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### **Three Generations of Participation Rights in European Administrative Proceedings**

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## **Three Generations of Participation Rights in European Administrative Proceedings**

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## Abstract

This paper develops a conceptual framework for analyzing the development of participation rights in Community administration from the early 1970's to the present day. Procedural rights can be divided into three categories, each of which is associated with a distinct phase in Community history and a particular set of institutional actors. The first set of rights, the right to a fair hearing when the Commission inflicts sanctions or other forms of hardship on individuals, first emerged in the 1970's in the context of competition proceedings and later in areas such as anti-dumping and structural funds. This phase was driven by the Court of Justice and an English, and to a lesser extent, German conception of the value of a fair hearing. The rise of transparency in the 1990's-- the requirement of openness in all Community institutions, including administration--marks the second stage. The drive for transparency was led by certain member countries with longstanding traditions of open government--the Netherlands, Denmark, and Sweden--as well as the European Parliament. The most recent phase in the development of process rights is the debate on whether and under what conditions, individuals, firms, and their associations, billed "civil society," should take part in Community legislative and rulemaking proceedings. The Commission and now the Convention on the Future of Europe have been the keenest proponents of giving citizens and their associations a right to participate in rulemaking and legislative proceedings.

Civil society participation is then critically examined. Representation--not expertise or good management practices--is the only justification for allocating power, within the Community policymaking process, to individual citizens and their organizations. Yet there is no consensus in Europe, where republican, corporatist, and liberal traditions continue to flourish, on the legitimacy of representation outside of political parties and the electoral process. Without wider consensus, I conclude that associational participation in Community policymaking should not be entrenched and that the Commission should, in mediating the informal influence of civil society actors, act in awareness of its innate institutional bias toward liberal interest group pluralism.

# Three Generations of Participation Rights in European Administrative Proceedings

Francesca Bignami\*

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## **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 be heard by government administration is one way in which citizenship has been vindicated--and reinvented--in modern times.

The right to be heard is perhaps even more important in the European Union. Born at the same time as the administrative state, Europe has never had the luxury of the symbols and institutions of the nineteenth-century nation state or the eighteenth-century republic. Precisely because those symbols and institutions are perceived as so critical to the exercise of public power, Europe's member countries, both their politicians and their peoples, have been reluctant to vest Europe with a "parliament," "ministers" and a "constitution" for to do so would diminish the significance of their own parliaments, ministers, and constitutions. Europe, notwithstanding the Charter on Fundamental Rights, the Convention on the Future of Europe, and other constitutional developments, governs and will continue to govern through the science of policymaking.

In this paper, I develop a conceptual framework for analyzing the development of rights of participation in European Community administrative proceedings from the early 1970's to the present day.<sup>1</sup> My claim is that process rights in Community administration can be divided into

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<sup>1</sup> 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 which 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. The reader should keep in mind that this definition is purely functional and that the normative justifications for allowing individuals or groups to influence specific administrative determinations vary from area to area. The reader should also note that procedural rights which are commonly understood as furthering rule of law ideals, such as publication of final decisions, have been intentionally excluded from the coverage of this paper.

three categories, each of which is associated with a distinct phase in Community history and a particular set of institutional actors.<sup>2</sup> The first set of rights, the right to a fair hearing when the Commission inflicts sanctions or other forms of hardship on individuals, first emerged in the 1970's in the context of competition proceedings and later in areas such as anti-dumping and structural funds. This phase was driven by the Court of Justice and an English, and to a lesser extent, German conception of the value of a fair hearing. The rise of transparency in the 1990's marks the second stage in the development of administrative process rights. Although the transparency principle applies to all of the institutions in all of their activities, it is particularly relevant to Community administration because it enables individuals and their associations to follow more closely, and hence influence, the course of administrative decisionmaking. The drive for transparency was led by certain member countries with longstanding traditions of open government--the Netherlands, Denmark, and Sweden--as well as the European Parliament. The most recent phase in the development of process rights is the debate on whether and under what conditions, individuals, firms, and their associations, billed "civil society," should take part in Community legislative and rulemaking proceedings. The Commission and now the Convention on the Future of Europe have been the keenest proponents of giving citizens and their associations a right to participate in rulemaking and legislative proceedings. Here I take sides. Representation--not expertise or good management practices--is the only possible justification for allocating power, within the Community policymaking process, to individual citizens and their organizations. Yet there is no consensus in Europe, where republican, corporatist, and

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<sup>2</sup> In European Community law, the definition of whether an act is "administrative" or "legislative" commonly turns on whether the determination is aimed at a particular individual or set of individuals or whether it is a generally applicable rule. While this might be appropriate in national parliamentary systems, where the legislative body retains some power over so-called "delegated legislation," it is ill-suited to the Community's system of fragmented sovereignty. I therefore define a Community administrative proceeding as any determination of rights and duties made individually by the Commission or the Council in furtherance of powers conferred directly by the Treaty Establishing the European Community (EC Treaty) or by secondary legislation. This definition turns on the exercise of powers in the absence of the full legislative process. It is also important to recognize for purposes of understanding the true scope of hearing 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.

liberal traditions continue to flourish, on the legitimacy of representation outside of political parties and the electoral process. Without wider consensus, I conclude that associational participation in Community policymaking should not be entrenched and that the Commission should, in mediating the informal influence of civil society actors, act in awareness of its innate institutional bias toward an extreme form of liberal interest group pluralism.

### **I. The First Generation: The Right to a Fair Hearing**

Procedural rights were first established in Community 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>3</sup> At the origin of these rights were fundamental fairness concerns, given the analogies to criminal penalties, together with a distinctly English, and to a lesser extent, German, conception of the administrative process. The Court of Justice has been the most influential of the Community institutions in developing these rights. It took the lead in the early 1970's and continues to press the Commission in its treatment of economic actors. Even when the Commission has acted on its own initiative, as with a series of administrative rules adopted in the 1980's and 1990's, it has been obviously spurred by the Court and has defined the procedural safeguards through direct reference to the jurisprudence of the Court.<sup>4</sup>

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<sup>3</sup> By competition, I refer only to trade-restrictive agreements, abuse of dominant position, and mergers. I do not include state aids because there, 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 ECR I-1719 and Council Regulation (EC) No 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.

<sup>4</sup> Oral hearings are almost always held in competition proceedings. Under the Commission's rules, the hearing officer must ensure respect for the principles set down by the Court of Justice and the Court of First Instance. 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 (replacing earlier decision from 1994). Likewise, the Commission's rules on access to case files in competition proceedings were expressly adopted in order to guarantee respect for the principles set down by the Court. Introduction, Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, 1997 O.J. (C 23) 3. For the most recent rules on hearing and access to file rights, see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the

In most systems of administrative law, notions of fundamental fairness require that the defendant have the right to vigorously contest administrative determinations which 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, and the scope of the 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, while in the civil law, she must wait until the administrative process has been completed and apply to the courts for judicial review.<sup>5</sup> The fairness of the 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, bodies such as the early Railway and Canal Commission, or which serve as an appeals mechanism within a ministry or agency.<sup>6</sup> By contrast, in many continental administrative law traditions, fairness is guaranteed through the possibility of review in an independent forum. Individuals have a right to contest an adverse administrative determination at some point, but not necessarily before the administration deciding on the act.

