THE JEAN MONNET PROGRAM

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Jean Monnet Working Paper 10/03

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HOW DO OUR JUDGES CONCEIVE OF DEMOCRACY?
THE DEMOCRATIC NATURE OF THE COMMUNITY DECISION-MAKING PROCESS UNDER SCRUTINY OF THE EUROPEAN COURT OF JUSTICE

NYU School of Law • New York, NY 10012

ISSN 1087-2221

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ABSTRACT

This paper examines the ECJ case law on the democratic nature of the community decision-making process and is an attempt to draw a *file rouge* from this line of judgements, even if the fact that the Court fluctuates "between highs and lows", following the path not only of specific individual cases, but also of the institutional historic moment, makes this task a difficult one.

The paper shows us that the democratic principle used by the ECJ judges seems, at least initially, to need to rediscover itself in the constitutional traditions common to the member States. A sign of that osmosis occurring between the Community level and the national one: the Court finds supports in the classical theory of representative democracy as the living experience of the legal orders of the Member States. This study also argues however that, at the moment, the Court doesn't linger too much – except in rhetoric – on the problematic of popular representation but, rather, focuses its attention on the principle of institutional balance limiting, in the end, the democratic process to within the boundaries of the institutional relationships.

The starting point for the democratization of the Community decision-making process seen in the jurisprudence of the ECJ has been until now, the strengthening of the role of the European Parliament. It is clear however that the ECJ does not view this as sufficiently encompassing and continues to seek alternatives to fill the perceived democratic deficit. It is these alternatives which the author will explore and consider more fully.

"...except for the European Union
no transnational structures exists
with even the semblance of a democratic process"[1]

HOW DO OUR JUDGES CONCEIVE OF DEMOCRACY? THE DEMOCRATIC NATURE OF THE COMMUNITY DECISION-MAKING PROCESS UNDER SCRUTINY OF THE EUROPEAN COURT OF JUSTICE

1. A THEME DEAR TO THE COURTS: INSTITUTIONAL BALANCE AS A FUNDAMENTAL PART OF THE EUROPEAN DEMOCRACY

On October 12, 1993, the German Constitutional Court, with particular audacity, raised the problem of democracy in the context of the European community (*Maastricht Urteil*). On that occasion, the German Supreme Court investigated – perhaps for the first time before a Court - the democratic nature of the community decision-making process, questioning in particular the continued transferal of competence from the federal level to the supranational level and the possible democratic deficit inherent in this: if in fact the real European legislative body is the Council leaving the European Parliament with merely consultative powers, at first glance it would appear that the democratic principle wavers.[2]

A more recent sentence from the Court in Strasburg (Matthews case, February 18, 1999) changes the thrust of the argument, sustaining that it is not possible to consider the European system of government according the traditional categories of national public law, with their more or less strict divisions of power, and in particular with classic distinction between executive and legislative powers. The *sui generis* nature of the

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[*] *I am most grateful to Professor Weiler and his wonderful staff for their kindness and for providing me with a really stimulating and enjoyable working environment at NYU.*

[1] DAHL R. A., *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, Pol. Sc. Quart., 1994, 31-32.

[2] The doubt that the German Constitutional Court displays in regard to the violation of the democratic principle in the process of Community integration stems from the original terms of the Brussels forms of government and from the fact that European Parliament is not capable of substituting - at least at the moment - the functions assumed by national parliaments: "*Damit würden das demokratische Prinzip und das Erfordernis der Gesetzmäßigkeit der Verwaltung in ihr Gegenteil verkehrt, weil die Verwaltung, die die Gesetze vollziehe, sich die Gesetze selbst gebe*." BVerfGE 89, 155 (166). It's interesting to stress, also, the particularity of this judgment, since it was a *Verfassungsbeschwerde*, i. e. a direct claim of a german citizen assuming the violation of the democratic principle.

European Union is reflected first and foremost, in the very structure of the European decision making process, established by the strict co-participation of the European Parliament, the Council, and the Commission.[3] In a system so articulated, the Strasburg judge believes, while recognizing the evident lack, that the role of Parliament is essential (and sufficient) with a view to guaranteeing the democratic principle of the European Union: starting from the fact that Parliament derives its legitimacy from direct elections held under universal suffrage, this:

> "*must be seen as that part of the European Community structure which best reflects concerns as to 'effective political democracy'*" [4]

It certainly cannot be said that the Judge of Luxembourg, for his part, is new to this theme. On the contracty, having - perhaps more silently than the courts- contributed directly to the configuration of a more solid parliamentary institutional position in the European government: if in such cases the impetus is (as often is) the protection of correct legislative procedure in its multiple aspects and, by extension the guarantee of the role of Parliament in representing the peoples of Europe, the reasoning appears to be rather the juridical application of democratic principle. The cardinal principle of such a series of decisions, around which the defense of democratic principle revolves, is the existence and the maintenance of institutional balance, which constitutes the true factor guaranteeing the realization of European democracy, analogously to what happens at the national level through the principle of the separation of powers. [5]

Both similarities and differences, therefore, link the affirmations of the European Supreme Courts. It is immediately evident that, in the Courts, the debate on the state of democracy in the Union finds its ideal referent in the role of Parliament, a sign, above all, of juridical continuity with the parliamentary traditions of the member states of the European Community. Consequently, this easily explains the perplexity perceived by the highest Courts regarding the excessive imbalance of the decision-making pole in the area specific to executive power - the so-called "executive dominance issue" - which does not seem particularly compatible with the classical Parliamentary model.

Dwelling in a more pointed fashion on the ample case law of the European Court of Justice can, therefore, constitute a helpful angle from which to understand the evolution of the affirmation of democratic principles in the European Union. This is true also because, often, jurisprudential affirmations appear to prefigure those normative

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[3] ECHR, February 18, 1999, *Matthews v. United Kingdom*, par. 48

[4] Id., to par. 52; the same judgment concludes: "The Court thus finds that the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty, and is sufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the 'legislature' of Gibraltar for the purposes of Article 3 of Protocol No. 1." (par. 54)

[5] According to RESS G., *Democratic Decision-Making in the European Union and the Role of the European Parliament*, in CURTIN D. e HEUKELS T., *Institutional Dynamics of European Integration*, Essays in honour of H. G. Schermers,Vol. II, Dordrecht, Martinus Nijhoff Publishers, 1994, 159, the role of the parliamentary body in representing the peoples and the respect for the separation of powers are the basis of democracy, in that diverse juridical traditions assimilated these attributes in different ways.

reforms to which the treaties have conformed throughout the history of European integration.[6]

In this sense, the Court undoubtedly appears as a privileged "political" agent in the study of European constitutional evolution.[7]

Within the guarantee of institutional balance, a singular axis is formed between the Court and the European Parliament, by which the latter identifies the judge of Luxemburg as the subject invested with the power to defend his prerogative as the democratic body *par excellence* in the European government. That Parliament (often) sees in the Court an ally is surely a peculiar hallmark of the Community organization and shows the limits of comparison with the typical parliamentary legal traditions of the Member states.[8]

At times the motivations of Parliament in calling the Court to the protection of its role sound rhetorical and in cases like these, in which the affirmation is more a question of style rather than inherent to the real configuration of the case, the Community judge

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[6] It will be clear in our analysis that the European Court of Justice is particularly aware of the historical context within which a given controversy inserts itself. This statement corresponds to an observation of a general nature according to which "our very concern with democracy and legitimacy cannot be considered in isolation from the integration forces which have generated and shaped the community" (CRAIG P. e DE BURCA G., *The Evolution of EU Law*, Oxford University Press, Oxford, 1999, 50).

[7] That the Court may be numbered among so called political subjects is similarly a well-known problem for the Member States: let's give an example. In 1992, the text of the Maastricht Treaty was debated in Germany in front of the *Bundestag* in the course of planned ratification procedures and was ratified by a wide majority of delegates: thus, there did not appear to be significant obstacles to a tighter European integration in German territory. Later, however, it was learned that the *Bundesverfassungsgericht* was occupied with the Treaty, considering a direct constitutionality action (*Verfassungsbeschwerde*), and at that point, the President of the Federal German Republic decided to suspend the ratification procedure and await the Court's decision. What can we learn from this case? That, if we want to really enter into the merits of the democratic debate in Europe, judiciary power appears to be, at least at the moment (and if you will, paradoxically), a privileged interlocutor, a concrete starting point for understanding the affirmation of democratic principle in European integration. And in fact one may note how the intervention of jurisdictional power in this arena may be strongly required, and above all in the workings of the Parliamentary body, thus revealing an "institutional" dimension in the concrete case. We should also add that such an intervention is not only appreciated by other institutions, but in a certain sense is requested by the very nature of the ambitious integration program that in order to succeed needs the support of all the governing bodies, not excluding the judiciary: ZULEEG M., *Demokratie durch Rechtsprechung*, in KRÄMER L., MICKLITZ H.-W. e TONNER K. (eds.), *Law and Diffuse Interests in the European Legal Order,* Liber amicorum Norbert Reich, 1997, 1: "*die Idee, die rechtssprenchende Gewalt für ein öffentliches Interesse nutzbar zu machen, drängt sich auf*." DEHOUSSE R., *Integration Through Law Revisited: Some Thoughts on the Juridification of the European Political Process*, in SNYDER F. (eds.), *The Europeanisation of Law: the Legal Effects of European Integration*, Oxford, Hart Publishing, 2000, 20: "To an increasing extent, the ECJ has thus been called to set itself up as an arbiter of institutional conflicts, something that naturally exposes it to more sustained attention by political actors and public opinion."

[8] For a critique of the utilization of the parliamentary model for European government, see DEHOUSSE R., *Constitutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue*, in HAYWARD J., *The Crisis of Representation in Europe*, F. Cass Ed., London, 1995, 134: "this model, because of its majoritarian aspects, is ill-adapted to the needs of a hybrid creature like the EC, characterised by great diversity and by strong national feelings." For an accurate analysis of European Parliamentalism today see DANN P., *Looking through the Federal Lens: The Semi-parliamentary Democracy of the EU*, Jean Monnet Working Paper 5/02, in particular in the moment in which he contends that the special form of parliamentary democracy that exists today in Europea must be read within the structure of executive federalism, according to "This system of an executive federalism, shaped most fundamentally by its interwoven competencies, entails a need for executive cooperation and consensual decision-making." (45).

tends not to dwell on them and enters more specifically into the merit.[9] At times, instead, the request for protection by the "democratic" body is by definition more articulated and internal to the problematic of the evident constitutional matrix; thus, in order to seize the importance of the Court's role to the representative body of the peoples, it can be useful, for example, to bring the intervention of Parliament back within the viewpoint of the Court n. 1/92. In such a situation, the European Parliament laments the limitation of powers conferred upon Community judges in the future institutional structure of the European Economic Area, so that it does not grant adjudicative power an eventual defense of the parliamentary role in the decision-making process: from all this derive the (reduced) competences attributed to the Court of Justice as that agreement contradict the democratic principle established in the Preamble.[10] Firstly, we can deduce from such observations the principle according to which the democracy of the European Union is possible only under the conditions that all of its bodies are able to develop the functions attributed to them according to the institutional balance established by Treaties. Perhaps however one can go further and see in the Court, Parliament's primary interlocutor in the battle for the affirmation of democracy in Europe. Let us therefore note this "strange" alliance between Court and Parliament, almost unknown to the traditions of the member States.[11]

2. Consultation of Parliament at the Center of Institutional Balance in the Era before Maastricht.

a. A premise on method

"*La democrazia è una cosa complicata, guai a chi cerca di semplificarla più di tanto*:" [12]. Above all one must submitt successive analysis that Amato's realistic affirmation risks ulterior complications in this case, given the uncertainty of the juridical nature of the European Union itself. Indeed, before taking up any analysis regarding the affirmation of the democratic principle in the Community ambit, it would be necessary to

[9] This is the case, for example, in a decision by the Court regarding the resolution of Parliament on the seat of institutions and the principal place of work on the same, in which this body justifies the adoption of the contested act "on the grounds of the increase in its workload and its democratic responsibility, especially since the entry into force of the Single European Act" (Judgment of the Court of 28 November 1991, *Luxembourg v. European Parliament*, Joined cases 213/88 e C-39/89). The decisions appears interesting in regards to institutional conflicts and it was preceded by a series of cases on similar issues, in which the Court clarified the outlines of the reciprocal rights and obligations amongst institutions and Member States: see judgment of the Court of 10 February 1983, *Luxembourg v. European Parliament,* Case 230/81; judgment of the Court of 10 April 1984, *Luxembourg v. European Parliament,* Case 108/83.

[10] See Opinion of the Court of 10 April 1992, pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, par. V.

[11] This hypothetical alliance between Parliament and the Court of Justice is confirmed, in particular, by Mancini F., *Democracy and the European Court of Justice*, in Id., *Democracy and Constitutionalism in European Union*, Hart Publishing, Oxford, 2000, where, however, it is normally the Court-Commission axis which is underlined, as a critique to Mancini, see Harlow C., *Citizen Access to Political Power in the European Union*, EUI 99/2.

[12] Amato G., *Costituzione europea e Parlamenti*, Nomos, 2002, 13.

say that one can find a system of a State or international nature. It is very different, indeed, to argue democracy as the connotation of a State organization rather than a supranational one (and in this sense, perhaps, even the observations on the democratic deficit would often need to be contextualized). As it is not the task of this work to go into detail on the problematic of the European Union's statehood (or lack thereof), we will start, more simply, from the given fact according to which the European Union (still) cannot be defined as a classically understood State.

Consequently, the legal debate on democracy in Europe has been vitiated through a general ambiguity, due to the "double face" of the European Union: the international side of the Community is at the origin of an(initial) silence by the Treaty on this topic, its evolution towards a new form of statehood create and urgency to address this.

Notwithstanding, it seems additionally difficult to mechanically transport observations and theories of democracy at the supranational level (given that at such level this problematic must be treated with greater caution and engender greater uncertainties, as they have fewer points of reference) if not actually different, compared with the state level as they are still in full evolution. Therefore, for example, if it is a common affirmation that the internationalistic origin of the European Community is such that it is impossible to classify it as a majoritarian democracy, being characterized by a decisional and legislative process of a consensual type, nevertheless the differences are such to permit the use of this kind of terms only sparingly.[13]

While starting from the observation by which the Union cannot be considered a State, the problem of democracy at the Community level manifests itself, and this cannot be relegated exclusively to national experiences. The need for what is called "Eurodemocracy" is felt, justly, as a mandatory step in the history of European integration, since the transferal of competences at the Community level - which then, in function of the principle of direct effect and of the supremacy of Community law, has shattering effects within the single member states - requires the legitimization of the power exercised at the Community level and therefore the formulations of a nexus between European government and citizens. If national parliamentary support at the moment of ratification was once considered sufficient to these ends – a case in point was Kirchof's analysis, that indicated in such law the "point of passage" of the Community norm within single state order[14] - now more and more doubts arise about whether this can still be considered an adequate instrument for covering the entire Community

[13] Of this nature is the critique (shared by others) of IERACI G., *Contemporary Democracies. A Dichotomous Pattern for Comparative Politics,* Quad. Sc. Pol., 2/2002, 258 ss., on the analysis of the form of European government as developed, for example, by LIJPHART A., *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, New Haven – London, Yale University Press, 1999, 42 ss. Lijphart inserts the European model into the category of consensual democracies with two legislative branches (Council and Parliament) and an executive branch (Commission) within a context destined to become federal. In regards to the utilization of the consensual model for European democracy it is also interesting to recall the criticism of Harlow: "This is, however, the consensus of diplomacy. If we define a consensual democracy as one in which the question 'Who governs?' receives the reply 'As many people as possible!', then Europe is not on course." (HARLOW C., *Citizen Access to Political Power in the European Union*, cit.).

[14] Lastly, KIRCHHOF P., *Die Gewaltenbalance zwischen staatlichen und europäischen Organen*, Paper of 5. 25. 1998 at the Humboldt Universität of Berlin, in FCE 2/98; see also KIRCHHOF P., *Der deutsche Staat im Prozeß der europäischen Integration*, in ISENSEE/KIRCHHOF, *Hdb. des Staatsrechts*, 1992, 855 ss.

phenomenon.[15] The European Union thus launches a double challenge: on the one hand the democratization of the supranational level, but on the other hand, the member states cannot allow themselves to lower their guard, and are themselves essential and irremovable to the ends of the European democratic experiment.

