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Some Aspects of the Decision-Making Process in the European Communities

Francis Crijns *

I. INTRODUCTION

The European Community finds itself in a state of almost permanent crisis as the process of integration continues to stagnate; all of its noble objectives still to be realized; and since 1958, bedevilled with many new problems, especially in the areas of environmental and energy policy. Furthermore, the socio-economic situation has changed fundamentally with the enlargement of the Community to ten member states in 1981 which has weakened rather than strengthened the possibilities to cope with these difficulties. In addition to these general considerations, institutional factors, such as the procedures according to which decisions are made in the Communities and the role of the Council, the Commission and the European Parliament also contribute to this state of malaise.

In this article, I shall focus attention on two of these institutional problems namely (1) the alleged paralysis of decision-making in the Communities,¹ and (2) the attribution of legislative power claimed by the European Parliament.² In the first part of this article, I shall describe how decisions are made according to the Treaty establishing the European Economic Community (EEC Treaty).³ I shall then discuss its actual development, dwelling on the production of decisions by the Council

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¹ Kapteyn & Verloren Van Themaat, *De uitbreiding van de Europese Gemeenschappen*, 1972 SOCIAL ECONOMISCHE WETGEVING 323, 333.

² The Resolution of July 6, 1982, on the European Parliament's position concerning the reform of the Treaties, suggests that the Council and Parliament jointly exercise legislative power on the basis of the Commission's proposals or on their own initiative. 25 O.J. EUR. COMM. (No. C 238) 25, 27, para. 7 (1982).

³ Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) [hereinafter cited as EEC Treaty].

and the Commission. I conclude this section of the article by arguing that there is no paralysis of the decision-making process in the Communities, at least not when one looks at the volume of the decisions. If there is a problem, then it is rather of a *qualitative* kind. To correct this qualitative failure, I have suggested that the non-application of the Treaty provision of a majority voting rule should be eliminated.

In the second part of the article, I shall examine the claim of the European Parliament (EP) that it should receive colegislative power within the decision-making process. I shall first outline the powers of the EP according to the EEC Treaty and then review, as far as decision-making is concerned, the different proposals for improvement that have been published in the past few years. I shall deal with a number of arguments against granting legislative power to the European Parliament. Here, my major thesis is that an attribution of legislative power to the European Parliament would be wrong for two main reasons. First, because it would be contrary to the constitutional evolution in the Member States, and it would not fit in the institutional system of the EEC Treaty. And second, because the extension of legislative power to the EP would add an extra obstacle to the already rather difficult decision-making procedure in the European Community.

II. THE ALLEGED PARALYSIS OF DECISION-MAKING IN THE EUROPEAN COMMUNITIES

Some scholars have alleged that decision-making within the Community has been paralyzed⁴ or inevitably will be blocked⁵ while others have argued the opposite, that the Community is trying to do too much.⁶ To evaluate these conflicting statements, it is necessary to examine the formal structure of decision-making as spelled out in the EEC Treaty and how it operates in actual practice.

A. Decision-Making Procedure According to the EEC Treaty

1. *Position of the Council*

The EEC Treaty provides three different voting procedures for decision-making by the Council: decisions can be taken by unanimous vote;⁷

⁴ See Kapteyn & Verloren Van Themaat, *supra* note 1.

⁵ Mathijesen, *Enkele Juridische Aspecten van Een Toedring*, 1977 NIEUW EUROPA (No. 3) 139.

⁶ COMMITTEE OF THREE TO THE EUROPEAN COUNCIL, REPORT ON EUROPEAN INSTITUTIONS 46 (1979) [hereinafter cited as COMMITTEE OF THREE REPORT].

⁷ Article 100 of the EEC Treaty provides that: "[t]he Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down

or by a qualified majority;⁸ or by a simple majority.⁹ As a rule, when treaty provisions do not specify that unanimous or a qualified voting procedure is required, then decisions are taken by a majority of the Council members.¹⁰ But, since the Treaty provides in most cases for decisions to be taken unanimously or by a qualified majority, decision-making by the Council by simple majority vote is not the rule but the exception.

A closer look at the Treaty shows that the types of decisions in which the Treaty provides for a qualified majority is higher than those in which a qualified majority is prescribed after the second stage of the transitional period or after the transitional period.¹¹ Moreover, it also appears that the Treaty always requires unanimity only for the most important decisions.¹² However, the unanimity requirement, in most of these cases, is not quite so obvious. Article 235 is one example.¹³ There are in fact some decisions where this requirement is self-evident, because they cover questions which materially involve either the Community's constitutive power or its relations with other persons in international law,¹⁴ or can be considered, as in the case of article 235, as "para-constituent."¹⁵ But in other cases, for example articles 51 and 100 mentioned above, and also in many other Treaty regulations,¹⁶ this argument does

by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the Common Market." EEC Treaty, *supra* note 3, art. 100.

⁸ Article 43, paragraph 2, of the EEC Treaty provides that: "[t]he Council shall, on a proposed from the Commission and after consulting the Assembly, acting unanimously during the first two stages, and by a qualified majority thereafter, make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make." *Id.* art. 43, para. 2.

⁹ Article 143, paragraph 1, of the EEC Treaty provides that: "[s]ave as otherwise provided in this Treaty, the Council shall act by a majority of its members." *Id.* art. 148, para. 1.

¹⁰ *Id.*

¹¹ See, EEC Treaty, *supra* note 3, art. 44, para. 4; art. 55, para. 2; art. 70, para. 2; art. 79, para. 3; art. 93, para. 2; art. 94; art. 103, para. 3; art. 108, paras. 2, 3; art. 109, para. 3; art. 127; art. 203, paras. 3, 5; art. 204, para. 2; art. 206.

¹² See EEC Treaty, *supra* note 3, art. 4, para. 3; art. 51; art. 57, para. 2; art. 59; art. 75, para. 3; art. 84, para. 2; art. 99; art. 100; art. 103, para. 2; art. 121; art. 126, sub. b; art. 136; art. 159; art. 160, para. 2; art. 194; art. 206, para. 4; art. 209; art. 235; art. 236; art. 237; art. 238.

¹³ Article 235 of the EEC Treaty provides that: "[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures." EEC Treaty, *supra* note 3, art. 235.

¹⁴ See *id.* arts. 236, 237, 238. See also Report of the Working Party Examining the Problem of the Enlargement of the Powers of the European Parliament, 5 BULL. EUR. COMM. (No. 4) 40 (Supp. 1972) [hereinafter cited as Vedel Report].

¹⁵ Vedel Report, *supra* note 14, at 41.

¹⁶ See, e.g., EEC Treaty, *supra* note 3, art. 57, para. 2; art. 59; art. 84, para. 2; art. 99; art. 100; art. 103, para. 2; art. 121; art. 126, sub b; art. 136; art. 159, para. 2; art. 160, para. 2; art. 194; art. 206, para. 4; art. 209.

not apply. Therefore, the necessity of a unanimous vote in these provisions is, in my opinion, less obvious.

Where the Council is required to act by a qualified majority, the votes of its members are weighted.¹⁷ In the Community of Ten, the big member states (Germany, France, Italy and Great Britain) each possess 10 votes, The Netherlands, Belgium and Greece each have 5 votes, Denmark and Ireland each have 3 and Luxembourg has 2 votes.¹⁸ To make a decision on a proposal from the Commission, 45 out of 63 votes are required.¹⁹ In other cases, the Treaty requires in addition that at least six members of the Council vote in favor.²⁰ These Treaty provisions and the special voting procedure of Article 149 are designed to strengthen the position of the Commission and to protect the interests of the smaller countries. In other words, it is not possible for the big member states alone to deviate from a Commission proposal, because, under article 149 unanimity is required in that case.²¹ Secondly, one can note that even after the second enlargement, the big member states cannot outvote the smaller ones since the treaty requires that the adoption of an act by a qualified majority, cooperation of, at least, two smaller countries is necessary.²²

2. *The Position of the Commission*

The protection of the Community's interest is vested in the Commission.²³ Moreover, the Treaty provides in most cases that the Council makes a decision on a proposal from the Commission.²⁴ Because of this right to present proposals to the Council, the Commission has a key posi-

¹⁷ "Where the Council is required to act by a qualified majority, the votes of its members shall be weighed as follows. . . ." *Id.*, art. 148, para. 2.

¹⁸ *Id.*, art. 148, para. 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* art. 149.

²² Speech by T. Van Rijn, *Besluitvorming-stechnieken in de Raad*, Colloquium, University of Leiden (Jan. 26, 1979), at 9.

²³ EEC Treaty, *supra* note 3, art. 155. *See also*, Merger Treaty, art. 10, 10 J.O. EUR. COMM. (No. 152) 7 (1967)).

²⁴ Article 189 of the EEC Treaty provides that:

In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Id. art. 189.

tion in the decision-making process of the Community. In fact, this amounts to an exclusive right of initiative since the Council cannot take a decision without a proposal from the Commission. This exclusive right of initiative may be called the first principle on which the cooperation between the Commission and the Council in the decision-making process is based. Article 149, which is the cornerstone of the decision-making machinery, contains two other principles: (1) the Commission can modify its proposal as long as the Council has not yet taken a decision, and (2) the Council may only amend such a proposal unanimously.²⁵

In summary, article 149(1) has two functions. First, it ensures the protection of the Community's interest by binding the Council in principle to the proposal of the Commission. If the Council wishes to dissociate itself from this proposal, it can only do so by unanimity. Second, article 149(1) also protects the interests of the smaller member states, which rests with the Commission.²⁶ So, in the decision-making system of the Treaty, the Commission becomes the eleventh party—in addition to the ten member states—during the discussions in the Council that lead to a Council decision. As such, the Commission cannot only reconcile conflicting national claims but also bring these in line with the Community's interests, of which the Commission is the guardian. Thus where *decisions by a qualified majority are required*, the Commission can play the role of an arbiter with, sometimes, decisive influence.²⁷

3. *Position of the European Parliament*

The EEC Treaty itself defines the position of the European Parliament as a weak one. Article 137 speaks of an "assembly"²⁸ with only "advisory and supervisory powers."²⁹ Although the European Parliament is the first international parliament which is elected directly by the voters,³⁰ it is not a legislature and its part in the legislative process is only

²⁵ EEC Treaty, *supra* note 3, art. 143, para. 2. See also P. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 146 (1973) [hereinafter cited as P. VERLOREN VAN THEMAAT I].

²⁶ EEC Treaty, *supra* note 3, art. 143.

²⁷ P. VERLOREN VAN THEMAAT I, *supra* note 25, at 147.

²⁸ The Assembly named itself, in 1962, the "European Parliament." *Resolution of March 30, 1962*, J.O. EUR. COMM. 1045 (1962).

²⁹ Article 137 of the EEC Treaty provides that, "[t]he Assembly, which shall consist of representatives or the peoples of the States brought together in the Community, shall exercise the advisory and supervisory powers which are conferred upon it by this Treaty." EEC Treaty, *supra* note 3, art. 137.

³⁰ Article 138 of the EEC Treaty provides that:

The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. Since June 1979, the date of the first direct European elections, the E.P. has been composed of members elected every five years

an advisory one. In a recent judgment the Court of Justice of the EC held that this advisory power "represents an essential factor in the institutional balance intended by the Treaty. Although limited, it reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."³¹

The Vedel Report explained the weak position of the European Parliament by the fact that:

[T]he authors of the Treaties were more interested in the construction than in the government of Europe, they did not give the Parliament a very important place among the Community institutions, no doubt thinking that the matter would have to be reviewed when the time came: hence the legal and political ambiguity of the European Parliament's position.³²

The second part of this essay will further discuss the competence of the European Parliament.³³

B. Actual Developments

The decision-making process in the Community has, in fact, developed differently from what should have taken place according to the above-mentioned Treaty provisions.

The intended transition from the unanimity rule to the majority rule, for example, with respect to the agricultural policy,³⁴ the transport policy³⁵ and the external trade policy³⁶ has never taken place. Majority decisions are, in fact, an exception and for the rest hardly any voting takes place within the Council. Discussions go on and on until an agree-

through universal suffrage. The E.P. has now 434 members: 81 from each of the countries with the largest population, 25 from the Netherlands, 24 from Belgium, 24 from Greece, 16 from Denmark, 15 from Ireland and 6 from Luxemburg.

Id. art. 138, para. 3.

³¹ S.A. Roquette Freres v. Council of the European Communities, 1980 E. Comm. Ct. J. Rep. 3333, 3360; *see also* Maizena GmbH v. Council of the European Communities, 1980 E. Comm. Ct. J. Rep. 3393.

³² Vedel Report, *supra* note 14, at 29.

³³ *See infra* notes 112-125 and accompanying text.

³⁴ Article 43 provides that; "[t]he Council shall, on a proposal from the Commission and after consulting the Assembly, acting unanimously during the first two stages and by a qualified majority thereafter, make regulations, issue directives or take decisions. EEC Treaty, *supra* note 3, art. 43, para. 2.

³⁵ Article 75 of the EEC Treaty provides that; "[f]or the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council shall, acting unanimously until the end of the second stage and by a qualified majority thereafter, lay down. . . ." *Id.* art. 75, para. 1.

³⁶ Article 112 of the EEC Treaty provides that; "[o]n a proposal from the Commission, the Council shall, acting unanimously until the end of the second stage and by a qualified majority thereafter, issue any directives needed for this purpose." *Id.* art. 112, para. 1.

ment is reached.³⁷ This practice has been applied since the enactment of the EEC Treaty in 1958, but it became the subject of a "constitutional" crisis in 1965 during the transition from the second to the third stage of the transitional period.³⁸ For many decisions this transition involved a change from the unanimity rule to the qualified majority rule.³⁹

1. *The Luxemburg Compromise of January 1966*

The constitutional crisis of 1965 was provoked by the Commission's proposals on the financing of the common agricultural policy (CAP).⁴⁰ The Hallsstein-Commission had proposed a revision of the Community's financial structure, the crucial elements of which were the creation of its own resources for the Community and making these resources subject to extended budgetary powers of the EP.⁴¹ The beginning of the third stage of the transitional period on January 1, 1966 implied that the CAP could from then on be decided by a qualified majority of the Council.⁴² France declared its opposition to the application of the majority rule when *a vital interest* of a member state is at stake, called into question the position of the Commission and boycotted the Council's session and all meetings of working groups.⁴³ The crisis was discussed in a special session of the Council and resulted in the so-called "Agreement of Luxemburg."⁴⁴ Strictly speaking it is incorrect to refer to this as an "agreement," because there was no agreement between the six member states. The compromise records the agreement of all the member states that, on matters where a decision that could be taken by majority vote on a proposal from the Commission would affect very important interests of one or more partners, the members of the Council will endeavour to reach a unanimous decision, within a reasonable time. The French delegation felt, however, that where very important interests are at stake the discussion must be continued until unanimous agreement is reached. This difference of opinion is noted but not settled in the Compromise.⁴⁵

³⁷ See Van Rijn, *supra* note 22, at 7; cf. Vedel Report, *supra* note 14, at 26.

