R. II-3217; Case T-194/94, *John Carvel & Guardian Newspapers v. Council*, 1995 E.C.R. II-2765.

41. Case T-14/98, *Heidi Hautala v. Council*, 1999 E.C.R. II-2489; Case T-124/96, *Interporc v. Commission*, 1998 E.C.R. II-231.

42. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, 1997 O.J. (C 340) art. 255 [hereinafter TREATY OF AMSTERDAM].

43. CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 35, art. 42.

44. Regulation No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43 [hereinafter “Regulation on Public Access to Documents”].

45. CONSTITUTIONAL TREATY, *supra* note 36.

46. *Id.* at art. I-50 (“Transparency of the proceedings of Union Institutions, bodies, offices and agencies”).

second part, which incorporates the Charter of Fundamental Rights, recognizes the individual right of access to documents.<sup>47</sup> Lastly, Article III-399 sets down the structural, institutional conditions of transparency, which are largely repetitive of the rights set out in the first part of the Constitutional Treaty.<sup>48</sup> The Treaty confers symbolic, constitutional status upon the principles of openness, transparency, open meetings, and access to documents. As a practical matter, however, the new articles do not add much. They recognize the legislative practice of requiring all institutions, committees, and agencies, in addition to the Commission, the Parliament, and the Council, to respect the right of access to documents.<sup>49</sup> They also constitutionalize the rules of procedure of the Parliament and the Council, under which debates on legislation are open to the public.<sup>50</sup> Finally, the Constitutional Treaty specifically requires the Parliament and the Council to publish documents related to their deliberations on legislative matters. However, the scope of the requirement turns on the access-to-documents rules of the respective institutions; therefore, access to such documents would not need to be significantly broader than is presently the case.<sup>51</sup>

This phase in the development of participation rights was led by certain Member States and the European Parliament, not the Court, and political, rather than judicial, institutions continue to take primary responsibility for developing and expanding transparency guarantees.<sup>52</sup> The Nordic countries and the Netherlands have longstanding traditions of freedom of the press, public disclosure, and access to government documents. Both the Swedish and the Finnish constitutions guarantee access to government information.<sup>53</sup> The expectation that government officials should interact openly with the public and members of parliament has shaped the way in which diplomats and bureaucrats from these Member States exercise their authority within the

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47. *Id.* at art. II-102 (“Right of access to documents”).

48. *Id.* at art. III-399.

49. *Id.* at art. III-399.1. See, e.g., Regulation No. 1641/2003 of the European Parliament and of the Council of 22 July 2003 Amending Council Regulation (EEC) 1210/90 on the Establishment of the European Environment Agency and the European Environment Information and Observation Network; Rules of Public Access to Documents, 2002 O.J. (C 292) 10 (European Investment Bank). For a partial list of access rules of different European bodies, see Steve Peers, *From Maastricht to Laeken: The Political Agenda of Openness and Transparency*, in *INCREASING TRANSPARENCY IN THE EUROPEAN UNION?* 7, 15 (Veerle Deckmyn ed., 2002).

50. CONSTITUTIONAL TREATY, *supra* note 36, art. I-50.2. In the case of the European Parliament, both plenary meetings and committee meetings are open to the public. In the case of the Council, only the final meeting of the Council, which rubber-stamps the agreements previously negotiated by low-level, national representatives, is made public. There is nothing to suggest that the Constitutional Treaty means anything different by “the Council [shall meet in public] when considering and voting on a draft legislative act.” *Id.* at art. I-50.

51. *Id.* at art. III-399.2.

52. See generally D.M. Curtin, *Betwixt and Between: Democracy and Transparency in the Governance of the European Union*, in *REFORMING THE TREATY ON EUROPEAN UNION: THE LEGAL DEBATE* 95 (Jan A. Winter et al. eds., 1995) (describing role of northern Member States and the European Parliament).

53. The Swedish right of access dates back to the Freedom of the Press Act of 1766, one of Sweden’s basic constitutional laws. See Joakim Nergelius, *Constitutional Law*, in *SWEDISH LAW IN THE NEW MILLENNIUM* 65, 83-84 (Michael Bogdan ed., 2000). Chapter Two of the Act gives citizens the free right of access to official documents. In Finland, the right dates back to the same Freedom of Press Act of 1766, since Finland was governed by Sweden at the time. It now is guaranteed under Section 12 of the Finnish Constitution.

Community system and, combined with the events of Maastricht, has led to the improvement of transparency in a variety of institutional practices.<sup>54</sup>

The European Parliament has also been an advocate of transparency.<sup>55</sup> In part, this bias is natural for an elected body: parliamentary debates, votes, and committee work are open to the public so that constituents can hold their representatives accountable. For the European Parliament, transparency assumed particular significance because it was a means of improving what, just over a decade ago, were still quite meager institutional powers. Knowing what was happening in the Commission or the Council served to expand Parliament's influence.