As Jürgen Schwarze has argued, the Court of Justice came under the influence of English, and to a lesser extent, German administrative law in viewing fairness as turning on the procedural rights available to firms in Community competition proceedings rather than on the relief they could obtain from the Court through judicial review.<sup>7</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 individual consequences of the Commission's determination, together with the

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rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, art. 27.

<sup>5</sup> Like all classifications, this one obscures a much richer reality. Until the 1960's, in U.S. administrative law, judicial review in the courts was often all the process that individuals were allowed, and even after the due process revolution of the 1970's, this is sometimes still the case.

<sup>6</sup> Robert Baldwin & Christopher McCrudden, *Regulation and Public Law* 17-19 (1987).

<sup>7</sup> 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).

distinctly English conception of rights, led the Court down the road of proceduralization.<sup>8</sup> The plaintiff, an association of marine paint manufacturers, operated a world-wide sales network for its members. Transocean notified the network agreement to the Commission, which conditioned its approval on Transocean's members disclosing any cross-holding patterns between their directors and other firms in the paint sector. The Commission imposed the condition without alerting Transocean in advance of the decision and without giving Transocean the opportunity to object.

Notwithstanding the fact that 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." The Court further stated that this general rule was especially applicable "in the case of conditions which, as in this case, impose considerable obligations having far-reaching effects."<sup>9</sup> It is clear, therefore, that the Court was motivated by the perception that the Commission's decision would impose significant burdens on Transocean. But where did this "general rule" come from? The Court itself did not elaborate on the source of the rule, but it had the benefit of the UK Advocate General's opinion. Advocate General Warner 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>10</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.

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<sup>8</sup> Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 ECR 1063.

<sup>9</sup> *Id.* at 1080, para. 15.

<sup>10</sup> *Id.* at 1088.

The Court has expanded the procedural boundaries in competition cases in a number of other respects.<sup>11</sup> The right of access to the Commission's evidentiary record, a right which enables economic operators to challenge effectively the Commission's position, was developed in a line of cases and has culminated in the recognition, by the Commission, of a general right of access to the file. In early cases such as *Boehringer Mannheim*,<sup>12</sup> *ACF Chemiefarma*,<sup>13</sup> and *Imperial Chemical Industries*,<sup>14</sup> the Court established the principle that the duty, under the competition regulations, to allow parties to "make known their views" included the duty to set 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, in applying these principles, the Court was quite deferential to the Commission. That changed in the late 1970's, starting with *Hoffman-La Roche*. There, the Court departed from the Advocate General's opinion: it found that the document alleged to have been improperly withheld was essential to the defense and carefully examined, fact-by-fact, whether Hoffman La-Roche had had an opportunity to examine the evidence and respond at some point in the case.<sup>15</sup> Moreover, in the 1980's, the Court recognized a series of limits on the Commission's powers of investigation, including a privilege for attorney-client communications,<sup>16</sup> a privilege against self-

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<sup>11</sup> See generally Loic Azoulay, *The Court of Justice and the Administrative Governance*, 7 Eur. L.J. 425 (2001); Paul Craig & Grainne de Burca, *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).

<sup>12</sup> Case 45/69, *Boehringer Mannheim GmbH v. Commission of the European Communities*, 1970 ECR 769.

<sup>13</sup> Case 41/69, *ACF Chemiefarma v. Commission*, 1970 ECR 661.

<sup>14</sup> Case 48/69, *ICI v. Commission*, 1972 ECR 619.

<sup>15</sup> See Koen Lenaerts & Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 1997 *Common Mkt. L. Rev.* 531, 545-49. Lenaerts and Vanhamme discuss the developments in the Court of First Instance on the right of access as well as the Commission's legislative initiative, in which it codified and extended the Court's jurisprudence by establishing a procedure for access to competition files. 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 Reg. (EEC) No. 4064/89, 1997 O.J. (C 23) 3.

<sup>16</sup> Case 155/79, *Australian Mining and Smelting Europe Ltd. v. Commission*, 1982 ECR 1575, para. 23 (covering communications made between an independent lawyer and a client for the sole purpose of defending the client in the competition proceeding at issue).

incrimination,<sup>17</sup> and a duty to respect national search warrant requirements and only collect evidence related to the specific ends of the investigation.<sup>18</sup>

The procedural principles worked out 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) and the parties have the right to contest the statement, both through access to the file to scrutinize the evidence and in a written reply in which they rebut the evidence and challenge the Commission's arguments. An oral hearing is also conducted, presided by an independent officer, in which the parties have an opportunity to further develop their objections to the Commission's case. Lastly, an exhaustive written decision, often running hundreds of pages, sets forth the facts and reasons for the finding of a competition infringement and the resulting sanction.

Competition proceedings represent the Community Rolls Royce of administrative adjudication and have influenced the development of procedural rights in other areas of Community administration.<sup>19</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>20</sup> on an individual or a discrete set of individuals. In anti-dumping determinations, the Commission directly assesses the functional equivalent of a fine--the anti-dumping duty--and thus the Court

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<sup>17</sup> Case 374/87, *Orkem v. Commission*, 1989 ECR 3283 (allowing firms to refuse to answer questions that directly

<sup>18</sup> Cases 46/87 & 227/88, *Hoechst AG v. Commission*, 1989 ECR 2859.

<sup>19</sup> For a comprehensive overview of this category of rights, see Hans Peter Nehl, *Principles of Administrative Procedure in EC Law* (1999).

<sup>20</sup> Case C-395/00, *Distillerie Fratelli Cipriani SpA v. Ministero delle Finanze*, 2002 ECR , para. 51; Case C-48/96, *Windpark Groothusen v. Commission* 1998 ECR 2873, para. 47. The Charter of Fundamental Rights establishes a right to good administration which includes "the right of every person to be heard before any individual measures which would affect him or her adversely is taken." Art. 41.2. The right to a hearing turns on whether the Commission act has an adverse effect. The plain meaning could extend to denial of benefits, since, after all, the decision to apply an import duty, and not grant an exemption, or to deny a research grant to one party and award it to another, is a measure which adversely affects the disappointed party. Nonetheless, the Court of Justice has always used the term to mean the imposition of a burden akin to a penalty or sanction and given that the Charter was drafted

was willing, early on, to recognize hearing rights.<sup>21</sup> In 1998, the Court found that the right of defense applies in the customs field when the Commission seeks to recover duties from importers alleged to have mistakenly or fraudulently benefited from certain exemptions.<sup>22</sup> The Court has sporadically imposed procedural guarantees in other areas: in one case, the exclusion of a Swedish fishing company from a Community fishery zone because of allegations of illegal fishing activities was enough to trigger a hearing right<sup>23</sup> and in another case, the reduction of financial assistance triggered the right.<sup>24</sup> In these cases, however, the scope of the hearing right is far less extensive than in the core areas of competition and anti-dumping law.<sup>25</sup> The litigants have the right to a brief description of the facts and reasoning supporting the contemplated decision, to make their arguments and advance their evidence in a written submission, and receive a brief and by no means exhaustive reply in the Commission's statement of reasons.