³⁸ P. VERLOREN VAN THEMAAT I, *supra* note 25, at 144.

³⁹ E.g., EEC Treaty, *supra* note 3, arts. 43, para. 2, 56, para. 2, 69 and 75. In other cases the transition from the unanimity rule to the qualified majority rule should already take place after the first stage of the transitional period, e.g., *id.* arts. 54, para. 2, 57, para. 1 and 63, para. 2.

⁴⁰ P. KAPETYN & P. VERLOREN VAN THEMAAT, INLEIDING TOT HET RECHT VAN DE EUROPESE GEMEENSCHAPPEN 18 (1980) [hereinafter cited as P. VERLOREN VAN THEMAAT II].

⁴¹ E. STEIN, P. HAY, & M. WAELEBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 63-64 (1976).

⁴² See *supra* note 34.

⁴³ 9 BULL. EUR. COMM. 5 (1966).

⁴⁴ *Id.* See also P. VAN THEMAAT I, *supra* note 25, at 144.

⁴⁵ Vedel Report, *supra* note 14, at 26; see also Richard Mayne, The Times (London), May 24,

The Vedel Report still contains an unexcelled outline of the consequences of the Luxemburg Compromise. In chapter III regarding the institutions and current practice in the light of the tasks awaiting the Community the report points out that:

[t]he consequence of this document has been that in practice not only France but other Member States too, invoking the principle of reciprocity, have referred in various cases to the concept of "very important interests" and this has meant that the principle of unanimity has been generally applied What is in question is the practice of votes hardly ever being taken in the Council (except on budgetary matters). At all levels—experts, Permanent Representatives, Ministers—all procedures except that of unanimous agreement have been rejected in advance, without any reference to the importance of national interests at stake in each case. This practice does not enhance the Council's power to take decisions, not so much because it prevents majority decisions, but because, in rejecting this possibility, it robs discussions of a stimulus which could help efforts to bring together differing points of view and leads to a certain indifference over the search for solutions. It also affects the institutional balance. Once it has been accepted that decisions in Council always require unanimous agreement, the Commission's proposals lose the privilege granted them by Article 149 of the EEC Treaty. This has affected the Commission's activities. The dose of innovation which could and normally should be included in its proposals is likely to be sacrificed in the search for solutions which will meet with unanimous approval. . . . The division of work required by the Treaties is thus impaired.⁴⁶

The discussions within the Council are taking more and more the character of intergovernmental negotiations in which there is no longer a place for the independent and separate role of the Commission.⁴⁷

On May 17 and 18, 1982, the Council's decisions fixing agricultural prices were finally adopted by a qualified majority.⁴⁸ It is still too early to say whether the Luxemburg Compromise will remain the basis for the decision-making process in the Council and if so, whether the function of "vital interests" in that process will remain unchanged? In the Solemn Declaration on European Union, signed in Stuttgart on June 19, 1983, it is said that:

[T]he application of the decision-making procedures laid down in the Treaties of Paris and Rome is of vital importance in order to improve the European Communities' capacity to act. Within the Council every possible means of facilitating the decision-making process will be used, including, in cases when unanimity is required, the possibility of abstaining from

1982, at 11, col. 5 (letter to the editor) who calls the "Luxemburg Compromise" not a compromise but a contradiction.

⁴⁶ Vedel Report, *supra* note 14, at 26-27.

⁴⁷ Van Rijn, *supra* note 22, at 11.

⁴⁸ 16 GEN. REPORT EUR. COMM. 24 (1982).

voting.⁴⁹

But from the declarations to the official report made at the Stuttgart Summit, it appears that, of the ten member states, only five countries (Belgium, The Netherlands, Luxemburg, Germany and Italy) accept the rules of the Treaty in the matter of voting procedures; three countries (Great Britain, Denmark and Greece) demand, contrary to the Treaty, unanimity when a vital interest is at stake; and two countries (France and Ireland) hide behind the point of view that a decision should be postponed when such an interest comes into play, which in fact also comes down to unanimity.⁵⁰⁵¹ So the situation in the Council with regard to the voting procedure has in fact deteriorated and the majority decision about agricultural prices of May, 1982 cannot, therefore, be seen as the beginning of a structural change.

2. *The European Council*

The establishment of the European Council in 1974 is connected, on the one hand, with the inadequacy of the Treaty mechanism concerning social and economic policies and on the other hand with the evolution of the cooperation between the member states in the field of foreign policy which is not covered by the EEC Treaty. The objectives of the European Council are summarized as follows in the Solemn Declaration on European Union, signed in Stuttgart on June 19, 1983, stating that:

[t]he European Council brings together the Heads of State or Government and the President of the Commission assisted by the Foreign Ministers of the Member States and a member of the Commission. In the perspective of European Union, the European Council:

- provides a general political impetus to the construction of Europe;
- defines approaches to further the construction of Europe and issues general political guidelines for the European Communities and European Political Cooperation;
- deliberates upon matters concerning European Union in its different aspects with due regard to consistency among them;
- solemnly expresses the common position in questions of external relations;
- initiates cooperation in new areas of activity.

When the European Council acts in matters within the scope of the European Communities, it does so in its capacity as the Council within the meaning of the Treaties. The European Council will address a report to the European Parliament after each of its meetings. This report will be presented at least once during each Presidency by the President of the European Council. The European Council will also address a written annual

⁴⁹ 16 BULL. EUR. COMM. (No. 6) 26 (1983).

⁵⁰ See EUROPE (No. 3633), June 20, 1983, at 3.

⁵¹ See *infra* notes 73-78 and accompanying text.

report to the European Parliament on progress towards European Union. In the debates to which these reports give rise, the European Council will normally be represented by its President or one of its members.⁵²

The Committee of Three⁵³ commented on the European Council in its report of October 1979 as follows:

[t]he European Council was created to meet the demands of a period in which the detailed guidance in the Treaties was running out, external circumstances had grown hostile, and the capacity to tackle these problems of the Council of Ministers and of the Commission had declined. . . . It was logical that the leaders of the Nine Governments, who could take the overall view and speak for all their colleagues to a greater extent than any individual Minister, should decide to create a forum in which they themselves could deliberate on Community affairs Since that time [1974] the European Council has met regularly thrice a year, and it can look back on significant achievements. Within the Community framework it has resolved a series of contentious issues posing grave threats to solidarity and progress. It has launched valuable new ventures. It has taken a stand on major world issues. Without the European Council these results would have obtained far more slowly and painfully or not at all. Its right to exist is, then, no longer challenged.⁵⁴

The development of the European Council brings with it a double risk, however. On one hand there is the possible erosion of the Treaty if the European Council concerns itself with treaty matters without bothering about the rules and procedures of the Treaty; on the other hand the decision-making process in the Council will become even more difficult.⁵⁵ therefore, I have my doubts about the conclusion of the Committee of Three that the European Council succeeded in escaping from the "*fourdeur*" afflicting the traditional Community bodies and that it restored political impetus and spontaneity to the handling of Community affairs at the highest level.⁵⁶ In contrast, the Spinelli Report concluded that the attempts to overcome the paralysis of the Council by setting up the European Council had failed.⁵⁷

C. The Real Output

As previously discussed, there are conflicting statements on the decision-making in the Community.⁵⁸ The Committee of Three felt, for ex-

⁵² Solemn Declaration of European Union, 16 BULL. EUR. COMM. (No. 6) 24-26 (1983).

⁵³ See *supra* note 6.

⁵⁴ COMMITTEE OF THREE REPORT, *supra* note 6, at 15-16.

⁵⁵ See Van Rijn, *supra* note 22, at 13.

⁵⁶ COMMITTEE OF THREE REPORT, *supra* note 6, at 18.

⁵⁷ 1982-1983 EUR. PARL. DOC. (No. 1-305/83/B) 4 (1982).

⁵⁸ See *supra* notes 4-10 and accompanying text.

ample, that the Community was trying to do too much.⁵⁹ Mathijesen has recently expressed the view that this decision-making practically had come to a halt.⁶⁰ But how true is it that a rather modest output is produced or does the problem lie elsewhere? The following tables clearly indicate that the output *in itself* is undoubtedly impressive. The production of regulations and decisions by the Council and the Commission in the period 1967-1977 (figure and table 1) as well as the more recent output of the Commission (figure and table 2) is voluminous. Tables 3 to 5 indisputably show that a lot of work is done in Brussels and Strasbourg and that it is highly productive.

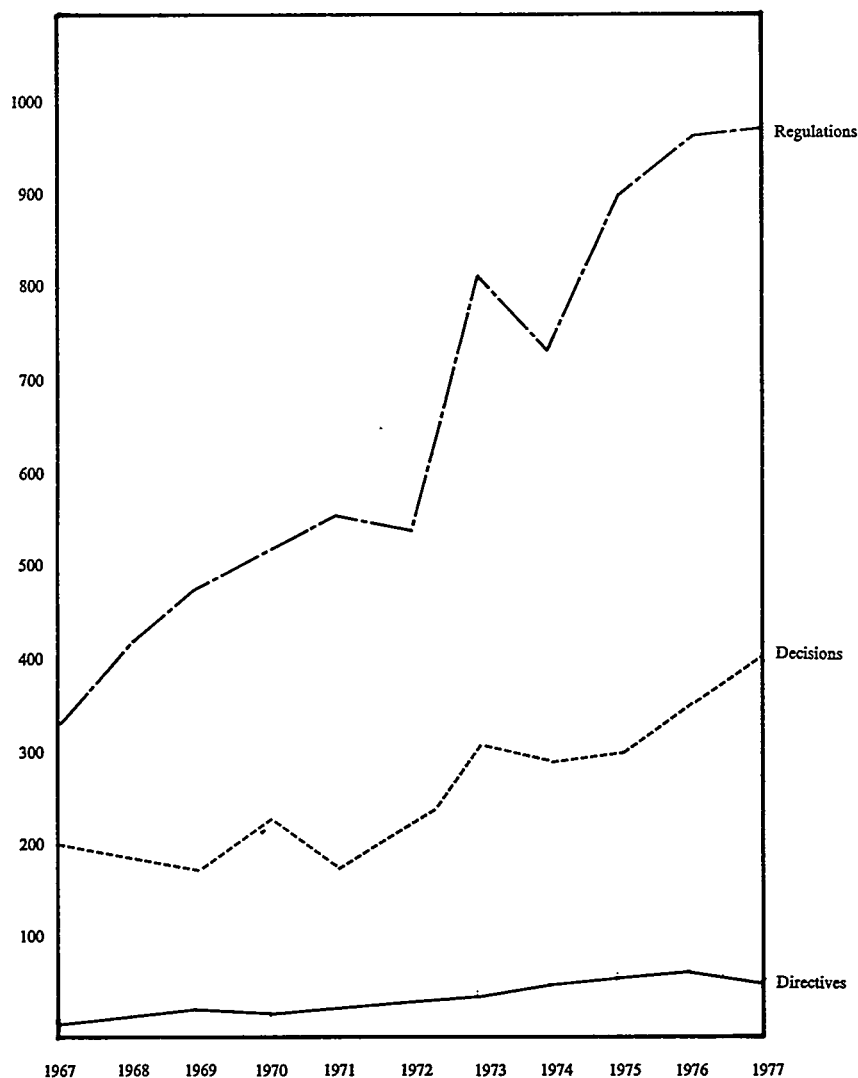
Table 1

Year	Number of Regulations	Number of Decisions	Number of Directives
1967	338	205	13
1968	415	197	24
1969	480	186	29
1970	523	236	25
1971	565	184	28
1972	542	243	37
1973	814	322	38
1974	757	293	54
1975	900	306	58
1976	964	365	71
1977	974	409	57

⁵⁹ COMMITTEE OF THREE REPORT, *supra* note 6, at 46.

⁶⁰ P. MATHIESEN, A GUIDE TO EUROPEAN COMMUNITY LAW 42 (3d. ed. 1980) [hereinafter cited as MATHIESEN].

Figure 1
Regulations, Directives and Decisions Made by Council and Commission under Article 189 EEC 1967-1977⁶¹

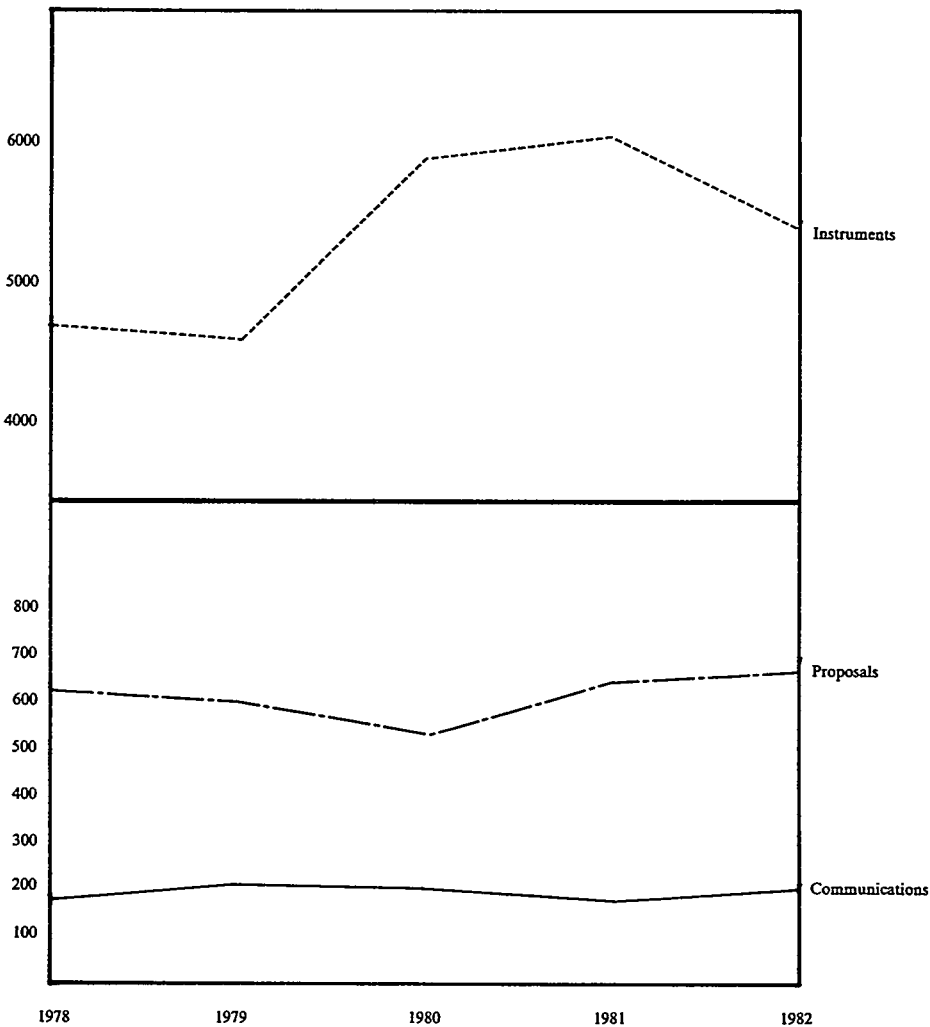


⁶¹ This data has been compiled from the official journals of the European Community from 1967-1977 by my assistant at the time, Mr. Jos Houben. The concrete information about the production of the institutions after 1979 is taken from the general reports on the activities of the European Community. The figures refer exclusively to regulations, directives and decisions as discussed in Article 189 of the EEC Treaty.

