Robert Schuman Centre

Citizen Access to Political Power in the European Union

CAROL HARLOW

RSC No. 99/2

EUI WORKING PAPERS

EUROPEAN UNIVERSITY INSTITUTE

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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Citizen Access to Political Power in the European Union

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EUI Working Paper **RSC** No. 99/2

BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in April 1999
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

I. DIVERGENT MODELS

1. Economics and Politics

The European Union as we know it today has economic roots.[1] But its existence and survival as a political entity depends on something more profound. The importance of the secondary political and cultural elements has been encapsulated by Richard Munch, who tells us that:[2]

> *Europe is moving closer together economically under the leadership of the European Union because, on the one hand, the European states are hoping for increased economic prosperity as a result and because, on the other hand, they see themselves increasingly challenged by competition with the USA and Japan. However, this does not immediately imply that the Member States of the European Union are moving unavoidably toward a new European nation-state. Other forces have to be at work, ones which go beyond external economic competition and internal economic attraction, if a unit is to be created which is more than simply an association of sovereign states with complementary economic interests. If the European Union follows the path of the individual nation-states, it will have to undergo homogenization processes in terms of the emergence of a leading language [and] the development of a leading culture...*

Munch goes on to identify four levels of the integration process taking place in the construction of the European Union. These are: (1) economic production and consumption; (2) political decision-making; (3) bonds of solidarity and (4) cultural identity, i.e., 'seeing oneself as a European with a European world view and way of life'.

For Munch, solidarity bonds imply 'the emergence of a European unit of mutual solidarity amongst people who share a sense of belonging together'. Cultural integration means 'building a cultural identity in terms of a shared view of what Europeans have in common, and what makes them distinct from non-Europeans'. We might further define these characteristics in terms of nationhood; equally, we might see them as a central ingredient of the concept of citizenship. In the lectures which follow, I shall be arguing that political decision-making and bonds of solidarity and cultural identity are closely interlinked. I shall want to argue that political citizenship is an integral and central part of cultural identity and that, without input into political decision-making, bonds of solidarity cannot develop. On the other hand, I shall argue that citizenship and strong political machinery cannot develop in the absence of bonds of solidarity dependent on cultural identity. It is this paradox that, as an

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[1] A. Milward, *The European Rescue of the Nation State* (1992).

[2] Munch, 'Between Nation-State, Regionalism and World Society: The European Integration Process' 34 *JCMS* (1996) 379, 384-5.

aftermath of the unsuccessful Maastricht Treaty and in the face of arguments for widening the geographical spread of the Union, EU constitutional law has to resolve.

2. Law and Politics

A commonly held view of the European enterprise is to the effect that the political side has been a failure but the legal and judicial side has been an undoubted success. Politicians and the political process, in other words, are responsible for the fragmentation and faction culminating in the Maastricht Treaty of European Union, whereas the legal process represents a model of a quiet and painless journey towards a successfully integrated 'new legal order'.

It is an essential premiss of these lectures that such a neat line between law and politics cannot be drawn. Just as constitutional law could irreverently be described as the output of politics, so politics must inevitably be conducted within the structuring framework of constitutional law. To criticise the sterility of EU politics must therefore inevitably reflect upon its constitutional law. Law and politics in the EU have in fact followed very similar paths over a time span, an evolution mirrored, I suggest, in the development of legal scholarship.

Daniela Obradovic[3] describes the development of the European political project as having taken the following course:

> *Originally established as an elitist project, for many decades European integration failed to raise the basic question of its policy legitimacy. Since European integration has always been an affair of the elites, both political and business, they have relied on persuading the mass public that the European venture is a good idea. As long as people did not perceive themselves as being directly affected by European decisions, they were willing to 'go along' uncritically with elite decisions.*

An exactly similar development has been charted in EC law and legal scholarship.[4] At first doctrine was descriptive rather than critical. A narrow focus on the Court of Justice meant that, in documenting the evolution of EC constitutional law, lawyers tended to place the Court at the centre of 'constitution-building' - an emphasis mistaken in terms of democracy but naturally encouraged by the Court, concerned in the eyes of some commentators to establish a role for itself as a federal constitutional court.[5] It is

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[3] Obradovic, 'Policy Legitimacy and the European Union' 34 *JCMS* (1996) 191, 192.

[4] Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic 16 *OJLS* (1996) 231.

[5] See, e.g., Weiler 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Community' 61 *Washington Law Review* (1986) 1103; Jacobs 'Is the

not news that the Court was unashamedly integrationist. Indeed, integrationism was once described as a 'genetic code transmitted to the Court by the founding fathers'.[6] Accepted by the Court, integrationism went virtually unquestioned by legal commentators - in Shapiro's famous metaphor[7], 'acolytes' - who saw their role partly as the circulation of information about EC law, partly, perhaps as a joint venture in which both were participants.[8] But then, as Shapiro went on to remind us, lawyers tend to prefer their public law without politics.[9] Unquestioned by the Court, integrationism was in key with the current political climate and went largely unchallenged by the legal and academic establishments.[10]

In reality, whatever the successes of EU economic law, EU public law and constitutional dialogue both remained lopsided and somewhat under-developed. Indeed, the objectives of the constitutional settlement still today possess an economic orientation. They are not, as lawyers like to think or pretend, 'neutral' but overtly political in nature; too closely linked to the individualistic economic ideology which motors the Single Market.[11] The celebrated 'four freedoms' add up, in other words, to a single freedom of unrestricted trade.

But this divine ordering is no longer accepted by legal commentators and the one-sided EU vision of rights - indeed, the question of its commitment to a rights-based legal order at all - has come squarely on to the agenda.[12]

Court of Justice of the European Communities a Constitutional Court?' in Curtin and O'Keefe (eds) *Constitutional Adjudication in European Community and National Law* (1992); Rinze 'The Role of the European Court of Justice as a Federal Constitutional Court' *Public Law* (1993) 426.

[6] Mancini and Keeling, 'Democracy and the European Court of Justice' 57 *MLR* (1994) 175, 186.

[7] Shapiro, 'Comparative Law and Comparative Politics' 53 *S. California Law Review* (1980) 537.

[8] For the career structure supporting this bias, see Schepel and Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' 3 *Eur. L.J.* (1997) 165. For a notable exception to the prevailing contemporary tone, see H. Rasmussen, *On Law and Policy in the Court of Justice* (1986).

[9] Above, note 7.

[10] Wallace and Smith, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent' 18(3) *W. European Politics* (1995) 137.

[11] Mestmacker, 'On the Legitimacy of European Law', 58 *RabelsZ* (1994) 617; Seidel 'Constitutional Aspects of the Economic and Monetary Union ' and Streit and Mussler 'The Economic Constitution of the European Community: "From Rome to Maastricht"', both in F. Snyder (ed.) *Constitutional Dimensions of European Economic Integration* (1996).

[12] e.g., Coppel and O'Neill, 'The European Court of Justice: Taking Rights Seriously' 12 *Legal Studies* (1992) 227; de Burca, 'The Language of Rights and European Integration', in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (1995).

Thoughtful studies of citizenship have become the basis for thoughtful and widespread debate concerning the place of citizenship in the EU settlement.[13] It is healthy that, as lawyers, we should participate in this debate. As lawyers, however, we need to go further and question the notion of a legal citizenship defined in terms of a right to litigate.[14] We need to think more closely about the democratic credentials of the ECJ's 'citizen enforcement' ideology and question Judge Mancini's view of the Court as an ally of democracy. Is not Law's vision of the European project elitist rather than democratic?

In this paper, I shall argue that these are not matters to be reserved for politicians and the European elite. They are central to a healthy system of EU constitutional law,[15] the development of which lies partly in the hands of lawyers. Crossing the traditional politics/law boundary, I shall go on to suggest that the apparent strength of the legal order is leading to its enlistment as a surrogate political process.[16] Techniques of group litigation which parallel the work of lobbyists in the political process are well under way at European level.[17] Do they contribute to democracy or to the democratic deficit?

The political development of the EU fits squarely inside Hirschman's celebrated imagery of citizen participation: *Exit, Voice and Loyalty*.[18] In the first phase, commonly known as the phase of 'nominal' or 'implicit' consent, the citizens were content to be loyal. More cynically perhaps, they did not question the choices of the elite; except when their interests were directly touched, they paid little attention to what was happening at European level. Now, in a second phase, the citizens are demanding a voice. The lesson of Maastricht is that, if they are not satisfied on this point, Exit remains a very real possibility.

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[13] e.g., Preuss, 'Problems of a Concept of European Citizenship' 1 *ELJ* (1995) 267; S. O'Leary, *European Union citizenship: the options for reform* (1996); Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' 22 *EL Rev.* (1997) 554.

[14] Szyszczak, 'Making Europe More Relevant to its Citizens' 21 *EL Rev.* (1996) 351.

[15] Curtin, 'Betwixt and Between: Democracy and Transparency in the Governance of the European Union' in D. Winter et al., *Reforming the Treaty on European Union - The Legal Debate* (1996).

[16] C. Harlow and R. Rawlings, *Pressure Through Law* (1992).

[17] Harlow, 'Towards a Theory of Access for the European Court of Justice' 12 *YEL* (1992) 213.

[18] A. Hirschman, *Exit, voice and loyalty: responses to decline in firms, organisations and states* (1970).

3. Integrationism/Elitism v. Pluralism/Democracy

As a linear explanation of the historical evolution of democratic insitutions in the EU, the picture sketched above by Obradovic has been challenged. Craig argues,[19] for example, that tension has existed from the outset in the Community between elitism and a contrasting 'republican model of political authority'. I find this questionable and, in any event, Obradovic is impeccable as a statement of present intention. The 'crisis of legitimacy' which has replaced the 'democratic deficit' as a focus of public debate is generally agreed to date to the Maastricht Treaty of European Union (TEU) and to have escalated thereafter, an interpretation receiving some support from the tone of papers prepared for the 1996 IGC. de Burca[20] identifies four themes running through these papers: legitimacy, democracy, subsidiarity and openness, and transparency. She notes that, 'of the four legitimacy-related themes addressed in the primary sources, that of democracy produces the largest, most varied set of proposals'.

Since they originate with the European institutions, it is not surprising to find these proposals largely conceived at EU level: for example, the perennial panacea of an increased role for the European Parliament (EP), to which I shall return in the third lecture; or of increasing the Commission's accountability to the EP. Both developments were statal in character, in the sense that they make the Commission look more like a national government and the EP more like a national Parliament. Thus they might also be described as 'integrationist', inviting explanations of the EU in terms of a federal state.[21] Yet this is a state without a federal constitution and more particularly without the classic demarcation of state and federal powers which are the hallmark of federal government. Perhaps our federal future is one in which the Member States will be eliminated, with regions in direct relationship with Brussels? The increased powers and remit for the Committee of the Regions are measures which could certainly enhance citizen input. But would they carry subsidiarity too far? And are they a marker, pointing to a 'Europe of the Regions'? So long as we do not know where we are headed, such developments are likely to increase the fear of integration, rather than, as we might expect, to allay fears.

If these proposals pass too lightly over constitutional problems, none really deals either with the central dilemma for modern society of efficiency versus democracy.[22] Munch speaks of:

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[19] Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment' 3 *ELJ* (1997) 105.

[20] de Burca, 'The Quest for Legitimacy in the European Union' 59 *MLR* (1996) 349. The citation is at 361.

[21] See, Lenaerts, 'Constitutionalism and the Many Faces of Federalism' *AJCL* (1990) 205.

[22] Above note 2 at 397.

endangering th[e] Europe-wide capacity for decision-making by extending the democratic right to participate - a capacity for which the political union was supposed to be formed in the first place and which can only be legitimate, however, if democracy is correspondingly expanded.

The problem is of course that no one really knows how to resolve or, perhaps more accurately, to balance the tension between democracy-oriented values and that of efficiency.

Let us end this introductory lecture by briefly considering two models of governance, chosen with a view to exemplifying the two divergent trends.

(i) Elite Governance

For Andersen and Burns, the European Union is 'an instance of post-parliamentary governance, where the 'direct influence of the people' through formal representative democracy has a marginal place'. They argue that:[23]

individual citizens voting in free, equal, fair and competitive Euro-elections cannot influence the composition of Euro-authorities, much less bring about a rotation of those in office.... In general, the EU is not a political system in which rulers are held accountable for their policies and actions in the public realm by citizens, and where competing elites offer alternative programmes and vie for support at the European level - and in this sense it is not a modern political democracy.

It has to be said that Andersen and Burns are generally pessimistic about parliamentary institutions: 'the core of Western political systems, they are undergoing systematic erosion'. There has been a slippage from government based on representative democracy to governance based on 'a variety of different regulative, representative and authority processes'. Thus Andersen and Burns[24] see the EU as an intrinsic part of a global 'rationalisation process' in which 'expert sovereignty' necessarily prevails over both popular and parliamentary sovereignty while policies and regulation are legitimated by reference to expert knowledge. Popular input, or the 'direct influence of the people' is possible only at national level, where it is necessary for legitimating the EU enterprise. This model is certainly elitist, though not necessarily integrationist, in character. Whether the authors believe their pessimistic, though penetrating and accurate, appraisal of EU institutions to be descriptive or prescriptive they do not clearly say, though their conclusions suggest the former. They speak of:[25]

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[23] Andersen and Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance' in S. Andersen and K. Eliassen, *The European Union: How Democratic is it?* (1996). They are relying on unpublished papers by Philippe Schmitter.

[24] ibid. at 229. A similar picture is presented by G. Majone in *Regulating Europe* (1996).

[25] ibid. at 243.

> *a frustrating and delegitimising gap between representative democracy's responsibility and its lack of structural capability and control. At the same time, there is a corresponding major gap between the actual control exercised by the agents and institutional arrangements of organic governance and their public accountability.*

In Majone's regulatory vision of Europe, which also has a tendency to discount democracy, a regime of experts is validated by their expertise. Control is possible without parliament. It occurs through 'self-policing mechanisms which are already present in the system'. This means building:[26]

> *a network of complementary and overlapping checking systems instead of assuming that control is necessarily to be exercised from any fixed place in the system.*

Some of the systems of accountability envisaged by Majone are democratic, such as oversight by congressional (or parliamentary?) committees or public participation. The majority, such as powers of appointment, strict procedural requirements, professional standards, and judicial review, are not. In general, Majone posits control of experts by experts. This is hardly democratic, but it also differs from the 'consumer sovereignty' which proponents of the market substitute for civil and political citizenship.

(ii) Civic Republicanism

In sharp contrast, Craig denies[27] the validity of legitimation for the EU based on elitist political theory. For Craig the answer lies essentially at Union level in a concept of 'democracy based upon institutional balance' - a view not unnaturally favoured by the institutions in their reports for the 1996 IGC. This he believes to be a consensual solution to a constitutional order ('a self-evident proposition on which all people can agree'). Left like this, Craig's republican solution - like the Madisonian model from which it derives[28] - could be open to criticisms of elitism - though to Sunstein, the potential for popular democracy is always latent in Madisonian theory:[29]

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[26] G. Majone, *Regulating Europe* (1996), p. 39. The theory of 'interpolable balance' presented there is borrowed from C. Hood, "Concepts of control over public bureaucracies: 'comptrol' and 'interpolable balance' in X-L Kaufman (ed.) *The Public Sector* (1991). See also, Ladeur, 'Towards a Legal Theory of Supranationality - The Validity of the Network Concept' 3 *ELJ* (1997) 33.

