

'CAHIERS' OF THE FORWARD STUDIES UNIT

# GOVERNANCE IN THE EUROPEAN UNION



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# **Governance in the European Union**

**Edited by Olivier De Schutter,  
Notis Lebessis and John Paterson**

A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (<http://europa.eu.int>).

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# Governance and collective adventure

Before delving into *Governance in the European Union*, the reader is entitled to a warning. The approach to the art of governing — to which the reader is introduced by the writers gathered together by Olivier De Schutter, Notis Lebessis and John Paterson — is not the same as that which has sustained an abundant literature in political science over past years on new modes of European governance.

This literature most often adopts a descriptive point of view. It aims to describe the novel decision-making processes created by the European political system, which have successfully established a supranational legal framework accommodating a multiplicity of 'horizontal' or 'vertical' powers that are not subject to the classical hierarchies of the State.

The contributors to this book, on the contrary, are not directly interested in the European Union or its novel political system. Their attention is focused beyond the specificities of this system on what they describe as a profound mutation of democracy in the nations of Europe and elsewhere. They detect its origin in a transformation of the knowledge used in the formation of the rules of public life. Knowledge is no longer 'given' and accessible by the mechanisms of elected representation or by the concentration of specialist expertise, but rather thought to be 'constructed' and renewed in a process of collective learning that draws support from social pluralism. This philosophical point of departure leads to recommendations that the authors qualify as 'procedural'. Indeed, such recommendations make this very much a normative exercise.

Although this approach to governance has not been developed with the European Union in mind, it is particularly well-suited to it. The EU, as a political system, has bypassed the stage of 'substantive rationality', which so profoundly permeates national institutional systems marked by a strict separation between the legislative, executive and judicial powers. It is instead devoted to cooperation among these three orders. Furthermore, because the Union does not replace the Member States, it confronts, on a daily basis, the impossibility of establishing rules exclusively based on substantive rationality. While trying to establish a variety of trans-national and trans-cultural processes, the Union must take into account the diversity of the European fabric. In this sense, few mechanisms are more complex than those of the multiple channels of consultation that now enhance the exercise of the Commission's monopoly of initiative. Comitology similarly constitutes a procedural effort that is remarkable for bringing together all the national administrations to apply European directives in a variety of national contexts.

And yet, this novel European construction also suffers a crisis of democracy. The contributors to this book help the reader to understand how this crisis is not first and foremost a question of a **deficit**, that is, of the absence of a parliamentary institution analogous to that found at the centre of national public life. For them — and I must say that they have convinced me — the crisis of European political legitimacy originates principally from the procedures of the European Community, which have become formal rather than genuine. It is necessary to stress the word ‘become’ because this was not the original situation. Following their analyses, the reader is forced to admit that the current management of complexity by the national and Community powers in charge of Europe, though admirable in many respects, does not really do justice either to the richness of knowledge or to the diversity of contexts in Europe.

The richness of social, cultural and scientific knowledge is no longer taken into account by the European legislative system, despite the organisation of sophisticated consultation prior to the announcement of legislation. Instead, the system unduly privileges sectoral perspectives at the expense of both the pluralism of expertise and the problems to be resolved. The BSE crisis is a case in point.

Although open to national influence, the EU legislative system does not reflect the diverse context of the Member States when it comes to defining the modalities of its application. Continuing to be based on a model that separates the ‘law’ and the ‘modalities of application’, comitology and the national transposition of directives further ignore the heart of the problem: the lack of feedback in the application of rules as experienced by those ‘on the ground’ to those who conceptualise legislation ‘from above’. Effective and legitimate governance requires honest evaluation, the involvement of stakeholders, and confidence in the control mechanisms.

In fact, it is as if ‘European governance’ in the political science sense — a new way to share legislative and executive powers in a community of nations who pool their sovereignty — has only travelled half of the route. It must ensure that procedures, which were designed with the aim of sectoral efficiency, are also authentically participatory and respectful of diversity. It is not by accident that the territorial dimension, which is inter-sectoral by nature and conducive to participation, is imposing itself upon the new European governance.

Nevertheless, the way ahead — which concerns in particular the European Commission’s future White Paper on European Governance — does not flow easily from this procedural diagnosis. The decision-making processes to be reformed have, in their time, established the very success of the Community approach. Thus, a great deal of clear-headedness is necessary in order to recognise that the arrangements that enabled the preservation of European institutions must now be challenged so this power is once again exercised properly and advisedly. Finally, procedural rationality alerts us to the importance of the formation of collective knowledge and learning; yet this eminently political task also requires the expression of a subjective, indeed symbolic, vision and meaning. Both remain necessary for every collective adventure.

*Jérôme Vignon*

Chief Adviser responsible for the White Paper on European Governance

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# Governance in the European Union: introduction

**Olivier de Schutter, Notis Lebessis and John Paterson**

The papers in this collection were written over a period of almost five years. They represent the various stages of a debate launched at the end of 1995 with a seminar organised by the European Commission's Forward Studies Unit together with the Centre for the Philosophy of Law at the Catholic University of Louvain. This seminar led, in October 1997, to the Commission on 'Governance and the European Union' at the Journées juridiques Jean Dabin, which the Centre for the Philosophy of Law had chosen to devote to the proceduralisation of law. Subsequently, the issue of governance, and more specifically how to approach it in the light of proceduralisation (i.e. the setting up of mechanisms to promote self-learning within organisations), continued to receive attention from the Forward Studies Unit, which placed its consideration of the issue in the context of the scenarios for the reform of the European Commission.

The 12 chapters of this book, organised into four sections, reflect this process to varying degrees<sup>1</sup>. For the participants — mostly university researchers and European Commission officials — the process offered a rare opportunity to consider the practices of governance at European Union level from three starting points: a theoretical interpretation of 'transformations in the art of governance' (Part I); national experience in countries with administrative cultures as diverse as those of the United Kingdom and France (Part II); and aspects specific to the Community context (Part III). The conclusions (Part IV), written once all the other contributions were available, attempt to suggest guidelines for the future, anchoring them very clearly in the context of the European Commission's current reform plans.

All those who took part in the process made essentially the same diagnosis of the crisis in contemporary regulation; they also shared the same ambition, that is, they were motivated by their concern to propose a way out of this crisis.

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<sup>1</sup> Some of the contributions were initially presented during the 'Governance and the European Union' seminar, which began work in December 1995: these are the reports by J. Lenoble and J. De Munck, A. Dunsire and C. Hood, B. Perret, and J.-C. Thoenig. The report by O. De Schutter was presented during the Commission on 'Governance and the European Union' at the Journées juridiques Jean Dabin in October 1997. Although K.-H. Ladeur, G. Majone and R. Dehousse took part in the seminar, the studies by K.-H. Ladeur, by G. Majone and M. Everson, and by R. Dehousse do not cover exactly the same ground as at the time. Lastly, it was considered valuable to ask P. Calame for a contribution on his conception of active subsidiarity, P. Herzog for a consideration of the role of civil society and the opening-up of the European Union's institutional system, and G. Bertrand and A. Michalski for a summary of the 'Scenarios 2010' project begun in 1997 in the European Commission's Forward Studies Unit, given the obvious close connection between these subjects and the seminar's hypothesis. While N. Lebessis and J. Paterson contributed several reports during the 'Governance and the European Union' seminar, and thus influenced its course, the conclusions set out in Chapter 11 are original.

The basic hypothesis can be formulated in a number of ways. Traditional forms of regulation are currently in crisis. This crisis is also a political crisis, since it finds expression in widespread scepticism about the ability of our societies to modify themselves and thus alter their own historical course. However, the crisis is not related to a given regulatory model, such as the substantive law of the welfare state or the formal law of the liberal State; rather it is a crisis affecting the very idea of a model, i.e. the idea that governance is to be understood in terms of **applying a method**, in differing environments and despite such differences. Seen this way, the political crisis is merely the symptom of a deeper crisis in formal (or, more precisely, substantive) rationality and its presuppositions, namely that phenomena obey laws, that we can update these laws, and that, thanks to the accumulation and processing of information, we can use our knowledge to act effectively.

However, it is not enough to break with these suppositions, and with the type of rationality that was based on them and to recognise ourselves as indebted rather to the 'procedural' type of rationality, as in H. Simon's famous expression, i.e. a form of rationality which takes better account of the limits on our capacity to process information and construct models. For our institutions, in the narrow sense conferred on the term by political science, reflect a strong allegiance to this substantive rationality from which we would like to be free. To start with, we have the system of the separation of powers, which distinguishes between the justification of rules by the legislator and their implementation by the courts or executive authority. Substantive rationality also leaves its mark on the way in which we handle what might be considered less important institutional issues, such as the aims and mechanisms of consultation (upstream of policy implementation) or the evaluation of public policy (downstream from implementation). And it also determines, among other things, the role played by experts in the decision-making process and that played by the representatives of civil society.

The studies which follow therefore have more in common than simply the same diagnosis. They propose avenues for the future by envisaging what reforms could be made to ensure that specific institutional arrangements (capable of implementation at European Union level) reflect the need for a procedural approach to rationality. The reforms envisaged thus reflect the concern to re-establish a link between the justification for a rule and the application of that rule in differing environments: at the very least, application must have a retroactive effect on justification (the rule must be subject to constant revision in the light of its application); at best, the reforms will break with the separation between justification and application, a separation which is so typical of the formal concept of the rule. The reformers thus reject the idea that a conflict exists between the effectiveness of a rule and its legitimacy in the eyes of those it affects: on the contrary, they consider this to be a false dilemma, since what has no legitimacy cannot be effective, and what is ineffective cannot be maintained on the sole pretext of preserving vested interests. The reforms will thus introduce reflexivity into the decision-making process, leading those involved to reflect not only on **how** to 'govern well' but also on what 'governing well' actually **means** in a specific context where the criteria do not have the same relevance as in a neighbouring context, and where the interests concerned do not correspond to those which had been initially expected, as is discovered

when a policy is implemented. This reflexivity gives rise to a constant learning process, which is a positive way of looking at what we described a moment ago in negative terms as the abandonment of the idea of a model.

One final aspect of the proposals set out in detail hereinafter deserves to be highlighted: it is the way they link up the need for good governance with the need for democracy. In terms of procedural rationality, the opinions of the people involved are not an obstacle to the effectiveness of a decision: they are an essential ingredient, and it would in fact be costly to ignore them or to fail to contribute actively to their formation. Although P. Herzog expresses himself on such matters in characteristically strong terms, most of the studies which follow share his point of view concerning the operation of the European Union's institutions, which are 'handicapped by two structural defects: the system is not designed to explore the views of society, and the impact of its choices is very poorly assessed, if at all. These two defects could be rectified if organised civil society were to be involved in discussions upstream, and in assessment and retroactive action downstream, using the channels of proceduralisation...'

In their opening paper, which launched the 'Governance in the European Union' seminar, J. Lenoble and J. De Munck discuss 'transformations in the art of governance'. They attempt to back up the diagnosis we have just made of the political crisis and to connect the latter to a crisis in the type of rationality from which we draw our understanding of the role of politics and its instruments. One of the interesting aspects of the paper is that it locates the present debate on governance within an historical trend, which we have inherited and from which we must learn.

The report by K.-H. Ladeur represents an attempt to go beyond the ethics of discourse laid down by J. Habermas, i.e. a form of proceduralisation which, working in counterfactual mode, attempts to purge discourse of the power relationships which pervert its use, since participants' involvement in the discussion presupposes that they agree to submit to the law of the best argument. K.-H. Ladeur proposes a form of proceduralisation which claims to be less idealistic and which takes account of the limits of our rationality and the complexity of society, to which agreed rules must apply. These limits and this complexity may constitute an opportunity in so far as they prompt us to devise new regulatory patterns, the cognitive vocation of which should be explicitly accepted in an 'experimental society'. In such a society, rules become instruments of knowledge. They are designed in such a way as to forge links between the various networks of a fragmented society: they thus encourage the overlapping of the knowledge characteristic of each of these networks so as to encourage organisations, the holders of collective knowledge, constantly to revise the cognitive frameworks on the basis of which they propose to address issues of general interest.

In the second part a number of contributions describe national experiences or set out considerations prompted by these experiences where they seem likely to advance the debate on governance in the European Union. A. Dunsire and C. Hood start from an analysis of changes in UK public administration over the last two decades, i.e. since the beginning of the 1980s, and find some evidence of both 'pro-

ceduralisation' (e.g. in the development of assessment mechanisms and complaint channels for the users of public services, or in certain tendencies to contract out public service tasks) and 'collibration' (i.e. State intervention in social subsystems in order to change the power relationships within them, thereby contesting the autonomy of such subsystems and their tendency to return to a homeostatic equilibrium). Although one may have reservations about their interpretation of the concept of proceduralisation, the two explanations that the writers contrast have in common their choice of an institutionalist approach to social relationships, i.e. their starting point for considering governance issues is the idea that the rules governing the behaviour of the various players within each subsystem are not 'given', but rather may be changed if they are subjected to critical revision. Governing thus entails modifying the environment within which social players move, i.e. while not necessarily constraining the players, at least refusing to fetishise the circumstances in which they interact.

While the contribution from A. Dunsire and C. Hood attempts to relate issues of public policy and regulatory method to certain hypotheses on changes in the concept of rationality, the reports by B. Perret and J.-C. Thoenig proceed in what we could call more of an inductive fashion. These two authors start from the French experience, but rather than aiming to draw conclusions from it about competing forms of rationality in the design of public intervention (J.-C. Thoenig sees proceduralisation as more of a slogan than an operational concept), they attempt to update its lessons, in particular from the point of view of European governance. B. Perret thus examines the transformation of public policy evaluation in the 1970s. He describes this transformation in terms of the grafting of an evaluation model onto the traditional model, which was until recently the only one available to us. Traditional evaluation was based on the positivist experimental approach, with the expert seeing himself as having the task of choosing, on the sole basis of the quantitative data that he has been able to collect, the most effective method for achieving the goals of a given policy. A new form of evaluation, however, came to be superposed on the traditional form: it is designed to take into account, first, the existence of a plurality of modes of knowledge (this assumes that evaluation is the work of a group of experts who desire to pool their assorted knowledge) and, second, those effects of a government decision that go beyond its initial target, effects which must be taken into account by the type of evaluation which B. Perret terms as 'ballistic'. This new form of evaluation deliberately places the exercise within an ongoing, collective learning process: it not only accepts that the evaluation may take the evaluator by surprise and cause him to review his models, but it also urges him to construct with others the appropriate analysis grid for the evaluation, without assuming that there is one grid which is a priori more appropriate than another.

The study by J.-C. Thoenig, rather like that by A. Dunsire and C. Hood on the United Kingdom, starts with a review of the ways in which government action has changed in France and ends up making very specific proposals with respect to governance in the European Union. J.-C. Thoenig calls in particular for greater mobility among those responsible for European policies, not only between the various European Commission departments but also between local and Union level and

between the Union's Member States, in order to reduce the obstacle which differences in national administrative cultures present to action by the Community. Other proposals call for decentralising Community action, contributing to the emergence and vitality of networks of those involved in the implementation of Community policy, and introducing ways of representing national or sectoral interests which do not exclusively use institutional channels. The aim of these proposals, which it would be pointless to attempt to reproduce in detail here, can be summarised quite simply: the environment in which Community policies are implemented, and the institutional environment in particular, should be transformed in order to heighten the effectiveness of these policies, which run into difficulties largely because of too sharp a dividing line between the level at which they are adopted and the local level at which they are implemented.

Placed at the end of Part II, J.-C. Thoenig's study actually anticipates the contributions in Part III, which brings together proposals formulated explicitly with respect to the European Union, some of them relating specifically to the reform of the European Commission. G. Majone and M. Everson identify the main obstacles to the implementation of Community legislation today as being the differences that persist between the various administrative cultures in the Member States and, more generally, the discrepancies between the administrative environment and what would be required for the legislation to be totally effective. The authors place the emphasis on a possible solution to these obstacles: the development of independent administrative agencies. The reservations against delegating certain tasks to independent bodies are well-known, in particular as regards political responsibility and democratic control: back in 1958, the EC Court of Justice voiced such concerns in its ruling in *Meroni v High Authority*, thus creating within the Community's legal system a constitutional barrier to delegation that has never been completely overcome since. G. Majone and M. Everson consider, however, that the delegation question is posed today in radically new terms, especially in the light of the way the principle of the separation of powers is now applied in the European Union.

Like G. Majone and M. Everson, R. Dehousse attempts to look at the question of the legitimacy of European integration in a new light but does not restrict himself to considering it on the basis of the traditional conception (still dominant in State affairs) of the separation of powers. R. Dehousse's concern is that the need for legitimacy should not be met simply by applying the classical institutional interpretations that have prevailed in the past. The model based on representative democracy and the separation of powers is not the only one capable of taking appropriate account of legitimacy requirements. Legitimacy requires effective control of action taken by those in government and, on the part of the latter, a certain impartiality in the content of their decisions: R. Dehousse shows that there are other means, insufficiently explored to date, which may be used to take account of these guarantees and which may be more suited to the specific nature of European integration, envisaged here in terms of a strictly constitutional project. To summarise, not only can the legitimacy of the integration process no longer rest solely on downstream aspects, i.e. on its achievements, following the functionalist vision of its founding fathers, the upstream foundation of Community legitimacy should itself be re-thought. This would be achieved by breaking with the illusion that any legit-

imacy is ultimately to be underpinned at State level (the States remaining 'masters of the Treaties'; to quote the German Constitutional Court) and by breaking with the temptation of institutional fetishism, which consists in reproducing on a large scale at Community level the democratic model found at national level.

The institutional proposals commented on by O. De Schutter take a similar line. Initially presented during the Commission on Governance and the European Union at the Journées juridiques Jean Dabin in October 1997, the report on 'proceduralising European law' lists a number of ways in which the demands for transparency and participation formulated, with different emphases, by R. Dehousse and P. Herzog could be satisfied in practice. The report envisages a new basic right, the right of any party affected by a public decision to submit comments, to which the author of the decision would be bound to reply; it highlights the new procedural, rather than instrumental, terms in which the principle of proportionality, as a general principle of Community law, could be conceived; it considers the changes that the need for greater proceduralisation could mean in the judicial context; it outlines more particularly the consequences that the proceduralisation of European law might have for the way in which the European Commission exercises its functions, notably the way in which it consults prior to adopting Community policies and the mechanisms by which Community policies are evaluated. This list of issues covered by the report is in itself sufficient to illustrate that the challenge lay clearly in translating the need for proceduralisation into operational terms via specific arrangements — which the report attempts to identify among the tools already available under Community law — otherwise proceduralisation might never amount to more than a vague abstraction, attractive perhaps, but denied any real effect.