Table 2

Year	Number of Instruments	Number of Proposals	Number of Communications
1978	4799	647	178
1979	4651	616	216
1980	5901	542	208
1981	6044	651	181
1982	5321	675	202

Figure 2
*Commission's Output 1978-1982*⁶²

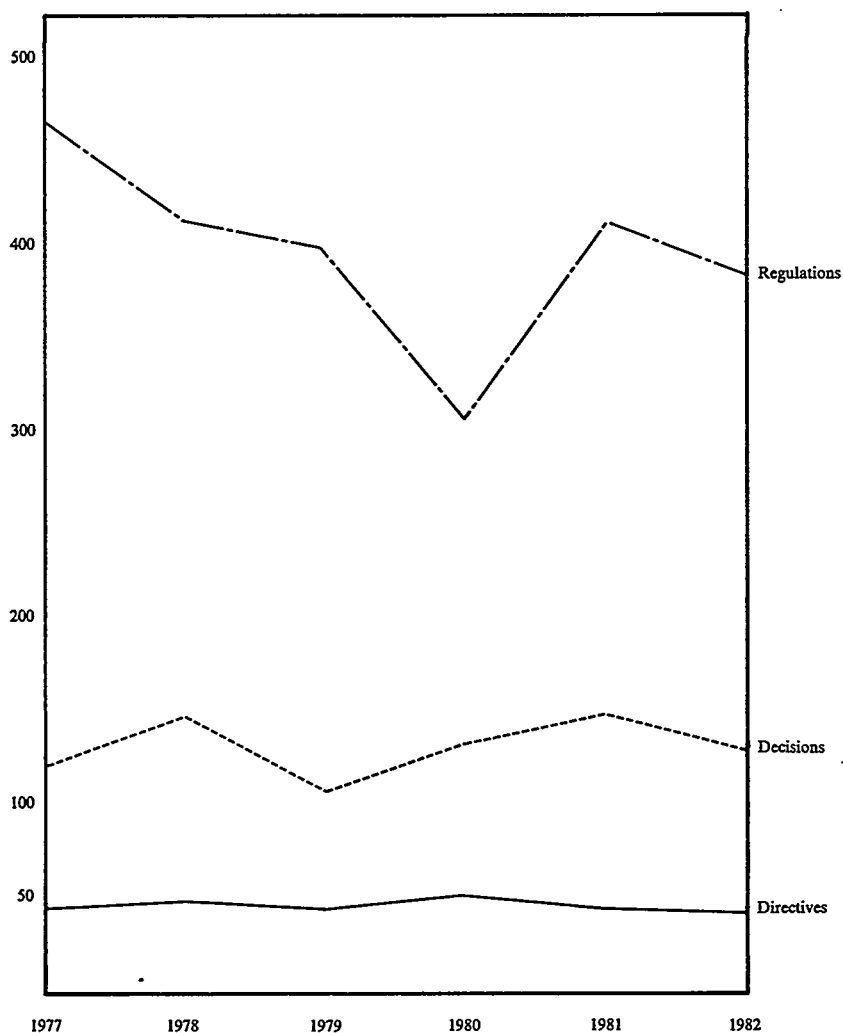


⁶² From 1979 (the 13th General Report on the Activities of the EC) a summary is given of the activities of the institutions in figures. With regard to the Commission, the figures concern commission instruments (regulations, decisions, directives, recommendations, opinions), proposals (for regulations, decisions, directives, recommendations, assents) transmitted to the Council, and communications, memorandums and reports. See 13 GEN. REP. EUR. COMM. 334 (1979); 14 GEN. REP. EUR. COMM. 28 (1981); 15 GEN. REP. EUR. COMM. 30 (1981); 16 GEN. REP. EUR. COMM. 39 (1982).

Table 3

Year	Number of Regulations	Number of Directives	Number of Decisions
1977	474	48	125
1978	414	50	150
1979	400	49	112
1980	312	51	136
1981	414	45	150
1982	393	42	128

Figure 3
Council's Output 1977-1982⁶³



⁶³ The reviews of the Councils work contain no specific figures for the Council's output; the general reports of the commission document this information only from 1980. For the figures in 1980, 1981 and 1982 see 14 GEN. REP. EUR. COMM. 29 (1980); 15 GEN. REP. EUR. COMM. 28 (1981); 16 GEN. REP. EUR. COMM. 27 (1982). The figures for 1977, 1978 and 1979 are taken from the index of the O.J. EUR. COMM., section L (legislation).

Table 4
*Number of Days Spent on Council Meetings and Meetings of
Preparatory Bodies⁶⁴*

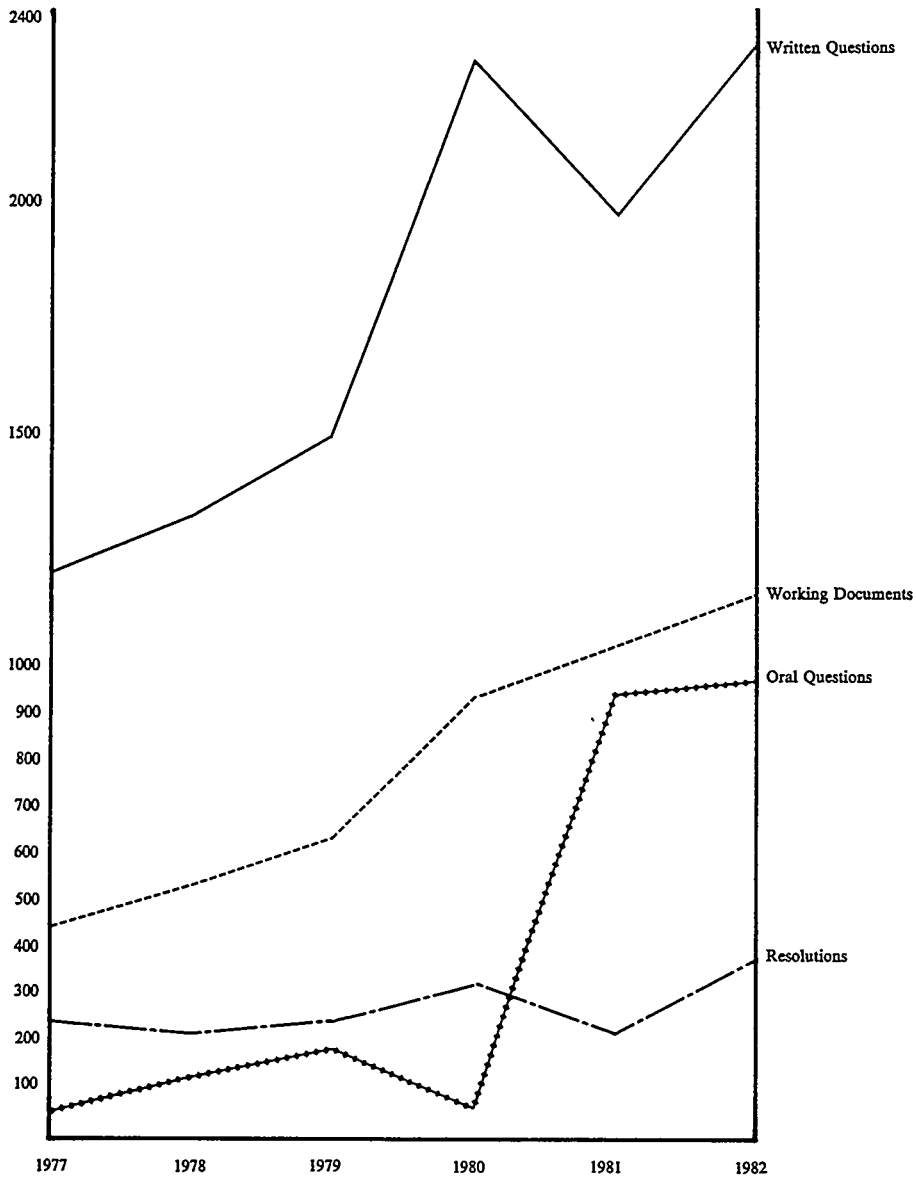
Year	Ministers	Ambassadors and Ministerial Delegations	Committees and Working Parties
	EEC/EAEC/ECSC	EEC/EAEC/ECSC	EEC/EAEC/ECSC
1958	21	39	302
1959	21	71	325
1960	44	97	505
1961	46	108	655
1962	80	128	783
1963	63½	146½	744½
1964	102½	229½	1002½
1965	35	105½	760½
1966	70½	112½	952½
1967	75½	134	1233
1968	61	132	1253
1969	69	129	1412½
1970	81	154	1403
1971	75½	127½	1439
1972	73	159	2135
1973	79½	148	1820
1974	66	114½	1999½
1975	67½	118	2079½
1976	65½	108½	2130
1977	71	122	2108½
1978	76½	104½	2090
1979	59	107½	2000
1980	83	106½	2078½

Table 5

Year	Number of Resolutions	Number of Working Documents	Number of Written Questions	Number of Oral Questions
1977	256	452	1209	84
1978	239	539	1330	125
1979	250	643	1501	197
1980	337	952	2323	85
1981	220	1063	1993	953
1982	390	1172	2344	992

⁶⁴ 28 REVIEW OF THE COUNCIL'S WORK 277 (1980).

Figure 5
Output of the European Parliament 1977-1982⁶⁵



⁶⁵ The figures concern resolutions working documents (requests for opinions reports and motions for resolution), written and oral questions. See 11 GEN. REP. EUR. COMM. 321 (1977); 12 GEN. REP. EUR. COMM. 356 (1978); 13 GEN. REP. EUR. COMM. 332 (1979); 14 GEN. REP. EUR. COMM. 28 (1980); 15 GEN. REP. EUR. COMM. 28 (1981); 16 GEN. REP. EUR. COMM. 26 (1982).

While it is true that the above data is *quantitative*, it is nonetheless important if only to prove the untenability of the statements about the demise of decision-making in the Community. For the same reason, the chairman of the Committee on institutional problems of the European Parliament is not mistaken in stating that: "[i]t's a relief, if a decision, even the smallest one, pops up from the Council."⁶⁶ In 1982 alone, the Council made decisions on 393 regulations, 42 directives and 195 decisions.⁶⁷ These figures aside, such statements also disregard the indisputable successes of the Communities. The Spierenburg Report⁶⁸ pointed out that since the founding of the Communities decisions from the Council and the Commission have led to the customs union, the common agricultural policy, free movements of persons and the common commercial policy. The Communities play an important part in the GATT negotiations and make an essential contribution to the new type of relationship which has been evolved with developing countries.⁶⁹

Admittedly, proof that the quantitative output is important does not yet say anything about its quality. The activities of the EP appear to be extensive in quantitative output, but it is not possible to draw any conclusions about the real importance and influence of this parliament. As the Committee of Three stated, "[t]here are three or four times as many Council meetings now as there were in 1958 and the lower levels of the Council machinery have ramified even faster. Yet the significance of the business concluded had not increased in proportion to the volume."⁷⁰ In other words, the conclusion must be that in the decision-making process of the Communities, the problem is not quantitative, but rather *qualitative*.

D. The Reasons for the Quality Deficit

This section will examine some examples of *general strains* on Community decision-making which contribute to this quality deficit. Here I shall focus on the influence of the national decision-making procedure, the discrepancy between the long-term goals of the Community and the Treaty instruments, and finally, the fragmentation of the Community policy. I shall then discuss *institutional strains* on the decision-making

⁶⁶ *Parlements leden Weinig Geschokt Door "Mandaats"—Crisis*, 1982 EUROPA VAN MORGEN (No. 4) 55 (Feb. 3, 1982).

⁶⁷ See *supra* note 63 and accompanying text.

⁶⁸ SPIERENBURG COMMISSION, PROPOSALS FOR REFORM OF THE COMMISSION OF THE EUROPEAN COMMUNITY AND ITS SERVICES 4 (1979) [hereinafter cited as SPIERENBURG REPORT].

⁶⁹ See also H. IPSEN, EUROPAISCHES GEMEINSCHAFTSRECHT 155-56 (1972); COMMITTEE OF THREE REPORT, *supra* note 6, at 3-5.

⁷⁰ COMMITTEE OF THREE REPORT, *supra* note 6, at 8.

machinery in the Community including the insufficient delegation to the Commission and the unanimity practice as a result of the Luxembourg Compromise.

1. General Strains

a. The Influence of the National Decision-Making Procedure

The way in which a national administration adopts the position it wants to defend in the negotiations in Brussels carries important consequences for the decision-making process within the Community.⁷¹ When the national viewpoint is determined after a strong interdepartmental co-ordination procedure, it becomes politically difficult to deviate from it in Brussels. And when such a national point of view has survived for a long time in the Commission's working groups and, later, in those of the Council, it becomes virtually impossible for the member of the Council in question to give up this point without demanding in return some kind of *quid pro quo* from the other Member States. The package deals which result from this give and take constitute a strain on the speed and efficiency of the decision-making by the Council. The same applies if national parliaments try to bind their government by instructions given in advance. Such scrutinous procedures make the search for agreement within the Council more difficult and more laborious.⁷²

On the other hand, if there is no unanimity at the national level about the margins of negotiation in Brussels, for example, because of the weak internal position of the national government in question, this can also have a disastrous effect on the decision-making process in the Council. Members of the Council will tend to avoid decisions with the result that few, if any, decisions will be made.