[27] Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment' 3 *ELJ* (1997) 105 at 124-8.

[28] Here Craig draws on the writings of Blackstone, the legal bible of the first American colonists: see further, P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990). Craig also derives republican theory from a variety of continental European sources.

[29] C. Sunstein, *The Partial Constitution* (1993) at 164.

> *There is a crucial difference between the economic principle of "consumer sovereignty" - by which consumers, in markets, decide on the allocation of goods and services through registering their "preferences" - and the Madisonian principle that vests ultimate sovereignty in the people. On the Madisonian principle, citizens and representatives are supposed not to seek to pay for "what they want", but to deliberate about social outcomes. They are required to offer reasons on behalf of one view rather than another. They are required to listen and talk to one another... On this view, democratic outcomes reflect the considered judgements of the citizenry rather than an aggregation of consumption choices.*

Thus following the path trodden historically by American constitutionalism, Craig[30] links the 1993 Inter-Institutional Declaration and the 1996 IGC reports, both of which emphasise the need to 'make the Union more transparent and closer to the citizens'[31], to a more modern and democratic model of constitutionalism. To the transparency stressed by the institutions, Craig adds[32] his own preferred value of participation, arguing that this provides an important method for enhancing the legitimacy of, and democracy within, the EU. Craig himself rejects the criticism of institutional balance as:[33]

> *... simply a device which enables the Community to move forward in an incremental manner, without really resolving the issues of democracy and legitimacy which lie at the heart of the debate about its future.*

Craig's theory of EU constitutionalism must, I think, be read as implicitly (though nowhere overtly) integrationist. Envisaging incremental growth rather than stasis, Craig relies on increased citizen input for a gradually increased legitimation of the European enterprise. A more imaginative input from administrative law will give citizens a Voice at European level.

In the remainder of these lectures, I shall take an opposite view. Like Andersen and Burns, I see the present EU consitutional settlement as essentially bottom-weighted. Its structure is confederal and must remain so just so long as a true federal structure is not in place. Thus it is a Community and not a Union which I envisage. On the other hand, while I accept that democracy at EU level need not be a carbon copy of the statal arrangements to which we are accustomed, I cannot accept the concept of a political organisation solely legitimated at state level. Like Craig, I believe that there must be room for citizen input on the European plane.

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[30] Above note 27 at 119.

[31] The citation is from the *Report of the Reflection Group*, SN 520/95, December 1995, p. iii.

[32] Above note 27 at 121.

[33] ibid. at 11.

What I am suggesting is a form of pluralism, though not one which invokes public choice theory. The dangers of pluralism lie in the fact that it is disjunctive. In some contexts, notably the United States, this has created a conflictual politics, resulting in the cynicism of public choice theorists such as Buchanan and Tullock[34] or Olson,[35] who virtually discount the value of citizen participation unless exercised through the limited mechanism of market choice. The enterprise on which pluralists wish the Community to embark is therefore dangerous, leaving obvious space for dispute. Nonetheless, it is a journey which must be undertaken, since it is the path down which the Council is directing us. TEU Art. 3(b), which for the first time introduced the subsidiarity concept into the vocabulary of the Treaties, marked a first step down the road of pluralism. The Treaty of Amsterdam marks a further step in the process of disaggregation. Its conformation (*géométrie variable*) allows the Member States to travel in different vehicles and at varying speeds. Diversity, subsidiarity, and plurality are the order of the day. How could it be otherwise when the EU is opening its doors to new entrants, in some of which democracy's roots are still shallow and the soil in which they are planted thin?

At present, the Union can be criticised as an organisation whose statute (the Treaties) professes democracy, which insists on democracy in its members, maintaining (since Amsterdam) the right to expel those who slip from democratic standards, but is not itself democratic. Unless the EU can make more space for its citizens it is doomed to failure as a political enterprise. It will not meet the standards of democracy essential to legitimate its institutions in the eyes of its electorate. In the rest of these lectures, I shall sketch in the existing avenues open to citizens for participation in the political and policymaking process. I shall briefly indicate the purpose for which they were intended and what use has so far been made of them. I shall further argue that, far from rejecting the nation state and seeking to transcend it, we need to draw on national experience to strengthen the democratic experiment in Europe.[36] Until the cultural and underpinnings are in place, political and constitutional developments will be dysfunctional and useless.

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[34] J. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1967).

[35] M. Olson, *The Logic of Collective Action: public goods and the theory of groups* (1982).

[36] In an unpublished paper entitled 'Flexible Integration. The European Union as a Polycentric Polity', presented at the CORE conference in Copenhagen, 1998, Marlene Wind drew on the concept of polycentricity to devise a framework inside which my remarks here could be formalised.

II. PARTICIPATION THROUGH REPRESENTATION

Arguments over 'democracy deficit' in the EU have been rendered peculiarly obscure through the confusion of several overlapping concepts, notably: democracy, sovereignty, representation, legitimacy. According to Lodge,[37] the debate has gone through several stages. Thus she notes at first the limited scope of arguments over democratic legitimacy in the EU, seen merely as a 'problem of securing the election of the European Parliament by direct, universal suffrage'. After this was conceded in 1979, attention turned instead to the limited powers of the EP, suddenly viewed as Europe's only representative body;[38] in other words, the debate had shifted from representation to sovereignty. It was becoming dominated by the symbolism of parliament as 'sovereign lawmaker', particularly potent in the United Kingdom, Italy and Denmark, perhaps less so in federal systems such as Germany with strong regional legislatures, or unitary France, where the lawmaking power is shared between legislature and executive.

An alternative way to express this stage of the debate is that the lawmaking process of the EU did not resemble that of a national state nor did its institutions function in the same way. This was an approach which tended, however, to overlook the diminishing role of parliaments in lawmaking throughout Europe (sovereignty) while at the same time downplaying the symbolic role of parliaments in democratic systems (legitimation). To lawyers the former function tends to be viewed as paramount, together with the parliamentary function of exacting accountability. To political scientists, legitimation may become the most important parliamentary function. Thus to Norton[39], the core function of parliaments is representation, which maintains the fiction of consent (legitimacy) in the political system.

An important function of parliaments, even if secondary, is to influence policy and to play some part, if only a scrutinising role, in legislation. Accountability is retrospective in the sense that parliamentary scrutiny legitimates policy and at the same time eliminates the unacceptable. Prospectively it establishes the parameters of legality. Parliamentary debates or the reports of parliamentary committees may of course be very influential. Just such a niche in the European policymaking has somewhat surprisingly been

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[37] Lodge, 'The European Parliament' in S. Andersen and K. Eliassen, *The European Union: How Democratic Is It?* (1996) at 187-8.

[38] Williams, 'Sovereignty and Accountability in the European Community' 61 *Political Quarterly* (1990) 299.

[39] P. Norton (ed.), *Parliaments in Western Europe* (1990) and Norton, 'Introduction: Adapting to European Integration' in *National Parliaments and the European Union*, Special Issue, 1(3) *J. of Legislative Studies* (1995) 1.

captured by the United Kingdom second chamber, the House of Lords, reports from whose Select Committee on European Affairs are read with respect by the European institutions.

In this analysis, the European policy and lawmaking processes receive a double legitimation: once through the representative credentials of the directly elected EP; secondly and indirectly, through the democratic credentials of national representatives in the Council. Note that such a model is likely to prove unpopular with national Parliaments because of the loss of power which it denotes. The 'democracy deficit' argument has in fact unrolled in the post-Maastricht years precisely along these lines, with the emphasis shifting to the limited role of national parliaments in EC policymaking. Amsterdam saw the formalisation at Treaty level of proposals for amelioration (below). How practical these will prove is another question.

For Lodge,[40] the 'democracy deficit' means no more no less than a yawning gap in accountability and control:

> *What was and remains ill-understood is the degree to which the European Parliament has not won powers forfeited to national governments by national parliaments: neither can exercise effective control over either what national governments do in the EU or what the EU executive does. National governments were responsible for this situation and deliberately engineered a situation whereby national parliaments were denied effective controls over national executives. This made it easier for national governments, working through the Council, to escape national as well as European parliamentary scrutiny and control. Thus, allegations that the European Parliament was engaged in an exercise to increase its powers at national parliaments' expense were based on a false premise: national governments, not the European Parliament, were the beneficiaries of parliamentary weakness at both national and EU level. National parliaments failed to engineer an effective scrutiny, monitoring or control role for themselves vis-à-vis national Ministers and governments. They also failed, until 1990, to engage in constructive dialogue - and more importantly, in continuing, regular communication - with the European Parliament.*

A pessimistic assessment, according to which a central effect of the European venture has been to shift power from parliaments to vest it in governments, whose European dealings are potentially despotic. The theoretical legitimation for this transfer of power can, as we saw with Andersen and Burns, only be indirect: namely, the obvious fact that all European governments are themselves directly elected. The absence of any real accountability, however, renders legitimation purely hypothetical, a truth exposed by Maastricht. Accepting the accuracy of this dismal picture, I shall use the rest of this lecture to ask whether the damage can be repaired or even limited.

[40] Above note 37 at 188.

A. The European Parliament

First, we need to ask the question whether at European level, the EP is able to achieve sufficient input into policy-making to stifle fears over 'democracy deficit'. Here the assessment of Parliament-watchers varies considerably. Let us first consider the imbalance between legislative and budgetary powers. In terms of 'democracy deficit', attention has focussed on the limited legislative powers. Commentators suggest, however, that budgetary powers have been used to good effect to influence Commission policy-making. Jacobs and Corbett[41] cite battles fought in the 1980s over the CAP. These resulted in a victory for the EP in 1988, when the Council agreed that new budget lines could not be started without the consent of the EP and that new legislation which contained no budgetary provision could not be implemented until the budget had been amended. Westlake[42] sees the achievement of the EP as being its brick-by-brick approach to building a political base which culminated in the co-decision procedure (TEU); 'with the genius of the born fighter', it has built pragmatically on existing powers, making the best use of 'lucky breaks'.[43] Westlake's current prophecy is for a period of incremental growth in legislative power. Further rapid progress seems blocked by the Council, jealous of its own lawmaking prerogatives in a climate hostile to further integration. The prophecy has been subsequently validated by the Amsterdam Treaty, which orders, but does not extend, EP legislative powers. Westlake therefore predicts a shift of interest back to budgetary powers to secure accountability.

Commentators also remark on the power to censure the Commission, culminating in the power to approve appointments in the Treaty of Maastricht (EEC Art. 158 (2)). In this context, most regret the decision to approve the appointment of Jacques Santer, seen as a failure to establish definitive control over the Commission. It is, however, agreed that the Commission does now treat the EP seriously as a player in policy-making,[44] a position strengthened by the institution of the new co-decision procedure, seen by some as a significant step in a journey towards legislative sovereignty.[45]

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[41] F. Jacobs and P. Corbett, *The European Parliament*, 3rd. edn. (1995) at 231-2.

[42] Westlake, "'The Style and the Machinery": The Role of the European Parliament in the EU's Legislative Processes' in P. Craig and C. Harlow (eds) *The European Lawmaking Process* (1998). See further, M. Westlake, *A Modern Guide to the European Parliament* (1994).

[43] ibid., p. 141. Westlake instances the Isoglucose ruling (Case 26/74 *Roquette Freres v Commission* [1976] ECR 677) where the ECJ ruled that Council must await a formal opinion from the EP before taking a formal legislative decision. The ruling in the Chernobyl case (Case C-70/88 *European Parliament v Council* [1990] ECR I-2041), which allowed the EP to come to the ECJ to 'defend its privileges' is another example.

[44] See generally, M. Westlake, *The Commission and the Parliament* (1994).

[45] Westlake, above note 42 at 144. See also *Commission Report for the Reflection Group*,

Westlake[46] regards the co-operation procedure introduced by the Single European Act as successful in leading to a more consensual lawmaking process. The institutions, which had to make the procedures work to complete the Single Market, behaved responsibly:

> *The institutions co-operated, and at times collaborated, as the Treaty draftsmen had intended... The Parliament could point to impressive statistics about the take-up of its amendments by the Commission and the Council at second-reading. At last, the Parliament was playing a constructive and potentially influential role in the legislative process.*

Contrary to many pessimistic assessments at the time of adoption, based largely on the absence of legislative sovereignty,[47] the co-decision procedure (TEU) has shown a steady continuation of parliamentary influence. Measuring the procedure on a number of indicators, including (negative) the number of failures to achieve an agreed text and (positive) the number of EP amendments accepted, Boyron concludes[48] that the procedure has been succesful: of 98 acts studied by her (around 25% of the total legislative package) only 2 have failed outright, of which one has since been re-introduced on the EP's terms.[49] In the remaining cases, 89.5% of EP amendments were broadly acceptable, 59% after compromise, usually on technicalities of drafting. The main concern is over delay: 29 further proposals were awaiting a common position. Although Boyron believed these should be accounted a failure, like Westlake, she is generally optimistic, seeing co-decision procedure as helpful in extending EP influence.

Boyron found too that EP amendments were directed to pleasing its natural constituency: the consumers and people of Europe. They also showed the influence of pressure/interest groups. She gives the example of an MEP, himself a 'biker', who acted as spokesman for bikers in preferring amendments to the directive on motor vehicle power. In this case, certainly unusual, a lobbyist was even admitted in conciliation meetings under the guise of

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Brussels, May 1995.

[46] ibid. at 143.

[47] Curtin, The Constitutional Structure of the Union: A Europe of Bits and Pieces' 30 *CML Rev.* (1993) 17 at 35-46; Piris, 'After Maastricht, are the Community Institutions more Efficacious, more Democratic and more Transparent?' 19 *EL Rev.* (1994) 449 at 469-470; Dashwood, 'Community Legislative Procedures in the Era of the Treaty on European Union' 19 *EL Rev.* (1994) 343.

[48] Boyron, 'The Codecision Procedure: Rethinking the Constitutional Fundamentals' in P. Craig and C. Harlow (eds) *Lawmaking in the European Union* (1997) at 148.

[49] This was Directive 95/62 on the application of open network provision to voice telephony, OJ 1995 L 331/6. The directive on the legal protection of biotechnological inventions failed, but was also to be reintroduced. By May 1998, 47 out of 124 co-decision acts had gone to conciliation, still with only two failures.

parliamentary assistant.[50]

This leads back naturally to parliaments' representative function. The Single European Act described the EP as 'an indispensable means of expression... for the democratic peoples of Europe'. It is therefore pertinent to ask how far it achieves this role. Like many commentators, Jacobs and Corbett see it as handicapped by a lack of publicity and of media coverage:[51]

> *It is not, as national parliaments are in many countries, the "meeting place" of the country, the centre of national debate and the hub of public life. It is often perceived as remote and its multi-lingual character reduces the opportunity for cut and thrust or drama in its debates.*

They conclude that nonetheless the EP serves in three particular ways as an important transmission belt for ideas: first, MEPs transmit the worries of constituents, received through a considerable and growing mailbag; second, the EP acts as a forum for transmission of ideas between national representatives, thus fostering the growth of a trans-national political culture; third, MEPs transmit knowledge of the Community and its affairs downwards to constituents and the public generally in their Member States.

