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# PERSPECTIVE

SARI K.M. LAITINEN-RAWANA\*

## Creating a Unified Europe: Maastricht and Beyond

The Treaty on European Union, popularly called the Maastricht Treaty, was signed in February of 1992 and entered into force on November 1, 1993.<sup>1</sup> The Treaty represents an ambitious effort to create an ever closer union among the peoples of Europe<sup>2</sup> and marks the European Community's most far-reaching step since the EEC Treaty.<sup>3</sup> The Maastricht Treaty changes the nature of the Community and takes it one step closer to a federal union. The Community's primary goal will no longer be tied exclusively to the economic area, but will expand to involve goals and objectives previously reserved for Member States. With such dramatic increase in the scope of the Community, it is no surprise that ratification of the Maastricht Treaty became the center of controversy in Europe and produced more divergence rather than the desired unity among Member States.

The purpose of this article is to examine the potential of the Maastricht Treaty to aid in the creation of a unified Europe. The absence of consensus over the

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1. *Presidency Sums up the New European Union*, EC Update (CCH), Nov. 11, 1993, at 1.

2. TREATY ON EUROPEAN UNION [MAASTRICHT TREATY] art. A. The Treaty contains a mass of amendments to the three constitutive treaties of the European Community: the ECSC Treaty, the Euratom Treaty, and the EEC Treaty. Most significantly, the Maastricht Treaty affects the EEC Treaty that has already been amended by the Merger Treaty and the Single European Act.

3. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].

direction of the Community, as well as the turmoil over the ratification of the Maastricht Treaty, reflect the few opportunities of various interest groups and individuals to be heard in the Community. A unified Europe will result in increased opportunities for the various constituent interests to participate in Community affairs. Increased participation will ensure that those who have voiced dissatisfaction regarding their role in the Community (the European Parliament, Member State Governments, and individuals) become represented in Community actions and policies. This article will analyze how the Maastricht Treaty will expand the opportunities of the European Parliament, Member State Governments, and individuals to participate in Community decision making.

## I. Background

The division over the contents of the Treaty was painfully clear throughout the ratification process. The United Kingdom secured an exemption from the new social-policy agenda of the Community. Member States concluded an agreement on social policy without the United Kingdom.<sup>4</sup> Many Member States secured separate protocols relating to other issues.<sup>5</sup> In addition, the Danish and French referendums over the Maastricht Treaty demonstrated the increasing dissatisfaction over the Community.<sup>6</sup> In Germany, ratification was delayed because of several appeals filed in the German Constitutional Court challenging the compatibility of the Maastricht Treaty with German sovereignty and the German Constitution. In October 1993 the Court unanimously ruled in favor of ratification.<sup>7</sup> A poll of German government officials discovered that the appeals "reflect the malaise of a public frustrated and annoyed at not having been directly consulted on the Maastricht Treaty."<sup>8</sup>

4. MAASTRICHT TREATY, *supra* note 2, Protocol on Social Policy & Agreement on Social Policy Concluded Between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland. As a result, the United Kingdom will not participate in creating or passing social instruments. Any social legislation passed will not apply to the United Kingdom. See Donald C. Dowling, Jr., *EC Employment Law After Maastricht: "Continental Social Europe?"*, 27 INT'L LAW. 1, 7-11 (1993).

5. See, e.g., MAASTRICHT TREATY, *supra* note 2, Protocol on the Acquisition of Property in Denmark (concerning acquisition of second homes in Denmark), Protocol on Portugal (concerning Portugal's autonomous regions of Azores and Madeira), Protocol on France (concerning the privilege of monetary emission in French overseas territories).

6. Denmark's first referendum in June 1992 placed the future of the Treaty in doubt when the Danes narrowly voted down the Treaty. The Danes approved the Treaty in another referendum in May 1993. The French voted in favor of the Treaty in a referendum in September 1992, but with a narrow margin: 51.05% in favor, 48.95% against.

7. *The Union Treaty: What Will It Change?*, EC Update (CCH), Oct. 28, 1993, at 1. To the complaint that the European Community as envisioned by the Maastricht Treaty dissolves German sovereignty, the Court stated that the treaty creates a league of states, "each of which preserves its national identity while sharing many once-sovereign powers." *Last Harrumph for Maastricht*, ECONOMIST, Oct. 16, 1993, at 52.

8. Jahabar Sadiq, *Fear of Sovereignty Being Undermined*, BUS. TIMES (Malaysia), July 7, 1993. The intergovernmental negotiations that led to the adoption of the Maastricht Treaty were conducted in secrecy, ignoring the "basic requirements of a democracy, namely transparency, information and public discussion." Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 30 COMMON MKT. L. REV. 17, 18 (1993).

The Maastricht Treaty has been not only a source of dissatisfaction over the direction of Europe's future, but also a catalyst for expressions of dissatisfaction over the Community on a larger scale. Some doubt whether the goal of a unified Europe is attainable within the existing Community structure. Member State governments frequently resist Community action by delaying or failing to implement Community legislation. The resistance stems from the Community's power structure. Sovereignty and power flow from the national level to the central institutions of the Community. The bottom-up power transfer depletes power at the national level. A considerable percentage of national laws originates or is directly handed down by the Community. Member State governments can only watch while their sovereignty over an increasing number of subject areas is channeled to the Community headquarters in Brussels. The Community has had to increase its enforcement arsenal to bring rebelling states in line with Community agendas. To the outside world, Europe may appear unified, but inside, the voices of dissent and discord are becoming louder. The situation is reminiscent of the "Europessimism" or "Euroschlerosis" of the early 1980s when many lost faith in the European institutions.<sup>9</sup>

A unified Europe is an attainable goal, but it requires that the Community respond to the voices of dissatisfaction, and that the Community become more open to increased participation from its diverse constituent interests. At the level of the central Community institutions, the legislative process must be reformed to become more responsive to the European Parliament's input. At the Member State level, the Community must respect the diversity of its members and recognize that certain goals are best achieved by local action. Finally, more opportunities to participate in and learn about Community affairs should be provided to the European citizen.

Increased participation at all three levels would only yield positive results in European integration. First, increased participation would help reduce the notorious "democratic deficit" in the Community. The current democratic deficit is the result of the Community organization that operates like no other democratic government in the world. The Community legislative process does not follow the traditional separation-of-powers scheme but combines elements of the processes of international organizations and a federal legislature.<sup>10</sup> As a result, the elected institution of the Community, the European Parliament, is considerably weaker than the executive institutions. In general, legislative process is very efficient, but at the same time fails to include the European Parliament in a meaningful way. Legislation may be passed against the majority opinion of the Parliament. The Maastricht Treaty contains amendments that increase the powers of the European Parliament, thereby decreasing the democratic deficit.

