

Europe in Search of its Civil Society

*Olivier De Schutter**

Abstract: *Building upon the experience of the Convention for the elaboration of the Charter of fundamental rights and upon the suggestions of the White Paper on European Governance, this article puts forward proposals for a better involvement of the ‘civil society’ in the system of the European Union. It offers a general diagnosis of the misunderstandings surrounding the notion of ‘civil society’ and the relationship of representative democracy to participatory democracy. It then draws some lessons from the experiment in deliberative democracy which led to the drafting of the Charter of fundamental rights. Finally, it focuses on the contribution the organisations of the civil society can make to good governance in the European Union. Altogether, the proposals presented tend to encourage a better structuration of the actors of the civil society. Such a structuration, the article concludes, although it is usually considered with suspicion even by those whom it would most benefit, must be seen instead as a condition for the effective exercise of whichever participatory rights might be granted to the organisations of the civil society.*

Three recent developments have caused a renewed interest in the identification of a ‘civil society’ at the European level, and in the methods by which to improve its participation in the institutional system. First, the strengthening of the ‘anti-globalisation’ mobilisation was both made possible by, and in turn favoured, the emergence of a transnational network of organisations. These organisations have widely varying degrees of formalisation and modes of intervention. But they gather around a small number of common themes, one of which is their opposition to the pursuit of the project of economic liberalisation in Europe, as long as such liberalisation—often equated, at the rhetorical level, with privatisation of traditionally public sectors—is not counterbalanced by progress in the social field and by the democratisation of the decision-making process in the European Union. Many feel that this ‘new actor’ should be better integrated in the institutional system of the Union if the dialogue with him is to lose its purely confrontational dimension. Many

* Faculty of Law and CPDR, Catholic University of Louvain, Louvain-la-Neuve, Belgium. The author was involved in the Convention for the elaboration of the Charter of Fundamental Rights of the European Union both for the International Federation of Human Rights Leagues (FIDH), and as an expert to the Economic and Social Committee (group III). He also co-edited a volume which, published by the Forward Studies Unit of the European Commission, influenced the White Paper on European Governance: O. De Schutter, N. Lebessis & J. Paterson (eds.), *Governance in the European Union*, ‘Cahiers’ of the Forward Studies Unit, Official Publications of the European Communities, Luxembourg, 2001. This paper was completed in October 2001.

feel that the legitimacy of the European Union, in the years to come, will depend on its capacity to include this voice, and to offer convincing answers to the questions raised by these organisations.

Second, there is the experience of the drafting of the Charter of Fundamental Rights of the European Union. This process, which took place between December 1999 and October 2000, has raised considerable interest within the most diverse organisations of the civil society. Partly because of the simplicity of the issues raised by the drafting of a Charter of Rights—simple, at least, in the symbolic stakes of such an exercise—, partly because of the unprecedented openness of the Convention—which invited outside contributions, placed them on the website of the Convention, and held a hearing of 67 non-governmental organisations (NGOs) on April 27, 2000—the drafting process led to an authentically European-wide debate among the organisations of the civil society. The general impression was that the drafting process of the Charter compared favourably with the classical intergovernmental negotiations preceding constitutional changes in the European Union, even when such intergovernmental conferences are prepared by ‘reflection groups’, as was the case of the Westendorp group in charge of identifying the issues to be decided in the Treaty of Amsterdam of 1997. Any reform of the treaties which would not involve the representatives of the civil society in the way the Convention for the drafting of the Charter of Fundamental Rights did, it is now generally agreed, would suffer from a damaging deficit of legitimacy. With the Charter, a precedent has been set which simply cannot be ignored in future transformations of the European Union.

Third, at last, there exists a rather vague but widely diffused impression that the legitimacy of the European process of integration, which for forty years has been mainly result-based, must now be more process-based. Output-legitimacy must be complemented by input-legitimacy,¹ now that the initial project of building solidarity among the peoples of Europe by the creation of a single market has exhausted its appeal. Improving the participation of the organisations of the civil society is considered an element of this search for legitimacy. Thus, the *White Paper on European Governance*, delivered by the Commission on 25 July 2001, considers positively the contribution of the non-governmental organisations to the definition and implementation of European policies: NGOs ‘often act as an early warning system for the direction of political debate’, and their involvement ‘offers a real potential to broaden the debate on Europe’s role. It is a chance to get citizens more actively involved in achieving the Union’s objectives and to offer them a structured channel for feedback, criticism and protest’.²

¹ On this distinction, F. W. Scharpf, *Regieren in Europa* (Campus, 1999); and F. W. Scharpf, ‘Democratic policy in Europe’, 2 ELJ 136.

² COM(2001) 428 final, 25.7.2001. See esp. the comments on ‘Better involvement’, as part of the ‘Proposals for change’ contained in the communication (point 3.2.).

³ The Memorandum reads in relevant part: ‘The Forum will consist of the representatives of national parliaments, the European Parliament, the European Commission and the governments of the Member States. The candidate countries can also contribute to the work according to arrangements to be decided. The President may take initiatives for consulting the regions. He will also be responsible for contacts with civil society’ (http://europa.eu.int/futurum/documents/other/oth200601_en.htm).

⁴ ‘Openness’ and ‘participation’ are listed among the five principles of ‘good governance’ by the White Paper of July 2001. The other three principles are ‘accountability’, ‘efficiency’, and ‘coherence’. See pp. 10–11.

There is no reason to suppose that this renewed interest in the involvement of civil society will diminish soon. Quite on the contrary. The 'deeper and wider debate about the future of the European Union' called for by the Declaration on the Future of the Union adopted by the European Council in Nice in December 2000 envisages 'wide-ranging discussions with all interested parties', including the 'representatives of civil society'; and the Memorandum of the Benelux countries on the Future of Europe, released on 20 June 2001, anticipates that the Forum which—in contact with the ongoing and simultaneous public debate—should prepare the next IGC is to take 'contacts' with civil society, very much in the fashion such contacts were so usefully made in the drafting process of the Charter of Fundamental Rights.³ Moreover, the emphasis on openness⁴ and participation in the *White Paper on European Governance* of the European Commission is simply one indication among others of a desire to launch new modes of collaboration between the institutions of the European Union and the non-governmental organisations, for the sake of both a better effectiveness of European policies and their improved legitimacy.⁵

Thus, the calls for a stronger contribution of the civil society—mostly labelled 'organised civil society', as in Article 257 of the EC Treaty as revised by the Nice Treaty⁶—concern both the constitutional process in the European Union—practically ongoing since the Single European Act of 1986—and the definition and implementation of its policies and secondary legislation. For these reasons,⁷ it has never been more urgent to ask under which conditions the concept of 'civil society' can be a viable one in institutional language, which forms the involvement of civil society in the European Union could take, and what is implied by the proposals to strengthen the mechanisms of 'representative democracy' which already exist in the system of the European Union by adding mechanisms of 'participatory democracy'.

