

Quis Custodiet Custodes?

The European Commission's Policy-Making Role and the Problem of Democratic Legitimacy

Draft - comments welcome

Paper to be presented at the European Community Studies Association's (ECSA-US) Third Biannual International Conference: "European Integration after 1992 and Maastricht: Uniting Empirical and Policy Research with Revitalized Theory", Washington, D.C., May 27-29, 1993

Janne Haaland Matlary
Senior researcher, CICERO, and lecturer, Department of Political Science,
University of Oslo
Chairperson, ECSA-Norway

"In the representative democracies of Western Europe there is a multitude of forms of participation, representation, and governance which reflect functional differentiation as well as patterns of power. To rethink our models of political organizations and institutions, as well as the relationships between organizational forms, democratic values, and moral principle is a pressing task."

J.P. Olsen, Organized Democracy p. 37

Introduction

As of late there has been much popular focus on the role of EC in terms of democratic legitimacy. Directly triggered by the popular resistance to the Maastricht treaty during 1992,¹ the debate has resulted in the EC itself suggesting ways in which it may become more 'acceptable' to the average European citizen, ranging from televised sessions of the Council of Ministers to application of the now infamous principle of subsidiarity, ill-defined by the participants in the debate yet ubiquitously suggested as a remedy.²

¹ This resistance is paradoxical if one assumes that the contents of the treaty play any role in eliciting reactions to it - the former strengthen the role of the member states in the EC's decision-making process by allotting more importance to the European Council.

² It remains very unclear which criteria will be used to determine which policy decisions are to be taken at national level and which are to be taken at EC level. This is further complicated by the fact that policy areas are variously integrated into the EC - there is a major difference between the CAP and energy policy, to mention but one example. Can subsidiarity be applied to areas where there exists a legal 'competence', and if so, by what process can this competence be 'undone'? Further, is subsidiarity thought of as relevant for the national level only? If the term is taken to mean that decisions should be taken as close to those that they affect as possible, we are talking about some form of 'participatory democracy' which seeks as decentralized decision-making as possible. This conceptualization is current in Scandinavia, where 'subsidiarity' is translated by the 'principle of proximity'. However, 'subsidiarity' as a major principle of Catholic thought, whence it originates; stresses functions in the sense that there are certain tasks or functions that the family, associations, churches, etc, can take best care of, by virtue of their inherent characteristics, and which therefore states should not interfere with. This principle thus delimits the sphere of the state. See e.g. Pope John Paul II, Centesimus annus, encyclica, 1991, where he underlines the autonomy of these institutions vis-a-vis the state. A functional understanding of subsidiarity is however difficult to apply to the EC versus national state - it begs the question of criteria for determining which functions are best taken care of at either level. In order to determine this one would have to have a 'measure' of policy outcomes and efficiency of policy-making, but who is to define efficiency, and how is it to be defined?

Is there a 'problem' of democratic legitimacy in the EC? If so, of what does it consist? The reaction to the Maastricht treaty strongly suggests that the issue of accountability has been a dormant issue in European politics, yet the negative reactions to the treaty's scope of a political union were probably dependent just as much on a popular distrust of national politicians and thus often part of a domestic political discussion, as on any dissatisfaction with the functioning of the EC as such. The word 'union' as such represents a major political mine-field in Northern Europe.

The issue of democratic legitimacy has hitherto not been a major topic in terms of an institutional debate of the role that the various EC institutions could or ought to play apart from the continuous debate about European federalism, which involves the two levels of the national polity and the EC. The perhaps paradoxical issue related to this is that as the so-called 'democratic deficit' is perceived to increase - commonly assumed to be the case in the Maastricht debate - the response is usually that national policy-making power be increased, not that the European Parliament (henceforth EP) be strengthened. The fashionable remedy, subsidiarity,³ is also a strategy to weaken inter alia the EP by advocating decentralized (here: national level) decision-making, thus appealing not only to those that think that the EC in general has amassed too much power, but also to those - often the same groups - who favour a form of participatory democracy, i.e. that decisions be taken by those whom they affect. As mentioned, the rendering of subsidiarity in Scandinavian languages is 'nærhetsprinsippet', literally meaning the 'principle of proximity'. In e.g. environmental policy, where the Maastricht treaty suggests more integration in the form of adopting majority voting as the standard decision-making procedure, the EP has been adamant in its opposition to applying subsidiarity to environmental policy because it is feared that it would lead to policies of national scope only, not addressing the international scope of most environmental problems.

It is thus a very confusing (as well as confused) debate that is currently emerging under the heading of the 'democratic deficit'. However, the mere fact that this debate exists - however confused - answers the question of whether there is a 'problem' of democratic legitimacy in the EC. The definition of such a problem - whether there is one, of what it consists - will always depend on how one defines democratic norms. However, even without any clear notion of what the problem consists of one may conclude that there is a problem simply because a great number of political actors perceive it that way. This makes it interesting and relevant to problematize the role of the Commission in terms of democratic legitimacy.

In this paper I shall take the liberty of posing a number of questions without providing any comprehensive answers to them. The stress is on the need to

³ Svenska Dagbladet, 9.5.1993, notes that "noone in the EC agrees on what this term means", and cites professor of Latin, Birger Bergh at Lund, who remarks that "it is truly amazing that a word like this can become so popular without anyone having the moral courage to ask what it really means".

problematize the issue of democratic legitimacy with regard to non-plebiscitarian policy-makers. This essay is thus exploratory in its discussion of democratic norms, yet presents empirical evidence that is the result of a major inquiry over several years. (In the discussion of democratic theory I assume knowledge of the main themes and theories referred to, and I have therefore not foot-noted this section in a formal way, i.e. as would be necessary for an article to be published. The themes in this section are much less developed than in the empirical section, and represents my own very early stage of thinking about these questions after an absence from political theory as a discipline for more than ten years.)

The following work order obtains: First I seek to delineate the theoretical implications of the general problem of the 'democratic deficit' and the Commission's role in this. Then I move to an empirical substantiation of my claim that the Commission plays important policy-making roles both formally and informally. In the third and last section I discuss if and how these roles can be justified according to various democratic norms.

Corporate 'representation' in the EC and Nation-State as a Democratic Problem

The EC as a political system was not designed to satisfy central democratic norms of representation and accountability. These were assumed to belong to the national level in the sense that once a country was an EC member, it was already a democracy, which is one of the criteria for adhesion. The government's EC policy-making would thus have been arrived via democratic procedures prior to 'entering' the EC arena. What these democratically elected governments subsequently agreed to cede in terms of sovereignty in order to achieve integration, was legitimated by the fact that the governments in question were representative of their constituents.

