**Functional participation as an additional source of legitimacy for the European polity**

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**Remark:** Due to time constraints I haven’t been able to write a paper on “Ensuring Functional Participation in The Implementation of EU Regulation” as promised. Yet, I think the present paper should be able to introduce some interesting issues in our debate. It is the conclusion of my book ‘Law, Legitimacy and European Governance. Functional Participation in Social Regulation’, that will be published in September 2004 by Oxford University Press. I am aware that the first part of the paper might raise some question marks, as it is a synthesis of the book (and might not always be self-evident to understand without having read the book). But I can provide more detailed explanations orally, and I think the second and third part of the paper open up the debate to broader issues that our central to the topic of the conference. (The Table of Contents of the book is attached to the paper. Page numbers do not correspond to the final version. The conclusion ranges from page 438 to 460.)
I. Functional participation as additional source of legitimacy in social regulation: potential and limits

A. Forms of functional participation: potential and limits

The traditional democratic deficit debate has focused mainly on territorial representation, referring in particular to the parliamentary model as a normative framework, linked to the assumption of a hierarchical and neutral bureaucracy. In this framework interest group participation cannot appear other than as a democratic nightmare. More recently, the European governance debate has discovered ‘civil society’ as a source of legitimacy in European policy-making. Yet, claims about the legitimacy and the legitimating potential of ‘civil society participation’ have only been made in general terms.

The aim of this book has been to place the issue of functional participation central into the debate on the legitimacy of the European polity, going both beyond the general claims of the governance debate and beyond the descriptive picture provided by the interest group literature. This focus does not imply that territorial representation is irrelevant or that the parliamentary model has no value at all as a descriptive and normative model for the European polity. Both territorial and functional participation are part of the complex reality of European governance. The question taken as starting point of this research is whether – beyond territorial representation – functional participation can provide additional legitimacy to the European polity.

The answer has not been sought in general claims on interest intermediation in the EU. Rather has it been argued that interest intermediation in the EU is a very complex
reality structured through (more or less) institutionalised forms of functional participation, each of which is based on different normative assumptions. There is, consequently, not one all-including narrative for functional participation in European policy-making.

Unable to analyse all different forms of functional participation in European policy-making, the research has focused on institutionalised forms of functional participation in European social regulation, using in particular the example of occupational health and safety policy (OH&S). Four forms or models of functional participation have been analysed in detail, the European Economic and Social Committee (EESC), tripartite advisory committees, information agencies and the social dialogue.

The EESC can be said to be inspired by a model of ‘deliberative democracy via a functional assembly’. Enshrined in the Treaty as the body composed of national socio-economic groups and functioning like an assembly, the EESC can express itself on many socio-economic aspects of the European integration project. In the past decade the EESC has made efforts to qualify this role of functional assembly by broadening its deliberative input through strengthened contacts with civil society.

Among the myriad of committees characterising EU governance, tripartite advisory committees function as consultative structures to the European Commission in relation to a well-defined regulatory sector. The foundational legitimacy of such committees differs, for instance, from that of a functional assembly as the EESC. As the example of the Advisory Committee on OH&S (AC) shows, tripartite advisory committees provide a particular ‘input’ in terms of representation and deliberation that can be described as a model of ‘tripartite expert deliberation’. Composed on a tripartite basis of experts from national social partners and national administrations,
the AC searches for the adoption of common opinions via a multi-level process of deliberation in which mainly technical arguments prevail but through which the main functional groups, namely management and labour, can also give voice to their separate interests.

European social regulation has also seen the emergence of ‘information agencies’. There are different *rationale* for the creation of the European information agencies. The foundational legitimacy of the Bilbao Agency could be defined as a ‘network agency with tripartite guidance’. The underlying assumption of such a structure is that a pluralist and transparent network, independent from the political decision-making process, has a knowledge-generating capacity which could lead to better policy-output by persuading policy-actors and those acting in the field. Yet, independence, plurality and transparency are not sufficient to guarantee the knowledge-generating capacity of networking. To make such a structure work it is assumed that national administrations and social partners should have a particular role in guiding the Agency’s activities. The Agency may thus function as ‘an additional source of EU legitimacy’ by bringing in a variety of actors on the input side (under tripartite guidance) which is assumed to lead in turn to better output. These normative foundations differ considerably from those underlying other information agencies, or even more so from those related to independent regulatory/executive expert agencies.

Among the forms of functional participation analysed, the European social dialogue is most clearly an institution ‘of corporatist inspiration’. In contrast to the other forms of functional participation, it is based on the idea of direct interest representation. Moreover, its consultation process – even if involving 57 organisations – is linked to the possibility of leaving regulation in the hands of a limited number of encompassing organisations by negotiation. Its foundational legitimacy could be sought in the
arguments formulated with regard to neo-corporatist structures, such as ensuring access to weaker interests, governability and better policy-output. Yet, it also assumes representativity and equal balance in bargaining position between management and labour.

The analysis also revealed the shortcomings and legitimacy problems (both in terms of input- and output-legitimacy) of these forms of functional participation and has made suggestions for improvements, in particular by assessing the role of law in addressing these problems.

The EESC is a particular transparent structure of functional participation which also allows for the participation in (OH&S) policy of interests other than management and labour. However, its influence on European decision-making has been questioned. Moreover, one can criticise its representativity, not only with regard to civil society but even with regard to the variety of socio-occupational groups. Its deliberation also seems on some occasions to be limited to a very small number of EESC members. Its representativity could be enhanced by changing the Treaty provisions on its composition (privileging, for instance, the EP instead of the Council in the appointment procedure), but also by major efforts in broadening consultation with civil society, through, among other mechanisms, hearings. Its influence could be enhanced by being more selective in its activities, focusing on those issues where it can provide a particular representative input and expertise. In the field of OH&S, for instance, the EESC could focus more on providing the broad agreement of the socio-economic actors at the initial stage of policy-making, via exploratory opinions, or provide assessment on implementation, leaving technical adjustments of concrete proposals to other fora such as the AC. A stricter interpretation of the statement of
reasons requirement may enhance the EESC’s influence but more results may be expected from an explicit Treaty change requiring the Commission, the Council and the EP to reply as to how they have taken into account the EESC opinion.