⁷¹ C. SASSE, REGIERUNGEN PARLAMENTE MINISTERRAT, 116-27 (1975) [hereinafter cited as C. SASSE].

⁷² Vedel Report, *supra* note 14, at 33. The most important scrutiny procedure is employed by the Danish parliament. The Danish government is obliged to negotiate in Brussels on the basis of the viewpoint of the parliamentary "Committee for the Common Market." The influence of this Committee is nicely illustrated by the recent development of the common fisheries policy. Initially, while Denmark was in the chair of the Council, the Committee blocked a final settlement of this common policy. EUROPE (No. 3518), Jan. 5, 1983, at 1. But, later, it agreed, while Germany was in the chair of the Council, with the compromise proposed by the President of the Council, the President of the Commission and the Danish Minister for Foreign Affairs. EUROPE (No. 3531), Jan. 22, 1983, at 7. A global outline of these kinds of procedures can be found in the Krieg Report (Assemblée Nationale Française, second ordinary session 1978-1979, at 11-12). A more detailed survey of parliamentary scrutiny procedures in the EC can be found in S. SASSE, *supra* note 71, at 78-115 and in J. FITZMAURICE, THE EUROPEAN PARLIAMENT 27-50 (1978). The German and British procedures, in particular, are treated in C. SCHWEITZER, DIE NATIONALE PARLAMENTE IN DER GEMEINSCHAFT—IHRE SCHWINDENDER EINFLUSS IN BONN AND WESTMINSTER AUF DIE EUROPAGESETZGEBUNG, 27-91 (1978).

b. Discrepancy Between the Long-term Goals of the Community and the Treaty Instruments

The differences in the Treaty between negative and positive integration⁷³ expose another general strain in the decision-making process. This is due to the fact that the Treaty contains few or no specific instruments for carrying out an economic, monetary and industrial policy to complement or replace the national policies in these areas.⁷⁴ An examination of article 2 of the Treaty will reveal that its two fundamental objectives are the establishment of a common market and the progressive approximation of the economic policies of the member states.⁷⁵ While the first objective has been realized the second one is still in the distant future. This is due in large measure to the fact that the Treaty contains little competence and few instruments to enable the Community institutions to realize a common socio-economic policy.⁷⁶ Add to this the fact that the Treaty itself does not contain any means or instruments to tackle new problems that were not topical subjects in 1958, for example, the energy crisis, the environmental problem or unemployment. Article 235 of the Treaty offers only a relative solution to this problem.⁷⁷ At the moment, there is almost general agreement that the Community does not have the competence required in order to act determinedly in the field of monetary and economic policy, in particular with regard to the industrial, social

⁷³ Negative integration is defined as the elimination of obstacles and the abolition of discriminations between the Member States necessary for the establishment of a common market. Positive integration is defined as the realization of common policies, viz., in the economic and monetary areas. Cf. P. MATHIESEN, *supra* note 60, at 123.

⁷⁴ Speech by S. Patijn, *Het Europese Parlement en de Besluitvorming in de Europese Gemeenschappen* 7, Colloquium, University of Leiden (Jan. 26, 1979).

⁷⁵ Article 2 of the EEC Treaty provides that:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of the Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

EEC Treaty, *supra* note 3, art. 2.

⁷⁶ While article 103 of the EEC Treaty (conjunctural policy) speaks of "measures appropriate to the "situation," article 105 (economic policies) makes possible only "recommendations on how to achieve such cooperation" of their economic policies; article 108 (balance of payments) also contains only "recommend[ations] to the Council concerning the granting of mutual assistance." Article 118 (social field) limits itself to the "task of promoting close cooperation between Member States in the social field. . . ." *Id.* arts. 103, 105, 108, 118.

⁷⁷ Article 235 of the EEC Treaty provides that:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers. The Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

EEC Treaty, *id.* at 235.

and regional policies.⁷⁸ Thus a discrepancy arises between the officially proclaimed long-term aims of the Community and the new demands of the 1980's on the one hand, and, on the other hand, the instruments, which as provided by the Treaty, are at the Community's disposal, to realize these aims. It is this discrepancy which, in my opinion increasingly frustrated the Community's decision-making machinery. The Community's institutions are blamed for not being able to realize what in the abstract is considered by the Member States to be necessary goals. But in actuality the problem is the failure of the political will to place the necessary tools and means at the disposal of the Community institutions.

c. Fragmentation

The distribution of the Commission's administrative sectors and the portfolios of the members of the Commission is another example of the way the Community decision-making process is affected.⁷⁹ Most important in this respect is the fact that the Community policy is developed only in a fragmentary way and is not part of an "overall strategy." This results in competitive relations within the Community (between the members of the Commission as well as between the different Councils) and within departments in the member states. Actually, this latter fact is not all that surprising, for the member states also do not always have a coherent "strategy" to coordinate their policies.

This "compartmentalized policy-making"⁸⁰ functioned fairly adequately in the transitional period of the EEC, when the Community's activities were based on powers which are fairly accurately defined in the Treaty. But the policymaking strategy created severe coordination problems when the attention of the Community had to be focused on policy areas for which the EEC Treaty not only provided less competence but about which there were no unanimous views in the member states either. This problem of lack of coherence and coordination of the Community's activities is indeed acknowledged, but no adequate remedy has yet been found.⁸¹

2. *Institutional Strains*

Second, there are *institutional* strains in the decision-making ma-

⁷⁸ Wallace, *Walking Backwards in Unity*, in W. WALLACE, W. WALLACE & C. WEBB, *POLICY-MAKING IN THE EUROPEAN COMMUNITIES* 310 (1978) [hereinafter cited as W. WALLACE]; C. SASSE, *supra* note 71, at 198.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See, e.g., 8 GEN. REP. EUR. COMM. 297 (1974); 9 GEN. REP. EUR. COMM. 19 (1975); 10 GEN. REP. EUR. COMM. 33 (1976).

chinery in the European Communities. One of these is the fact that the Council tries to do too much.⁸² Article 155 of the Treaty provides for a delegation of powers from the Council to the Commission⁸³ but, until now, such a delegation takes place only in a very minor way, and mainly in the agricultural area.⁸⁴ Given the large number of decisions that have to be taken in the implementation of the Treaty, this non-delegation stands in the way of an appropriate and quick decision-making by the Council.⁸⁵

However, the most important institutional strain lies in the following aspects of the decision-making procedure itself: the question of majority decisions, the Luxemburg Compromise and the importance of "vital interests."

The failure to apply the majority rules laid down in the Treaty following the Luxemburg Compromise is generally regarded as one of the most important causes of the qualitative paralysis of the Council.⁸⁶ The Luxemburg Compromise of 1966 has been able to exert such a pernicious influence because unanimity has become general practice. This unanimity practice has in particular two negative consequences. First, the practice has distorted the Treaty's institutional decision-making procedures with the result that a de facto veto stands in the way of quick and qualitatively good decisions.⁸⁷ Second, it has disturbed the balance of power between the Council and the Commission as established in the EEC Treaty, in particular cooperation as equals which enables the Commission to play an independent role as an arbiter.⁸⁸ This disturbance has led to a weakened Commission that is somewhat dependent on the Council, and in an overloaded Council which becomes the only focus of the Community activities.⁸⁹

3. Remedies

In the first place, the institutional balance between the Commission and the Council should be restored. This means a return to majority voting which would require a revitalization of article 149 of the Treaty.

⁸² See *supra* note 6.

⁸³ Article 155 of the EEC Treaty provides that: "[i]n order to ensure the proper functioning and development of the common market, the Commission shall . . . exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter." EEC Treaty, *supra* note 3, art. 155.

⁸⁴ See Van Rijn, *supra* note 22, at 27.

⁸⁵ *Id.*

⁸⁶ *Id.* at 25.

⁸⁷ COMMITTEE OF THREE REPORT, *supra* note 6, at 50-51.

⁸⁸ Cf. P. VERLOREN VAN THEMAAT I, *supra* note 25, at 147.

⁸⁹ COMMITTEE OF THREE REPORT, *supra* note 6, at 50-51.

Second, the concept of "vital interest" should be revised. As the Committee of Three stated, "[i]n the reality of the Community today, voting cannot be used to override individual states on matters which they regard as involving very important interests."⁹⁰ I have my doubts about this observation, given that the concept of "vital interest" is derived from international law.⁹¹ For example, article 27 of the Convention of Vienna,⁹² provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁹³ Moreover, article 46 of the Vienna Convention adds to this that a violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.⁹⁴ In other words, the Vienna Convention *objectified* the concept of "vital interest." Whereas consistent with the practice of the Community the concept of "vital interest" is interpreted *subjectively* with each member state itself defining what are "vital interests."⁹⁵ This is definitely the root of the problem.

These remarks are not meant to suggest that "vital interests" are not important for the member states. On the contrary, I too hold the view that it would be irresponsible and unjustifiable if one member state of the EEC forced another member state into a minority position when a *really vital subject* of the latter was at stake. The "abuse" of the Luxemburg Compromise has been twofold; the practice of unanimity was applied to less important matters with the result that unanimity became the rule and the Council no longer concerned itself with the question whether or not a "vital interest" was at stake in making certain decisions.⁹⁶ The result being that a kind of automatic veto weapon came into being. Therefore, I do not agree with the Committee of Three that "each State

⁹⁰ *Id.* at 50.

⁹¹ C. SASSE, *supra* note 71, at 140.

⁹² Vienna Convention on the Law of Treaties, May 23, 1969, 1972 NEDERLANDS TRACTEN-BLAD No. 51 [hereinafter cited as Vienna Convention Treaty].

⁹³ Article 27 of the Vienna Convention Treaty provides that; "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46." *Id.* art. 27.

⁹⁴ Article 46 of the Vienna Convention Treaty provides that:

1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Id. art. 46.

⁹⁵ COMMITTEE OF THREE REPORT, *supra* note 6, at 50.

⁹⁶ See *A Community of Twelve? The Impact of Further Enlargement of the European Communities*, 1978 BRUGES 92.

must remain the judge of where its very important interests lie.”⁹⁷ When several states have committed themselves to concerted action as is the case in the Community, then it is not acceptable that one single member state, by invoking unilaterally its “vital interest,” should be allowed to frustrate the general interest of the Community in its entirety.⁹⁸ The conclusions of the Summit of Stuttgart⁹⁹ again accentuate the necessity to do something about the problem of vital interests. As the recent report of five national institutes of international affairs concluded that:

[I]t is impossible for the Community to operate within a framework in which national governments have frequently recourse to a veto to block decisions favoured by the majority. Where existing common policies require to be managed, majority voting in the Council of Ministers must be accepted if the Community’s policy-making is not to grand to a halt.¹⁰⁰

The first step should be to objectify the criteria for defining “vital interests” as was done the Convention of Vienna. Then, arrangements and procedures ought to be agreed upon for the application of these criteria, for instance, by clearly marking off and defining the subjects and areas in which such “a vital interest” is *not* at stake. The Commission should play an important part in these procedures.¹⁰¹ If one does not want to get bogged down in a purely intergovernmental cooperation in which every member state has by definition the right of veto, then the delineation of “vital interests” is indeed the least one can do in the circumstances. But even if majority voting is restored and “vital interests” defined and restricted, two serious problems remain: (1) the overloading of the Council, and (2) the discrepancy between the long-term goals of the Community and the Treaty instruments.

The first problem is the least difficult. On condition that the practice of invoking “vital interests” will be canalized, the Council would limit itself to decisions with a general character (“framework laws”) and take such decisions by a qualified majority. All executing decisions should then be delegated to the Commission.¹⁰²

⁹⁷ COMMITTEE OF THREE REPORT, *supra* note 6, at 51.

⁹⁸ Cf. EUROPE (No. 3518) Jan. 5, 1983, at 1; EUROPE (No. 3519) Jan. 6, 1983, at 1.

⁹⁹ 16 BULL. EUR. COMM. (No. 6) 24 (1983).

¹⁰⁰ ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, THE EUROPEAN COMMUNITY: PROGRESS OR DECLINE? 45 (1983).

¹⁰¹ In the recent proposals of the European Parliament with regard to an European constitution, the Commission is assigned with the appreciation of vital interests. See EUROPE (No. 3689) Sept. 16, 1983, at 1.

¹⁰² Van Rijn, *supra* note 22, at 28 proposes a different scheme, i.e., unanimity for framework laws, a qualified majority for all decisions with a general character executing these framework laws and, finally, all other executing decisions to take by the Commission. In my opinion, however, there is no reason for the Council to decide with unanimity provided that the concept of vital interest will be revised as indicated.

The second problem, that of the discrepancy, is more complicated. Here the question is how the member states are to arrive at decisions in policy areas which so far have remained national but which are indispensable to and of crucial importance in furthering European integration. As early as ten years ago, Professor Verloren Van Themaat pointed out the important aspect of the division of powers between Community and member states in stating that: "[t]he main question here is in what fields the member states remain solely or primarily competent . . . , in what fields, on account of their interconnection, the Community powers must have priority . . . , and in what fields the member states may remain active side by side with the Community."¹⁰³

Writing in this same vein, Helen Wallace has distinguished four categories of policy sectors: (1) sectors in which the Communities have already become the primary source of policy and responsibilities have been clearly transferred away from national governments. As a consequence, the main responsibility which falls on national administrations is to ensure that their operation of national policies conforms to Community rules for example, the customs union and the common agricultural policy; (2) sectors in which responsibilities are divided, such that member states retain a national policy but have also accepted a specific Community policy in parallel. For example, member States maintain their own policies towards developing countries and at the same time participate in a Community program of development aid; (3) sectors in which the main responsibility remains with the member states. Community activities in these kinds of areas are considered as a marginal though useful contribution to the national resources. Examples include social and regional policy; and (4) sectors which remain clearly domestic because they are not in the main stream of economic management and for which the intervention of the Communities is, consequently, problematic. An example of this is education.¹⁰⁴ These sectors may be characterized as supranational sectors (1), national sectors (4) and intergovernmental sectors (2 and 3). I would add to this that in the sectors in which the main responsibility remains with the member states but for which the Treaty also provides Community tasks (the intergovernmental sectors), the responsibilities of the Communities remain vague. An example of this is the coordination of the economic policies of the member states or the realization of a common social policy.

Recent research has shown that in the functioning and working of

¹⁰³ P. VERLOREN VAN THEMAAT I, *supra* note 25, at 412-13.

