The Concept of Legislation and Participation Rights in European Union Law

Alexander H. Türk[*]

Introduction

The process of European integration over the last 60 years from an international agreement in the field of coal and steel with six Member States into a quasi-federal system in a European Union with 27 Member States has profoundly altered the political and legal landscape in Europe. Successive treaty amendments leading over time to a considerable transfer of competences from the Member States to the European Union have established the European Union as the primary forum of law-making in many policy areas. With the transformation of the nature and effect of these laws, mainly as a result of the Court of Justice's[1] jurisprudence, in the legal orders of the Member States, the lawmaking process at European level was expected to meet the changing demands of a legal order evolving from a regulatory regime to an emerging constitutional legal order.[2] The comforts of a system of executive federalism, in which the governments of the Member States dominate the adoption of European laws was no longer considered adequate to meet the demands for democratic legitimacy of this new constitutional order.

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* Professor of Law, Dickson Poon School of Law, King's College London. The author would like to thank Ms. Esin Kucuk for her research assistance.

1 Since Lisbon the Court of Justice is officially known as Court of Justice of the European Union (CJEU), consisting of the Court of Justice, the General Court and the Civil Service Tribunal.

2 Leonard F. M. Besselink, *The Notion and Nature of the European Constitution after the Lisbon Treaty', in* EUROPEAN CONSTITUTIONALISM BEYOND LISBON 261-282 (Philipp Kiiver, Jan Wouters, & Luc Verhey eds., 1 ed. 2009).

In response to these demands, the Lisbon Treaty has continued the trend towards greater parliamentarisation of the Union's legislative process by further enhancing the role of the directly elected European Parliament.[3] However, while this approach reduces the executive dominance of the Commission and the Council in the legislative process, the increased demand for Union laws, the complexity of risk and market regulation, the need to adapt laws to frequently changing economic circumstances, and the rapid change of the scientific and technical knowledge base reduce Union legislation to providing often only a legal framework, which has to be complemented by administrative rulemaking, making the latter the dominant feature of Union lawmaking. While it has extended the involvement of the European Parliament also in this area, the parliamentarisation of administrative rulemaking is limited by the European Parliament's resources and the need to not undermine the important contribution which national governments make at the Union level in the plethora of committees and agencies which constitute the backbone of Europe's integrated administration.[4] More profoundly, the European Parliament's ability to enhance the democratic legitimacy of Union lawmaking is itself constrained by its unequal representation of the Union's citizens[5] and by the limited public space it provides at present.[6]

The limited, albeit necessary, contribution of further parliamentarisation to enhance the democratic legitimacy of Union

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3 See Alexander H. Türk, *Lawmaking after Lisbon*, inEU LAW AFTER LISBON 62, 66 (Stefanie Ripley, Andrea Biondi, & Piet Eeckhout eds., 2012).

4 Herwig C.H. Hofmann & Alexander H. Türk, *The Development of Integrated Administration in the EU and its Consequences*, EUR. L. JOUR. 253 (2007).

5 *See* the Lisbon judgment of the German Federal Constitutional Court B Verf G, 2 be 2/08 of 30 June 2009.

6 Dieter Grimm, *Does Europe Need a Constitution*, 1 EUR. L. J. 282 (1995).

lawmaking have led to demands of increased opportunities for the involvement of citizens in the Union's lawmaking activities. Interest representation, in the form of institutionalised representation, in the Economic and Social Committee or the Committee of the Regions, or in form of informally consulted committees,[7] has been considered as a pervasive feature of European lawmaking from its beginning.[8] However, while interest representation is still regarded as an indispensable mechanism for efficient lawmaking,[9] the changing nature of the European legal order has brought to the fore the need for the participation of interests, and generally the Union's citizens, as an instrument for enhancing the democratic legitimacy of Union lawmaking.[10] The insertion in the Lisbon Treaty of the principle of participation can be seen as recognition of the contribution participatory mechanisms can make to the democratic legitimacy of the Union.

The principle of participatory democracy is as such however only of value if it can be made operational in the Union legal order. While Union legislation can clearly provide a mechanism for the operationalization of this principle, the role the CJEU in providing participatory rights has come under increased scrutiny.[11] And even

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7 THOMAS CHRISTIANSEN & TORBJÖRN LARSSON (EDS.), THE ROLE OF COMMITTEES IN THE POLICY-PROCESS OF THE EUROPEAN UNION (2007).

8 JOANA MENDES, PARTICIPATION IN EUROPEAN UNION RULEMAKING: A RIGHTS-BASED APPROACH (2011).

9 MENDES, *id.*at 117-118.

10 COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN GOVERNANCE: A WHITE PAPER, COM (2001) 428 FINAL. See also STIJN SMISMANS, LAW LEGITIMACY AND EUROPEAN GOVERNANCE. FUNCTIONAL PATICIPATION IN SOCIAL REGULATION (2004).

11 PAUL CRAIG, THE LISBON TREATY, LAW, POLITICS, AND TREATY REFORM (2010); Joana Mendes, *Participation and the Role of Law after Lisbon: A Legal View on Art 11 TEU*, COMMON MKT. L. REV.1849 (2011).

though they acknowledge the right to a fair hearing in administrative procedures as a fundamental right, the Union courts have refused to grant participation rights, other than those provided in Union legislation, in lawmaking procedures, when they consider such procedures as 'legislative' in nature. This has met with fierce criticism in academic writing, claiming that such an approach undermines participation rights of citizens, the democratic legitimacy of such rules, in particular in light of the newly established constitutional principle of participatory democracy, and the instrumental value of such participation.[12]

While it is helpful in general to highlight the values of participation in Union lawmaking, such criticism generally fails to engage with the Union courts' central argument that the 'legislative' nature of the lawmaking procedures prevents them from granting such participation rights. The aim of this article is to engage with this argument more fully. It will critically assess the Union courts' understanding of the concept of 'legislation'. It will argue that the Union courts have used the concept in an inconsistent and sweeping manner thereby reducing its value to serve as a basis for the exclusion of participation rights in Union lawmaking. It will suggest that greater conceptual clarity is needed for the use of this concept to assess the necessity for the judicial creation of participation rights. It will be argued that the concept has a dual meaning as legislation in form and legislation in substance, each serving different rationales. In consequence, the former has considerable force in excluding participation rights in legislative procedures, while the latter has to be used with caution in denying participation rights, particularly in

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12 MENDES, *supra.* n.8; PAUL CRAIG, EU ADMINISTRATIVE LAW 292-298 (2nd ed. 2012).

Union administrative rulemaking. It is submitted that the Union courts should grant participation rights where administrative rulemaking involves individualised determinations leaving the award of participation rights otherwise to the Union legislator.

The article will proceed as follows. It will first provide a more detailed picture of lawmaking in the EU after Lisbon. It will discuss the Union courts' case-law on the right to a fair hearing in a comparative perspective before critically assessing the Union courts' understanding of the concept of Union legislation as basis for the exclusion of the right to a fair hearing in case of legislation in form, but also in case of legislation in substance. The article will conclude with some reflections on the demands for the Union courts to expand the right to be heard in administrative rulemaking beyond individual determinations.

Union Lawmaking after Lisbon

Even though it formally discarded any constitutional symbolism, the Lisbon Treaty by and large retained the lawmaking reforms of the failed Constitutional Treaty.[13] The introduction of a formal distinction between legislative and non-legislative acts as part of a hierarchy of norms in EU law was designed to make the Union's lawmaking processes more democratically legitimate, and to provide for greater accountability and transparency.[14] The adoption of

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13 *See* generally on the Lisbon Treaty CRAIG, *supra.* n. 11.

