

The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy*

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Even though the Lisbon Treaty avoids the constitutional foundation of the European Union, it contains the same strategies as the Constitution for Europe to strengthen its democratic legitimacy. This article explores the Lisbon Treaty's 'Provisions on Democratic Principles' and, particularly, the strategies of democratization based on the participation of citizens and organized civil society in European governance. The article provides a legal analysis of the principles of participatory democracy and the rules governing civil dialogue, external consultations and citizens' initiative.

1. INTRODUCTION

The European Union (EU) began its own journey to democracy inspired by traditional institutions from national constitutionalism. Its first steps to gain independent democratic legitimacy drew on parliamentary representation; in fact, this year's elections to the European Parliament (EP) marks thirty years since the first direct election of June 1979. The relative weakness of the EP (the only directly legitimated European institution) within the institutional framework of the Union has been considered as the main cause of the EU's democratic deficit. Therefore, every reform of the founding Treaties has gradually increased both the power of the EP in the law-making process – mainly, through the extension of the co-decision procedure – and its political control over the European Commission. This strategy of democratization, though, has been followed by ever-lower voter turnouts in European elections and increased feelings of disaffection among European citizens towards supranational integration. A suitable explanation for this paradox could be that the process of political representation does not operate properly within a supranational context. It seems highly questionable whether the EP is able to assume the effective representation of a huge and extremely heterogeneous polity

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such as the EU.¹ In addition, the EP elections do not provide citizens an opportunity to choose between different ways of running Europe. European elections are perceived as second-order national elections where political parties confront mainly domestic issues and citizens vote according to their opinions on national politics.² Considering that the translation of the principle of political representation to a supranational polity evidences structural shortcomings, the EU has been bound to explore complementary strategies to improve its democratic legitimacy.

Over the last decade, several normative theories of supranational democracy have again embraced Republicanism and have stressed the importance of civic virtue and citizens' participation in the policy-making processes beyond the mere consumption of individual political rights. From this normative perspective, participation is considered as an inherent value of democracy that 'enables individuals to rise above their private existence and become emancipated citizens, hopefully, more knowledgeable, more attentive to the interests of others, and more probing of their own interests'.³ Citizens' participation in the policy-making process is supposed to enhance democratic legitimacy because it enriches public deliberation with new arguments – particularly with the opinions expressed by those directly affected by political decisions (input legitimacy). Participation is then conceived as an opportunity for citizens and civil society organizations to argue in public deliberation, giving opinions subjected to the criticism of reason.⁴ In addition, the advocates of participatory democracy commonly argue that civic participation produces better results (output legitimacy) presuming that the involvement of certain private actors (expertise) in the policy-making process provides the needed knowledge to achieve effective outcomes. Kohler-Koch clearly summarizes the supposed democratic benefits of citizens' participation at the EU level: 'The involvement of societal groups in the decision-making process aims likewise at expanding the

¹ According to Haltern, Weiler & Mayer, 'the European Parliament is debilitated not only by its formal absence of certain powers but also by its structural remoteness. The technical ability of MEPs to link and represent actual constituents to the Community process is seriously compromised in the larger Member States by simple reasons of size. Its abstract representation function of "the people" – its public forum function – is also compromised, by a combination of its ineffective powers (the real decisions do not happen there), by its mode of operation (time and place), by its language "problem", by the difficulty (and disinterest) of media coverage', J.H. Weiler, U. Haltern & F. Mayer, 'European Democracy and Its Critique – Five Uneasy Pieces', *Jean Monnet Working Paper* (1995), n. 1, 8.

² It is evocative that over the years one has seen a gradual increase in the formal powers of the European Parliament and a decrease in the turn-out to European elections. And when they turn out, these elections are dominated by a national political agenda, a mid-term signal to the national party in power. This is, an evocative fact too, the opposite of American politics where State elections are frequently a mid-term signal to the central federal government. The non-emergence of true trans-European political parties is another expression of the phenomenon. Critically, there is no real sense in which the European political process allows the electorate "to throw the scoundrels out", to take what is often the only ultimate power left to the people which is to replace one set of "governors" by another. In its present state, no one who votes in the European elections has a strong sense at all of affecting critical policy choices at the European level and certainly not of confirming or rejecting European governance', Weiler, Haltern & Mayer (1995), *supra* n. 1, 9.

³ B. Kohler-Koch & B. Rittberger, 'Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 16.

⁴ As Closa notices, participation would contribute to quality deliberation when the engaged actors 'avoid arguments based on vested interest and seek persuasion based on strong arguments appealing to superior moral reason', C. Closa, 'Deliberative Constitutional Politics and the Turn towards a Norms-Based Legitimacy of the EU Constitution', *European Law Journal* 11, no. 4 (2005): 421.

knowledge base to increase the quality of EU policies, making public administration accountable to society as a whole, achieving an all-embracing mobilization of political interest and enhancement of direct participation of citizens, creating a trans-national democratic public sphere'.⁵

Participatory democracy has transcended academic theory. As a matter of fact, the engagement of citizens – primarily through the civil society organizations⁶ – in the EU decision-making extends nowadays along an open, dynamic, and rather informal process, commonly known as governance, which differs substantially from the national legislative procedures firmly structured by national constitutions. European supranational governance is characterized by the constant interactions between multiple actors including institutions and bodies of the EU, national and sub-national institutions, and other non-institutional collective actors representing civil society. Participation has also been recognized as one of the general principles of 'good governance' in the Commission White Paper on European Governance (2001) (hereinafter 'White Paper').⁷ The White Paper stresses the importance of 'wide participation throughout the policy chain' in order to ensure 'the quality, relevance and effectiveness of EU policies'.⁸ The access of non-institutional partners to European governance has been granted by the later Commission consultation regime (General Principles and Minimum Standards for Consultation of Interested Parties, 2002; Framework for relations with interest representatives: Register and Code of Conduct, 2008).⁹