Notwithstanding this extension of procedural rights into areas where the Commission imposes particularized hardship, the Court has been reluctant to do the same where the

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in the context of that jurisprudence, the burden interpretation appears to be the correct one.

<sup>21</sup> Case 264/82, *Timex Corporation v. Council & Commission*, 1985 ECR 849; Case C-49/88, *Al-Jubail Fertilizer v. Council*, 1991 ECR 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 fair hearing, see Case T-88/98, *Kundan Industries Ltd and Tata International Ltd v. Council*, 2002 ECR ; Case T-121/95, *EFMA v. Council* 1997 ECR II-2391, para. 84; Case T-159/94 & T-160/94, *Ajinomoto and Nutrasweet v. Council*, 1997 ECR II- 2461, para. 83; Case T-147/97, *Champion Stationery v. Council*, 1998 ECR II-4137, para. 55.

<sup>22</sup> Case T-50/96, *Primex Produkte v. Commission*, 1998 ECR II-3773. The Court found that the importer had a right of access to the Commission’s file and a right to respond, in writing, to the Commission’s allegations, including the right to submit evidence. The Customs Code was amended to reflect the Court’s holding. Commission Regulation (EC) No. 1677/98 of 29 July 1998 amending Regulation (EEC) No. 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, 1998 O.J. (L 212) 18 (Regulation 2454/93, art. 906A). 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 and T-135/03, *Common Market Fertilizers v. Commission*, 2003 O.J. (C 158) 24, 25.

<sup>23</sup> Case C-135/92, *Fiskano v. Commission*, 1994 ECR I-2885; see also Case T-46/00, *Kvitsjoen v Commission*, 2000 ECR II-03713.

<sup>24</sup> Case T-450/93, *Lisrestal v. Commission*, 1994 ECR II-1177.

<sup>25</sup> Koen Lenaerts & Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 1997 *Common Mkt. L. Rev.* 531, 562-66. In U.S. administrative law, the distinction bears some resemblance to the distinction between formal and informal adjudication under the Administrative Procedure Act. However, because of the evolution of procedural requirements in the context of informal adjudication and rulemaking, today those requirements exceed anything existing in the Community outside of the core areas of competition proceedings.

determination results in an individual benefit. On this issue *Hauptzollamt Munchen-Mitte v. Technische Universitat Munchen* is still the Court's most authoritative statement.<sup>26</sup> Technische Universitat had applied for an exemption from the generally applicable customs duty, on the grounds that an equivalent microscope (being imported from Japan) was not produced by any European manufacturer and was to be used exclusively for scientific purposes. Technische Universitat was not given the opportunity to explain the scientific uses of the microscope or the inadequacy of existing European models. The Commission and comitology committee decided against Technische Universitat and, in matter of fact, in favor of Philips, which claimed it produced an equivalent microscope. The Court held that Technische Universitat had a right to submit a written statement, but only because, in such cases "the importing institution is best aware of the technical characteristics which the scientific apparatus must have in view of the work for which it is intended," not because the decision determined how much--or how little--Technische Universitat would have to pay for the microscope. Thus, hearing rights in areas where specific benefits are conferred are contingent upon the type of fact involved in the decision and whether the interested party can contribute to the correct resolution of the fact. It is by no means absolute.

The Court's ambivalence toward a minimal fair hearing right in areas where the Commission confers specific benefits is inconsistent with national administrative law traditions. In most systems, the dividing line for purposes of determining the scope of procedural guarantees is not whether the administration confers a burden as opposed to a benefit but whether the determination is an individual or a generalized one.<sup>27</sup> Individual acts are classically

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<sup>26</sup> Case C-269/90, *Hauptzollamt Munchen-Mitte v. Technische Universitat Munchen*, 1991 ECR I-5469, paras. 23-25. In *Hauptzollamt*, the Court reversed its earlier position that the applicable customs legislation did not give rise to a hearing right. See 203/85, *Nicolet Instrument v Hauptzollamt Frankfurt am Main*, 1986 ECR 2049, para. 15

<sup>27</sup> In German administrative law this category of administrative action is covered by the concept of by the "Verwaltungsakt" (administrative act) and in French administrative law by "acte individuel.

distinguished from general administrative acts because, given the similarity to judicial determinations, basic fairness principles are thought to require, at the very least, a skeleton description of the evidence and the proposed decision and a right to respond. Understandably, the Court is reluctant to impose needless procedural hoops on the Commission because of the consequences for cost and speed, yet, in light of existing standards in the member states, it is going to be difficult for the Court to resist fair hearing rights where the Commission's determination results in a specific benefit.

## **II. 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 mainly refers to the individual right of access to information. By allowing individuals to closely follow 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 1990's with the Danish rejection of the Maastricht Treaty and the attempt to dissipate popular distrust of Brussels through a series of open government measures. These have largely been focused 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>28</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 narrowly interpret the

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<sup>28</sup> Decision 93/73/EC, Council Decision of 20 December 1993 on public access to Council documents, 1993 OJ (L340) 43; 94/90/ECSC, EC, Euratom: Commission Decision of 8 February 1994 on public access to Commission documents, 1994 OJ (L 46) 58.

exceptions<sup>29</sup> and by requiring, when an exception was justified, that access be denied line-by-line, redacting if necessary, rather than through blanket exclusions of entire documents or sets of documents.<sup>30</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>31</sup> by the guarantee of a “right of access to documents” in the Charter on Fundamental Rights,<sup>32</sup> and, finally, after a long, bitter set of negotiations, in the Regulation on public access to documents of all three institutions.<sup>33</sup>

The impetus toward transparency continues, with considerable force, in the draft Constitution. The new article on transparency would constitutionalize the current practice of requiring all committees and agencies, in addition to the Commission, Parliament, and Council, to respect access to document rights.<sup>34</sup> It would also go beyond access to documents and make explicit what now is only implicit, namely that European bodies are under a duty to “conduct their work as openly as possible.”<sup>35</sup> Moreover, the new article would require both the Parliament and the Council to meet in public when considering and adopting legislative measures. Lastly, Parliament and the Council would be required to publish documents related to their deliberations on legislative matters, documents which at present can be obtained only through access to

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<sup>29</sup> Case T-194/94, *John Carvel & Guardian Newspapers v. Council*, 1995 ECR II-2765; Case T-309/97, *The Bavarian Lager Co. Commission*, 1999 ECR II-3217.