14 It should however be noted that, as much as it sought to enhance the democratic legitimacy of the traditional mechanisms for Union lawmaking, the Lisbon Treaty failed to address the Open Method of Co-ordination (OMC), which operates in many areas of Union law, such as economic policy and employment, as alternative to or supplement for the traditional Union lawmaking processes. The OMC allows the Union to operate in areas in which it does not traditionally enjoy lawmaking competences, but the dominance of executive

legislative acts jointly by the European Parliament and the Council of Ministers was considered essential to realise the Union principle of representative democracy, based on the representation of citizens in the European Parliament and the Member States in the Council of Ministers in the legislative process.[15] The Lisbon Treaty seeks to achieve this aim in the provision of the ordinary legislative procedure as standard procedure for the adoption of legislative acts,[16] even though it deviates from this approach in certain, limited cases, by allowing legislative acts to be adopted in special legislative procedures.[17] Despite the almost complete realisation of the formal representation model in the adoption of Union legislation, it was felt that this would not be sufficient to provide the legislative process with sufficient democratic legitimacy. The requirement for the Council to meet in public when deliberating and voting on legislative drafts seemed to address concerns about the transparency of the legislative process.[18] More importantly, the inclusion of elements of participatory democracy in the Lisbon Treaty[19] was seen as a way to strengthen attempts at providing the Union with a public forum of discourse, which could transcend the national policy debates about the Union. The participatory mechanisms, set out in Article 11 TEU, providing for the opportunity for citizens and representative associations to voice their views and

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actors, such as the Council and the Commission, and the lack of openness in its operation have raised concerns about political and legal accountability. Similar concerns have been voiced about the involvement of private parties in the field of social policy or standardisation. See Türk, *supra.* n.3, at 79-84.

15 *See* TEU art. 10.

16 *See* TFEU art. 289(1).

17 *See* TFEU art. 289(2). In some cases basic acts are adopted in a non-legislative procedure.

18 *See* TEU art. 16(8).

19 The Lisbon Treaty also reinforces existing forms of institutionalised interest representation in the Economic and Social Committee (Articles 301 to 304 TFEU) and the Committee of the Regions (Articles 305-307 TFEU).

exchange them publicly, the requirement of an open, transparent and regular dialogue of Union institutions with civil society, the obligation of the Commission to carry out broad consultations to ensure coherent and transparent Union action, might well be seen as constitutional symbolism by merely enshrining at Treaty level the existing consultation practice of the Commission,[20] but it seems more convincing to see them as constitutional standards for Union lawmaking.[21]

A tendency towards greater parliamentarisation can also be found at the level of subordinate, or administrative lawmaking, which the Lisbon Treaty however had to reconcile with the traditional involvement of the Member States in this area. Given the limitations of the legislative process, the Union has since its inception relied to a large extent on administrative rulemaking. Such rules were in the past adopted mainly through the system of comitology, which denotes a process by which the Commission, on a delegation from the legislative authority, adopted administrative rules under the control of committees comprised of representatives of the governments of the Member States.[22] With the increase of its powers in the legislative

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[20] These practices are set out in particular in Commission Communication 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 final. See also European Commission 'Impact Assessment Guidelines', SEC(2009) 92, section 4. The citizens' initiative in Article 11(4) of TEU constitutes a new participatory mechanism and is now set out in Regulation (EU) No211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative, 2011 O.J. (L 65/1).

[21] *See* Armin von Bogdandy, *Constitutional Principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 11-54 (Armin von Bogdandy & Jürgen Bast eds., 2010); Joana Mendes, *Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design*, EUR. L. J. 22, 26 (2013).

[22] CARL FREDRIK BERGSTRÖM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM (2005); HERWIG C. H.

process, the European Parliament had fought hard to gain greater involvement in the comitology system. The distinction between delegated acts under Article 290 TFEU and implementing acts under Article 291 TFEU for the adoption of subordinate rules in the Lisbon Treaty is therefore mainly to be seen as a political settlement to accommodate the demands of the European Parliament. The dichotomy of subordinate rulemaking has led to sharply differing forms of control to be exercised over such acts reflecting different conceptions of the nature of delegated acts on the one hand and implementing acts on the other hand.[23]

Under Article 290 TFEU, a legislative act may entrust the Commission with the power to adopt delegated acts of general application to amend or supplement non-essential elements of legislative acts.[24] The legislative act can provide the European Parliament and the Council with the power to revoke the delegation, but also with the power to object to the entry into force of such acts. The conception of delegated acts is therefore that of quasi-legislative acts, the adoption of which is entrusted to the Union and subject to control by the Union's legislative authority. This model of lawmaking replaces the structural dialogue between the Commission and the Member States for the adoption of implementing rules in the form of

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HOFMANN, GERARD C. ROWE & ALEXANDER H. TÜRK, ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION 264–284 (2011); CRAIG, *supra.* n. 12, chapter 5.

23 *See* Herwig C.H. Hofmann, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, EUR. L. J. 482 (2009); Paul Craig, *Delegated Acts, Implementing Acts and the New Comitology Regulation*, EUR. L. REV. 671 (2011).

24 By reserving the essential elements of an area to the legislative act, Article 290(1) TFEU emphasises the prerogative of the legislative authority over policy formulation. *See* Case C-355/10, *Parliament* v. *Council*, judgment of 5 September 2012.

the comitology system with a more formal system of control. While this model ensures a more equal representation of the branches of the legislative authority, the powers of objection and revocation reduce the involvement of the European Parliament and the Council to formal veto powers without establishing institutionalised forms of an inter-institutional dialogue. Moreover, in addition to removing the traditional involvement of the Member States through comitology, Article 290 TFEU also does not provide for any specific participatory mechanisms for the involvement of civil society.[25]

On the other hand, Article 291 TFEU preserves, with certain modifications, the traditional comitology system for the adoption of implementing acts. As the adoption of implementing acts is in principle within the province of the Member States, Article 291 TFEU only allows a Union act to entrust the Commission, or exceptionally the Council, with the adoption of implementing acts where such acts are needed for achieving uniform conditions for the implementation of Union acts. The Commission's exercise of implementing powers is subject to mechanisms of control by the Member States, which are laid down in Regulation 182/2011 adopted by the European Parliament and the Council.[26] While this approach ensures the continued existence of the comitology regime within the scope of Article 291 TFEU, it alters the power of such committees, the opinion of which the Commission has to seek before adopting an implementing act. Under the pre-Lisbon regime any unfavourable opinion by the committee on the Commission's draft implementing act would merely trigger a

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[25] The constitutional standards set out in Article 11 TEU arguably also, however, apply in this case.

[26] Regulation (EU) 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, 2011 O.J. (L 55/13).

referral of the Commission's draft to the Council. Under the new comitology regime, the absence of the Council from the decision-making process endows opinions of the committees, at least *vis-à-vis* the Commission, with a legal finality, which they did not have before.[27] In the absence of any involvement of the European Parliament and the Council in the comitology process, the representative element of the process can only be seen in the constraining effects of the basic act.[28] It would be incompatible with such effects for the opinion of the comitology committee to be based on policy considerations other than those enshrined in the basic act, at least when it is adopted in the ordinary legislative procedure.[29] On the other hand, while the participation of the governments of the Member States in the process for the adoption of implementing acts can be said

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27 According to Regulation 182/2011, the effect of the committee's opinion depends on whether the Commission has to follow the advisory (Article 4) or the examination procedure (Article 5). Under the former, the Commission merely has to take utmost account of the committee's opinion, whereas under the latter an unfavourable opinion prevents the Commission from adopting an implementing act. While the Commission may submit the draft implementing act to an appeal committee, composed of senior representatives of the governments of the Member States, for further deliberation, a negative opinion in the appeal committee prevents the Commission from adopting the act. In this case the opinion has also indirect effects for third parties, e.g. where the Commission fails to obtain the necessary majority in the responsible committee(s) for the approval of its draft administration act, for which a third party has applied.

28 In contrast to Article 290 TFEU, any Union act can confer the power to adopt implementing acts under Article 291 TFEU. All the same, in practice the majority of conferrals will be contained in legislative acts.

29 This consideration also follows from the rule of law, which establishes a hierarchical relationship between the enabling act and the implementing act. Moreover, the principle of the institutional balance would preclude comitology committees to base their opinions on policy considerations which the competent institution which adopted the enabling act did not consider relevant.

to enhance the deliberative quality of the comitology process,[30] Article 291 TFEU lacks any specific participatory mechanisms of civil society.

Despite the limited force of representative elements in the adoption of subordinate acts, neither Article 290 TFEU nor Article 291 TFEU makes provision for any participatory mechanisms. Article 290 TFEU for delegated acts and Article 291 TFEU, and its detailed rules in Regulation 182/2011, for implementing acts focus instead on the procedural aspects of (*ex post*) control of Commission draft acts. Given their focus on achieving a political settlement between the Council and the European Parliament, this is hardly surprising. In the absence of any statutory provisions,[31] participatory mechanisms for the adoption of subordinate acts result therefore mainly from self-imposed commitments by the Commission. The impact assessment process, which applies to a limited degree also to subordinate acts, constitutes such an important commitment, a central feature of which is the consultation of external experts[32] as well as the consultation of interest groups.[33]

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30 It could of course be argued that the participation of the governments of the Member States in the comitology process constitutes a representative element. However, this view is doubtful in two respects. First, Article 10 TEU does not refer to comitology committees as having representative status. Second, comitology committees consist mainly of civil servants of the Member States, which, unlike the ministers in the Council, are not accountable to their national parliaments.