To this assessment we would need to add the important role of committees,[52] often successful in raising issues which Commission and Council might prefer to overlook. The Herman Committee,[53] for example, raised a debate on the need for a new EU constitution, though this was muted and ultimately unsuccessful. EP committees have assumed an important role in voicing the concerns of the (or perhaps 'a') public, e.g., in the case of animal welfare, a direct response to constituency concerns and petitions.[54] They have also acted on behalf of less vocal minorities: e.g., in the strong position maintained on racism, discussed further below. Committtees are an important point of entry for lobbyists as well as individuals, as their membership is published and the members can be directly approached. Shapiro[55] sees committees as specially important in establishing control over expert

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[50] Above note 48 at 154 (note 30).

[51] Above note 41, p. 271.

[52] On which see, D. Dinan, *Ever Closer Union? An Introduction to the European Community* (1994) at 283-7.

[53] See Working Document on the Constitution of the European Union PE 203.601/B (15 Sep 93) and Draft Report on the Constitution of the European Union PE 203.601/rev. (9 Sep 93).

[54] Radford, 'Animal Passions, Animal Welfare and European Policy Making' in P. Craig and C. Harlow, *Lawmaking in the European Union* (1998); See also Jacobs and Corbett, *The European Parliament* (1990) at 151-154. On petitions and the Petitions Committee, see ibid. at 242-3.

[55] Shapiro, The Politics of Information: U.S. Congress and European Parliament' in P. Craig and C. Harlow (eds) *The European Lawmaking Process* (1998).

bureaucracies and urges generous funding and development of EP committees along the lines of US congressional committees.

An important entry point to the EP is through the creation of 'intergroups' consisting of members from different political groupings with a common interest in a particular political theme: environment, animal welfare, federalism (the Crocodile Club) or free movement (the Kangaroo Group). An easy way in for interest groups is to offer to service an intergroup which hold regular meetings whose agenda is open to influence, or, at an earlier stage, to promote the establishment of an intergroup.[56] Social action groups have used this entry-point with some success. An intergroup may form part of a policy community or network, a 'chain of participants working in the same area who come to know and depend on each other over a long period'.[57]

But despite worthy efforts to heighten its profile, it is hard to see the EP as representative of its constitutents. A recent comparison of the opinions of MEPs and their constituents on the two salient issues of EMU and common border control epitomises the problem. The researchers conclude:[58]

> *The dramatic failure of <u>any</u> political representation on these issues cannot be demonstrated better than by comparing the attitudes of the electorate and their candidates... Doing so, one can hardly avoid the conclusion that voters and their potential representatives are living in different European worlds.*

Reasons why this may be so are discussed at a later stage in this paper.

B. The Council of Ministers

There is general agreement that national delegations to the Council tend to represent national interests, though some cynics have noted a close co-relation between national interests and those of their main commercial operators [59]. There is general agreement also that the best way to influence the Council is through national political avenues.[60] 'Interests need to be plugged in both to their usual channels of national representation, but also to the ways in which national governments co-ordinate their machinery for working in Europe'.[61]

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[56] J. Greenwood, *Representing Interests in the European Union* (1997) at 44-8.

[57] ibid. at 15.

[58] Thomassen and Schmitt, 'Policy Representation' 32 *European J. of Political Research* (1997) 165 at 181.

[59] A. Stern, Lobbying in Europe After Maastricht: How to Keep Abreast and Wield Influence in the European Union (1994) at 99.

[60] W. Grant, *Pressure Groups, Politics and Democracy in Britain* (1995); F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (1997) at 229.

[61] Jacobs and Corbett, above note 41 at 31.

Although lobby groups can use their Brussels base to lobby the Council, and regions in particular may do this, there is general agreement that the Commission is more permeable.

C. The Comitology

The 'Comitology' is a network of advisory committees established to control and monitor the Commission's rulemaking powers,[62] widely used to implement the Single Market and to deal with technical regulation, much of which is important. At first they were able to operate behind a screen of ignorance. Had they been required to justify their activities, justification could have been found in Majone's theory of expert governance.

Staffed largely by national civil servants, the committees tend nowadays to be seen as impervious to popular input and largely representative of national and Commission viewpoints.[63] In other words, they have come to be seen as a bureaucratic obstacle to democracy badly in need of control by standard administrative law techniques, including judicial review.[64] Advocates of expert committees, on the other hand, describe them as a channel for democratic participation in policymaking and the implementation of legislative powers.[65] Just as intergroups may form part of a policy network, so may the comitology. Some social action groups (e.g., environmentalists or consumer groups) have been extremely successful in inserting their own technical experts on to committees as members of national delegations.[66] Groups also work their way into the comitology by providing information and services which the Commission finds useful, or through servicing an intergroup. The verdict on the comitology remains an open one but there is general agreement that it would benefit from greater openness, transparency and the adoption of more democratic procedures. It has, for example, been suggested that a variant of American 'notice and comment' procedure might be used to widen the debate when new rules are made.[67] Admittedly this would allow for greater

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[62] By Council Decision of 13 July 1987, EC 87/373, OJ 1987, L197/33.

[63] Vos, 'The Rise of Committees' 3 *ELJ* (1997) 210.

[64] St. John Bradley, 'Comitology and the Law: Through a Glass, Darkly', 29 *CML Rev.* (1992) 693 and 'The European Parliament and Comitology: On the Road to Nowhere?' 3 *ELJ* (1997) 230.

[65] Joerges and Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalistation of Comitology' 3 *ELJ* (1997) 273. See also, R. Pedler and G. Scheafer (eds) *Shaping European Law and Policy. The Role of Committees and Comitology in the Political Process* (1996).

[66] Buitendijk and van Schendelen, 'Brussels advisory committees: a channel for influence?', 20 *EL Rev.* (1995) 37.

[67] Dehousse, 'Law Implementation in a Polycentric Community: Towards a Regulation of Transnational Governance' (conference paper, forthcoming).

permeability. A negative consequence might be, however, that private interests would be afforded a prime opportunity to turn rulemaking procedures to their own advantage, bringing the painfully slow EU lawmaking process to a halt.[68]

D. The Committee of the Regions

The institutionalisation of regionalism, formalised by the Maastricht Treaty, introduced the prospect that Europe could be heading towards a variation on the theme of an integrated, federal Europe: the so-called 'Europe of the Regions'. Once again, two models are in play, in the first of which the EU is seen as a supra-national organisation, designed by sovereign nation-states for the purposes of maximising economic performance and over which they retain control.[69] The second model draws on globalisation to describe a decline in power and sovereignty of the nation-state.[70] To Muller and Wright, as areas such as health, education, social welfare, environment, police and migration are sucked into the European orbit:[71]

> *the EU is slowly redefining existing political arrangements, altering traditional policy networks, triggering institutional change, reshaping the opportunity structures of members states and their major interests. These interests are now increasingly entangled in relationships at four territorial levels: the international, the European, the national and the local, and for some of these interests it is by no means clear that the national level is the most important.*

In this variant of integration, the secondary (state or provincial) tier would be provided by the regions rather than the Member States.

Nothing suggests, however, that this is about to happen. Popularity with the integrationist Commission helps to explain the latter's support for the Committee of the Regions, established by TEU Art. 198 to provide a voice for regional interests in EU decision-making. The Commission already had good relations with regional authorities through the regime of structural subsidy and regions are heavily and increasingly represented in Brussels.[72] The Commission

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[68] See M. Shapiro, 'Codification of Administrative Law: the US and the Union' (1996) 2 *ELJ* 26.

[69] Taylor, 'The European Community and the State: Assumptions, Theories and Propositions' 17 *Review of International Studies* (1991) 17; Hoffmann, 'Reflections on the nation-state in Western Europe today' 20 *JCMS* (1982) 29.

[70] M. Rhodes, *The Regions and the New Europe: Patterns in Core and Periphery Development* (1995).

[71] Müller and Wright, 'Reshaping the State in Western Europe: The Limits to Retreat' in W. Müller and V. Wright (eds) *The State in Western Europe Retreat or Redefinition*, Special Issue, 17(3) *W. European Politics* (1994) 6.

[72] J. Greenwood, *Representing Interests in the European Union* (1997) at 225-241. See also, Laffan, 'While you're over there in Brussels, get us a grant: the management of structural

may therefore have encouraged regionalist aspirations as a counterweight to the national interest representation in the Council. On the other hand, it has been said that:[73]

> *the Commission's acquiescence to the establishment of the Committee of the Regions was motivated by its own political agenda. It [was] hoped that the Committee of the Regions might serve to counter the instrinsic shortcomings in European Union policy-making. The Committee of the Regions was seen, inter alia, as enhancing the democratic legitimacy of the European Union, bringing the European Union closer to its citizens and enacting the principle of subsidiarity.*

A similar point is made by Héritier, who sees sub-national actors as a tool of the Commission in the struggle with national government:[74]

> *Another frequently used informal strategy of innovation is 'coalition-building' with subnational actors operating against their respective governments in order to get a 'foot in the door' of a policy field. Local governments, interest groups and firms are offered incentives to commit themselves to new policy measures, even though such measures may not have the whole-hearted support of their governments.*

But a very natural fear of 'Balkanisation' - the Europe of the Regions has been described by Hooghe[75] as a model of 'contested hierarchy' - caused the Council to draw the sting of its potential rival. This reaction needs to be read in the light of a developing threat from regional politics at national level. The Council's position is at present eased by the fact that the EP also sees the new Committe as a rival, partly due, perhaps, to the fact that, in the absence of strong, trans-European political parties, MEPs often see themselves as regional representatives.[76] This is perhaps well for the Council, since McCarthy believes[77] that it would be hard for the Commission to ignore pressure from 'these two democratic and relatively representative bodies' were they to act in concert. Change here could be brought about by a new power in the Amsterdam Treaty for the EP to consult the Committee. But appointments remain firmly in the hands of the Council, which nominates solely on the recommendation of

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funds in Ireland' 4 *Irish Political Studies* (1989) 43.

[73] McCarthy, 'The Committee of the Regions: an advisory body's tortuous path to influence' 4 *JEPP* 439, 443. See also, Hooghe and Keating, 'The politics of EU regional policy' 1 *JEPP* (1994) 367.

[74] Héritier, 'Policymaking by subterfuge: interest accomodation, innovation and substitute democratic legitimation in Europe - perspectives from distinctive policy areas' 4 *JEPP* (1997) 171 at 178.

[75] Hooghe, 'Subnational Mobilisation in the European Union' 18 *W. European Politics* (1995) 175.

[76] Marsh & Norris, 'Political Representation in the European Parliament' in *Political Representation in the European Parliament*, Special Issue, 32 *European J. of Political Research* (1997).

[77] Above note 73 at 448.

Member States, an uncompromising rejection of the Commission's position, which had insisted that elected office at local or regional level should be a criterion for appointment. Moreover, the Committee of the Regions was granted no legislative role, its function being merely to advise and issue opinions. This necessarily limits its influence. 'EU advisory organs have only been considered important actors in the policy process when they have gained more than mere consultative rights'.[78] Powerful regions, such as the German lander, prefer to negotiate for occasional seats on the Council of Ministers.[79] A similar solution is envisaged for Scotland, which will be empowered by the devolution legislation to represent the United Kingdom when appropriate at Council level.

The mere fact that sub-national politics are local in character makes them easier of access to citizens than national or transnational policy-making fora. It does not, however, necessarily make them more representative. Like European elections, low salience and poor turnout is a consistent feature of sub-national elections. Riven by faction, dissected by a North/South geographical division, and split once more by a local/regional divide, the Committee has so far failed to provide a coherent sub-national Voice. How could it? On present performance, it seems doomed to follow the EcoSoc into the twilight of influence.

E. National Parliaments

The British House of Commons has predictably argued that national parliaments, 'with their diverse characters matched to their national cultures... are closer to the citizen, and are uniquely qualified to provide an element of responsiveness and democratic control that the Union needs'.[80] It is also alert to the dangers of widening EC membership to countries with a less developed parliamentary tradition.

Although Norton has shown himself [81] ultimately pessimistic about an increased role in the lawmaking process for national Parliaments, whether individually or through an extension of existing procedures for inter-parliamentary cooperation,[82] this view was presented before the Treaty of

[78] ibid. at 451. See also, Farrows and McCarthy, 'The Committee of the Regions: opinion formulation and impact' 7 *J. of Regional and Federal Studies* 7.

[79] EEC Art 146 had been reworded by the TEU to allow a representative of each Member State at ministerial level to commit the government of that state.

[80] *The 1996 Inter-Governmental Conference: The Agenda; Democracy and Efficiency; The Role of National Parliaments*, HC 239-I (1994-5) para. 107. See also, *The Role of the National Parliaments in the European Union* HC 51 (1995-6).

[81] Norton, 'National Parliaments and the European Union: Where to From Here?' in P. Craig and C. Harlow, *Lawmaking in the European Union* (1998).

[82] For ways in which this might be done, see European Parliament, *The European Parliament*

Amsterdam strengthened the position of national parliaments (below). We must recall too that, since the warning light of Maastricht, major reforms have been put in place in several national Parliaments.[83] Experience shows that the key to successful national parliament input lies in information. Those parliaments which have succeeded in establishing their right to see policy documents and legislative proposals at an early stage have been able to influence policy; late notification or post hoc scrutiny means no influence.

Control sufficient to permit genuine input into the European policy-making process can be measured[84] against a scale on which Denmark represents a maximum.[85] At the other end of the scale, Member States whose parliamentary tradition is relatively weak may look to the European level to strengthen national parliamentary traditions. Here the potential effect of widening the Union to include countries where representative institutions are less well ensconced must not be forgotten.[86]

(i) Denmark

The Folketing is seen as a policy-making assembly which has retained its position after entry.[87] The Market Relations Committee (now the European Affairs Committee (EAC)) of the Danish Folketing created in 1961 has since entry mandated the negotiating position of its Ministers in the Council of Ministers and also plays a major part in formulating Danish policy for each IGC. A Minister who needs to step outside his or her mandate has to refer back to the EAC. The Danish Accession Treaty obliges the Government to report on developments and to notify the Folketing of any proposal relevant to Denmark on which parliamentary action will be required. The strength of the EAC is generally agreed to lie in its authoritative composition, indicating the priority

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and the Parliaments of the Member States, Parliamentary scrutiny and arrangements for cooperation (1994).

[83] Norton (ed.) National Parliaments and the European Union, Special Issue, 1(3) J. of Legislative Studies (1995).

[84] Studies of several of national parliaments are contained in P. Norton (ed.) *National Parliaments and the European Union*, Special Issue, 1(3) *J. of Legislative Studies* (1995). See also Bergman, 'National Parliaments & EU Affairs Committees: notes on empirical variation and competing explanations' 4 *JEPP* (1997) 373.

[85] Arter, 'The Folketing and Denmark's European Policy' 1 *J. of Legislative Studies* (1995) 110; Jarvad, 'The Committee of EU Affairs of the Danish Parliament, the Folketing. How to Maintain Some Parliamentary Control with the Legislative Power of the Combined Executives in the Council of Ministers', in P. Craig and C. Harlow, *Lawmaking in the European Union* (1998).

[86] Hesse, 'Constitutional Policy and Change in Europe: The Nature and Extent of the Challenges' in H. Hesse and N. Johnson (eds), *Constitutional Policy and Change in Europe* (1995).