¹⁰⁴ Wallace, *National Bulls in the Community China Shop: The Role of National Governments in Community Policy-Making*, in W. WALLACE, *supra* note 78, at 39, 40.

international organizations, majority decisions will not, as a rule, impose obligations.¹⁰⁵ If they do, however, as is the case of the EEC, then a vote will often be avoided, especially when important issues are at stake. Moreover, it turns out that the unanimity requirement will often form a serious impediment to a decisive and alert policy.¹⁰⁶ In addition, practice shows also that agreement through the majority rule is only conceivable if the objectives to be attained have been defined precisely and if the Community powers have been clearly delineated.¹⁰⁷

On the other hand, if the interests at issue cannot as yet be weighed precisely; if the objectives to be pursued are still so indeterminate and vague that it is rather difficult to determine which role, and to what extent, certain factors will play in the process, and if optimal procedures and instruments have not yet been developed, then unanimity seems to be unattainable.¹⁰⁸ An impasse in the decision-making will be the consequence. The above remarks suggest that a wider application of the majority rule within the Community only stands a chance in matters in the first category (accurately defined objectives, clearly defined Communitarian powers) and stands little or no chance in matters in the second category (vaguely defined objectives and no optimal procedures and instruments). Since the problems the EEC now faces involve activities of the intergovernmental sectors, they belong to this second category. Consequently, the application of the majority rule to these problems does not seem likely until they have been clearly defined in concrete terms, for instance, after an adaptation of the Treaty. Therefore, a new *Messina*¹⁰⁹ will be necessary in order to draw up a general program with time schedules and procedures with regard to these, as yet, intergovernmental policy areas. In other words, a new treaty between the member states will be required.

¹⁰⁵ P. VERLOREN VAN THEMAAT, RECTSGRONDS LAGEN VAN EEN NIEUW INTERNATIONALE ECONOMISCHE ORDE 36, 55 (1979) [hereinafter cited as VERLOREN VAN THEMAAT III].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 57-58.

¹⁰⁸ *Id.*

¹⁰⁹ At a meeting in Messina, Italy, at the beginning of June, 1955, the foreign ministers of the six announced that they intended to continue the attempt to establish a United Europe so as to preserve Europe's role in the world, restore its influence and prestige and steadily increase the standard of living of the people. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITY, STEPS TO EUROPEAN UNITY, COMMUNITY PROGRESS TO DATE: A CHRONOLOGY 16 (1981).

III. ATTRIBUTION OF LEGISLATIVE POWER TO THE EUROPEAN PARLIAMENT?

A. Powers of the European Parliament According to the EEC Treaty

1. *Participation in the Legislative Procedure*

Generally speaking, the EEC Treaty provides only for consultation on important matters such as agriculture, transport and competition,¹¹⁰ but the Council does, in fact, consult Parliament in many cases when not specifically required by the Treaty. When provided for in the Treaty, consultation constitutes an "essential procedural requirement," and failure to comply with it constitutes a ground for annulment of an act by the Court of Justice.¹¹¹

2. *Participation in the Budgetary Procedure*

Originally, the EEC Treaty provided that the EEC budget be financed by contributions of the member states.¹¹² The European Parliament could only *propose* modifications in the draft budget drawn up by the Council.¹¹³ It was the understanding that the contributions of member states would be later replaced by Community resources.¹¹⁴ This understanding was realized in 1970.¹¹⁵ As a consequence, the powers of the European Parliament were increased in 1970 and 1975.¹¹⁶ Article 203 of the EEC Treaty was amended and the EP was given two new powers. It could now accept and reject the draft budget and ask for a new draft budget,¹¹⁷ and it had final power regarding non-obligatory expenditures.¹¹⁸ However, with regard to obligatory expenditures, those that result necessarily from the Treaty or from acts adopted by its institutions,¹¹⁹ the Council remains the principal decision-making

¹¹⁰ See EEC Treaty, *supra* note 3, arts. 43, para. 2 (agriculture), 75, para. 1 (transport), and 87, para. 1 (competition).

¹¹¹ See *supra* note 31.

¹¹² EEC Treaty, *supra* note 3, art. 200.

¹¹³ *Id.* art. 203, (prior to 1970 amendment).

¹¹⁴ *Id.* art. 201.

¹¹⁵ *Decisions on the Replacement of Financial Contributions from Member States*, 13 J.O. EUR. COMM. (No. L 94) 19 (1970).

¹¹⁶ The Treaty amending certain budgetary provisions of the Treaties establishing the European Communities and the Merger Treaty of April 22, 1970, 14 J.O. COMM. EUR. (No. L 2) 1 (1971) (entered into force Jan. 1, 1971). The Treaty amending certain financial provisions of the Treaties establishing the European Communities and the Merger Treaty of July 22, 1975, 20 O.J. EUR. COMM. (No. L 359) 1 (1977) (entered into force June 1, 1977).

¹¹⁷ EEC Treaty, *supra* note 3, art. 203.

¹¹⁸ *Id.* art. 203, paras. 4, 5.

¹¹⁹ *Id.* art. 203, para. 4.

body.¹²⁰

The question of which expenditures are obligatory or non-obligatory, however, is differently interpreted by the Parliament and the Council.¹²¹ The continuing differences of opinion between the three institutions on this problem resulted in serious difficulties for the budgetary procedures after 1979.¹²² On June 30, 1982, a joint declaration was signed by the Presidents of the Council, the Commission and the European Parliament, respectively, which contained a new classification of expenditure.¹²³ But, at the end of 1982, new difficulties arose on the classification of the expenditures covering the financial impact of the compensation to the United Kingdom for that year.¹²⁴ The Council had classified these as obligatory, in consideration of which the EP recognized the non-obligatory character of these expenditures.¹²⁵ The powers of the EP in the budgetary procedure have certainly increased. However, as the Vedel Report stated: "there should be no illusions about the Parliament's budgetary power In the Community, as in the States, the budget in the main does nothing more than put figures to decisions taken 'upstream.'" ¹²⁶

3. *Parliamentary Questions*

The EEC Treaty only provides for the possibility of questioning the Commission.¹²⁷ But the EP extended this obligation to, and was accepted by, the Council in 1958.¹²⁸ In 1962, the EP introduced the procedure of oral questions followed by a debate which was again accepted by the Council and by the Commission. Finally, in 1973, the question time in which Council and Commission agreed to participate was introduced.¹²⁹

¹²⁰ *Id.* art. 203, para. 5. The obligatory expenditures represent about 75% of the Community budget.

¹²¹ The Treaty contains only a vague definition of obligatory expenditures. *See supra* note 27.

¹²² *See* 12 GEN. REPORT EUR. COMM. 48 (1978); 13 GEN. REPORT EUR. COMM. 46 (1979); 14 GEN. REPORT EUR. COMM. 50-53 (1980); 15 GEN. REPORT EUR. COMM. 49 (1981).

¹²³ *See Joint Declaration By the Three Constitutions*, 15 BULL. EUR. COMM. (No. 6) 7 (1982). The three institutions defined compulsory expenditure as "such expenditure as the budgetary authority is obliged to enter in the budget to enable the community to meet its obligations, both internally and externally, render the treaties and acts adopted in accordance therewith." *Id.* at 7-8.

¹²⁴ 15 BULL. EUR. COMM. (No. 10) 54 (1981).

¹²⁵ 26 O.J. EUR. COMM. (No. C 13) 67 (1983). *See also* EUROPE (No. 3539), Feb. 3, 1983, at 1.

¹²⁶ Vedel Report, *supra* note 14, at 30; *see also* P. VERLOREN VAN THEMATAAT I, *supra* note 25, at 140.

¹²⁷ EEC Treaty, *supra* note 3, art. 140, para. 3.

¹²⁸ P. MATHIJSEN, *supra* note 60, at 25-26.

¹²⁹ *Id.* at 25-26.

4. *Conciliation Procedure in the EP*

During the negotiations for the Treaty amending certain financial provisions in 1975, a Joint Declaration of the European Parliament, the Council and the Commission was adopted instituting a conciliation procedure in the event of the Council departing from the opinion of the EP.¹³⁰ The above-mentioned joint declaration of June 30, 1982, on various measures to improve the budgetary procedure¹³¹ contains an improvement of this conciliation procedure between the three institutions.¹³² In addition, procedures have been developed, in practice, through the competent parliamentary committees which have increased the Commission's parliamentary responsibility and the consultation of the EP by the Council.¹³³ In practice these procedures depart markedly from what was originally intended. This, in part, is a result of the lack of flexibility of the Council: package agreements in the Council are usually concluded even before discussion starts with the various parliamentary delegations.¹³⁴ Altogether, these developments remain marginal and the direct elections of 1979 have not as yet added any substantial improvements to the EP's position.¹³⁵

5. *Motion of Censure*

The power to dismiss the Commission as a body by the adoption of a motion of censure¹³⁶ appears to be a rather impressive power, but, in fact, it is not. Such a motion is not addressed to the real decision-maker in the Community which is the Council. As a result, the Council which bears the ultimate responsibility for the activities of the Community is left outside the reach of the EP.¹³⁷

6. *Article 175 of the EEC Treaty*¹³⁸

At the end of 1982, for the first time in the history of the Communities, the European Parliament decided to bring proceedings against the Council before the Court of Justice for failure to act on the common

¹³⁰ 18 O.J. EUR. COMM. (No. C 89) 1 (1975); *see also* P. MATHIJESSEN, *supra* note 60, at 24.

¹³¹ *See supra* note 124.

¹³² 14 BULL. EUR. COMM. (No. C 89) 1 (1975); *see also* P. MATHIJESSEN, *supra* note 60, at 24.

¹³³ *See supra* note 124.

¹³⁴ 14 BULL. EUR. COMM. (No. 12) 10 (1981); *see also* 16 GEN. REP. EUR. COMM. 53 (1982).

¹³⁵ P. VERLOREN VAN THERMAAT II, *supra* note 40, at 97-98.

¹³⁶ *See* P. MATHIJESSEN, *supra* note 60, at 33; P. VERLOREN VAN THERMAAT II, *supra* note 40, at 181.

¹³⁷ *See* P. MATHIJESSEN, *supra* note 60, at 33.

¹³⁸ EEC Treaty, *supra* note 3, art. 144.

transport policy.¹³⁹ Two months before, and in conformity with article 175 of the Treaty,¹⁴⁰ Parliament had instructed its President to call upon the Council to act, accusing it of failing to do so in the field of common transport policy.¹⁴¹ The problem with this supervisory power is, however, that the only avenue open to the Court of Justice is to declare that the failure to act is contrary to the Treaty, so that the Court action remains virtually without direct consequences.¹⁴²

In conclusion, it is evident that the EP has few real powers. To a large degree the functions are, indeed, advisory and relate to the communication of ideas, the gathering of information and the formation and expression of public opinion on Community matters.¹⁴³ The budgetary powers have certainly increased, but within the institutional system of the Treaty there is no place for a European Parliament that can determine in a decisive way the substance of the Community budget.¹⁴⁴ Moreover, the budget of the Community fulfills quite a different function from the budgets of states in earlier ages.¹⁴⁵ And as the result of the recent application of article 175 of the Treaty will undoubtedly illustrate, such an action will produce little effect as long as the member states are lacking the political will to pursue a well defined policy. The direct elections have as yet contributed little to change this situation.¹⁴⁶

B. Proposals for Improvement

1. *The 1972 Vedel Report*

The proposals contained in the Vedel Report are formulated against the background of an economic and monetary union,¹⁴⁷ and concern mainly the enlargement of the powers of the European Parliament.¹⁴⁸

¹³⁹ Cf. P. MATHIJESSEN, *supra* note 60, at 27.

¹⁴⁰ Article 175 of the EEC Treaty provides that; "[s]hould the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions or the Community may bring an action before the Court of Justice to have the infringement established." EEC Treaty, *supra* note 3, art. 175, para. 1.

¹⁴¹ 16 GEN. REPORT EUR. COMM. 24 (1982).

¹⁴² Article 175 paragraph 2 of the EEC Treaty provides that; "[t]he action [against the Council or the Commission] shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months. EEC Treaty, *supra* note 3, art. 175, para. 2.

¹⁴³ *Transport: Proceedings Against the Council for Failure to Act*, 15 BULL. EUR. COMM. (No. 9) 57 (1982).

¹⁴⁴ P. MATHIJESSEN, *supra* note 60, at 32.

¹⁴⁵ T. HARTLEY, *THE FOUNDATION OF EUROPEAN COMMUNITY LAW* 18 (1981).

¹⁴⁶ Cf. P. VERLOREN VAN THEMATAAT II, *supra* note 40, at 156.

¹⁴⁷ P. VERLOREN VAN THEMATAAT I, *supra* note 25, at 140.

¹⁴⁸ See *supra* note 135.

But the Report also discusses the position of the Commission and the Council in the Community.¹⁴⁹

One of the proposals recommends a gradual increase in legislative powers. As a first step, Parliament would be given: (1) a parallel decision-making power in matters which materially involve either the Community's constitutive power or its relations with other persons in international law,¹⁵⁰ and (2) the power to veto measures directed at harmonizing legislation which has important effects on national laws, or questions of principle affecting common policies which may also involve harmonization measures.¹⁵¹ This veto power would, in a second step, be transformed into a genuine power of shared decision-making such that a Council decision, for example, would not come into force without being approved by the Parliament.¹⁵² With regard to the budgetary power of the EP the report emphasizes that the gap between the budgetary power proper and the power to make decisions with financial implications will disappear as soon as this concept of shared decision-making is extended to the EP.¹⁵³

Secondly, the Report underscores the need for an increase in EP power. In addition to the utilization of parliamentary procedures and an improvement in relations with the Council, the Report accentuates the parliamentary investiture of the President of the Commission.¹⁵⁴ With respect to the relations between the EP and the national parliaments after direct elections, the Report stresses the necessity of constructing some sort of communications network that engenders consensus.¹⁵⁵ Regarding the Council, the Report stresses that the majority principle of voting should be reactivated.¹⁵⁶

2. Reports from Community Institutions

At the Paris meeting of December 1974, the heads of government asked the Community institutions to present a report on the plan for the European Union. They agreed also to instruct Mr. Tindemans, at the time Belgium's Prime Minister, to prepare a summary report on the basis

¹⁴⁹ Vedel Report, *supra* note 14, at 34.

¹⁵⁰ *Id.* at 31.

¹⁵¹ *Id.*

¹⁵² *Id.* at 39. List A includes: revision of the EEC Treaty (Articles 201 and 236), implementation of Article 235, admission of new members and ratification of international agreements by the Community.