With these questions in mind, this paper proceeds in three parts. A first part will offer a general diagnosis. It will attempt an answer to the question: what is wrong with the current relationship between the European Union and its 'civil society' and which preconditions should be met before we can fix it? Two issues will be considered: the relationship of 'participatory democracy' to 'representative democracy'; and the coexistence of different rationales for the improvement of participatory mechanisms in the European Union, which needs to be taken account of before we enter into a

³ See esp. the Commission discussion paper, 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', presented by President R. Prodi and Vice-President N. Kinnock, COM(2000)11 final, 18.1.2000; and the Opinion of the Economic and Social Committee on the Commission discussion paper, CES 811/2000, 13.7.2000.

⁶ Although the Treaty of Nice did not constitutionalise the concept of 'civil dialogue', despite the many calls to that effect, it did amend Article 257 EC by providing that the Economic and Social Committee 'shall consist of representatives of the various economic and social components of *organised civil society* and, in particular, representatives of producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general public'.

⁷ Perhaps it should be added that another level of participation of the civil society in the institutional system of the European Union, situated in an intermediate position—between the constitutional and the regulatory levels—could be that of the annual interinstitutional Conferences encouraged by the European Parliament in the field of economic policy (in its *Resolution on participation of citizens and social players in the Union's institutional system*, adopted on December 10, 1996 (rapp. Ph. Herzog)), and the extension of which to other areas the Economic and Social Committee recently called for (*Opinion of the Economic and Social Committee on Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper*, CES 535/2001, 25.4.2001, 4.9.).

discussion on their possible institutional translations. We face these issues in more or less identical terms, whether we wish to improve the contribution of civil society to the constitution-making process in the European Union or whether we seek a greater involvement of civil society in the policy-making of the EU, between the constitutional moments. The second part will analyse more specifically the role of the civil society in a 'Convention' like that entrusted with the drafting of the Charter of Fundamental Rights, by drawing some lessons from the experience of the Charter. This part discusses the relationship of expert discourse to lay discourse; and the relationship of transparency and openness to input-legitimacy. The third part will focus instead on the contribution of civil society to good governance in the European Union. This last part will make a concrete proposal, which can be read as a suggestion to implement the generous, but exceedingly vague, recommendations of the recent *White Paper on European Governance* of the Commission.

I The Promise of Participatory Democracy

Enhanced Participation and the Risk of Paralysis

Although, since many years, the emphasis has been on the so-called 'democratic deficit' of the European Union, by which is meant the lack of representativeness and direct electoral accountability of those in charge of the definition of the policies of the European Union, the 'deficit' thus denounced does not seem to be at the heart of the legitimacy problem faced by the Union. Not only should we avoid the temptation of simply transposing, at the level of the Union, modes of democratic representation which parallel those of the Nation-State, as if these levels were comparable.⁸ But, more importantly, the 'democratic deficit' also has its source in the impression that the policy makers in the European Union, whether or not they are considered authentic representatives of the citizens, have lost the ability to influence the historical course of our societies—if, indeed, they ever had such an ability. The original Treaty of Rome instituting the European Economic Community, the basic philosophy of which was never questioned since 1957, postulated that social progress would naturally flow, as a side benefit of economic growth, from the creation of an expanded market where factors of production circulate freely and in which competition is not distorted.⁹ The institutional translation of this belief can be found in the imbalance between the political forces required for liberalisation to proceed forward and those which must be gathered for solidarity to be achieved between Member States or populations of different socioeconomic condition within the States: in other terms, the presumption remains strong in favour of economic cohesion, rather than of territorial and social cohesion, and the decision-making rules provided in the EC Treaty, especially the rules pertaining to vote in the Council of Ministers, reflect that basic choice. For those who seek to improve the modes of participation of the civil society in the institutional system of the European Union, then, one of the stakes is how not to worsen this

⁸ R. Dehousse, 'Comparing national law and EC law : the problem of the level of analysis', *American Journal of Comparative Law*, 1994, at 201.

⁹ On the consequences of this philosophy on the status of social rights in the case-law of the European Court of Justice, see C. A. Ball, 'The Making of a Transnational Capitalist Society: the Court of Justice, Social Policy, and Individual Rights under the European Community's Legal Order', *Harvard International Law Journal*, 1996, p. 307.

imbalance, which already exists and which leads an expanding part of European public opinion to express scepticism about the capacity of the Union to truly improve their living conditions: the question is how to combine the need for legitimisation of the European Union's policies, by a larger participation of all those interested, with the need not to further encumber the decision-making process, and to avoid the risk of further disarming the political in the face of the market forces in the construction of the Union. This difficulty is part of the dilemma between favouring participation of all the stakeholders and risking paralysis because of the weight of vested interests and the obligation not to disturb them.

One way to circumvent this apparent difficulty is by clarifying the relationship between 'representative democracy' and 'participatory democracy'. 'Representative democracy' may not be perfect in the European Union,¹⁰ it exists. It is based on a particular form of legitimacy by input: that which the citizens of the Union confer to their representatives in the Council and the European Parliament by voting at national and European elections. 'Participatory democracy' does not compete with representative democracy, but complements it. It is based on 'the action of interest groups and citizens' initiatives: people belong to groups that build up expert and grassroots knowledge of the social issues in question. These bodies also participate in public information and communication processes, so helping to create a general perception of the common good. The term 'civil society' implies this type of participation'.¹¹ The implication of the citizens, here, is not automatic, but depends on the contribution of each to civic action, and thus it may widely differ from person to person; it is totally voluntary, and based on the free choice of each individual rather than on inherited solidarities of family, class, or religion; and it is pluralistic, in the sense that by joining the organisations of the civil society one chooses not only one complete vision of society over others, but also the particular values—environment, human rights, consumers' rights . . .—one wishes to promote by civic involvement. These differences are far too important to consider that the recognition of participatory rights to representatives of the civil society constitutes a threat to the classical modes of democratic representation through elections. 'By organising themselves, citizens provide themselves with a more effective means of impressing their views on different society-related issues on political decision-makers. Strengthening non-parliamentary democratic structures is a way of giving substance and meaning to the concept of a Citizens' Europe'.¹² Such 'non-parliamentary democratic structures', however, should not add new hurdles to the political decision-making process, but add to its value, by improving the quality of the democratic debate and widening its scope. It should not challenge the legitimacy of the elected representatives by imposing the presence of non-elected representatives, but facilitate the adoption, by the elected representatives, of decisions which will be seen as more legitimate by those to whom they are addressed. And it should not lead to a dilution of the responsibilities in the decision-making process, but instead to more accountability of the elected representatives, whom in the last instance remain answerable to the collectivity. These, at least, are the principles

¹⁰ See the Resolution on the democratic deficit, OJ C 187, 1998, p. 229.

¹¹ Opinion of the Economic and Social Committee on 'The role and contribution of civil society organisations in the building of Europe', CES 851/99, 22.9.1999, point 5.2., at 6.