There has been little discussion of the EC in terms of norms of democratic legitimacy in the scholarly literature. This seems to stem from two factors; one, no one has been really concerned with this as long as it has not been a central political issue in the EC itself or in the national public debate; and two, the viable norms of democracy in parliamentary democracy are all tied to the 19th century liberal model of plebiscitarian representation that prescribes a national-level parliamentary (or 'mixed' - presidential) system on which the only legitimation of political action ultimately stems from representation through the parliamentary channel. When I some years ago tried to find theoretical justifications for types of corporate or functional representation in contemporary Western democracies⁴ I had to look to rather obscure theorists of Mussolini's Italy and the inter-war

⁴ J.H. Matlary, Interest Group Participation in Politics: A Normative Analysis of the Role and Status of Associations in Democratic Theory, magistergradsavhandling, Oslo University, 1983

English guild socialists⁵ as the most recent contributions, despite the fact that what is commonly referred to as the 'corporate channel' of policy-making is a well-researched empirical fact in most of these countries. As J.P. Olsen remarks, "(theories of representative democracy) assume that legitimacy can (and should) be based solely on political parties and the electoral system - a very unlikely alternative in modern welfare states".⁶

Thus, a major problem is that while the empirical research on non-plebscitarian political actors has flourished in modern political science - from the interest group research in the US in the 1950ies and 60ies⁷ to the stress on the 'corporate channel' in the 1970ies and early 80ies, there has not been a corresponding development in democratic theory. Older theories of functional representation have not been taken seriously by the political science profession in the sense of exploring their possible relevance for modern democracies. In fact, the normative force of an exclusively plebscitarian definition of representation seems still to be so strong as to virtuelly render impossible any serious consideration of functional representation despite the overwhelming evidence that the corporate channel decides increasingly more in modern polities, partly at the direct expense of the the parliamentary channel. The ideal-type of parliamentary democracy is treated as the only valid conception of democracy, also by 'value-neutral' political scientists. Leo Strauss made this point many years ago in his famous essay "What is Political Philosophy?", stating that "I have never met any scientific social scientist who apart from being dedicated to truth ..was not also wholeheartedly dedicated to democracy...by saying that democracy and truth are values, he says in effect that one does not have to think about the reasons why these things are good..⁸ This normative commitment is arguably one major explanation why the development of democratic theory does not reflect or even attempt to address the

⁵ The most prominent of these is G.D.H. Cole, whose main theme was that socialism should be implemented through a system of associations akin to medieaval guilds, where people would be owners of e.g. small-scale industries as well as participants in decision-making in these associations. Guild socialism was anti-statist, and as it turned out, quite Utopian, and stands in a tradition of English socialist thought that has close ties to the to Fabianism. See e.g. Cole's Guild Socialism, London, 1920

⁶ J.P.Olsen, Organized Democracy: Political Institutions in a Welfare State -The Case of Norway, Oslo, Universitetsforlaget, 1983, p. 37

⁷ The pluralism of Robert Dahl is central to this tradition; which started with the classic work by Bentley and Truman on pressure groups. In the 70ies and early 80ies much empirical work was done on corporatism, especially in Western Europe, variously called 'liberal corporatism', 'corporativism', etc., associated with the work of e.g. Schmitter, Lehmbruch, and others. In Scandinavia there was also considerable work on the 'corporate channel' of decision-making, and on segmentation of policy areas.

⁸ Leo Strauss, "What is Political Philosophy?" in ibid., What is Political Philosophy and Other Studies, The Free Press, Glencoe, 1959, p. 20

existence and growth of functional or corporate 'representation' in modern polities.⁹

In other words, empirically we know that the corporate channel is a very major actor in policy-making, yet we cannot find any democratic validation of this because our notion of democracy is confined to plebscitarian representation. Further, the legacy of parliamentary institution-building from the 17th and 18th centuries has also precluded any consideration of including types of functional representation in the formal decision-making process. By this I refer to the abolition of the Stander and their replacement by the gradual introduction of universal suffrage. The residue of functional representation in modern parliaments is often a second chamber without real influence, where the criterion of admittance is some form of peerage or honorary status. There is no institutionalization of functional representation based on e.g. profession or group characteristics in any contemporary parliament despite the fact that the political process towards defining 'rights' for new political groups typically are launched in terms of some group-specific quality - women as a group, homosexuals as a group, linguistic or racial minorities as groups, etc. On this logic all citizens who do not share in these characteristics are excluded from the group. This is however not seen as a democratic problem by most, least of all by the group members themselves.

The dearth of democratic theory that grapples with the problem of functional representation is therefore a great handicap when trying to deal with the question democratic legitimacy of inter alia EC institutions. The only normatively admissible democratic theory - also among political scientists - is, I maintained above, the liberal-democratic 19th century theory of plebscitarian democracy.¹⁰ It remains true that some will define democracy in economic terms, from variants of socialism to marxism, and this orientation will normally favour a 'participatory' type of procedure instead of an indirect, parliamentary one. However, I will not discuss these political theories here because they do not bear upon the problem of representation, which is our necessary point of departure - vide the existence of liberal-democratic institutions based solely on plebscitarian representation at the national level as the sole basis for legitimacy in the EC. These institutions are legitimated on the ideal-typic model of democracy where politics is confined to parliament, implementation to the executive and where no policy-making takes place in more or less well-organized interest groups. As the importance of the political activity of the latter becomes increasingly well documented, the question of functional representation becomes relevant. The more a policy area becomes segmented, i.e. insulated from other policy areas in a closely knit and well-defined permanent bargaining relationship with sectoral interest groups and issue-area

⁹ To anyone acquainted with the view of democracy espoused in classical political philosophy, represented by both Plato and Aristotle, the virtues of democratic government are far from self-evident.

¹⁰ This is normally traced back to Locke and, although definitions of the 'classical' liberal tradition vary. See e.g. Mulford Q. Sibley's Political Ideas and Ideologies: A history of Political Thought, Harper and Row, New York, 1970, ch. 26

bureaucrats, the more pressing the question of democratic legitimacy becomes.

At this point clarification about the concepts of representation and legitimacy are in order:

If the political role of interest or functional groups is conceived of along a continuum, the formalization of functional representation would be at the one extreme as the end result of a gradual process which usually entails the legitimation of the political role played by these groups, at least within the segment in which they operated. The concept of legitimacy as an empirically observable phenomenon is thus a dynamic one. In other words, the informal political role played by the corporate channel may gradually result in formalization of its role, and thus of the roles played by the various actors in it. In some European democracies there exists such a formalization of functional representation, for instance in the form of tripartite income bargaining (das Sozialpartnerschaft) in Scandinavia and Austria. Typically, in sectors like agriculture and fisheries, farmers' and fishermen's organizations negotiate farm product prices and subsidies exclusively with the state. Examples of formalization of functional representation are legion although the term is usually not employed as the designation of this institutionalization. It too is normatively laden - on the negative side.

In the European Commission, we do in fact find an important degree of functional representation in the many committees and formal working groups under its auspices. In fact, national representation by bureaucrats - itself a type of functional representation as these people are there by virtue of their expertise within their specific policy area - is coupled with formalized representation by interest groups, often the pan-European Spitzenverbände. There is in other words very little representation within the Commission that can be justified by the plebsitarian norm of representation.

However, looking merely at formal structure is misleading. If a discussion of 'how democratic the Commission?' is to have any meaning, we need to know something about which role it actually plays in policy-making. On the logic of the ideal-typical 19th century parliamentary model, the European Parliament (henceforth EP) is the only popularly elected EC actor, while the European Council and the Council of Ministers are indirectly representative since they represent governments that are democratically elected in the member states. The Commission is on this view first and foremost an apolitical executive, playing a role akin to the role that ministries play in a parliamentary system - in the ideal-type a value-neutral implementer of policy - while the Court has a controlling function that, again on the ideal-typical level, does not entail a political role for it. (The EP has the most awkward role of all EC institutions since it is neither representative of the member states in lieu of national parliaments nor plays a similar role to a national parliament within the EC - it cannot remove the Commission by a vote of no confidence.)