<sup>30</sup> Case T-14/98, *Heidi Hautala v. Council*, 1999 ECR II-2489; Case T-124/96 *Interporc v. Commission*, 1998 ECR II-231.

<sup>31</sup> TEC, art. 255.

<sup>32</sup> Charter on Fundamental Rights, art 42.

<sup>33</sup> 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.

<sup>34</sup> See, e.g., Regulation No. 1641/2003 of the European Parliament and of the Council of 22 July 2003 amending Council Regulation (EEC) No. 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network.

<sup>35</sup> Draft Constitution, art. I-49

<sup>36</sup> Draft Constitution, art. III-301.2.

information requests and hence are not widely distributed and are not available on a timely basis.<sup>36</sup>

This phase in the development of participation rights was led by certain member states and the European Parliament, not the Court, and responsibility for developing and expanding transparency guarantees continues to lie primarily with political, as opposed to judicial, institutions.<sup>37</sup> The Nordic countries and the Netherlands have longstanding traditions of freedom of the press, public disclosure, and access to government documents. Both the Dutch and the Swedish constitutions guarantee access to government information. The expectation that government officials are to openly interact with the public and members of parliament has shaped the way in which diplomats and bureaucrats from these member states have exercised their authority within the Community system and, combined with the events of Maastricht, has led to the improvement of transparency in a variety of institutional practices.<sup>38</sup>

The European Parliament has also been an advocate of transparency.<sup>39</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

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<sup>37</sup> 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)

<sup>38</sup> An anecdote from my research on European data protection policy illustrates the impact of the Swedish accession on transparency. It is common practice for the Council, when adopting legislative proposals, 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 and, when they were opposed by the other delegations, made a declaration to the effect that they deplored the failure to make the declarations public. See *Extrait du PV de la 1866ème session du Conseil du 24/07/1995*. More recently, when Denmark occupied the Presidency responsible for concluding the final agreements on 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” in German “Alles Banditen” or roughly, “They’re all a bunch of rogues.”)

<sup>39</sup> As far back as 1984, it issued a resolution calling for greater access to documents. Parliament Resolution 1984 OJ (C172) 176.

what, just over a decade ago, were still quite meager institutional powers. Knowing what was happening in the Commission or the Council, was a means of expanding Parliament's influence. For instance, the inter-institutional agreements on a form of administration known as comitology, agreements between the Parliament and Council and the Parliament and the Commission, which ultimately led to a new framework decision for comitology procedures, were all designed to improve Parliament's control over executive decisionmaking but also had the effect of rendering comitology more transparent to the public at large.<sup>40</sup>

The jury is still out on the effectiveness of the public access guarantees in enabling individuals to influence ongoing policymaking initiatives. In the United States, the Freedom of Information Act has been used not only as a general accountability tool but also as a means of obtaining information about specific administrative proceedings. Whether access rights will be used in the latter fashion, will depend on the interpretation of the exceptions as well as the speed with which the institutions respond to requests. In theory, the establishment of a register under the Regulation should allow individuals to follow all proceedings, administrative and otherwise.<sup>41</sup> The Regulation's exception, however, for documents antecedent to final decisions might very well prevent such use of access rights:

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>42</sup>

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<sup>40</sup> See Commission's Undertaking of 26 September 1996; Budget Resolution of October 1996; *Modus Vivendi*, 1996 O.J. (C102) 1; *Klepsch-Millan Agreement* of 13 July 1993, 1993 O.J. (C255) 19; *Plumb-Delors Agreement* of 1988.

<sup>41</sup> See Commission Decision 2002/47/EC, 2002 O.J. (L21) 23; Commission Decision 2001/937/EC, 2001 O.J. L (345) 94; European Parliament Decision 2001/C 374/01, 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.* (2003).

<sup>42</sup> Art. 4.3.

Moreover, the exception for privacy rights could very well exempt documents in proceedings where specific individuals are consulted, which would put another gaping hole in the access right. Lastly and most critically, an effective right of access will depend on the resources which the Council and Commission choose to dedicate to the subject. Without good record-keeping, registration, and archiving practices in each and every department and without a corps of administrators dedicated to responding, in a timely fashion, to public access requests, the right will be chimerical. Thus, even though the Court and the Ombudsman will undoubtedly contribute to the vigorous enforcement of access rights, only a willingness on the part of the member states and the 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. Where the new commitment to transparency has affected the Commission most is precisely in the administrative arena. Traditionally, in the Commission, only important policy initiatives were made public through White Paper and Green Papers. Now certain committees of national representatives and certain divisions within the Commission have begun making the more mundane activity of interpreting, implementing, and updating existing legislative frameworks more transparent. The examples I have in mind are financial services, data protection, and telecommunications.<sup>43</sup> Recently, the Commission, on its own initiative or functioning as the secretariat for the committees of national regulators, has begun placing the committees' work agendas and draft proposals on its website.<sup>44</sup> This constitutes a dramatic shift from the past,

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<sup>43</sup> 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.

<sup>44</sup> 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.

when rulemaking powers exercised outside of the formal legislative process of White Paper and Commission proposal were shielded from the public eye and therefore implementing rules or informal guidelines could appear in the Official Journal as a surprise to the interested community, a *fait accompli*. This type of continuous transparency, more so that formal access rights, enables interested parties to make their views known to the Commission and national regulators and thus actively shape the course of Community administration.

### **III. The Third Generation: The Right to Participation in Legislative and Administrative Policymaking?**

#### **1. The role of civil society in European governance**

The third, and most recent phase in the development of Community procedural rights began in the late 1990's.<sup>45</sup> This is the question of whether associations, individual citizens and firms, so-called “civil society” should be directly involved in the work of the institutions.<sup>46</sup> Of course, these actors have always shaped politics in the European Parliament and the Council, through the national politics of elections, parties, and interest groups. Moreover, their 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 now there is a call from certain quarters to consider them legitimate partners in European governance.

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<sup>45</sup> Many perceive consultation as a variant of transparency, but, as should be clear, I see the two as distinct. Transparency allows for scrutiny of public decisionmaking but leaves influence to existing political and legal mechanisms. Consultation is a specific form of influence through a formal and routine sequence of objections from interested parties and reasons and justifications from administrators. Moreover, where consultation is entrenched as a legal right, enforceable in a court of law, the reasoning must adhere to the professional norms of the legal community as well as those of the specific policy area, say, of the medical or engineering professions.

<sup>46</sup> I exclude political parties, national parliaments and local government from my definition of civil society because I believe that their right to make their views known is rooted in a widespread consensus on the desirability of electoral democracy. They do not raise the same perplexities of whether and how functional interests and religious and other values should be represented.

