

# CREATING RIGHTS IN THE AGE OF GLOBAL GOVERNANCE: MENTAL MAPS AND STRATEGIC INTERESTS IN EUROPE

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## INTRODUCTION

We are experiencing a transformation as radical as the shift from religious to secular authority in medieval Europe and from monarchy to democracy in the western world of the eighteenth century. Public power in western democracies is migrating from the national realm to the global one.<sup>1</sup> The institutions through which we seek to protect ourselves from physical violence, promote economic prosperity, keep the environment clean, and further the other attributes of the good life are now as much global as national. Domestic legislatures, executive branches, courts, and administrative agencies do not decide alone. They are constrained by the decisions of international bureaucrats, they abide by the rules adopted by transnational networks of regulators, and they comply with the decisions of international tribunals. By establishing, participating in, and adhering to global regimes, domestic polities today share power with government officials and citizens elsewhere in the world and with international organizations to an extent that is unprecedented in recent memory.

What shape will global authority take? What configuration of public power and rights against government will emerge? This Article takes a first step towards developing a positive theory of rights in institutions of global governance through a study of the European Commission, one of the oldest and most powerful international organizations in existence today. Rights, it turns out, are the creature of historical challenges to international organizations and the calculated, rights-innovative response of those organizations based on national constitutional traditions.

The Commission began in 1952 as a specialized international secretariat responsible for the administration of European coal and steel production in six member countries.<sup>2</sup> In 1957, the same countries signed the Treaty of Rome, in which they made ambitious commitments to a common market in goods, services, capital, and labor. The state parties entrusted the Commission with the far-reaching powers of a classic executive branch.<sup>3</sup> Yet the Commission

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<sup>1</sup> See Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* 258 (3d ed. 2001).

<sup>2</sup> The founding treaties of the European Union are: the Treaty of Paris Establishing the European Coal and Steel Community (1951); the Treaty of Rome Establishing the European Economic Community (1957), in 1992 renamed the European Community ["Treaty of Rome" or "EC Treaty"]; the Treaty of Rome Establishing the European Atomic Energy Community (1957); and the Maastricht Treaty on European Union (1992) ["Maastricht Treaty"]. The articles of the EC Treaty and the Maastricht Treaty were renumbered in the Amsterdam Treaty (1997). On June 18, 2004, the Treaty Establishing a Constitution for Europe ("Constitutional Treaty") was approved by European Heads of State. It will be signed in fall 2004 and then will be submitted to each of the Member States for ratification. The Constitutional Treaty would replace all of the previous ones.

<sup>3</sup> Aside from the treaties, there are three important types of legal acts in the European Union ("EU"): European laws (which include what are known as Directives and Regulations), European implementing regulations (which include what are known as implementing Directives and implementing Regulations), and European decisions. See Constitutional Treaty, arts. I-32, I-36.

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was conceived as an organization responsible for administering an international regime, in which the participants were states, not citizens. Hence individual rights were largely absent from the Treaty of Rome.

The transformation, half-a-century later, is remarkable. The Commission must engage in a full, adversarial hearing when enforcing European law against individuals and firms. It maintains a public, electronic register of all legislative and administrative documents and makes those documents immediately accessible to European citizens. Before the Commission submits a legislative proposal to the Council and Parliament for a decision, it must invite public comment on an early draft and incorporate the comments in the final proposal. In sum, European citizens are guaranteed a host of procedural rights familiar in national systems of democratic government.

Administration through adversarial hearings, extensive disclosure of government documents, and consultations open to all groups and citizens is familiar, but not universal. Another, equally liberal democratic outcome could have been imagined just as easily. Rather than require a full adversarial hearing before the Commission, the Court of Justice might have used its extensive fact-finding powers to scrutinize the facts, law, and policy choices underpinning the Commission decision.<sup>4</sup> (The Court of Justice is the highest court of the European Union and has jurisdiction over European legislative and administrative acts.) There might have been no right to official documents.<sup>5</sup> And public comment on draft legislation might have been staged at the very end of the legislative process, when the Commission proposal was under consideration in the European Parliament.<sup>6</sup> The alternative, imagined Commission would have been a very different government body, yet it still would have met comfortably the standards of today's set of liberal democracies.

Why do Europeans today enjoy this particular constellation of rights when the Commission exercises authority? How do we explain the legal rules that constrain and shape the Commission's powers? In this Article, I draw on the insights of the extensive political science literature on European integration and Europe's system of networks, public-private partnerships, and transnational governance. The theory of historical institutionalism, in particular, has much to tell us about the rise of individual rights in Commission decisionmaking.<sup>7</sup> Historical institutionalists posit a critical role for institutions in determining political outcomes. They typically define institutions as the formal organizations of political and social life, including the rules and norms associated with those organizations, such as constitutions and administrative procedures. In this school of thought, once institutions come into being, they show remarkable stability and affect collective results in predictable ways. The institutions themselves are explained as responses to particular historical circumstances and not by reference to the contemporary functions that they are believed to serve. Given the extraordinary staying power of institutions in the face of the changing material conditions of political communities, historical

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There are six important government bodies: the European Council, which is composed of Heads of States and meets every six months to agree on treaty amendments and other types of major political change; the Council of Ministers ("Council"), on which government representatives of the Member States sit and vote; the European Commission ("Commission"), staffed by civil servants and headed by a President and College of Commissioners appointed by the Member States with the consent of the European Parliament; the European Parliament, directly elected since 1979 through national elections; the Court of Justice, the highest court of the EU; and the Court of First Instance, established in 1988 to hear cases brought by individuals against European institutions, with a right of appeal to the Court of Justice. The European legislative and administrative processes can be described, in very general terms, as follows. Before 1993, European laws were passed by the Council on a proposal from the Commission. Since 1993, European laws are passed by the European Parliament and Council acting on a proposal from the Commission. Implementing regulations and decisions are issued by the Commission. See generally Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases, and Materials* 3-109 (3d ed. 2003).

<sup>4</sup> See *infra* text accompanying note 1 (discussing French *droit administratif* and German traditions).

<sup>5</sup> See *infra* text accompanying note 2 (reviewing access to information legislation in Italy, the UK, and Germany).

<sup>6</sup> See *infra* text accompanying note 3 (reviewing the legislative and rulemaking processes in all Member States).

<sup>7</sup> See Peter Hall & Rosemary C.R. Taylor, *Political Science and the Three Institutionalisms*, 44 *Political Studies* 936 (1996).

institutionalists suspect that the original reasons for establishing institutions are not the same as those that make them necessary today.

Historical institutionalism has been used mainly to explain political and social developments within or across countries. This study of individual rights in Commission decisionmaking contributes to the theory by revealing the dynamics of institutions and institution-building unique to global political communities. First, I show that the rights and procedures developed within the confines of the nation-state are extremely influential in shaping the new rights and procedures that emerge to structure collective life in the post-national setting. The European Union emerged out of six, then nine, then twelve, and finally fifteen consolidated nation-states.<sup>8</sup> Each has a highly formalized and deeply entrenched set of organizations and rules that developed largely independently of one another because of the territorially bounded nature of economic and social life in the era of nation-building. National constitutional rules, such as the procedures that must be followed by government administration and the rights of citizens to object to government decisions, serve as powerful templates in designing European institutions. When officials and citizens interact in international institutions, they do not set out to design, what, by common consensus, is the fairest and most efficient of organizations, rather they promote the different national models of democracy into which they have already been socialized. Purposeful, strategic human action is constrained by the mental maps of democracy developed in national polities.

Second, consistent with historical institutionalism, I find that constitutional rules in global communities are created and altered at critical, historical moments, after which they remain fairly stable and shape political outcomes. For historical reasons largely outside their control, the national and supranational officials in European institutions occasionally face challenges to their authority and they behave strategically to preserve their powers by changing the constitutional rules.<sup>9</sup> While the bureaucratic politics replicate in some respects the dynamics of institutional change within the nation-state, the nature of crisis and adaptation in the international setting displays unique characteristics. Challenge comes not only from individuals and groups responding to economic or technological imperatives but also from citizens with allegiances to national constitutional symbols and practices who seek to retain them in the face of growing European authority.

The response of international institutions at such moments also differs systematically from the response of national government bodies examined in country-specific studies. The European Union has emerged through consent-based procedures involving states of roughly equal standing. Compared to previous historical episodes of consolidation of political authority, force and power have been remarkably absent in the construction of a new European political space. When European institutions respond to challenges, they cannot use force, power, or even majority decisionmaking mechanisms to tip the balance against the challengers. European institutions, like most international institutions, are weak as far as organizations of political life go and they must appease and accommodate challengers. The positive side of the story, with

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<sup>8</sup> The European Union was formed initially of six Member States (France, Germany, Italy, Belgium, the Netherlands, and Luxembourg). The UK, Ireland, and Denmark acceded in 1973, followed by Greece in 1981, Spain and Portugal in 1986, Sweden, Finland, and Austria in 1995, and the Czech Republic, Slovakia, Hungary, Poland, Estonia, Latvia, Lithuania, Slovenia, Cyprus, and Malta in 2004. It now has 25 Member States.

<sup>9</sup> There are two major types of European institutions, intergovernmental and supranational. The European Council and Council of Ministers are intergovernmental institutions on which representatives of national governments sit and which operate similarly to international bodies like the UN Security Council and the WTO Conference of the Parties. The Commission, Parliament, and European Courts are supranational institutions. They are considered supranational because decisions are made by public officials with five or six-year tenures of office who, under the treaties, are to serve not their national governments but the collective, European mission enshrined in the treaties. They bear similarities to institutions like international tribunals and international secretariats.

respect to the European Commission, is that European citizens enjoy more extensive rights before the Commission than they do before their national administrations. The irony is that the numerous checks on the Commission's powers risk undermining one of the rationales for the creation and perpetuation of pan-European governance: to reassert popular sovereignty in the face of problems and actors that escape the territorial confines of the nation-state.

By advancing a theory of rights specific to international organizations, this Article also contributes to the literature on international relations and international law. Theories of international systems have sought to answer two related questions: why do states create international institutions and, once created, do international institutions behave autonomously and hence act as an independent causal force in international politics? The field is divided between the realist and liberal institutionalist camps. Realists take the view that international organizations are established to facilitate relations among states by handling minor tasks and do not have the power to shift outcomes away from the bargains that the states would reach in their absence.<sup>10</sup> Liberal institutionalists attribute far more significance to international organizations, both in the functions that states confer upon them and in their power to shape outcomes in international relations.<sup>11</sup> Yet both schools treat the international organization itself as a black box. Courts and administrations in international regimes are presumed to operate according to certain functional imperatives that are common to courts and bureaucracies everywhere, regardless of whether they are national or international. This Article moves the study of international systems one step further by asking a third question, "Why are individuals guaranteed certain rights before international organizations?" and answering with a set of interrelated, internally consistent hypotheses about national mental maps, historical challenge, and the strategic response of international actors.

The evidence for my explanation of European rights as the creature of historical crisis and strategic institutional response comes from the historical record. In Part II of this Article, I demonstrate that rights before the Commission were created in three phases, each of which was the product of a strategic move by one or more European institutions to preserve authority in the face of opposition and each of which drew from a template of good government developed elsewhere. As a result, today, European citizens enjoy three major, historically distinct, sets of rights in their relations with Europe's executive branch: the right to a hearing, the right to transparency, and the right to civil society participation.

The first historical turning point was the accession of the United Kingdom in 1973. The common law system of administrative law contained a number of anomalies compared to the continental systems that were already part of the European Community.<sup>12</sup> In 1973, the risk was that English courts would not enforce Commission decisions that failed to abide by the common law's guarantees of fair and lawful public power. I show that the Court of Justice and the Commission responded by adopting the common law right to a fair hearing in European competition proceedings, a right that then migrated to other areas in which particularized Commission decisions adversely affect the interests of firms or individuals. The second critical moment was the Danish rejection of the Maastricht Treaty in 1992. I demonstrate that, to guarantee Danish ratification of the Maastricht Treaty second time around, the twelve Heads of State made a series of commitments to transparency, patterned on the Danish, and more

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<sup>10</sup> See Joseph Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 *International Organization* 485 (1988).

<sup>11</sup> Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 85-109 (1984) (stating the original liberal institutionalist position).

<sup>12</sup> In the interest of historical accuracy, I use "European Community" when specifically referring to the period before the Maastricht Treaty of 1992. Otherwise I use "European Union" or "EU."

generally, northern model of open government. The European Parliament then combined its long-standing institutional interest in more information on Commission policymaking--critical for the exercise of Parliament's legislative powers--with the northern transparency ideal to push for extensive access to documents legislation. The third and final juncture was the resignation of the Santer Commission in 1999, in response to vitriolic criticism from a European Parliament intent on asserting its new treaty power to hold the executive to account. I show that the Commission's response was to adopt legal measures guaranteeing that civil society--citizens and organized interests--would be consulted in the lawmaking process, hence improving its democratic credentials in the eyes of the general European public and creating allies among the civil society groups that were to be consulted. This innovation was patterned both on the trend towards civil society participation in other international organizations and the European tradition of corporatist interest representation.

Understanding the European experience with rights is crucial for a number of reasons. First, as this Article amply demonstrates, rights before Europe's executive branch are very different from the rights guaranteed under American administrative law. Yet this point is missed by American scholars and lawyers alike, to the detriment of their students and clients. The similarities that Americans tend to discern between European and American administrative procedure have the quality of bad puns rather than true resemblances. Only a sustained examination of the roots and evolution of European rights can do away with the misinformation caused by those bad puns and uncover the real nature of European rights. Second, the causal theory that I develop to explain the creation of rights in Europe can be applied to other arenas of global governance, including those in which the U.S. is a direct participant. As I show in the Conclusion, the dynamic of competing national rights traditions and strategic institutional interests is one that we can expect to animate a variety of international bureaucracies and tribunals. Therefore, the European experience contains useful lessons for Americans as they navigate today's emerging system of global governance.

My argument is organized as follows. Part I presents the major positive theories of European rights, legal constitutionalism, intergovernmentalism, and neo-functionalism, together with my historical-institutionalist alternative. In Part II, which constitutes the bulk of the Article, I recount the history of rights before the European Commission through the lens of historical institutionalism. For each phase, this consists of a detailed examination of the nature of procedural rights before and after the critical historical event; a description of the event and the nature of the challenge it posed to European authority; specific evidence of the salience of national mental maps of rights following the event and the strategic use of the right by certain European institutions to consolidate their powers; an analysis of the evolution of the right after the historical moment; and a comparison the new, invariably more expansive, European right with the right in the place of origin. Because mental maps of good government developed within each nation-state were critical, the account of rights before the turning point includes a review of the constitutions and administrative procedure laws of the Member States. In Part III, I return to the competing theories of European constitutional design and demonstrate that the predictions they generate as to the nature of rights, the institutional proponents of rights, and the timing of rights are not borne out by the evidence. Lastly, in the Conclusion, I take stock of rights before the Commission and argue that they are more extensive than in any of the places of origin because of the uniquely weak character of the Commission compared to a classic executive branch. In the Conclusion, I also show that, like any good theory, mine generates a number of specific hypotheses and predictions for the future direction of constitutional change in the EU and another, still emerging, system of global governance, the World Trade Organization.

## I. EXPLAINING RIGHTS

Theories that seek to develop positive explanations for rights have focused generally on national constitutions as opposed to international regimes.<sup>13</sup> Until recently, citizenship was conceived exclusively as a matter of belonging to historical, territorially defined communities and hence the duties and entitlements of citizenship were developed within the framework of the political institutions that governed those communities. Beyond the confines of the nation-state, there were international organizations, but they were believed to order relations among sovereign states, not individuals, and hence their operations did not give rise to duties and rights inhering in individuals, nor could those same individuals make direct claims on international organizations for protection and other collective goods.<sup>14</sup> In this section, I canvass briefly the major approaches to explaining rights in national constitutional orders, with the aim of laying the ground for the discussion of theories of European governance. Any real exploration of theories of national constitutionalism is beyond the scope of this Article. However, a passing familiarity with the principal schools of thought is necessary because their insights have animated the nascent debates on the nature of political institutions and individual rights in the European Union.

### *A. National Constitutional Theory*

At the domestic level, broadly speaking, there exist two types of theories, one that treats rights as value choices by voters, legislators, public officials, and judges and the other that treats them as the product of strategic behavior designed to maximize the individual preferences of those same individuals, generally operationalized as material interests. The first I label legal constitutionalism, in light of the prevalence of the approach in the legal academy, and the second I label rational choice constitutionalism. Both make distinctive assumptions about two central elements of any explanation for the emergence and survival of constitutional rules: human preferences and the way in which individuals collectively create and change the rules. In the remainder of this section, I review the assumptions of the theories and give examples from the scholarship most relevant to the subject of this Article, that is, procedural rights in the decisionmaking of government administration.

#### 1. Legal constitutionalism

Legal constitutionalists assume that individuals have preferences for certain types of collective life that go beyond self-regarding interest, what I call values. When they come together to design or reform government, individuals give expression to their commonly held values or, if their values turn out to be different, some persuade others that their position is the better one. Constitutional rules are designed to promote the moral choices of members of the political community. The rules of government, in turn, guide human action because they are internalized by individuals, or, in other words, become norms of behavior. Thus, a legal

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<sup>13</sup> By rights, I mean both classic liberal rights such as those contained in the American Bill of Rights and rights to participate in democratic decisionmaking through, for instance, the right to vote and have one's representatives influence public affairs. By constitution, I mean all the rules that serve to constitute and define public authority in a political community. These can be set down in a written founding document called a "constitution" but also in parliamentary laws, court judgments, and administrative rules and practices. See, e.g., Mark Tushnet, *The New Constitutional Order 1* (2003) (defining "constitutional order" as a "reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions").

<sup>14</sup> See Abram Chayes & Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 271, 271-85 (1995) (describing classic and modified views of international organizations as "creatures of their Member States").

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constitutionalist explains constitutions, parliamentary laws that set down basic government procedures and rights, and judgments of constitutional courts as a function of the substantive value choices made by national leaders at a constitutional convention, representatives in a legislative assembly, or judges on a deciding court. Citizens act in accordance with the constitution, law, or judgment because they are automatically recognized as legally and morally correct and hence deserving of obedience.

For instance, in American constitutional law, the decision of the Constitutional Convention to divide legislative power between the Senate, the House of Representatives, and the President is explained as a function of Madison's desire to avoid the rise of factions.<sup>15</sup> The institutional design that Americans live with today ensures balance--or put differently stalemate--over action because Madison preferred the "enlarged and permanent" interest that would emerge over time to the "irregular passion" of majority action.<sup>16</sup> Likewise, the right to property and contract contained in the Fifth and Fourteenth Amendments is explained as an endorsement by the Founders of Locke's view of limited government.<sup>17</sup> To move to a more recent statement of rights, the Administrative Procedure Act (APA), passed in 1946 to structure the relations between federal administration and citizens, was taken by James Landis as a codification of what was fair and just.<sup>18</sup> George Sheperd and Martin Shapiro explain the APA as a compromise between what the Republicans in Congress thought was good government--an administration limited by the common law's protection of property rights --and what the Democrats believed was good government --an administration free to alter the status quo and use its expertise to create prosperity for all citizens.<sup>19</sup>

## 2. Rational choice constitutionalism

Rational choice constitutionalism dates to the early 1980's and is informed by the disciplinary methods of economics and political science. The behavioral assumptions of rational choice scholars depart significantly from the ones employed in legal constitutionalism. They start from the premise that preferences of actors are fixed and self-regarding. Although many scholars claim that any type of preference can be accommodated in their model of human action, including altruism, on closer examination preferences are generally operationalized as the preservation and improvement of material wealth or physical safety. When citizens collectively decide how to govern their joint affairs, they do so by adopting rules that maximize individual preferences in a Pareto-efficient manner. And once the rules are adopted, they are obeyed because they promote self-interest. Thus, in this school of thought, constitutions and rights are explained as the self-interested decisions of citizens and legislators rather than as the expression of the type of public life they believe to be morally right.

Some of the most influential work by rational choice scholars conceptualizes constitutions as solutions to collective action dilemmas. Jon Elster argues that rights and independent courts to enforce rights are enacted by today's legislators in order to afford them protection against the arbitrary actions of tomorrow's.<sup>20</sup> Those with political power today tie their hands through constitutional rules such as majority voting and the right to a fair trial only

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<sup>15</sup> See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 60-64 (1985).

<sup>16</sup> See generally Hanna Fenichel Pitkin, *The Concept of Representation 195-96* (1972) (discussing Madison's political philosophy).

<sup>17</sup> See, e.g., Richard Epstein, *Private Property and the Power of Eminent Domain* (1985).

<sup>18</sup> See James M. Landis, *Administrative Process—The Third Decade*, 13 *Admin. L. Rev.* 17 (1960-61).

<sup>19</sup> See George B. Sheperd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. Rev.* 1557 (1996); Martin Shapiro, *APA: Past, Present, Future*, 72 *Va. L. Rev.* 447 (1986).

<sup>20</sup> See Jon Elster, *Introduction*, in *Constitutionalism and Democracy* 1, 8 (Jon Elster & Rune Slagstad eds., 1988).

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because they fear that, tomorrow, their opponents will hold the reins of government. Likewise, political scientist Adam Przeworski argues that constitutions are obeyed only when politicians have a material interest in doing so.<sup>21</sup> According to Przeworski, the most basic rule of any democracy, the rule that the individual or party that wins the majority of votes takes political office and allows the losers to keep their property, only is viable when property is distributed so widely that the losers have an incentive to respect the rule. Election losers without property have nothing to fear from staging a rebellion and attempting to establish a dictatorship. Election losers with property have a lot to fear because they know that if they fail, the winners might very decide to ignore the rule themselves and establish a dictatorship in which they expropriate all property. Majority rule and property rights, therefore, are obeyed only when election losers have a material interest in doing so.

To turn to the rational choice approach to public administration, Matthew McCubbins, Roger Noll and Barry Weingast (McNollgast) argue that legislators enact procedural rights in order to protect the deal that is struck among competing interests in the legislature when that deal is sent to administration to be implemented.<sup>22</sup> With administration, the analytical tool is the principal-agent relationship. Unless the principal (legislator) has control instruments, the agent (the administration) will do its own bidding. According to McNollgast, administrative procedures and individual rights prevent policy drift when government agencies are charged with implementing statutes. First, procedure empowers organized interests and hence ensures that the interests that lobbied successfully in the legislature can protect their gains in the administration. Additionally, formal procedure facilitates oversight by legislators.<sup>23</sup> It bears mentioning that, given the behavioral premises of rational choice theory, the policy choices contained in the original enabling act being implemented by the administration are themselves the product of the self-interest of voters, organized interests, and legislators.<sup>24</sup>

A hypothetical will serve to synthesize the differences between legal and rational choice constitutionalists. Take a constitutional rule prohibiting torture. For a legal constitutionalist, the rule exists because citizens do not want themselves--or their neighbors-- to be subjected to arbitrary physical violence, because they all agree that freedom from arbitrary physical violence is the only moral way in which to organize their joint affairs, and because the rule against torture is so deeply engrained that they adhere to it without further reflection. A rational choice constitutionalist would explain the same rule based on an individual preference for personal safety, a historical community in which resources are so widely distributed that individuals can guarantee their own personal safety only by agreeing with other individuals to a rule against torture applicable to all, and the persistence of historical conditions under which individuals suffer threats to their own physical well-being if they harm others. The legal constitutionalist would criticize the rational choicer for the simplistic understanding of human motivation and the failure to account for norm-driven behavior, in which strategy plays no role. The rational choicer would reply that the legal constitutionalist ignores the historical record, which is full of examples in which rules that would appear to be morally superior, such as a rule against torture, fail to materialize or are routinely flouted. The relationship between values, collective outcomes,

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<sup>21</sup> See Adam Przeworski, *Why Do Political Parties Obey Results of Elections*, in *Democracy and the Rule of Law* 114, 131 (Jose Maria Maravall & Adam Przeworski eds., 2003).

<sup>22</sup> See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 *J. L. Econ. Org.* 180, 183-89 (1999).

<sup>23</sup> See Matthew D. McCubbins, Roger G. Noll, Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431 (1989).

<sup>24</sup> See Robert D. Cooter, *The Strategic Constitution* 20-73 (2000) (discussing interest of legislators in obtaining and preserving power by winning elections and interest of citizens and organized interests in improving material well-being through voting and campaign contributions).



and rule-abiding behavior is natural for the legal constitutionalist, problematic for the rational choicer.

### B. European Constitutional Theory

As in the domestic context, students of European governance have developed radically different accounts of rights depending on their disciplinary affiliations. In this section, I present the leading theories and develop their implications for procedures and rights before the Commission.<sup>25</sup> Each generates predictions for three aspects of participation rights: the type of rights, the European institution responsible for promoting rights, and the timing of the emergence of rights. In Part III of the Article I return to these theories of rights to explore how their predictions fare when put to the test of the historical record presented in Part II and when compared to my historical institutionalist analysis.

#### 1. Legal constitutionalism

European legal scholars are principally concerned with describing and normatively assessing the state of individual rights based on higher principles derived from constitutional law or universal theories of justice. Sometimes, however, European legal constitutionalists examine the origins of individual rights and, when they do so, they work with the same assumptions about human motivation and the interaction of individuals in collective life as do their domestic counterparts. The citizens, legislators, and judges who decide rights and obey them are motivated by the values and higher principles that serve as the basis for the normative evaluation.<sup>26</sup> The focus of legal scholars is generally the Court of Justice's jurisprudence but logically can, and does, extend to Europe's legislators, especially when they are engaged in acts of high constitutional politics such as drafting the European Charter of Fundamental Rights or the Constitutional Treaty.

Of the European legal constitutionalists who focus on rights before the Commission, the work of Hanns Peter Nehl is exemplary, both for the breadth and the incisiveness of the analysis.<sup>27</sup> Nehl concentrates on the jurisprudence of the Court. He argues that the Court was driven by concerns for fairness, rationality, and administrative efficiency in developing the principles that, today, guide Commission decisionmaking. Nehl is influenced by the neo-functional approach, explored in detail below, in which rights serve the institutional interest of the Court in expanding its powers, but ultimately he is wed to the normative understanding of the Court's past and future case law. In Nehl's account, the Court was motivated by the imperative of protecting the dignity of European citizens against the arbitrary exercise of government powers, promoting administrative rationality, and preserving a workable administrative process. The Court will continue to grapple with this set of concerns in deciding future cases. Nehl's legal constitutionalist approach is manifest in the following passage from the concluding chapter of his book:

[I]t is useful to refer once again to the basic rationales determining the existence of process standards. The Community Courts have forcefully stressed the *dignitary* purpose of those rules and thereby considerably improved individual protection in administrative procedures. Surely, also from the perspective of the *instrumental* rationale, the high degree of procedural protection and participation

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<sup>25</sup> See generally Gary King, Robert O. Keohane & Sidney Verba, *Designing Social Inquiry* 99-114 (1994) (identifying falsifiability and specificity of hypotheses as one rule for constructing causal theories).

<sup>26</sup> See, e.g., *The EU and Human Rights* (Philip Alston ed. with Mara Bustelo & James Heenan, 1999).

<sup>27</sup> See Hanns Peter Nehl, *Principles of Administrative Procedure in E.C. Law* (1999).

is paralleled by an increased standard of rationality, accuracy, as well as transparency of the decision-making process. . . . Both the dignitary rationale and the instrumental rationale of process rules as essential components of this notion are to be combined in a reasonable manner. The task of the Community Courts is delicate in this regard. They bear the responsibility for maintaining the workability of the administration and the institutional balance provided for in the Treaty.<sup>28</sup>

Given the normative objective of analyses such as Nehl's, it is difficult to derive robust, forward-looking predictions for the nature of rights. Commission procedure has guaranteed and will continue to guarantee the basic values of dignity, rationality, and workability, and if there arise circumstances in which Commission procedure falls short of these guiding principles, they should be corrected. The question of what type of procedures and rights comport with dignity, rationality, and workability is addressed on a case-by-case basis, when and if litigants claim that the Commission's procedure is deficient. A legal constitutionalist analysis, however, does generate predictions as to which institutions will press for rights in the administrative process: judges sitting on courts. In Nehl's account, the Court of Justice is the institution that seeks to protect fairness, while the Commission, as a typical bureaucracy, is mainly interested in efficiently and expeditiously exercising its powers. Lastly, according to a legal constitutionalist, the timing of rights should follow, or slightly lag behind, the attribution of powers to the Commission. As the Commission acquires and exercises enforcement and rulemaking powers, litigants should go to the Court demanding fair treatment and the Court of Justice should require the Commission to respect procedural rights to the extent warranted by dignity, rationality, and efficiency.

## 2. Intergovernmentalism and neo-functionalism

On the political science side of the fence, scholars of European institutions have developed two, competing theories of the origins of institutions like the Council, Commission, and Court of Justice and their role in European governance: intergovernmentalism and neo-functionalism.<sup>29</sup> Both types of scholarship proceed from the same behavioral premises as domestic rational choice constitutionalists: actors' preferences are self-interested and they behave strategically to maximize their preferences when designing constitutional rules. In explaining the creation of the common market and other areas of European governance, material interests--profits through cross-border trade, protection against discrimination in the workplace, consumer safety, and so on--and strategic behavior to further those interests are the essential explanatory factors. The difference between intergovernmentalists and neo-functionalists rests in their assessment of which actors have been historically important in moving forward the common market project. As the labels would suggest, intergovernmentalists argue that national governments, pressured by domestic lobbies and engaged in treaty-making and decisionmaking in the Council of Ministers, have controlled the pace and direction of European integration. Neo-functionalists, by contrast, argue that the supranational institutions of the Commission and the Court of Justice, in collaboration with individuals and lobbies who benefit from integration, have been the key players.

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<sup>28</sup> Id. at 167-68.

<sup>29</sup> See generally Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998) (intergovernmental theory explained by the leading exponent); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 *Am. Pol. Sci. Rev.* 63 (1998) (neo-functional theory explained by the leading exponents).

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The scholarship has mostly explored the question of why the European Union has acquired powers in areas where sovereign states traditionally held exclusive authority.<sup>30</sup> On the issue of the design of institutions like the Commission that exercise powers at the supranational level, including individual rights, political scientists have been relatively silent. The theories themselves, however, contain a number of implications for the rights question and recently students of European governance have begun to turn their attention to the matter.

In an intergovernmentalist account, administrative procedure, like the substantive policy that the procedure is designed to implement, is the product of the interests of states. What type of interest does a government have in procedure and rights? States may wish to protect their nationals when they expect them to come before international tribunals or international bureaucracies.<sup>31</sup> A salient feature of public international law is the national interest in protecting the well-being of citizens when they leave the sovereign territory of the state.<sup>32</sup> The same can be expected when governments cede sovereignty over certain policy matters, which can involve events occurring within the territorial confines of the state or citizens of the state, to an international tribunal or an international bureaucracy. What type of procedure and rights would a state promote as best protecting its citizens? Although international relations theories are largely unhelpful on this question, especially once they are asked to incorporate variation among democratic states, a good working hypothesis is the bundle of rights and procedures available within the state.<sup>33</sup> As with the other elements of international agreements, the most powerful states within the international regime should be the ones that are able, through bargaining, to upload their systems of rights onto international tribunals and bureaucracies.

If the intergovernmentalist theory is accurate in the case of Europe, the rights that private parties enjoy before the Commission should be those that exist in the most powerful Member States. The actors promoting rights should be Member States, in treaty negotiations or bargaining on the Council of Ministers, rather than the supranational institutions of the Court of Justice, the Commission, and the Parliament. Lastly, on the question of timing, rights should be established as soon as Member States confer autonomous powers upon the Commission that could be exercised in such a way as to directly undermine the well-being of Member State nationals.

In the neo-functionalist line of analysis, rights serve the interests of supranational actors, principally the Court of Justice and private parties that invoke the assistance of the Court in

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<sup>30</sup> The debate between intergovernmentalists and neo-functionalists started as a broader debate between realists and liberal institutionalists in international relations theory. See *supra* text accompanying note\_\_.

<sup>31</sup> States may also have an interest in administrative procedure because it enables them to control the international organizations to which they delegate agenda-setting and enforcement powers. Mark Pollack argues, following the McNollgast line of analysis reviewed in the previous section, that Member States (the principals) may use procedure to protect against policy drift when the Commission (the agent) is given the power to enforce European treaties and laws. See Mark A. Pollack, *The Engines of European Integration* (2003). Pollack demonstrates that the creation of committees (so-called comitology committees) to oversee Commission decisionmaking follows the predictions of the principal-agent model of administrative authority. Pollack, however, focuses on procedures and rights that are available to Member States, not individuals, and indeed the McNollgast prediction of rights for all citizens is unconvincing in a system where each legislator disposes of the resources necessary to monitor administration. The McNollgast analysis overlooks the fact that legislators can lose, as well as gain, control over administration by allowing individuals and associations with competing agendas to intervene in administration through procedural rights. It would be irrational for a Member State to empower domestic interest groups to protect the original bargain contained in a European law through procedure when many domestic groups will almost certainly have interests that are opposed to the law--and be themselves the source of policy drift--and when the state has an entire administration at its disposal to do the monitoring directly. In the case of a state as opposed to a resources-poor Congressman, therefore, it is unlikely that the principal-agent problem would generate rights for citizens.

<sup>32</sup> See Ian Brownlie, *Principles of Public International Law* 521-55 (5<sup>th</sup> ed. 1998) (describing protections under international law for citizens of one state whose persons or property is stationed in the territory of another state).

<sup>33</sup> See generally Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *International Organization* 217 (2000) (reviewing realist theories of state preferences for human rights).

promoting their agendas. Supranational bodies, according to neo-functionalists, seek to aggrandize their powers. As Mark Pollack puts it, Europe's supranational institutions are "competence maximizing," meaning that they "seek to increase both their own competences and more generally the competences of the European Community."<sup>34</sup> Rights, in the neo-functionalist line of analysis, are instrumental to the competence-maximizing agenda of the Court of Justice because they enable litigants to go directly to the courts and challenge government action as incompatible with higher, European law, thus bringing most public decisionmaking within the power of the Court of Justice.<sup>35</sup>

Neo-functionalists have largely focused on the Court's role in establishing European rights that individuals can invoke in their dealings with their national administrations, not the Commission. Martin Shapiro, however, has argued that similar judicial politics are responsible for the development of rights in Commission proceedings.<sup>36</sup> According to Shapiro, a mix of self-interested litigants, judicial activism, public distrust of technocracy, and the inherent legal logic of procedural checks on administration has led, and will continue to lead, the Court to create an extensive set of procedural rights similar to those in American administrative law.<sup>37</sup> Shapiro contends that the structural and legal conditions that resulted in the proceduralization of American rulemaking in the 1970's are today present in the EU.

The historical process as recounted by Shapiro can be broken down into a number parts. Litigants using every possible argument to avoid administrative action and espousing a larger anti-technocracy culture, challenge decisions before the Court on the grounds that the Commission failed to respect procedural requirements in the administrative process. They do so using the textual hook of Article 253 of the EC Treaty, which provides that all measures adopted by the institutions "shall state the reasons on which they are based."<sup>38</sup> The duties under Article 253 would appear to be minimal but the provision is used by the Court to develop a jurisprudence of extensive procedural rights for the parties and, covertly, to engage in judicial review of the substance of the Commission's administrative determinations. The Court does so out of a penchant common to constitutional courts for judicial activism as well as the legal logic of procedure. Once the Court requires the Commission to give reasons, it cannot accept just any set of reasons; the Court demands reasons that respond to the objections of the parties and justify, in the eyes of the judges, the measure.<sup>39</sup> In Shapiro's account, the imperatives of rights at the European level are slightly different than in the relation between the Court of Justice and national administrations: the Court is driven less by the desire to maximize competences and more by a reaction, common in most advanced democracies, to the vesting of extensive discretion in the hands of technocrats. Nonetheless, the self-interest of private plaintiffs and the judicial activist, competence-maximizing tendencies of the Court are critical forces for rights in both settings.

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<sup>34</sup> See Mark A. Pollack, *Supranational Autonomy*, in *European Integration and Supranational Governance* 217, 219 (Wayne Sandholtz & Alec Stone Sweet eds., 1998).

<sup>35</sup> See generally Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *International Organization* 41 (1993) (recounting the so-called "constitutionalization" of the EC Treaty, whereby international obligations were transformed into hard constitutional rights that could be invoked by individuals in court through the neo-functionalist lens); Alec Stone Sweet & James Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, in *European Integration and Supranational Governance* 92, 105 (Wayne Sandholtz & Alec Stone Sweet eds., 1998) (elaborating neo-functional theory of constitutionalization of the EC Treaty); J.H.H. Weiler, *The Transformation of Europe* (1991) (recognizing and synthesizing the constitutionalization of the EC Treaty).

<sup>36</sup> See Martin Shapiro, *The Giving Reasons Requirement*, in *University of Chicago Legal Forum* 179 (1992); Martin Shapiro, *The Institutionalization of European Administrative Space*, in *The Institutionalization of Europe* 94 (Alec Stone Sweet, Wayne Sandholtz & Neil Fligstein eds., 2001).

<sup>37</sup> Shapiro, *The Institutionalization of European Administrative Space*, *supra* note \_\_ at 98-99.

<sup>38</sup> EC Treaty, art. 253.

<sup>39</sup> Shapiro, *The Institutionalization of European Administrative Space*, *supra* note \_\_ at 100.

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Deriving predictions for rights before the Commission from the neo-functionalist account is easy. They should be similar to the rights that exist in American administrative law. The Court of Justice should be the actor promoting the rights, in the interest of law, democracy, and judicial power, and the Commission should resist, in an attempt to retain discretion and technocratic expertise. Lastly, procedural rights should develop gradually, as litigants test the waters, the Court of Justice considers and initially rejects novel theories, but then is moved by virtue of the logic of judicial politics to accept the litigants' arguments.

### *C. Historical Institutionalism*

Historical institutionalism is an approach that was developed by political scientists and economists in the 1980's and 1990's to understand cross-national differences in political and economic outcomes<sup>40</sup> In the historical analysis at the heart of this Article (Part II), I demonstrate that the evidence supports this theory and more than it does the competing theories (Part III). This school of thought defines institutions as the formal organizations of political and social life, and the written rules, together with the less formal, unwritten norms, associated with those organizations.<sup>41</sup> Legislatures, courts, parliaments, constitutions, laws, regulations, judicial decisions, administrative circulars, and standard bureaucratic operating procedures, all fall squarely within the definition of institution. According to historical institutionalists, once institutions come into being, they show remarkable staying power and affect political outcomes in predictable ways (so-called "path dependence"). In the sociological variant of historical institutionalism, this is because rules and conventions shape the preferences and identities of individuals. In the rational choice variant, the same persistence of institutions is explained as a result of their role in solving collective action dilemmas and the difficulty, due to the very nature of collective action dilemmas in political life, of discarding one sub-optimal set of rules and organizations for another, better set.<sup>42</sup>

In this approach, institutions are created and altered in response to historical circumstances that can only be understood by going back and examining the events that were faced by the relevant political actors at the moment in time when change occurred. Many historical institutionalists find that institutions undergo long periods of relative continuity interrupted by sudden change (historical junctures) followed by more continuity. External shocks such as war or technological changes can provoke such junctures. Historical institutionalists regard functionalist explanations with skepticism. The logic of path dependence and unintended consequences make it unlikely that historical actors created organizations and rules to serve the needs that they fulfill today.