The powers of the Parliament can be divided into three categories: the budget, legislation, and administration. Starting in the 1980s, the Parliament has consistently and repeatedly pushed the Commission and the Council for more information related to all three powers.<sup>56</sup> The right to transparency for all European citizens, not only parliamentarians, benefited from the Parliament's crusades to improve institutional clout and, in turn, lent legitimacy and moral weight to what was essentially a self-interested, strategic campaign for information.

The right to transparency is an important accountability tool, but its effectiveness as a means for European citizens to influence specific, ongoing policymaking initiatives is unclear. The American experience with transparency and the Freedom of Information Act (FOIA) is illustrative on this score.<sup>57</sup> FOIA has been used by regulated parties and public interest groups to obtain information about specific administrative proceedings, permitting them to influence administrative decisions through legal and political means more effectively, and to mount formidable legal challenges, after final

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54. An anecdote from my research on European data-protection policy illustrates the impact of northern Member States on transparency. When adopting legislative proposals, it is common practice to enter declarations, some common to both the Council and the Commission, others by individual Member States, as to the interpretation of certain provisions of the legislative proposal. When the Data Protection Directive was adopted in 1995, the Danish and Swedish representatives requested that these declarations be made public. When they were opposed by the other delegations, they made a declaration deploring the failure to publicize the declarations. See *Extrait du PV de la 1866ième session du Conseil du 24/07/1995*. More recently, when Denmark occupied the Presidency responsible for concluding the final agreements on Central and East European accession, the Danish Prime Minister allowed European Council meetings to be filmed for a documentary. The documentary provoked an outcry from European leaders when it was shown in May 2003. In Danish, the documentary was called "Fogh behind the Façades," and in German "Alles Banditen," or roughly, "They're all a bunch of rogues."

55. As far back as 1984, it issued a resolution calling for greater access to documents. Parliament Resolution, 1984 O.J. (C 172) 176.

56. See, e.g., Commission, Bilan annuel 1991 d'application du "Code de conduite": Communication de la Commission au Parlement européen, Annex I, at 4.3, 5 June 1991 SEC (91) 1097 final (agreement between Commission and Parliament setting down the information to be communicated to the Parliament during the legislative process); Resolution Closing the Procedure for Consultation of the European Parliament on the Proposal from the Commission of the European Communities to the Council for a Regulation Laying Down the Procedures for the Exercise of Implementing Powers Conferred to the Commission, 1986 O.J. (C 297) 94, 95 (requiring Commission to transmit to Parliament information on administrative proceedings); Resolution in Accordance with the Provisions of Article 85 of the Financial Regulation Informing the Commission of the Reasons for the Deferral of Discharge in Respect of the Implementation of the Budget of the EC for the 1982 Financial Year (14 May 1984), 1984 O.J. (C 127) 36, 38, paras. 4, 14 (decrying scant information on the implementation of the budget provided by the Commission).

57. Freedom of Information Act, 5 U.S.C. § 552 (2002).

decisions are issued.<sup>58</sup> Whether the Regulation on Public Access to Documents will take on this function in Community administrative law will depend on the interpretation of its exceptions as well as on the speed with which the institutions respond to requests. The register of documents established under the Regulation should allow individuals to follow all proceedings, both legislative and administrative.<sup>59</sup> However, the exception for documents that precede the final, official decision might well prevent interested parties from using transparency to participate directly in rulemaking and lawmaking:

Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.<sup>60</sup>

Likewise, the exception for documents naming specific individuals, to ensure respect for their privacy rights, could put another gaping hole in the right of access.

Finally and most critically, an effective right of access will depend on those resources that the Council and Commission choose to commit to transparency policy. Without good record-keeping, registration, and archiving practices in each and every department, and without a corps of administrators dedicated to responding to public access requests in a timely fashion, the right will be chimerical. In other words, even though the Court and the Ombudsman will undoubtedly contribute to the vigorous enforcement of the right of access, only a willingness on the part of the Member States and Community institutions to commit significant resources will make it a reality.