[87] Darmgaard, 'Denmark: Experiments in Parliamentary Government' in E. Darmgaard (ed.) *Parliamentary Change in the Nordic Countries* (1992).

attached to it by the Folketing. Arter [88] notes that anti-European parties, whose prominence has increased in recent years, have made good use of their representatives in the EP. 'Agreements between EAC members and MEPs within particular parties can still constitute an effective two-pronged offensive to a government's EU stance'. Yet even here the Danish Maastricht referendum suggests that the EAC can be out of touch with popular opinion; Government and Folketing, in other words, can form a single, Europeanist elite.

(ii) United Kingdom

In a median position, the UK at first chose imperiously to ignore the European dimension, despite early insistence by the House of Commons on the so-called 'parliamentary reserve',[89] whereby 'No Minister of the Crown should give agreement in the Council of Ministers to any proposal for European Community legislation which is still subject to scrutiny or is awaiting consideration by the House'. The House of Commons also was notorious for its arrogant indifference to MEPs, a breakdown in communication only just beginning to be repaired. Maastricht, the impact made by the Factortame cases,[90] and the growth of Euro-scepticism, all operated to induce change.

Yet Judge[91] has remarked on the limited ambition of the House in scrutinising EC legislation. While the (non-representative) House of Lords Select Committee on the European Community early established itself as a policy-making organ, carefully selecting its subjects, maintaining an excellent standard of report, and infiltrating these into the European institutions where they were regarded with respect, the same is not true of the Commons, whose Select Committee on European Legislation found problems not only with the bulk of the material it was expected to scrutinise but also with access and timing. Mainly in consequence of the Committee's experience, the Select Committee on Procedure in 1988 published an important report on scrutiny of EC legislation.[92] Criticism was directed particularly at the unavailability of official Council texts which greatly hampered scrutiny. A revision of procedures followed this report and the hope was that the debates would be better attended and Members would be better informed. The new procedures are beginning to shake down and it is generally felt that they afford opportunities for stronger scrutiny of EC rules than previously, generating more

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[88] Above note 85 at 120-1.

[89] See Resolution of the House of Commons of 3 October 1980, HC Deb., vol. 991, col. 843, now Resolution of 24 October 1990, HC Deb., vol. 178, col. 399.

[90] *R. v. Secretary of State for Transport ex p. Factortame (No. 1)* [1990] 2 AC 8; *R. v. Secretary of State for Transport ex p. Factortame (No. 2)* [1991] 1 AC 603.

[91] Judge, 'The Failure of National Parliaments?' 18(3) *W. European Politics* (1995) 79.

[92] *European Community Legislation*, 4th Report of the Select Committee on Procedure, HC 622-I (1989/90). For the Government response, see Cm. 1081 (1990).

interest in the Committees' work thus lending them a more authoritative profile.

(iii) France

Towards the far end of the scale comes France, where Frears[93] concluded in an early study that the Parliament was alone amongst the Nine in its indifference to the transfer of its powers to the EC. The probable reason was domination of European policy by the Presidency, traditionally responsible for foreign affairs with little interference from the Parliament.[94] Change came with Maastricht, which triggered an amendment to Article 88 of the Constitution. This compels the French Government prior to decision by the Council of Ministers to submit all proposed EC legislation to the Parliament. Art 88(4) provides for an advice by each chamber on the content of European acts (widely defined), a procedure which is said to work well.[95] More recently, the Conseil d'Etat has, in a notable break with tradition, copied to the Assembly its legal opinions to government, the significance being that the Conseil is very well informed, as it receives extensive documentation from the EC Commission. A convention has also developed whereby the President now sends to Parliament all documentation, including that relating to the Third Pillar, thus putting the French Parliament on an equal footing with the EP. Both chambers of the French Parliament now have committees, whose reports are debated. Nonetheless Rizzuto[96] concludes that, although unfettered governmental freedom of action is a thing of the past, the new procedures have not added greatly to parliamentary input into policy-making at European level; in other words, they have brought some retrospective accountability but few prospective powers. The problem may be intensified by the split of powers between President and Prime Minister, heightened whenever the outcome of an election produces 'cohabitation'. The outcome of the recent French election demonstrates how dangerous this gap in the lines of communication may be.

(iv) National Parliaments and European Parliament

What has generally been neglected both by national parliaments and the EP is the need for a strategic approach whereby national parliaments combine with the EP, strengthening liaison bodies, such as the Assizes of national parliaments, which has met only once at Rome under the sponsorship of the EP.[97] A Declaration attached to the TEU 'invites the European Parliament and

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[93] Frears, 'The French Parliament and the European Community' 12 *JCMS* (1975) 140.

[94] Rizzuto, 'The French Parliament and the EU: Loosening the Constitutional Straitjacket' 1 *J. of Legislative Studies* (1995) 46.

[95] Maus, 'Les constitutions nationales face au droit européen', 28 *Revue francaise de droit constitutionnel* (1996) 675.

[96] Above note 94.

[97] Westlake, 'The European Parliament, the National Parliaments and the 1996 Intergovernmental Conference' 66 *Political Quarterly* (1995) 59.

the national parliaments to meet as necessary as a Conference of Parliaments'. COSAC, a committee of parliamentary delegations, meets twice-yearly in the country of the Presidency. The EP has also established a service for inter-parliamentary liaison. What characterises inter-parliamentary relationships is largely, however, indifference; what characterises relations between national parliaments and the EP is, in sharp contrast, jealousy. The Treaty of Amsterdam includes new declarations, intended to stiffen the Commission's obligation to work more closely with them. No new machinery is, however, put in place. Thus, while this may mean better access to documentation, the political picture is unlikely to change for the better.

Does the answer lie in a co-ordinated approach? Or is it preferable to extend accountability at national level, tightening the grip of national parliaments on their governments? The Danish Folketing is a commendable experiment and one generally popular with the Danes. Could it be copied? Or would this mean that all dealings, especially in a widened Union, would come to a grinding halt?

The weakness of representative institutions at EU level cannot be overlooked, nor downplayed by recourse to elite or two-tier theories of governance. It presents a genuine threat to the future of the European enterprise. The absence of real accountability and of real representative input into policy-making, undercuts the legitimacy of the EU. As we shall see in the next lecture, the result has been a failure to establish valid political institutions. The period of tacit approval is over; whenever their formal approval is necessary, the 'peoples of Europe' have delivered a verdict of 'not proven'.

III. CITIZENSHIP AND CITIZEN PARTICIPATION

1. Defining Citizenship

The core argument of this paper is that membership of the European Union is capable of eroding hard-won rights of access to the democratic process and that it is of paramount importance for all our futures that this should not be allowed to happen. It might then be thought that to approach participation and access through definitions of citizenship is to digress. But concepts of citizenship necessarily connect to questions of access. 'Civic republicanism' can, for example, scarcely be invoked as an explanation of European constitutionalism[98] if Europe has no citizens. Conversely, the birth of the Common Market as an international organisation justifies the view of Andersen and Burns[99] that legitimacy is provided by representation at national level. (To digress for a moment, at this stage of development, the institutional structure was, perhaps for the first and last time, entirely appropriate for its tasks). This lecture, therefore, approaches the question of participation through varying concepts of citizenship.

It is hardly novel to observe that citizenship is an idea with a powerful resonance stretching back through time to link us with the Greek city-state and gaining in importance during and after the eighteenth-century revolutions. Murchland suggests, however, that it has only just started to attract the attention of modern sociologists and political theorists:[100]

> *The driving forces of modern society - whether economic, technological or nationalistic - do not encourage a very strong sense of citizenship... But we are beginning to realise that this weak sense of citizenship may be at the root of many of our social pathologies.*

The same idea is elaborated in a way which possesses special resonance for citizens of Europe in a study by Wiener and della Sala, worth quoting at length:[101]

> *While very few challenge the basic elements of liberal democratic constitutional thought - that is, limits on the powers of government and the entrenchment of basic*

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[98] Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment' 3 *ELJ* (1997) 105, above, Part One.

[99] Andersen and Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance' in S. Andersen and K. Eliassen, *The European Union: How Democratic Is It?* (1996). Above, Part One.

[100] Murchland, 'The Rigors of Citizenship' 59 *Review of Politics* (1997) 127.

[101] Wiener and della Sala, 'Constitution-making and Citizenship Practice - Bridging the Democratic Gap in the EU?' 35 *JCMS* (1997) 595 at 599.

individual rights - and the consensus around these principles is widespread, constitution-making has proved to be extremely difficult in advanced industrial societies. The roots of this dilemma may rest in the fact that contemporary constitution-building, while finding fertile ground in the eighteenth and nineteenth centuries for the basic institutional and structural features that will "constitute" a polity, may not have found a basis for understanding how individuals come together and create a sense of belonging, demand and recognise reciprocal rights and look for ways to gain access to these rights.

It is on the construction of this sense of 'belonging' that this lecture focusses.

Let us start with definition. Citizenship is a term with a multiplicity of meanings. The idea comprises a variable cluster of rights, obligations and meanings which differ in different communities and cultures and at different historical periods. Simple definitions of citizenship might be merely 'participation in or membership of a community'[102] or as comprising a 'bundle of rights and duties relating to the individual as a member of a political community' [103]. In short, the central core of the notion embodies community, with allegiance, cultural and personal identity and a sense of belonging, all stressed. Citizenship implies equality, but at first solely in the limited context of civil and political rights.

Access to the political process has been a central distinguishing characteristic of citizenship in western political thought since the seventeenth century. The fight for universal access to the political process raged throughout the nineteenth century. Consequently, in several continental constitutions, including that of France, this type of political citizenship receives a protected constitutional status. Although they are today in principle secured in the Member States, forming part of the consensus over liberal democracy to which Wiener and della Sala make reference, in some countries which may in the near future seek membership of the European Union, full political rights have only recently become a reality.

At the time of accession to the TEU, which for the first time introduced the concept of EU citizenship, a uniform right to vote was projected. In the event, TEU Art.8 permits EU citizens, defined as citizens of any Member State, to vote in the State in which they are resident but only in EU and local elections. Even this limited change meant that ratification required constitutional amendment in some Member States.[104] Moreover, the EP has not yet been able to agree a uniform method of election, as it was required to do by

[102] J. Barbalet, *Citizenship* (1988) at 2.

[103] B. Turner, *Citizenship and Social Theory* (1993) at ix.

[104] It was this requirement which was cleverly used by the French Parliament to secure additional powers over EC policy (above).

EC Art 138(3). Urged on by a Treaty amendment agreed at Amsterdam, requiring the EP to 'draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States', progress can perhaps be perceived. The Institutional Affairs Committee of the EP has recently adopted a report on electoral procedure. This calls for common principles throughout Member States, based on proportional representation and territorial constituencies, while leaving the precise arrangements to the State.

Although the celebrated Maastricht decision of the German Constitutional Court directly concerned the power to delegate German sovereignty, unease concerning citizenship lent emotional depth to the court's judgement in that fascinating case.[105] The angle taken by the German Constitutional Court linked sovereignty, legitimacy and citizenship, focusing on the constitutionality of devolving sovereignty to a trans-national entity where the notion of citizenship was in democratic terms 'thin'. In the context of these lectures, a subtext could be written. In the European institutional framework, where access to the political process is difficult for individuals, cession of further competences to the Union inevitably results in dimunition of the civil and political rights of citizens of the Member States.

Limited though it was to a handful of miscellaneous political rights - the right to petition the European Parliament or complain to the new European Ombudsman - the Maastricht citizenship provision (TEU Art. 8) did help to spark off a timely intellectual debate on the meaning of EU citizenship.[106] Since Maastricht therefore, citizenship has been high on both political and academic agendas; academics are also free to speculate. Lodge[107] sees the 'democracy deficit' debate as subtly shifting ground, since 1992 from a focus on direct election to encompass transparency and citizen access to the policymaking process.[108]

Politicians, on the other hand, need consensus for the implementation of

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[105] BVerfGE 89, 155. The case is reported in English as *Brunner v. European Union Treaty* [1994] 1 CMLR 57. See also, Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision?' 1 *ELJ* (1995) 219.

[106] From the copious literature, I would single out as most relevant: Preuss, 'Problems of a Concept of European Citizenship' 3 *ELJ* (1995) 267; Chryssochoou, 'Europe's Could-be Demos: Recasting the Debate' 19 *W. European Politics* (1996) 787; Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' 22 *EL Rev.* 554 (1997).

[107] Lodge, 'The European Parliament' in S. Andersen and K. Eliassen, *The European Union: How Democratic Is It?* (1996) at 188.

[108] e.g., Curtin, 'Betwixt and Between: Democracy and Transparency in the Governance of the European Union' in D. Winter et al., *Reforming the Treaty on European Union - The Legal Debate* (1996).

their proposals. Though the idea of European citizenship met an enthusiastic response from the European Parliament and Commission, [109] the Member States were less than keen. In the Treaty of Amsterdam, they took the opportunity to re-assert their sovereignty. The 'add on' concept of European citizenship is introduced by amended Art 8(1), which states that European citizenship 'shall complement and not replace national citizenship'. No further citizenship rights were introduced.

2. Outsiders, Insiders: Citizenship and Nationality

A primary use of the concept of citizenship is to define those who are, and those who are not, members of a given society, a negative and minimalist definition with which only lawyers are likely to feel wholly comfortable. This basic account of citizenship has been used throughout the centuries to define who is and who is not entitled to enter the country's boundaries; effectively erecting a protected enclosure around insiders, separating them from, and shutting out, outsiders. International law has, for example, defined nationality as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties' [110]. There is, however, a clear relationship between this passage and definitions of citizenship with which we have been working, demonstrating just how far the two ideas have become co-terminous. There is indeed a distinct danger that, in the EU, citizenship is emerging as an exclusive concept focussed on rights of entry and residence.[111]

Not only does this limited definition of citizenship in terms of nationality have the effect of physically restricting access to Union territory, but it has the equally significant effect of defining who shall not have access to political power within it; in other words, citizenship is used to deny these groups 'voice'. Hervey [112] believes that:

> *Contrary to the rhetoric of the institutions of the European Union, the social protections concerning free movement of individuals contained in Community legal provisions are not universally applicable rights to or guarantees of equal treatment. Rather the relevant provisioms of Community law, as interpreted by the institutions, and particularly by the Court, are based upon presumptions which further marginalise members of groups already neglected by national legal systems, and who are excluded from protection at European Union level.*

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[109] de Burca, 'The Quest for Legitimacy in the European Union' 59 *MLR* (1996) 349.

[110] ICJ Reports, 1955 at 4.

[111] O'Keefe 'The Emergence of a European Immigration Policy' 20 *EL Rev.* (1995) 20.

[112] Hervey, 'Migrant workers and their families in the European Union: the pervasive market ideology of Community law' in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* (1995).

Hervey includes women with racial minorities as 'marginalized', 'peripheral' or 'minority' groups. In the European context, the latter are far the more important. Women already have protection at Treaty level (EC Art 119) - at least in respect of their economic rights - and fall within the 'four freedoms'. In sharp distinction to gender protection, the EEC Treaty made no reference to race. A civil liberties worker, recording in 1995 the rising levels of 'Europe's ancient disease of anti-Semitism', growing hostility to gypsies and other minority ethnic groups and general animosity to immigrants, asylum-seekers and other outsiders, concluded [113] 'Whatever the cause, few would now deny that more needs to be done if the Union is to preserve its claim to uphold the fundamental principles of human rights'.

