Old Wine in New Bottles?

The Actual and Potential Contribution
of Civil Society Organisations to
Democratic Governance in Europe

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Dawid Friedrich is Research Fellow at the Centre for European Law and Politics (ZERP) at the University of Bremen. E-mail: dfriedrich@zerp.uni-bremen.de

Abstract

Political science literature often claims that the participation of civil society organisations increases the democratic quality of policy-making in international governance arrangements. However, it remains unclear under what conditions such a democratic value can be achieved and how the empirical reality of this participation relates to the alleged democracy-enhancing quality. In recent years, the European initiatives to establish a civil dialogue, to improve the consultation with civil society organisations and above all the White Paper on European Governance have triggered some scientific expectations that the EU seeks to establish a participatory regime which possibly improves the democratic character of EU policy-making.

The central hypothesis put forward in this paper is that the participation of civil society organisations is only then of democratic value if it takes place in an environment of *clear rules*; thus, an argument is made for a *regulated model of participation* which is both normatively meaningful and practically feasible. The safeguarding functions of legally enforceable rights to participation ensure democratic instead of lobbying-like participation.

Based on normative theoretical reflections on the democratic value of participation of civil society organisations as well as on empirical research in the fields of environmental policy (chemicals, REACH) and migration policy (family reunification), this paper argues that the EU has not yet established an approach to participation that increases the democratic quality of EU policy-making but that it rather follows a voluntaristic and instrumental approach. Nevertheless, some developments in the environmental area give reason for cautious optimism that the EU might move towards a more democratic participatory regime of policy-making.

Keywords

Introduction[1]

In recent years, it has become almost a truism in both academic and political discourses that the participation of organised civil society in governance arrangements at European and international level is conducive to their democratic quality. Consequently, in the academic realm the empirical focus of many studies in European Studies and International Relations has turned towards the analysis of the inclusion of these actors in policy processes and have made inferences about their contribution to the democratic quality of the governance arrangements. However, groundings in democratic theory of the inferences is often rather weak and the democratic 'shadow theory' (Dahl 1989: 33) not spelled out. In the political realm, the European Union (EU) has gone a considerable way to rhetorically make the case for increasing legitimacy via the participation of civil society organisations. Examples in case are the European Governance White Book (European Commission, 2001) or the introduction of a 'Principle of Participatory Democracy' (Art. I-47) in the draft treaty to a constitution for Europe.

Against this background I want to discuss the following assumptions in this paper, namely that

- the participation of civil society organisations enhances only under certain circumstances the democratic quality of European policy-making,
- that the currently existing participatory regime of the EU does not fulfil these circumstances
- but that a *regulated model of participation* would strengthen the democratic quality of civil society participation.

These assumptions are discussed in the following structure: In the first section I will begin with giving an account about the democratic challenge of the postnational age and try to outline the space the participation of civil society organisations can take in an overall democratisation of policy-making processes in the supra- and international realm. Against this background, the second section offers some reflections about the central term *participation* – whose meaning remains more often than not unexplained so that an impression of self-evidence in meaning is created by many publications in European Studies – and introduces then three different models of participation that serve as yardsticks to characterise some elements of the participatory regime of the EU. I will give a brief account of some empirical evidence on the EU's participatory regime and its democratic quality in the third section[2], focussing on policy processes in two areas, namely environmental and migration policies. A critical assessment of these findings result in the proposition of a regulated model of participation in the concluding section.

The democratic challenge of the postnational age

Democracy in a postnational context

The postnational age is characterised by the disintegration of three components of the national age, namely the territorial state, the nation and the national economy (see Habermas 1998: 94),[3] the congruence of which has enabled the emergence and functioning of the institutions of national modern liberal democracy. The thus understood nation state is not any longer the solitary agent of policy-making but shared with international agencies (McGrew 1997: 12) such as supranational organisations, the most advanced of which is undoubtedly the European Union, and non-state actors such as multinational firms and non-governmental organisations (NGOs). These processes of spatial and social opening in the postnational age challenge modern liberal democracy. States have lost their monopoly as the sole associations that enable citizens to realise personal as well as political autonomy, but the new decision-making loci above the nation-state have not yet become, some would even argue should never become, such associations with comparable abilities of closure.

Unsurprisingly, this profound transformation also challenges the practices and imaginations about the way societies cooperate and coordinate their public life, both internally and externally. Over the past fifty years within their nation-states, the Western world became accustomed to believe that the solution for a peaceful and prosperous life has been found in the combination of democracy, market economy and the welfare state. Yet, whereas capitalism accelerated after the victory about the socialist command economy in the last decade of the 20th century, democracy does not seem to be left unscratched by its triumph over socialism, as for instance the many articles in public media on incapacities of state action illustrates. Thus, unease has been triggered within established democracies about the viability of democracy as organisational structure of their societies, and in not (yet) democratic societies the attraction of democracy as role-model seems to falter.

But democracy is not only challenged from within but also from the outside of states. As interdependencies among societies grow, people of one country are increasingly affected by public policy-making of other, not necessarily neighboured countries. The global debate about climate change is but the most urgent example. As reaction, the international system has become more and more institutionalised, new measures and loci of policy-making have been created in order for nation-states to better coordinate their policies.[4] This internationalisation of policy-making has largely taken place by applying the practices of the national age, i.e. by relying on diplomacy and the delegation of expert bureaucrats. Yet, the postnational age requires new practices and brings the fundamental question to the fore about how to organise the international system and the policy-making processes in a democratically meaningful way. Major new social movements, mostly connected to globalisation critics, as well as Non-Governmental Organisations (NGOs) raise their voices to make their case for global democracy, hoping for a more sustainable, better distributed wealth if the people gain the power to self-determination also at global level.

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[3] Habermas speaks of a 'postnational constellation' (1998).

[4] For taking only one book on globalisation and democracy, which is still informative, see Held (1995).

Considering all these forces of globalization, differentiation, complexity, and pluralisation that challenge modern democratic practices, some voices are sceptical about the future of democracy and even question its continuation. Robert Dahl, for instance, sees the danger 'that the third transformation will not lead to an extension of the democratic idea beyond the national state but to the victory … of de facto guardianship' (1994: 33), thus, instead of the rule of the many we would end up with a system of the rule of the technocrats, the experts, the elite few, a system which would resemble more Platon's idea of a government by philosophers than a democracy. Indeed, as Blühdorn argues in his essay on 'simulative democracy' (2006), pluralisation and differentiation has reached such an extent that "there is nothing there to be represented. Of course there is a wide range of concerns, values, interests and demands. But these are highly diversified, inconsistent and volatile. They do not emerge from and cannot be (re)presented as the expression of any tangible identity" (ibid: 19). Here again a strong *demos* is seen as necessary condition of democracy. Colin Crouch (2004) even proclaim the age of 'post-democracy', where democratic institutions and practices are merely simulated (Blühdorn 2006).[5]

The rediscovery of participation

The interesting and for this paper highly relevant idea behind Crouch's notion of post-democracy is that 'virtually all the formal components of democracy survive' (2004: 22) and that they might even 'today in some respects…actually [be] strengthened' (ibid: 6), but that nevertheless the political practice is loosing democratic quality. He adds that politics and government 'are increasingly slipping back into the control of privileged elites in the manner characteristic of pre-democratic times' (ibid.), with 'little interest in widespread citizen involvement or the role of organizations outside the business sector' (ibid: 3). In this view, politics is predominantly shaped 'in private by interaction between elected governments and elites that overwhelmingly represent business interests' (ibid: 4), whereas the role of the once directly participating citizen has been 'reduced to the role of manipulated, passive, rare participants' (ibid: 21) so that political legitimacy can be created by 'means of encouraging the maximum level of minimal participation' (ibid: 112). What Crouch suggests by this is not only that elections are still performed on a regular basis, but that also regulated processes of consultation are increasingly established under the discursive umbrella of participation; this *maximisation of minimal participation* however is, according to Crouch, not only highly biased towards economic interests, but also of minimal political significance. Thus, the responsiveness, which was a central requirement for representative government to be judged as democratic, is diminishing, and the *demos* largely disempowered. Overall, state power does not seem to be anymore closely linked to the decisions and authorisation of the citizens, thus severely questioning the survival of democratic legitimacy and doubting that the increase of participation would be a suitable remedy to the problem.

