THE LEGITIMACY OF EUROPEAN GOVERNANCE: THE NEED FOR A PROCESS-BASED APPROACH

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The heated debates that have preceded the ratification of the Maastricht Treaty have brought to the fore the question of the legitimacy of the integration process. They have made clear that the European Union can no longer be regarded as a "classical" international organization, the decisions of which are legitimated by the consent of their members. Not only is the EU system a greater producer of binding norms of all kinds than most of its international counterparts, but various elements, from the resort to majority voting to the role of NGOs, make it impossible to simply attribute all its decisions to the sovereign will of EU Member States.

While there seems to be a broad agreement on the fact that traditional intergovernmental approaches no longer suffice to make sense of (let alone legitimize) the complex patterns of decision-making that characterize contemporary European governance, there is no real consensus as to how the present institutional structure ought to be amended to improve the legitimacy of European decisions in the eyes of public opinion. As a result, Europe has engaged in a phase of "mega-constitutional politics"[1], in which a substantial part of the political debate is devoted to institutional issues. The Maastricht Treaty was amended four years only after it came into force and the ink of the Amsterdam Treaty was barely dry that the EU engaged into a new round of Treaty revision.

This contribution attempts to shed new light on this mighty problem by suggesting that the traditional, parliamentary-based, approach to the reform of European institutions is defective, normatively as well as analytically. Taking as a starting point the

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[1] The expression is borrowed to Peter Russell, *Constitutional Odyssey - Can Canadians become a Sovereign People?*, Toronto University Press (1992).

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transformation of modern governance, it advocates an alternative, procedural approach, in which concepts of openness, transparency and participation play a central role.

1. The Limits of Representative Democracy

For many years, discussions on the legitimacy of the European institutions have revolved around the place of the parliamentary branch in the institutional system. The alleged weakness of the European Parliament and the inability of most national assemblies to significantly influence the behaviour of their executive were perceived as the core of the Union's "democratic deficit". The European Parliament itself was not slow in raising the issue. From the mid 1980s onwards, it has repeatedly emphasised that while the competences transferred to the European Community were mostly of a legislative nature, its own legislative powers remained weaker than those of national legislatures, which was said to result in a weakening of the democratic quality of European decision-making.[2]

Interestingly, this parliamentary vision of democracy has featured prominently in the positions taken by institutions that did not share the European Parliament's vested interest in promoting its own role. Thus, in the discussions on institutional reform that have spanned the last fifteen years, many national governments have regularly advocated an increase in the powers of the European Parliament — a position which apparently had the support of large layers of the population in countries like Germany[3] or Italy. Similarly, in its now famous ruling on the Maastricht Treaty, the German Constitutional Court identified in the institutional weakness of the European Parliament the main shortcoming in the democratic credentials of the European Union:

"Where [the European Union] assumes sovereign tasks and exercises sovereign powers to carry them out, it is first an foremost for the national peoples of the Member States to provide democratic control via their national parliaments. Nevertheless, as the Community's tasks and powers are expanded, so the need grows to add to the democratic legitimacy and influence imparted through the national parliaments by securing the representation of the national populations of the Member States in a European

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[2] Resolution on the democratic deficit, OJ 1988, C 187/229.
[3] Larat, "L'Allemagne et le Parlement européen", (1999) *Critique internationale*, n° 5.

Parliament, as a source of additional democratic underpinning for the policies of the European Union."[4]

This apparent concession to orthodoxy was all the more remarkable, given that the *Bundesverfassungsgericht* ruled out any possibility for democratic government ever to emerge at the European level, on the grounds that the European polity lacks the ethnical and cultural homogeneity that are indispensable for the proper functioning of any democratic system. Why bother about institutional engineering if it is unable to ensure the results that one seeks to achieve anyway?

This convergence in the political discourses on European democracy shows how deeply anchored a model representative democracy is in the Western European political culture. To assess the relevance of this model in the EU context, it is however useful to identify clearly a number of underlying assumptions. First, in its most basic understanding, the system is based on what one could call an *input-oriented* form of democratic legitimation[5]: people elect their representatives, the latter take decisions affecting the fate of the polity, and they must be accountable for their choices before voters. Central to this assumption is the fact that all political choices can somehow be attributed to the will expressed by citizens through their votes. Secondly, laws passed by representative bodies are *par excellence* the instruments whereby such political choices are made. In this vision inherited from Jean-Jacques Rousseau, legislative bills are the expression of an axiomatic "general will". Thirdly, there is often an implicit equation between the "general will" and the common good: what legislators decide is supposed to serve the interests of the whole polity.

Applying such a model to the governance of the European polity is however problematic. Indeed, I would argue that this model is analytically weak, and normatively ill-adapted to the specificity of the European Union.

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[4] Case Nos 2 BvR 2134 and 2159/92, 12 October 1993, reprinted in Oppenheimer (ed.), *The Relationship between European Community Law and National Law: The Cases*, Cambridge, Cambridge University Press, 1994, 524-575 at 553.

The vision of representative democracy that is used in discussions on the legitimacy of European institutions often seems to have more to do with eighteen century models of democracy than with the governance of complex post-industrial societies. It fails to take account of the many problems this form of government has been confronted with at national level. To mention but a few: we have known since Schumpeter that it is wrong to assume that the people itself decides issues through the election of representatives:[6] elections are better described as a way to chose — or, better said in our times of growing dissatisfaction with politics, to get rid of — those who govern, and this choice is far from being merely influenced by competing visions of the common good. Likewise, phenomenons such as the emergence of large-scale bureaucracies, technological development and the growing importance of expert advice in public policy make it difficult to argue that all decisions affecting the fate of the polity are taken by people's representatives. The decision-making process is generally much more complex : in many countries, legislation to be adopted by parliaments is almost always drafted by the executive, and is often conditioned by expert advice or by complex negotiations involving representatives of organized interests. Political parties, the role of which was not contemplated in liberal constitutions, also play an important mediating role. In other words, the somewhat ethereal vision of representative democracy which is referred to in discussions on the would-be European democracy has little to do with the way this model actually operates in our times.[7]

Applying the representative model at European level is also problematic from a normative standpoint. Its use often rests on an implicit assumption: if it works at home (a risky statement, as was just said), it will also work at European level. Indeed, the institutional reforms of the last fifteen years, with their steady increase in the powers of the European Parliament, seem to be inspired by the idea that parliamentary democracy is

[5] Scharpf, "Democratic Policy in Europe", 2 *European Law Journal*, (1996) 136-155

[6] Schumpeter, *Capitalism, Socialism and Democracy,* London: Allen & Unwin, 1942.