As the author in 1996 of a report to the European Parliament on participation by citizens and civil society in the European Union's institutional system (a major source of inspiration for O. De Schutter), P. Herzog's contribution to the collection is a committed paper, in which he calls for the reaffirmation of European political identity in the face of what he perceives as the Member States' reassertion of their role in the European process. However, this will require greater involvement of citizens and their organisations in Community decision-making. The democracy requirement, the recognition of the failure of a form of substantive rationality, and the concern to see a genuine European political identity emerge all combine to form a particularly fruitful alliance: in his own words, P. Herzog devotes himself to exploring 'ways of actively giving shape to a European civil society' with the same concern for operational aspects as seen in the other chapters that make up this part.

P. Calame was asked to contribute a paper on the meaning he assigns to 'active subsidiarity'. Unlike the traditional (one dare not say 'passive') conception of subsidiarity, which is based on a clear division of tasks between players or levels, active subsidiarity starts from the hypothesis that, against a background of increasing interdependence, 'the distribution of powers will be the exception and the inter-linking of powers the rule'. In this connection, P. Calame talks of 'shared sovereignty' between the parties concerned. The idea is that, in each specific environment and starting from common issues that elicit different responses from each party, the most appropriate action should be determined together: in reality we are wit-

nessing the end of 'sovereignty' as it has been traditionally understood, i.e. the abandonment of the model of a single power having absolute control over a territory or subject area assigned exclusively to it. Authority must no longer specify methods or lay down guidelines for the exercise of the powers it delegates: rather it has to cultivate the sharing of powers and experiences and foster the emergence of networks bringing together differing approaches to issues which are cross-disciplinary by definition, provided we are prepared to view them as such.

It is thus the rejection of the rule model that we are witnessing. However, this rejection does not mean that we will fall into arbitrariness or subjectivism, as long as it is combined with an obligation on decision-makers to provide public justification: such justification (for example, in the form of the gradual development of 'public case-law', the value of which P. Calame assessed with relation to the granting of building permits) enables the apparent, rather than real, dilemma between the formalism of the rule and subjectivism to be overcome: formalism pays insufficient attention to the context in which the rule will be applied and subjectivism is harmful from the point of view of the security that the various parties will expect. This concept of active subsidiarity as a pooling of knowledge rather than as a division of assigned powers can also affect the way in which we evaluate public policy: complementing B. Perret, P. Calame thus proposes a transition from 'mechanistic' evaluation, conducted by outside observers who have nothing to do with the policy being evaluated (the observer's role being to help 'correct' the policy so that it will better attain its stated goals), to 'constructivist' evaluation, carried out by the very people who are concerned by the policy and for whom the exercise represents an opportunity for internal reflexivity.

G. Bertrand and A. Michalski propose the construction of 'scenarios for the future' as another way of encouraging this internal reflexivity, for which the appropriate kind of evaluation could indeed provide the opportunity. The contrasting of different scenarios is seen as a means of breaking with an exclusively sectoral vision of the future and arriving at 'a holistic approach to policy-making'. One of the benefits of constructing scenarios is thus methodological: by definition, such an exercise presupposes the confrontation of different types of knowledge and, consequently, the coming together of individuals from differing backgrounds, which is in itself beneficial, independently of the heuristic value of the scenarios in themselves. The paper considers five 'future scenarios' solely from the point of view of governance. While it is not possible to review each of the scenarios here (they include, for example, the triumphant markets hypothesis and the hypothesis of creative societies, in which leisure would gradually become as important as work, and that of 'shared responsibilities', which cannot but remind us of P. Herzog's vision of the European integration process), we can nonetheless underline the similarity between the authors' conclusions and the other proposals made in this section: G. Bertrand and A. Michalski conclude, for example, that we should encourage greater involvement by those affected in the decision-making process, which should be based on a diversity of opinions; that the European Commission should do less to direct the network of parties concerned and more to foster and coordinate them, whilst avoiding too great a rigidity in representative structures and in the positions of those involved; and that these changes in European governance are urgently need-



ed because, in the first place (and here the authors share the diagnosis provided by G. Majone and M. Everson), the diversity of national administrative cultures and the lack of coordination between them make for ineffective Community policies and, secondly, this problem will worsen once new Member States have joined an enlarged Union. We are aware that this is familiar ground. One of the most interesting aspects of G. Bertrand's and A. Michalski's paper is that, despite the originality of their methodology, the remedies suggested remain essentially the same.

In the conclusions which they drew up for this book, J. Paterson and N. Lebessis place the above papers in the context of the deadlines which the European Commission will have to meet in the coming months and years. Promoting new forms of governance is among the strategic objectives that the Commission has set itself for 2000–05: J. Paterson and N. Lebessis stress the urgent need for action, not only because new enlargements are already scheduled, but also because an effective solution must be found to counter the loss of Europe's credibility in the eyes of the public, i.e. what is sometimes called 'euroscepticism'. As we have moved from 'negative' to 'positive' integration, i.e. one based on harmonisation rather than solely on the abolition of the European Community's internal borders, this 'euroscepticism' has gained momentum and is particularly dangerous in that it tends to be self-perpetuating: in order to increase the objectivity and rationality of Community policies, we are tempted to have greater recourse to experts and to the committee procedure, which in turn saps the democratic legitimacy of these policies and thus feeds the scepticism which the expert's involvement was supposed to diminish.

Rejecting the tendency to divide Community policies according to sector and to fall back on the rule of expertise, J. Paterson and N. Lebessis propose a transformation in governance in the European Union along three main lines. The first consists in complementing the vertical, or sectoral, dimension of Community policies by taking account of a horizontal or cross-disciplinary, i.e. inter-sectoral dimension. The second entails greater involvement in the decision-making process of laymen from the 'European civil society', not so that they replace the experts, but rather so that the latter are prompted to re-examine what they know and, more especially, to take better account of the external aspects to certain policies and the concomitant need to examine each issue in the light of several different kinds of knowledge. Thirdly, the authors propose that attention should no longer focus exclusively on the point at which decisions are taken: the debate on governance in the European Union must also cover the implementation, evaluation and revision of policies, and it is not an exaggeration to say that the organisation of such a retroactive approach would form one of the major challenges. We may thus conceive of a mode of European governance which would be a genuine source of constant learning for those involved in Community policy-making: institutional arrangements should positively incite policy-makers constantly to question what they know in the light of other ways of viewing and tackling the problems confronting them.

We will close this introduction by commenting on what might appear to the reader to be a paradox. On the one hand, we said, we are not seeking a new model

of governance that is better than the others: what we need today is to break with the very idea of a 'model', i.e. a 'good governance' recipe that can be applied to all situations. On the other hand, the studies which comprise this collection are presented as a set of fairly specific proposals; and, on the whole, the authors represented here were motivated by a concern for practical feasibility.

We do not see a contradiction here. From the point of view of the reflexivity injected into the formulation of public policies, the legitimacy of government action in the eyes of those governed, the crisis in politics today, the greater or lesser malleability accorded to institutional arrangements, and thus the greater or lesser adaptability of these arrangements — from all these points of view, the various forms of governance are not the same.

It is true that the authors broadly agree on the avenues that they propose, but it would be wrong to affirm that they agree, to a greater or lesser extent, on any one 'model' of governance: the question that they ask together, and to which they find some common answers, is: by what mechanisms can we hope to break with the idea of a model and thus with forms of government action which are never taken aback by the circumstances they encounter and which refuse to take seriously the complexity of real life? All in all, there are some forms of governance which are less likely than others to stiffen into 'models' and more likely than others to prompt competing models to re-examine themselves so that they might learn from the others: the purpose of this collection is to invite readers to discover these forms of governance and the possible applications they may have within the European Union.



**PART I:**  
**THEORETICAL DEVELOPMENTS**



# Transformations in the art of governance

## A genealogical and historical examination of changes in the governance of democratic societies<sup>1</sup>

Jean De Munck and Jacques Lenoble

### Introduction

The invitation to introduce the subject of ‘transformations in the art of governance’ is somewhat perplexing. Our belief, sustained now by 10 years of research, is that conceptual and normative proposals (such as those we will put forward here) only take on their full meaning in the contexts in which they are applied. Yet these contexts, by definition, cannot be anticipated. It should not, therefore, be expected that we will give a model of politics, an abstract, general construction on the basis of which practical directives can be deduced. One of our central points on the crisis in politics is that it should not be categorised as a crisis of existing models, as is too often the case, but as a crisis of the **idea of models itself**. We will attempt to explain this point.

Such a clarification requires a detour — a conceptual, even philosophical detour. We think that it is only through this work of examining the issues below the surface that the questions more commonly posed, and rightly so, in European circles on citizenship, nationality, participation and so on can be addressed in a new light and in all their gravity. The question of the art of governance today is not a question of prescriptions. The central insight that will underlie our presentation is that this crisis revolves around our models of rationality.

Modernity was directly conceived as an attempt at rationalising society. But what is a rational decision? We think that this question is now the key to understanding the transformation of our political systems. To understand how politics is organised, therefore, it must be considered together with the ways in which collective knowledge is produced. Everything that has happened over the last two or three centuries in our modern societies is directly linked to the way in which the production of knowledge and laws is conceived, i.e. to cognitive approaches. It seems to us that it is by evaluating these different ‘cognitive models’ which have run through our societies that we may understand how to interpret what is going

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<sup>1</sup> Paper given in Brussels on 20 December 1995 as part of the seminar of the Forward Studies Unit of the European Commission on transformations in the art of governance.

on and, at the same time, more normatively, try to steer the process of restructuring the authorities which hold power.

How will we proceed? For explanatory purposes, we will take a genealogical and historical approach. We will proceed in five stages to put the contemporary situation into perspective.

First of all we will review the characteristics of the first way of conceiving the question of politics that emerged in modern times: the formalist model of reason. This model shaped the conception of law and the State — and hence of public administration — in the early days of modern democracy.

Second phase: we will look at what changed at the end of the 19th century and in the first half of the 20th century through the emergence of what was called the ‘social State’ or the ‘welfare state’.

Third phase: we will consider the contemporary crisis, i.e. the crisis of the forms of rationality inherited from the first two phases. This crisis is not only the crisis of the social State and a return to the first ‘formalist’ phase — as some elements of today’s ‘deregulatory’ discourse would have us believe. It is a crisis affecting the foundations underlying both the first and second phases.

Fourth phase: we will give a few conceptual pointers on the notion of procedural reason, which is, it seems to us, the overarching concept on the basis of which the construction of a new model of regulation can be envisaged.

Final phase: using more empirical examples, we will attempt a first outline of what is emerging in our societies, thus illustrating the way in which our modes of governance have evolved.

## **The formalist model of the law and the State**

In the 18th century, as is well known, our societies embarked on the adventure of democracy. The Enlightenment project was one of reason. The starting point for this project was obviously the abolition of the transcendental guarantee of the law. In other words, the modes of social coordination and regulation were no longer based on a meta-social guarantee. Therefore, what is called the ‘indeterminacy of the law’ emerged. An era of uncertainty as to the sources of regulatory legitimacy then began. A society of individuals replaced the ancient regulatory order based, in the last resort, on divine guarantee. It was from the simple interplay of their will that the social order is assumed to have emerged — as shown by the myths of modern natural law.

The trait that has just been noted — uncertainty — is a **negative** trait. But how could this harmony of individual wills be seen in a **positive** light? What would the dominant model be? How should the coordination of collective action be conceived anew in this context of uncertainty? The first response — if we reduce it to

its bare essentials — was organised around two fundamental concepts: contract and nature.

### ***Contract and nature***

The theory of the contract — articulated essentially by Rousseau and Kant, in a wide-ranging discussion involving many other writers — attempted to examine social legitimacy from the starting point of the category of subjectivity. In the private sphere, this led to the theory of civil rights; in the public sphere, to the theory of the general will. The social contract is the principal concept of this tradition. Formal law (general and abstract) was the expression of this general will born of the clash of subjectivities, a clash which replaced the old transcendent foundations. Our whole legal and political organisation was indexed to this initial hypothesis of a formal law guaranteed by the general will. The basis of social regulation was found in the category of autonomy: the collective subject formed an autonomous subject. The only legitimate law was that which the subject could give himself — at the collective level, of course. It was on this basis that modern law was redefined. Its formal universality became the touchstone of its validity. The law, emanating from the representatives of the general will, was drawn up syntactically as a general, abstract law. This first major model, which would, to an extent, be embodied in the organisation of society and politics, was essentially based on the hypothesis of self-transparent subjectivity. As Habermas so aptly noted<sup>2</sup>, the link between reason and will was here assumed to be ensured by the general, abstract form in which this 'general will' was expressed. The semantic form of the law set out by parliament in itself guaranteed its rational expression and its embodiment of practical reason in actuality.

In counterpoint, according to the subject/object doublet thoroughly analysed by Foucault, the objectivity of nature provides the second point of support for rationality. This 'naturalist' model runs through a whole section of modern political philosophy: it can be found in Locke, in the idea of 'natural rights', of which the right to property is the central element. It finds its full expression in the work of Adam Smith. This is the theory of the market, where legitimacy, i.e. the guarantee of harmonious coordination of the individual players, is no longer based on the idea of a law expressed by the general will, but on the balance produced by the market mechanism, which it is the function of the law to guarantee in its autonomy (by the respect due to individual rights). The rational coordination of individual projects is no longer the result of the formation of a general will but of the pre-established harmony of interests. The moral autonomy model is replaced by that of a natural law deemed to govern social life and the coordination of collective action. The realisation of practical reason in society is no longer guaranteed by the general form of the law in which the general will is formulated. It is henceforth guaranteed by the combination of the calculations of individual interest that are the

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<sup>2</sup> J. Habermas, 'La souveraineté populaire comme procédure, un concept normatif d'espace public', *Lignes*, No 7, 1989.



essence of the market. Either way, we remain in a simple formal game which definitively guarantees the rationality, and hence the harmony, of collective action. But the universalising form of the general law is replaced by the calculating form of the maximisation of individual interests.

These first two models that modern society gave itself express an initial shared presupposition: that there is a form of formal rationality (a formal manner of producing knowledge) which is supposed to guarantee the rationality of the regulating law. It is the content of the legislation that is legitimated by a formal mechanism, as an expression of unlimited reason. This is why we can talk of a substantial rationality, as opposed to what is called 'procedural rationality'. There is a guarantee of the content of the law that ensures its relationship with the truth. The idea here is thus of a self-transparent rationality, in keeping, of course, with the model of truth-correspondence which dominated philosophical thought for so long: the equal, free will of each individual/citizen is legitimately represented by the general will, expressed by a law whose rationality is guaranteed by the general, abstract form of its wording.

### ***The organisation of the State***

From this flow the characteristic traits of the legal and political organisation which emerged in this period and the corresponding theories of law.

First of all, it explains the primacy of the legislature in the organisation of powers. It also explains the form taken by the representative body — what political observers have identified as the phenomenon of 'parliamentarism'. The first form of organisation of the legislative body was in fact based on a theory of election that favoured the selection of 'notables'<sup>3</sup> with broad independence from the legislative body, a public opinion that was distinct from the representatives and a major capacity for debate within the parliamentary institution. All of this would change fundamentally at the end of the 19th century when a party system emerged.

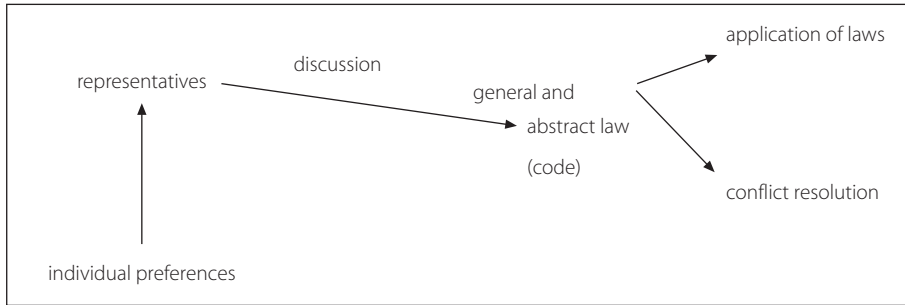
The second dimension was that the law took as its model the rationality of mathematical discourse. The law was defined by its formalism. Its rules of production and application gradually changed in modern society and it gradually rid itself of the specific traits that characterised it in pre-modern societies. First of all, a law was no longer validated by the respect due to a criterion of material justice (separation of the law from morality and politics) but through the formal, systemic criterion of the respect due to a hierarchically superior rule. Then, as far as judgment regarding application of the rules is concerned, the rationality model was also formalised, becoming reduced to the model of a deductive type of reasoning.

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<sup>3</sup> See on this subject Manin, B., *Principes du gouvernement représentatif*, Paris: Calman-Levy, 1995.

### ***A linear schema of the law***

Let us sum all this up in a diagram.



What does law mean in this model? The process of drafting the law starts out from individual preferences (this is the principle of subjectivity, mentioned above). These individual preferences lead, via election mechanisms, to the selection of representatives deemed to represent these preferences. It should be noted straight away that the representatives are official: they are mandate-holders. This is the idea of parliament. These representatives themselves engage in discussion on the content of the law and, on this basis, decide on a general, abstract law, valid for all people and for all situations. The general, abstract laws set the rules of the game in the sense that the rules of a game of chess are set. Liberal law sees society as an interaction of players for which rules must be set.

This is a very linear construction of the law. The law is extracted from individual preferences by the mediation of representatives and is discussed by the parliament, which decides on its general, abstract wording. Then this wording goes 'back down' into society by means of its application. Nothing could be simpler. This is representation as conceived by the 19th-century liberals.

## **Emergence of the social State**

The social State was eventually born as methods of governance adapted to the industrial changes that western societies went through in the 19th century. It must not be forgotten that the models constructed in the 18th century were virtually pre-industrial models. Industrialisation would challenge conceptions of the law, government and legitimate representation. Historically, we can distinguish phases in the process of change. Very roughly, just to set some pointers, we can isolate three phases. First phase: from the 1848 revolution to the 1920s. This is the period in which the social question was formulated. Second phase: the economic and political crisis of the inter-war period. Democracy was in such a state of crisis that in Germany, Italy and Spain it tipped over into fascism. This was also the era of the great workers' party split between communism and social democracy. The third

phase began in the 1930s, by structural reforms in democratic Europe, and in the United States through the New Deal. This is the phase of stabilisation of the social State. What are the main features of the transformation of the model of the law and the model of government during this period?