One can therefore perceive, albeit with evident limitations, how the democratic question is trying to impose itself ever more directly at the supranational level. None other than the result of an osmotic pressure created by the ever tighter integration of the member nations, in regards to which - be it said incidentally - it would also be interesting to verify how the Community construction has, on the contrary, influenced those same state democratic structures, effectively making them correspond to a model ever more homogenous in Western Europe.[16] We are therefore in front of a new democratization

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[15] PREUSS U., *The Constitution of a European Democracy and the Role of the Nation State,* Ratio Iuris, 4/1999, 418: "Although a general consent of the national parliaments to the transfer of sovereignty to the Community has been given in the past through ratification of the EC Treaty and its numerous amendments, this is hardly sufficient for democratic legitimation of the huge number of regulations which are issued by the Community's organs." Thus AMATO G., *Costituzione europea e Parlamenti*, cit., 15, urges us to propose an alternative—at the national level—to the use of the law of ratification: "*Quando si ratificano i trattati internazionali, in genere si ratificano quelli che disciplinano le relazioni esterne. Quando si ratifica una modifica dei trattati comunitari non si ratifica una decisione che attiene alle relazioni esterne, ma una decisione che attiene al governo degli affari interni. Il processo di ratifica così come è congegnato è allora del tutto inadatto ad assicurare ai Parlamenti il ruolo che ad essi spetta rispetto agli affari interni. (...) Più andiamo avanti, quindi, più ci accorgiamo che qui abbiamo bisogno di qualcosa che deve andare – comunque chiamiamo i trattati comunitari – il più possibile nella direzione dei procedimenti di revisione costituzionale*."
This observation becomes more and more urgent at the current stage of European evolution: with the enlargement, in fact, European Union would risk being "blackmailed" by the ratification acts of every single member state: See WALLACE W. and SMITH J., *Democracy or Technocracy? European Integration and the Problem of Popular Consent*, in HAYWARD J., *The Crisis of Representation in Europe*, F. Cass Ed., London, 1995, 154.

[16] More precisely, BLONDEL J. and BATTEGAZZORRE F., *«Majoritarian» and «Consensus» Parliamentary democracies: a Convergence towards «Cooperative Majoritarianism»?,* Quad. Sc. Pol. 2/2002, 251, observe: "Specifically, the influence of the 'Europeanisation' process can only have the effect of reducing further in the future hitherto strongly-felt division within the individual States of the Union and thus lead governments in each country to seek arrangements with other political and social forces in order to strengthen their position vis-à-vis the governments of other member states.". According to the authors such a trend unequivocally favours a trend among Western European governments to shift towards forms of cooperative majoritarian democracy. Analogously CHRISSOCHOOU D., *Democracy and Symbiosis in the European Union: Toward a Confederal Consociation?,* West European Politics, 1994, 3, point out that "The new 'politics of symbiosis' – itself an essential reinforcement of the system's consociational character – has further facilitated the *recentralisation* of national governmental power in favour of executive-centred elites and, inevitably, at the expense of traditional representative institutions which find it all more difficult to sustain sufficient levels of political responsibility over their respective executive agents."
If this reading is correct, one could read it as a sign of the federalization of the European Union since, as affirmed by DÍEZ-PICAZO L. M., *What does it mean to be a State within the European Union?*, Riv. It. Dir. Pubbl. Com., 2002, 655 "the normal situation in contemporary experiences of federalism is that belonging to the federation involves a notable constraint on the political structure of the component units". And this would happen, furthermore, in a *sui generis* fashion (by an osmotic process) because it would be precisely the absence in the Treaties of a norm on the political structure of Member States that would distance the latter from the classical federal constitutions, that, instead, albeit in a general way, always include a clause on the matter: as seen in art.4, c. 4 of the U.S. Constitution and art. 28 of the Grundgesetz. Thus the emphasis of Pernice is extremely interesting, according to which art. 6 of the Treaty would be "requirement of a minimum constitutional homogeneity in the Member States, comparable to that of Art. 28 (1) of the

process, comparable only in a general sense with the other existing forms of state and that is supported willingly by a double level of democracy: not only that of its member states, but also, distinctly, that of the very Community machine as expressly decreed by articles 6 and 7 of the Treaty.[17]

The interest in probing possible paths to the democratization of the Union is derived from the asserted need of a stronger democratic support for the Community construction. A study on the position of the Court in this matter may appear to be a detail, and yet such an approach constitutes a precious, concrete and realistic visual angle on the present state of democracy in Europe.

b. *The Roquette Frères decision as a first occasion of reflection on the democratic principle.*

The cornerstone of the successive case law on the subject, and a first step towards a jurisdictional guarantee of the democratic principle at the Community level, is a ECJ decision concluding with the annulment of a regulation on the common norms for the production of isoglucose: we are in 1979, the year of the first direct election of the European Parliament.[18]

How the historic fact – contemporary to the dates in question - touched upon the comportment of the Court, is implicit in the tenor of the affirmations of the judges in regards to the democratic principle, and to the subsequent resolution of this case.

The case arose following a request for a parliamentary opinion on the part of the Council that, due to the entering into force of that act starting July 1 1979, which was requested during the April session. Not only was the issue not discussed in Parliament during the April or May sessions, but it was further postponed due to the imminent taking office of the new (and first) Parliament elected by universal suffrage, the reason for an interruption of the session until the month of July. On June 25th, 1979, the Council, without requesting the urgent consultation of Parliament, adopted the new regulation on the matter (n. 1293/79). This is precisely the object of the present challenge.

German Constitution concerning the constitutional order of the Länder" (PERNICE I. *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making revisited?,* CMLR, 1999, 726).

[17] That the level of democracy of the Member States of the Union be considered with different criteria and parameters is analyzed in a study by CANNIZZARO V., *Integrazione Europea e Democrazia degli Stati Membri*, in AMOROSINO/MORBIDELLI/MORISI, *Istituzioni Mercato e Democrazia*, Liber Amicorum Predieri, particularly 79.

[18] While the case (de facto) is unique, there are two decisions, corresponding to two identical claims, one on behalf of Germany and one by France: Judgment of the Court of 29 October 1980, *SA Roquette Freres v Council of the European Communities*, Case C-138/79, ECR, 1980, 3333, and Judgment of the Court of 29 October 1980, *Maizena GmbH v Council of the European Communities*, Case C-139/79, ECR, 1980, 3393. This issue was not new for the Court of Justice which has just declared invalid a preceding regulation of the Council's on the matter: (Judgment of the Court of 25 October 1978, *Royal Sholten Honig Ltd et al v Council of the European Communities*, Joined Cases n. 103 e 145/77, followed by the declaration of nullity of regulation n. 1111/1977) giving to the same body the task of adopting all the necessary provision and assuring the good functioning of the sweeteners' market. Within a few months, in order to cover the normative gap, the procedure for generating a new regulation was reactivated, and the case cited developed from this procedure.

There are various points of particular interest in this sentence. The central point of the motivation of the Community judges resides in the violation of the obligation of consultation provided for the adoption of the said regulation, because:

> *"the consultation (...) is the mean which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."*

In the case in question the simple request of an opinion without having exhausted all the means necessary to obtain it, is not sufficient to avoid the breach of an essential procedural requirement of the act. Given that in order to have a declaration of nullity of the act the breach of the law must be of an essential nature, the Court is obliged to found its reasoning - however slippery the affirmation of reality may be - on the remark that the absence of an opinion from Parliament configures a potential violation of democratic principle. Moreover, the Advocate General, in instructing the case remarked how the confrontation between parliamentary structures with national parliaments is seriously limited and the further reduction of the previous opinion of the European Parliament to a simple request would be equivalent to making the participation of the peoples of the Member States practically inexistent in the legislative process. In general, in fact, using the words of Advocate General Reischl, one may consider that the consultative power of Parliament in the era constituted:

> *"The most important means of involving the peoples of the Community in the drafting of Community legal measures."*[19]

The historic affirmation of the Court in the Roquette Frères sentence will constitute the dominant refrain of the European Court of Justice's cases in such matters, and is fundamentally based on two principal elements in the definition of democracy, evidently two sides of the same coin: on the one hand the necessary presence of Parliament within the legislative procedure as an element of institutional balance provided for by the treaties, and on the other hand, the participation of the peoples in the supranational decision-making process. To the classical conception, whereby a government is considered democratic in the measure in which its institutions are (at least in part)

[19] Opinion of Mr. Advocate General Reischl delivered on 18 September 1980, Case 138-139/79, ECR 1980, 3363, 3375. Since Parliament is the only body not admitted to participate in the Council's sessions, one can understand how the procedure of consultation becomes an indispensable instrument in order to make possible the participation of the European peoples (represented in Parliament) in the formation of the acts. For a reduction of the scope of this judgment, see BEUTLER B., *Anmerkung (EuGH 138-139/79)*, EuR, 1981, 58, who recognizes the important of this judgment on the part of the Court in order to consolidate the democratic principle in the Community Organization, but who points out however that the consequences that this body can extract from this affirmations are, in any case, limited: "*In der Auseinandersetzung um die grundsätzliche Positionsbestimmung des Parlaments hat die Entscheidung des Gerichtshofes insoweit eher die Bedeutung der rechtlichen Bestätigung einer vom Parlament gefordeten Mindestposition*". On the essentiality of such a violation, not without a critical streak, see HARTLEY T., *Consulting the European Parliament*, E. L. R., 1981, 183.

accountable to popular elections, the liberal-democratic or Madisonian theory[20] is joined, according to which democracy is constructed on a sort of platform of reciprocal powers and controls divided amongst single governing bodies, thereby effecting a system of checks and balances. It is easily discernible that the two levels are closely connected, as, in the long run, the theory of checks and balances is destined to exalt popular participation as one of its elements: and in this sense such a theory seems, in its current state, less fictitious than the theory regarding popular participation in the European government. In a recent conclusion, Advocate General Geelhoed affirms this nexus between the two democratic principles:

> *"Institutional balance plays an important role in the decisions of the Court. In this, however, the Court establishes a direct link with the prerogatives of the European Parliament and the democratic principles underlying them."*[21]

While the Court can base the affirmation of the balance of powers on previous decisions and on textual foundations (art. 4), with regard to the democratic principle understood as the participation of the peoples in the decisional process the textual foundation is truly minimal in the Treaties. Clearly, there is the norm regarding the composition of European Parliament that qualifies its members as representatives of the peoples of the States united in the Community, but the Court undoubtedly tends to go beyond this affirmation. The democratic principle that the Court draws on appears to need to rediscover itself in the constitutional traditions common to the member States, a sign of that osmosis occurring between the Community level and the national one: the Court finds support, at least initially, in the classical theory of representative democracy as the living experience of the legal orders of the Member States.[22]

A further observation regarding the use of the plural "peoples" (an expression found in the Treaties as well), and the generic recalling of the representative nature of the parliamentary body: the Court's insistence on this point appears to originate from the need to individuate an outlet to the principle of popular representation, traditionally

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[20] This conception recalls the so-called. Madisionian democracy, that corresponds to an "effort to bring off a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side, and the desire to limit their sovereignty on the other." (DAHL R. A., *A Preface to democratic Theory*, Chicago, The University of Chicago Press, 1956, 4).

[21] Opinion of Mr Advocate General L. A. Geelhoed, delivered on 10 September 2002, *Imperial Tobacco Limited v Secretary of State for Health*, Case C-491/01, par. 179. Thus the Advocate General continues on noting that with the choice for the co-decision procedure "the most stringent adoption procedure was chosen by which account may be taken of as many interests as possible. Considered from the aspect of institutional balance: if there is any procedure in Community law which is designed to achieve an optimum balance between different authorities that would appear to me to be the co-decision procedure." (par. 180)

[22] Democratic principle is a constitutional principle common to all European States, whereby it is worth considering the Community principle even prior to its express introduction into the Treaties: on this, see RESS G., *Democratic Decision-Making in the European Union and the Role of the European Parliament*, cit., 157 and, identically, MANCINI G. F. e KEELING D. T., *Democracy and the European Court of Justice*, The Modern Law Review, 1994, 179, which further specifies: "There are of course limits on how far the Court may go with such an approach. It could hardly have invented a European Parliament if none was provided for in the Treaty. But since there was a provision in the Treaty – however limited – for a representative assembly to participate in the legislative process, the Court was able to stress the importance of the democratic element, elevate it to the status of a fundamental principle and strike down legislation not sanctified with even a whiff of democratic legitimacy."

understood as a bench-mark of every democratic ordinance: if, in the process of European integration, the national parliaments tend to lose importance, the peoples of the member States must find another level of representation (the supranational one), otherwise the system could not be defined as democratic. [23] At the same time, the fact of not representing a single people, but rather, *peoples* makes this form of representation *sui generis* and makes the European Parliament a body not comparable with national Parliaments: starting from this observation there have been those who sustain that the heart of democracy in Europe is not so much the right to be *represented* as the right to *participate* in the process by which European government is chosen.[24] The European Parliament is of a strange breed: on the one hand it is the Community body that is apparently most comparable to its national equivalent, while on the other hand, every attempt to assimilate it crashes on the rocks of an evident functional difference. Even if - be it said incidentally -, at present, it's difficult to find a "classical" parliamentary system also in the national experience, since it is more and more evident a general trend towards an executive dominance at this level too. But - to remain on the community problematic - the international origin of the Community structure weighs decidedly on the Community system: the problem, therefore, is more serious than a simple representative deficit in the decision-making process. Even more worrisome, in fact, is the deficit that is perceived at the level of the separation of powers with the tilting of powers toward the executive pole, which is one of the more immediate consequences of the integration process.[25]

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[23] WEILER J. H. H., *European Democracy and the Principle of Constitutional Tolerance: the Soul of Europe*, in CERUTTI F. and RUDOLPH E. (ED.), *A Soul for Europe*, Peeters Leuven – Sterling, Virginia, 2001, notes suggestively how "this fateful decision, welcome for its respect for the distinct identity and cultural and political richness of the States and nations which make up Europe, is at the source of the Union's democratic dilemma". ZULEEG M., *Demokratie und Wirtschaftsverfassung in der Rechtssprechung des Europäischen Gerichtshofs*, EuR, 1982, 22, further holds that the participation of the peoples via their own representatives is not indicative of the judiciary's wanting to remake itself according to the vision of classical representative democracy: "*Die «Völker» lassen sich in diesem Zusammenhang als Inbegriff derer auffassen, die von der Gemeinschaftsgewalt betroffen sind. Ihnen steht die Beteiligung an der Ausübung hoheitlicher Gewalt zu*."

[24] More precisely the thesis of ZULEEG M., *Demokratie in der europäischen Gemeinschaft*, JZ, 1993, 1071, starts with the affirmation of a so-called "*negative demokratische Kompetenz*" of the EP: "*Da ein Volk in Europa noch nicht besteht, sind die Einrichtung des EPs, seine unmittelbare Wahl durch die Völker der Mitgliedstaaten angeblich nur als Geste des guten Willens, als Reverenz an das demokratische Prinzip zu begreifen. Die verfassungsrechtliche Bedeutung des EPs sei daher gegenwärtig „en quelque façon nulle". Ihm komme eine „negative demokratische Kompetenz" zu, selbst anch dem Vertrag von Maastricht*." As a consequence, Zuleeg considers that the idea of hidden democracy in such an institutional configuration is rather that of a participative and non a representative nature: "*Wer sich einer Hoheitsgewalt beugen muss, soll zumindest daran beteiligt sein, diejenigen zu bestimmen, die über ihn Hoheitsgewalt ausüben. Der selbstverantwortliche und selbstbestimmte Mensch ist die Richtschnur dieses Demokratieverständnisses*" (1072).

[25] In greater depth, CURTIN D. M., *Postnational Democracy*, Kluwer Law International, Boston, 1997, 45, observes: "much more serious than a lack of parliamentary representation at whatever level should prove most appropriate to the type of decision-making. Coming closer to the heart of the matter, we find there is a further deficit and this time at the level of the separation of powers and in particular the enormous empowerment of the executive which has been the very concrete result of the European integration." Thus, too, one understands the recall to not separate potential reflections on the democratic theses applied to the European system from the origin of this order; Craig observes that if the domination of the Member States and of the Council, the impotence of the EP(at least until 1986) and the lack of transparency en participation make one think of a top-down (if not elitist) vision of democracy *à la* Schumpeter, nevertheless such characteristics are a natural consequence of the fact that the EU was initially created by

This latter observation leads us to the second concern manifested by the Court, which is that of maintaining institutional balance - a preoccupation present as well in many preparatory documents for the intergovernmental conference and in reform proposals.[26] The Court is thus driven to analyze the form of European government in its entirety, referring to the existence of a system of checks and balances by which the government can be considered democratic if the pre-established equilibrium amongst the individual institutions is respected: competences, therefore, but controls and limits as well. Furthermore, it must immediately be noted that it would make little sense to translate the Court's expression "institutional equilibrium" into the classical principle of the separation of powers.[27] If the institution's reasoning is similar - to protect the Community organization from the monopoly of power held by a single body, and in this sense the instrumental nexus is easily identifiable with democracy -, one cannot imagine the principle of the separation of powers to be simply transported to a higher level. The Court always speaks of balance (and not division of powers), precisely in order to clarify that within the Community an equilibrium takes place, implying *in primis* an institutional cooperation rather than a subdivision of tasks.