In contrast to the EESC, the AC has provided a satisfying output and influence but it suffers from a lack of transparency and the representation and deliberation in the AC does not reflect the variety of national differences it is supposed to express. To make the AC more transparent, publicity – for instance, via publication of its opinions and composition on the internet – appears more important than an individual right of access based on Article 255 EC Treaty and case law. To become more representative of the national differences, financial support to weaker Member States seems most appropriate.

The Bilbao Agency could, like the EESC but for other reasons, provide more transparency and a broader involvement of all those concerned, but its output remains a source of serious concern. An increase in resources made available by the Member States to their National Focal Points would enable the latter to respond better to the Agency’s requests. On the other hand, the guidance of the Agency’s functioning should be less in the hands of the national administrations which are too often both party and judge. Strengthening of functional participation in the Agency Board and in the national networks has been suggested to counterbalance the dominance of the national administrations. Moreover, to increase the quality of the information gathered, the strengthened functional participation could be combined with granting the Agency, research and some control powers. In addition, its potential could be better realised by enshrining its functioning in a new approach to OH&S policy inspired by the OMC.
Finally, the neo-corporatist social dialogue is based on two assumptions that prove particularly problematic, namely the idea of a balanced bargaining position between management and labour, and the assumption of representativity of the European social partners’ organisations. Legal intervention to ‘redress’ the balance between management and labour and to control the conditions and outcome of the social dialogue meet with the limits of political feasibility. Legal intervention to ensure the representativity of the European social partners’ organisations struggles to identify representativity criteria which would fit the *sui generis* system of the EU.

Among the forms of functional participation analysed, in particular the European social dialogue may cause legitimacy concerns. However, the aim of this research has not been to compare these different forms of functional participation to determine which one should be preferred to the exclusion of the others. Not only might it be difficult to compare the different normative grounds on which these forms of functional participation are based, but such forms of participation are also created for different reasons and are active in different stages of policy-making and different modes of governance. Consequently, it would not necessarily be useful to argue that one form of functional participation is better than another when they are active in different types of policy-making. Arguing, for instance, that the Agency should be preferred to the AC because it is more transparent might not be sensible, since the Agency has a different task in another aspect of policy-making than the AC. Therefore, this research has placed the analysis of forms of functional participation within the context of a particular policy-sector, namely OH&S policy. In this way, this book has shown how forms of functional participation are combined at different stages and in different modes of policy-making (legislation, regulatory
implementation and persuasive policy-making). This analysis allows to assess whether forms of functional participation are complementary or not, and to make suggestions for change and re-orientation of certain forms of participation where necessary.

B. Functional participation across stages and modes of policy-making: potential and limits

The (combinations of) forms of functional participation change over time, according to changes in modes of policy-making. At the start of this book, the history of OH&S policy has been described from the ‘traditional point of view’ on EU legitimacy and democracy, referring mainly to territorial representation and the parliamentary model.\(^1\) After the analysis provided in this book, the history of European OH&S policy can be re-read, taking into account the potential of functional participation as an additional source of legitimacy.

While the Treaty of Rome recognised the concern for OH&S but no Community regulatory competence in the field, such regulation emerged from the political will to realise the internal market on the one hand, and to protect existing national OH&S standards and to give the European integration project a more ‘human face’ on the other hand; especially since the 1972 Paris Summit. In the period 1972 to 1992, and in particular after the Single European Act, European OH&S policy is characterised by the adoption of legislative Directives. OH&S policy is not left over to an

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\(^1\) Chapter 2, IV A.
independent agency supposed to have the technical expertise in the field but follows
the ‘normal’ legislative procedure, ensuring territorial representation via both the
Council and the European Parliament; first with unanimity vote in the Council and
mere consultation of the EP (on the basis of Article 100 EEC); and since the Single
European Act with Qualified Majority Voting and co-operation (Article 118a EEC)
and, since Amsterdam, co-decision of the EP (now Article 137 EC). In addition to this
territorial representation, functional participation in the drafting of legislation is
institutionalised via the consultation of the AC and the EESC. Already enshrined in
the Rome Treaty, the EESC could give its advice on all legislative initiatives in the
field of OH&S. Yet, as soon as the Paris Summit opened the door to the development
of a real OH&S policy, the AC has been established as a specific advisory body to
this policy sector. The combination of tripartite functional deliberation and
deliberative democracy via a functional assembly can thus function as additional
sources of legitimacy.

During the 1990s the nature of OH&S policy changed due to dissatisfaction with the
application of existing OH&S norms and due to the emergence of other policy
priorities – such as combating unemployment – which are, to a certain extent,
considered to conflict potentially with the further rise in OH&S standards. Moreover,
this change takes place in the context of a broader reform of the European social
dimension, privileging soft co-ordination of national policies to the creation of new
common standards and rights at the European level. The output of new legislation in
OH&S decreases considerably.

On the other hand, the existing legislative framework can be adapted to technical
change via comitology procedures, in which a comitology committee ensures the
representation of national administrations. The AC ensures functional participation in these procedures. Such functional participation could also be considered to compensate for the lack of parliamentary involvement. Moreover, in the particular procedure for the adoption of indicative Occupational Exposure Limit Values (OELs), the AC also ensures a ‘tripartite expert deliberation’ counterbalancing the ‘scientific deliberation’ of the Scientific Committee (SCOEL).

But the main feature of OH&S policy in the 1990s is not the adjustment of the legislative framework through comitology, but a shift to more persuasive policy-making. The Council and the EP in general do not intervene in persuasive policy-making, apart from approving the budget the Commission might need for it. The Commission itself has seen its central role of policy-entrepreneur in persuasive policy-making overshadowed by the creation of the Bilbao Agency. Due to functional participation in the Agency Board and network, the shift of responsibility for persuasive policy-making from the Commission to the Agency can be considered as a shift from ‘bureaucrats’ to those most directly involved in the field, in particular the social partners.

In a comparable way the social dialogue provides a new mode of governance that could leave OH&S regulation directly in the hands of the social partners.

In an idealised way, functional participation in OH&S policy during the 1990s can thus be described as an additional source of legitimacy in the adoption process of

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2 Binding OELs need to be adopted via legislation. Given that the AC is normally consulted on OH&S legislative proposals (even if not required) it is likely that this would also be the case for the adoption of binding OELs. Yet, to date indicative OELs have been preferred to binding ones.
regulatory implementation measures, in addition to territorial representation in comitology committees (and in addition to the scientific deliberation of the SCOEL), compensating for lack of parliamentary involvement, and as a way to place both persuasive policy-making and regulation directly in the hands of those most concerned by the issue.