¹² Opinion of the Economic and Social Committee on the Communication of the Commission, 'Promoting the role of voluntary organisations and foundations in Europe', COM(97) 241 final, OJ C 95, 30.3.1998, at 99.

guiding the proposals made in this paper. One of the advantages of conceiving thus the relationship between 'representative democracy' and 'participatory democracy' in the institutional system of the European Union is that, under this conception, the introduction of elements of the latter is not seen as burdening the decision-making process with new requirements—yet new interests to take into account, new compromises to be made—, with the risk of paralysis this may imply. Participatory democracy can enrich the democratic process, it should not make it unworkable. It is time for us to abandon the idea that power, in a particular collectivity, is somehow subject to the law of Lavoisier—'*rien ne se perd, rien ne se crée*'—, so that the recognition of certain powers to some necessarily should go hand in hand with the deprivation of others from the same mass of power: political power—the power to influence the course taken by a society, and to drive the society in a particular direction—does not exist in fixed quantity, and we can offer some to new actors without diminishing the capacity of other actors to fulfil the mandate they have been elected for.

Competing Rationales between the Slogan of Participatory Democracy

Yet other dilemmas have their source in the coexisting rationales behind the push for closer cooperation between the European Union institutions and the organisations of the civil society. If the reason for strengthening this relationship is 'fostering participatory democracy', then it must build on the existing organisations, and take as given both their current structures (even when, for instance, the coordination at the European level of national organisations remains poor or even non-existing) and their self-chosen goals (even when these goals are purely sectorial or remain defined at a national level, without considering either the other sectors affected or the specifically European dimension). If, on the other hand, the goal is to 'contribute to European integration' by using the organisations of the civil society as channels to the 'grassroots level' of the citizens, so as to contribute to 'the formation of a 'European public opinion',¹³ then an active role of the European Union institutions is required in the development of the civil society at a European level, so that its organisations can effectively fulfil that task. But does this not risk threatening the independancy of the civil society?¹⁴ This first hesitation intersects with another, which concerns the kind of

¹³ See, e.g. the Discussion Paper of the Commission, 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', *op. cit.* note 5 *supra* 6: 'European NGOs and their networks and national members, can serve as additional channels for the Commission to ensure that information on the European Union and EU policies reaches a wide audience of people concerned by and affected by its policies'. This is also a rationale for the promotion of 'civil dialogue' which the Economic and Social Committee puts forward: 'the representatives of organised civil society have a special responsibility and role to play as intermediaries vis-à-vis the general public' (Opinion of the Economic and Social Committee on the Commission Discussion Paper 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', CES 811/2000, 13.7.2000, point 5.1.).

¹⁴ The concern that the organisations of the civil society should not be created or formed by the European Institutions, but rather be taken as they exist and furnished the capacities to contribute to the European Union is a recurrent theme in the positions taken by the official institutions. See, e.g., the Resolution adopted by the European Parliament on the basis of the report on participation of citizens and social players in the Union's institutional system (A4-0338/96, PE 218.253/déf.) (Herzog Report), para. 35: 'political institutions must observe the principle that social players and organisations are independent; [the European Parliament] notes that the role of the former is not to bring the latter into being, but rather to provide them with a legal framework and the means of obtaining information and gaining real access to the institutions'. All attempts to better organise the civil society

knowledge which is to be gained from an improved participation of the organisations of the civil society in the decision-making process of the European Union. Sometimes, what is insisted upon is the need for 'expert input' and 'direct feedback' from those segments of society immediately affected by the policies in discussion: it is then the specific expertise of the non-governmental organisations and other actors of the civil society which should feed into the policy-making; the policies thus informed, it is supposed, should be better devised and more precisely focused—more efficient if you want, although in a meaning of 'efficiency' which should precisely not be reduced to a cost-benefit analysis.¹⁵ On other occasions instead, the goal will be rather to 'represent the views of specific groups of citizens to the European Institutions': the democratic-participatory rationale for the consultation of the representatives of civil society, then, is afforded more weight than the informational rationale.¹⁶ Whether one or another of these motives for improving participation is preferred will determine the attitude of the European Institutions with respect to the existing organisations of the civil society and the need to restructure them in accordance with the reasons for involving them or not in the decision-making process. Consider the following consequences which may be drawn from the different rationales for improving the participation of the organisations of the civil society in the decision-making processes of the Union, as shown in Table 1.¹⁷

around the European Institutions, particularly the Commission, have failed because of that obstacle—that the institutionalisation of civil society may lead to its domestication, and thus to a loss of its subversive potentialities.

¹⁵ Thus, we read in the Discussion Paper of the Commission, 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', *op. cit.* note 5 *supra* 7: 'Timely consultation with all stakeholders at an early stage of policy-shaping is increasingly part of the Commission's practice of consulting widely, in particular before proposing legislation, to improve policy design and to increase efficacy'.

¹⁶ All the expressions quoted are borrowed from the Discussion Paper of the Commission, 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', *op. cit.* note 5 *supra*. More precisely, the discussion paper mentions, under the heading 'Rationale of co-operation between the Commission and non-governmental organisations', the following five goals: 'Fostering participatory democracy'; 'Representing the views of specific groups of citizens to the European Institutions'; 'Contributing to policy making'; 'Contributing to project management'; and 'Contributing to European integration'. The first two rationales may roughly be considered under the 'democratic-participatory rationale' for improving the participation of civil society; the third and fourth rationales may be considered under the 'grassroots knowledge rationale'; and the last rationale listed by the Commission closely parallels the 'diffusion rationale'.

¹⁷ The following scheme improves on O. De Schutter, 'Proceduralising European Law: Institutional Proposals', in: O. De Schutter, N. Lebesis & J. Paterson (eds.), *Governance in the European Union*, *op. cit.*, p. 189, 200. I do not mean of course that all the arguments currently put forward in favor of a greater involvement of civil society in the institutional system of the European Union fall neatly within one of these paradigmatic rationales. Consider for instance the view of the Economic and Social Committee that 'civil society organisations can . . . be viewed dynamically as a locus of collective learning. In complex societies, which cannot be run on a centralized basis, problems can only be resolved with active grassroots participation. Various forms of social experimentation and forums for pluralist discussion are a prerequisite for an 'intelligent' democracy and can generate an ongoing process of social learning. In this sense, civil society is a 'school for democracy' (Opinion of the Economic and Social Committee on 'The role and contribution of civil society organisations in the building of Europe', CES 851/99, 22.9.1999). This combines the 'grassroots knowledge model', in our tripartite division, with the 'diffusion of a European perspective' model—indeed, there is a dialectical interaction between the knowledge gained from the civil society organisations and the capacity of these organisations to evolve in the process of learning from the views of other actors, including the European institutions.

Table 1. Rationales for improving the participation of the organisations of the civil society in the decision-making processes of the Union.