However, this fact is intrinsic to the structure of the Community organization, which lacks a detailed set of regulations regarding the powers of individual institutions. [28]

States, and it is therefore natural that they have more power. (CRAIG P., *Democracy and Rulemaking within the EC: an Empirical and Normative Assessment*, in CRAIG/HARLOW, *Lawmaking in the European Union*, London, Kluwer Law, 1998, 60). The preponderance of the Council is certainly the source of complication from the point of view of the democratic principle, because it represents States and not the people, by which a democratic legitimization passes though a mediated form. See WEILER J. H. H., *Problems of Legitimacy in Post 1992 Europe*, Aussenwirtschaft, 1991, 411 ss.: also on this point BIEBER R., *Democratization of the European Community through the European Parliament,* Aussenwirtschaft, 1991, 164.

[26] For an extensive development of this point see, (in regards to the IGC of 1996) DE BURCA G., *The Quest for Legitimacy in the European Union*, Modern Law R., 1996, 349 ss. De Burca brings to light (365 ss.) how the proposals on the issue of the democratization of Europe are truly diverse, sometimes in opposite directions: primarily one can individuate a supranational vision (federal) – that emphasizes the role of European Parliament and wants to strengthen the fields of intervention of the Court of Justice – and an intergovernmental - confederational ideal underlining the unanimous vote and the consequent role of the Council in negotiations. But there are many other currents (like the functionalist-regulative one that hopes for a greater role for independent agencies).

[27] According to CRAIG P., *Democracy and Rulemaking within the EC: an Empirical and Normative Assessment,* cit., 43, this formula could be read as a rhetorical affirmation that allows the community to proceed in an incremental way. Craig, instead, suggests taking this affirmation seriously and verifying the idea of democracy that is behind it: a study on this shows that it has been "one of the central elements in the republican conception of democratic ordering, another being the idea that democratic deliberations should be designed to achieve the public interest rather than the narrow sectional desires". And this affirmation can be easily repeated for the EU. Stressing institutional balance, according to Craig, recalls the republican idea that can be summed up as "the necessity to create a stable form of political ordering for a society within which there are different interests or constituencies." (46)

[28] From which follows a state of constant tension: on this, see BIEBER R., *The Settlement of Institutional Conflicts on the Basis of Art. 4 of the EEC Treaty*, 21 CMLR, 1984, 505, who considers that "this particular situation leads to „institutional competition "for the major share in the policy-making process. At the same time there is competition between the Community and its Member States over policy-making power." Contrary to dominant legal literature, Bieber sustains that "the legal basis for the institutional fluidity of the community Treaties is formed not by the maintenance of a balance which supposedly derives from Art. 4, but rather by both preservation of the identity of the institutions, to which specific reference is made in Art. 4 of the EEC Treaty and the obligation to cooperate, which may also be inferred from Art. 4." (509). Così

The need for a guiding principle in cases of doubt regarding functional interferences is born from this very vague rule taken from the Treaties: in this context one must understand the institutional balance that the Court raised up as one of the constitutive aspects of the Community form of government.[29]

Immediately following the taking of office of the first European Parliament elected by universal suffrage, these are, therefore, the theoretical elements on which the affirmation of democracy in Europe is founded. Following this, successive decisions will base itself on them in order to *constitute*[30] a European decision-making process that can define itself as (ever more) democratic.

Such elements take the problematic under scrutiny without half-measures: if, on the one hand, the international origin of the European Community made it such that the issue of democracy was not written into its political agenda - according to the works of a noted Advocate General "*shocking thought it may seem the Community was never intended to be a democratic organization*"[31] - on the other hand, this question emerges

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PRECHAL S., *Institutional Balance: A Fragile Principle with Uncertain Contenute*, in HEUKELS T., BLOKKER N. and BRUS M., *The European Union after Amsterdam*, Kluwer Law International, The Hague, 1998, 293, observes that the term "Institutional balance" "is rapidly developing into one of these catchwords everybody uses without exactly knowing what it means or what it should mean. ... The notion may seem to be something very fundamental, as a constitutional feature of the Community, but in fact it has limited value. As a principle of interpretation it may function to a certain extent as a guarantee against the concentration of power within one single institution and as preserving the autonomous position of each of the institution within the Community institutional structure." Even if the Community system explains in a particularly acute way the case of undetermined norms in matter of relations between institutional actors, it must be noted that this phenomenon is not unknown in national constitutions, that "*specie quelle più risalenti nel tempo, dedicano scarne e generiche disposizioni alla ripartizione orizzontale dei poteri e alla disciplina del processo decisionale. L'esigenza di garantire flessibilità al sistema consiglia infatti di rinunciare ad una disciplina troppo rigida e completa delle relazioni tra gli organi costituzionali e dei procedimenti decisionali in cui questi sono coinvolti*." (CATTABRIGA C., *La Corte di Giustizia e il processo decisionale comunitario*, Milano, Giuffrè, 1998, 177)

[29] Scholars agree on this point, exemplified by BRADLEY K. S. C., *Maintaining the Balance: The Role of the Court of Justice in defining the institutional position of the European Parliament,* CMLR, 1987, 41 ss.: "yet it is the very open-ended character of the relevant Treaty provisions which has enabled the Court of Justice to develop a coherent theoretical structure of inter-institutional relations in the Community decision-making process, based on the notion of the institutional balance intended by the Treaty."

[30] According to the expression used by Weiler to describe the evolution of the jurisprudential interpretation of art. 30: see WEILER J. H. H., *La costituzione del Mercato Unico Europeo*, in Id, *La Costituzione Europea*, Bologna, Il Mulino, 2003, being published.

[31] MANCINI F., *Democracy and the European Court of Justice*, cit., 31. According to Mancini, proof of this can be found easily in the preamble and in the first part of the Treaties, in which the word democracy is not even mentioned, where instead peace and freedom find a place as values to be defended. What seems even more surprising is that the constituents do not concern themselves with (expressly) reserving the admission of new States to the democratic principle, by which "any state" is spoken of generically (art. 237 EC), even if the new art. 49 (Amsterdam Treaty) specifies "any European States which respects the principles set out in art. 6(1)". Proof of this is STEIN E., *Thoughts from a Bridge. A retrospective of Writings on New Europe and American Federalism*, USA, The University of Michigan Press, 2000, 340, who observes that "In 1950, the European Coal and Steel Community was conceived as a technocrat regime: the so-called Common Assembly was added by Jean Monnet as an afterthought at the urging of the Dutch and others." On the same note, CRAIG P. e DE BURCA G., *The Evolution of EU Law*, cit., 7, who underline that at the beginning "Democracy was, by way of contrast, a secondary consideration in a double sense. This was in part because it was felt that the best, perhaps only, way of securing the desired peace and prosperity was by technocratic elite-led guidance. It was in part because even when the attention was focused on the 'people' the notion of democracy was limited or attenuated. The essence of the discussion was on the way in which

progressively along with the evolution of the Community structure, and, in the first place, with the initial affirmation of the role of Parliament. [32]

In this fashion, while in other historical experiences the democratic principle has been affirmed as a founding principle of nation-states or federations, here this appears rather as an identifying element of a European common ground, to be maintained as a common nucleus of identity.

c. Democracy Put to the Test of Court Politics

If now, however, we consider what constitutes institutional balance, a first methodological consideration imposes itself: given that we are considering a principle of judicial matrix characterized by a significant indeterminacy which gives it a flexible definition, the Court proceeds in part (in a manner of speaking) between highs and lows, following the path not only of specific individual cases, but also the institutional historic moment. It is therefore difficult to understand, due to these continual oscillations, how much the democratic principle is really at the heart of the Court's interests.

Almost ten years after the *Roquette Frères* decision - years during which democratic argumentation has been omitted, at least explicitly, from the texts of Community decisions - the thesis of institutional balance has been picked up again, in an impetuous manner, by Advocate General Mancini, for whom consultation would constitute "*the heart of the system of checks and balances upon which the Community constitutional order is based*."[33] The specific case relates to a regulation on invalidity insurance whose procedural adoption later required further modifications in the opinion of the Parliament. The question was related therefore to the need to consult Parliament about the new amendments.

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the success of the European enterprise would lead to a transfer of loyalty to and acceptance of the Community institutions. It was not directed towards the fundamental issue of whether democratic controls in the more normal sense of the term should form an important part of the Community order." Such observations further reflect the position on the subject of neo-functionalist thought. See also VERHOEVEN A., *The European Union in Search of a Democratic and Constitutional Theory*, London, Kluwer, 2002, 57 ss.

[32] The observations of FERRERA M., *Decision making, competences, legitimacy*, www.europeos.it, 4, seem opportune in this regard. According to him, criticism in regards to the Community democratic deficit "tends to neglect the evolutionary dynamics, i.e. the mutual reinforcement that over time can link the various components of legitimacy." The temporal factor and the concomitant osmotic process with the context of the Member States seem to reduce the criticism of the democratic deficit: like ZULEEG M., *National Parliamentary Control and European Integration*, in HEUKELS T., BLOKKER N. and BRUS M., *The European Union after Amsterdam*, Kluwer Law International, The Hague, 1998, 304: "a living European democracy is gradually emerging. This evolution is no reason to be apprehensive of a corresponding loss of democratic structures in the Member States. Living democracies inspire each other as can already be seen in the Europe of today. The convergence of the protection of fundamental rights are an essential factor of a functioning democracy."

[33] Opinion of Mr Advocate General Mancini delivered on 13 October 1987, *Mario Roviello v Landesversicherungsanstalt Schwaben*, Case 20/85, par. 8: in the conclusive phase of adoption of regulation 2000/83 (that is, after having obtained the opinion of Parliament), the German delegation proposed to the Council to add a specific point for the application of that regulation in Germany, as a result of the difficulty in coordinating the new norm with the pre-existing system of German State insurance. And it was precisely in relation to this point 15 (attached 6), voted by unanimous resolution of the Council and therefore inserted in the final text of the regulation, that the petitioner claims to have been discriminated against in comparison with the same category of workers with German citizenship.

The procedure used, as Advocate General Mancini clearly points out, is anomalous, and all those involved recognized this, but in regards to the need to re-consult Parliament in cases like this, both legal literature and previous cases were unclear.[34] Mancini's scrupulous examination bring us to the conclusion that there was a breach of essential procedural requirement and that the norm that stipulates the consultation of Parliament must be considered, more as a substantive provision than a procedural one (as it allows Parliament to participate in the legislative process), and therefore subject to a rigorously restrictive interpretation.

The Advocate General thereby considers the examination of the decision concluded, and the aforementioned point invalid due to an infringement of an essential formality.

The politics adopted by the Court literally distort the foundation proposed by Mancini, disregarding the examination of the type of the breach of essential procedural requirements of the act and focusing only on the possible contrast with the principle of non-discrimination on the basis of nationality.

Perhaps the examination of the issue was particularly clear and the policy adopted by the Court has to be considered simply as the result of a choice in favor of the "easiest" solution, nevertheless it is somewhat difficult to explain the silence of the Community Judges on the point of a breach of essential procedural requirement of the act, above all if one compares this to the following case on *Titanium Dioxide*, of 11 June 1991.[35]

We are following the course of another historical turn in European integration: the entering into force of the Single European Act in 1987 confirmed the way - taken up by the same Court of Justice - focused on reinforcing the democratic principle in European decision-making processes, as is evidenced by the adoption of the procedure of cooperation and the extension of the qualified majority voting within the Council. This is clearly the context in which the Court's decision on *Titanium Dioxide* must be placed.

The object of contention between the Commission and the Council relates to the choice of the legal basis for the adoption of the directive 89/428 that is oriented towards establishing the modality of the harmonization of programs to reduce pollution provoked by the refusal of certain industrial establishments and in order to improve competition in the production of titanium dioxide.[36] Following the adoption of the Single Europe Act,

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[34] Thus, the Advocate affirms that "opinions on the need to submit such an amendment for the approval of the Assembly are not merely varied but largely divergent" (par. 8). The problematic of the need for a new consultation would become ever more stringent in the future with the evolution of Community legislative procedures, in consideration of which "to place an extreme restriction on the reconsultation requirement would result in excluding the Parliament from the legislative procedure in cases where the text finally adopted differed in substance from the text on which the Parliament had already been consulted. On the other hand, to apply the reconsultation requirement generally would lead to a systematic second reading and confusion between the consultation and cooperation procedures." (Opinion of Mr Advocate General Darmon delivered on 16 March 1994, *European Parliament v Council of the European Union*, Case C-388/92, par. 19).

[35] Judgment of the Court of 11 June 1991, *Commission of the European Communities v Council of the European Communities*, Case C-300/89. A similar case in this aspect is the decision of the Court of March 2, 1994, *European Parliament v. Council of the European Communities*, Case C-316/91 (see in particular par. 14).

[36] It is not possible to retrace in this space the large-scale "institutional war" in progress over the years in regards to the choice of a legal basis for the act: on this topic one may consult cases 68/86, *UK v. Council*,

the Commission proposed article 100A (95 Treaty of Nice) as a legal base, and Parliament, consulted in this regard, deemed the Commission's choice appropriate. The Council, in voting instead adopted the directive on the basis of article 130 (157 Treaty of Nice) with the respective utilization of the procedure of unanimous voting. The Commission's action for annulment of the directive on the basis of invalid legal basis (with the sustained intervention of Parliament) stems from these facts.

It is to be noted that Article 100 A relates to the harmonization measures of the Member States in order to constitute an internal market, whereas article 130 is a norm specifically directed to the environmental sector: the Court itself does not fail to notice that both positions relate to the issue at hand, but stresses in this case an obstacle to the possibility of simultaneously inserting two different foundations as the legal basis of the act. It is no novelty that in certain areas the goals of harmonizing overlap with specific sector norms and the issues would not be problematic if the procedures for adoption coincided, but this is precisely not the case. On the contrary, here the procedures are in clear opposition above all exactly from the point of view of the democratic principle. These two norms represent instead, two different democratic models implicit in the different modalities in the adoption of the act: Article 100A foresees the use of the cooperation procedure and qualified majority voting in the Council,[37] whereas article 130 prescribes the unanimous voting of the Council, and previous consultation of the Parliament. According to the Court, applying the joint legal basis in a case of this type would result in altering the cooperation procedure, effectively requiring the adoption of a unanimous voting in the Council, and this:

> *"The very purpose of the cooperation procedure, which is to increase the involvement of the European Parliament in the legislative process of the Community, would thus be jeopardized."*[38]

Thus the Court concludes in a lapidary manner, excluding the possibility of possible recourse to the dual legal basis and opting for the legal basis of Article 100A, with the consequent nullity of directive n. 89/ 428.

The reading of the decision does not leave room for doubt: the choice of what procedure to adopt had much greater weight, in the Court's reasoning, than issues of a textual nature related to competence. The Community judiciary, this time, clearly intends to respond to Advocate General Tesauro's invitation, according to whom the issue should be considered on the procedural level, since this was the point along which the norms diverged in a fundamental manner. [39]Tesauro, furthermore had underlined with particular

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Hormones, 1988, ECR 575, e 70/88, *Parliament v. Council*, *Chernobyl*. For a detailed analysis see BRADLEY K., *The European Court and the Legal Basis of Community Legislation*, E. L. R., 1988, 379 ss

[37] Whenever the same body wants to accept a proposal of the Commission as amended by Parliament, if it wants to reject the proposal, it must obtain a unanimous vote.

[38] Judgment of the Court, Case C-300/89, cit., par. 20. Similar decisions with the aim of reinforcing the role of Parliament within legislative procedure or qualified majority vote in the Council, based on the utilization of an incorrect procedure, can be read in cases 32, 52 e 57/87, *ISA and others v. Commission*, June 21, 1988 e and in the previously cited case 70/88.