[7] Interestingly, parliaments themselves now seem to realize that the complexity of contemporary society requires a redefinition of their traditional role. See Working Group of European Union Speakers on the Quality of Legislation, *The Complexity of Legislation and the Role of Parliaments in the Era of Globalization*, mimeo, Lisboa 1999.

a valid model at the European level as well as at national level. This, however, fails to take into consideration the fact that moving from the national to the supranational level entails a change in the level of analysis. Because the European Union is not a state, but some sort of union of states, it would be fallacious to imagine that such a transposition can be done mechanically.[8] On the contrary, the exercise is fraught with problems. Recent analyses have highlighted the limits inherent in an input-based approach to the question of democracy in the European Union. In a conglomerate where people's primary allegiances tend to remain with their state,[9] the legitimacy of supranational institutions remains problematic. The development of a democratic debate is hampered by the absence of a common language and of pan-European media.[10] Moreover, and more fundamentally, the heterogeneity of the European polity is such that the adoption of a purely majoritarian system, in which decisions can be taken by a majority of representatives of the people, is difficult to conceive. The lack of any strong collective identity makes it difficult to believe that minorities would easily accept that their fate be decided against their will[11]. Already now, it is far from rare to hear the EU being accused of ignoring the traditions or the interests within the Union, in spite of the many safeguards that exist in the decision-making process to protect Member States' interests. This kind of tension would be likely to grow exponentially if some strict majoritarian rule were to be adopted. Ultimately, majority rule would end up feeding centrifugal forces.

Does it follow that the best way to ensure the democratic functioning of the EU is simply to return to a pure intergovernmental system, in which no decision could be taken but with the explicit consent of all Member-States, as is often argued in these days of

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[8] I have developed this point in an earlier essay: "Comparing National Law and EC Law: The Problem of the Level of Analysis", *American Journal of Comparative Law (1994)* 201-221.

[9] Dupoirier with Roy ad Lecerf, "The Development of National, Subnational and European Identities in European Countries", Frognier and Duchesne, "Is there a European Identity?" in O. Niedermayer and R. Sinnott, *Public Opinion and International Governance*, Oxford University Press, 1995, 194-226.

[10] Grimm, "Does Europe need a Constitution?", 1 *European Law Journal (1995)* 282-302, Meyer, "European Public Sphere and Societal Politics" in Mario Telo (ed*.), Démocratie et construction européenne*, Bruxelles, Presses de l'Université libre de Bruxelles, 1995, 123-131.

[11] Dehousse, "Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?", *West European Politics*, (1995) 118-36, Weiler *et al.,* (1995) *West European Politics* (1995) 4-39, Scharpf, "Legitimacy in the Multi-Actor European Polity", in *Essays for Johan Olsen,* 1999, 260-288, at 276-78.

creeping Euro-skepticism ? That would be a simplistic conclusion. Even leaving aside the transaction costs inherent in pure intergovernmental models, it ignores the fact that negotiations in a multi-veto system cannot reach an optimal outcome unless negotiators depart from their "democratic" mandate, namely the preferences of their fellow citizens.[12] It also overlooks the fact that at national level too, the state machinery can easily be captured by specific interests, or even be simply concerned with interests of its own. What is conveniently presented as *the* national interest often corresponds more the interests of specific groups of people, rather than the public good. France's traditional tough stance on agricultural issues in trade discussions may serve farmers' interests, but does it really serve those of industrial producers or of consumers? Likewise, Britain's attitude in the BSE crisis appeared to be motivated more by a concern for the fate of beef producers than by the interests of consumers.

This is not without analogy with the motive given by James Madison to justify the establishment of some kind of constitutional democracy at continental level. Rejecting Montesquieu's idea that the public good was easier to achieve in a small, homogeneous republic, Madison argued that it was easier to ignore the interests of minorities in smaller polities:

"the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression."[13]

To protect republican government, he wrote, the remedy is to extend the "sphere" of the polity. By taking in "a greater variety of ideas and interests", this change of scale will "make it less probable that a majority of the majority of the whole will have a common motive to invade the rights of other citizens."[14] Applied to contemporary Europe, such an approach might lead one to view the integration process as a source of value added in terms of democracy. For a British trade unionist in Mrs. Thatcher's Britain, or for a French industrialist interested in greater freedom of trade , the Europeanization of social

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[12] Scharpf, *supra* note 10 at 282.
[13] *The Federalist*, 10.

policy or of trade relations, respectively, might appear as a way to secure a policy less hostile to their preferences, rather than as a loss of collective sovereignty. Indeed, behind calls for European interventions, we often find groups of people who somehow have failed to secure from public authorities the kind of decision they wanted.

Reflections on European constitutionalism must therefore avoid two kinds of evils. Statism — the tendency to reason as if one could simply transpose at supranational level solutions experienced at national level — is likely to lead to conclusions that might threaten the stability of the whole system. At the same time, however, one should take account of the fact that the EU is in many respects unlike traditional international organizations, be it only because it decides on a wide range of issues that affect people's daily life. Advocating a return to the good old days when national sovereignty, embodied in national parliaments, was the answer to all legitimacy concerns will not help, as a large number of issues appear to require transnational cooperation. Some sort of democratic input in European decision-making is therefore needed - urgently, one might argue, given the lack of enthusiasm displayed by citizens of all Member States in Euro-elections. The best way to achieve this objective, I would argue, is to go beyond classical discussions on the kind of institutional arrangement that should exist at the end of the integration process, and to pay greater attention to the evolution of European governance. Normative analysis should be grounded on a careful analysis of reality, if it is to avoid the pitfalls of excessive abstraction.