The transparency principle not only guarantees the right of individuals to demand documents but also informs government practices making documents freely available. The new commitment to transparency has affected the Commission most precisely in the administrative arena. Traditionally, only important, new policy initiatives of the Commission were publicized in advance through White and Green Papers. Now, certain committees of national representatives and certain divisions within the Commission have begun making transparent the more mundane activity of interpreting, implementing, and updating existing legislative frameworks. Important examples include administrative decisionmaking in the areas of financial services, data protection, and telecommunications.<sup>61</sup> The Commission, on its own initiative or while functioning as the secretariat for committees of national regulators, has recently begun

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58. *Id.*

59. See Commission Decision 2002/47/EC, 2002 O.J. (L 21) 23; Commission Decision 2001/937/EC, 2001 O.J. (L 345) 94; Bureau Decision on public access to European Parliament documents, 2001 O.J. (C 374) 1. For a critical overview of the experience to date with the Regulation, see Magdalena Elisabeth de Leeuw, *The Regulation on the Public Access to European Parliament, Council, and Commission Documents in the European Union: Are Citizens Better Off?*, 28 EUR. L. REV. 324 (2003).

60. Regulation on Public Access to Documents, *supra* note 44, art. 4.3.

61. Commission Decision 2001/527/EC Establishing the Committee of European Securities Regulators, 2001 O.J. (L 191) 43; European and Council Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31, art. 29 [hereinafter "Data Protection Directive"].

placing the committees' work agendas and draft proposals on its website,<sup>62</sup> marking a dramatic shift from the past. Previously, administrative decisionmaking, meaning Commission powers exercised outside of the legislative process of White Papers and Commission proposals, was shielded from the public eye. Implementing rules or informal guidelines published in the Official Journal could come as a surprise to the interested community, *a fait accompli*. This type of continuous transparency, even more than formal access rights, allows interested parties to make their views known to the Commission and national regulators and thus to actively shape the course of Community administration.

#### IV

##### THE THIRD GENERATION: THE RIGHT TO CIVIL SOCIETY PARTICIPATION?

###### A. Civil Society in European Governance

The third and most recent phase in the development of Community procedural rights began in the late 1990s.<sup>63</sup> The suggestion is that individual citizens, voluntary associations, and interest groups, so-called "civil society," should have the right to participate directly in the work of the institutions.<sup>64</sup> Of course, these actors have always shaped politics in the European Parliament and the Council through their national representatives. Moreover, interest group lobbyists have been a long-standing feature of Bruxellois topography. The difference, noticeable in the change of terminology from "pressure group" to "civil society organization," is that there is now a call from certain quarters to consider them legitimate partners in European governance.

As Stijn Smismans argues, the Commission has been the most vigorous institutional promoter of governance by civil society.<sup>65</sup> Civil society discourse has served two distinct institutional interests: (1) it has supported the Commission's bid to extend its policymaking powers from the internal market area to social policy matters, known in Community parlance as "expanding competences"; and (2) it has served as a defense against charges that the Commission is an unaccountable executive body, removed from the popular will. Since non-profits such as religious organizations and charities benefit from the Commission's funding in the social arena, they are natural

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62. See, e.g., Article 29 Working Group on Data Protection, *Politique de transparence du groupe établi par l'article 29 de la directive 95/46/CE*, November 20, 2002, 12251/02/FR.

63. Many perceive consultation as a variant of transparency, but it should be made clear that they are distinct in Community law and European political discourse. Transparency allows for scrutiny of public decisionmaking but leaves influence to existing political and legal mechanisms. Consultation is a specific form of political and, in some countries, judicially enforceable, influence through a formal and routine sequence of objections from interested parties and reasons and justifications from administrators.

64. Political parties, national parliaments and local government are not part of the European definition of "civil society."

65. Stijn Smismans, *European Civil Society: Shaped by Discourses and Institutional Interests*, 9 EUR. L.J. 473 (2003). Smismans argues that the Economic and Social Committee has also played a significant part in promoting the civil society idea. While this is undoubtedly true, the Economic and Social Committee carries considerably less clout than the Commission in the Brussels complex. Hence, in terms of pure influence, the Commission is the more significant of the two.

allies in the bid to move beyond core common market areas to unemployment policy and immigrant rights. Moreover, the civil society connection adds democratic legitimacy to the Commission, which has been accused by the European Parliament as corrupt and unaccountable, and is therefore a means of safeguarding the Commission's legislative powers from poaching by the Parliament and the Council.<sup>66</sup>

The exact shape of governance through civil society is still uncertain and hotly contested. The Commission's most recent statement is contained in its Communication on Consultation of December 2002,<sup>67</sup> which supplements the White Paper on European Governance of June 2001.<sup>68</sup> The participation envisaged by the Commission will take two forms. First, the Commission will consult civil society on major legislative proposals by publishing a description of the issues open for discussion on its website and any civil society responses. The Commission will then summarize the civil society responses, as well as the ways in which it took account of such responses in an explanatory memorandum accompanying the proposal.<sup>69</sup>