Second, increased participation would increase the legitimacy of Community

9. See, e.g., Andrew Moravcsik, *Negotiating the Single European Act*, 45 INT'L ORG. 1 (Winter 1991); Gregory F. Treverton, *The Year of European (Dis)Unification*, 91 CURRENT HIST. 353 (Nov. 1992); Walter Goldstein, *Europe After Maastricht*, 71 FOREIGN AFF. 117 (Winter 1992/93); Richard C. Longworth, *The Road to 1992: What a Long, Difficult Trip It's Been*, 1 EUR. 6 (Jan./Feb. 1992).

10. John T. Lang, *The Development of European Community Constitutional Law*, 25 INT'L LAW. 455, 460-61 (1991).

goals and institutions. The legitimacy of a governing body depends on whether the governing body is generally recognized as a valid authority. The less willing individuals and Member States are to abide by Community actions, the less legitimate the Community's authority becomes. Those who believe that their interests and inputs are not represented or considered will be less willing to accept the results. Increasing the opportunities to participate and to be heard would assure that the end result, favorable or not, includes a consideration of the interests represented, because those whose interests were represented are more likely to cooperate and consent to the results. The Community represents interests that are diverse both in strength and size. Small interest groups that may have had a chance to influence decisions at the national level are squeezed out when action is taken at the Community level, because the group may lack resources or the necessary strength in size. The Maastricht Treaty contains amendments that will increase citizen and Member State participation in the Community and help restore sorely needed legitimacy to Community actions.

Finally, increased participation at all three levels would increase the accountability of those who make the decisions. When a decisionmaker has to respond and deal with an increased number of interests, the decisionmaker must become sensitive to reach a decision that satisfies the largest number of interests represented. Otherwise, it is unlikely that the decisionmaker will maintain popular support. In the Community, increased participation of the European Parliament would force the Commission and Council to become more accountable. Furthermore, in areas where Member States have diffuse and fragmented interests, the proper decisionmaker should become the local governments to avoid imposing European-wide standards that ultimately satisfy nobody. When the decisionmaker is brought as close as possible to the people, the accountability of the decisionmaker increases. The European Commissioner in Brussels rarely, if ever, has the chance to discuss a new law proposal relating to social issues with a Greek worker that the legislation affects. The Maastricht Treaty contains the principle of subsidiarity that has the potential to increase decisionmaking at the local level.

Some argue that increased opportunities to participate would slow down the progress and efficiency of the Community. This argument mischaracterizes the causal relationship between participation on one side and progress on the other. It is the Community's emphasis on fast and efficient progress that has led to the erosion of opportunities to participate in the Community and to the failure to reach a unified Europe. Increasing participation on all fronts in the Community may indeed slow down progress, but will create more satisfied constituents. Increased participation will create a unified Europe that fully supports any progress made—slow as it may be. Those who insist on fast integration may ultimately destroy any hope of a unified Europe. A unified Europe will be the result of increasing the opportunities of a larger group of interests to become involved and to influence Community affairs.

## II. Increasing Participation at the Community Level: New Powers of the European Parliament

The current legislative process in the Community fails to provide the European Parliament with adequate opportunities to fully participate in and influence Community legislation. The European Parliament is a curious anomaly in the Community structure. It is the only institution elected by universal suffrage; it comprises over 500 representatives and their staff and yet has no genuine power to represent and respond to the interests of the electorate. Its role is mostly advisory and consultative. Community legislation may be passed against the majority view of the Parliament. The Maastricht Treaty contains provisions that have the potential to increase the role of the Parliament in the Community. The purpose of this section is to examine the role of the Parliament in the current legislative process and to evaluate how the Maastricht Treaty will expand the role of the Parliament in the Community's legislative process.

### A. CURRENT LEGISLATIVE PROCESS

The key institutions in the legislative process are the Commission, the Council of Ministers, and the European Parliament. In a nutshell, the European Commission proposes legislation, and the Council of Ministers passes legislation after consulting the European Parliament.<sup>11</sup> The Community has three types of law: treaties, regulations, and directives. A regulation is binding and directly applicable in Member States.<sup>12</sup> A directive is binding, but leaves the choice of form and methods of implementation to the Member States within a deadline.<sup>13</sup> A regulation is comparable to a national law, whereas a directive must be incorporated into national law by the Member State legislature.<sup>14</sup>

Proposals for regulations and directives are initiated in the Commission.<sup>15</sup> The Commission has a monopoly power over law proposals. The Council may request the Commission to submit a legislative proposal, but there is no mechanism to

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11. Directorate-General for Information and Public Relations of the European Parliament, *The European Parliament* 10, Cat. No. AX-73-91-659-EN-C (1992).

12. EEC TREATY, *supra* note 3, art. 189.

13. *Id.*

14. *The European Community 1992 and Beyond* 25, EC Comm'n, Cat. No. CC-60-91-385-EN-C (1991). The EEC Treaty authorizes the Council and Commission to issue decisions and recommendations that do not have the binding force of primary law. A decision is binding only to the parties to which it is addressed.

15. The members of the Commission are appointed by Member State governments. EEC TREATY, *supra* note 3, art. 157(1). The Commissioners are nevertheless required to act independently of their governments in performing their duties because the Commission represents Community, not national, interests. EEC TREATY, *supra* note 3, art. 157(2). Each member of the Commission is responsible for a specific subject matter within the Commission. The Commission cannot be removed except as a whole by means of a motion for censure by the European Parliament. *Id.* art. 144. Under limited circumstances, the European Court of Justice may retire a commissioner for serious misconduct. *Id.* art. 160. The Commission consists of 17 members.

compel the Commission to draft a proposal.<sup>16</sup> The exclusive power to propose makes the Commission the power house of the Community when added to the fact that the Commission also enforces Community legislation.<sup>17</sup>

The Commission submits its proposal to the Council.<sup>18</sup> The Council performs the traditional function of a legislature—it passes laws—but is always dependent on the Commission initiative, which is unusual in the traditional separation of powers scheme.<sup>19</sup> The Council always meets in closed session.

Voting on the Commission's proposals occurs by simple majority unless the Treaty requires otherwise.<sup>20</sup> The critical question becomes whether the passage of a proposal requires a unanimous vote or a qualified majority. The voting method specified has political implications. Each Member State possesses a predetermined number of votes.<sup>21</sup> If a unanimous vote is required, a single country possesses a veto power over the proposed legislation. To obtain a qualified majority, fifty-four of the total of seventy-six votes are required. The qualified majority vote provides regional balance and dependency to the legislative process. For example, when a qualified majority vote is required, the northern European members cannot pass a proposal without the support of at least one of the southern European members. Moreover, the biggest four or five members cannot pass a proposal over the objection of the smaller ones.

Before the Council may reach a final decision on a proposal, the Council must seek the European Parliament's participation in varying degrees.<sup>22</sup> The

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16. *Id.* art. 152. The Commission does consult with representatives of Member States and with committees of the Parliament to aid in formulating proposals. On occasion, the Commission may submit orientation papers to the Council for debate for feedback on the proposal. Werner Ungerer, *Institutional Consequences of Broadening and Deepening the Community: The Consequences for the Decision-Making Process*, 30 COMMON MKT. L. REV. 71, 72-73 (1993).