The participatory trend has also inspired the last, long, and hazardous process of EU institutional reform.¹⁰ Declaration No. 23 on the future of the Union annexed to the Treaty of Nice (2001) addresses the democratic challenge of the EU acknowledging 'the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States'. This Declaration also intended to arise a 'deeper and wider debate about the future of the European Union', demanding the involvement of all interested parties, particularly 'the representatives of national parliaments and all those reflecting

⁵ B. Kohler-Koch, 'The Organization of Interest and Democracy in the European Union', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 257.

⁶ According to the Economic and Social Committee, 'civil society organizations include: the so-called market players; organizations representing social and economic players, which are not social partners in the strict sense of the term; NGOs which bring people together in a common cause, such as environmental organizations, human rights organizations, consumer associations, charitable organizations, educational and training organizations, etc.; community-based organizations (CBOs), e.g., youth organizations, family associations and all organizations through which citizens participate in local and municipal life; religious communities'. Opinion 'The Role and Contribution of Civil Society Organisations in the Building of Europe' (OJ C 329, 17 Nov. 1999, 30).

⁷ 'European Governance: A White Paper' COM (2001) 428 final, 25/7/01.

⁸ Commission 2001, 10.

⁹ Commission Communication, '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; Commission Communication, 'European Transparency Initiative: A Framework for Relations with Interest Representatives (Register and Code of Conduct)', COM (2008) 323 final.

¹⁰ 'The political discourse supporting institutional reforms in the EU is quite evidently inspired by the mainstream debate in academia that the present institutions of liberal democracy are not operating satisfactorily, that a key problem is the lack of civic engagement and, therefore, a main concern is how to promote effective citizenship', Kohler-Koch & Rittberger, *supra* n. 3, 11.

public opinion, namely political, economic and university circles, representatives of civil society, etc.'. One year later, the Laeken European Council adopted a new Declaration on the Future of Europe that insisted again on the democratic challenge facing Europe arguing that EU institutions must be brought closer to their citizens. The Laeken Declaration convened a 'Convention' that pursued the debate opened in Nice and that had to 'pave the way for the next Intergovernmental Conference as broadly and openly as possible'.

The Convention was conceived as a public forum of deliberation that brought together representatives of national governments, members of national parliaments, members of the EP, and Commission representatives. The conventional method fostered a substantial democratic improvement in the drafting of EU's primary law as the plenary sessions of the Convention were held in public and all the contributions were available to the citizens.¹¹ The Laeken Declaration also set up a *Forum* that allowed civil society organizations to provide further inputs into the conventional deliberations.¹² The 160 registered organizations including churches and religious communities, think tanks, local and regional organizations, social partners, professional groups, business associations, academic institutions, and other non-governmental organizations (NGOs) presented a total amount of 1,264 contributions.¹³ The Convention devoted a special plenary session to civil society (24–25 June 2002) where a legal basis for civil dialogue was demanded: 'the safeguarding and promotion of more participatory democracy featured in many statements, as did the inclusion in the Treaty of the principle of a regular dialogue with civil society, which should in practice lead to consultation of the relevant representative organizations at an early stage in the framing of Union legislation'.¹⁴ Even if it could be argued that 'the convention's emphasis on civil society was a rhetorical device to gain legitimacy rather than a genuine move towards a more pluralistic EU democracy',¹⁵ it seems that the contacts between the Convention and the civil society organizations were not absolutely sterile.¹⁶

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¹¹ 'The Convention operated in a fully transparent manner: its meetings were open to the public, and all its official documents were available on its website, which received an average of 47,000 visitors per month, rising to 100,000 in June 2003. In addition it took a number of initiatives to ensure wider participation in its work', European Convention, 'Report from the Presidency of the Convention to the President of the European Council', CONV 851/2003, 3.

¹² 'By June 2002 there were signs that de NGOs were winning their battle and that a more structured dialogue would take place (...). Latest by July 2002 the NGOs, the platforms and the Civil Society Contact Group has established firm connections with a strong segment of Convention Members', N. Beger, 'Participatory Democracy: Organised Civil Society and the "New" Dialogue', *The Federal Trust Online Papers* (2004), n. 9, 5.

¹³ 'The Forum established in accordance with the Laeken declaration received 1264 contributions from NGOs, the business community, academia and others. Meetings were organised with a wide range of groups with an interest in the Convention. These included churches and religious organisations, think tanks, representatives of local and regional organisations, and NGOs. In addition a special plenary session devoted to civil society took place in June 2002', European Convention, 'Report from the Presidency of the Convention to the President of the European Council', CONV 851/2003, 3.

¹⁴ European Convention, 'Notes on the Plenary Session with Civil Society', CONV 167/02, 8.

¹⁵ E. Lombardo, 'The Participation of Civil Society in the Constitution-Making Process', CIDEL Workshop Constitution Making and Democratic Legitimacy in the EU, London, November 2004, 2.

¹⁶ As Hoffmann argues 'although the designs and concepts provided by the Forum participants might not always be identical with the opinion of the majority of the Convention members, establishing a close co-operation and incorporating some of them into the final document would add to the credibility and legitimacy of the Convention and its outputs', L. Hoffmann, 'The Convention on the Future of Europe – Thoughts on the Convention-Model', *Jean Monnet Working Paper* (2002), n. 11, 13.