As part of the consultation, the Commission will actively solicit the opinions of certain "target groups"—namely those who will be affected by the policy, who will be involved in its implementation, or whose organizational mission is directly related to the policy. The choice among the different views is a "political decision" for the Commission alone to make.<sup>70</sup> These minimum standards are meant to guide the practices of Commission officials but, importantly, do not constitute binding legal duties enforceable in judicial proceedings.<sup>71</sup> Moreover, the Commission makes it clear that the Communication contains only minimum standards, and it—or national committees of regulators—might choose to consult on more specific matters that would fall within the ambit of administrative rulemaking.<sup>72</sup>

Second, in what the Commission calls "co-regulation," associations will take on responsibility for implementing basic legislation by developing standards and codes of conduct, under the loose supervision of the Commission and committees of national regulators.<sup>73</sup> Co-regulation is generally not recognized as a form of civil society participation in European governance because it is not thought to be governance at all: the issues that are delegated to associations are conceived as narrow matters that con-

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66. See Karel Van Miert, *LE MARCHÉ ET LE POUVOIR* 241-59 (2000) (recounting this history from the insider perspective of a Commissioner).

67. Communication from the Commission, *Towards a Reinforced Culture of Consultation and Dialogue—General Principles and Minimum Standards for Consultation of Interested Parties* by the Commission, COM (02)704 final, December 11, 2002 [hereinafter "Communication on Consultation"].

68. European Commission, *White Paper on European Governance*, COM (01) 428 final, July 25, 2001 [hereinafter "White Paper on Governance"].

69. Communication on Consultation, *supra* note 67, at 19-22.

70. *Id.* at 12.

71. *Id.* at 10 ("[A] situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy.").

72. *Id.* at 11.

73. *White Paper on Governance*, *supra* note 68, at 11-13. "Co-regulation" is distinguished from "self-regulation" in that, in the latter, associations develop their own standards and norms, thereby preempting altogether European regulatory initiatives.

cern and affect only certain firms. Because of their experience and interest in the area, their associations are therefore the best-placed to set down the applicable rules.<sup>74</sup>

The reality, however, is that this form of industry self-regulation consists of policymaking with a real impact on individuals and firms outside of any particular industry association—and therefore constitutes civil society participation in governance. Co-regulation covers the work of standardization committees in implementing “New Approach” harmonization directives. Such directives set general standards for products and services and delegate the task of hammering out the precise definitions to European committees comprised of national standard-setting organizations.<sup>75</sup> Co-regulation also includes codes of conduct adopted by industry associations. In sum, civil society is called upon to participate in European governance in two ways: (1) the Commission can decide to retain public authority but ask for the systematic participation of citizens and their associations; or (2) the Commission can transfer public authority to voluntary associations and industry groups while simultaneously loosely supervising their activities.

Policymaking in the data protection area illustrates both forms of civil society participation. First, the committee charged with overseeing implementation of the Data Protection Directive consults interested parties on a regular basis. For example, in November 2002, the Working Party on Data Protection announced that it would make drafts available to the public before reaching final decisions and that it would engage in consultations with interested parties based on draft documents, a series of questions, or an indication of a future problem to be addressed.<sup>76</sup> Consultations are announced on the website, as well as through mailings to certain European-level associations, and are conducted at the discretion of the Working Party. To date, the Working Party has held two consultations, one on video-surveillance and the other on internal transfers of employee data in multinational corporations. Clearly, the recent debate on civil society participation has already had an impact on this nook of the Community’s administrative culture.

Second, the Data Protection Directive passed in 1995 makes use of co-regulation through codes of conduct:

The Member States and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to this Directive, taking account of the specific features of the various sectors.<sup>77</sup>

The Directive thus attempts to enlist trade associations and firms in formulating specific rules that protect personal information. This is co-regulation as opposed to self-regulation because the Directive foresees a role for public authorities in reviewing the standards:

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74. *Id.* at 21.

75. See ELLEN VOS, INSTITUTIONAL FRAMEWORKS OF COMMUNITY HEALTH AND SAFETY REGULATION: COMMITTEES, AGENCIES AND PRIVATE BODIES 56, 251 (1999).

76. See Article 29 Working Group on Data Protection, *supra* note 62.

77. Data Protection Directive, *supra* note 61, art. 27.1.

Draft Community codes, and amendments or extensions to existing Community codes, may be submitted to the Working Party. The Working Party shall determine, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to the Directive. If it sees fit, the authority shall seek the view of data subjects or their representatives. The Commission may ensure appropriate publicity for the codes which have been approved by the Working Party.<sup>78</sup>

In June 2003, the first code of conduct, drafted by the European Direct Marketing Association, was approved by the Working Party.<sup>79</sup> The Commission has also received proposed codes from the European association of headhunters and the European association of caller identification firms. Furthermore, in early 2003, the Confederation of British Industry (CBI), together with the International Chamber of Commerce (ICC), proposed a set of model contract clauses for data transfers abroad. Although not strictly speaking codes of conduct, these model contract clauses are being drafted through the same form of interaction between private associations and public bodies: the CBI and ICC, in consultation with their member firms, draft the terms, and the Commission, together with the responsible committees of national regulators, reviews them.<sup>80</sup>