Historical institutionalism differs from legal and rational choice constitutionalism in a number of key respects. Let me return to the organizing themes from the beginning of this part of the Article, human preferences and the process through which constitutional rules are created and changed. First, in the historical institutionalist approach, when citizens design constitutional rules, they can be motivated by *both* value and interest, not one exclusive of the other. That is because their mental maps are shaped by their previous engagement in institutions and therefore their capacity for strategic action to further self-interest is limited by the social understandings that have already developed within a historical community. Second, constitutional rules are not designed purposively by members of the political community to the same extent as in the legal or

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<sup>40</sup> See generally Peter Hall & Rosemary C.R. Taylor, *Political Science and the Three Institutionalisms*, 44 *Political Studies* 936 (1996); Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (1990).

<sup>41</sup> Hall & Taylor, *supra* note \_\_\_ at 938.

<sup>42</sup> See Paul Pierson, *Path Dependence and the Study of Politics*, 94 *Am. Pol. Sci. Rev.* 251 (2000).

rational choice accounts. Voters and public officials do seek to further certain types of moral visions and strategic interests when they create, adhere to, and recreate the rules. However, the moral visions and strategic interests that the rules serve today may very well not be the reasons that produced them in the first place. A positive explanation of constitutional rules, therefore, requires careful examination of the historical record, to discern when and for what reasons they emerged. Third, and related to the second point, rules undergo episodes of far-reaching transformation, after which change occurs at the margins, within the basic parameters set down during the earlier moment of transformation.

As I show in detail in the next part of this Article, the historical institutionalist understanding of human motivation and institutional change captures the dynamics of rights creation in European governance more closely than any of the other theories canvassed in this section.<sup>43</sup> Political actors pursue certain visions of good government that cannot be attributed to self-interest (contrary to the intergovernmentalist and neo-functionalist accounts) yet their visions are particular to their constitutional experiences within their nation-states, not universalistic (contrary to legal constitutionalism). The agents of European institutional change do not work from a tabula rasa. The individuals who shape European institutions are educated and socialized within distinct national cultures and are strongly influenced by their national traditions of rights and public law. Furthermore, while the European officials sitting on supranational bodies act strategically to improve their own powers when designing constitutional rules (contrary to legal constitutionalism), they do not behave according to a single model of judicial or bureaucratic power-grabbing (contrary to the neo-functionalist approach). Rather, European judges and public officials respond to highly contextual, historically specific challenges to their authority. Related to this last point, the pattern of rule change has followed the sequence of juncture and continuity observed by historical institutionalists in other settings. New rights in Commission decisionmaking have come into being, redefining what it is to be a European citizen, episodically, not incrementally (contrary to the legal constitutionalist and neo-functionalist approaches). Finally, the national, context-specific values which voters, litigants, and public officials seek to further by promoting certain rights are different from the values that the rights come to serve, over time, in their new European setting. Thus, rights are created by purposive actors to further certain interests and values but not the same ones as they serve today.

The table below summarizes the alternative theories and the competing predictions.

**Table 1**—Creating rights before the European Commission: Theories and predictions

	<b>Legal constitutionalism</b>	<b>Intergovernmentalism</b>	<b>Neo-functionalism</b>	<b>Historical institutionalism</b>
<b>Human motivations</b>	Individuals promote values of dignity,	Governments bargain to promote material well-being	Using doctrinal hook of the duty to	European institutions respond

<sup>43</sup> Historical institutionalism has informed some of the more recent scholarship on the development of the European Union as a political entity. See Alec Stone Sweet, Neil Fligstein & Wayne Sandholtz, *The Institutionalization of European Space*, in *The Institutionalization of Europe I* (Alec Stone Sweet, Wayne Sandholtz & Neil Fligstein eds., 2001). It is often understood as complementary to the neo-functionalist approach because it provides a theoretical framework for understanding the rise of *supranational* organizations and rules. See Paul Pierson, *The Path to European Integration: A Historical-Institutionalist Analysis*, in *European Integration and Supranational Governance* 27, 48 (Wayne Sandholtz & Alec Stone Sweet 1998). In my analysis, however, historical institutionalism is used to emphasize the importance of *national* institutions for the creation of supranational ones. Furthermore, neo-functionalist explanations continue to suggest a certain inevitability or teleology in the end result of the common market and other areas of European governance: economic interests motivate market actors, who pressure political actors, who in turn establish efficient, European-wide rules. However, historical institutionalists are cautious of this form of explanation.

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<b>behavior</b>	workability.	Commission proceedings.	supranational court expands competence and furthers anti-technocracy values and individual litigants pursue material interests.	authority by adopting rights derived from national traditions.
<b>Institutional agents</b>	European Courts	Member States (treaties and laws passed by Council of Ministers)	European Courts	Institution facing historical challenge
<b>Timing</b>	Gradual, tracking the attribution of powers to Commission.	Sudden, at the time that Commission conferred powers.	Gradual, tracking the attribution of powers to Commission.	Sudden, shortly following the moment of challenge to authority.
<b>Bundle of rights</b>	_____	Rights existing in most powerful Member States.	Rights in U.S. administrative law.	Rights necessary to consolidate authority of institution, based on one or more Member State traditions.

## II. THREE GENERATIONS OF RIGHTS BEFORE THE COMMISSION

In this part, I discern three generations of rights before the Commission: the right to a hearing, the right to transparency, and the right to civil society participation. The explanation of the adoption and subsequent evolution of each right is organized chronologically. I first describe the nature of government decisionmaking and individual rights before and after the critical historical event. Since I insist on the importance of Europeans' old mental maps of legitimate government authority in designing new, European-wide constitutional rules, the before consists of the rules of government administration at the national level and the rules that applied to Commission decisionmaking. Then, I analyze the event that prompted the adoption of the right. I demonstrate that European institutions responded to historical circumstances by adopting a template of legitimate administration developed elsewhere and did so for the strategic reason of preserving supranational, European authority. After the careful analysis of the historical moment in which the right was adopted, I trace the incremental development of the right in shaping how the Commission exercises its authority. Lastly, I compare where the right stands today with the national--or in the case of civil society, international--tradition from which it was drawn to reveal the dynamics of rights in the European system of global governance.

### A. *The First Generation: The Right to a Hearing*

Compared to an ordinary executive branch, the Commission has few direct enforcement powers.<sup>44</sup> Fines, injunctions, orders, and permits under European laws passed in Brussels are

<sup>44</sup> See Francesca Bignami, *Transnational Administration: International Data Transfers under the European Privacy Directive*, forthcoming in *Mich. Int'l L. J.*

generally decided and issued by national administrations in each of the twenty-five Member States. Nonetheless, the very fact that the Commission exercises direct powers over citizens of the Member States, bypassing national governments, is extraordinary in light of the international origins of the organization. The Commission directly enforces European law in three areas: competition law (anti-trust), anti-dumping law, and customs law. In 1957, the Commission was given the power to impose fines and issue orders against firms that engaged in anti-competitive behavior.<sup>45</sup> In 1969, it was authorized to impose duties on foreign goods and, by extension, the firms selling the goods, if they were being sold at an unfair price ("dumped") on the European market or were being subsidized by a foreign government.<sup>46</sup> In 1979, in a narrow class of cases, the Commission was given the power to decide whether the customs duties that had been paid or were due on imported products under the European Customs Code had to be returned to the importer.<sup>47</sup> What were the rights of French, German, Italian, Belgian, Dutch, and Luxembourg citizens when they first came face-to-face with international authority? What are their rights today? And how can we explain the difference in the rights that a European citizen yesterday could invoke when she learned that she was at risk of paying a hefty competition fine and those same rights today?

1. The right to oppose adverse Commission determinations then and now

a. National traditions of administrative procedure

In all Western legal systems, individuals have the right to contest vigorously decisions of government administration that inflict hardship upon them. Nonetheless, the stage at which the individual may contest the determination, the forum before which she may vindicate her rights, the scope of the rights, and the range of hardships believed to warrant such procedural rights, differ considerably from one country to another. For purposes of characterizing procedural rights, European systems of administrative law can be divided into those that fall into the *droit administratif* family and those that are part of the common law family.<sup>48</sup> Of the original six Member States, all were squarely *droit administratif* systems (France, Italy, Belgium, Luxembourg, and the Netherlands) or closely related to *droit administratif* systems (Germany).<sup>49</sup>

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<sup>45</sup> See EC Treaty, arts. 81 and 82 (ex 85 and 86); Council Regulation No 17/62, First Regulation implementing Articles 81 and 82 (ex 85 and 86) of the Treaty, 1962 O.J. (L 13) 204. This has been repealed and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1. The Commission has since come to exercise powers in the related areas of merger control and state aids. See *infra* text accompanying note \_\_\_\_.

<sup>46</sup> See Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, 1968 O.J. (L 93) 1. The Regulation has been amended on numerous occasions. The law currently in force is Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Communities, 1996 O.J. (L 56) 1.

<sup>47</sup> See Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, 1979 O.J. (L 175) 1. This law has been repealed and repayment and remissions are currently dealt with under Articles 236 to 239 of Regulation (EEC) No 2913/92 establishing the Community Customs Code, 1992 O.J. (L 302) 1.

<sup>48</sup> The standard classification of countries into *droit administratif* and common law systems is based on the nature of the court in which individuals can seek redress against administrative action. See John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2d ed. 1985); L. Neville Brown & John S. Bell, *French Administrative Law 1-8* (5<sup>th</sup> ed. 1998). In *droit administratif* countries, the courts have jurisdiction only over challenges to acts of the administration and are staffed by specialized judges who can also be employed elsewhere within government administration. In common law countries, the courts are courts of general jurisdiction, with powers over all types of disputes and whose judges are the same regardless of the type of dispute. The characteristic of interest here--the extent and nature of procedural rights before administration--is different from that used to create the standard typology. Nonetheless, the countries fall into the same clusters.

<sup>49</sup> German administrative law is generally characterized as related to, but different from, the *droit administratif* family. See Mahendra P. Singh, *German Administrative Law in Common Law Perspective 1-20* (2001). Administrative acts are reviewed in specialized courts but the judges on those courts are recruited and promoted according to the rules governing the entire judiciary.



Administrative decisions in *droit administratif* countries are generally made with few opportunities for individuals to make their views known.<sup>50</sup> When the administrative process is completed, however, individuals have the right to apply to the courts for full review of the legality of the determination. Individuals have the right to contest adverse administrative determinations at some point, but not necessarily before the administrative authority deciding on the act. Fairness is guaranteed through access to strict "control" (*contrôle*) of the administration's decision in an independent forum. By contrast, in the English common law tradition, many of the same requirements of impartiality and procedure that are imposed on courts are also imposed on government bureaucrats. Government administration acts through trial-type procedures in which the citizen has the right to challenge the factual and legal premises of the determination before an unbiased decisionmaker. Once the determination becomes final, however, access to the courts is restricted, the grounds of review are limited, and the types of remedies available are strictly defined. The fairness of the administrative act in the common law turns on the ability to engage in a quasi-judicial process at the time of its adoption.

The basic difference in procedural rights can be traced to differences in experiences with the administrative state. In France, government administration is highly centralized and professionalized and consequently the mode through which it exercises power and renders decisions is characteristic of a bureaucracy. By contrast, in Great Britain, local government (where most of the decisions that impose direct burdens on individuals are taken) is largely autonomous of central government departments in London and is not highly professionalized. In the 1800's, local government was mostly the task of the justices of the peace, responsible for administration of the poor laws, the highways, and liquor licenses.<sup>51</sup> Even now, local government administration in England is handled largely by boards of elected local officials. Given these histories, it is no surprise that the *droit administratif* and common law ideals of fair government administration differ. In the *droit administratif* tradition, it consists of professionalized decisionmaking, without extensive procedural rights for individual citizens, but with intense scrutiny after-the-fact by judges. In the common law tradition, the ideal consists of neutral third-party dispute resolution within the administration, entailing extensive procedural rights for the parties seeking to avoid the adverse government decision, and limited review afterwards, before judges.

#### b. Administrative procedure of the European Commission

Procedural rights were first established in European competition proceedings, one of the few areas in which the Commission, as opposed to the Member States, is empowered to directly impose sanctions or other burdens upon individuals and firms.<sup>52</sup> In the Treaty of Rome, anti-

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Moreover, fines and other forms of administrative sanctions are reviewed by ordinary criminal courts and law suits against government based on the Civil Code, i.e. sounding in contract, tort, or property, are brought in ordinary courts. As for administrative procedure, German law also stands between the *droit administratif* and common law families. The attention to individual rights in the Basic Law of 1948 has led to fairly extensive procedural rights whenever an individualized administrative act (*Verwaltungsakt*) is promulgated. See *id.* at 74-80. Nonetheless, the bureaucratic culture in German administration is strong and therefore the quasi-judicial procedures that characterizes British administration are less pervasive in the German case.

<sup>50</sup> See Marco D'Alberty, *Diritto amministrativo comparato* 35 (1992) (comparing Anglosaxon proceduralism and French checking of administrative decisions by the Conseil d'Etat).

<sup>51</sup> See H.W.R. Wade & C.F. Forsyth, *Administrative Law* 448 (8th ed. 2000).

<sup>52</sup> In this article, I do not cover the limits on the Commission's investigative powers. These include a privilege for attorney-client communications, Case 155/79, *Australian Mining and Smelting Europe Ltd. v. Commission*, 1982 ECR 1575, para. 23 (covering communications made between an independent lawyer and a client for the sole purpose of defending the client in the competition proceeding at issue), a privilege against self-incrimination, Case 374/87, *Orkem v. Commission*, 1989 ECR 3283 (allowing firms to refuse to answer questions that directly go to the question of guilt or innocence), and a duty to respect national search warrant requirements and only collect evidence related to the specific ends of the investigation, Cases 46/87 & 227/88, *Hoechst AG v. Commission*, 1989 ECR 2859. Rather, I focus on the procedures the Commission must follow and the rights it must respect

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competitive agreements and abuses of monopoly power were prohibited and the Commission was entrusted with enforcement powers.<sup>53</sup> Five years later, in 1962, the Council passed Regulation 17/62, designed to implement Articles 85 and 86 of the Treaty.<sup>54</sup> The Regulation stipulated that:

Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15, 16 the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.<sup>55</sup>

In other words, the Commission was required to “hear” the parties whenever it took any action to enforce competition law: decisions that an agreement or practice did not violate Articles 85 and 86, so-called “negative clearance” (art. 2); findings of an infringement of Article 85 or 86 and orders for termination of the infringement (art. 3); decisions under Article 85(3) that an agreement was exempt from the prohibition on anti-competitive agreements (art. 6); decisions on the retroactive application of European competition law to agreements existing before the passage of Regulation 17/62 (art. 7); the revocation or amendment of exemptions granted under Article 85(3) (art. 8); decisions to impose fines (art. 15); decisions to impose “periodic penalty payment” to compel compliance with Commission decisions (art. 16).

The next year, the Commission set down the details of the procedure, which, as shall be explained shortly, followed French and German law.<sup>56</sup> The opportunity to be heard comprised the following sequence:

- The Commission would notify the parties, in writing, of the “objections raised against them.” Art. 2.
- The parties would have opportunity to “make known in writing their views concerning the objections raised against them” and provide exculpatory evidence. Art. 3.
- The Commission would hold an oral hearing at which the parties could present their case, represented by counsel if they wished. Art. 7.
- The Commission's final decision would be limited to the objections on which the parties had had an opportunity to set forth their views. Art. 4.

Under Article 190, now 253, of the EC Treaty, the Commission was also under a duty to state the reasons for official acts, including competition enforcement decisions.<sup>57</sup> Lastly, under Article 173, now 230, of the EC Treaty the parties could go to the Court of Justice to challenge the decision on one of four grounds: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, and misuse of powers.

The law left open many questions. How detailed did the statement of objections need to be? Would the parties have to rely on the Commission’s characterization of the facts, as set out in the statement of objections or would they have a right to review independently the evidence collected by the Commission? If the parties had the right to review the evidence, did this include all of the information collected by the Commission or just the evidence supporting the

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when it exercises its decisionmaking powers under the Treaties. The Commission’s powers to collect information from individuals and rights in that context are related but tangential to my inquiry.

<sup>53</sup> EC Treaty, arts. 81 and 82 (ex arts. 85 and 86).

<sup>54</sup> Council Regulation No. 17/62, First Regulation implementing Articles 81 and 82 (ex 85 and 86) of the Treaty, 1962 O.J. (L 13) 204. This has been repealed and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

<sup>55</sup> *Id.* at art. 19.

<sup>56</sup> Regulation No. 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No. 17, 1963 O.J. (L 127) 2268.

<sup>57</sup> EC Treaty, ex art. 190 (now art. 253). Article 190 provided that “acts adopted by the Council or the Commission shall state the reasons on which they are based . . . .”

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Commission's determination? Could the same civil servants who investigated the case also decide it, or did the decision have to be reached by a neutral third party? In its final decision, did the Commission have to address all of the points raised by the parties, both those going to their alleged anticompetitive behavior and those suggesting less burdensome remedial measures, or could the Commission wait to respond, if and when the decision was challenged in the Court of Justice?

In the following three decades, the Court of Justice, joined by the Court of First Instance in 1988, answered most of these questions. In a line of cases on the right to a hearing, the Court of Justice imposed an extensive set of procedural requirements on the Commission. In the statement of objections, the Commission must notify the parties of all aspects of the planned decision, to allow the parties a full opportunity to answer the case against them and object to the proposed remedial measures.<sup>58</sup> It must allow the parties to examine all of the information in its files.<sup>59</sup> Summaries of the evidence or the production of evidence limited to information that the Commission considers relevant to the case will not suffice. The Commission is not under a duty to separate prosecutorial and adjudicatory functions and therefore the same civil servants who investigate the case may also decide it.<sup>60</sup> Under the separate but related duty to give reasons, the Court requires that the Commission give a complete enough statement of the facts and considerations underlying the final decision so that the parties and the Court can discern whether the Commission has adhered to the substantive requirements of European administrative law.<sup>61</sup> However, the Commission is not obliged to answer all of the objections of the parties in the final decision. If the parties choose to challenge the administrative determination in the European Courts, the Commission can advance more detailed reasons for the decision there.<sup>62</sup>

The Commission has also helped define the contours of the European right to a fair hearing. Starting in the early 1980's, the Commission issued a series of policy statements and binding rules, setting down procedures for exercising the right to examine the evidence. Thus, in 1982, the Commission announced that it would attach copies of the evidence to the statement of objections issued to the parties at the beginning of a competition proceeding, or, if the evidence was unwieldy, allow the parties to inspect the files on Commission premises.<sup>63</sup> A Commission rule from 1997 defines the classes of documents that are available to the parties and those that are protected from disclosure and sets down the procedure for enabling the parties to consult the documents.<sup>64</sup>

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<sup>58</sup> See Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 ECR 1063; Cases 142 & 156/84, *BAT and Reynolds v. Commission* 1986 ECR 189, para. 13 (defining statement of objections as "a procedural and preparatory document, intended solely for the undertakings against which the procedure is initiated with a view to enabling them to exercise effectively their right to a fair hearing"); Cases C-89, C-116, C-117, C-125 to 129/85, *Woodpulp II* 1993 ECR I-1307, paras. 40-54 and 148-154 (annulling those parts of Commission decision that were not clearly raised in the statement of objections).

<sup>59</sup> See Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, 1979 ECR 1139; Case T-7/89, *Hercules v. Commission* 1991 ECR II-1711, para. 53; Cases T-30/91, T-31/91, T-32/91, T-36/91, T-37/91, *Soda Ash Cases*, 1995 ECR II-1775, II-1821, II-1825, II-1847, II-1901 (setting down "general principle of equality of arms" under which all parties are entitled to know contents of case file); Case T-36/91 *ICI v Commission* 1995 ECR II-1847. See generally Koen Lenaerts & Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 1997 *Common Mkt. L. Rev.* 531, 545-49 (reviewing case law on the right of access to the file).

<sup>60</sup> See *Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, Cimenteries CBR and Others v Commission* 2000 ECR II-491, paras. 712 to 718.

<sup>61</sup> See Case 41/69, *ACF Chemiefarma v Commission*, 1970 ECR 661, 690; *Michelin*, 1983 ECR 3500.

<sup>62</sup> See Case T-308/94, *Cascades SA v. Commission*, 1998 ECR II-925, paras. 220-23.

<sup>63</sup> 12th Report on Competition Policy (1982).

<sup>64</sup> See Commission Notice 97/C 23/03 on the internal rules of procedure for processing requests for access to the file in cases pursuant to Arts. 85 and 86 EC, Arts. 65 and 66 ECSC and Council Reg. (EEC) No 4064/89, 1997 O.J. (C 23) 3.

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The Commission has also created the figure of the hearing officer.<sup>65</sup> This is a civil servant in the Commission department responsible for competition (Directorate-General for Competition) who presides at the oral hearing. Her primary function is to ensure that the hearing is fair by allowing the parties to present their statements, putting questions to the parties, entering new evidence into the record, and allowing witnesses to give testimony. At the conclusion of the oral hearing, the Hearing Officer issues a report in which she summarizes the proceedings, draws conclusions from the hearing, and makes recommendations for new evidence-gathering if she believes it to be necessary.<sup>66</sup>

Lastly, when the Council enacted a European merger law, based on a proposal from the Commission, all of the procedural guarantees developed in the context of Article 85 and 86 (now 81 and 82) enforcement actions were extended to merger proceedings.<sup>67</sup> Firms, therefore, that seek to obtain clearance for a merger enjoy the same procedural rights as firms under investigation for engaging in anti-competitive practices or abusing a dominant position under Articles 85 and 86 (now 81 and 82).

### 2. The historical juncture: Accession of the United Kingdom

What explains the choice that has been made in favor of a detailed statement of objections, full disclosure of all the evidence, and a hearing presided by a civil servant independent of the investigating officers? In this section I demonstrate that UK accession in 1973 represented a critical test of the European system of legal authority because of the different common law understanding of lawful administrative action. As explained earlier and analyzed in depth below, under English law, individuals enjoy rights in administrative proceedings similar to those to which they are entitled in the courts.<sup>68</sup> The Commission's administrative procedure, based as it was on the *droit administratif* systems of the original six Member States, did not afford the same rights. The incompatibility between the European mode of exercising enforcement powers and the British conception of good government posed a challenge to the Court of Justice's and Commission's legal authority over British citizens, on British territory. Here I show that the Court of Justice and the Commission adopted the British mental map of fair administration and that they did so for the strategic reason of appeasing British judges and lawyers and thus extending their authority to the UK.

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<sup>65</sup> See 2001/462/EC, ECSC: Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, 2001 O.J. (L 162) 21. The position was first created in 1982 and then modified in 1990. See Notice on procedures for applying the competition articles of the EEC and ECSC Treaties (Articles 85 and 86 of the EEC Treaty and 65 and 66 of the ECSC Treaty), 1982 O.J. (C 251) 2; Commission Decision of 8 September 1982: 13th Report on Competition Policy 273 (1983) (setting down "terms of reference" of Hearing Officer); Commission Decision of 23 November 1990: 20th Report on Competition Policy 312 (1991) (modifying "terms of reference" of Hearing Officer); Harmut Johannes, *The Role of the Hearing Officer*, 1989 Fordham Corp. L. Inst. 000 (B Hawk ed., 1990).

<sup>66</sup> See 20001/462/ECSC: Commission Decision of 23 May 2001, *supra* note \_\_\_, at art. 8.

<sup>67</sup> Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1990 O.J. (L 257) 13, at art. 8. This has been replaced from May 1st, 2004 by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1. See also the implementing regulation, Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2004 O.J. (L 133) 1.

<sup>68</sup> To refer to the country, I use the noun "UK." Since the legal system of the UK is comprised of separate courts for England and Wales, on the one hand, and Scotland on the other hand, and most of the cases come from England, I generally use the adjective "English" to modify "law" when I refer exclusively to the judge-made principles of the common law. When I refer more broadly to the statutes and the legislative activities of Parliament, which generally apply throughout the UK, and the activities of government administration, which also generally apply throughout the UK, as well as the judge-made law of the courts, I used the adjective "British" to modify "law."

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- a. The common law challenge: The principle of natural justice compared to the French *droit de la défense* and the German *rechtlichen gehörs*

As explained earlier, one of the most significant differences between the *droit administratif* systems of the founding Member States and English law is the extent to which administrative decisionmaking is proceduralized. The picture that was drawn of the two principal European traditions, however, was impressionistic. Especially in administrative law, generalization is perilous since administrative procedures and the stringency of judicial review can differ dramatically from one government department to the next, one field to another. To show that the Commission's administrative procedure was first designed on the *droit administratif* model of the six original Member States and then was transformed to mimic the minority common law model, I enter into the details of administrative law in the Member States, in particular, competition law, which would have been the natural reference point for the civil servants, lawyers, and judges designing Commission procedure. I examine first the law of France, the place where the *droit administratif* model originated, then I review the features of German law that depart significantly from the *droit administratif*, and finally I compare the two systems to the English common law.

In France, the right to make one's case before an administrative decision can be issued is known as the rights of the defense (*droits de la défense*). The right dates back to 1944, when the French Conseil d'Etat (Council of State) recognized that individuals have the right, above and beyond any of the rights created by the legislator in an enabling statute, to refute the administration's version of the facts if the decision constitutes a sanction.<sup>69</sup> In the case, *Dame Veuve Trompier-Gravier*, the prefect (*préfet*) of the Seine region (*département*) had revoked a newspaper kiosk permit based on the defendant's alleged misconduct without giving the defendant the opportunity to refute the charges against her.<sup>70</sup> The Conseil d'Etat found in favor of dame veuve Trompier-Gravier and annulled the prefect's decision based on a theory of general principles of law (*principes généraux du droit*), among which figured the rights of defense. In French administrative and constitutional law, this judgment constituted an extraordinary turning point, for it was the first in a long line of cases in which the Conseil d'Etat created whole cloth, without a textual basis, general principles of law that French administration is required to obey.<sup>71</sup> The Conseil d'Etat in *Dame Veuve Trompier-Gravier* disregarded, for the first time, the fundamental tenet of French constitutional law under which the law (*la loi*) enacted by Parliament is the expression of the sovereign French people and judges are to apply the law, never make it.

Notwithstanding the significance of the rights of defense for French public law, it is critical to appreciate the limits of the right compared to the common law tradition. It only applies to administrative sanctions. And sanctions comprise only a subset of administrative determinations that impose hardship on individuals. The determination must involve personal facts (*caractère personnel*) that go to the behavior of the individual concerned for it to be considered a sanction.<sup>72</sup> Sanctions are distinct from three broad classes of individualized decisions: administrative acts that rest entirely within the discretion of the administration and where a hearing of the parties would have no impact;<sup>73</sup> administrative acts that are non-discretionary because they draw the necessary consequences from a previous administrative or

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<sup>69</sup> The Council of State is the highest French court responsible for reviewing decisions of government administration.

<sup>70</sup> *Dame Veuve Trompier-Gravier*, 5 May 1944, Recueil Conseil d'Etat, p. 133.

<sup>71</sup> See Marceau Long, Prosper Weil, Guy Braibant, Pierre Delvolvé & Bruno Genvois, *Les grands arrêts de la jurisprudence administrative* 352-53 (14th ed. 2003).

<sup>72</sup> *Commissaire du gouvernement* (Guy Braibant), *Conclusions from Conseil d'Etat*, January 8, 1960, Min. Intérieur c. Rohmer.

<sup>73</sup> Jean-Marie Auby & Roland Drago, *Traité des recours en matière administrative* 427 (1992).

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judicial determination and where, again, a hearing of the parties would have no impact;<sup>74</sup> and police measures (*mésures de police*), characterized as forward-looking decisions, adopted to protect public safety or health, which concern the whole public and only incidentally affect the interests of a specific individual.<sup>75</sup> In sum, the rights of defense are far from universally recognized in the daily decisionmaking of French administration, even in decisions that name particular individuals or are clearly directed at certain individuals or firms.<sup>76</sup>

In addition, the procedure required of the administration is extremely abbreviated compared to what would be expected in a judicial proceeding. The party must be informed that the government is contemplating a sanction, she must be informed of all the charges against her (*griefs*), and she must be able to present her case in such a way as to be able to influence the administration's decision (*présenter utilement sa défense*).<sup>77</sup> With the exception of disciplinary proceedings involving state employees, the duty to inform the party of the factual and legal basis of the contemplated decision does not include the communication of all the administration's evidence, rather it entails a summary description of the facts at issue in the case. Furthermore, the manner in which an individual is entitled to present her case depends on the circumstances of the particular decision and does not entail, as a rule, an oral hearing.<sup>78</sup>

At the time that the European Commission was given powers in the competition area, France also had legislation prohibiting certain types of inter-firm agreements and abuses of dominant positions.<sup>79</sup> The administrative enforcement mechanism comported with the bureaucratic rationality ideal and the limited nature of the rights of defense in French law. The Minister of Finance and Economic Affairs was required to refer a suspected competition infringement to a special commission appointed by the government and known as the Technical Commission on Cartels and Dominant Positions (*Commission Technique des Ententes et des Positions Dominantes*).<sup>80</sup> The Commission appointed a rapporteur to investigate the matter and draft a report and a separate advisory opinion that would then circulate to the members of the Commission, the parties, and any government ministries that might be concerned.<sup>81</sup> The firms accused of the anti-competitive behavior had the right to submit written observations on the report, but were not permitted to see the evidence in the file. Moreover, when the Commission met to consider and vote on the case, the parties did not have the right to appear in person and, even when they were permitted to appear, they generally were not allowed representation by a

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<sup>74</sup> Long et al., supra note\_\_ at 356, point 8b).

<sup>75</sup> Auby & Drago, supra note \_ at 427.

<sup>76</sup> My analysis is based on the jurisprudence of the Conseil d'Etat. A number of legislative texts provide greater protection for rights of the defense. The most significant are the Presidential Decree of 28 November 1983 and the Law of 12 April 2000. Under Article 8 of the Decree and Article 24 of the Law, all administrative acts that must be accompanied by a statement of reasons under an earlier law (Law of 11 July 1979) must also allow for an adversary proceeding (*une procédure contradictoire*), which in French legal terminology is the equivalent of respect for the rights of the defense. See Long et al., supra note\_\_ at 355, point 7. The acts covered are all those that are unfavorable (*défavorable*) to the interested party or that derogate from a standard legal rule (*une décision dérogatoire*). Jean-Bernard Auby, *Juris-Classeur Administratif*, Fascicule 107-20, at 14, point 110 (1998). The Decree and the Law have extended the right of defense in a number of ways, for instance, by requiring a hearing even in the case of police measures. However, this legislation post-dates the developments in the Court of Justice and the Commission analyzed below and therefore cannot serve to explain rights in Commission proceedings.

<sup>77</sup> Auby & Drago, supra note \_\_ at 429.

<sup>78</sup> This is another element of administrative procedure which was altered by the Decree of 1983. In the administrative proceedings covered by the Decree, individuals have the right to submit written observations and to give an oral presentation of their case. See Auby, supra note \_\_ at 15, point 113.

<sup>79</sup> See Decree 53-704 of August 9, 1953, 1953 J.O. 7045 (anti-competitive agreements); Law 63-628 of July 2, 1963, 1963 J.O. 5915 (abuse of dominant position). See Eric E. Bergsten, *The Law of Restrictive Trade Practices in France*, II Business Regulation in the Common Market Nations 1, 109-12 (Harlan Morse Blake ed., 1969).

<sup>80</sup> See Bergsten, *The Law of Restrictive Trade Practices in France*, supra note\_\_ at 122-26; V.G. Venturini, *Monopolies and Restrictive Trade Practices in France* 88-100 (1971).

<sup>81</sup> The provisions of the government regulation setting down the procedure of the Commission and the Ministry, Decree No. 54-97 of 27 January 1954, are reproduced in Venturini, supra note \_\_ at 98n.41.

lawyer since, as one contemporary commentator put it, "the Commission has apparently found that lawyers are too technical and want to argue the law, which the Commission feels is not helpful before an economic advisory body."<sup>82</sup> The Commission's opinion would then be issued to the parties and sent to the Minister of Finance and Economic Affairs for a final decision on the infringement and the appropriate remedial action. The Commission's recommendation, although technically non-binding, was considered an administrative act, subject to outside scrutiny in the Conseil d'Etat.<sup>83</sup> Hence, in France, the specifics of the administration of competition policy fell into line with the basic features of the *droit administratif* tradition: there were few procedural rights before the deciding authorities but access to the Conseil d'Etat for scrutiny of the merits of the decision was guaranteed.

The only mental map of rights and administrative authority that departed significantly from the *droit administratif* model in the first decades of the European Commission was German law. Although, broadly speaking, the German system is grouped with the *droit administratif* countries, it possessed, and continues to possess, certain unique features. In the realm of administrative procedure, it afforded greater protection for individuals. The federal Administrative Procedure Act of 1976, which codifies long-standing principles of administrative law, requires that before an administrative authority issues an individual act (*Verwaltungsakt*) that interferes with rights the parties have a right to be heard (*rechtlichen gehörs*). Interfering with rights captures a wider class of administrative action than the French concept of sanction.<sup>84</sup> The administration is under a duty to inform the interested party (*Beteiligten*) of all the facts and evidence relevant to the decision and give the interested party an opportunity to controvert them.<sup>85</sup> Individuals have the right to a written decision in which the essential factual and legal grounds of the decision are given.<sup>86</sup> Unlike French law, individuals have a right of appeal against the act within the administration (*Vorverfahren*), as well as a right of appeal to the courts.<sup>87</sup> However, as a rule, and contrary to the English common law, administrative authorities are not under a duty to allow the interested party to examine all of the evidence, independent of the relevance to the party's case, or to make oral representations. Moreover, administrative authorities are not required to afford an independent, neutral adjudicator to take evidence and consider the government's case against the individual, as in the common law tradition.

In competition proceedings as well, German administrative procedure differed from the French procedure. The parties before the German Cartel Office (*Bundeskartellamt*) had the standard right to notice of the charges and the evidence, the right to respond with a written statement, and the right to receive a reasoned decision.<sup>88</sup> In contrast to ordinary administrative procedure and the proceedings before the French Technical Commission, the parties also had a right to an oral hearing.<sup>89</sup> However, again, they did not have a right of access to all of the evidence in government's file<sup>90</sup> nor were the administrative officials responsible for the investigation independent from those who took the final decision.

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<sup>82</sup> See Bergsten, *The Law of Restrictive Trade Practices in France*, supra note\_\_ at 124.

<sup>83</sup> *Société La Langouste*, cited in Bergsten, *The Law of Restrictive Trade Practices in France*, supra note\_\_ at 125.

<sup>84</sup> See Georg Röss, *Due Process in the Administrative Procedure in 3 Federation Internationale Pour Le Droit Europeen (FIDE)*, *Due process in the administrative procedure, Rapports du 8eme Congres, 22-24 Juin 1978*, 4.1, 4.10 (1978).

<sup>85</sup> *Verwaltungsverfahrensgesetz* [Federal Administrative Procedures Act or "VwVfG"], §§ 28, 29.

<sup>86</sup> *VwVfG*, § 39.

<sup>87</sup> *VwVfG*, §§ 71-73.

<sup>88</sup> See *Gesetz gegen Wettbewerbsbeschränkungen* of 1958 [Act Against Restraints of Competition or "GWB"], §§ 51, 53 (now §§ 54,56);

<sup>89</sup> See *GWB*, § 53 (now § 56).

<sup>90</sup> See *infra* text accompanying note\_\_ (discussing limited access to administration's evidence in German competition proceedings).

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Procedural duties in English administrative law, known as the principles of natural justice, are more extensive. Natural justice is one of a number of requirements that English courts impose, as a matter of judge-made common law, on government administration. The courts interpret parliamentary statutes delegating powers to the administration as containing certain conditions for the lawful exercise of powers. The administration may not commit errors of fact and law, exercise discretion so that its decisions are unreasonable or based upon irrelevant considerations, or make decisions without respecting the procedures of natural justice. Should the administration breach any one of these principles, the courts will hold administrative action to be *ultra vires*.<sup>91</sup> These common law doctrines are so engrained that it is hard to envisage a parliamentary statute that would be interpreted by the courts to authorize the administration to act in breach. Notwithstanding the British constitutional doctrine of parliamentary supremacy, it would be extremely difficult for Parliament to write a statute that an English court would interpret as permitting errors of fact or law, authorizing unreasonable acts, allowing decisions based on irrelevant considerations, or permitting disrespect for natural justice.

Natural justice comprises two elements: officials are forbidden from deciding cases in which they may be biased (*nemo iudex in re sua* or "no man a judge in his own cause") and every person has a right to be fairly heard (*audi alteram partem* or "hear the other side").<sup>92</sup> Both can be traced back to cases decided in the second half of the 1800's, in which decisions of local administrative authorities were quashed because they had disregarded the rules of natural justice.<sup>93</sup> The rule against bias has no equivalent in French or German administrative law. Bias can stem from a number of sources, including a pecuniary interest in the matter, a personal or family relationship to the parties, prejudging the outcome before hearing all of the evidence, and the commingling of prosecutorial and adjudicatory functions.<sup>94</sup> Some of the most common sources of bias in government administration, however, are permitted by the courts. For instance, if a minister decides a matter pursuant to a delegation from Parliament, it will be considered lawful notwithstanding the fact that civil servants under his direction might have been responsible for investigating the case or that the minister might have prejudged the matter by announcing a department policy.<sup>95</sup>

The right to be fairly heard overlaps with the *droits de la défense* and the *rechtlichen gehörs* but applies to a broader array of administrative action than the French right and entails more extensive duties than both the French and German rights. Under English case law, administration must respect the right to be heard whenever it plans to take a decision that adversely affects the legal rights or interests of an individual.<sup>96</sup> Although the characterization of what is a legal right or interest narrows the application of the right, it is nowhere as restrictive as the French limiting principle of a sanction. Administrative decisions that are entirely forward-looking, discretionary, or policy-driven, must nonetheless respect the right to be heard. As a result, administrative decisions such as land-use planning, the allocation of funds to local administrative authorities, and the awarding of licenses to first-time applicants can only be made after the affected parties have an opportunity to make themselves heard.<sup>97</sup> As for the content of the right, the courts have held that it includes the right to know the government's case, including

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<sup>91</sup> Wade & Forsyth, *Administrative Law*, supra note \_\_ at 37.

<sup>92</sup> Wade & Forsyth, *Administrative Law*, supra note \_\_ at 445, 469.