In fact, the draft of the Treaty establishing a Constitution for Europe (TECE) presented to the European Council in Thessaloniki on 20 June 2003 devoted a whole title to 'The Democratic Life of the Union' that integrated explicit references to the role of European citizens and civil society organizations in the governance of the Union and several participatory devices such as civil dialogue, consultations, and citizens' initiative.

The constitutional character of the TECE prompted the public debate about its ratification and instigated the proliferation of referenda. A significant number of Member States that had always ratified the European treaties exclusively through parliamentary channels assumed that the constitutional re-foundation of the EU needed explicit consent from the national sovereign. Eventually, the rejection of the Constitutional Treaty by French and Dutch peoples caused the failure of the 'constitutional adventure'. After a two-year impasse period, the European Council held in Brussels on June 2007 called for an intergovernmental conference to draft a new treaty that would amend the existing treaties. In order to avoid high-profile debates and more national referenda,¹⁷ it was agreed that the new reform treaty should avoid constitutional references: 'The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution", is abandoned'.¹⁸ Nevertheless, the European Council also agreed that the democratic challenge of the supranational polity could not be avoided. Consequently, the reform Treaty had to replicate the provisions of the Constitutional Treaty on democratic equality, representative democracy, participatory democracy, and the citizens' initiative.¹⁹ As a result, the Treaty signed in Lisbon on 13 December 2007 proposes a new Title II – 'Provisions on Democratic Principles' – that would be included in the consolidated version of the Treaty on the European Union (Articles 9–12 TEU) if the currently ongoing ratification process is completed.

2. REPRESENTATIVE DEMOCRACY IN A UNION OF CITIZENS AND MEMBER STATES

The Lisbon Treaty's 'Provisions on Democratic Principles' tries to integrate all the democratic credentials of the EU. This heterogeneous title proposes an intricate model of democracy that combines several interrelated principles such as political equality, representation, participation, and other principles of good governance such as openness and transparency. As Closa argues, the model of democracy stemming from this title 'is an

¹⁷ De Burca remarks 'the apparently paradoxical choice of EU leaders to respond to the popular discontent with the EU expressed by the negative referenda results in France and the Netherlands, and to the increasing demands for greater democracy, openness and transparency in EU affairs over the last two decades, by retreating to a secretive and executive-dominated process', G. De Burca, 'The EU on the Road from the Constitutional Treaty to the Lisbon Treaty', *Jean Monnet Working Paper 03/08* (2003), 3.

¹⁸ Council of the European Union, 'Amendment of the Treaties on which the Union is Founded: IGC Mandate', 11222/07, 6.

¹⁹ The provisions regarding the social partners and autonomous social dialogue, the European ombudsman, the transparency of the proceedings of Union institutions, bodies, offices and agencies, the protection of personal data, and the status of churches and non-confessional organizations that had been included in the TECE has been transferred to other titles of the TEU and TFEU.

uneasy combination of several models and inputs'.²⁰ If we consider the title's 'chaotic structure', its 'cumulative origin' and the different enforceability of its parts,²¹ it seems that it will require a singular intellectual effort to reconstruct the title as a meaningful whole.²²

In order to find out what EU democracy means we must discard, as von Bogdandy does, 'inappropriate understandings':²³ EU democracy is not founded on the principle of popular sovereignty that has been proclaimed in the national constitutions inspired by social contract tradition. The EU's primary law does not identify a European People acting as a single supranational sovereign and consequently the concept of EU democracy does not imply the self-determination of a people. As Eder and Trenz have stated, 'in the European framework of diversity of already existing and consolidated democracies', the democratization of the EU 'does not straightforwardly lead to the emergence of a new democratic unit, a European demos'.²⁴ The EU coexists with formally sovereign Member States and the emergence of a hypothetical supranational sovereign would pose a serious challenge to the integrity of the national sovereignties granted by the national constitutions and by the EU founding treaties as well.²⁵ Let us consider, by way of illustration, whether or not the will of the 'European people' would prevail over the divergent will of French and/or Dutch people. Eluding a hypothetical conflict of sovereignties, the Provisions on Democratic Principles do not include direct democracy devices such as a euro-wide referendum to state the European popular will. Citizens' involvement in supranational politics cannot be about popular statements but about reason-giving in the public deliberations guided by European institutions. As Reanud Dehousse maintains, what matters in European politics 'is not that the eventual decision can be formally attributed to the will of the citizenry, but rather that those who so wish be given a chance to express their views'.²⁶

The Provisions on Democratic Principles evade references to the European People and identify a Union of citizens and Member States whose 'functioning shall be founded on representative democracy' (Article 10.1 TEU). The European Citizens are 'directly

²⁰ C. Closa, 'European Citizenship and New Forms of Democracy', in *Genèse et destinée de la Constitution Européenne: commentaire du Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir*, eds G. Amato, H. Bribosia & B. de Witte (Brussels: Bruylant, 2007), 1050.

²¹ *Ibid.*, 1057.

²² A. von Bogdandy, 'A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 35.

²³ von Bogdandy, *supra* n. 22, 35.

²⁴ K. Eder & H.-J. Trenz, 'Prerequisites of Transnational Democracy and Mechanisms for Sustaining It: The Case of the European Union', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 179.

²⁵ P. Poires Maduro argues that the European Union cannot assume a supreme constitutional authority, a popular *pouvoir constituant*, because 'it would entail replacing the national polities for the European polity and it could destroy the present plural relationship between the European and national constitutions', M. Poires Maduro, 'How Constitutional Can the European Union Be? The Tension between Intergovernmentalism and Constitutionalism in the European Union', *Jean Monnet Working Paper* 5/04 (2004), 38.