However, this idealised picture of functional participation as an additional source of legitimacy should be qualified. First, as analysed above, each form of functional participation has shortcomings in terms of input- and output-legitimacy and/or transparency and accountability. Second, the combinations of forms of functional participation show problems of duplication and tensions between different normative models. So the consultation of both the AC and the EESC in the drafting of OH&S legislation may make more sense if the EESC focuses on aspects the AC does not provide, such as a broader representative input; or it can act more independently from regulatory proposals in providing exploratory opinions or reports on implementation. Moreover, since the Amsterdam Treaty, consultation on legislative OH&S proposals has been complicated by the obligatory consultation process of the social dialogue which duplicates the consultation of the AC. While nobody is satisfied with the current state of affairs, it proves extremely difficult to find a solution that could both build on ‘tripartite expert deliberation’ and give room to ‘bipartite corporatism’.

More generally, the changes of policy-making style in the 1990s have rather weakened than strengthened functional participation. Whereas functional participation in OH&S policy-making was well established via the AC and the EESC during the ‘legislative boom period’, the 1990s have witnessed an evolution in which prevail a certain ‘technocratisation’ and a strengthened role of the national administrations

The important shift to persuasive policy-making has been characterised by the creation of the Bilbao Agency. However, whereas it offers theoretically the opportunity to place persuasive policy-making (partially) in the hands of the social partners, it is the national administrations, in particular that play a dominant role in the functioning of the Agency.

In theory also the social dialogue would provide a mode of policy-making in which the social partners obtain a central place, even allowing that they would entirely draft binding regulation. Yet, in the sector of OH&S, negotiation under the social dialogue is expected to take place only for few issues.

Regarding regulatory implementation, the AC is not always capable of playing its ‘counterbalancing’ role, in particular where it is assumed to counterbalance scientific deliberation in the procedure to adopt OELs.

Finally, regarding the important issue of (control on) the application of (European) OH&S norms, the Community limits itself to building its hope on the Committee of Senior Labour Inspectors (SLIC), neglecting the important role of workers’ and trade unions’ representatives in this field.

One can conclude that European OH&S policy has become more horizontal but not necessarily more participatory. The lack of a well-established role for functional participation is problematic given the limits of territorial representation (in terms of expertise, and therefore prone to be influenced by the best resourced lobbying groups), the limits of scientific deliberation (less ‘neutral’ than assumed and/or captured in its own paradigm) and the ambiguous position of national administrations.
as both judge and interested party. Therefore, the role of functional participation as an additional source of legitimacy should be strengthened.

Several suggestions to strengthen functional participation have been made. The final picture of functional participation in OH&S policy could then look as follows. The EESC could provide the broad agreement of the socio-economic groups on the general lines of OH&S intervention via exploratory opinion.

For legislative proposals, the parallel consultation of the AC and the social dialogue could be maintained. Yet, ETUC and UNICE could be asked to express their opinions for the two-stage social dialogue via the (reformed) interest groups of the AC. If (the) European social partners prefer to negotiate, the proposal would leave the AC and the normal legislative procedure; an option which, however, will remain marginal in the field of OH&S. If there is no negotiation, the AC could then adopt its opinion. This procedure would make the AC more interest-based (due to the co-ordinating role of ETUC and UNICE within the interest groups), although without losing entirely its character of tripartite expert deliberation. Moreover, the procedure has the advantage of leaving all options under the social dialogue (both in terms of consultation and negotiation).

The Commission would subsequently send its formal proposal to the EESC, which could adopt an opinion if it considers it can provide a particular added value in terms of representative and deliberative input, but should also have the opportunity to decide not adopting an opinion if it considers it is preferable to focus its resources on other issues.

In regulatory implementation the AC can indeed play a ‘counterbalancing’ role to compensate for the lack of parliamentary involvement and to counterbalance
scientific deliberation. Yet, to reach this objective, it is desirable that the consultation of the AC would be made obligatory (and juridical enforceable). Moreover, to be effective, the trade unions and the weaker Member States within the AC would need to be financially supported to be able to possess the necessary expertise.

Regarding persuasive policy-making and the better application of OH&S standards in practice, the position of the social partners in the Bilbao Agency should be strengthened in order to improve the quality of the information it provides. Moreover, the Agency should be given competencies of research and some controlling power. Social partners representatives should be included into the SLIC.

Finally, functional participation may play a central role in a redesigned approach to OH&S policy-making. As suggested above, a guidelines procedure could be established in order to set levels for reduction of certain risks and hazards or set standards for health and safety services. Such a guidelines procedure, inspired by the ‘open method of co-ordination’ could be a compromise between legislative standards, which are often considered ‘too hard’, and persuasive policy-making, which may be a ‘too soft’ approach. In contrast to the ‘traditional’ open method of co-ordination, such a guidelines procedure could provide a central place for the Agency in collecting comparable data and information for the annual national reports. Such Agency involvement would profit from the information of the social partners and allow the latter to exert a certain control on the information provided by the national administrations.

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3 See Chapter 5, IV C 1 (b).
II. The ‘role of law’, proceduralisation of functional participation, and the dichotomy between pluralism and corporatism

In this book ‘piecemeal’ suggestions for improvement of the legitimacy of functional participation have been made, some of a very ‘practical nature’, others by way of suggestions for changing the legal provisions regarding a particular form of functional participation, and still others pointing to the possibility – though marginal – of improving the legitimacy of functional participation by strengthened judicial review of the current legal framework. No general new normative draft for functional participation has been proposed, nor any general legal framework to structure such participation.

Yet, in the legal literature dealing with the infranational reality of European governance, one can frequently find requests for the development of a set of constitutional and/or administrative principles which should structure the infranational reality in response to concerns over democratic accountability and legitimacy. The debate has in particular paid attention to the introduction at the European level of an Administrative Procedures Act (APA) on the model of the American one. More recently, also political scientists have attempted to formulate general principles to ensure the legitimacy of ‘European governance arrangements (EGAs)’.

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5 P. C. Schmitter (forthcoming).
Many of these EGAs constitute forms of functional participation. Should they be subject to such a codification of general principles of democratic accountability and legitimacy? Should a general legal framework of common principles for functional participation be developed, instead of, or, as a complement to the proposed piecemeal changes? Should the ad hoc building of forms of functional participation be replaced or complemented by a more generalised proceduralisation of functional participation – including judicial review of it? As has just been emphasised, the aim of this research has not been to develop such a general legal framework, but the analysis made allows one to make some observations in this regard.