### ***'Materialisation' of the law***

Let us go back to the 'linear' schema of the law which we have just set out. This normative schema of the law found itself in crisis, but only in part. The crisis, which was extremely serious, affected two fundamental elements. First of all, from the 19th century, the schema of the formation of the general will from individual preferences was contested. Post-Hegelian philosophical discourse and the emerging sociology, on both the right and the left, highlighted the fact that a society is founded not on individual preferences, but on actual social relationships. A society is not made up of individual atoms, it is not a clash of liberties, but it is structured by concrete organic totalities — already existing social relationships. The real challenge for representation is not to succeed in representing individual preferences, but to represent these totalities themselves.

Let us take, for example, the developing industrial world. It is almost a cliché: the industrial world was a world structured by social relationships. These objective social relationships created collective entities: workers, the owners of the means of production, the middle class of employees, etc. Since social relationships were givens, this social reality could no longer be represented by means of elections on the basis of individual preferences. Rather, organic representatives were preferred, which, in practice, appeared on the social scene as a mobilising apparatus, mainly in the form of trade unions, whose representativeness did not depend on a formal mandate, but on their capacity to express objective interests which already existed in the reality of social relationships.

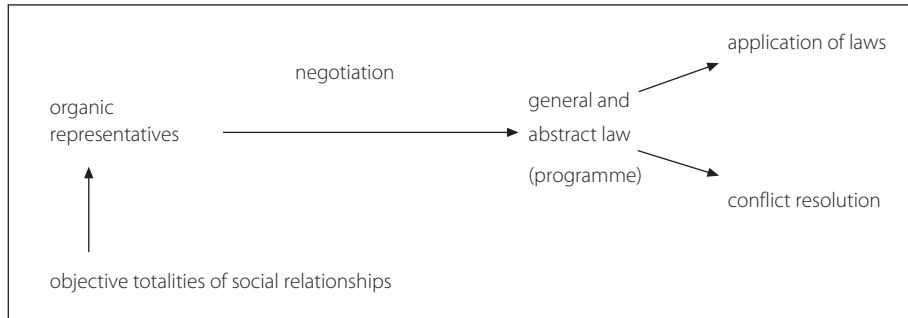
At the same time, another system of representation appeared on the horizon of the western democracies, a new system that was to clash with the first. This was the fundamental critique of 'parliamentarism', made by socialism, communism and the fascist right. For it must not be forgotten that the critique of formal mediation was grounded on the same basic framework, even though it developed in opposing political directions. Fascist ideology thus promoted the concept of 'corporation'. The corporation is clearly an ideal linked to that of 'pre-structured social relationships'.

While the first element relates specifically to representation, the second element of change relates to the conception of the law. To be precise: the organic representatives were called on to provide a general, abstract law. On this point, one can say that the social State did not change the conception of the law, which continued to be formulated in standard wording applicable to all situations. However, a nuance that would be decisive was introduced: the law was no longer, strictly speaking, conceived in the form of rules of the game. Why? This was a society in the midst of incredibly dynamic change, carried along by the constant movement

of industrial progress. In such a situation, maintaining stable rules of play would be, of course, an irrational desire. Rather, the general law must serve to dynamise society and lead to progress. And this general law therefore no longer sets the rules of the game but rather concrete objectives. This is what is called 'the instrumentalisation of the law'. Let us define more closely the exact scope of this transformation, this materialisation or instrumentalisation of the law that marked the emergence of the social State.

The machine of the liberal State in fact seized up with the advent of the real inequalities that the formalism of freedom rights and individual choice alone proved incapable of remedying. The social State emerged: it would be responsible for transforming social reality by means of a proactive policy. In striving to follow a policy of social coverage, the law extended its field of intervention. As Weber says, the law was no longer content to set the formal limits of action for which individuals would have sole responsibility: it materialised and aimed to defend substantive conceptions of justice in order to 'cure' society (redistribution of income, economic regulation, social policy, etc.) or the individual (medicalisation of criminal law, for example) of some of its ills. But, as a result, confronted with the contingency of action, the ways in which it was expressed were transformed and de-formalised. The law increasingly defined the goals to be attained, thus leaving to the public apparatus responsible for applying it an increasingly large margin of imprecision. But the imprecision, momentarily open, unlike the formalist certainty of classical liberal law, closed up immediately 'thanks' to scientific rationalism: experts — and their technical knowledge — were supposed to provide the bases for a rational calculation making it possible to define the irreducible regulatory framework in 'deformalised' areas. The application of the law recovered — albeit in new ways — the certainty that had momentarily been compromised. Reason kept its same magic power: calculating reason extended its grip to State legislation. In this sense, one might say, the conception of the approach to application itself did not change, even if it was henceforth increasingly cast in the form of teleological reasoning. And this is where there is continuity with the first phase as such. On the right-hand side of the diagram, we are still in an approach to application conceived on the basis of the formalist distinction between justification and application. It is the formalist model that continues to apply on that side. Admittedly, the social State added a second figure to this first figure of rationality. But it would not substantially change its organisation. The formal approach to the criteria for the soundness of the State's 'commands' was, no doubt, no longer considered sufficient. But the idea of possible rational determination of these criteria was still endorsed. State regulation, if it extended its hold, would, in future, be guaranteed by an instrumental knowledge that the 'experts' were supposed to be able to provide. These new scholars of power would 'calculate' the best conditions to realise the collective well-being with a view to a more genuine equality between members of society. Of course, a number of political and ideological conflicts that ran through our social States involved a major functionalisation of the classic liberal doctrines and the utopian projects to transform history. But they remained attached to a 'scientific' conception of rationality and therefore reproduced, but with new emphases, the models and distinctions on which the now reviled liberal State drew. In this sense, notwithstanding their significant differences, these two

models of the State can be described as two species of the same genus that is dominated by a formalist, calculating approach to social regulation by State command.



### ***Changes in governance***

The transformations thus brought about in the organisation of the liberal State obviously also had an effect at the level of the organisation of the State: the balance of powers changed. A rise in administrative power could be seen. Increasing importance was attributed to the regulatory agencies, both in the United States and in Europe. There was an extraordinary rise in the power of the executive.

As for the system of representation, mass parties emerged. As political scientists note, from this point on it was more about choosing parties than notables. Electoral choice was an expression of belonging or identity. The emergence of what were called mass parties fundamentally transformed the manner in which the legislative body functioned. The freedom of personal speech of the representatives diminished and the main forum for debate shifted from parliament to party headquarters.

Thus, even though the linear schema of the law was maintained, there were changes. Social relations replaced individual preferences, mobilising apparatus replaced formal mandate-holders. Lastly, the laws were no longer rules of the game, but objectives requiring planning if they were to be achieved.

### ***The economic side: Fordism***

This model of the formation of the political will was, to a certain extent, embodied in the economy itself. By overturning the category of subjectivity and individual autonomy, the social State could no longer maintain the 'naturalist' representation of economic life. The representation of the market had itself been subverted.

Karl Polanyi's book on 'the great transformation'<sup>4</sup> clearly describes this transition from the separate, self-regulated market of the 19th century to a market that was re-embedded in society — the society of the 20th century. In place of the market, the concept of 'economic regulation' emerged.

Let us pursue this parallel with the metamorphosis of the general will. At their core, economic relations were no longer seen as a clash of individuals, but conceived on the basis of institutional agreements that were agreements of coordination between economic agents. A new mode of regulation was thus constructed, which can be called 'Fordism', as it is by many sociologists and economists today, following in the footsteps of the regulatory school of thought. We cannot analyse it exhaustively here. For our purposes it is sufficient to stress two particularly important features of this type of regulation: product standardisation and primacy of supply.

This is true, first of all, of the producer/consumer relationship. The industrial product is standardised before its sale to the consumer. The same car is made for everyone: it is supposed to represent an 'average' of individual preferences. The mass product is inextricably linked to a certain type of calculation of profitability: the economy of scale. A large number must be produced in order to reduce the marginal cost. In this type of reasoning, demand is situated downstream of supply. This sometimes causes crises of overproduction.

The relationship of the producers among themselves also bears the mark of formalist standardisation. On the one hand, in terms of the organisation of work, the dominant model is Taylorism. What is Taylorism? It is a way of rationalising work that consists of dividing up the acts of work, analysing them and homogenising them. Workers thus find themselves subject to the production imperative, which is a general, abstract rule. In *Modern times*, Charlie Chaplin immortalised this Taylorian model and the mortification of work that it creates in tragi-comic form. On the other hand, in terms of employment relationships, a transformation takes place which is an exact reflection of what has happened in the political order: employment relationships are no longer thought of as a clash of individual preferences but as a clash of collective entities. And the labour market is thus increasingly regulated by the establishment of organic representation. This is where the collective agreement is born.

This Fordist regulation and the transformation of the way in which the general will was formed were in symbiosis with each other. It was a long process of historical construction but, after some terrible crises, it led to an extremely manageable, secure world, for at least 30 years — between 1945 and 1973. These 30 years after the great crises that accompanied its emergence were this model's heyday.

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<sup>4</sup> Polanyi, K., *The great transformation: the political and economic origins of our time (La grande transformation: aux origines politiques et économiques de notre temps*, translated by Catherine Malamoud, Paris, Gallimard, 1988).

## The contemporary crisis

Today, the pillars on which this model of regulation rests are all crumbling away. This is true in both the political and economic spheres.

### *Three signs of crisis in the political field*

In the political field, at least three signs of crisis, three warning lights, indicate that this model has ceased to be stable.

Let us start with the first, the one that is best known to the general public: the crisis of the mobilising apparatus. The mass party — such as the communist party, the socialist party, the Christian socialist parties in Europe — was supposed to embody a very ‘organicistic’ idea of the construction of representation. Mass parties were supposed to represent a loyal electorate, loyal because they recognised in the parties’ positions the objective representation of their interests. The phenomenon of the floating voter, whose decision is not known in advance, intrigues today’s political scientists. These individuals are, to an extent, disconnected from their social anchors. They no longer vote socialist or Christian Democrat because they belong to the socialist or Christian world. They no longer necessarily vote communist because they are workers. The working people are divided between the national front, the communist party, the socialist party, and so on. In other words, the very idea that there is an aggregation of pre-existing social relationships and the mobilising apparatus to express them seems to be disintegrating dramatically. It is also, of course, the trade unions that are in crisis. In some systems of union legitimisation we are seeing the use of elections and referendums re-emerge, as if organic representation and the way it is legitimated could no longer function.

The second warning light concerns the application of laws. An internal dialectic has been put in place, which is, in a way, leading the idea of pure and simple application of the law to its self-destruction. Basically, the starting point was the idea that, since there were objectives, general, abstract laws could define the ‘means’ to attain them. It was thought that the application of these general, abstract laws was enough to obtain the desired effects. But, in fact, a process of application on the basis of objectives requires particular attention to real situations, and constant adjustment of the steps taken. And so, clearly, the administration was increasingly forced to practise ‘situationism’. It was obliged to adjust its supposed application process to the always concrete, infinitely varied, multiplicity of situations that it encountered. And, consequently, this administration was called on to revise the general, abstract law, to make it more flexible and amend its actual wording. There was an inflation of administrative regulations. This required an increase in the interpretative capacity of the civil servant, who does not have to apply a law, but meet objectives (carry through a programme). Furthermore, these objectives are multiple and, on occasion, contradictory. The aim must be not only growth, but also equity, or a reduction in the cost of externalities, and the objectives must therefore be prioritised: the law is applied less and less, and interpreted more and more.

In a way, the process of application is becoming a process of reformulation. Within a formalist framework, this poses a serious problem of legitimacy, for the administration is supposed to apply, not reformulate, the text of a law adopted earlier.

The third signal that is turning red is the fact that the 'organic representatives' are going through a crisis of legitimacy. On the one hand, they are called on because they have acquired an undeniable competence. But, on the other, these representatives have also, like the civil servants, become involved in the teleological movement of transforming social issues. Consequently, they become experts in the sense that their legitimacy no longer stems from an aggregation of social relationships of which they express the internal logic, but rather from their capacity to manage complex situations and make a success of policies. And so you see union officials and the representatives of the party apparatus become experts and technocrats. They disconnect from the regulatory intuitions of actual players, speak an ever more complicated jargon, become embroiled in opaque reasoning and thus endanger their legitimacy.

### ***Towards a 'post-Fordist' order***

If you look at the economic aspect of the model, you will see the same indications of crisis.

The rule of the relationship between producer and consumer is undergoing a radical transformation, in the sense that the very idea of product standardisation is gradually tending not to disappear but to be complemented by its exact opposite; the idea that, to guarantee profitability margins, products must not be standardised but differentiated has gained currency. This is true both in the world of industry and in the world of service production. The new schools of management point out that it is not supply, but demand, which must drive economic production. Just-in-time manufacturing, for example, is replacing the Fordist model and is trying to adjust the production system to actual demand, keeping it under constant control (notably through new technologies). What does competitiveness require in an industrial context? The word is on everyone's lips. But in terms of historical and political analysis, what is important are the rules and cognitive schemas which structure understanding of this competitiveness. The big difference from Fordism today is that profitability is no longer solely based on economies of scale, but also on economies of diversity. The rules of competitiveness no longer necessarily consist of reducing the marginal cost of the product through mass production, but, rather, through diversification of the product range.

Consequently, in terms of the relationship of the producers amongst themselves, Taylorism is of course vanishing as a way of rationalising work, especially in the service sector — because what is required there is a **qualitative** added value. The production standard is therefore put in context: it is interaction with the consumer that will produce the service's added value. Individualisation of work becomes absolutely fundamental. And clearly (unfortunately, one might say, for economic regulation) the wage relationship has ceased to be the central attractor of the economy.



## The proceduralisation of public action

A series of indicators have thus turned red, telling us that the model of the rationalisation of collective action on which the social State was founded is in crisis. We can sum up the features of this model of rationality in two words: standardisation and formalism. Are we capable of inventing a new model which will enable us to generate rules which avoid this standardisation and formalism? Here then is our question on the development of models of governance, appropriately — in our view — reformulated. We think that a response can be given to this question through the concept of ‘proceduralisation’. We would now like to introduce you to this concept. Let us start with a ‘conceptual’ approach; we will then move on to actual examples.

### *Proceduralisation: a first conceptual approach*

Unfortunately, we cannot enter into the technical and more philosophical debates that would be essential to really open out the concept of proceduralisation. We will merely attempt to pin down two of a number of criticisms which were formulated in the 1960s and 1970s which may enable us to establish some conceptual benchmarks so that we can consider the new modes of rationalisation which are coming into being.

The first idea is that what was characteristic both in the early modern (formalist) model and in the model which applied this representation when the social State emerged is the idea that there were totalities of pre-existing meanings: in nature, in social relations, in the direct access of subjectivity to itself. What ensured the universality of the law, namely its legitimacy, was a guarantee that the content could in some way express what was universal. One belief was unshakeable: reason must discover the laws of reality. Whether this is in the structure of the wording itself (generality and abstraction in Rousseau and Kant), or whether it is in the ‘totalities of meaning’, there is a code which enables us to access truth, or what is universal, and which provides us with the key to good regulation. Both the first and second phases of modernity relied, more or less consciously, on this ‘positivist’ assumption.

Today, one could prove the deconstruction of this assumption, both in the philosophy of science and in the philosophy of law. The idea that a **method** (in the positivist sense) could access the truth is increasingly being rejected. In its place the idea of discussion is being put forward, i.e. the universal is no longer determinable in its content. It can be no more than a vision of a universal agreement in a discussion that, as such, is never perfect. It is therefore no longer anything other than the vision of a horizon, and, *ipso facto*, the method no longer provides us with the content of what is just, true, authentic, but simply boils down to the procedural conditions which guarantee a discursive, argumentative process.

This initial critique had a strong impact on political philosophy. You find traces of it in Rawls, who tries to restore a non-metaphysical version of the ‘social

contract' of the first stage of modernity, in the form of a purely procedural justice. And it can be found in German philosophy, mainly in Habermas. What are the consequences of this type of proceduralisation? Firstly, this critique leads to the development of a theory of public space. It is on this basis, notably, that four years ago, together with the Forward Studies Unit, the Centre for the Philosophy of Law in Louvain-la-Neuve came up with the concept of post-national and post-conventional identity as an approach to the specific characteristics of the European model. The idea of proceduralisation with respect to both the liberal State and social State models consists of saying: what is lacking in the democratic space is in fact the failure to constitute a forum, an adequate public space. A rule would be all the more legitimate if it resulted from the revitalisation of a public cultural space. The second consequence is that a European identity will only be truly democratic if it is constructed on the basis of a renunciation of the national image, in other words a renunciation of the identification of political space with cultural space. What must be fostered is a decoupling of the political from the cultural in favour of cultural pluralism. This leads to the concept of post-national identity.

All of this has been carefully thought out by Habermas, and by writers such as Jean-Marc Ferry. But there is a second element that characterises proceduralisation, which is not yet properly constructed, and it is to this that the Centre for the Philosophy of Law is now directing its energies. This second element does not concern the idea of the law itself, but the process of its application. With reference to the liberal State, the fundamental idea was that the implementing bodies are simply authorities that, in a strictly mathematical manner, deduce the meaning of an implementing measure from the general, abstract law. This reasoning was syllogistic. In the social State, as we have pointed out, there was a shift from syllogistic to teleological reasoning — reasoning by objectives. This teleological reasoning became the model on the basis of which organisation was re-thought, in terms of both the administrative and the judicial functions. But this reasoning still harboured a grain of positivism: there was as it were a retrieval of the imaginary from the rationality of the content. In line with the development of positivism in the social sciences, there was an extraordinary upgrading of expertise in all fields. For example, in the management of mental disability, there was a desire to use the expertise of psychiatrists and psychologists, who were supposed to provide a key to reality. This is why managers — administrators or judges — were those who were capable of applying a law that had become programmatically by recourse to the social sciences. In both the formalist and teleological orders, the distinction continued to be made between two separate logical operations — this is an old presupposition of western rationality. **Justification** of the law is independent of the operation of **application**. The fundamental assumption of this conception is that, in a well-understood rational process, there can be no retroaction, no working backwards from application to validity. Assessment of a context does not mean challenging the validity of a rule, and we are not, therefore, in a process of permanent reconstruction of the rules, because the two phases in fact have a logical autonomy.

The proceduralisation of which we ourselves speak presupposes a dialectic between the rule and its application. And this dialectic must be based on the concept of learning. This then leads to a restructuring of our political space in a com-

pletely new way. It is no longer sufficient to say that the radicalisation of democracy requires the creation of a public cultural space; it must also be asserted that the issue of democratic reorganisation concerns not only, and this goes without saying, the promotion of cultural public spaces, but also the reorganisation of all implementing bodies. And, indeed, what is under way today is a gradual proceduralisation of the institutions, i.e. a restructuring of the ways in which the rules are applied. These are, at the same time, processes of renegotiation that must be linked to an acceptance of a broader range of ways in which the players concerned can participate.