<sup>93</sup> See, e.g., *R. v. Rand* (1866) LR 1 QB (rule against bias) (discussed in Wade & Forsyth, *Administrative Law*, supra note \_\_ at 448); *Cooper v. Wandsworth Board of Works* (1863) 14 CB (NS) 180 (right to a fair hearing) (discussed in Wade & Forsyth, *Administrative Law*, supra note \_\_ at 473).

<sup>94</sup> Wade & Forsyth, *Administrative Law*, supra note \_\_ at 460-66.

<sup>95</sup> *Id.* at 452, 464-66.

<sup>96</sup> See *id.* at 484.

<sup>97</sup> See *id.* at 525-31.



the evidence and reports in the government's possession.<sup>98</sup> The parties are also entitled, as a general matter, to present their case directly before the deciding authority, although sometimes written submissions are all that is required.<sup>99</sup> Thus, English administrative procedure differs from its French and German counterparts in both the extent to which the parties have the opportunity to examine the government's evidence and the emphasis on oral hearings.

The principles of natural justice have not only been developed by common law courts, but have also been given effect by parliamentary statutes establishing the institutions of the British administrative state.<sup>100</sup> In the early part of the 1900's, a number of special tribunals were created to administer the social legislation of the welfare state and they have since multiplied in virtually all policy domains. Tribunals exist for awarding social security benefits, allocating fishing licenses, deciding on child support, determining whether companies have infringed information privacy laws, and myriad other policy areas.<sup>101</sup> Tribunals are charged with making decisions that in *droit administratif* systems would be made by government ministries. Tribunals are analogous to courts in that they are independent of the ministry responsible for the policy area in which they adjudicate.<sup>102</sup> Furthermore, their proceedings are adversarial: the government presents the case against the defendant and the defendant has the opportunity to respond. They are different from ordinary common law courts because they are specialized—their jurisdiction is limited to one administrative scheme—and their procedure is abbreviated compared to a civil or criminal trial. Appeals on questions of law decided by administrative tribunals can be taken to the ordinary courts.

The other type of legislative scheme designed to give effect to the dictates of natural justice is the statutory inquiry. Inquiries are established in areas where, ultimately, the decision is a discretionary one entrusted to a minister, but where it is believed that the minister should listen to what the public has to say on the matter. A civil servant is tasked with conducting a fair hearing of all of the interested parties and then making a recommendation to the minister.<sup>103</sup> This is the procedure that is followed before the government may acquire land, build roads or airports, alter certain types of health services, and make a number of other types of administrative decisions. The case law and the parliamentary practice of establishing tribunals in the place of bureaucracies and statutory inquiries in the place of exclusive ministerial power demonstrate the extent to which the principle of natural justice permeates the fabric of British administration.

At the time that the UK joined the European Community, the enforcement of British competition policy adhered to the principle of natural justice. The institutional apparatus was split between the Restrictive Practices Court and the Monopolies and Mergers Commission. The Restrictive Practices Court (RPC) was a full-fledged administrative tribunal, with jurisdiction over cartels and certain forms of vertical agreements in restriction of competition.<sup>104</sup> The Monopolies and Mergers Commission (MMC) was also organized as an administrative tribunal but it only had the power to make recommendations on mergers and anti-competitive

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<sup>98</sup> See *id.* at 506-11. There are exceptions to the duty to disclose the evidence, especially where there are good reasons to preserve the confidentiality of the government's sources. See *id.* at 509-10.

<sup>99</sup> See *id.* at 511-15.

<sup>100</sup> See *id.* at 466.

<sup>101</sup> See *id.* at 929-37 (table listing tribunals).

<sup>102</sup> See *id.* at 890-98.

<sup>103</sup> See *id.* at 889, 938-39.

<sup>104</sup> See G.V. Rogers, United Kingdom Legislation on Restrictive Trade Practices in Comparative Aspects of Restrictive Trade Practices, 1, 10, in Supplementary Publication No. 2, International and Comparative Law Quarterly (1961); Paul Craig, The Monopolies and Mergers Commission: Competition and Administrative Rationality, in Robert Baldwin & Christopher McCrudden, Regulation and Public Law 201, 205 (1987).

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practices to the administration.<sup>105</sup> The government ministry, namely the Department of Trade and Industry, was responsible for deciding on the appropriate prohibitions. In sum, cartel policy was the province of a classic administrative tribunal and fully in line with the principles of natural justice. Monopolies and merger policy was administered through the combination of a commission independent of the government, before which individuals had a right to be heard, and discretionary ministerial decisionmaking, without procedural guarantees for individuals. In both cartels and mergers, however, the contrast with the French *Commission Technique* and the German *Bundeskartellamt* is evident.

The Commission procedure set down in 1962 and 1963 fell in line with the procedural guarantees of French and German competition law. As in both French and German law, the parties had the right to learn of the government's essential facts and arguments, respond in writing, and receive a reasoned final decision. As in German law, the parties also had the right to an oral hearing. However, the Commission was not required to inform the parties of every aspect of the planned decision, reveal all of the evidence and reveal it directly to the parties, or provide for a neutral third party to officiate the administrative proceeding. As in the French and German systems, it was believed that any injustice that could arise from such defects could be remedied when the administrative decision was appealed to the Court of Justice. In 1973, this view was called into question.

### b. National value: The influence of the English right to a fair hearing

The English principle of natural justice influenced both the jurisprudence of the Court of Justice and the European Commission's self-imposed procedural reforms. UK accession brought a marked shift in the Court's doctrine on procedural rights in competition law.<sup>106</sup> In 1966, in the very first challenge to a Commission competition decision, the parties raised the question of the adequacy of their rights in the course of the Commission's proceedings. The parties claimed, and the Court dismissed, a right to examine Commission evidence, the very same right that the Court declared in 1979 to part of a fundamental "right to be heard." *Consten and Grundig*, firms that had been denied an exemption under Article 85(3) for their exclusive distributorship contract, argued that the Commission had violated their rights of defense.<sup>107</sup> They argued that they should have had the right to receive and examine all of the evidence gathered in the Commission's investigation. *Consten and Grundig* were especially keen to examine memoranda from the French and German authorities responding to questions posed by the Commission, which they believed had influenced the Commission's decision.

Advocate General Roemer rejected their claims, followed by the Court, largely based on the finding that the Commission procedure comported with the procedure followed by national competition authorities and, in particular, the German one.<sup>108</sup> The Advocate General recognized that there was a "right to be fully heard" (*rechtlichen gehörs*) but that, as far as the right to

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<sup>105</sup> See Rogers, *United Kingdom Legislation on Restrictive Trade Practices*, supra note\_\_ at 14; Craig, *The Monopolies and Mergers Commission*, supra note\_\_ at 205, 206, 221 (citing to *Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry* [1975] AC 295).

<sup>106</sup> Jürgen Schwarze has also argued that the Court of Justice came under the influence of English administrative law in viewing fairness as turning on the procedural rights available to firms in competition proceedings rather than on the relief they could obtain from the Court through judicial review. See Jürgen Schwarze, *Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation*, 51 *Int'l Comp. L. Q.* 17, 21 (2001).

<sup>107</sup> Cases 56 & 58/64, *Consten & Grundig v. Commission*, 1966 ECR 299.

<sup>108</sup> The Court of Justice is composed of one judge from each Member State and eight advocates general, selected on a rotating basis by the Member States. An advocate general is assigned to each case and issues an extensively reasoned, non-binding opinion advising the Court on the right outcome before the Court decides the case. See Craig & de Búrca, *EU Law*, supra note\_\_ at 88, 93-94.

examine the evidence was concerned, Consten and Grundig only had the right to a summary of the facts that the Commission used in support of the competition decision. The Advocate General based his conclusion on the law governing the German Cartel Office (*Bundeskartellamt*):

A clear summary of their contents [documents that served as the basis for the decision], which allows those concerned to learn without difficulty of the essential lines of the opinion of the third parties concerned, is enough. These are also the principles which govern the procedure before the *Bundeskartellamt*. (Cf. Müller-Henneberg and Schwartz, 'Gesetz gegen Wettbewerbsbeschränkungen und Europäisches Kartellrecht', 2<sup>nd</sup> ed., p. 959.)<sup>109</sup>

The Court followed the Advocate General.<sup>110</sup>

In 1970, when the Commission used for the first time its power to impose fines, the parties challenged the decision on similar procedural grounds and again they were rejected by the Advocate General and the Court, with one small exception. In *ACF Chemiefarma v. Commission*, a number of quinine producers were found to have participated in a price-fixing cartel. They argued that the Commission's statement of objections was not sufficiently precise; that the Commission should have communicated all of the evidence in the file, or in the alternative, should have communicated the documents that served as evidence for the Commission's allegations; and that the final decision was defective because it did not address arguments made by the parties on the nature of the pharmaceuticals market.<sup>111</sup> The Commission, as it had in *Consten and Grundig*, relied on the absence of a duty to disclose the file in the cartel laws of the Member States in defending its procedure.<sup>112</sup> The Advocate General rejected all of the quinine producers' procedural challenges and, for the most part, the Court followed.<sup>113</sup> Only on the question of whether the Commission had to disclose the records from staff visits to certain firms or whether it could simply summarize the results of the investigation, did the Court hedge. It said that the Commission should have communicated the records, but when the Court went on to examine the prejudice to *ACF Chemiefarma*, it found it to be minimal. The failure to communicate the documents and allow for critical examination of the proof led to the conclusion that the Commission had failed to prove its case in one limited respect: the life of the ten-year cartel, and hence the amount of the fine, was reduced by seven months.<sup>114</sup>

The next competition case, decided in 1972, produced no surprises. In *ICI v. Commission*, the member of a dyestuffs price-fixing cartel challenged the Commission's fine. The complainant alleged a similar litany of procedural defects and, again, the Advocate General and the Court rejected them.<sup>115</sup>

By 1974, the tone of the Court had changed dramatically. *Transocean Marine Paint Association v. Commission* was one of the first competition cases to be decided after the accession of the UK.<sup>116</sup> *Transocean*, an association of marine paint manufacturers, operated a world-wide sales network for its members. It had previously notified the Commission of the agreement, and had obtained an Article 86 (3) exemption. When *Transocean* applied for renewal

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<sup>109</sup> Id. at 368.

<sup>110</sup> Id. at 338.

<sup>111</sup> Case 41/69, *ACF Chemiefarma v. Commission*, 1970 ECR 661, 669-74. See also related cases Case 44/69, *Bucher & Co. v. Commission*, 1970 ECR 733 and Case 45/69, *Boehringer Mannheim v. Commission*, 1970 ECR 769.

<sup>112</sup> Id. at 670.

<sup>113</sup> Id. at 707-08, 712-13 (opinion of Advocate General Gand); id. at 684-86 (opinion of the Court).

<sup>114</sup> Id. at 697, para. 142.

<sup>115</sup> Case 48/69, *Imperial Chemical Industries Ltd. v. Commission*, 1972 ECR 619, 635-37 (arguments of parties), 697-701 (opinion of Advocate General Mayras), 650-52, para. 16-44 (judgment of the Court).

<sup>116</sup> Case 17/74, *Transocean Marine Paint Association v. Commission*, 1974 ECR 1063.

of the exemption, the Commission sent Transocean a notice of objections in which the conditions being contemplated by the Commission in order to ensure that the agreement would not have anti-competitive effects were listed. After giving Transocean the opportunity to make written and oral submissions, the Commission issued the final decision. There, according to Transocean, was a condition that had not been notified to the parties: Transocean's members would have to disclose cross-holding patterns between their directors and other firms in the paint sector. Transocean challenged the decision on the grounds that it could not have anticipated the condition from the proceedings and hence never had the opportunity to make its views known.

The Advocate General assigned to the case was one of the new British members of the Court, Advocate General Warner. He agreed with the Commission that the procedure was perfectly consistent with the letter of the applicable law. Nonetheless, Advocate General Warner concluded that the "right to be heard" was part of Community law and that by imposing what amounted to an entirely new condition without hearing the parties, the Commission breached the right and the new condition had to be annulled.<sup>117</sup> The Advocate General based his conclusion on a long excursion into the laws of the Member States. He first gave what amounted to a textbook statement of the English rule:

There is a rule embedded in the law of some of our countries that an administrative authority, before wielding a statutory power to the detriment of a particular person, must in general hear what the person has to say about the matter, even if the statute does not expressly require it. *Audi alteram partem* or, as it is sometimes expressed, '*audiatur et altera pars*.'<sup>118</sup>

He then launched into an extensive discussion of the English "rule of natural justice" under which "although there are not positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."<sup>119</sup> The Advocate General then canvassed the traditions of other Member States. In his tally, England, Scotland, Denmark, Germany, and Ireland clearly embraced the principle, while France, Belgium, and Luxembourg were arguably evolving in that direction, and Italy and the Netherlands clearly rejected it. His results did not support a declaration that the right was ubiquitous or even that it was a majority tradition. Nonetheless, he concluded:

My Lords, that review, which I have sought to keep short, of the laws of the Member States, must, I think, on balance, lead to the conclusion that the right to be heard forms part of those rights which the 'law' referred to in Article 164 of the Treaty upholds, and of which, accordingly it is the duty of this Court to ensure the observance.<sup>120</sup>

The Court embraced the common law principle put forward by the Advocate General. For the first time, it found that there was a "general rule" that: "a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known."<sup>121</sup> In the past, the Court had framed its review of the Commission's procedures as a matter of policing respect for the rights of defense set down in the competition laws. In *Transocean*, by contrast, the Court announced a higher principle that that could be used to supplement the competition laws. The Court concluded by annulling the condition and sending the case back to the Commission for further proceedings, in which the parties could make their views known.

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<sup>117</sup> Id. at 1089.

<sup>118</sup> Id. at 1088.

<sup>119</sup> Id.

<sup>120</sup> Id. at 1089.

<sup>121</sup> Id. at 1080, para. 15.

## Creating Rights

By the time the Court decided the next major competition case involving procedural issues, it was clear that the tide had turned towards a court-like administrative process. Hoffman-La Roche, a manufacturer of vitamins, was found by the Commission to have engaged in an abuse of a dominant position by forcing buyer firms to purchase all of their supplies from Hoffman-La Roche.<sup>122</sup> Hoffman La Roche objected to the Commission's procedure on the same grounds as the parties in the pre-*Transocean* cases: in the course of the administrative proceeding, the Commission had not allowed Hoffman to inspect certain documents which supported the findings of fact in the Commission's final decision. Hoffman argued that the Commission had breached the right to be heard. This time, the Court agreed.

The extent to which the new, English tradition had transformed the judge-made law of rights before the Commission is graphically illustrated by the difference between the opinion of the Advocate General and the judgment of the Court. Advocate General Reischel recommended to the Court that it find against Hoffman-La Roche. As his predecessor Advocate General Roemer had done in *Consten and Grundig*, the Advocate General looked to the procedural guarantees in German competition law for guidance. Like Roemer, he observed that, under German law, the parties to the administrative proceeding only had a right to a summary of the evidence, not the right to examine the evidence for themselves:

According to [the German Law Against Restrictions on Competition] in administrative proceedings the only applicable principle is that the persons concerned must have the opportunity to give their views on the objections laid against them and that a decision cannot be found on facts of which the parties concerned were unaware. The way in which the Bundeskartellamt (the Federal Cartel Office) applies this principle is evidently to cumminicate [sic] only the essential content of the pleadings, and in particular to notify them only of the essential purport of the views of the other parties concerned. There is no right to carry out a thorough inspection of documents . . . .<sup>123</sup>

The Advocate General found that there was “no general legal principle” giving a right to inspect documents and therefore, recommended that the Court find against Hoffman La-Roche.

The Advocate General showed himself to be behind the times. With UK accession, the nature of Europe's legal system had radically changed. The common law's principle of natural justice had replaced the German law of procedural rights as the yardstick against which European authority had to be measured. Thus the Court declined to follow the Advocate General and departed from the cases decided before accession. The Court declared, for the first time, that the right to be heard was a “fundamental principle of Community law” and that the ability to examine the Commission's evidence was part and parcel of the right:

[I]n order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty.<sup>124</sup>

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<sup>122</sup> Case 85/76, *Hoffman-La Roche v. Commission*, 1979 ECR 461, 472.

<sup>123</sup> *Id.* at 600.

<sup>124</sup> *Id.* at 512, para. 11. It should be noted, however, that ultimately the Court held against Hoffman La-Roche since it found that there had been no prejudice. Although Hoffman La-Roche had not been permitted to examine the documents during the administrative proceedings, it was allowed to do so in the court case, and therefore the Court found that it had been given an adequate opportunity to make its case. See *id.* at 513-14, para. 15-19.

## Creating Rights

The rejection of the earlier case law is striking. Both the timing of the change in the Court's doctrine, as well as the reasoning of the Hoffmann-La Roche judgment, in which the Court categorized "the right to be heard" in much the same terms as Advocate General Warner in the earlier *Transocean* case, support the conclusion that European administrative law came under the spell of the English common law. In the twenty-five years of competition cases that have since followed, the European Courts have worked out the ramifications of the fundamental principle of the—now European-- "right to be heard."

The background of how the Commission came to adopt the figure of the hearing officer at the oral phase of competition proceedings also demonstrates the common law's influence on individual rights before the Commission. The historical record shows that the Commission drew upon the common law's rule against bias, the second element of natural justice. As mentioned earlier, in 1982, the Commission announced that a civil servant, unconnected with the investigation, would preside at the oral hearing at which parties accused of anti-competitive behavior give testimony and refute the Commission's evidence.<sup>125</sup> According to a number of sources, this innovation occurred in response to a damning report from the House of Lords European Communities Select Committee.<sup>126</sup> There, the House of Lords criticized the European Commission for combining the functions of judge and prosecutor, in breach of the second principle of natural justice. The Select Committee said:

It is clearly essential that the rules and proceedings of the Commission should be seen to be just and fair as well as effective. The evidence received by the Committee revealed that there exists widespread doubt whether the Commission's procedures are just and fair to undertakings whose practices are under investigation. . . . For most witnesses, including the Bar and Law Society, the grounds for believing that there was "room for improvement" were derived from the fact that the Commission combines the functions of investigator, prosecutor, and judge. In general it was urged that the requirements of natural justice should, as far as is possible, be observed in the adjudication by the Commission of all contentious or disputed cases and that there should be no departure from natural justice on grounds of administrative convenience.<sup>127</sup>

Since the existing treaty framework would not allow for the appointment of an independent figure, similar to a member of a British administrative tribunal, the Committee suggested that a civil servant, removed from the Commission's investigation, be brought in at the hearing phase:

The Committee suggest that the creation of an additional post of Director in Directorate-General IV [the Commission competition department] should be considered. The Director so appointed would enter the case at the stage of the preliminary meeting [the Committee also recommended introducing a preliminary meeting in which the parties would be able to clarify the factual basis and reasoning of the complaint] over which he would preside. He would also preside

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<sup>125</sup> It is important to avoid confusion between Commission hearing officers and American administrative law judges (ALJs). Unlike an ALJ, a hearing officer does not have responsibility for initial determinations of fact and law that may only be altered by the higher echelons of the administrative agency for good reasons. In European competition proceedings, the section responsible for the investigation and the Director General for Competition retain full responsibility for making the findings in the case.

<sup>126</sup> See, e.g., Julian M. Joshua, 15 *Fordham Int'l L.J.* 16, at 74 (1991/1992) (principal administrator at DG Competition stating that "[l]argely as a result of these criticisms [from common lawyers and industry groups], the post of Hearing Officer was created in 1982").

<sup>127</sup> See House of Lords, European Communities Committee, Eighth Report on Competition Practice vi, para. 9 (1981-82 H.L. 91) (Feb. 23, 1982) (citations deleted and emphasis added).

over the oral hearing, and would assume, within Directorate-General IV, responsibility for the subsequent conduct of the case.<sup>128</sup>

The Commission very shortly afterwards took on board the crux of the House of Lord's recommendation by creating the figure of the hearing officer.

The House of Lords exercised a similar influence over the Commission's decision to disclose all of the evidence to the parties, regardless of whether or not the Commission considered the evidence relevant and hence relied on it to build its case.<sup>129</sup> Although the Committee's report was only published in February 1982, its inquiry began one year earlier. The Committee put a number of questions to the European Commission on competition procedure, circulated the critical comments of British lawyers to the European Commission, and called upon a high ranking civil servant responsible for competition (Mr. Pappalardo, Director, DG IV) to testify before the Committee. The British Lords on the Committee had this to say to the Italian Director about the Commission's practice of only allowing companies to examine the evidence the Commission deemed relevant:

Lord Fraser of Tullybelton. Without wishing to be more offensive than I can help, Mr. Pappalardo, the difficulty is that if the company concerned knows that the judge has in his file under the table a whole lot more documents but does not quite know what those other documents are, it is apt to leave the company in a dissatisfied position. That is the trouble, is it not?

Chairman (Lord Scarman)

The Court said in the La Roche case that the Commission must produce the documents on which they rely. What troubles the undertaking is that there are other documents on which the Commission has not chosen to rely and they want to know what they say?—I know [Mr. Pappalardo]. This is the problem. There are various answers to that, not simply the dogmatic approach that since this is an administrative procedure we do not need to go that far. . . . It is unthinkable for any official of DG IV to have a document which would be favourable to the company and to forget it in order to punish the company.

Chairman. You might not understand the document. You might not see that it was helpful to the undertaking? . . . I cannot exclude that. [Mr. Pappalardo] However, it seems to me somewhat theoretical.<sup>130</sup>

The House of Lords final report recommended that the Commission give access to the entire file and the Commission, shortly thereafter, did precisely that.

In making the recommendation, the House of Lords relied on a recent opinion of Advocate General Warner. There the British Advocate General had criticized the Commission for not disclosing all of the information to the parties to a competition proceeding. He recited yet another classic common law maxim:

The Commission seems to me moreover to have overlooked that "justice must not only be done but must manifestly be seen to be done." Justice is not seen to be done if there is concealed from an undertaking, for no imperative reason, part of the text of a complaint made against it.<sup>131</sup>

This passage from the House of Lords' report illustrates vividly how British lawyers, statesmen, and judges throughout the European system, on both national and supranational government

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<sup>128</sup> Id. at xx, para. 42(e).

<sup>129</sup> See supra text accompanying notes \_\_\_.

<sup>130</sup> Id. at 49-50, para. 125-28.

<sup>131</sup> Id. at vii, para. 11 (citing to J-P Warner's opinion in *The Distillers Co. Ltd. v. Commission*, 1980 ECR 2229, 2295-97).

bodies, working with the British mental map of legitimate administration, joined together to challenge the *droit administratif* way of governing. The critique from judges and lawyers socialized in the common law tradition spurred yet another transformation in European competition law in the direction of a quasi-judicial administrative process.

- c. Supranational interest: The interest of the Court of Justice and the Commission in extending European legal authority

Why did the Court and the Commission alter the rights available in administrative proceedings in accordance with the English principle of natural justice? After all, the UK was a vastly outnumbered minority. In 1973, it was only one of two common law Member States in a European Community of nine Member States, the rest of which were members of the *droit administratif* family or represented variations on the *droit administratif* system. The same is true today. The answer lies in the distinctive European system of legal authority. Enforcement of European law relies upon national administrations, police, and, most importantly in the rights context, courts. The Commission can issue decisions and the Court of Justice can hand down judgments, but unless national courts are willing to enforce European law against individuals, the decisions of the European institutions exist on paper only. When the UK acceded and British lawyers, judges, and statesmen launched the natural justice attack, the Court and the Commission came under immense pressure to accommodate them. The consequence of failing to do so was English courts unwilling to enforce Commission competition decisions because the time-honored rights of their citizens had been breached. The Court and the Commission reformed competition proceedings and adopted the right to be heard with the objective of bringing the UK into the European system of legal authority.

There is a stark and an infinitely more subtle and realistic way of rendering the European dynamic of legal authority. First, the stark account.<sup>132</sup> To execute any decision against an individual or firm, the Commission and the Court of Justice rely on national administrations and national courts. A firm that does not comply with a Commission competition decision and the Court of Justice judgment upholding that decision can only be brought into line—and a bank account attached or an individual detained for contempt of court—through the decision of a national government officer, upheld in national court. If the government officer and the judge are unwilling to enforce the Commission's decision, it becomes an obligation in the international law sphere rather than an authoritative command in the positivist sense.<sup>133</sup> Especially at the beginnings of European integration, the Commission and the Court were intensely aware of the limits of their enforcement authority and this awareness contributed to the making of European law.<sup>134</sup> A Commission decision or Court of Justice judgment could not blatantly disregard national cultural traditions of the lawful exercise of public power. The judges on the Court of Justice were particularly attune to the need to accommodate their British brethren, given the

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<sup>132</sup> I draw upon Joseph Weiler's analysis of cooperation between the Court of Justice and national courts in enforcing European law over national law. See J.H.H. Weiler, *The Transformation of European Law*, 100 *Yale L.J.* 2403 (1991). According to Weiler, supremacy of European law was achieved not by judicial proclamation in Luxembourg, but rather through a gradual process in which the Court accommodated national judiciaries and, reciprocally, national judiciaries came to accept European law and the European Court of Justice as supreme to national law, even national constitutional law.

<sup>133</sup> See HLA Hart, *The Concept of Law* (2d ed. 1994) (edited by Penelope Bulloch & Joseph Raz). Oxford: Clarendon Press.

<sup>134</sup> See, e.g., A.M. Donner, *The Court of Justice of the European Communities in Legal Problems of the European Economic Community and the European Free Trade Association* 66, 72, Supplementary Publication No. 1 of the *International and Comparative Law Quarterly* (1961) (statement by second President of the Court of Justice on the Court's reliance on national courts to refer cases and execute judgments); House of Lords, *European Communities Committee, Eighth Report on Competition Practice*, *supra* note \_\_ at 50-51, paras. 133-35 (Director of DG IV stating that Commission's inspection authority was entirely dependent on whether a British judge would grant a warrant authorizing entry).



sensibilities of judges to rights claims and the imperatives of protecting individual freedoms in the face of oppressive government action.

The subtle version of the cooperation dynamic builds on the stark one. In making decisions and rendering judgments, European judges and administrators take seriously objections from their counterparts at the national level, schooled in their distinct traditions of public law.<sup>135</sup> A national jurist's claim that European authority has been exercised unfairly must be examined with extreme care. To put it slightly differently, one of the most important interpretive sources for determining the scope and limits of the power conferred on the Commission by the EC Treaty are national legal traditions. As the Court has repeatedly stated, "the Court draws inspiration from the constitutional traditions common to the Member States."<sup>136</sup> But, different from what the Court says, there sometimes does not exist a common tradition. Hence, when it comes to determining the limits of European public power, in the absence of a common tradition, it is the tradition that will object loudest to the particular exercise of public power that prevails. This solicitude for national understandings of legitimate, rights-abiding public authority is related to the absence of European enforcement powers and the corresponding strategic need for cooperation from national courts and administrations, but it runs far deeper. It now can be said to define the new, European constitutional tradition.<sup>137</sup>

My explanation for the powerful influence of a minority rights tradition is largely based on speculation. However, there is significant evidence that the Court of Justice was aware of the consequences of disregarding national mental maps of fair and rights-abiding government administration. In the first years of the European Community, individuals indeed did go to their national courts to protest Commission decisions and national courts were willing to review the decisions, to ensure that their citizens were not subject to arbitrary and unlawful exercises of public power. The case in point is the challenge brought in the Italian courts by a number of Italian steel producers to a fine issued by the High Authority, the predecessor to the Commission and the executive branch for the Treaty Establishing the European Coal and Steel Community Treaty (ECSC Treaty).

In 1965, the Italian Constitutional Court was asked by a trial court in Turin to consider the constitutionality of a decision issued by the High Authority.<sup>138</sup> The challenge was based on exactly the same type of argument that, had the Court of Justice not incorporated the right to be heard eight years later, might have been made by British litigants: the High Authority's decision and the review available in the Court of Justice did not satisfy national constitutional principles

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<sup>135</sup> Indeed, in the case of some of the European institutions, it is misleading to speak of European and national officials as distinct groups. The Court of Justice is composed of senior judges and legal scholars with extensive experience in their national systems.

<sup>136</sup> See, e.g., Case C-71/02, *Karner Case*, 2004 ECR I, para. 48.

<sup>137</sup> In 1961, the second President of the Court, A.M. Donner made a similar point when describing the task of judging on the Court of Justice. He was commenting on the difference between Court of Justice's practice of deliberating in secret and issuing unanimous judgments and the use of voting and majority and minority opinions in the common law system. He said:

[T]he deliberations of the court are and must remain secret. If differences of opinion occur, they cannot be made public. So the ruling has to be given in one judgment. . . . The exclusion of the possibility of giving separate or dissenting opinions protects the independence of judges. Of course, by clothing the rulings in anonymity, it robs the action of the court of that vivacity, which is so great an attraction in Anglo-Saxon jurisdictions. *But on the other hand, it forces us to work out an agreement, which is perhaps not approved by all, but which is considered clear and adequate by lawyers from all six of the Member States.* It demands much longer discussion in camera and a very careful wording of the decision, but it ensures rulings that are understandable throughout the Communities and contributes to the establishment of a common fund of legal notions and principles.

See A.M. Donner, *The Court of Justice of the European Communities*, supra note \_\_ at 68 (emphasis added). Only an administrative process that respected the right to a fair hearing would have been considered "adequate" by the British lawyer who joined the Court in 1973.

<sup>138</sup> Italian Constitutional Court, Decision No. 98/1965 of December 27, 1965, reported and translated in 1966-67 *Common Mkt. L. Rev.* 81.

of lawful administrative action. The facts are as follows. Under the ECSC Treaty, the High Authority had the power to regulate the production of steel in the Member States, including the power to impose certain taxes related to the importation and use of scrap iron for steel production.<sup>139</sup> In 1961, the High Authority requested that producers forward original invoices documenting their electricity consumption, or certified copies of the invoices, as one means of monitoring and verifying the amounts of scrap iron being consumed by individual steel plants. Ten Italian companies replied that they could not comply for various reasons and that the request was unlawful. The High Authority then issued an order pursuant to its information-gathering powers under the Treaty.<sup>140</sup> The steel companies brought a challenge in the European Court of Justice and the Court upheld the order.<sup>141</sup>

Four days later, the High Authority issued new decisions to the parties, imposing fairly significant fines for the failure to comply with the first order (0.5% of the companies' annual turnover) and fining the companies additional amounts for the each day's delay in failing to produce the documents, counted from the date of notification of the second set of decisions (2.5% of the daily turnover for nine of the companies and 5% for the tenth company).<sup>142</sup> This time, the parties challenged the High Authority's order in both Italian court and the European Court of Justice. For its part, the Court of Justice upheld the fine, with one exception. It found that given that the applicants had to obtain the invoices from third parties, i.e. the electricity company, there were good reasons for the delay in turning over the documents. Therefore the Court suspended the daily penalties for a period of seven months.<sup>143</sup>

The High Authority's decision did not fare so well on the Italian front. Four separate cases were filed in local courts: one in Milan, one in Naples, one in Rome, and one in Turin. Exercising their rights under Italian law, the steel companies challenged the decisions of the High Authority on the grounds that the order breached a basic interest (*interesse soggettivo*) by taking their property without respect for the Italian Constitution's guarantees of lawful administrative action.<sup>144</sup> The litigants challenged the constitutional validity of the ECSC Treaty, in particular, the failure of the Treaty and the European Court of Justice to afford the plaintiffs the same protections against arbitrary and oppressive government action as afforded under the Italian Constitution. Only the Milan court held, without reservations, in favor of the High Authority.<sup>145</sup> The Naples court first examined whether the Court of Justice was structurally similar to an ordinary Italian court—as opposed to an Italian administrative court which has less independence from the executive branch—because under the Italian Constitution, citizens are guaranteed an ordinary judicial forum to challenge administrative acts that breach basic interests such as property. The Court of Justice passed muster. Hence, the Naples court found that the

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<sup>139</sup> Treaty Establishing the European Coal and Steel Community, UN Treaty Series No. 3729 (1957).

<sup>140</sup> ECSC Treaty, art. 47.

<sup>141</sup> Cases 5/62, 6/62, 7/62, 8/62, 9/62, 10/62, 11/62, 13/62, 14/62, 15/62, *Società Industriale Acciaierie San Michele and others v. The High Authority*, December 14, 1962, [1963] Common L. Rep. 13.

<sup>142</sup> Case 2-10/63, *Società Industriale Acciaierie San Michele and others v. The High Authority*, December 16, 1963, [1964] Common L. Rep. 146, 148.

<sup>143</sup> *Id.* at 165.

<sup>144</sup> *Soc. Metallurgica di Napoli (SIMET) S.p.A v. High Authority*, Tribunale di Napoli, Decision of February 28/April 22, 1964; *Merloni S.p.A. v. High Authority*, Tribunale di Milano, Decision of June 24/September 28, 1964; *Soc. Acciaierie San Michele v. High Authority*, Tribunale di Torino, Decision of December 11/69, 1964; *Soc. Acciaierie Ferriere di Roma (FERAM) v. High Authority*, Tribunale di Roma, Decision of September 22, 1964. These cases are reported and discussed in 2 Common Mkt. L. Rev. 449 (1964-65).

<sup>145</sup> In finding that these lawsuits were even admissible, all four Italian courts were acting in blatant disregard of Articles 44 and 92 of the ECSC Treaty. Under the ECSC Treaty, arts. 44 and 92, decisions of the High Authority imposing monetary sanctions and judgments of the Court of Justice upholding those decisions must be enforced by the Member States in their territories. The officials of the Member States must do so “with no other formality than the certification of the authenticity of such decisions.” ECSC Treaty, art. 92. Moreover, “enforcement of such [High Authority] decisions can be suspended only by a decision of [the European Court of Justice].” *Id.*

## Creating Rights

ECSC Treaty was constitutionally permissible and consequently only the European Court of Justice, not national courts, had jurisdiction over the decision of the High Authority.

The Rome court held that, in the case of the steel companies, the judicial protection from unlawful administrative action that they had been afforded comported with the requirements of the Italian Constitution. In doing so, however, the court found that there was no way of excluding the possibility that the constitutional rights of Italian citizens would be undermined in the future through inadequate judicial protection. It said:

[there are] more delicate questions resulting from the inability to impugn before the European Court the decisions of the High Authority on the grounds of conflict between Community norms . . . and norms of our Constitution which assure inalienable guarantees for the rights of individuals.<sup>146</sup>

The Turin court went the furthest of all. Unlike the Naples court, the Turin court found that the Court of Justice was indeed a special, administrative court, without the full array of powers of an ordinary court of law, and hence judicial review in the Court of Justice breached the guarantee of access to an ordinary court contained in the Constitution. Moreover, the Turin court found that the grounds of review set down under the ECSC Treaty were limited, in violation of the Constitution's requirement that there be full legal protection of the rights and interests (*diritti soggettivi* and *interessi legittimi*) affected by administrative decisions.<sup>147</sup> Lastly, the Turin court linked the case to the broader conflict between the Italian Constitutional Court and the European Court of Justice on the question of whether European law was supreme to Italian law. The Turin court repeated the Italian Constitutional Court's earlier holding that the Italian Constitution was supreme to the treaties and that a constitutional amendment would be required to establish the supremacy of European law. Therefore, the Turin court referred two questions to the Constitutional Court: were the Articles limiting the grounds of review before the European Court of Justice of High Authority decisions (art. 33) and giving the Court of Justice exclusive jurisdiction to rule on the validity of European acts (arts. 41 and 92) valid under the Italian Constitution?

The Constitutional Court decided the question in favor of the High Authority and against the steel companies. But it did so by systematically comparing the administrative law guarantees at the European level to those afforded under Italian constitutional law and concluded that the two were roughly equivalent.<sup>148</sup> It did not give the High Authority and European Court of Justice carte blanche. For students of European law, it should be noted that this decision came down after the Court of Justice's judgment in *Costa v. ENEL*, in which the Court of Justice held that, contrary to an earlier pronouncement of the Italian Constitutional Court, European law was supreme to Italian law.<sup>149</sup> Obviously, the Italian Constitutional Court was still not persuaded.

According to the Constitutional Court, the independence and impartiality of the Court of Justice passed Italian constitutional muster:

That Court [Court of Justice] is established and functions according to the rules corresponding to the basic principles of our own legal system . . . . It is unanimously recognised that the Court of Justice is endowed with a judicial

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<sup>146</sup> Soc. Acciaierie Ferriere di Roma (FERAM) v. High Authority, Tribunale di Roma, Decision of September 22, 1964, 2 Common Mkt L. Rev. 449, 451 (1964-65) (reporting and quoting from case).

<sup>147</sup> Unlike the EC Treaty, the ECSC Treaty only allowed individuals to impugn administrative decisions on the grounds of abuse of power (*détournement de pouvoir*). ECSC Treaty, art. 33. This excluded a number of grounds available to national litigants, most notably excess of power (*eccesso di potere*) and violation of law (*violazione della legge*).

<sup>148</sup> Id. at 82-84.

<sup>149</sup> See Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, 1964 ECR 585.

character; and it may be observed that its members must fulfil their respective functions with independence and impartiality.<sup>150</sup>

Moreover, the Constitutional Court found that, under the ECSC Treaty, San Michele would be allowed to impugn the High Authority's decisions in the Court of Justice on the same grounds as afforded under Italian law.

The [High Authority's decision] is subject to attack before the Community Court by virtue of Article 36, para. 2, by way of appeal with full jurisdiction (*recours de pleine juridiction*); some maintain even that, once formulated, such an appeal under Article 3, para. 3 [article guaranteeing review of monetary sanctions issued by High Authority] may be used to attack acts contemplated in Article 33, para. 2 [individual decisions of Authority]. The latter, by their nature, could not be subjected to any wider control under the internal order.

The Italian Court therefore concluded that the arrangement for review of administrative acts in the ECSC Treaty complied with the Italian fundamental right to judicial protection, guaranteed under Article 2 of the Constitution. It said that the relevant provisions of the Treaty created a judicial order "[i]n accordance with the rules corresponding to the fundamental features of our judicial system, even if they do not repeat literally the whole of the rules."<sup>151</sup>

What is the relevance of this old Italian case for the right to a fair hearing? At the time that the UK acceded and *Transocean Marine Paint* was decided, the case was not so old. *Transocean Marine Paint* was decided only nine years later and many of the same judges were still sitting on the Court. The Italian case served as a warning that, after accession, British lawyers and judges might challenge the authority of the Commission and the Court of Justice if the Court failed to accommodate those features of the British public law tradition that set it apart from continental systems. The procedural guarantees of the principle of natural justice were precisely such features.

Some will object that because of the British constitutional doctrine of parliamentary supremacy and because Parliament had incorporated the treaties through the European Communities Act of 1972, an English court would not assume jurisdiction over the Commission decision, as the Italian courts had done. But would the English court have interpreted Parliament's exercise of sovereignty in the European Communities Act as one in which it rejected centuries of common law on the rules of natural justice? The answer, especially in the early years after accession, was not clear. It is certainly not fanciful to argue that this question was on the minds of the members of the Court of Justice and that, to head off resistance from English courts, they adopted the right to be heard and a highly proceduralized blueprint of Commission decisionmaking.<sup>152</sup>

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<sup>150</sup> Id. at 83.