It has been argued that an American-style proceduralisation of functional participation\(^6\) may be a plausible option for the EU given the particular parallels between, on the one hand, the US system of government and interest intermediation, and on the other hand, the EU institutional set-up and system of interest participation. Thus the EU system of government more resembles the American ‘checks and balances’ system than the parliamentary model of the European nation-state which places parliament at the apex of government.\(^7\) As argued at the beginning of this book, the multiple access points in this EU system of ‘divided governance’ have led most authors to describe interest intermediation at the European level as pluralist.\(^8\) Moreover, it has been argued that the forces which existed at the origins of the proceduralisation of interest intermediation in the US are currently present in the EU,

\(^6\) See Chapter 1, III C 2.

\(^7\) F. Bignami (1999).

\(^8\) Chapter 1, II A 2.
such as calls for transparency and public participation, fear of technology and technocracy, existing constitutional judicial review, and conflicting regulatory and deregulatory sentiments.  

However, functional participation in the EU also differs considerably from the American system of interest intermediation. First, while lobbying is part of European governance, the EU has also created more ‘corporatist’ forms of functional participation which create a ‘balanced’ fixed access for certain interest groups in various phases of policy-making, including the drafting of legislation, regulatory implementation and persuasive policy-making. Second, in this system the role of judicial review is much more modest than in the American system. Where the Treaty or the European legislator has created an institutionalised form of functional participation it does not appear to be for the judiciary to change the composition or mode of functioning of such an institution. As analysed above in relation to the EESC, the AC, and the European social dialogue, the European Courts have been reluctant to develop judicial review that might structure or value the deliberation in such bodies.  


10 One can argue that the CFI has gone far in the UEAPME case, interpreting the conditions of the social dialogue procedure far beyond what was needed to deal with the case at hand; but even then this has mainly been a justification of an established practice that had (by repetition) obtained the approval of the Council and Commission (by implementing agreements signed by ETUC, UNICE and CEEP). See Chapter 6, II B.
Yet, precisely such clear procedural requirements are often lacking. Neither do current *locus standi* rules facilitate judicial review in playing a major role in guaranteeing equal access for interest groups.

The modest role for judicial review in opening policy-making to functional participation can be linked to the different legal, and in particular, administrative law, traditions of the Member States in which pro-active or aggressive judicial review has generally found less room than in the US.\(^{11}\) Moreover, since the composition of the ECJ also reflects these different national legal systems – as well as different professional traditions and political preferences (given the appointment procedure of the judges) – judicial activism by the European Courts is less probable than with smaller, more homogeneous courts.\(^{12}\)

This European system of interest intermediation, which provides in addition to lobbying also more ‘corporatist’ forms of functional participation, has its shortcomings in terms of representativity, accountability and transparency, as shown in this research. However, the system may also have some advantages over the American neo-pluralist model:

First, in the neo-pluralist model all interest groups are formally guaranteed an equal right of access to decision-making, enforceable via legal means. However, in practice such a system may privilege those who have the financial means to legally enforce their right of access, excluding ‘weaker’ interest groups. On the contrary, in many of the institutionalised forms of functional participation in the EU a ‘balanced’


representation is sought, including also the ‘weaker interest groups’. The AC, for instance, aims to represent labour at the same level as the much better resourced business interests.

Second, the neo-pluralist model places interest groups in a direct relation with the policy-maker – legislator or administrator – but not in interactive relation with each other. As shown in this research, institutionalised forms of functional participation in the EU often aim to encourage interaction among different interest groups. The consultation of deliberative fora is preferred to direct interest consultation or is used as a complement to direct interest consultation via lobbying. As has emerged from the interviews held, the availability of structures where management and labour (and other groups) can meet is positively evaluated by the participants – even if these structures are not always the most influential on direct policy-making as such. Moreover, management structures (e.g. the Agency Board) can be left to fora (partially) composed of interest groups, and even the substantial drafting of legislation may be handed over to the direct interaction of ‘those most directly concerned’ (social dialogue).

It is worth noting that in the US the dissatisfaction with the far-reaching neo-pluralist model based on the APA and judicial review has led to some initiatives to introduce structures where interest groups interact with each other.13 The 1990 Negotiated Rulemaking Act introduced a (non-obligatory) procedure through which agencies can – via a general notice in the Federal Register – bring together interested parties in the

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initial stages of rulemaking.\textsuperscript{14} Once an act is designated for negotiation, a ‘convenor’ is appointed to facilitate a negotiated outcome. When a consensus is reached on a proposed rule, the agency then submits the latter to the normal notice and comment procedure.\textsuperscript{15}

Third, the American proceduralisation of interest group participation has been criticised for its aggressive judicial review in which the border between procedural and substantive review becomes so thin that the discretion of the administration tends to be replaced by the discretion of the judges.\textsuperscript{16} The European system is less prone to becoming subject to ‘government by judges’.

This is not to say that the EU has nothing to learn from the American experience with proceduralising interest intermediation. Neither does it follow that all claims to provide a set of common principles for functional participation are without

\textsuperscript{14} The Negotiated Rulemaking Act followed successful experiments with such a procedure by some agencies during the 1980s, among which was the American agency for OH&S, namely the Occupational Health and Safety Administration.

\textsuperscript{15} In contrast to, for instance, European tripartite advisory committees, the Negotiated Rule-making does not establish fixed committees of assumed representative organisations but provides the creation of \textit{ad hoc} fora for negotiation among those interest groups reacting to the notice in the Federal Register.

\textsuperscript{16} M. Shapiro (1988: 36); and (1996); R. Dehousse (1999). For the older American doctrine in which judicial intervention in discretionary agency policies is justified by pointing to the lack of control on agencies by the political organs – the Congress and the President, see R. B. Stewart (1975), and C. R. Sunstein (1985-1986).
foundation. However, the findings of this research allow one to formulate some reflections which should be taken into account if general principles for functional participation are looked for.