As Stijn Smismans has persuasively argued, the Commission has been the most vigorous institutional promoter of governance by civil society.<sup>47</sup> Civil society discourse has served two distinct institutional interests: it has supported the expansion of the Commission's jurisdictional mandate and it has served as a defense against charges that the Commission is an unaccountable executive body, removed from the popular will. Since non-profits like religious organizations, charities, and so on benefit from the Commission's funding in the social arena, they are natural allies in the bid to move beyond the core common market areas, and bring welfare, immigrant rights, unemployment, and other social policies under the EU umbrella. Moreover, the civil society connection adds an element of democratic legitimacy to the Commission, therefore justifying both the advancement of European integration and safeguarding the Commission's legislative and other prerogatives.

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, which supplements the White Paper on governance of June 2001. 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 specific issues open for discussion on its website, publishing the civil society responses on its website, and summarizing the responses as well as the ways in which they did or did not alter the Commission's legislative proposal in an explanatory memorandum accompanying the proposal.<sup>48</sup> The Commission will also actively solicit the opinions of certain "target groups," namely those who will be affected by the policy, will be involved in implementation of the policy, or whose organizational mission is directly related to the policy. The choice among the different views is

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<sup>47</sup> See 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 and hence, in terms of pure influence, the Commission is the more significant of the two.

<sup>48</sup> 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 (2002) 704 final, December 11, 2002, pp. 19-22

a “political decision” for the Commission alone to make.<sup>49</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>50</sup> Moreover, the Commission makes it clear that the Communication contains only minimum standards and it might, or national committees of regulators might, choose to consult on more specific matters which would fall within the ambit of administrative rulemaking.<sup>51</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.<sup>52</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 which are delegated to associations are conceived as narrow matters which only concern and affect certain firms and therefore their associations are the best-placed, because of their experience and interest in the area, to set down the applicable rules.<sup>53</sup> The reality, however, is that this form of industry self-regulation constitutes policymaking with a real impact on individuals and firms outside of any particular industry association. In my view, therefore, co-regulation is an extreme—and potentially lopsided— form of civil society participation in governance. This category covers the work of the standardization committees under the rubric of the “New Approach” harmonization directives and codes of conduct adopted by industry associations. In sum, there are two ways in which civil society is called upon to participate in European governance: the Commission can decide to retain public authority but call for the views of civil society more thoroughly and systematically than it ever

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<sup>49</sup> Id. at 12.

<sup>50</sup> 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.”)

<sup>51</sup> Id. at 11.

<sup>52</sup> White Paper on Governance at 11-13. “Co-regulation” is distinguished from “self-regulation” in that, in the latter, associations develop their own standards and norms, thus preempting altogether European regulatory initiatives.

<sup>53</sup> Id. at 21.

did in the past, or the Commission can transfer public authority to civil society organizations but loosely supervise their activities.

Let me illustrate with two specific examples from the data protection area. First, the committee charged with overseeing implementation of the Data Protection Directive has undertaken to systematically consult interested parties. In November 2002, the Working Party on Data Protection announced that it would not only make its draft measures available to the public before reaching final decisions but that it would also engage in consultations with interested parties based on draft documents, a series of questions, or an indication of a future problem to be addressed. According to the statement, consultations will be announced on the website as well as through mailings to certain European-level associations. They will be conducted at the discretion of the Working Party and are expected to occur a couple of times each year. It is clear that the recent debate on civil society participation has already had an impact on this small nook of the Community's administrative culture.

Second, the Data Protection Directive passed in 1995 makes use of co-regulation through "codes of conduct." It provides that:

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.

Art. 27.1. The Directive thus attempts to enlist trade associations and other bodies which represent firms that handle personal data to formulate the specific rules that guarantee the basic data rights established under the Directive, namely the fair, legitimate, proportionate, and secure collection, processing, and communication of individuals' personal information. One may speak of co-regulation as opposed to self-regulation in that the Directive foresees a role for public authorities in reviewing the standards:

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.

Art. 27.3.

In June 2003, the first code of conduct, drafted by the European Direct Marketing Association (FEDMA), was approved by the Working Party.<sup>54</sup> The Commission has also received proposed codes from both the European association of headhunters (AESC) and the European association of caller identification firms (ETP). Furthermore, in early 2003, the Confederation of British Industry together with the International Chamber of Commerce proposed a set of model contract clauses for data transfers abroad. Although, strictly speaking, these model clauses are not codes of conduct, the process through which the model contract clauses were generated--through consultation of the respective organizations' members-- and the subsequent review by the Commission and the comitology committee are roughly analogous.

## **2. The justifications for civil society participation**

The prevailing institutional reasons for the participation of civil society in policymaking are problematic because they obscure the real value choices that will have to be made by the Commission and committees in determining, when conducting consultations, whom to consult and which comments to accept or reject and, when reviewing industry standards and codes of conduct, whether or not to approve them in light of the applicable legislation. What is the rationale for entrenching civil society participation in Community policymaking? After all, the good government reforms could have stopped with transparency and could have left associational influence to existing political and legal processes. Three distinct discourses on the legitimacy of policymaking through civil society are evident from the Commission's communications: technocratic expertise, the Commission as firm engaged in good management practices to improve its brand name among European citizens, and the representation of interests

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<sup>54</sup> Art. 29 Working Party, Opinion 3/2003, June 13, 2003.

and values.<sup>55</sup> As I argue below, the first two discourses mask the realities of the participation of individuals, firms, and their associations and therefore run the danger of obscuring, both to public decisionmakers as well as to civil society itself, the real dynamics of risk allocation and resources distribution. Only representation withstands scrutiny but given the radical disagreement in Europe on representation outside of the electoral process through interest groups, it cannot support the emerging Brussels consensus on governance with civil society.

In the White Paper on Governance, the Commission advanced a technocratic and functional vision of its role in European governance. Essentially, it combined conventional national theories on constitutional government, mechanically transposed to the supranational level, with the functionalist ethos which persists in the mentality of Europe's civil servants. 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 citizens and hold the executive branch, i.e. the Commission, accountable, the Commission would make expert and scientific judgments necessary to carry out the legislative will.<sup>56</sup>

This technocratic and functionalist 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 paper--openness, accountability, effectiveness, coherence, and participation--only the definition of participation appears to encompass the Commission's interaction with civil society organizations. It reads as follows:

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

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<sup>55</sup> See generally, Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984). Frug identifies a number of legitimating ideologies of American bureaucracy, including democratic formalism, expertise, judicial review, and pluralism. Some of these ideologies are apparent in the Commission's discourse, and I treat them as such. Nonetheless, as should be clear from what follows, I take the representation rationale seriously.