What is called the end of the cult of the law, i.e. the putting in place of checks on the legislature, shows that the creation of general, abstract rules is in fact subject to constraints, in the same way as the judiciary. The role of principles is thus strengthened, while, at the same time, they become increasingly vague. In this respect, it is extremely interesting to note that these principles have no content that is determinable a priori and that they have meaning only within the framework of a local situation in which the principle of proportionality is applied. At the same time, in the implementing bodies, methods of conflict resolution or the monitoring of administrations give rise to a generalised proceduralisation of the administrative and supervisory bodies, as well as a radical transformation of the role of the judge. The judge is not there to tell the truth in the place of the executive or the legislature. But the movements towards a changed and strengthened role for the judge must be conceived in terms of monitoring the discussion process, which, itself, must be thought of as a learning process. Whether this is in social, administrative or family law, we are gradually seeing checks being put in place on the process of argument that puts the law in context.

In the liberal State, the legislative body was primordial. It was in the social State that executive power emerged. Today, the bodies monitoring administrative staff are being boosted, while the ways in which the administrative bodies themselves operate and are made up are being transformed. What characterises the new phase now emerging in the way we organise democracy is the transformation of the bodies more particularly in charge of operations applying the rules. The theoretical reason for this, as has already been indicated, is that the distinction between justifying and applying a rule, i.e. the means of conceiving change and hence social regulation, is now being fundamentally reassessed, on both the theoretical and practical fronts.

To say that is not to disqualify parliament or the groups that have become established in the social State. It is merely to say that this type of regulatory construction is now no longer sufficient. It follows that, for example, at European level, to dynamise the European institutions, it cannot be sufficient to revitalise the European Parliament or bring the social partners to a hypothetical table of European social negotiations. The European institutions must resolutely face up to the questions posed by the proceduralisation of public decision-making. The European administration is a young administration with the means to be a vector for democratic invention. Nonetheless, it must still avoid becoming trapped in nostalgia that

would repeat national inhibitions at European level. This is the direction that we feel the Commission's internal work must take.

This then is the sense in which we are talking about proceduralisation. Fundamentally, it is about rethinking modes of collective regulation using a new model of collective rationality. The misunderstandings perpetuated by language must therefore be avoided. The ideas set out above, however, show clearly that this proceduralisation of the law is to be understood neither in the functionalist sense of Niklas Luhmann nor in the formal, idealistic sense of Jürgen Habermas. This is why we talk about a **cognitive proceduralisation**: a putting in place of mechanisms which enable learning processes to be generated at a collective level which can cope with the uncertainty linked to contexts of bounded rationality. In this sense, therefore, proceduralisation must not be confused with formal procedures. As we know, the law drawn up by the French revolutionaries set great store by procedures. But these procedures were formal rules, which, precisely, could not be put to the test of application and constantly revised. Rationality itself was not, in this case, put to the test of procedure. It is precisely this ongoing testing which seems to us to be the characteristic of the emerging model. In this model, rationalisation no longer consists of reading the laws of reality using the appropriate methodology, guaranteed by deductive reasoning or by social science, but rather of reflexively constructing situations by procedures. It is a genuine collective invention, which is now guaranteed only by itself, i.e. by its own creative process. What is most important in this process are the two conditions which we have just explained in conceptual terms: **open dialogue between all the parties concerned by a problem; and the ongoing reflexive loop between justification of the law and its application in practical contexts.**

## A few examples

To try to illustrate this definition of proceduralisation, we will give and comment on a few examples. First of all, we will give two examples of new procedures for producing collective knowledge. Then we will give two examples of the new types of monitoring. Of course, these examples are open to conflicting interpretations. And the models that they illustrate may generate undemocratic tendencies, perverse effects, etc. We propose these examples as opportunities for discussion and not as perfect paradigms of proceduralisation.

### Proceduralisation and production of collective knowledge: two examples

#### *Regulation of drug use*

The regulation of drug use will be the first example of a transformation in the way collective knowledge is produced, a transformation which is taking place before our eyes but of which we are only semi-aware.

What is the starting point? Well, the mode of regulation that for the most part was put in place in the 1960s and 70s (when drug addiction became a serious and disturbing problem for society) was genuinely typical of the social State. The mode of regulation linked two types of intervention. The first type represses drug trafficking and use. A formal law expresses an ideal of abstinence that is seen as the model of health in general. And as for the 'drugs' thus criminally penalised, they have been defined by the experts. The other type of intervention is therapeutic, relying on psychologists. Criminal judges themselves eagerly become psychologists, or at least surround themselves with expert opinions. In both types of intervention, knowledge about drug addiction is expressed in 'causalist' terms: the cause is either in drugs (hence the idea of outlawing these substances), or in the drug addict himself (hence the 'will to cure' which characterises social behaviour towards addicts, a dimension which did not escape the lucid observation of Michel Foucault). Based on positive knowledge, **programmes** were then put in place, with an aim that was not considered a problem as such: abstinence.

Unfortunately, of course, as everyone knows, 20 years on, the results of this policy were disastrous: the phenomenon of drug trafficking and use has only got worse. Meanwhile, however, the model of regulation has evolved and is still in the midst of ongoing change. What happened? First of all, there was a change in the epistemological attitude: awareness has grown of the whole range of determining factors. Above all, it is the very definition of the problem that has changed: to sum it up in a phrase, it is no longer the product which is perceived as the source of the problem, nor an 'internal predisposition of the drug addict', but the **psychological-ly and socially constructed use of a certain type of product**. The crucial point is this: there can be no definitive list of toxic substances. There are 'soft' uses of so-called 'hard' drugs (even heroin), and even 'social' use of these products (cocaine, for example, among high-earning professionals), or 'hard' uses of supposedly 'soft' drugs (such as marijuana, alcohol or tobacco). The very idea of a closed list of products has, moreover, been demolished on the ground itself: new synthetic products are burgeoning and the definition of drug addiction is expanding: what about amphetamines, antidepressants, designer drugs, solvents, etc.? But the need to refer to use in order to define and regulate drugs means, *ipso facto*, that there is a need to examine the context. It is hard to imagine a policy to combat the use of cocaine among high-earning professionals that would be the same as that pursued in Europe's inner cities. The social context, the causes and effects of drug use are always different. A purely formalist approach to the problem, based on a 'standard' definition of health, is no longer tenable.

We are gradually seeing new modes of production of collective knowledge emerge in this field, particularly through the somewhat haphazard promotion of the concept of prevention. The Dutch, of course, were the forerunners: they were the first to break the monopoly of the positivist experts, and involve representatives of the drug addicts themselves in drawing up policies (by means of the famous *Junkiebonden*). In Europe, a whole range of experiments involving new partners is flourishing: doctors, social workers, street educators, pharmacists and groups of drug addicts themselves are contributing. How the objectives of the regulatory policy and the resources implemented are put into practice depends on various cri-

teria: the fight against AIDS, urban safety and the fight against poverty are all intimately connected with the fight against drugs. There is a new dialectic between decentralised modes of action and central power. New channels of coordination are appearing: the public prosecutor's office, for example, is called on to play a coordinating role between players, and not just prosecute offences. Control of these new mechanisms is, of course, being fought over. The different players — including the police, the central State, welfare bodies and judges — are trying to throw themselves into what is a new game, and to acquire a maximum of resources in the playing of it.

### ***The Cambridge experiment***

The second example is that of the Cambridge Experimentation Review Board, which was set up in Cambridge (United States) in 1976. To sum up the history of this experiment in a few words: in 1976, Harvard University decided to install a new genetic engineering laboratory on the fourth floor of one of the university buildings. An alarmist article which appeared in the *Boston Phoenix* rang warning bells: the building's wiring was not safe, the plumbing was ancient, and seemingly ineradicable colonies of insects had taken up residence in the building — were they not potential transmitters of micro-organisms to the world outside the laboratory? The scientists tried to allay the fears of the mayor, arguing that the usual safety regulations had been taken into account. The experts who had conceived the plan were reliable. But to no avail: invoking the 'monsters' that the laboratory would inevitably produce, the mayor, Alfred Velucci, imposed a moratorium on the university, pointing out that it was his duty as mayor to ensure that nothing was done in public or private laboratories which could endanger the health of the city's inhabitants. The scientists were utterly dumbfounded: one of the world's most prestigious universities deprived of the capacity to conduct research into genetic engineering by a local government decision! But the scientific camp was actually split: at least one Nobel laureate lent his support to the mayor. On the question of public health, even science itself seemed unsure.

After much negotiation, a compromise was reached: a special Citizens' Committee was set up and charged with giving opinions and recommendations on the project. This was the Cambridge Experimentation Review Board. Remarkably, in this committee responsible for studying a highly technical dossier, there was no researcher as such. Lear describes as follows how Sullivan, then City Manager of Cambridge, put together the committee<sup>5</sup>: there were eight places to be filled plus the chair, to which the new city councillor for health and hospitals, Dr F. Communale, had already been appointed. Every part of the city was to be represented by these nine members; Sullivan first ensured that this was the case. Then came the ethnic considerations, which he dealt with by including an Irish, an American, an Italian, and a French national, a Jew and an African-American among the members. Both sexes had to be equally represented: Sullivan gave four seats to men and four

<sup>5</sup> Lear, J., *Recombinant DNA — The untold story*, New York: Crown, 1978, p. 163.

to women. Cambridge had to include two groups that were influential in electoral politics — the Cambridge Civic Association and those who ran independently of it: Sullivan chose an important female figure in the association, and an independent man who had been mayor. To ensure that the committee had an independent source of scientific knowledge on the physical constraints, Sullivan chose a civil engineer, an authority in the country on construction issues. For a religious point of view, he appointed a nun who was both a nurse and a member of the administrative staff of a hospital. To represent the world of business, an oil company executive was appointed. A black social worker spoke for the poor. Sullivan completed the Review Board with a student of urban policy who had a degree in the philosophy of science, a doctor specialising in the treatment of infectious diseases, and a cousin of the mayor — a political activist who had a day job at Carter's Ink Company.

The Committee worked flat out. It consulted experts in favour of and opposed to genetic engineering. It visited laboratories and carried out simulations of genetic combining processes. After six months, it presented a unanimous report. It recommended that the experiments be continued, and required the teams of biologists to comply with the security directives issued by the national scientific body, while also adding new safeguard measures. It required the laboratory staff to be trained to deal with all the risks that might arise during the experiments. It set out the technical reliability specifications for the equipment used and precise measurements of resistance to antibiotics for the micro-organisms 'produced' by the laboratory. The city was to appoint its own inspection committee with authority to intervene in all the laboratories at any time.

The report was hailed as an excellent piece of work by both the scientists and the politicians. It enabled Harvard University to get out of an unprecedented crisis that was endangering its capacity to carry out research. It satisfied the mayor. In short, it produced a new type of legitimacy through non-traditional channels, avoiding both formal political representation and positivist expertise. This experiment can already be seen as a historic step in the regulation of the relationship between science and society in the United States.

Three features are worth highlighting. First of all, the committee was not composed on the basis of preconceived ideas about interests. In fact, the members were chosen to 'reflect' the urban community, but without an obsessive concern for representativeness: for example, Hispanics, as such, were not represented. It was more the 'people's jury' model which prevailed. Secondly, its work evidenced a genuine group learning process. The group's chairman pointed out that all the recommendations, including some sophisticated measures that were undervalued or avoided by the NIH officials and the experts, came from members of the citizens' committee, and not from its ad hoc scientific advisers. In the course of its work, the group gained both technical competence and self-confidence. Some members who could not even formulate a question at the start learned not only how to ask relevant questions but also to detect unsatisfactory replies and throw them back with more detailed enquiries. Some were even sometimes able to spot statements

made by witnesses without the requisite authority<sup>6</sup>. New knowledge, appropriate for dealing with a complex question, had thus been produced. The third characteristic of the procedure was that it was a public procedure. Some of the committee's hearings took place in public. Its membership was known to everyone. This broke with the secret practices of the expert committee. It was only in this way that the process of constructing knowledge was able to acquire legitimacy.

### Proceduralisation and monitoring of public decision-making

As indicated above, the proceduralisation of public action that the current transformation of our advanced democracies seems to call for is principally linked to a new understanding of the relationship between justification and application of the rules. It is in order to accede to this necessary transformation of our systems of legal regulation and to what motivates it — a better understanding of 'normative' requirements linked to the dynamic of reason — that we are talking of the emergence of a third paradigm of the law. Beyond the formal law of the liberal State and the substantive law of the social State, the paradigm of procedural law is now taking shape. As we have said, to differentiate it from the functionalist perspective of Luhmann or the formalist, idealist perspective of Habermas, it is a **cognitive proceduralisation**: the putting in place of mechanisms which enable learning processes to be generated at collective level to manage the uncertainty linked to contexts of bounded rationality.

Essentially, there are three fields in which the practical consequences of this 'cognitive proceduralisation of the law and institutions' can be seen at the end of the 20th century.

- (a) Constitutionalisation of the law: monitoring of laws and regulations in the light of the fundamental rights of the individual (and of groups)

Beyond the ethical gain that this constitutionalisation implies, the increasingly important reference to principles — prime among them, the principle of equality — makes reflexivity legally possible within the legal system. The dimension of revisability of the rules which results from the interplay of double conditionality (respect for consistency and relevance within the context of application) is marked today by the technical possibility given to the players in the legal debate to question the justification of particular rules in terms of the consequences they entail in a particular context from the point of view of the requirements of equality and respect for fundamental rights. A reflexivity internal to the legal system is being introduced and gradually activated. This reference to fundamental principles is the necessary (though not sufficient) technical condition for the extension of a form of legal reasoning based on the logic of the principle of proportionality. This increasing emergence of principles most clearly expresses the interplay between the syntactic and semantic dimensions of the law. Certainly it can legitimately be said that these principles only acquire

<sup>6</sup> Dutton, D. B., *Worse than disease: Pitfalls of medical progress*, with contributions by Preston, T. A. and Pfund, N. E., Cambridge, New York: Cambridge University Press, 1988, p. 320.



legal validity, at least in our constitutional systems of written law, by being written into fundamental charters. The role of the overarching principle played by the principle of equality is one of those most explicitly established by these charters. What is interesting is precisely that this inclusion demonstrates the fact that our legal systems are taking into account the reflexivity that a correct understanding of social rationalisation and of the formalisation of the law implies. Let us note immediately that this reflexivity, made possible by the increasingly important role played by fundamental rights, most of all the principle of equality, is distinguished technically by the fact that these principles are often increasingly applied concurrently. It can be deduced that the sense of these fundamental rights can now only be determined in cross-reference to the other concurrent principles and in accordance with their context of application: this explains the increasing importance of the principle of proportionality, which the meaning of the principle of equality increasingly comes down to.

(b) Restructuring of the administrative and judicial functions

The powers of the judges are being increased at the very time that this increase requires them to exercise their supervisory function on the basis of ever-broader legal concepts. This strengthening blurs the traditional boundaries between the functions of administration (discretionary assessment, judgment as to expediency) and adjudication (ruling on legal issues and passing sentence). This extension can be seen in a wide range of legal disputes, whether the cases are constitutional, economic, family, criminal or administrative. But what it is also important to note is that this extension of the judges' powers also means a change in the nature of the monitoring process: increasingly (especially in the field of administrative, social and economic law), it aims less at defining the substantive solution required than determining the extent to which the material decisions were taken in line with the constraints on the discussion process supposed to ensure respect for a minimum of rationality. Monitoring becomes more and more procedural precisely in the sense of monitoring the rational constraints on a learning process in the context of bounded rationality.

On the administrative front too, the issue of monitoring is undergoing great change. In Germany, France, Belgium and the United States, there has been increasingly strict monitoring of administrative decisions over the last 15 to 20 years<sup>7</sup>. In these countries, more and more mechanisms have been put in place to check the substance of administrative decisions. These new safeguards ensure that an administrative action is considered legal only if it has been able to gather all the opinions of the people concerned and to respond to the various arguments that have been put forward. The question of the monitoring of administrative acts is: how is it possible to ensure that a public decision is rational?

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<sup>7</sup> This does not appear to apply to the Luxembourg Court to the same degree. It is often said that the Luxembourg Court is a proactive court. This is both true and false. It is a proactive court with regard to national legal orders. But it is a very formalist court with regard to the European institutions. The way in which European administrative law is constituted is related to the formalist models of State-controlled administrative law.

The lawyers' response today goes well beyond the model of expertise, one of the incarnations of which, the cost–benefit calculation, you are no doubt familiar with. At the same time, the exercise of the administrative function is revealing administrative authorities with a high participation ratio from the milieux concerned and a mode of operation that is increasingly similar to the processes of contentious administration (blurring of the three functions defined by Montesquieu and transfer to the administration of quasi-judicial powers). What is interesting about these so-called 'independent' administrative authorities is not so much their stated independence from the executive as the fact that the decision-making procedures are restructured so as to ensure compliance with the 'cognitive' conditions of collective decision-making in the context of bounded rationality.

Obviously, this is not the place to go into recent developments, mainly in the United States, of these techniques of proceduralised and strengthened control exercised by the judge with regard to public decisions. There is a significant and growing amount of literature in the United States on this question, building from the pivotal article by R. Stewart, 'The reformation of American administrative law'<sup>8</sup>. However, by way of example, we will refer to two recent examples taken from French case-law. These attest to the fact that tendencies towards proceduralisation are not only emerging, though less clearly, in Europe, but also concern not just the classic sector of the public authorities. In fact, they concern the general functioning of collective institutions, particularly in social and economic policy. This shows that what is at issue is the transformation of the way in which the coordination of collective action is conceived in our modern societies.

The two examples concern the thorny problem of mass redundancies for economic reasons. These two decisions<sup>9</sup> are interesting because, in both cases, the case-law subordinates the legality of a decision by the management of a company not only to the obligation to allow the different interests concerned (such as the workers) to argue their point of view<sup>10</sup>, but also to checks on the rationality of the discussion process leading to the final decision. In both cases, while refusing to identify with the manager, the judge also refuses to go along with the classic position which, to avoid the judge having to assume the delicate power of entering into a discretionary assessment of the soundness of the management decision, recognises the autonomy of the management's power to manage. Contrary to these two antinomial positions, which are both based on

<sup>8</sup> 88 *Harv L. Rev* 1669 (1975).

<sup>9</sup> Judgment No 27 of 20 January 1993 of the Dijon Court of Appeal (*Gonot v SA Devanlay Lacoste*) and Judgment of 15 November 1991 of the Paris Court of Appeal (*Alia et consorts v Société Marquis Hotels Lt*).