First, one should address the question of which infranational reality is supposed to be subject to such a codification of general principles. Some authors have argued for due process and judicial review, or proceduralisation in very broad terms regarding ‘European governance arrangements (EGAs)’\(^{17}\) or regarding ‘the network structures’ of European governance.\(^ {18}\) But such EGAs and ‘network structures’ cover very different realities, including forms of functional participation but also structures such as scientific committees or comitology committees. Moreover, the infranational reality of European governance reaches from the drafting of legislation, to regulatory implementation, application of individual rules and persuasive policy-making. Is it possible to develop common principles of accountability and legitimacy for very different institutions involved in very different parts of policy-making?

The debate on the introduction of a European APA has been more focused, namely has concerned the introduction of procedural guarantees in administrative rule-making, i.e. regulatory implementation. Yet, functional participation is not only limited to regulatory implementation. Would it be sufficient to introduce procedural guarantees for functional participation in regulatory implementation whereas no general principles of accountability and legitimacy would be required for functional participation in the drafting of legislation – given the final word of EP and Council – or in persuasive policy-making – because it is ‘merely’ a question of persuasion and

\(^{17}\) P. C. Schmitter (forthcoming).

not of decision-taking? The problem is further complicated by the fact that some forms of functional participation, such as the AC, have both a role in the drafting of legislation and in regulatory implementation.

Second, closely linked to the debate on which EGAs are supposed to be subject to the codification of general principles, is the question of the level at which these common principles should be formulated. If the aim is to provide a general framework for regulatory implementation and/or functional participation therein, an APA may be contemplated. If one wants to set general principles of coherence, openness, fairness and amenability to political or judicial control for all forms of infranational governance or for all forms of functional participation, constitutional rather than administrative principles may be desirable.19

Third, while it may be apparent that it is difficult to find a common normative framework for such different EGAs as comitology committees and scientific committees, this research has revealed how even the category of ‘functional participation’ is not one ‘homogeneous reality’ but consists of a variety of structures built on different considerations about the role of deliberation, representation, transparency, accountability etc. To these institutionalised forms of functional participation one should add the always available road of direct lobbying. The minimal regulation of such lobbying20 is not free of normative considerations either. The establishment of a common legal framework for all these forms of functional participation appears equally difficult.

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19 In this vein, see G. de Búrca (1999).

20 See Chapter 1, II B.
One can opt to do away with many of the existing structures by introducing a more standardised American type proceduralisation. Yet, this would also throw away the advantages of the current system. Moreover, it would require adaptation of the European Institutions – to overcome, for instance, the increased workload of the ECJ – and would require European citizens and their organisations to adapt to a system of interest intermediation they are not used to at the national level.

Alternatively, one can opt for a ‘soft proceduralisation’, limiting the general framework for functional participation to some very broad (constitutional) principles requiring transparency and amenability to political or judicial control; principles which are open to different interpretations. In addition, one can opt for some ‘soft pluralisation’, namely as a complement to other more corporatist forms of functional participation, some pluralist techniques may be introduced, either without the legally enforceable features of the American example and/or applied on a more modest scale, in relation to particular policy sectors or modes of governance.

In fact, in particular as a follow-up to the debate of the White Paper on European Governance, the EU appears to embark on the road of both a soft proceduralisation and a soft pluralisation of interest intermediation while maintaining also the more neo-corporatist forms of functional participation.

21 Arguing for a soft proceduralisation of comitology, see R. Dehousse (1999); and more broadly for a ‘soft’ codification of EC administrative procedures, see C. Harlow (1996).

With ‘pluralisation’ is not meant that the EU would open up to a system of lobbying
that did not already exist, but that it introduces increasingly procedures of functional
participation in which, in principle, all interest groups that desire to do so can
participate. Consultation via Green and White Papers is a technique the Commission
has been using since quite some time. Yet, such general consultations have been
intensified during the last years.\textsuperscript{23} The Commission has created on its website a single
access point for such consultations, called ‘Your-Voice-in-Europe’.\textsuperscript{24} Besides the
occasional opportunity to chat with EU leaders, and the possibility to express ‘your
experience’ with the implementation of EU policies, the webpage aims mainly at
providing a clear access point to consultations on Green and White Papers and
Communications. Such consultations can take place on topics of a general nature
aiming at a wide public, or can be focused on more specific topics aiming to involve a
more particular target group.\textsuperscript{25} In each case, the Commission publishes a general
report on the results of the consultation, indicating who replied, what were the main
arguments, whether this will result in changes to the proposal. However, contrary to

\textsuperscript{23} See also above, Chapter 3, in relation to the consultation processes that were

\textsuperscript{24} http://europa.eu.int/yourvoice/index_en.htm

\textsuperscript{25} More targeted consultations do not exclude groups or persons from consultation but
the Commission actively seeks to obtain the input from what it considers the relevant
interested parties. Such online consultations are sometimes ‘dispatched’ to the
webpage of a particular DG, linked to ‘Your Voice’. E.g. ‘Infonet’, a webpage
APA procedures, these ‘soft-pluralist’ procedures do not include any right to participate or means of judicial review.

In December 2002 the Commission also published a Communication on ‘General principles and minimum standards for consultation of interested parties by the Commission’. The principles are very broadly defined as ‘participation, openness and accountability, effectiveness and coherence’. The minimum standards include some more precise provisions such as a period of at least 8 weeks for reception of responses to written public consultations, and the promise that the results of open public consultation will be displayed on websites. The Communication may be seen as an attempt to a (very) soft proceduralisation of consultation procedures and/or functional participation. However, the Communication states explicitly that it is a non-legally binding document. Although this does not exclude its justiciability as a source of soft law, it is very unlikely the Court can build on this, given the Court’s general reluctance of judicial review on functional participation, and, above all, because the document states explicitly that ‘a situation must be avoided in which a Commission proposal could be challenged in the Court on the grounds of alleged lack of consultation of the interested parties’.

Moreover, the scope of the document is unclear. The Commission will be guided by these general principles and standards ‘when consulting on major policy initiatives’,

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27 The same principles had already been put forward in the Commission’s White Paper on European Governance, see above, Chapter 1, I C 2.

28 See in particular P. G. Bonnor (forthcoming), who argues that the ‘general principles and minimum standards’ may, nevertheless, be used a soft law for review by the European Ombudsman, in particular in relation to implementation procedures.
‘without prejudice to more advanced practices applied by Commission departments or any more specific rules to be developed for certain policy areas’. The Communication seems mainly to aim at providing a framework for the sort of ‘soft pluralist’ consultations organised via the ‘Your Voice’ webportal, while shying away of dealing with the more neo-corporatist forms of functional participation as analysed in this research. In fact, the Communication explicitly excludes the EESC, the European social dialogue and comitology from its application. Put differently, the (very) soft proceduralisation proposed by the Communication would only apply to some forms of functional participation.