So far I have concentrated on the issue of representation, asking why functional representation is not discussed in terms of democratic theory when in fact there is so much of it around, at the national level as well as in the EC. The focus on

representation is however directly tied to a static notion of political institutions, viz. that if one designs political institutions properly, paying attention to the relationship between them, political outcomes are legitimately arrived at according to some previously agreed-to norm. The example of parliamentary democracy illustrates this: as long as parliament is duly elected, and it follows the rules agreed to, outcomes of policy are legitimate. However, the focus on institutional structure naturally tells us little about the political power wielded outside of these institutions by other actors and about how legitimate people think parliamentary politics is. One has simply defined politics as that which takes place within these institutions, and which ultimately derives from the 'one man, one vote' norm of representation.

To speak of legitimacy in such a narrow sense is however largely uninteresting. As stated, as an empirical concept it is something that exists when the citizenry accepts something as legitimate. Legitimacy is thus created by political actors because it is needed by them, and it is especially much needed when their political activity is not already legitimated by being based on the plebiscitarian norm of democracy. This process of legitimation is not necessarily based on any democratic norms, although the norms of participatory democracy are often used: women as a group have been excluded from much political participation before, therefore they should participate more now, the argument runs, etc.

Thus one may assume that the growth of functional representation itself contributes to legitimating the latter. But in order to discuss the question of democratic legitimacy the term should neither refer to some static and narrow definition that only plebiscitarian representation is democratic, nor should it beg the question by saying that legitimacy is something that is created and which obtains to the extent that people think it does. This would make the question for norms an absurd one.

I will here treat legitimacy as a dynamic concept in the empirical analysis in showing how the Commission is creating legitimacy for its integrative efforts, but the discussion of which democratic norms may be viable regarding the role of the Commission logically must refer to norms that take their point of departure in some form of 'government by the people' and which do not only refer to one group in society, but which address the whole. For instance, I may argue that people are best served if they participate in or are represented by associations or parties that are organized according to some function like profession, interests, geographical or linguistic characteristics, and so on or that people are best served by having the most efficient outcomes of policy-making, e.g. that supranational environmental policy-making in the EC is better than policy-making at the national level, given the policy problem dealt with.

I will thus seek not only to look at the role of the Commission statically in terms of its formal role - in fact, as an institutional design, it is a rather hopeless object of an analysis of democratic legitimacy - there simply is none for it; but first determine the main features of its 'real' policy-making role compared to its formal executive function in the institutional design for then to move to a discussion of 'how democratic' it can be argued to be in terms of criteria that go beyond the static one of representation. The answer to 'how democratic' thus depends first, on which 'real' policy-making role the Commission plays, and second, on which

criteria of democratic legitimacy one chooses as central ones. These two aspects of the analysis are presented in the following two sections:

The Policy-Making Role of the European Commission: The Case of Energy Policy

The Commission has the important function as both initiator of all policy, guardian of the treaties, and as the implementing body of much policy. It is the drafter of the texts, which as Wallace notes is a very crucial role.¹¹ The problem of democratic legitimacy with regard to the Commission centers on both its formal role as initiator of policy and its many-faceted informal roles as policy-maker, which will be exemplified below.

The formal role as initiator of policy is not based on a mandate from any plebscitate - the Commissioners are selected by the various member governments but are not to represent them. They are to represent the EC or 'community' interest as distinct from and often opposed to member state interests, and it is indeed a serious allegation against a Commissioner that he or she is (secretly) promoting a national interest. The concept of plebscitarian representation is thus irrelevant to an analysis of the Commission's leadership.

It is equally inapplicable to the rank and file of the Commission, about some 3000 issue-area experts within the various DGs. These are recruited on a basis of merit (although informal national quota play a role) and work as experts, not as national representatives. To the extent that they play political roles - an empirical question - although at the outset they do have a formal role as initiators of policy - these roles cannot be accounted for on the logic of plebscitarian representation.

Third, the actors that are formally functionally represented in the Commission are the interest groups. By which criteria are they selected? There are no written criteria. Further, whom do they represent? All sectoral interests in a policy-area, or just the most powerful ones? In the case to be presented below, energy policy, the heavy industrial groups all cluster around DGXVII, the Energy directorate; while the environmental lobby - not among the heavy-weights - go to the EP. If that is because it cannot gain access to the Commission, this means that interest group representation is not at all 'pluralistic' in a benign way.

The Commission is unique in Europe as a political institution that is partially based on functional representation. It is also unique in its official role as initiator of policy. These two formal characteristics of the Commission present problems from the viewpoints of democratic legitimacy. In addition comes the confidential nature of much of the policy-making process, which is akin to that of any national ministry. This is not only the question of quis custodiet custodes, but also of how 'checks and balances' could be implemented if they existed.

At the outset we can thus agree that the formal role of the Commission is a major problem according to strictly plebscitarian norm of democracy. This becomes even

¹¹. H. Wallace, "Making multilateral..", in W. Wallace, The Dynamics of European Integration, London, 1991, p. 215

more pronounced when we include the informal roles that the Commission plays, I will argue. Below is a presentation of the Commission's role in energy policy, an area where it has little formal say but where it has nonetheless attained a major policy-role during the period 1985-1992:

On the general role of the Commission, Ludlow has pointed out that it is a common error to assume a conflictual relationship between the former and the Council. The two institutions cooperate closely throughout the policy-making process.¹² The same national officials in a given policy area assist the Council as well as the Commission in various committees. Draft proposals are therefore thoroughly discussed before they reach the Council stage, not only in the formal decision-making process Commission - Parliament - Council, but also in the various committees en route. However, the most substantial part of policy is made at the drafting stage. This is the work of the Commission and it alone. The 'products' that result are legion - expert reports, policy papers, studies, programs, and formal proposals for policy such as draft directives, based upon a draft communication.

Ludlow further points to the importance of the leadership of the Commission as vital in explaining why some periods in the history of the EC have been more productive than others. Hallstein and Delors are associated with dynamic and extremely goal-oriented Commissions, where policy is sought coordinated under a "high-politics" aegis. Energy policy is e.g. seen as part of the internal market and east-West integration. Only with very able leadership is it possible, on this view, to use the resources of the Commission in the sense that the propensity for linkages is utilized.

Further, a draft directive in the making is discussed by various committees and interest groups that are often standing members of such committees. The policy proposal eventually presented to the Council is thus not unknown to the various national and other interests affected. On its way to the Council every proposal is examined in great detail by COREPER (Committee de representants permanents), which has some 180 subcommittees at its disposal. National representatives thus influence the policy document at various stages. Here important interest groups are included as well. The decision-making system represents a mingling of purely national interests and those of the Community as a whole.

In relation to the many committees and their experts, the numbers that are employed in each DG is small. This has the advantage that these experts are bound to elicit advice and comments from many sources on a particular aspect of policy. Yet a DG which is managably small is able to define a "policy interest" for itself.

Who are the major Commission actors in energy policy? Here, not only DG XVII, but also DGIV (Competition), , DGXXI (Customs union and indirect taxation), and DGXI (Environment) are central. Proposals that come from one DG are "cleared" by the others. Thus, internal differences between DGs will have to be resolved before a proposal is sent on to the European Parliament.