¹⁵³ *Id.* at 39-41.

¹⁵⁴ *Id.* at 47-48.

¹⁵⁵ *Id.* at 55.

¹⁵⁶ *Id.* at 58.

of the reports presented by the institutions and his consultations with the governments and representative sectors of public opinion in the Community.¹⁵⁷ The following is a brief summary of the reports from the Community institutions.

a. Commission Report

In its report on the institutional structure of the European Union, the Commission examined the question of executive power and recommended that the most suitable model, once the European Union was fully under way, would be a collegial body, whose members would be independent of the national government. This organ would absorb all the executive functions of the Council as well as the executive and administrative functions together with the power of initiative of the present Commission.¹⁵⁸ With regard to the legislative branch, the Commission recommended that a bicameral system consisting of a Chamber of Peoples and a Chamber of States; the latter designated by the national governments.¹⁵⁹

b. European Parliament Report

The report from the EP voiced strong support for a European Union based on an institutional structure which contains the following three organs. First, a body, within which participation by the member states in the decision-making process of the Union will be guaranteed; second, a Parliament having budgetary powers and powers of control participating on at least an equal footing in the legislative process; finally, a single decision-making center which will be in the nature of a real European government, independent of the national Governments and responsible to the Parliament of the Union.¹⁶⁰

c. Court of Justice Report

In its report the Court of Justice anticipated the problem of a possible clash between legislative enactments and the Treaty provisions. If and when this occurred, the Court of Justice saw itself as the appropriate body to exercise judicial review.¹⁶¹

¹⁵⁷ *Id.* at 71.

¹⁵⁸ *Id.* at 77.

¹⁵⁹ *Reports on European Union*, 8 BULL. EUR. COMM. (No. 9) 5 (Supp. 1975).

¹⁶⁰ 8 BULL. EUR. COMM. (No. 9) 11 (Supp. 1975).

¹⁶¹ *Id.*

d. Economic and Social Committee Report

The Economic and Social Committee in its report called for a European Parliament elected by universal suffrage whose legislative function in all the matters coming within Community jurisdiction will have to be progressively assigned. This Parliament would be responsible for adopting the budget, passing Community laws, and supervising the application of such laws. It would also be empowered to take action on its own initiative in certain areas.¹⁶²

The Committee suggested looking at the executive function from two perspectives. First, during the transition period before the achievement of a full-fledged European Union, the main decision-making powers should be vested in the Council, while the implementing powers should fall within the purview of the Commission.¹⁶³ During this interim stage the Council of Ministers should include one or two permanent ministers from each member state. These ministers should be members of their respective governments with powers delegated to them. To lend their deliberations in the Council the requisite effectiveness, they could be accompanied by specialist ministers according to the agenda.¹⁶⁴ The Council of Ministers should be allowed to take part in the debates of the Parliament, help in the drafting of Community legislation and together with the Commission ensure that such legislation is implemented in the member states.¹⁶⁵

The Commission, as the concrete expression of the Community, must possess wide initiative and executive powers. For this reason, the Economic and Social Committee considers that the Commission should lay before the European Parliament a program setting out the objectives it proposes to attain during its term of office and the means it intends to use to attain them. In the final stage of European Union, the members of the Commission should be appointed by the European Parliament using the method just described.¹⁶⁶ The Commission, in consultation with the Council of Ministers, would be responsible for drawing up draft Community legislation for submission to the Parliament, and for defending such draft legislation before Parliament.¹⁶⁷

¹⁶² *Id.*

¹⁶³ *Id.* at 18.

¹⁶⁴ *Id.* at 29.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

3. *The Tindemans Report*

Tindemans proposed the following changes for the European institutions. With regard to the powers of the European Parliament, the Tindemans Report stated that:

[T]he Council should immediately allow the EP to take initiatives by undertaking to consider the resolutions which Parliament addresses to it. This would permit the Assembly to make an effective contribution towards defining common policies. In the course of the progressive development of the European Union this practice should be given legal value through a Treaty amendment, which would accord to the Parliament a real right of initiative. Parliament should be able to consider all questions within the competence of the Union, whether or not they are covered by the Treaties.¹⁶⁸

With regard to the Council of Ministers, the Tindemans Report stated that:

[t]he Council of Ministers (foreign affairs) should be entrusted by a decision of the European Council with coordinating in the most appropriate manner the activities of the specialist Councils, and the distinction between ministerial meetings devoted to political cooperation and meetings of the Council should be abolished Recourse to majority voting in the Council should become normal practice in the Community.¹⁶⁹

With respect to the Commission and its role in the execution and administration of common policies within the Community, Tindemans recommended that greater use be made of article 155 of the Treaty, which provides for such powers to be conferred on the Commission.¹⁷⁰ The authority and cohesion of the Commission, he felt, should be increased by having the President of the Commission appointed by the European Council.¹⁷¹ The President of the Commission would then appoint his colleagues in consultation with the Council, bearing in mind the number of Commissioners allocated to each country.¹⁷²

4. *Fresco on Enlargement 1978*

Against the background of the accession of Greece, Portugal and Spain to the Communities, the Commission analyzed the institutional consequences of this enlargement in the so-called "Fresco" of April 20, 1978.¹⁷³ The Commission emphasized that the functioning of the Com-

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Tindemans, *Report to the European Council on the European Union*, 9 BULL. EUR. COMM. (No. 1) 29 (Supp. 1976).

¹⁷¹ *Id.* at 30-31.

¹⁷² *Id.* at 31.

¹⁷³ *Id.*

munity institutions should be improved in order to combat the tendency of decision-making procedures becoming more cumbersome due to the enlargement of the Community's membership. The main changes would be: (1) to make greater use of majority voting on matters which practical experience has shown to be suitable for majority voting; (2) to have the Commission, as a rule, exercise administrative and executive functions; and (3) to take greater care in deciding which of the legal instruments provided for by the Treaties is to be used in each case and how it is to be implemented.¹⁷⁴

5. *The Spierenburg Report of 1979*

Although the Spierenburg Report only concerns the internal organization of the Commission, it contains some suggestions which also bear on the decision-making process as a whole. The following recommendations were made: (1) the number of portfolios assigned to the members of the Commission should be limited to eight;¹⁷⁵ (2) the arguments for a small Commission of twelve members (one from each member state) must prevail over those for a larger Commission of, for example, seventeen members;¹⁷⁶ and (3) the governments should not insist on the appointment to the Commission of the candidate of their first choice, if the President-elect makes an objection. In that case they should nominate a second candidate.¹⁷⁷

6. *Report of the Committee of Three*

The Committee of Three was entrusted by the European Council with a mandate to consider adjustments to the machinery and procedures of the Community institutions.¹⁷⁸ Its hefty report contains suggestions concerning the three main institutions. First, the committee recommended that the Council should strengthen the Presidency in its dual role of organizational control and political impetus and ensure that the Presidency has the authority to impose order and discipline in the work of the Council and its subordinate bodies.¹⁷⁹ Concomitantly, the Council's burden of decision-making should be reduced by delegating some of its functions to the Commission and by delegating decisions of little or no political significance to lower levels in the Council's own machinery.¹⁸⁰

¹⁷⁴ *Id.*

¹⁷⁵ 11 BULL. EUR. COMM. (No. 2) 9, 11-12 (Supp. 1978).

¹⁷⁶ For more details, see 11 BULL. EUR. COMM. (No. 2) 11-12 (Supp. 1978).

¹⁷⁷ SPIERENBURG REPORT, *supra* note 68, at 32.

¹⁷⁸ *Id.* at 43.

¹⁷⁹ *Id.* at 47.

¹⁸⁰ COMMITTEE OF THREE REPORT, *supra* note 6, at 1.

In all cases where the Treaty does not impose unanimity and very important interests are not involved for any state, voting should be the normal practice after an appropriate but limited effort for consensus has been made, and a state which wants to avert a vote because of very important interest should say so clearly and explicitly.¹⁸¹ Second, it was recommended that the Commission continue to present its overall working program to the Parliament for debate at regular intervals and every six months representatives of the Commission should hold talks with the managers of parliamentary business to plan on a consultative program for the coming period.¹⁸² In addition, all Commissioners should be prepared to appear in person before the EP.¹⁸³ Finally, with regard to the European Parliament, the report stressed the need to better relations between members of the EP and their respective national parliaments.¹⁸⁴ It recommended appointing junior ministers to take over the main tasks of liaison between the Council, and the EP¹⁸⁵ The report also looked into the Commission—Parliament—Council triangle noting that it was incomplete without direct contact between the EP and the European Council.¹⁸⁶ A bi-annual report to it by the President of the European Council in person was seen as a possible solution.¹⁸⁷

7. Report on the Mandate of May 30, 1980

The mandate given to the Commission by the Council on May 30, 1980 concerned the common agricultural policy, structural changes and the budgetary problem, in particular regarding the British contribution.¹⁸⁸ With regard to the institutional aspect, the Commission in its report of June 1981 expressed the firm view that a return to the institutional balance provided for in the Treaties would help to re-establish the unity of purpose which prevailed when the Community was created.¹⁸⁹ Absent a decision-making process based on a better balance between the contributions made by all the institutions, the Community would never regain its dynamism or live up to the expectations of the people of Europe.¹⁹⁰

¹⁸¹ *Id.* at 35.

¹⁸² *Id.* at 47.

¹⁸³ *Id.* at 51.

¹⁸⁴ *Id.* at 78.

¹⁸⁵ *Id.* at 79.

¹⁸⁶ *Id.* at 77.

¹⁸⁷ *Id.* at 79.

¹⁸⁸ *Id.* at 81.

¹⁸⁹ *Id.*

¹⁹⁰ COMMISSION OF THE EUROPEAN COMMUNITY, COMMISSION REPORT ON THE MANDATE OF MAY 30, 1980 12, 21 (June 24, 1981).

8. *Investiture Resolution of the European Parliament of 1981*

On February 12, 1981 the European Parliament adopted a resolution approving the appointment of the Commission and reiterating its request to participate in the future in that exercise.¹⁹¹

9. *Institutional Debate in the European Parliament in July 1981*

In its July 7 to 9, 1981 session, the European Parliament tackled the subject of relations between the institutions. The thread running through all the reports and draft resolutions was a resolve to recast relations between the institutions so as to give Parliament more power.¹⁹² Two approaches emerged during the debate. The first, a policy of "small steps" or proposals aimed initially at improvements within the bounds of the existing Treaties was reflected in resolutions on Parliament's right of initiative and its role in the legislative process.¹⁹³ The second approach, advocated by the EP members of the so-called "Crocodile Club," was aimed at recasting relations between the institutions by means of a revision of the Treaties.¹⁹⁴ To this end the EP decided to set up a standing Committee on institutional problems.¹⁹⁵

10. *French Memorandum of October 1981*

In October 1981, the French Government sent to the member states and the EC institutions a memorandum on the revitalization of the Community, which contained no institutional innovations. According to the memorandum, the Community already has institutions with considerable powers, and it is not necessary either to increase their powers or to alter the balance between them.¹⁹⁶ Furthermore, it states that, "[w]ithin the institutional framework laid down in the Treaties, an effort should be made to improve the operation of the Community and cooperation between its institutions."¹⁹⁷

In the institutional context, the French government stressed that a more extensive application of the voting provisions in the Treaties would enable the Council to make its decisions more quickly.¹⁹⁸ France then proposed that the President should call for a vote where prescribed by the Treaty, on the understanding that voting could be deferred if one or

¹⁹¹ *Id.* at 3.

¹⁹² *Id.*

¹⁹³ 14 BULL. EUR. COMM. (No. 2) 48-49 (1981).

¹⁹⁴ 14 BULL. EUR. COMM. (No. 7/8) 66 (1981).

¹⁹⁵ 15 GEN. REP. EUR. COMM. 25 (1981).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ 14 BULL. EUR. COMM. (No. 11) 93 (1981).

more member states so requested in order to defend an essential national interest.¹⁹⁹ The Memorandum stated that:

[i]t would also be useful to devote some attention to relations between the Council and the European Parliament and the conditions under which Parliament carries out its role in the institutional complex. This review should take into account the difficulties which have arisen in connection with the budget in recent years and the European parliament's desire to play a more active part in the Community's legislative process. Serious consideration should also be given to relations between the European Parliament and the national parliaments.²⁰⁰

11. Commission Communication of October 14, 1981

In a communication to the Council and the European Parliament on October 14, 1981, the Commission also commented on the role of the European Parliament in the decision-making process.²⁰¹ Stressing the importance of EP's role in this process, the Commission emphasized that cooperation between Commission and Parliament in particular must not be allowed to interfere with the responsibilities assigned specifically to the Commission by the Treaties, namely the Commission's right to initiate Community legislation which is specified as one of the original and cardinal features of the Community structure.²⁰² The communication stated that "[w]hile it is accordingly keen that Parliament should engage in moves of its own, and fully intends to give these every possible support, the Commission feels it must also state forthrightly that parliamentary participation in the actual decision-making process cannot be other than at the expense of the Council's quasi-monopoly of this."²⁰³ With regard to the legislative power of the EP, this document seems somewhat ambiguous. On the one hand the Commission expresses the feeling that, on the whole, existing procedures provide Parliament with the means of acquiring a fair measure of influence.²⁰⁴ Yet, on the other hand, the Commission feels "that any new treaty should define the direction in which Parliament's powers should be extended, providing in particular for Parliament to be given certain legislative powers. . . ."²⁰⁵

12. Genscher-Colombo Proposals

On November 19, 1981, the German Foreign Minister, Mr. Gen-

¹⁹⁹ *Id.* at 100.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *The Institutional System of the Community*, 15 BULL. EUR. COMM. (No. 3) 8 (Supp. 1982).

²⁰⁴ *Id.* at 8-9.