<sup>56</sup> 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, 16; see 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, 6 .

depends on central governments following an inclusive approach when developing and implementing EU policies.<sup>57</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 and thus makes for better policy. The expertise rationale is particularly powerful 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>58</sup>

Second, participation is a good management practice. It is about managing the "policy chain" and giving the Commission's consumer, the European citizen, what she wants, thus creating brand loyalty or "confidence." This functionalist rationale, infused with contemporary management consultant jargon, appears throughout the paper:

[NGO's] act as an early warning system for the direction of political debate.<sup>59</sup>

Or:

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>60</sup>

Or again:

Participation is not about institutionalising protest. It is about more effective policy shaping based on early consultation and past experience.<sup>61</sup>

Both of these strands are problematic because they create the illusion that, in deciding which associations should be consulted and whose suggestions should be accepted, or in deciding which associational codes of conduct should pass muster, value judgments are not made. The public good is not crafted by the Commission and the interests and associations to

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<sup>57</sup> Commission, European Governance COM(2001) 428 final, July 25, 2001.

<sup>58</sup> Id. at 21.

<sup>59</sup> Id. at 14.

<sup>60</sup> Id. at 15.

whom it listens. These depictions of civil society 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. In the technocracy narrative, when a choice is made to consult on a particular issue, to consult only certain groups, or to accept comments from some over the objections of others, it is because of the objective nature of the policy problem. Public servants select areas for consultation by defining them as technical problems in need of information. They ask certain organizations for comments and accept their suggestions because those organizations have the necessary resources, expertise, and knowledge. I certainly do not deny that expertise and science have a legitimate place in policymaking, but applied to interest groups the concepts are problematic because they mask the use of knowledge to frame problems, represent partial world views and shape political agendas.<sup>62</sup>

The management narrative also obscures the value choices made by public authorities: it denies altogether the existence of different and conflicting information, interests, and world views. It represents a curious extension of the scientific management rationale for administration, widespread both in Europe and America in the 1950's and 1960's, from the socioeconomic problems to be fixed to the public process through which the problems are defined. In the traditional understanding of the administrative state, bureaucrats use their specialized knowledge and experience to manage the market and promote public well-being but, at a very general level, they do so under the direction of the legislature and the public interest goals contained in democratically enacted statutes.<sup>63</sup> In the Commission's rhetoric, the public interest itself can be ascertained through good management practices, by ensuring that the right systems are in place to allow interest groups to signal the direction of political debate, give feedback, and effectively shape policy.

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<sup>61</sup> Id.

<sup>62</sup> Regulators must always rely on regulated parties because they often have the most detailed information on the particular activity or product at issue. If, however, the parties are understood as representing a set of interests and values rather than expertise, the role of independent agents in evaluating the parties' data and collecting data from other sources, the resources allocated to independent agents to do such work, and the sanctions attached to providing inaccurate, incomplete, or biased data will be more substantial.

<sup>63</sup> See James M. Landis, *The Administrative Process* (1938).

Only the third reason for governance with civil society--representation--can justify the exercise of public authority with, as in the case of entrenched consultation rights, or through, as in the case of co-regulation, civil society organizations. In the age of European consensus on representative democracy, the only plausible justification for allocating public power to individuals, firms, and private associations is the claim that they represent the wider body of citizens who will have to obey public decisions. While the White Paper was quite shy on this point, the recent Commission Communication frankly bills civil society consultation a “supplement” to parliamentary processes and states that “the guiding principle for the Commission is therefore to give interested parties a *voice*, but not a vote.”<sup>64</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>65</sup>

However representation, both in ensuring a “proper balance”<sup>66</sup> among different interests in the consultation process, and in considering “how representative views are when taking a political decision following a consultation process”<sup>67</sup> is central to the document.

### **3. Representation through civil society associations**

Representation through elected representatives, through political parties, through trade unions and employer organizations, and now through "civil society organizations" has always

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<sup>64</sup> 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 (2002) 704 final , December 11, 2002, p. 5 (emphasis added).

<sup>65</sup> Id. at 5.

<sup>66</sup> Id. at 20.

<sup>67</sup> Id. at 12.

been fraught with difficulty in political theory.<sup>68</sup> Conceptions of certain types of representation as legitimate, others illegitimate, as fostering civic virtue and a vigorous *res publica* or leading to the demise of the polity and the soul, change across time and place. The one constant, however, is that representation is socially constructed. Thus, to return to the civil society debate, representation of civil society in Brussels cannot be conceived as the mechanical reflection of interest or value; it is the definition of interest and value and the ability to command adherence to that definition.

The proponents of civil society, both in the EU and in other international organizations, often betray a naturalistic conception of civil society. Existing civil society organizations and, if all goes well, public decisionmaking, merely reflect an underlying, primordial civil society. In the current attempt to draw on associations to legitimate international organizations, lawmakers, commentators, and the associations themselves portray individuals as naturally organizing themselves into associations based on value from a pre- industrial age, values like family, religion, or local community, reminiscent of Durkheim's solidarity by similarity, or based on the functional interests of industrial and post-industrial economies, interests such as work and consumerism, reminiscent of Durkheim's solidarity by difference. This harks back to the *ordo-liberal* economic agenda of the original European Community and contains many of the same pitfalls. It is plausible, just barely, to say that market actors can and should operate in a sphere devoid of public power, in which their sole motivation is to maximize profit, defined in strictly economic terms, and in which the costs and benefits faced by market actors are the natural costs and benefits generated by certain uses of resources. It is entirely implausible to say that an association, whose very purpose is, regardless of its type, to exercise authority over its members, somehow exists independently of the body which is defined as possessing a monopoly of authority, namely the state. As long as there has been some form of public authority-- the polis, the Republic, the Emperor, the king, or the nineteenth-century nation state--claims to

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<sup>68</sup> See *Political Innovation and Conceptual Change* (Terrence Ball, James Farr & Russell L. Hanson eds. 1989), in particular the essays by Quentin Skinner, *Language and political change*, James Farr, *Understanding conceptual change politically*, Terrence Ball, *Party*, and Hanna Fenichel Pitkin, *Representation*.

representation have been constructed through the dialectic of established, and contending, discourses of legitimacy, power holders and power challengers, new and old forms of wealth and status.