2. The Growth of Bureaucratic Governance

As indicated above, so far normative discussions on how to improve the legitimacy of European institutions have essentially focused on the powers of the European Parliament. In many respects, this is but a corollary of a tendency to regard harmonization, i.e. the approximation of substantive rules, be they contained in laws or in administrative regulations at domestic level, as a key instrument in EU policies. Harmonization being

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[14] *Ibid.*

primarily a legislative exercise, it was only natural to pay so much attention to legislative procedures. However, this emphasis on legislative procedures overlooks a fundamental transformation under way in the governance of the European Union. Now that the legislative framework for the internal market is nearly complete, there seems to be a slow down in the Community's legislative activities. Figure 1 shows that the number of primary legislative proposals has declined in recent years.
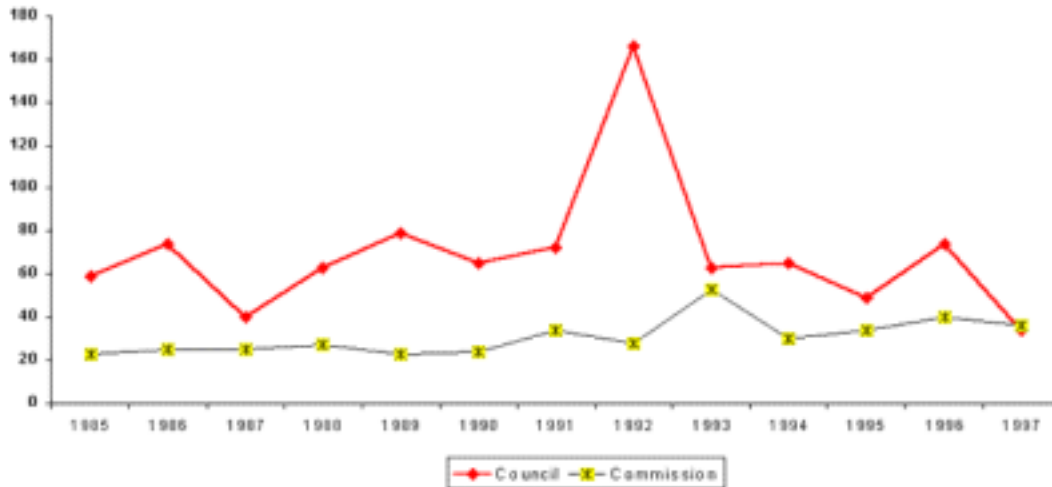
Figure 1:
Proposals of primary legislation introduced by the European Commission
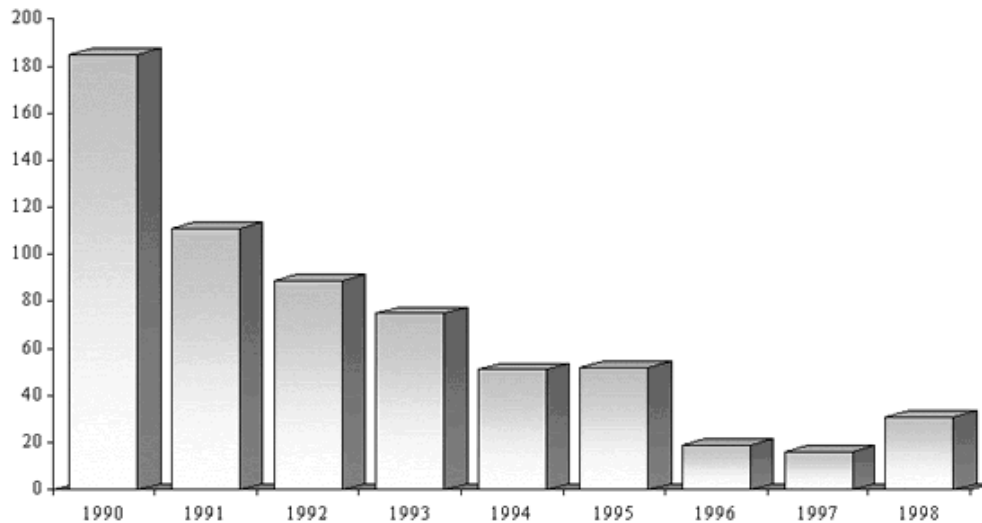
Sources: *Reinforcing Political Union and Preparing for Enlargement, Commission Opinion for the Intergovernmental Conference 1996*, 1995, p. 87, for years 1990-1995; COM (95) 512 final for year 1996; SEC(96) 1819 final for year 1997; http://europa.eu.int/comm/off/work/1998/index_fr.htm for year 1998

It would be wrong to conclude from this that the overall volume of Community regulatory activity is declining. Indeed, the overall volume of Commission rule-making, most of which takes place in the comitology framework, remains rather high, as shown in Figures 2 and 3.

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Figure 2:
Number of Directives adopted by the European Institutions

The Commission has long been – and by far – the main producer of Community regulations. Moreover, in 1997, the number of directives adopted by the Commission exceeded for the first time that of directives adopted by the Council.

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Figure 3:
Number of Regulations adopted by the European Institutions
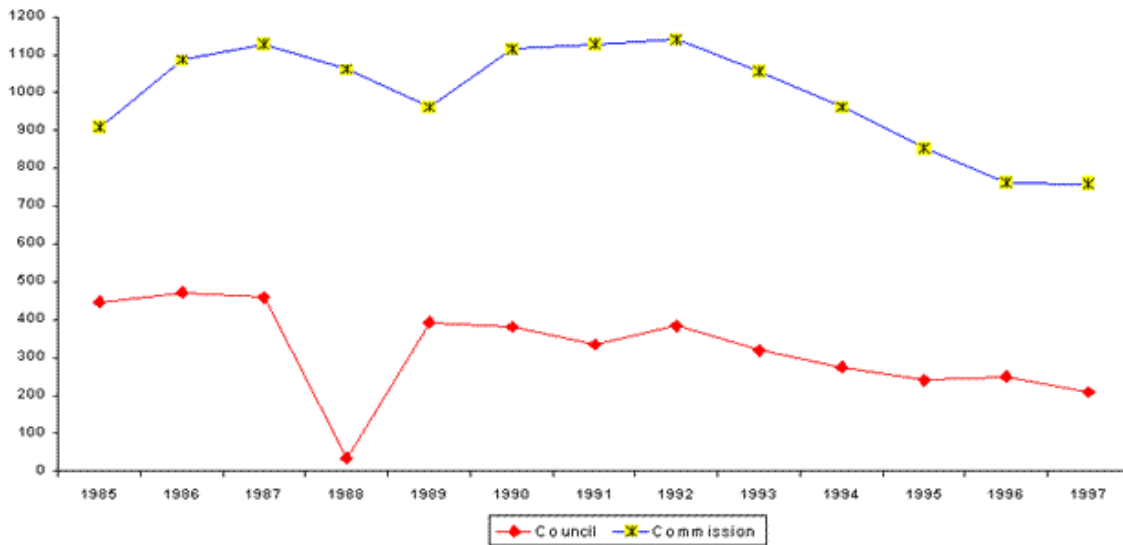
Source: *General Report of activities of the EC* * Data retrieved from CELEX, the interinstitutional computerised system on community law, excluding instruments not published in the OJ and instruments listed in light type (routine management instruments valid for a limited period).
For years 1993 to 1997, regulations adopted by the European Parliament and Council in accordance with the co-decision procedure are included in the category "Council".