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[5] Blühdorn describes simulative democracy in the following way: 'What is being performed or simulated is not primarily *democracy*, but that the consumer-citizen still has the status of autonomy that was ascribed to idealist subject. In terms of the public good and its implementation, what is being regenerated by means of simulation is the belief in the existence of a public good and the belief in political decidability. And with regard to the source of legitimacy, what is being simulated is that economic competitiveness and efficiency are not just abstract and formal criteria, but that they are grounded in substantive social needs and values' (2006: 21). Later however he adds, that 'the celebration of the institutions and procedures of representative democracy…incrementally turn these institutions and procedures into purely managerial bodies and formalized rituals' (ibid: 26), giving the impression that simulative democracy is also about simulating democratic practices, in this resembling Colin Crouch's analysis.

However, the blurring of territorial and social boundaries does not only endanger existing forms of democratic participation, it is also a potential source for democratic participatory innovation. Although acknowledging this new 'democratic landscape' (Warren, 2002), which is characterised by an unknown extent of complexity and differentiation, there are more optimistic voices than the former about democracy's future. In both the academic and the political realm, a debate has grown in recent years about the need and the feasibility of either replacing or complementing the familiar institutional designs of democratic governance, moving beyond a mere voting-based democracy. A particularly prominent feature of this debate is to complement 'electoral rights [of citizens, DF] with new kinds of participatory patterns' (Magnette 2003: 151) at local, regional and global level of governance (e.g. Fung 2003; Fung and Wright 2003; Heinelt et al. 2002; Steffek et al. forthcoming). Representative for this literature is Mark Warren, who says that the new democratic landscape 'offer[s] new opportunities to cultivate capacities for self-rule and generate multiple spaces within which self-rule can develop. Yet these same developments tend to undermine formal democratic institutions' (2002: 686). This statement shows, on the one hand, the normative expectations connected to participation as a means to come closer to the democratic ideal of self-rule, but it also points at the possibility that participatory governance might come at the cost of the familiar institutions of representative democracy, on the other hand. It seems thus necessary to cautiously weigh the potential democratic gains of participatory governance with possible democratic pathologies. This is a particularly crucial aspect in participation beyond the nation-state, where the agents of participation are often collective rather than individual actors. It is, above all, civil society organisations who gained prominence here. Irrespective of this tension, for large parts of the 'optimistic' literature, the democratic gains of the increasing self-rule opportunities seem to outweigh the losses on the side of formal institutions.

It is interesting to see that both in the sceptic and in the optimistic literature about the future of democracy the notions of participation, participatory governance and participatory democracy are of some prominence. The literatures suggest that participatory governance is an integral part of modern 'continuous democracy', that the 'democracy mix' between representative and participatory elements of democracy can vary in different political systems at different points in time, and that this mixture is in need for constant rebalancing. Since both literatures, however, share to different extends the view that participatory governance is not *per se* democratic but can, to the contrary, have substantial democratic pathologies, the next section goes more deeply into the discussion about the democratic promises and limits of participatory governance in policy-making processes beyond the nation-state.

Participation and democratic policy-making beyond the nation-state

Having seen that it is by no means self-evident that we can observe an upsurge of 'participation talk' in a historical context which aggravates the challenges of size and complexity we already know from within nation-states, it seems necessary to make some comments on the concept of participation, its meaning and the actors that can engage in participatory activities as well as to clarify the democratic potential of the participation of civil society organisations.

Approaching the meaning of political participation

Participation refers in its broader sense to all social activities that refer to the engaging and partaking in some form of activity with other people, thus including participation in cultural, religious or social activities. In this paper, participation is qualified to those activities that are taking place beyond the mere private realm of families, friendships and hobbies.[6] Political participation aims at establishing, contributing to, influencing of or hindering decisions and/or implementation of public affairs. It therefore encompasses societal self-regulatory efforts as well as the interactions of the citizens with the institutions of the political system. Participation is a communicative action which 'involves preliminary deliberation (conversations, debate, discussion)' (Kaufman 1969: 192), where the deliberation and the decision-making are based on the principle of equality so that every participant's concern has, at least formally, equal weight. Mere destructive protest for the sake of protest thus falls outside the present definitional scope of participation.

As are other key concepts of democratic theory, such as legitimacy or democracy itself, also participation is situated on the interface of normative and empirical social science. In democratic theory exists the basic agreement that some form of people's participation in politics is indispensable for any form of democracy (see i.a. Schmidt 2000). However, it is important to note that in democratic theory the opinion prevails that participation consists of two dimensions, namely an *instrumental* and a *normative dimension* (see Scharpf 1970; Schultze 2002). In a nutshell, the former dimension emphasises the idea that participation is an exchange act, meaning an 'instrumental means for gaining power in order to increase the probability of realising private benefits' (Scaff 1975: 449). The participant offers some of its resources to the receiving institution and demands in exchange responsiveness to her interests. This dimension stresses therefore an orientation on the output of policy-making. Yet, although democratic systems also require instrumentality in order to function, instrumental participation requires the existence of a democratic context in which it takes place, because one can well imagine a non-democratic setting that allows for the participation of some selected participants. The normative dimension of participation assigns an additional *normative* value to participation by highlighting the interactive quality of participation among equals and the pursuit of the public good by inclusive means of collective policy-making.[7]

Different approaches to democracy disagree in their judgement about which of the two dimensions is more important for modern mass democracies and what forms of participation should or could be institutionalised in a postnational context. The reason for this disagreement is simply that there is no unitary theory of democracy (see Held 2006). Propositions about the necessary extent and the appropriate forms of participation vary according to the respective underlying conception of democracy, as do propositions about participation's democratic promises and limitations. Accordingly, there are varying judgements concerning the democratic vices and virtues of the existing multiple participatory forms in modern democratic political systems. Political participation can either be formalised, for instance voting, or take

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[6] In concentrating in this study on the political dimension of participation, I do not want to dispute that cultural and communal activities and the like, such as taking part in a bowling club (Putnam), are enormously important for any society to be more than an accidental gathering of individuals. I merely express the different focus of this study.

[7] Scaff (1975) distinguishes between 'participation as interaction' (with a value in itself) and 'participation as instrumental action' (with an objective external to participation).

place informally as, for instance, civil disobedience. This continuum of formal and informal participatory practices includes diverse activities such as protesting, campaigning, writing advisory papers in an expert committee, being active in political parties or organising a referendum. Participation can take place at all levels of authority where concerns of common interest are dealt with, *i.e.* the local, national, regional and global level, and it is possible at all stages of the policy cycle. Furthermore, also the agents of participation vary in different theories. Whereas in classic democratic theory[8] participatory democracy was about the participation of individuals, more recently, in the wake of the 'participatory revolution' since the 1960s (Blühdorn 2007), the term participatory democracy is increasingly used together with participatory governance, referring to the participation of collective actors of the organised civil society (Greven 2006).