The results of the Commission's consultation on consultation is proof enough that neither civil society nor 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 of the 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. Look, then, at who answered the Commission's consultation paper. The national organizations were overwhelmingly British, with a few German and Swedish appearances, and overwhelmingly employer groups. Among the European-wide organizations there were employers and professional federations—but not the European Trade Union Congress—the principal consumers group, a couple of environmental groups, four social sector groups, one family organization federation, and one citizens rights group. It is not idle speculation to hypothesize that the results reflect different traditions of interest representation identified by comparativists: British employers are organized into pluralist 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 deny that particularized interests and their associations can ever create a stable, prosperous, and virtuous *res publica*.<sup>69</sup> The corporatist tradition, by

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<sup>69</sup> For a discussion of republican, corporatist, and pluralist forms of interest organization and state-interest relations, see Philippe C. Schmitter, *Still the Century of Corporatism?*, 36 *Review of Politics* 85 (1974); Graham K. Wilson, *Interest Groups* (1990); *Policy Styles in Western Europe* (Jeremy Richardson ed. 1982).

contrast, does allow a role for associations in exercising public authority, but only those which are believed to embody economic and social realities writ large. These realities might be the familiar Marxist, now social democratic, categories of labor and capital, but in some places can include rural interests, ethnic groups or regional identities. The liberal tradition is the only one which embraces all forms of associational life as legitimate representation of interest and which sees the possibility of a single body politic through interest group competition.<sup>70</sup>

For the Commission to choose among these, paradoxically, would defy rather than affirm the European idea of representation.<sup>71</sup> The Commission is too removed, in its institutional composition, from ideals of representative democracy to choose, on the behalf of Europe, among these different traditions. To some extent, the Commission in promoting "civil society" has already rejected a strongly republican conception of the body politic and an institutional role defined purely as power broker among sovereign states. Whether associational life will be pluralist or corporatist, however, has not yet been decided. The Commission communication, importantly, does not create a legal right of participation, one element of a pluralist order.<sup>72</sup> In saying that the Commission does not wish to create "bureaucratic" hurdles to the participation of some organizations in consultation proceedings, yet also stating that an organization's influence will sometimes depend on its "representativeness," the Commission reveals a deep ambivalence on the question of pluralism or corporatism.

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<sup>70</sup> The political science literature has not established a clear link between forms of interest representation, government structure, traditions of the state, and the relationship between state and market. See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 181 (1999). Nevertheless, logically speaking, it would appear that the ability to exclude certain individuals, firms, and associations from public decisionmaking, which is at the heart of the republican and corporatist traditions, is associated with the ability to intervene in the market and alter the status quo by adopting redistributive policies, whether those be outright transfers or the adoption of environmental and consumer rules which result in significant costs for certain market actors. The ability to exclude interests would also appear to be associated with the existence of a strong state. A choice in favor of liberal pluralism, therefore, might affect the extent of certain forms of redistributive policymaking as well as the nature of European public authority.

<sup>71</sup> In an earlier article, I took 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).

<sup>72</sup> Legal rights of participation make it more difficult to exclude certain groups on the grounds that they represent minority interests in at least two ways. First, they enable critics--excluded groups--to stall administrative action through litigation. Second, because of the principles of legal reasoning and the rule of law, it is difficult in a court, as opposed to the political arena, to discount objections on the grounds that they were raised by only two firms, not

Not only would a right to a certain form of interest group participation be democratically problematic, but it would inevitably privilege certain groups, issues, and national political traditions. To illustrate, take the longstanding difference between the English and continental labor movements: English unions tend to be organized along craft lines, continental ones along industry lines. Simplifying grossly, English workers tend to identify with their trades and thus a train driver defines himself as a train driver, with all of the wage differentials and privileges which attach, whereas on the Continent, a train driver defines himself as a blue collar worker in the railway industry, without the wage differentials but with the social benefits that come from the bargaining power of a union which represents all workers in the industry. The choice of pluralism is the choice of a concept of interest as train driver, not as blue collar worker. 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 Sweden, 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 broad spending and policy priorities to more narrow questions of, say, the scope of universal services obligations in telecommunications.

Furthermore, if the Commission were to adopt a liberal pluralist conception of civil society, it would take on an extreme form which exists nowhere else. Even in the United States, where the faith in pluralist interest group representation is perhaps the strongest among Western traditions, elected representatives are charged with mediating among interest groups. The Madisonian apotheosis of passion and interest into republican virtue occurs not simply through the checking of interest against interest, but through the institutional balance of strong electoral bodies. The Commission might be a powerful institution under the Treaty legislative process but in other respects it is weak: it has few resources, material or moral, to allow it to stand above the pluralist interest group fray. The Commission does not have the economists or other experts on staff to examine the claims made by interested associations. Indeed a large part of the charm of

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the 30,000 members of a trade association or the 370,000 million voters for the European Parliament.

consultation and codes of conduct is that the Commission can obtain expert information about different policy problems and thus extend the reach of European harmonization without needing the financial resources of a true, federal executive branch. Neither does the Commission have the moral resources to withstand interest group pressure. Its policy choices are never supported or rejected by a popular vote or a general strike or even a demonstration. 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. The members of the Commission are not chosen through direct elections, or through parliamentary elections, rather they are nominated for a five-year term by national governments and then approved by the European Parliament. Removal can occur, but only under exceptional circumstances. The extent to which the Commission depends upon interest groups, rather than the ballot box and electoral politics, in undertaking new policy initiatives and fulfilling its role as policy entrepreneur creates a bias in favor of pluralism.

#### **4. The draft Constitution**

The Convention on the Future of Europe expanded the role envisioned for civil society organizations in public decisionmaking. The drafters of the proposed Constitution identified two forms of citizenship and democratic governance in contemporary public life and enshrined both in the Constitution. The first is "representative democracy" and encompasses elections, political parties, government by elected officials, open decisionmaking, and local decisionmaking wherever possible (or, in European parlance, subsidiarity).<sup>73</sup> The second is "participatory democracy" and refers to the involvement of civil society in day-to-day government decisionmaking as well as a citizens' initiative in which one million or more citizens may request--but not require--the Commission to put forward a legislative proposal.

The provisions most relevant to this discussion, those on direct participation by civil society, are as follows:

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<sup>73</sup> Draft Constitution, art. 45.

Article 46: 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.

.....

This principle must be read together with an earlier provision on democratic equality:

Article 44: The principle of democratic equality

In all its activities, the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union's Institutions.

Together, these two provisions would create a broader right of participation than previously recognized in the Commission's statements. In its current form, the Constitution would require not only the Commission, but the European Parliament, the European Council, the Council of Ministers, and the Court of Justice, that is all of those institutions identified earlier as part of the Union's institutional framework, to allow individuals and associations to comment on their initiatives.<sup>74</sup> The Commission's duties are set out more precisely: it would be required to carry out consultations with concerned parties, which would likely be interpreted to imply a systematic process of the type outlined in the Commission Communication. Moreover, such consultations would not be confined to major legislative proposals but would be required whenever necessary to ensure that government action is "coherent and transparent." The draft Constitution is highly ambiguous on the question of whether the Commission and other institutions, once they have engaged in the dialogue, are then obliged to treat all associational views as equally legitimate in the pluralist tradition or whether they may give certain interests

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<sup>74</sup> Draft Constitution, art. 18. Especially in the case of the Court of Justice, this duty is perplexing since, as a court, its legitimacy has traditionally rested with the neutral and impartial interpretation of the law, unswayed by politics. Does it mean that the Court should allow for amicus curiae briefs, that it should allow the public to comment on opinions of the Advocate General before judgments are handed down, that it should institute a mechanism for accepting public views on its decisions, or that it should accept comments on its annual report?

more weight than others. On the one hand, under the principle of democratic equality, all groups and citizens will, in theory, be able to demand "equal attention" from the institutions. On the other hand, the principle of participatory democracy requires that associations be "representative."