<sup>10</sup> This is certainly the first phase of a genuine proceduralisation which is already emerging in several sectors of substantive law. See also, in the labour law sector, the very significant ruling of the President of the Paris Tribunal de grande instance (regional court) of 11 June 1993 in interim proceedings in the case *Syndicat national du personnel navigant et a. v Air France*: 'We therefore order Air France to send each of its affected employees and the representative trade unions a letter in which it explains its decision and gives its interlocutors an opportunity to make known their point of view and their suggestions, before any implementation of its decision.'

a substantive approach to rationality, the judge follows the path, albeit still with great care, of checking the discretionary assessment and the consistency of argument of the management's decision in the light of the economic imperatives invoked to justify the mass redundancies.

The first case concerns a company producing ice-cream which used the seasonal nature of its production (70 % of the product was sold between April and September) as an argument for laying off permanent staff and re-employing staff on seasonal contracts. The Dijon Court of Appeal, assessing the rationality of the management's economic reasoning<sup>11</sup>, concluded that 'the explanations provided by the employer and limited only to the impact of the rate of production on labour costs do not show that the company's interest, taken in its broadest sense, justified redundancies'. The procedural approach requires the company to be looked at as a whole, i.e. as what in English is known as a **stakeholder community**. Without a reasoned argument between the different interests involved and without a proportional sharing of the costs imposed on them, there can be no rationally justified decision.

In the second case, the Paris Court of Appeal contested the fact that the decision for mass redundancy was motivated by economic reasons. The financial situation of the owner company (MHLP) was certainly problematic. But, the Court considered, this situation had, in a way, been deliberately caused by the parent company of which MHLP was a subsidiary by pursuing a strategy<sup>12</sup> adopted for the multinational group's own reasons. Also taking into consideration the fact that the management had 'not seriously negotiated' nor 'honestly provided the information that the employees needed in order to determine

<sup>11</sup> These are the Court's main citations:

'Whereas it should be ascertained whether the economic grounds invoked by the employer justified the axing of permanent posts;  
whereas on this point, an analysis of the documents presented by the management of S.A. MIKO to the works committee shows the unsuitability of the personnel structure to seasonal fluctuations in production;  
whereas the plan implemented to resolve this difficulty consists of reducing the excessive staff numbers in winter by getting rid of permanent posts and meeting the increase in demand in summer by recruiting a seasonal work force;

Whereas a reorganisation of the company, as undertaken by the management of S.A. MIKO, may constitute an economic cause for job conversion only if it is decided upon in the interest of the company;

whereas in this case, it is not debatable that the axing of 90 jobs during part of the year would increase the company's profitability, this choice should be assessed in the light of all the interests at stake within the company; it can thus be seen that S.A. MIKO is the French market leader in ice-cream, with a constantly strengthening position, and whereas, while the volume of production declined by 3.1 % in 1991, the increase in prices led to a 7.4 % growth in turnover for the same year;

whereas in this context, the reduction in labour costs is a response less to economic necessity than to the employer's desire to put profits before job stability;

Whereas, furthermore, this choice is not based on a rigorous analysis of the situation as, in 1989, the auditor's report sent to the works council in the Saint-Dizier factory revealed: 'the company does not have sufficiently precise accounting procedures to undertake an analysis of the costs and margins per product which would make it possible to measure the seasonal financial impact of the business'.

<sup>12</sup> This strategy, the Court noted, consisted of:

- ' — rapidly carrying out major renovation works at a total cost of FRF 84 million;
- financing these works principally through loans the costs (abnormally high, as rightly noted by the auditor) of which were borne by the company's budget;
- making transfers from this same budget of very high sums for which the consideration is not clearly shown;...

their course of action', the Court considered that the decisions affecting the employees were not related to 'sufficiently clear economic difficulties or to technological change' and were therefore justified only by the interest of the company or related to its own imperatives.

(c) Deformalisation of modes of conflict settlement and public decision-making

There is thus a threefold movement in contemporary law: an upward trend in regulatory requirements; a downward trend in the processes of the production of legal meaning; and a horizontalisation in negotiating conflict resolution and decision-making methods. These developments are the expression of a growing contextualisation of the procedures for drawing up and applying rules. The structure of a State governed by the rule of law based on production of law. However, more fundamentally, the functions of the players cannot be apprehended by means of the classic distinction between the drafting and the application of the law: new ways of producing law and legal meaning are emerging which reveal a fundamental questioning of the traditional ways in which rules are applied. Thus, Montesquieu's theory on the distinction between the three functions (legislative, executive, judicial) is thus strongly challenged. Not only does the vertical organisation of powers within the State, based on a clear independence of these three functions, appear less and less effective, but more fundamentally, the functions of the actors can no longer be understood by the classic distinction between the elaboration and the application of law: new methods of producing law and legal meaning emerge which express a fundamental questioning of traditional modes of applying rules. This reflects a new conception of the distinction, traditionally held to be irreducible, between the justification and the application of a rule.



# Proceduralisation and its use in a post-modern legal policy

Karl-Heinz Ladeur

## Abstract

Proceduralisation as a form of replacing a substantive decision by a legally established process of consultation, participation, or balancing conflicting interests, is quite frequent as a pragmatic approach. Its value can only be considered adequately if the relationship between law and its cognitive infrastructure is taken into account: the law has increasingly to generate knowledge by its decisions instead of drawing on experience.

## Introduction

The concept to be outlined here is itself based on the concept of learning in the sense of self-modification — as such it should be self-reflective enough to protect us from indulging in the illusion that there could be a kind of blueprint of a correct path to follow in legal theory. Proceduralisation is a method which takes into account that many practical problems are not accessible to theoretical reconstruction. It could serve as a kind of framework for an open process of observation of society from outside and self-observation of law from within. This brings us immediately to the core of the approach, the link between legal systems and (changing) cognitive assumptions, rules attributing responsibility, and stop-rules for the search for knowledge in decision-making processes. These are not truth-based rules but practical constructions linking cognition and action. That is why self-modification of society has a profound impact on its 'social epistemology', its self-descriptions used as a cognitive infrastructure for legal decision-making. Proceduralisation tries to adapt legal methods to alterations in the cognitive basis of society and adjust them to differentiated forms of knowledge.

## General remarks on social causality and decision-making in law and politics

### *Causality and the State*

The rise of the modern concept of State is closely linked to the idea of **causality**: the traditional legitimation of political power with reference to the past and the continuity to be derived therefrom in modernity, was replaced by a State

order based on an abstract conceptuality showing many parallels with the natural scientific representation of causality imposing an abstract order of stable laws subsuming the fluctuation of multiple single events and allowing for understanding and the technical use and manipulation of nature drawing on knowledge of its laws<sup>1</sup>. The modern State, on the other hand, was supposed to set up a human general order separating man from the burden of the specific, irrational, fragmented local order and establishing the equal legal personality as a unit to which specific legal acts and legal positions (property rights) could be attributed. As a countervailing part of this new abstract order, the State has to take up a similar position: as the creator of a new abstract legal order the State is supposed to have legal personality itself<sup>2</sup> — at least in continental legal systems. A society which derives legitimation from the future — and no longer from tradition — would need a flexible knowledge base allowing for operation on partial information<sup>3</sup>. And that is why the functioning of the legal system is linked to a paradigmatic construction of reality.

Causality as a social concept presupposes a specific type of cognitive openness allowing for learning from **experience**<sup>4</sup>, a concept which combines continuity of a basic paradigmatic framework superimposed on a world which gets its structure and accessibility from a pre-established separation of levels of complexity separating general law-like, experience-based and singular specific relationships<sup>5</sup>. One of the basic assumptions within this domain of causality is the possibility of assigning responsibility for direct effects of actions to an adult individual whereas distant consequences and diffuse effects of far-reaching interrelationships between laws and the accumulation of a plurality of events potentially darkening the clear-cut attribution rules are excluded from consideration. The same is valid for the exercise of **'negative' rights** absolving the subject from responsibility for consequences which could not themselves be conceived as **harm** imposed on a third person<sup>6</sup>. 'Harm' in this sense is not just a disadvantage imposed on somebody but a deviation from a presupposed normal course of events, reducing the value of a good attributed to a person and protected by subjective right. The concept of harm lays open the close interrelationship between the factual assumptions and legal attribution rules of liberal order<sup>7</sup>.

This model of knowledge which is inherent to the liberal legal system may have simplified social interrelationships; on the other hand, however, it has both

<sup>1</sup> See for the concept of causality Rasmussen, J., 'Event analysis and the problem of causality, in Brehmer, B./Leplat, J. (eds.), *Distributed decision-making*, Chichester: Wiley, 1991, pp. 247 ff.; see also Simon, H. A., *Economics, bounded rationality and the cognitive revolution*, Aldershot: Elgar, 1995.

<sup>2</sup> See only Runciman, D., *Pluralism and the personality of the State*, Cambridge: CUP, 1996,

<sup>3</sup> This is why the concept of 'observation' which indicates a mobile changing 'operative' position in polycontextual setting instead of the ideal observer has got such a prominence in systems theory, see Luhmann, N., *Beobachtungen der Moderne*, second edition, Opladen: Westdeutscher Verlag, 1996.

<sup>4</sup> See for this concept Koerner, S., *Experience and conduct: a philosophical enquiry into practical thinking*, Cambridge: CUP, 1976.

<sup>5</sup> See Hacking, I., *The emergence of probability*, Cambridge: CUP, 1993, for the epistemological conditions of the rise of 'probability'.

<sup>6</sup> See Sugden, R., *The economics of rights, cooperation and welfare*, Oxford: Blackwell, 1986; see also Klosko, G., 'Political constructivism in Rawls's political philosophy', *American Political Science Review*, 1991, pp. 611 ff.

<sup>7</sup> See Ladeur, K.H., 'Coping with uncertainty', in Teubner, G./Farmer, L./Murphy, D. (eds.), *Environmental Law and Ecological Responsibility*, Chichester: Wiley, 1994, pp. 299 ff.

constrained and enabled individuals to abide by its main assumptions and develop and adapt their 'mental model' of reality on the basis of its rules. This is particularly important for the role of public and private education and for the functioning of the economy as well.

One of the main problems of present-day law and politics is the lack of a shared model of reality establishing a basic framework of description to be used especially in legal practice and serving as a knowledge base for the management of social conflicts and the adaptation of law to a society which is changing. There has always been a concern for a normative consensus in society but at least the same value should be attributed to the importance of a certain basic cognitive framework which can be used for a common description of society, or can at least help to structure conflicts according to some shared criteria<sup>8</sup>.

Politics and law-making are increasingly confronted with the rise of 'ill-structured' problems for which there is no common understanding even though the value basis of a society may be homogeneous. For example, there is a shared normative assumption that — contrary to classical liberal ideology — mass unemployment is a public concern. However, a productive polemic on modern unemployment proves elusive; possible causal factors proliferate rendering it difficult to establish a shared model of these causes, let alone a solution. The idea of proceduralisation of State action should first of all be helpful in reconstructing the problem of modelling society and of designing a common frame of reference for politics, which could serve as a functional equivalent to the liberal cognitive paradigm<sup>9</sup>.

### ***The lack of a shared 'mental model' of society and the necessity to stimulate cognitive learning processes***

The mode of decision-making based on a stable pattern of causality and experience could be called '**substantive rationality**': in the first place, this means that decision-makers are not confronted with the necessity of constructing the domain of options within which they have to formulate a decision. This domain can be presupposed as given, and general assumptions can be separated from specific ones, the range of alternatives is limited, and choice is prone to subjective values. The sustainability of this mode of substantive rationality is mainly challenged by the difficulty of integrating time and change into its stable frame of reference. Once self-modification of society is more rapid, and complex feedback between variables and events in historical time have to be taken into account **learning** is a primary concern. And learning is a crucial element of **procedural rationality**, which leads to institutional flexibility and enables decision-makers to construct their domain of options, which can no longer be presupposed to be structured by the stable separation and differentiation established by the traditional model of so-

<sup>8</sup> See for a historical approach to this problem Burt, S., *Virtue Transformed: Political argument in England 1688–1740*, Cambridge: CUP, 1992.

<sup>9</sup> See Lindbeck, A., 'Incentives and social norms in the welfare state', Stockholm University, Institute for *International Economic Studies*, Seminar Papers, 617, 1996.



cial causality<sup>10</sup>. The simple reason for this is that more and more specifically technological and economic decisions include an element of experimentation and strategic design, as they tend to **change reality** in a much more fundamental way than in the past. Contrary to the 'society of the individuals', in the 'society of organisations' we are confronted with actors possessing a much more sophisticated strategic potential of decision-making. This means that they can coordinate a plurality of different actions within a broader time horizon and are no longer exclusively dependent on general conditions which themselves are excluded from strategic intervention, as was the case within an order based on the individual as the main actor.

The concept of learning which tries to tackle the new problem of private and public decision-making should not be reduced to the collection of more information but includes the necessity of **constructing** and considering an '**internal environment**', within which the decision-making takes place, once the external environment can no longer be presumed to be structured by the general rules of causality<sup>11</sup>. Decision-making can no longer draw on a stable frame of reference, clearly separated levels of complexity nor the legitimacy of linear relationships reproducing a societal equilibrium. The new complexity undermines the stable hierarchy of rules, concrete experience and single events. That is why reference to rules should increasingly be substituted by organisational design which combines external and internal self-observation. The new external complexity has to be managed within organisations by considering decision-making processes as depending recursively on the generation and the execution of processes of decision-making themselves. The reconstruction of decision-making units has to draw on the necessity to stimulate and orient their learning capability and to broaden their action potential vis à vis the turbulence of the external environment and so develop flexibility in order to compensate for lack of transparency and structure in social reality by generating more options and more adaptability because strategic, multiple actions tend to change reality. This means that processes of self-revision and adaptation have to be integrated into private and public organisations.

### ***The main difference between substantive and procedural rationality***

The traditional model of decision-making was dominated by substantive rationality, which could be regarded as being 'instrumentalist': it started from given goals, given conditions and given constraints. The rationality of decision-making was then dependent on the actor whose main task was to search for the one best solution on the basis of pre-structured social causality and legal norms. Procedural rationality, however, presupposes the relevance of the process which generates a situation to be tackled by a learning approach. Information needed in decision-making is not just collected but generated by decision-making processes themselves, and information will always be partial and subject to change. This certainly

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<sup>10</sup> See Simon, H. A., loc. cit.

<sup>11</sup> See Varela, F. J./Thompson, E./Rosch, E., *The embodied mind: cognitive science and human experience*, Cambridge (MA): MIT Press, 1997; see also Nonaka, I., *The knowledge creating company*, Oxford: OUP, 1995.

has important repercussions on decision-making itself: decisions have to be open to self-revision because procedural rationality is a kind of 'bounded rationality' (H. A. Simon).

Substantive rationality starts from a few basic assumptions about social causality and social rules; it treats reality as transparent and does not need sophisticated external observation processes. Procedural rationality, on the other hand, takes into consideration the fact that it can only reduce uncertainty and set up some kind of 'best available' partial knowledge. That is why it has to focus on viable procedures which in their turn have to take into consideration limited attention constraining the decision-maker to focus informational activity and to be aware of the fact that the creative element of knowledge-generating process and design is unavoidable. Decision-making is no longer oriented toward some specific final outcome but it is linked to post-decision-making processes of improving data and re-designing models<sup>12</sup>. It has to guarantee flexibility in order to be able to buffer the effects of errors or to broaden the range of alternatives taking into account the necessity to 'second guess' the decision-making. This approach either excludes decisions altogether or places a burden of argumentation on them, with far-reaching, irreversible consequences and a demand for systematic integration of evaluation. Substantive rationality, however, presupposes a basic set of normative assumptions (legal rules etc.) and constructions of reality allowing for specific facts of the case to be subsumed under general concepts. It presupposes the 'omniscient decision-maker' who has to emphasise the precision of detailed empirical descriptions of cases and can refer to a universal normative framework attributing responsibilities (mainly) to individuals, and stabilising expectations.

## **Traditional problem structure in public decision-making**

### **Legislation**

19th-century legislation was characterised by a paradigm set by police law whose main function consisted in preventing people from causing 'danger' to public goods, including health of individuals, through specific police measures. The legislative paradigm was based on a norm structure which followed the model of an 'if/then' structure: a legal consequence was attributed to a general description of facts<sup>13</sup>. Of course, rules were indeterminate, a fact especially valid for police law, but the legislature could draw on basic assumptions structuring indeterminacy: for example it presupposed goods, especially rights, as indicators of harm and causal attribution rules which themselves presupposed the possibility to refer to normal states and the possibility of linking specific causes to specific effects which may be separated from a background of an opaque flow of influences.

<sup>12</sup> See for the new experimental logic of search and creation generally Hayek, F. A., *New studies in philosophy, politics, economics and the history of ideas*, reprint, London: Routledge, 1990.

<sup>13</sup> See Luhmann, N., *Ausdifferenzierung des Rechts*, Frankfurt (M): Suhrkamp, 1982.

The legal model of the late 19th century is based on stable separation between the rule and its application, a model which is not called into question by the Anglo-Saxon common law because, although this shifted the main task of elaboration and conservation of law to judges, it presupposed a basic stability no less than the continental legal systems did.

### Liberal administration

The same paradigm of police law can also be used in order to describe decision-making processes within the liberal administration: inherent to police law is the assumption that the police dispose of the average knowledge (experience) which does not exclude that it might be necessary to consult specialists who themselves have had to interpret a common knowledge potentially accessible to everybody. For example, engineers having to judge dangers caused by the use of some steam boiler have to draw on basic textbooks on engineering and to answer the legal question whether it is to be regarded as 'safe' or not. This evaluation of course implies a value component, and especially a decision on the general acceptability of technical risks, because the concept of 'safety' as a criterion of decision-making cannot be taken at face value. There are some discussions, especially concerning early railway projects, on how and to whom to attribute risks, especially of fire. But even though judgments are open to discussion, they have to relate to some common representation of a state of **normality** open to slow social evolution which is not called into question by even serious accidents<sup>14</sup>. The attribution rules themselves are considered to be stable whereas in detail one could quarrel about whether cattle-grazing on the rails is 'normal' or whether thatched roofs catching fire from sparks emitted by railway locomotives is a harm to be attributed to railway companies or just bad luck to be borne by owners. Nonetheless, the alternatives are rather clear-cut<sup>15</sup>.

Even though administration had the power of discretion, decision-making was considered to be oriented at a state of equilibrium presupposing shared and general public knowledge and values. Experience reinforced and reproduced itself, continuously on a case-to-case basis, and learning had to be only spontaneous and not systematic.

### Judicial decision-making

The same problem can also be demonstrated in civil law cases: where someone buys a steam boiler and is hurt when it explodes, the question of compensation under this system is reduced to the problem of liability for **negligence**. Again, this rule expects average care from the producer, and so refers to experience and knowledge generated by people working in a specific domain of the economy. The

<sup>14</sup> See for the evolution of liability in complex cases Meder, Th., *Schuld, Zufall und Risiko*, Frankfurt (M): Klostermann, 1993.