<sup>151</sup> Mario Berri, Annotation on *Société Acciaierie San Michele v. European Coal and Steel Community*, Italian Constitutional Court, Decision No. 98/1965 of December 27, 1965, 4 Common Mkt. L. Rev. 238, 240 (1966-67) (quoting from Court).

<sup>152</sup> My explanation of the salience of the common law right to be heard at the moment of accession is also consistent with the explanation that has been advanced by Joseph Weiler, Pierre Pescatore, Federico Mancini, and Imke Rissopp-Nickelson for the emergence of fundamental rights generally in the jurisprudence of the Court of Justice. See Federico Mancini, *The Making of a Constitution for Europe*, in *The New European Community: Decisionmaking and Institutional Change* (Stanley Hoffmann & Robert O. Keohane eds., 1991). Pierre Pescatore, *Die Menschenrechte und die Europäische Integration*, 2 *Integration* 103–136 (1969); Imke Rissopp-Nickelson, *Interlocking Regimes and the Protection of Human Rights in Europe* 124-76 (Duke University, Ph.D. Dissertation, 2002) (on file with author); J.H.H. Weiler, *Human Rights and the European Community: Methods of Protection*, in *The European Union--The Human Rights Challenge II*, 580-81 (Antonio Cassese et al. eds., 1991). With fundamental rights, the puzzle is what prompted the Court, in the 1960's, to shift away from categorically denying the power to review European measures for respect of basic rights to the position that fundamental human rights were "enshrined in the general principles of Community law and protected by the Court." See Case 29/69, *Erich Stauder v. City of Ulm*, 1969 ECR 419, 425, para. 7. The common wisdom today is that the Court of Justice responded to pressure from the German and Italian constitutional courts.

### 3. The evolution of the right to a hearing

Once the Court established the right to be heard in competition proceedings, it rapidly migrated to other areas of direct Commission enforcement of European law. The common law understanding of fair administration colonized other areas of Commission action through the logic of judicial decisionmaking. The Court of Justice extended the right to a hearing to other policy fields based upon the precedential value of the earlier cases in deciding the later ones and the similarities that existed, as a matter of fact and logic, between individuals in competition proceedings and other types of European proceedings.<sup>153</sup> The first place where this occurred was anti-dumping law.

As a policy related to the customs union, international trade is an area in which the Commission has had direct enforcement powers since the early years of the European Community. When importers of a product are alleged to have benefited from government subsidies at home or to be selling the product on the European market at a price below the “normal value” of the product (“dumping”), the Commission is responsible for enforcement. The Commission, not national administrative bodies, is charged with determining that there has been subsidization or dumping and calculating the appropriate duty. The duty is intended to offset the unfair price advantage of the imported good.

When the first European law was passed in 1968, it provided for a fairly extensive procedure.<sup>154</sup>

- The Commission would publish a notice of the investigation in the Official Journal, as well as individually advise the representatives of the exporting government and the exporters and importers known to be concerned.
- The parties would be allowed to examine “all information that is relevant to the defence of their interests . . . and that is used by the Commission in the anti-dumping investigation.”<sup>155</sup>
- The parties would be allowed to refute the allegations of government subsidies or sale at less than the normal value in writing. If they so-requested and if they “showed a sufficient interest,” the parties would be allowed to present their views orally.<sup>156</sup> Furthermore, on the request of the parties, the Commission would organize a meeting of the foreign and domestic interests, to enable them to exchange their views.

In 1979, however, the Court of Justice suggested that the procedure did not adequately guarantee the right to a hearing because the parties did not have an adequate opportunity to review the information collected by the Commission.<sup>157</sup> The case involved a challenge to an administrative decision imposing an anti-dumping duty on ball

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<sup>153</sup> Formally, as in all civil law systems, the decisions of the Court of Justice and the Court of First Instance do not have precedential value, since judges are not recognized as lawmakers. However, the European Courts rely on and cite to their previous cases in their judgments.

<sup>154</sup> Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, 1968 O.J. (L 93) 1. These provision gave effect to the procedural guarantees in the GATT Anti-Dumping Code. See Clive Stanbrook & Philip Bentley, *Dumping & Subsidies: The Law and Procedures Governing the Imposition of Anti-dumping and Countervailing Duties in the European Community* 15 (3d ed. 1996). The GATT Anti-Dumping Code was laid down in the Agreement on the Implementation of Article VI of the GATT, which was signed on 30 June 1967 and entered into force on 1 July 1968. The European anti-dumping and subsidies law has been amended on numerous occasions. The law currently in force is Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Communities, 1996 O.J. (L 56) 1.

<sup>155</sup> *Id.* at art. 10(4).

<sup>156</sup> *Id.* at art. 10(6).

<sup>157</sup> See *Nippon Seiko v. Council and Commission* [Ball bearings], [1979] ECR 1303, 1262 (opinion of the Advocate General).

bearings and tapered roller bearings from Japan.<sup>158</sup> The Commission recommended to the Council of Ministers (the European institution with the final decisionmaking authority in dumping and subsidies proceedings) that a duty of 15% be imposed, without disclosing to the ball-bearing producers what cost figures had served as the basis for calculating the duty. Advocate General Warner, ever-ready to vindicate the principles of natural justice, relied on the competition law that he had been instrumental in creating to find that the right to be heard applied to anti-dumping investigations:

It is a fundamental principle of Community law that, before any individual measure or decision is taken of such a nature as directly to affect the interests of a particular person, that person has a right to be heard by the responsible authority; and it is part and parcel of that principle that, in order to enable him effectively to exercise that right, the person concerned is entitled to be informed of the facts and considerations on the basis of which the authority is minded to act. That principle, which is enshrined in many a Judgment of this Court, and which applies regardless of whether there is a specific legislative text requiring its application, was re-asserted by the Court only yesterday in Case 85/76 *Hoffman-La Roche & Co. AG v. Commission*.<sup>159</sup>

He easily concluded that the Commission had decided the anti-dumping duty in breach of the producers' right to be heard.

The Court never reached the procedural question, since it found for the producers and against the Commission and Council on the alternative grounds that they had acted contrary to powers conferred under the European anti-dumping law.<sup>160</sup> However, the Advocate General's declaration attracted considerable attention in the academic commentary as well as policymaking circles.<sup>161</sup> A few months after the judgment was handed down, European anti-dumping law was amended in two fundamental respects.<sup>162</sup> First, firms on both the foreign and domestic sides were allowed to inspect all of the information gathered in the course of the investigation and in the Commission's files. Second, the firms that exported and imported the product under investigation were given the right to request that the Commission disclose its "essential facts and considerations." The common wisdom in international trade circles is that the revisions were made to respond to the criticism of Advocate General Warner in *NTN Tokyo Bearing*.<sup>163</sup>

Then, in 1985 and again in 1991, the Court annulled two sets of anti-dumping duties because they had been imposed in breach of the parties' right to be heard. In the first, *Timex*, the main European manufacturer of wrist-watches and the initiator of the anti-dumping proceeding, had not been allowed to examine information collected on watches from Hong Kong. The Commission reasoned that the action was against watches from the Soviet Union, not Hong Kong, and European anti-dumping law only provided for the disclosure of evidence provided by the parties to the investigation. The Court held against the Commission and the Council, reasoning that to protect the procedural rights of *Timex*, it was necessary to interpret the governing law broadly.<sup>164</sup>

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<sup>158</sup> Case 113/77, *NTN Tokyo Bearing Company, Ltd. and Others v. Council of the European Communities*, 1979 ECR 1185.

<sup>159</sup> *Id.* at 1261.

<sup>160</sup> *Id.* at 1208-10, para. 20-27.

<sup>161</sup> See Case C-49/88, *Al-Jubail Fertilizer v. Council*, 1991 ECR I 3205, 3221 n.41, para. 72 (opinion of Advocate General discussing reaction of international trade community to earlier opinion of Advocate General Warner).

<sup>162</sup> Council Regulation (EEC) No 1681/79 of 1 August 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, 1979 O.J. (L 196) 1, art. 3.

<sup>163</sup> See *Stanbrook & Bentley, Dumping and Subsidies*, *supra* note\_ at 15; J.F. Beseler & A.N. Williams, *Anti-Dumping and Anti-Subsidy Law: The European Communities* 24 (1986).

<sup>164</sup> See Case 264/82, *Timex Corp. v. Council & Commission*, 1985 ECR 849, 868-69, para. 24-25.

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In the second case, *Al-Jubail Fertilizer v. Council & Commission*, the influence of the right to a hearing in competition proceedings was unmistakable.<sup>165</sup> In *Al-Jubail Fertilizer*, the manufacturer of fertilizer from Saudi Arabia claimed that the Commission had failed to communicate a number of facts relevant to the imposition of the duty, including the information on European costs of production and prices of fertilizer, which had served as the basis for concluding that there had been injury to the domestic industry.<sup>166</sup> Advocate General Darmon first quoted at length from the opinion of Advocate General Warner in *NTN Tokyo Bearing*.<sup>167</sup> He then noted the analogies between the position of the parties in a competition proceeding and in an anti-dumping proceeding:

From the viewpoint of an undertaking, the loss of the Community market as a result of the imposition of a high anti-dumping duty—as in this case—has financial consequences which are comparable to those which follow the imposition of a fine for an infringement of Articles 85 or 86 of the Treaty of Rome.<sup>168</sup>

Finally, in concluding that the Commission had to respect procedural rights in anti-dumping proceedings similar to those guaranteed in the competition area, the Advocate General said that the right to be heard announced in the lead competition case naturally applied in the case at hand:

[A] principle as *general* as the one defined by the Court in its judgment in *Hoffman-La Roche v. Commission*, namely that the Commission may not base its decisions on facts, circumstances or documents on which the party concerned has been unable to make its views known, would seem to apply to dumping proceedings as well.<sup>169</sup>

The Court squarely followed the Advocate General's opinion. It declared that the right to a fair hearing was a "fundamental principle" of European law and that it applied to anti-dumping proceedings because of the adverse impact that an anti-dumping duty could have on the interests of the parties:

[I]t is necessary . . . to take account in particular of the requirements stemming from the right to a fair hearing, a principle whose fundamental character has been stressed on numerous occasions in the case-law of the Court (see in particular the judgement of 17 October 1989 in Case 85/87 *Dow Benelux v. Commission* [1989] ECR 3137 [competition case]). Those requirements must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.<sup>170</sup>

A number of cases have since been decided in which the Court of Justice, now joined by the Court of First Instance, have defined the scope of the right.<sup>171</sup>

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<sup>165</sup> Case C-49/88, *Al-Jubail Fertilizer v. Council*, 1991 ECR at I-3220.

<sup>166</sup> See *Al-Jubail Fertilizer v. Council*, 1991 ECR at I-3220, points 63-64, I-3227, point 99. There are two components to any anti-dumping proceeding. First, the administrative agency must find that the foreign product was dumped on the domestic market, that is, it was sold below "normal value" (or in the U.S., "fair value"). Second, the agency must find that the domestic industry suffered "injury" by virtue of the dumping.

<sup>167</sup> *Id.* at I-3221, para. 72.

<sup>168</sup> *Id.* at I-3221, para. 73.

<sup>169</sup> *Id.* at I-3222, para. 75.

<sup>170</sup> *Id.* at I-32141, para. 15.

<sup>171</sup> See, e.g., Case T-88/98, *Kundan Industries Ltd and Tata International Ltd v. Council*, 2002 ECR II-4897, para. 132 ; Case T-121/95, *EFMA v. Council*, 1997 ECR II-2391, para. 84; Case T-159/94 & T-160/94, *Ajinomoto and Nutrasweet v. Council*, 1997 ECR II-2461, para. 83; Case T-147/97, *Champion Stationery v. Council*, 1998 ECR II-4137, para. 55.

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The last policy field in which the Commission must abide routinely by the right to a hearing, as a result of the judicial logic of reasoning by analogy and reliance on earlier judgments, is customs. Since 1968, the European Community has had a single set of tariff rates for goods imported into the Community from third countries. The duties are calculated and collected, pursuant to an elaborate set of European rules, by national customs services in each of the Member States. Generally national administrations, not the Commission, handle the collection of custom duties. Since 1979, however, in a narrowly defined class of cases, the Commission has had the power to make individualized determinations affecting specific firms.<sup>172</sup> These are cases in which the importer applies for the repayment (the duty has already been paid) or the remission (the duty is owed but has not yet been paid) of a customs duty due under the European Customs Code. The importer's claim can be based on any one of a number of circumstances set out in the Customs Code, for instance negligence on the part of the Commission in administering customs policy.<sup>173</sup> Remission or repayment may also be made under the general fairness clause of the implementing regulation.<sup>174</sup> The proceeding is initiated by the importer by filing an application with the responsible national customs services.<sup>175</sup> The customs services is responsible for determining whether to grant remission, but, in the case of doubt, may refer the question to the Commission, which has the last word.

Until recently, individual importers did not enjoy the right to a hearing before the Commission in remissions proceedings. The procedure afforded under national law before the customs services of the Member States was deemed enough. Even when the national customs services sent the file to the Commission for consideration, no provision was made for the trader to make his views known. Then, in Case T-346/94 *France-aviation v Commission*, the Court of First Instance held that that a trader who requests repayment of customs duties has the right to be heard during the proceeding.<sup>176</sup> As a consequence of that judgment, the Commission amended its customs rules in 1996. Under the new provision, when a national customs service sends a file to the Commission, it is required to include a statement by the trader certifying that the trader has read the case file and stating either that she has nothing to add or listing the additional information that she considers should be included.<sup>177</sup> But still no provision permitted individual importers to have any direct contact with the Commission in the course of the repayment or remissions proceedings.

The Court of First Instance changed the state of affairs in two subsequent cases involving remissions applications for customs duties owed on high-quality beef imported from Argentina (known, appropriately, as Hilton beef). There, the Court of First Instance held that if the Commission was contemplating reversing a favorable determination by the national customs service, it was under a duty to give the importers access to the Commission's file and an opportunity to respond, in writing, to the Commission's allegations, including the right to submit evidence.<sup>178</sup> Again, the Commission amended its customs rules to reflect the Court's holding.<sup>179</sup>

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<sup>172</sup> See Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties, 1979 O.J. (L 175) 1. This law has been repealed and remissions is currently dealt with under Articles 236 to 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, 1992 O.J. (L 302) 1.

<sup>173</sup> See Council Regulation No 2913/92, *supra* note \_\_ arts. 236-39.

<sup>174</sup> See Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, art. 905, 1993 O.J. (L 253) 1 (implementing art. 239 of the Customs Code).

<sup>175</sup> See *id.* at arts. 905-09.

<sup>176</sup> See Case T-346/94, *France-aviation v. Commission*, 1995 ECR II-2841, paras. 34 to 40.

<sup>177</sup> Commission Regulation (EC) No 12/97 of 18 December 1996 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, 1997 O.J. (L 9) 1, art. 1(12).

<sup>178</sup> See Case T-42/96, *Eyckeler & Malt AG v. Commission*, 1998 ECR II-401; Case T-50/96, *Primex Produkte v. Commission*, 1998 ECR II-3773. See also Case T-290/97, *Mehibas Dordtselaan BV v. Commission* 2000 ECR II-15, para. 44.



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In two pending cases, the Court has been asked by importer firms to extend the right to a hearing even further: the issue under consideration is whether parties to remissions proceedings also have the right to make oral representations to the Commission.<sup>180</sup>

The Court has sporadically recognized the right to a hearing in other types of Commission proceedings which, according to the test developed by the Court and reminiscent of the earlier formula of Advocate General Warner in *Transocean Marine Paint Association*, “are initiated against a person and are liable to culminate in a measure adversely affecting that person.”<sup>181</sup> These are policy areas in which enforcement is almost exclusively in the hands of national authorities and the Commission intervenes rarely, under exceptional circumstances. In one case, the exclusion of a Swedish fishing company from a Community fishery zone because of allegations of illegal fishing activities was enough to trigger a hearing right.<sup>182</sup> In another, it was the reduction of European financial assistance to a Portuguese firm that triggered the right.<sup>183</sup> In these cases, however, the scope of the hearing right is far less extensive than in the core areas of competition, anti-dumping, and now, customs administration.<sup>184</sup> The litigants have the right to a brief description of the facts and reasoning supporting the contemplated decision, to make their arguments and advance their evidence in a written submission, and to receive a brief and by no means exhaustive reply in the Commission's statement of reasons.

Notwithstanding the Court's central role in establishing adversarial, trial-type procedures in Commission decisionmaking, it has recognized a critical limit to the right to a fair hearing. The Commission decision must “adversely affect” the party vindicating the right. This requirement has led the Court to reject the right in two types of cases. When the Commission's decision is characterized as a benefit-conferring, as opposed to a sanction or burden-imposing one, then the right is not guaranteed. In *Windpark Groothusen*, the Commission denied an application for Community aid under a programme promoting energy technologies.<sup>185</sup> The Commission based the decision exclusively on the information submitted in the initial application, without allowing the applicant to submit observations before the final funding decision was made. The Court of First Instance, upheld by the Court of Justice, found that there was no right because “the applicant . . . had merely been placed on a reserve list of possible beneficiaries of Community financial support.”<sup>186</sup>

The other type of case in which the Court does not recognize that a party is adversely affected is where a third-party individual stands to benefit or lose from the Commission's enforcement action. In other words, the individual is a member of the wider public in whose interest the Commission is supposed to act when it applies European law, not the specific individual or firm against whom the Commission is taking action. For instance, the Court denied that a consumer group had the right to a fair hearing in an anti-dumping case brought against audio-cassettes imported from Japan, Hong Kong, and Korea. The Commission, therefore, was

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<sup>179</sup> See Commission Regulation (EC) No 1677/98 of 29 July 1998 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, 1998 O.J. (L 212) 18 (Regulation 2454/93, art. 906A).

<sup>180</sup> Cases T-134/03 & T-135/03, *Common Market Fertilizers v. Commission*, 2003 O.J. (C 158) 24, 25.

<sup>181</sup> See, e.g., Case C-135/92, *Fiskano v. Commission*, 1994 ECR I-2885, para. 39.

<sup>182</sup> See Case C-135/92, *Fiskano v. Commission*, 1994 ECR I-2885; see also Case T-46/00, *Kvitsjoen v Commission*, 2000 ECR II-03713.

<sup>183</sup> See Case T-450/93, *Lisrestal v. Commission*, 1994 ECR II-1177.

<sup>184</sup> See Koen Lenaerts & Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 1997 *Common Mkt. L. Rev.* 531, 562-66.

<sup>185</sup> Case C-48/96, *Windpark Groothusen v. Commission* 1998 ECR 2873.

<sup>186</sup> Case T-109/94, *Windpark Groothusen v. Commission*, 1995 ECR II-3007, para. 50; Case C-48/96, *Windpark Groothusen v. Commission* 1998 ECR 2873, para. 47 (affirming reasoning of Court of First Instance).

allowed to deny the consumer group access to the information in its files on the alleged dumping.<sup>187</sup>

The Court has employed a variation of this logic in state aids cases. In state aid proceedings, the Commission takes action against Member States alleged to unfairly assist their national firms through direct subsidies or favorable treatment in one form or another. Competitors of the national champions often bring the state subsidies to the Commission's attention. The Court has repeatedly held that the Member State under investigation has a right to a hearing.<sup>188</sup> By contrast, the procedural rights of the state enterprise and competitor firms are significantly more limited.<sup>189</sup>

The most recent chapter in this history is the European Charter of Fundamental Rights of 2000, which, under the Constitutional Treaty of 2004, would be given binding legal force. Article 41 codifies the extensive case law of the Court of Justice on individual rights in European administration, including the right to a hearing chronicled above.<sup>190</sup> The relevant paragraphs read as follows:

Article II-41 Right to good administration

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

.....

Thus, Article 41 enshrines the long and steady trajectory of the Court of Justice's jurisprudence that started with *Transocean Marine Paint Association* in 1974 and continues to this day.

#### 4. European value: The European and British rights compared

How does the European right to a hearing today, after thirty years of Court of Justice judgments and Commission policymaking, compare to the British tradition from which it was drawn? Since generalization in administrative law is dangerous, it is best to compare the procedures in the same substantive policy area. The one field where such one-to-one comparison is possible is competition. The results are startling: by the early 1980's, the European right had overtaken the British one. The entitlements of the right to a hearing, taken as combination of the duty to give notice of the government's case, disclose the evidence, and allow the parties opportunity to refute the opposing case, were more extensive before the European Commission than before the British authorities.

As the reader will recall, early in the history of British competition policy, jurisdiction was split between two administrative authorities, the Restrictive Practices Court, responsible for

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<sup>187</sup> See Case C-170/89, *BEUC v. Commission*, 1991 ECR I-5709, para. 19.

<sup>188</sup> See, e.g., Case C-48/90, *Netherlands and Others v. Commission*, 1992 ECR I-565, paras. 44, 49 (finding a right of defense, including the right to receive a statement of objections and right to make views known for the Netherlands and the Netherlands alone).

<sup>189</sup> See Cases T-371 & 394/94, *British Airways plc and British Midland Airways Ltd. v. Commission*, [1998] ECR II-2405; Case C-367/95, *Commission v. Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval)*, 1998 ECR 1719, paras. 53, 58 (finding that Commission, in deciding not to pursue complaint from competitor firm, did not need to give competitor access to the information in the file or the opportunity to state its views).

<sup>190</sup> Constitutional Treaty.

cartels and certain types of vertical restraints of trade and the Mergers and Monopolies Commission (MMC), responsible for investigating monopolies and mergers and a variety of market practices considered to be anti-competitive. By the mid-1970's, the MMC had become the most active of the two authorities.<sup>191</sup> Yet the procedure there fell short of the Commission's proceedings in certain respects. The parties did not have the right to examine all of the evidence gathered by the MMC.<sup>192</sup> Furthermore, the letter sent out to the parties at the beginning of the MMC's investigation, informing them of all of the facts and arguments against them, was not believed to be as comprehensive as the Commission's statement of objections.<sup>193</sup>

Although not strictly related to the principle of natural justice, there was a last, notable difference between British and European competition proceedings which significantly limited the rights of the parties under investigation. The British system allowed for vastly more discretion in the hands of the Secretary of State of Trade and Industry, i.e. the Minister, than was enjoyed by the College of Commissioners in the European context.<sup>194</sup> The MMC issued a comprehensive report on the anti-competitive practices or merger in which it made findings on injury to the public interest and made recommendations on the appropriate remedies. The Minister, however, had complete discretion to reject the finding of injury or the proposed remedial measures and this discretion was often used.<sup>195</sup> The application of largely political considerations at the final stage of the proceedings signified that even though the parties were heard, early on, in a quasi-judicial proceeding, the final outcome could well be based upon factors of which they had had no notice and on which they had no opportunity to respond.<sup>196</sup>

In 1998 and again in 2002, British competition law was completely overhauled. Part of the reforms were designed to de-politicize British competition law, taking away the Minister's powers to depart from the report of the Commission (now called the Competition Commission), and replacing review by the Minister with a powerful appeals tribunal within the Competition Commission.<sup>197</sup> There lies the irony. In the 1970's and early 1980's, rights and procedures in European Commission competition proceedings were transformed to respond to the common lawyer criticism of an overly bureaucratic process without adequate opportunities for individuals test administrative decisions and protect their rights. Now, the British system has been changed to render it more judicial in nature, expressed modeled on European competition proceedings.<sup>198</sup> Even though this reconfiguration of British administrative authority does not come under the doctrinal heading of natural justice, effectively, the right to be heard and the rule against bias are more vigorously protected in a system with a powerful appeals tribunal and without ministerial discretion. Here we see the influence of new European mental maps of rights on old national traditions, the effect of which has been to bring the British system closer to the ideal of natural justice.

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<sup>191</sup> See Richard Whish, *Competition Law* 56, 83, 149, 152 (1985) (comparing monopolies legislation and cartel legislation).

<sup>192</sup> See Julian M. Joshua, *The Right to be Heard in EEC Competition Procedures*, 15 *Fordham Int'l L.J.* 16, 41, 46 (1991/1992).

<sup>193</sup> Cosmo Graham, *The Enterprise Act 2002 and Competition Law*, 67 *Modern L. Rev.* 273, 285 (2004).

<sup>194</sup> See Whish, *Competition Law*, supra note \_\_ at 240 -42 (comparing "political approach" of UK scheme with legal approach of European one).

<sup>195</sup> See Whish, *Competition Law*, supra note \_\_ at 57-59, 83-84.

<sup>196</sup> See Graham, *The Enterprise Act 2002 and Competition Law*, supra note \_\_ at 274.

<sup>197</sup> *Id.* at 276, 279 (describing new institutional structure); Mark Furse, *Competition and the Enterprise Act 2002*, at 32 (2003).

<sup>198</sup> The influence of the European model and the cross-fertilization between the European and British systems is evidenced by the person of Sir Christopher Bellamy. Bellamy is a long-standing member of the English bar. He originally litigated competition cases and gave critical testimony on European competition proceedings before the House of Lords Committee in 1981. See House of Lords, *European Communities Committee, Eighth Report on Competition Practice*, supra note \_\_ at 27. He later served as the UK judge on the Court of First Instance, where he gained extensive experience with Commission competition proceedings and he now has returned to the UK to serve as the chair of the three-judge Competition Appeals Tribunal. See Graham, *The Enterprise Act 2002 and Competition Law*, supra note \_\_ at 284.

*B. The Second Generation: The Right to Transparency*

The next wave of rights to transform the structure of Commission decisionmaking and the relationship between the Commission and European citizens came in 1993. The Commission has the far-reaching policymaking prerogatives of an executive branch in a parliamentary system of government. The EC Treaty gives the Commission the exclusive right to introduce laws into the assemblies with the power to vote and enact laws, the Council of Ministers and the European Parliament.<sup>199</sup> The Commission is also responsible for implementing European laws by promulgating implementing regulations, monitoring implementation by the Member States (which, as mentioned earlier, generally are responsible for day-to-day enforcement), and suing Member States in the Court of Justice if their implementation is inadequate.<sup>200</sup> What rights did European citizens have in 1957 when the Commission exercised authority through broadly applicable policy measures?<sup>201</sup> Today? And how do we explain the transformation? In this section of the Article, I give the first part of the answer to this set of questions by examining the rise of the right to transparency.

1. The right to examine Commission documents then and now

a. National traditions of open government and the right of access to documents

In Europe, there exists considerable variation among government administrations in how open or closed they are to the public.<sup>202</sup> Most are believed to fall on the closed side of the spectrum. This is the case for administrations in both the civil law and common law traditions. Over the centuries, government officials in countries like France, Italy, Belgium, Germany, and the UK have been allowed to draft legislation, promulgate administrative rules, and make administrative decisions in relative secrecy, without the prospect of widespread public scrutiny through reporting requirements, the right of access to documents, and other transparency devices. The exception is government administration in the smaller countries of northern Europe: Sweden, Norway, Denmark, the Netherlands, and Finland.

Let me briefly enter into the specifics of Sweden, the legal system that is recognized as the lead contributor to the northern paradigm. A number of features of that system separate it from the majority tradition: powerful parliamentary committees, an ombudsman elected by parliament with investigative and prosecutorial powers over government officials, constitutionally guaranteed independence for the administration from the prime minister and the cabinet, and the constitutional right of access to government documents. Although the classic north-south dichotomy is not as stark as it used to be because of a number of contemporary, European-wide trends in government administration, the difference still exists.

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<sup>199</sup> This is different from lawmaking in the U.S., where bills tend to originate in Congress, but similar to European parliamentary systems, in which the same political party or set of parties sitting in the government cabinet controls both the executive branch and the legislature and hence relies on the administration to draft the bills that are then sent to the legislature for debate and voting.

<sup>200</sup> In carrying out its implementation responsibilities, the Commission generally acts together with committees of national representatives with area-specific expertise, known as comitology committees.

<sup>201</sup> As should be clear, I exclude from my discussion the indirect right to shape Commission policies through voting for legislators on the Council of Ministers or the European Parliament, through petitions to the European Parliament and the European Ombudsman, and through challenges to European laws and regulations in the European court system.

<sup>202</sup> See generally Jacques Ziller, *European Models of Government: Towards a Patchwork with Missing Pieces*, 54 *Parliamentary Affairs* 102, 105, 108 (2001) (describing Swedish open government system and contrasting with majority closed government tradition).

## Creating Rights

Whether a country has general access to documents legislation largely tracks the categorization of a system as open or closed. In the Nordic systems and the Netherlands, individuals have the right to request documents related to a broad array of government acts, without a need to demonstrate any particular connection to the government proceeding. Especially in Sweden and Finland, the right has deep, historical roots and is part of the constitutional identity of the nation, or at least of the public lawyers of the nation.<sup>203</sup> The declaration on transparency in the Swedish Treaty of Accession gives a flavor of the symbolic nature of the right:

Transparency in the management of public affairs and, in particular, access of the public to administrative documents as well as the protection that the Constitution guarantees for the media, are and remain fundamental principles that are part of the constitutional, political, and cultural heritage of Sweden.<sup>204</sup>

It is important not to exaggerate the scope of the right. The legislation in all of these countries contains significant exceptions. Everywhere, public officials may refuse disclosure to prevent harm to the public interest or to other individuals, albeit according to different, national understandings of what constitutes harm. Moreover, in Sweden and Finland, preparatory material such as drafts, outlines, and reports generally do not fall within the ambit of the right.<sup>205</sup> Drafts, memorandums, and minutes of meetings in government ministries leading to the adoption of legislative proposals are also excluded from the scope of administrative documents. By contrast, in Denmark, information produced in connection with administrative proceedings, regardless of whether it is contained in the final act, is also subject to disclosure.<sup>206</sup> As in Sweden and Finland, however, documents that are highly political in nature, like drafts of bills and minutes of cabinet meetings, are excluded.<sup>207</sup>

The Netherlands has probably the most liberal system of all. Individuals may request documents related to any general policy decision or individual determination made by any part of the administration, including the documents related to the initial preparation and drafting of the decision and including material related to government bills.<sup>208</sup> The principal exception to the disclosure of internal documents is the one for documents containing personal opinions of public officials. Even on that score, however, in the interests of "good administration" and democratic government, the administration can transmit the information, but is required to do so in an anonymous form, so as to prevent identification of the individual who gave the opinion.<sup>209</sup> It

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<sup>203</sup> The Swedish right of access dates back to the Freedom of the Press Act of 1766, one of Sweden's basic constitutional laws. See Joakim Nergelius, *Constitutional Law*, in Michael Bogdan, *Swedish Law in the New Millennium* 65, 83-84 (2000). Chapter Two of the Act gives citizens the free right of access to official documents. In Finland, the right dates back to the same Freedom of Press Act of 1766, since Finland was governed by Sweden at the time. It now is guaranteed under Section 12 of the Finnish Constitution.

<sup>204</sup> 1990 O.J. (C 241) 397.

<sup>205</sup> In Sweden, only those documents that are communicated to the interested party, that are adopted at the end of an administrative proceeding, or that are placed in the public register, are covered. Freedom of the Press Act, art. 2.7 available at <http://www.oefre.unibe.ch/law/icl/sw03000.html>. Material relating to internal deliberations is not communicated nor required to be placed in the public register. In Finland, the exception for internal documents is itself subject to exceptions. See Act on the Openness of Government Activities, §§ 5(2), 6 (2000) available at <http://www.om.fi/1184.htm>.

<sup>206</sup> Access to Administrative Files Act, arts. 7 & 8, Act No. 572, 19 December 1985, available at <http://www.privacyinternational.org/countries/denmark/dk-foi-85.doc>. The first Danish law on access to information was enacted in 1964 and a comprehensive scheme was instituted in 1970 in the Act on Access of the Public to Administrative Files. See David Banisar, *The Freedom.org Global Survey: Freedom of Information and Access to Government Laws Around the World* 26 (2004).

<sup>207</sup> Access to Administrative Files Act, art. 10.

<sup>208</sup> The Government Information (Public Access) Act (WOB), art. 3, Law of 31 October 1991, *Staatsblad* (Official Journal, "Stb.") 1991, 703, as last amended by law of 5 April 2001, *Stb.* 2001, 180. The first Dutch access to information law was adopted in 1978. The right of access to information is recognized in Article 110 of the Dutch Constitution. See Banisar, *The Freedom.org Global Survey*, *supra* note \_\_\_ at 58.

<sup>209</sup> WOB, art. 11.

should also be noted that the Swedish and Finnish laws require officials to keep registers listing government documents open for public consultation, although the registers do not contain the full text of documents.<sup>210</sup>

Among those Member States on the closed side of the spectrum, one group of countries have recently adopted cross cutting access to documents legislation but are still newcomers to the habit and law of open government. The UK adopted a law in 2000, Ireland in 1997, Belgium in 1994, Portugal in 1993, and Spain in 1992.<sup>211</sup> A second set of Member States has adopted general legislation which significantly restricts the right by requiring individuals to show a special interest in the document because the document is related to an administrative proceeding affecting their rights and duties. Italy<sup>212</sup> and Greece<sup>213</sup> fall in this category. Lastly, Germany does not provide for a general right of access, rather the right is contained in numerous, sector-specific laws in areas such as the environment and municipal planning.<sup>214</sup>

b. The right of access to Commission documents

Until 1992, European citizens who wished to know how the Commission exercised its powers enjoyed the same rights, or more accurately, lack of rights, as their counterparts in Member States belonging to the closed government tradition. They had the right to know of official acts passed by European institutions pursuant to their powers under the treaties, in the case of individual decisions through the communication of the decision in writing to the concerned party, and in the case of generally applicable measures, through publication in the Official Journal.<sup>215</sup> It is difficult to imagine how matters could have been otherwise: all of the Member States were committed to the basic rule of law principle that, as governments of law and not men, the law should be put down in writing and should be known to citizens. But European citizens did not have the right to be informed of what went on behind the closed doors of the Commission's offices. As a matter of practice, the Commission was more open than many national administrations.<sup>216</sup> Nonetheless, as a matter of rights, European citizens could not demand to learn of individual decisions that were not of specific concern to them, to review the expert reports and technical data that served as the basis for administrative and legislative acts, or to view the correspondence among Commission departments and between the Commission and outside parties on the administration of the law.

In 1993, there began a process of transformation of European law. On December 6, 1993, the Commission and the Council entered into an agreement, called a Code of Conduct, pledging to adopt access to document rights for their respective organizations and agreeing to common conditions and principles. Thereafter, the Council and Commission separately

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<sup>210</sup> See Banisar, *The Freedom.org Global Survey*, supra note \_\_ at 81 (Sweden), 31 (Finland).

<sup>211</sup> See Banisar, *The Freedom.org Global Survey* supra note \_\_ at 13 (Belgium), 41 (Ireland), 70 (Portugal), 80 (Spain).

<sup>212</sup> See Law No. 142 of 8 June 1990; V. Italia & M. Bassani, *Procedimento amministrativo e diritto di accesso ai documenti* 535-69 (1995); Banisar, *The Freedom.org Global Survey*, supra note\_ at 44.

<sup>213</sup> See Banisar, *The Freedom.org Global Survey*, supra note \_\_ at 36.

<sup>214</sup> See Martin Bullinger, *République fédérale d'Allemagne* in *Institut International des Sciences Administratives, Le secret administratif dans les pays développés* 197 (1977); Bieber, *Informationsrechte Dritter im Verwaltungsverfahren* DOV §§ 857, 867 (1991).

<sup>215</sup> See EC Treaty, art. 254 (ex art. 191); Decision creating the 'Official Journal of the European Communities,' 1958 O.J. (C 117) 53.

<sup>216</sup> See Commission of the European Communities, *Public Access to the Institutions' Documents*, COM (93) 191 final, 5 May 1993, at 2. The Commission says that "it has already a commendable history of an open door policy, especially in comparison with existing practices in national administrations." Most would agree that even though this statement is self-serving, it also is true.

promulgated internal rules of procedure implementing the terms of the Code of Conduct.<sup>217</sup> The rules were worded extremely broadly. The documents covered by the rules were defined as any written text held by the Council or Commission and the exceptions to disclosure were sketched in the briefest of terms, covering areas such as public security, privacy, business secrets, and the Community's financial interests.<sup>218</sup> Four years later, the Amsterdam Treaty created a right of access to documents:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents . . . .<sup>219</sup>

In 1999, the Commission agreed to extend the right of access to material generated in the European rulemaking process, including meeting agendas, drafts, and final decisions, and to create a public register of all such documents.<sup>220</sup> Finally, in 2001, the Council, Commission, and European Parliament passed a law giving effect to the right of access in the Amsterdam Treaty.<sup>221</sup>

The Public Access to Documents Law, which has been followed by more precise provisions in each of the institution's rules of procedures,<sup>222</sup> elaborates considerably on the terms under which Europeans can exercise their right of access. The most significant innovation is the requirement that each institution establish a register of documents and that, whenever possible, access be provided through direct electronic access to the documents listed in the register.<sup>223</sup> The law also creates a new category of sensitive documents, designed to cover material generated in the fields of foreign affairs, security, and police cooperation, which would enable the institutional author of the document to veto disclosure.<sup>224</sup> As for the exceptions to disclosure of ordinary, non-sensitive documents, they are specified in far greater detail compared to the 1993 rules of procedure and require the institutions to engage in more balancing, weighing the applicant's public interest in disclosure against the commercial interest or institutional interest in secrecy.<sup>225</sup>

## 2. The historical juncture: The Maastricht Treaty crisis

What explains the radical change in the right of European citizens to know how the Commission exercises its powers? In this section, I demonstrate that the crisis provoked by the Danish rejection of the Maastricht Treaty led to the salience of the northern model of open

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<sup>217</sup> 93/731/EC: Council Decision of 20 December 1993 on public access to Council documents, 1993 O.J. (L 340) 43; 94/90/ESC, EC, Euratom: Commission Decision of 8 February 1994 on public access to Commission documents, 1994 O.J. (L 46) 58.

<sup>218</sup> 93/731/EC: Council Decision, *supra* note\_\_ at arts. 1, 4; 94/90/ESC, EC, Euratom: Commission Decision, *supra* note\_\_ at Annex, "Exceptions."

<sup>219</sup> EC Treaty, art. 255.

<sup>220</sup> Decision 1999/468/EC of the Council of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184) 23, art. 7 [hereinafter "Comitology Decision"].

<sup>221</sup> Regulation No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 145) 43 [hereinafter "Public Access to Documents Law"].

<sup>222</sup> See 2001/840/EC: Council Decision of 29 November 2001 amending the Council's Rules of Procedure, 2001 O.J. (L 313) 40; Parliament Decision adapting its Rules of Procedure to the provisions of European Parliament and Council Regulation (EC) No 1049/2001 on public access to Parliament, Council and Commission documents (2001/2135 (REG)), 2002 O.J. (C 140 E) 120; 2001/937/EC, ECSC, Euratom: Commission Decision of 5 December 2001 amending its rules of procedure, 2001 O.J. (L 345) 94.