17. The sheer size of the Commission is also staggering. The Commission and the staff now consist of approximately 15,000 people. Most lobbying activities in the Community center around the Commission. On lobbying activities in the Community, see Odile Prevot, *A New Concern in Europe: Lobbyists, The Merchants of Influence*, 5 TRANSNAT'L LAW. 305 (1992).

18. The Council members represent national governments. EEC TREATY, *supra* note 3, art. 146. The Council presidency rotates at six-month intervals in a preset order. *Id.* The Council consists of 12 members. The Council of Ministers is easily confused with the European Council. The European Council consists of the Heads of State that meet twice a year in summits to discuss broad policy for the Community.

19. Carl O. Lenz, *The Court of Justice of the European Communities*, 14 EUR. L. REV. 127, 129 (1989).

20. EEC TREATY, *supra* note 3, art. 148(1).

21. The current division of votes is as follows: Belgium (5), Denmark (3), Germany (10), Greece (5), France (10), Ireland (3), Italy (10), Luxembourg (2), Netherlands (5), Portugal (5), Spain (8), and United Kingdom (10). *Id.* art. 148(2).

22. The members of the Parliament are elected by universal suffrage. Each country selects a specified number of representatives to the Parliament. Members of Parliament serve a five-year term; they are divided into political groups in the assembly hall.

Prior to the most recent parliamentary election in June 1994, the division of members was as follows: Belgium (24), Denmark (16), Germany (81), Greece (24), France (81), Ireland (15), Italy (81), Luxembourg (6), Netherlands (25), Portugal (24), Spain (60), and the United Kingdom (81). *Id.* art. 138.

Parliament, however, has only limited rights to influence the Commission's or Council's work. The first right is the right to give nonbinding opinions on legislative proposals.<sup>23</sup> In some cases, this is the power to delay the passage of the legislation in question until the proposal has been amended to reflect the views of the Parliament, because the Council cannot legally pass a law without having received the Parliament's opinion.<sup>24</sup>

The second right is the right to question. The Parliament may require the members of the Commission and the Council to answer, in writing or orally, questions on Community issues,<sup>25</sup> thus facilitating a dialogue between the Community organs. The oral question-and-answer sessions, or question times, between a member of parliament and an executive are a time-honored tradition in many European countries. The question times allow members of the Parliament to "obtain information and confirmation of positions from the Commission or Council, but rarely fresh action or statements of position."<sup>26</sup>

The third right of the Parliament to influence Community legislation is the right to participate in the cooperation procedure.<sup>27</sup> The Single European Act of 1987 amended the Treaty of Rome to introduce the cooperation procedure as the first increase in the powers of the Parliament. The cooperation procedure extends to selected subject areas, such as the areas of social policy and research,<sup>28</sup> which are not the areas where the most significant decisions of the Community are made. For this reason, the cooperation procedure has come under attack for failing to provide the Parliament with any meaningful power over important subject areas.

Under the cooperation procedure, the Commission drafts a proposal and submits it to the Council, which seeks the opinion of the Parliament. Once the Council has received the Parliament's opinion, the Council adopts a common position by a qualified majority<sup>29</sup> and submits the common position back to the Parliament

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Because of German unification, the number of members to be elected in the June 1994 election was increased to 567. If Norway, Finland, Sweden, and Austria join the European Community next year, there will be more than 600 members of Parliament.

23. *Id.* art. 145.

24. Case 138/79, *Roquette Frères SA v. Council*, 1980 E.C.R. 3333.

25. EEC TREATY, *supra* note 3, art. 140.

26. H.G. Thomas, *Democracy and 1992—Integration Without Accountability?*, X(2) LIVERPOOL L. REV. 185, 187 (1988) (citing J. FITZMAURICE, *THE EUROPEAN PARLIAMENT* 150 (1978)). The question time has become popular. Since 1973 each part-session of the Parliament has included a question time. EMILE NOËL, *WORKING TOGETHER—THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 27 (1991), *updated and printed in* 15 SUFFOLK TRANSNAT'L L.J. 514 (1992). In 1989 the Commission replied to 581 questions during oral question time as well as to 1711 written questions from the Parliament. *Id.*

27. EEC TREATY, *supra* note 3, art. 149.

28. The cooperation procedure applies to measures adopted, for example, under art. 130E (regional development fund), art. 130Q(2) (research and development), art. 118A (health and safety of workers), art. 57 (mutual recognition of diplomas), art. 7 (nondiscrimination on grounds of nationality), and art. 48 (freedom of movement of workers).

29. EEC TREATY, *supra* note 3, art. 149(2)(a).



for a second reading.<sup>30</sup> The Parliament may approve the position or remain silent, whereafter the Council is free to pass the proposal. If the Parliament rejects the common position, the Council can still pass the legislation by a unanimous vote.<sup>31</sup> If the Parliament proposes amendments, the Commission considers the amendments and then forwards the amended proposal to the Council. If the Commission did not adopt some of the Parliament's amendments, the Council may adopt such amendment only by a unanimous vote.<sup>32</sup> Otherwise, the Council may adopt the amended proposal by a qualified majority.<sup>33</sup>

The net result under the cooperation procedure is that the Council may pass the legislation over the objection of the Parliament if the Council can reach unanimity on the issue. In addition, in areas where the cooperation procedure does not apply, the Parliament remains a consulting and advisory body. The Parliament has repeatedly demanded the right to participate in the Community legislative process on an equal footing with the Commission and Council.<sup>34</sup> Until the Maastricht Treaty, the demands have been unsuccessful.

## B. THE LEGISLATIVE PROCESS AFTER THE MAASTRICHT AMENDMENTS

The Maastricht Treaty introduces a co-decision procedure that increases the Parliament's involvement in the legislative process.<sup>35</sup> Under the co-decision procedure, the Commission submits its proposal to both the Council and the Parliament.<sup>36</sup> Once the Council receives the Parliament's opinion, the Council adopts a common position that it submits back to the Parliament. The Parliament has three months to respond. If the Parliament approves or remains silent, the Council may adopt the proposal. If the Parliament proposes amendments, the amended proposal must then be submitted to both the Commission and the Council for their opinions. The Council may adopt the amended proposal by a qualified majority if the Commission has not issued a negative opinion on the amended proposal. If the Commission issues a negative opinion on the amended proposal, the Council may still pass the proposal, but only if the Council can pass the proposal unanimously.

If the Parliament intends to reject the proposed legislation, the Council may

30. *Id.* art. 149(2)(b).

31. *Id.* art. 149(2)(c).

32. *Id.* art. 149(2)(d).

33. Independently of the cooperation procedure, the Parliament may request the opening of a conciliation with the Council when the two institutions disagree on a Commission proposal that would have a significant financial impact.

34. D. LASOK & J.W. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 233 (4th ed. 1987).

35. MAASTRICHT TREATY, *supra* note 2, art. 189b. For a detailed analysis of the co-decision power, see Pierre Mathijsen, *The Power of Co-Decision of the European Parliament Introduced by the Maastricht Treaty*, B. TUL. EUR. & CIV. L.F. 81 (1993).