31 The EU does not have at present a general statute setting out participatory mechanisms for administrative rulemaking, as it exists for example in the USA in the form of the Administrative Procedures Act. Also, policy-specific legislation only rarely provides for the participation of interested parties in administrative rulemaking in the EU.

32 *See* European Commission, *Impact Assessment Guidelines*, SEC(2009) 92, section 4.2.

33 *Id.* at section 4.3. The Commission guidelines attach a legitimising function to such consultation. *See* Section 4, at 21.

The provisions for the adoption of subordinate rules under Articles 290 and 291 TFEU has however to be seen in the wider procedural context which characterises EU administrative rulemaking. The EU has established in many policy fields agencies, which have been entrusted with responsibilities in the creation of administrative rules.[34] While agencies have generally no rulemaking powers, their contributions increasingly constitute an integral part of the Union's administrative rulemaking process, be it for the adoption of delegated acts under Article 290 TFEU or for implementing acts under Article 291 TFEU. The legislative acts establishing agencies involved in the Union's normative activities often contain provisions which considerably limit the power of the Commission to modify agency draft regulatory acts, in particular in respect of technical aspects of the draft.[35] Even in the absence of such provisions, the technical and scientific expertise embodied in such drafts imposes considerable

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[34] HOFMANN, ROWE, & TÜRK, *supra.* n. 22 at 285–307.

[35] See Article 17(2) of Regulation 216/2008 of the European Parliament and the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EC, Regulation (EC) 1592/2002 and Directive 2004/36/EC, 2008 O.J. (L 79/1). See also Articles 10(1) and 15(1) of Regulation (EU) 1093/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision 716/2009 and repealing Commission Decision 2009/78/EC, 2010 O.J. (L 331/12); Articles 10(1) and 15(1) of Regulation (EU) 1094/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision 716/2009 and repealing Commission Decision 2009/77/EC, 2010 O.J. (L 331/48); Articles 10(1) and 15(1) of Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision 716/2009 and repealing Commission Decision 2009/7/EC, 2010 O.J. (L 331/84).

constraints on the Commission's discretion to deviate from them.[36] The importance of the regulatory activities of agencies is reflected in enhanced participatory mechanisms, which are laid down in legislation establishing the agencies or their internal rules. Agencies often provide for extensive mechanisms for the participation of national authorities, experts and the general public.[37] Such participation can take place in the form of networks,[38] or in more institutionalised forms, such as advisory for a and stakeholder groups,[39] or in the form of public consultations.[40]

It has however been argued that 'participation in these cases is a response to the regulatory needs present in each field and to the substantial aims of the corresponding legal regime', but crucially 'is not directed at ensuring procedural protection to concerned persons'.[41] More generally, the point has been made that participation rights enshrined in Union legislation do not provide a sufficient protection of procedural rights, as 'procedural protection is partially perceived as a matter of political choice and is conditioned by the delicate balance that EU decision-making procedures often need to achieve between

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36 *See* Case T-70/99, *Alpharma* v. *Council*, 2002 E.C.R. II-3495.

37 HOFMANN, ROWE, &TÜRK, *supra.* n. 22 at 304–307.

38 *See* e.g. Article 36 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, 2002 O.J. (L 31/1), as amended.

39 *See* Articles 27 of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, 2002 O.J. (L 31), or Article 33(4) of Regulation (EC) No 216/2008, *supra.* n. 35.

40 *See* Article 29 of Regulation 178/2002, *Id.*, or Article 52(1) of Regulation 216/2008, *supra.* n. 35.

41 MENDES, *supra.* n. 8 at 110.

competing national and other interests'.[42] Such considerations throw the spotlight on the contribution the Union courts have made for the protection of participation rights in Union law making, in particular through the case-law on the right to a fair hearing, by comparing it with the approach taken in other legal systems inside and outside the EU.

Right of Fair Hearing in EU Law – A Comparative Perspective

The Union courts have developed participation rights within the context of the rights of defence in administrative proceedings, which include, amongst other procedural guarantees,[43] the right to a fair hearing.[44] As fundamental principle derived from the common constitutional traditions of the Member States, the right to a fair hearing cannot be limited or excluded by Union legislation.[45] Consequently, the right is enforced even in the absence of or in case of an insufficient provision for the right in Union legislation.[46] In recognition of its fundamental status in the case law of the Union courts, the right has now been enshrined in Article 41(2) Charter of Fundamental Rights (CFR), as part of the right to good administration.[47] The right entitles individuals to be informed about the case against them and to respond. This means in essence that the responsible institution can only rely on those aspects of the case in regard to which the individuals concerned had an opportunity to make

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42 *Id.* at 161.

43 The rights of defence include the right to be heard, the limited right against self-incrimination, and the limited right of legal professional privilege.

44 See TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW Chapter 8 (2nd ed. 2007) ; CRAIG, *supra.* n. 12 Chapters 11 and 12; HOFMANN, ROWE, &TÜRK, *supra.* n. 22 at 204–221.

45 Case T-260/94, *Air Inter* v. *Commission*, 1997 E.C.R. II-997, ¶60.

46 Case C-32/95 P, *Commission* v. *Lisrestal and others*, 1996 E.C.R. I-5373, ¶30.

47 *See* art. 6(1)(3) TEU.

their views known. It also allows the individual to have access to one's file, now also enshrined in Article 41(2) CFR, and to respond to third-party comments.

What is more difficult to ascertain is how the Union courts determine the scope of application of the right to a fair hearing. In a recent study of the right to a fair hearing it has been observed that 'while analysing the Courts' case law, one is led to conclude that it fails to provide basic criteria that would make the scope of the right to be heard more predictable'.[48] It is therefore not surprising that attempts to provide insights into the Union courts' pragmatically-oriented approach to the scope of the right to be heard mainly centre on its application in various policy sectors, rather than on the presentation of a uniform approach to the limits of this right.[49] As the following survey will show, it is however possible to identify the considerations which guide the Union courts in their determination of the right to be heard.

The Union courts' core formula postulates that the right to be heard applies 'in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person'.[50] While it has been applied with great flexibility across the Union's policy sectors and the Union courts have deviated from it on occasion,[51] this formula encapsulates as guiding considerations the

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48 MENDES, *supra.* n. 8 at 163. See also HANNS PETER NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW 98 (1998); Barbier de la Serre, *Procedural Justice in the European Community Case-Law Concerning the Rights of the Defence: Essentialist and Instrumental Trends*, 12 EUR. PUB. L., 225, 248-250 (2006).

49 *But see* MENDES, *supra.* n. 8, chapter 4.

50 Case 234/84, *Belgium* v. *Commission*, 1986 E.C.R. 2263, ¶28.

51 *See* HOFMANN, ROWE, & TÜRK, *supra.* n. 22 at 206–214.

requirements of individualisation and adverse effect. The necessary degree of individualisation depends on the extent to which the act has to reflect individual determinations of the conduct of the parties concerned. This is usually determined on the ground of whether they are the parties whose conduct is under investigation by the Union authority in the application of the applicable legal standards of Union law. Such an investigation can be the result of the initiative of the Union authority itself or on application by a third party,[52] or even of the parties concerned themselves, as in case of a compulsory notification of their intended conduct.[53] Also, the parties under investigation need not be the formal addressees of the act resulting from the investigation. It is however necessary that the applicable Union law requires a sufficiently close link of the parties concerned with the investigation to the extent that the act resulting from the proceedings has (also) to be based on determinations of their conduct.[54] While it will therefore more likely arise in bilateral administrative relationships, the right to be heard can also be found in multi-lateral relationships, involving public and private parties, where some or all of the parties can distinguish themselves through a sufficient degree of individualisation.[55] This also explains why the right to be heard has been acknowledged also in proceedings which result in acts of general application. While such acts apply to persons who are defined in their

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52 *See* Case T-65/96, *Kisch Glass* v. *Commission*, 2001 E.C.R. II-3261, ¶ 33.