The Third Pillar structure authorised by the Maastricht Treaty diminished accountability and provided few opportunities for participation in policy-making. TEU Art. K3 2 authorised joint initiatives, joint positions and joint actions and allowed measures of implementation to be adopted by the Council, though by a two-thirds majority. At European level, accountability was minimal; at national level, it was seriously eroded. The accessible Commission, sympathetic to anti-racist policies, did not service the Third Pillar, though it may be represented and participate in discussion. TEU Art K6 also provided for consultation with the EP. This may have helped to bring to the notice of the cooperating goverments unwelcome views which they would not otherwise have received and to obviate difficulties of lobbying an amorphous 'body' with no proper institutional structure. The EP undoubtedly helped also to stimulate pressure for the new position on racism in the Treaty of Amsterdam. Generally, however, policy-making in these key areas was left to national governments and to supporting committees of national civil servants inadequately supervised by their political masters.[114] Yet, despite the voluntary nature of the Third Pillar, the argument was often put to national parliaments that policy could not be altered because it emanated from Europe and was, by implication, 'imposed' on the national government which would otherwise wish to act more liberally.

Formal recognition of the need for racial equality had to await the 1997 Amsterdam Treaty and then fell far short of the recognition at Treaty level for which civil liberties groups had been asking.[115] The Treaty includes a specific

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[113] M. Spenser, *States of Injustice* (1995) at 128.

[114] For comment on the previous arrangements, see Guild, 'The Constitutional Consequences of Lawmaking in the Third Pillar of the European Union' in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (1998). On consultation, see also Case C-392/95 *Parliament v Council* (10 June 1997), where the Parliament's right to be consulted on regulations concerning visas taken under EC Art 100c was upheld.

[115] See Justice, The Union divided, Race discrimination and third country nationals in the

reference to discrimination based on 'racial or ethnic origin' and, by a new Art K1, establishes the prevention of racism and xenophobia within 'an area of freedom, security and justice' as a Treaty objective. The Council, acting unanimously and after consultation with the EP, is permitted to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' (EC new Art 6a). Probably more important, the Commission is authorised to prepare initiatives to combat racism and xenophobia. The significance of the new procedures lies in the fact that the Commission has tended to speak strongly against racism, xenophobia and anti-semitism and has reminded its own officials 'to focus on the problems of racism and xenophobia in the day-to-day devlopment of their policies'.[116] So too has the EP. Indeed, following Amsterdam, the EP passed a new resolution[117] which takes into its Preamble reference to the EU's previous action against racism and states that the EU should itself 'set a convincing example in the fight against racism and xenophobia'. The Resolution calls on the Commission for a strong action programme under TEU Title VI, to include if possible a European Charter of Immigrants' Rights. The EP also took the opportunity to distance itself firmly from 'politicians and parties that make racist and xenophobic statements at either national or European level.'

Finally, the Treaty brings under EU competence many Third Pillar matters, though with important reservations on policymaking at EU level and with notable opt-outs on immigration matters for Ireland and the United Kingdom. All that can be said is that clarification of competence and greater transparency is likely to help NGOs and those representing third-party nationals to participate in policy-making. That immigrants will be able to voice their own concerns is less likely.

3. The First Phase: Economic and Social Citizenship

Citizenship in the EC developed primarily as a bundle of economic rights, a reality reflected in the Treaty freedoms (freedom of movement, establishment, services and capital, EC Arts. 48, 52, 58, 67). For Everson,[118] citizen participation in the Community is at heart no more than participation in the market, a peculiarly 'thin' notion of citizenship. Everson goes on to argue that the 'fatal legacy' of market citizenship has been to divest citizenship of

European Union (1997).

[116] See the earlier Commission document, Communication from the Commission on racism, xenophobia and anti-semitism and proposal for a Council Directive designing 1997 as European Year Against Racism, COM(95) 653.

[117] Resolution on racism, xenophobia and anti-Semitism and the results of the European Year against Racism (1997) PE 266/057 adopted 29 January 1998.

[118] Everson, The Legacy of the Market Citizen' in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (1995).

activism. The inherently passive idea of market or economic citizenship is, in a national setting, always subsidiary to that of the active, participatory, political citizen. European citizenship, on the other hand, is infected with a fatal schizophrenia. The participatory, political function of citizenship is situated at national level, where the citizen owes allegiance; only the market or consumer function operates at EU level.

Everson's vision of market citizenship as essentially passive could, however, be challenged. Perhaps the 'fatal legacy' of EC market citizenship lies less in inherent, conceptual weakness than in failure to 'thicken' the notion? In the ideology of 'New Right' politics, the citizen is defined in economic terms as taxpayer and consumer. True, this could be seen as a 'thin', passive conception of citizenship, transmuting citizens into 'consumers' but this would be to underplay the element of genuine empowerment which underlies the Citizen's Charter as propounded by the Conservative Government of John Major in the United Kingdom.[119] The Charter is designed not only to raise the standards of delivery of public services but also to empower the citizen to take action when the service delivered is substandard. It has reinforced the idea that choice is the best spur to quality improvement; that in consequence information about government is a citizen-right and a government-obligation; and that the users of services are to be consulted about the level and nature of those services. In one sense then, the Charter gives market citizens 'Voice', even if we should be careful not to confuse this with participation.

On the other hand, the close link between the Charter and market ideology fatally limits its ambit. The Charter sets out merely to correct market failures by providing remedies for indivduals 'who are forced to be loyal customers to public institutions over which they have very little direct control.[120]' The Charter empowers customers and managers not citizens. Thus it can be seen as a legitimating device designed to pass economic citizenship off as political citizenship.

Perhaps Everson also underplays the social aspect of economic citizenship. Here T.H. Marshall's post-war work on citizenship is of relevance. To Marshall goes the credit for articulating the idea that political citizenshp must be extended to embrace social rights. Defining citizenship as full membership of a community, Marshall adds that those who possess the status are equal with respect to the rights and duties associated with it. This adds to the classic civil and political rights a variable package of cultural, educational

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[119] See for further discussion, C. Harlow and R. Rawlings, *Law and Administration* (1997) 2nd. edn., Chap. 5; Barron and Scott, 'The Citizens' Charter Programme' 55 *MLR* (1992) 526.

[120] Hambleton & Hoggett, 'Rethinking consumerism in the public service' 3 *Consumer Policy Review* (1993) 103, 115.

and welfare rights realised in modern societies through the social services and educational system.[121] An alternative way to conceptualise Marshall's proposition is to see social rights as a necessary pre-condition to the exercise of political rights (citizenship); in other words, gross material inequality (e.g., illiteracy or poverty) effectively bars participation in political activities.

Marshall's insight can be related to the expansion of the EU into social policy-making, allowing this development to be explained in two rather different ways. On the one hand, it could be seen as a sign of commitment to Marshall's new social rights, which do today receive general recognition at a fairly basic level in the MSS of the EU. On the other, it might represent a narrower commitment to the 'level playing field' of the Single Market, with social rights viewed as burdens on industry to be as far as possible equalised.[122] To exemplify, we might read EC Art 119 as providing a state-guaranteed social right of equal payment. Again, we might - and feminist theorists certainly would - read it as providing the means of access to political rights by providing the means of political participation. Or we might read it as directly providing a civil right of citizenship by enhancing the status of women as partners in the workplace. Finally, we might read it as a right of economic citizenship linked to 'the level playing field' ideal of the Single Market, a less resonant interpretation though undoubtedly the one which the Article envisaged.

In the EU, the clear link between economic and social citizenship is reflected positively in the concept of 'social partnership' between management and labour. We need to question, however, whether the institutions for making partnership operational are adequate. First in time came the paternalist Economic and Social Committee (EcoSoc). Modelled on national machinery to institutionalise interest representation, EcoSoc consists of a mix of workers, employers, professionals and consumers, and advises Commission and Council on economic and social matters.[123] Its reason for existence is exchange of information: 'to increase democratic accountability, make Community decision-making more transparent, and familiarise the economic and social sectors with the Council's legislative output'. Despite determined efforts to become the Voice for consumers, the EcoSoc has in practice been superseded by the EP and is today 'an obscure, relatively powerless body' whose reports 'sit, unread, in Council meetings'.[124]

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[121] T.H. Marshall, *Citizenship and Social Class* (1950) at 71-4.

[122] E. Meehan, *Citizenship and the European Community* (1993) at 69.

[123] Obradovic, 'Accountability of Interest Groups in the Union Lawmaking Process' in P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (1998).

[124] D. Dinan, Ever Closer Union? An Introduction to the European Community (1994) at 312.

The advent of the Social Charter in the TEU has shifted attention to a far more significant development in EC lawmaking. Art. 4 of the Agreement on Social Policy provides for the 'social partners' to be consulted by the Commission on social policy. Soft law, in the shape of agreements between the social partners can be implemented either by the Council or at national level. Arguably, this is a real if limited start to a form of participatory democracy in which workers acquire Voice in social policymaking.[125]

4. The Second Phase: Civil and Political Citizenship

Political citizenship may be narrowly defined in terms of voting rights, the sense in which it was first construed in debates concerning democracy deficit or legitimacy. Everything points, however, to the fact that this is precisely the category of voting right in which EU citizens show least interest. True, the right to vote is exercised, with less enthusiasm in some countries than others, but everywhere the data suggests the low salience of EP elections. Average turnout across the Union is 58.5%, falling steadily from 65% in 1979 to 62.8% in 1989 [126]. In the UK, where voting is not obligatory, only 36.4% of the electorate voted in 1994, a figure nearer to local elections than the average of over 70% at national elections [127]. In Ireland, when in 1989 an EP election coincided with a national election, the turnout improved by 20%.[128] In West Germany, turnout fell from 65.7% in the first direct election in 1979, to 62.3% in 1989, to 59.5% in 1994. In France in 1994, 47.3% of the electorate did not vote. Turnout is high only when voting is compulsory, takes place on a Sunday, or 'is translated into seats with a high degree of proportionality'.[129] Voters seem to sense that political power is not really at stake; nation rather than party determines voters' policy preferences.[130]

Statistical indices can be fleshed out by a closer look at the development of trans-European political parties. Even before direct elections had been

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[125] Fredman, 'Social Law in the European Union: The Impact of the Lawmaking Process' in P. Craig and C. Harlow (eds) *Lawmaking in the European Union* (1998).

[126] Franklin, van der Eijk and Oppenheim, 'The institutional context: turnout' in C. van der Eijk, M. Franklin et al., *Choosing Europe? The European electorate and national political processes* (1996). See also Smith, 'The 1994 European Elections: Twelve into One Won't Go', 18 *W. European Politics* (1995) 199. (It must be remembered that the countries participating differ).

[127] The 1945-92 figures are tabled in B. Jones et al., *Politics UK* 2nd. edn. (1994) at 170. Compare the turnout of 77.8% in the 1992 General Election with the figure in the text.

[128] van der Eijk, 'What Voters Teach Us About Europe-Wide Elections: What Europe-Wide Elections Teach Us About Voters', 15 *Electoral Studies* (1996) at 149.

[129] Franklin et al., above note 126.

[130] Thomassen and Schmitt, 'Policy representation' 32 *European J. of Political Research* (1997) 165 at 176.

introduced, Marquand[131] was saying that the chances of moving beyond a 'Europe of the nations' depended very much on the emergence of European political parties. We are still awaiting this outcome nearly twenty years later. Hix and Lord[132] measure European party democracy against five basic critieria:

(i) organisational cohesion,
(ii) office-seeking, or the quest for political power through office
(iii) policy/ideological competition
(iv) electoral legitimacy or choice of office-holders thorough party competition and
(v) accountability through party policy and electoral platforms.

Warning that they are measuring a particular form of participation in democracy rather than the degree of democracy, they nonetheless conclude that the position of European level political parties is still 'extremely weak in comparison to parties in most democratic systems'.

Hix and Lord[133] argue too that the crisis has actually deepened. The election of the EP has done 'little to prevent the development of a new and much deeper wave of scepticism towards European integration'. The so-called 'permissive consensus', legitimating bargains between Europe's governmental elites, has come to 'an abrupt end'. In Denmark, anti-Maastricht parties won the 1992 ratification referendum, though the 'Yes' vote scraped home the next year, signalling Exit rather than Voice.[134] In France, in the 1994 Euro-election, anti-Maastricht lists gained almost 40% of the vote. In the 1994 elections in the UK, Labour swept the board, leaving a Conservative national Government virtually shorn of European representation - a prime example of the rule that high salience national politics dictate outcomes in Euro-elections.[135]

The usual explanation for low salience is institutional; the elections do not (as in the US presidential election) determine who governs. In European terms, elections do not allow the people to participate in policymaking. Another explanation is equally plausible. National leaders can ignore popular opinion on Europe in a way impossible in national politics; because of the weakness of Euro-politics, European issues are never properly put to the people. In a study

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[131] Marquand 'Towards a Europe of the Parties', *Political Quarterly* (1978) 425.
[132] S. Hix and C. Lord, *Political Parties in the European Union* (1997) at 204-213.
[133] ibid. at 198-9.
[134] Siune and Svensson, 'The Danes and the Maastricht Treaty: The Danish EC Referendum of June 1992' 12 *Electoral Studies* (1993) 99. In 1998, the Danish electorate voted in a referendum to ratify the Treaty of Amsterdam, but about 45% voted against.
[135] Obradovic, 'Policy Legitimacy and the European Union' 34 *JCMS* (1996) 191. Labour went on to win the 1997 national General Election overwhelmingly.

the 1994 elections, Boyce[136] noted that the media had been blind to the 'continuous, close entanglement' between national and European politics and policy-making and had in consequence reduced the European elections to 'little more than national opinion polls'. Nevertheless Boyce warns against equating party weakness with parliamentary weakness, believing the EP to have become 'increasingly assertive and politically astute'. Paradoxically, while popular support proves insufficient to legitimate either the institutional structure of the EU or the EP as a representative body, the EP is beginning to find its voice as popular representative. From such acorns, great oaks can grow.

5. Lobbying and interest representation

The political deficit might be less important if other forms of democratic participation flourished at EU level. As Richardson[137] reminds us:

> *In a sense, citizens are consumers of participation or activism and a market has developed to meet their needs. Yet one of the fundamental assumptions of any society which claims to be a democracy is that its citizens are active participants in the process of governing. Indeed, liberal democratic theory argues that the active participation of citizens is not only a good in itself, but it is also functional to the success of a liberal democracy. Translating this ambition into a reality in modern democracies is, however, exceptionally difficult. For the ambition to be realised there needs to be a set of readily available opportunity structures for citizen participation, matched by a set of citizen attitudes towards participation.*

Verba, Nie and Kim[138] define participation to encompass 'all those activities by private citizens that are more or less directly aimed at influencing the selection of government personnel and/or the decisions they make'. They go on to criticise too narrow a focus on voting (hence by implication on political parties), suggesting that:

> *different modes of political activity represent significantly different ways in which citizens attempt to influence the government - different in terms of the motivations of the acts, different in terms of the processes that bring people to the activity, different in terms of the consequences of the acts.*

In addition to voting and campaigning, categories which could be broadened out to include all forms of direct participation through political parties, Verba, Nie and Kim list as political activity (i) citizen-initiated contacts, in the sense of

[136] Boyce, 'The June 1994 Elections and the Politics of the European Parliament' *Parliamentary Affairs* (1994) 141 at 156.