²⁰⁵ *Id.*

scher, and the Italian Foreign Minister, Mr. Colombo, presented to the European Parliament their respective governments' proposals for a "*European Act*" and a draft declaration on economic integration.²⁰⁶ This initiative by the Federal Republic of Germany and Italy was the extension on the institutional level of the proposals for the consolidation of Community policies made by the French Government in its memorandum of October.²⁰⁷ In the Genscher-Colombo Report the following points merit attention: (1) closer links between Council meetings and meetings of ministers to promote greater political cooperation within the limits imposed by existing procedures and without making any amendments to the Treaties; (2) careful consideration of the question of voting in the Council; and (3) improvement of relations with the European Parliament.²⁰⁸ However, the follow-up of this report, the Summit of Stuttgart, held from June 17 to 19, 1983, has been rather disappointing. Mention already has been made of the fact that the situation in the Council with regard to the voting procedure has continued to deteriorate since this summit.²⁰⁹ With respect to the Council/Parliament relation, the position adopted by the EP itself is significant. On June 30, 1983, the EP adopted a resolution expressing disappointment at the outcome of the Stuttgart Summit.²¹⁰

13. *Conclusions*

In conclusion the proposals summarized above are in varying degrees concerned with the relation between the Council, the Commission and the European Parliament. What is striking about them is that only the Vedel Report and the reports of the Economic and Social Committee and the European Parliament emphasize in fairly strong language the need to grant legislative power to the EP. The other proposals, in contrast, are silent on this point. The Commission holds a somewhat ambiguous position,²¹¹ and the recent German/Italian proposals for a "*European Act*"²¹² contain, in fact, no real legislative responsibilities for the European Parliament²¹³ which is confirmed by the Summit of Stutt-

²⁰⁶ *Id.* at 9. See also *id.* at 11.

²⁰⁷ *Id.* at 12.

²⁰⁸ 14 BULL. EUR. COMM. (No. 11) 10 (1981). The texts of the two drafts are reproduced in this bulletin at pages 87-91.

²⁰⁹ 15 GEN. REPORT EUR. COMM. 25 (1981).

²¹⁰ 15 BULL. EUR. COMM. (No. 2) 53 (1982); see also A. LAREDO, 2 *INTEGRATION ET DEMOCRATIE* 73-75 (1982).

²¹¹ See *supra* notes 50-52 and accompanying text.

²¹² 16 BULL. EUR. COMM. (No. 6) 105 (1983).

²¹³ See *supra* notes 201-205 and accompanying text. Such an ambiguous position also appears in the recent report of E. Cerexhe, *Rapport sur l'Avenir Institutionnel des Communautés Européennes*

gart in its declaration on European Union.²¹⁴ The partisans of legislative powers for the EP suggest in fact that the position of the European Parliament in terms of legal status and formal powers should be equal to that of any other Western European national assembly.²¹⁵

C. Arguments Against Granting Legislative Power to the European Parliament

1. *The Trias Politica of Montesquieu*

The principle that a parliament should be equipped with legislative power goes back to the ideas of Charles de Secondat, Baron of Brede and Montesquieu, expressed in his book, *De l'Esprit des Loix*, published in 1748, and in particular chapter VI of the eleventh book, *De la Constitution de l'Angleterre*.²¹⁶ In this chapter, Montesquieu distinguishes three powers in the state; the legislative, the executive and the judicial power.²¹⁷ Political freedom²¹⁸ can only exist, says Montesquieu, if these three powers are separated.²¹⁹ The legislative power in the proper sense²²⁰ should be given to the people or its representatives²²¹ with a veto for the nobility.²²² The legislative power should also have the capacity to control the execution of the laws,²²³ while the executive power, in turn, should take part in the legislature by a right of veto.²²⁴ In this way, a balance of powers will be established which will prevent abuse of power.²²⁵ Montesquieu's theory of the *trias politica* has exercised an important influence on the constitutions established in the 18th and 19th centuries, in particular on the Constitution of the United States which embodies this concept of separation of powers.²²⁶ Such a strict divorce of

dans la Perspective d'un Enlargissement, 1982 ASSOCIATION DES INSTITUTS D'ÉTUDES EUROPEENNES 57 (1982).

²¹⁴ *Id.* at 52.

²¹⁵ EUROPE (No. 3532) Jan. 24/25, 1983, at 1.

²¹⁶ 16 BULL. EUR. COMM. (No. 6) 102 (1983).

²¹⁷ See COMMITTEE OF THREE REPORT, *supra* note 6, at 74; T. HARTLEY, *supra* note 145, at 18, 25.

²¹⁸ E. LABOULAYE, OEUVRES DE MONTESQUIEU (1875) [hereinafter cited as E. LABOULAYE].

²¹⁹ *Id.* vol. 11, at 4.

²²⁰ Often it is forgotten that what Montesquieu means by "political freedom" only refers to the freedom which is achieved by providing in the constitution a certain degree of separation of the three powers and not the freedom in connection with the rights of citizens, which is discussed in volume 12. See *id.* vol. 11, at 1.

²²¹ E. LABOULAYE, *supra* note 218, vol. 11, at 8-11.

²²² Legislative powers is defined as the faculty to make statutes. *Id.* at 14.

²²³ E. LABOULAYE, *supra* note 218, vol. 11, at 11.

²²⁴ *Id.* at 14.

²²⁵ *Id.* at 17.

²²⁶ *Id.* at 19.

the executive from the legislature does not exist, however, in the West European parliamentary systems.²²⁷

Moreover, the theory of the *trias politica* is now obsolete in Western Europe for several reasons.²²⁸ In the first place, a pure separation of powers, in the sense that *one* organ can only exercise *one* power, is not quite possible. Even in the Constitution of the United States the strict separation of powers is mitigated by the Presidential veto and by his right to propose legislation.²²⁹ Second, the numerous functions of the modern welfare state cannot be described and understood if we start only from the three powers of Montesquieu.

In Montesquieu's scheme, the executive power is limited to the execution of the laws adopted by Parliament, but modern government covers much more than "execution of laws."²³⁰ In modern times the rule-making process has changed fundamentally in two respects. On the one hand, the legislator leaves the framing, amplification, refining and continuous adaptation of general rules in the hands of the executive.²³¹ On the other, rules in the sense of the totality of binding decisions do not have to be made through passing laws.²³² The result has been that Parliament retired as a legislator and cleared the way for the phenomenon of an increasing delegation with "*Freies Ermessen*" for the administration and more and more "*Unbestimmte Gesetzesbegriffe*."²³³ Finally, the separation of powers according to the *trias politica* in a "watchman-state"²³⁴ does not fit in modern welfare states, in which there exist not three but various powers influencing government including, but not limited to, pressure-groups, trade unions, multinational companies and the civil service.²³⁵

²²⁷ *Id.* at 5.

²²⁸ U.S. CONST. art. I, § 1 (the legislative power); *id.* art. II, § 1 (the executive power); *id.* art. III, § 1 (the judicial power).

²²⁹ See G. SMITH, *POLITICS IN WESTERN EUROPE* 128 (1972); S. FINER, *FIVE CONSTITUTIONS* 22 (1979).

²³⁰ As early as 1829, Mohl, the German constitutionalist called this theory a theoretical mistake with many disadvantageous consequences to society and science. R. MOHL, *I DAS STAATSRRECHT DES KONIGSREICHES WURTEMBERG* 22 (1829).

²³¹ W. MURPHY & J. TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW* 3 (1977).

²³² See B. JEANNEAU, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 97 (1981) [hereinafter cited as B. JEANNEAU]. Illustrative of this evolution is the new Dutch constitution that came into force on February 17, 1983. This new constitution does not supersede the old provisions concerning the executive power of the King, but contains a new provision (art. 89, para. 4), which recognizes the necessity of delegation by the formal legislator to the government.

²³³ INTERIM REPORT OF THE COMMITTEE WETGEVINGSVRAAGSTUKKEN STAATSUITGEVERIJ 10 (1982).

²³⁴ G. SMITH, *supra* note 229, at 203.

²³⁵ *Macht en onmacht van de wetgever*, in *OPSTELLEN* 70 (1978) (written for the occasion of the 15th Anniversary of the Law Faculty of Tilburg).

2. *The European Communities and the Rule of Law*

Some elements of the ideas of Montesquieu have been adopted by the West European idea of the "*Rechtsstaat*."²³⁶ It is worth mentioning here, as far as the institutional aspects are concerned, the principle of balance of powers in the State as a guarantor of individual freedom and pluriform democracy,²³⁷ together with the principle of "legality" which allows the State to restrict freedom of the citizens so long as the laws are applied equally to everybody and accepted by Parliament.²³⁸

The principle of balance of power between the state powers also takes shape on the level of the European Communities. But here it is applied differently than at the national level and it is implemented less rigorously than as prescribed by the Treaty. The Community does not have three institutions for three powers as is the case at the national level, but *four* institutions (Council, Commission, EP and the Court of Justice) dealing with *three* powers (legislation: the Council,²³⁹ executive: the Commission,²⁴⁰ and the judiciary: the Court of Justice²⁴¹) and a tradition of strong cooperation among the several branches.²⁴² So, in the Community we are not dealing with a separation of powers in the sense of Montesquieu's *trias*, but rather with a dual balance between the Council (legislature) and the Commission (executive) on the one hand and between the legislature, the executive and the judiciary, on the other.²⁴³

3. *The Democratic Deficit in the European Community*

As a result of this lack of effective parliamentary participation insufficient justice is done to the principle of legality as well as to the principle of democracy. Statements like "parliamentary deficit"²⁴⁴ or "a weak democratic legitimation"²⁴⁵ have been used to characterize the European Parliament's role with respect to the Community's legislation. Further-

²³⁶ B. JEANNEAU, *supra* note 232, at 97.

²³⁷ See de Latour, *Le Songe de Montesquieu*, LE MONDE, Jan. 20, 1983, at 2.

²³⁸ The original German term "*Rechtsstaat*" was introduced in 1829 by Mohl in his book DAS STAATSRICHT DES KONIGSREICHS WURTEMBERG (1928). Its principle is that the relation between the state and citizen is not a relation of power but of law. This relation should be governed by statutes and by principles of law such as the fundamental rights that are defined in the Constitution. The term has never been translated and, although there are important differences between both, it can be compared with the British concept of "rule of law."

²³⁹ Cf. B. JEANNEAU, *supra* note 232, at 13.

²⁴⁰ Ballin, *De Mens in de Sociale Rechtsstaat*, in OVERHEIDSBUNDEL 30 (1982).

²⁴¹ See EEC Treaty, *supra* note 3, art. 145.

²⁴² See *id.* art. 155.

²⁴³ See *id.* art. 164.

²⁴⁴ See *id.* arts. 149, 189.

²⁴⁵ K. VOGEL, GESETZGEBER UND VERWALTUNG 176 (1976) (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 24, 1966); H. IPSEN, *supra* note 69, at 223-24.

more because of this democratic deficit the technocratic element in the Community's decision-making gains the advantage.²⁴⁶ Ipsen has noted that the practical development of the Community's decision-making system has had two consequences for democratic control.²⁴⁷ On the one hand minimal democratic control prescribed by the Treaty, for example, the control of the European Parliament over the Commission, has weakened through the undermining of the Commission's position and the attendant reinforcement of the executive power in the member states.²⁴⁸ On the other hand the loss of legislative control suffered by the national parliaments—a result of the activities of the Communities—has not been compensated by a proportional expansion of the powers of the European Parliament.²⁴⁹ Thus, according to Ipsen, "the gap in democratic legitimation remains open at the level of the Community, while it increases at the national level."²⁵⁰ This democratic deficit in the decision-making process of the European Communities leads back to the crucial question in the second part of this essay which is, should national parliamentarism be the norm for "parliamentarism" in the European Community?

4. *Traditional or Modern Parliamentarism?*

Van Schendelen distinguishes between a traditional and a modern science of parliament.²⁵¹ The former is largely normative and entertains the idea that parliaments have a number of characteristic functions which can be narrowly defined. Traditional parliamentarism emphasizes particularly the importance of the three norms of representation, legislation and control.²⁵² Modern parliamentarism does not deny that parliaments can have representative, legislative, and control functions. It postulates, however, that in general those are neither the sole nor the most important functions of parliaments. The functions of a parliament vary considerably according to political context and time.²⁵³ This distinction between a classical traditional parliamentarism on the one hand and a modern undogmatic parliamentarism on the other can be useful in

²⁴⁶ Koupmans, *De Europese Gemeenschappen en het Nederlandse Staatsbesk*, 1980 RECHTSGELERD MAGAZIJN THEMIS (No. 4/5) 371.

²⁴⁷ Timmermans, *EEG Harmonisatie en Nederlands Recht: Een Beeld Van Bewogen Beweging*, RECHTSGELERD MAGAZIJN THEMIS (No. 4/5) 425 (1980).

²⁴⁸ *Id.*

²⁴⁹ H. IPSEN, *supra* note 69, at 1033-34.

²⁵⁰ *See supra* notes 46-49 and accompanying text.

²⁵¹ H. IPSEN, *supra* note 69, at 1030, 1033.

²⁵² *Id.* at 1034.

²⁵³ Van Schendelen, *Het Parlement*, in VERKENNINGEN IN DE POLITIEK 168 (4. Hoogerwerf ed. 1976).

answering the question whether or not national parliamentarism should be the norm for the European Community.

Undoubtedly, the founding fathers of the European integration were inspired by the classical approach. They were thinking in terms of a federated Europe governed by an independent commission, represented by a parliament directly elected by the people and federal states represented by a council.²⁵⁴ In the 1950s, the classical division between a truly executive government, a truly legislative parliament and a constitutional court of justice was the ideal.²⁵⁵ As late as 1975, Sassen felt that the reinforcement of democratic legitimation in the Community would come from the granting of co-legislative power to the European parliament. At the same time Parliament would exercise political control over those Community institutions holding the executive power, including the Council of Ministers.²⁵⁶ The current view that the European parliament should have colegislative powers can only be explained in the light of a classical parliamentarism. Modern parliamentarists in contrast to their classical counterparts are more likely to take a critical, rather than a dogmatic view of parliament as a representative institution in the current political system.

5. *Parliament and Legislation*

There was growing realization as early as 1916 that parliaments were becoming less and less able to cope with their legislative tasks.²⁵⁷ Today, the parliament is not only incapable of functioning as legislature in the classical sense, but the development of the social welfare state has caused a shift in emphasis from parliament to government.²⁵⁸ Furthermore, the transition of the liberal watchman state to the social welfare state has affected the character of legislation itself.²⁵⁹ First, the nature of "formal" legislation has changed drastically. Formal law actually no longer functions as the source of detailed regulations, but rather as an institution which grants lower governmental and administrative bodies

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 171.

²⁵⁶ Koopmans, *Euro-Verkiezingen: Symbool of Panacee*, 1978 SOCIAL ECONOMISCHE WETGEVING (No. 1) 6.

²⁵⁷ Homan, *Het Verdrag Tot Oprichting van de EEG: Enige Herinneringen aan de Voorbereidingen 1955-1957*, INT'L SPEC., Mar., 1982, at 168; see also J. MEGRET, LE DROIT DE LA COMMUNAUTE ECONOMIQUE EUROPEENNE 6 (Institut d'Études Européennes Université Libre de Bruxelles No. 9, 1979).