<sup>15</sup> See generally for the relationship between law and social conventions in liberal societies Long, M./Monier, J., *Portalis — Esprit de justice*, Paris: Michalon, 1997.

producer has access to, and shall consider, professional knowledge, and in that case he will not be liable even if after the fact he comes to learn that the constructions in question were far from perfect. Accidents not falling within the 'negligence' category have to be borne by the victim as just 'bad luck'. It presupposes attribution of specific actions which could be controlled by individuals on the basis of public knowledge. Presupposing technical **progress**, the public accepts that technical system at a certain stage of evolution but this has to be considered as 'normal', and there is no liability for normal action.

## Summary

Public decision-making based on the traditional paradigm of social causality and liberal law presupposed general rules with application being separate from them. The reverse side of the separation consists in the assumption that the decision-making process does not modify the rules themselves; even if knowledge changes, its evolution is supposed to develop spontaneously and slowly, without alternatives, underlying public or private decision-making. Furthermore, it referred to specific facts (being distinguished from a general background of reality) as its privileged cause and not some global risk or events to be considered as just 'hazard' or bad luck. This paradigm establishes a common frame of reference for legislature, administration and the judiciary leading to a certain model of decision-making which corresponds to the rules of private decision-making.

Substantive rationality of the law presupposes clear legal programmes based on 'if/then' relationships and a stable knowledge basis enabling interpretation and adaptation of law to continuous processes of transformation of society. In addition to that, the functioning of the legal system draws on basic attribution rules assigning responsibility to individuals for controllable cause-effect relationships to be distinguished from a background of 'noise' created by processes of self-modification of society. This basic idea of causality establishes stop rules for the inevitable search for new knowledge in liberal society. The dominant type of knowledge generation is **experience** which is itself closely linked to the general structure of a society of individuals and especially to a decentralised structure of technical evolution drawing on practical trial-and-error processes spontaneously generating a kind of average knowledge accessible to everybody. This basic knowledge structure is a crucial presupposition for the functioning of the legal system inasmuch as it allows the construction and application of laws referring to prestructured complexity.

## Procedural rationality and public decision-making

### The example of law-making

The new problems the legislator is confronted with can be demonstrated by the decision to introduce co-determination procedures for workers in big firms in Germany. It is not necessary to go into details on how this fits into the structure of

company law. In a perspective of constitutional and legal theory this problem in essence refers to the constitutional protection of property. In systems allowing for constitutional control of parliamentary laws especially, we need an idea of a core of property which should be exempt from legal interference. Apparently weighing up constitutional compatibility of co-determination with this core element of property depends on the effects of co-determination on the decision-making process within enterprises. But how do we know? How can future scenarios be evaluated? Of course, one can arrange parliamentary processes of 'hearings' with trade unions, employers, associations, experts on economy, lawyers, etc. One of the crucial problems we are confronted with is obviously that the information we will get is equivocal to say the least. A forecast of the effect of a change in decision-making on the efficiency of co-determined enterprises is highly uncertain. This is not only a problem of lack of 'information,' which the law itself tries to turn into a medium of change of hitherto established processes of decision-making, but it develops an approach of 'legal policy' focusing on its own attribution rules. The legal system no longer presupposes a prestructured state of normality but aims at a transformation of reality without being able to fully determine the elements of this process<sup>16</sup>.

This problem of course raises the question of how to manage uncertainty: does constitutional protection of property exclude experimentation with its rules or should Parliament dispose of discretion once detrimental outcomes are not evident? This brings us to the problem of how to manage the process of knowledge generation within political institutions. Is Parliament the adequate organ for the generation and observation of knowledge for complex decision-making processes? Can Parliament compensate for the lack of a common knowledge, especially of a shared domain of experience? Or do we have to impose new constitutional rules on decision-making in complex domains stressing mechanisms of knowledge generation? The answer to this question has crucial consequences for the control of constitutionality by constitutional courts<sup>17</sup> because there is a close link between the role of parliamentary decision-making and the role of constitutional control. We could of course shift the emphasis to the constitutional court as an institution which should observe and evaluate the role of property under conditions of complexity. This would also be the equivalent of advocating a more active role for the court in the management of highly uncertain issues. And one could argue that courts are not well-prepared for this type of decision-making. One could argue, however, in favour of a strong constitutional barrier **against** uncertainty excluding modification of law once outcomes are not well-known and hard to forecast. But this could not be an acceptable solution because self-modification of society is a process which is not even primarily created by the law itself; on the contrary, in complex fields of decision-making it is also highly uncertain where the cause of self-transformation of society is to be located. Does the law initiate a process of change or does it rather interfere and structure a spontaneously generated process

<sup>16</sup> See the decision of the German Federal Constitutional Court, *Bundesverfassungsgericht* (Reports), 50, 290, pp. 320 ff.

<sup>17</sup> See for the unclear balancing rules of the German Federal Constitutional Court Schneider, H., *Zur Güterabwägung des Bundesverfassungsgerichts bei Grundrechtskonflikten*, Baden-Baden: Nomos 1997; see also Haltern, U. R., *Verfassungsgerichtsbarkeit, Demokratie und Mißtrauen*, Berlin: Duncker & Humblot, 1998.

of self-modification of society leading into uncertainty anyway? On the other hand, self-modification of society as a continuous process is rapid and does not necessarily allow for piecemeal type intervention, since decision-making based on partial knowledge is inevitable and it would only be an illusion to establish a constitutional rule shifting burdens of proof onto those who advocate specific change. Nonetheless we must accept that we cannot fully override our 'duty' to make decisions; and therefore cannot establish a general principle restricting decision-making or parliamentary law-making under conditions of uncertainty.

An alternative could consist in a kind of combination of discretion of Parliament on the one hand and a restructuring of decision-making procedures on the other, which could as well pave the way to a reinterpretation of the role of constitutional courts, since the new method of 'balancing' of pros and cons constitutional courts use in complex cases is not sufficient. So one could imagine new **procedural** rules taking into account the complexity of knowledge generation, and problems of potential irreversibility of decision-making on partial information and one could think of explicit procedural obligations to observe in a systematic way the consequences of decision-making under conditions of uncertainty, whereas normally self-modification would be left to spontaneous processes of information after the fact. So the only way to manage these ill-structured problems of decision-making consists in re-entering the problem into decision-making procedures. Procedure in this sense is not limited to explicit procedural norms, rather it advocates a shift of emphasis from aims which are highly unstructured to processes of knowledge generation and monitoring of decision-making under conditions of indeterminacy. This approach tries to find a functional equivalent to a shared common knowledge collected and distributed as experience. And this common basis can consist only of a procedural approach re-entering the problem of unstable frames of reference into the legal process itself, whereas in the past knowledge generation could be considered to be more or less evident and to function spontaneously.

Parliament nowadays is confronted with ill-structured issues where there is no clear-cut aim, no shared description of problems, where contradictory criteria have to be applied, no stable attribution rules can be presupposed and where even observation of consequences to be assigned to a 'reformed statute' is highly controversial. So one of the elements advocated by a procedural approach would consist in a reconsideration of the institutional structure of Parliament with reference to generation of knowledge, its potential management of ill-structured problems, taking into account its institutional conditions of decision-making as opposed especially to private decision-makers, administrators and the judiciary. In particular, the element of self-revision and monitoring of outcomes of statutes should be taken more seriously. Constitutional theory should explicitly take into account that law-making has to set up and differentiate an **experimental design**, laying open problematic assumptions, alternatives, weaknesses of informational bases and combining discretion left to the majority with sophisticated processes of monitoring based on competing assumptions and open to alternative evaluation after the fact. Above all, this means to take seriously the fact that we do not dispose of a common basis of experience for complex problems of decision-making. (This assumption

does not of course exclude that there are still many decisions to be taken on the basis of experience, but this is no longer the typical situation of law-making.)

### **Administrative decision-making in ill-structured domains**

The new problem of administrative decision-making under conditions of complexity can be demonstrated with issues of nuclear law as opposed to the example of licensing the use of a steam boiler mentioned above. Nuclear law can no longer presuppose a stable concept of 'safety' but has to take into account **risks**<sup>18</sup> linked to lack of knowledge, as well, a problem which can no longer be left to spontaneous processes of new experience generated from trial-and-error processes. Administrative decision-makers have to take into account requirements of the 'state of science and technology' (the wordings in European nuclear laws are different but the substance of the problem is the same). This formulation also raises the problem of the function of the legislature. What about the 'reservation' of legislative competence? How far has the legislature to structure this problem of knowledge generation by the norm itself? Is this formulation equivalent to a delegation of competence to administration or experts?

For administration itself, this means that decision-makers can no longer draw on a common experience: design of nuclear power plants is based on highly sophisticated new types of knowledge, statistics, models, and theoretical calculation of probabilities, etc. The administrators need expertise, but this expertise again is no longer easily accessible because it cannot draw on homogeneous public knowledge as could the engineer consulted by administrators deciding on the safety of a steam boiler. Knowledge of nuclear risks is specified (linked to practice without being easily transferable to a general public), incomplete, heterogeneous and prone to diverging evaluations (it consists of empirical elements, methodological generalisations, technological design, constructing mathematical models, 'safety philosophies' and highly opaque interrelationships between its components). This, *inter alia*, results in the fact that the choice of scientific advisors can predetermine the character of the expertise which administrators will receive. This is especially due to the fact that the 'state of science and technology' is not just a more sophisticated type of knowledge as compared to experience but it is a different type of knowledge which is referred to: science and technology are much less closely linked to practice and decentralised processes of trial and error open to spontaneous learning than experience. Ecological designs are much more complex and far-reaching than traditional technical constructions, but we should take into account particularly that technology itself generates new knowledge which does not draw primarily on stable experience. For the administrator this means that public decision itself has no settled knowledge basis: risks have to be evaluated according to theoretical knowledge, and assumptions linked to a certain design which is itself based on theoretical model building. This situation has the side-effect that learning from

<sup>18</sup> See for a legal perspective Di Fabio, U., *Risikoentscheidungen im Rechtsstaat*, Tübingen: Mohr, 1994; see also Bechmann, G. (ed.), *Risiko und Gesellschaft*, Opladen: Westdeutscher Verlag, second ed., 1997.

practice is more complicated than it was in the past because processes within power plants are much more difficult to observe than the functioning of traditional mechanical, technical devices. On the other hand, industry has a strong interest in keeping information secret. Administration is confronted with a new version of the link between knowledge and action, but this time the link is much more complex than their own experience-based knowledge which is better structured and more accessible because the process of its continual enlargement and self-revision is public and distributed over a multiplicity of agents<sup>19</sup>.

Thus, administration is confronted with the same type of complex problems as the legislator, especially because there is no longer a clear relationship between legal concepts and a presupposed body of knowledge. Knowledge is, rather, rapidly evolving, uncertain, heterogeneous, theory-laden, and involved in fragmented strategic decision-making with limited public access. That is why it will not be sufficient to accumulate 'more of the same', that is just more information because information generation in complex processes is potentially infinite. Rather, we need a clear profile of procedures for decision-making laying open the problems related to the ill-structured character of scientific and technological design; to emphasise the necessity of establishing explicit mechanisms allowing for more transparency of, and more sensitivity to, the different heterogeneous components of this type of scientific and technological knowledge; and, to integrate sophisticated processes of monitoring into decision-making reintroducing a substantive problem as a procedural issue.

### Judicial decision-making on complex issues

New problems raised by liability for defective products have revealed the existing limits of the traditional experience-based reference to 'negligence' as a basis for responsibility of harm. One of the problems related to the growing differentiation of production is demonstrated by accidents which have more and more questioned the rationality of the proof rules to be applied in these cases. For example, when a glass bottle of lemonade explodes and hurts someone, the victim had to prove the producer's negligence<sup>20</sup>. However, strict application of this rule results in the victim almost always bearing the consequences as 'simple bad luck'. For production methods are not really accessible to the public once defects are not visible and knowledge is too specialised. That is why court practice has experimented with reversal of the burden of proof. Reversal of the burden of proof in many cases leads to more sophisticated documentation of production processes and its rules which then might help producers to prove that it was not in fact negligence which led to the accident. This is a kind of second-order duty imposed on producers to guarantee access to knowledge on production processes where duty to produce safe products is insufficient. Another case of such a second-order procedural type

<sup>19</sup> See Peters, B. J./Pierre, J., 'Governance without government?', *Journal of Public Administration Research and Theory*, 1998, pp. 223 ff.; see also Peters, B. G./Savoie, D. J., 'Managing incoherence', *Public Administration Review*, 1996, pp. 281 ff.

<sup>20</sup> See generally Meder, loc.cit.



of duty consists in **warnings**<sup>21</sup> producers have to publish if potential side-effects come to light only after the product has been placed on the market. Courts try to compensate for the lack of a common set of knowledge by developing new knowledge-related duties, an approach which to a certain extent manages problems related with the lack of a common knowledge base in a satisfactory way. On the other hand, we are increasingly confronted with a certain complexity generated by this approach itself. For example, warnings have to take into account the problem of limited attention. The issuing of too many warnings by producers may be counterproductive: inundated with superfluous information, consumers may simply ignore crucial warnings. We are confronted here with a rather typical problem of producing unintended consequences of decision-making.

The reason why this happens is again related to the dynamics of knowledge generation: knowledge, and practical attitudes and convention, evolve in ways which are not easily foreseen because they do not follow continuous linear paths. Much knowledge remains implicit in practice and so allows actors to withhold it, a situation which was not so pressing in the past because experience as a common knowledge basis was much more open to spontaneous evolution. On the other hand, strengthening liability may again produce unintended side-effects because it could lead firms to shift risky production to undercapitalised small firms, a problem which could then of course be tackled by broadening responsibility. But this approach would again create new uncertainties. Yet we have to take seriously the risk of suffocating innovation if liability is expanded beyond hitherto accepted rules.

We cannot go into details of product liability here, the examples given serve only to demonstrate that the judge as well as the legislator and the administration are more and more confronted with ill-structured problems related to lack of knowledge and lack of stable rules of experience allowing us to forecast behaviour once certain legal rules are changed under conditions of complexity and indeterminacy. That is why the introduction of rights with regard to risks beyond the traditional limits of harm will not be very helpful because they will only create new problems of balancing<sup>22</sup>. A new productive approach to tackle this type of ill-structured problem can only start from reflection on the transformation within the relationship of normative and cognitive components of the legal system, and especially the loss of structure established by the concept of causality. Diffuse causality leads to 'moving targets' and especially to unintended side-effects. This is related to one of the phenomena judges are confronted with: the hitherto established clear-cut separation between the general norm and public experience; application in a specific case is called into question because the court decision can easily lead to far-reaching transformation of economic processes and consumers' attitudes in a

<sup>21</sup> See the judgments of the German Bundesgerichtshof (highest civil court) concerning information to be given to consumers in the case of the 'baby bottle syndrome' which had been provoked by excessive consumption of baby tea, in *Neue Juristische Wochenschrift*, (1994, pp. 932 ff; 1995, pp. 1286 ff; 1999, pp. 2273 ff); see also Damm, R., 'Zu den Anforderungen der Produkthaftung von Produkten, bei denen durch Fehlgebrauch erhebliche Körper und Gesundheitsschäden entstehen können', *Juristenzeitung*, 1992, pp. 637 ff; Lit-tbarski, S., 'Herstellerhaftung ohne Ende — eine Segen für den Verbraucher?', *Neue Juristische Wochenschrift*, 1995, pp. 217 ff.

<sup>22</sup> See for a general critique Glendon, M.A., *Rights talk: the impoverishment of political discourse*, London: Pinter, 1992.

rapidly changing context. This is especially due to the fact that courts can no longer presuppose a stable frame of reference for their description of the case under consideration, more and more they are constrained to take into account large groups of actors and their behaviour. For example, in calculating which type of actor can more easily obtain insurance against certain risks or which actor has more strategic resources to structure a certain field, questions arise as to whether we should just expect consumers to learn about risks and take into account that an adaptation might be slow and divergent, or whether we should 'use' producers and their resources to advocate adaptation?

These reflections show that judges are increasingly constrained to develop a strategic approach in deciding cases in rapidly evolving environments. And again, proceduralisation can be helpful in the development of more sophisticated and differentiated approaches stressing the problem of knowledge generation and the inevitability of taking into account repercussions of decisions within larger groups, once not only products and production processes change but also consumers' attitudes and habits. In cases of negligence, one could in the past have presupposed a certain type of product and a certain experience of how to use the product, including of how parents prepared children to adapt to everyday risks. Once self-modification of society affects the whole process of knowledge generation and its transfer between generations, decision-making on assigning responsibility becomes much more difficult and demanding. This evolution leads us to reconsider the relationship between legislation, administration and the judiciary in the light of the knowledge problem. Functions of public institutions have to be redesigned in a cooperative manner redesigning the relationship between law-making, administrative decision-making and judicial control. The different resources of State powers should be re-evaluated with reference to their potential contribution to the management of uncertainty, which is a common task and whose complexity undermines the clear-cut separation of powers.

## **Social State and social complexity**

### **New types of knowledge used in welfare policy**

Other examples of difficult problems related to lack of stability of patterns of responsibility or of a shared social model of description of society can be found in the field of social policy. In the past, individuals were not held responsible for distant consequences of actions, but only for harm to bearers of legally protected rights. On the other hand, individuals were held responsible for their well-being and failure to earn a living was just 'bad luck', perhaps a case for charity but not for collective responsibility. As we all know, this has changed. And there are good reasons for this transformation of the legal system especially in the establishment of public insurance, social assistance, etc. However, contrary to widespread assumptions, solidarity in complex society is not a solution but a problem. This can be demonstrated by a reflection on the first steps in the development of new public insurance systems: they were only possible on the basis of a new type of knowledge enabling decision-making beyond the traditional model of individual cause-effect relationships and rules of individual attribution of responsibility, that is:

**statistics** drawing not on individual actors but calculating with group relationships (diseases, unemployment within large populations) which leave aside the individual<sup>23</sup>. This is one of the aspects which show that calculability of **risks** to be ensured not only introduces a new complex concept into our social modelling but also conflicts between the old individual attribution of responsibility still valid in economy and the new collective form generated. The conflict is due to the fact that the new rule necessarily leads to an attenuation of the rigidity of the old one: this leads to problems of 'moral hazard' creating the risk of overburdening collective responsibility. Exploiting social insurances distributes costs over a large number of people, that is why its effects are diffused and more acceptable to individual beneficiaries. A further aspect is related to the huge public bureaucracies which are necessary to administer systems of collective responsibility (the same is true for social assistance): they tend to have no incentive to attain a certain efficiency because failing programmes or decline of public attention for social policy may easily weaken their own position. However, this sector is dominated by large corporate groups (trade unions, welfare organisations, etc.) which have their own stake in this domain. Their interests tend not to be identical with those of the individuals to be protected (poor people etc.). Without going into further details here, these few remarks should have made clear that collective responsibility is a problem because of a lack of transparency of the field and the difficulty in constructing shared models of complex realities. This problem has a self-reinforcing character because organised groups get more and more interested in changing public perception of the problem, remoulding the self-image of people and establishing a culture of 'victimisation' preventing clear insights into the structure of social policy and its rules<sup>24</sup>. That is why, on the other hand, the system tends to invite people to abuse the system who otherwise would be opposed to it if they could understand how it works. This helps organisations to concentrate on the creation of 'positive' ideas of a just society — which everybody is sympathetic towards — without telling what the problems of justice under conditions of complexity really are. This is a destructive circle because the evolution of the system does not know any stop-rules allowing for observation and the construction of a rational, transparent administrative order. Once a basic level of social security is transcended, the system necessarily gets into more and more self-contradictions, the reflection of which is at the same time sealed off by ideological formulas<sup>25</sup>.