Against this background, it is possible to distinguish four different forms and actors of participatory activities ordered according to either the normative or the instrumental dimension:[9]
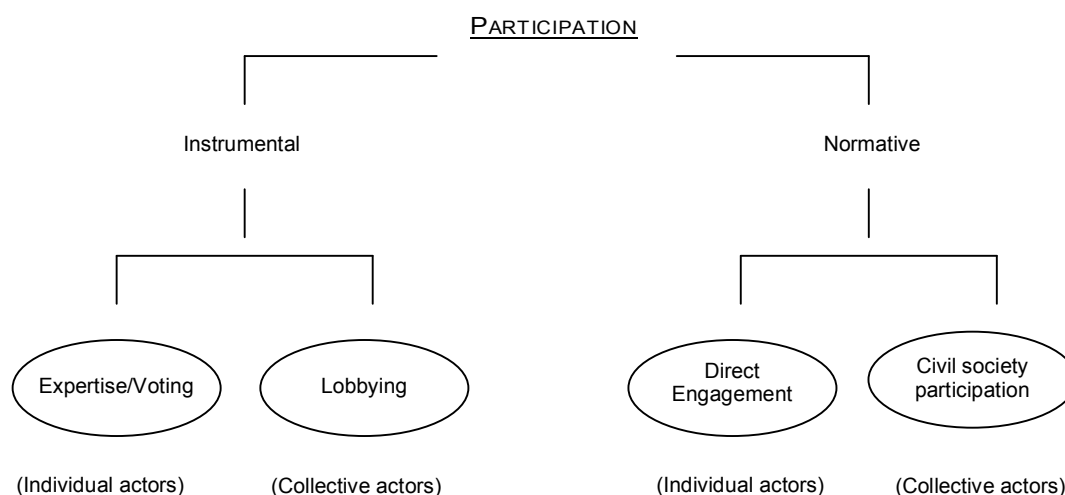

Figure 1: Dimensions and forms of participation

These types of activities are broad enough to capture the forms of participation named above; moreover, their grouping to a type of actor, either individual or collective, should be understood as a proxy rather than as exclusive categorisation. It does need further mentioning that also individuals engage in lobby activities – but mostly on behalf of a collective actor – and that also lobbyists provide expertise, as do civil society organisations which also engage in lobby activities.

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[8] I want to stress that I use the term 'classic' in a temporal form, referring to authors such as Rousseau or J. S. Mill. I do not agree with authors such as Joseph Schumpeter (1947) who constructs an allegedly coherent classic doctrine of democratic theory against which one can put one's own argument.

[9] In line with the definition of participation, I do not capture non-legal forms of political expression (such as violent campaigns) nor instances of civil disobedience (such as non-registered protests).

Civil society organisations as participatory actors

There is no undisputed model in democratic theory that deals with the participation of civil society organisations in supranational policy-making processes, neither is there a leading definition of civil society or of any other type of non-state collective actor. Yet, in the contemporary literature on democratic policy-making one can identify two competing camps who stress different forms of a democratic will-formation but, interestingly, whose empirical implications for analysing the participation of non-state collective actors does not seem to differ that much. One side supports an aggregative and another a deliberative model of democratic will-formation (Young 2000: 18ff).

The aggregative model is based on the principles of 'equal consideration' and 'personal autonomy' (Cohen 1996: 98) and argues that 'an ideally democratic procedure gives equal weight to the interests of each in arriving at binding collective decisions' (Cohen 1991: 221). In this view, a democratic process is a competitive process in which the (pre-politically given) preferences of individuals, who are understood as following a consequentialist logic, are aggregated (Nanz and Steffek 2005; Sørensen and Torfing 2004). Of particular prominence is the idea of parliamentary representation as key mechanism for realising the democratic requirement of self-governance, (political) equality being secured by the formula One Person – One Vote. The tradition of classic American pluralism (see i.a. Dahl 1956) offers an approach within the scope of aggregative thinking that is explicitly concerned with the participation of non-state collective actors (Young 2000: 19, footnote 5). Pluralists call these actors *interest groups* rather than *civil society organisations*. For them, the existence of interest groups is vital for political processes to become more democratic. The groups function as interest aggregators and, arguably, enhance the capability of minorities to voice their interests and to demand responsiveness of the decision-takers.[10] There does not seem to be principle objections (other than empirical ones) that such groups and their functions could not gain also a postnational dimension. Indeed, with view at the lively development of a European scene of interest groups, NGOs, lobby firms etc. one can possibly argue that the contours of a plural (democratic) society – the existence of a plurality of transnational interest groups – is emerging.

In recent years, however, the literature on the participation of civil society organisations has become heavily influenced by a second model of democratic will-formation, namely deliberative democracy. The deliberative model is based on the principle of 'political justification' (Cohen 1996: 99) rather than aggregation, the basic idea being that the presumption of self-governance can be fulfilled only if public policy decision-making is 'in principle open to appropriate public processes of deliberation by free and equal citizens' (Benhabib 1996: 69). A discussion is deliberative if the propositions made are justified by arguments or reasons. Since many of us are more familiar with the 'standard model of politics' captured by the aggregative model of democracy, the following question needs answering: what makes deliberation democratic? Indeed, deliberation *per se* is not democratic. Deliberation of experts on important policy matters in a small group cannot be called democratic but is situated in the instrumental dimension of participation (see Figure 1). In contrast to the aggregative model, the rationale of deliberation is the idea that citizens' preferences are not pre-politically given and have thus 'only' to be fed into

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[10] For a classic criticism of American Pluralism see Connolly (1969).

channels of interest aggregation (such as interest groups). Therefore, according to the deliberative model, collective choices are in need to be discussed (rather than aggregated) in a process of public reasoning (and are thus political in nature). The *democratic* moment of deliberation, in this view, is that political decisions are 'the outcome of a procedure of free and reasoned deliberation among individuals considered as moral and political equals' (Benhabib 1996: 68). Furthermore, this procedure is oriented at the public good because the deliberative process results in intersubjective (rather than objective or transcendent) meanings of common concerns.

With view at the participation of civil society *organisations*, not much is directly said in deliberative democracy. Instead, deliberative democracy in a Habermasian perspective (Habermas 1992) predominantly focuses on the public sphere effects of civil society *at large* by outlining a 'two-track model'. Habermas 'shifts some of the burdens for securing democratic outcomes away form the individual virtues of an active citizenry onto the "anonymous network of communication" in civil society' (Baynes 2002: 134). According to Habermas, the civil society is

> composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distil and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of general interest inside the framework of organized public spheres.
>
> Habermas 1996: 367

The idea is that in this civil society network individual citizens' concerns are picked up and voiced in the wider public sphere ('weak public'), where the issues are discussed, and then carried further to the institutionalised political system ('strong public'). This 'two track model' seeks to offer a solution to the problem of socio-cultural complexity in today's differentiated and heterogeneous societies: political decision-making in institutions must be open to the general public and yet structured in a way as to be effective. Interestingly, where pluralist thought sees an immediate link between the citizens, their preferences, interest groups and governmental action, this immediate link seems broken in the 'two-track model'. It seems to be ill-equipped to capture the gradual transformation of a contemporary multi-centred, heterogeneous polity such as the EU because the proliferation of 'governance', i.e. of multiple forms and fora of decision-making bodies within modern polities poses considerable problems for this differentiation between an informal weak public sphere on the one hand and the formal institutions of a strong public on the other. Indeed, both the existence of a European public sphere[11] and of a strong public in the EU cannot be assumed as given. In sum, it seems reasonable to argue that deliberative democracy in this reading focuses too much on the *argumentative rationality* of democratic processes and the ideal of communicative action within public spheres.