Building on the insights of this research, and without aiming to provide a general legal framework for functional participation or to evaluate the EU system of interest intermediation against the US system, one could conclude the following:

First, the reality of EU infranational governance includes so many differently inspired institutions (aiming at functional participation, scientific expertise, territorial representation) that it is difficult to imagine a one-dimensional legal framework for it. Moreover, even forms of functional participation are inspired by different normative considerations, and they appear in very different phases of the policy-making process. Yet, a soft proceduralisation could be imagined, requiring in particular transparency and accountability, open to different interpretations according to the type of infranational institution and place in the policy-making process.

Second, with a general neo-pluralist proceduralisation of interest group participation one would lose some of the strengths of the more corporatist structures and introduce a system which has its own shortcomings. However, this does neither exclude the introduction of some pluralist techniques, nor the introduction of a soft-
proceduralisation (dependent or independent from the introduction of pluralist techniques).

Regarding the introduction of pluralist techniques, one should take into account the particular features of the European polity and acknowledge that the importation into a government system of what might be a well-established accountability design in another government system, may lead to an institutional patchwork with missing pieces.29 On the one hand, one should note that, even if introduced at a modest scale, i.e. in particular policy areas or modes of governance, pluralist techniques with strong judicial review might go against the traditions of most of the Member States and might risk slowing down an already cumbersome decision-making in which more corporatist forms of functional participation already provide a certain ‘counterbalancing power’. On the other hand, (soft) pluralist techniques may be complementary to neo-corporatist settings. Not only can the Commission use soft notice and comments procedures while relying also on neo-corporatist institutions, such pluralist techniques could also be ‘delegated to’ or applied by these neo-corporatist forms of functional participation. The EESC, for instance, could play a central role in organising soft notice and comment procedures, building on its role as ‘bridge to civil society’ and reducing in this way the workload of the Commission.

Regarding soft proceduralisation, one should clearly define its scope, in relation to which EGAs and/or which forms of functional participation, and consequently decide the right level at which to define such principles, standards and procedures.

29 For an elaborated example, see J. Ziller (2001) who analyses the patchy introduction of elements of what he calls ‘the Swedish model of government’ into the ‘standard European model of government’.
III. About fugitive constitutional moments and future challenges

While writing the last words of this book, the draft for a Constitutional Treaty, presented by the European Convention, has just been handed over from the Italian Presidency of the EU to the Irish one, after the Rome Summit of December 2003 failed to close the IGC with an agreement on it. The ‘constitutional moment’\textsuperscript{30} appears suddenly as fugitive. The elite-driven debate of the Convention risks losing its claim on historical recognition if finally it cannot result in an agreement with profound transformative effects, and the European citizen appears not even to really care about this fact.

Even if the draft Constitutional Treaty is finally adopted, its direct transformative effects on the reality of functional participation in the EU will be very limited. As argued above,\textsuperscript{31} once again territorial representation and (fundamental) rights have been placed on the apex of the normative constitutional framework. The draft Constitutional Treaty does surely not provide a proceduralisation of functional participation, although such participation might be slightly influenced by the recognition of such rights as access to documents, right to good administration, freedom of assembly and association, and collective bargaining into Part II of the Constitution, i.e. as fundamental rights of the Union.\textsuperscript{32} Moreover, the constitutional

\textsuperscript{30} N. Walker (2003).

\textsuperscript{31} Chapter 1, I D.

\textsuperscript{32} See above, Chapter 6, IV B 1 (a).
draft has symbolically introduced the concept of participatory democracy under the title ‘the democratic life of the Union’, Article I-46 states.\textsuperscript{33} 

The principle of participatory democracy

1. The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action

2. The Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent….

Although paragraph 1 also refers to ‘citizens’, the aim of the article has been, above all, to introduce the idea of interaction with civil society organisations as developed by the Commission and the EESC.\textsuperscript{34} However, the entire article has been drafted

\textsuperscript{33} CONV 850/03 (18/7/2003), Draft Treaty establishing a Constitution for Europe.

\textsuperscript{34} See CONV 369/02 (28/10/2002), Preliminary draft Constitutional Treaty. A fourth paragraph of the article also introduces an element of ‘direct democracy’, namely ‘a citizens’ initiative’, i.e. one million citizens may invite the Commission to submit a (legislative) proposal, but this paragraph was only introduced on the very last moment before the Convention adopted the final text, and does in practice not add much to the existing right of petition to the European Parliament. See, in more detail, S. Smismans (2004 b).
cautiously enough not to create a right of participation on behalf of civil society organisations.\textsuperscript{35}

Whether or not the draft Constitutional Treaty will finally be adopted and ratified – and turn the Convention and IGC retrospectively into a constitutional moment – a readjustment of the European institutional setting is in any case unavoidable, giving the enlargement of the Union. Enlargement poses a serious challenge to the functioning of the European institutions. A great deal of attention has been paid to the effect of enlargement on the functioning of the main Community institutions, namely the Commission, Council and European Parliament. However, enlargement will equally affect the infra-national reality of European governance, and functional participation in particular. The effect of increasing the number of participants in the myriad of committees and representative/participative structures remains a largely ignored topic both at political and academic level. The representative character of these structures and their styles of deliberation and negotiation might significantly change by increasing the number of participants.

As analysed in this book, some forms of functional participation have taken a start with adjusting to enlargement. So the Nice Treaty has set a maximum limit to the number of EESC members, namely 350. A new Council Decision has been adopted in 2003 to reform the AC, changing its composition by reducing the number of representatives per country, namely from six (two for each group) to three (one for each group). Unfortunately, the same trick cannot be applied to the Board of the Bilbao Agency, where each country has already only three representatives. How to

\textsuperscript{35} For a more detailed analysis, see S. Smismans (2004b).
adjust then to enlargement, given that the Agency Board has already today been
criticised for being too large to be efficient?\textsuperscript{36}

The ‘number-question’ is not merely resolved by defining a maximum level of
representatives in these structures, but goes down to the different working levels
within them; such as sections, working groups, Bureau. Greater numbers at these
levels influence the processes of deliberation, whereas smaller groups may raise
questions on the representativity in terms of reflecting national diversity.