<sup>223</sup> Public Access to Documents Law, arts. 11, 12. For a comprehensive overview of the changes introduced by the Regulation, see Steve Peers, *The New Regulation on Access to Documents: A Critical Analysis*, 21 Y. Eur. L. 395 (2002).

<sup>224</sup> Public Access to Documents Law, art. 9.

<sup>225</sup> *Id.* at arts. 4.2, 4.3.

government in the eyes of European Heads of State, who consequently made a number of hortatory commitments to transparency. Once the crisis had subsided, momentum for transparency continued because of the presence of government officials from the North within the institutional system—reinforced considerably by the accession of Sweden and Finland in 1995—and because of the advocacy of the European Parliament.

a. Danish rejection of the Maastricht Treaty: Northern values and the interest of European Heads of State

The idea of a European right of access to government documents was not new. The first directly elected European Parliament called for “legislation on openness of government of Community affairs” in 1984.<sup>226</sup> This was followed, in 1988, by a parliamentary resolution declaring the “right to information” to be a fundamental freedom and requesting the Commission to propose access to information legislation.<sup>227</sup> Again, in 1989, when the Parliament urged the Member States to adopt a binding declaration of rights, it included the right of access to information in its proposed Declaration of Fundamental Rights and Freedom.<sup>228</sup>

In the Intergovernmental Conference leading up to the signing of the Maastricht Treaty in 1992, the Dutch government sought to insert a provision, modeled on the Dutch Constitution, that would have required the European institutions to pass legislation on access to information.<sup>229</sup> The idea did not find strong support among the other Member States, and as a compromise measure, the Commission proposed that the text be included as a toothless, non-binding protocol to the Treaty. Thus, attached to the Treaty on European Union, signed at Maastricht on February 7, 1992, was a Declaration, by the Heads of State, on the right of access to information:

The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.<sup>230</sup>

Nowhere was there mention of an individual right and, aside from the usual diplomatic language, the only concrete action envisaged was a Commission report, which, given the text of the protocol, might very well have been limited to a call for the publication of more official documents and better access to existing data bases.

The Danish rejection of the Maastricht Treaty in the national referendum of June 2, 1992, was the catalyst that set the right to transparency into motion.<sup>231</sup> The Danish referendum, along with the Euro-skepticism it triggered in a number of other countries,

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<sup>226</sup> Resolution on the compulsory publication of information by the European Community, 1984 O.J. (C 172) 176, para. 1

<sup>227</sup> Resolution on the compulsory publication of information by the European Community, 1988 O.J. (C 49) 174.

<sup>228</sup> Resolution adopting the Declaration of fundamental rights and freedoms, 1989 O.J. (C 120) 51, 55. Article 18 (Right of access to information) provides: “Everyone shall be guaranteed the right of access and the right to corrections to administrative documents and data concerning them.”

<sup>229</sup> D.M. Curtin, *Betwixt and Between: Democracy and Transparency in the Governance of the European Union*, in *Reforming the Treaty on European Union: The Legal Debate* 95, 101-02 (Jan A. Winter et al. eds., 1995). Parliament indirectly advocated transparency by demanding the incorporation of its Declaration of Fundamental Rights and Freedoms, which as described above, contained Article 18 on the right of access to government information. See Resolution on the Intergovernmental Conference in the context of the Parliament’s strategy for European Union, 14 March 1990 (Martin I Report), para. 3(d), reprinted in Richard Corbett, *The Treaty of Maastricht: From Conception to Ratification: A Comprehensive Reference Guide* 106, 108 (1993).

<sup>230</sup> Maastricht Treaty, Declaration 17.

<sup>231</sup> The close observer and freedom of information crusader, Tony Bunyan, is also of the opinion that the Danish rejection of Maastricht, not the Maastricht protocol, was the critical moment. See Tony Bunyan, *Secrecy and Openness in the European Union*, available at <http://www.statewatch.org/foi>.



was a tremendous blow to the twelve governments that had signed the Treaty.<sup>232</sup> Over one year had been consumed in the negotiations on the Treaty and the result was an ambitious project of monetary and political union that went well beyond the customs union and common market of the original Treaty of Rome.<sup>233</sup> The Maastricht Treaty was a step beyond the functional, market-oriented vision of Jean Monnet's European Community. It included European citizenship, a common currency, and cooperation on foreign policy, immigration, and police matters. The signatories had a great stake in ratification and the Danes and the gloomy mood that set in after their referendum stood in their way.

Transparency emerged as a powerful concept through which the governments could reclaim legitimacy for the European project, largely because it was the open government country of Denmark that had rejected the Treaty. After the "No" vote, the Danish government submitted a memorandum outlining the changes that would be necessary if the Maastricht Treaty was to survive a second referendum. At the top of the list were openness and transparency.<sup>234</sup> The response was a steady wave of commitments to transparency by European Heads of State at European Council meetings in the fall of 1992.<sup>235</sup> The Commission dutifully produced a series of policy documents in spring of 1993.<sup>236</sup> And in summer and fall of 1993 the last Member States ratified the Treaty: the Danish electorate approved Maastricht in a second referendum on May 18, 1993; the UK House of Commons voted in favor of the Treaty on May 20, 1993 and the UK House of Lords approved the Treaty on July 20, 1993; and the German Constitutional Court upheld the constitutionality of the Treaty, thereby allowing Germany to ratify it, on October 12, 1993.

#### b. The aftermath of Maastricht

After the Maastricht Treaty was ratified by all Member States in the fall of 1993, transparency could very well have faded from the political agenda and could have become a hortatory duty without any real bite for the day-to-day operation of the institutions. In this section, I show that the advocacy of Europeans with cultural allegiances and expectations shaped by their experiences as citizens of the Netherlands, Denmark, and later Sweden and Finland, combined with the interest of the Parliament in obtaining information for itself, ensured that the impetus for transparency was sustained. The rights exercised by European citizens day-in-and-day-out in obtaining information about how European government is run flow directly from the legal instruments to which these European actors made a decisive and critical contribution.

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<sup>232</sup> Shortly thereafter, the French electorate approved the Maastricht Treaty in a referendum by just over 50 percent, one of the narrowest margins ever. See Bermann et al., *Cases and Materials on EU Law*, supra note \_\_ at 18.

<sup>233</sup> The Intergovernmental Conferences on Political Union, Economic and Monetary Union were launched at the European Council meeting in Rome on December 15, 1990.

<sup>234</sup> Prime Minister's Office, Denmark in Europe, reprinted in European Institute of Public Administration, *The Ratification of the Maastricht Treaty: Issues, Debates and Future Implications* 505, 505-06 (Finn Laursen & Sophie Vanhoonacker eds., 1994) (calling for "openness and transparency in [the EC's] decision-making procedures" and "openness in administration").

<sup>235</sup> See Conclusions of the Presidency, Birmingham European Council, 16 October 1992, Annex I, reprinted in European Institute of Public Administration, *The Ratification of the Maastricht Treaty*, supra note \_\_ 407, 409; Conclusions of the Presidency, European Council in Edinburgh, 11-12 December 1992, Annex 3 to Part A, reprinted in European Institute of Public Administration, *The Ratification of the Maastricht Treaty*, supra note \_\_ 411, 429.

<sup>236</sup> See Commission of the European Communities, *Increased Transparency in the Work of the Commission*, 1993 O.J. (C 63) 8; Commission of the European Communities, *Public Access to the Institutions' Documents: Communication to the Council, the Parliament and the Economic and Social Committee*, COM (93) 191 final, 5 May 1993; Commission of the European Communities, *Openness in the Community: Communication to the Council, the Parliament and the Economic and Social Committee*, COM (93) 258 final, 2 June 1993.

i. National value: The influence of the northern tradition of open government

The evidence of the significance of the northern mental map of rights and democracy comes in the form of surnames. Who, in the institutions, were transparency advocates? The parliamentarians who have chosen to make transparency their mission by authoring committee reports and sponsoring resolutions have mainly come from the North: Jens-Peter Bonde (Denmark), Maj-Lis Loow (Sweden), Hanja Maij-Weggen (Netherlands), Heidi Hautala (Finland).<sup>237</sup> When the Parliament, Commission, and Council entered into tripartite negotiations over the final text of the Public Access to Documents Law of 2001, five out of the seven parliamentarians were from the North: two Swedes, two Finns, and one Dutchwoman.<sup>238</sup> This is not to say that there are no exceptions. A few British parliamentarians have also been active on the issue and, over the years, parliamentarians from a couple of other Member States have shown sporadic interest.<sup>239</sup> Nonetheless the northern provenance of most of the transparency advocates is striking, especially given that, in the Parliament's system of weighted representation, there are relatively few parliamentarians from the small Member States to the North.

Likewise, within the Council of Ministers, the representatives of northern Member States have consistently come down on the side of transparency, against representatives of Member States in the center and south of Europe. The voting record of the Council working party on access to documents is illustrative on this score. When an application is filed with the Council and it possibly comes within one of the exceptions to the right of access, it is sent to a working party of Member State representatives. In 2000, the working party was divided on whether to grant access in 24 instances. Denmark voted to grant access in 88% of those cases, Sweden in 83%, Finland in 53%, the Netherlands in 29%, the UK in 20%, Ireland in 17%, Greece and Germany each voted to granted access in only one case (4%), and the remaining Member States (Austria, Belgium, Italy, Luxembourg, France, and Sweden) voted to deny access in all 24 cases.<sup>240</sup>

The citizens and Member States of northern Europe also made their mark in the judicial branch (Court of Justice and Court of First Instance). Member States intervened on the behalf of plaintiffs in seven out of the 28 cases brought between 1993, when the first rules of procedure entered into force, and summer 2002.<sup>241</sup> They were all northern Member States: Sweden in four cases,<sup>242</sup> the Netherlands in three,<sup>243</sup> Denmark in two,<sup>244</sup> and Finland in one.<sup>245</sup> Member States

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<sup>237</sup> See Francis Jacobs, *Institutional Dynamics after Nice: Views from the European Parliament*, May 2001, at 5 (unpublished paper on file with author). Francis Jacobs is a long-time civil servant at the European Parliament who worked for the Institutional Affairs Committee on transparency matters. See Interview with Francis Jacobs (June 17, 2004) (notes on file with author).

<sup>238</sup> *Id.* at 6. The other two were British.

<sup>239</sup> *Id.* at 4, 5. Jacobs names Michael Cashman and Nicholas Clegg, from the UK, Dirk Sterckx, from Belgium, and Antonio Di Pietro, from Italy, as active on the issue.

<sup>240</sup> See *id.* at 6.

<sup>241</sup> In the U.S., the functional equivalent is litigation under the Freedom of Information Act (FOIA) by individuals who file a request with the government for documents, are denied the documents on the basis of one of the many exceptions available under FOIA, and then sue the government to contest the denial. My count of European cases is based on a list developed by the activist Tony Bunyan and the academic Steve Peers for the period 1993-August 5, 2002, and available at:

<http://www.statewatch.org/caselawobs.htm>. I counted as a different case any case that was assigned a different number by the Court of First Instance. This led to the omission of one case from the Statewatch list of Court of First Instance orders, item 10, Case T-111/00, *BAT v. Commission*, 2001 ECR II-Feb. 21. I have independently done a search to check for the accuracy of the count, as well as the categorization of intervenors and plaintiffs. For purposes of the count, I included all of the lawsuits brought by individual plaintiffs and the one lawsuit brought by a privileged, non-individual plaintiff, namely the Netherlands.

<sup>242</sup> Case T-105/95, *WWF UK (World Wildlife Fund for Nature) v. Commission*, 1997 ECR II-313; Case T-174/95, *Svenska Journalistförbundet v. Council*, 1998 ECR II-3269; Case T-188/97, *Rothmans International v. Commission*, 1999 ECR II-2463; Case T-14/98, *Heidi Hautala v. Council*, 1999 ECR II-2489.

<sup>243</sup> Case T-194/94, *Carvel v. Council*, 1995 ECR II-2765; Case T-83/96, *van der Wal v. Commission*, 1998 ECR II-545; Case T-174/95, *Svenska Journalistförbundet v. Council*.

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also intervened in support of the defendant institutions (the Council and Commission, alternatively). They were countries with traditions of closed government: France in four cases<sup>246</sup> and the UK in four.<sup>247</sup>

The Netherlands also independently sued the Council over the first Council access to documents rules. The Netherlands, supported by the European Parliament (which because of the rules of standing existing at that time was only allowed to sue in the Court of Justice to protect its own legislative prerogatives and could not bring suit independently) sued the Council on the grounds that access to documents should be set down in a legislative measure rather than internal rules of procedure.<sup>248</sup> The consequence of adopting the access to documents measure as internal rules of procedure had been to allow the Council to act by a simple majority, thereby enabling the Member States in favor of continued secrecy to easily outvote Member States like the Netherlands in favor of transparency, and to allow the Council to cut out the Parliament entirely from the decisionmaking process. Both the Netherlands and Parliament considered that the exceptions to the access to documents principle were far too broad and hence vitiated the right to transparency.<sup>249</sup> They lost, foreshadowing the argument of the next section, where I demonstrate that Parliament, not the Council or the Court of Justice, was the main institutional proponent of transparency because it could act notwithstanding the majority, closed government tradition and it had a strategic, institutional interest in doing so.

The nationalities of the plaintiffs are also revealing.<sup>250</sup> Eight were from the UK, eight from the Netherlands, four from Germany, two from Finland, one from each of Denmark, Sweden, France, Greece, and Italy, and two were public interest groups with diverse membership.<sup>251</sup> Plaintiff nationalities roughly correspond with expectations, albeit less strikingly than in the case of government intervenors. In terms of their numbers relative to population, citizens of northern, open-tradition countries are disproportionately represented. British citizens are an interesting anomaly: they vindicate access to information rights even though they have never had access to documents legislation at home, their national administration is widely known for resisting open government measures, and their government was one out of only two Member States that intervened in support of defendant European institutions. Part, but certainly not all, of the high case count can be attributed to a single dispute between the Commission and two British nationals over certain VAT documents which generated three separate cases.<sup>252</sup>

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<sup>244</sup> Case T-194/94, *Carvel v. Council*; Case T-174/95, *Svenska Journalistförbundet v. Council*.

<sup>245</sup> Case T-14/98, *Heidi Hautala v. Council*.

<sup>246</sup> Case T-105/95, *WWF UK v. Commission*; Case T-174/95, *Svenska Journalistförbundet v. Council*; Case T-14/98, *Heidi Hautala v. Council*; Case C-58/94, *Netherlands v. Council*, 1996 ECR I-2169.

<sup>247</sup> Case T-105/95, *WWF UK v. Commission*; Case T-174/95, *Svenska Journalistförbundet v. Council*; Case T-14/98, *Heidi Hautala v. Council*; Case T-309/97, *The Bavarian Lager Co. v. Commission*, 1999 ECR II-3217.

<sup>248</sup> Case C-58/94, *Kingdom of the Netherlands v. Council*, 1996 ECR I-2169.

<sup>249</sup> See Curtin, *Between and Between*, *supra* note\_\_ at 103 (describing Dutch position); Case C-58/94, *Netherlands v. Council*, 1996 ECR at I-2193 (describing Parliament's position).

<sup>250</sup> I counted a firm as a national of a Member State if the Court of First Instance said that it had a place of establishment in the Member State. I classified individuals based on where the Court of First Instance said the person resided.

<sup>251</sup> Cases T-194/94, T-123/99, T-111/00, T-311/00, T-19/96, T-78/99, T-178/99, T-36/00 (UK); Cases C-58/94, T-83/96, T-188/97, T-188/98, T-20/99, T-211/00, T-41/00 (the Netherlands); Cases T-124/96, T-309/97, T-92/98, T-156/97 (Germany); Cases T-14/98, T-304/99 (Finland); Case T-610/97 R (Denmark); Case T-174/95 (Sweden); Case T-106/99 (France); Case T-3/00 (Greece); Case T-103/99 (Italy); Case T-105/95 (World Wildlife Fund, which is a trust incorporated under English law and whose head office is in the UK); Case T-191/99 (Incorporating Committee (*Associazione*) for the Defence of Foreign Lecturers, established in Italy).

<sup>252</sup> See Case T-78/99, *Elder & Elder v. Commission*, 1999 O.J. (C 174) 11; Case T-178/99, *Elder & Elder v. Commission*, 1999 ECR II-3509; Case T-36/00, *Elder & Elder v. Commission*, 2001 ECR II-607. These are items 4, 5, and 8 on the Statewatch list of "Orders of the Court of First Instance."

- ii. Supranational interest: The interest of the European Parliament in information on policymaking in the Commission and the Council

In the ordinary politics following the Maastricht ratification crisis, the European Parliament proved to be the most significant institutional proponent of transparency. Parliament's central role is less evident than the institutional association analyzed in the previous section between the Court of Justice and the Commission and fair hearing rights and connection explored in the next section between the Commission and the right to civil society participation. That is because a variety of European institutions have adopted legal instruments, issued reports, and decided cases requiring that the Commission and Council give access to documents. In this section I present the evidence for ascribing the Parliament such a central role. I then go on to show that parliamentarians, both from northern and southern Member States, were committed to transparency, more so than to other rights associated with democratic government, because transparency overlapped with Parliament's campaign to obtain greater powers within the European institutional complex by acquiring more information on the legislative and administrative affairs of the Commission and Council.

There are a number of episodes in the development of transparency after the Maastricht debacle that demonstrate the centrality of Parliament. In the aftermath of the high-level European Council meetings of fall 1992 and the final national ratifications of the Maastricht Treaty in summer and fall of 1993, the Parliament, Commission, and Council negotiated an inter-institutional agreement on transparency.<sup>253</sup> It is widely held among policymakers and scholars alike that the inter-institutional agreement of October 1993 served as the basis for the Commission's and the Council's first rules on access to documents. Yet the Council originally was determined to discuss subsidiarity only and it was intense pressure from the Parliament that put transparency and democracy on the bargaining table as well.<sup>254</sup> In the agreement, the Council undertook to make some of its debates public, publish voting records, and improve access to documents. The Commission and the Parliament also committed themselves to a number of transparency measures.<sup>255</sup>

Parliament also played a key role in the Intergovernmental Conference (IGC) leading to the Amsterdam Treaty and Article 255 on access to documents.<sup>256</sup> The Danish parliamentarian Jens-Peter Bonde issued a number of working documents on the behalf of the parliamentary Committee on Institutional Affairs recommending the inclusion of transparency provisions in the Treaty.<sup>257</sup> In all of the European Parliament's contributions to the 1996-1997 IGC, it insisted that commitments to transparency be made in specific treaty articles.<sup>258</sup> A simple comparison of

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<sup>253</sup> Interinstitutional Declaration on Democracy, Transparency and Subsidiarity, 25 October 1993, Bull. EC 10/93, at 18.

<sup>254</sup> See Richard Corbett, *The Treaty of Maastricht: From Conception to Ratification: A Comprehensive Reference Guide* 82 (1993); Richard Corbett, *The European Parliament's Role in Closer EU Integration* 344 (1998).

<sup>255</sup> Parliament, not entirely happy with the result, entered a unilateral declaration pressing for greater openness in Council meetings, stating that "the adoption of all legislative texts by a public vote is a sine qua non of democracy and transparency." Corbett, *The European Parliament's Role in Closer EU Integration*, supra note \_\_ at 344. In 1994, the Institutional Affairs Committee of the Parliament sought to negotiate a more comprehensive inter-institutional agreement on transparency, appointing three parliamentarians as "explorers," but with no success. See Mr. Donnelly, Mr. St. Pierre & Mr. Tsatsos, Working Document on Transparency and Democracy of November 1994, PE 210.692/A (on file with author).

<sup>256</sup> The Treaty of Maastricht foresaw an intergovernmental conference in 1996. The IGC was officially launched on 29 March 1996 and was preceded by a number of reflection documents prepared by the institutions and an ad hoc committee. See *The 1996 Intergovernmental Conference: Retrospective Data Base*, available at <http://europa.eu.int/en/agenda/igc-home>.

<sup>257</sup> Committee on Institutional Affairs, Working documents PE 227.237; PE 222.239; PE 222.240.

<sup>258</sup> See Resolution on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference—Implementation and development of the Union, 1995 O.J. (C 151) 56, 59, 62; Resolution embodying (i) Parliament's opinion on the convening of the Intergovernmental Conference, and (ii) an evaluation of the work of the Reflection Group and a definition of the political priorities of the European Parliament with a view to the Intergovernmental Conference, 1996 O.J. (C 96) 77, 86 [hereinafter "Parliament Resolution on Amsterdam IGC"].

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Parliament's three major demands--demands not made by the two other important IGC actors besides the Member States, the Commission and the Amsterdam Reflection Group-- with the final outcomes of the treaty negotiations demonstrates Parliament's influence.<sup>259</sup> The Parliament proposed that the principle of openness be written into the Treaty, that a rule of access to documents be included in the Treaty, and that the legislative meetings of the Council of Ministers be opened to public scrutiny, both through open meetings and through access to the minutes, votes and reservations recorded at those meetings.<sup>260</sup> While Parliament's requests were not incorporated word-for-word, the Amsterdam Treaty included all three dimensions.<sup>261</sup>

After Amsterdam, the very first significant legislative innovation in the transparency area was adopted at the behest of Parliament. New legislation setting down the structure and operation of European administration was adopted in summer of 1999. The original proposal submitted by the Commission did not make any mention of the public's right of access to the documents generated in the administrative process.<sup>262</sup> Following an amendment proposed by Parliament, the law provided that a public register of documents would be created and that the access to documents rules set down in the Commission's rules of procedure would also apply to the administrative process.<sup>263</sup>

The Public Access to Documents Law, adopted to give effect to the commitment of the Amsterdam Treaty to transparency, was also strongly influenced by Parliament. In the aftermath of Amsterdam, Parliament tasked its Committee on Institutional Affairs with coming forward with recommendations for the implementation of Article 255, which were adopted by the entire Parliament in the plenary session of January 12, 1999.<sup>264</sup> Nevertheless, when the Commission eventually came forward with its proposal for legislation, parliamentarians found it disappointing in a number of critical respects.<sup>265</sup> The Commission proposal would have excluded from the coverage of the law all internal documents that were not contained in official acts, in order to protect the so-called "space to think" of the institutions.<sup>266</sup> The list of exceptions to the right of access was far more extensive than those in the earlier access to documents rules of the Council and the Commission. It contained some dangerously broad categories such as the protection of "the effective functioning of the institutions" and "the stability of the Community's legal order."<sup>267</sup> Furthermore, when the documents of third parties were involved, the proposal required that they give their consent before the documents could be released.<sup>268</sup> All

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<sup>259</sup> See Reflection Group's Report, Messina 2<sup>nd</sup> June 1995, Brussels 5<sup>th</sup> December 1995, at "A more transparent Union," available at <http://europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html#2.5>; Commission Opinion, Reinforcing Political Union and Preparing for Enlargement, 28 February 1996, at "Simplifying and democratizing Europe," available at <http://europa.eu.int/en/agenda/igc-home/eu-doc/commissn/avis-en.html#onethree>.

<sup>260</sup> See Parliament Resolution on Amsterdam IGC, 1996 O.J. (C 96) at 86 (section 20 called "A positive response to popular demands for more openness and transparency").

<sup>261</sup> See TEU, art. 1 ("decisions are taken as openly as possible"); EC Treaty, art. 255 (right of access to documents); EC Treaty, art. 207 (Council to make public the documents and votes related to its legislative activities).

<sup>262</sup> See Commission, Proposal for a Council Decision laying down the procedures for the exercise implementing [sic] powers conferred on the Commission, 1998 O.J. (C 279) 5.

<sup>263</sup> See Amendments by Parliament, 1999 O.J. (C 279) 404, 410 ("Except for reasons of confidentiality, all documents shall be made public and accessible by electronic transmission."); Comitology Decision, *supra* note\_\_ at art. 7 (providing that "[t]he principles and conditions on public access to documents applicable to the Commission shall apply to the committees" and that "[t]he references of all documents sent to the European Parliament . . . shall be made public in a register to be set up by the Commission in 2001").

<sup>264</sup> See Resolution on openness within the European Union, 1999 O.J. (C 104) 20; Committee on Institutional Affairs, Report on Openness within the European Union of 8 December 1998 (A4/0476/98).

<sup>265</sup> See Jacobs, Institutional Dynamics after Nice, *supra* note\_\_ at 16-25.

<sup>266</sup> See Commission, Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, 2000 O.J. (C 177) 70, art. 3 (a).

<sup>267</sup> *Id.* at art. 4(a).

<sup>268</sup> *Id.* at art. 4(d).

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communications with the Member States or with non-Community institutions were at risk of falling into this loophole.<sup>269</sup> Another shortcoming of the Commission's proposal was the failure to use the device of the public register to make documents directly available to the public, electronically, without the need to file a request.<sup>270</sup> Lastly, Parliament was concerned that the Council would use the public interest exception to exclude most documents related to common foreign and security policy and police and judicial cooperation.<sup>271</sup>

In response, the responsible parliamentary committee produced a highly critical report and proposed a number of amendments.<sup>272</sup> Parliament approved the amendments to the Commission's text, after which followed a series of trilogues between Parliament's representatives, the Swedish Presidency of the Council, and the Commission.<sup>273</sup> (Trilogues are tripartite negotiations among the deciding institutions on the final text and are functionally equivalent to conference committees of members of the House of Representatives and the Senate in the U.S.) In the final compromise version, Parliament succeeded in reducing considerably the list of exceptions. Moreover, all European institutions were required to establish electronic registers of documents. For legislative documents, direct, electronic access to the document is mandatory and for other documents such access should be provided where possible. In conclusion, had the Amsterdam Treaty not required that the legislation be adopted by co-decision, the law would have almost certainly represented a step backwards for transparency. (Co-decision gives Parliament decisionmaking powers equal to those of the Council and thus requires the Commission to anticipate the Parliament's position in the original proposal and to allow Parliament to vote on the final text.) Parliament ensured that the Council and Commission did not back-peddle on their existing rules of procedure and, in some respects, improved the access to documents scheme.<sup>274</sup>

Why did Parliament campaign so hard for transparency, above and beyond other principles associated with good European governance, and more assiduously than other institutional actors? Since the European Parliament was first directly elected in 1979, it has pushed for access to information on the Commission and the Council for Parliament. Without information, the meager powers it originally possessed under the Treaty of Rome would have been virtually non-existent. After Maastricht, the growing currency of the northern value of transparency led the Parliament to couple the strategic, institutional need for information with the campaign for open government.

The relationship between the normative ideal of transparency for all European citizens and the need of Parliament for information to exercise its legislative prerogatives was complex: the institutional interest furthered the ideal and the ideal was used to promote the institutional

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<sup>269</sup> Id. at art. 4(a)

<sup>270</sup> Id. at art. 9.

<sup>271</sup> In August 2000, the Council amended its rules to exclude documents relating to security and defence and classified as "top secret", "secret", or "confidential." See Council Decision 2000/527/EC Council Decision of 14 August 2000 amending Decision 93/731/EC on public access to Council documents and Council Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council documents, 2000 O.J. (L 212) 9. Parliament was up in arms and brought a case against the Council in the Court of Justice seeking to annul the decision. See Case C-387/00, 2000 O.J. (C 355) 15, subsequently withdrawn, 2002 O.J. (C 144) 30. Parliament therefore viewed the public interest exception with great suspicion.

<sup>272</sup> See Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Report on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council, and Commission documents, 26 October 2000 (A5-0318/2000). It was approved by Parliament on 16 November 2000. See Public Access to Documents of the European Parliament, the Council, and the Commission (vote), 2001 O.J. (C 223) 194.

<sup>273</sup> See Jacobs, Institutional Dynamics after Nice, *supra* note \_\_ at 20. The Presidency of the Council rotates every six months to a different Member State.

<sup>274</sup> See Bo Byurulf & Ole Elgström, Negotiating Transparency: The Role of Institutions, 42 J. Common Mkt. Stud. 249, 264 (2004) (finding that the co-decision requirement was extremely significant in shaping the Public Access to Documents Law).

interest. On the one hand, the right of transparency for all piggy-backed upon the improvements that Parliament obtained for its own purposes. Before Maastricht, Parliament had successfully forced a number of institutional changes that required the Commission and Council to forward documents and give updates on their proceedings on a timely basis. Once the northern right to transparency became a defining element of the European concept of good government, as a matter of normative discourse, Parliament's past successes in obtaining documents, as well as its subsequent crusades to obtain yet more information had to be extended to all European citizens. In other words, once transparency became a European value, Parliament could not ask for information for itself and itself alone. On the other hand, Parliament promoted transparency because the right served Parliament's strategic, institutional need for information from the Commission and the Council. In other words, once the northern mental map of open government had been transferred to Europe, Parliament had a concrete, institutional interest in advancing a rhetoric and law of transparency.

To demonstrate the logic of supranational institutional interest and national value, it is again necessary to do some of the history. Parliament's campaign for information can be divided into three categories: the budget, legislation, and administration. In the past, the European Parliament's most important, and some would say, only, powers were in the area of the budget. In two treaties dating to the 1970's, the Parliament acquired the right to propose amendments to the European Community's annual budget and to reject the budget if dissatisfied with the outcome after final voting in the Council.<sup>275</sup> Parliament also obtained the right to review or "discharge" the European Community's accounts, after the expiration of the fiscal year, to ensure that the money appropriated under the budget had been spent lawfully.<sup>276</sup> Since Parliament was first directly elected in 1979, it has consistently called for more documents, reports, and statistics on the programs to be financed by each of the line items in the budget, as well as more information on how the monies appropriated were spent.

Dissatisfaction with the scant information provided by the Commission has been expressed repeatedly, in many forms. The comments accompanying the Parliament's annual discharge reports are one place where it can be found.<sup>277</sup> More information on the intended use of budget appropriations, as well as the implementation of the different programs, is a staple of the recommendations and criticisms put forward by Parliament. Just to give a flavor of the critique, I present here portions from the Parliament's report on the discharge of the budget from the 1982 financial year. Parliament explained the decision to defer the discharge--perceived at the time as an extraordinary expression of disapproval, similar in terms of opprobrium to a parliamentary no-confidence vote--based on the failure of the Commission to transmit complete and comprehensible information on the disbursement of Community funds. Parliament stated that it: "Strongly deplors the fact that the present Commission has taken a step backwards, as compared with the preceding college, by refusing to make certain basic document available to

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<sup>275</sup> Treaty Amending Certain Budgetary Provisions of the Treaties (1970); Treaty Amending Certain Financial Provisions of the Treaties (1975). The provisions can be found at EC Treaty, art. 272. For an overview, see Corbett, *The European Parliament's Role in Closer EU Integration*, supra note\_\_ at 93-97.

<sup>276</sup> Corbett, *The European Parliament's Role in Closer EU Integration*, supra note\_\_ at 93-97. The provisions can be found at EC Treaty, arts. 275, 276.

<sup>277</sup> Another place is Parliament's contribution to the Intergovernmental Conference leading up to Maastricht. Parliament's Committee on Budget Control called for strengthening of Parliament's "right to information," by requiring information to be transmitted by European institutions besides the Commission and by establishing a right of parliamentary inquiry. See Final Report of the Committee on Budgetary Control on strengthening Parliament's powers of budgetary control in the context of its strategy for European Union, 27 Sept. 1991 (A3-0253/91) at 6, 12.

Parliament."<sup>278</sup> And it said that it: "Requests the Commission to consider ways of providing more and clearer statistical and explanatory information on the execution of the budget."<sup>279</sup> The discharges of subsequent years are replete with comments in the same vein.<sup>280</sup>

In the 1980's and the 1990's, Parliament also pushed the Commission for more information in connection with its legislative powers. Until 1986, the Parliament only had the power to give non-binding opinions on European legislation through what was known as the consultation procedure.<sup>281</sup> The real decision-making power rested with the Commission, which had the power to propose legislation, and the Council, which had the power to adopt legislation. In the Single European Act of 1986, the co-operation procedure was introduced in certain policy areas. Co-operation required that Parliament review proposals at two, separate stages in the legislative procedure, once after the Commission issued the initial proposal, and a second time, after the Council had voted on the proposal. On the second reading, Parliament could propose amendments, which the Council could reject, but only by a unanimous vote. Parliament's legislative powers were improved in the Maastricht Treaty of 1992. Maastricht introduced co-decision, which preserves the two readings structure of cooperation, but requires the Council to adopt Parliament's amendments if the legislation is to pass. As the label suggests, in co-decision, Parliament and Council are co-legislators: the approval of both is necessary for a piece of legislation to be enacted. In the treaties negotiated subsequent to Maastricht, co-decision has been extended to a wide number of areas, so that today, outside of the foreign policy and criminal law areas, it is the prevalent mode of enacting European laws.

In all three procedures, information on the Commission's policy agenda, the Commission's specific legislative proposal, and the trajectory of the proposal once it enters Council—where more often than not it undergoes numerous and substantial amendments—is critical. Without advance warning of the different proposals in the Commission pipeline, and without access to the information supporting the Commission's proposals, parliamentary committees are handicapped in researching the issues and writing their reports and the Parliament as a whole cannot take informed votes. In the consultation procedure, if the proceedings in the Council are secret, the Commission's proposal can be transformed by the Council and enacted into law without any warning to the Parliament. Parliament's power of

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<sup>278</sup> Decision refusing to grant a discharge to the Commission of the EC in respect of the implementation of the EC budget for the 1982 financial year in accordance with the provisions of Article 5 of Annex IV to the Rules of Procedure (17 December 1984), 1984 O.J. (C 337) 23, 24 (para. 4).

<sup>279</sup> Resolution in accordance with the provisions of Article 85 of the Financial Regulation informing the Commission of the reasons for the deferral of discharge in respect of the implementation of the budget of the EC for the 1982 financial year (14 May 1984), 1984 O.J. (C 127) 36, 38 (para. 14).

<sup>280</sup> See Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1983, 1985 O.J. (C 122) 35, 36, 37, 38, 39 (paras. 1, 5, 6, 7, 8, 22, 23); Resolution embodying the comments which form an integral part of the Decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1984, 1986 O.J. (L 120) 141, 142, 143 (paras. 15, 19, 20, 32); Resolution on action taken by the Commission in response to the comments made in the resolution accompanying the decision granting a discharge in respect of the implementation of the 1984 budget, 1987 O.J. (C 318) 128, 128 (para. 3(a)); Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1988, 1990 O.J. (L 174) 42 (paras. 4, 20, 24, 30); Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1989, 1991 O.J. (L 146) 24 (paras. 6, 17, 64, 74, 75); Resolution containing the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1990, 1993 O.J. (L 19) 26 (paras. 3, 36, 70); Resolution on the Commission report on action taken in response to the observations contained in the resolution accompanying the decision giving discharge in respect of the general budget of the European Communities for the 1990 financial year, 1993 O.J. (C 315) 89, 89, 90 (paras. 3, 16); Resolution embodying the comments which form an integral part of the decision granting a discharge in respect of the implementation of the general budget of the European Communities for the financial year 1991, 1993 O.J. (L 155) 72 (paras. 18, 37, 53, 84).

<sup>281</sup> See generally Craig & de Búrca, *EU Law*, supra note \_\_ at 141-47 (describing consultation, cooperation, and co-decision).



consultation is rendered meaningless, since the Commission proposal on which Parliament gives its opinion may bear no relation to the law ultimately passed by the Council. Information on Council proceedings is also important in co-operation and co-decision; advance warning of the likely outcome of the Council vote is necessary for Parliament to react fully and propose its own, well-considered amendments in the second reading.

The failure to disclose declarations made by Member States when approving European laws in the Council can also undermine the Parliament's legislative prerogatives. These declarations are similar to reservations in international treaties and can modify the text of the agreement, either by allowing derogations for certain Member States or by altering the interpretation of the legislation for certain Member States. If declarations are not published, then, in effect, the Member States on the Council can alter legislation without the knowledge or input of the Parliament, even on matters on which Parliament had full co-decision powers.<sup>282</sup>

To safeguard its institutional prerogatives as legislator, the Parliament has negotiated an inter-institutional agreement with each new Commission since 1990.<sup>283</sup> (A new Commission takes office every five years.) In all, timely and complete information on the Commission's policy initiatives and the state of play of negotiations in the Council have figured prominently. Parliament has also separately urged the Council to notify Parliament of any planned changes to the proposal in the course of negotiations there.<sup>284</sup> It has suggested an inter-institutional agreement with the Council, patterned on the agreements with the Commission, but without any success to date.<sup>285</sup> As far back as 1981, in connection with the power to approve the annual budget, which it shared with the Council, Parliament voiced frustration with the secrecy of the Council and requested information on the state of play of negotiations among the Member States sitting on the Council:

[Parliament c]onsiders that the procedure of budgetary collaboration between Council and Parliament during the annual budgetary process should be improved by a series of practical measures: for example, the Committee of Permanent Representatives and the Budgetary Committee of Council should supply the rapporteur and the members of the Committee on Budgets with the working documents and minutes of their meetings.<sup>286</sup>

Information has also been at the heart of Parliament's attempt to establish legislative oversight of European administration. The implementation of European legislation by the Commission, through implementing regulations or individualized decisions, very often requires the approval of committees of national regulators. So-called comitology committees are designed to serve as a surrogate for the Council and enable the Council to monitor, and sometimes veto or modify, Commission implementing regulations and decisions. The Parliament has staged a long battle to eliminate comitology committees in European

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<sup>282</sup> This occurred in the case of state aids to shipbuilding, where, thanks to an unpublished statement made at the time of the Council vote, the Germans were permitted a derogation for East German shipyards. See Jacobs, *Institutional Dynamics after Nice*, *supra* note\_\_ at 9 n. 3.

<sup>283</sup> See Commission, *Bilan annuel 1991 d'application du "Code de conduite"*: Communication de la Commission au Parlement européen, Annex I, at 4.3, 5 June 1991 SEC (91) 1097 final; Resolution on the obligation for the Council to await Parliament's opinion, 324 O.J. (C 324) 125, 128 (point 19, urging Commission to fulfil the information-related undertakings in the Code of Conduct); Resolution on the Commission's annual work programme (approving annexed Code of Conduct negotiated with the Commission), 15 March 1995, 1989 O.J. (C 89) 68, 69-70 (points 3.1, 3.2, 4); Framework Agreement on relations between the European Parliament and the Commission, 2000 O.J. (C 121) 122, 124 ("Flow of information", points 12-17).

<sup>284</sup> Resolution on the obligation for the Council to await Parliament's opinion, 1990 O.J. (C 324) 125, 127, 128 (points 7, 17).

<sup>285</sup> See *id.* at 128 (point 15).

<sup>286</sup> Resolution on the inter-institutional dialogue on certain budgetary questions, 1981 O.J. (C 101) 107, 107 (point 2).

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administration and entrust the Commission, acting alone, with implementation.<sup>287</sup> Because comitology committees empower the Council, the Parliament views them with great suspicion. In Parliament's eyes, comitology committees constitute a device through which the Council can undermine legislative commitments, obtaining results that would otherwise be impossible because of opposition from the Parliament. Parliament, however, has been unsuccessful in eliminating comitology committees. In compensation, it has sought to establish supervisory powers over European administration equal to those of the Council.