Purposes of the implication of organised civil society	Democratic-participatory argument: taking into account the interests of those affected	Grassroots knowledge argument: informing the policies with the specific expertise of a particular sector/geographical area/segment of population	Diffusion of a European perspective: using the organisations of the civil society as a channel for the formation of a truly European public opinion
Selection criteria: which organisations should be implicated?	Representativeness of players	Expertise of players, quality of the information they possess, uniqueness of perspective	Potential audience of players, segments of society they could reach ¹⁸
Role of the European Institutions in organising the civil society at a European level	Equalisation of resources between the different players, by distributing information, subsidising their activities on the basis of their representativeness	No equalisation of resources is required: the organisations are chosen precisely because of what they may contribute specifically in terms of information, thus improving the quality of decision-making	More is required than equalisation of resources: new actors must be called into existence when some segments of the population or sectors cannot be reached in the absence of other channels
Risks entailed in the chosen mode of implication of organised civil society	Risk of bias due to the weight of the vested interests, making large-scale reforms difficult to effectuate	Risk of bias due to the impossibility of challenging/questioning the perspective of the ground level actors	Risk of bias due to the separation between the civil society organised at a European level and the more grassroots, nationally-anchored organisations
Implication of the organised civil society as a source of legitimacy	Legitimacy flows from the fact that the decision takes into account the views of all stakeholders	Legitimacy flows from the objectivity of the information gathered prior to the adoption of the decision, and the impartiality of the expertise gained from grassroots organisations	Legitimacy is to follow from a pedagogical exercise in the direction of those affected by the decision: it is <i>post hoc</i> rather than <i>ex ante</i>

Although it is unnecessary here to spend much time in commenting this charter—most of the elements of which are self-explanatory and require no further elaboration—it should be emphasised that, in the current debates on improving the involvement of the organisations of civil society in the European institutions, these different arguments coexist as if they were simply complementing one another, rather than competing with one another. This idealised view, however, can be maintained only until the concrete forms by which the participation of the civil society may be encouraged are left vague. Once the discussion will become more focused, once concrete suggestions will be made as to how the wish for greater participation can

¹⁸ See esp., among the selection criteria put forward by the Commission in its Discussion Paper on 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', *op. cit.* note 5 *supra* 11: 'Their capacity to work as a catalyst for exchange of information and opinions between the Commission and the citizens'.

be institutionalised, contradictions will appear between the different rationales which have just been presented. How should a selection be made between the organisations of civil society competing for political influence in the institutional system of the European Union? Should the European institutions—either the European Commission or the Economic and Social Committee—actively structure the existing networks of organisations, or even, when it is felt necessary, create new networks and thus encourage the emergence of new actors, or should they take the civil society ‘as it exists’, with the risk of granting even more influence to the organisations which already exercise a disproportionate influence due to their modes of organisation? Should legitimacy result from taking into account the views of those affected by the decision, or should it be gained, *post hoc*, by the explanation accompanying the decision, and the channeling of this explanation to those concerned? These questions, we may dare say, still await their answers. Although they are around us since almost ten years—at least since the Communication of the European Commission of 2 December 1992 on ‘An open and structured dialogue between the Commission and special interest groups’¹⁹—clear choices have been postponed to this day. As a *de facto* result, the better-organised and better-informed groups of the civil society are exercising an influence which other groups are incapable of attaining, although the latter may be more representative, may detain more valuable information, and may even provide more useful and efficient channels between the European institutions and the citizens. A consensus is now emerging according to which the limits of informality have been reached in the consultation of civil society: which civil society needs to be consulted, and what consultation should precisely entail, therefore are questions which now require clearer answers.

II Involvement of the Civil Society: Lessons from the ‘Convention’ for the Drafting of the Charter

The unprecedented openness to the representatives of the civil society of the Convention for the drafting of the Charter on Fundamental Rights had two main objectives. First, the involvement of the representatives of the civil society was to serve to anchor the legitimacy of the drafting process—and later, of course, of the text of the Charter itself—thus reinforcing further what was already intended in the choice made by the European Council of Tampere in October 1999 to bring together, in a single ‘body’, representatives of the (governments of the) Member States, of the national parliaments, of the European Parliament, and of the Commission. Second, such an involvement of the civil society was to contribute greatly to the visibility of the Charter, the very purpose of which, indeed, was initially to make the existence of certain fundamental rights they hold more visible to the citizens of the Union—and, we should add, to all those whose activities can fall under the field of application of European Union law. Given these objectives, it should come as no surprise that one of the issues which such a process raises—for the representatives of the civil society as well as for the members of the Convention themselves—is that of the coexistence of an expert knowledge, detained by some specialists of the matter under discussion, and the

¹⁹ OJ C63 of 5.3.1993. The communication followed upon the declaration on the right of access to information as annexed to the Treaty on European Union and on the Birmingham Declaration adopted by the European Council on 16 October 1992, which called for a more open Community to ensure a better informed public debate.

lay perspective of the other participants in the debate. The other two issues I address in the following paragraphs are the consequences of the open character of the drafting of the Charter, and the definition of the mandate of the Convention.

Expert Knowledge and the Lay Perspective

One striking feature during the drafting of the Charter of Fundamental Rights of the European Union, indeed, was the curious coexistence in and around the Convention of technicians, mostly jurists, experts in the issue of protection of individual rights in the legal order of the European Union on the one hand, and actors adopting a more political attitude on the other hand, openly intent on attaining a particular result in the process of drafting—the inclusion or the exclusion of a particular right, for example—rather than on achieving a document irreproachable as a codification of the *acquis* in the field of fundamental rights. These two discourses could have easily cohabited if the division of tasks among them had been clarified at the outset, for instance if the process had separated the exhaustive enumeration of the rights which could be plausible candidates for inclusion in the Charter, from the selection of some rights considered ‘fundamental’ in the self-definition of the Union, and after having assigned the former task to expert jurists, had dealt with the latter aspect in an openly political mode. Perhaps, too, the very ambiguity of the exercise contributed to the tension between these two discourses: the drafting of the Charter, indeed, was an exercise in codification (‘to make visible the invisible’, in the words of J.-P. Jacqué), but at the same time it was highly politicised, because of the range of choices which had to be made in the ‘codification’ itself and because of the symbolic dimension necessarily attached to the drafting of a Charter of rights. Nevertheless, it may safely be said that some problems of coexistence between these two discourses are generally encountered, and that if we are to make progress towards a more systematic implication of the representatives of the civil society in the decision-making processes of the Union, these problems should be confronted and, to the extent possible, solved.

Where are these problems located? There is, on the one hand, the constant risk of the abuse, by those detaining expert knowledge, of the argument of authority, especially when the resort to such a mode of argument veils choices motivated by political predilection. There is on the other hand, and reciprocally, the distrust of experts by the actor who sees his role as more political: behind the technical argument opposed to his proposal (‘interesting, but technically infeasible’), is it not an ideological difference which surfaces? Such cycles of mutual suspicion must be avoided. A way of doing so is by preceding the work within a forum such as the Convention for the drafting of the Charter by the presentation of a substantial preparatory report, explicitly meant to summarise the ‘existing expert knowledge’ on the subject matter under discussion, fleshing out the available scenarios and listing the arguments ‘pro’ and ‘con’ each scenario. It is a truism of course that there is no clear-cut division between two modes of knowledge (‘expert’ and ‘lay’), two positionalities (‘objective’ or ‘neutral’, and ‘subjective’ or ‘engaged’), or more generally, between ‘facts’ and ‘values’. It would therefore be totally inappropriate to consider that, once a forum is presented with such an ‘exploratory report’, the options listed or the reasons favouring or disfavouring each option should be immune from criticism or revision. Nevertheless, the initial preparation of such a report would guarantee a clearer separation between two types of arguments, pragmatically distinct and based on

different modes of justification, and in relation to which the participants in a forum such as the Convention are very differently situated.