We have had to become familiar with 'complex causality' in nature — putting into question the calculability of linear cause–effect relationships — but society has become no less complex. For the new social problems there will not be any 'end of the pipe' technologies, either. I will only mention one example: the explana-

<sup>23</sup> See generally Ewald, F., *L'Etat-providence*, Paris: Grasset, 1986.

<sup>24</sup> See now Nolan jr., J. L., *The therapeutic State. justifying government at the century's end*, New York: NYUP, 1998, which analyses the rise of the 'caring' State, an evolution which is accompanied by a serious decline in efficiency of State activities, Tanzi, V./Schuknecht, L., *The growth of government and the reform of the welfare state*, IMF WP, 1995, p. 130.

<sup>25</sup> See for a critique of the ideologies of the welfare state Goodin, R. E./Schmidt, D., *Social welfare and individual responsibility*, New York: Free Press, 1998; for the administrative system in particular: Brunsson, N./Olsen, J. P., *The reforming organisation*, Bergen: Fagbogverlaget, 1997; for the conception of the State: Crozier, M., *Etat modeste, état moderne*, Paris: Seuil, 1991.

tion for unemployment. The American economist, Paul Krugman<sup>26</sup>, has recently quite plausibly observed that all present approaches provide only partial explanations for this intriguing phenomenon, and that the most realistic assumption will have to accept that this is a case of complex causality, that is, a lot of different concurring and competing partial causes are to be considered. The challenge for economy — and, we have to add, also for legal science — must consist in gaining access to an institutionalised approach to model this new type of complex causality. In legal terms this could mean, for example, that complex systems of collective responsibility, including collective bargaining processes, would have to be constrained to link their policy to certain model construction assumptions about their expectations concerning central data of the underlying processes. Such a model would have to be designed in such a way as to allow for comparison and retrospective observation. This could be a way of confronting society and social actors with self-generated constraints systematically, and of explicitly taking into account problems of ill-structured fields of action which tend to be more and more opaque. The self-modelling and self-designing capacities of society, which in the past were based on trial-and-error processes within society of the individuals, have to be reconstructed and adapted to the conditions of the society of the organisations with the prospect of an **'experimenting society'**. This concept tries to link itself to the liberal principle that a constitution must always be based on a kind of pre-constituted order from which it derives the distinctions with which it organises decision-making processes and attributes responsibilities. In the past, we could more or less rely on some implicit regenerative power of society. But under the conditions of the new paradigm, the process of **generation** of new possibilities, the intertwining with unintended consequences, must be taken into account more explicitly. A new functional equivalent to the classical liberal substantive rationality based on general rules, individual responsibility, experience, and decentralised decision-making has to be found.

For the internal rationalisation of the State, the above-mentioned approach could mean, for example: administrative tasks which are difficult to structure should only be taken up if a systematic evaluation programme is set up because information has to be generated explicitly once experience spontaneously emerging from trial-and-error can no longer be relied upon. Public tasks in general should be more related to the development and conservation of the informational infrastructure of society in a broad sense which would have to be set up in order to generate more possibilities and widen the 'pool of variety' in society. In this way, procedural objective duties of the State could be linked with the rationality of traditional liberal rights rather than being integrated into the continuity of a substantive purpose-oriented logic of the welfare state.

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<sup>26</sup> See Krugman, P., *Inequality and the political economy of eurosclerosis*, CEPR DP, 867 (1993).

## Outlook: toward the 'experimenting society'

### Critique of discursive rationality

Contrary to the 'argumentative rationality' of the post-conventional model of deliberation prompted by the Habermasian school, the model here advocated would rather presuppose bounded rationality and draw on the operation with provisional conventions, the management of self-produced constraints, the search for stop-rules oriented towards 'viable' patterns of decisions and attribution of consequences. At present, new distinctions are necessary, which have to be adapted to self-organisation of processes in society which are no longer registered by the old 'representative' macro organisations. A discourse-ethical version of proceduralisation of constitutional law would, however, neglect specific functions of the legal system. Priority of a discourse of justice would expect too much collective action potential, it underestimates the inevitability of constraints for the ongoing process of differentiation of society which cannot be overcome by 'deliberation'. There is no a priori justice which does not consider problems of **implementation** of justice in a complex society and that is why the priority of a discourse of justice over competing systemic and instrumental rationalities is far from being plausible. Such a claim to priority is an integral part of the form of discursive rationality but cannot be justified explicitly. It is not astonishing that Habermas<sup>27</sup> derives the self-enlightening potential of political discourse from a rationality inscribed into language itself which has to be liberated from political power relationships and economic instrumental rationality. Judging from real history, it is far from evident that 'disinterested' political discourse has in any way privileged access to a global rationality. The main danger for liberal society in the past has been created by 'altruistic' political movements, which specifically for their altruistic nature, ask for sacrifices which lead to a circle of self-destruction of society at large. The main problem in society is not to find rules for political argumentation but to maintain patterns of cooperative **action**. The problem of how to establish a cooperative order within a fragmented and rapidly evolving society cannot meaningfully be tackled without taking seriously the problem of **knowledge**, a common frame for self-description of society under conditions of indeterminacy if necessary. Neutralising interest by deliberation would — even if it were possible — only solve the problem of fairness which is, by far, not the more pressing one.

A post-modern society cannot be integrated through a stable set of common shared beliefs but rather by 'overlapping networks' of practical differentiated political and social interactions generating a kind of implicit knowledge which can be used as the raw material for setting up explicit conventions. The complex society confronted with uncertainty must turn into an 'experimental society', restructuring its institutions in the sense of a reshaping of incentives for learning and adaptation. The fact that the main actors now are organisations and not individuals blocks the way back to a pseudo-liberal deregulated society. However, the liberal traditions exclude as well the alternative of a State replacing spontaneous self-reg-

<sup>27</sup> See Habermas, J., *Between facts and norms*, Cambridge: MIT Press, 1996.

ulatory potentials of the market by substantive goal-oriented regulations. That is why a renewal of a liberal society under conditions of complexity which must lead towards a self-organising society, can only be imagined to come about by introducing into organisations periodic 'irritations' which create potentially externalised problems which can no longer be left to spontaneous evolution. The procedural character of this conception consists in the assumption that it is more requisite variety which is at stake. The general frame of reference should be focused on methods and procedures of confronting social systems and organisations with self-generated constraints challenging the risk, especially of organisations, of becoming locked into some established track of their development. The emphasis of this concept is laid on a paradoxical external determination of internal self-determination of organisational networks of interrelationships, leading towards a new legal order of a **'self-organising society'**<sup>28</sup> which is distinguished from the primary liberal society of the individuals by the characteristic that its self-modification comprises also its own rules.

The central role of causality and experience as building-blocks allowed the establishment of an integrating framework structuring social reality, and the formulation of individual expectations in social interaction and cooperation. Society cannot be reinvented, nor can the knowledge generated by and implicit in practice be ignored by any political and legal theory. That is why a meaningful solution to the present crisis of State<sup>29</sup> can only consist in the search for a functional equivalent of the classical relationship between the basic legal structure and its institutionalised model of society as well as its method of generating and evaluating new knowledge in a framework of self-observation of its own functioning. The relationship between legal order, and cognitive structure of society established by liberal order, is taken as a starting-point in this approach because it has functioned in an acceptable way. A global, justice-oriented, argumentative procedure cannot play this role because it neglects the constraints implicit in differentiated social practice fields. The model of proceduralisation presented here is linked to the specific processes of knowledge generation and their relation to private action and public decision-making, as was the case with the traditional link between abstract legal norms and reference to general experience. It tries to combine normative and cognitive components in a prospect of an experimenting, flexible self-organising society. It regards procedures explicitly as generating new knowledge, new options and new models as a functional equivalent of the link between abstract general rules, and experience as a public knowledge base of a society of individuals. Both approaches are characterised by the necessity of mobilising knowledge for decision-making in a society confronted with indeterminacy emerging with future orientation as opposed to reproduction of tradition.

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<sup>28</sup> See generally Ulrich, H./Probst, G., J. B., *Self-organisation and management of social systems: insights, promises, doubts and questions*, Berlin: Springer, 1984.

<sup>29</sup> See only the salient analysis of Guéhenno, J. M., *The end of the nation State*, Ann Arbor: University of Minnesota Press, 1995; id., *L'avenir de la liberté*, Paris: Flammarion, 1999.



**PART II:**  
**THE NATIONAL CONTEXT**





# Proceduralisation and the UK public administration reform

**Andrew Dunsire and Christopher Hood**

Substantial changes have occurred in UK public administration over the past two decades. Whether those changes should be interpreted as consistent with the 'proceduralisation hypothesis' (and, if so, whether proceduralisation is an unintended consequence of measures which had rather different aims) is debatable. Following the format requested for the European Commission *Cellule de prospective* 'Governance in transition' seminar in 1996, this paper first briefly outlines some of the major changes that have occurred in UK public administration over approximately two decades, and then considers (second section) how far these changes amount to 'proceduralisation'. In the third section it considers alternative ways of conceiving administrative change.

## **UK public administration reform: a brief summary**

In the half-century or so since the end of World War II, British public administration has exhibited both trends and cycles. The clearest cycle is shown in the shift from the post-war programme of nationalisation of utilities and 'strategic' industries (in which central State internal control, to a degree, took the place of regulation), to the equally far-reaching privatisation programme of the 1980s and 1990s, in which private ownership was accompanied by more formal and explicit regulation. Perhaps the clearest long-term trend is the fall in direct public employment in central government. The UK civil service (which encompasses only the central government departments and agencies) is roughly half of its size at the end of World War II; the large imperial bureaucracy of 50 years ago has all but disappeared; the armed forces are a fraction of their post-1945 (or even pre-1939) size. The other public services (including local authority staffs, healthcare workers, school and university teachers, and police) have had varying fortunes, but in total have undergone a smaller contraction from their post-World War II peak.

Although the internal and external 'management problems' faced by the UK State have changed dramatically over that period (including post-war reconstruction, decolonisation, membership of the European Union, major internal conflicts in Northern Ireland, the economic consequences of the 'oil shocks' of the 1970s, and of liberal trade regimes in the 1980s and 1990s), some features of its public administration would still be fairly recognisable to a time-traveller from 50 years ago. Its public service remains divided between a relatively small civil service at national level, dominated by career 'generalists' rather than lawyers or engineers, and a large public serv-

ice at local government level more dominated by specialists. It has a highly specialised structure of administrative tribunals rather than the more general structure of administrative law courts in the public law countries. Formally it has no national police force and no overall Ministry of Justice. Defence, diplomacy, immigration, tax and social security are the only major policy programmes administered on a UK-wide basis (unless we add the operation of the intervention system for the common agricultural policy, run by a civil service board since EU membership in 1973). Civil servants have no formal 'statute', continue to operate at the topmost levels in large part as 'courtiers' rather than 'managers' (see Sisson, 1976), and their terms and conditions are largely covered by general employment law rather than special public service law, though senior civil servants remain subject to greater restrictions on their political party activity than applies in most other countries.

Over the 20 years leading up to the election of the Blair Labour Government in 1997, however, important changes occurred in the UK public service. Most of these changes have been exhaustively described and commented on elsewhere<sup>1</sup>, and space restrictions prevent detailed discussion here. Accordingly, we give only a highly selective account.

The major overall changes over this period can be characterised as:

- A general shift from a 'public bureaucracy State' to a 'regulatory State' and 'enabling State', with privatisation and outsourcing of tasks formerly performed by State employees at both central and local government levels.
- A growth in the scope of public services provided by 'quangos' or special-purpose public bodies outside general-purpose authorities, arising in many cases from transfer of responsibilities away from local authorities (for example, in housing and education, and for many other services in London after the dissolution of the Greater London Council in 1986).
- A change in the style and formality of oversight of public services, including more 'judicial activism' in review involving both the European Court of Justice and domestic courts; an expansion of ombudsmen and grievance procedures, with approximately 17 ombudsmen, and specialised complaints bodies for police, security services, and the armed forces in Northern Ireland; a growth in public audit, which at both central and local government level expanded in the 1980s from 'regularity audit' to policy analysis and efficiency scrutiny, and of related scrutiny activities — for example, the introduction of 'clinical audits' in health services and much-expanded inspection activities in school and higher education services (see Hood et al., 1999).
- A move towards more explicit and codified forms of accountability. Public service codes of conduct for ministers, local councillors and public servants were published. 'Open government' measures were imposed on local government by

<sup>1</sup> See, for example, Fry (1985, 1988a and 1988b), Pollitt (1986 and 1993), Dunsire and Hood (1989), Jones (1989), Chapman (1991), Drewry and Butcher (1991), Metcalfe and Richards (1991), Painter (1991), Stoker (1991), Foster (1992), Jordan (1992), Stewart and Walsh (1992), Jones and Burnham (1995), Ferlie et al. (1996), Hood (1996), Hood and James (1997).

statute in the 1980s, and adopted by White Paper for central government in the 1990s (freedom of information legislation is pending at the time of writing). Public servants were exposed to a range of new procedural requirements, including requirements for demonstrating efficient service provision (compulsory market-testing under the conservatives, replaced by the Blair Labour Government by a 'better value' regime for local government involving certificated efficiency); compulsory assessment of the 'compliance costs' (to business) of new regulatory initiatives; and the requirements of the 1991 'Citizen's Charter', which is discussed in the next section.

- Substantial constitutional changes in a formerly 'hyper-unitary' State, beginning with major changes in the administration of Northern Ireland following an Anglo-Irish agreement of 1985; and the introduction in 1999 of devolved elected assemblies in Scotland, Wales and Northern Ireland. The latter was part of a 'consociational' settlement among the conflicting political forces in Northern Ireland that was brokered by the UK and Irish Governments (and remains precarious at the time of writing). An elected mayor and assembly for London is due to be set up after elections in 2000. These changes matched the territorial administrative devolution of the United Kingdom with corresponding devolution of elected authority, but also introduced new administrative arrangements.

Probably the public service changes which are best known internationally are those which occurred in the public enterprise sector (see Abromeit, 1986; Veljanovski, 1987; Wiltshire, 1988; Dobek, 1993). An initially tentative and low-key programme of privatisation beginning in the late 1970s (and in fact starting with a sale of government shares in the oil company BP by a Labour Government in 1977) developed into a massive transfer of one million jobs from the public to the private sector in the subsequent decade (see Foster, 1992).

The key point about the privatisation programme for our present purposes was the way that it engendered a new structure of 'external' regulation, involving a greater measure of quasi-independent control, and greater explication of the 'rules of the game' than had applied during the nationalisation era, in spite of repeated Treasury attempts to introduce explicit control frameworks. Regulatory functions were now divided between sectoral departments and quasi-independent 'offices' constituted as non-ministerial departments, and dominated by Directors-General largely recruited from outside the civil service and given direct statutory powers. This structure was modelled on the fair trading regulatory regime that had been re-developed in the early 1970s, and represented an ambition to create a distinctive 'light rein' style of regulation very different from the juridified and heavy-duty US approach to industry regulation. Whether that ambition has actually been realised is a matter of debate. The view that utility regulation in fact became steadily more complex and legalistic is commonly expressed.

As with privatisation, the Thatcher Government at first avoided dramatic changes in the civil service, and consciously eschewed wholesale restructuring of ministerial responsibilities, in contrast to the approach taken by Sir Edward Heath's Conservative Government in the early 1970s (Hennessy, 1990, p. 645). Major

changes began later, particularly in the aftermath of the widespread civil service pay strike of 1981, when the department responsible for civil service pay and management was abolished, its permanent head despatched to the House of Lords and early retirement, and a modest degree of discretionary pay later introduced to replace the traditional classified civil service system of fixed grades and increments.

Towards the end of the 1980s, the service-delivery elements of civil service work began to be transformed by 'corporatisation', separating out executive operations from policy ministries into quasi-independent civil service agencies<sup>2</sup>. Requirements for compulsory tendering of a proportion of departmental activities ('market testing') were introduced in the early 1990s, and were superseded by a new regime of 'running costs controls' (focusing on organisational rather than programme costs), linked to efficiency plans. 'Fundamental expenditure reviews' were introduced in 1993, heralding a radical 'delaying' of some departments, notably the Treasury itself. By 1996 all central controls on pay had been removed, and Treasury control revamped into an ostensibly more 'strategic' approach which concentrated on monitoring of running costs.

Other changes affecting the conduct of business by civil servants included a White Paper in 1993 introducing a general principle of 'openness', the publication of a Civil Service Code of Conduct in 1995 in response to concerns about civil service ethics raised by the (then) Treasury and Public Services Committee of the House of Commons; an extension and revamping of the compliance cost assessment regime for new regulations originally introduced in 1985; and a reshaping of the powers of the Civil Service Commission (the recruitment and testing body) in 1995. This latter change for the first time gave the First Civil Service Commissioner a role in civil service promotions, through membership of the committee which makes recommendations to the Prime Minister about permanent secretaryships. It also finally separated the role of regulation of merit appointment systems in the civil service from the operational process of civil service recruitment, and introduced a First Civil Service Commissioner from outside the civil service (rather than a serving civil servant) in order to limit conflict of interest. The Blair Labour Government retained most of these changes, introduced a new spending review regime that involved quasi-contractual departmental performance targets and proposed to introduce freedom of information legislation for central government.