Parliament has asserted control over administrative decisionmaking since the mid-1980's through a series of resolutions, inter-institutional agreements, and now, legislation. The duty of the Commission to transmit information on administrative proceedings to the Parliament is common to all of these instruments.<sup>288</sup> Today, after over twenty years of institutional wrangling, the Commission is required to forward Parliament the proposals for administrative action submitted to the committees, the agendas of committee meetings, the names and organizational affiliations of committee members, and the votes and minutes from committee meetings. Furthermore, Parliament today has the right to vote on implementing measures adopted by comitology committees, although a "no" vote only has moral force and does not bind the Commission.

Parliament's need for information on the work of the Commission and the Council has contributed to its advocacy of the right to transparency through the two mechanisms that I briefly sketched earlier in this section and that I explore in detail here. First, the value of open government for all citizens, not only parliamentarians, has driven Parliament to include the public in what previously was a quest for information restricted to itself. After the right to transparency became a salient conceptual paradigm, it caused Parliament to redefine the campaign for information in such a manner as to include all citizens. The value redefined the strategic institutional interest.

The piggybacking of the right to transparency onto Parliament's information initiatives is evident in the administrative area. The first law guaranteeing parliamentary oversight of the administrative process (comitology committees) both codified the gains that Parliament had made in the previous decade through inter-institutional agreements, and included a right of access for the public-at-large.<sup>289</sup> As mentioned above, the provision was pushed by Parliament,

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<sup>287</sup> See generally Corbett, *The European Parliament's Role in Closer EU Integration*, supra note\_\_ at 133, 256 (parliamentary resolution of 1981 recommending that committees be purely advisory in nature); Kieran St. Clair Bradley, *The European Parliament and Comitology: On the Road to Nowhere?*, 1997 *Eur. L. J.* 230; Ellen Vos, *Institutional Frameworks of Community Health and Safety Regulation: Committees, Agencies and Private Bodies* 120 (1999).

<sup>288</sup> See Resolution closing the procedure for consultation of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Regulation laying down the procedures for the exercise of implementing powers conferred to the Commission, 1986 O.J. (C 297) 94, 95 (point 1); Plumb-Delors Agreement of 1988, cited in Vos, *Institutional Frameworks of Community Health and Safety Regulation*, supra note\_\_ at 126 (agreeing to forward all proposals for implementing measures to the Parliament at the same time as they are submitted to comitology committees); Code of conduct on the implementation of structural policies by the Commission, 1993 O.J. (C 255) 19, 19-20 ["Klepsch-Millan Agreement"] (agreeing to forward the Parliament all plans, generally elaborated by the Member States and then transmitted to the Commission, for the use of regional development funds, all proposals for Community initiatives, and the results of any reviews of the implementation of development projects on the ground); Modus vivendi of 20 December 1994 between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the EC Treaty, 1996 O.J. (C 102) 1 (undertaking to forward all proposals for implementing measures, to allow Parliament the opportunity to vote on proposals, and in the event of a negative vote, to adopt the measure only after "taking due account of the European Parliament's point of view"); Resolution on the draft general budget of the European Communities for the financial year 1997—Section III—Commission, 1996 O.J. (C 347) 125, 125, para. 72 (agreeing to forward the Parliament a wider array of documents—the agendas of committee meetings and the results of votes taken in comitology committees—and to allow parliamentarians to attend comitology meetings if there is no objection from the national regulators on the committee); Comitology Decision, supra note\_\_ at arts. 7.3, 8 (codifying information and control powers established in earlier instruments).

<sup>289</sup> Comitology Decision, supra note\_\_.

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not the Commission or the Council. Parliament's transparency amendments were watered down in the end but, had it gotten its way, the law would have read:

Having regard to the rules and principles of transparency and access to documents flowing from Articles 1 of the EU Treaty, 207 and 255 of the EC Treaty and Declarations 35 and 41 attached to the Final Act of the Amsterdam Treaty,

...

Except for reasons of confidentiality, all documents shall be made public and accessible by electronic transmission.<sup>290</sup>

In other words, the new right to transparency led Parliament to advocate more information about the administrative process not just for itself, but for all European citizens.

The second reason for Parliament's advocacy was the moral resource that the right brought to the institutional interest in information. The right for all citizens was also a means of improving Parliament's access to information on the European institutions and hence Parliament's powers. As mentioned above, in the 1980's, Parliament called for a right of access to information in three separate resolutions. Although the resolution made no difference, given that the northern value had not yet been placed on the European agenda by the Danes and Parliament was still fairly powerless, Parliament expressly coupled information as a fundamental right for all European citizens, with information as a necessary complement to its powers in the legislative and administrative processes. Parliament said that it:

1. Takes the view that right to information is one of the fundamental freedoms of the people of Europe and that it should be recognized as such by the European Community;

....

4. Requests that the minutes of Council meetings which concern the discussion of and decision-making of a regulation or directive should be published, including the statements which alter the purpose of the directive or give another interpretation to the published document;

....

6. Wishes to see open access to information concerning the activities of the management and the advisory committee [comitology committees involved in European administration], with a view to obtaining precise information on the scope of the decisions taken;

7. Proposes that a mediator be appointed within Parliament to monitor compliance with the obligation incumbent on the Community bodies to provide information.<sup>291</sup>

In other words, Parliament linked the battles narrated above to the fundamental freedom of the right to information. The right to information was ideologically attractive because it could also serve as an umbrella for the campaign to further Parliament's legislative prerogatives.

Parliament's initiatives after the Amsterdam Treaty of 1997 also revealed the instrumental quality of the right for Parliament. As mentioned above, Parliament tasked a committee (Committee on Institutional Affairs) with producing a report on the legislation that would be needed to implement Article 255 on access to documents.<sup>292</sup> The opinion of a related

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<sup>290</sup> Proposal for a Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission (COM(98)0380—C4-0501/98—98/0219(CNS)), 1999 O.J. (C 279) 404, 407, 410.

<sup>291</sup> See Resolution on the compulsory publication of information by the European Community, 1988 O.J. (C 49) 175, 175-76; see also Resolution on the obligation for the Council to await Parliament's opinion, *supra* note\_\_ at 128 (point 16).

<sup>292</sup> See Committee on Institutional Affairs, Report on Openness within the European Union of 8 December 1998 (A4/0476/98). The report was adopted by Parliament in the plenary session of January 12, 1999, 1999 O.J. (C 104) 20.

committee (Committee on Legal Affairs and Citizens' Rights) on the report is telling. After discussing the means of guaranteeing transparency for European citizens, the Committee moved on to transparency measures for parliamentarians:

A rapporteur [the parliamentarian tasked by the appropriate committee with preparing a report on a proposed European law] should have increased rights of access when drawing up his report. Access to all documents used during the preparation of a Commission proposal might be considered in this context.

The competent parliamentary committee should be granted rights of access during the committee procedure [European administrative process described above].

Parliament as a whole might be granted rights of access in the case of major interinstitutional issues and problems connected with institutional law.<sup>293</sup>

The opinion of a second related committee (Committee on Civil Liberties and Internal Affairs) was even more pointed in calling for a right to transparency for both the public and Parliament. In the foreign and security policy area (so-called Second Pillar) and in the police and immigration areas (so-called Third Pillar and parts of the First Pillar), Parliament's legislative prerogatives are extremely limited.<sup>294</sup> Parliament has not, in contrast with areas where it has cooperation or co-decision powers, been able to cajole and threaten the Council and Commission with deadlock in order to obtain information and influence. In the opinion, the Committee used the right of access to documents to make the case for greater parliamentary information and influence in police and immigration matters:

The current campaign for access to documents of the Justice and Home Affairs Council is crucial in fostering a culture of transparency within the Union.

....

It goes without saying that the European Parliament should be informed and therefore consulted before any legislative decision. Public access to documents must also relate not only to the official institutions and bodies of the Union but also to all formal or informal working parties in which the Union is directly or indirectly involved.<sup>295</sup>

The conflation of the general right of access to documents with Parliament's powers to require information and be consulted is evident.<sup>296</sup>

### 3. The evolution of the right to transparency

Since European citizens obtained concrete procedures through which they can exercise their transparency rights in the Public Access to Documents Law, the only significant development has been the Constitutional Treaty. The Treaty gives the transparency measures that have been established over the past decade the status of higher, constitutional law. In the first part, the duties incumbent upon the European institutions are set down.<sup>297</sup> The second part of the Constitutional Treaty, which incorporates the Charter of Fundamental Rights adopted in

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<sup>293</sup> Id. (Opinion for the Committee on Institutional Affairs, section C., at 21 of electronic version).

<sup>294</sup> TEU, art. 21 (common foreign security policy); art. 39 (police cooperation); art. 67 (immigration).

<sup>295</sup> See Report on Openness, supra note\_\_ (Opinion of the Committee on Civil Liberties and Internal Affairs, Introduction, at 26 of electronic version).

<sup>296</sup> In the negotiations over the Public Access to Documents Law, the Parliament was also driven by its strategic need for information about preparatory deliberations in the Commission and the Council. See Bjurulf & Elgström, *Negotiating Transparency*, supra note\_\_ at 254. By contrast, both the Commission and the majority of members on the Council wished to protect the secrecy of their deliberations. Id. at 253-54.

<sup>297</sup> Constitutional Treaty, art. I-49 ("Transparency of the proceedings of Union Institutions, bodies offices and agencies").

2000, recognizes the individual right of access to documents.<sup>298</sup> Lastly, Article 305 sets down the structural, institutional conditions of transparency, which are largely repetitive of the rights set out in the first part of the Constitutional Treaty.<sup>299</sup>

The principal change wrought by the Constitutional Treaty is the symbolic, constitutional status conferred upon the principles of openness, transparency, open meetings, and access to documents. As a practical matter, the new articles do not add much. They recognize the legislative practice of requiring all institutions, committees, and agencies, in addition to the Commission, Parliament, and Council, to respect access to document rights.<sup>300</sup> They also constitutionalize the rules of procedure of Parliament and the Council under which debates on the adoption of legislation are open to the public and under which parliamentary reports and the votes and statements from high-level Council meetings are made public.<sup>301</sup> Lastly, the Constitutional Treaty specifically requires Parliament and the Council to publish documents related to their deliberations on legislative matters, but the scope of the requirement turns on the access to documents rules of the respective institutions and hence access to such documents would not need to be significantly broader than it stands at present.<sup>302</sup>

#### 4. European value: European and northern transparency compared

To conclude, let me take stock of the European right to transparency today. The European right combines different elements from the northern traditions of open government but it has also taken on dimensions not found in any of those traditions. Europeans have a right of access to preparatory documents, if not outweighed by the public interest in confidentiality before the legal act is adopted and almost without exception after the measure is adopted. In this, the European right approximates the Danish and Dutch laws on right of access. The institutions are under a duty to maintain registers of all documents that can be easily consulted, approximating the Swedish and Finnish systems. Yet where possible the institutions are also under a duty to give individuals direct access to documents, electronically, rather than requiring them to undertake the lengthy, bureaucratic process of an access to documents request. This goes beyond Swedish and Finnish law.

The most notable, and different element of the European right is that it extends to government activities of a highly political nature. The reader will recall that in all of the northern systems, documents relating to the contribution of government cabinets and ministers to draft legislation are excluded from the right of access. Likewise, parliaments are not covered by access to documents legislation. This is not true in the EU. Some of the drafts, minutes, votes, and declarations produced and recorded in the meetings of the Council, in which representatives

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<sup>298</sup> Constitutional Treaty, art. II-42 ("Right of access to documents").

<sup>299</sup> Constitutional Treaty, art. III-305.

<sup>300</sup> Constitutional Treaty, art. III-305.1. See, e.g., Regulation No 1641/2003 of the European Parliament and of the Council of 22 July 2003 amending Council Regulation (EEC) No 1210/90 on the establishment of the European Environment Agency and the European Environment Information and Observation Network; Rules of Public Access to Documents, 2002 O.J. (C 292) 10 (European Investment Bank). For a partial list of access rules of different European bodies, see Steve Peers, *From Maastricht to Laeken: The Political Agenda of Openness and Transparency, in the European Union in Increasing Transparency in the European Union?* 7, 15 (Veerle Deckmyn ed., 2002).

<sup>301</sup> Constitutional Treaty, art. I-49.2. In the case of the European Parliament, both plenary meetings and committee meetings are open to the public. See *infra* text accompanying note \_\_\_. In the case of the Council, only the final meeting of the Council, rubberstamping the agreements negotiated previously by low-level, national representatives are made public. See *infra* text accompanying note \_\_\_. There is nothing to suggest that the Constitutional Treaty means anything different by "the Council [shall meet in public] when considering and voting on a draft legislative act." Art. I-49.

<sup>302</sup> Constitutional Treaty, art. III-301.2.

of national governments negotiate the text of European laws, are subject to the right of access.<sup>303</sup> Citizens can also consult documents from comitology committees (part of the European administrative process) which, in some cases, reproduce the intergovernmental politics of the Council.<sup>304</sup> Although I have not focused on transparency in the European Parliament, the right of access to documents applies there too, and applies to draft reports and agendas of committee meetings.<sup>305</sup> Furthermore, in the EU, the right to transparency includes open, public meetings of legislative bodies: Council meetings giving final approval to European laws, parliamentary committees, and the plenary sessions of the European Parliament.<sup>306</sup> The negotiations and political deals that, even in the northern traditions of open government are freely conducted behind closed doors, without any hint of a right or duty of transparency, are coming under pressure, albeit still limited, from the European right to transparency.

The added dimensions of transparency are causally related to the Parliament's strategic interest in information and the unique European institutional landscape in which the Parliament operates. As this section has documented, since Parliament was first directly elected it has called consistently for greater openness in the Council and the Commission to further its own powers. The need for information extended to information about what the Commission and Council were contemplating doing, not simply what they had already decided, and hence European transparency includes preparatory documents unlike Swedish and Finnish transparency. Parliament's campaign also extended to the highly political, intergovernmental bargaining in the Council and therefore the European right, in contrast to the northern systems where it originated, applies there too.

### *C. The Third Generation: The Right to Civil Society Participation*

The last generation of rights before the Commission and the second set, after transparency, to revamp Commission authority in the area of broadly applicable policies began in 1999. The civil society phase is different from the two previous ones in a number of important respects. First, the right did not originate in domestic public law, rather it was drawn from the international arena where civil society had become the dominant paradigm for legitimizing international organizations. Nevertheless, the right has assumed a distinctly European significance. The international provenance of the right meant that it was poorly defined compared to the right to a hearing and transparency, which had been worked out in the institutionally and historically rich political space of the nation-state. The amorphous nature of the international value of civil society meant that European political entrepreneurs, constrained by old, European maps of legitimate relations between public bodies and private citizens, quickly infused the new right with the familiar, European practice of corporatism.

Secondly, unlike the right to a hearing and transparency, this historical moment of rights creation is still in progress. A number of important elements remain to be decided: Will European citizens and their organizations be able to vindicate the right in the European Courts? What type of policy measures will it cover? And will the right apply, and in what shape will it

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<sup>303</sup> See Public Access to Documents Law, *supra* note \_\_, at art. 4.3; Council Decision of 22 March 2004 adopting the Council's Rules of Procedure (2004/338/EC), 2004 O.J. (L 106), Annex II, art. 11.

<sup>304</sup> See Comitology Decision, *supra* note \_\_, art. 7.

<sup>305</sup> See European Parliament, Rules of Procedure, 1999 O.J. (L 202) 1, r.97; Jacobs, *Institutional Dynamics after Nice*, *supra* note \_\_ at 11-14. Transparency in Parliament's own affairs, through access to draft committee reports and open committee meetings, came rather late. The adoption of rules to protect rights of access was directly tied to the charge of hypocrisy, namely that Parliament could not demand that the Council and the Commission be transparent and, at the same time, fail to guarantee the right in its own affairs. See Interview with Francis Jacobs (June 17, 2004) (notes on file with author).

<sup>306</sup> Council's Rules of Procedure, *supra* note \_\_ at art. 8; Parliament's Rules of Procedure, *supra* note \_\_ at r. 96.

apply, to European institutions besides the European Commission? In what follows, I employ the same organizing scheme as in the previous two sections: the right before and after the critical event, the historical juncture (event, value, and supranational interest), the development of the right in the aftermath of the juncture, and the comparison between the European right and the right in the place of origin. The reader should bear in mind, however, that the right to civil society participation is still unsettled. I analyze certain facets of the right as belonging to the aftermath of the historical juncture not for purposes of complete descriptive accuracy but to relate this episode of rights creation to the previous ones and to draw broader lessons for a theory of rights in the EU and other, emerging global polities.

1. The right to be consulted on legislation and implementing regulations then and now

a. National traditions of public participation in lawmaking and rulemaking

The procedure through which legislation and implementing regulations are drafted in the Member States displays both similarities and differences.<sup>307</sup> It is similar in that, generally speaking, the government and the administration enjoy considerable discretion in drafting legislation and rules and are not under a legal duty to interact with members of the public. Before submitting bills to parliament for a vote or laying implementing regulations before parliament, sometimes for a vote and other times simply for purposes of information, the executive is not required to make its draft public and consult with interested citizens and organizations. National procedure is also similar in that, in most Member States, there are carefully defined exceptions to executive discretion in areas such as the environment and land-use planning, according to which officials are required to publicize drafts and consult the public. The procedure is different in that notwithstanding the government's considerable discretion, some systems require drafts to be reviewed by a specialized, independent body within the administration (Council of State) and other systems rely heavily on advisory bodies composed of interest organizations.

Let me elaborate a bit on this element of domestic public law. First I consider lawmaking. All of the Member States are parliamentary democracies, meaning that the executive is elected by the members of the legislative assembly and therefore enjoys the confidence of the legislative assembly.<sup>308</sup> The government cabinet and the administration are given extensive power to initiate legislation and adopt implementing regulations because they are considered to be the expression of the popularly elected legislative assembly. In drafting legislation, most national administrations are not under a duty to adhere to any special procedures.<sup>309</sup> They are not required, under their constitutions or ordinary legislation, to publicize their drafts and consult the public.<sup>310</sup>

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<sup>307</sup> I use the term "implementing regulation" to cover any legal measure promulgated by government administration that is designed to affect a broad class of individuals and that is issued pursuant to a delegation contained in a law passed by the legislative assembly (or, in the case of France's presidential system, pursuant to the President's autonomous powers under the Constitution). Implementing regulations are known as *règlement* in France, *Rechtsverordnungen* in Germany, *decreto legislativo* in Italy, and statutory instrument in the UK. The functional American equivalent is a rule or regulation. The American reader should bear in mind that the categorical difference between lawmaking and rulemaking in American public law is much less pronounced elsewhere. That is because in parliamentary systems, unlike the American separation of powers system, the government cabinet answers to Parliament when it drafts both laws and rules (at least in constitutional theory although the practice can be very different).

<sup>308</sup> See Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* 117-27 (1999).

<sup>309</sup> In this, there is no difference between European systems of lawmaking and the legislative process in the U.S.

<sup>310</sup> The British government sometimes engages in consultation, but as a purely discretionary matter of good administrative practice and not because of a legal duty. One of the modernization initiatives of the Blair government has been to require government departments to consult with the public when they draft legislation or major pieces of delegated legislation, i.e.

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There are two important exceptions to government discretion in lawmaking, on which there exists variation among the Member States. In countries influenced by the French administrative law tradition (*droit administratif*), the government is often required to submit draft legislation to a specialized section of the administration. The Council of State, as the body is known in France, Italy, Belgium, and Greece, checks the bill for technical drafting errors, respect for constitutional principles, consistency with other legislation, and so on. Second, in some instances, the government is required to submit bills to advisory bodies composed of organizations representing the relevant interests, a practice which is often referred to as corporatism because it bears a certain resemblance to the powerful corporations of tradesmen and artisans that governed the city states of early modern Europe.<sup>311</sup> This is typical of certain policy areas, for example welfare, industrial policy, and consumer protection. Such advisory boards are far more common in places such as Germany and Scandinavia, where interests are highly organized and there is a long tradition of corporatist relations between government and intermediate organizations.<sup>312</sup> In virtually all Member States, however, including those whose administrations are not viewed as particularly open to outside interests, advisory boards composed of peak associations exist in certain fields.<sup>313</sup>

Now I turn to the procedure for adopting implementing regulations. In most of the Member States, the same government discretion and exceptions to that discretion apply in the case of significant implementing regulations.<sup>314</sup> There is an additional set of exceptions however. In most European systems, administrators are required to publicize their intentions and consult with the public-at-large on their choices in carefully defined classes of rulemaking. These are generally decisions believed to have concrete effects on discrete, geographically defined, groups of citizens. In addition, they are generally decisions that are made by local and regional administrators, not central government. Land-use planning is one example.<sup>315</sup> Government building projects and public investment decisions that have the potential of hurting the environment are another example.<sup>316</sup> Rules which are considered insignificant, usually because they address matters of internal administrative organization, deal with a limited class of cases, or have limited temporal effects are subject to fewer procedural requirements than draft

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statutory instruments. See Cabinet Office, Code of Practice on Written Consultation (Nov. 2000), available at <http://www.cabinet-office.gov.uk/regulation/Consultation/Code.htm>. As a general rule, government departments must allow twelve weeks for comment, synthesize and summarize those comments for public consumption, and then explain the policy choices ultimately made. However, these are just Cabinet Office guidelines, namely they do not create binding legal duties and they vest a significant amount of discretion concerning when and how to consult with administrators.

<sup>311</sup> See Yves Mény, *Government and Politics in Western Europe* 143-46 (Janet Lloyd trans. & Andrew Knapp revisor, 2d ed. 1993).

<sup>312</sup> See Victor A. Pestoff, *Globalization, Business Interest Associations and Swedish Exceptionalism in the 21st Century?*, paper presented at University of North Carolina-Chapel Hill on March 26, 2001, at 1-6 (on file with author) (describing Swedish case).

<sup>313</sup> Mény, *supra* note \_\_ at 145 (discussing French Conseil Economique et Social).

<sup>314</sup> See generally Edward C. Page, *Governing by Numbers* 124-73 (2001) (describing procedures for drafting and promulgating statutory instruments in the UK); Adam Tomkins, *Delegated Legislation in the English Constitution in Delegated Legislation and the Role of Committees in the EC*, 101, 109-14 (Mads Andenas & Alexander Türk eds., 2000) (same); Etienne Picard, *Delegation of Legislative Power in French Public Law*, in *Delegated Legislation and the Role of Committees in the EC* 67, 84-93 (Mads Andenas & Alexander Türk eds., 2000) (reviewing rulemaking powers in France); Alexander Türk, *Delegated Legislation in German Constitutional Law*, in *Delegated Legislation and the Role of Committees in the EC* 127, 162-81 (Mads Andenas & Alexander Türk eds., 2000) (describing parliamentary and private sector involvement in German rulemaking). The obvious counterpoint is the U.S. where rules are subject to the procedure of notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553.

<sup>315</sup> For Italy, see Aldo Sandulli, *Il Procedimento*, in 2 *Diritto Amministrativo Generale* 927 (Sabino Cassese et al. eds., 2000). For France, see Jean-Marie Pontier, *La démocratie de proximité: les citoyens, les élus locaux et les décisions locales*, 55 *La Revue Administrative* 160 (2002). For Germany and the UK, see Theodora Th. Ziamou, *Rulemaking, Participation and the Limits of Public Law in the US and Europe* 141-161 (2001).

<sup>316</sup> Although this has existed since the early 1980's in certain European countries, environmental impact statements have now become a feature of every national system through the Environmental Impact Assessment Directive, 85/337/EEC, 1985 O.J. (L 175) 40.



legislation and implementing regulations.<sup>317</sup> They very often are promulgated by individual ministers, not by prime ministers sitting in the cabinet of ministers, and they are not subject to review by the Council of State or advisory bodies.

b. Public participation in Commission lawmaking and rulemaking

Until the late 1990's, the European Commission's procedure for drafting legislation and implementing regulations was very similar to that of its national counterparts. The Commission was not formally required to publish drafts or consult the public. As a matter of law, the Commission's proposal could remain entirely confidential until the moment that it was sent to the other institutions for adoption, principally the Council, and, starting in the late 1980's, the European Parliament. As in the Member States, there was an exception for organized interests represented on corporatist advisory bodies.

There were two different forums for the participation of private associations in European governance. In 1957, the founding Member States established alongside the other original institutions, an advisory body called the Economic and Social Committee (ESC) that was modeled after their own corporatist traditions.<sup>318</sup> The ESC was constituted of producer interests--employers, workers, farmers, tradesmen, and professionals--and the organizations sent to Brussels to represent such interests were appointed by their governments and were generally highly structured, peak associations with national constituencies. Later, consumer organizations were added to the ESC. Under the Treaty of Rome, the Commission was required to consult the ESC on legislative proposals: at the same time that a proposal was sent to the Council for a decision and the Parliament for an opinion, it was also sent to the ESC for an opinion. Notwithstanding the role that was carved out for the ESC in the European legislative process, it quickly came to be known as one of the most powerless institutions in Brussels.

The second forum for corporatist interest representation was the issue-specific advisory committee, created by law in a particular policy area to assist the Commission when drafting laws and rules.<sup>319</sup> The interest representation that occurred through advisory committees differed from the ESC in a number of ways. The Commission, not the Member States chose the organizations that sat on the committees; the organizations were generally pan-European, not national, federations; their advice was sought earlier in the policymaking process, as the Commission was drafting the proposal and not after the proposal had been completed; their advice was sought on both laws and implementing regulations, not only laws; and, lastly, the enabling laws establishing the committees generally left consultation to the Commission's discretion.

The practice of public participation in Commission decisionmaking was, in fact, quite different from the closed nature of the procedure in the law on the books. The Commission would often solicit input from producer groups, firms, and associations not represented on the advisory bodies in order to build political momentum for proposals. It largely did so on an

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<sup>317</sup> See generally Ziamou, *Rulemaking, Participation and the Limits of Public Law in the US and Europe*, *supra* note\_\_ at 15-21 (describing distinction between these two types of administrative rules in Germany, Greece, the UK, and the U.S.). The functional American equivalent would be the rules exempted from notice and comment requirements under 5 U.S.C. § 553(b)(3)(A).

<sup>318</sup> See EC Treaty ex art. 194. In 1957, Article 194 read: "The Committee shall be composed of representatives of the various categories of economic and social life, in particular, representatives of producers, agriculturists, transport operators, workers, merchants, artisans, the liberal professions and of the general interests."

<sup>319</sup> See, e.g., 73/306/EEC: Commission Decision of 25 September 1973 relating to the setting up of a Consumers' Consultative Committee, 1973 O.J. (L 283); 181/195/EEC: Commission Decision of 16 March 1981 setting up, within the Advisory Committee on Seeds, a Special Section on the approximation of laws, 1981 O.J. (L 88) 428; 2004/391/EC: Commission Decision of 23 April 2004 on the advisory groups dealing with matters covered by the common agricultural policy, 2004 O.J. (L 120) 50.

informal basis although it sometimes would also publish forward-looking policy documents, known as Green and White Papers and available to the public-at-large, in which it would outline a number of issues on which it was contemplating drafting legislation and ask for the public's response. But the law permitted the civil servants in the Commission to draft in splendid isolation from the European citizenry and the Official Journal is full of directives and regulations that started in precisely that fashion.

Then, in December 2002, the Commission adopted a non-binding policy document, called a Communication, in which it outlined the procedure that all divisions within the Commission would follow for consulting individuals and their associations, billed "civil society," in drafting policy proposals.<sup>320</sup> The procedure is as follows. The Commission describes the issues open for discussion, the public is invited to submit written comments, and the civil society responses are published.<sup>321</sup> This process is to take place largely through the Commission's website. The Commission then summarizes the comments and explains how the final proposal was or was not altered by the civil society responses:

The Commission will provide adequate feedback to responding parties and to the public at large. To this end, explanatory memoranda accompanying legislative proposals by the Commission or Commission communications following a consultation process will include the results of these consultations and an explanation as to how these were conducted and how the results were taken into account in the proposal.<sup>322</sup>

Parallel to the consultation of the public-at-large, the Commission also solicits the opinions of certain "target groups" which are believed to have a special interest in the proposal because they will be directly impacted or will be involved in the implementation of the policy, or because they pursue organizational aims related to the proposal.<sup>323</sup>

In the Communication on Consultation, the Commission qualifies the procedure in a number of essential respects. On the one hand, the Commission minimizes the importance of the procedure by asserting that the final decision on the content of the legislative proposal is a political one for it alone to make.<sup>324</sup> Moreover, the Commission states that the standards set down in the Communication are meant to guide administrative practice but do not constitute legally binding duties enforceable in court:

[A] situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of interested parties. Such an over-legalistic approach would be incompatible with the need for timely delivery of policy, and with the expectations of the citizens that the European Institutions should deliver on substance rather than concentrating on procedures.<sup>325</sup>

Lastly, the Commission confines the procedure to "major policy initiatives," namely proposals for European laws, and excludes the "minor" changes to the European legal framework contained in implementing regulations and other types of official instruments.<sup>326</sup> On the other hand, the Commission makes it clear that the procedure set down in the Communication on Consultation

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<sup>320</sup> Communication from the Commission, Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final, December 11, 2002 [hereinafter "Communication on Consultation"].

<sup>321</sup> Id. at 19-22.

<sup>322</sup> Id. at 22.

<sup>323</sup> Id. at 19.

<sup>324</sup> Id. at 12.

<sup>325</sup> Id. at 10.

<sup>326</sup> Id. at 10, 15.

constitutes a floor and that it might choose to consult on more specific matters that would fall within the ambit of administrative rulemaking.<sup>327</sup>

The commitments undertaken in the Communication on Consultation have had a significant impact on the procedure for drafting policy initiatives and legislative proposals. Since the Communication was published, there has been a steady flow of consultations in a variety of fields and on a number of different types of policy instruments. I list some of them here to give a sense of the change in the Commission's working methods. The Directorate-General responsible for customs has published and solicited comments on a draft proposal for a new Customs Code.<sup>328</sup> Earlier in the policy chain, the Commission requested comments on a Green Paper outlining a number of issues related to the quality and general accessibility of services in areas of the European market undergoing liberalization. After reviewing and summarizing the comments, the Commission set down its general approach but concluded that it was not the time to go forward with new legislation in the area.<sup>329</sup> Downstream in the policy process, the Commission conducted a public consultation on the implementation of the European broadcasting law, to determine whether there were problems with the existing framework and subsequently issued a series of official interpretations of the law, as guidance for the Member States.<sup>330</sup> These are but a few examples. In 2003, the first year after the Communication came into force, there were a total of 21 public consultations.<sup>331</sup> It appears that what was, at best, a sporadic exercise, limited to mammoth policy initiatives in the past, is becoming routine throughout the Commission.<sup>332</sup>

## 2. The historical juncture: The fall of the Santer Commission

What explains the Commission's decision to engage in the systematic consultation of the public in drafting legislative proposals? Why did it depart from its past practice, as well as the standard mode of administration in the Member States? This turn of events creates a real puzzle, more so than the right to be heard and transparency, because civil society consultation was entirely self-imposed, not compelled in part by the judiciary (as with the right to be heard) or by European legislators (as with transparency). The historical experience with government bureaucracies has been that their interest lies in unfettered discretion and that rights and procedures are imposed from the outside. However, a closer examination of the background demonstrates that, starting in 1999, consultation was in the Commission's interest. In this

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<sup>327</sup> *Id.* at 11.

<sup>328</sup> See European Commission, Consultation on the New Customs Code, available at [http://europa.eu.int/comm/taxation\\_customs/customs/consultations/customs\\_code\\_en.htm](http://europa.eu.int/comm/taxation_customs/customs/consultations/customs_code_en.htm).

<sup>329</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: White Paper on services of general interest, May 12, 2004, COM (2004) 374 final.

<sup>330</sup> Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without frontiers' Directive, 2004 O.J. (C 102) 2.

<sup>331</sup> European Commission, General Report on the Activities of the European Union 22, para. 17 (2004).

<sup>332</sup> There has been organizational change in the Commission to manage the new right to civil society consultation. The "Openness and professional ethics" unit in the Commission Secretariat-General (the functional equivalent to the Executive Office of the President in U.S. administration) is responsible for transparency, principally access to documents, and consultation. The five civil servants who work on civil society consultations are responsible for encouraging Directorate-Generals to conduct consultations on the items included in the Commission's annual work programme. See Interview with Lea Vatanen, European Commission, Secretariat-General, Directorate B "Relations with civil society," Openness and professional ethics (June 16, 2004). They also field questions from personnel around the Commission on how to structure the procedure. In addition, they manage a data base containing a list of advisory bodies with civil society representation in operation in the different Directorate-Generals and a voluntary registry of civil society organizations. This data base is called Consultation, the European Commission and Civil Society (CONECCS) and is available at [http://europa.eu.int/comm/civil\\_society/coneccs/index\\_en.htm](http://europa.eu.int/comm/civil_society/coneccs/index_en.htm). There is also a central data base for all consultations being conducted by the Commission's Directorate-Generals. See [http://europa.eu.int/yourvoice/consultations/index\\_en.htm](http://europa.eu.int/yourvoice/consultations/index_en.htm).

section, I show that the Commission suffered a spectacular loss of moral authority with the resignation of the Santer Commission in 1999. At the same time, a discourse on legitimacy through the participation of civil society had developed in the international arena. What, just ten years ago, the Commission described as input from "special interest groups"<sup>333</sup> could now be framed as the consultation of "civil society." The Commission adopted the duty to consult civil society to improve its legitimacy in the eyes of the European public.

a. The fall of the Santer Commission

The Commission has been criticized for fiscal mismanagement and cronyism ever since it underwent major expansion in the 1970's and 1980's. As long as the Commission and the Council were the only strong organizations within the European institutional complex, the charges of inefficiency and corruption never amounted to much. That changed in the 1990's with the reforms made in the Maastricht and Amsterdam Treaties and the rise of the European Parliament as a powerful actor. Not only did it obtain co-equal legislative powers, as detailed earlier in this Article, but it was given a variety of legal means through which to hold the Commission accountable, similar to an ordinary, national parliament.<sup>334</sup> When, in 1998, it came to light that Edith Cresson, the French Commissioner responsible for Research and Development, had given out an expert contract to her dentist, the Parliament took the scandal as an occasion to demonstrate its new role as the legislative body to which the Commission had to answer.<sup>335</sup> It voted to set up a Committee of Wisemen to investigate the Commission's financial and employment practices in January 1999.<sup>336</sup> The report that was issued two months later, on March 15, 1999, was a tough indictment of the Commission and concluded with a fatal statement: "It is difficult to find a member of the Commission with any sense of responsibility." The Commission, headed by President Jacques Santer, was at risk of being the first Commission in history to be censured by the Parliament and rather than face such a motion, it resigned.<sup>337</sup>

When the new Commission headed by President Romano Prodi took office on September 17, 1999, it faced a real crisis. The Commission's reputation was at an all-time low. On the agenda was enlargement to the East, after the Luxembourg Crisis and the single market agenda of 1986, the single biggest transformation of the European Union since its founding. The Prodi Commission was called upon to manage a complicated task, full of political minefields, at the same time as it suffered from low esteem from the Parliament and European public opinion more broadly. The response was to undertake a massive, Commission-wide exercise on good governance. Numerous divisions and special task forces within the Commission, as well as outside think tanks and scholars, were called to reflect on how to render the Commission more legitimate.<sup>338</sup> The result was the Commission White Paper on European Governance, published

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<sup>333</sup> See European Commission, Communication on an open and structured dialogue between the Commission and special interest groups of 2 December 1992, 1993 O.J. (C 63). The difference between this Communication and the Communication on Consultation is striking. In 1992, the Commission was focused on encouraging ethical practices among lobbyists and Commission civil servants. In 2002, by contrast, the emphasis was on promoting greater dialogue between the Commission and private associations.

<sup>334</sup> For instance, before Maastricht, the Commission was appointed exclusively through bargaining among European Heads of State, but in Maastricht, Parliament acquired the power to vote on the Commission as a whole (but not individual members) and in Amsterdam, the power to vote on the Commission President. See Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* (2d ed. 1998).

<sup>335</sup> See Karel Van Miert, *Le marché et le pouvoir* 241-59 (2000) (recounting this history from the insider perspective of a Commissioner at the time).

<sup>336</sup> Parliament acted pursuant to the power acquired in Maastricht to set up temporary Committees of Inquiry. EC Treaty, art. 193.

<sup>337</sup> See EC Treaty, art. 201.

<sup>338</sup> See Discussion Paper, *The Commission and Non-Governmental Organisations, building a stronger partnership*, (COM (2000) 11) of 18 January 2000; White Paper on Administrative Reform, (COM (2000) 200) of March 1, 2000 (especially Action 4

in 2001.<sup>339</sup> The principal innovation of the White Paper was the civil society concept.<sup>340</sup> Through the "involvement" and "consultation" of civil society, the Commission's policies would be more democratic and of better quality. The Communication on Consultation setting down the specifics of the consultation procedure followed one year later.

- b. International value: The influence of the idea of legitimacy through governance with civil society

Global politics of the last decade have been marked by the emergence of widespread skepticism of international agreements and organizations. The benefits of multilateral organizations such as the WTO, the World Bank, the IMF, and the OECD have been challenged by a wide variety of social and environmental justice NGOs. To some extent, international organizations are the scapegoats for the effects of the market-driven processes of the globalization of capital. Nonetheless, they and their policies have been critiqued for contributing to the inequalities and loss of local control associated with globalization. In the view of the skeptics, international economic organizations have not kept their promise of development and prosperity and instead have facilitated global capital's exploitation of the Third World, labor, and the environment.

Disparagement of international economic organizations was accompanied by the demand that NGOs have a voice their decisions. The call for participation was made on the grounds of democracy, legitimacy, and effectiveness; only if international decisionmakers were responsive to NGOs would their policies be fair and equitable. This demand extended to a wide array of international decisionmaking: treaty negotiations, inter-state dispute resolution, foreign lending decisions, and the allocation and distribution of foreign aid at the local level.

The call for greater NGO participation was tied to the reconceptualization of NGOs as civil society. NGOs have long been part of the international system.<sup>341</sup> The International Labor Organization created in 1919 provided that representatives of workers and employers would sit and vote alongside government representatives on its decisionmaking bodies.<sup>342</sup> Later, the founders of the United Nations created a permanent, institutional role for non-governmental actors by providing in the Charter that the government representatives on the Economic and Social Council were under a duty to consult NGOs.<sup>343</sup> In the mid-1990's, however, these old

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developing a set of recommendations for best practice in consultation); European Commission, *European Governance: Preparatory Work for the White Paper* (2002); *Governance in the European Union* (Oliver De Schutter, Notis Lebessis & John Paterson eds., 2001) (results of academic seminars organized by the Commission in preparation for the White Paper). In total, there were twelve different internal working groups, each of which was responsible for a distinct set of good government issues. Within Work Area No. 2 on "Handling the process of producing and implementing Community rules" there was a Working Group on "Consultation and participation of civil society." European Commission, *European Governance: Preparatory Work for the White Paper* 63 (2002).