[137] Richardson, 'The Market for Political Activism: Interest Groups as a Challenge To Political Parties' 18(1) *W. European Politics* (1995) 116.

[138] S. Verba, Nie and Kim, *The Modes of Democratic Participation: A Cross-National Comparison* (1971).

individual initiatives to contact an official or parliamentary representative and (ii) cooperative activity with other citizens, either (a) by working with or forming informal groups to influence government officials or (b) by working through formal organisations for the same purpose.

For some years, social scientist have realised[139] that both heads of activity were well developed in the EU, though doubts must exist as to how 'democratic' or representative they really are. Brussels has been described as a lobbyists' city, a paradise for self-interested political lobbying, dominated by multi-national business interests and professional lobbyists.[140] Research confirms[141] the commonsense conclusion that 'political voice' is unequal and often biased; greater equality in participation would yield a difference in the messages transmitted to policymakers and political actors who, in any event, are inclined to hear only what they want to hear.

The dominance of business in European policy-making has to be admitted. While governments and the Council are pleased to regard themselves as 'sovereign' decision-makers, they actually operate within severe constraints.[142] Business, and especially big business, is one of those constraints and adds to the pressure which its corporate voice can already exercise through political channels, a less obviously political form of lobbying. This is done by 'providing analysis and advice, by posing questions and influencing the general climate of opinion'.[143] Some writers, such as Strange[144] or Schmidt,[145] go so far as to describe post-modernist societies as a triangular, corporatist elite, with states, international institutions and international business as its sole participants. This analysis provides simultaneously a justification for the Andersen and Burns analysis[146] of two-tiered European democracy and a strong argument against the model.

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[139] Harlow, 'A Community of Interests? Making Use of European Law' 55 *Modern Law Review* (1992) 331; S. Mazey and J. Richardson (eds.), *The European Lobbying Process* (1993).

[140] W. Grant, *Pressure Groups, Politics and Democracy in Britain* (1995).

[141] Especially, S. Verba, K. Schozman, H. Brady, *Voice and Equality: Civic Voluntarism in American Politics* (1995).

[142] Without digressing into discussion of neo-functionalism or neo-institutionalism, which dominated the theorising of early EC politics (see, Hix, 'The Study of the European Community: The Challenge to Comparative Politics' 17(1) *W. European Politics* (1994) 1), this is a point they tend to overlook.

[143] Cowles, 'The European Round Table of Industrialists: The Strategic Player in European Affairs' in J. Greenwood (ed.) *European Casebook on Business Alliances* (1995).

[144] Strange, 'The Defective State' 124 *Daedalus* 55. See also, S. Strange, *The Retreat of the State, The Diffusion of Power in the World Economy* (1996).

[145] Schmidt, 'The New World Order Inc: The Rise of Business and the Decline of the Nation-State' 124 *Daedalus* (1995) 75.

[146] Above, Part One.

The primary way for citizens to mobilise themselves against this corporatist alliance is by banding together into public interest or social action groups. Some of these receive public funding and, at European level, are recognised and encouraged by the Commission. Greenwood[147] tells us, for example, that 59% of European-level public-interest groups which he studied (a total of 45) received European funding. They may also receive recognition in other ways e.g., where consumer or environmental groups receive standing rights for purposes of litigation[148] or in terms of placements by the Commission on advisory committees.[149] The function of public interest groups is to ensure that corporate interests and the 'social partners' (namely, business, employers and unions) do not monopolise access to the policymaking process. Their success is debatable, even if the most complete evaluation[150] describes them as 'far from powerless in European public affairs' and notes a developing 'culture within the Commission of deliberately seeking out the views of public-interest groups, and of attempting to create a level playing field for interest representation between public, and business, interests'. This has resulted in the publication of a code of practice[151] for dealings between the Commission and interest groups, with a view to advancing transparency and defusing charges of lobbying and even corruption. Notably, the EP is also beginning to express concern about lobbyists and lobbying. Three Reports (the Galle, Nordmann and Ford Reports) have already been made urging the EP to regulate the conduct of its members and relations with interested parties. Tentatively, steps towards a long overdue regulation have been taken.[152] Approaching the problem from the reverse side, the EP is also improving transparency of Members' interests.[153]

Perhaps we are moving towards Richardson's picture of political parties in terminal decline, to be replaced by single issue and public interest groups and social movements, which could, in international and trans-national fora, ultimately prove equally effective. But could they ever become equally democratic? Equality and transparency are both at present problematic. Until we can be confident that informal interest- representation will not degenerate into lobbying, we are right to be cautious.

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[147] J. Greenwood, Representing Interests in the European Union (1997) at 177.

[148] Harlow, 'Towards a Theory of Access for the European Court of Justice' 12 *Yearbook of European Law* (1992) 213.

[149] Buitendijk and van Schendelen, 'Brussels advisory committees: a channel for influence?' 20 *EL Rev.* (1995) 37.

[150] Greenwood, above note 147 at 178-9.

[151] European Commission, An Open and Structured Dialogue Between the Commission and Special Interest Groups SEC (92) 2272.

[152] Greenwood, above note 147 at 80-100.

[153] A Register of Members' Interests was set up by a Resolution of 17 July 1996 and is to be tightened following the Wijsenbeek Report, adopted 26 May 1998 by the Committee on Rules of Procedure.

6. Conditions for Participation

Many years ago, at the height of the vogue for citizen-participation in land use planning, Arnstein, an American town planner, devised[154] a typology, or eight-rung 'ladder of citizen participation', exposing the reality of much participation as a placebo. Rungs 3 (informing) and 4 (consulting) of Arnstein's ladder are labelled 'degrees of tokenism' on the ground that citizens 'may indeed hear and be heard. But under these conditions they lack the power to insure that their voices will be heeded by the powerful'. Whether in the EU these rungs have yet to be reached or whether we remain on Arnstein's lowest rungs of (1) therapy and (2) manipulation, when power-holders use information to 'educate' or 'cure' those wishing to participate, is an open question.

Thus, in her work on European policymaking, Héritier stresses the anxiety of the Commission to build legitimacy and support through inclusion of public interest groups, pointing to the way in which recent environmental legislation:[155]

> *includes a clause guaranteeing the right of public access to information. By offering interested citizens and organisations information about what Europe-induced policy activities imply, the Commission is seeking to bridge the gap between the 'Brussels bureaucracy' and European citizens. It is hoped that having a better understanding of, and insight into, these policies will encourage the European public to support them... [The objective of] active involvement of associations in drafting European policy and implementation... is to avoid conflicts by forming a broad consensus prior to embarking upon legislation and to sustain legislation once it is in place...*

Who is using whom? And is this tokenism or manipulation? Do 'interested citizens' gain access to, and succeed in influencing, the policy-making process, or are they 'allowed to hear and be heard', yet their voice goes unheeded?

Even in the generally well-resourced area of environmental politics, one notes a grave imbalance of resources. When the first European environmental group, the European Environmental Bureau, started up in 1974, it was a tiny operation and networking was at first very limited.[156] The Commission provided funding, and its clever role in stimulating at one and the same time a European environmental policy based on supposed public demand and evidence

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[154] Arnstein, 'A Ladder of Citizen Participation' 35 *J. of the American Institute of Planners* (1969) 216.

[155] Héritier, 'Policymaking by subterfuge: interest accomodation, innovation and substitute democratic legitimation in Europe - perspectives from distinctive policy areas' 4 *JEPP* (1997) 171 at 180.

[156] Rucht, 'Think globally, act locally? Needs forms and problems of cross-national cooperation among environmental groups' in D. Lieferrink, P. Lowe and A. Mohl (eds) *European Integration and Environmental Policy* (1993).

light of Héritier's findings. Today the European scene has changed with the advent of the big players, such as Greenpeace, Friends of the Earth or the World Wildlife Fund. These world players possess a greater degree of independence. Even local environmental groups (complaining, for example, about breaches of the Bathing Water Directives at one single site) are more sophisticated. Instructed by the Commission on tactics, they are now well-versed in playing the EU off against national governments and vice versa, utilising every available forum. Environmental groups routinely instruct their members to use the Commission's published complaints procedure[157] to pressurise the Commission into preferring infringement proceedings under EC Art 169. They have started to use the Court to gain access to Commission policy documents and decisions.[158] In some states, litigation strategies directed at national governments are well-developed.[159] Again, the first Annual Reports of the European Ombudsman list two group complaints from local British groups seeking to use the new institution against planning decisions taken at national level.[160] Questions remain, however, about the real level of influence.

Transparency

In a powerful plea for greater transparency in the EU, Curtin argues that, without an adequate flow of information, even the first stages of democracy become meaningless:[161]

> *It is regarded as essential to the democratic process that individuals are able to understand the decision-making process and the means by which the decision-makers have reached their conclusions in order effectively to evaluate governmental policies and actions and to able to choose their representative intelligently. An equally important objective of openness in democratic government is to enhance public confidence in government.*

Since Maastricht, the European elite has for the first time admitted transparency as 'one of the primary means of engaging the interest and loyalty of the people in the European Union'. The discourse is in terms of 'empowerment', yet the primary objective seems to be the purchase of 'loyalty' to the elite-led agenda for the European enterprise. On Arnstein's ladder, does this concession represent 'manipulation' or 'therapy' rather than true dialogue?

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[157] COM (96) 600, 1996 OJ 303/1.

[158] *World Wildlife Fund v Commission* [1997] 2 CMLR 55. And see below.

[159] C. Harlow and R. Rawlings, *Pressure Through Law* (1992) at 269-289.

[160] See Cases *132/21.9.95/AH/EN v Commission re Newbury Bypass*, Annual Report of the European Ombudsman for 1996 at 66-7.

[161] Curtin, 'Betwixt and Between: Democracy and Transparency in the Governance of the European Union' in D. Winter et al., *Reforming the Treaty on European Union - The Legal Debate* (1996) at 95-6.

And even at these lowly levels of participation, the EU falls short. Only the proceedings of the EP are sufficiently open, while the true legislator (the Council) legislates in virtual secrecy. A Declaration on Transparency (No. 17) was annexed to the TEU and followed at the Edinburgh Summit by further resolutions.[162] Subsequently, the Commission published a Code of Conduct on public access.[163] This gradual progression towards openness was extended at Amsterdam. The new TEU Art. 1 requires that EU decisions be taken as openly as possible. A new EC Art 255 gives citizens and others a right to EP Council and Commission documents, though subject to important limits. Moreover, this is 'work in progress': all the institutions are under an obligation to work towards higher standards within the next few years.[164] This is important, as the Court has ruled[165] that, until general rules are adopted by the legislature, access rests on institutional 'powers of internal organisation'. Given what has already been said about access to policy-making in Third Pillar matters - still significant in justice and policing and, to a lesser extent, in immigration - it is crucial that the transparency obligation should be extended to these traditionally closed areas.

The good faith of the Council was tested and exposed immediately after Edinburgh by a journalist who applied to see Council documents and was promptly refused on the ground that they did not fall within the class of document which had to be released. The Tribunal of First Instance (TFI) demonstrated that legal action can buttress democracy by ruling against the Council on the ground that there had been a failure adequately to balance the citizen's interest in gaining access against the institutions' interest in confidentiality.[166] This was, however, a tiny victory. Another tiny victory was won in Netherlands v Council,[167] where somewhat cryptically the Court ruled that the institutions must 'take measures in order to ensure their internal operation in conformity with the interests of good administration'.

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[162] Piris, 'After Maastricht, are the Community Institutions More Efficacious, More Democratic and More Transparent?' 19 *EL Rev.* (1994) 449 at 470-6.

[163] See, Resolutions on the compulsory publication of information by the EC, OJ C 1984, 172/176 and OJ C 1988, 49/174;
Inter-Government Agreements on Democracy, Transparency and Subsidiarity, EC Bull 12-1992, p. 7 (11/12 Dec 1992); EP Resolution A3 0356/93; A7 Council Decision 93/731/EC, OJ 1993 L 340, p. 43; Code of Conduct concerning access to documents (6 Dec 1993, Council and Commission) OJ 1993 L 340, p.41; Commission Decision, OJ L46/58 (18 Feb 1994). For the role of the Netherlands and Denmark in these developments, see Curtin note 161.

[164] See, V. Deckmyn and I. Thompson, *Openness and Transparency in the European Union* (1998).

[165] Case C-68/94 *Netherlands v Council* [1996] ECR I-2169.

[166] Case T-194/94 *Carvel and Guardian Newspapers* [1995] ECR II-2769.

[167] Case C58/94 *Netherlands v Council* [1996] ECR I-2169.

An 'own-intiative inquiry' opened by the European Ombudsman in June 1996, covering not only the institutions but may other important EU actors, including agencies, the European Investment Bank and Monetary Institute, the ECoSoc and the Committee of the Regions, followed this ruling up. The inquiry was designed to discover the existence and public availability of rules governing access by the public to documents and found that every institution, with the single exception of the ECJ (which is currently examining its practice), had adopted rules on access and that these bore a remarkable similarity to those already promulgated by the Council and Commission. To the Ombudsman, registers of documents seemed the best way to inform the public and secure consistent access.

Ideals of 'participatory democracy' are undoubtedly beginning to fire the imagination of EU citizens, leaking in from national politics and fuelling new demands for transparency and rights of access to information[168] and the present situation is unlikely to satisfy the many supporters of civic republicanism or participatory democracy.[169] This time the goal is the top rungs of Arnstein's ladder.[170]. These carry increased degrees of citizen power and 'decision-making clout'. Partnership (6) is defined as allowing negotiation and 'trade off' with power holders. Social action and public interest groups, we have suggested, already have one foot on this rung though, twenty years after the idealistic Arnstein wrote, democratic credentials of 'trade off' are in doubt. At the top of Arnstein's ladder comes full delegation of powers (7), which gives citizens full control over decision-making. No doubt he had local politics in mind. In the European context, subsidiarity and regionalism might be employed in just such a fashion. As has been indicated, however, it seems unlikely that the 'Europe of the Regions' will materialise.

Suggestions have recently been put forward[171] for a 'New Age' deepening of citizen interest and input. A European legislative ballot to allow direct voting on certain citizen inspired legislative initiatives, at first at election time, later more generally, has been proposed. This would be strengthened by a 'European public square', enhancing transparency by placing on the Internet full details of the decision-making process for every EU project. A 'private forum' for meaningful exchanges between 'Community Institutions and certain private

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[168] See, Curtin and Mejers, 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?' 32 *CML Rev.* (1995) 390.

[169] Such as Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment' 3 *ELJ* (1997) 105. Above, Part One.

[170] Arnstein, above note 154.

[171] Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals' 32 *EL Rev.* (1997) 150.

participate and discuss EU policies amongst themselves and (implicitly) with the institutions, would both be included. But delegated decision-making, the top rung of Arnstein's ladder (7), in which 'have-not citizens obtain the majority of decision-making seats, or full managerial power' is not even on the agenda. Present attitudes, institutional structures, and even objectives, suggest that it never will be.