¹² Peter Ludlow, "The European Commission", in Keohane and Hoffmann, The New European Community, p. 103

DXVII is naturally the major actor in energy policy. The Energy Directorate is often estimated to be very responsive to energy industry interests.¹³ This is however not unnatural in light of the close co-operation between this DG and interest groups in the area. A DGXVII representative even expressed the view that if one were unable to implement IEM proposals due to interest group opposition, the European Council might intervene if work were too slow in the energy area. This indicates that a certain apathy may be felt by the DGXVII staff at times, but also that the reality of 'intervention from above' is present. The European Council can thus "impose" a Community interest when the particular and sectoral interests become too identified with interest groups in the sector itself.

DGIV, the Competition Directorate, has a more confrontational role vis-a-vis business groups as this DG intervenes directly when EC competition rules are violated. This DG has throughout 1990 and 1991 assumed a much more active role in this respect than before, also in the energy sector. DGIV has the powers to intervene in all instances of unfair competition based on the Rome Treaty rules against "abuse of dominant position"¹⁴.

However, the mere existence of a monopoly is not enough to prompt intervention; there has to be a situation of "abuse". In reality this has meant that a complaint must be brought to DGIV, or that the latter can intervene when a situation of conflict has arisen. DGIV has therefore not been intervening in the monopoly structures in the gas market, but acted when such a structure threatened to develop, as in the case of former East Germany. However, during 1990 a more active role was assumed where the Commissioner intervened directly in monopoly structures in the energy sector, demanding that member governments justify the maintenance of monopoly companies or abolish them.

Also, it must be added that the competition commissioner, Leon Brittan, has been very active in using DGIV powers, which for a long period were rather dormant.¹⁵ Late in 1991 he announced that he wanted an explanation from all member governments who still retained energy monopoly companies, and demanded that these either be abolished as they might contradict the IEM, or that they be justified and shown not to distort competition.¹⁶ This is a major stepping up of DG IV activity compared to the traditional stance that awaits a call for action by a party that complains of unfair competition. Ludlow points to the general assertiveness of DGIV in the latter part of the 1980ies, and finds that it is due to a more favourable climate among the member states towards supra-national intervention. The Treaty basis for intervention has certainly been

¹³ Interview with DG XVII representative, September 1990, Brussels

¹⁴ Paragraph 86, The Treaty of Rome

¹⁵ These assessments are mainly based on interviews in DGIV, September, 1990

¹⁶ ECE, "Controversial Correspondence", September 1991

constant, and so have the personell ressources of the DG by and large.¹⁷

In addition to DG's IV and XVII, DG XI works in direct relation to energy policy. It is in charge of inter alia the environment, and since energy and environmental policy have been integrated by the European Council as of June 1990, the two directorates cooperate closely. The environmental policy proposals are presented by this DG, and also the proposal for a CO2 tax which is both an energy as well as an environmental issue. Council meetings are common to both Energy and Environmental Ministers when such "cross-disiplinary" issues are on the agenda, otherwise the usual, separate councils are held.

But not only the Energy Commissioner, but also the President of the Commission himself, Jacques Delors, has taken an active interest in energy policy. Delors' interest seems to be in the integrative possibilites inherent in energy trade. He has remained a vital influence in the energy charter process, to be discussed below; which was introduced at a European Council meeting by a member state, then "taken over" by DG XVII and promoted by Delors on several occasions as the best way of building interdependence and integration between East and West. In his speech to the CSCE at the signing of the Paris Treaty in November, 1991, he made reference to the charter, and he also mentioned it in other speeches. While its energy policy implications are important also to Delors, clearly the more "high" politics consequences and not the least, possibilities, remain vital.

Part of the strength of the Commission lies in this diversity: one policy area is dealt with in its most basic components by its proper DG, yet at a higher and collegiate level in the Commission, package deals and linkages may be created surrounding the policy area such that compromises are made possible and possibly the enlarging of the scope of the issue area is ensured.

This versatility of the work that can take place in the Commission is a key to understanding its recent sucesses. It has instruments and agents that can legitimately deal with many facets of a policy area. For energy, these include the environmental dimension, the east-west dimension, the internal market dimension, the competition dimension - to mention but some important ones. Further, there are a corresponding variety of actors under the Commission aegis to deal with all these facets - the DGs, the Committees, the head of the Commission, etc.

The policy proposals and processes that were investigated in my study¹⁸ of energy policy are divided into two categories: the internal energy market (henceforth IEM) proposals and the common energy policy (henceforth CEP) proposals. The IEM-proposals are those whose policy content is essentially deregulatory, i.e. that concern market rules for the trade in and production of energy and which are mandated by the general internal market programme of the EC. The CEP-proposals entail issue linkages between policy areas and/or are

¹⁷. Ludlow, op.cit., p. 105

¹⁸ This study has not yet been published: J.H. Matlary, Towards Understanding Integration: An Analysis of the Role of the State in Ec Energy Policy, 1985-1992, dr.philos. thesis, University of Oslo, 1993

formally integrative, calling for the establishment of an EC-level energy policy in areas like e.g. security of supply. They are not logically implied by the internal market programme, but represent the Commission's extension - or attempts at such - of the energy policy agenda beyond the IEM in the period under study. Both the IEM and the CEP-proposals may result in integration; the latter is possible even if a policy proposal by virtue of its content is deregulatory, as will be shown.

The IEM-proposals are IEM, Stage One, which is a package of four directives on electricity and gas transmission and investment transparency from 1989; and the IEM, Stage Two, which is the 1991 draft directive on third party access to electricity and gas transmission. The CEP-proposals include the integration of energy and environmental policy in the draft directive on a carbon/energy tax; the European energy charter; and the chapter on a common energy policy which was proposed for the Maastricht treaty, but which was deleted in the last round of negotiations. These policy proposals are presented in detail in Part Two and analyzed in Part Four of this study.

Turning to the role of the Commission in the IEM and the CEP-process, its initiating role is obvious. The first stage of the IEM, consisting of *inter alia* the **transmission directives** for gas and electricity, was presented in 1989. Both the 1988 report on obstacles to the IEM and these draft directives proposed third party access, that is, common carriage. This radical move was met with considerable opposition among member states as well as on the part of the industry. When the package was discussed by the Council of Energy Ministers in May, 1990, the draft directive on gas was returned to the Commission for lack of agreement. However, the electricity transit directive was adopted at that meeting. The Commission modified the gas transit directive to include access for transmitters only, detailing the 29 such transmitters in Europe that were eligible. Even with this modification, Germany voted against the directive when it was on the Energy Council agenda in October of the same year.

Two insights about the work of the Commission are here important: one, compromise is sought in the prolonged process of modification that took place after the Council failed to reach a viable agreement the first time the directive was on the agenda. However, after a certain degree of modification the directive was returned to Council where it was adopted despite opposition. The Commission had staged many informal and formal encounters with interest groups in the process of compromise-seeking, so the second version of the directive represented the farthest one could go in modifying the proposal while retaining the IEM-concept as the guide.

The Commission then proceeded to the second stage of the IEM: It set up four working groups consisting of national representatives, interest groups, and Commission officials, in order to work on the further opening up of the electricity and gas markets. Opposition to the IEM, especially from industry, was thus incorporated into the process in a much more formal way than hitherto. These working groups spent a year and a half on the subject, and published their reports on recommendations for further work before the Commission presented its communication on the same subject.