Moreover, such a procedure would have other side-advantages which are far from negligible. First, by its very existence, the preparatory report would equalise the cognitive resources of the participants. It would equip those least familiar with the question under discussion with the basic tools they require to hold an argumentation favouring the values they attach most importance to. It is not enough, indeed, to afford participatory rights to those interested, and to hold a debate from which a certain consensus should emerge. These participatory rights will remain purely formal until accompanied by the capabilities which actors need to exercise them effectively, which include the distribution of cognitive resources; and the debate will remain an unsatisfactory mode of legitimising a decisional process until it approximates the ideal situation where all relationships of power are excluded, which includes the power exercised by those who detain the relevant knowledge on those who are deprived of this knowledge. Secondly, the clarification of the main existing options at the very outset of the deliberation represents an appreciable gain of time and energy; and it limits the possibility of misunderstandings, by providing the participants with a common vocabulary and set of references.

Openness and Participatory Rights

It has already been mentioned that the work of the Convention for the drafting of the Charter was characterised by its total openness. Not only was the discussion transparent, almost completely public;²⁰ more importantly, the filing of outside contributions was encouraged, and when such contributions were received, they were posted on the website of the Convention for commentary. In fact, this openness greatly contributed to the legitimacy of the process, even more so than did the plural composition of the Convention itself. Nevertheless, we should not underestimate some of the side-effects the openness thus conceived has produced. First, it led to a clear transferral of power from its 62 members to the Secretariat of the Convention, entrusted with the examination of the numerous amendments suggested to the text in discussion. Second, it produced a certain dilution of responsibilities: as the final product resulted from a collective deliberation, no one had to accept completely the full parenthood of the decision. Third, and more importantly, because of the absence of any restriction on whom could actually contribute to the debate on the Charter, the outside observers were not recognised a 'right to be consulted'. Indeed, the more open the consultation process, the less the right to be 'heard' may in fact impose on the institution addressed an obligation to answer: thus, unsurprisingly, the 'right to have one's views taken into account' was degraded into the most banale exercise of freedom of expression.

This latter consequence was not considered by its participants to be a significant deficiency in the process of the Convention. This may be attributed to the specificity of its object. The identification of the rights to be included in the Charter was closer, in some respects, to a discovery process, than to a process of political negotiation on norm-setting. And, except for those who feared that the adoption of the Charter could lead in the future to a further extension of the competences of the European Community or of the powers of the European Union, to add new rights to the list

²⁰ Only the meetings of the members of the Presidium were not open to the public.

in discussion was hardly costly: at least, adding new rights did not automatically lead to subtracting other rights, as in the classical give-and-take of zero-sum games. Perhaps these specificities made the Habermassian model of reaching a consensus through free discussion particularly plausible in the context of the Convention. However, were such a model to be imported in other settings than the Convention, its affinity with the allocation mechanisms of the market would soon become apparent—and the implicit image of the invisible hand, whereby the free exchange of ideas is presumed to lead necessarily to the best approximation of the truth, would show its limits. The opening up of the decisional process to all those interested could, in fact, amount to the possibility for the better informed, the better situated—in sum, for those having the most resources at their disposal—to impose their views, by exercising an influence which there is no reason to suppose will be proportionate either to their representativity or to the quality of the knowledge they contribute.

I would suggest that it is possible and necessary to open up to a much wider range of interests procedures like the intergovernmental conferences which have traditionally been closed, but that the form of ‘openness’ which the Convention exemplified in neither the only nor the most useful one available. If the implication of the civil society in such processes in the future is to become a reality, its organisations need to be better structured, and the dialogue with the representatives chosen by electoral means requires more formality. We should face the fact that a number of the groups which have been most active around the Convention for the drafting of the Charter of fundamental rights did not actually represent those interests in the name of which they were intervening: even a superficial examination of their claims to representativity would have made it more difficult for self-proclaimed spokespersons to use the Convention as a channel to diffuse views which, by far, were not always shared by those for whom they came forward.

It is true that ‘representativity’ of the organisations of the civil society is a highly debatable concept, which makes it open to all sorts of manipulations. What emerges from the current discussions, and which I would personally favour, is a two-tiered definition of this requirement, with one component applicable to all organisations, and another component which should remain variable. Some criteria, indeed, can be imposed on the organisations of the civil society insofar as these criteria are presupposed by the very pretence of these organisations to represent certain interests at the European level. Thus for example, it could be required that these organisations ‘exist permanently at Community level’, that they ‘represent general concerns that tally with the interests of European society’, that they be accountable to their members and, indeed, have received from their members the ‘authority to represent and act at European level’, whilst remaining independent from outside bodies from which they could be prohibited from receiving instructions.²¹ Although the imposition of these requirements and other possible candidates can of course be disputed,²² the idea of

²¹ These elements are borrowed from the list of ‘criteria for representativeness’ put forward by the Economic and Social Committee in its Opinion on ‘Organised civil society and European governance: the Committee’s contribution to the drafting of the White Paper’, CES 535/2001, 25.4.2001, point 3.4.1., at 6.

²² For example, in the same Opinion, the Economic and Social Committee insists that to be recognised as entitled to participate at European level, the organisation must ‘comprise bodies that are recognised at Member State level as representative of particular interests’. However, it may happen that certain organisations, although representative in fact of the interests they speak for, will be ignored by official channels of representation within the State, for instance because of the slowness with which institutions

imposing certain basic conditions to those organisations expressing a will to take part in the civil dialogue seems hardly contestable. At a minimum, a certain correspondence between, on the one hand, the claim to representativeness of the organisation, and on the other hand, its membership and modes of internal decision-making, could be required: such a requirement amounts to little more than to ask from the organisations the same transparency as is imposed on the institutions of the Union themselves. Beyond general requirements of that nature, certain specific criteria of representativeness could be imposed on the organisations, according to the category they belong to. The view of the Economic and Social Committee is that

'[if] representativeness were to be measured solely by the number of members of NGOs, that would be tantamount to failing to grasp the basic principles of civil society. Civil-society initiatives often come to the fore in areas where there is not (yet) a general awareness of a problem, such as was the case in the environment field some years ago . . . [A]ssessment of the degree of representativeness of NGOs must under no circumstances be based solely on quantitative criteria—it must also involve qualitative criteria. Whether or not NGOs are representative can therefore not be established exclusively on the basis of the number of members whom they represent. The judgment must also take account of the ability of such bodies to put forward constructive proposals and to bring specialist knowledge to the process of democratic opinion-forming and decision-making'.²³

Indeed, the reasons for an improved participation of the organised civil society in the institutional system of the European Union,²⁴ the types of organisations coexisting in the 'civil society', and the incentives those whose interests these organisations promote may have or may not have to become members,²⁵ differ widely. The criteria of representativeness should meet this heterogeneity, and they should be applied in a realistic manner, rather than in a formalistic way. However, these criteria should exist, and they should be sufficiently well defined and transparent, to avoid any discriminatory application.