[39] And in consequence, the incorrect choice of legal base does not mean simply a formal defect, but rather constitutes a hypothesis of a infringement of essential procedural requirement. See Opinion of Advocate General Tesauro of March 14, 1991, Case C-300/89, par. 2.

emphasis the historical moment in which the case took place, that is, after the Single European Act entered into force, noting that:

> "*it is well known that the most important innovations introduced by the Single European Act include the extension of majority voting by the Council and reinforcement of the Parliament' s participation in the Community decision-making process, by means of the cooperation procedure. These innovations rank as principles since they are intended, respectively, to accelerate the process of Community integration and to strengthen the democratic safeguards attached to the legislative process*."[40]

On the basis of this reasoning, the General Advocate sustains the thesis according to which it would not be possible to opt for a restrictive interpretation of Article 100A, which by nature is at the heart of this historical evolution: if this were to happen, it would compromise the relaunching of the process of Community integration to come

> *"through greater recourse to faster decision-making procedures and the enhancement of democratic guarantees through more effective involvement of the Parliament in the legislative process*."[41]

In the *Titanium Dioxide* decision one can therefore see - at a procedural level - a sort of frontal battle between the affirmation of a (attempt at a) form of supranational democracy and the persistence of a typical "intergovernative" logic: certainly the decision is a strong sign that the unanimous voting (with its feared possibility of a single State's veto) does not appear to please the Court a great deal, and can perhaps be read as the reaction to the Council's persistent praxis eager to obstruct the new cooperation procedure. The issue is confirmed in the language of a recent decision, according to which, generally speaking:

> *"interpreting the areas subject to the procedure of joint decision broadly reinforces the participation of the Parliament in the legislative process of the European Union, and that participation reflects, within the Community, a fundamental democratic principle, that the peoples should take part in the exercise of power through the intermediary of a representative assembly*"[42]

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[40] Id., par. 13. This centrality of Parliament in order to affirm the democratic principle is expressed by the Preamble of the Single Europe Act itself (GUCE L 169, of 29. 6. 1987), in which the starting point is the conviction that "European ideas, the results achieved in the fields of economic integration and political cooperation, and the need for new developments correspond to the wishes of the democratic peoples of Europe, for whom the European Parliament, elected by universal suffrage, is an indispensable means of expression."

[41] As if this were not enough, in supporting this thesis - and a further confirmation of how significant a role the procedural guarantee of democracy played in the decision - Tesauro adds that, regardless, environmental politics (art. 130) can merely gain from the adoption of procedures provided for by art. 100A: "That policy can only benefit from the fact that the measures in question are adopted by a majority rather than unanimously and with more effective involvement of the Parliament" (Opinion of Advocate General Tesauro of March 14, 1991, Case C-300/89, par. 14).

[42] Opinion of Mr. Advocate General Ruiz-Jarabo Colomer, delivered on 24 February 2000, *Grand Duchy of Luxembourg vs. European Parliament and Council of the European Union*, Case C-168/98, par. 59.

The two animating spirits of the Community's decision-making process thus emerge with clarity in the case under consideration: the affirmations of Advocate General Mancini are thus exemplary, while limited specifically to the approval of the budget, clearly establish the fundamental difference in the Parliament's and the Council's position:

> *"The Parliament strategy is inspired by the history of Western institutions (...) and a basic forecast: the greater its influence in determining the budget becomes, the less resistible will be its request for new powers and, by the same token, for greater democracy in the Community system. For its part the Council points to realities which, although unpleasant, are scarcely contestable; (...) with the exception of the ECSC levies, it is still the Member States which gather them in and place them at the disposition of the Community. In brief, it is they who are in fact the taxpayers and it is therefore they who, through the institution which represent them, are entitled to the greater share of the decision-making power on the extent of expenditure."* [43]

If this, perhaps in rather extreme terms, may be considered the representation of two Community spirits, returning to the case under consideration, the solution taken by the Court was quickly criticized by legal scholars for its (perhaps overly) political connotations: it seems to be oriented towards the goal of Community integration via the reinforcement of the democratic principle rather than towards a systematic analysis of the treaty and of the competences designated in it. [44] It is also unusual for the Court to privilege the general norm of article 100A so blatantly, despite the existence of an *ad hoc* norm in environmental issues. The Court's "political" decision seems therefore undeniable and - with al the distinctions of the case - its position seems very distant from the preceding dialogue with Advocate Mancini in 1987. Perhaps this is a sign that the days are mature for Maastricht's Treaty, confirming at a normative level the road taken by Community Judiciary. Perhaps, in the solution of the case the norm in question has

[43] Opinion of Mr Advocate General Mancini, Case C-34/86, cited., par. 2: no trace of such a motivation is found in the following decision. Even if it may seem to be taken for granted, it is worth repeating the observation of Ress: "The conflict of values in regard to the principle of democracy is therefore not based on reservations against a strong role for the EP in the decision-making process of the Communities or against parliamentarism as such, but one concerns for the national sovereignty of the Member States as expressed by their influence on the law-making process of the Community." (RESS G., *Democratic Decision-Making in the European Union and the Role of the European Parliament*, cit., 161). So too, MANCINI F., *Democracy and the European Court of Justice*, cit., 31 ss., notes that if on the one hand Ress's thesis is true, on the other, one must also consider the fear that a strong Parliament could block the decisions of the Council, thereby creating a stalled situation and thereby a weakening of the Community.

[44] EVERLING U., *Abgrenzung der Rechtsangleichung zur Verwirklichung des Binnemarktes nach Art. 100a EWGV durch den Gerichthof*, EuR, 1991, 181: the author underlines how this was certainly not the only possible solution, even from a procedural point of view, but that evidently according to the Court the two procedures cannot overlap "*weil das Verfahren der Beteiligung des Parlaments unterschiedlich ist. Dazu verweist er vor allem auf die mit dem Verfahren der Zusammenarbeit nach Art. 100a angestrebte Stärkung des demokratischen Prinzips*." So too states EPINEY A., *Gemeinschaftsrechtlicher Umweltschutz und Verwirklichung des Binnenmarktes – Harmonisierung auch der Rechtsgrundlagen?,* JZ, 1992, 569: "*Auch in der weiteren Argumentation des EuGH drängt sich der Eindruck auf, daß er eher auf ein integrations- und demokratieförderndes Ergebnis als auf eine systemgerechte Abgrenzung der verschiedenen Kompetenznormen Wert legte*." In like manner, BERNARD C., *Where politicians fear to tread?*, E. L. R., 1992, 133 draws out the in the choice of the Court the attempt to favour the qualified majority voting, which eliminates the possibility of a single State veto.

come into sharper focus: Article 100 A, on which the legislative harmonization in the creation of a single market depends, a norm which is at the heart of Community interests.[45] In effect, the disposition of 100 A is explicitly analyzed according to this directive, some years later, by Advocate General Saggio. In this case the importance of the disposition is expressly reiterated, making explicit the connection between Art. 100A and the democratic principle:

> *"the Council may, in accordance with the co-decision procedure set out in Article 189b, reach decisions by a qualified majority, thereby ensuring greater efficiency and democracy in the decision-making process."*[46]

The legal basis issue therefore becomes another battlefield - along with the guarantee of consultation procedure - for the affirmation of the democratic principle at the Community level: despite being an apparently technical problem, in essence this allows another angle from which to re-establish the institutional balance established in the Treaties, since opting for an *ad hoc* legal basis in order to avoid the invention of Parliament would clearly allow a violation of what could be called Community "constitutional design". The choice of legal basis thereby works as a sort of functional guarantee, in the absence of other instruments of democratic control over the legislative process. [47]

The highs and lows of the Court in the protection of the democratic principle are therefore diverse. For the sake of completeness we must also acknowledge two other decisions in which the Court does not follow the reasoning given by the Advocate Generals in favor of the protection of the democratic principle. These decisions would be extremely interesting in themselves given that the issue is the decision-making process in

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[45] This is the reading preferred by BARENTS R., *The Internal Market Unlimited: some Observations on the Legal Basis of Commuity Legislation*, C.M.L.R., 1993, who considers that in this case the Court is defending not so much democracy as the common market. In this reading, the result of the emphasis given to art. 100A nevertheless brings us to critical consideration, as this ends with attributing to the Community a sort of "*factual Kompetenz-Kompetenz",* whereby being attributed a role of a "nearly omnipotent economic legislator." (108).

[46] Opinion of Mr Advocate General Saggio delivered on 7 May 1998, *Willi Burstein v. Freistaat Bayern*, Case 127/97, par. 19. The Advocate also confirms the reasoning of the norm under consideration with particular clarity, "which is to give the Community institutions a means, one which has proved to be fundamental, for the achievement of the objectives set out in Article 7A and, therefore, of establishing the internal market, with all the freedoms which that implies." (par. 22).

[47] BARENTS R., *The Internal Market Unlimited: some Observations on the Legal Basis of Community Legislation,* C.M.L.R., 1993, 92: "In the absence of substantial democratic control on the Community legislature, this guarantee function constitutes a vital element of the rule of law in the Community." One thus understands the primary role that the Court comes to assume. DEHOUSSE R., *Integration Through Law Revisited: Some Thoughts on the Juridification of the European Political Process*, in SNYDER F. (eds.), *The Europeanisation of Law: the Legal Effects of European Integration,* Oxford, Hart Publishing, 2000, 20, points out, in addition, how "the prudent compromises that successive Treaty reforms gave rise to have been reflected in a multiplication of procedures: they are no less than 23 at the moment. As the rights of each institution vary considerably from one type of procedure to another, the choice of the legal basis for EU decisions bears considerably importance: this explains the mushrooming of challenges to the legal bases in the post-Single Act years." This typology of cases, furthermore, is typical in federal orders: to this effect, one may note the extensive case law on the part of the U.S. Supreme Court in this regard. For a preliminary comparative approach, see BRADLEY K., *The European Court and the Legal Basis of Community Legislation*, E. L. R., 1988, 401.

an "expanded" perspective, that is, including active participation of national parliaments. This time, the discussion turns on the horizontal direct effects of the directives and concerns a possible worsening of the democratic deficit in the arena of the Community legislation "*where national parliaments are by-passed when directives are implemented*."[48] But, yet again, the Court remained silent on this problematic in making its decision.

Therefore the path followed by the Court over these years is not a clear one, and the democratic problem is often confused with other reasoning, making it difficult to perceive the fundamental thinking in this matter on the part of the Community judiciary.[49] After the historic Roquette Frères case, Advocate Generals have attempted on various occasions to bring reflection on the protection of democratic principle forward, but the Court has not always responded to the invitations in its conclusions in this regard.

To conclude and continue on to the next phase, a clarification regarding Parliament's claim to the Court seems opportune: albeit the Community judiciary never writes the word "democracy" in its decisions on the capacity of the Parliament to bring an action for annulment in front of the Court, it has been sustained that even these cases could be considered part of this line of cases, due to their fundamental common motivation in favor of reinforcing the parliamentary role in the institutional design. It is in this sense that the decisions on the Parliament's right of action - in the moment in which they seek to re-equilibrate the position of Parliament in regards to other powers in the procedural field - might be considered, albeit in a less direct manner, part of the democratic evolution of the Community government.[50]

And, yet, the omission of the word democracy in the aforementioned cases does not seem accidental:[51] the nucleus of this creative law making locates itself on the

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[48] Advocate General Jacobs, in decision 316/93 had begun to retort to the possible objection to the horizontal direct effects of the directives, due to "having an insufficient democratic basis" (par. 23), affirming that the same objection one must then be repeated for other Community acts: opinion of Mr Advocate General Jacobs of 27 January 1994, *Nicole Vaneetveld contro Sa Le Foyer e Sa Le Foyer v. Federation des Mutualites socialistes et syndacales de la province de Liege,* Case C-316/93. The same problematics is picked up again after only a few days by Advocate General Lenz, in the famous suit *Faccini Dori*, from which the quote in the text is taken: Opinion of Mr Advocate General Lenz delivered on 9 February 1994, *Paola Faccini Dori v Recreb Srl.* Reference, Case 91/92, par. 68.

[49] Perhaps in this regard a certain resistance on the part of the Court to leaning too much on the issue of democratic principle is also in play, since, as observed by VERHOEVEN A., *How Democratic need European Union Members be? Some Thoughts after Amsterdam,* E. L. R., 1998, 230 - "The Concept of democracy and human rights are closely linked to a society's particular identity and are value-laden and sensitive." Or perhaps, as Verhoeven still suggests, "the limited use by the Court of the democracy principle is liked to the traditional liberal approach to democracy, which tends to privilege civil rights (which protect the citizen against governmental interference) over political, participatory rights."

[50] On this, ZULEEG M., *Demokratie durch Rechtsprechung*, cit., 5: "*Gerade diese Beteiligung ist es, die auf Gemeinschatsebene ein grundlegendes demokratisches Prinzip wiederspielt. Auf diese Weise ist das Klagerecht des EP eben doch mit dem demokratischen Gedanken verknüpft*." Likewise, MANCINI F., *Democracy and the European Court of Justice*, 38, considers that these decisions have contributed to reinforcing the democratic side of the Community government.

[51] Noted cases in this regard are those on article 173 of the Maastricht Treaty (230 Amsterdam Treaty), which omits the prevision of Parliament as an institution authorized to action on the annulment of an act of another institution. In 1987 (the case *Comitology,* Judgment of the Court of September 27, 1988, *European Parliament v Council of the European Communities*, Case C-302/87), Parliament tries to have a right to action to the Court for annulment of an act of another institution, in this supported by a previous case of creative interpretation of art. 173 (Judgment of the Court of April 23 a 1986, *Partì Ecologiste "Les Verts" v. European Parlament*, Case 294/84). The Court, nevertheless, states that the Treaty provisions do not

particular sector of jurisdictional guarantee of parliamentary prerogatives and on the need to assure a coherent jurisdictional system, rather than on institutional balance in itself and the democratic principle. Such a position, furthermore, presents the advantage of preserving the nucleus of the theory of checks and balances that otherwise would risk finding itself constrained by a law created through the judicial system in spurts.

The consequences resulting from this case law, however, certainly come to bear on the future interinstitutional dialogue, and, therefore, on the evolution of the democratic process in Europe. The battle taken up by Parliament to obtain an extension of its right to intervene in proceeding before the Court can be easily explained by the fact that the conflict between institutions in front of the Court has become, over time, one of the central points of political discussion and to be excluded is synonymous with having little weight within Community affairs.[52] It is not a coincidence that it was the direct election of European Parliament itself which opened the season of institutional conflict before the Court. As Advocate General Darmon makes clear, referring specifically to the representative assembly of the peoples:

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enable to recognize the capacity of the European Parliament to bring an action for annulment; according to art. 173 of the Treaty, Parliament does not have this power, by which the Community judiciary lacks the legal basis for intervening in favour of the Parliament. It is a peculiar issue, because the conclusions of Advocate General Darmon had amply demonstrated how, in reality, the problem was not so simple: Advocate Darmon's motivation was founded specifically on the need for jurisdictional protection of Parliament, that would be otherwise weakened in the moment in which the guarantee of parliamentary prerogatives came to depend on a claim that could not be proposed by the main interested party (Opinion of Advocate General Darmon of May 26, 1988, Case 302/87, cit., par. 32 ss.). WEILER J. H. H., *Pride and Prejudice – Parliament v. Council*, E. L. R., 1989, 345, notes that in the distancing of the Court from the position of the Advocate General that typical self-restraint of constitutional courts may have played a role, by which they do not invade the sphere proper to the modifications of the Treaty (since Treaty reforms are not judiciary competence): an amendment of article 173 in favour of the action of Parliament had just been rejected by the Council and perhaps the Court did not want to contradict the position of the Community legislature. Weiler's affirmations are amply confirmed by the Opinion of the Advocate General Van Gerven on November 30, 1989, *European Parliament v Council of the European Communities*, case 70/88, par. 5, in which the previous case *Comitology* is justified by starting from fear "as interference by the Court in the very delicate question of institutional balance" and "as interference in the political decision-making process", all the more since "When the Treaties were revised, the Council refused expressly, in fact, to approve a proposal by the Commission to grant the Parliament the same unlimited right to bring actions for annulment as that enjoyed by the Council and the Commission."
Shortly thereafter, however, the issue is presented again and the Court reconsiders the fundamental line of Darmon's argumentation, retracing his path, (case *Chernobil*, Judgment of the Court of October 4, 1990, *European Parliament v. Council*, Case 70/88*)*: with the interlocutory decision of May 22, 1990, the judge of Luxemburg, in fact, the community judge admits the action of Parliament for annulment, motivated yet again by the thesis of institutional balance, by which an institution must always be able to bring action against potential violations of its own prerogatives. The Court has thus recognized that the means at Parliament's disposal were not sufficient to guarantee the maintenance of institutional balance as specified by the Treaties. In brief, see the judgment of the Court of May 22, 1990, *European Parliament v Council of the European Communities*, Case 70/88, p 22: "Observance of that balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance, and in order to do so must be able to review observance of the prerogatives of the various institutions by means of appropriate legal remedies."
[52] DEHOUSSE R., *Integration Through Law Revisited: Some Thoughts on the Juridification of the European Political Process*, cit., 18.

"*It must be pointed out that the cases involving the European Parliament arose almost entirely during the 1980s, after its election by direct universal suffrage. That does not mean that I am saying post hoc, ergo propter hoc . However, one cannot fail to note that the European Parliament's desire to be more closely involved in the Community decision-making process acquired a new dimension with the impetus provided by its new legitimacy*".[53]

This is a fundamental point, because the possibility of really participating in the constitutive dialogue of the Community decision-making process will become, after Maastricht, the dominant note of the reasoning of the Court of Justice for the protection of democratic principle.