The second stage of the IEM restates the original aim of reaching common carriage or third party access for also consumers, however, these need to be of a

certain size, thus excluding the individual household consumer. This represents a compromise over the the original common carriage proposal from the 1988 document on the 'obstacles to the IEM. The implementation of third party access is however planned to take several years, so that industry can prepare itself. Again much opposition has ensued from industry and member states. The contents of this draft directive is, like the first one on gas transit, ambitious, and thus, very unlikely to be accepted in its present form. However, such is not the realistic intention on the part of the Commission. I would argue that it intentionally presents a very ambitious draft because it is certain that it will be modified in the long process towards becoming a directive.¹⁹ The major opposition from industry has this time partially been modified by the long-term cooperation in the working groups and the consequent 'maturation' of the Commission's ideas. However, the framework of the internal market remains the framework for the decision-making also in this area, so that eventually the EC will arrive at policy consistent with the basic principles of that. However, this is done in a step-by-step fashion.

Theoretically, the Rome treaty contains the necessary legislation for the Commission to demand open access immediately, incurring paragraph 90. However, also in the case of stage two of the IEM the Commission instead chose the cooperation procedure based on paragraph 100 A. This is because a consensual albeit slower decision-making process seems to be sought whenever possible in order to achieve as much legitimacy as possible for a given policy. However, the possibility of using paragraph 90 remains.

Also in the CEP-process the initiating role of the Commission is extremely important. Here there is no guiding concept, like the internal market, which in a way stipulates what must be done in the energy field in order to conform to a set of core principles. The CEP is almost wholly the 'creation' of the Commission.

External events have however presented new linkage possibilities to the latter. Without the changes in East-Central Europe and the formerly Soviet Union, as well as the Gulf War, the major policy proposals of the CEP would hardly have materialized.

However, the proposal to include energy in the Maastricht **treaty revisions** originated wholly within the Commission and was part of the proposal for the general treaty revision. One may say that the rapid extension of the EC energy agenda, due to external events, made it important that energy policy in the EC should have a legal basis as such. The policy area formally rests on guidelines only, which is the 'weakest' form of EC policy.

The treaty revisions are really only a formalization of the process of energy policy initiated by the Commission: One here underlines that the IEM remains a vital part of EC energy policy, but that it is necessary to go beyond that in several respects: with regard to the environment, to security of supply, and to the role of the EC as an international actor. Already the Energy Commissioner had suggested

¹⁹^This is underlined by the frequent trips to Ec capitals on the part of the Energy Commissioner. The TPA proposal met with considerable opposition at the Energy Council meeting in April, 1992, whereupon the Commissioner set out to discuss it in the national ministries of the member states. "Talks signal redrafting of TPA", ECE, April, 1992

a security of supply policy for the EC, to be attained in stages over several years, but with the clear aim of pooling member states' energy reserves. The suggestion for an oil emergency mechanism is part of this general policy, but was presented as a consequence of the Gulf War. At the same time the Commissioner introduced the idea that the EC apply for membership in the IEA and that it thus speak as a unilateral actor in that forum.

Apart from some few member states, like Belgium and Italy, few actors other than the Commission have voiced a need for a CEP in the form of giving it a legal basis. The energy commissioner has however been arguing this need over a long period. Both the security of supply policy as well as the merging of environmental and energy policy may necessitate such a basis. However, elements of energy policy clearly fall under the legislation on competition policy, e.g. the lack of gas transit possibilities is arguably an abuse of monopoly position. Legally the Commission could base all its policy relating to creating a freer market in energy on this legislation. However, having a legal basis is often not enough, or may not even be necessary. The competition rules have been in place since 1957, yet have rarely been used in many sectors of EC policy simply because the political will in the member countries to 'activate' the rules was lacking. The internal market concept represents the restatement of the validity of these rules, and as such, provides a political mandate to use them actively. Paradoxically one may thus say that a CEP may materialize without a legal basis in the treaties if there is sufficient political will behind the individual proposal. Some members, e.g. the UK, have argued that as the transit proposals for gas and electricity falls under the competition rules, the Commission should simply base the decision-making on paragraph 90 and not bother with the full-fledged political process of 100 A.

However, the Commission will certainly have strengthened its potential for developing a CEP if it has a legal basis for the development of a common energy policy. It is precisely in periods of much opposition to a common policy that the legal competence for it is mostly needed. However, such a competence can only be established in periods of much legitimacy on the part of the states for more integration. A strategy for the Commission is therefore to try to establish a formal commitment to such a 'competence' when the political backing for the IEM-work is strong. It is thus logical that the Commission should be preoccupied with the CEP while the states are concerned with the IEM, and that it should utilize a time of much general state support for a policy like the IEM to try to forge a CEP in various ways. This makes for an interesting observation with important implications for integration theory: in periods of much state activity at the EC level, like the post-85 period, the state may reinforce its power, as the intergovernmentalists argue. Yet, at the same time the Commission and other EC institutions may achieve the same: they need a high level of legitimacy from the states for their general work, and only when such legitimacy exists, can the EC itself seek to strengthen its powers in a given policy area. In other words I would argue that in periods of little integration neither the states nor the EC institutions increase their influence in policy-making, whereas in periods like the post-85 one, both sets of actors do. EC policy-making thus need not be a zero-sum game, as intergovernmentalists assume, but may in fact be a sum-sum game because two sets of actors look for different outcomes. If the Commission is able to design

policy that 'satisfies' the states but which has implications for its own role in the issue area in an integrative direction, it is successful in pursuing the hypothesized strategy of gradually creating a CEP. While the states pursue domestic interests in energy, the Commission pursues elements of a CEP.

The case of the treaty revision was however too obviously a request for a unilateral transfer of power from the states to the Commission for most states to accept. However, as I argue, a CEP can be built in a variety of ways. The outcome of the treaty revision was an EC competence in the area of infrastructure, something which was an important part of a CEP. Also, as the agenda-building in the energy issue area extends, the discrepancy between the lack of a legal basis and the policy content increases. The perceived need for a legal basis for a CEP is then more apparent, and with that the possibly the willingness on the part of the states to consider establishing such a basis.

Turning now to the other CEP-cases, the role of the Commission in these has been somewhat different. The role of the Commission was thus naturally the central one in the process of the treaty revisions. However, with regard to the case of the **European Energy Charter** there were several possible fora for the political process. Nevertheless the Commission came to play the leading role in also this process. When the charter idea was introduced by the Dutch premier Ruud Lubbers in June 1990, the European Council responded favourably. During the course of the Fall of 1990, several member states developed their views.²⁰ Neither the Dutch, Germans, nor the British were particularly prone to choose the EC as the charter organization. However, simultaneously with this process in the national ministries, the Commission itself, i.e. DGXVII, started negotiations on the charter with the Russians. These talks took place in October, 1990. At this time the charter process was not far advanced in the member states, e.g. France did at the time not have much information of the process or take much interest in it.²¹ While there in Germany and the UK was a discussion of where the seat of the charter should be, the Commission continued its negotiations with the Russians, and was therefore the natural body for developing the preliminary text for the charter, which appeared in the early part of 1991. The first charter conference took place in July of the same year, the second in the Fall, and the signing of the charter took place in December, 1991, only a year and a half after the initial launching of the idea by Ruud Lubbers. At that time there was no discussion any longer about which role the EC should play vis-a-vis other international fora in this process.²² The EC had become the unquestioned leading policy-maker in the

²⁰. Extensive non-papers were e.g. produced by Germany, the Netherlands, and the UK, during the Fall of 1990, and the charter was the subject of several informal meetings in the various capitals. I am indebted to officials from the Norwegian Ministry of Oil and Energy for details on this process.