This focus on rationality goes at the expense of the *participatory moment* of democracy, which is, as not only I believe, inscribed to deliberative democracy. Jon Elster nicely depicts the issue when he says that deliberative democracy:

> includes collective decision making with the participation of all who will be affected by the decision or their representatives: this is the democratic part.

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[11] Recent evidence on Europeanisation of a public sphere, see Sifft et al. (2007).

> Also, all agree that it includes decision making by means of arguments offered
> by and to participants who are committed to the values of rationality and
> impartiality: this is the deliberative part.
>
> <div align="right">Elster 1998: 8</div>

These rough characterisation nicely captures the link between participation and
deliberation, reintroduces a stronger actors' dimension into this theory but makes also
clear that deliberative theorists also encompass representative mechanisms of
democracy because they understand also majoritarian decision-making procedures as
inherently deliberative (Manin 1987).

This participatory moment is the concern for more policy-oriented research, such as
the present study, where the democratic effect of the inclusion of civil society
organisations in governance arrangements is of interest. Thus, such research has to
seek how to reintroduce the dimension of agency within the framework of the non-
aggregative conception of deliberative democracy. There is, to my knowledge, only
one effort to apply more systematically the reasoning of deliberative democracy for
analysing the participation of civil society organisations (see Nanz and Steffek 2004;
Steffek et al. forthcoming). This approach conceptualises civil society organisations as
'transmission belts' between the citizenry and the institutional level of policy-making.
By endorsing the Habermasian definition of civil society this view acknowledges the
plurality of concerns and life-forms in a modern society as appropriately mirrored in
the diversity of civil society organisations. It is thus an attempt to ascribe to a certain
set of actors the function of bridging the link between the weak and the strong public.
Analogies to pluralist aggregative ideas are evident.

Different models of participatory governance

For both models, policy-making is democratic if the arrangements are given shapes
that ultimately aspire to link the processes to those people who live within the
confines of the policies. Participation is but one, though central, element of how to
institutionally accommodate this ideal. Both the pluralists and the participationist-
deliberative approach perceive voluntary associations in its broadest meaning as
appropriate vehicles that link the people with the political institutions. Thus, the
connection between the individual people and the policy-making process is indirect,
mediated via the collective actors of the civil society. From this fragile link follows in a
pragmatic perspective, that one should restrain from having too high expectations.
Civil society participation is not a universal remedy for improving the democratic
quality of European policy-making. Nevertheless, it opens the possibility for thoughts
about additional, complementary institutionalisations that are capable of rendering
policy-making process more democratic which cannot (and perhaps even should not)
rely predominantly on representative mechanisms. At least the example of the EU
demonstrates that the increasing competences of the European Parliament have not
smoothed the unease about the EU's democratic legitimacy.[12] The participation of
civil society organisation is only one, but potentially important element in a mix of
democratic elements in modern politics.

But which model should, then, serve as justification for the institutionalisation of a
participatory regime? What institutional efforts are needed to make usage of the

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[12] For a strong view that makes the case for representative, parliamentarian democracy in the EU, see
Rittberger (2006).

democratic potential of participation? The instrumental dimension of participation can be attributed to the aggregative approach of democracy, because here democracy is a method for achieving instrumental ends[13]. Its normative dimension, instead, is more closely linked to the deliberative approach, because democracy is an ideal rather than a method and deliberation adds normative characteristics to a participative process (see above). I believe that both types of participation, instrumental and normative, have their place in a democratic frame but that the democratising effect of deliberative participation is higher than the instrumental one. Deliberative participation adds directly to the fabric of democratic politics itself, whereas aggregative participation is important for the functioning of existing democratic structures, but could also take place in non-democratic contexts.

Yet, in the light of the criticisms on pluralist accounts on participation, I argue that the participation of civil society organisations requires some institutional means and commitment by the political institutions to democratic participation. An environment of clear *rules*, thus a *regulated regime of participation* is needed to democratise participation of civil society organisations. Figure 2 illustrates these assumptions and shows three different modes of participation that include different degrees of democratic potential. The figure also shows my assumption that participation can become democratically deficient and/or pathologic, i.e. disadvantageous to democracy. Participation would be democratically deficient if it solely serves instrumental purposes, whereas it could become pathologic, when participatory arrangements produce new democratic problems, such as overregulation of deliberative procedures which would render the processes utterly ineffective.

I claim that the continuum of instrumental participation vs. normative participation can be described as changing degrees of voluntarism[14] and of regulation of the participatory pattern. Thus, one can hypothesise different types of participation along this continuum, which are of course predominantly analytical conceptualisations rather than empirical observations. Aggregative participation is characterised by voluntarism where the 'top' cherry picks those actors that it wants (mostly collective actors, i.e. lobby groups, but also individual actors such as experts) and where the aims of the participants is to strategically try to realise as much of their own objectives as possible. Deliberative participation requires some regulation in order to guarantee the participation of and for all and to ask all actors, i.e. also the political institutions, to engage in deliberation by encouraging them to justify their positions vis-à-vis the positions of the others.

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[13] See for the origins of 'democracy as a method' particularly Schumpeter (1947).

[14] The usage of the term 'voluntarism' in this context entails more than just the possibility of public actors to decide on a case-by-case logic about whom to consult. It also means a certain perception of politics which is based on the assumption that there is a fixed, externally given priority list of policy preferences. This understanding is to some degree underlying most conceptions of aggregative democracy, where the aggregation of interests rather than processes of deliberation and arguing is at the centre of the argument (see for instance Cohen 1996). In the latter understanding, to the contrary, policy preferences are conceptualised as emergent in a social interaction process, thus subject to change in reaction to convincing arguments and learning processes.
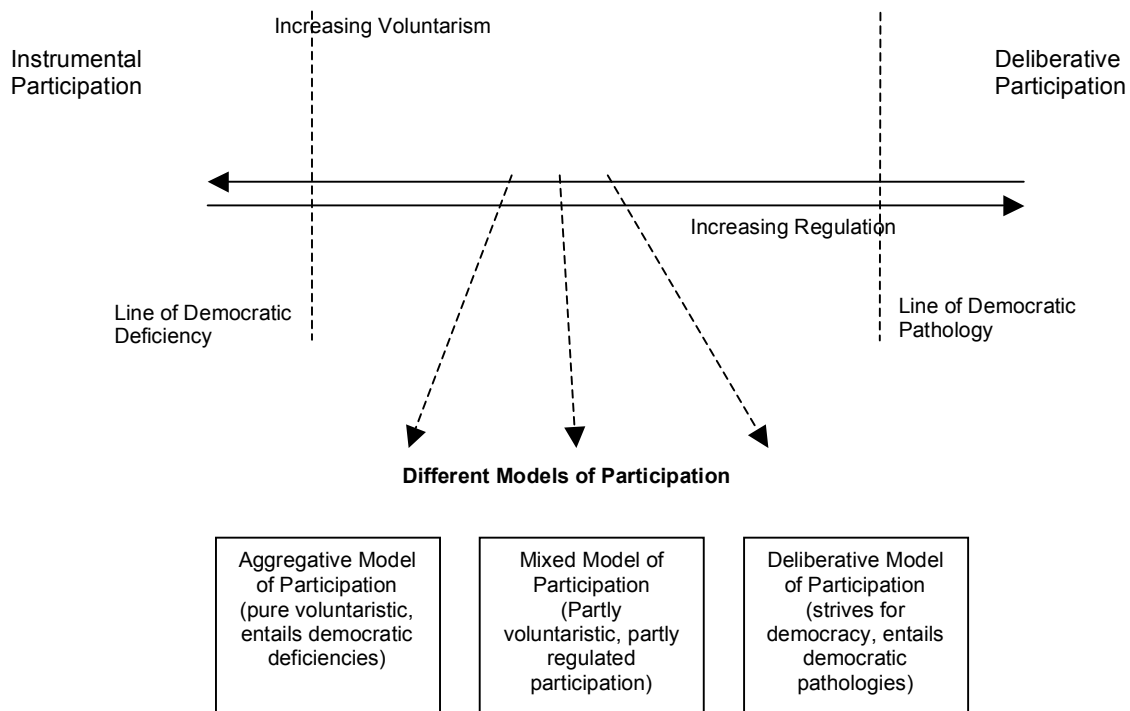
Increasing Voluntarism