²⁵⁸ Sassen, *Politiek, Parlement en Democratie in de Europese Gemeenschap*, in DUYNSTEE, POLITIEK, DEMOCRATIE 204 (1975).

²⁵⁹ Burkens & Stroink, *Sociale Verzorgingsstaat en Consensuele Besluitvorming*, 1980 N.J.B. 743-50.

authority to spell out detailed regulations.²⁶⁰ At the same time administrative agencies have gradually acquired extensive powers through numerous administrative legislations which have penetrated all parts of society.²⁶¹ The government increasingly imposes legal regulations (a system of licenses) or creates legal claims as well as financial allowances (social benefit and subsidies). As a result, citizens depend less on directly elected bodies and more and more on institutions, which only have a derived legitimacy, for the definition of their rights and duties.²⁶²

This evolution of the legislative function of parliament has taken place in all the West European countries. Writing in 1974, Klaus von Beyme noted very clearly that "[i]t is unanimously agreed in almost all the national studies that the legislative function has increasingly degenerated to a bill reviewing role."²⁶³ This reduction, if not the complete disappearance of the legislative function of parliament, can be considered as one of the aspects of the decline of parliament in general.²⁶⁴ Thus a curious discrepancy has developed between the government's exercise of authority which underwent fundamental changes and the structure of decision-making which has hardly changed since the nineteenth century.

6. *Parliament and Economic Decision-Making*

Another important aspect of this development is that it clearly brings to light that parliament in its function as co-legislator can hardly assert itself in the making and execution of *economic policy*. Governments negotiate about basic aspects of economic policy with organized trade and industry and the agreements resulting from these negotiations are then presented to parliament as a *fait accompli*.²⁶⁵ The fact that parliament has next to no influence on this policy is in itself not surprising given that its classical repertory of powers is based on the nineteenth century presupposition of a highly developed civil economic self-suffi-

²⁶⁰ *Id.* at 743.

²⁶¹ *Id.* at 745.

²⁶² *Id.* at 746.

²⁶³ K. Von Beyme, *Basic Trends in the Development of the Functions of Parliament in Western Europe*, in EUROPEAN PARLIAMENT AND THE FUTURE OF PARLIAMENTS IN EUROPE 16, a symposium held at Luxembourg by the European Parliament, May 2-3, 1974, (published by the Office for Official Publications of the European Community 1975). G.S. Reid underscores Parliament's failure to meet its responsibilities in legislation in Reid, *The Parliament in Theory and Practice*, in THE CONSTITUTIONAL CHALLENGE: ESSAYS ON THE AUSTRALIAN CONSTITUTION, CONSTITUTIONALISM AND PARLIAMENTARY PRACTICE 37-55 (M. James ed. 1982).

²⁶⁴ B. JEANNEAU, *supra* note 232, at 102.

²⁶⁵ Geelhoed, *Democratie en Economische Orde in de Verzorgingsstaat*, in BEDRIJVEN IN MOEILIKHEDEN 1981 244 (1982).

ciency which was only occasionally curbed by the state.²⁶⁶

The assumption that all important decisions were taken in and by the parliament could work in the liberal "watchman" state of the nineteenth century only because of the idea that governmental intrusion should be restricted as much as possible in order to give maximum latitude to the free play of economic forces. In other words, parliament has not *lost* power with regard to economic decision-making since it never had such power.²⁶⁷ In view of this we may wonder whether the conditions in the West European states are still favorable for national parliamentarism or whether the problem is one of a reappraising parliament's position and its tasks at the *national* level. Those who agree that such a reappraisal is called for will scrutinize the system of the national separation of powers before simply imposing it on the European scene.²⁶⁸

7. *Communitarian Parliamentarism?*

The wording of articles 137 and 138 of the Treaty and the change of name of the European Parliament in 1962²⁶⁹ were fashioned after existing national classical parliamentary models.²⁷⁰ But these changes, as Ipsen quickly adds, were undertaken "without recognizing the already existing criticism of national parliamentarism, and without realizing the functional changes of parliaments in their control of modern economic and financial planning."²⁷¹ This is the first communitarian reason to question the wisdom of advocating national parliamentarism as the norm for the European Community.

One of the other reasons that militates against an imitation of national parliamentarism at the Community level is the fundamentally different situation of the Community when compared to nation-states. First, the development of the European dimension is still in its infancy and nobody can predict what the institutional set-up will look like in the end. Secondly, there are hardly any Community instruments yet for conducting an economic, monetary, or industrial policy. Therefore, nobody has a clear view of which specific decision-making structure will be required for a European coordination of national policies;

²⁶⁶ Geelhoed, *De Europese Unie*, 1975 SOCIAAL ECONOMISCHE WETGEVING (No. 11) 702.

²⁶⁷ A. FRANSSEN, *SOCIALISME EN DEMOCRATIC* 425 (1976).

²⁶⁸ S. COUWENBERG, *WESTERS STAATSRECHT ALS EMANCIPATIE-PROCES* 54 (1977). *See also* D. COOMBES, *THE POWER OF THE PURSE THE ROLE OF EUROPEAN PARLIAMENTS IN BUDGETARY DECISIONS* (1976); D. COOMBES, *REPRESENTATIVE GOVERNMENT AND ECONOMIC POWER* (1982).

²⁶⁹ *See supra* note 28.

²⁷⁰ H. IPSEN, *supra* note 69, at 1034.

²⁷¹ *Id.*

The theory of the classical constitutional doctrine of the separation of powers is of limited use for interstate organizations like the European Community whose focus is on realizing certain clear cut goals. Hahn therefore avoids the notion of "separation of powers".²⁷² He prefers to speak of "*Funktionen und Funktionenteilung*" where the European Communities are concerned. This avoids confusion with the concept belonging to the classical doctrine.²⁷³ There is evidence which suggests that national parliamentary institutions have as yet been unable to solve problems of an economic cooperation which transcend national borders.²⁷⁴ In such a situation it is not possible to transfer the institutions and the distribution of powers of a liberal nineteenth century state to a developing and as yet mainly economically oriented supranational Community. A traditional parliamentary system with its dualism between government and opposition in the sense of varying majorities seems hardly compatible with the specific demands and requirements of the Community.²⁷⁵ In addition, the unique aspect of the existing treaty system—the cooperation between Council and Commission—which is extremely popular²⁷⁶ is not compatible with the traditional *trias politica* models of the Western European parliamentary systems.

Another reason for not adopting the classical model is the lack of real *European* political parties. The existing European party federations are artificial constructions. Since they are not based on shared ideas or substantial agreement about European politics but exclusively on positions in national politics, they reflect national rather than European realities.²⁷⁷ Finally, the differences which exist between the parliamentary systems in Western Europe should not be minimized. The constitutional systems of the member states of the EC are not identical,²⁷⁸ not to speak of the different administrative cultures and styles as well as the differences in perceptions of the role of the state.²⁷⁹ The unity and coherence of administrative action in France, for example, stands in contrast to the

²⁷² H. HAHN, *FUNKTIONENTEILUNG IM VERFASSUNGSRECHT EUROPÄISCHER ORGANISATIONEN*, 36-37 (1977).

²⁷³ *Id.*

²⁷⁴ Van Wijnen, *Aspekten van en Kanttekeningen bij het Functioneren van het Parlement*, 1975 *SOCIALISME EN DEMOCRATIE* 97.

²⁷⁵ H. IPSEN, *supra* note 69, at 1045.

²⁷⁶ See, e.g., Solemn Declaration, 16 BULL. EUR. COMM. (No. 6) 24, 26 (1983) (stating that "[t]he application of the decision-making procedures laid down in the Treaties of Paris and Rome is of vital importance in order to improve the European Community's capacity to act."

²⁷⁷ Brinkhorst, *D'66 in de Nederlandse en Europese Politiek van de Jaren Tachtig*, CIVIS MUNDI, Nov. 1979, at 253; see also H. IPSEN, *supra* note 69, at 1035.

²⁷⁸ F. RIDLEY, *GOVERNMENT AND ADMINISTRATION IN WESTERN EUROPE* 13 (1979).

²⁷⁹ *Id.*

divided administrative system in Britain.²⁸⁰ The main differences relate to the organization of the parliament in one or two houses, the participation in forming the government, the overthrow of the government by a parliamentary vote and the dissolution of parliament.²⁸¹ Thus, even if one were to start from a traditional parliamentary model, the problem of deciding which national Western European parliamentary system should be taken as the starting point remains a critical one. In this situation reflection on a new institutional model for the European Communities is more productive than a blind imitation of national systems.²⁸²

D. Conclusions

In the European Community, a classical separation and balance of powers has not materialised. There are constitutional checks and balances in the EC but they cannot be compared with those of national states.²⁸³ Hence comparison with national models, including national federal models, are odious.²⁸⁴ Caution should be exercised when advancing the thesis that the treaties are in many respects similar to the national constitutions and can therefore be considered "the constitution" of the European Community.²⁸⁵ The scientific view regarding the future balance of power in the EC is that a development simply based on Montesquieu's theory should definitely be rejected.²⁸⁶

In addition, we should avoid looking upon the powers of the European Parliament as a reflection or a reproduction of the prerogatives of national parliaments.²⁸⁷ It would, for various reasons, be a fundamental mistake to impose the principles, notions, and structures of traditional national parliamentarism on the European scene primarily because of the changes which have occurred during the transition process from a liberal to a social "Rechtsstaat."²⁸⁸ We have seen that in the socio-economic domain, the influence of parliament has waned. In view of this there is every reason to reconsider the function of the European Parliament

²⁸⁰ *Id.* at 73.

²⁸¹ See G. SMITH, *supra* note 229, at 328-29 (European constitutional comparison).

²⁸² H. IPSEN, *supra* note 69, at 1043.

²⁸³ H. HAHN, FUNKTIONENTEILUNG IM VERFASSUNGSRECHT EUROPÄISCHER ORGANISATIONEN 37 n.112 (1977).

²⁸⁴ Koopmans, *supra* note 246, at 373-74.

²⁸⁵ P. MATHIJSEN, *supra* note 60, at 226.

²⁸⁶ See T. OPPERMAN & M. KILLIAN, VERGANGENHEIT UND ZUKUNFT DES EUROPÄISCHEN PARLAMENTS 390 (1981).

²⁸⁷ E. CEREXHE, LE DROIT EUROPEEN-LES INSTITUTIONS 154 (1979); S. COUWENBERG, WESTERS STAATSRECHT ALS EMANCIPATIEPROCES 54 (1977).

²⁸⁸ See Cerexhe, *supra* note 213, at 30.

before reaching for the classical competencies.²⁸⁹ The same holds true for the legislative powers of the European Parliament at a time when the national parliaments are handing over more and more of their power to other bodies. On the European scene, a legislative veto-right of the EP would add, moreover, an extra obstacle to the existing decision-making procedure. A second reason for rejecting classical parliamentarism is that the existing national parliamentary devices might be unsuitable for an arrangement like the Community which is still in the making and in which the pursuit and control of economic power are central issues. Another reason is that, at the moment, we can only speculate about the final outcome of the Community and it would, to say the least, be premature to thwart the unexplored possibility of a pluralist political structure.²⁹⁰ In all likelihood a balance of power—which is not modeled on any example in the known state organizations—will be achieved between Commission, Council and European Parliament.²⁹¹

Some authors contemplate whether constitutional developments at both the national and international levels do not tend in the direction of the separation of *two* powers. In particular, the separation between the legislative and executive on the one hand and the judiciary on the other. Such a separation is already apparent in the European Community.²⁹² Ipsen goes even further when he argues that the new EEC model is possibly better suited for modern government tasks, and that those who adhere to the national separation of powers can learn from it.²⁹³ The call for a reconsideration of the basic constitutional notions²⁹⁴ thus acquires a new impulse from the European point of view. Hence for the European Community it seems most adequate to maintain a “*dialektische Verfassungspolitik*,”²⁹⁵ which leaves the future form of European parliamentarism open, and does not rigidly impose national parliamentary constructions. The conclusion here is that expansion of the European Parliament’s legislative power is *not* in accordance with the constitutional developments in the member states.

From the preceding analysis it follows that the fundamental failure of the institutional system of the Community lies in the uneasy relations between the Council and the Commission. The Commission’s position has been undermined, resulting in a dependent relation with the Council.

²⁸⁹ Geelhoed, *supra* note 266, at 682.

²⁹⁰ H. IPSEN, *supra* note 69, at 997.

²⁹¹ P. VERLOREN VAN THEMATAAT II, *supra* note 40, at 507.

²⁹² See Vogel, *supra* note 245, at 176.

²⁹³ H. IPSEN, *supra* note 69; at 223-24.

²⁹⁴ S. COUWENBERG, DE AMSTREDEN STAAT 100 (1975).

²⁹⁵ H. IPSEN, *supra* note 69, at 957.

The logical remedy would seem then to be a reestablishment of the institutional balance between Council and Commission as laid down in the Treaty. This means that the Commission must reassert its independent role of an arbiter as the treaty provides while the Council, which is now too much the focus of all the Community's activities, must take a step backward. A greater coherence, independence and authority for the Commission will be necessary. The institutional balance will, however, not be fortified as long as the EP establishes itself as a link between the Council and Commission. The European Parliament should not forget that its own power of control will be reinforced to the extent that the position of the Commission is reestablished. In other words, the EP and the Commission are natural allies in the decision-making process of the EC and the indicated tendencies in the European Parliament could affect this relationship adversely.

This does not mean that the European Parliament should not occupy a more important place than it presently does. Recently Roger Morgan mentioned five types of functions for the elected European Parliament; representation, control over the executive, policy making, planning and external relations.²⁹⁶ The current President of the European Parliament, Piet Dankert, has emphasized that the most important task for the EP is to convince Europeans that their main socio-economic problems cannot be solved by national approaches.²⁹⁷ The EP should strengthen its position as a sounding board for and a stimulator of public opinion in the Community.²⁹⁸ Nevertheless, whatever the merits of the above arguments, the proper function of the EP should be determined on the basis of separate standards which are not derived from the classical categories of national states.

²⁹⁶ Morgan, *Nieuwe Taken Voor het Europese Parlement*, INT'L SPEC., Nov. 1979, at 676-81.

²⁹⁷ 1983 EUROPEA IN BEWEGING (No. 1) 3.

²⁹⁸ Vedel Report, *supra* note 14, at 34; see also D. COOMBES, REPRESENTATIVE GOVERNMENT AND ECONOMIC POWER 45 (1982).