²⁶ R. Dehousse, 'The Legitimacy of the European Governance: The Need for a Process-Based Approach', *Cahiers Européens de Sciences Po* (2002), n. 1, 26.

represented at Union level in the EP' (Article 10.2 TEU). The EP is therefore composed of 'representatives of the Union's citizens' (Article 14.2 TEU) who enjoy the right to vote and to stand as candidates in European elections. It should be noted that the EP will no longer represent 'the peoples of the States brought together in the Community' as the current version of the Treaty establishing the European Community declares (Article 189 TEC). Considering that the EP is the only directly legitimated European institutions, the Lisbon Treaty perseveres in the classic strategy of 'democratization through parliamentarization'. The EP will again see how its role in the law-making process is enhanced – particularly through the extension of co-decision procedure to new policy areas – and it will see important new powers emerge over the EU budget and international agreements. The article devoted to representative democracy also remembers the democratic legitimacy of the European Council acknowledging that the Heads of State or Government representing Member States are 'themselves democratically accountable either to their national Parliaments or to their citizens' (Article 10.2 TUE).

Following the mandate of the European Council, the 2007 IGC included a new general article acknowledging the role of the national parliaments in EU policy-making. The formal recognition of the national parliaments' active contribution to 'the good functioning of the Union' (Article 12 TEU) implies that EU democracy has to definitely be considered as a 'multilevel democracy' that, as Auel and Benz argue, 'comes about in strategic interactions between national and European institutions, among which the power to set the agenda, to make decisions, as well as to veto these decisions are distributed'.²⁷ Since the nineties, the national parliaments, as representatives of the multiple European *demoi*, have been seen as fulfilling an ever more important role in European governance.²⁸ The Protocol on the role of national parliaments, annexed to the EC and EU Treaties in Amsterdam, contained obligations imposed on the Commission, the Council of Ministers, and the Court of Auditors in terms of their role in the distribution of information. During the Convention on the future of Europe, it was broadly accepted that the national parliaments should also be entitled to have a say in the revision procedures of the Treaties, to be notified of application accessions and, more importantly, to control the application of the principle of subsidiarity allowing national parliaments to intervene in the early stages of the legislative process.²⁹ The European Council mandate to the 2007 IGC not only announced a new general article summarizing all the national parliaments' prerogatives in EU policy-making, but also stated that the role of national parliaments will be further enhanced through a reinforced control mechanism

²⁷ K. Auel & A. Benz, 'Expanding National Parliamentary Control: Does It Enhance European Democracy?', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 71.

²⁸ 'From the 1970s onwards, it was the EP which most prominently featured in institutional reform initiatives to create a democratic Europe. This changed in the mid-1990s when the 1996 Intergovernmental Conference in Turin included not only the topic of an extension of the EP's powers, but also the participation of national parliaments as means of democratizing the EU in the negotiation mandate for the Treaty of Amsterdam', Auel & Benz, *supra* n. 27, 57.

²⁹ D. Curtin, 'A Comment on Rittberger and Lord', in *Debating the Democratic Legitimacy of the European Union*, ed. B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 160.

of subsidiarity – modified according the Protocols on national Parliaments and on subsidiarity and proportionality.³⁰

The article on representative democracy also mentions the role of the European Political parties in the democratic life of the EU arguing that they ‘contribute to forming European political awareness and to expressing the will of citizens of the Union’ (Article 10.4 TEU). This provision brings no novelty to EU primary law considering that the European political parties had already been recognized as an ‘important factor for integration within the Union’ since the Treaty of Maastricht (Article 191 TEC). In addition, the rules governing political parties at European level and the rules regarding their funding have been settled by the Regulation (EC) No. 2004/2003 of the EP and of the Council of 4 November 2003. However, the European political parties continue to have no meaningful role in the integration process and are incapable of articulating a transnational political discourse.

3. A LEGAL FRAMEWORK FOR PARTICIPATORY DEMOCRACY IN THE EU

As we have noticed above, the Provisions on Democratic Principles refer to the important role of European citizens and civil society organizations in the EU governance and announce a set of mechanisms granting access to EU policy-making. Citizens’ participation in supranational politics is conceived in this title as an opportunity to present arguments in public deliberations guided by European institutions. Warleigh underlines the significance of these provisions arguing that ‘the establishment of participatory democracy as one of the EU’s normative bedrocks is a potentially important step because it makes clear that representation, that pillar of liberal democracy, cannot be the sole means to a legitimate regime in the EU’.³¹

Participation of citizens and civil society organizations in EU governance is not conceived in these provisions as an enforceable subjective right. As Closa argues, ‘the kind of entitlements regulated convey an approach that is very much focused on providing guidelines for the behaviour of the institutions of the Union and less so on empowering

³⁰ ‘The period given to national parliaments to examine draft legislative texts and to give a reasoned opinion on subsidiarity will be extended from 6 to 8 weeks (will be modified accordingly). There will be a reinforced control mechanism of subsidiarity in the sense that if a draft legislative act is contested by a simple majority of the votes allocated to national parliaments, the Commission will re-examine the draft act, which it may decide to maintain, amend or withdraw. If it chooses to maintain the draft, the Commission will have, in a reasoned opinion, to justify why it considers that the draft complies with the principle of subsidiarity. This reasoned opinion, as well as the reasoned opinions of the national parliaments, will have to be transmitted to the EU legislator, for consideration in the legislative procedure. This will trigger a specific procedure: before concluding first reading under the ordinary legislative procedure, the legislator (Council and Parliament) shall consider the compatibility of the legislative proposal with the principle of subsidiarity, taking particular account of the reasons expressed and shared by the majority of national parliaments as well as the reasoned opinion of the Commission; If, by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration’, Council of the European Union, ‘Amendment of the Treaties on which the Union is founded: IGC Mandate’, 11222/07, 7.