53 *See* Case 17/74, *Transocean Marine Paint Association* v. *Commission*,1974 E.C.R. 1063; Case C-269/90, *TechnischeUniversitätMünchen* v. *Comission*, 1991 E.C.R. I-5469; Case T-82/01, *VOF Josanne and others* v. *Commission,* 2003 E.C.R. II-2013.

54 *See* Case T-170/06, *Alrosa* v. *Commission*, 2007 E.C.R. II-2601, ¶187; Case C-49/88, *Al-Jubail Fertilizer* v. *Council*, 1991 E.C.R. I-3187, ¶5; Case C-32/95 P, *supra.* n. 46, ¶24.

55 On the idea that the bilateral relationship between decision-maker and person concerned constitutes the essential structural element determining the scope of the right to be heard, see MENDES, *supra.* n.6 at 186 et seq.

objective capacity, a right to be heard is granted to those who can be distinguished on the basis of a sufficient degree of individualisation. One can of course object that this view ignores cases, in which the Union courts omit the 'initiated against' part of the formula and merely require adverse consequences to grant the right to be heard, as in the case of *Transocean Marine Paint Association*, where the right to be heard was merely based on whether a person's interests were 'perceptibly affected by a decision.'[56] *Transocean* and other such cases have, however, in common that the requirement for individualisation was clearly met.[57]

In addition to the need of individualisation, the right to be heard also requires a sufficient degree of adverse consequences resulting from the adoption of the act. The Union courts have not limited the notion of adverse effects to disciplinary sanctions against the Unions' civil servants[58] or sanctions against persons whose behaviour was investigated in antitrust[59] or anti-terrorism[60] cases. They have also acknowledged the impact of an act on the person's legal position, such as the imposition of conditions for obtaining an exemption under antitrust rules,[61] or the denial of benefits.[62] They have even accepted

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56 Case 17/74, *supra.* n.53, ¶15.

57 In Transocean the right to be heard applied to the persons who had applied for an exemption and could therefore be considered the parties under investigation. This is also brought more clearly out in all the other language versions of the case, which in para. 15, refer to 'adressaten' (Dutch), 'destinataires' (French), 'Adressaten' (German),destinatari (Italian), 'adressaterne' (Danish) of decisions, thereby limiting the scope of the right to be heard to the addresses of administrative decisions. This is also the approach in trademark cases, see Case T-79/00, *Rewe-Zentral* v. *OHIM*, 2002 E.C.R. II-705, ¶14.

58 Case 32/62, *Alvis* v. *Council of the EEC*, 1963 E.C.R. 49, at 59.

59 Case 85/76, *Hofmann-La Roche* v. *Commission*, 1979 E.C.R. 461, ¶9.

60 Case C-402/05, *PKadi and Al Barakaat International Foundation* v. *Council and Commission*, 2008 E.C.R. 6351.

61 Case 17/74, *supra.* n.53.

that the economic impact of an act, such as the imposition of anti-dumping duties on imported products[63] or the repayment of structural funds[64], can have effects sufficiently adverse to trigger a right to be heard.

The right to be heard is clearly based on instrumental considerations, ensuring that administrative decisions are made in full cognisance of the relevant facts and the relevant legal aspects.[65] A purely instrumental rationale would however not distinguish the constitutional right to be heard from the duty of the decision-maker 'to examine carefully and impartially all the relevant elements of the case,'[66] a duty which the Union courts regard as an objective procedural guarantee and not as an individual right.[67] The dual requirements of individualisation and adverse effects that engage the right to be heard reflect deeper considerations of fair treatment, based on the fundamental value of respect of persons as autonomous and responsible moral agents, which entitles them to consideration and self-defence, in particular where their conduct is questioned.[68] This explains the recurrent reference of the Union courts to the 'initiated against' formula, which suggests that a right to be heard should be granted where the person's conduct is considered to fall short of an

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62 Case C-269/90, *supra.* n.53.

63 *See* the Opinion of AG Darmon in Case C-49/88, *supra.* n. 54, ¶73, comparing the loss of the Community market as a result of the imposition of a high anti-dumping duty comparable in its financial consequences to a fine in antitrust proceedings.

64 Case C-32/95 P, *supra.* n. 46, ¶33.

65 Case C-269/90, *supra.* n. 53, ¶24.

66 Case T-326/07, *Cheminova and other* v. *Commission*, 2009 E.C.R. II-2685, ¶228.

67 Case T-369/03, *Arizona Chemical and others* v. *Commission*,2005 E.C.R. II-5839, at ¶86.

68 DENIS JAMES GALLIGAN, DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES (1996).

expected standard and the proceedings are initiated on the basis of a *prima facie* assumption of wrongdoing. The concern for fair treatment, which is reflected in the requirements of individualisation and adverse effects, goes however further. Where the applicable legal standards require the making of individual determinations of certain persons who are particularly affected, their participation is considered indispensable for the proper application of those standards, irrespective of any implication of wrongdoing.[69]

This would explain why the Union courts are reluctant to apply the right to a fair hearing in a 'legislative' context, in which individuals are mainly considered in an objective or abstract capacity without individual determinations being made. This is also reflected in Article 41(2) CFR, which limits the right to a fair hearing to individual measures. This view is also prevalent in many legal traditions of the Member States of the EU and beyond its borders, restricting as they do hearing rights to administrative acts making individual determinations.

In the European legal tradition,[70] the right to be heard has traditionally been recognised as a constitutional principle in judicial proceedings. Its extension to administrative decisions was mainly driven by the courts' concern about the procedural protection of individuals against an expanding administrative state. National courts in the EU have however shown a tendency to grant the right to be heard in administrative proceedings which in their view are most closely associated with the adjudicative model of court proceedings.

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69 On the importance of the hearing principle as instrument of fair treatment, *see Id.* at 350.For an account of procedural fairness that it is primarily based on a dignitarian rationale, *see* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B. U. L. REV. 881 (1981).

70 For a comparative view, *see* JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 1243-1320 (2006). *See* also MENDES, *supra.* n. 8 at 46-55.

The English legal principle of *audi alteram partem* has long been applied as part of the principle of natural justice in judicial and quasi-judicial proceedings.[71] And while the English courts have expanded the principle generally to administrative acts[72] which affect an individual's rights, interests, or legitimate expectations,[73] the adjudicative model still casts a shadow over the application of the principle. This can not only be seen in the debate about whether hearing rights in administrative proceedings constitute an extension of the principle of natural justice or are derived from the principle of procedural fairness,[74] but is also influential for the determination of the content and extent of the hearing right.[75] And finally, this also provides an explanation why English courts have limited hearing rights to individual cases and have held them generally not to be required for the adoption of legislative rules.[76] Other national courts in the EU while also recognising the right to be heard as a general principle of law have been more cautious in the expansion of the right to administrative proceedings. The French courts, which consider the right to be heard as a general principle of law forming part of the

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71 *See* PAUL CRAIG, ADMINISTRATIVE LAW (7th ed. 2012); WILLIAM WADE& CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW (10th ed. 2009); STANLEY DE SMITH, HARRY WOOLF, & JEFFREY JOWELL, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (5th ed. 1995). On the application of the principle in Irish law, see SCHWARZE, *supra.* n. 70 at 1306.

72 *Ridge* v. *Baldwin,* [1964] A.C. 40 HL. On the position in Irish law, see SCHWARZE, *supra.* n. 70 at 1306-1307.

73 CRAIG, *supra.* n. 71 at 349-353.

74 *See* the discussion in *Id.* at 345-347.

75 *Id.* at 358; SCHWARZE, *supra.* n. 70 at 1279.

76 *Bates* v. *Lord Hailsham* [1972] 1 W.L.R. 1373 Ch D at 1378. See WILLIAM WADE & CHRISTOPHER FORSYTH, *supra.* n. 71 at 469; CRAIG, *supra.* n. 71 at 450-452 on exceptions from that rule. Compare also *R.* v. *Liverpool Corporation, Ex p. Liverpool Taxi Fleet Operators' Association,* [1972] 2 Q.B. 299 CA (CivDiv); *R. (Greenpeace Ltd)* v. *Secretary of State for Tade and Industry,* [2007] EWHC 311 (Admin).

rights of defence, require for the application of the hearing right an administrative measure of a certain gravity, which includes sanctions and other measures interfering with existing rights.[77] Many national legislators in the EU, often in reaction to the judicial recognition of the hearing principle in administrative proceedings, have by enshrining the right to be heard in administrative proceedings in statutory provisions expanded the scope of the right granted by the courts. Some legislators have decided to include the right in an ever more expansive list of sectoral legislation.[78] Others have provided for the right in a more general statute.[79] And in some Member States of the EU a constitutional provision provides the basis for hearing rights in administrative proceedings.[80] And while this would in turn encourage courts to extensively interpret the statutory rights, a common feature

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77 SCHWARZE, *supra* n.70 at 1247-1249; ANDRE DE LAUBADERE, JEAN-CLAUDE VENEZIA, & YVES GAUDEMET, TRAITE DE DROIT ADMINISTRATIF, TOME 1 682-683 (4th ed. 1996). For a similar position in Belgium, see SCHWARZE, *supra.* n. 70 at 1292-1294, and in Luxembourg, see *Id.* at 1309-1310.