<sup>339</sup> See European Commission, *White Paper on European Governance*, COM (2001) 428 final, July 25, 2001 [hereinafter "White Paper"].

<sup>340</sup> The White Paper contained two other major themes: confining the Commission to the technical, administrative realm while leaving political decisions to the Council and the Parliament; and improving transparency. Both the technocratic characterization of the Commission and transparency, however, were well-established arguments for European integration and the Commission. See generally Christian Joerges, "Economic order"--"technical realization"--"the hour of the executive": some legal historical observations on the Commission White Paper on European governance, *Jean Monnet Working Paper No. 6/01*, at 16 (discussing neo-functional roots of technocracy argument in White Paper).

<sup>341</sup> See generally Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *Mich. J. Int'l L.* 183 (1997) (analyzing the history of NGO participation in international law).

<sup>342</sup> The ILO is composed of an annual General Conference, a Governing Body which meets three times a year, and a Secretariat. Representatives of workers and employers sit on both the General Conference and the Governing Body. See Steve Charnovitz, *The International Labour Organization in its Second Century*, 4 *Max Planck Yearbook of United Nations Law* 1, 25 (2000).

<sup>343</sup> See UN Charter, art. 71 ("The Economic and Social Council may make suitable arrangements for the consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with

actors took on a new identity as civil society. The official rhetoric of the UN system, the World Bank, and a variety of other international organizations shifted from "NGO" to "civil society" and "civil society organizations."<sup>344</sup>

The change in language was not simply a matter of form. It was related to a vast body of academic and policymaking literature in which civil society, by which is generally meant social and environmental justice NGOs and not market actors or their associations, was put forward as the key to legitimate global governance. An analysis of the normative claim in favor of civil society participation in international organizations is beyond the scope of this Article. Suffice it to say that the organizations of global civil society are believed to foster transnational solidarities, pluralism in the international system of governance, republican commitments to collective self-government, and communitarian values.<sup>345</sup> Most dramatically, some claim that the organizations of civil society represent the global people.<sup>346</sup> The transformation that the practice and rhetoric of international organizations underwent in the 1990's is nicely captured in a statement by the Secretary-General of the United Nations Conference on Trade and Development:

I am happy to see that nowadays there is practically no international organization, not only in the United Nations system but also outside it, that is not actively seeking ways of integrating the civil society. What was new in December 1995 is becoming a common concern of international organizations now.<sup>347</sup>

The Commission was influenced by this reconceptualization of organizations outside of the state in adopting its procedure for drafting lawmaking proposals. The evidence for this claim can be found in the origins of civil society talk within the Commission. The Commission is composed of over thirty Directorate-Generals but only three--the Directorate-Generals responsible for international trade, development (international aid), and employment and social affairs--began to conceive of their relations with private associations as relations with "civil society" in the late 1990's. Departments such as DG Agriculture, DG Internal Market, and DG Competition did not develop a civil society discourse even though they routinely deal with intermediate associations of farmers, workers, firms, and consumers. In other words, departments with regular contacts with other international organizations were far more likely than departments that largely dealt with internal matters to develop a discourse on civil society.<sup>348</sup> And it was their discourse that was then taken on by the Commission as a whole. In

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international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned."). See generally United Nations Non-Governmental Liaison Service (NGLS), *The NGLS Handbook of UN Agencies, Programmes, and Funds Working for Economic and Social Development* 6-7 (2d ed. 1997) (describing the mechanism for consulting NGOs).

<sup>344</sup> See Peter Willetts, *The Rules of the Game: The United Nations and Civil Society*, in *Whose World is it Anyway?* 247, 258 (John W. Foster, Anita Anand, Jing de la Rosa eds., 1999). A simple search of the United Nations Bibliographic Information System (the bibliography of the UN's official library) confirms the impression widely held among academics and policymakers. A search for the key word "civil society" for the years 1984 through 2003 reveals the growing popularity of the term. From one document in 1984, the yearly hits gradually increase to 29 in 1997 and then explode, with eighty in 1998, 101 in 1999, and 261 in 2003.

<sup>345</sup> See generally John Keane, *Global Civil Society* 169, 202 (2003) (putting forward the pluralism and solidarity argument for international civil society); Michael Edwards, *Civil Society* 42-43 (2004) (setting forth the republican and communitarian justifications for international civil society).

<sup>346</sup> See, e.g., Richard Falk, *The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions*, in *Cosmopolitan Democracy: An Agenda for a New World Order* 163, 170-71 (Daniele Archibugi & David Held eds., 1995); Mary Kaldor, *Civilizing Globalization: The Implication of the Battle in Seattle*, 29 *Millennium Journal of International Studies* 105 (2000); Keane, *Global Civil Society*, supra note \_\_ at 169, 202; Willetts, *The Rules of the Game*, supra note \_\_ at 260.

<sup>347</sup> UNCTAD, Report of the Trade and Development Board on its fifteenth executive session held at the Palais des Nations, Geneva on 27 June 1997, Annex II, TD/B/EX (15)/9 (August 11, 1997).

<sup>348</sup> DG Employment first engaged in a "social dialogue" with labor and management organizations, following the specific mandate contained in the Maastricht Treaty, arts. 137-39 and then in a "civil dialogue" with non-profit organizations and

the White Paper that first proposed consultation for the entire Commission, the Commission singled out the experiences of the trade and development departments: "This [involving civil society] already happens in fields such as trade and development, and has recently been proposed for fisheries."

The experience of DG Trade, responsible for international trade, most clearly demonstrates the influence of the civil society concept from the international sphere. In October 1998, the negotiations on the Multilateral Agreement on Investment collapsed because of opposition from anti-globalization organizations.<sup>349</sup> The response of the Trade Commissioner, Sir Leon Brittan, was to organize a series of public meetings, open to all "civil society organizations," starting in November 1998.<sup>350</sup> At the meetings, a number of general and sectoral issues on the agenda of the upcoming Seattle WTO Ministerial were discussed (transparency, development, the environment, investments, intellectual property, goods, trade). The European delegation at Seattle included representatives of labor, business, the environment, farmers, development organizations, and so on. After the Seattle protests of December 1999 and the collapse of WTO negotiations, DG Trade instituted a more formal version of the meetings held the previous year. Consultation, known initially as the "Trade Policy Dialogue with EU Civil Society" and now simply as the "Civil Society Dialogue" includes period public meetings on trade issues as well as regular Internet chats with the Trade Commissioner.

The use of civil society language by the Commission departments responsible for international aid also supports the claim of international influence. In the foreign aid domain, the Commission has a long history of implementing development policy through NGOs.<sup>351</sup> Since 1975, the Commission has also consulted NGOs on broader policy questions through the Liaison Committee of NGOs, now known as CONCORD (European NGO Confederation for Relief and Development). The relationship was and continues to be weighted toward the clientelistic, implementation side, in which the Commission is the donor agency and the NGOs are the funding recipients, although there have been recent efforts to ensure more NGO participation at the initial stages of policymaking.<sup>352</sup> By the mid-1990's, the very same NGO actors came to be known as civil society.<sup>353</sup>

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voluntary associations starting with the Social Policy Forum that it organized in May 1996. See Stijn Smismans, *European Civil Society: Shaped by Discourses and Institutional Interests*, 9 *Eur. L. J.* 473, 475-78 (2003) (analyzing the rise of civil society participation in DG Employment and Social Affairs). By 1998, DG Employment came to refer to its interlocutors as part of "civil society." See Summary Report of the European Social Policy Forum, Brussels 24-26, 1998, at 49, published by the European Foundation for the Improvement of Living and Working Conditions and the European Commission's Directorate-General for Employment, Industrial Relations and Social Affairs (on file with author). The early adoption of civil society rhetoric in DG Employment does not support the case for international influence since DG Employment deals largely with internal, European affairs. However, this historical fact does not controvert the claim that one strand in the Commission's proceduralization of policymaking drew upon developments in the international realm.

<sup>349</sup> See WWF European Policy Office, *Civil Society and Trade Diplomacy in the "Global Age"* (Sept. 2002), available at: [http://trade-info.cec.eu.int/civil\\_soc/Civil\\_society\\_%20and\\_Trade\\_Policy\\_in\\_the\\_EU.pdf](http://trade-info.cec.eu.int/civil_soc/Civil_society_%20and_Trade_Policy_in_the_EU.pdf) (recounting this history).

<sup>350</sup> See E-mail from Eva Kaluzynska, DG Trade, Civil Society Dialogue (June 17, 2004) (stating that private associations were called "civil society organizations" from the beginning of the dialogue).

<sup>351</sup> There are two ways in which NGOs can take responsibility for implementing European international development aid. Since the 1970's, NGOs have been paid to distribute specific forms of aid such as food aid, and since 1976, they have been able to propose projects to the Commission for co-financing (at least 15% of the financing must come from the NGOs' own resources). See E-mail from France Marion, EuropeAid Co-operation Office, European Commission (Aug. 4, 2004) (on file with author); see also Agnès Philippart, *The relations between NGOs and the European Commission 1* (Executive summary of unpublished thesis, Oct. 2002, on file with author) (identifying the Lome Convention of 1975 as the first instance of Commission-NGO partnership).

<sup>352</sup> See Interview with Peter Bangma, Civil Society and NGO Liaison, DG Development, European Commission (June 17, 2004); European Commission, *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, COM (2002) 598 final*, Brussels, Nov. 7, 2002.

<sup>353</sup> See E-mail from France Marion, EuropeAid Co-operation Office, European Commission (Aug. 4, 2004) (on file with author) (stating that she believes that "civil society" was used for the first time in the Lome IV Convention signed on 15 December 1989). The difference between the agreement on aid to ACP (African, Caribbean and Pacific) countries of 1995 and that of 2000

c. Supranational interest: The interest of the Commission in reclaiming political standing within the European institutional complex

Civil society consultation served the interest of the Prodi Commission in reestablishing credibility because it brought the Commission closer to the ideal of good global governance.<sup>354</sup> The strategic use of the concept was manifest in the policy documents setting down the procedures for civil society consultation. A brief excursion into theories on the role of language in political conflict is necessary to fully understand the deployment of the civil society concept in the White Paper and, later, the Communication on Consultation. The mechanism by which words and ideas are used by actors like the Commission in struggles to define political authority has been analyzed by political theorists such as Quentin Skinner, James Tully, and Charles Taylor, drawing on J.L. Austin's concept of speech act.<sup>355</sup> A statement made in the context over the struggle to define, exercise, extend, or modify political authority should be understood as action.<sup>356</sup> It is not epiphenomenon. What was the individual doing by using certain words? Speech act analysis builds on the crucial insight that language is used strategically by the participants in a political debate and because this is so, it cannot be assumed that words are being used in accordance with prevailing linguistic conventions: a political actor might use an old word unconventionally or, albeit rare, might even coin a new word rather than work within the limits of the existing linguistic conventions. Furthermore, in the speech act theory of language, authors use words to affirm or change the existing structure of authoritative decisionmaking. They can do so openly, by working within linguistic conventions to criticize or praise the powers that be, but they can also do so covertly, by using old words in new ways, and hence recharacterize existing political relations.

A couple of examples will help make the point. Feminists like Betty Friedan have applied the old language of "exploitation" to the new setting of middle-class housewives in the suburbs, thereby mounting a formidable challenge to existing structures of patriarchy.<sup>357</sup> In the literature on social movements, this practice is identified as framing. Thus Margaret Keck and Kathryn Sikkink argue that the international movement against female genital mutilation was able to place the issue on the agenda of national governments and international organizations only after it applied the language of "castration" to female genital mutilation, a radical innovation given the previous use of the word "circumcision" to describe the very same practice.<sup>358</sup>

How, then, did the Commission use strategically the language of "civil society" in the debate over the constitution of European public authority and reclaim a central role itself in the institutional balance of powers? First, what were previously understood as "special interest

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is evidence of this shift: the former refers to "non-governmental organizations," the latter to non-state actors, which are defined as comprising the private sector, economic and social partners, and civil society, i.e. what in former times would have been called NGOs. See Agreement Amending the Fourth ACP-EC Convention of Lomé signed in Mauritius on 4 November 1995, arts. 38; ACP-EU Partnership Agreement signed in Cotonou on 23 June 2000, arts. 6, 32.

<sup>354</sup> Stijn Smismans has also argued incisively that the Commission used the discourse on civil society to improve its own democratic credentials and thus respond to the legitimacy crisis that it faced. See Smismans, *European Civil Society*, supra note\_\_ at 484. However, he does not focus on the international element of the concept.

<sup>355</sup> See James Tully, *The pen is a mighty sword: Quentin Skinner's analysis of politics*, in *Meaning and Context: Quentin Skinner and His Critics* 7, 10 (James Tully ed., 1988).

<sup>356</sup> This is related to Wittgenstein's theory of word as "deed."

<sup>357</sup> See Quentin Skinner, *Language and Political Change in Political Innovation and Conceptual Change* 6-23, 14 (Terrence Ball, James Farr & Russell L. Hanson eds., 1989).

<sup>358</sup> Margaret Keck & Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (1998).



groups,"<sup>359</sup> "voluntary associations,"<sup>360</sup> the "social partners,"<sup>361</sup> and "lobbies"<sup>362</sup> were redefined as "civil society organizations." The word "civil society" was used to transfer the positive connotations developed in the rhetoric of the international sphere to a set of social actors and government practices that were very familiar in European politics yet were looked upon with suspicion by citizens of a number of Member States and by some of the civil society actors themselves.<sup>363</sup> In the Communication on Consultation, drawing upon the definition in the earlier White Paper, the Commission gave the following definition of civil society organizations:

Problems can arise because there is no commonly accepted--let alone legal-- definition of the term 'civil society organisation'. It can nevertheless be used as shorthand to refer to a range of organisations which include: the labour-market players (i.e. trade unions and employers federations--the 'social partners'); organisations representing social and economic players, which are not social partners in the strict sense of the term (for instance, consumer organisations); NGOS (non-governmental organisations) which bring people together in a common cause, such as environmental organisations, human rights organisations, charitable organisations, educational and training organisations, etc.; CBO's (community-based organisations), i.e. organisations set up within society at grassroots level which pursue member-oriented objectives, e.g. youth organisations, family associations and all organisations through which citizens participate in local and municipal life; and religious communities.

So 'civil society organisations' are the principal structures of society outside of government and public administration, including economic operators not generally considered to be 'third sector' or NGOs. The term has the benefit of being inclusive and demonstrates that the concept of these organisations is deeply rooted in the democratic traditions of the Member States of the Union.<sup>364</sup>

With this definition, the Commission recharacterized in a positive light a set of long-standing interest organizations and government practices that were the subject of debate and contention in Europe. The Germans might deny a role for the World Federation of Advertisers in European governance because it is considered a lobby, the British might do the same for the European Trade Union Conference because it is labor, and the French might oppose the involvement of the Vatican's charitable organization known as Caritas because it would represent the introduction of religion into public life. None of them, however, would say that "civil society" should be excluded. In essence, the Commission sidestepped the thorny issues of whether and what interest groups can be considered legitimate actors in government decisionmaking.

In the White Paper and then the Communication on Consultation, the Commission adopted the prevailing theory of civil society as good for democracy and global governance because private associations contest power holders in government, foster republican participation in government, and promote communitarian values. First, the White Paper:

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<sup>359</sup> See, e.g., Commission Communication on an open and structured dialogue between the Commission and special interest groups, 1993 O.J. (C 63).

<sup>360</sup> See Communication on Promoting the Role of Voluntary Organisations and Foundations in Europe (1997).

<sup>361</sup> See TEC, arts. 137-39.

<sup>362</sup> See Parliament's Rules of Procedure, *supra* note\_\_ at Annex IX ("Provisions governing the application of Rule 9(2)—Lobbying in Parliament").

<sup>363</sup> For the history of the concept, see Noberto Bobbio, *Civil Society*, in *Democracy and Dictatorship: The Nature and Limits of State Power* (Peter Kennealy trans. 1989); John Ehrenberg, *Civil Society: The Critical History of an Idea* (1999); John Keane, *Despotism and Democracy*, in *Civil Society and the State: New European Perspectives* 35 (John Keane ed., 1988).

<sup>364</sup> Communication on Consultation, *supra* note\_\_ at 6. The White Paper contains essentially the same definition. See White Paper, *supra* note\_\_ at 14 n.9.

## Creating Rights

Civil society plays an important role in giving voice to the concerns of citizens and delivering services that meet people's needs. . . . The organisations which make up civil society mobilise people and support, for instance, those suffering from exclusion or discrimination.<sup>365</sup>

Another passage in the White Paper reads:

Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe's role. It is a chance to get citizens more actively involved in achieving the Union's objectives and to offer them a structured channel for feedback, criticism and protest.<sup>366</sup>

The Communication on Consultation repeated the point:

The specific role of civil society organisations in modern democracies is closely linked to the fundamental right of citizens to form associations in order to pursue a common purpose as highlighted in Article 12 of the European Charter of Fundamental Rights. Belonging to an association is another way for citizens to participate actively, in addition to involvement in political parties or through elections.<sup>367</sup>

The last move made by the Commission was to ally itself with civil society by setting down a set of rules for consulting civil society in the policymaking process. In the White Paper, the Commission promised that it would take the steps necessary for "[i]nvolving civil society."<sup>368</sup> It committed to "[m]ore effective and transparent consultation"<sup>369</sup> and "a reinforced culture of consultation and dialogue."<sup>370</sup> And I explained earlier, in the follow up Communication on Consultation, the Commission put forward full-blown standards for the routine, structured participation of civil society in drafting policy initiatives.

To conclude, what was the Commission doing by saying it would consult "civil society"? The Commission was saying that it was closer to the good government ideal of today and should continue to govern.<sup>371</sup> Given the overtly political nature of the White Paper, there really is no need for much interpretation of what the Commission was doing. The Commission was explicit:

Better consultation and involvement, a more open use of expert advice and a fresh approach to medium-term planning will allow it to consider much more critically the demands from the Institutions and from interest groups for new political initiatives. It [the Commission] will be better placed to act in the general European interest.<sup>372</sup>

And hence, to finish the thought, the Commission should retain its position at the epicenter of European integration:

Both the proposals in the White Paper and the prospect of further enlargement lead in one direction: a reinvigoration of the Community method. This means ensuring that the Commission proposes and executes policy; the Council and the European

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<sup>365</sup> White Paper, *supra* note\_\_ at 14.

<sup>366</sup> *Id.* at 14-15.

<sup>367</sup> Communication on Consultation, *supra* note\_\_ at 5.

<sup>368</sup> White Paper, *supra* note\_\_ at 14.

<sup>369</sup> *Id.* at 15.

<sup>370</sup> *Id.* at 16.

<sup>371</sup> To translate this into speech act theory, this is a sequence of illocutionary and perlocutionary acts. When a person says "The door is open" to someone else she may be requesting that the other person close the door (illocutionary act). If she actually gets the hearer to close the door, she has performed a perlocutionary act. See Entry under Speech Act Theory, *The Cambridge Dictionary of Philosophy* 869 (Robert Audi, general editor 2d ed. 1999).

<sup>372</sup> See White Paper, *supra* note\_\_ at 33-34.

Parliament takes decisions; and national and regional actors are involved in the EU policy process.<sup>373</sup>

Before moving on, I would like to stress one point. The fact that the civil society idea was adopted by the Commission for the strategic reason of reclaiming political standing after the resignation of the Santer Commission does not bear upon the normative analysis of civil society participation. To put it in the bluntest way possible, civil society is not superstructure.<sup>374</sup> In seeking to defend the Community method and reclaim authority, the Commission had to work within certain parameters of democratic discourse. The Commission could not say obey me because I represent divine authority on earth. Nor could it say obey me because I represent a European nation bound together by a common blood and a common language. Rather, it had to say obey me because I am democratic. Civil society, as one variation of "I am democratic," is not an infinitely malleable concept. The revival of civil society in the 1990's was accompanied by a set of judgments as to what qualifies as civil society--not corporations in their profit-seeking guise--and what values civil society serves-- pluralism, protest, republican citizenship, and community--and the Commission, in consulting civil society, was, and continues to be, constrained by this set of judgments. Because "consultation of civil society" cannot be stretched to accommodate, for instance, European regulatory policy dictated by a single profit-seeking corporation, it is an idea with autonomous force that must be evaluated on its own merits.

### 3. The evolution of the right to civil society participation

In fall of 1999, at the same time that the Prodi Commission began the good governance exercise that culminated in the White Paper, it was influential in setting into motion a chain of events that produced one of the major innovations of the recent Constitutional Treaty, an article on the right of civil society to participate in European governance. The Charter of Fundamental Rights of 2000 was an important precedent for the Constitutional Treaty in both the structure of the drafting process and the substance of the commitments made therein.<sup>375</sup> Drafting of the non-binding Charter of Fundamental Rights began in fall of 1999 and it was approved by the European Council at Nice in December 2000.<sup>376</sup> The Charter was the idea of the German presidency of the European Council.<sup>377</sup> It was not intended to introduce new rights, rather it was conceived as vehicle for rendering the existing rights of European citizens in their relations with European institutions (as opposed to their national governments) more visible and thus improve the legitimacy of the EU.

In line with this purpose, the European Council designed an inclusive and open drafting process. The drafting body ("Convention") include a number of actors that had, in the past been excluded from the high politics of European treaty negotiations: representatives of the European

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<sup>373</sup> Id. at 34.

<sup>374</sup> See Skinner, *Language and Political Change*, supra note\_\_ at 10-13. The use of language in contemporary political theory underscores my insistence on attributing moral force to the idea of civil society, independent of the strategic reasons that led to its adoption. According to Skinner, words can be broken down into their sense, reference, and evaluative force. Sense is the abstract criteria for applying a word, reference is the range of factual circumstances to which the word applies, and evaluative force is the range of attitudes, positive or negative, which the word expresses. The sense and reference of words are routinely manipulated by social actors so that may benefit from their appraisative force. At the same time, because the vocabulary available to social actors is limited and meaning can be stretched only so far, social actors are also constrained by words. Skinner gives the example of Elizabethan merchants who describe their commercial activities as "religious", in the attempt to give trade the same status as other forms of economic activity, for instance landholding. Trade and the accumulation of wealth were a far cry from the activities to which "religious" routinely referred. Nonetheless, Elizabethan merchants could not engage in any type of trade, rather they had to be conscientious, punctual, and fair in their trading relations to adopt the label of "religious."

<sup>375</sup> See Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

<sup>376</sup> Craig & de Búrca, supra note\_\_at 358.

<sup>377</sup> See Gráinne de Búrca, *The drafting of the European Union Charter of fundamental rights*, 26 Eur. L. Rev. 126, 128-32 (2001).

## Creating Rights

Parliament and national parliaments were given membership on the Convention, alongside the Member States and the Commission, and representatives of the Court of Justice and Council of Europe<sup>378</sup> were given observer status.<sup>379</sup> Furthermore, the European Council instructed the Convention to conduct its affairs as openly as possible. Thus the Convention was required to hold all of its hearings in public, make the documents submitted at the hearings accessible on a website, and seek the opinions of the Economic and Social Committee, the Committee of the Regions, and the Ombudsman. The Convention was also encouraged to invite “other bodies, social groups or experts” to give their views.

The European Council conclusions establishing the Convention did not carve out a specific role for NGOs or other private associations.<sup>380</sup> Nonetheless, a number of public hearings of NGO representatives were held and a Convention website was created where citizens and organizations could submit their views.<sup>381</sup> The Commission, as a member of the Convention, strongly supported including civil society organizations in the deliberative process and was one of the main reasons that civil society came to be so heavily involved.

The Constitutional Convention, which did include a formal role for civil society, was modeled on the earlier experience with the Charter of Fundamental Rights. And it was because of the suggestion of civil society representatives heard at that Convention that the Constitutional Treaty now contains a far-reaching right to civil society consultation. In December 2001, the Laeken European Council decided to create the Convention responsible for drawing up the Constitutional Treaty. The Convention was composed of 102 members and 102 alternates, chosen by national governments, national parliaments, the European Parliament, and the Commission.<sup>382</sup> Alongside the Convention was a Forum for civil society organizations. The Forum consisted of a website, open to all voluntary organizations, on which drafts of the Constitutional Treaty were published and on which comments and proposed amendments from members of the public could be posted.<sup>383</sup> The function of the Forum was purely advisory. The Praesidium, led by a Chairman (Giscard d'Estaing), two Vice-Chairmen (Giuliano d'Amato and Jean Luc Dehaene) and composed of nine members drawn from the Convention, set the agenda and drafted proposals for the Convention and the Forum to consider.

The early months were devoted to soliciting views from the members of the Convention, what d'Estaing called the “listening stage.”<sup>384</sup> In this context, a meeting of civil society organizations was held in Brussels on June 24-25, 2002.<sup>385</sup> There, Joseph Bresch, the President of the Economic and Social Committee, put forward the suggestion that the Constitutional Treaty provide for the principle of participatory democracy and include civil society.<sup>386</sup> A skeleton

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<sup>378</sup> The Council of Europe is a separate international organization, headquartered in Strasbourg, that is charged with enforcing the European Convention on Human Rights.

<sup>379</sup> Indeed, it is clear that notwithstanding the name of the document, the drafting of the Charter was not believed to be an episode of high politics. It was taken by the European Council to be mainly a codification exercise and one that would culminate in a symbolic, rather than a legally binding, statement of rights.

<sup>380</sup> de Búrca, *The drafting of the European Union Charter of fundamental rights*, supra note \_\_ at 132 (analyzing the Tampere European Council conclusions of October 1999).

<sup>381</sup> The European Charter of Fundamental Rights, available at <http://perso.wanadoo.fr/ciemi.org/p17en.html> (discussing first public hearing in December 1999); Antonio Vittorino, Member of the European Commission and representative of the European Commission to the Convention, speech delivered on May 13, 2000 in Lisbon, Portugal, at 5, available at [http://europa.eu.int/comm/justice\\_home/unit/charte/en/speeches.html](http://europa.eu.int/comm/justice_home/unit/charte/en/speeches.html) (discussing hearing of April 26, 1999 attended by more than 70 NGOs).

<sup>382</sup> See Organisation of the European Convention, <http://european-convention.eu.int/organisation.asp?lang=EN>. See generally Peter Norman, *The Accidental Constitution: The Story of the European Convention 19-48* (2003) (describing the structure of the Convention).

<sup>383</sup> See Forum of the European Convention, [http://europa.eu.int/futurum/forum\\_convention/index\\_en.htm](http://europa.eu.int/futurum/forum_convention/index_en.htm).

<sup>384</sup> See Norman, *The Accidental Constitution*, supra note \_\_ at 48.

<sup>385</sup> Id. at 50.

<sup>386</sup> Alain Lamassoure, *Histoire Secrète de la Convention Européenne* 122 (2004).

outline of the Constitutional Treaty was then circulated and posted on the Convention's website in the fall of 2002.<sup>387</sup> The drafters anticipated a provision on "participatory democracy" which would guarantee that: "the Institutions are to ensure a high level of openness, permitting citizens' organizations of all kinds to play a full part in the Union's affairs."<sup>388</sup> Anyone, including individuals, voluntary associations, and interest organizations could submit comments on the draft, which were also posted on the Convention's website. They did, and many called for including a duty on the part of the European institutions to consult civil society in policy planning and decisionmaking.<sup>389</sup> The fuller draft released on April 2, 2003 included an article on participatory democracy very similar to the final version, in which civil society organizations were given the right of participation in the decisionmaking of the European institutions.<sup>390</sup> Thus, the decision to attribute constitutional status to civil society participation was linked to the structure of the Convention and its Forum for civil society organizations, which in turn was tied to the experience with citizen groups in the Charter of Fundamental Rights and the Prodi Commission's decision to support civil society organizations in the bid to improve its democratic credentials and re-establish institutional stature after the fall of the Santer Commission.

The provision dedicated to relations between European institutions and civil society says:

Article 46: The principle of participatory democracy

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

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The comments that accompanied the first appearance of Article 46 in the draft of April 2, 2003 were explicit in drawing the connection between participatory democracy and civil society: "The purpose of this Article is to provide a framework and content for the dialogue which is largely already in place between the institutions and civil society."<sup>391</sup>

While the Articles of the Constitutional Treaty on the right to good administration and the right to transparency simply constitutionalize existing law, Article 46 both elevates civil society consultation to the rank of higher law and extends the right to a host of new areas. Insofar as the Commission is concerned, Article 46 converts what was previously an administrative practice set down in a non-binding policy document into a constitutionally guaranteed procedure. With respect to other European institutions, the provision creates an entirely novel set of rights and duties. The duty to engage in "dialogue" and the duty to give citizens and their associations an

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<sup>387</sup> Id. at 71.

<sup>388</sup> Id. at 131.

<sup>389</sup> See, e.g. Active Citizenship Network, "Horizontal" subsidiarity, democratic governance and referendum, available at [http://europa.eu.int/futurum/forum\\_convention/documents/contrib/other/0100\\_r\\_en.pdf](http://europa.eu.int/futurum/forum_convention/documents/contrib/other/0100_r_en.pdf); BirdLife International European Community Office et al., Concerning: Participatory Democracies, suggestions for amendments to Article 34 and 36, available at [http://europa.eu.int/futurum/forum\\_convention/documents/contrib/other/0058\\_c9\\_en.pdf](http://europa.eu.int/futurum/forum_convention/documents/contrib/other/0058_c9_en.pdf).

<sup>390</sup> The final version of the Constitutional Treaty was signed by all members of the Convention on July 10, 2003, presented to the Italian Presidency of the European Council on July 18, 2003, and agreed to by the European Council, with a few modifications (which do not affect the article on civil society consultation), on June 18, 2004. The Constitutional Treaty must now be ratified by all 25 Member States. See Information Note from the Secretariat to the Convention, CONV 852/03 (July 18, 2003), available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00852en03.pdf>; European Commission, Summary of the agreement on the Constitutional Treaty (June 28, 2004), available at [http://europa.eu.int/futurum/documents/other/oth250604\\_2\\_en.pdf](http://europa.eu.int/futurum/documents/other/oth250604_2_en.pdf).

<sup>391</sup> See Note from Praesidium to Convention, CONV 650/03, at 8 (April 2, 2003), available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00650en03.pdf>.

opportunity to make their views known, were good government principles originally developed by the Commission, for the Commission, but in the Constitutional Treaty they have been extended to all European institutions. Article 46 transforms a procedure designed for and by a single European institution--the Commission--into a general principle of democracy applicable to all.

The turning point for European rights that started in 1999 with the resignation of the Santer Commission has still not come to a close. A number of basic questions continue to surround the right to civil participation and will probably not be resolved until the Constitutional Treaty is ratified (or not), the first legal challenges are brought to European measures on the ground that the principle of participatory democracy was violated, and the first legislative measures are taken to give effect to the principle. Among the most significant questions that remain open are: Will the right be legally binding and enforceable in the European Courts or will it be interpreted as a programmatic article, that is, a right that European public officials are bound to respect and uphold in their activities but that is not an area for the intervention of judges?<sup>392</sup> What types of Commission measures are subject to the duty to consult, just European laws or also implementing regulations, and if implementing regulations, all of them or only the most significant ones? Lastly, how will the right of civil society participation be construed in the different institutional setting of adjudication by the European Courts, intergovernmental bargaining in the Council of Ministers and European Council, and technical administration and information-gathering in the European agencies? The coming years promise to be eventful ones for the right to civil society participation.

#### 4. European value: Civil society in European and global governance compared

The Commission drew from the international realm when it set into motion the civil society phase of European governance. None of the Member States had a developed discourse on the importance of civil society for good government or a procedure, applicable to all lawmaking, in which citizens and associations were systematically invited to comment on the early drafts of legislation. Yet the civil society ideal in the international realm was nebulous and ill-defined. Unlike the right to a hearing and transparency, public law principles that had been elaborated in the thick institutional space of the nation-state, the idea of legitimacy through civil society left the Commission with significant latitude in designing the organizational change that would constitute governing with civil society. The latitude, however, was illusory because of the ever-present constraints of European mental maps, in this case the mental map of corporatist relations between public bodies and private interest organizations.

The European right to civil society participation differs in two critical respects from the international right. First, the understanding of civil society is different. Civil society in the international realm is generally used to refer to NGOs that seek social or environmental justice, not associations of firms or workers whose agendas are informed by their market activities.<sup>393</sup> Moreover, the term encompasses an extremely fluid set of private associations. An association qualifies as civil society just by virtue of being an organization that is one-step removed from the

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<sup>392</sup> See Cases C-72/91 & 73/91, *Firma Sloman Neptun Schiffarts AG v. Seebetriebsrat Bodo Zieseemer*, 1993 ECR I-887, paras. 23 to 29 (discussing distinction between programmatic and other types of provisions of the treaties).

<sup>393</sup> For instance, the World Bank uses civil society “to refer to the wide array of non-governmental and not-for profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations.” See <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK%3A20101499~menuPK%3A244752~pagePK%3A220503~piPK%3A220476~theSitePK%3A228717,00.html>. Associations based on the market-related activities are expressly excluded from the definition.

institutions of government. As long as the group has a name, an e-mail address, and a core of activists, it counts as civil society. Civil society in Europe means NGOs. But it also embraces producer groups such as farmers, employer associations, sectoral industry groups, labor unions, and professional associations. Furthermore, civil society in the Commission documents and the Constitutional Treaty signifies a structured reality of organizations that represent distinct functional interests, religious traditions (churches), and political values. It refers to a self-contained universe of labor unions, employer organizations, consumer federations, umbrella environmental organizations, anti-discrimination groups, political liberties associations, and churches. Lastly, to count as a civil society organization in Europe, an association is expected to have a membership base, a physical address with offices, and a bit of history.

The different, European understanding of civil society is directly tied to the Commission's strategic use of the international discourse in the old institutional setting of European corporatist interest group representation that I described at the beginning of this section. All of the Commission documents borrow their definition of civil society from the corporatist European institution par excellence, the Economic and Social Committee, which had developed earlier a definition of civil society that, not surprisingly, reflected its own model of interest representation.<sup>394</sup> The new, central data base of Commission organizations with civil society representation is simply a compilation of already existing advisory bodies composed of organized interests, many of which can trace their roots to the 1960's.<sup>395</sup> I do not wish to suggest that civil society is only a label and that nothing has changed in the relationship between European institutions and the public. Certainly, the civil society concept brought with it a commitment to consult a wider array of non-state organizations with a broader set of concerns than the old peak associations of labor, business, the professions, and farmers. Yet these new associational actors must still fit a distinctly European mold. They are defined as organizations with a long-standing role in national politics, i.e. churches, or are expected to reach out to a significant number of Europeans through membership or other activities and show some organizational stability before the Commission will take their claims seriously.

The second major difference between the European right to civil society participation and the international right is the breadth of the organizational change that has occurred in order to include civil society in public decisionmaking. The consultation procedure adopted by the Commission is more comprehensive than the institutional practices of any of the major international economic organizations (World Bank, IMF, NAFTA, WTO). While, for instance, the World Bank has developed venues for civil society participation, they do not stretch across-the-board to all policy areas, do not entail the same, weighty sequence of publication, public comments, and official explanation, and do not have binding, legal status.<sup>396</sup> The participation that can be expected once (and if) the Constitutional Treaty is ratified and Article 46 takes effect, will surpass wildly anything that exists in the international realm. As with the previous episodes of rights creation, the Commission did not simply borrow mental maps of liberal democracy,

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<sup>394</sup> See White Paper, *supra* note\_\_ at 14 n.9 (quoting from Opinion of the Economic and Social Committee on "The role and contribution of civil society organisations in the building of Europe," 1999 O.J. (C329) 39). The Nice Treaty of 2000 subsequently affirmed the ESC's bid to associate itself with civil society with an amendment equating the organizations represented on the ESC with civil society: "The Committee shall consist of representatives of the various economic and social components of organised civil society and in particular representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers, and the general interest." EC Treaty, art. 257.

<sup>395</sup> See *supra* note\_\_.

<sup>396</sup> See The World Bank and Civil Society, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK%3A20092185~menuPK%3A220422~pagePK%3A220503~piPK%3A220476~theSitePK%3A228717,00.html> (describing World Bank civil society policies, which entail ad hoc meetings with NGOs and encouraging NGO involvement in defining local development needs and implementing programs).

rather it was driven to construct a more extensive rights scheme than existed in the place of origin.

### III. THE ALTERNATIVE THEORIES AND THE EVIDENCE

My analysis of the historical record shows that the historical institutionalist understanding of human preferences and collective processes of constitutional change can help explain the development of rights before the European Commission. European actors were motivated by values, what I also call mental maps of good government: the common law right to a fair hearing, the northern right to transparency, and the international right to civil society participation. Earlier, in Part I, I foresaw that these would be social understandings that actors had developed through their experiences as citizens of their different nation-states. The first and second generations of rights were clearly driven by individuals with allegiances to their national constitutional symbols and practices but the third generation was more complex. The Commission adopted a normative discourse of good government that had been developed outside Europe, yet precisely because the institutions and social understandings in the international realm were so ill-defined, the old European mental maps quickly took over. As anticipated in Part I, European actors were not only motivated by values but also by their strategic interest in preserving and consolidating authority: the interest of the Court of Justice and the Commission in the enforcement of their decisions; of Heads of State in securing ratification of a hard-fought set of political deals contained in the Maastricht Treaty; of the Parliament in improving its legislative powers; and of the Commission in preserving its institutional role as the engine of European integration.

The collective processes that led to the transformation of rights also fit a familiar mold. New procedural rights emerged sporadically, in response to historical, highly contextualized challenges to the powers of specific European institutions: the accession of a common law country, the Danish rejection of the Maastricht Treaty, and the resignation of the Santer Commission. After rights were added to the European toolkit, they showed real staying power and conceptual constancy. Lastly, the national and international values that spurred constitutional change are different from the European ones that the rules serve today: the European right to a hearing affords parties more procedural guarantees than the British counterpart; the European right to transparency covers a wider array of government activities and affords citizens additional means for obtaining government information as compared to the northern right; and the European right to civil society participation covers a more structured organizational reality, through a more extensive and well-defined procedure, than does the international right.

In Part I, I presented three alternative theories of rights and constitutional change in the EU and derived specific hypotheses for the case of procedural rights in Commission decisionmaking.<sup>397</sup> Legal constitutionalism, intergovernmentalism, and neo-functionalism generate predictions on a number of dimensions of rights in Commission proceedings: the bundle of rights that individuals enjoy, the time when different types rights are acknowledged by the Commission, and the European institution responsible for advocating and imposing the rights on the Commission. Now that I have presented the history, I return to the competing theories and examine how they fare when matched against the pattern of institutional change that has occurred over time. If they were successful in predicting rights, notwithstanding their very different assumptions about human motivations and collective decisionmaking processes, then I

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<sup>397</sup> See generally King, Keohane & Verba, *Designing Social Inquiry*, supra note \_\_ 99-114 (identifying falsifiability and specificity of hypotheses as one rule for constructing causal theories).



would have to conclude that historical institutionalism fails to capture the essential elements of constitutional change that can be used to explain rights before the Commission and elsewhere.<sup>398</sup> As it turns out, although the competing theories are able to account for certain features of procedural rights, they each fall short of providing a comprehensive and accurate set of predictions.