Instrumental
Participation

Deliberative
Participation

Increasing Regulation

Line of Democratic
Deficiency

Line of Democratic
Pathology

Different Models of Participation

| Aggregative Model of Participation (pure voluntaristic, entails democratic deficiencies) | Mixed Model of Participation (Partly voluntaristic, partly regulated participation) | Deliberative Model of Participation (strives for democracy, entails democratic pathologies) |

Figure 2: Models of Participation

In the remaining of this paper I will present the results of an analysis of the participatory pattern in two policy areas of EU governance in order to identify which model of participation the EU resembles and in how far the empirical reality is conducive to the democratic character of the EU's policy-making processes. Every institutional design of participatory arrangements will possess some elements that are more conducive to democracy than others, and it is up to empirical scrutiny to judge whether the advantages outweigh the costs.

Participatory pattern in selected European policy processes Some empirical findings

Guidelines of the analysis

Where do these conceptual reflections on participation and the different mechanisms of democratic will-formation (aggregative vs. deliberative) leave us with respect to the empirical interest, namely whether the participation of civil society organisation adds democratic quality to European policy-making processes? What criteria can be applied that are both normatively meaningful and empirically researchable? Adopting a pragmatic position, it seems reasonable to assume that the phenomenology, i.e. the *empirical* description of actors of both the pluralist approach (in the aggregative tradition) and that from Nanz and Steffek (in the deliberative tradition) are not so far apart from each other. The latter define a civil society organisation as:

> a non-governmental, non-profit organization that has a clearly stated purpose, legal personality and pursues its goals in non-violent ways. Apart from activist organizations this definition includes the social partners (i.e. trade unions and

employer associations), consumer associations, charities, grassroots organiza-
tions and religious communities.

(Nanz and Steffek 2005: 382)

On purely empirical grounds there seems to be no reason not to call these
organisations 'interest groups' as pluralist would probably do.[15]

Moreover, by (re-)introducing the actors-perspective into research on deliberative
democracy, also the normatively informed empirical research has to grapple with
similar empirical problems as pluralist theories, above all the problem of asymmetry
and inequality of access and voice. Powerful criticism against early forms of pluralist
theory (see i.a. Connolly 1969) highlights the asymmetrical dominance of different
interest groups and consequently their unequal access to and a biased responsiveness
of the political institutions. This means that the pluralist laissez-faire approach to
participation, which believes ideally in self-regulated equilibrium of the voicing
function of the interest groups without compensating action of the political
institutions, is arguably not able to overcome the problem of factionalism, of
asymmetry and dominance of particular groups. There is no reason to believe that
this problem would not become reproduced (or even aggravated) at a supranational
level and there is necessity also for empirical deliberative participation research to
deal with these problems.

Besides these pragmatic considerations, there are additional theoretical grounds on
which one can justify a small list of criteria, which serve as minimum requirements
for participation to be called democratic, from both briefly introduced theoretical
approaches. Perhaps not the only, but a major normative aim of pluralism is to
overcome the problem of faction and to protect minorities. The partaking of interest
groups, so the assumption, is conducive to these aims if the policy-making processes
are transparent and openly accessible to all groups that have a stake in a particular
issue. So, the process must be inclusive with view at minority groups and the political
institutions should be responsive to their concerns. Similarly in the participationist-
deliberative perspective: Deliberation is normatively conducive to democracy if it is
organised in a transparent and open way that is inclusive to all those voices that are
concerned by a particular policy. The interactions must be based on mutual
justification and result in a reasoned responsiveness. Consequently, it is possible to
distinguish four aspects which guides the empirical examination, a discussion of
which will lead to a picture about the contours of the EU's participatory model,[16]
namely *transparency*, *access*, *equal inclusion* and *responsiveness*.

Transparency of the policy-making processes, including the availability of necessary
information, as well as access to the processes are necessary preconditions for
speaking of real participation for both approaches to democracy. Moreover, equal
inclusion of all voices that are concerned or interested in a decision is crucial in both
perspectives. Since equal inclusion is a contrafactual argument which cannot be
proven, efforts of the receiving institution (the EU) to strive for breadth and to
support for less visible, weaker organisation serve as empirical proxies. The

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[15] Special cases are, perhaps, churches and charities. But part of their activities is similar to other NGOs,
namely the representation of the interests of special groups, such as for instance migrants or children.

[16] These aspects repeat the list proposed by Nanz and Steffek (2005). Yet if one considers the indicators
proposed by Dahl (1985, 1989) and his positive reaction on a critique on his approach from a deliberative
perspective (Dahl 1991), one can justifiably argue that these criteria also speak to an aggregative
understanding of participation.

approaches differ, however, in the conceptualisation of responsiveness. In the aggregative understanding, participation is seen as instrumental device to achieve specified interests by both the participants as well as the addressees of participatory activities; thus, the benchmark of responsiveness would be the extent to which interest groups succeeded to place their preferences into the policy decision. In a deliberative understanding, also responsiveness is an empirical proxy, namely for the principle of justification which is central to the theory of deliberative democracy. Since this study is not a project on assessing the deliberative *quality* of political discussions (see for this Steenbergen et al. 2003) and since it is almost impossible to get the appropriate data (protocols of meetings, internal discussion papers etc.), a special understanding of responsiveness, instead of justification, seems empirically appropriate. Responsiveness is, in the deliberative understanding, given if, over time, one can find traces of the arguments of civil society organisations in the analysed legislative drafts. This approach is no impact assessment as in the aggregative understanding that focuses on the final outcome, but it assumes that, during the years of deliberations and negotiations, certain topics might well be discussed and temporarily included in a draft proposal, only to be, perhaps, excluded in a later stage of the process. Thus, it is less important whether the civil society organisations were *successful* in placing their concerns, but rather to identify whether the documents give evidence of reflections with these concerns by the public institutions. Responsiveness is analysed by an extensive content analysis of all accessible formal and informal documents during the whole processes.

Obviously, this research approach does not attempt to 'test' either of the theoretical approaches. It rather seeks to find empirical evidence that could plausibilise the expectations about the democratic value of participation in European policy-making. A thorough distinction between both approaches was not aspired and does not seem empirically possible, given that they meet fairly nicely at the pragmatic level of empirical observation.