Far from constituting a threat for the 'independance' of the organisations of civil society or from bridling their creativity, such a structuration would present two major advantages. First, it would guarantee a more democratic diffusion of the information, at the earliest stages of the decisional process. This would constitute a huge step forward from the current situation, where in many cases the 'useful' information (i.e. the information available when the policies are first shaped, and not simply

incorporate new actors or for even less excusable reasons. It seems that this criterion gives too much weight to the recognition of actors at Member State level; in the worst scenario, the reliance on such a criterion could even threaten the very independance of the organisations concerned, especially when they are critical of governmental policies.

²³ Opinion of the Economic and Social Committee on the Commission discussion paper 'The Commission and non-governmental organisations: building a stronger partnership' (COM(2000) 11 final), CES 811/2000, 13.7.2000, point 2.2.5., p. 4.

²⁴ We have identified three at least of such reasons: participatory democracy; the adoption of policies informed by grassroots knowledge; and the wide diffusion of the European perspective so that the policies are better understood by those in charge of implementing them or affected by them.

²⁵ Whether the organisation seeks advantages which will mainly benefit its members, all those having certain characteristics in common, or the general public, will be especially relevant when deciding whether its 'representativeness' is to be made dependant on the number of its members. This is a *locus classicus* of the interest-groups theory at least since M. Olson, *The Logic of Collective Action. Public Action and the Theory of Groups* (Harvard University Press, 1966). See also E. Elhauge, 'Does Interest Group Theory Justify More Intrusive Judicial Review?', 101 *Yale Law Journal* 31, 36–37 (1991); G. Becker, 'A Theory of competition Among Pressure Groups for Political Influence', 98 *Quar. J. of Econ.* 371 (1983); G. Stigler, 'The Theory of Economic Regulation', 2 *Bell Journal of Economics & Managment Science* 3 (1971).

implemented or translated in legal texts) is acquired on a more or less random basis, according to the talent of the organisation, its luck, or the links it has managed to build within the institutions. This will constitute an advantage whether or not the organisations of the civil society are granted more than simply the right to express their views, i.e. whether or not they are granted a 'right of consultation' worthy of the name. Second, a better structuration of the organisations of civil society makes it possible to go beyond recognising these organisations a 'right to be heard', and to ensure instead, as the European Commission has described it, 'that [the organisations of the civil society] receive appropriate feedback on how their contributions and opinions have affected the eventual policy decision, thereby making the relationship a real dialogue'.²⁶ The absence of such a 'real dialogue' was built into the—otherwise laudable—choice of the Convention to open its forum most widely to all the groups wishing to put views forward: indeed, if such a 'real dialogue' implies a right of the organisation to receive a reasoned answer to the suggestions it puts forward, it is manageable only insofar a selection is made among the organisations. In that sense, a better structuration of the civil society should not be seen as imposing an obstacle to their participation which would have not existed previously; it is, rather, the condition for getting us closer to the recognition of participatory rights which are the very ingredients of a participatory democracy.

The Mandate of the Convention

It is well known that the European Council of Cologne had defined rather narrowly the mandate of the body set up to draft the Charter. The Convention was to agree on the content of a Charter of fundamental rights, but the Charter should not extend the powers or add new tasks to the European Community or to the European Union. The Convention was not to discuss the jurisdiction of the European Court of Justice, or the need for enlarging the *locus standi* of individual applicants seeking the annulment of a Community measure, although the current interpretation of Article 230 EC is generally considered as an obstacle to an effective protection of fundamental rights in the Community legal order.²⁷ The Convention was to take no position on the question of accession of the European Community (or the European Union) to the European Convention on Human Rights, although, obviously, the adoption of a Charter of fundamental rights replaced this question to the forefront of the European

²⁶ Commission Discussion Paper, 'The Commission and Non-Governmental Organisations: Building a Stronger Partnership', *op. cit.* note 5 *supra* at 10.

²⁷ See, e.g., A. Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court', (1974) *CML*, p. 191; P. Craig, 'Legality, Standing and Substantive Review in Community Law', (1994) *Oxford Journal of Legal Studies*, p. 507; A. Arnall, 'Private Applicants and the Action for Annulment under Article 173 of the EC Treaty', *CML*, 1995, p. 7. After the European Court of Justice itself had expressed its concern about the consequences of the requirements of (then) article 173 of the EC Treaty (now Article 230 EC) on the protection of fundamental rights in the Community legal order (see its Report of May 1995 on certain aspects of the application of the Treaty on the European Union, point 20), the Irish presidency of the second semester of 1996 has suggested an extension of the *locus standi* of individual applicants when the action of annulment of a Community measure of general applicability invoked a violation of fundamental rights (see Conference of The Representatives of the Governments of the Member States, Presidency Suggested Approach, 8 October 1996, CONF/3945/96, p. 4). However, neither this suggestion, nor the Belgian suggestion in favor of an action for annulment in the public interest which could be introduced by representative associations, were followed upon by the Intergovernmental Conference.

debate.²⁸ Although the Convention was to draft the text of the Charter, the decision on its legal status—whether or not to include it in the Treaties—was to be left to the Heads of State and Government within the European Council. At last, the Convention was to dissolve once its members could agree on a project to be presented to the Council: it was deprived of any opportunity to follow upon its work.

Such a situation, characterised by a mandate defined once and for all, and by the absence of any follow-up of the Convention on the product of its deliberations, presents us with two difficulties.

First, identifying what should be the precise scope of the mandate of such a Convention may not always be possible. If a Convention were to be convened on how to achieve sustainable development in the Union, would it not be plausible that, beyond environmental matters *stricto sensu*, it should enter fields like transportation, telecommunications, or the common agricultural policy? Perhaps the Convention which will be set up to draw different scenarios for reforming the institutions in order to meet the needs of the enlargement will not face the same difficulty. But at least as long as such a Convention is sectorialised, it may be useful to introduce formally the possibility of a revision of that mandate, by allowing the Convention, set up for one particular purpose, to renegotiate its mandate, when it appears from its deliberations that the initial anticipation of the framing of the problem on which suggestions are to be made was in fact mistakenly appreciated.

Second, the lack of any possibility for the Convention to follow-up on its work situates us in an absurd dilemma: either the devaluation of the product of its deliberation, which, once the Convention has dissolved, will appear to be subordinated to the contingencies of political agendas and priorities, and to the classical deal-making of everyday political processes; or, on the contrary, the sacralisation of the work of the Convention, which becomes practically impossible to amend because of the legitimacy it is endowed with, and because any change would be interpreted as a disavowal. With the Convention having drafted the Charter of fundamental rights, we had some of both: the impression created in the public was that the members of the Convention, and the great number of actors around them, has invested a lot to be gratified finally with what resembled a *fin de non recevoir* by the European Summit of Nice, closing the French presidency; and at the same time, it would be unthinkable for one of the Fifteen now to suggest that the 'right to engage in work' really does not go far enough in the direction of a right to employment, or that environmental protection really has no place in a Charter of fundamental rights.