In other words, in sheer numbers, the importance of secondary (non-legislative) rule-making appears to be considerable. The combination of these two elements -- the decline of purely legislative activity, and the respectable size of secondary rule-making – suggests that we should reconsider the traditional emphasis on legislative procedures in discussions on the legitimacy of European institutions. The legislative phase is but one part (admittedly important) of the decision-making process. A growing number of salient political issues are likely to arise in the post-legislative phase, be it in rule-making or the concrete application of Community rules. Should a given product be authorized? What kind of precautionary measures are needed to protect human health in the case of scientific doubts related to our alimentary habits? The management phase may gain even more importance in the future, as the Amsterdam Treaty has enhanced the powers of the European Community to deal with what is known as "risk regulation" in areas such as

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human health, consumer policy and environmental protection.[15] As risk regulation decisions are often made on the basis of complex scientific evidence, they cannot always, or indeed most of the time, be made *in abstracto,* once and for all, in legislation, but rather require individual, *ad hoc* decisions, taken by administrative bodies.

If this analysis is correct, a growing number of important decisions at European level are likely to be taken by bureaucratic structures of some kind. In practice, as the EU largely remains a system of decentralized administration, in which legislative rules are implemented by the Member states' administration, this suggests that the role of intergovernmental committees, known as comitology in the Euro jargon, is bound to increase in the years to come. However, the way those committees operate may be the source of a variety of legitimacy problems. First, the system is striking in its opacity. Who does what and how is nearly impossible to tell for a lay audience. This lack of transparency may undermine the authority of Community decisions: citizens may find it difficult to accept decisions based on recommendations from obscure bodies, the composition and functioning of which remain a mystery. Secondly, it is not clear that the social prestige of committee members will be sufficient to command obedience. While scientific experts may derive some authority from their technical knowledge, bureaucrats are the focus of widespread mistrust in European countries. Thirdly, the little we know of the way comitology works may also become a source of concern. The convergence of concerns, interests and language among experts which is said to be the hallmark of comitology seems to enable the system to operate fairly smoothly.[16] However, while positive from the standpoint of efficiency, this consensus may undermine the legitimacy of the system, as it can easily be depicted as one more instance of power in the hands of a closed circle of élites. The risk of collusion is quite real: can experts be regarded as neutral in areas where research is largely financed by industry ? Can we really assume that they will not be influenced by their national origins ? The BSE crisis has shown that

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[15] Dehousse, "European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?" (1998) *CML Rev.* 595-627; Ludlow, *Preparing Europe for the 21st Century: The Amsterdam Council and Beyond*, Brussels: CEPS, 1997.

[16] Joerges and Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology", (1997) 3 *European Law Journal* 3, 255-272

issues of this kind are far from moot. They must therefore be addressed squarely if one is to put comitology on firmer grounds for legitimacy purposes.

How may this objective be achieved? Generally speaking, five different types of arguments are traditionally used to legitimize bureaucratic processes.[17] Given the specificity of the Community regulatory process, it would be wrong to assume that they can be mechanically transposed to the European level. However, they furnish good yardsticks for assessing the legitimacy of bureaucratic decisions taken at that level.

- The "legislative mandate" approach is the most traditional. Parliament is seen as the main repository of legitimacy and the administration must strive to achieve the objectives that are set out in governing legislation.

- In the "accountability or control" model, legitimacy is grounded in the fact that the administration is somehow under control, i.e. that it is held accountable for its decisions by a representative body (generally the legislature) or by courts.

- The "expertise" claim stresses that as a result of their technical character, many decisions cannot be taken by the legislature: expert judgement is needed to judge the respective merits of competing options, and experts must be granted sufficient discretion.

- The "procedural" approach emphasizes the fairness of decision-making processes. It demands that consideration be given to the interests of persons affected by administrative decisions. Procedures designed to associate such persons to the decision-making process are therefore viewed as essential. They tend to vary according to the kind of decisions that are taken. Under "due process" requirements, administrative bodies must consider the interests affected by individual decisions. As regards rule-making, the same concern for fairness may lead to the adoption of rules guaranteeing transparency and participation or consultation rights.

- *Efficiency* is also often claimed as a ground for legitimacy, particularly in recent times, as the ability of government structures to deliver results is becoming increasingly important. While there are many ways of defining efficiency, two meanings are

particularly relevant for our purposes: decision-making efficiency (the ability to take decisions when needed) and substantive efficiency, i.e. the ability to take the "right" decisions.

Obviously, these approaches are not necessarily mutually exclusive. Accountability and control can be used to monitor the effective implementation of legislative mandates or the compliance with the procedural requirements of the "due process" model. Likewise, the resort to experts is often advocated on efficiency grounds, and can be balanced through various accountability techniques. Nevertheless, there are clear differences among various claims. The degree of discretion required in the "expertise" model is at odds with the idea of exhaustive legislative mandates. Similarly, the vision of the public interest inherent in the "legislative mandate" approach often assumes the existence of a collective body – the people – whose interests are represented by Parliament, while the "procedural" model is informed by a more polycentric vision of the polity, in which the coexistence of a wide variety of interests, which must all be given due consideration, is acknowledged.