78 This has been the case in Belgium, *see* SCHWARZE, *supra.* n. 70 at 1292-1296. And also the Netherlands, *Id.* at 1311-1314.

79 *See* ¶28 of the German Law on administrative procedure (*Verwaltungsverfahrensgesetz* of May 25, 1976, BGBl. I 1976, p. 1253), as amended; Article 10 of the Italian Law of 7 August, No. 241/90 (G.U., 18 August 1990, No 192), as amended; the Luxembourg Law of December 1, 1978, as supplemented by the Règlement of June 8, 1979, in particular Article 9; Article 84 of the Spanish Law No 30/1992, of 26 November, (B.O. No. 285, 27 November 1992); Article 100(1) of the Portuguese Decree-Law No. 442/91, of 15 November (Diário No. 263, I-A). In French law, see Article 8 of the *Ordonnance* no. 83-1025 of November 28, 1983 concerning relations between the administration and the citizen, J.O. 1983, pp. 3492 *et seq.*, which requires a hearing for all acts which have to be reasoned by virtue of Law no. 78-17 of January 6, 1978, J.O. 1978, pp. 227 *et seq.* In Danish law, *see* ¶¶19-21 of the Law no. 571 of December 1985 (*Forvaltningslov*), as amended. The United Kingdom's Tribunals and Inquiries Act 1992 by contrast is much more limited in scope.

80 *See* Article 20(2) of the Greek Constitution; Articles 267(5) and 269(3) of the Portuguese Constitution; Article 105 (c) of the Spanish Constitution; and indirectly in Article 34(1) of the Irish Constitution and Article 97(1) of the Italian Constitution.

of such rights is that they only apply for individualised administrative decisions, but not for generalised administrative rules.[81] Notable exceptions from this general trend can be found in Spain[82] and Portugal.[83]

The distinction between adjudication and legislation is also crucial for the application of hearing rights in India and the USA. While it has been read into several constitutional provisions,[84] the right to a hearing is generally considered in India as an essential component of the principle of natural justice.[85] Similar to English law, its application was initially limited to judicial and quasi-judicial proceedings,[86] but is now firmly recognised as being applicable also in administrative proceedings entailing civil consequences as part of the principle of fairness.[87] On the other hand, the right to a fair hearing, absent any statutory provision to the contrary, cannot be relied on

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81 This is the position in German, French, Italian (see Article 13 of Law 241/90, *supra.* n. 79), Luxembourg, and Danish law.

82 *See* Spanish Const. art.105(a) which requires a law for the hearing (*audiencia*) of citizens in the process of the elaboration of administrative measures of general scope (*disposicionesadministrativas*) which affect them. However a general law to that effect has not yet been passed. *See* MENDES, *supra.* n. 8 at 52-53.

83 *See* Article 117(1) of Decree-Law No 442/91, *supra.* n. 79, grants representatives of affected interests, but not natural persons, a hearing before the imposition by regulation of duties or charges. *See* also Article 4(1) of Law No. 83/95, of 31 August (Diário No. 201, I-A).which allows for the participation of interested citizens in the localisation and realisation of public works. *See* MENDES, *supra.* n.8 at 54-55.

84 Indian Const. art.19 and art.311.

85 *See* M.P. JAIN AND S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 142 (4th ed. 1986).

86 On the evolution of the *audi alteram partem* principle, see *Id.* at 143-147.

87 *See* Hedge, J., in *A.K. Kraipak* v. *India*, A.I.R. 1970 S.C. 150, at 154; Bhagwati, J., in *Maneka Gandhi* v. *India*, A.I.R. 1978 S.C. 597, at 626; D.K. Jain, J., in *Automotive Tyre Manufacturers* v. *The Designated Authority & Ors.*, judgment of January 7, 2011, at ¶58.

where the act is considered to be legislative in nature.[88] The exclusion of natural justice is not limited to Acts of Parliament, but also extends to subordinate legislation, which is usually distinguished from administrative acts by considering 'the angle of general application, the prospectivity of its effect, the public interest served, and the rights and obligations flowing there from'.[89] In the USA, while they enjoy constitutional protection in the procedural due process clauses of the 5th and 14th Amendments of the US Constitution, hearing rights are similarly limited to adjudication and cannot be relied upon in case of rule-making.[90] The Supreme Court in *Bi-Metallic* suggested that a line needed to be drawn between adjudication, where the courts are entrusted with the protection of procedural due process, and rule-making, where the political process provides the necessary checks.[91] The Court thereby refuses to fashion any form of procedural due process for administrative rule-making, a task that is in its view best placed in the hands of the politically accountable bodies.[92] It has been argued that what matters for the distinction between adjudication and rule-making is less the number of people affected[93] or the nature of the

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88 *See The Tulsipur Sugar Co. Ltd.* v. *The Notified Area Committee*, A.I.R. 1980 S.C. 882; *Union of India* v. *Cynamide India*, A.I.R. 1987 S.C. 1802; *Shri Sitaram Sugar Company &Ors* v. *Union of India,* A.I.R. 1990 S.C. 1277; *State of Tamil Nadu &Anr* v. *P. Krishnamurthy &Ors,* judgment of 24 March 2006. See also the recent judgment by the Appellate Tribunal for Electricity in *M/S Ferro Alloys Corporation Ltd.* v. *Odisha*, judgment of January 2, 2013, para. 67.

89 *See*Chinnappa Reddy, J., in *Union of India* v. *Cynamide India*, 1987 SCR (2) 841, at 854 in relation to price fixation.

90 *See*Londoner v. *City and County of Denver,* 201 U.S. 373 (1908) and *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915).

91 *Bi-Metallic,supra.* n.90 at 445. For a critique of the political checks argument, see KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 116-117 (2008).

92 Section 553 (c) of the Administrative Procedure Act 1946 provides for notice and comment as default procedure for administrative rule-making.

93 *See* the decision of the 10th Circuit in *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973), where procedural due process was denied despite the fact that

effects on individuals,[94] but 'the generalised nature of an agency's decision, and the general applicability of that decision.'[95] Others have pointed towards the importance of whether 'potential factual issues exist concerning a particular individual or group'.[96]

It is therefore clear that the jurisprudence of the Union courts by excluding the right to be heard in a legislative context 'embodies a normative choice,'[97] which is also adopted by many national legal systems. Nevertheless, as the following section of the case-law of the Union courts will show, it is often not quite clear what the Union courts mean by 'legislative' and the rationale for the exclusion of the right to a fair hearing appears to shift with whatever meaning is attached to the definition of the term. This is compounded by the fact that the use of the notion of legislation, which seems to be inextricably linked to national constitutional states, requires more consideration when used in the context of the law of a supranational organisation such as the EU.

Atlanta and the Concept of Union Legislation

In the leading case for the exclusion of the right to be heard, the General Court in *Atlanta*[98] held that 'the right to be heard in an administrative procedure affecting a specific person cannot be

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Anaconda was the only entity affected by a regulation of the EPA limiting the emissions of sulphur oxide in a Montana county.

94 Generally applicable rules can of course have a variable impact. See *Air Line Pilots Association* v. *Quesada*, 276 F.2d 892 (2nd Cir. 1960), which the 2nd Circuit denied procedural due process against a regulation of the FAA establishing a mandatory retirement age of 60 for all air line pilots.

95 WERHAN, *supra.* n.91 at 116.

96 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES 557 (2nd ed. 2002).