²¹. Confidential source material made available by the Norwegian Ministry of Oil and Energy

²². See e.g. Agence Europe, 13.4.1991, 24.10.1991, 17.12.91, and Europe Documents, nr. 1754, 17.12.1991, as well as PIW, 2.12.1991, "European Charter: New GATT or Bureaucratic Binge?"

process, and proceeded to set up a section in DGXVII to work exclusively on the charter.²³

In this case the Commission had a very general mandate only, provided by the European Council. While the states were discussing which international organization would be the seat of the charter, the Commission went to work immediately and completely 'took over' the policy process by defining the topics for negotiation, and then, after this framework had been established, presented it to the states.

The charter is an excellent example of the overriding importance of the initiating role of the Commission in policy-making. The states were actually presented with a fait accompli.

The third CEP-case is an energy-environmental one, more specifically, the proposal for a **carbon tax**. This proposal started with the commitment to stabilising carbondioxide emissions at the 1990 level by the year 2000 at the European Council meeting in Luxembourg, 1990. The previous European Council meeting in Dublin in June, 1990, had decided that energy and environmental policy be coordinated.²⁴ In the early Fall of the same year a draft communication on the use of fiscal instruments in climate policy emanated from DGXI.²⁵ This paper was so controversial that it was hastily down-graded to becoming a so-called 'expert opinion'.²⁶ Yet it still presented the case for using fiscal tools on the part of the Commission. The next step was the Commission's communication "A Strategy to Limit CO2 Emissions by the year 2000", where a carbon tax was formally proposed. The first joint energy-environmental council meeting where this was on the agenda was in the December, 1991. The Commission was asked to study a number of questions before the Council could decide on a specific carbon tax.

The role of the Commission in the process towards the carbon tax was threefold: First, it proposed the merging of energy and environmental policy to the European Council in June, 1990, next, it put the emission stabilization proposal on the agenda of the European Council, and third, it commissioned a report on the usefulness of fiscal measures as a basis for its own proposal for such a tax. At the same time the legal basis for environmental policy in the EC was being strengthened in general in the process towards the Maastricht treaty revisions,

²³ The work in this section continued in 1991 and 1992 towards the signing of the legally binding Basic Agreement. "Good Progress for Basic Agreement: Consensus Reached on Transit, Investment", Norsk Oljerevy, no.7., 1997

²⁴ "The Environmental Imperative", Declaration by the European Council", Dublin, June 1990

²⁵ DGXI, "Draft Communication on the Use of Economic and Fiscal Instruments in Ec Environmental Policy", 18.6.1991. This communication was later 'down-graded' to becoming an 'expert report' and thus not a policy proposal because it was too controversial within the Commission, according to sources in Brussels (Interviews, 16-17.9.90)

²⁶ Interviews in Brussels, 16-17. September, 1990

where an obvious strategy was that the integration of a legally 'strong' environmental policy in the treaty with the 'weak' energy policy area, as the treaty stipulates, would indirectly also strengthen the status of energy policy and thus contribute towards a CEP.²⁷ The role of the states in this policy process was at best that of reluctant participants. None of them were outright eager to see a carbon tax accepted, apart from Germany which had adopted more stringent emission reduction policies at home than the EC goal. It thus was in Germany's domestic interest to have the tax adopted. For DGXI, the adoption of such a tax would be very important in boosting its own importance within the hierarchy of DG's. It would be the first case of an EC tax, and of the integration of an environmental policy in the form of a tax with the internal market. Also, an adoption of the tax before the UNCED conference in June, 1992, would make the EC a notable actor internationally in this policy area. This was very important to the Environment Commissioner, who repeatedly challenged his colleagues in the Commission on this, threatening not to participate in the UNCED conference unless the he could bring a 'dowry', as he phrased it.²⁸

Among the roles that the Commission plays - initiator of policy, guardian of the treaties, and implementor of policy, - the first is clearly the most important one in the energy field. There was no external pressure on the Commission to create the IEM - quite the contrary. As for the CEP, external events prompted some of the policy proposals, or put differently, the Commission seized the opportunity that these events presented. Beyond the role of initiator another crucial role was that of broker: interest groups, national representatives, and some times other EC bodies all had stakes in the policy-making. The Commission, however, was present at every stage, and had the explicit role of mediator as the 13th member of the Council. As such, it attempted to facilitate the making of compromises rather than insisting on its original proposals, as evidenced in e.g. the case of the stage one gas transit directive.

The IEM can thus be argued to have served as a strategy for the Commission towards the making of a CEP which entailed the major policy-making role for it. The IEM was mandated by the general internal market concept, and thus enjoyed unquestioned legitimacy on the part of the states. Legitimacy for a CEP was largely lacking with the states. Only Italy and Belgium had pronounced an interest in an creating a general competence for a CEP.

While the Commission defined the contents of the IEM proposals strictly according to the internal market model, it also defined accompanying policies that would make the IEM acceptable to the less developed regions. The effect of these policies was to render the Commission the major actor in the energy development of these states: the scope of Commission responsibility increases with the competence to develop infrastructure, the administration of the structural funds,

²⁷ SEC (91) 1744

²⁸ The end of this story was that Ripa di Meana did not go to Rio, but the reason for this may be more prosaic than the official version: he resigned as commissioner shortly afterwards in order to become Italian minister for the environment.

and the integration of environmental concerns into the development of the energy sector.

The strategy of increasing the scope of Commission activity was demonstrated at an energy conference arranged by the former with participants from the less developed countries and EC institutions.²⁹ Here the Commission detailed what it could 'offer' in return for support for both the IEM and the CEP-proposals. The regional funds were presented, and the future of other sources of funding outlined. The participating states offered their views and their needs; in fact the scope of the conference was that of an unofficial bargaining arena.³⁰ The transition periods that may be granted to these states in implementing e.g. a carbon tax or the IEM-proposals, implies that these essentially deregulatory policies will apply in some EC countries while CEP-type policies will prevail in others. The IEM is essentially a regime that fits the stage of energy development in Northern Europe, but one which is alien to the early stages of energy sector development in the South where in many respects the energy sector has to be built from the bottom. Thus, the IEM does not really concern this region, or at least, will not be important for many years to come. The Commission may thus play the major role in developing the energy sector in the South while playing much less of a role in the North. This is mutually advantageous -the North wants a deregulatory regime while the other states need help in developing infrastructure from a very primitive level. The role of the Commission in this kind of trade-off illustrates why EC policy-making often is a sum-sum game: the Commission boosts its powers as energy policy-maker for the less developed part of the EC, the developed part gets its IEM, and the less developed states get their funding.

Summing up, the Commission has the central role of initiating policy. In the policy process it is also the broker of interests and modifier of proposals. Beyond this general role it has, I have argued, played an increasingly important role in the development from the IEM towards the CEP. The IEM work is mandated by the general internal market concept. The role of the Commission is to ensure that all EC policy conforms to the principles of the internal market. Thus, to an extent the contents of the IEM were defined before DG XVII started its work. The mandate was the result of a common position by the European heads of state; thus, the member states themselves initiated and mandated this process. However, all the details of the IEM were left to be determined by DGXVII. In other words, it determined of what the 'problem' consisted and which policy solutions were viable options, hence also largely influencing which 'interests' the states could adopt.