36. MAASTRICHT TREATY, *supra* note 2, art. 189 (laying out the requirements of the co-decision procedure).

convene a Conciliation Committee to work out the differences between the Council and the Parliament.<sup>37</sup> The committee has six weeks to find common ground. If an acceptable compromise is reached, the Parliament and Council must then approve the proposal. If conciliation fails, the Council by a qualified majority can unilaterally adopt the original common position it drafted. However, the Parliament has the power to prevent the passage by an absolute majority of its members. This authority is significant because it gives the Parliament an effective veto power.

As was true with the cooperation procedure, the new co-decision procedure also applies to selected subject areas. These areas include: the multiannual framework research programs; general programs on environmental protection; the development of trans-European networks; education; public health; culture; measures relating to consumer protection; free movement of workers; and some aspects of the right of establishment and the internal market.<sup>38</sup> Some of these areas are new competencies of the Community as enlarged by the Maastricht Treaty. None of these areas are the core competencies of the Community. Despite the fact that the procedure applies only in limited areas, it is a welcome expansion of Parliament's powers.<sup>39</sup> The Parliament has already exercised its new power under the co-decision procedure. In March 1994, a Conciliation Committee was formed under the co-decision procedure to consolidate the differences of the Parliament and the Council over the research budget for the next four years.<sup>40</sup>

In addition to the new co-decision procedure, Maastricht expands the areas where the cooperation procedure applies.<sup>41</sup> The Maastricht Treaty also gives the Parliament new powers of assent in several areas. First, the President and other members of the Commission will now be subject as a body to a vote of approval by the Parliament.<sup>42</sup> The Commission's term of service increases from four to five years to coincide with the term of the member of Parliament.<sup>43</sup> The make-up of the Commission may now become a political issue in the European parliamentary election campaigns.<sup>44</sup> Second, the assent power is introduced into the foreign affairs of the Community. Previously, the Parliament had the power of assent

37. *Id.* art. 189b(2)(c).

38. For a detailed list of the areas that will require the co-decision procedure, see Maastricht—The Position of the European Parliament, EUR. PARL. DOC. (Annex I) at 11 (Notice to Members) [hereinafter Position of the Parliament].

39. With respect to the co-decision power, one comment stated: "The right of veto that comes with co-decision is the key. Use it too often and the parliament will be judged frivolous; use it too seldom and the parliament will be ignored. Use it just right, as a threat as well as a reality, and the parliament will be taken seriously." *Europe's Feeble Parliament*, ECONOMIST, Jan. 22, 1994, at 15.

40. James Landale, *EU: European Deputies Wield New Power*, TIMES, Mar. 5, 1994, available in WESTLAW, INT-NEWS database. The Parliament and the Council disagree on the overall amount of the budget, how the money should be shared, and by whom. *Id.*

41. For a detailed list of these areas, see *Position of the Parliament*, *supra* note 38, at 12.

42. MAASTRICHT TREATY, *supra* note 2, art. 158(2).

43. *Id.* art. 158.

44. European Union 27, EC Comm'n, Cat. No. CC-74-92-265-EN-C (1992).

in accession of new members to the Community and in association agreements with non-Community nations.<sup>45</sup> Under the Maastricht Treaty, the Parliament's assent is required for all international treaties that have substantial financial or contractual implications for the Community.<sup>46</sup>

The European Parliament slowly but surely gains more say in the Community legislative process. The original, purely advisory and consulting role of the Parliament has increased with the cooperation and co-decision procedures, which constitutes a significant step toward reducing the democratic deficit of the Community and increases the participation of the Parliament in the legislative process.

One of the major shortcomings of the current, as well as the Maastricht, scheme of democracy in the Community is the lack of political accountability. The Commission consists of members appointed by national governments, and the Council represents the executive branch of a Member State government.<sup>47</sup> The Parliament is the only directly elected institution in the Community, yet it is not empowered to effectively scrutinize the two other, more powerful, Community institutions. The Parliament can reach the Commission only by dismissing it as a whole through the motion for censure.<sup>48</sup> The new power to approve the Commission as a whole does not reach individual commissioners. Doubts as to one commissioner may not be enough for the Parliament to gain a majority to deny the approval of the entire Commission.

Another shortcoming is that the current role of the Parliament is complicated. Depending on the subject matter of the proposal, the Parliament may have one of three roles: the Parliament may be able to give an opinion; the Parliament may be able to initiate the cooperation procedure; or the Parliament may be able to initiate the co-decision procedure. Many subject matters may not lend themselves to easy classification between the relevant subject matters and disputes over which procedure is to be employed are foreseeable.<sup>49</sup>

Further, the co-decision and cooperation procedures reach only a limited number of Community competencies. The European Parliament strongly criticized this shortcoming of the current system and the Maastricht Treaty in its official position on the Maastricht Treaty.<sup>50</sup> The current legislative process in the Commu-

45. EEC TREATY, *supra* note 3, arts. 237-238.

46. MAASTRICHT TREATY, *supra* note 2, art. 228. Some additional powers the Parliament gains under the Maastricht Treaty include the right to request the Commission to draft a proposal on a specific subject matter. *Id.*, art. 138b. The power to request, however, is not equivalent to a power to compel the Commission to draft the desired proposal. The monopoly over proposals remains with the Commission. Finally, the vision of a true people's Europe may be facilitated by the new powers of the Parliament to appoint an ombudsman and to receive petitions from Community citizens. *Id.* arts. 138d-138e. These issues are discussed in part IV of this article.

47. Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

48. EEC TREATY, *supra* note 3, art. 144.

49. René Barents, *The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation*, 30 COMMON MKT. L. REV. 85, 89 (1993).

50. Position of the Parliament, *supra* note 38, at III.

nity, even after the Maastricht Treaty, "only insufficiently satisfies the democratic constitutional principle according to which all public power issues from the people."<sup>51</sup>

The European Parliament should be raised to a more equal playing field with the two more powerful institutions.<sup>52</sup> The Community needs an effective Parliament to scrutinize the Commission's and Council's work. All legislation could be approved by the Parliament, for example, by extending the co-decision procedure to all areas of Community competence. Such a change may slow down the legislative process of the Community, but would increase participation and ensure that a larger number of interests will be represented at the Community level. The French and Danish vetoes on the Treaty indicated a popular dissatisfaction with the vision of an ever closer union. The dissatisfaction is well founded. The Community has made significant inroads into areas that affect the smallest unit of the Community—the individual farmer, small business owner, and the factory worker—and yet continues to alienate these people by depriving the European Parliament of a meaningful role in the Community. A directly elected Parliament will be meaningful only if the Parliament enjoys authority to govern. Increasing the opportunities of the Parliament to influence the legislative process in a meaningful way would ensure that a larger group of interests will become represented and heard at the Community level.