## B. Normative Justifications for Civil Society Participation

What is the rationale for civil society participation in Community policymaking? After all, good government reforms could have stopped with transparency, leaving associational influence to existing political and legal processes. The Commission argues three different reasons why Community policymaking will be more legitimate if achieved through civil society: (1) technocratic expertise; (2) good management practices; and (3) the representation of functional interests and religious and civic values. Although the expertise idea has some currency, the good management rationale betrays an elite, outmoded conception of democracy, and both run the danger of obscuring the conflicts over scarce resources—the essence of all politics—that underpin European governance. Representation in the interest of improving European democracy is the most compelling normative justification. However, Europeans disagree on the possibility of representation through membership in interest groups. Therefore, the representation rationale alone cannot support a European consensus on civil society.

In the White Paper on Governance, the Commission advanced a technocratic—or administrative—vision of its role in European governance. Essentially, the White Paper combined conventional national theories on constitutional government, transposed to the supranational level, with the traditional, functionalist understanding of European politics, still extremely powerful among statesmen, civil servants, and scholars. As the Commission saw it, the Council and European Parliament should make law and the Commission should implement it. The Council and Parliament would represent

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78. *Id.* at art. 27.3.

79. Article 29 Working Party, Opinion 3/2003, June 13, 2003.

80. *See* Article 29 Working Party, Opinion 8/3003, Dec. 17, 2003 (issuing favorable opinion subject to a number of reservations); Data Protection Directive, *supra* note 61, art. 26 (setting down procedure for approving model contracts for transfers of personal data abroad).

citizens and hold the executive branch—the Commission—accountable, and the Commission would make the expert judgments necessary to carry out the legislative will.<sup>81</sup>

This technocratic logic also pervaded the Commission's depiction of its relationship with civil society. Among the five principles of good governance identified by the Commission at the outset of the White Paper—openness, accountability, effectiveness, coherence, and participation—only the definition of participation encompasses the Commission's interaction with civil society organizations:

Participation. The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain—from conception to implementation. Improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies. Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies.<sup>82</sup>

Two very powerful strands in the institutional discourse on civil society participation emerge from this passage. First, participation is valuable because it contributes knowledge and expertise, thus leading to better policy. The expertise rationale is especially prominent in the discussion of when co-regulation is appropriate:

Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance.<sup>83</sup>

Second, participation is a standard good practice that should inform the Commission's management of European democracy. Civil society participation contributes to the good management of the policy chain, enabling the Commission to give the consumer or the European citizen what she wants, creating brand loyalty or "confidence." This elite, top-heavy understanding of European politics appears throughout the paper:

Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe's role. It is a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest.<sup>84</sup>

And likewise: "Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience."<sup>85</sup>

The expertise rationale has some merit. To return to the example of data protection, it is likely that firms in the business of direct marketing will know best what information storage practices are likely to be vulnerable to identity theft and other misuses of citizens' private information. However, it is also clear that the economic interests of direct marketing firms do not lie in the best possible protection of private

81. See Christian Joerges, "Economic Order"—"Technical Realization"—"The Hour of the Executive": Some Legal Historical Observations on the Commission White Paper on European Governance, JEAN MONNET WORKING PAPER NO. 6/01, available at <http://www.jeanmonnetprogram.org/papers/01/012201.html>; J.H.H. Weiler, *The Commission as Euro-Skeptic: A Task-Oriented Commission for a Project-Based Union*, JEAN MONNET WORKING PAPER NO. 6/01, available at <http://www.jeanmonnetprogram.org/papers/01/013401.html>.

82. White Paper on Governance, *supra* note 68, at 10.

83. *Id.* at 21.

84. *Id.* at 15.

85. *Id.*

information and that these economic interests will undoubtedly color their characterization of the available information storage technologies.

By contrast, the good management rationale does not stand up to scrutiny. It suggests that the Commission has not moved beyond the ideology of neo-functionalism in which elites are central to politics. If Europe is to become democratic, the notion that civil servants in Brussels or national regulators sitting on European committees are the only citizens capable of identifying “the” supranational interest and delivering the best, European-wide policies, must be abandoned. In its good management incarnation, civil society participation cannot render European politics democratic.<sup>86</sup>

Both the expertise and the good management strands share one critical flaw: they create the illusion that politics are absent from the decisions to consult some civil society groups and not others, to adopt some civil society suggestions over others, and to approve certain associational codes of conduct and reject others. According to the rhetoric, the public good is not constructed by the Commission and the interests and associations to whom it listens; rather, through the consultation process, expertise is incorporated, and the policies desired by the European people are revealed. These depictions of European governance paint a civic world in which public authority can somehow operate without conferring benefits and inflicting costs, excluding some groups and including others, and creating political winners and losers. Yet Europe is no exception to the fact that politics involve struggles over the distribution of scarce resources.