The opposition to the major IEM proposals, on transmission in two stages, has been considerable. For gas, the industry interests are singularly opposed to a freer market. This opposition is also reflected in some member states' attitude. It is no overstatement to say that the Commission has launched its proposals in the face of very little enthusiasm and support from other actors in the energy segment. The

²⁹ "Energie et Cohesion Economique et Social", Lisbon, 4-5.6.1992

³⁰ These are my own observations.

point here is that it is the Commission that has been the major driving force behind the IEM in the definition of policy, although some states, notably France, have been active participants.

In the CEP-cases the role of the Commission is even more pronounced. There is no mandate in the White Paper for a CEP, and no basis for it in the treaties. Two EC institutions are central to understanding the CEP-developments: The European Council and the Commission.

Both the charter work and the merging of energy and environmental policy were decisions by the European Council. However, the mandate given to the DGs was naturally very general. The proposal for including the chapter on energy in the treaty revisions at Maastricht came from the Commission itself, supported by some member states like Belgium and Italy. Further, a number of CEP-proposals, on themes like an oil sharing mechanism, a general policy for supply security, membership of the EC in the IEA, application of competition rules 'upstream', etc., have come from DGXVII directly, often introduced by the Energy Commissioner at an opportune time. The suggestion for an EC oil sharing mechanism was prompted by the Gulf War. There had been a flow of different policy proposals and less formalized initiatives from DGXVII in the period from 1990 to the end of 1992, when this study ended, and in most cases these have been seen as timely by the member states in view of the external events surrounding the EC with implications for energy issues - the Gulf War, the demise of the USSR, the energy-environmental crisis in East-Central Europe, etc. There can be little doubt however that the active commissioner himself has played a role.

The case of the charter illustrates best how the Commission attained a major policy-making role: After the European Council had concluded that the charter concept by the Dutch premier Lubbers was worth while to work further on, the arena was in a sense wide open. The EC was not assigned any permanent role in this work, but asked to start preliminary work. It was entirely undecided where the seat of such a charter would be and who its signatories would be. Lubbers had addressed a constituency consisting of all of Europe and the OECD.

The various member states worked out their general views on the charter in the form of non-papers in September-October, 1992. Here it was evident that the question of which international organization should be in charge of the charter was unsettled. The UK e.g. lists almost all relevant institutional settings as a preliminary basis for discussion.

However, at the same time DGXVII was already conducting informal negotiations with the Russians. These took place in Moscow first, between Jacques Delors, Frans Andriessen and the Russian counterparts as early as the 18-20 July, 1990, one month after the European Council meeting. At this meeting it was decided to start negotiations, and the Energy Commissioner conducted the next meeting, again in Moscow, between the 11 and 13th of September. Following this was a third meeting in late September. This time a delegation led by the Director-general of DGXVII, C. Maniatopoulos, came from Brussels. At this meeting all the major aspects of the charter were discussed, partners identified and the basis for a first draft of a charter text laid. The Commission defined a working group, consisting of the DG's for External Affairs, Energy, and Economy, which proceeded to propose a charter conference for all European countries, and both Delors, Lubbers, and Kohl mentioned the charter concept especially at the CSCE-summit

in Paris in November, 1990. A draft text for the charter was discussed at the two charter conferences held in 1991, where the Commission played the role of both initiator and broker. The final charter text was signed in December, 1991. By that time there was no discussion of whether the EC should play the major role in the charter work. The EC even advised the CSCE-convention that met in Helsinki in March, 1992, that no initiatives in this field were needed so as not to 'duplicate work'.

The discussion that had started in the Fall of 1990 on which international setting to choose for the charter had simply proved irrelevant as the EC moved to work on the charter contents themselves very quickly. The major negotiations with the Russians were already in full swing when the member states somewhat academically discussed the former issue.

The role of the Commission in this policy process was clearly the dominating one. It had the general mandate from the European Council, which is the intergovernmental forum of the member states, and the experts from the various DG's available to start work immediately after the Summit in June, 1990, which they did. Once the 'ground work' was accomplished in terms of negotiations with the Russians, the policy process was defined as well as the role of the Commission in it. From then on it would have been very difficult indeed for a member state or another international organization to challenge any aspect of this. In this case the Commission both defined the 'problem', the policy 'solutions', and which 'interests' the states could have.

The case of the carbon tax also shows that the Commission is the major actor in the definition of the contents and the process of policy. Again there was a very general mandate from the European Council at its meeting in June, 1990, where it was laid down that energy and environmental policy were to be coordinated; and a decision on stabilisation of carbon emissions at the Environment Council in October the same year was made. DGXI had issued a draft communication suggesting fiscal instruments to deal with environmental problems already in June, 1990. This was however down-graded to become an expert report later because it was too controversial at that time; however, the agenda for a carbon tax was set despite this. A communication suggesting a carbon tax specifically, issued by DGXI and DGXVII together, was discussed at the joint Council meeting in October, 1991. A decision on a tax was reached in June, 1992, where the tax was conditionally adopted.

Again the Commission played the major role in the definition of the policy process. It used a general mandate from the European Council as a basis for specific proposals. The member states were also participants in this process, but they seldomly took the lead: their institutional role was to respond.

A 'division of labour' is patterned here: the European Council plays the role of 'grand strategy'-maker: here policy-areas are linked in but a general way, and the direction of further work for the EC is indicated. Then the Commission defines the issues and designs the policy proposals. The member states then respond to this in the Council meetings for each policy area. The EP is naturally also part of the decision-making, but is also in the role of respondent.

For the IEM, the mandates provided by the White Book and the competition legislation in the Treaty of Rome are more specific than the general mandates

given by the European Council in the CEP-cases. The former identifies the contents of policy much more clearly: it deals with making the energy sector conform to the general competition rules of the EC. The CEP-cases are to some extent generated within the Commission itself, while some issues were given a very broadly defined mandate by the European Council.

The initiating role of the Commission is therefore the more important in the CEP-cases. As Wallace points out, "the Commission is no neutral arbiter, but a player with vested interests of its own to promote."³¹ The ambition of DG XVII is clearly to play a role as an actor on the international energy scene, not to divest itself of influence in the energy sector by simply deregulating it. In the IEM-cases, some member states exert important influence over the agenda, and certainly the member states can halt the policy process through sanctions in the Council of Ministers. But by doing so, the proposal is reworked in order to be returned at a later meeting, and the member state that still opposes, may be outvoted. The SEA thus has improved the relative position of the Commission vis-a-vis the member states.

The formal roles of the Commission cannot, as stated at the outset, be accounted for by plebiscitarian norms of democracy. When one includes the various informal powers that the Commission can make use of - as illustrated in the above analysis - legitimation of these by plebiscitarian norms becomes even more difficult. The question of functionally-based political actors - bureaucrats and interest groups - then remains as the major one: Can their roles be legitimated?

Democratic Theory for "Modern" Politics: Can it be Had?

When the research on interest groups was a main preoccupation in American political science, a major, albeit often implicit assumption underlying this research was that one, all groups had near-to equal access to policy-makers, and two, that their influence on the latter largely would cancel each other out. The notion of pluralism was central to the democratic justification of interest group participation in the political process.³² Because interest groups were conceived of as ad hoc, the question of corporate or functional representation was not raised. When later empirical research on European polities evidenced de facto incorporation of interest groups in the state, the pluralist argument no longer carried much weight.