### III. Increasing Participation at the National Level: Subsidiarity

The Maastricht Treaty adds the principle of subsidiarity to the EEC Treaty:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>53</sup>

In broad outline, subsidiarity divides power between the Community and Member State governments.<sup>54</sup> Subsidiarity is an attempt to clarify which level—national or supranational—has the final authority on a given issue. The question is similar to the division of powers between central and local governments in a federal system.

Subsidiarity is best understood in the larger context of the Maastricht agenda. The Treaty calls for respect for the national and regional differences in the Com-

51. Ulrich Everling, *Reflections on the Structure of the European Union*, 29 COMMON MKT. L. REV. 1053, 1074 (1992).

52. Koen Lenaerts, *Some Reflections on the Separation of Powers in the European Community*, 28 COMMON MKT. L. REV. 11, 20 (1991); see Ungerer, *supra* note 16, at 78.

53. MAASTRICHT TREATY, *supra* note 2, art. 3b.

54. For an account of the history of subsidiarity in Europe, see Deborah Z. Cass, *The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992).

munity. For example, article F(1) of the Treaty calls for respecting the national identities of Member States. Article 128(1) calls for the Community's contribution to the flowering of the cultures and diversity within the Community. The Treaty also establishes the Committee of Regions to aid the Council in better achieving the cultural diversity goal in Community measures.<sup>55</sup> Subsidiarity therefore recognizes that certain decisions are better made as close as possible to the citizen.<sup>56</sup> The creation of subsidiarity may answer the concerns and resistance of Member States that fear they will lose their national power and identity to the bandwagon called European integration.

Subsidiarity has the potential to increase the participation of Member States in Community agendas that Member States know how to do best: respond to local concerns. At the same time, subsidiarity ensures the accountability of the decisionmaker, because the decisionmaker is immediate and close to the public. The hope is that subsidiarity will safeguard against Community institutions from unilaterally expanding their power at the expense of national governments.<sup>57</sup> The purpose of this section is to examine the division of powers between the Community and Member States and how the division affects Member State participation in the Community before and after the Maastricht Treaty.

#### A. CURRENT DIVISION OF POWER BETWEEN COMMUNITY AND MEMBER STATES

The Treaties of the Community do not distribute powers and competencies between the Community and Member States. The EEC Treaty established an economic union to carry out certain tasks and objectives that are listed in the EEC Treaty.<sup>58</sup> The Community may legally act only to accomplish the enumerated tasks and objectives, that is it has enumerated or limited powers. Member States are generally competent to act unless the EEC Treaty provides otherwise.<sup>59</sup> In

55. MAASTRICHT TREATY, *supra* note 2, art. 198a. The Committee consists of local and regional authorities from all Member States. It will have an opportunity to comment on proposed Community legislation when the EEC Treaty, as amended by the Maastricht Treaty, so requires and otherwise when the Commission or the Council considers it appropriate. The Committee may issue an opinion on its own initiative. *Id.* art. 198c. The Committee's inaugural meeting was held in March 1994. Chris Porter, *Europe's Regions Edge into the Limelight*, Reuter Newswire, Mar. 8, 1994, available in WESTLAW, INT-NEWS database. Commissioner Bruce Millan expects that the Committee "could play a key role in tackling the gulf between Europe's citizens and the bureaucrats of Brussels." *Id.* Others, such as Jacques Delors, have expressed a more cautious opinion regarding the potential of the Committee. *Id.* In short, as a newly created body within the Community structure, the Committee of Regions will have to prove itself as a viable and effective body that can and will accomplish its purposes.

56. From Single Market to European Union 21, EC Comm'n, Cat. No. CC-74-92-289-EN-C (1992).

57. Nicholas Emiliou, *Subsidiarity: An Effective Barrier Against "the Enterprises of Ambition"?*, 17 EUR. L. REV. 383 (1992).

58. EEC TREATY, *supra* note 3, arts. 2-3. The Maastricht Treaty will increase the tasks and objectives of the Treaty of Rome. See MAASTRICHT TREATY, *supra* note 2, art. 3.

59. Barents, *supra* note 49, at 85.

practice, every Community measure must cite the Treaty provision on which the measure is based. To accomplish the enumerated tasks and objectives, the Community is authorized to make regulations and directives binding on Member States.<sup>60</sup> Further, article 235 gives the Community the power to act if the action is necessary to attain an objective and where the Treaty has not provided for the necessary powers elsewhere. Article 235 is sometimes referred to as the Necessary and Proper or Implied Powers Clause.

It is now firmly established that Community legislation is supreme over any conflicting national legislation, generally because Member States have expressly agreed that Community legislation is binding on them. In reality, the Community and Member States often engage in a tug-of-war. Member States have attempted to block or delay Community legislation by failing to implement duly passed directives. Conflicts arise over whether the Community acted within its enumerated competencies. The conflict is real. In 1989 alone the Community enacted 5,719 regulations directly applicable in Member States.<sup>61</sup>

The European Court of Justice (ECJ) has taken an active role in sorting out the hierarchy between Community and Member-State law. The landmark decision *Van Gend & Loos*<sup>62</sup> created the direct effect doctrine: A provision of the EEC Treaty may have a direct effect in a Member State if the provision is clear and unconditional, requiring no further legislative intervention by the Member State. Several provisions of the Treaty of Rome have since been ruled to have a direct effect.<sup>63</sup> Direct effect means that a national of a Member State may rely on the Treaty provision in national courts against conflicting Member State law.

From direct effect, it was only a short step to the supremacy doctrine. The ECJ held in *Costa v. ENEL*: "The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."<sup>64</sup> If there was any confusion left over the place of national law in the Community legal order, the *Simmenthal* decision made it clear that provisions of Community law take precedence over national laws and "render automatically inapplicable any conflicting provisions of current national law."<sup>65</sup>

60. EEC TREATY, *supra* note 3, art. 189.

61. Noël, *supra* note 26, at 13.

62. Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 1963 C.M.L.R. 105.

63. Articles 7, 9, 10, 12, 13(2), 16, 30, 36, 37, 48, 52, 53, 59(1), 62, 60(3), 67, 76, 79, 80, 85, 86, 90, 92(1), 93(3), 95, 96, 106, 119, and 221 have been ruled to have a direct effect. See Andrew C. Geddes, *The Incoming Tide: The Impact of EEC Law*, 141 NEW LAW J. 1330 (1991); Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 1964 C.M.L.R. 425; RALPH H. FOLSOM, EUROPEAN COMMUNITY LAW IN A NUTSHELL 73-74 (1991). Some articles have qualifications attached for them to be directly applicable.

64. 1964 E.C.R. at 593.

65. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629, [1978] 3 C.M.L.R. 263.