Nevertheless, a crucial point of distinction is the extent to which the participatory regime of the EU offers appropriate opportunity structures for participatory activities, whether these structures are regulated or relies in a laissez-faire approach on the self-regulative abilities of the interest groups. So, in an instrumental understanding of participation, the provision transparency and access are sufficient because all divergent groups seek to be included and strive for responsiveness. The more demanding normative understanding of participation also calls the political institutions to provide for the realisation of equal inclusion and responsiveness in order to achieve fair and equal deliberation among all concerns. This means that the more the participatory regime is characterised by laissez-faires, the more it will be conducive to instrumentalised aggregation of interests rather than to deliberative processes. The more the participatory regime is regulated, the more one can expect deliberative forms of participation.

The subsequent presentation of the empirical results sheds some light on the extent to which the vivid participatory discourse within the European institutions over the last years has already 'trickled down' into the practice of some European policy-making processes, whether expected effects already have some democratic significance and which of the above participatory models the EU seems to be heading to. To make it very clear: what I am interested in here is the contribution the participation of civil society organisations might have on the democratic character of European policy-making processes. This means that I am neither interested in the strategies of civil

society organisations in pursuing their participatory activities, nor do I attempt to find a model that explains their (non-)participation. The results presented here serve merely as illustration to empirically plausibilise the theoretical assumptions (for elaborations of the empirics, see Friedrich forthcoming; Friedrich and Nanz 2007). The next section is structured as follows: the aspects of transparency, access and equal inclusion are, in principal, regulated (or not) across all policy-areas in the EU. Therefore, the following section deals with the overall formal participatory frame of European policy-making. However, the implementation of these provisions as well as responsiveness depends on the participatory practice in concrete policy-making processes. The results of my analysis of two processes will be briefly presented. The first process is situated in the environmental policy area and concerns the 2006 EU regulation on the 'Registration, Evaluation and Accreditation of Chemicals' (REACH), the second is the directive on family reunification (Council of the European Union 2003) in the area of legal migration. Since both policy areas have a different history of integration, differ in their policy-field specific characteristics and actor constellations and vary in the degree of political sensitivity, and since both policy processes are key decisions in their area in recent years, they are appropriate cases to illustrate the contours of a possibly evolving European participatory model.[17]

Outlining participation in European policy-making

Transparency, understood as access to documents, is an indispensable precondition for the emergence of publicity and for participation. It does not prejudice a concrete model of participation because it „allows for scrutiny of public decisionmaking but leaves influence to existing political and legal mechanisms" (Bignami, 2003: 15). Since the early 1990s, the EU has started to develop a transparency regime which includes both formal rules and soft approaches.

The first steps of this development in the different European institutions were fairly cautious.[18] They resulted eventually in the transparency clauses of the Amsterdam Treaty (1997, Art. 255) and the Charter of Fundamental Rights (2001, Art. 42) and – 'after a long, bitter set of negotiations' (Bignami 2003: 11) – the Regulation 1049/2001 EC, which entered into force in December 2001. This regulation lays down the principles for and limits to access to the documents of the European Parliament, the Commission and the Council. It obliges the institutions to report annually on the implementation of their efforts to comply. However, the regulation leaves the doors open for many exceptions[19] and, in a preliminary analysis, after two years of the Regulation's existence, the European Citizen Action Service complained that, 'at the very most, the Institutions fulfilled the minimal requirements' (Ferguson 2003: 1) and

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[17] The empirical analysis is based on computer based qualitative content analysis, document analysis and expert 16 interviews which were conducted with representatives of the European Commission, the Council, the European Parliament and civil society organisations (Summer 2005).

[18] In the 1990s, the main EU institutions decided upon transparency rules, see the Council decision 93/73/EC (20 December 1993); the Commission decision 94/90/ECSC (8 February 1994); decision of the EP 97/632/EC (10 July 1997).

[19] Art. 4.3. of the regulation says, that: "Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure." This clause makes it easy for the EU institutions to refuse requests for many relevant documents.

that refusal rates for access to documents were actually rising.[20] Ratification of the Constitutional Treaty would substantially improve transparency, not only in terms of access to documents but also in terms of conducting the work of the institutions as openly as possible. Both the European Parliament and the Council would be obliged to meet publicly when deliberating and adopting legislation (Bignami 2003). The publication of the Green Paper on a Transparency Initiative by the European Commissioner Siim Kallas (May 2006) shows the consciousness for room of improvement.[21]

Nevertheless, interviewed civil society organisations revealed notable satisfaction with the accessibility of documents; in particular, improvements in internet-access were mentioned. However, the lack of transparency in the Council's working procedures was frequently mentioned;[22] interviewees would welcome it if the positions of the individual Member States were made visible, *i.e.*, if the footnote-papers of the Council working groups could be made accessible as well. Other statements point in the direction that it would be important for effective participation if the procedures were made more transparent. For CSOs, it would be as important as 'access to documents' to obtain 'access to the agendas' of the European institutions in an early stage, so that they could gain time to prepare themselves and to develop positions in co-operation with their national sections. Nevertheless, although CSOs are still not on an equal footing with the European institutions, the EU's transparency regime as a whole seems to be, to some degree, conducive to democratic participation of civil society.

Access, and they way access to policy-making processes is granted to civil society organisations, is decisive for determining the participatory model. The more regulated access possibilities are the more political equality might be achieved, whereas conversely the danger of becoming instrumentalised and coopted by the public institutions increases with more laissez-faire. This aspect portrays in particular the institutionalised repertoire that the European Union offers organised civil society to its policy-making processes. It is noteworthy that, unlike other international organisations such as the UN[23], the EU has no general formal accreditation scheme that explicates rights of participation. Instead, the European Commission, as the most important interlocutor for CSOs, stipulates that it 'wants to maintain a dialogue which is as open as possible'.[24] Rather than a conditionality approach for civil society involvement, the Commission explicitly favours a self-regulatory model. However, this lack of explicit *conditions* for access comes together with a lack of explicit *rights* for access. The European Commission favours a decentralised approach and states that its 'different services are responsible for their own mechanisms of dialogue and consultation' and rejects 'an over-legalistic approach [which] would be incompatible with the need for timely delivery of policy' (European Commission 2002: 10).[25]

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[20] The reported refusal rates rose from 19 per cent in 1999 to over 33 per cent in 2002 for the European Commission, and from 16 per cent in 1999 to almost 29 per cent in 2002 for the Council (for documents that were released wholly). See Ferguson (2003: 4).

[21] Until 15 July 2007 there takes place a consultation on improvements for access to documents.

[22] By acknowledging a deficit, in a decision from 21 December 2005, the Council announced to meet in public in all those issues that are decided under co-decision. The European Ombudsman (press release No. 2 2006) called at the Council to make all meetings public with deals with concrete political decisions.

[23] See http://www.un.org/dpi/ngosection/index.html.

[24] See http://europa.eu.int/comm/civil_society/.

[25] The Social Dialogue and the Economic and Social Committee are treaty-based provisions for consultation that are outside the scope of this paper.