Only the Commission’s third rationale for civil society participation—representation—is fully persuasive. At a time when rule by the people, or democracy, is widely perceived to be the only legitimate form of government, the best justification for allocating public power to individuals, firms, and private associations is the claim that they represent the wider body of citizens that are duty-bound to obey the decisions of European government. Although the White Paper on Governance is shy on this point, the Communication on Consultation frankly refers to civil society consultation as a “supplement” to parliamentary processes, further stating that “the guiding principle for the Commission is therefore to give interested parties a *voice*, but not a vote.”<sup>87</sup> The Commission certainly has not abandoned the expertise or brand-loyalty rationales:

By fulfilling its duty to consult, the Commission ensures that its proposals are technically viable, practically workable and based on a bottom-up approach. In other words, good consultation serves a dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large.<sup>88</sup>

Nevertheless, representation is central to the document, both in requiring a “proper balance”<sup>89</sup> among different interests in the consultation process and in considering

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86. *Id.*

87. Communication on Consultation, *supra* note 67, at 5 (emphasis added).

88. *Id.* at 5.

89. *Id.* at 20.

“how representative views are when taking a political decision following a consultation process.”<sup>90</sup>

### C. Representation through Civil Society Associations

Representation of the people through elected representatives, political parties, trade unions and employer organizations, and now civil society organizations, has always been fraught with difficulty in political theory.<sup>91</sup> Conceptions of certain types of representation as either legitimate or illegitimate, as fostering either civic virtue or corruption, change across time and place. The one constant is that representation is socially constructed. Thus, returning to the civil society debate, the representation of civil society in Brussels cannot be considered the mechanical reflection of economic interests or religious and civic values; rather, it is the definition of interest and value and the ability to command adherence to that definition.

Proponents of civil society, both in the European Union and in other international organizations, often betray a naturalistic conception of civil society. In their view, civil society organizations and, ideally, public decisionmaking, merely reflect a civil society that pre-exists government. In the current attempt to draw on associations to legitimate European institutions, lawmakers, commentators, and the associations themselves portray individuals as naturally organizing themselves either into associations based on values from a pre-industrial age, such as family, religion, or local community—reminiscent of Emile Durkheim’s solidarity by similarities—or into associations based on the functional interests of industrial and post-industrial economies, such as work and consumerism—reminiscent of Durkheim’s solidarity arising from the division of labor.<sup>92</sup> It is implausible, however, to claim that an association whose very purpose, regardless of type, is to exercise authority over its members somehow exists independently of the body that is defined as possessing a monopoly of authority over a given territory—namely, the state.<sup>93</sup>

The Commission’s consultation that preceded adoption of the Communication on Consultation is proof enough that neither civil society nor the representation of civil society is natural. If the Durkheimian understanding of civil society were correct, one would expect to find roughly the same associational life in all Member States and the same interest and value organizations present both at the European level and at the national level. Furthermore, one would expect that civil society organizations would extensively mobilize on an issue so vital to them. Consider, then, who submitted comments in response to the Commission’s consultation.<sup>94</sup> The national organizations were overwhelmingly British, with a few German and Swedish appearances, and were predominantly employer groups. Among the European-wide organizations there were employers and professional federations—but not the European Trade Union Congress—the principal consumer group, a couple of environmental groups, four social

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90. *Id.* at 12.

91. See generally HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1972).

92. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., 1984).

93. See MAX WEBER, *I ECONOMY & SOCIETY* 56 (Guenther Roth & Claus Wittich eds., 1968).

94. See *Communication on Consultation*, *supra* note 67, at 23-28.

sector groups, one family organization federation, and one citizens' rights group. One explanation is that the results reflect the different traditions of interest representation identified in comparative politics: British employers are organized into sector-specific associations, the Swedish and the Germans into corporatist peak organizations, and the Mediterraneans into less powerful associations without the resources or inclination to respond to the Commission's consultation paper.