³¹ A. Warleigh, ‘On the Path to Legitimacy? A Critical Deliberativist Perspective on the Right to the Citizens’ Initiative’, in *Governance and Civil Society in the European Union: Normative Perspectives (vol. 1)*, eds C. Ruzza & Della Sala (Manchester: Manchester University Press, 2007), 64.

the citizens'.³² For instance, the 'right' of every citizen 'to participate in the democratic life of the Union' is phrased so broadly that it only acquires relevant meaning when it is related to the mandate contained in the very same paragraph: 'Decisions shall be taken as openly and as closely as possible to the citizen' (Article 10.3 TUE). Thus, this provision aims to guarantee that institutions, bodies, and agencies of the Union act with the greatest possible respect to the principle of openness – an essential prerequisite for citizens' participation and administrative accountability. The second subparagraph of Article 1 TEU had already enshrined the concept of openness in order to create an ever closer union among the people of Europe. The principle of openness is closely related to the right of access to EP, Council and Commission documents (Article 255 TEC) whose exercise is subjected to the principles, conditions, and limits defined in the Regulation No. 1049/2001 of the EP and the Council of 30 May 2001. Recently, the Judgment of the European Court of Justice of 1 July 2008 (*Turco v. Council*) has also granted access to the opinions of the Council's legal services relating to any piece of legislation. We should also be aware of the European Transparency Initiative,³³ a remarkable strategy launched by the European Commission to improve openness and accessibility to European governance.

Article 11.1 TEU is another example of a general principle addressed to European institutions: 'Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action'. This ambiguous provision urges European institutions to conceive additional public channels of communication beyond the traditional right to petition to the Parliament, the right to apply to the Ombudsman, or the right to write to any institution in an official language and to receive a response in the same language (Article 21 TEC), thus allowing individuals and civil society organizations to comment more spontaneously on their initiatives. In this article, participation seems to be mainly conceived as a wide-open unidirectional communication from citizens towards the institutions since it does not mention the requirement to provide feedback. The procedures for making views heard must be determined by European institutions. Information and communication technologies have an important role in this sense. Interactive platforms for information and debate such as 'Your Voice in Europe',³⁴ 'Debate Europe',³⁵ and 'Citizens' Agora'³⁶ have been put into practice on the EU's EUROPA Website allowing citizens to give opinions in digital discussion *fora* and to participate in open consultations.

All the provisions on participatory democracy must be interpreted in accordance with the principle of political equality: 'In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its

³² Closa, *supra* n. 20, 1053.

³³ Commission Green Paper, 'European Transparency Initiative' COM (2006) 194 final; Commission Communication, 'Follow-up to the Green Paper "European Transparency Initiative"' COM (2007) 127 final.

³⁴ <<http://ec.europa.eu/yourvoice/>>.

³⁵ <http://europa.eu/debateeurope/index_en.htm>.

³⁶ <<http://forum.agora.europarl.europa.eu/jiveforums/category.jspa?categoryID=9>>.

institutions, bodies, offices and agencies' (Article 9 TUE). Political equality is formulated here as a non-discrimination mandate inferred from the right to equality before the law and the interdiction of discrimination proclaimed in the Charter of Fundamental Rights (Articles 20 and 21). The provision on equality guarantees that European citizens will enjoy equal access to participatory spaces and ensures an equitable treatment of participants. Political equality also places a responsibility on institutions to equalize the information and resources available to different participants in policy making. Article 9 TUE reiterates Article 17 TEC, stating that every national of a Member State shall be a citizen of the Union and that European citizenship is additional to national citizenship and does not replace it.

4. CIVIL DIALOGUE AND CONSULTATIONS: PARTICIPATORY GOVERNANCE INVOLVING CIVIL SOCIETY ORGANIZATIONS

The commitment of European institutions to promote participatory democracy also entails the active promotion of 'an open, transparent and regular dialogue with the representative associations and civil society' (Article 11.2 TUE). Civil dialogue is something more than the mere communication of opinions. It demands an argumentative effort from citizens (discursive participation) and an institutional compromise of reciprocity. Article 11.2 seeks to engage all European institutions in civil dialogue; each institution must determine, then, which appropriate shared spaces for deliberation are to be used. The Commission has traditionally engaged in dialogue through external consultations which are expressly encouraged in Article 11.3 TUE. The EP has channelled civil dialogue primarily through informal public hearings. The Rules of Procedures only consider the celebration of this kind of meetings when considering petitions (Rule 193). Annex IX of the Rules of Procedures regulates the access of citizens and members of 'interest groups' to EP and establishes a code of conduct to be respected. This internal regulation, however, does not grant regular contacts and reciprocal communication. The culture of dialogue of the Council is narrower. Although some NGOs from the 'Social Platform' have been invited to the informal meetings of the Council for Employment, Social Policy, Health and Consumer Affairs (EPSCO),³⁷ it seems that these kinds of sporadic concessions are far from the idea of maintaining a regular dialogue. Even if Article 11.2 TEU is addressed to all institutions, it is still not clear how the Court of Justice, that exercises its jurisdiction in accordance to the principles of independence and impartiality, should consider the arguments provided by civil society.