Perhaps part of this dilemma may be traced back to the very mission—drafting a Charter of fundamental rights—which was attributed to the Convention set up by the European Council of Tampere. The dilemma, nevertheless, may be relatively easily circumvented. The adoption by a Convention of a single text or set of proposals places the governments in the delicate position of having either to set it aside (making one wonder whether the Convention was worth the effort) or to adopt it without a modification (making one wonder whether the Convention is not just an alibi for not assuming responsibility). However, if a Convention is entrusted instead with the task of identifying different scenarios or enumerating a number of proposals, possibly in contradiction with one another but which have gained a sufficient support among its members and have passed, at least provisionally, the test of public deliberation, the

²⁸ See the Finnish proposal of 22 September 2000 on the accession of the European Community to the European Convention on Human Rights (CONFER 4775/00).

difficulty would not arise. This, indeed, will be the way the mandate of the Convention entrusted with the preparation of the next intergovernmental conference will be defined. Another way out of the dilemma, though perhaps too ambitious, would be to recognise a 'droit de repentir' to a Convention: once it would have completed its first report, the Convention would submit the report to the Council, and, taking into account the position of the Council and, perhaps, the reactions of other actors to the initial proposals, it would reconvene and revise its initial proposals, with the hope of achieving then a consensus without being robbed of its legitimacy.

III The Contribution of Civil Society to Governance in the European Union

The implication of the organisations of the civil society in the institutional system of the European Union, at the level of the adoption of the decisions, may take a number of forms. These forms can be located on an axis including at least four positions. We may call these mechanisms, of which a number of variants may of course be imagined: *participation*, *committed consultation*, *simple consultation*, and *freedom of expression*. In its opinion on 'Organised civil society and European governance', the Economic and Social Committee defines 'participation' as 'providing the opportunity [to the organisations of the civil society] to help shape an opinion-forming and decision-making process in accordance with democratic principles'.²⁹ The same opinion defines 'consultation'—what I call here 'simple consultation'—as including 'all initiatives that enable whoever is affected by a measure to express their views at the earliest possible stage'.³⁰ These two forms of implication are presented as exhausting the possibilities which exist: 'Civil dialogue could become the key instrument for participation in the European democratic model. Civil dialogue is based on public debate, which extends to legislative matters. However, it will be essential to bear in mind that consultation and participation are two different forms of involvement that are governed by different conditions'.³¹ However, this leaves aside the mechanism of involvement which is located at equal distance from 'participation' and from 'simple consultation', and which I call here, by lack of a more adequate vocabulary, 'committed consultation'; and it neglects that, by virtue simply of the freedom of expression which is recognised to them, the organisations of the civil society can indeed influence the decisional process in the European Union whether or not they are formally involved in that process—a point which, despite its obvious character, seems worth making, as it constitutes an answer to those who fear that a 'domestication of contestation' could result from a further institutionalisation of the civil society in the European Union.

The expression of 'committed consultation' is coined to insist on the specificity of this form of consultation, which is to impose obligations on the institution which consults. In its resolution of 10 December 1996 on the participation of citizens and social players in the European Union's institutional system, the European Parliament 'stresses the importance of a general principle (to be written into the Treaty) proclaiming the right of every citizen and every representative organisation to *draw*

²⁹ Opinion on 'Organised civil society and European governance: the Committee's contribution to the drafting of the White Paper', CES 535/2001, 25.4.2001, point 3.4, at 5.

³⁰ *op. cit.* note 29 *supra* point 3.5., p. 6.

³¹ *op. cit.* note 29 *supra* point 4.8.1., p. 12.

up and promote their opinions and to receive replies directly or indirectly, without that right however implying direct participation in decision-making'.³² Although, if extended to 'every citizen', such a right to voice an opinion and to receive an answer could appear unmanageable, it would be plausible to grant such a right to organisations recognised as representative in a particular field, and thus to guarantee to such organisations a right to be heard, to receive an answer, and if it feels that the answer is not satisfactory, to apply for a judicial review of the quality of the grounds given in response to objections made in the course of the consultation procedure.³³ Such a right to be heard, backed by the possibility of judicial review, would not be reducible to simple consultation, where no control whatsoever exists on what is answered or not to the organisation consulted. Nor would it amount to participation in the decision-making procedure, for it remains perfectly possible for the competent institutions to decide against the point of view expressed by the organisation.

Such a form of involvement of the organisations of the civil society seems more promising than both participation and simple consultation. Participation implies accentuating further the lack of accountability of European institutions, which already suffer from what is perceived as the opacity of the decisional procedure, and from the number of actors involved. It risks depoliticising further the decision mechanisms within the Union, whilst what is required is, instead, their repoliticisation. As to simple consultation, although this seems the avenue privileged by the *White Paper on European Governance*,³⁴ it risks remaining purely formal, at best, a way of legitimising decisions which depend on other parameters, at worst, if it is not paired with the possibility to seek a judicial control of the quality of the answers offered to the objections put forward by the organisations concerned. 'Committed consultation', compared to these alternatives, conforms better with the relationship of participatory democracy to representative democracy which has been briefly described above. And it should immunise the consultation process from the strange impression received by the organisations heard by the Convention drafting the Charter of fundamental rights—the impression that, however relevant and important their comments were, they would be taken into account only, if at all, if they also gained sufficient political backing,

³² Resolution adopted on the basis of the report on participation of citizens and social players in the Union's institutional system (A4-0338/96, PE 218.253/déf.) (Herzog Report), point 24 (emphasis added). The resolution calls such a right a 'right to freedom of expression'. The explanatory memorandum thus defines consultation as 'the possibility of delivering opinions and receiving answers. The decision-making power delegated to the central institutions in not being called into question . . . A clear distinction, however, needs to be made between consultation, a very broadly based procedure, and dialogue and negotiation, in which representative social players confer with governing bodies' (p. 11).

³³ Of course, the quality of the answer to be provided to the organisation which has put forward its arguments in such a form of consultation would depend on the weight of these arguments, some of which may appear of little value. Comp., in the context of an article of the ECSC Treaty which required the Commission 'to give the party concerned the opportunity to submit its comments' before imposing a penalty, Case 9/83, *Eisen und Metall AG v Commission* (1984) ECR 2071, at p. 2086 (para. 32).

³⁴ In its most explicit paragraph on this matter, the White Paper states: 'Creating a culture of consultation cannot be achieved by legal rules which would create excessive rigidity and risk slowing the adoption of particular policies. It should rather be underpinned by a code of conduct that sets minimum standards, focusing on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests or nationality, which is a clear weakness with the current method of ad hoc consultations. These standards should improve the representativity of civil society organisations and structure their debate with the Institutions' (p. 17).

there being no obligation imposed on the Convention to justify its decision not to follow upon certain suggestions which were made.

Which precise forms could such a 'committed consultation' take, if the 'civil dialogue' were to be organised in this mode? One scenario would be the following. First, the questions of general interest on which the organisations of the civil society could usefully contribute should be identified and listed. These questions could be those affecting interests which are widely diffused but fragmented, and thus possibly underrepresented in the democratic process; those affecting fragilised interests, which risk being ignored or underprotected—for instance, those of minorities or future generations—those calling for very specialised or local knowledge, because of the need to contextualize the regulatory solutions adopted. On matters such as gender equality, environment, consumer protection, the status of third country nationals, or poverty—to name just a few where the consultation of the organisations of the civil society could truly add value to the public deliberation—a number of fora, one per area of concern, could be constituted. In each of these fora, would be invited to participate the 'most representative organisations' of the field. For the reasons exposed above, the criteria of representativeness should vary from forum to forum, although some such criteria of representativeness could be common to all the organisations enjoying such a 'consultative status'.