The point is not that an idea of representation of interest and value through associations should be rejected. Rather, it is that this type of representation, like all others, is socially constructed. But unlike representation through political parties and elected representatives, it does not enjoy anything approaching a "European" conceptual consensus. Certain strains of the Enlightenment republican tradition, evident in democracies like France, Italy, and other southern countries, deny that particularized interests and their associations can ever create a stable, prosperous, and virtuous political community.<sup>95</sup> The corporatist tradition, by contrast, does allow a role for associations in influencing and exercising public authority, but only those that are believed to embody economic and social realities writ large, such as the familiar Marxist, now social democratic, categories of labor and capital, or perhaps rural interests, ethnic groups, or regional identities. Germany and the countries of northern Europe are generally believed to adhere to corporatist ideas of interest representation. The pluralist tradition is the only one that embraces all forms of associational life as legitimate representations of interest and that envisions the possibility of a single body politic through interest group competition. Moreover, it is the only tradition that, in the American incarnation, gives interest groups, regardless of their size or aims, the right to influence and challenge public policy through the courts. No European democracy squarely fits the pluralist model.

Paradoxically, for the Commission to choose among these would defy rather than affirm the European idea of representation.<sup>96</sup> The Commission is too removed in its institutional composition from ideals of representative democracy to choose on behalf of Europe among these different traditions. In promoting "civil society," the Commission has already rejected to some extent a strongly republican conception of representation and politics. However, whether associational life will be pluralist or corporatist has not yet been decided. Importantly, the Communication on Consultation does not give citizens and their associations the right to go to court if their views are not solicited or their comments are not accepted—one element of a pluralist order. In saying that "bureaucratic hurdles" to the participation of organizations should be avoided, but also that an organization's influence will sometimes depend on its "representative-

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95. For a discussion of republican, corporatist, and pluralist forms of interest organization and state-interest relations, see POLICY STYLES IN WESTERN EUROPE (Jeremy Richardson ed., 1982); VIVIEN A. SCHMIDT, DEMOCRACY IN EUROPE: INSTITUTIONS, IDEAS, DISCOURSE (forthcoming 2005) (manuscript at 8, on file with author); GRAHAM K. WILSON, INTEREST GROUPS (1990); Philippe C. Schmitter, *Still the Century of Corporatism?*, 36 REVIEW OF POLITICS 85 (1974).

96. For a somewhat different view, see Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451 (1999).

ness,” the Commission reveals a deep ambivalence on the question of pluralism or corporatism.<sup>97</sup>

Not only would a Commission choice among one of the different forms of interest group representation be problematic from the perspective of democracy, but it would also inevitably privilege certain groups, issues, and national political traditions. Consider the long-standing difference between the British and continental labor movements: British unions are generally organized along craft lines, continental ones along industry lines. Simplifying grossly, British workers tend to identify with their trades, so that a train driver would define himself as such, with all the wage differentials and privileges that attach; on the Continent, workers are more likely to identify along class lines, so that a train driver would define himself as a blue collar worker in the railway industry, without significant wage differentials but with the social benefits that come from the bargaining power of a union that represents all workers in the industry. The choice of pluralism is the choice of the least-common-denominator interest of train drivers, as opposed to the interest of all blue collar workers. Or, take an example closer to the everyday work of the Commission: is being a consumer about believing that all consumers should have access to basic goods of decent quality, as in the corporatist Swedish tradition, or is it about believing that consumers should have the broadest choice possible, as in other countries? The answer to this question influences everything from spending and policy priorities to more narrow questions such as the scope of universal services obligations in telecommunications.

Furthermore, if the Commission were to adopt the pluralist conception of all interest organizations as legitimate, with equal rights of participation in government decisionmaking, a number of structural features of European government suggest that interest group politics would take on a form that exists nowhere else. Among Western democracies, pluralism is strongest in the United States. The founders accepted factions and interests as inevitable ingredients of politics, and they designed a government scheme that would incorporate all, in the hope that factions would check each other and that, over time, the “enlarged and permanent” interest would emerge.<sup>98</sup> However, voting, elected representatives, and legislative bodies were critical if the laws of the Republic were to be made in the interest of the whole rather than in furtherance of the “irregular passion” of transient majorities.<sup>99</sup>

The Commission’s connection to electoral politics is weak, suggesting that it might be less able than domestic governments to resist interest group pressure. The Commission is an executive branch in the parliamentary tradition, with a very powerful role in the legislative process through the right of initiation, but its links to majoritarian politics are tenuous at best. Its members are not chosen through direct or parliamentary elections but are instead nominated for a five-year term by national governments and then approved by the European Parliament.<sup>100</sup> Removal can occur,

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97. Communication on Consultation, *supra* note 67, at 11.

98. See generally HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 195-96 (1972) (discussing Madison’s political philosophy).