However, there are some provisions that shape the relationship between civil society and the Commission. First of all, there is the 'civil dialogue' initiative of the late 1990s, which was established by the DG Employment and Social Affairs in co-operation with the Platform of European Social NGOs. Later, the Commission's White Paper on European Governance (European Commission 2001), in particular, aimed at enhancing the importance of civil society in the European decision-making processes. However, I agree with Pauline Cullen that '[t]he only tangible results from these initiatives were a Commission website with a registration system, and the use of internet portals as cyber or virtual consultations' (Cullen 2005: 6), referring to the online database CONECCS ('Consultation, the European Commission and Civil Society')[26], and the internet consultation scheme called 'Interactive Policy-Making' (IPM). Although the Commission hopes that it will be used by Commission staff in order to identify an appropriate mixture of partners for consultation, its *de facto* usage apparently stays behind this goal. Up to now, both CONECCS and the IPM are relatively unknown among both civil society and civil servants, and there is no structured intra-institutional strategy for disseminating relevant information.[27] Only further, detailed research can show whether this website will remain what it currently is, *i.e.*, a voluntary, non-conditional database for information which has failed to improve the *de facto* consultation procedures (as Cullen suggests), or whether it will develop into an incremental foundation for a system of 'access leagues', as Greenwood and Halpin argue (2005: 5).

The European Parliament (EP) does not provide for structured contacts with civil society organisations, but has well-developed informal contacts with them, and, as Smismans states, 'is seen as very receptive to the demands of the NGO sector' (2002: 18). My interviews yielded a similar answer although interviewees emphasised that in order to gain access to the EP building, however, they must be registered and are issued with a maximum of four permanent entrance permits per organisation. This rather recent restriction to access, in an attempt to tighten security in the EP, has triggered much unease among civil society organisations, and there are discussions in progress to improve this scheme. The (European) Council is lagging behind in its effort to become more open and accessible to civil society, both formally and informally. There is neither a formal consultative status, nor a framework in place for relations between them and the Council.[28]

For the time being, the participation of civil society organisations has to be characterized as 'participation by grace and favour', meaning that the extent of the participation hinges largely upon the discretion of individual civil servants and differs widely across the institutions and the recent debates in greater participation was largely implemented on a soft and voluntary basis.

If considered from an instrumental perspective from above, *equal inclusion* is, instead of the expertise provided by the organised civil society, less important. However, for normative perspectives the equal consideration of all is a central democratic value.

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[26] See http://europa.eu.int/comm/civil_society/coneccs/index.htm.

[27] For instance, within the Commission, knowledge dissemination about IPM depends solely on the small IPM-unit within DG Internal Market (interviews with IPM personnel).

[28] An exception to this rule is the contacts of the Social Platform. In 2000, the Portuguese Presidency invited the Platform to an informal Social Affairs Council Meeting and provided the participants with speaking rights (Alhadeff et al. 2002). These meetings were repeated until the Presidencies of Italy and Greece stopped this invitation. The British Presidency in 2005 promised, however, re-established these meetings.

Therefore, since one cannot assume a naturally given equilibrium among civil society organisations, the empirical proxy are institutional efforts to guarantee equal access to political processes. Next to access, it is above all financial provisions to support the organisation of vulnerable and disadvantaged groups which can contribute to equal inclusion. Whether there are successful attempts can only be considered on a case-by-case basis, however, one can note that the Commission tries to support civil society organisations.

There exists a complex web of budget lines from which NGOs can receive financial support. With some exceptions, funds depend on whether the organisation can meet the requirement of co-financing. The amount of funding, their purpose and the procedures vary across policy areas. Even the Commission can only estimate that about €1,000 million is allocated per year (European Commission 2000); consequently, in recent years, there has been a debate about possible changes in the financing structure, which, however, could be detrimental to smaller NGOs (Smismans 2002).[29] One can say that the European Commission, at a general level, makes some effort to enable civil society activities at European level, but that these efforts lack transparency and favour well-established NGOs with high reputation and expertise, so that, as several interviewees made clear, the functionary can expect not only 'opinions' and 'unrealistic wishes', but also 'competent' aid and 'technical expertise'. Moreover, budget lines pursue the EU's policy goals and potentially exclude a number of organisations that follow a different agenda. In the area of human rights, for instance, the current focus on anti-discrimination policies excludes other themes (similarly Cullen 2005). Hence, the existing EU practice of supporting civil society organisations does not guarantee broad inclusion, although, at the same time, it is not fundamentally detrimental to the inclusion of stakeholders, either.

With view at the *responsiveness* of the analysed policy-making processes, in legal migration the case of the directive of family reunification, which came about in a long and thorny process, revealed little intake of civil society concerns. Even more, the analysis over time shows a gradual exclusion of issues that were important for the civil society. At the beginning, the Commission wanted to achieve an encompassing directive concerning all instances of family reunion, *i.e.*, for third-country-nationals with long-term residence status, for Geneva Convention refugees, for those with subsidiary forms of protection, and for EU citizens with non-EU family members. It adopted an encompassing definition of family that did not distinguish between married, unmarried or same-sex partners, and granted them socio-economic rights comparable to those of EU citizens. The comments of all civil society organisations on the early two drafts, particularly on the first one drafted in 1999, were very positive, because the Commission was receptive during the early consultation that took place before the first proposal. In contrast, the scope of the second amended proposal (2002) was considerably restricted in all these areas. For instance, persons with subsidiary forms of protection and EU citizens were excluded from the directive, married and unmarried partners are now treated separately, and the accession of the latter is no longer obligatory for the Member States. Having seen their stakes disappear over time, they were united in their disagreement over the new proposal and over the final directive.

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[29] See also European Citizen Action Service, 'The Financial Relationship between NGOs and the European Commission', Brussels: ECAS, 2004.

One major 'success' of civil society needs to be mentioned, however: although they were generally satisfied with the second amended proposal, they already anticipated that the proposal would end up with minimum standards. As a result, they argued for flexibilization, which would allow the Member States the discretion to deviate positively from the minimum standards of the proposal, and for a standstill clause. The latter would avoid a race-to-the-bottom by forbidding the Member States to lower their existing standards. Eventually, after the long and thorny negotiations in the Council that followed the second proposal, the Commission seemed to realize that its aim of real harmonisation was not achievable, and abandoned its resistance to have greater flexibility and a standstill clause included in the directive. However, it included a deadline clause in the second amended proposal of 2002, which required many flexible clauses to be revisited within two years of the directive's coming into force.

Similar to the migration case, also the analysis of the *responsiveness* of the REACH-process shows that the Commission showed significant willingness to listen to the concerns of stakeholders, and the majority of civil society organisation were satisfied with the early White Paper on Chemicals; only some business concerns said to be disappointed by a lacking balance between environmental and economic aspects. However, in the course of the process and a reshuffle of competences in favour of business concerns within the European institutions, the environmental and consumer concerns found themselves increasingly on the defensive and some organisations seem to have given up on many issues, for example, the inclusion of lower tonnages for registration and the establishment of a hazard-based approach even in the registration and evaluation processes. Instead, they concentrated on key issues, such as on a quality criterion in the registration process and, above all, on the authorisation scheme that should, according to them, include the phasing out of chemicals of very high concern and their mandatory substitution. Without this, so their argument, the precautionary principle would not be respected at all and no substantial improvement in relation to the existing legislation would be achieved. Contrary to this, the business-organisations succeeded in avoiding a substantial application of the precautionary principle. Instead of a hazard-based approach to registration, a risk-based approach was introduced and substitution was only made optional in the authorisation stage.