Shaw has described citizenship rights as:[172]

> *part of a set of political processes whereby EU citizens themselves, through their practices as citizens, build the type of Community of which they wish to be members. It offers opportunities for developing the values which citizens may wish to see as the foundation stone of that polity.*

Far from reaching this desirable goal, the European enterprise has brought a steady disempowerment of citizens. Power has steadily leached away to a level where national parliaments cannot master it and citizen input becomes difficult. A variant of corporatism, centred on the Council, the Commission and its experts and interested lobbyists typically representing big business, has materialized. As yet, no representative bodies have emerged with the strength to combat it.

[172] Shaw, 'European Union Citizenship: the IGC and Beyond' 3 *European Public Law* (1997) 413 at 438.

IV. PARTICIPATORY DEMOCRACY AND COURTS

There is an important area of overlap between citizenship and the Rule of Law, in that access to courts and equality before the law are important rights of citizenship often listed as a fundamental human right.[173] And, just as political and civic citizenship focus on formal equality (e.g., universal suffrage), so formal interpretations of the Rule of Law principle protect procedural rights. Formalist interpretations of the Rule of Law principle do not deal in substantive equality; they do not seek to go behind the simple mantra of equality before the law to insist on equality of arms.[174] In other words, formalists are not interested in law's functional dimension; access to justice in the sense of equal access to legal services[175] is not on the formalist agenda. The Rule of Law concept serves the important function of dividing law from the political sphere. In this way the maxim helps to sustain the myth of law's autonomy central to formalist, legal theory. Here again, formalists do not seek to go behind the veil of neutrality[176] to evaluate the role which law actually plays in political affairs.

Without denying the importance of this dual role for western constitutional thought, I shall argue here that the right of access to courts provides an important avenue of access to the political process. This inevitably raises the question whether courts form part of the political process or, as lawyers prefer to believe, merely offer procedural supports to democracy.[177]

1. Courts and Politics

The twin questions whether courts are part of the political machinery[178] and thus provide a forum for political participation[179] is very much a late twentieth-century question. By this, I do not mean that the question has never been asked before but that our generation seems to have become preoccupied by it. The

[173] Thus ECHR Arts 5 and 6 establish the right to fair procedures in criminal proceedings and the right to a judicial trial. See also Close, 'Definitions of Citizenship' in P. Gardner (ed.), *Hallmarks of Citizenship; A Green Paper*, British Institute of International and Comparative Law (1994) at 4; Szyszczak, 'Making Europe More Relevant to its Citizens' (1996) 21 *EL Rev.* 351; O'Leary, 'The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *CML Rev.* 519 and 554.

[174] See, e.g., Raz, 'The Rule of Law and its Virtue' 93 *Law Quarterly Review* (1977) 195; T. Allan, *Law, Liberty and Justice, The Legal Foundations of British Constitutionalism* (1993).

[175] On which see notably, M. Cappelletti and B. Garth (eds) *Access to Justice* (1978).

[176] On which see the celebrated article by Wechsler, 'Foreword; Toward Neutral Principles of Judicial Review' 73 *Harvard Law Review* (1959) 1.

[177] For the classic exposition see J. Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

[178] R. Miliband, *The State in Capitalist Society* (1973) at 125-130.

[179] Stewart, 'The Reformation of American Administrative Law', 88 *Harvard Law Review* (1975) 1667.

dominant legal tradition both in the common law world and in continental Europe is positivist, part of the legacy of the Enlightenment. Montesquieu bequeathed to modern Western society the concept of judicial independence[180] and, in an alternative reading of the same conception, that of judicial 'neutrality'. From this beginning, the positivist ideal of autonomous and apolitical law became the paramount model during the nineteenth century. According to the so-called declaratory theory of law, judges possessed no independent discretion; their function was simply to apply the law to the facts: Rules + Facts = Decision.[181] The influence of this classical rule of law model is still forceful in European legal systems, including that of the EC.

The alternative model in which courts, inside a democratic system, are seen as capable of political activity, albeit of a different kind from politicians, emanates from the United States and is rooted in American realism.[182] Realists derided the formulistic picture of 'slot machine justice' (Rules + Facts = Decision).[183] Later, when studies of the American Supreme Court had made it impossible to maintain the fiction of apolitical law, the argument shifted ground to centre on the contentious question of 'government of judges'; in other words, from whether law and adjudication possess a political dimension to how political adjudication could be made compatible with majoritarian democracy.[184]

Later, or perhaps in parallel, the debate once more shifted ground. The success of the Supreme Court with its newly acquired 'rights jurisdiction' after the celebrated decision[185] on equal rights in state education, stimulated a spectacular growth in 'public interest law', defined at first as the use of law for the benefit of under-privileged classes of the community to achieve social reform or legal change. A new model of constitutional and administrative adjudication began to find favour, in which the courtroom provided a platform for the under-privileged in the political process, putting them into a position of 'equality' with the powerful.[186] In the rest of this lecture I shall try to relate these developments to Europe.

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[180] M. Vile, *Constitutionalism and the Separation of Powers* (1967) at 88-90.

[181] See J. Frank, Courts on Trial: Myth and Reality in American Justice (1973).

[182] On which see, P. Atiyah and J. Summers, Form and Substance in Anglo-American Law, A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions (1987); N. Duxbury, Patterns of American Jurisprudence (1995).

[183] See, e.g., Cohen 'Transcendental Nonsense and the Functional Approach' 35 *Columbia Law Review* (1935) 809.

[184] See the debate between A. Bickel, The Least Dangerous Branch; The Supreme Court at the Bar of Politics (1962); J. Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); M. Perry, The Constitution, Courts and Human Rights (1982).

[185] *Brown v. Board of Education of Topeka* 347 US 483 (1954).

[186] Stewart, 'The Reformation of American Administrative Law', 88 *Harvard Law Review* (1975) 1667.

2. 'Political' Adjudication in Europe

In setting the scene, we must first bear in mind that a majority of the fifteen Member States is already familiar with constitutional adjudication. Secondly, Landfried argues[187] that the debate has already moved from formalist positivism to a realist understanding and critique. In the early post-war period which saw the establishment of the German Consititutional Court, the concern of students of constitutional courts was juridical (with jurisdiction and legal principle) rather than political. Attention focussed on the lawmaking function of judges and whether 'judges make law or simply interpret constitutions in a value-neutral, mechanical way'. Today, Landfried tells us, the emphasis has moved to the 'constitutional legitimacy [of judicial lawmaking] and with ways of rendering it responsible and relating it to contemporary conceptions of popular sovereignty'.

Two things are noteworthy about the essays in Landfried's comparative collection. First, it contains no essay on the Court of Justice, perhaps suggesting the low visibility of the latter as a political and constitutional court.[188] Secondly, a sharp distinction in viewpoint emerges between countries with a well-established parliamentary tradition and those where, as in Germany, federalism and a written constitution have altered the balance of power between judge and legislator. In the former, von Beyme suggests,[189] the principle of constitutional review is less easily accepted. Both types of constitutionalism are to be found inside the EU, the parliamentary tradition being particularly marked in the United Kingdom where, prior to accession in 1972, judicial review of legislation was not permitted.[190] We should probably recognise a further distinction between 'checks-and-balances' constitutions and those which, like that of France, accept instead a vertical separation of powers. These countries too have difficulty in accepting constitutional review. Thus in France, without a tradition

[187] C. Landfried (ed.), *Constitutional Review and Legislation* (1988).

[188] But see Stein and Vining, 'Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context', in F. Jacobs (ed.), *European Law and the Individual* (1976); Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Community', 61 *Washington Law Review* (1986) 207.

[189] von Beyme, 'The Genesis of Constitutional Review in Parliamentary Systems' in C. Landfried (ed.), *Constitutional Review and Legislation* (1988) at 21.

[190] But see the effect of the Factortame litigation: R. v. Secretary of State for Transport ex p. Factortame (No. 1) [1990] 2 AC 8; R. v. Secretary of State for Transport ex p. Factortame (No. 2) [1990] 3 WLR 818; C221/89 R v Secretary of State for Transport ex p Factortame (No 3) [1991] ECR I-3905, [1992] 3 WLR 288. For comment see, Gravells, 'Disapplying an Act of Parliament Pending a Preliminary Ruling: Constitutional Enormity or Community Law Right?', Public Law (1989) 568 and Gravells, 'Effective Protection of Community Law Rights: Temporary Disapplication of an Act of Parliament' Public Law (1991) 180. And see, R v Secretary of State for Employment, ex parte EOC [1994] 1 All ER 910.

of strong parliamentary government, review is entrusted to a semi-political Constitutional Council.

Stone argues[191] that, as the constitutional function of courts receives recognition within a given constitutional tradition, so the court begins to assume some of the characteristics of a legislator. The adversarial 'checks and balances' picture of a Supreme Court which can obstruct, fetter or frustrate the legislature, is replaced by a more consensual picture of a joint legislative enterprise in which the parameters are fixed by the legislature and judiciary working together. In this model, the function of the judiciary becomes to feed in alternative values through the development of a jurisprudence of rights, and to protect minority interests against a pre-eminently majoritarian political process (below).

3. The Court of Justice and Political Participation

The two questions, whether the Court of Justice possesses a constitutional jurisdiction, and whether it is a policy-making or political court, were slow to arrive on the scholarly agenda. Still controversial, they need to be approached slowly and on a step-by-step basis.

How do courts acquire a 'political' competence and in what areas is it exercised? Arguably, all courts possess policy- and law-making functions and most cases involve a measure of policy-making which may bring judges unexpectedly into the political limelight. The three sensitive and highly charged areas of constitutional adjudication, judicial review and human rights adjudication are, however, especially likely to bring charges of 'government by judges'. Prima facie the Treaty bestows on the ECJ only one of these 'political' competences: an administrative jurisdiction under EC Arts 173, 175 to review the legality of acts and omissions of the Community institutions, with power to annul. Its primary role is to 'ensure that in the interpretation and application of this Treaty the law is observed' (EC Art 164). It is the way in which it has acquired competence under the other two heads that has opened it to charges of judicial activism and politicking. Rasmussen[192] in particular has attacked the Court's policymaking activities as 'transgress[ing] the borderline to the Community's judicial function', though Weiler has spoken of its treatment of human rights as an example of 'sheer judicial power'.[193] Volcansek[194] too

[191] Stone, 'Where Judicial Politics are Legislative Politics: The French Constitutional Council' 15 *W. European Politics* (1995) 29. See also Stone Sweet, 'Constitutional Dialogues: The Protection of Human Rights in France, Germany, Italy and Spain' in S. Kenney, W. Reisinger, J. Reitz (eds) *New Approaches to Law and Politics in Europe*.

[192] H. Rasmussen, On Law and Policy in the Court of Justice (1986). See now, H. Rasmussen, European Court of Justice (1998).

[193] Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European

describes the 'reaches and limits of Community law' as having been 'delineated by the Court of Justice through its unabashed willingness to make policy'.

To experienced court-watcher Martin Shapiro, the ECJ undoubtedly possesses a constitutional jurisdiction. He sees the Court as exercising all three 'political' competences. In deciding whether institutional acts conform with the Treaty and whether legislation is founded on a proper legal base, it exercises 'constitutional' jurisdiction over all Community organs and Member States. EC Arts. 173, 175 empower 'administrative' judicial review over Community institutions. Its human rights jurisdiction was self-endowed.[195] According to Shapiro,[196] 'Once the Court had proclaimed that the members had surrendered part of their sovereignty, it could easily go on to argue that the members surely would not have made such a surrender to a governing entity authorized to run roughshod over individual rights'.

Most observers would agree with Shapiro that the ECJ has played a central political role in shaping the Community:[197]

> *During long years in which the political development of the Community seemed to have ground to a halt, it was the Court that kept alive the vision of the Community as something more than a trade alliance. In a sense, the Court created the present-day Community; it declared the Treaty of Rome to be not just a treaty but a constitutional instrument that obliged individual citizens and national government officials to abide by those provisions that were enforceable through their normal judicial processes. A treaty among individual sovereign states was transformed through international law into constitutional and legal obligations directly binding on citizens. Moreover, these obligations took priority over conflicting legal obligations derived from the law of the members. Although the word was not used, authority to make laws binding directly on all individuals and superior to all other laws is usually said to be sovereign. Thus, not simply in the fancy language of modern political theory, but in a very real and concrete sense, the Court of Justice constituted the European Community.*

Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Community', 61 *Washington Law Review* (1986) 207.

[194] Volcansek, 'The European Court of Justice: Supranational Policy-Making', 15 *W. European Politics* (1992) 109 at 117.

[195] See Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelgesellschaft v. EVST* [1970] ECR 1125; Case 4/73 *Nold v Commission* [1974] ECR 491. The jurisprudence is well-known to be a response to the prompting of the German Constitutional Court in its 'Solange' jurisprudence, on which see, S. Boom, 'The European Union after the Maastricht Decision: Will Germany be the "Virginia of Europe?', 43 *American J. of Comparative Law* (1995) 177.

[196] Shapiro, 'The European Court of Justice' in M. Sbragia (ed.) *Euro-Politics, Institutions and Policymaking in the "New" European Community* (1992) at 148.

[197] ibid. at 123.

Judge Mancini, who is in a position to know (if not exactly an impartial observer), argues that the Court has used its constitutional jurisdiction to support democracy.[198] He relies on two main examples. The first is the support which the Court has given to the European Parliament. In the Isoglucose case,[199] the ECJ ruled that the Parliament must be consulted, buttressing its position in the legislative process. In defiance of the Treaty, the Court went on, in a series of cases[200] described by Mancini and Keeling[201] without a hint of embarrassment as entailing 'the performance of a surgical operation on the body of a perfectly clear Treaty rule', to grant standing, first to be sued and later to sue in defence of its privileges, in the ECJ. I have argued elsewhere[202] that a more democratic solution would have been to give the EP parity in standing with other institutions. Such a solution would have acknowledged the representative function of the EP and provided a valuable counter-balance to the Commission as the primary amicus curiae before the Court.

In the second category of human rights, Mancini rests his case on three achievements: the doctrine of 'direct effect', to which I shall return; the opening up of the ECJ by recourse to EC Art 177; and finally the cataloguing of Community rights, described by Mancini and Keeling[203] as 'one of the greatest contributions the Court has made to democratic legitimacy in the Community'.

4. Human Rights and Citizenship

By no means everyone would agree with this assessment. On various occasions, the contribution of the ECJ to human rights has been described as grudging, one-sided, partial and limited. This point is important, since human rights litigation has in the last decades begun to provide a significant way for citizens to participate in decision-making. Human rights litigation may be described as 'negative decision-making', since it sets parameters to which decision-makers have to conform; from the positive standpoint, as already noted, a well-established human rights jurisdiction may virtually act as a third branch of the legislature. This can give human rights groups a positive input into policymaking, though admittedly through the medium of a surrogate.

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[198] Mancini and Keeling, 'Democracy and the European Court of Justice' 57 *Modern Law Review* (1994) 175.

[199] Case 138/79 *Roquette Freres v Council* [1980] ECR 3333.

[200] Case 13/83 *European Parliament v Council* [1985] ECR 1513; Case 294/83 *Les Verts v Parliament* [1986] ECR 1339; Case 302/87 *Parliament v Council* [1988] ECR 5615 ('Comitology'); Case C-70/88 *Parliament v Council* [1990] ECR I-2041 ('Chernobyl').