Let it be it noted, in conclusion, how these steps on the part of the Community judiciary on the action of European Parliament to the Court were then ratified in the subsequent Treaty, thereby recomposing that contrast between legislature and judge that the legal scholars and the same Court had highlighted as the first difficulty in the cases aforementioned.[54]

3. Consultation of Parliament after Maastricht: from Institutional Balance to Interinstitutional Dialogue

a. From the obligation of consultation to loyal cooperation in interinstitutional relations

As has been noted, the Maastricht Treaty marks a point of epochal development in the history of European integration, and this is reflected to a large extent even in the theme here under scrutiny.

In the period following this Treaty the tenor of decisions changes completely, and even the resolution of cases is not so predictable. It is certainly possible that the introduction in the Treaty of new cooperation and co-decision procedures influenced the change in the Court; these procedures on the one hand reinforced the position of Parliament within the decision-making process, while on the other they required the

[53] Opinion of Advocate General Darmon of May 26, 1988, *European Parliament v Council of the European Communities*, Case 302/87, par. 28: this type of cases has meant the emergence of the role of "Constitutional Court" for the European Court of Justice (see Bieber R., *The settlement of institutional conflicts on the basis of Art. 4 of the EEC Treaty,* 21 CMLR, 1984, 510 ss.).

[54] The gaps in art. 173 Maastricht Treaty and in the Treaties in general in regards to parliamentary protection, had, in fact put the Court in the delicate position of having to decide whether to leave the previous rule intact, leaving modification to a future legislative intervention or proceed to guarantee a adequate system of jurisdictional protection and, with this, to maintain institutional balance as provided for in the Treaties. Particularly clear is the opinion of Advocate General Van Gerven, case 70/88, cit. par. 6, "The distinction I have just outlined between the interpretation of the Treaty with a view to ensuring that there is an adequate and coherent system of legal protection and its interpretation in a manner which might interfere with the delicate political balance between the institutions is in my view an essential one. Whereas the first is the inalienable task of the courts, the second falls to the (primary) legislature. (…) Whereas establishing (or re-establishing) an institutional balance between the Council, the Commission and the Parliament - a matter which I consider is not the province of the courts - entails giving the Parliament as full a right of action as the Council and the Commission enjoy, that is not the case if the aim is to ensure that the Parliament enjoys effective legal protection."

Community judge to delineate more clearly the outlines of what has been referred to by many authors as a procedural labyrinth, and thereby also provide a more precise image of the very procedure of consultation.[55] From the following decisions it again emerges that the core of this case law on the democratic principle is focused on the protection of institutional balance, that the Court furthermore interprets in a new manner. There is a passage, in fact, to a type of scrutiny different from that formerly utilized by the Court, focused on examining the real state of the relationships amongst the individual institutions. No longer, therefore, a verification of the essential breach of law merely from an objective point of view, but also from a subjective one, implies a control of the overall behavior of the institution in the legislative process.

The consultation procedure is still at the center of the attention of the Community judge: however, also following the Maastricht Treaty's entering into force, more than half of the acts in whose formulation Parliament participates are adopted with the aforementioned procedure that thereby remains central for the analysis of interinstitutional relations.[56] And therefore, it is not by chance that, in a little less than six months, the Court intervenes at full tilt on this proceeding with a closed dialogue between judges and Advocate Generals. We are at the end of 1994, and the relationships amongst the individual institutions are put to the test in the light of the newly written norm.

Decision 65/93[57] relates to a case in which the Council decides to adopt a regulation on the matter of preferential tariffs despite lacking parliamentary support, as it was evident that Parliament would never express itself on the subject before the expected coming into force of the regulation itself. The Council, in order to justify such a choice, based itself on the exceptional nature of the case, due to the fact that that act deals with the particular matter of previous international agreements of the Community's, which must have added the urgency of making the aforementioned sector conform to the

[55] This need is clear in the Opinion of Mr. Advocate General Léger delivered on 28 March 1995, *European Parliament v. Council of the European Union*, Case C-21/94, par. 28: "in order to distinguish the consultation procedure on the one hand from the assent procedure on the cooperation or co-decision on the other, the Council must be able to depart, *within certain limits,* from the proposed text and the opinion of the Parliament which is not legally binding on it." See also, regarding this issue, DE BURCA G., *Case C-21/94, Parliament v. Council and Case C-417/93, Parliament v. Council*, C. M. L. R., 1996, 1063.

[56] According to the assessment of BOYRON S., *The Consultation Procedure: has the Court of Justice turned against the European Parliament*, E. L. R., 1996, 148, the majority of acts adopted since Maastricht came into force have been adopted with the procedure of consultation: more precisely, 168 with this procedure, 52 with the cooperation procedure and 97 with the co-decision procedure. Therefore "the consultation procedure is not a residual power yet."

[57] Judgment of the Court of 30 March 1995, *European Parliament v Council of the European Union,* Case C-65/93; Opinion of Mr Advocate General Tesauro, delivered on 13 December 1994, *European Parliament v Council of the European Union,* Case C-65/93. Contested is a regulation providing for preferential tariffs applying to certain products coming from countries in the East and from developing countries. The proposal of the regulation on the part of the Commission is dated October 15, 1992, and presents itself as particularly urgent, because - among other points - it is concerned with making that system conform to the imminent initiation of the Single European Market (January 1, 1993). On October 22 the Council therefore asks Parliament to express its opinion according to the urgent procedure, so that it can adopt the act before January 1993, the scheduled date for the entering into force of the regulation. On December 21, 1992, by which point it was clear that Parliament would not have given its opinion before the New Year, the Council decided to adopt the act despite the lack of parliamentary intervention.

imminent introduction of the single market; furthermore, the Council declared that it had done all it could to obtain the opinion of Parliament.[58]

The Court's response completes - or perhaps it would be better to say, furthers, the reasoning followed in previous cases concerning the adoption of the acts subject to the previous opinion of Parliament: in fact, after having recalled the essential nature of opinion in order to realize correct legislative procedure, the Court affirms:

> "*However, the Court has held that inter-institutional dialogue, on which the consultation procedure in particular is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions.*"[59]

Therefore, yet again, the reasoning pivots on institutional balance, but this time it is specified that we are not dealing with something of a static and defined nature, rather, it is achieved through a sort of reciprocal "good behavior" on the part of the institutions themselves. And the Court seems to indicate, in order to verify the loyal collaboration amongst institutions; its control may extend to the matters of their internal choices. It is not only question, therefore, of respecting individual norms related to the procedure (an objective approach), but also that of fulfilling the obligation of a sincere cooperation (a subjective approach). The closing remarks of the case on the part of the Community judge is noteworthy: Parliament's claim is rejected as a sort of retaliation, as the Court considers that the lack of observance of the essential requirement of consulting Parliament is justified by the lack of observance on the part of that institution of its obligation to loyal cooperation with the Council. [60]

The principle of loyal cooperation amongst Community institutions was originally born from the discipline of the budget approval. This area is particularly interesting in capturing the real state of interinstitutional relations and, therefore, for the realization of the democratic principle within the decision-making process: to tell the truth, it is rare in such cases for the Court to speak of democracy in an explicit manner, in part due to the technical nature of the matter, in part because the Community judges strongly heeds the limits of their own intervention in an issue of such an evident political nature.[61] One can

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[58] It seems important to point out that the Council, in this case, directed to Parliament the motivations of the decision to adopt the act even if the opinion of Parliament was not obtained: "Whereas it is imperative to avoid a legal vacuum that could seriously harm the Community' s relations with the developing countries as well as the interests of economic operators; whereas, therefore, the regulation on the application in 1993 of the Community' s regime of generalized tariff preferences must be adopted sufficiently early to enable it to enter into force on 1 January 1993; Whereas it appears, after consultation of the President of the European Parliament, that it would be impossible to hold an extraordinary session at the European Parliament to enable it to adopt its opinion in good time to allow the adoption and publication of the regulation before the end of 1992; Whereas, in these exceptional circumstances, the regulation should be adopted in the absence of an opinion of the European Parliament" (Judgment of the Court, Case C-65/93, cit., par. 10).

[59] Id., par. 23.

[60] See par. 28.

[61] This concern emerges clearly in the words of the Court (Judgment of the Court of 3 July 1986, *Council of the European Communities v European Parliament.,* Case C-34/86, par. 42): "It must be observed in the first place that, although it is incumbent on the Court to censure that the Institutions which make up the budgetary authority keep within the limits of their powers, it may not intervene in the process of negotiation between the Council and the Parliament which must result, with due regard for those limits, in the establishment of the general budget of the Communities". In this sense the Court (partially) corresponds

say that it is the very structure of the decision-making process in the budget affairs that is marked originally by a strict collaboration amongst institutions: according to the treaties, in fact, Commission, Council and Parliament should work together, and in particularly, this axis of strict collaboration is established between the so-called "budgetary authority" (Parliament and Council). To settle the possible interinstitutional contrasts in this arena, European Parliament, the Council and the Commission adopted a Common Declaration on June 30, 1982 (that, for its part, constitutes the result of an agreement in order to resolve in an extra-judiciary way a claim pending before the Court) where, for the first time in the history of the Community, the "*harmonious cooperation between the institutions is essential to the smooth operation of the Communities*" was established.[62]

Going back therefore to the merits of the case under scrutiny, the Court did not want to follow the more rigorous line proposed by Advocate General Tesauro, and also out-stepped him, in the end, on the very configuration of institutional balance. For the Advocate as well, the problematic aspect of the argument revolves around this point but, individuating in the Parliament's opinion a norm of constitutional character, he affirms that it is not possible to intervene on the subject except in a legislative manner, that is to say, through the procedure of treaties revision.[63]

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to the suggestion of Advocate General Mancini, according to whom, "the poor drafting of the provisions which governs the budgetary procedure and the conflicting political objectives of the two institutions invite the conclusion that, even if the Court's judgment does not have the effect of exacerbating their relations, it will have very little impact on them." (Opinion of Mr Advocate General Mancini delivered on 2 June 1986, *Council of the European Communities v European Parliament,* Case C-34/86, par. 19).

This separation between judicial power and the financial decision-making issue seems confirmed in an indirect fashion also by the fact that some claims were withdrawn in the course of proceeding from institutions that show a preference, in the solution of conflictive issues, for interinstitutional documents and declarations as opposed to jurisdictional intervention: the most important example in this regard—due to the declaration that it achieved (that is, the cited "*Joint Declaration of the European Parliament, the Council and the Commission of 30 June 1982, on various measures to improve the budgetary procedure*") – is constituted by two cases, 72/82, *Council v Parliament* e 73/82, *Council v Commission*.

[62] The declaration also states, "whereas various measures to improve the operation of the budgetary procedure (…) should be taken by agreement between the institutions of the Communities, due regard being had to their respective powers under the Treaties" So BIEBER R., *The Settlement of Institutional Conflicts on the Basis of Art. 4 of the EEC Treaty,* cit., 514, observes that for the first time in the history of the European Community an official document emphasizes the need for cooperation amongst the institutions: "*in procedural terms, the declaration is the most far-reaching result ever produced by interinstitutional cooperation*." Clear in this regard is the judgement of the Court of 27 September 1988, *Hellenic Republic v Council of European Communities,* Case 204/86: in this case Greece complained of an erroneous delimitation between mandatory and non-mandatory expenses: one must consider that the matter of budget is, as always, particularly delicate because, as the same Community judge affirms, "indeed the operation of the budgetary procedure, as it is laid down in the financial provisions of the Treaty, is based essentially on inter-institutional dialogue"(par. 16).

[63] Since within the treaties the hypothesis of urgency is not provided for (as requested by the Council), to allow it in a jurisprudential setting would bring about the alteration of the structure of European governance and in function of judicial power (par. 14). This affirmation is confirmed by an unbroken line of judgments on the fact that "The rules on the relations between the institutions and on the corresponding distribution of powers clearly constitute one of the essential components of that constitution, and derogations from them cannot be made without thereby altering the characteristics of the system." (par. 20). To support this thesis, the Advocate recalls also the noted judgment of the Court of February 23, 1988, *United Kingdom v Council,* case C-68/86, according to which "the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member

The constitutional aspect of the questions would therefore impede any alteration of the norm through creative law making, and in a categorical way.[64] Although in the judgment one does not find any trace of this problematic raised in the Advocate General's opinion, in reality this is a recurring concern, in a more or less explicit fashion, in many decisions of the Court, as it resounds a typical need of any democratic state, most commonly noted under the title of the (difficult) relationship between constitutional review and legislative discretion.[65]

A final question remains regarding the analysis of the case: to be honest, the regulation adopted by the Council was published in the Official Journal, owing to a major delay, after the meeting in which Parliament offered its opinion (with the connected requests for amendments). The Advocate sustains that it would be "strange" to allow Parliament's delay as justification for the adoption of the act, and to then let it pass that a delay of administrative nature (the publication of the act) effectively made the urgency of the opinion irrelevant. For the Community judge the question has no relevance to the goals of the dispute of the facts, but for the reader, a question may arise: if, for the Court, the Council cannot be justly held accountable for the delays in publication and, therefore, for the anomalous procedure in the adoption of the act, who then is responsible?[66]

In this case one understands the general objection according to which it is not so much an issue of democratic deficit as the lack of participation on the part of the European peoples' representative institution in the decision making process - and, in effect, all these cases reveal a dialogue, more or less halting, amongst the Community institutions - as a gap in the circuit that usually follows the decision-making process (as, for example the existence of control and responsibility mechanisms) that results in a "lack of completion in the democratic process circuit."[67]

States or of the institutions themselves", and it is evident that the norms on the participation of Parliament in the legislative process are part of these provisions (par. 17).

[64] Otherwise, according to the Advocate, the Council could always have taken recourse in the procedure provided for by art. 175, even if, repeating the very words of the Advocate: "I do not thereby intend to deny that, in cases of urgency, such a remedy might prove ineffective. As I have already said, however, a different solution would require an amendment of the rules which govern the balance between the institutions, and which the Court has always held, and rightly held, to have constitutional force. Such an amendment is therefore a matter for the legislature, and not for the Court" (par. 23).

[65] This kind of relationship would be particularly interesting to investigate, because the delicate balance between judiciary and legislature is a strong-hold of every democratic order, nevertheless it is not possible to do it in this case because it would require a wide ranging examination on all of the Community cases. As far as the specific analysis in progress, one can say that, at first glance, this problem does not seem to be noticed as particularly problematic within Community interinstitutional relations: generally, it seems that Parliament calls the Court to its defense against the extreme power of the Council and that the Council tries to limit the possible blows of the Community judiciary, but in regards to whether to the Court of Justice has this power or not, there does not seem to be any doubt. Tesauro's thesis, so fashionable with national constitutional cases, seems to be isolated in these judgments. This is not the case, however, in the matter of budget, for example.

[66] By this Parliament certainly did not mean to insinuate that the Council remain blocked in waiting for an opinion, but at the same time, it could not allow that the Council proceed to adopt a decision on the issue before receiving the opinion of Parliament. (par. 12) Per BOYRON S., *The Consultation Procedure: has the Court of Justice turned against the European Parliament*, cit., 147: "However it raises an important question as regards the organisation of accountability within the European Community and one wonders whether the Court was well advised to have accepted the argument of the Council."

[67] CASSESE S., *Non c'è deficit di democrazia,* La Stampa, in www.europeos.it

b. *Politics and Law in the Community decision-making processes*

The problematic raised in sentence 65/93 finds itself expanded, after a brief period of time, in two other judgments: the loyal cooperation amongst institutions, in facts, comes to situate itself, for its very nature, in a border area between politics and law and the judge in this case begins to question the convenience of his own intervention. In case 417/93 a regulation with the object of prolonging the so-called TACIS program (providing technical assistance for economic reforms taking place in States of the former Soviet Union) for another three years and extending it to the Mongolian State is discussed.

The European Parliament principally deplores the fact that even before asking its opinion on this act it was already on the agenda for the Council's meetings and that the debate was thus in such an advanced state as to effectively make the consultation "*a mere sham or fiction*." [68] This argument reechoes an evident unease of Parliament relating to the conduct of the Council which often and voluntarily seems to decide immediately, obtaining an opinion only in a *pro forma* manner, in reality having already taken a definitive position on the matter independent of parliamentary intervention. And effectively, even the Court perceives that in the seating of March 24, 1993, the Council found "*a wide convergence of views within the Council*",[69] despite later adding that a definitive position had to wait for the opinion of the Parliament. This last affirmation is enough for the Court to salvage the correctness of procedure, but well-founded suspicion emerges that in reality the wide-ranging political convergence in the Council seat may count much more than the subsequent re-examination after Parliament's consultation. And it is this practice which, in the final analysis, is at the origin of Parliament's claim:[70] the Court, nevertheless, gives no weight to this order of motives and approves the conduct of the Council.