At this stage, my concern is not to endorse any one of these models, but rather to discover how suitable they may be, given the specific character of Community decision-making. To streamline somewhat the discussion, I will take as a starting point the limits of an approach that would rest exclusively on the "expertise" model. Involving experts at various levels of the decision-making process is undoubtedly necessary, particularly when the decisions to be taken technical dimension. Providing much-needed expertise is clearly an important achievement of the European committee system. It can even be argued that the quality of deliberations among experts will not only contribute to the quality of the regulatory process, but also to its legitimacy, as was suggested by Joerges and Neyer.[18] Yet, this does not suffice. For one thing, there is no guarantee that experts' "deliberations" are actually exclusively inspired by the public good: all sorts of considerations, ranging from their vision of their country's interests to possible links with

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[17] I am using here in a slightly adapted fashion a terminology borrowed from Baldwin, *Rules and Government*, Oxford: Clarendon Press, 1995 at 41 – 45.

[18] *Supra* note 15.

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the industry they are supposed to regulate, may influence the positions they take within committees. Moreover, even assuming that their attitude is *in fact* influenced by purely disinterested concerns, would this suffice to ensure the legitimacy of their decisions? I don't think so: granting experts "carte blanche" is likely to be unpopular in a period of widespread mistrust of technocrats of all kinds. Right or wrong, lay people may also have views on the decisions to be taken, and insist that they too should be considered. Some sort of control over their deeds is therefore necessary.

Our reflections should consequently focus on the remaining approaches. Various versions of the "legislative mandate" and the "accountability" models have been invoked by those who argue that the European Parliament, now that it has acquired the status of a co-legislator in many areas, should have more power over delegated legislation. Both types of arguments are part of the same, *supranational* avenue: the European Parliament, it is said, being the institution most representative of the European people at large, should play a greater role in overseeing comitology. In contrast, as was just indicated, the *procedural* model rests on a radically different vision of legitimacy, one which would require the opening of comitology to representatives of all interests affected by its decisions. Each of these two options will now be reviewed in turn.

3. The Supranational Avenue: Legislative Mandates and Parliamentary Control

Since the introduction of legislative codecision in 1993, the European Parliament has insisted on being treated as a Council co-equal in supervising Commission implementing decisions. It has opposed particularly vigorously management and regulatory committees, which it regards as a way of circumventing its newly acquired legislative powers: in the four years since codecision was introduced, comitology was an issue in about two-thirds of the dossiers that were subjected to the conciliation procedure. Disagreement over the proper implementing procedure was also at the root of Parliament's rejection of the directive on voice telephony -- the first time that Parliament used its codecision prerogatives to reject a Council common position.

There are several ways in which the European Parliament could become more closely involved with the decisions currently being taken within the comitology framework.

The first, "legislative mandate", approach would suggest that the current balance between legislation and administrative decisions be altered in order to ensure that the most salient policy decisions are taken as legislative measures. A return to legislative policymaking is a technique widely advocated in order to combat the growing influence of bureaucracies.[19] Surely, it would be historically incorrect to describe comitology as having robbed the European Parliament of its legislative prerogatives, as comitology predates Parliament's rise to the status of a full-fledged legislature. However, MEPs have consistently called for a clearer demarcation between decisions that can be taken through comitology and those that require a proper legislative procedure,[20] a position that underlies Parliament's support for a clear hierarchy of Community acts. The European Court of Justice itself has suggested that "the *basic elements* of the matter to be dealt with" must be adopted in accordance with the legislative procedure laid down by the Treaty, while "the provisions implementing the basic regulations" may be adopted according to a different (i.e. comitology) procedure.[21]

However, there seem to be clear functional limits to what can be achieved along these lines. As indicated above, it is not always possible for legislation to anticipate all the problems that may arise in the implementation phase. Parliaments may lack the time or the necessary expertise to solve all problems in advance, and they may find it expedient to delegate part of the problem-solving task to implementing agencies. Moreover, the borderline between policy choices and implementation "details", between legislation and administration, is often blurred when scientific or technical choices must be made. Prior to the BSE crisis, who would have thought that animal feed was an issue that would gain considerable public attention?

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[19] Lowi, *The End of Liberalism*, second edition, (New York: Norton, 1979).
[20] Bradley, "The European Parliament and Comitology: On the Road to Nowhere?" 3 *European Law Journal* (1997) 230-254 .

Parliamentary control over the executive, another traditional oversight instrument, seems equally difficult to adapt to the specific features of Community governance. While at national level, parliamentary control over the administration is a by-product of its control over the cabinet via the institution of ministerial responsibility, no such thing exists at European level. Although Parliament has gained considerable control over the Commission in the post-Maastricht years, functionally comitology committees are not under the Commission's authority,[22]. The vertical chain of command thought to exist at national level (parliament-executive-bureaucracy) is broken at European level, where delegated legislation is, at least partly, in the hands of networks of national experts. The European Parliament's role must be adapted to this network-based reality if it is to be of more than symbolic relevance.

Parliament's response to that structural difficulty has been to put pressure on the Commission, as the latter plays a leading role in implementation procedures, and appears to be extremely influential in comitology committees. The Plumb-Delors agreement of 1987 stipulated that the Parliament would be notified by the Commission of most draft implementing measures. These were then to be forwarded to the responsible parliamentary committee so that it could voice its concerns whenever necessary. Clearly, the effectiveness of such an agreement depends primarily on the Commission's willingness to keep the Parliament informed and to take its views into account. In both respects, the first years of the agreement have been rather disappointing: many drafts have not been sent to the Parliament and, in all but a handful of cases, parliamentary committees have failed to react.[23] The strengthening of Parliament's grip over the Commission in recent years has led to a formal recognition of its right to be informed of committees' proceedings.[24] Even if this were to occur, however, a question would still

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[21] Case 25/70, *Köster*, [1970] at 234.R 1161.

[22] Even though the Court of Justice has recently ruled otherwise, at least as regards access to committee documents. See case T-188/97, *Rothmans International BV v. Commission,* 19 July 1999, not yet reported.

[23] Bradley, *supra* note 19 at 237; Corbett et al., *The European Parliament*, 3rd ed., London: Catermill (1995) at 254-55.