The ‘number-question’ has also an additional budgetary cost, in particular due to the
introduction of other languages. Even if one can contain the extra costs for mobility
of the participants in forms of functional participation by reducing their number per
Member State, the language issue will impose an important budgetary burden. The
burden will be particularly heavy for structures as the Bilbao agency, which have an
information function that is only likely to reach its ‘clients’ if the documents are
drawn up in their language. Already today it is argued that the Agency should limit its
tasks given the resources it has at its disposal.\textsuperscript{37} Trade union representatives expressed
profound doubts on what the Agency can realise if most of its budget will have to be
spent on translations.\textsuperscript{38}

\textsuperscript{36} N. Ahrendt (1998: 141), Head of the Commission Unit ‘Organization of
Commission Departments’ notes that the agencies with social partners participation
on the Board, in particular, will face problems with enlargement, which may
necessitate a change.

\textsuperscript{37} See Chapter 5, IV B.

\textsuperscript{38} Interview sources.
Obviously, the influence of enlargement on forms of functional participation is not simply a question of numbers, but also one of integrating different cultural, political and administrative traditions, and levels of socio-economic development; all of which are likely to upset current ‘balances’.

As mentioned repeatedly in this book, ‘civil society’ and systems of interest intermediation in the enlargement countries are young and weakly developed. This will have consequences in terms of the representativity of the persons assumed to represent ‘civil society’ into the European structures for functional participation, such as the EESC, tripartite advisory committees, (boards of) agencies etc. In particular, this puts under pressure the European social dialogue, of which already today one can question the representative and democratic nature.

Regarding OH&S these countries have generally much less developed systems of protection than the current Member States. Will the AC members from the enlargement countries end up like some of the representatives of the Southern European countries, i.e. approving in silence through lack of expertise? Will the enlargement countries be able to set up an information network for the Bilbao Agency?

Or will these countries simply have other policy priorities (maybe also due to a lack of structured functional participation) and oppose further Community initiatives in this field?

To conclude, enlargement imposes important constraints on the system of functional participation in the EU, both in terms of input-legitimacy (representation and deliberation) and output-legitimacy (efficiency). It will not suffice to declare in a constitution that the EU is based on a principle of participatory democracy, nor to set
a ceiling on the number of representatives in institutionalised structures of participation.

In addition, European political decision-makers will have to decide on two aspects they are traditionally reluctant on. First, the Community will have to engage in a more horizontal activity of supporting the strengthening of forms of functional participation in the enlargement countries (which implies interfering with ‘national sovereignty’ over the institutional set-up of the State); and second, and closely linked to that, providing additional money to enable forms of functional participation to work both at the European and the national level.

In the light of enlargement, one could further doubt about the role of functional participation as ‘additional source of legitimacy’ in European governance, and herald the legitimacy of territorial representation. Yet, this would be a strong underestimation of the problems of territorial representation; in particular again in the light of enlargement, both with regard to the European level and with regard to the national level of the entering countries. Moreover, the assumption that the issue of interest group participation is entirely resolved by the direct interaction between these groups and territorial representatives is a complete fiction. Even if one would not ‘regulate’ interest group activity, this activity would take place at multiple levels of governance. Put differently, one does not resolve the problem by enclosing him/herself into the normative box and the fiction of ‘the parliamentary model combined with a neutral hierarchical bureaucracy’. The complexity of governance in contemporary society and in a multi-level system is there to stay and functional participation is part of that reality. We cannot do else than looking for the best normative and practical tools to deal with it.
Chapter 1. Functional participation, the missing link in the EU’s legitimacy debate

I. From democratic deficit to governance debate

A. The democratic deficit debate and the dominance of territorial representation
   1. The European democratic deficit, the parliamentary model and territorial representation
   2. The ‘hierarchical and neutral bureaucracy’ as a complement of the parliamentary model

B. The particular features of the European polity
   1. The EU is not a state
   2. No hierarchical and neutral bureaucracy
   3. Reconceptualising democracy and legitimacy

C. The governance debate
   1. Beyond territorial representation: citizenship and transparency
   2. The White Paper on European Governance and the discovery of civil society

D. Governance ‘post-White Paper’: the draft Constitution and beyond

II. About interest groups, civil society and functional participation

A. The descriptive account of the interest group literature
   1. The picture of European interest group participation
   2. Analysing the EU as a pluralist or corporatist polity

B. Law and the distinction between lobbying and institutionalised forms of interest group participation

C. The concept of functional participation

D. Functional participation and civil society

III. Studying functional participation: an interdisciplinary approach

A. The analysis of political scientists

B. The insights and the position of lawyers

C. The tools of political theorists
   1. From macro to micro: Normative models for the European polity and for functional participation
   2. (Neo-)pluralism, neo-corporatism and deliberative democracy
D. Functional participation, law, legitimacy and European governance

1. Forms and models of functional participation: an inductive approach
2. Legitimacy
3. The role of law
4. Governance: analysing a policy-sector
5. Synthesis: the guiding ideas of the research

Chapter 2. Functional participation in social regulation: the case of European occupational health and safety policy

I. Functional participation and the European social dimension

A. The European social dimension, legitimacy and functional participation
B. OH&S: between social regulation and social policy

II. OH&S policy in the context of the internal market

III. The changing nature of European OH&S policy
   A. The pre-Single European Act period
   B. The regulatory boom-period 1987-1992
   C. Post-1992: persuasive policy-making and new modes of governance
      1. From regulation to persuasion
      2. A persuasive policy that cannot convince

IV. Functional participation as additional source of legitimacy in social regulation
   A. An additional voice in the legitimacy debate
   B. Forms and models of functional participation
   C. Functional participation across stages of policy-making and modes of governance

Chapter 3. The European Economic and Social Committee (EESC)

I. The creation of the EESC

II. Legal status and functioning of the EESC

A. Composition
B. Competence
III. The EESC as a functional assembly

A. Functional assembly or associative parliament?
1. A functional body with parliamentary features
2. About ‘representatives of the general public’ and civil society
B. Strengthening the link with civil society; towards deliberative democracy
C. The normative strengths of the EESC as a form of ‘deliberative democracy via a functional assembly’