Less than a month afterwards, however, the Court intervenes in an opposite direction (case 21/94), annulling a directive on the matter of transportation due to the lack of re-consultation of the EP. [71]

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[68] Judgment of the Court of 10 May 1995, *European Parliament v Council of the European Union,* Case C-417/93, par. 8.

[69] Id., par. 13.

[70] Thus BOYRON S., *The Consultation Procedure: has the Court of Justice turned against the European Parliament*, cit., 148, criticizes the scant attention of the Court on the area of the political agreements arranged within the Council meetings: "One might wonder how provisional the text is if a political compromise has been reached between Member States. It is difficult to believe that Member States will decide to upset a (perhaps fragile) agreement in order to incorporate amendments of the European Parliament. The administrative organization of the decision-making process in the Council reflects a political reality which the European Court refuses to recognize*."*

[71] Judgment of the Court of 5 July 1995, *European Parliament v Council of the European Union*, Case C-21/94. The directive in question (n. 93/89) concerns the national systems of taxation on commercial vehicles, and the tolls collected for the use of certain infrastructures: the matter was the object of haggling between Commission and Council for an extremely long period (from 1968 on), and the proposal of the Commission of 1987 was then presented to the Council in October of 1992 and approved by Parliament in December of 1992. The Council deliberated the definitive act with relevant modifications without reconsulting Parliament, from which the controversy stems. In this case one should really also consider the evolution of the matter to which it applies - in a final analysis we are dealing with an attempt on the part of the Commission to constitute a common policy in the matter of transportation (*common transport policy*) –, subject to recent Court interventions and to current concern in the Community policy: see also Judgment of

The Court resumes, above all, Advocate General Léger's observation according to which consultation must be real; the Council's defensive proposition in considering that it was already "sufficiently well informed as to the opinion of the Parliament on the essential points at issue" (par. 24) therefore cannot be accepted: in other words, it is not enough that the Council be aware of the Parliament's opinion on the matter because, as affirmed also in previous cases, the right to be consulted constitutes a prerogative of the parliamentary body and therefore must develop according to the established procedures. To allow the Council's thesis would lead, according to the Court, to:

> "*in seriously undermining that essential participation in the maintenance of the institutional balance intended by the Treaty and would amount to disregarding the influence that due consultation of the Parliament can have on adoption of the measure in question*." [72]

In this case the Court therefore comes to analyze the extreme hypothesis: if the decision making process is elastic[73] and governed by a sincere cooperation by the parts, why not allow that the awareness of European Parliament's *desiderata* can be enough to safeguard procedural correctness?[74] The Court, perhaps, is beginning to fear that such a line of thinking could lead to a distortion of the norm of the consultation of European Parliament and that the democratic principle risks being trapped in this flexible consultation procedure.

And yet, the issue is not so obvious if after two years it is re-proposed in virtually the same terms, possibly an indicator of a real problematic within interinstitutional relations. Case 392/95 seems particularly interesting, also because of the matter it bears upon: in discussion is the adoption of regulation n. 2317/95 [75] that establishes the nationality of the citizens of third countries subject to visas in order to enter the external borders of Europe. The problem id decidedly one of the most argued in Europe and the impassioned intervention of a government (French) in support of the Council therefore does not surprise. This type of judgment in front of the Court has also been seen, over the course of the years, as a good showcase for the governments of Member States to

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the Court of 16 July 1992, *European Parliament v Council of the European Union*, Case C-65/90, and Judgement of the Court, Case C-388/92, cit.

[72] Judgment of the Court of March 2, 1994, *European Parliament v Council of the European Communities*, Case C-316/91, par. 26. Note also that the Court has specified in relation to the choice of legal basis for the adoption of the act that "the right to be consulted in accordance with a provision of the Treaty is a prerogative of the Parliament. Adopting an act on a legal basis which does not provide for such consultation is liable to infringe that prerogative, even if there has been optional consultation." (par. 16)

[73] In particular, Advocate general Léger (Opinion of Mr Advocate General Léger delivered on 14 February 1995, *European Parliament v Council of the European Union,* Case C-417/93) shows the peculiarity of the balancing test that Court must fulfil starting from the flexible nature of the Community legislative process (due to the fact that the text can be revised up to the moment of its definitive adoption).

[74] On this topic one may recall that according to the previous cases of the Court, the obligation of a new consultation exists in the case of a substantial modification of the act on which Parliament was already consulted, except that the amendments correspond essentially to the desires of Parliament: extensively on this theme see the Judgment of the Court of November 11, 1997, *Eurotunnel SA e a. C. Sea France,* Case C-408/95, par. 45-46 and the corresponding opinion of Advocate general Tesauro of May 27, 1997, par. 28.

[75] Opinion of Mr Advocate General Fennelly delivered on 20 March 1997, *European Parliament v Council of the European Union*, case 392/95 and Judgment of the Court of 10 June 1997, *European Parliament v Council of the European Union*, case 392/95.

illustrate and attempt to make their own position important in front of the Court and the other Community institutions.

In the specific case, Council adopted a regulation visibly different from the previous text without reconsulting Parliament, whose previous opinion was antithetical to the definitive regulation. Parliament's action against the violation of an essential procedural requirement of an act inevitably followed.

First and foremost we must note the point that was fundamentally modified: the regulation's initial text fixed a brief transitional period at the conclusion of which it would be necessary to establish a Community list, including all the third countries subject to visas, whereas the definitive text provides for an undetermined period in which each country would be able to have its own list in addition to the common one. The substantial modification of the act is therefore evident, as is the diverse nature of the interests that the institutions want to privilege: supranational and intergovernmental interests clash diametrically here, becoming almost a text-book case of the difference in the politics supported by the Council and that of Parliament. The thesis of the Council is, in its way, coherent, because it was "*well aware*" [76] of the fact that Parliament preferred the preceding text with a brief transition period and the subsequent adoption at the supranational level of a mandatory list of countries subject to visas, it was unnecessary to re-consult Parliament.

The Advocate General Fennelly brings to light not only the divergences in the texts, but also the fact that the Council itself seems to openly admit the substantial modification in the act. The thesis of the Council, however, would be that in the moment in which it is clear on the Parliament's opinion on the subject (whether it be in agreement with the Council or not), to proceed on to a new consultation would have the exclusive effect of delaying the adoption of the act. To sustain even in such cases the need for a re-consultation would turn parliamentary consultation into "*a purely formal obligation*". [77] In these affirmations one can read in sharp relief Parliament's real weakness, for the Council seems to allude to a tacit practice whereby, once a position is adopted within the Council, it is rarely willing to retrace its steps: one might also ask if the already cited complaint of Parliament (in regards to a consultation merely formal or fictitious) is not really founded. The Advocate's opinion does not allow for a middle ground: to present the pretext of prior awareness of the point of view of Parliament in the matter is unacceptable and ends in denying the utility of the very procedure of consultation.[78]

In this regard, may it be noted that the Court of First Instance never intervened on the question of the obligation of consulting Parliament, except for two brief admonitions in cases of a more specifically technical nature that are traceable to such kind of issues. The first of these is from December 1, 1999 (joint cases 125/96 and 152/96) and explains, in part, the absence of this judiciary body from the disputes on the procedure of consultation. The case is related to an action for annulment of directive n. 96/22 on the part of pharmaceutical industries. One of the objections that the appellants pose to the

[76] Opinion of Mr Advocate General Fennelly, Case 392/95, cit., par. 13.
[77] Id., par. 20.
[78] Id., par. 23. Analogously, par. 25: "the reconsultation requirement does however mean that the Council's margin for manoeuver in considering legislative proposals is limited by the obligation to respect the Parliament's Treaty prerogatives, and that it may not set itself up as sole arbiter of the futility or otherwise of reconsulting the Parliament."

Court in this case regards the modification of the act (namely, the adoption of a directive rather than a regulation) presented after the consultation of Parliament: the doubt that it concerned a modification of substantial nature seems, therefore, founded in some part. The Court, after having verified that modifications that could be considered substantial had not been added, examined the modification in the form of the act, considering that

> "*that amendment to the form of the measure does not any alteration in the actual substance of the text on which the Parliament was consulted (...) nor has it been called into question by the Parliament itself*" [79]

The affirmation is particularly interesting because it seems to allude to the fact that a violation of the obligation of consultation that is not claimed by the Parliament itself has no reason for existence. Which is to say, that if Parliament did not protest to the Court, it means (implicitly) that the modification was in line with its desires and, in line with previous cases before the Court of Justice, in such cases we are not dealing with a violation of the norm of parliamentary consultation. Which provokes a further question: the obligation of consultation is a requirement for legitimacy or a right at disposal of the Parliament?

The cases in question add another observation to this one, of no less importance, on the adequacy of the judicial instrument for solving interinstitutional conflicts: returning to the specific case, Advocate General Fennelly maintains, in effect, that there might exist cases in which the opinion of Parliament is:

> *"so clear that, at least politically speaking, it is well understood that the Parliament and the Council hold conflicting views, that fact would, on a legal level, be irrelevant."* [80]

Thus, the issue of the limit of jurisdictional intervention returns in a new manner to this scenario: the Advocate General, in fact, seems to want to re-emphasize to the parties (and to the governments) the distinction between politics and law in cases pending before the Court and the indifference on the part of the judge to motivations of a political nature. It is clear that the evolution of this type of judgments on interinstitutional conflicts in the period following the adoption of the Maastricht Treaty has made the problem of excessive political interest emerge, but at the same time one may ask how separable the two fields really are in the cases in point. An intervention like that of the French government - which chose to underline "*the politically sensitive nature of the process of determining the third countries whose nationals should be obliged to obtain*

[79] Judgment of the Court of First Instance of 1 December 1999, *Boehringer Ingelheim Vetmedica GmbH and C.H. Boehringer Sohn v Council of the European Union (T-125/96) and Commission of the European Communities (T-152/96),* Joined cases T-125/96 and T-152/96.

[80] Opinion of Mr Advocate General Fennelly, Case 392/95, cit., par. 23. Thus the observation in par. 31 is equally interesting: "it seems to me that the 'substantial modification' test was developed by the Court as a criterion for the sufficiency of the consultation of the Parliament in policy areas, principally transport, where the Council enjoys a wide margin of discretion.". In the specific case the obligation of reconsultation. "This does not in any way affect the Council's substantive discretion as to the choice of countries which should feature on the list of third countries, but merely seeks to ensure that the procedure defined in Article 100c(1) for establishing this list is properly respected."

visas"[81] and to reiterate, in front of the Court, above all the need to adopt a determined political strategy (in the specific case, that of small successive interventions and a common minimum, but not exhaustive, list) - reveals the origin of the Court's concerns, which correctly turns to stress the boundaries of its intervention in defense of the democratic principle.

In conclusion, one can affirm that the cases examined show clearly how in the cases under scrutiny various issues intersect in practice. The Court seems trapped between different needs, like the rigorous respect for the democratic principle or the admission of exceptions in order to avoid excessive burdens on procedure and subsequent legislative inefficiency. "*To balance the tension between democracy-oriented value and that of efficiency*"[82] is a notoriously difficult and delicate affair (also at national level!). European Parliament has certainly not always given proof - at least in these cases - of responding punctually to the requests of the Council. And yet the Council, for its part, has incremented the adoption of a practice tending towards (in effect) minimizing parliamentary intervention.

The Court thus comes to assume an highly complex role in regards to the protection of democracy in the decision-making process: if, in fact, textual comparison (objective criteria) is no longer sufficient for resolving the contrasts amongst Community governing bodies but it is necessary to consider also the sincere interinstitutional cooperation (subjective criteria), maintaining institutional balance as outlined by the Treaties becomes an extremely delicate task. And yet it is precisely to the maintenance of institutional balance that the Court entrusts the guarantee of the democratic principle.

A final doubt: why, all things considered, should we insist on the principle of institutional balance when the situation (at least in the "real world") so clearly favors the Council-Commission axis? Can the theory of checks and balances be truly efficacious in a context that differs so greatly from the classic examples where it is usually applied? The doubt remains, even if in the attempt at "parliamentarization" of the Union one cannot see what other instrument the Court could have used in order to reinforce the democratic tenor in the organization of powers.

4. The Court of First Instance and Participative Democracy, or the Functionalist Method in the Formation of Community Acts

If what we have thus far described is a decision-making process according to model which is, in general terms, comparable with the parliamentary one of federal States, we must also note the co-existence in the Community law of legislative processes that are highly distinguishable from such a method, characterized instead by a marked functionalist and sectional character: one of these processes was examined by the Community judge and obtained a decidedly interesting solution.

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[81] Id., par. 15. The same argumentation is represented a few years later, supported this time by Advocate Mischo: we are in the field of foreign policy, even if this time it bears more specifically on the field of agreements with third countries. Opinion of Mr Advocate General Mischo delivered on 11 March 1999, *European Parliament v Council of the European Union,* Case C-189/97.

[82] Harlow C., *Citizen Access to Political Power in the European Union*, cit.

More precisely, the case that opened the season of interventions by the Court of First Instance in defense of the democratic principle concerns an action for annulment brought by a European association representing the interests of small and medium-sized undertakings at the European level (UEAPME) which was then joined by related associations from many other member States. At the origin of the claim there was the fact of not having been called to participate in the negotiations (ex. At. 4 of the Agreement on Social Politics) following which the directive 96/34 on parental leave was adopted: more precisely the aforementioned association protests the "*infringement of its right to participate in the collective negotiation of framework agreements at European level.*"[83]

This issue turns out to be a major one, because the act in question is the first to be adopted according to the new discipline provided for by the 1992 Agreement on Social Politics; and it is even more interesting if one considers that this rule was then incorporated - yet again it seems that judiciary and legislature proceed at the same pace - within the Treaty of Amsterdam.[84] This particular form of normative production, furthermore, follows previous attempts at formalizing a process by which social parties could intervene in the formation of acts (see for example art. 118 of the Single European Act). And digging deeper for the origin of the rule, we come across the legal tradition of the Member States concerning the *erga omnes* extension of collective contracts, with the diverse evolution that the individual Member States then registered. The problematic in questions falls, therefore, within the field of a form of legislative production of a neo-corporative type in which the first agents of the process are the workers' unions and employers' associations.

In this case, one can easily say that the adjective "alternative" that the tribunal uses in describing the formation of the acts takes on a double meaning: on the one hand, it indicates the substitutive decision-making process for the social politics sector, on the other hand it also indicates a certain critical connotation representing the unusual nature of the affair, its special nature.[85]

The problematic aspect that the Social Politics Act of 1992 raises concerns the fact that in this specific sector not only can the Commission promote the consultation of the social parties at the Community level (art. 3), but the social parties themselves have the possibility of proposing (within such consultations) the start of the procedure as

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[83] Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 June 1998, *Union Europeenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union*, Case T-135/96, par. 58. The Court in the present case had to decide on the admissibility of the appeal of annulment of the directive on the part of an association that had not participated in the agreements ex. Art. 4, and, more precisely, "whether any right of the applicant has been infringed as the result of any failure on the part of either the Council or the Commission to fulfill their obligations under that procedure, given that the applicant's right to judicial protection requires it to be regarded as directly and individually concerned if it is distinguished by reason of specific attributes which are peculiar to it or of factual circumstances which differentiate it from all other persons." (par. 83). In such case, in general, there was a renewal of the problematic connected to the binding nature of acts adopted by the aforementioned procedure and whether their working was subject to determined criteria, and in particular, to the verification of the representativity of the signatories of the agreements.

[84] Thus, articles 118a e 118b pick up art. 3 e 4 of the Agreement on Social Policy without modifications.

[85] Thus the appellant considers seriously (par. 44 ss.) "the specific nature of Directive 96/34", that is not equivalent to the classical directives and therefore to the Court's previous cases on the matter, and the Court itself repeatedly recognizes the unusual nature of the case.

provided for in art. 4. Any agreements established amongst the aforementioned social parties, if voted by the Council (by a qualified majority or unanimously depending on the matter), can then lead to a legislative act.

If this is in a few words, the legal context, one can nevertheless, along broad lines isolate similarities and differences in regards to the ordinary legislative process. In a certain sense one can, in fact, say that the proposal always originates with the Commission, or better said, it begins on the Commission's initiative. The social parties, for their part, can take control of the process only within the consultations initiated by the Community institution directed towards a possible Community action in the sector. Therefore, technically, there is a certain analogy with the Commission's right to legislative initiative. The difference, however, immediately appears because the act takes its form from the agreements of the social parties, and to these the Community institutions cannot affix amendments, but only reject or approve them (more precisely, the final approval of the text is the Council's duty): this final passage is fundamental because it makes it such that the act assumes a binding form. One could say, in conclusion, that the opening and closing of the process is a competence of the Community institutions.

Significant absence: Parliament.