The supremacy doctrine is now firmly entrenched in the Community legal order.<sup>66</sup> Member States have transferred their sovereignty and competence to the Community institutions. Once the Community legislates, the legislation becomes supreme and preempts national law. It is easy to understand why national governments feel overwhelmed by the Community power while watching their own power fade away. The Community's effective enforcement system of compliance also adds to the arsenal of Community against Member States.<sup>67</sup>

Much of the frustration of national legislators may also be traced to the complicated scheme that the Community has created for the relationship between Community and national law. When a national legislature discusses a new bill, it has to decide whether the bill is in any way affected by existing Community treaty provisions, regulations, or directives. Existing national law must constantly be updated when the Community passes new laws to ensure compliance with Community law. The pressure to implement directives by the deadlines set by the Community adds to the burden. The national legislature must follow the decisions from the ECJ and act accordingly.<sup>68</sup> Finally, the national legislatures have witnessed an increasing transfer of power and sovereignty to the Community institutions and the resulting imposition of Europe-wide standards that may be poorly suited to the needs of the particular Member State. Subsidiarity has the potential to allocate power back to the national level.

## B. DIVISION OF POWER AFTER THE MAASTRICHT TREATY AND SUBSIDIARITY

The subsidiarity principle applies if the conditions of article 3b are met. First, subsidiarity applies only in areas that do not fall within the exclusive competence of the Community. If a competence is exclusive to the Community, subsidiarity

66. Expanding on the established supremacy and direct effect doctrines, the ECJ has since held that a direct effect may also be horizontal, i.e., as between private individuals. Case 43/75, *Defrenne v. Sabena*, [1976] 1 E.C.R. 455, [1976] 2 C.M.L.R. 98. Direct effect has also been expanded to cover regulations (Case 34/73, *Variola SpA v. Amministrazione Italiana delle Finanze*, 1973 E.C.R. 981) and also to some directives (Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337, [1975] 1 C.M.L.R. 1).

67. In 1990 the ECJ adopted an important addition to the Community's enforcement arsenal. The Court held that a state may be held liable for damages to an individual for the failure to implement a directive. *Francovich v. Italian Republic*, Cases C-6/90 & C-9/90, 1991 E.C.R. i-5357, 2 C.M.L.R. 66, discussed in Christopher Greenwood, Case and Comment, *Effect of EC Directives in National Law*, 51 CAMBRIDGE L.J. 3, 5 (1992). The Maastricht Treaty will further expand the enforcement arsenal by providing for a lump sum or penalty payment against a Member State that has failed to comply with a judgment ordering the state to fulfill an obligation under the Treaty. MAASTRICHT TREATY, *supra* note 2, art. 171. Currently, the Commission enforces Community law and has the right to ensure Member State compliance with Community law, e.g., by taking the noncomplying state to the ECJ.

68. Every national judge is considered a Community judge and has the power to question the validity of national laws against Community law. Curtin, *supra* note 8, at 31. The ability of national courts to question and strike national laws is foreign to many European legal systems where courts generally do not review the validity of legislation.

has no application. The difficulty lies in the failure of the EEC Treaty to specify which competencies belong exclusively to the Community.

The European Court of Justice has tackled the issue several times. There is consensus that in areas such as common commercial policy, fisheries policy, and in areas where the Community has issued comprehensive measures, the Community enjoys exclusive competency to act.<sup>69</sup> On the other hand, the attempt to divide Community competencies between exclusive and concurrent may be a futile exercise.<sup>70</sup> Member States have transferred some of their power and sovereignty to the Community. The principle of supremacy therefore dictates that in matters transferred to the Community, the Community has exclusive power.<sup>71</sup> The commentaries to the Draft Treaty on European Union support this view. If the Community and Member States enjoy concurrent power over a subject matter, the Member State is authorized to pass measures only until the Community decides to exercise its concurrent power in the area.<sup>72</sup> After the Community has decided to act, "the Union's competence is the same as in those cases where it has exclusive competence and the Member States are not entitled to act except where the law of the Union grants them the right to adopt implementing measures."<sup>73</sup> Consequently, once the Community acts, any national measure that conflicts with the Community measure is rendered ineffective. Conversely, as long as the Community remains silent, Member States are free to regulate the area or an aspect of an area not touched by the Community measure.

The second requirement of a subsidiarity imposes conditions on the Community's ability to act in areas where Member States have concurrent competence. The Community can take action only if the objectives of the proposed action cannot be sufficiently achieved at the Member State level and can therefore, by reason of the scale of effects of the proposed action, be better achieved at the Community level. The Community may act only to perform tasks that are more efficiently carried out in common than by Member States acting alone.<sup>74</sup>

The crucial question in interpreting subsidiarity then becomes whether the objectives of the Community action can better be attained at the Community or Member State level. The Community, acting to fulfill a competence where Mem-

69. FRANCESCO CAPOTORTI ET AL., *THE EUROPEAN UNION TREATY: COMMENTARY ON THE DRAFT ADOPTED BY THE EUROPEAN PARLIAMENT ON FEBRUARY 14, 1984*, at 74 (1986).

70. See, e.g., A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 *COMMON MKT. L. REV.* 1079 (1992).

71. *Id.* at 1080-81.

72. CAPOTORTI, *supra* note 69, at 77.

73. *Id.* The German Constitution provided the model for the subsidiarity doctrine and also supports the view that once the Community acts on any matter falling within its competence, its jurisdiction over the subject matter is exclusive. Toth, *supra* note 70, at 73. Article 72 of the German Basic Law (*Grundgesetz*) provides that in matters of concurrent power between the federal government and the *Länder*, the *Länder* shall be able to legislate provided that the federal government does not avail itself of the power to legislate. CAPOTORTI, *supra* note 69, at 76 n.6; see also Emiliou, *supra* note 57, at 388-90.

74. CAPOTORTI, *supra* note 69, at 78-79.



ber States have concurrent competence, must first examine the objective of its proposed measure. The Community must assure itself that the objective cannot sufficiently be attained by Member States acting separately. Moreover, the Community action should have a wide-ranging effect in the Community—for example, the action should benefit the whole Community. If the Community comes to the conclusion that the objective, due to its local impact, is sufficiently attained at the Member State level, the Community should refrain from taking measures.

But the subsidiarity principle is worded vaguely enough that the reverse may occur. The Community may decide that the time has come to set a Community-wide standard in the area where Member States have had the power to regulate separately. Thus, the subsidiarity principle will have a centralizing effect. Much is left to the discretion of the Community. Indeed, there is substantial disagreement on whether subsidiarity was intended to have a centralizing or decentralizing effect: whether subsidiarity transfers power from Member States to the Community or whether it transfers power from the Community to the Member States in situations where subsidiarity applies.