By analysing the documents in more detail, it was striking to see that the discussion became more and more polarised. The same arguments were put forward again and again, and many indications suggest not only that the actors tend not to listen to each other, but also that they even tend not to listen to the results of impact studies. In particular, the environmental NGOs make their claims visible and their approach is based on arguing and reason-giving. However, business stakeholders apply a mixed strategy: they engage less openly in discussions, and rely much more on their direct access to important official players in the process and place much trust in their lobbying capabilities. One part of the strategy of the business associations and conservative/liberal Members of the EP was to prolongate the legislative process - with success. Due to this tactic, it was the newly elected EP which had to deal with REACH, which not only led to a further delay of one and a half years, but also to watering-down of measures, because the new EP is more conservative and business-friendly than the former. Furthermore, business-organisations profited from the procedural changes which strengthened business concerns both in the Commission and the Council. One can only speculate whether these changes were more important for shaping the directive's content than the business' argumentative input was.

The contours of the European participatory model
Towards a regulated approach?

The results of the foregoing analysis are ambiguous. In particular the European Commission, to some degree also the other institutions, has made some efforts to improve the opportunities for participation by enhancing transparency and access to information and extending consultative practices. Examples are the transparency initiative, legislation on the access to documents and e-governance mechanism such as CONECCS and IPM. Yet, much less progress could be found concerning other crucial aspects of democratic participation, above all access and equal inclusion. The participatory practices differ across policy areas and depend very much on the capabilities of the civil society organisations, such as reputation, expertise and manpower. Developments in the overall architecture of participation have not (yet) succeeded in affecting the 'intergovernmental core' (Steffek and Kissling, forthcoming) of European policy-making; a cooperative style of governance did not succeed the hierarchical style. In early stages of the processes, the Commission tries to be very open and receptive, as soon as the Council enters the stage, however, the doors remain largely closed.

It seems as if the participatory infrastructure has not kept up with the pace of the participatory discourse. Some doubts remain on the interest of the EU, even of the European Commission, to establish a coherent model of participation which is conducive to democracy. It seems as if the European institutions value the instrumental aspects of participation, thus adopting an approach to participation which exploits the resources of the participants and neglecting their normative function as transmission belts to the diversity of concerns expressed by civil society organisations. Thus, one can see how practices of instrumental participation can entail democratic deficiencies (see Figure 2 above). At the same time, however, the Commission seemed to hope for the legitimising effects of the participatory discourse itself. Currently, the existing participatory structures and practices favour, above all, well-organised, strong civil society organisations with high capabilities. This increases the trend towards the establishment of *super-NGOs*; this trend signifies the contours of a developing European model of participation that could be characterised as corporatist laissez-faire participation and centres on the instrumental rather than the normative dimension of participation.

With view at these results, it somewhat surprises that there are voices the argue that the existing practice of participatory governance has established a strong system of rules which compensates for the disadvantages of some, above all non-business, civil society organisations (Greenwood forthcoming). To the contrary, one could interpret the findings in the sense of Colin Crouch's notion of post-democracy in the sense that we witness attempts to foster political legitimacy by 'means of encouraging the maximum level of minimal participation' (Crouch 2004: 112).

If this characterisation of the EU's current participatory model is accepted, how could efforts look like to enhance its normative value? I believe that a *regulated model of participatory governance* would be able to mitigate some of the effects of the current system which are detrimental to the democratic character of participation. In two stages, this regulated model would include rights and duties for all actors engaged in policy-making processes.

The first stage is about preventing the abuse of the aggregative form of participation on purely instrumental grounds, void of democratic impetus. The model would require the EU to establish equal rights for participation for all civil society organisations who wants to partake and would give access for them to the European Court of Justice in case of neglect. The differences among the civil society organisations and in their often informal access to the policy-makers violate the principal of political equality. Thus, a legalised interest group system seems necessary in order to counterbalance some aspects of the asymmetrical capabilities of different organisations. Such a legal frame would require the EU institutions to be transparent about their formal and informal consultations, it would require the organisations to make all their lobbying activities public. It would ask the EU institutions to systematise their efforts to fund civil society organisations in order to come closer to equal inclusion of all voices. This enhanced regulative character of participatory governance would increase the transparency of classic interest representation, bring some light into the shadowy corners of lobbying and would thus increase accountability of European decision-making.

The second stage of this model would have to go beyond these managerial efforts of regulating interest aggregation by introducing a deliberative component to participatory governance. The aim would be to strengthen the democratic fabric of the policy-making processes by fostering deliberative participation. Such an effort would, above all, establish for all actors the duty to clearly justify their own positions with regard to the positions of others, always with in the light of a public common good. Again, this would have consequences for both types of actors, public and private. It would be an attempt to limit the 'rent-seeking account of interest group activity' (Mansbridge 1992: 496-7) by obliging all interests to consider their positions in a broader context. By this, one could hope for increase in the other-regardedness of actors and an increase in intersubjectively shared preferences. It would be a means to oblige the Council to end the secrecy of their policy-making and encourage dominant interests to contextualise their own interests. The obligation for justification and deliberation might change preferences of participators, enrich the process with new information, generate innovative ideas and enhance inclusiveness. It would be an important contribution to strengthen the capabilities of disadvantaged groups.

Of course, such a regulated model of European participatory governance would not be able to solve all the democratic problems of the EU, nor of the participation of collective actors. Yet, it would be a worthy attempt to strengthen participatory democracy as a complement to representative mechanisms by destabilising 'entrenched forms of authority – starting with, but not limited to, technocratic authority – in ways that may clear the way for an eventual reconstruction of democracy' (Sabel and Zeitlin 2006). It is about institutionalising the principle of 'mutual recognition', of respect, by means of introducing the obligation for reflexivity, without which no peaceful cooperation and democracy in complex and diverse societies would be possible.

Sceptics will of course immediately argue that this model is overly unrealistic and would bring about insurmountable burden of bureaucracy. I would argue that not. With view at the model's first stage, there are some developments at global level that already stimulate the EU to make possibly substantial progress towards democratic participation. The 'Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters', which was agreed by the United Nations Economic Commission for Europe (UNECE), foresees access to

information, public participation in decision-making and to justice in environmental matters – very much of what I believe important for democratic participation in all policy areas. However, the EU is apparently divided about which way to go in its participatory regime. On 17 February 2005, the EU ratified the convention, though in a watered-down version that excluded access to certain types of documents and, above all, denied NGOs access to the European Court of Justice.[30] Furthermore, the next years will show whether the EU's transparency initiative succeeds in enlighten some parts of the lobbying activities. For the model's second stage, a 'Code of Conduct of Good Participation' between the EU institutions and the participating organisations seems an appropriate tool that could establish norms of arguing, reasoning and justification. Although there is no such code in sight in the near future, the Commission has started, in its responses to online-consultations on IPM, to summarise the main arguments put forward and even partly to comment on its own positions in light of these arguments. The envisaged Code of Conduct would not expect miracles from the subscribers and would be based on the familiar sanctions of soft law, above all naming and shaming.

In sum, although the EU's current participatory regime is not coherently structured according to democratic requirements, some cautious and recent developments give room for cautious optimism. Social scientists will need some patience to observe in the coming years if and how far the intensive discourse on participation and democracy in Europe will leave the stage of rhetoric and enter the phase of realisation.

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[30] See the relevant legislation under the Aarhus Convention (Council of the European Union, 2003, Directive of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC; Directive of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC) at http://europa.eu.int/comm/environment/aarhus/. An early legal analysis of the relationship between the Aarhus Convention and the EU is provided by Rodenhoff (2002).

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