IV. Legitimacy problems and the role of law

A. Input-legitimacy
1. Representativity
   (a) Representativity problems
   (b) The role of law in redressing representativity problems
2. Accountability
   (a) The difficult status of EESC members
   (b) The role of soft law
3. Deliberation
   (a) A difficult assessment
   (b) The deliberative freedom of a constitutionalised assembly
B. Output-legitimacy
1. An assessment and some suggestions
2. The role of law

V. The EESC and OH&S

A. The role of the EESC in OH&S policy
B. The legitimacy of the EESC’s role in OH&S policy

Conclusion

Chapter 4. Tripartite advisory committees: the Advisory Committee on Safety and Health at Work (AC)

I. Functional participation via tripartite advisory committees

A. The creation of tripartite advisory committees in social policy
B. Tripartite advisory committees and the typology of committees
C. The AC as analytical representative of functional participation via (tripartite) committees

II. Legal status and functioning of the AC

A. Composition
B. Competence and functioning
III. The AC as ‘tripartite expert deliberation’

A. Sectoral expertise in risk regulation
B. A complex combination of interest representation and deliberation
   1. Elements of interest-representation
   2. Elements of deliberation
C. ‘Tripartite expert deliberation’ in risk regulation

IV. Legitimacy problems and the role of law

A. Input-legitimacy
   1. How representative is the AC?
      (a) Problems of representativity
      (b) The (limited) role of law in redressing representativity problems
   2. How deliberative is the AC?
B. Output-legitimacy
   1. An approximate assessment
   2. Can the AC’s output-legitimacy be enhanced by judicial review?
      (a) Requiring the consultation of the AC
      (b) Statement of reasons
C. Transparency and accountability
   1. The AC in the opaque web of committees
   2. The way to the open committee door: access to documents and/or publicity?
D. The limits of judicial review

Conclusion

Chapter 5. Information agencies: the European Agency for Safety and Health Protection at Work

I. The creation of European agencies

A. The Bilbao Agency and typologies of European agencies
B. Reasons for the creation of European agencies
   1. European agencies and the ‘European social dimension’
   2. European agencies and ‘administrative integration’
   3. The origins of the Bilbao Agency

II. Legal status and functioning of the Bilbao Agency

A. Competence
B. Organs and functioning
   1. The ‘central’ structure of the Agency
   2. The network structure of the Agency
III. A network agency with tripartite guidance

A. The independent regulatory/executive expert agency
B. The network agency
   1. The normative challenge of the ‘policy networks’ concept
   2. Networking as foundational legitimacy: the BilbaoAgency
   3. Network agencies and other information agencies
C. The network agency with tripartite guidance

IV. Legitimacy problems and the role of law

A. Input-legitimacy
   1. How ‘independent’, plural and transparent is the network?
   2. How strong is social partners’ participation?
B. Output-legitimacy
C. The role of law in strengthening the legitimacy of ‘governance through information’
   1. The role of law in improving input- and output-legitimacy
      (a) Resolving the conundrum ‘independence-plurality-functional participation’
      (b) The legal framework for a less modest agency
   2. Transparency and accountability
      (a) Transparency
      (b) Transparency and the protection of individual rights
      (c) Accountability

Conclusion

Chapter 6. The European social dialogue

I. The origins and the concept of the European social dialogue

II. Legal status and functioning of the social dialogue

A. The cross-sectoral social dialogue
   1. The two-stage consultation procedure
   2. The negotiation of collective agreements
   3. Implementation of European law via national collective agreements
B. The sectoral social dialogue
   1. The infrastructure
   2. The procedure of Articles 138-139 EC

III. The normative foundations of the social dialogue

A. Political theory: neo-corporatism
   1. The neo-corporatist inspiration of the social dialogue
2. Normative considerations on neo-corporatism as a system of interest intermediation

B. The constitutional law of the EC as conceptual framework: the UEAPME case
   1. UEAPME: a summary
   2. The democratic principle: from the ECJ to the CFI
   3. The principle of democracy on which the Union is founded
   4. Functional democracy instead of sovereignty of ‘the people as a whole’
   5. A new institutional balance?
   6. The future potential of UEAPME

C. Labour law theory
   1. Another level of collective bargaining or just a regulatory technique?
   2. Industrial relations as inspiration and aim of the social dialogue
   3. Labour law theory as normative framework

D. The common ground of political theory, EU constitutional law and labour law theory

IV. Legitimacy problems and the role of law

A. Three assumptions and their problematic confrontation with reality
   1. An output assessment
   2. The assumption of equal balance in bargaining power
   3. The assumption of representativity

B. Can law remedy the legitimacy problems?
   1. Restore the balance in bargaining power and increase the output by legal intervention?
      (a) Basic rights of collective bargaining
      (b) Public intervention, and the threat thereof, to incite the social partners to bargain
      (c) Setting and controlling the conditions (and content) of the bargaining process
      (d) The particular case of implementation of ‘autonomous agreements’ by Council decision
   2. Criteria of representativity: a difficult legal issue

C. Synthesis: the social dialogue dilemma

V. The social dialogue in the field of OH&S

Conclusion

Chapter 7. Functional participation across stages and modes of policy-making

I. Functional participation in regulatory policy-making: legislation

A. The combination of functional participation up to the Amsterdam Treaty
   1. Functional participation in legislation
2. The legitimacy of combined functional participation in legislation

B. The combination of functional participation after the Amsterdam Treaty
   1. The problematic introduction of the social dialogue in the field of OH&S
   2. The legitimacy of functional participation in legislation post-Amsterdam
      (a) The institutional choice between tripartite expert deliberation and bipartite corporatism
      (b) Combined functional participation and the choice between legislation and negotiation

II. Functional participation in ‘regulatory implementation’

A. Implementation and functional participation: beyond the comitology debate

B. Functional participation as compensation for lack of parliamentary representation?
   1. The procedure ‘adaptation to technical change’
   2. Functional participation as additional source of legitimacy

C. Functional participation to counterbalance scientific expertise?
   1. The procedure to adopt occupational exposure limits
   2. Functional participation as additional source of legitimacy

III. New modes of governance and the participatory myth

Conclusion

Conclusion

I. Functional participation as additional source of legitimacy in social regulation: potential and limits
   A. Forms of functional participation: potential and limits
   B. Functional participation across stages and modes of policy-making: potential and limits

II. The ‘role of law’, proceduralisation of functional participation, and the dichotomy between pluralism and corporatism

III. About fugitive constitutional moments and future challenges

Bibliography