A decentralizing approach to interpreting subsidiarity would increase participation by Member States. In cases where the action proposed by the Community is sufficiently achieved at the Member State level, subsidiarity becomes a tool to increase the flexibility and responsiveness of the entire union to local needs.<sup>75</sup> The Community consists of twelve diverse nations where pressing concerns of purely local nature would otherwise have to yield to Europe-wide standards. An example of how subsidiarity may increase the Community's flexibility was the case of *London Boroughs* decided by the House of Lords of the United Kingdom.<sup>76</sup> The House of Lords upheld the London traffic authority's regulation on the basis of subsidiarity. Article 130R(4) of the EEC Treaty contains a reference to a principle similar to subsidiarity. The article states that Community should act with respect to the environment only "to the extent that the objectives can be attained better at the Community level than at the level of individual Member States."<sup>77</sup>

The London traffic authority had imposed a night prohibition on lorry traffic to reduce noise and pollution. Exceptions were given to lorries that used a special silent air brake. The ban was challenged based on Community law. The House of Lords stated that local authorities are better equipped to deal with the local environmental problems than are central Community institutions.<sup>78</sup> Environmental protection lies within the concurrent competence of the Community and Member States. The House of Lords limited the Community's reach in this area because

75. Eugene D. Cross, *Pre-Emption of Member State Law in the European Economic Community: A Framework for Analysis*, 29 COMMON MKT. L. REV. 447, 471 (1992).

76. *Regina v. London Boroughs Transport Committee*, 1 C.M.L.R. 229 (Q.B. Div'l Ct. 1989); see also Emiliou, *supra* note 57, at 394-95.

77. EEC TREATY, *supra* note 3, art. 130R(4).

78. Cross, *supra* note 75, at 394-95.

the environmental protection of urban London and the local needs are better analyzed, achieved, and implemented at the local rather than Community level.

Besides the environment, several new competencies of the Community, as expanded by the Maastricht Treaty,<sup>79</sup> are prime candidates for the application of the principle of subsidiarity. The new competencies allow the Community to promote and contribute to health protection, education, cultures, civil protection, and tourism, which are closely linked to unique local needs and conditions. Retaining power over such subject areas at the lowest possible level would ensure the accountability of the people who make the decisions. The national and regional diversity of Member States should be respected, and subsidiarity provides the mechanism to recognize the diversity.

Deferring to the local level would also increase experimentation and creativity with regulatory solutions to local conditions.<sup>80</sup> Only when a dimension of one of the areas reaches Community-wide proportions does the Community become the appropriate authority to take measures. An example of such an action is the push for recognition of educational diplomas between Member States to facilitate the freedom of movement of workers.<sup>81</sup>

Whether subsidiarity will become a justiciable issue in the ECJ remains to be seen. Subsidiarity certainly has the potential to serve as a check and balance in the power sharing between the Community and Member States.<sup>82</sup> This potential should be recognized especially in the new competencies that the Maastricht Treaty creates for the Community. Subsidiarity should become a valuable tool for Member States to preserve their jurisdiction over local needs and concerns. Subsidiarity recognizes that Europe should not become rigid and unified in its structure and that the Community should only deal with those matters that it is better equipped to deal with than are Member States.<sup>83</sup> Subsidiarity increases vertical democracy by increasing participation by Member States in their internal affairs. Subsidiarity seeks an accommodation between uniformity and plurality in power sharing between the Community and Member States.<sup>84</sup>

#### IV. Increasing Participation at the Grassroots Level

Nationals of Member States are directly affected by Community measures in everyday situations. Conversely, the French and Danish referendums showed the

79. See MAASTRICHT TREATY, *supra* note 3, art. 3; see also Robert Lane, *New Community Competences Under the Maastricht Treaty*, 30 COMMON MKT. L. REV. 939 (1993).

80. Cross, *supra* note 75, at 471.

81. See MAASTRICHT TREATY, *supra* note 2, art. 57, 31 I.L.M. at 260.

82. It is unlikely, however, that Member States will be able to rely on subsidiarity as a defense to any Community action for failure to comply with Community law. Too many of the current competencies of the Community have been so comprehensively regulated by the Community that these areas may be considered now to be the exclusive domain of the Community, thereby precluding the application of subsidiarity.

83. European Union, *supra* note 44, at 11.

84. Cass, *supra* note 54, at 1135.

power of the individual to influence Community progress. The Community is no longer exclusively an economic union.<sup>85</sup> Several new competencies of the Community bear only an indirect relationship to trade issues. The purpose of this section is to examine the nature and scope of citizen participation in Community affairs.

The Maastricht Treaty establishes a new element to citizen participation in the Community: Union citizenship.<sup>86</sup> "Every person holding the nationality of a Member State shall be a citizen of the Union."<sup>87</sup> However, the status of Union citizenship is not granted by the Community; instead the citizenship flows from the nationality of a Member State. Acquisition or loss of Member State citizenship is a prerequisite to the acquisition or loss of Union citizenship. The Member States retain their freedom to choose the various criteria that determine their citizenship.<sup>88</sup>

The Treaty confers several rights on the new citizen. The first Community right is the right to move and reside freely within the territory of any Member State.<sup>89</sup> Prior to the Maastricht Treaty, any national of a Member State as well as accompanying family members were free to move to another state to take up employment. The national was required to obtain a residence permit valid for at least five years.<sup>90</sup> Moving to reside in another Member State for purposes other than employment was limited by the requirement that the individual must have enough resources not to become a burden on the social security system of the state.<sup>91</sup> The Maastricht Treaty breaks the connection between the right to travel and economic criteria—the right to travel is no longer an economic right.<sup>92</sup> The "Eurocitizen" will be able to enjoy the fruits of European integration anywhere in the Community.

The right to travel would not be complete unless accompanied by similar rights to participate in the political process in the place of residence. Another Community right established for the European citizen is the right to vote and stand for election in the Member State where the individual resides under the same conditions as the nationals of the state.<sup>93</sup> Many Member States will have to amend their

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85. The Maastricht Treaty recognized this by deleting the word "Economic" from the name of the Community. MAASTRICHT TREATY, *supra* note 2, art. G(A)(1).

86. *Id.* arts. 8-8e.

87. *Id.* art. 8.

88. CAPOTORTI, *supra* note 69, at 37.

89. MAASTRICHT TREATY, *supra* note 2, art. 8a(1).

90. 1 EC COMMISSION, COMPLETING THE INTERNAL MARKET: A COMMON MARKET FOR SERVICES 146 (1992).

91. *Id.* at 155; see Carlos Closa, *The Concept of Citizenship in the Treaty on European Union*, 29 COMMON MKT. L. REV. 1137 (1992).

92. Closa, *supra* note 91, at 1142.

93. MAASTRICHT TREATY, *supra* note 2, art. 8b(1). The Treaty extends the same right to the European citizen in elections to the European Parliament. All three Community institutions have a role in implementing detailed regulations on the issue. A proposal for a directive has been issued detailing the procedure to be followed for the right to vote and to stand as a candidate in a country in which the Union citizen resides but does not hold nationality. Council Directive 93/109, 1993 O.J. (L 329) 1.

constitutions to incorporate the mandate of this provision.<sup>94</sup> Traditionally, European nations have reserved the right to political participation exclusively to their own nationals. The opening up of participation in national politics to "foreigners" is a radical concept in Europe where national rivalries still persist and nationalism is strong. Nevertheless, the Union citizenship will facilitate free movement of workers within the Community, and the accompanying citizenship rights will make citizen participation more realistic among those who choose to move to another Member State.