These fora should perform at a minimum two tasks. First, they should be consulted on the legislative proposals which, it is suspected, may affect the interests they represent, or which they believe might do so. Such a consultation should lead to the definition of an harmonised position of the representative organisations within each forum. These organisations, after an internal deliberation, should thus come forward with a coordinated position, which will have the advantage of both facilitating the task of the institutions (they are not to arbitrate, between the different views presented by the organisations speaking for the same collective interest, which views to afford the most weight to) and of justifying the imposition on these institutions of an obligation: either to take into account the position thus expressed by a consulted forum, or to explain, by an adequate motivation, the refusal to take into account this position. This mode of 'committed consultation' means, for example, that when a particular measure presents a risk for the protection of civil liberties, the forum 'human rights', where would be represented the main organisations of that sector, will be asked to take position. Once such a position is made known to them, the institutions entrusted with the decisional power would be obliged to act in accordance with the concerns expressed in that position, or if they refuse to do, explain why—with the possibility that, if the concerned forum is unsatisfied by the explanation, it will challenge the decision before the European Court of Justice.

Incidentally, it will be noted that the possibility of obtaining a judicial review in such a case partially compensates the limited possibilities for individuals to seek the annulment of Community measures of general applicability, under Article 230 EC. One of the consequences of the restriction currently imposed by the case-law of the European Court of Justice on the *locus standi* of individuals is that associations may not invoke the collective interest for the pursuance of which they are constituted to challenge a Community measure, by introducing an action seeking its annulment under Article 230 EC:³⁵ such an action will be normally inadmissible,³⁶ unless the

³⁵ For a more detailed presentation of this technically complex question, see O. De Schutter, 'L'accès des groupements à la justice communautaire', (1999) No. 61, *Journal des tribunaux-Droit européen*, p. 153.

association can show that its position as a negotiator in a particular sector has been affected by the measure which is challenged,³⁷ or unless the association, in fact, is simply acting on behalf of its members, for reasons of procedural economy, where these members individually would have standing to seek the annulment of the challenged measure.³⁸ In the proposal presented here, associations considered to be among the most representative in a particular domain will have the possibility to contribute to the preservation of the legality in the Community legal order, insofar as the forum which they belong to would be recognised as a 'semi-privileged' applicant under Article 230 EC, and would have the power to seek the annulment of the measure adopted—in the view of the interested forum—without sufficient consideration of the objections or concerns it put forward when consulted.

Besides their consultative role, these fora should be entrusted with the evaluation of the policies of the European Union, by examining the impact of these policies on the fulfilment of the values for the preservation of which the fora of the organised civil society are set up. Such a systematic evaluation is crucially needed in the present context, as is explicitly recognised by the *White Paper on European Governance*. It would introduce a reflexivity in the development of European policies, which would have to permanently revise themselves in view of their consequences. It would immensely contribute to progressively building the knowledge of the actors involved in the process of evaluation, thus constituting one of the self-learning mechanisms the White Paper calls for.³⁹ A virtuous cycle can be expected to result from these evaluation processes: the more these processes are considered seriously and develop into learning processes, the more the representative organisations of the civil society will acquire the capabilities required to effectively exercise their participatory rights, the more weight will be afforded to the positions they feed into the decisional process, and the more their consultation will be seen as adding quality to the decision-making, rather than as burdening it.

IV Conclusion

The proposals favouring a better structuration of the organisations of the civil society, and the granting of participatory rights to these organisations, generally face two critiques. First, it is said, any form of institutionalisation leads to 'domesticate' the organisations of the civil society, to reduce their imaginative potential, to bridle their creativity or their subversive capacity. Second, it is said, such an institutionalisation would derogate from the classical modes of decision-making through political representatives, which have received a mandate from the voters and are politically accountable—and this is an even more worrying perversion, it is often added, insofar as granting participatory rights to the organisations of the civil society would lead to the dominance of private (particular) interests on the common good—for whilst the voter acts as a citizen, the individual involved in an organisation of the civil society

³⁶ Joined Cases 16 and 17/62, *Confédération nationale des producteurs de fruits et légumes e.a. v. Council EEC*, ECR 901 (1962).

³⁷ Joined Cases 67, 68 and 70/85, *Kwekerij Gebroeders van der Kooy b.v. e.a. v Commission*, ECR 219 (1988) (para. 21).

³⁸ Joined Cases T-447/93 and T-449/93, *AITEC e.a. v Commission*, ECR II-1971 (1995) (para. 60).

³⁹ See COM(2001) 428 final, 25.7.2001, p. 26.

would further his selfish or corporatist interest, to the detriment of the collective interest of whole community.

I hope to have convinced the reader that these critiques are without a solid foundation. The structuration of the organisations of the civil society, for the practicability of the participatory rights which should be granted to them, does not limit their ability to act or make themselves heard through other means—indeed, whilst adding an avenue of action, it does not suppress the other avenues which already exist. As to the risk that the deeper involvement of the organisations of the civil society might lead to the dominance of uncontrolled private-interest groups, what it calls for is, rather than the maintenance of the *statu quo*, a deeper structuration of the civil society. Indeed, such a structuration should include a control on the internal modes of decision-making of the organisations claiming to be ‘representative’ of the interests for the promotion of which they are constituted, as such a claim will be considered to imply that the internal rules of the organisation should be democratic and regularly applied. As to the co-optation of the representative organisations in the institutional system of the European Union, for instance by their inclusion in fora representative of certain collective interests, it can be expected to lead to a laundering of the preferences expressed by these groups.⁴⁰ Once these organisations, instead of lobbying and competing behind the scene for political influence, will be invited to officially take positions when consulted on how certain measures or policies will affect the interests which they represent, they will have to redefine these very interests. Their initially ‘brute’ interests, or ‘naked preferences’,⁴¹ will have to leave way to more rationally defined interests, which will have to be presented at least as contributing to the common good or, at the very least, as taking account of the general interest of the collectivity. It is thus that Europe can hope to find its civil society: not by sacralising the civil society as it exerts influence at present, nor by instrumentalising it—but by granting it certain participatory rights, and thereby encouraging the organisations of the civil society to reframe the interests they speak for in the light of the European project.

⁴⁰ See R. E. Goodin, ‘Laundering Preferences’, in J. Elster & A. Hylland (eds.), *Foundations of social choice theory* (Cambridge University Press), 1986, chap. 3, for a formal presentation of the concept. For a sceptical view, see J. Elster, ‘The market and the forum: three varieties of political theory’, chap. 4 of the same volume.

⁴¹ See esp. C. Sunstein, ‘Interest Groups in American Public Law’ (1985) 29 *Stanford Law Review* 38.