97 CRAIG, *supra.* n.12 at 318–319.

98 Case T-521/93, , 1996 E.C.R. II-1707.

transposed to the context of a legislative process leading to the adoption of general laws'[99] and hence the right to be heard is excluded 'in the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned.'[100] The General Court placed considerable emphasis on the fact that the act in issue was adopted by the Community legislator on the basis of the then EC Treaty and found that 'the only obligations of consultation incumbent on the Community legislature are those laid down in the [Treaty] article in question.'[101] The General Court made the point that the mandatory consultation of the EP satisfied the democratic principle, while the equally mandatory consultation of the Economic and Social Committee (ESC) ensured the representation of various groups of economic and social life. Consultation of other parties, such as traders engaged in the banana trade, was not obligatory. This argumentation seems to place considerable emphasis on the fact that the act was adopted in a legislative procedure providing for the mandatory consultation of the EP and the ESC, rather than the general applicability of the Act.[102]

The importance of the characterisation of legal acts as legislative lies in the legal consequences which are attached to such a finding. In national constitutional systems which embrace the principle of representative democracy, legislative acts are accorded in the national legal order a privileged position, which excludes the

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99 *Id.*¶70.

100 *Id.*¶70.

101 *Id.*¶71.

102 On appeal the Court upheld this position of the General Court, *see* C-104/97P, *Atlanta and others* v. *Commission and Council*, 1999 E.C.R. I-6983, ¶¶37 and 38. *See* however MENDES, *supra.* n.8 at 196.

application of any procedural rights.[103] The rationale for this exclusion is that the legislative procedure is believed to ensure (procedural) due process through the equal representation of the citizens.[104] This raises the question as to whether similar considerations can justify the exclusion of the right to be heard in case of acts adopted in the Union's legislative procedure.

It can be acknowledged that the Union after Lisbon still does not constitute a state and that the Union Treaties even lack the formal and substantive characteristics of a Constitution found in nation states. From this does however not follow that the term 'legislation' cannot validly be used in Union law provided it serves a purpose which is functionally equivalent to that employed in states. It has been convincingly argued elsewhere that the European Union has evolved into a constitutional legal order.[105] An autonomous legal order can exist beyond the nation state[106] and therefore also within the Union. Also, the objection that the Union lacks a *demos* as basis for an autonomous legal order[107] is based on the questionable assumption that

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103 *See* the discussion of the English, French and German legal systems in ALEXANDER H. TÜRK, THE CONCEPT OF LEGISLATION IN EUROPEAN COMMUNITY LAW: A COMPARATIVE PERSPECTIVE (2006).

104 TÜRK, *Id.* For a discussion in US literature see MASHAW, *supra.* n.69, in particular at 921-925; Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, GEO. WASH. L. REV.577, 610-611 (2011); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV.117, 168-169 (2011).

105 Paul Craig, *Constitutions, Constitutionalism, and the European Union*, EUR L. J. 125 (2001); AMARYLLIS VERHOEVEN, THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY (2002).

106 *See* Neil McCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1–19 (1993); VERHOEVEN, *supra.* n.105 at 296; TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, (Christian Joerges, Inger-Johanne Sand, & Gunther Teubner eds., 2004).

107 *See* Grimm, *supra.* n.6 at 282–302; Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European*

a *demos* can only exist within the confines of a nation state and cannot be based, as in the Union's case, instead on a civic understanding of *demos*.[108] It is therefore equally possible to perceive the constitutional nature of the Union in non-statal terms[109] and to classify it 'among the non-revolutionary, historical types of constitutions.'[110]

While the nature of the Union does not *a priori* exclude the characterisation of Union acts as legislation, it could be argued that none of the Union's institutions can be considered as being sufficiently representative in the traditional sense of a national parliament to justify the term legislation for Union acts.[111] The Union is however not characterised by the traditional view of national parliaments as representing the nation. Instead each institution represents a particular interest in the law-making process that allows the Union to form a system of functional representation.[112] Despite its distinguishing features, similarities with the national system become apparent when bearing in mind that the legislative process in the nation state also comprises all constitutionally relevant institutions in a deliberative process of law-making.[113] Consequently the functional equivalent of legislation at Union level to that of national legislation exists, where the Union institutions participate in the law-making process in

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Community, 99 COLUM. L. REV. 628 (1999); Giandomenico Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8 EUR L. J. 319 (2002).

108 *See* Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR L. J. 219, 256 (1995); VERHOEVEN, *supra.* n.105 at 160.

109 McCormick, *supra.* n.106 at 2; VERHOEVEN, *supra.* n.105 at 122.

110 Besselink, *supra.* n.2 at 262.

111 BVerfG, *supra.* n.5. *See also*MENDES, *supra.* n.8 at 215-220.

112 See TÜRK, *supra.* n.103, at 217-218.

113 This argument addresses Mendes's objection in MENDES, *supra.* n.8 at 215-220, that the EP is not representative in the sense of a national parliament.

accordance with the specific function they represent in the Union.[114] Union acts can therefore be considered as legislative where the procedure for the adoption of such acts provides for a sufficient representation of these interests.

The rationale for the exclusion of the right to be heard in Union law is ultimately based on the presumption that the legislative procedure ensures (procedural) due process through the equal representation of its states and citizens. It would therefore be incompatible with the Union's principle of representative democracy to allow individuals privileged access to the legislative procedure through the right to be heard. This view is not inconsistent with the principle of participatory democracy, as set out in Article 11 TEU, which has as rationale the enhancement of the Union's democratic legitimacy rather than the protection of privileged access of individuals to the Union's legislative procedure. While Article 11 TEU can, and possibly should, be read as imposing on the Union institutions, an obligation to observe minimum standards of public consultation[115], such an obligation exists, however, in the public interest and can

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[114] The Commission represents 'the general interest of the Union' (see Art 17(1) TEU), the interests of the Member States are represented in the Council (see Art 10(2) TEU) and the citizens are represented by the European Parliament (see Art 10(2) TEU). The European Parliament is best placed to protect minority interests and to provide a public forum of communication. Despite efforts to subject Council debates to greater openness (see Art 16(8) TEU), it is still doubtful that the Council can provide such a forum (*see* Magdalena E. de Leeuw, *Openness in the Legislative Process in the European Union*, 32 EUR L. REV. 295 (2007)).

[115] As has been pointed out by MENDES, *supra.* n. 8 at 218, the principle of institutional balance is not undermined by this approach, as such consultation requirements merely affect the relationship between the respective Union institution and the public, but not the relationship between the Union institutions.

therefore not ground participation rights for the benefit of specific individuals.

While acts adopted in the ordinary legislative procedure in Article 294 TFEU clearly satisfy the requirements of equal representation, the picture is more complicated for acts adopted in one of the special legislative procedures. One could argue that the special legislative procedures which provide for the adoption of an act by the Council with the consent of the European Parliament or by the European Parliament with the consent of the Council provide both institutions with sufficient participation. This is however not the case for special legislative procedures which merely provide for the consultation of the European Parliament. The latter procedure is indeed indistinguishable from Treaty procedures which lead to the adoption of non-legislative acts, such as that provided under Article 103(1) TFEU, which provides for the adoption of Council acts after consultation of the European Parliament.[116] It follows that, contrary to the position taken by the Union courts in *Atlanta*, the procedure leading to the adoption of the act in issue, in which the European Parliament merely had to be consulted,[117] could not be considered as legislative and could therefore not justify the exclusion of the right to be heard on the procedural characteristics of the act.

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[116] *See* Case C-3/00, *Commission* v. *Denmark*, 2003 E.C.R. I-2643, at paras. 42 to 50. The Court held that an act based on Article 95(4) and (6) EC (now 114(4) and (6) TFEU) could not be considered as legislative, as it was not adopted in the co-decision procedure, but rather in a procedure in which the Commission had to assess the specific needs of a Member State. See also Joined Cases C-439/05P and C-454/05P, Land Oberösterreich, 2007 E.C.R. I-07141 paras. 28 to 44, for requests made under Article 95(5) EC (now 114(5) TFEU).

[117] Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas, 1993 O.J. (L 47/1), was adopted on the basis of Article 43 EEC Treaty, which provided for the adoption of the act by the Council after consultation of the EP.

The Right to a Fair Hearing and Acts of General Application

The Union courts in *Atlanta* seemed to have based the exclusion of the right to the heard mainly on their perception of the nature of the procedure in which the act was adopted and rather less on the general applicability of the act. All the same, this latter aspect assumed greater importance in later judgments of the Union courts as ground for excluding the right to be heard. The extension of the exclusion of the right to be heard to acts of general application was also based on the understanding of such acts as legislative, not only on ground of the procedure followed for their adoption, but their substance.