#### A. Legal Constitutionalism

As we saw earlier, legal constitutionalists work from the premise that constitutional designers are motivated by higher principles of democracy, fairness, and justice and that the rules and rights that are adopted by conventions and courts further those principles. Hanns Peter Nehl's work best exemplifies this approach in the context of the European Commission. Give the normative underpinnings of this form of scholarship the forward-looking element of the theory combines the positive "will" with the normative "should." Therefore it is difficult to discern the concrete mix of rights Nehl believes a constitution designer will (and should) protect at a given historical moment because they best guarantee the basic values that Nehl discerns as fundamental to modern administration, namely individual dignity, administrative rationality, and workability. His analysis, however, does produce expectations as to which institutions will press for rights in the administrative process and when they will do so. First, given that their professional and institutional mission is inextricably woven with higher principles of justice, judges should be the most receptive to claims that European administration is unfair and illegitimate. Bureaucrats, by contrast can be expected to focus on getting the work of administration done. In other words, procedural rights should be driven by the judgments of the European Courts. Second, such rights should emerge as soon as the Commission begins exercising different types of power and private parties go to the courts to complain that it was exercised unfairly.

In the case of the right to a hearing and other types of rights in individualized Commission proceedings, Nehl's expectations as to the institutional proponent of the right are mostly borne out by the historical record. The Court of Justice set down the right to a hearing in competition proceedings and then extended the right to other areas of Commission administration where private parties could show that they were similarly burdened. Yet the late arrival of the right--eight years after the first competition case was decided--and the Commission's entrepreneurship in undertaking organizational change are difficult to explain.

The events that pose real difficulties for legal constitutionalism are the rise of the right to transparency and civil society participation. Many years before they became standard elements of European rights discourse, individual litigants had made functionally similar claims before the Court of Justice and had been rejected. For instance, Nehl narrates a case from 1984 in which a trader vindicated, unsuccessfully, the right of access to documents.<sup>399</sup> In *Tradax Graanhandel BV v. Commission*, a Dutch importer of maize challenged a duty ("levy") assessed as part of the European price support scheme for agricultural commodities, but rather than challenging the implementing regulation setting down the duty, the Dutch importer requested the information that had been used to make the calculations that resulted in the duty. The Commission turned down the Dutch importer's request and, when Tradax went to the Court of Justice, both the Advocate General and the Court dismissed the claim.

Tradax argued that general principle of good administration required the Commission to provide the documents--as evidenced by the access to documents laws common to a number of

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<sup>398</sup> See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. Chi. L. Rev. 1, 76-80 (discussing importance of considering rival explanations and collecting data on rival variables to address omitted variable problem in research design).

<sup>399</sup> Case 64/82, *Tradax Graanhandel BV v. Commission*, 1984 ECR 135.

Member States--and that the right to a hearing, through which parties obtained documents in competition proceedings, should also apply to a business affected by an implementing regulation.<sup>400</sup> Neither the Advocate General nor the Court were persuaded. The reasoning of the Advocate General illustrates the institutional limits of judges and fairness doctrines in reforming administration:

Nor does it seem to me that there is any general or absolute principle of Community law, as is suggested, which requires information to be disclosed by the institutions of the Community to persons affected by Community acts in the absence of express provision and in the absence of litigation. The provisions of the laws of Member States which have been cited requiring disclosure of information in the possession of governments, in the interests of more open government, may support an argument that there should be specific or general measures laying down some rules. It does not seem to me to establish a general principle of "unwritten law" which aids the applicants in this case. Moreover, the fact that in competition and staff cases the Court has recognized that, before a decision is taken affecting an individual he has a right to be heard and to know the case against him, does not seem to me to lead to the conclusion that after a levy is fixed for all traders (since it is not contended that there is a right to the information before the levy is fixed) the information must be given to individual traders.<sup>401</sup>

Moreover, unlike the English right to a hearing, there was no threat to the legal authority of the Commission or the Court. Both the Advocate General and the Court were satisfied that Tradax's rights were adequately protected by the right to challenge to the implementing regulation in court, at which point Tradax and the court would be able to review the documents underpinning the levy.<sup>402</sup> They obviously believed that a Dutch court would see the matter in the same light.

A Dutch litigant, acting according to a mental map formed through education and experiences in the Dutch public law system of open government, was unable to persuade the Court to adopt an access to documents rule.<sup>403</sup> It was only after Maastricht, the declarations of European Heads of State in fall of 1992, and the enactment of the first Commission access to document rules in 1993 and 1994, that the Court began enforcing a right of access to documents to the benefit of traders in situations almost identical to that of Tradax.<sup>404</sup>

The same unsuccessful testing of legal theories before the Court of Justice has occurred in the sphere of civil society participation. The primary doctrinal candidate for obtaining, through the Court of Justice, the functional equivalent of the right to participation is the duty to give reasons under Article 190, now 253, of the EC Treaty.<sup>405</sup> A requirement that the Commission respond to the objections of interested parties in the statement of reasons supporting a regulation or law would approximate the explanatory memorandum that the Commission now issues in civil society consultations. Yet the Court has always rejected the claim that the

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<sup>400</sup> Tradax also claimed the right to information based on the doctrines of legal certainty and legitimate expectations, on the theory that an individual should be able to check that the law was rightfully applied by examining the information and reasoning used by the administration in promulgating an implementing regulation. See *id.* at 1369-70.

<sup>401</sup> *Id.* at 1386 (opinion of Advocate General Gordon Slynn).

<sup>402</sup> *Id.* at 1378, 1375, paras. 18, 19, 24 (judgment of the Court); *id.* at 1387 (opinion of Advocate General Gordon Slynn).

<sup>403</sup> Another case in which the litigants attempted, unsuccessfully, to make creative use of the right to a hearing to obtain documents that now may be requested under the right to transparency (although the documents might, nevertheless, be covered by one of the statutory exceptions) is Case C-170/89, *BEUC v. Commission*, 1991 ECR I-5709. See *supra* note \_\_.

<sup>404</sup> See Case T-188/97 *Rothmans International BV v. Commission*, 1999 ECR II-2463; Case T-111/00, *British American Tobacco International (Investments) Ltd. v. Commission*, 2001 ECR II-2997.

<sup>405</sup> The deciding institution in the case of implementing regulations is the Commission and in the case of laws are the Parliament and Council acting on the Commission's proposal.

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Commission is obliged to engage in an exchange of views with the European public, now known as civil society, before adopting regulations and proposing laws.<sup>406</sup>

As far as the anticipated timing of rights is concerned, unsurprisingly, legal constitutionalist theory also disappoints. The Commission has always had the power to adopt rules and propose laws and it has done so since the 1960's. Yet, notwithstanding the objections from individual litigants chronicled above, until recently the Commission exercised such powers free of any duty to disclose documents or engage in an exchange of views with civil society organizations and members of the public. Only in 1993 and then in 2002 did such rights and obligations come into being. In sum, it appears that even though judges are moved by complaints of oppressive, government action to do justice and make administration fairer, they face limits based on their pre-existing mental maps of rights, both in what they will recognize as oppressive and unjust and in what they believe that they can do to remedy injustice as a court of law as opposed to a democratically elected legislature.

### B. Intergovernmentalism

According to intergovernmentalists, the preferences of Member States and bargaining among them are responsible for the rules through which European institutions govern. Most intergovernmentalists base their model of European integration upon the same self-interested individual preferences and strategic behavior at the foundation of domestic rational choice theories of constitutional design. Given the market-creating ends of the original European Community, intergovernmentalists focus on domestic economic lobbies, whose views are filtered through their governments, and then serve as the grounds for national preferences in treaty negotiations and bargaining on European laws in the Council of Ministers.<sup>407</sup> As we saw in Part I, if pressed to anticipate national preferences for individual rights, an intergovernmentalist would say that states seek to protect the material well-being of their own citizens from arbitrary government action and that the definition of what constitutes arbitrary should follow national patterns of individual rights and public duties. This type of preference verges on altruistic value, as opposed to selfish interest. However, because rational choice theorists that attempt to accommodate value-driven preferences rank them as insignificant compared to material interests, we would not expect states to exhibit much variation in the intensity of their preferences for rights.<sup>408</sup> And therefore, an intergovernmentalist would not predict that weaker states would use the possibility of linkage across policy areas to secure *their* rights for their citizens by

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<sup>406</sup> See, e.g., Case 16/65, *Firma G. Schwarze v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, 1965 ECR 1081 (challenge to agriculture implementing regulation based on duty to give reasons); Case C-244/95, *P. Moskof AE v. Ethnikos Organismos Kapnou*, 1997 ECR I-6441 (challenge to agriculture implementing regulation based on duty to give reasons); Case C-263/02 P, *Commission v. Jégo Quéré SA*, 2004 O.J. (C 106) 13 (challenge to fishing implementing regulation based Commission's duty to take into consideration different interests under EC Treaty, art. 30, previous involvement of the parties, and right to be heard). Nehl is correct to observe that, in the context of Commission decisions on whether to pursue a complaint against a Member State for a breach of the Treaty prohibition on state aids, the Court has used the duty to give reasons, together with the duty "in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint" to require the Commission to respond, in the statement of reasons, to specific concerns raised in the original complaint. See Nehl, *Principles of Administrative Procedure in EC Law*, *supra* note\_\_ at 160-63 (discussing *Commission v. Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval)* and *Brink's France SARL [Sytraval II]*, 1998 ECR I-1719). This use of the duty to give reasons to require the Commission to engage in a consultation-like procedure, however, is closely tied to the existence of a complaint procedure established under European law, permitting competitor firms to alert the Commission of illegal state subsidies. See Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, 1999 O.J. (L 83) 1, art. 20.

<sup>407</sup> See Moravcsik, *The Choice for Europe*, *supra* note\_\_ at 24.

<sup>408</sup> See Barry R. Weingast, *A Postscript to 'Political Foundations of Democracy and the Rule of Law'*, in *Democracy and the Rule of Law*, *supra* note\_\_ 109-113 (asserting that, according to the rational choice perspective, values fall considerably lower than material interests in individual preference rankings and therefore a rational choice theorist would expect individuals to act on value-driven preferences only when the costs of such behavior are low).

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making significant concessions on other issues.<sup>409</sup> Hence the specific rights that should emerge from negotiations should be the ones existing in the most powerful Member States.

From the beginnings of European integration to the present day, France and Germany have been and continue to be the two most powerful Member States, notwithstanding the many waves of accession and the membership of another large country, namely the UK.<sup>410</sup> An intergovernmentalist, therefore, would expect European citizens to enjoy the rights that French and German citizens are guaranteed under their domestic constitutions and laws. Moreover, an intergovernmentalist would anticipate that rights are promoted by Member States and are contained in treaties and laws negotiated among Member States. Lastly, the timing of rights should follow the same historical sequence as the conferral of powers upon the Commission, since states would only want to protect their citizens from arbitrary government action once they perceived that the Commission had the power to impose it.

The intergovernmental explanation is persuasive in the early days of the Commission. As the reader will recall, the first area in which the Commission exercised direct enforcement powers was competition law. The right to be notified of the Commission's evidence and arguments and reply in writing and orally, at a hearing, were set down in a Council regulation. The Commission was also required to give a statement of the reasons supporting the final competition decision under Article 190 of the Treaty of Rome. This conformed to French competition procedure (notice, a right to reply in writing, and a reasoned opinion of the Technical Commission on Cartels and Dominant Positions) and German competition procedure (the same plus the right to an oral hearing). The institutional advocates of rights also followed expectations: the basic framework was set down, in part, by the states that negotiated the Treaty of Rome and the Council Regulation. And the timing is historically correct: as soon as the Commission was given direct enforcement powers (Council Regulation of 1962) it was also required to respect basic rights (Council Regulation of 1962 and Commission Regulation of 1963).

By the time the Court of Justice recognized the right to a hearing in 1974, however, the intergovernmental model of European institutional change ceased to hold true. The right was not drawn from France or Germany or even the legal tradition of a majority of the Member States, but from a state (the UK) with little power, given her recent entry into the European Community after years of having been denied admission by De Gaulle. Furthermore, the right was established by supranational institutions, the Court of Justice and, to a lesser extent, the Commission, and emerged at a time when there had been no change in the Commission's powers.

The same initial consistency with intergovernmentalism followed by departure from the model is true also of transparency and civil society participation. Before 1993, individuals did not have a right to documents, as in the majority, closed government tradition, which included France and Germany. After 1993, the intergovernmental predictions falter, for the right came from Member States that were powerless as a matter of their economies and populations (Denmark and the Netherlands), were established partly by a supranational institution (the European Parliament), and were introduced well after the Commission had come to exercise significant rulemaking and lawmaking powers independent of the Member States represented on the Council.<sup>411</sup>

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<sup>409</sup> See Christina Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 *Am. Pol. Sci. Rev.* 1, 2-3 (reviewing the theory of linkage in interstate bargaining).

<sup>410</sup> See Moravcsik, *The Choice for Europe*, *supra* note \_\_ at 137, 374.

<sup>411</sup> By 1986, with the introduction of qualified majority voting for harmonization measures in the Single European Act, the Commission had the power to act contrary to the wishes of Member States and by extension, in the intergovernmental model,

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Likewise, before 2002, public participation in rulemaking and lawmaking had followed the majority corporatist model of consulting advisory bodies on which select interest organizations were represented. The Economic and Social Committee was established in the Treaty of Rome and advisory committees were set down in a number of European laws that dated to the 1960's and 1970's. Thus, both forms of interest representation were promoted by the Member States and at the time that the Commission was first given rulemaking and lawmaking powers. After 2002, while the definition of the interested public retained the original corporatist bent, procedure for consulting interests, as well as the types of private associations that were consulted, became much more inclusive. Moreover, the institutional proponent of the right was supranational Commission. Lastly, the right to civil society participation did not appear at a time when the Member States transferred new powers to the Commission.

In summary, the European experience shows that states initially do control the rights that their citizens enjoy before international organizations but, sooner or later, they lose control to those organizations. Intergovernmental theory offers an important corrective to my analysis of the European Commission because it accounts for the procedural baseline that existed before each of the historical challenges that prompted organization change and new rights. Nevertheless, because this theory does not provide any intellectual tools for understanding the dynamics of European institutional change outside of intergovernmental bargaining, it remains fundamentally incomplete.

### *C. Neo-Functionalism*

As the reader will recall from Part I, neo-functional explanations of Europe, like intergovernmentalist ones, are based on self-interested motives and constitutional processes, but they identify supranational European institutions rather than inter-state bargaining as the critical forum in which such motives operate. Martin Shapiro has come the closest to articulating a neo-functional view of constitutional innovation in the Commission. As I explained earlier, Shapiro employs a rational choice model of human behavior, in which litigants with the money to hire lawyers and the interest in avoiding administrative action, challenge Commission decisions on novel legal theories and judges are driven by competence-expanding, activist tendencies to rule in their favor. His account also includes anti-technocracy, pro-democracy values and the internal logic of the legal doctrine of the duty to give reasons. Nevertheless, these value-driven premises are complementary to the rational choice ones: all elements of the neo-functional model point in the direction of an ever-expanding bag of procedural rights.

According to Shapiro, procedural rights before the Commission should gradually come to approximate those under American administrative law. The institutional advocate of rights should be the Court of Justice, since judges are interested in expanding their powers, as well as remaining faithful to the doctrinal demands of the duty to give reasons and the political demands of protecting litigants (and democracy) against overweening bureaucrats. Lastly, the timing of the rights should track, with a slight lag, the exercise of different types of government powers by the Commission: the Commission issues decisions and rules, litigants oppose the measures and test the waters with new legal theories, the Court of Justice considers and initially rejects the theories, but is moved eventually, in response to self-interest, pro-democracy values, and doctrinal logic, to accept the litigants' arguments.

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their citizens. Before 1986, Member States might have believed that they could control Commission activities in the rulemaking and lawmaking areas through unanimity voting on comitology committees and the Council, or that, in the isolated areas where such checks did not exist, in the nooks and crannies of the management of agricultural prices and customs duties, the decisions were simply too technical to be able to adversely--and arbitrarily--harm the economic well-being of their citizens.

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Even though Shapiro's model of constitutional change is very different from Nehl's, his predictions on institutions and timing are virtually identical and as I explained, neither finds support in the historical record of transparency or civil society participation. The history of litigation before the European Courts contains many instances in which plaintiffs advanced theories that would give them access to documents and an exchange of views with the Commission in advance of the enactment of a rule or law, and the Courts consistently refused to entertain their claims. In establishing the right to transparency and the right to civil society participation, the Court of Justice was a marginal actor and the incremental logic of judge-made law did not apply.

In addition to the predictions on institutions and timing, Shapiro anticipates that the Commission will be required to respect procedures analogous to American ones, by which he means principally notice and comment rulemaking. The judicial interpretation given to the Administrative Procedure Act in the late 1960's and 1970's requires federal agencies to publish rulemaking proposals, including the policy considerations and scientific information underlying proposals, accept comments from the public, and give detailed explanations of their policy choices in the final rule.<sup>412</sup> As the reader will recall, Shapiro argues that the duty to give reasons will eventually be interpreted in such a way as to give individuals a very similar set of rights. But that has not happened. Even in the core administrative area of individual enforcement decisions under competition, anti-dumping, and customs law, the Commission's statement of reasons is far from the exhaustive rebuttal of all of the objections of the parties required under American law.<sup>413</sup>

The difference between the European and American practices lies in the origins of the duty to give reasons. It was contained in the Treaty of Rome of 1957 and was imposed on European institutions to give effect to the rule of law principle common to the founding Member States that all government acts must be based on law.<sup>414</sup> The European institutions promulgating the act had to give the reasons for it: the legal provision on which it was based and the grounds for holding that the government act furthered the purposes of the legal provision.<sup>415</sup> The duty to give reasons was not conceived as a device for guaranteeing pluralist participation in administrative proceedings, as the analogous provisions of American law have been interpreted by American courts.<sup>416</sup> In the *droit administratif* systems of the original Member States, if the parties believed that the administration had not taken into account an important consideration and hence had acted contrary to the dictates of the enabling law, they could go to court.<sup>417</sup>

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<sup>412</sup> This set of requirements does not include transparency. Even in the judicialized American system of government, a congressional act (the Freedom of Information Act) was necessary before individuals had a general right to learn how their government governed and whether it did so in accordance with the Constitution and the laws. Even though the neo-functional argument attributes a formidable role to judges, it does not exclude legislative activism and rights established through the lawmaking process.

<sup>413</sup> See *supra* text accompanying note \_\_.

<sup>414</sup> The duty to give reasons appears to have had special legal significance in Germany. The "obligation to give full reasons" is considered part of the constitutional principle of lawfulness of administration as well as the constitutional principle of effective judicial protection against the executive, since only if a party knows the reasons for a decision can he or she discern whether her rights have been infringed by the executive. See Georg Ress, *Due Process in the Administrative Procedure*, *supra* note \_\_ at 4.4.

<sup>415</sup> See Case 45/86, *Commission v. Council*, 1987 ECR 1517 (obligation to state legal basis); Case 138/79, *Roquette*, 1980 ECR 3333 (obligation to refer to any proposals or opinions required under EC Treaty); *Italy v. Commission*, 1969 ECR 277 (obligation to give "clear and unambiguous" statement of reasons).

<sup>416</sup> Articles 5 and 7 (ex Article 4) of the EC Treaty confirms the rule of law, as opposed to pluralist participation, understanding of the duty to give reasons. Article 5 says: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." Article 7 says: "Each institution [European Parliament, Council, Commission, Court of Justice, Court of Auditors] shall act within the limits of the powers conferred upon it by this Treaty." The duty to give reasons under Article 253, therefore, should be read in conjunction with the duty to remain within the limits of the powers conferred by the Treaty under Articles 5 and 7. I am indebted to Xavier Lewis for this insight.

<sup>417</sup> See *supra* text accompanying note \_\_.

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When the right to a hearing came to be recognized as part of European law, it had no impact on the duty to give reasons because the common law right to a hearing did not provide for a judicial-like opinion at the end of the proceeding, indeed it had nothing to say about the form of the final administrative decision.<sup>418</sup> Thus, the statement of reasons that the Commission today gives in competition and international trade cases does not answer each and every point made by the parties in the administrative proceeding.<sup>419</sup> Knowing the grounds for a Commission decision is one thing, obtaining a reply on every objection of fact, policy, and law is another thing. The European Courts only require that the statement of reasons be complete enough to enable the parties to determine whether the administration acted according to law or whether it is necessary to go to court to vindicate their right to a government of laws and not of men.<sup>420</sup>

If we move beyond the category of individual decisions and consider the duty to give reasons for general acts, the European path has also taken an unexpected turn, at least compared to the American one. With the right to civil society participation, the proceduralized sequence of public notice, opportunity to comment, and government response has been introduced for acts of a general nature but, for the time-being, only for European laws, not implementing regulations. The Commission, in reasserting authority after the resignation of the Santer Commission, needed the normative support of civil society to justify its role in making the fundamental, political choices contained in European legislation. It had no strategic interest in involving civil society in what was perceived as the technical domain of rulemaking. This is precisely the opposite from what would be expected based on American law. In the U.S., regulations must adhere to notice and comment procedures but congressional statutes, as a matter of constitutional and statutory law, are free from requirements of public debate before they are passed.<sup>421</sup> Although politically inconceivable, legislation could in theory be enacted by the President and Congress without any opportunity for public comment.

In sum, the pattern of rights that has emerged in Europe cannot be explained fully by the universal, or at least Western, anti-technocratic values and strategic interests identified by Shapiro. The relative strengths of the historical institutionalist explanation are apparent. By postulating a number of competing social understandings of good government and rights, based on different institutional experiences within the nation-state, and by assuming that the strategic interests of European actors will be defined by reference to historical events, historical institutionalism both gives a more complete account of the emergence of rights and a more accurate understanding of where European rights stand today, on the books and in practice.

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<sup>418</sup> See Wade & Forsyth, *Administrative Law*, supra note\_ at 516.

<sup>419</sup> See, e.g., Case C-278/95 P, *Siemens v. Commission*, 1997 ECR I-2507, para. 17; Case T-198/01, *Technische Glaswerke Ilmenau GmbH v. Commission*, 2004 ECR II-(unpublished), paras. 59-60; Case T-459/93, *Siemens SA v. Commission*, 1995 ECR II-1675, para. 31 (“[the obligation to state reasons] is intended to give an opportunity to the parties of defending their rights, to the Community judicature of exercising its powers of review and to the Member States and to all interested parties of ascertaining the circumstances in which the Commission has applied the Treaty . . . . However, . . . , in stating the reasons for the decisions it has to take in order to ensure that the rules of competition are applied, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations have decisive importance in the context of the decision . . .”).

<sup>420</sup> This difference between the American statement of basis and purpose and the European duty to give reasons is complemented by a difference in the procedure for judicial review of administrative decisions. If the parties decide to challenge a Commission decision and they decide to make the same (sometimes unanswered) objections in court, the Commission is allowed to reply with new arguments, albeit not new factual evidence because that would breach the right to be heard. See Case T-141/94, *Thyssen Stahl AG v. Commission*, 1999 ECR II-347, paras. 608-11. By contrast, before an American court, as a general rule the administration can only rely on the explanations given in the administrative process, although especially in the rulemaking context, the courts will overlook the failure to respond to a party's objection in the administrative proceeding if it determines that it had no effect on the final rule and hence was not prejudicial. See *Sierra Club v. Costle*, 657 F.2d 298, 360 (1981).

<sup>421</sup> See William N. Eskridge, Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 267-498 (2002).

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The specific predictions of the alternative theories, compared to the historical development of rights, are summarized below.

**Table 2**---Predictions of the alternative theories matched against the historical record

	<b>Legal constitutionalism</b>	<b>Intergovernmentalism</b>	<b>Neo-functionalism</b>	<b>Historical record</b>
<b>Individualized proceedings (rights, institutions, timing)</b>	--; European Courts; gradually after 1962.	Procedural rights of French and German traditions; Member States; 1962.	Rights under U.S. law; European Courts; gradually after 1962.	Originally rights of French and Germany traditions (1962 and 1963) followed by English right to a hearing (1974); Member States, European Courts, Commission.
<b>Transparency (rights, institutions, timing)</b>	--; European Courts; gradually after 1957.	Limited or no access to documents as in French and German closed government traditions; Member States; 1986 or before.	--	Originally no access to documents followed by northern right to transparency (1993); Heads of State and European Parliament.
<b>Civil society participation (rights, institutions, timing)</b>	--; European Courts; gradually after 1957.	Functional representation in certain policy areas as in France and Germany; Member States; 1986 or before	Procedure similar to U.S. notice and comment for implementing regulations; European Courts; gradually after 1957.	Originally functional representation on ESC (1957) and advisory committees (1960's and 1970's), now routine and formal procedure for early consultation of public on all legislative proposals (2002); Commission.

To conclude this examination of the competing theories, let me point to some avenues of future research for historical institutionalism. In essence, by reviewing the historical record of rights before the Commission, I selected a number of cases based on a range of values taken by the dependent variable, i.e. rights change or rights stasis.<sup>422</sup> My theoretical claims, however, would be stronger if I had also included cases selected on the independent variable, namely the presence or absence of historical crisis.<sup>423</sup> One promising line of future research, therefore, would be to examine other possible crises-- accessions, voter revolt, and strident opposition to the Commission from other European institutions—to see whether they indeed were crises and whether they too prompted rights change.

<sup>422</sup> See King, Keohane & Verba, *Designing Social Inquiry*, supra note \_\_\_ at 141.

<sup>423</sup> *Id.* at 140.



## CONCLUSION

I conclude by taking stock of rights before the European Commission and advancing some predictions for the future of rights in Europe and other systems of global governance. Before the Commission may issue adverse determinations against specific individuals, it must notify the parties of all aspects of the planned decision, allow the parties to examine the information in its files, accept written submissions, hold an oral hearing, and give a complete enough statement of the grounds for the final administrative decision so that the parties, and eventually the European Courts, can discern whether the Commission has adhered to the substantive requirements of European law. As we have seen, this set of rights is most extensive in competition and anti dumping proceedings, slightly less so in customs remissions proceedings, and even less so in the other, rare instances in which the Commission bypasses national administrations and makes adverse individualized determinations. This is a set of rights inspired by the *droit administratif* tradition and the English right to a hearing. When the right to a hearing migrated to Brussels, it guaranteed the parties more thorough-going disclosure of the government's case than in the administration of origin, the UK Monopolies and Mergers Commission. It also operated largely free of political discretion after the parties were heard, contrary to British administration of competition policy.

Moving along to transparency, the Commission now is under a legal duty to maintain a public, electronic register of all the documents generated in the administrative and legislative process--technical studies, committee agendas, and reports that serve to prepare official acts--together with the official acts. The Commission is under a duty to make those documents immediately accessible through the register or, if not possible, as a second-best, to provide the documents upon a request from a European citizen or resident. The right of citizens to know how government makes decisions day-to-day, before and after the public debates in a parliamentary assembly, expanded in its adoptive home. None of the northern systems, where the right originated, combined the transparency guarantee of a public register, with full-text, immediately accessible electronic documents, with that of access to documents that are preliminary and political in nature.

Lastly, when the Commission drafts proposals for European laws, it now must respect the right of civil society participation. It is obliged to make an early draft of the proposal available to European civil society, accept comments, and explain in the final version why it did or did not modify the proposal in light of the comments. The definition of which associations count as the civil society that must be taken seriously in the consultative process borrows from the European corporatist tradition of interest representation, although it is more inclusive than the corporatist model. The systematic and cross-cutting procedure for involving civil society in Commission decisionmaking goes beyond any of the reforms yet undertaken by international organizations, the place where the demand for civil society participation originated.

Notwithstanding the fact that procedural rights emerged in different historical periods and were informed by different cultural traditions and supranational interests, they display one, striking common characteristic: the right to a hearing, the right to transparency, and the right to civil society participation all afford citizens a greater set of entitlements against European government than in their place of origin. What is the common thread that explains this surprising outcome? It is the weak nature of the Commission as a government organization. As we saw earlier, the Commission relies on cooperation from national administrations and national courts in enforcing European law. It does not have a police force that it can call into action, European courts in which it can directly appear to seek the execution of orders, or jails into

which it can put recalcitrant citizens. It does not have independent enforcement powers. Politically too the Commission is weak. It is not led by a popularly elected official, as are executive branches at the national level, a directly elected president in presidential systems of government, or a prime minister and cabinet appointed after parliamentary elections in parliamentary systems of government. It is led by a College of Commissioners, headed by a President, that is appointed by common consensus among the Member States, with some input from the European Parliament. In no way can the Commission be said to enjoy an electoral mandate when it undertakes its mission. In responding to challenges from national judges, lawyers, and statesmen, as in the case of a right to a hearing, the Commission cannot use legal enforcement powers. In responding to challenges from national voters and elected officials, as in the case of the right to transparency and civil society participation, the Commission cannot use the political mandate of a popular vote. The Commission cannot say, as generally national executive authorities do when faced with demands for rights, that it governs in the name of the people and therefore, the will of the majority and the greater good must, under the circumstances, prevail over the rights of the individual.

The history of procedural rights before the Commission is reassuring because it shows that as authority migrates beyond the confines of the nation-state, citizens, lawyers and judges with allegiances to their strong national--and to some extent international--rights cultures are vigilant in protecting rights in new political spaces. Nonetheless, there also is a certain irony to history that I have told in this Article. The European project, at the heart of which is the Commission, was begun in response to one, calamitous failure of the political space of the nation-state: war. European leaders have given up exclusive powers over a variety of policy areas and transferred them to the EU on the belief that their countries do better by pooling sovereignty rather than going it alone. Yet even though the Commission has obtained significant powers to carry out the European aims of the treaties, it is circumscribed by extensive procedural rights. The institutional weakness responsible for this outcome is the result of the design of the same Member States that originally conferred powers upon the Commission. No European Head of State wants competition from a directly elected President of the European Commission. Nor would any national voter want to be arrested, tried, and sentenced by a public official who spoke a different language, had been schooled in a different legal system, and had allegiances to a different set of cultural and political institutions. As I have shown, the extensive procedural guarantees have also been driven by an unexpected institutional competitor of the Commission: a directly elected European Parliament with extensive, treaty-based powers. As the different dimensions of the still-uncertain right to civil society participation are decided, the margins of the right to a hearing and the right to transparency are worked out in existing and novel policy areas, and new rights arise, this dynamic should be kept in mind. The Commission is not an ordinary executive branch and for that reason it might well be more dangerous, but for that reason too, it is less able to resist demands for rights.

Now I turn to speculating about the future. One possible objection to my historical analysis is that the forces that I identify as determinants of European rights are so culturally and historically specific that they do not count as elements of a general theory of constitutional change that can be applied going forward in time or in analyzing other international settings. To the contrary, my study of the Commission has brought to light a number of features of rights in the era of global governance that are lasting and cross-cutting. The national traditions that inspired European rights are quite stable.<sup>424</sup> Comparatists have long been fascinated with the

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<sup>424</sup> There is an extensive literature on the “Europeanization” of national law, see, e.g., *The Europeanisation of Law* (Thomas G. Watkin ed., 1998), but most scholars find that divergence persists notwithstanding the adoption of facially similar or identical legal doctrines.

resilience of national legal cultures in the face of legal transplants from abroad and, even in a globalizing world, differences in language, legal education, and the national institutions in which lawyers and legal scholars pursue their careers, can be expected to produce continuity.<sup>425</sup> Moreover, the distinctive, supranational interest in maintaining and extending authority that motivated European actors can be expected to persist in the EU and to drive organizations in international regimes. Lastly, even the historical crises that provoked organizational change in the Commission have a certain generalizable quality: a fundamentally different legal culture (the common law vs. the civil law), a new set of policy prerogatives in areas of high politics (the commitments to defense, immigration, and a single currency contained in the Maastricht Treaty), and the entrepreneurship of a supranational institution rendered newly powerful through a combination of the political authority of direct elections and the legal authority of new treaty powers (the Parliament).

What then might the future hold for European rights? The accession of Central and Eastern European countries on May 1, 2004 was a historic event for the EU. To some extent, the dynamics of this accession are different from previous ones because of the enormous discrepancy in wealth between the new and old Member States. The new states gain far more from becoming members of the European club than the old states gain from letting in the new members.<sup>426</sup> Nevertheless, especially for supranational European institutions like the Court of Justice where power differentials do not animate decisionmaking to the same extent as in the intergovernmental institution of the Council, lessons can be drawn from the previous experience with rights before the Commission.

After the fall of communist regimes in Central and Eastern Europe, all of those countries adopted new constitutions and established constitutional courts to safeguard rights. Some, in particular the Hungarian Constitutional Court, have become very active.<sup>427</sup> It is quite common for members of the legal establishment in newly democratized countries to be wed to fundamental rights, especially highly visible, sweeping, and symbolic statements of such rights.<sup>428</sup> The Court will not be able to resist the pressure to engage in searching constitutional review of European acts because of the strategic need to reassure courts like the Hungarian one that fundamental rights have been protected. In the jurisprudence of the Court of Justice, therefore, even before the adoption of the Constitutional Treaty that would render the European Charter of Fundamental Rights legally binding, we should expect a marked shift in the rhetoric of fundamental rights.

Furthermore, the distinction between European and national acts, which determines whether European fundamental rights apply, will come under siege. (Currently European fundamental rights apply only to European acts, much like the U.S. Bill of Rights only protected individuals against acts of the federal government before incorporation against the states in the 1960's.) That is because the Central and Eastern European judges on the Court of Justice and those sitting on national courts can be expected to insist on ensuring respect for fundamental rights in their countries, regardless of whether government authorities are acting under national or European law. The prestige and authority of the Court of Justice will be perceived as a unique institutional opportunity to do so. The Court might be able to resist the pressure to serve as a

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<sup>425</sup> See Pierre Legrand, *Fragments on Law-as-Culture* (1999); Pierre Legrand, *European Legal Systems are not Converging*, 45 *Int'l. & Comp. L.Q.* 52, 81 (1996); Ugo Mattei, *Three Patterns of Law: Taxonomy & Change in the World's Legal Systems*, 45 *Am. J. Comp. L.* 5 (1997); John H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 *Stan. J. Int'l L.* 357 (1981), reprinted in John H. Merryman, *The Loneliness of the Comparative Lawyer* 17 (1994).

<sup>426</sup> See generally Milada Vachudova, *Europe Undivided: Revolution, Democracy and Integration after Communism* (2004) (putting forward theory of asymmetric dependence in the context of enlargement to the East).

<sup>427</sup> See Kim Lane Scheppele, *The New Hungarian Constitutional Court*, 8 *East European Constitutional Rev.* 81 (1999).

<sup>428</sup> See Moravcsik, *The Origins of Human Rights Regimes*, *supra* note \_\_ at 221-30.

constitutional court for all acts, European and national, in those instances where the implementation of European policy is not at stake and hence there is no strategic need to accommodate local courts in order to ensure enforcement of European measures.

In other areas of global governance, predictions are complicated by the absence of any organization even matching the relatively weak European Commission of the 1950's and 1960's and by the presence of one state, the U.S., that is significantly more powerful than the rest. The WTO's Dispute Settlement Body (DSB) is one of the most likely international bodies to become an institution whose decisions will be executed at the national level as a routine matter, without extensive diplomatic politics and national debate. Like the European Court of Justice, the DSB relies upon the cooperation of national authorities in implementing its decisions under the WTO agreements: the government administrations that must change their laws and regulations to come into compliance and the courts that must uphold those laws and regulations. Like the Court of Justice, the DSB also operates across widely divergent legal systems. Therefore, the dynamics of national mental maps of rights, on the one hand, and the strategic interest in affirming supranational authority, on the other hand, that drove the adoption of the right to a hearing in the Court of Justice in the 1970's can be expected to animate the development of rights in the DSB as well.

The DSB is often called upon to settle disputes among states involving highly technical, scientific issues.<sup>429</sup> One state claims that another's domestic regulation in the area of consumer or food safety is an illegal barrier to trade and the other state replies that the regulation is justified by the need to protect the health or consumer welfare of its citizens. The parties generally furnish extensive scientific evidence in their briefs. The DSB can also appoint scientific experts to give their opinion on the matter and refer to the technical standards adopted by specialized international organizations, the UN's Codex Alimentarius Commission being the most commonly cited. Because of the necessity of obtaining the cooperation of U.S. administrative agencies and courts in implementing DSB decisions, the procedure through which the DSB decides whether a national regulation legitimately furthers a public safety concern should take on some of the idiosyncratic aspects of American administrative law. Unlike the administrative procedures of European WTO members, DSB procedure should assume a highly formal, adversarial bent in which governments and interest groups have an opportunity to examine and object to the scientific evidence underlying the conclusions in the briefs, expert reports, and international standards.

Let me unpack this analysis a bit further. Comparative studies show that one of the significant differences between American and European systems of administrative law is the extent to which scientific rulemaking is proceduralized and judicialized in the U.S.<sup>430</sup> Under the notice and comment procedure outlined in Part III, American administrative agencies must publicly disclose the proposed rule, together with all of the underlying scientific facts, give the public the opportunity to submit written objections and observations, and furnish an exhaustive reply to the comments. In most European systems, as explained in Part II, bodies composed of representatives of different producer and consumer interests are often consulted, but draft regulations are not made widely available to the public. In anticipation of the reaction of American administrative agencies and reviewing courts, the DSB should gradually allow the

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<sup>429</sup> See generally Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *Tex. Int'l L. J.* 405, 425 (2003) (describing DSB's use of international scientific standards); Christopher T. Timura, *Cross-Examining Expertise in the WTO Dispute Settlement Process*, 23 *Mich. Int'l L. J.* 709 (2002) (describing DSB's use of experts); David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment after Five Years*, 32 *NYU J. Int'l L. & Po.* 865 (2000) (describing DSB's use of Codex Alimentarius standards).

<sup>430</sup> See Ziamou, *Rulemaking, Participation and the Limits of Public Law in the US and Europe*, *supra* note \_\_\_ at 130-41 (comparing U.S. rulemaking procedure with that of Germany, the UK, and Greece).

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state parties to the dispute and interest groups, through the device of the amicus curiae brief, extensive rights to participate in the scientific fact-finding process. The DSB, however, walks a thin line. To the extent that the procedure is perceived as overly politicized, driven by the interest groups submitting the amicus curiae briefs and the unelected trade specialists sitting on the DSB, administrations and courts on the European side of the Atlantic might call into question the legitimacy of the outcomes and, in turn, deny their cooperation.

Prediction is always a hazardous intellectual exercise and especially so in the world of international law and politics. Nonetheless, it demonstrates how the experience with rights and citizenship in the world's only firmly established system of global governance can inform our understanding of other, emerging ones.