Major players, instead, are the social parties. And here opens the sore point of the affair, which is the origin of the complaints, because the associations initially consulted by the Commission do not necessarily take part in the following phase of the negotiations as well. And even if the Commission has instituted a list (constantly updated) of associations that satisfy the criteria of representativity, in practice those associations that ask the Commission to utilize procedure ex art. 4 can keep the others out. The Commission, however, affirms that it is not its task to decide who should participate in the negotiations, considering it an internal issue for the social parties themselves.

In the specific case in question the negotiations were initiated and held by three associations, UNICE (Union of the Confederation of Industry and Employers of Europe), CEEP (European Center for Public Enterprise), and CES (European Confederation of Unions, together with its related unions). UEAPME claims, for its part, not only its greater representativity in regards to small and mid-sized businesses, but also the fact that in the Commission's 1993 Communication on the Application of the Agreement on Social Politics, it had been recognized as a representative association, from which fact it should have been able to achieve its right to participate in the negotiations. In brief, UEAPME complains that, despite having participated in the consultation, it was later systematically excluded from the negotiating phase of the act.[86]

[86] More precisely, it "was systematically excluded from the negotiations which led to the adoption of the measure, even though it had on several occasions expressed the wish to be included and give reason why it should be." (Action brought on Sept. 5, 1996 by UEAPME, O. J. 1996, 318/21). As affirmed by BETTEN L., *The Democratic Deficit of Partecipatory Democracy in Community Social Policy*, E. L. R., 1998, 31, this is the point that UEAPME's action brings to light; that in fact the negotiations are "basically a closed shop". ADINOLFI A., *Admissibility of action for annulment by social partners and "sufficient representativity" of European Agreements*, E. L. Rev., 2000, 175, underlines that, in effect, "the loose formulation of the provision is clearly due to a willingness to leave a large degree of autonomy to social partners": the problem is that this is a factor that allows difficulties in the moment in which the agreed-upon act claims to be binding for everyone.

This is, in synthesis, the case and the questions that it poses to the democratic principle are numerous and relevant. The fundamental point around which the case revolved around is that of the representativity of those signing the agreement, because it is their job to substitute - if one can put it this way - Parliament's intervention in the classic decision-making process: and this point, as we also know from the analysis of the Court's case law, is particularly delicate, because it absolves the task of permitting the participation of the peoples of the Member States in the Community decision-making. This element thus becomes a sort of essential requirement, in the absence of which the process cannot be considered equivalent to the ordinary legislative one (with all the related consequences on the democratic nature of that process). [87]

However, this affirmation goes to the heart of democratic principle: in order to talk about democracy, the first requirement is that the derivation of authority from popular will must be - in some way - constantly reevaluated. Classical legal literature has long indicated that the distinctive point for the construction of a democratic system is represented by the so-called "*ununterbrochene demokratische Legitimationskette*", [88]that is, that a sort of "backwards" legitimization must be constantly recovered which, together with the operating of further juridical devices, makes possible and effectively maintains a continuous relationship between public action and citizens. Thus it is not by chance that Sartori emphasized how it is the very "*cinghie di trasmissione del potere*"[89], that is all those instruments set up in order for the people to be able to influence the decision-making process - like elections and representation - that constitute the decisive channel of every democratic organization. If all the passages of conversion of power from low to high are not respected, a democratic deficit in the process of formal legitimization is inevitable.

How does the Court respond to this provocation on the representativity of the associations that stipulated the act?

The Community judiciary utilizes the criterion of sufficient cumulative representativity. According this criterion, it is not necessary that a given association be representative in itself, but it is enough that the set of associations, taken as a whole, reaches a sufficient level of representativity: and here, it is important to note that what is

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[87] The solution of the suit depends, therefore, on the representativity of the signing associations, because only in the case that one manages to show the lack of sufficient representativity may the appeal of an association excluded from the negotiations be admitted. As the Tribunal affirms in par. 90: "the representatives of management and labour which were consulted by the Commission in accordance with Article 3(2) and (3) of the Agreement, but which were not parties to the agreement, and whose particular representation - again in relation to the content of the agreement - is necessary in order to raise the collective representativity of the signatories to the required level, have the right to prevent the Commission and the Council from implementing the agreement at Community level by means of a legislative instrument."

[88] In classic fashion, BÖCKENFÖRDE E. W., *Demokratie als Verfassungsprinzip*, in ISENSEE/KIRCHHOF, Hdb. Staatsrecht, Bd. I, 1987, 894: "*Positiv-konstituierend legt der Satz vom Volk als Träger und Inhaber der Staatsgewalt fest, daß Innehabung und Ausübung der Staatsgewalt sich konkret vom Volk herleiten muß. Die Wahrnehmung staatlicher Aufgaben und die Ausübung staatlicher Befugnisse bedarf einer Legitimation, die auf das Volk selbst zurückführt bzw. von ihm ausgeht (sogennante* ununterbrochene demokratische Legitimationskette*)."*

[89] Per SARTORI G., *Democrazia. Cos'è*, Rizzoli, Milano, 2000, pag. 29: "il punto cedevole di tutto l'edificio sta nelle cinghie di trasmissione del potere; e la messa a fuoco etimologica non se ne avvede. Elezione e rappresentanza sono sì il corredo strumentale senza il quale la democrazia non si realizza; ma ne sono al tempo stesso il tallone d'Achille".

required is precisely, a sufficient level, not an absolute one. And to separate the question of what can be considered "sufficient" the Tribunal adds that the number can be considered but that it "*cannot be regarded as decisive*";[90] for the Court, instead, a factor of greater importance seems to be the fact that the representativity of the partiers be considered in relationship to the contents of the agreement, an unusual, if not dangerous, affirmation, because it means measuring representativity on the basis of a single (sectarian) interest.[91] And in general, in regards to this problematic, the warning of legal scholars on the possible risk for the democratic principle of excessive slipping "*from government to governance*" is always important.[92]

The Court concludes its examination observing that the associations participating in the process of the formation of the act possess a cumulative representativity sufficient in the light of the contents of the framework agreement, keeping in mind the fact that they were cross-industry organizations and with a mandate of general nature.[93] To tell the truth, without going into details of the labour law field, a preliminary reading of the judgment shows that the verification of the criteria for satisfying the representativity of the businesses is still an unclear matter in positive and terms and jurisprudential ones.[94] The decision initiates, therefore, more than one doubt in relation to the respect of democratic principle and the possibility to compare this procedure with the ordinary legislative one. According to the Court, in fact:

> "*the principle of democracy on which the Union is founded requires - in the absence of the participation of the European Parliament in the legislative process - that the participation of the people be otherwise assured, in this instance through the parties representative of management and labour who concluded the agreement which is*

[90] Judgment of the Court of First Instance, cit., Case 135/96, par. 102.

[91] The representation of interests founded on a legislative act (therefore of general character) is somewhat less problematic: "a concept of an organisation's representativity based on its claim to represent interests, rather than actual numbers of members, poses problems. Even more so, if the evidence for representation of those interests is based on the text of agreements concluded." (BERCUSSON B., *Democratic Legitimacy and European Labour Law*, cit.,159).

[92] More precisely, HARLOW C., *Citizen Access to Political Power in the European Union*, cit., observes the following processes perceptible also in the national seat: "There has been a slippage from government based on representative democracy to governance based on 'variety of different regulative, representative and authority processes'. (…) a global rationalisation process in which expert sovereignty necessarily prevails over both popular and parliamentary sovereignty while policies and regulation are legitimated by reference to expert knowledge." In the evolution of these forms of legitimization different from typical processes of representation, the observation of Merusi is more and more important: "*Non è il caso qui di attardarsi sulla vexata questio se l'essenza della democrazia stia nella rappresentanza oppure nel contraddittorio cui pure è sottoposta anche la rappresentanza. E' sufficiente osservare che, quando la rappresentanza non c'è, il contraddittorio deve essere completo ed integrale*…."(MERUSI F., *Giustizia amministrativa e autorità amministrative indipendenti,* Dir. Amm. 2/2002, 196)

[93] Judgment of the Court of First Instance, cit., Case 135/96, par. 96. Previously, in fact, the Court had requested that, as the act had to be applied to all work situations, in order to obtain a sufficient level of representativity the signatories of the agreement had to represent all categories of businesses and workers at the Community level (par. 94).

[94] The Court of Justice, too, was put to the test in the analysis of the criterion of representation in a national union association (therefore not at the European level, but internally) in the cases of June 8th, 1994, *Commission of the European Communities v. UK and Ireland*, C-382/93 e *Commission of the European Communities v. UK and Ireland*, C-383/93, and had raised as many perplexities.

endowed by the Council, acting on a qualified majority, on a proposal from the Commission, with a legislative foundation at Community level."[95]

But if it is really like this, in the final analysis, it is unclear by what means associations equally representative to those signing and recognized by the Commission can be excluded from the list of those social parties formally admissible in the negotiations. If the point is an equivalence of the processes based on the concept of representation (and if this aspect is fundamental in guaranteeing the democratic principle), it is not clear why it would be employed in a declining manner, allowing a minimum level of representation: assuming a minimum level is reached, since in this case one might also wonder if all the workers are really represented in the act in question. An observation on the general nature of neocorporative procedures at the Community level is therefore opportune: this procedure "*doesn't replace Parliament and other institutions and processes of pluralist democratic government, but simply side-steps them in reaching the fundamental public choices of the polity*." [96]

Here, therefore the debate in regards democracy gets complicated: on the one hand, in fact, the process was conceived in function of a expanded participation by subjects that are external (but extremely interested) to the classical decision-making circuit, while on the other the Court itself seems reluctant to completely abandon the logic of representative democracy and its partial application to the case in point ends up confusing the plans. If the democratic nature of the process is founded on the role of social parties, the question of which subjects are allowed to participate remains open. In

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[95] Judgment 135/96, cit., par. 89.

[96] WEILER J. H. H., HALTERN U. R. e MAYER F. C., *, European Democracy and its Critique,* in HAYWARD J., *The Crisis of Representation in Europe*, F. Cass Ed., London, 1995, 32. In more general terms, SCHMITTER P. C., *Come democratizzare l'Unione europea e perchè*, Bologna, Il Mulino, 2000, 78: "*per l'UE, quindi, il problema vero non sta nell'assenza di rappresentanza, bensì nella distribuzione, sistematicamente deviata, di interessi e passioni, che cercano la loro strada all'interno di un potere decisionale complesso e reticente. Fin dalle sue origini, il processo di integrazione tende a privilegiare due pacchetti di interessi: in primo luogo e formalmente, quelli dei governi degli Stati membri e, in secondo luogo e informalmente, quelli dei settori d'affari più direttamente connessi all'ambito elle politiche funzionali*." This observation is connected to the affirmation of CARTABIA M. e WEILER J. H. H., *L'Italia in Europa*, Bologna, Il Mulino, 2000, 48: "*Quando determinate competenze con le relative scelte politiche sono trasferite all'Europa, allora si verifica un effetto di indebolimento dei soggetti portatori degli interessi nazionali più diffusi e frammentati rispetto ai soggetti esponenziali di interessi più potenti e compatti, derivante dalla maggiore difficoltà che i primi incontrano nell'organizzarsi al livello transnazionale rispetto, ad esempio, al corpo più compatto delle grandi industrie*."
More specifically on the case, it is worth repeating the words of BETTEN L., *The Democratic Deficit of Partecipatory Democracy in Community Social Policy*, cit., 33, who observed, touching the heart of the problem: "It may be safely assumed that UNICE, CEEP and ETUC do not represent a majority of employers and workers in Europe. They may be the most representative of all organizations, but they still do not represent a majority of employers and workers. This is particularly true for worker's representation which is at an all time low in most Member States. Is it not important that if not all, then at least a majority of workers and employers are represented? Do not go against the grain of democratic society, to the principle of which all Member States must now formally subscribe, not to respect the majority rule?" To tell the truth, still in regards to the democratic principle, a further question should be considered; that of the democratic nature within the associations themselves. For example, l'ETUC (as far as workers are concerned) fundamentally takes decisions in this way: a majority of the participating associations must approve the decision and of these a qualified majority must be composed of stable organizations in the Member States.

other words, the problem shifts to the criteria of representation admitted within a form of participative democracy. Perhaps, it seems possible to say, it would be simpler to maintain a greater distinction in the plans of representative and participative democracy and see them as complements rather than alternatives.[97]

These affirmations intend to be critical neither in regards to the dialogue with the social parties, nor to question the utility of such a process. Nevertheless, it seems to point out a certain difference between the historical origin and the (actual) function of the social dialogue at the European level[98] and the affirmation according to which such procedures can be considered a surrogate for the ordinary legislative process.

A final observation: the task of verifying sufficient representativity for the Commission and the Council (and potentially for the Court) is therefore arduous, because the protection of the democratic principle depends on it.[99] The breadth of the examination can certainly be justified by the delicate nature of the matter, and at the same time the issue is not without problems: the Council in fact has expressed doubts on the depth of the Court's intervention in one arena, namely that of social policy, in which the Council enjoys legislative discretion and the very social parties might fear for their own autonomy.[100] One thus wonders if issues of this nature find their proper interlocutor in the judiciary.

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[97] Thus VILLIERS C., *European Company Law – Towards Democracy?,* Ashgate Dartmouth, Aldershot, 1998, 10, in an attentive examination of the evolution of Community company law, notes how "ultimately it might be argued that the two forms of democracy are interdependent: effective representative democracy leads to the establishment of machinery and procedures which make participatory democracy possible and participation raises an awareness and an interest in the representative democratic system." Thus, too, at the end of the analysis, Villiers emphasizes that "The form of democracy at European Community level is representative democracy. However, the quality of that representative democracy is influenced by what degree of participation in decision-making is possible." (226) Also because we cannot forget that the measures inherent to the Community decision-making process are such that render truly risky the substitution of the classical representative criterion with other types of representation (ex. like those of interests).

[98] Such reforms on the matter have developed under the pressure of giving a social face to European evolution and going beyond the legislative impasse into which the labour law field had fallen at the Community level. Note, in confirmation of this, that in effect the adoption of the aforementioned procedure allowed the approval of a Commission proposal which dated to 1983, that had never been adopted by the Council; in 1995, therefore, the Commission had decided to initiate a consultation with the social parties (ex art. 3) on their possible orientation on the matter: in this sense one can say that one of the proposed goals of the Agreement on Social Policy - to reinvigorate social policy - was accomplished.

[99] As is evident from the reading of par. 5, according to which the Commission must examine the representativity of the parties, and 86, by which the Council, for its part, is responsible for verifying whether the Commission has satisfied the obligations imposed on it by the decrees of the agreement, at the risk of approving an act with an invalid procedure. BERCUSSON B., *Democratic Legitimacy and European Labour Law*, Ind. L. J., 1999, 160, is particularly critical in regards to the Court's reading of art. 3, what it sees as the origin of a particularly invasive control that goes "to the heart of the autonomy of the social partners."

[100] These concerns can be easily read in the Legal Service document (Affaire T-135/96, UEAPME contre Conseil, Brussels, 7 July 1998, Document 10218/98) subsequent to the Tribunal's decision. See also BERCUSSON B., *Democratic Legitimacy and European Labour Law*, cit., 170, who considers that the risk to the autonomy of the social parties is so high that "it might, therefore, be a preferable option for the social partners to seek to achieve the necessary degree of democratic legitimacy from the EU institution which the Court has described without reserve as possessing that quality: the European Parliament".

Instead, the intervention of the Court does not seem to raise problems in two other related cases concerning a possible application of participative democracy. One is the *Atlanta AG* judgment of the Court of First Instance (and the consequent appeal to the Court of Justice), judgments that form part of the well known "banana saga".[101] The aspect that stands out in this case is the appellants' attempt to claim a violation of defensive rights as the result of not having been consulted in the Community legislative process. It was easy for the Court to show that the only consultation requirements that the Community legislator must respect are those provided for by Treaty: it is still interesting to note how the parties attempt to base their right to be heard on the transposition of the right typical of administrative processes (especially in the antitrust field) within the Community decision-making, which is perhaps an indicator of a legislative process seen as more open in comparison with the national ones, but may also be a real need for greater participation in an arena that for its nature is more distant that the national one.[102] But the Court retorts that:

> "*the Commission was under no further obligation to consult the various categories of traders concerned by the Community market in bananas. It is quite feasible for the Community legislature to take into consideration the particular situation of distinct categories of traders without hearing them all individually.*"[103]

In this case both the Court of First Instance and the Court of Justice re-emphasize the ordinary legislative nature of the process, that does not allow the use of other types of procedures within it.[104] The Community judge is particularly clear on the prohibition of analogies even in a case in which the parties tried to expand the obligation of consultation to bodies other than Parliament: within the complex affair on State aid to an Irish business, the appellant had recalled the fact that the Commission, after having regularly

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Perhaps, then, it is not an accident that from this judgment, instead of another appeal from UEAPME, what followed was an agreement amongst the social parties regarding future negotiations. ("Proposal for a cooperation Agreement between UNICE e UEAPME" of 12 November 1998).