99. *Id.*

100. EC TREATY, art. 214.

but only under exceptional circumstances.<sup>101</sup> Parliamentary oversight of the Commission is not well developed.<sup>102</sup>

Even when the European Parliament does mobilize on the appointment or removal of the Commission or on a particular policy question, it is difficult to argue that the Parliament is acting on the behalf of voters throughout the European Union. European citizens still do not consider the policy matters decided in Brussels as truly important to public life; they cast their votes in European elections based on the performance of political parties in national governments. In sum, electoral accountability of policy-makers in Brussels, even the elected ones, is weak. If interest groups were given a legal right to participate in policymaking, regardless of their size or aims, the absence of strong, directly elected European institutions suggests that their influence—or “capture” as some American commentators like to put it<sup>103</sup>—would be great.

#### D. The Constitutional Treaty

One of the most remarkable innovations of the Constitutional Treaty is a new right to civil society participation, which is expressly included in the provision on participatory democracy:

**Article I-47: The principle of participatory democracy**

1. The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action.
2. The Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.<sup>104</sup>

The comments that accompanied the first appearance of Article I-47, in the draft of April 2003, even more explicitly linked participatory democracy to civil society: “The purpose of this Article is to provide a framework and content for the dialogue which is largely already in place between the institutions and civil society.”<sup>105</sup>

Unlike the constitutional provisions on the right to good administration and the right to transparency, which simply codify existing law, Article I-47 both elevates civil society consultation to the rank of higher law and extends the right to a host of new areas. Insofar as the Commission is concerned, Article I-47 converts what was previously an administrative practice set down in a non-binding policy document into a constitutionally guaranteed procedure. With respect to other European institutions, the provision creates an entirely novel set of rights and duties. The duty to engage in “dialogue” and the duty to give citizens and their associations an opportunity to make

101. *Id.* at art. 201.

102. See DAVID JUDGE & DAVID EARNSHAW, *THE EUROPEAN PARLIAMENT* 221-30 (2003).

103. See George Stigler, *The Theory of Economic Regulation*, 2 *BELL J. OF ECONOMICS & MANAGEMENT SCIENCE* 3 (1971).

104. EC TREATY, art. I-47.

105. See Note from Praesidium to Convention, CONV 650/03, at 8 (April 2, 2003), available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00650en03.pdf>.

their views known were good government principles originally developed by the Commission, for the Commission; the Constitutional Treaty has transformed them into a general principle of democracy applicable to all European institutions.

The text of this provision raises a number of critical questions that will probably not be resolved until the Constitutional Treaty is ratified and the provision is interpreted by the European Courts and legislators. Among the most significant issues are: (1) will the right be legally binding and enforceable in the European Courts, or will it be interpreted as programmatic, that is, a right that European public officials are bound to respect and uphold in their activities but that is not judicially enforceable;<sup>106</sup> (2) what types of Commission measures are subject to the duty to consult—European laws only, or also implementing regulations; (3) if implementing regulations, all of them or only the most significant ones; and (4) how will the right of civil society participation be construed in the different institutional settings of adjudication by the European Courts, intergovernmental bargaining in the Council of Ministers and European Council, and technical administration in the European agencies?

In answering these questions, the European Courts and the European legislator should bear in mind the considerations that informed this analysis of civil society participation in Commission proceedings. The democratic traditions of the Member States fall mostly in the republican and corporatist camps, not the pluralist one. Hence, to address the first of these questions, giving all voluntary associations, regardless of their aims and their size, the legally enforceable right to participate in European policymaking would constitute a departure from ideas of democracy and legitimate representation in many, if not most, Member States.

## V

### CONCLUSION

The coming years promise to be eventful ones for the right to civil society participation. But the absence of vigorous electoral politics in the European Union is reason for hesitation—not only enthusiasm—when interpreting the principle of participatory democracy. True, the principle of representative democracy, also enshrined in the Constitutional Treaty, has not operated in the European body politic as had been hoped for by Altiero Spinelli and other early European federalists. The European Parliament is not, or not yet, Lord Tennyson's "Parliament of man, the Federation of the world," where "the common sense of most shall hold a fretful realm in awe/ and the kindly earth shall slumber, lapt in universal law."<sup>107</sup> But that does not warrant an equally naïve faith in the democratic potential of voluntary associations and interest groups. Indeed, depending on the shape that the right to civil society participation as-

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106. See Cases C-72/91 & 73/91, *Firma Sloman Neptun Schiffarts AG v. Seebetriebsrat Bodo Ziesemer*, 1993 E.C.R. I-887, paras. 23 to 29 (discussing distinction between programmatic and other types of provisions of the treaties).

107. ALFRED, LORD TENNYSON, *Locksley Hall*, verses 128-30, in 42 THE HARVARD CLASSICS, ENGLISH POETRY III: FROM TENNYSON TO WHITMAN (Charles W. Eliot ed., P.F. Collier & Son 1909-14) (1897).

sumes in the future, governance through civil society might well run counter to European ideas of democracy.