Taking into account that civil dialogue implies reciprocity, the inclusion of non-institutional actors in public deliberation cannot be unlimited: 'If such a real dialogue

³⁷ 'For example, the Portuguese invited the Social Platform to send a delegation to an informal Social Affairs and Employment Council Meeting (2000) and gave them speaking rights alongside Ministers and representatives of trade unions; the French, the Swedish and the Belgians repeated the invitation with some variations, but it was a consultation by grace and favour. No such offer was made by the 2002 Spanish Presidency, but has since then been picked up again, only to be interrupted by the Dutch now', Beger, *supra* n. 12, 4-5.

implies a right of the organization to receive a reasoned answer to the suggestions it puts forward, it is manageable only insofar a selection is made among the organizations'.³⁸ Consequently, Article 11.2 TUE gives priority to 'representative associations' of European civil society. The institutions must define the impartial criteria of representativeness that could help identify non-institutional partners. The selection of non-institutional partners is, in fact, a widespread practice in the Member States in the field of social dialogue (for instance, the selection of the most representative trade unions). Regardless, the priority given to representative associations must be based on objective differences and cannot lead to discriminatory practices that would violate the principle of democratic equality. As de Schutter has maintained, 'the criteria of representativeness should vary from forum to forum, although some such criteria of representativeness should be common to all the organizations enjoying such a consultative status'.³⁹ The European Economic and Social Committee has suggested several criteria that could be adopted by other institutions: 'In order to be eligible, a European organization must exist permanently at Community level; provide direct access to its members' expertise and hence rapid and constructive consultation; represent general concerns that tally with the interests of European society; comprise bodies that are recognized at Member State level as representative of particular interests; have member organizations in most of the EU Member States; provide for accountability to its members; have authority to represent and act at the European level; be independent and mandatory, not bound by instructions from outside bodies; be transparent especially financially and in its decision-making structures'.⁴⁰ Although institutions will give priority to 'representative associations' of European civil society, civil dialogue should also include the inputs given by national, regional, and local associations,⁴¹ as well as non-organized civil society agents (ad hoc organizations, expertise, civil servants). Finally, we should distinguish between civil dialogue which is open to all areas of Union action and the European social dialogue with management and labour forces that is limited to the scope of European social policies and that may lead to contractual relations, including agreements (Article 139 TEC).

The European Commission is particularly bound to engage in dialogue through 'broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent' (Article 11.3 TUE). Consultation, though, is not a new practice proposed by the Lisbon Treaty. In fact, the European Commission 'has a long tradition of consulting interested parties when formulating its policies. It incorporates external consultation into the development of almost all its policy areas'.⁴² In addition,

³⁸ O. De Schutter, 'Europe in Search of Its Civil Society', *European Law Journal* 8, no. 2 (2002): 211.

³⁹ *Ibid.*, 215.

⁴⁰ Economic and Social Committee, Opinion on 'European Governance – A White Paper' of 20 Mar. 2002, CES 357/2002.

⁴¹ 'Civil dialogue might also extend beyond the realm of the dialogue between transnational European civil society and the EU institutions but also include a multilevel dimension incorporating dialogue at national and sub-national levels', K.A. Armstrong, 'Rediscovering Civil Society: The European Union and the White Paper on Governance', *European Law Journal* 8 (2002): 122.

⁴² Commission Communication, '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, 3.

Protocol No. 7 on the implementation of the principles of subsidiarity and proportionality annexed to the Amsterdam Treaty, urged the Commission to 'consult widely before proposing legislation and, wherever appropriate, publish consultation documents'. The Commission has also been bound to consult management and labour forces before submitting proposals in the social policy field (Article 138 TEC).

In the White Paper, the Commission stressed its commitment to the culture of consultation and dialogue. It recognized the need to rationalize ad hoc consultation 'to make it more effective and accountable both for those consulted and those receiving the advice'. The consultation procedure was consequently ordered by the Commission Communication: 'Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties'. This Communication defines external consultations as 'the processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission'.⁴³ The general principles of consultation correspond exactly with the principles of good governance announced by the White Paper: Participation, openness, accountability, effectiveness, and coherence. The Commission wants to make a clear distinction between open and focused consultation. During the early phase of open consultation, the Commission intends to maintain 'an inclusive approach' to ensure that 'every individual citizen, enterprise or association will continue to be able to provide the Commission with input'. In addition, the Commission seeks intense involvement of 'interested parties' in the definition of its policies. As de Schutter has pointed out, 'what is insisted upon is the need for expert input and direct feedback from those segments of civil society immediately affected by the policies in discussion: it is then the specific expertise of the NGOs and other actors of the civil society which should be better devised and more precisely focused'.⁴⁴ Particularly, the minimum standards identify the consultation target groups with 'those affected by the policy, those who will be involved in implementation of the policy, or bodies that have stated objectives giving them a direct interest in the policy'. It is important to consider that the consultation regime acknowledges the importance of the input from 'representative European organizations' but does not consider the issue of representativeness at European level as a relevant criterion in the selection of interested parties: 'In many cases, national and regional viewpoints can be equally important in taking into account the diversity of situations in the Member States. Moreover, minority views can also form an essential dimension of open discourse on policies'. The consultation standards also determine a minimum deadline for consultation, the obligation to report on the results, the obligation for an appropriate reaction to comments received, and the establishment of a single access point for all the Commission's public consultations. In the White Paper, the Commission also demanded a new relationship of mutual responsibility with interested parties that have to follow

⁴³ Commission Communication, '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, 15–16.