[24] Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184/23 of 17 July 1999.

remain: how should Parliament process this information, and react if need be? Here, two problems must be addressed: lack of time and expertise. Can Parliament effectively scrutinize the hundreds of decisions adopted each year by committees, given its heavy agenda and complex organization? Will MEPs have the relevant expertise?

Entrusting supervision to Parliamentary committees, as was decided in the wake of the Plumb-Delors agreement, is a sound division of labour. Members of committees are likely to be better equipped than many of their colleagues to make sense of the technical issues addressed in draft implementing measures; further, decentralization is needed to deal with the masses of documents involved. But what kind of relationship should be established between Parliamentary committees and their counterpart(s) in the web of Comitology committees?

Interestingly, Parliament's ambitions seem to have increased in parallel with the emergence of its legislative profile. Parliament has at times expressed an interest in being more closely involved with the work of committees, e.g. by including its own observers in the committees.[25] This proposal raises a delicate but fundamental issue: in a system where influence appears to be directly related to the degree of expertise enjoyed by the various participants in the debate,[26] what can be the impact of elected representatives, namely politicians? True, the European Parliament could set up its own expert networks to control the work of committees. But in terms of legitimacy, the "value-added" of another layer of experts would be rather thin. Rather than have politicians clothe themselves as technical experts, as they at times seem tempted to do,[27] would it not be preferable to limit their role to a number of basic policy choices and to grant them the right to intervene when issues they deem fundamental arise in the implementation phase? Indeed, this seems to be the solution contemplated in the recent comitology decision as

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[25] Bradley, *supra* note 19 at 234.

[26] See the analysis of Eichener, *Social Dumping or Innovative Regulation? Process and Outcomes of European Decision-Making in the Sector of Health and Safety at Work Harmonization*, Florence: European University Institute, EUI Working Papers SPS 92/28.

[27] Landfried, 'Beyond Technocratic Governance: The Case of Biotechnology', (1997) 3 *European Law Journal* 253-272

regards regulatory decisions. Rather than systematically participating in the adoption of implementing legislation, the European Parliament has been given the right to step in whenever it feels a political input is needed, and to ask that a proper legislative procedure be followed.[28] Although such an opinion would not be binding, it would be likely to enjoy considerable weight, be only because Parliament has given ample evidence of its willingness to go to Court whenever it feels its prerogatives are being ignored.

Admittedly, such a division of labour would better correspond to the respective functions of legislator and executive in modern societies. Of particular importance, given the technical character of many issues tackled within European committees, is the Parliament's power to hold hearings. This technique could be used more systematically, as a means of obtaining independent expertise and facilitating a dialogue with interested parties. It would also enable the Parliament to exert greater control over the Commission, as the latter would be called upon to react to the views expressed by witnesses. Furthermore, hearings would very likely attract media attention to particular issues, thereby contributing to improved public awareness of the decisions taken at the European level. Such an approach, which emphasizes accountability and the European Parliament's function as a forum where the important political issues of the day can be debated, would be better suited both to the structure of comitology as a system of regulatory networks, and to the technical character of the issues tackled through comitology, than parliamentary involvement in the day-to-day work of committees.

But would enhanced monitoring by a supranational legislature suffice as a ground for legitimacy? There are reasons to be sceptical. Representative democracy has become the focus of widespread criticism in Western Europe, where it is often perceived as a system that enables a cartel of elites to exert tight control over the policy agenda.[29] Arguably, the gap between the rulers and the ruled may be even wider at the Community level. To many European citizens, the Parliament still appears a remote assembly, whose work remains

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[28] Article 5(5) of Council decision of 28 June 1999, *supra* note 23.
[29] Mény, *The People, The Elites and the Populist Challenge*, EUI Florence, Jean Monnet Chair Papers RSC n°98/47.

largely unknown and whose members do not always represent the mood of the populace. More importantly, in a system where primary allegiances remain firmly rooted at the national level, national ties may prove to be more important than the supranational logic of parliamentary democracy. To put the matter bluntly, German or Danish consumers might feel more effectively represented by, say, a delegate from a national consumer organization than by Greek or Portuguese MEPs.

Reflections on the legitimacy of the European policy process must also come to terms with the polycentric character of the European populace. Not only is there no European "*demos*",[30] but "we the people" cannot simply be read in the plural as a reflection of the coexistence of different states within the European Union. The truth is that the peoples of the Member States, too, are a kaleidoscope of regions, cultures and interests not always identified with the state apparatus, and can all legitimately claim to voice their views and be heard at the European level. After all, even at national level, the reductive nature of representative democracy, distorted even further by the structure of many electoral systems, makes it impossible for parliaments to mirror perfectly the broad range of interests and feelings that coexist within a single polity. Hence the attractiveness of alternative forms of legitimation, which provide for some form of direct participation of affected parties in the decision-making process.

The Procedural Avenue: Transparency, Openness and Participation

So far, I have argued that several of the approaches traditionally used in order to legitimate delegated legislation are ill-adapted to the specific needs of comitology. Reliance on the expertise model is no longer sufficient in a world where technocracy has become the focus of much mistrust. Legislative mandates cannot always be sufficiently clear, as it is impossible to consistently set down precise standards and objectives. Although more promising, an approach based on Parliamentary control over expert decisions is still far from sufficient, as the European Parliament cannot claim to represent

all the interests, be they national, local or sectorial, that coexist within the European Union. Additional techniques ought therefore to be considered if the legitimacy of European governance is to be put on firmer ground.

Bearing in mind what has just been said about the growing gap between citizens and government in Europe, one such technique might be to empower all the parties affected by comitology decisions to express their concerns before the relevant committees. The main advantages of such an approach would be twofold. An extensive dialogue with the various segments of civil society would obviate some of the shortcomings of representative democracy at the European level, by enabling those who so wish to have a say in the decision-making process.[31] In so doing, one might enhance the legitimacy of decisions taken by European bodies, for there is empirical evidence to suggest that decisions taken by public bodies (even non representative ones, such as courts) are more readily accepted when they appear to be taken according to fair procedures.[32] A greater openness of the decision-making process also improve public awareness of the issues discussed at the European level, thereby contributing to the emergence of a truly pan-European public sphere.