[201] Above note 198 at 180. For critical comment see, H. Rasmussen, *European Court of Justice* (1998) at 314-5.

[202] Harlow, 'Towards a Theory of Access for the European Court of Justice' 12 *Yearbook of European Law* (1992) 213 at 224-7.

[203] Above note 198 at 187.

For these purposes, the restricted nature of Community rights, never extending far outside the 'four freedoms' and centred on property and economic rights has been a serious limitation.[204] At least until the TEU (Art F(2)), where a clear statement is to be found that the Union shall 'respect human rights, as guaranteed by the ECHR... and as they result from the constitutional traditions common to the Member States, as general principles of Community law', this removed a vital parameter from the decision-making process and skewed it at the first stage, enabling the deduction to be made (unfairly) that considerations of human rights did not bind Community decision-makers.

One particular concept of rights which might tentatively be characterised as a sort of 'legal citizenship' has, however, been prioritised by the ECJ. This derives from the incorporation into EC law by the Court's jurisprudence[205] of the 'fundamental' citizenship right of access to a court, a dimension of the Rule of Law ideal enshrined in ECHR Art 6(1).[206] As developed further, the idea encompasses a right to see EC law enforced, whose bases lie in the doctrines of effet utile and of direct effect.[207] The Court's language sometimes suggests a private army of 'citizen enforcers'.[208] These individuals (in practice more often corporate entities) have direct recourse to national courts and indirect access to the ECJ through EC Art. 177. The restrictive standing requirements of the Treaties are, however, a serious obstacle. In the case of 'individuals', EC Art. 173 limits standing to persons 'directly' and 'individually' affected by a decision of the institutions. This means that both indivduals and groups have strictly limited access directly to the ECJ.

Empirical data demonstrates conclusively that corporate bodies avail themselves disproportionately of the legal process.[209] In other words, this 'rights jurisprudence' is not operating as a means to redress the balance for groups under-privileged in the political process but may to the contrary be increasing

[204] Coppel and O'Neil, 'The European Court of Justice: Taking Rights Seriously' 12 *Legal Studies*l (1992) 227; de Burca, 'The Language of Rights and European Integration' in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (1995). When the Court's contribution is assessed, it must always be remembered that courts do not have unlimited freedom to make law by the introduction of new principles and that, if they go too far, they are likely to generate hostility and unfavourable comment. Thus see, for a rebuttal of the above criticisms, Weiler and Lockhart, '"Taking rights seriously" seriously: The Europan Court and Its Fundamental Rights Jurisprudence' (1995) 32 *CML Rev.* 51-94, 579-627.

[205] Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.

[206] Briefly, ECHR Art 6(1) provides for civil rights and obligations to be determined in a fair and public hearing by an independent and impartial tribunal.

[207] Szyszczak, 'Making Europe More Relevant to its Citizens' 21 *EL Rev.* (1996) 351.

[208] See Snyder, 'The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques' 56 *MLR* (1993) 19 at 46-9.

[209] Harding, 'Who Goes to Court in Europe? An Analysis of Litigation against the European Community' 17 *EL Rev.* (1992) 105.

the political advantage already possessed by big business, corporate groups and multi-nationals.[210] This realisation raises two fairly basic questions. First, can corporate bodies ever be citizens? Given the traditional emphasis on civil and political rights, the answer must be negative. Second, can legal techniques be developed to correct the imbalance between citizens and coroporate actors?

5. Public Interest Litigation

Legal theory endorses two main models of public interest litigation. The first, elitist, model reserves public interest advocacy for a 'public advocate', technically known as a friend of the court or amicus curiae. In the case of the ECJ, this role is officially reserved for the Advocates-General, whose Opinions are seen as representing the public interest in the litigation before the court. These officers of the court cannot, however, themselves initiate proceedings, a function allocated in the case of infringement proceedings to the Commission (EC Art 169). The Commission is also building its amicus curiae function of representing the public interest through use of its 'privileged access' to the court as intervener in cases brought by third parties. The Commission intervenes systematically to brief the ECJ on policy, in this way building a Commission/Court alliance on policy matters.[211]

Easier access to the legal process for social action and interest groups could help to right this imbalance and shift the ECJ towards the second, more pluralist model of public interest litigation favoured in Anglo-American legal theory.[212] In this model, the courtroom is opened to a variety of groups to present their opinions on the public interest. Such groups come from all parts of the political spectrum and may use court procedures to score political points against their opponents rather than simply to win. In addition, they are likely to bring pressure to bear on courts to modify their procedures to facilitate public interest (political) litigation. The US precedent illustrates the way in which a political jurisdiction will be further politicised by public interest groups seeking to mount test cases for their clients.[213]

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[210] Illustrated in the case study of challenge to Sunday Trading laws by Rawlings, 'The Euro-law Game: Some Deductions from a Saga' 20 *J. of Law and Society* (1993) 309.

[211] Harlow, 'Towards a Theory of Access for the European Court of Justice' 12 *Yearbook of European Law* (1992) 213.

[212] Harlow, 'A Special Relationship? The American Influence on English Public Law', in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (1995). See also Stewart, 'The Reformation of American Administrative Law', 88 *Harvard Law Review* (1975) 1667; Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281.

[213] Epitomised in C. Harlow and R. Rawlings, *Pressure Through Law* (1992), Chap. 2.

Such actions are just beginning to become visible in the ECJ. The women's movement in particular has benefited from a well-organised test case strategy designed to see EC Art 119 and the equality directives enforced at national level. The success of this 'test case strategy', in which the statutory English Equal Opportunities Commission has played a leading role,[214] has fed back into national policy after the Commission funded conferences to raise the consciousness of legal actors at national level to the ECJ decisions.[215]

This model of public interest litigation requires not only generous rules of standing but also a right of intervention by third parties in proceedings. Perhaps more important, it requires acceptance by courts of a public interest role which encourages experiment with representative and collective standing. The widening of the classic amicus brief to allow in opinions from lobby groups and their use in intervention procedure encourages the practice of presenting to the court a wide range of contextual and sociological material and statistical or economic data.[216] Although these developments are perhaps most developed and best documented in North American courts, they have already travelled to Europe.

At least until recently, however, access to the ECJ has been limited bythe restrictions on standing contained in EEC Art 173. While Member States and the Community institutions are recipients of automatic, privileged access, other litigants must show, as noted above, that they are both indirectly and individually affected. Recent caselaw reveals the ECJ trying to break away from this restriction, though not decisively.[217] The position is eased by the fact that national rules are sometimes more generous than those of the ECJ and these govern standing in Art 177 actions.[218] Consumer groups are beginning to be active in the ECJ and are fighting for intervention rights.[219] Specifically for environmental litigation, a formal right of 'access to justice' throughout the EU for 'common interest groups, which have as their object the protection of nature

[214] Sacks, 'The Equal Opportunities Commission - Ten Years On' 49 *Modern Law Review* (1986) 560; Barnard, 'A European Litigation Strategy: the Case of the Equal Opportunities Commission' in J. Shaw and G. More (eds) *New Legal Dynamics of European Union* (1995).

[215] Docksey, 'The European Community and the Promotion of Equality', in C. McCrudden (ed.), *Women, Employment and European Equality Law* (1987) at 8.

[216] Such material is usually known as a 'Brandeis brief', after the American advocate who developed the technique: see Harlow and Rawlings, above note 213, Chap. 2 and generally.

[217] Documented in Harlow, 'Towards a Theory of Access for the European Court of Justice' 12 *Yearbook of European Law* (1992) 213. Since this article was written, the inauguration of the CFI has meant that standing points tend first to arise there.

[218] Case 158/80 *Rewe-Handellgesellschaft Nord mbll and another v Hauptzollamt Kiel* [1981] ECR 1805 (The Butterbuying Cruises case).

[219] See the landmark case, C-170/89 *Bureau Europeen des Unions des Consommateurs (BEUC) v Commission* [1991] ECR 5709.

and the environment' has been proposed to the Commission.[220] The fact that environmental actions are typically fought by collective action has also been recognised in EC law by a mention of group standing in relevant environmental directives.[221]

A significant case from Ireland[222] shows how the strategic use of courts may shore up a weak political position. Commission structural funds had been awarded to fund a visitors' centre in an area of outstanding scenic beauty. The Irish National Trust, with support from the World Wildlife Fund, complained to the Commission that EC environmental standards were being breached and requested infringement proceedings. After a short investigation, the Commission declined to act. The dissatisfied complainants demanded access to the documentation in terms of Decision 94/90 (above) only to be refused by the Commission. Challenged before the CFI, the Commission succesfully pleaded a public interest exception. Nonetheless the CFI annulled on the ground that inadequate and incorrect reasons for refusal to discover documents had been given. All that the groups had gained in practical terms was a little space in which to fight and manoeuvre.

In Greenpeace International,[223] Greenpeace challenged the legality of two decisions to build two power stations in the Canaries with the support of structural funds from the Commission. During the proceedings, Greenpeace asked the Commission to disclose details of payments. The Commission refused, on the ground that internal decision-making procedures were involved. Preliminary proceedings to determine whether the group had standing failed in the CFI and were appealed to the ECJ, which upheld the CFI's decision. The position of individuals and of groups, which based their claim to standing on the rights of individual was said to be similar. Worse, no distinct standing for environmental groups was allowed. This case denotes a temporary defeat for public interest litigation in the ECJ in other than exceptional cases. Although the ECJ partly defended its decision on the ground that proceedings were in place

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[220] The proposed draft directive is reprinted in Ormond, '"Access to Justice" for Environmental NGOs in the European Union', in S. Deimann and B. Dyssli (eds), *Environmental Rights, Law, Litigation and Access to Justice* (1995). The national situations are also outlined there. See also Macrory, 'The Enforcement of Community Environmental Law: Some Critical Issues', 29 *CML Rev* (1992) 347.

[221] Launched by the draft proposal for a Council Directive on civil liability for damage caused by waste (91/C 192/04) C192/6 OJ/L 23.7.91.

[222] Case T-105/95 *World Wildlife Fund v Commission* [1997] 2 CMLR 55. For an account of the case see Hatton, 'WWF UK, An Taisce and the Burren. The Standing of Environmental Groups before the European courts', in S. Deimann and B. Dyssli (eds), *Environmental Rights, Law, Litigation and Access to Justice* (1995).

[223] Case C-321/95 *Stichting Greenpeace Council (Greenpeace International) and others v Commission* (2 April 1998).

before national courts so that the applicants were not totally deprived of remedy, it would nonetheless seem that the European judiciary has little ambition to play a central role in enhancing rights of participation in the EU decision-making process.

Would the European Ombudsman be more helpful? His mandate, to investigate maladministration by the Community institutions, is not at first sight encouraging as a point of entry into decision-making. In a group of complaints[224] concerning the United Kingdom's alleged failure to carry out environmental impact assessment before the building of the Newbury by-pass, the complainants tested this new procedure by lodging complaints against Commission refusal to use Art 169 procedure. The number and style of the complaints suggests a determined use of the EO for the type of political lobbying becoming so familiar at national level. Although the outcome was unsuccessful, the affair was nonetheless important. Examination of the file to ensure that the decision to close it had been taken in conformity with general principles of good administrative behaviour, caused the EO to criticise the procedures for lack of transparency. He also noted the considerable dissatisfaction expressed by 'European citizens, some of whom regard the Commission's approach to the discharge of its responsibilities under Art 169 as arrogant and highhanded'. He requested the Commission to conduct a general examination of the procedural position of individuals in Art 169 procedure with a view to reform. This procedure is of course primarily aimed at compliance. But the indirect result of the investigation, already under way, could result in a considerable extension of citizens' rights to participate in policy-making.

On the one hand, I have suggested in this lecture that courts do themselves make policy and do participate in a political dialogue with political actors and, on the other, that courts do provide an avenue for citizens to participate in policy-making. On the second head, the procedure of the ECJ is strikingly conservative. As the true position is increasingly recognised, and as American influences increasingly permeate, interest and pressure groups are likely to move in with litigation strategies designed to obtain the benefits of the courtroom platform. American and British precedents suggest that in time this brings changes to legal procedure which alter the character of the legal process, bringing it closer to the political process and introducing a collective character.[225] The ECJ, with so many of the characteristics of a constitutional court will not be immune to this process. The question is whether in the next decade it will wish to maintain its activist stance in policy area. This will certainly entail procedural change. If, as it has just started to do, it retrenches into a less activist and more formalist position, then procedural barriers to the associational standing will serve it well.

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[224] *132/21.9.95/AH/EN v Commission re Newbury Bypass*, Annual Report for 1996 at 66-7.

[225] C. Harlow and R. Rawlings, *Pressure Through Law* (1992) at 290-320.

CONCLUSION

Seemingly, we are entering a new and more populist era in which the People are demanding Voice.[226] But whether we evaluate EU institutions in terms of Craig's civic republicanism, suggested as an appropriate model in Part One or of Shaw's objectives for a 'thick' concept of citizenship it is hard to see the citizens of the EU as 'active participants in the process of governing'. Equally, it is hard to see the constitution and institutions of the European Union as providing Richardson's 'set of readily available opportunity structures for citizen participation'. On the one hand, the institutions, which largely retain the elitist ideology of the original Economic Community, do not measure up to, nor even, in many cases, subscribe to Richardson's ideal. On the other, it is disappointing to realise the extent to which citizen attitudes have scarcely changed. An inchoate sentiment is regularly recorded on the Eurobarometer that Europe is 'a good thing' but there is minimal will to put this into effect. Until an appropriate match of ideal, attitudes and opportunities is put in place, a European democracy cannot come into being.

Research quoted in these lectures suggests that democratic institutions and a consensual basis for politics affect citizen satisfaction with the way in which democracy operates. There are growing signs also that representative democracy is an insufficient outlet for an increasingly educated populace with a hearty appetite for participation. That the European Union is not a classical majoritarian democracy is demonstrated by the tardiness of its move to majority, or even qualified majority, voting in its Council. Its international law parentage, and birth as an international treaty organisation, have endowed it with the characteristics of consensual policy- and lawmaking. This is, however, the consensus of diplomacy. If we define a consensual democracy as one in which the question 'Who governs?' receives the reply 'As many people as possible!',[227] then Europe is not on course. There is a fatal dichotomy between globalisation of institutions and market citizenship and consensual democracy with citizen participation. For Michael Ignatieff,[228] the central dilemma of modern societies concerns

> *the tension between the republican discourse on citizenship and the liberal political theory of market man. The one defends a political, the other an economic definition of man, the one an active participatory concept of freedom, the other a passive acquisitve definition of freedom; the one speaks of society as a polis; the other of*

[226] Y. Mény, 'The People, the Elites and the Populist Challenge' Jean Monnet Chair Paper No 47, EUI (1998).

[227] Lijphart, 'Unequal Participation: Democracy's Unresolved Dilemma' 91 *American Political Science Review* (1997) 1 at 4.

[228] Ignatieff, 'The Myth of Citizenship', in R. Beuer (ed.), *Theorizing Citizenship* (1995) at 54.

society as a market-based association of competitive individuals. The tension between man the citizen and economic man divides our spirits and loyalites to this day. We live as market man, we wish we lived as citizens.

Described as embarked on a course to an unknown destination, the European train has been rushing along the market track to the point where two tracks inevitably converge. A perilous situation, with the potential for derailment.

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