The General Court's ruling in *Arizona Chemical* provides a good example for the exclusion of the right to be heard in case of acts of general application. The applicant in this case had requested the adoption by the Commission of an act requiring the adaptation of Council Directive 67/548[118] to technical progress. Council Directive 67/548, adopted on the basis of the EEC Treaty, had delegated to the Commission the power to adopt such an act in accordance with the regulatory procedure laid down in Article 5 of Council Decision 1999/468.[119] The General Court rejected the right to be heard on the ground that 'according to the general principles of Community law such as the right to a fair hearing, neither the process of enacting acts

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[118] Council Directive 67/548/EEC of 27 June 1867 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, 1967 O.J. English Special Edition, at 234, as amended.

[119] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184/23).

of general application nor the nature of those acts themselves require the participation of the persons affected'.[120]

The General Court's first argument in *Arizona Chemical* that the process of enacting acts of general application did not warrant a right to be heard seems to be based on its understanding of the implementing procedure followed by the Commission as legislative in nature. The General Court asserts in this respect that '[u]nder that procedure, the Commission enjoys ... a power of initiative as part of the *legislative* process.'[121] This view seems misguided in light of the discussion above on *Atlanta* and Union legislation. On the one hand, the involvement of the Commission, through its power of initiative, ensures the representation of the Union interest and therefore constitutes a necessary condition for regarding a procedure as legislative. On the other hand, since the characterisation of a procedure as legislative is only justified where it ensures the functional representation of all the constitutionally relevant interests, the participation of the Commission is on its own insufficient to consider a procedure as legislative. The regulatory procedure did not provide for any participation of the European Parliament[122] and only for the limited involvement of the Council.[123] This also makes unsustainable

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120 Case T-369/03, *supra.* n.67, para. 73. See also Case T-122/96, *Federolio* v. *Commission*, 1997 E.C.R. II-1559, ¶75; Case T-199/96, *Bergaderm and Goupil* v. *Commission*, 1998 E.C.R. II-2805, ¶58; Case T-13/99, *Pfizer Animal Health* v. *Council*, 2002 E.C.R. II-3305, ¶487; Case T-70/99, *Alpharma* v. *Council*, 2002 E.C.R. II-3495, ¶388.

121 Case T-369/03, *supra.* n.67, ¶51. Emphasis added.

122 Articles 5(5) and 8 of Council Decision 1999/468 merely allowed the European Parliament to raise an *ultra vires* objection.

123 Article 5 of Council Decision 1999/468 provided for the involvement of the Council only in those cases, where the Commission could not obtain a positive (qualified majority) opinion in the comitology committee. On the point as to whether the comitology committee can be considered as adequate substitute for the involvement of the Council, see *supra.* n.30.

the argument of the General Court that 'the interests of those persons are deemed to be represented by the political bodies called to adopt those acts.'[124] It follows that the regulatory procedure, contrary to the view taken by the General Court, could not be considered as legislative.

These considerations also make it difficult to consider the new procedural regimes for the adoption of subordinate rules in Articles 290 and Article 291 TFEU as legislative in nature. This is obvious in case of the new comitology procedures, set out in Regulation 182/2011, leading to the adoption of implementing acts under Article 291 TFEU. Since they do not provide for any participation of the European Parliament and the Council, these procedures cannot be regarded as legislative. Despite the characterisation of delegated acts as 'quasi-legislative,'[125] it is submitted that the procedure leading to the adoption of such acts under Article 290 does also not qualify them as legislative. As discussed above in, the involvement of the European Parliament and the Council is limited in this procedure to a formal system of *ex-post* control and does not allow for a sufficient reflection of the interests which they represent.

The General Court's second argument in *Arizona Chemical* for the exclusion of the right to be heard for acts of general application is

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[124] Case T-369/03, *supra.* n.67, ¶73. It is interesting to note that the statement cites in support the ruling of the General Court in Case T-199/96, *supra.* n.120, which in turn refers to the General Court's ruling in *Atlanta* for support. As discussed above, the General Court's ruling in *Atlanta* does however not offer any support for the view that the right of a fair hearing does not apply in a procedure, which is not based on the Treaty itself.

[125] EUROPEAN COMMISSION, Communication from the Commission to the European Parliament and the Council – Delegated Acts – Implementation of Article 290 of the Treaty of the Functioning of the European Union, COM(2009) 673 final, at 3.

based on the notion that 'the nature of such acts themselves' does not require the right to be heard. This argument seems to be supported by the wording of Article 41(2) CFR, which provides for the right to be heard only in case of an 'individual measure' being taken. Also, as mentioned before, many national legal systems exclude the right to be heard for acts of general application, which are regarded as legislation in substance.

The notion of acts of general application as legislation in substance has been developed in EU law mainly in the Union courts' case-law, where it has formed the basis for the exclusion of standing of private parties seeking judicial review of Union acts. The Union courts have defined acts of general application as being 'applicable to objectively determined situations.'[126] An act can therefore only not be considered as being of general application where it has been adopted 'on the basis of and with exclusive application to the situation of specific individuals.'[127] The understanding of such acts as being 'essentially of a legislative nature'[128] is here not based on the procedure in which an act is adopted, but is derived from its scope of application. This notion of legislation in substance can also be found in many national legal systems[129] and is based on the idea that 'legislation should be adopted in general and abstract terms to ensure the equal treatment of those subjected to its rules.'[130]

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126 Joined Cases 16 and 17/62, *Producteurs de Fruits* v. *Council*, 1962 E.C.R. 471, at 479.

127 TÜRK, *supra.* n.103, at 240.

128 Joined Cases 16 and 17/62, *supra.* n.126 at 478.

129 TÜRK, *supra.* n.103, at 11-61.

130 *Id.*, at 162. *See* JEAN-JACQUES ROUSSEAU, DU CONTRACT SOCIAL Book II (1992).

While acts drafted in a general and abstract nature can contribute to ensuring the application of the principle of equality in the abstract, they do not, however, take account of the varying impact they can have on their addressees. An act of general application can therefore have a greater impact on specific individuals, be it because of the procedural or substantive guarantees they enjoy under Union law or because of the special impact of the act on their rights or interests. The Union courts have therefore, in certain limited circumstances, also considered a private party as individually concerned, and therefore as having standing to challenge a Union act, even though the act did not exclusively apply to that person and was therefore an act of general application.[131] A similar trend can be seen in the case law on the right to be heard, which has used the notion of individual concern to grant hearing rights to individuals also in case of acts of general application. The Court made it clear in *Al-Jubail* that the requirements of the right to a fair hearing 'must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.'[132] The Court's statement in *Al-Jubail* acknowledges that an act, despite its general nature can have a specific impact on certain individuals. A similar approach was taken by the General Court in *Yusuf*[133] when it emphasised, again with reference to *Atlanta* that 'the contested regulation is not of an exclusively *legislative*

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131 For a detailed assessment of the case-law of the Union courts on the relationship between the notion of acts of general application and the notion of individual concern, see ALEXANDER H. TÜRK, JUDICIAL REVIEW IN EU LAW 45-100 (2009).

132 Case C-49/88, *supra.* n. 54 at ¶15.

133 In Case T-306/01, *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, 2005 E.C.R. II-3533.

nature. While applying to the generality of economic operators concerned [...] it is of direct and individual concern to the applicants, to whom it refers by name, indicating that sanctions must be imposed on them'[134].

The case-law is however not consistent. *Al-Jubail* and *Yusuf* are difficult to reconcile with the ruling of the General Court in *Pfizer*.[135] In this case the General Court made it clear that the applicant had to be considered as being individually concerned on the basis that the applicant had instigated the procedure and benefited from procedural guarantees, such as the right to be notified during the procedure under Article 4 of Directive 70/524, as amended by Directive 96/51. However, the General Court with reference to *Atlanta* excluded the right to a fair hearing on the ground that the contested regulation was of general application. It pointed out that '[t]he fact that *Pfizer* – unlike the farmers in particular – is directly and individually concerned by the contested regulation does not alter that finding.'[136]

The general trend in the case-law suggests that the Union courts base the application of the right to be heard on the dual considerations of individualisation and adverse effects. An *a priori* exclusion of the

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[134] *Id.*¶324. Emphasis added. On appeal (Joined Cases C-402/05P and C-415/05P, *supra.* n. 60), the Court rejected the finding of the General Court that the Council regulation enjoyed immunity from judicial review save for a breach of *jus cogens* and found that the right to be heard was indeed breached. The Court did however not revisit the discussion raised in the General Court in *Yusuf* whether the legislative nature of the regulation prevented the application of the right to fair hearing. It seems a fair conclusion that the Court implicitly agreed with the position of the General Court on the point that despite its general application the contested act was not of an exclusively legislative nature.