⁴⁴ De Schutter, *supra* n. 38, 204.

the principles of good governance themselves.⁴⁵ The consultation regime has accordingly been completed with a Framework for Relations with Interest Representatives (Register and Code of Conduct). This Communication requires the register of interest representatives and defines the activities for which registration is expected ('activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions'⁴⁶). The registered organizations must agree to comply with a basic code of conduct.⁴⁷

Even though the clarification of the consultation regime must be considered as a further step towards good governance, it should be noted that the norms governing Commission consultations do not confer subjective rights to interested parties. The principles and rules proposed by the consultation regime are very flexible, allowing the different services of the Commission to adapt them to their respective areas. The Commission has avoided an 'over-legalistic approach' in its consultation since it would be 'incompatible with the need to introduce policies in due time and with public expectations that the European institutions dealing with issues of substance rather than focus on the procedures'.⁴⁸ The Commission has thus made a clear distinction between consultation procedures and the law-making process defined by the EU primary law. The European Court of Justice should in the future determine to what extent the inobservance of these procedural practices could be challenged by civil society organizations as an infringement of the principles of participatory democracy.

Participation by means of civil dialogue and consultation is mainly reserved for collective actors and normally depends on the possession of some quality or resource.⁴⁹ Moreover, empirical research⁵⁰ indicates that 'profit-making groups outnumber non-profit groups by a very significant margin, and their resources are much larger'.⁵¹ As a result, it has been commonly argued that participatory governance remains 'fundamentally elitist,

⁴⁵ Commission, 'European Governance: A White Paper', COM (2001) 428 final, 25/7/01, 15.

⁴⁶ 'The definition does not include activities concerning legal and other professional advice; activities of the social partners in the social dialogue when these actors engage in activities related with the role conferred on them by the Treaties', Commission Communication, 'European Transparency Initiative: A Framework for Relations with Interest Representatives (Register and Code of Conduct)', COM (2008) 323 final.

⁴⁷ 'Interest representatives shall always: (1) identify themselves by name and by the entity(ies) they work for or represent; (2) not misrepresent themselves as to the effect of registration to mislead third parties and/or EU staff; (3) declare the interests, and where applicable the clients or the members, which they represent; (4) ensure that, to the best of their knowledge, information which they provide is unbiased, complete, up-to-date and not misleading; (5) not obtain or try to obtain information, or any decision, dishonestly; (6) not induce EU staff to contravene rules and standards of behaviour applicable to them; (7) if employing former EU staff, respect their obligation to abide by the rules and confidentiality requirements which apply to them', Commission Communication, 'European Transparency Initiative: A Framework for Relations with Interest Representatives (Register and Code of Conduct)', COM (2008) 323 final.

⁴⁸ Commission Communication, '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, 10.

⁴⁹ H. Heinlet, 'Participatory Governance and European Democracy', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 225.

⁵⁰ 'In 2002, the official register of the Commission included 709 organisations in industry, the services professions, and agriculture and only 149 diffuse and other interests (e.g., artisans and consumers). Moreover, in contrast to business organisations, movements active at the EU level are usually loose and poorly staffed networks', D. Della Porta, 'The Europeanization of Protest: A Typology and Empirical Evidence', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 197.

⁵¹ P. Craig & G. de Burca, *EU Law, Text, Cases and Materials* (Oxford: Oxford University Press, 2003), 165.

characterized by a sort of self-appointed enlightened elite'.⁵² Consultation and civil dialogue could strengthen the contribution of functional interest representation to supranational governance but, as Magnette argues, do not 'guarantee a progress of enlightened understanding in the citizenry at large'.⁵³ Hence, these patterns of communication do not represent a definitive answer to the democratic challenge facing the EU.

5. THE CITIZENS' INITIATIVE: A CHANCE FOR WIDESPREAD POLITICAL PARTICIPATION

Considering that further democratization depends upon widespread political participation, we must welcome the provision on European citizens' initiative – a device inspired by national constitutionalism that would allow every single national from the Member States to trigger the EU law-making process: 'Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties' (Article 11.4 TEU).⁵⁴ Warleigh considers that 'the formal granting of such ability to citizens, acting collectively, would be unparalleled in the history of international and would thus have potentially enormous significance'.⁵⁵ A positive account of the citizens' initiative would remark that such an initiative allows participation from the bottom up: citizens should not expect an invitation from the Commission and could play an active role in opening deliberations about a particular legislative request.⁵⁶ Citizens' initiative is thus an opportunity to set the legislative agenda introducing unattended collective claims into the decision-making process. By means of citizens' initiative, nationals from different Member States could identify common interests and transnational demands. Citizens' initiative could serve, then, to encourage political debate beyond domestic affairs and to construct supranational discourses in an emerging European public space. In order to promote a particular proposal, organized civil society would search for transnational alliances that would contribute to the development of European networks. On the other hand, we should avoid high expectations concerning the democratic potential of the citizens' initiative. As well as other analogous

⁵² M. Greven, 'Some Considerations on Participation in Participatory Governance', in *Debating the Democratic Legitimacy of the European Union*, eds B. Kohler-Koch & B. Rittberger (Lanham, MD: Rowman & Littlefield, 2007), 241.

⁵³ P. Magnette, 'European Governance and Civic Participation: Can the European Union Be Politicised?', *Jean Monnet Working Papers* (2001), n. 6, 32–33.