What, then, characterizes the Commission's relationship to interest groups? On the one hand the smallness of the Commission makes it need interest group input, and the newness of the present period of integration (post-85, tied directly to the internal market) probably precludes that very rigid clientilistic relationships have developed. In fact, the research on EC lobbying indicates that access is quite open. However, if this is one characteristic, then one must hasten to add that formal incorporation of interest groups is another. Here there seems to be a lack of criteria and a favourization of the pan-European Spitzenverbände. Corporate

³¹H. Wallace, "Making Multilateral..", op.cit., in W. Wallace, ed., The Dynamics of European Integration, 1990

³² J.H. Matlary, 1983, op.cit., discusses this.

representation is a fact in the Commission.

If this is to be legitimated in terms of democratic theory, one can either argue that the interests represented by these groups are so important to the common weal that they should have more influence on decision-making about them than the average citizen; conversely, that these groups possess an expert knowledge of the issue-area concerned that ought to be included by the decision-makers so as to reach the most informed decision; or one can argue that these interest groups are affected more than the average citizen by decisions that bear upon the interests they represent, and that they thus should participate more in these decisions than the average citizen. The latter argument is notably that of participatory democracy, although it is usually not applied to interest groups, but to popular or citizen initiatives, and is thus considered a 'radical' argument. However, logically it is applicable to all political actors outside of the formal-institutional political channel.

However, any legitimation of corporate representation represents a break with the principles of plebiscitarian democracy. It is therefore very unlikely that the importance of corporate participation in politics - neither at the national nor at the EC level - will be officially recognized by policy-makers.

The other major problem regarding the role of the Commission concerns the importance of its own bureaucrats in the policy-making process. As we have seen above, the Commission is no mere implementor of policies decided on by the European Council, but creates policy even without any mandate. When a general mandate exists, the scope of interpreting the latter is so wide as to leave considerable powers in the Commission. If in addition to this the policy-making is made in legal-technical language, as in the EC, it is even less recognizable as policy. Anne Burley et al.³³ make the interesting point that the European Court has worked a silent revolution in centralizing legal powers in itself over the last 10-20 years, and this has been possible only because law has been considered non-political - in other words, the more the law is considered as above politics, the more efficient a legal strategy to gain political power will be. Applied to the work of the Commission, the more expertly based and technical policy proposals are presented and discussed as, the more likely it is that it will be accepted as 'implementation' and not as policy-making.

The only argument I can conceive of that can justify this political role on the part of the Commission is that policy-making made at a supra-national level, by experts who pursue either their own and/or the 'Community' interest - but not the national interest - results in qualitatively better outcomes than policy-making by elected but often much less able national-level politicians.³⁴ The empirical evidence for the policy-making roles of national bureaucracies is uniform: elected politicians

³³ A. Burley et al., "Europe before the Court: A Political Theory of Legal Integration", International Organization, vol. 47, Winter 1993, no. 1

³⁴ I am naturally aware that the notion of 'good' policy is infinitely problematic. Let me here simply define it as the most informed outcome of policy about international-scope issues that are highly complex, arrived at in a manner where party and national interests are 'buffered' against.

account for the general direction of policy, but considerable power rests with the executive. This is not unexpected since modern politics deals with an increasing number of issue areas that are increasingly more complex to deal with. The reaction to this development has been, and is increasingly, that the most able politicians leave parliamentary politics. In Norway this phenomenon is quite clear before the 1993 general elections: very few of the able younger politicians who have a alternative career path accepted a renomination to Parliament. Their reason was that 'too little real power resides in Parliament'.³⁵ The 19th century ideal-typic generalist-politician cannot cope with the agenda of modern politics. While politics becomes more and more knowledge-intensive, the media simplifies increasingly, and the result is often populism as the answer on the part of the politician.

These very broad reflections on the very complex theme of the crisis of the institutions of the liberal-democratic system are here intended to underline the previous point about the salience of the norm of the quality of decisions. If the Commission provides better decisions about e.g. environmental policy because one, the problem is international in scope, two, the policy-makers are experts and serve no national interest, and three, they need not concern themselves with pleasing the press or getting reelected, is this then a valid argument for democratic legitimation of the Commission's role? In one sense it is: the better the quality of the decisions, the better the common weal is served. In other words, from the point of view of the summum bonum, the main question in political philosophy, the quality of political outcomes is the prime concern. This is naturally the basis for the argument about the primacy of aristocratic government over democratic government in classical thought. However, this argument was in turn based on the assumption of man's capacity for virtuous action and an analysis on the conditions for it; and not on the premise of self-interestedness, which is the basis for our modern theories of political action.

However, even by basing a theory of political action on self-interestedness, it is possible to argue that the outcomes of an expert-based political process may be better than parliamentary political outcomes, where the self-interestedness of the politician is likely to result in his attempting to please so many different quarters simultaneously that he will pay less attention to the real contents of the political issue than the expert-bureaucrat.

If we then, for the sake of argument, agree that government by experts is probably better in terms of the quality of decisions than government by elected generalists, we are still left with Plato's problem of how to ensure that the experts are not corrupted. If they necessarily are self-interested, as we premise our theories on, then the solution of the Republic is of no use, for the experts will not let themselves be subjected to rules of asceticism and poverty. The problem of accountability then remains as the central one for democratic legitimacy.

The central democratic norm is thus, in my view, that of accountability. To achieve the best political solutions concerns the summum bonum but not democracy as such, which is after all one among several types of regimes. The

³⁵ This reason was quoted by politicians from all parties, conservative, socialist, and liberals.

institutions of the parliamentary system of government served their purpose in a given historical period, but cannot be expected to do so under the radically changing circumstances of the 21st century. This system solved the problem of accountability in a specific way, through the recall mechanism of the periodic general elections and the mechanism of a no-confidence vote in parliament.

But how can accountability be ensured in a system based on issue-specific policy-making where the actors are experts, interacting with issue-specific interest groups? Perhaps the problem when we look specifically at the Commission is not so large after all. The above empirical discussion of the Commission's role pointed to the role of the European Council as the democratically representative body that gave the policy directions to the Commission. At the other end of the policy process is the Council of Ministers. It has the decisive policy-making role - it adopts or rejects issue-specific proposals - but it was noted that the mode of policy-making in the Council typically was that of a respondent. Now, if one thinks that participation is an essential democratic norm, one will not approve of this. However, if one, like myself, favours knowledge-based decision-making over participation, one can see great virtues in the present system of interplay between the European Council, the Commission, and the Council of Ministers. The reason for this is that the role of the Council of Ministers serves as a safeguard for accountability in this system: if the Commission presents a proposal that deviates too much from the original mandate given by the European Council, the Council of Ministers says nay. This happens all the time - proposals are referred back to the various DG's, or simply rejected. I will thus end on a provocative note: In the present EC system one can arguably get the 'best of all possible worlds': informed policy that is subject to democratic accountability.

Summing up these very preliminary remarks, I believe that we have to rethink the Western institutional system of representative government in fundamental ways because the subject matter of this type of government is no longer the agenda of the minimalist 19th century state. On the contrary, the agenda is infinitely longer, more complex, and internationally interdependent in the sense that few political issues today really fully belong to the national level. Therefore much policy-making today, in the Commission as well as in national ministries, is conducted by experts. This is, I have argued, not only the better solution to the generalist-politician as decision-maker, but also already an empirical reality. I have pointed to the existence of such policy-makers in the Commission and in the 'corporate channel' at the national level. This reality makes however the discussion of accountability the more pressing.