From the standpoint of openness to the populace at large, the present situation is defective in several respects. As any scholar who has done research on comitology knows, information on the actual operation of committees is difficult to find. The total number of committees remains a mystery[33]. In 1994, Parliament had to freeze a share of the appropriations for committees in order to obtain more information from the Commission on the number of meetings and their work output.[34] Committees' rules of procedure are

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[30] Weiler, 'Does Europe need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', 1 *European Law Journal* (1995), 219-258.

[31] See Curtin, "Civil Society and the European Union: Opening Spaces for Deliberative Democracy", *Collected Courses of the Academy of European Law* (1998).

[32] Tyler, *Why people obey the Law*, New Haven, Conn. : Yale University Press, 1990

[33] See e.g. Vos, "The Rise of Committees", (1997) 3 *European Law Journal*, 210 at 213; Falke, "Comitology and Other Committees: A preliminary Empirical Assessment", in R.H. Pendler/G.F. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, (Maastricht, 1996), 117-165, at 136-137.

[34] Bradley, *supra* note 19, at 242.

difficult to get hold of. When formal rules do exist, they appear to focus on the internal operation of committees: regulating deliberation among experts, i.e. relationships between the Commission and national representatives, is their main target.[35] In contrast, little or no attention is paid to the relationship between the comitology web and the outside world. True, in some areas, committees have been created specifically for the purpose of allowing organized interests to give their input. In the food sector, for instance, an *ad hoc* committee has been set up to represent the views of various socio-economic interests. Yet the Advisory Committee on Foodstuffs offers a good illustration of the limits of what have been achieved so far.[36] As its members are appointed by the Commission, the latter may privilege certain interests; for instance representatives of environmental interests have been excluded. Moreover, the committee can only act at the Commission's request, which explains why it has remained inactive for long periods.

Rather than *ad hoc* representative fora, greater openness in the work of *all* committees is needed. This could be achieved with a standard set of procedural rules regulating the interface between comitology committees and civil society at large. What kind of principles should these rules contain? Without entering into a detailed examination of the question, it may be useful to point out some basic elements. Thus, for instance, the agenda of committee meetings, the draft proposals to be discussed, and the minutes should be made public.[37] Interested persons should be given the opportunity to express their views on any item on the agenda; public hearings could even be envisaged for matters of particular importance. Committees should also be required to explain the considerations that underlie their eventual choices.

How could such a proceduralization be brought about? A number of scholars have

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[35] See e.g. the rules procedure of the standing committee for foodstuffs, a consolidated version of which has been prepared by the Commission (doc. III / 3939 / 93 83/ 260 / 90-EN of 11 May 1993).

[36] Commission Decision 75/420/EEC of 26 June 1975, OJ L 182/35 of 17 July 1975; amended by Commission decision 78/758/EEC, OJL 251/18 of 14 September 1978. See the analysis of Vos, "Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies", PhD Thesis, Florence, 1997 at 152-54.

warned against the danger of "ossification" of administrative procedures through codification in a legislative act.[38] It is fair to say that both the European Court of Justice and the Court of First Instance have displayed a growing awareness of the necessity to protect "process" rights such as the right to be heard and the duty to state reasons, when individual rights are directly affected by Community decisions.[39] However, judicial decisions are necessarily *ad hoc*, rendered in concrete cases; they are therefore not the best avenue for injecting new principles into decision-making processes. Moreover, the overall object of the exercise should not be forgotten. What matters for legitimacy purposes is not only that justice be done, but also that it be *seen* to be done. Put together, these considerations point in the same direction: the best way to introduce the principles discussed here would be through a basic decision, adopted in the most solemn of manners, and that would apply to all kinds of bureaucratic decisions.

The framework comitology decision of 17 July 1999[40] has already made a significant number of steps in the right direction. It provides for the adoption of standard rules of procedure, which will be used by committees to draft their own rules of procedure, although they retain the right to make the adjustments they deem necessary.[41] It also renders applicable to the committees the principle and conditions governing public access to Commission documents[42] - a decision of considerable importance as both the Amsterdam Treaty and recent rulings of the European Court of First Instance appear to have reversed the hierarchy of values that prevailed in the past: public access to documents has become the rule, and confidentiality an exception to be interpreted

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[37] This could be achieved by exploiting the potential of Internet. See in this respect the proposals put forward by Joseph Weiler, "The European Union belongs to its citizens: three immodest proposals", 22 (1997) *European Law Review*, 150, 153.

[38] Schwarze, *European Administrative Law*, London: Sweet & Maxwell, 1992; Harlow, "Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot", (1996) 2 *European Law Journal* 3-25

[39] See e.g. cases C-269/90 *Hauptzollamt München v. Technische Universität München*, [1991] ECR I-5469; T-364/94, *France Aviation v. Commission* [1995] ECR II-2845 and the comments by Nehl, *Procedures Principles of Good Administration in Community Law*, LLM Thesis, Florence, European University Institute, 1997

[40] Council Decision of 28 June 1999 laying down the procedures for he exercise of implementing powers conferred on the Commission, OJ L 184/23 of 17 July 1999.

[41] Article 7 (1).

[42] Article 7 (2).

narrowly.[43] In a ruling rendered only two days after the adoption of the framework decision, the European Court of First Instance has indicated that as most committees do not have a staff of their own, for the purpose of access to documents, they are deemed to be under the Commission, which is in charge of their secretariat.[44]

All these developments should ease access to committee documents, thereby enabling those who so wish to keep track of their work. In terms of public awareness of policies conducted at the European level, this is certainly more important than the annual report on the working of committees which the Commission is now required to produce.[45] However, does this suffice? In my opinion, the answer can only be negative. Transparency is of course important, but only as a means to ensure a greater openness of decision-making procedures. For the latter objective to be attained, some provisions must be made for participation of individuals in such procedures,[46] and on this the framework decision is remarkably silent. Moreover, if the idea is really to enhance the legitimacy of EU decision-making by granting individuals a say in decisions affecting their fate, then this right should be granted adequate recognition. From that standpoint too, the solution that has prevailed falls short of the objective. True, the standard rules of procedures to be adopted could formally sanction some participatory rights, but it would remain legitimate for each committee to adopt more restrictive procedures if it so wishes. For the process-oriented approach to legitimacy outlined here to be taken seriously, the rights in question should be given a legal status that would protect them against arbitrary decisions of the rulers. In other words, what appears to be required is a decision of constitutional nature, namely a formal recognition of participatory rights to be enshrined in the Treaty itself.