⁵⁴ This provision was included in the draft Constitution for Europe during the very last session of the Convention. The proposal was presented by conventional Jürgen Meyer: 'The effect of the above proposal is to bring Europe closer to the people, as Laeken recommended. It represents a large step in the democratisation of the Union. It will extend the existing right of petition to a right of the citizens to present legislative proposals to the Commission of the EU. The Commission has then to decide whether it will take legislative activity or not. It is very important that the threshold for the signatures that are to be gathered for the European Citizens' Legislative Submission is not too high. A high threshold interferes with the process and effectively allows only powerful organisations the possibility of securing the required signatures', European Convention, CONV 724/03.

⁵⁵ Warleigh, *supra* n. 31, 64.

⁵⁶ 'The CI could give everyday citizens the chance to bring completely new ideas into the EU policy-making process because in the CI it is citizens who take charge and approach the commission, rather than the commission looking for tame interlocutors to beef up the perceived legitimacy of its proposals', Warleigh, *supra* n. 31, 66.

institutions from national constitutionalism such as the Austrian *volksinitiative*, the Italian *iniziativa legislativa del popolo*, or the Spanish *iniciativa legislativa popular* that, in fact, do not play a significant role in national politics,⁵⁷ the European citizens' initiative is similarly subjected to the political will of the institutions. The citizens' initiative would constitute just a preliminary step in the law-making process which is always formally launched by the Commission that preserves the monopoly of the legislative initiative. In addition, the European legislature would always be free to reject a legislative draft proposed by European citizens.

The legal implementation of the citizens' initiative is addressed to the European legislature. As Article 24 of the Treaty on the Functioning of the European Union (TFEU) states, 'the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative'. This regulation should contain a set of subjective political rights. In particular, the regulation must grant European citizens the right to sign a citizens' initiative – including EU citizens residing in a Member State other than their nationality – and establishes the conditions for the exercise of this right. The regulation will have to assign a legal status to the sponsors of the initiative who will likely have to constitute a committee. The sponsor committee will submit the legislative proposal to the European Commission at an early phase of the process, will manage the signature campaign, and will represent the citizens before the European institutions during the whole law-making process. The sponsor committee should enjoy a set of procedural rights that guarantee its participation throughout the process.

Before the circulation of the citizens' initiative, the sponsors should present a preliminary legislative proposal, which could be drafted in articles or phrased in general terms, to the European Commission. The Commission would then check that the initiative complies with EU primary law and that it is confined to its legislative initiative competences. In addition, the regulation should envisage a judicial review against a hypothetical rejection. The Commission should also define both the suitable kind of legal act to draft the proposal ('regulation', 'directive', or 'decision') and the appropriate legislative procedure. Auer argues that the Commission should be allowed 'to change the title, the form and the language of the initiative before it gives its formal assent'.⁵⁸

The official forms containing the proposed legislative act would then circulate during a signatures' campaign. The regulation on citizens' initiative should entrust the Commission with the management of a digital register on the Internet where European citizens could formally endorse the proposal. This Website could also allow the downloading of official forms to be used for the collection of handwritten signatures. In addition, it would be desirable that the Commission provides the sponsors with adequate financial support to prompt the signature campaign. Article 11.4 TEU demands that the

⁵⁷ Extensive empirical research about citizens' initiative in Spain in V. Cuesta, *Participación directa e iniciativa legislativa del ciudadano en democracia constitucional*, ed. Thomson-Civitas.

⁵⁸ A. Auer, 'European Citizens' Initiative', *European Constitutional Law Review* (2005), n. 1, 84.

signatures supporting the initiative correspond to nationals from a significant number of Member States. According to Auer, the territorial distribution of signatures could be determined either through a maximum number of signatures coming from a Member State or through a minimum number of Member States contributing with a minimum number of signatures.⁵⁹ Once the signature campaign is over, the Commission would verify that the gathered signatures correspond to nationals from Member States entitled to sign the citizens' initiative. The Commission should then decide within a reasonable deadline and attending political reasons whether the citizens' initiative should be formally submitted to the EU legislature. In case of rejection, the Commission should render a detailed opinion. Closa also has suggested 'deadlines for the Commission response and the necessity of motivation in accepting and/or rejecting petitions'.⁶⁰

6. CONCLUSION

As we have seen, the regulation of the procedures and conditions required for a citizens' initiative will be addressed to the European legislature if the Lisbon Treaty is finally ratified. The significance of the citizens' initiative in the democratic life of the EU will certainly depend on its legal implementation, so it might well be convenient to consider the modest suggestions made in this article in order to design a relatively functional device. With respect to civil dialogue and consultations, we claim that these techniques of public deliberation would better contribute to democratic upgrading if they are organized in a transparent and open way, including all the voices concerned by a particular policy. Additional efforts must be made by the European institutions to take account of the inputs given by national, regional, and local associations, as well as non-organized civil society agents. It is also clear that the influence of the participatory devices envisaged in the Lisbon Treaty will not only depend on the receptive attitude from institutions towards reasonable political demands but also on the ability of civil society organizations to foment public debate and to encourage citizens to become actively involved in European politics. Finally, we must conclude that participatory governance is not a definitive solution to improve the democratic quality of EU: participation of civil society organizations in the policy-making can never replace widespread political participation through representation. Direct participation and political representation should thus be seen as complementary to democratize the EU.

⁵⁹ 'The distribution requirement can be established by different methods. One method is to define a maximum number of signatures coming from one Member State, e.g., 25%, meaning that additional support from one state would have no legal value and that at least four states must be implicated. Another method would determine a minimum number of states, e.g., eight, contributing with a minimum number of signatures, e.g., 50,000, thus allowing one highly motivated state to produce as many as 650,000 signatures', Auer, *supra* n. 58, 81.

⁶⁰ Closa, *supra* n. 20, 1056.

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