It is difficult to anticipate the direction that the Court of Justice will take. The right to participatory democracy, however, is phrased so broadly that it should not be interpreted as grounds for review of European legislation and administrative acts.<sup>75</sup> Article 46 is similar to other, programmatic, provisions of the Treaty, which are binding on the institutions but do not constitute legal grounds for challenging public decisions.<sup>76</sup> In other words, failure to comply with the requirements of participatory democracy should not constitute infringement of an "essential procedural requirement" or an "infringement of the Constitution" under Art. III-266 (currently Art. 230) which an individual could raise as a defense to any European legislative or regulatory measure.

This interpretation of Article 46 would also be the one most consistent with national traditions of associational participation. The UK is probably the member state with the broadest consultation rights. One of the modernization initiatives of the Blair government has been to require government departments to consult with the public when they draft legislation or major pieces of delegated legislation, i.e. statutory instruments.<sup>77</sup> As a general rule, government departments must allow twelve weeks for comment, synthesize and summarize those comments for public consumption, and then explain the policy choices ultimately made. However, these are just Cabinet Office guidelines, namely they do not create binding legal duties and they vest a significant amount of discretion concerning when and how to consult with administrators. Other

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<sup>75</sup> In line with the existing Treaties and practice, the draft Constitution gives the Court of Justice the power to review European legislative and administrative acts for consistency with the Constitution: it "shall ensure respect for the law in the interpretation and application of the Constitution." Art. 28. Since such measures are not treated as directly and individually affecting individuals for purposes of primary jurisdiction in the Court of Justice, such a claim would be made in domestic court and the question would then be referred to the Court of Justice. .

<sup>76</sup> On the distinction between programmatic provisions and other Treaty provisions, see Cases C-72/91 and 73/91, *Firma Sloman Neptun Schiffahrts AG v. Seebetriebsrat Bodo Ziesemer*, 1993 ECR I-887, para. 23 to 29.

<sup>77</sup> See Cabinet Office, Code of Practice on Written Consultation (Nov. 2000), available at <http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm>.

European countries have given citizens and their associations the right to participate in certain types of rulemaking proceedings where the outcome is believed to have concrete effects on discrete groups of citizens. Land use planning at the municipal and regional levels is generally subject to disclosure and public debate requirements.<sup>78</sup> Government actions which might have an impact on the environment must, through the device of the environmental impact statement, be open to public debate before the adoption of the measure.<sup>79</sup> Legally binding consultation rights exist but they have been established one area at time, when the political process has recognized that the issues and the stakes particular to that area require greater interest group involvement than generally is the case in administrative decisionmaking.<sup>80</sup>

The Convention on the Future of Europe also took a stronger position than the Commission on the democratic justification for government by civil society. While the Commission, at the most, claimed that consultation was to "supplement" parliamentary processes, the draft Constitution enthusiastically embraces civil society participation as equal to, or, indeed, in some respects superior to electoral politics. It dedicates one article to the institutions of electoral politics and another to the involvement of civil society through consultation, legislative initiatives, and other mechanisms. Significantly, elections and parliaments are believed to guarantee the "principle of representative democracy," whereas civil society politics are thought to guarantee the "principle of participatory democracy." This formulation associates elections and legislative bodies with passive citizenship and the routinization of politics, and identifies interest group consultation with active citizen engagement and direct democracy. The political community can operate through two modes, either

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<sup>78</sup> For Italy, see Aldo Sandulli, *Il Procedimento*, in 2 *Diritto Amministrativo Generale* 927 (Sabino Cassese et al. eds., 2000). For France, see Jean-Marie Pontier, *La démocratie de proximité: les citoyens, les élus locaux et les décisions locales*, 55 *La Revue Administrative* 160 (2002). For Germany and the UK, see Theodora Th. Ziamou, *Rulemaking, Participation and the Limits of Public Law in the US and Europe* 141-161 (2001).

<sup>79</sup> Although this has existed since the early 1980's in certain European countries, environmental impact statements have now become a feature of every national system through the Environmental Impact Assessment Directive, 85/337/EEC, 1985 O.J. L 175 (40).

<sup>80</sup> Even in the United States, where the Administrative Procedure Act (APA) creates the functional equivalent of a consultation duty and that duty is enforceable in court, the coverage is limited: the APA expressly excludes many types of administrative rules as well as certain areas such as foreign affairs.

"representative democracy," meaning the periodic expression of preference in elections and the routine workings of legislative bodies, or "participatory democracy," meaning the daily engagement of citizens and their associations in directing the course of the body politic. The use of labels betrays a certain dissatisfaction with electoral politics, perhaps because it is still heavily dependent on national identities and therefore has not yet truly come to life in the European arena, perhaps because domestic elections have not always resulted in ringing support for European integration, or perhaps because electoral politics is weighed down by what some perceive as obsolete party machinery. And the use of labels reflects considerable faith in civil society participation to transform what is still understood by many as an international organization--a convenient mode of cooperation among nations--into a political community.

The problem is that the virtues of participation and active citizenship cannot be claimed by any particular set of public institutions or political processes. Thus a national election campaign can be more participatory than the publication of a new Commission initiative on consumer protection, which neither the local consumer group nor the individual consumer has time to look at. Likewise, representation, and all the consequences, positive and negative that flow from that idea, are not confined to legislative politics but are equally applicable to civil society politics. In a political entity numbering over 370 million people, the idea that, whenever the Commission or another European institution engages in public decisionmaking, all parties concerned, all interested citizens will be able to express their "views" and engage in "dialogue" is manifestly impossible. Some, of course, will engage in the dialogue and then the question becomes whether they should be heard, or in other words, be allowed to influence policy outcomes, a question which, in a democracy, will turn on representation.

## **Conclusion**

Interest groups and lobbyists are a staple in Brussels and therefore civil society, in some incarnation, will inevitably shape the Commission's policymaking. I am certainly not arguing for a Jacobean clamp down on private associational life in European governance. I am arguing that

the right to transparency, if supported by adequate resources, is highly significant and that, for the moment, transparency alone can guarantee good government in Brussels. I am also advocating self-awareness among administrators in seeing associational views for what they are, explaining their value choices honestly, and appreciating their bias towards interest group pluralism. Finally, I am arguing against a right to consultation in European policymaking. To do so would be to impose a liberal pluralist vision of representation and the polity which is not, or at least not yet, truly European.