A procedural approach of this nature, with its participatory ethos, would bolster the legitimacy of comitology. It should not however be seen as an alternative to parliamentary

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[43] See e.g. cases T-105/95, *WWF v. Commission,* (1997) ECR II-313, *Svenska Jornanlistförbundet v. Council,* (1998) ECR II-2289, T-188/97, *Rothmans International BV v. Commission,* 19 July 1999, not yet reported, T-14/98, *Hautala v. Council ,* 19 July 1999, not yet reported.
[44] Case T-188/97, *Rothmans International BV v. Commission,* 19 July 1999, not yet reported, at para. 62.
[45] Article 7(4) of the framework decision.
[46] A similar plea can be found in Craig, "Democracy and Rule-making within the EC: An Empirical and Normative Assessment", 3 *European Law Journal* (1997) 105-130.

control. On the contrary, proceduralization, because it would foster public debate, might significantly reinforce the accountability of committees. One can imagine, for instance, that if a committee were to overlook the concerns of, say, consumer groups, the European Parliament might be interested in knowing why. In this case, procedural and accountability concerns, far from being at odds with one another, would actually be mutually reinforcing.

Conclusion: The Need for a Process-based Approach

It is often said that the functionalist approach followed by the Founding Fathers is no longer able to ensure the legitimacy of the integration process. True, integration can be credited with a number of benefits — peace and prosperity being the most important — but now that it has become clear that decisions taken at European level influence people's lives in so many ways, *legitimation by outputs* is not sufficient. People no longer accept that the quality of decisions is all that matters: they want a say in policy choices that affect their destiny. As a result, calls for an *input-based* approach have gradually intensified. However, such calls are often inspired by an idealized, Rousseauian, vision of parliamentary democracy, in which representatives of the people serve the collective interest of a polity and translate it into legislative decisions. This understanding of democracy is so deeply rooted in Western European political culture that it is espoused by two camps that are at odds with each other: the self-professed European Federalists, advocating the upgrading of the powers of the European Parliament, and the *souverainistes* and Eurosceptics of all kinds, for whom they can be no real democracy outside national parliaments.

This approach is fraught with difficulties. It rests on a mechanical, transmission-belt, vision of public policy, in which voters control the Parliament, Parliament controls the executive, and the latter is supposed to keep the bureaucracy under control. However, real-life situations tend to be much more complex. Each link of the chain develops

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interests of its own and may be captured by specific interests of some kind. Moreover, the sovereign which is to be represented, the people, is far from being an homogeneous creature: behind this convenient abstraction, one finds a complex constellation of conflicting interests and preferences, which cannot easily be reconciled. These structural problems, which undermine the functioning of representative democracy at national level, are magnified at European level. The sheer size of the polity affects the representativeness of governing bodies: an assembly of some 600 members cannot claim to mirror all the interests that coexist within a polity of over 400 million people. The longer the command chain gets, the looser the ties between rulers and ruled. Consider, for instance, the position of citizens vis-à-vis the two dominant institutions of the European Union. The European Council is composed of 16 members, out of whom 14 escape to their control: they are without any influence on heir appointment or their dismissal. As to the European Commission, even though the European Parliament now exerts an incommensurably higher control over its destiny than used to be the case in the past, it embodies a complex compromise between the partisan backgrounds and the national origins of the commissioners, which makes it difficult for citizens to identify with the institution. Finally, the existence of multiple vetoes at various levels makes it near impossible to assign the responsibility for most decisions to a single body, thereby weakening democratic accountability.[47] All these elements are undoubtedly necessary to preserve the consensus-based character of the decision-making process, which is as crucial a constitutional feature in the EU as in any polycentric community. However, they make it illusory to hope that representative democracy will suffice to endow European institutions with all the legitimacy they need. As Robert Dahl has shown, changes in the scale of the polity unavoidably affect the way in which a democratic political system must respond to the preferences of its citizens: new paradigms are needed.[48]

This contribution has pleaded for a radically different approach. Adopting a resolutely inductive approach, it has taken as a starting point the growing importance of the post-

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[47] This latter point is developed in Scharpf, *supra* note 10 at 270-75.
[48] "A Democratic Dilemma: System Effectiveness versus Citizen Participation", 109 *Political Sciences Quarterly* (1994) 23-34.

legislative phase in public policies, and the difficulties faced by parliaments to keep abreast of complex decision making processes, which often invoke delicate technical issues. Some may of course deplore this evolution, but one should take notice of structural developments of this magnitude, rather than insisting on an romantic vision of the past. Thus, it is argued, the input-oriented approach which has so far dominated discussions on the legitimacy of European institutions needs to be supplemented by a *process-oriented* one, in which interested citizens would be given a say in the post-legislative, bureaucratic, phase. Unlike other approaches, this one attaches less importance to the quality of the inputs received by decision-makers (citizens' votes, legislative mandates) than to the fairness of decision-making procedures: what matters is not that the eventual decision can be formally attributed to the will of the citizenry, but rather that those who so wish be given a chance to express their views. Not only would such an approach, with its emphasis on transparency, openness and participation, appear to be more finely tuned to the evolution of European governance, but it could also contribute to inform the citizenry of the problems that are addressed at the European level, thereby facilitating the development of public deliberation, which is as essential an element of democracy in a transnational system as it is in a national one.

Admittedly, such an approach departs from classical understandings of European constitutionalism, which focus on the demarcation of the respective powers of the Union and of the Member States and on the balance of power between European institutions. At the same time, however, its ambition is identical to that of liberal constitutions: to keep power, wherever it lies and whatever its form, under control, and to ensure the fairness of decision-making processes. Moreover, the procedural avenue outlined here should not be seen as substitute to the control exercised by political institutions. On the contrary, the emergence of a public debate on "implementing" decisions might reinforce the accountability of otherwise obscure bodies, ultimately contributing to the emergence of a transnational public sphere. Governance, particularly in present-day complex societies, is a multi-faceted phenomenon, which cannot be encapsulated into one single model.