[101] Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 11 December 1996, *Atlanta AG and others v Council of the European Union and Commission of the European Communities*, Case T-521/93, Conclusions of Advocate General Mischo of May 6th, 1999, *Atlanta AG and others v Commission of the European Communities and Council of the European Union*, Case C-104/97 P. e Judgment of the Court(Fifth Chamber) of 14 October 1999, *Atlanta AG and others v Commission of the European Communities and Council of the European Union*, Case C-104/97 P.

[102] As is briefly recalled in the conclusions of Advocate General Mischo del 6 maggio 1999, cit., C-104/97 P. par. 58-59, "The appellant claims that the Court of First Instance erred in holding that the right to be heard in an administrative procedure concerning a specific person could not be transposed to the context of a legislative process leading to the adoption of general laws. It contends, rather, that the procedural rights available to an individual to defend itself against injury can never be dependent on the form taken by this injury and that this principle is enshrined in the fourth paragraph of Article 173 of the Treaty."

[103] Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 11 December 1996, Case T-521/93, cit., par. 73. The tribunal had further recalled that "the consultation of representatives of the various groups participating in economic and social life takes place in the Community's legislative process only in the form of consultation of the Economic and Social Committee" (par. 68).

[104] Judgment of the Court(Fifth Chamber) of 14 October 1999, Case C-104/97 P., cit., par. 34-35: "Under Article 173(4) of the Treaty, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. Contrary to the claims of the appellant, no right to be heard prior to adoption of a legislative act can be deduced from this provision."

requested the opinion of the Consulting Committee in the senses of art. 95, had issued the definitive decision with a few modification without the Committee being consulted again. The analogy with the consultation procedure of the Parliament, in this case as well, is sharply refuted by the First Tribunal.[105]

5. CONCLUSIONS IN PERSPECTIVE: NOT A DEMOCRACY, BUT ELEMENTS OF DEMOCRACY

If this is the conclusion per Scharpf's analysis,[106] the question on the current state of the European democratic regime is still open.

The present analysis has shown in broad lines the path followed by the Court of Justice: the starting point for the democratization of the Community decision-making process was the strengthening of the Parliament's position, thus following (or anticipating) the general process of "parliamentarization" of institutional balance also in progress at the institutional level.[107] This was, perhaps the most immediately accessible path in starting to fill the gap in the clearly seen democratic deficit within the Community structure, and, in a certain sense, the inevitable consequence of the process of integrating States.[108] However this choice was not a foregone conclusion: in fact, as we mentioned at

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[105] More precisely: "The European Parliament is a Community institution whose effective participation in the legislative process of the Community constitutes an essential factor in the institutional balance intended by the Treaty. By contrast, what is in issue in the present case is the participation of a technical body in the decision-making process of the institutions" (Judgment of the Court of First Instance of 7 July 1999, British Steel plc v Commission of the European Communities, Case T-89/96, par. 165).

[106] SCHARPF, *Governare l'Europa. Legittimità democratica ed efficacia delle politiche dell'UE*, Bologna, 1999.

[107] This, however, is a note common also to the Treaty reforms: legal literature itself has underlined this possibility as the most immediately feasible. STEIN E., *International Integration and Democracy: No Love at First Sight*, A. J. I. L., 2001, 525, stresses that "an alternative way to fill the gap in representative democracy can be found in the role of the European Parliament"; see also SCHMITTER P. C., *Come democratizzare l'Unione europea e perchè,* cit. 146, who underlines how "*lo scopo principale dell'EP consiste nell'inserire all'interno del processo politico dell'UE un modo di rappresentanza diverso, un modo che possa potenzialmente moderare e compensare gli effetti della rappresentanza negli stati nazionali*." On the relavant Parliament's position within the european government consider also recent affirmation of Advocate general Alber: "*L'introduzione della procedura di codecisione era volta a rafforzare l'elemento democratico nella legislazione. (...) Ora il Parlamento è divenuto a tutti gli effetti controparte del Consiglio con pari diritti nell'ambito della procedura di codecisione*" (Opinion of Mr. Advocate General S. Alber, delivered on 13 March 2003, *Commision of the European Communities v. Council of the European Union,* Case C-211/01, par. 76).

[108] The problem is not at all new for scholars of democracy: for example, see DAHL R. A., *Sulla democrazia*, Laterza Ed., Bari, 2002, 112: "*Le dimensioni contano. Sia il numero di persone che fanno parte di un insieme politico sia l'estensione del suo territorio influiscono sulle forme della democrazia*." From this statement Dahl observes that "*quali istituzioni politiche siano assolutamente indispensabili al governo democratico dipende dunque dalle dimensioni dell'insieme*." (98) The phenomenon of European integration, as noted by WEILER J. H. H., *The Transformation of Europe*, 100 Yale Law Journal, 1991, 2470, is therefore by its very nature acclimatized to a "*loss of democracy*" and, for this same reason, it is not a given that the way to recuperate it is an appeal to classical majoritarian instruments. Notwithstanding, we would like in conclusion to report the statement by STEIN E., *International Integration and Democracy: No Love at First Sight*, cit., 516, that underlines the merits of the democratic evolution of the European Union in consideration of its international origin. "Paradoxically, the European Union, though composed exclusively of liberal democratic states seeking to advance democracy in other states, and bound by the

the beginning of this analysis, the BVerfG in the *Maastricht Urteil* focused its attention on the role of the Council in order to found the democratic nature of the community decision-making, whereas the Court of Justice stresses the Parliament's role for the democratization process of the European Union system.

At the same time, the evolution of the parliamentary institution, with its highs and lows, is certainly not considered the final point of the process of Community democratization but other possible alternatives have been examined, considering decisional circuits "similar" to representative ones.[109] And if these last decisional processes seem to underline the functionalist spirit of the Community structure - with the shifting of the decision-making axis in favor of autonomous bodies of a technical-economic nature - in the opposite way, the strengthening of the parliamentary role would make a federal evolution (already in progress) emerge: these two distant spirits manage to cohabit without problems in the Court of Justice's cases.

At the moment, instead, the Court does not linger much - except in rhetoric - on the problematic of popular representation but, rather, focuses its attention on the principle of institutional balance limiting, in the end, the democratic process area within the boundaries of the institutional relationships.[110] Whether this is all that constitutes

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principle of democracy as a legal person within the texture of European regional law and even emphatically by its own constituent treaties, has been subjected to more charges of sustaining a democratic deficit within its institutions than any other international structure. The paradox may be explained by the origin and evolutionary method of the Union, but above all by the general difficulty of injecting democracy into international institutions, which I discussed above and which in this case is exacerbated by the unprecedently high level of integration." And more in general - also noted by WEILER J. H. H E TRACHTMAN J. P., *European constitutionalism and its discontents,* Nw. J. Int'l L. & Bus., 1997, 393 - it is not possible to totally abandon the international origin, but rather to rethink it in new terms: "On this reading Van Geend en Loos did not mark the creation on a new legal order, but the commencement of a mutation of the old international legal order. It's time to view European constitutionalism as a mutation of international law that has survived and, dare we say, flourished."

[109] Here the reference is to the UEAPME verdict of the First Tribunal: unconnected to the analysis of the case, in regard to this problematics, the affirmations of Longobardi can be useful, according to whom "*Proprio per salvare la democrazia rappresentativa è necessaria una integrazione forte di democrazia procedurale. (...) oggi si comincia a discutere di* adjudication as representation *e quindi di somiglianza di questi circuiti decisionali plurali e particolari con il meccanismo proprio della democrazia rappresentativa*." (LONGOBARDI N., *Il principio democratico*, in AA.VV., *I costituzionalisti e l'Europa. Riflessioni sui mutamenti costituzionali nel processo di integrazione comunitaria*, Milano, Giuffrè, 2002, 217-218).

[110] More precisely AZZARITI G., *Il principio democratico*, in AA.VV., *I costituzionalisti e l'Europa. Riflessioni sui mutamenti costituzionali nel processo di integrazione comunitaria*, cit., 222, says that this "*finisce per restringere l'ambito del processo democratico entro i rapporti istituzionali tra i diversi organi di governo*". He also asks, ironically, ironicamente, "*se la democrazia europea sia tutta qui*". Criticisms of the choice of the Court to bank on the principle of institutional balance have not been lacking: while legal scholars has seen in this principle the basis for the birth of a civic republicanism after an American constitutionalism fashion, notwithstanding the accusations of a possible elitism in a system of this kind do not appear to be unfounded. Without considering, furthermore, that an excessive emphasis on the role of European parliament seems anachronistics in moment in which national parliaments themselves are losing power even within single orders. For an analysis of civic republicanism see CRAIG P. e DE BURCA G., *The Evolution of EU Law*, Oxford University Press, Oxford, 1999, 37, who underline how in negative terms the principle of institutional balance develops a function that prevents tyranny, while in positive terms this would assure a deliberative democracy where diverse interests can be expressed. More extensively on the theory of civic republicanism in Europe, see CRAIG P., *Democracy and Rulemaking within the EC: an*

democracy is an open question. Even staying within the same thesis of institutional balance, the Court is constrained to scale a slippery wall, for it is difficult to reason on the separation of powers in the presence of balances which are still so unstable: the Community system presents itself, in fact, far from defined, it is dynamically in evolution. To attempt to hold onto a coherent line in this system seems like an arduous task, and one wonders if such a task is even the responsibility of the Court.[111] In this sense it will be interesting to follow the development of this great jurisprudential thread, because in this arena one can more easily grasp the possible political role of the Court, an issue that brings us back to a typical problematic from the last part of this century, particularly in regards to constitutional review.[112]

From the analysis of the judgments furthermore, one cannot grasp how much this principle has already started to become part of the Community's genetic map and how much it should still be considered as "prolonging" the constitutional traditions of the member States. Nevertheless the examination of Community case law has allowed us to grasp a real effort of the Court - the motor of Community integration *par excellence* - in order to highlight of the possible instruments aimed at guaranteed a democratic decision-making process in Europe. It will then be interesting to see if a recent statement by General Attorney Mischo in regards to the European Charter of fundamental rights will be confirmed also by the Court of Justice:

> *"The Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order."*[113]

Empirical and Normative Assessment, in CRAIG/HARLOW, *Lawmaking in the European Union*, London, Kluwer Law, 1998, 33 ss.

[111] And if even the Court, in the sense of art. 164, is conceived of as a guaranteeing institution, like a sort of «safety valve» for the system (CATTABRIGA C., *La Corte di Giustizia e il processo decisionale comunitario*, cit., 14), there seems to be a different possible creative role in regards to the democratization of the community system, as seems to be suggested also by KUPER R., The Politics of the European Court of Justice, Kogan Page, London, 1998, 67: "It is possible that the Court can be used as one arm in a campaign for wider democratisation and human rights. It is the campaign itself, however, which will be crucial."

[112] And effectively, in the moment in which the Court is recognized as having a constitutional function, the institutional balance itself will come to resent its presence in part, to the point of considering that the image of the judge compared to the legislator, "*si sostituisce quella, più consensuale, di un'impresa legislativa comune in cui i parametri sono fissati dal legislatore e dai giudici in reciproca cooperazione*." (HARLOW C., *Citizen Access to Political Power in the European Union*, cit., which continues noting how "*in questo modello la funzione del potere giudiziario diventa la promozione di valori alternativi attraverso lo sviluppo di una giurisprudenza dei diritti e la protezione degli interessi di minoranza contro un processo politico preminentemente maggioritario*.") Various authors are inclined already in favour of the constitutional role of the Court of Justice: SHAPIRO M., *The European Court of Justice*, in SBRAGIA (eds.), *Euro-Politics, Institutions and Policymaking in the «New» European Community*, 1992, 148; WEILER J. H. H., *The Autonomy of the Community Legal Order: through the Looking Glass,* in ID., *The Constitution of Europe, "Do the New Clothes Have an Emperor?" and Other Essays on European Integration*, Cambridge University Press, 1999, 322.

[113] Opinion of Mr Advocate General Mischo delivered on 20 September 2001, *References for a preliminary ruling from the Court of Session (Scotland), Edinburgh (United Kingdom),* Joined cases C-20/00 e C-64/00, par. 126. The case is presented as an intersting one from the constitutional point of view, bearing directly on the protection of fundamental rights, and, more specifically, of the property right. So too scholars begin to advance the hypothesis that one think of the Convention as a possible decision-making instrument even

A celebratory statement on style or a judgment on the method of the Convention as a possible road for a more democratic decision-making process?

Yet again the dimension of the concrete case and the institutional one overlap, and with these two, the historical moment. Certainly the procedure utilized in the formulation of the Charter is new, and clearly distances itself from the method of the intergovernative conferences in the sense of privileging the democratic components in the process of the formation of an act: there are, however, those who have pointed out critically that with this, yet again, no attention has been paid to "European democracy" but rather to creating a European system for safeguarding rights. In a manner that is perhaps overly pessimistic and limited to the individual case, one could also repeat with Fioravanti that "*con la Carta i diritti si candidano sempre di più a collocarsi sul piano sovranazionale, ed a beneficiare di modi di tutela che sempre più sono concordati sul piano sovranazionale, mentre la democrazia sembra essere condannata, quasi per sua natura, a rimanere ancorata alla dimensione nazionale, come se contenesse qualcosa di difficilmente allontanabile dall'origine*."[114]

In addition, it is evident that the constitutional traditions common to the member States have influenced the Community evolution much less in regards to public organization than in regards to fundamental rights. Where there has always been - be it in a jurisprudential or a positive manner - a direct reciprocal influence between the two levels of protection of fundamental rights, organization have suffered from its international origin, thus remaining safe from possible interferences from the national level. The fact that the debate on democracy has begun to invade the territory of international organizations, can be explained, as a perceptive German internationalist notes, in the evolutionary parable of international law, starting from the affirmation of rights but noting an ever more pressing "*invocatio der Demokratie.*" In other words, one starts with rights and ends up (perhaps) in public organization.[115]

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for the adoption of important Community legislation: for example, see VAN GERVEN W., *Codifying European Private Law? Yes, if,* E. L. R., 2002, 173: "the use recently made of the «Convention» instrument in view of drafting the European Union Charter of Fundamental Rights may be seen as a precedent, especially now that the instrument has received official confirmation in the Proclamation of Laken on 15 December 2001."

[114] FIORAVANTI M., *La Carta dei Diritti Fondamentali dell'Unione Europea nella prospettiva del costituzionalismo moderno*, in AMOROSINO/MORBIDELLI/MORISI, *Istituzioni Mercato e Democrazia*, Liber Amicorum Predieri, 2002, 265: on the contrary, one can also see the success, out of the second Convention, in understanding how well Fioravanti's thesis is founded. From the previous affirmation of rights in the Community area, numerous authors, including Fioravanti himself, see the creation of a people, that therefore clearly cannot be seen in the old terms of the "*pouvoir constituent*," of the original constitutive subject: see too PREUSS U., *The Constitution of a European Democracy and the Role of the Nation State,* cit., 427, who notes how "in a way the relation between constituent power and constitution is reversed (…). However this *pouvoir constituent* has little to do with the omnipotent *creator ex nihilo* which Sieyès and Schmitt had in mind."

[115] This position is that sustained by DOEHRING K., *Demokratie and Völkerrecht*, cit., 130, starting from the fact that the protection of fundamental rights is ideally guaranteed by democratic decision-making processes and therefore these aspects would go together. But Dohering immediately warns that "*der Schuß nicht zwingend ist*". According to Doehring, in fact, it is radically different if one is dealing with international or supranational structures: in the former, *de jure*, democracy is not required since the components are not the peoples but the States, whereas in the latter - like the Union itself - it is the Treaty itself that requires it. Doehring is skeptical, moreover, about the democracy of the European Union,

Today as never before, the issue of the democratic status of the European Union appears to be in evolution, proceeding by approximations, almost drawing closer to an ideal which, like democracy is always improvable.[116]

because even if one admits that it is *sui generis*, "*geht man aber so weit in der Abstraktion einer Demokratie, kann man nahezu jedes System als Demokratie besonderer Art bezeichnen, womit der Begriff der Demokratie jede Anlehnung an ihre Basiselemente verliert*."

[116] On this point see DAHL R. A., *Introduzione alla scienza politica*, (a cura di G. Sartori), Il Mulino, Bologna, 1967, 120. At the same time, it is noted that democracy is not exportable, that is, that a democratic government is the fruit of innumerable variables that cannot be reproduced in other historical or geographic contexts and therefore must be studied on a case-by-case basis. On this topic, the conclusions of Dahl's work are particularly enlightening: DAHL R. A., *A Preface to Democratic Theory,* The University of Chicago Press, Chicago, 1956, 151, in consideration of American democracy. Very similar are the observations *vis-a-vis* the Westminster regime by BARTOLE S., *Democrazia maggioritaria*, Enciclopedia del Diritto, 2001, 347.

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