[135] Case T-13/99, *supra.* n.120.

[136] *Id.*¶487. It seems difficult to draw an inference from the fact that the Court on appeal in *Atlanta* denied that the applicant was directly and individually concerned.

right in case of acts of general application would be incompatible with this approach. As the cases in *Al-Jubail* and *Yusuf* show, an act can be based on individual determinations even if its scope is of general application.[137] The premise of equal treatment on which the exclusion of the right is based does not hold true in this case. It is similarly irrelevant that legislation in substance is mainly concerned with policy, in which case procedural rights are only those granted by statute.[138] Apart from the fact that policy considerations can also be relevant for the adoption of individual acts, the normative basis for the Union courts to uphold the constitutional right to a fair hearing is based on the principle of fair treatment of the individuals affected by Union rules which are based on individual determinations, irrespective of the nature of such rules as legislation in substance. This has been succinctly put by Lawrence H. Tribe:

> 'The case for due protection grows stronger as the identity of the persons affected by a government choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decision maker's purview. For when government acts in a way that singles out identifiable individuals- in a way that is likely to be premised on suppositions about specific persons- it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*.'[139]

While the Union courts are therefore right not to exclude *a priori* the right to be heard in case of acts of general application, it is

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137 The act would be adopted on the basis of, but not with exclusive application to specific individuals.

138 *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 98-103 (1985).

139 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 503-504 (1978).

submitted that the concepts of direct and individual concern, which the Union courts often employ for granting the right to be heard in such cases is inadequate.[140] The notion of individual concern, which the Union courts have developed in the context of granting standing to challenge Union acts, in its *Plaumann* interpretation often depends on the procedural guarantees, which the person enjoys by grace of Union legislation.[141] This would be incompatible with the constitutional nature of the right to be heard. Also, an approach based on the investigative nature of administrative proceedings to establish the right of a fair hearing is not sufficient. While such an approach would trigger the right to be heard in anti-dumping and sanctions cases, but not in those cases where individuals initiate the proceedings through notification. Instead, the Union courts should focus on the dual considerations of individualisation and adverse effects, which already underpin much of the case of law of the Union courts, also within the context of the acts of general application.

Conclusion

The evolutionary development of the European Union's legal system has made it necessary for the Union courts to adapt the legal principles which they had created to meet the legal challenges posed by the Union's transformation into a constitutional legal order to which the creation of these principles has in no small measure contributed itself. This is also true for the right to be heard, which the Court had

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140 The Union courts have also been more generous in granting the rights of defence against acts of general application in case of challenges of Commission acts deciding on the inclusion of active substances in Annex I of Directive 91/414 as condition for the authorisation of plant protection products. *See* Case T-420/05, *Vischim* v. *Commission*, 2009 E.C.R. II-3841.

141 *See* the different outcomes in Case T-13/99, *supra.* n.120, and Case T-420/05, *supra.* n.140.

created for the protection of individuals in an administrative context and which had greatly contributed to promoting the rule of law in European law. The evolution of the right to be heard from an administrative law principle to a fundamental right reflects the changing nature of the European Union itself. The application and adaptation of the principle has been largely dependent on the perception by the Union courts of the nature of the legal system in which the principle has been applied. This has not only affected the content of the right to be heard, but also its scope. As this article has shown the exclusion of the right to be heard in *Atlanta* was based on a (mis)conception of the nature of the procedure used for the adoption of the act in issue as legislative, a conception which seemed to have resulted from an overly generous view as to the democratic legitimacy of Union lawmaking.

The greatly enhanced role of the European Parliament in the adoption of Union laws has however made it justifiable in the Lisbon Treaty to refer as legislative to those procedures which allow for a sufficient functional representation of the relevant Union interests. It has been submitted that it is this functional representation which legitimately excludes the right to be heard in the adoption of such acts. The notion of legislation in form is however limited to acts adopted in the ordinary legislative procedure and, arguably, also the consent-variants of the special legislative procedures. It cannot be extended to the Union's administrative rules, since they do not provide for a sufficient representation of the relevant Union interests in the decision-making process. The Union courts' assertion that the nature of the procedure of such acts warrants the exclusion of the right to be heard must therefore be rejected. It has been submitted that this assessment is not affected by the enhanced role of the European Parliament in the adoption of delegated acts under Article 290 TFEU.

It has also been argued that the nature of an act as being of general application does not *a priori* justify the exclusion of the right to be heard, to which affected persons should be entitled where the act is based on individual determinations, irrespective of the conception of such acts as legislation in substance. This would be in line with what has been identified as the general trend in the case law of making the right to be heard dependent on the dual considerations of individualisation and adverse effects. The normative justification of these considerations lies in their reflection of deeper values of fair treatment based on respect for the individual affected in the proper application of the legal standards which require the making of individual determinations.

On the other hand, the Union courts should resist the demands for expanding the right to be heard beyond the dual considerations of individualisation and adverse effects.[142] It is of course the case that rules can affect individuals as much as individual determinations,[143] but this does not provide a sound reason for the application of the constitutional right to be heard. Such a justification is said to be based on the argument that instrumental and dignitarian rationales also apply where a rule affects the rights or legitimate interests of individuals.[144] Apart from the fact that the notion of rights is still far from settled in Union law,[145] the argument makes ambiguous use of the meaning of 'right'. It is of course the case that Union rules can embody rights which individuals can invoke in national courts. The justiciability of rules underlying the doctrine of direct effect, does

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142 MENDES, *supra.* n. 8, advocating a rights-based approach to participation.

143 CRAIG, *supra.* n.12 at 295-296.

144 *Id.* at 296. See also MENDES, *supra.* n. 8, at 229-240.

145 JULIA KÖNIG, DER ÄQUIVALENZ- UND EFFEKTIVITÄSGRUNDSATZ IN DER RECHTSPRECHUNG DES EUROPÄISCHEN GERICHTSHOFS 57-82 (2010).

however say little about the nature of the right and its protection against modification or even removal in the legal order and any participation rights that would have to be granted as a result. A Union rule which stipulates a certain mesh size for fishing nets could be considered as being directly effective, meaning that it could be invoked in national courts against incompatible national law. Even if it can be argued that the rule confers a right,[146] it does however not follow that such a right is immune to change by the Union body competent to alter the rule. As the rule is based on a policy choice of that body, it can be replaced by a different policy choice and the individual concerned has in principle no legitimate expectation that the policy will not change.[147] The right to be heard cannot be said to derive from some more fundamental principle or deeper value of the legal order, which would justify the intervention of the courts to grant (constitutional) rights regardless of any statutory basis.[148]

This does however not mean that administrative rulemaking, in the absence of the right to be heard based on the considerations of individualisation and adverse effect, is not subject to any judicially enforceable procedural constraints. The principle of careful and impartial examination as objective procedural guarantee endows the Union courts with the power to review the legality of administrative rules. In addition, the principle of participatory democracy, which has

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146 For the purpose of direct effect it is not necessary for the rule to confer a right, a legitimate interest would be sufficient. *See* Case C-194/94,*CIA Security International* v. *Signalson and Securitel*, 1996 E.C.R. I-2201.

147 *See* also DWORKIN, *supra.* n.138.

148 On the limits of liberal theory to provide process values, *see* Mashaw, *supra.* n.69, in particular at 930. See however the arguments for a normative justification for the rights-based approach in MENDES, *supra.* n.8, Chapter 2. For a discussion on procedural fairness in the policy process, see GALLIGAN, *supra.* n.68, Chapter 15.

been incorporated in the Lisbon Treaty to enhance the democratic legitimacy of the Union, imposes constraints on administrative rulemaking which the Union courts are bound to enforce. To be sure, given its abstract nature it does not on its own create any constitutional participation rights for citizens, which the Union courts are competent to develop. It is the responsibility of the political bodies of the Union to give concrete expression to this principle. It is however the role of the Union courts to ensure that the Union legislator complies with its constitutional duty to provide for sufficient participation of citizens in the Union's lawmaking processes, in particular for the adoption of administrative rules, and to interpret any participation rights which the Union legislator establishes in light of the principle of participatory democracy.[149]

[149] Generally on the role of the courts in rule-making, *See* GALLIGAN, *supra.* n.68 at 489.