The European citizen will also enjoy the right to petition the European Parliament and to lodge complaints with the ombudsman.<sup>95</sup> The right to petition the Parliament is conferred in matters within the Community's fields of activity and that directly affect the individual or a group of individuals.<sup>96</sup> The petition may also be made in association with other citizens. The opinion of the Committee of Petitions strongly advocates a generous interpretation on the admissibility of a petition: "There is no reason to exclude matters of general interest on which the petitioner feels strongly, even where he is not personally affected."<sup>97</sup> The right to petition is a recognition of the Parliament's urging in 1989 that every person should have a right to petition the Parliament.<sup>98</sup> The ombudsman is a time-honored tradition in many European countries, and therefore it is no surprise that the concept is incorporated into the Community legal order.

The ombudsman is appointed by the Parliament and authorized to receive complaints concerning instances of maladministration of Community institutions or bodies.<sup>99</sup> If an instance of maladministration is established, the ombudsman must refer the matter to the institution involved. The institution then has three months to respond. The Parliament will determine the ultimate action to be taken once the investigation is complete.<sup>100</sup> The Parliament contemplates that the ombudsman will cooperate closely with national civil-rights organizations. The right to petition and to complain to an ombudsman will significantly increase an individual's opportunity to be heard in the Community.

The main shortcoming of the current Community structure and the Maastricht Treaty is the absence of a bill of rights.<sup>101</sup> The reason stems from the fact that the Community's original mission encompassed only economic and trade issues.

94. European Union, *supra* note 44, at 23.

95. MAASTRICHT TREATY, *supra* note 2, art. 8d.

96. *Id.* art. 138d.

97. Position of the Parliament, *supra* note 38, at 126.

98. *Id.* at 125.

99. MAASTRICHT TREATY, *supra* note 2, art. 138e. The ombudsman cannot receive complaints of alleged maladministration of the European Court of Justice or the Court of First Instance acting in their judicial role.

100. Position of the Parliament, *supra* note 38, at 127.

101. See, e.g., Schermers, *The European Communities Bound by Fundamental Human Rights*, 27 COMMON MKT. L. REV. 249, 252 (1990).

Resolution of human rights issues was to remain within national legal orders.<sup>102</sup> Because the competencies of the Community have continued to expand beyond economic issues, there is no good reason for the absence of a fundamental document such as a bill of rights. Currently, protection of human rights in the Community is being accomplished by the ECJ. The ECJ has declared that it will review Community measures in a manner that prevents violations of human rights.<sup>103</sup>

The ECJ has drawn on the European Convention on Human Rights, as well as on the constitutions of the Member States, as the sources for its fundamental rights jurisprudence.<sup>104</sup> The Court's active role has been endorsed by the European Parliament, as well as by the Commission and the Council in a joint declaration.<sup>105</sup> Nevertheless, despite several opportunities, the ECJ has not held the European Convention legally binding on the Community. The Court will merely draw from the Convention and Member State constitutions to derive common principles enforceable at law, not unlike the selective incorporation approach by the United States Supreme Court. The Maastricht Treaty supports the selective approach. Article F of the Treaty calls for the Community to "respect fundamental rights" as guaranteed by the European Convention as general principles of Community law.

It is noteworthy that the Draft Treaty on European Union did contain a provision for fundamental rights. The draft article would have codified the ECJ's approach. The draft article granted every person the fundamental rights and freedoms derived in particular from the "common principles of the Constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental Freedoms."<sup>106</sup> The Parliament listed the failure of the final draft of the Maastricht Treaty to adopt any form of fundamental rights as a major shortcoming of the Maastricht Treaty.<sup>107</sup> Any such protection will now result from piecemeal litigation in the ECJ.<sup>108</sup> A written Community bill of rights would help provide the necessary criteria for judicial review of Community action.

102. Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1113 (1986).

103. *Id.* at 1105.

104. Dallen, Jr., *An Overview of European Community Protection of Human Rights, with Some Special References to the U.K.*, 27 COMMON MKT. L. REV. 761, 771 (1990). Each Community member is a member to the European Convention. The legal basis of the ECJ's use of the Convention is subject to criticism. Today, the issue may be moot due to the Court's declaration that it will refer to the Convention whenever a human rights issue is presented before the Court. Weiler, *supra* note 102, at 1135.

105. Dallen, *supra* note 104, at 781.

106. CAPOTORTI, *supra* note 69, at 39 (citing art. 4 of the draft treaty).

107. Position of the Parliament, *supra* note 38, at iv.

108. See, e.g., Cases 97-99/87, *Dow Chemical Iberica SA v. Commission*, 1989 E.C.R. 3165, [1991] 4 C.M.L.R. 410 (discussing art. 8 of the European Convention and the inviolability of home); Case 27/88, *Orkem SA v. Commission*, 1989 E.C.R. 3301 (discussing the European Convention and the right not to incriminate oneself in a noncriminal procedure under Community and Member State laws); Case 236/87, *Bergemann v. Bundesanstalt für Arbeit*, 1988 E.C.R. 5125, [1990]

The primary purpose of any bill of rights is to protect the individual against official misuse of power.<sup>109</sup>

On the Member State level an individual may claim rights conferred by Community law through several remedies. Directly applicable Community legislation can be relied on in courts as against anyone. After the decision in *Francovich*,<sup>110</sup> failure of a Member State to implement a directive may give an individual a right to claim damages from the state if certain conditions are met. Citizens will also benefit from lobbying their parliaments on speeding the implementation of a directive. All of these activities require information on the development in the Community. A Member State would be wise to invest in educating their nationals through information campaigns and in training a well-informed legal profession. A well-informed and knowledgeable citizenry is a prerequisite for grassroots participation to work in the Community.

## V. Conclusion

As the power of the Community increases, so do the concerns of those who believe that the Community no longer adequately represents their interests. It may be time to stop and listen to the voices of dissatisfaction to ensure that the goal of a unified Europe becomes a reality. A unified Europe will be the result of increased opportunities to participate in Community affairs so that Community institutions will once again enjoy the legitimacy they need to continue creating a unified Europe.

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1 C.M.L.R. 525 (discussing the European Convention art. 8 and the protection of family in the Community and Member States); Case 352/85, *Bond van Adverteerders v. Netherlands*, 1988 E.C.R. 2085, [1989] 3 C.M.L.R. 113 (discussing art. 10 of the European Convention—freedom of expression—in the Community); Case 222/86, *UNECTEF v. Heylens*, 1987 E.C.R. 4097, [1989] 1 C.M.L.R. 901 (discussing free access to employment as a Community human-rights principle in accordance with arts. 6 and 13 of the European Convention); Case 257/85, *Dufay v. European Parliament*, 1987 E.C.R. 1561 (right to fair trial of art. 6 of the European Convention recognized as Community right).

109. On the national level, an individual may naturally rely on the human-rights protections of the national constitution. A national may also use the European Court and Commission of Human Rights to pursue a remedy. However, the European Court and Commission of Human Rights operate outside the Community framework. They are not Community institutions.

110. See *supra* note 67.