In the local government sector, the 19th-century style of uniform and inclusive local authorities which persisted until the 1980s was steadily eroded by restructuring (including the abolition of the Greater London Council and all the Metropolitan Councils in England in 1986). Successive transfers of powers took place from elected local authorities to what was dubbed a 'new magistracy' (Stewart, 1992) of appointed 'quangos' (which have been claimed to be responsible for about a quarter of all public expenditure in the United Kingdom). Powers of local authorities to decide spending and local taxing levels were restricted by 'capping' (see

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<sup>2</sup> The so-called 'next steps' agencies, named after the title of the document which recommended them (see Jenkins et al., 1988), whose tasks were enumerated in 'framework documents' approved by ministers (see Jordan, 1992; Theakston, 1992; Trosa, 1994; Cabinet Office, 1994b; Dowding, 1995).

John, 1994). The traditional local authority property tax (based on notional rental value and levied only on householders, and predominantly falling on private house-owners rather than public housing tenants) was briefly replaced by a poll tax on all adult local residents, only to be further superseded by a 'council tax' based on notional capital value and levied on all households. The Conservatives introduced institutional routes for State schools to 'opt out' of local authority control, but this policy was reversed by the Blair Labour Government after 1997. The same went for the Conservatives' policy of expanding statutory compulsion on local authorities to put areas of service provision out to competitive tender (see Ascher, 1987), rather than retaining in-house provision by local government employees without tendering. The Blair Labour Government modified this policy by introducing a 'best value' regime involving more extensive central inspection of costs and service quality, accompanied by powers to compel local authorities to give up direct provision of services.

In the health service sector, the other major area of UK public administration, a number of moves were made to circumscribe the previous pattern of professional autonomy (particularly by hospital consultants) and professional self-government. Those moves included the introduction of clinical audits in the 1980s, and the creation of organisational structures dominated by general managers hired on fixed-term contracts and paid on the basis of performance. The formerly 'monolithic' NHS hospital organisation (once run as a single nationwide service) was 'corporatised', with public hospitals steadily being transformed into independent 'public trusts' run by boards of local business people. The Conservatives introduced an 'internal market' in healthcare involving an institutional split between purchasers and providers (see Pollitt, 1993, pp. 64–6; Stewart and Walsh, 1992, p. 502). The Blair Labour Government modified these arrangements but retained the purchaser-provider split in the system and announced the creation of much expanded audit and inspection arrangements for healthcare, coupled with powers to take action against 'failing' hospital trusts.

The changes briefly summarised above have often been described as amounting to the most radical shift in UK public administration since World War II and perhaps in the 20th century. Many of these changes were in the direction of what came to be known as 'new public management' (NPM), a shorthand term for a set of related ideas about how to organise public services which challenged established or traditional ideas (see Hood, 1991; Pollitt, 1993). Different commentators have given different lists of the characteristic traits of NPM, but in general the thrust of the reforms has been to remove what had once been uniform system-wide rules greatly restricting managerial discretion over matters like pay and budgetary control. But at the same time, in what could be seen as a mirror-image process, parallel measures introduced measurement of managers' own performance, and other kinds of procedural controls by specialist regulators covering matters like data security and privacy, merit hiring principles, or quality and efficiency. Some of these controls span both public service and business (see Hood et al., 1999) and the expansion of public-sector regulation under the conservatives was taken further by the Blair Labour Government.

## UK public administration reform and the proceduralisation hypothesis

In this section, we briefly review some of the reforms outlined in the previous section and test them against the 'proceduralisation hypothesis'. We have worked on the assumption that 'proceduralisation' can be seen as embodying advance towards four main values in the relations of individuals, organisations, bureaucrats and politicians, in democratic countries:

**Éclairage**, or transparency and openness;

**constitutionalism**, or Kantian universality of internal process maxims;

**empowerment**, or enabling of individuals and groups;

**inclusion** (dialogue), or participation in decisions by those affected.

Three of these terms are used in the Draft Phase 1 Report of the European Commission's Seminar. The second, 'constitutionalism', is not explicitly used but seems to us implicit in the term 'proceduralisation'. 'Constitutionalism' here does not, of course, have its legal sense of 'conformity to **the** Constitution'; rather does it serve as an antonym of tyranny, absolutism or arbitrary rule, as in Vile's title *Constitutionalism and the separation of powers* (1967). 'Kantian universality' of maxims refers to Kant's aphorism in *Foundations of the metaphysics of morals* that 'I am never to act otherwise than so that I could also will that my maxim should become a universal law'<sup>3</sup>.

These four values are not mutually exclusive, nor do they exhaust the content of the 'proceduralisation hypothesis'; but they may serve as a useful checklist.

Let us move through the UK administrative reforms listed above. Privatisation, and contracting-out of work formerly done by State employees, seem not to have any necessary or direct relation to any of these four values, except in so far as individuals were 'enabled' by purchasing shares in a State asset when they were offered — and then only if they kept them rather than cashing in for the immediate profit. A gain in openness and constitutionalism may be said to have been realised indirectly from the privatisations of public utilities, paradoxically because of the **increase** in overt regulation which accompanied them, with the regulators' criteria being published; and similarly in the case of local authority and other contracts for previously in-house services. But no obvious gain emerges in empowerment or participation values.

The explosion of 'quangos' to run public services, substituting for control by elected authorities, has been almost purely and decisively negative for 'proceduralisation', whether in transparency, in constitutionalism, in empowerment, or in dia-

<sup>3</sup> 'Ich soll niemals anders verfahren, als so, daß ich auch wollen könne, meine Maxime solle ein allgemeines Gesetz werden.'

logue. In principle the development of new elected authorities in 1999–2000 takes the system in a different direction, but as yet no attrition of quangos is observable.

Growth in oversight mechanisms (judicial review, ombudsmen, complaint channels, public audit) shows clear advance in openness and constitutionalism, and a lesser advance in empowerment. These all began as specifically processual reforms: that is, monitoring and revising internal process, rather than structure or substance, of challenged decisions; but certainly the last — audit — has crossed the threshold into content and outcome, which is again an advance in empowerment (by proxy). And the ‘regulation of regulation’ has recently produced a set of benchmarks (Better Regulation Task Force, 1998) including transparency, accountability through consultation and public support for policy.

Changes in the size of the central civil service, and in their pay structure and recruitment arrangements, do not strike one as advances in ‘proceduralisation’ in any of its main values. Reshuffling of ministers and departmental boundaries increases opacity rather than transparency. As already mentioned, the separation of operational from policy-making echelons is a gain in information dissemination only by virtue of the publication of the ‘framework documents’ and reports of the executive agencies. Rather absurdly, it is still claimed that the accountability relationship of the heads of these agencies with MPs, the press, and citizens, has not changed at all — it is still via ‘ministerial responsibility’. Several recent cases show that this is a fogging, not a clarification, of the situation — a decline in processual constitutionalism, even a disempowerment of a potential complainant, compared with the previous position. There is no gain in participation values either.

The recent willingness of State authorities to produce more information about the basis of Cabinet decisions (Cabinet Office, 1994a), to publish lists of the names and tasks of Cabinet committees, to invite the public at large to nominate people for State honours, and other moves towards more ‘open government’ (including a White Paper in 1993 which vested monitoring of its provisions by the Parliamentary Commissioner for Administration), is a gain in *éclairage*, and perhaps in constitutionalism, even if they do little for the other two values. Advocates of ‘freedom of information’ (Wilson, 1984), however, claim that the Blair Government’s intended further legislation in this field is a step backward — away from the principle that all State information should be made public unless to do so would endanger the security of the State or the privacy of individuals, or breach commercial secrecy. Other openings-up which might be mentioned, marking gains in transparency and constitutionalism, are the registers of MPs’ financial interests, and the institution of a public appointments commissioner to oversee the selection of people to serve on ‘quangos’.

The decade also saw a somewhat startling development, the announcement of the name of the new head of the Security Service (MI5), and her delivery of a televised lecture on its work. The Service, perhaps in response to a possible challenge under the European Convention on Human Rights, was put on a statutory footing for the first time in 1992, and a quasi-independent security service commissioner set up to oversee the security services and hear complaints, so increasing constitu-



tionalism even if showing not much gain in transparency, empowerment or participation. MI5 has since (amid controversy) gained a foothold in internal policing, to replace its now-redundant 'cold war' role.

Compulsory competitive tendering, market testing, and other initiatives in the attempt to clarify 'true' costs of administrative operations are moves to enhance the 'rationality' of decision-making. Yet they do not promise much to the citizen in the way of transparency, constitutionalism, empowerment, or participation, except in so far as the knowledge so obtained is made public. The same is true of 'NPM' reforms and of performance measurement: the ostensible purpose is better managerial control, but a by-product of the managerial ethos is the knowledge gained in drawing up the standards, and in those cases where measurements are published. Other examples are the negotiation of the 'framework documents' for the executive agencies (created under the 'next steps' programme), a kind of 'mission statement' for the agency as well as warrant for its head; and the preparation of the rating assessments of the performance of schools, universities, hospitals, and local authorities. Those 'league tables' are intended to enable a more informed **choice** by parents, students, patients and their families, or local taxpayers (so counting as a considerable gain in empowerment). The question arises why the National Audit Office (the House of Commons' most powerful investigative arm) does not do something similar for government departments, ranking the 'good', the 'indifferent', and the 'poor' along standard scales — for which it is certainly competent, were it to be politically disposed to do so.

Such seeking for comparisons, even where invidious, represents a 'learning process' in which the bureaucrats and politicians are not greatly more sophisticated than the press and their readers, and where experts are far from infallible or skilled in communicating what they know. It brings into the public domain — to some extent — decision processes and practices otherwise impenetrable, except by the specific investigations of auditing offices or ombudsmen. The process may be said to furnish a gain in dialogue and inclusion values as well as transparency and empowerment — high in a 'proceduralisation' ranking, although not particularly enhancing processual virtue. A learning process of a more sophisticated kind can also be seen: awareness that any such comparative ranking depends crucially upon what is measured, and what is left out of the calculation — for instance, the drive, in the ranking of schools by examination performance, towards including 'value added' criteria (how much **improvement** there has been since earlier testing of the same cohort).

The matter of compulsory assessment of 'compliance costs' for any new regulatory action raises a different aspect of 'dialogue'. In preparing their assessments civil servants are required to consult firms and other organisations which are likely to be affected — that is, their decision process is constrained, and advance in constitutionalism (in our non-legal definition), while the fruit of such consultation brings it within the ambit of the 'proceduralisation hypothesis' in that specific way described in the Draft Phase 1 Report, p. 4, as 'insertion and reinsertion of the context into the elaboration and application' of rules:

*'the application of rules becomes simultaneously a process of renegotiation linked to the participation of plural actors.'*

Now in one sense there is nothing new for the British administrator in this practice. When Dunsire was a UK civil servant 40 years ago, it had long been standard practice (required by statute in many instances, such as the 1946 Road Traffic Act and the 1948 Merchant Shipping Act) to consult the affected parties in the preparation of any new regulations: relevant industry associations, bodies representative of manufacturers, of wholesalers, of retailers, of users, scientific and professional experts, other government departments, and so on, as appropriate. The formulation of the precise wording of a regulation would usually be in effect a joint exercise, its technicalities not concealing a political negotiation among interests, often 'laundered' (or legitimated) by their being integrated into an official 'advisory body'. This process is well documented in two volumes of administrative case studies published by the Royal Institute of Public Administration in the 1960s (Willson, 1961; Rhodes, 1965)<sup>4</sup>. The practice of encouraging the insertion of the 'context' into the elaboration of rules is thus of some antiquity.

Yet this practice was not true *éclairage*, or opening up of the governing process to the light of day. On the contrary, it took place in an environment of official secrecy behind closed doors, and widened 'participation' no further than was pragmatically necessary. And when the practice reaches its apotheosis in 'corporatism', it may represent a denial of constitutionalism and the opposite of empowerment of the individual. The tripartite policy-making a closed shop of industrialists, trade unions, and bureaucrats can be seen as a 'conspiracy against the citizen'.

It has been noted by many commentators that, despite the antiquity of 'consultation' practices in regulation elaboration and application, in many dimensions the last two decades saw, respectively, a **reduction** in the amount of public consultation by government ministers (Mrs Thatcher appointed not one Royal Commission during her terms of office); an increase in legislative change with insignificant preparatory research or pilot testing (the 'poll tax' being the prime example and the 1991 Dangerous Dogs Act often cited as another); and a dominance of ideological drive over preference gathering. Nevertheless, running through Thatcherite thinking there was another thread, which might be seen as at least from the same loom as proceduralisation: the ideas of:

1. 'tenant power' for public housing residents to 'opt out' of local authority management, and 'parent power' in education (institution of parent governors for all State schools, and a compulsory ballot of parents on the question of 'opting out' from local authority control);
2. a 'property-owning democracy' (sale of municipal housing to tenants, and machinery for a housing estate to 'opt out' of local authority control);

<sup>4</sup> It was not different in Germany, for example, where such bodies as industrial associations and chambers of commerce sometimes had public law status.

3. a 'shareholding democracy' (planned creation of 'windfalls' to small shareholders in privatising State assets);
4. a 'charter' for ordinary members of trade unions, through a series of statutes bringing about a notable shift from more-or-less unregulated internal rule books to processual control of ballots for leadership elections, for strikes, for contributions to political funds, and similar matters. Above all, this was the thread from which John Major's own 'big idea' was woven;
5. the 'Citizen's Charter'.

It is our contention that none of these Conservative programmes are really 'proceduralist' in **motivation** (for example, the first two were squarely aimed at reducing the power of Labour-dominated local authorities, and the fourth at reducing the power of union leaders), though they may have largely unintended procedural **effects**. In the space available we shall discuss only the last-named: the Citizen's Charter, rebadged as 'service first' by the Blair Labour Government.

One of the first moves of Margaret Thatcher after she became Prime Minister in 1979 was to announce a programme of civil service reform, cutting its size by a quarter, and aiming to change the culture at its top, from the 'mandarin' values of trusteeship for the public good, to the 'managerialist' values of performance measurement and efficiency. One of John Major's first moves after succeeding Margaret Thatcher as Prime Minister was to launch his own 'reform of the civil service' — aimed this time not at the senior ranks but at the middle and lower levels of the bureaucracy.

The government, said the document entitled *The Citizen's Charter* (Cabinet Office, 1991), wanted to 'change the relationship between the citizen and the State', and to 'give more power to the citizen'. It therefore promised that every government department and State agency would produce its own 'charter', laying down in straightforward terms that everyone could understand exactly what standards of service the citizen would be entitled to expect from its public officials, including courtesy and helpfulness at all times, but more importantly, commitments to prompt action, expressed in terms of a target response rate for correspondence, or a target maximum waiting time or delivery time, and the like. Moreover, the 'charters' would lay out what channels of complaint and redress of grievances were available to the dissatisfied customer, and in some cases, what forms of compensation would be payable when published targets were not met.

This initiative was presented as at once simple and revolutionary. Although it was greeted in the British press with a degree of scepticism and even ridicule — mere 'window dressing' — it attracted a good deal of international attention, as the most radical and far-reaching attempt to improve the quality of public services ever launched by any government.

There was a certain amount of foot-dragging by some departments, and it took nearly a year for even the earliest departmental charters to appear; but by

September 1995 there were some 40 charters covering the country as a whole or each of its component nations separately, with titles indicating the clientele embraced, such as the Passenger's Charter, the Taxpayer's Charter, the Parent's Charter, the Patient's Charter, and so on.

Under the Passenger's Charter, the still-publicly-owned British Rail agreed, *inter alia*, to pay cash compensation for the late arrival of trains in certain circumstances; the Taxpayer's Charter undertook that Inland Revenue staff would be fair, helpful and courteous at all times, and would keep taxpayers' private affairs strictly confidential; the Parent's Charter gave parents rights to vote for parent governors of every State school and to stand for election, to be balloted on whether the school should apply for self-governing (directly grant-aided) status, and to question their children's examination results; the Patient's Charter guaranteed treatment within one year for heart by-pass operations, and such rights as a choice of hospital meal, menus in the appropriate language, and meals to be ordered no more than two days in advance. Each department further pledged to set quality standards of various kinds for its own staffs and to publish how well they lived up to them.

There are for present purposes two key questions about all these developments. One concerns the impact that these citizen's charters have had over the first few years in improving the quality of British public services. The second is whether this scheme fits the 'proceduralisation hypothesis'.

To the first question there is no satisfactory answer. The original public scepticism has not in any way modulated into enthusiasm. Surveys in 1993 and 1994 showed that although most people knew about the charters, only one in three had actually seen one, one in ten had read one, and only one in 50 had used one to make a complaint. This state of affairs was in spite of the fact that 20 million copies of the Parent's Charter were sent out to homes in the United Kingdom, and the Patient's Charter was delivered to every household. A special 'Charterline' telephone helpline service set up in May 1993, expecting a thousand calls a day, was closed down in May 1994, having had roughly 25 inquiries per day at a cost of GBP 68 per inquiry (Rich and Willman, 1994). Since then press coverage of the charters, as such, has dwindled to almost nothing.

But given this public indifference, has the quality of public service improved noticeably as a result of the charters? There is plenty of documentary evidence, but no independent and objective audit of central departments' performance, as is provided for local authorities' schemes by the Audit Commission. The Citizen's Charter Unit in the Cabinet Office makes an annual report on the working of the Charter scheme, and awards a 'Charter Mark' to services or agencies which have turned in good performances. In *The Citizen's Charter — five years on* (Cabinet Office, 1996), marking the half-way point of its 10-year programme, the Prime Minister reported 42 national charters and more than 10 000 local charters, 417 Charter Mark holders and 298 'highly commended', and many examples of performance improvements. Each organisation with a charter makes its own annual survey and report. In 1993, the Citizen's Charter Unit set up a Task Force to investigate particularly the adequacy of

complaints procedures, as compared with private sector practices: this produced a *Good practice guide* in 1995 (CCCTF, 1995), and a main report, 'Putting things right', in the same year (Blackmore, 1997).

But massive failures in quality of service that achieve widespread publicity (waiting lists and bed shortages in the hospital service, inefficiency in the Child Support Agency or the Passport Agency, etc.) tend to be pursued without reference to whatever the relevant charter might have said. The greatest volume of complaints is currently against the (privatised) railway system; the fact that it is not in the public sector does not prevent the Transport Minister coming under daily fire for the perceived shortcomings of Railtrack and the 25 separate service-running franchises. Such high-profile controversies may create a climate of apparent dissatisfaction with public services that eclipses any more general improvement in quality of service by hundreds of agencies which do not hit the headlines. The mere fact that civil servants are obliged to specify what standards of service quality they aspire to in the coming year, and to measure their performance overtly against these standards at the end of the accounting period, is a revolution of a sort in itself, and may have an impact upon bureaucratic culture more significant than whatever changes in empirical performance are able to be announced.

Coming now to the second question, the relation of the Citizen's Charter idea to the 'proceduralisation hypothesis': in some ways, it certainly fits. It 'underlines the new functions of the State, of opening up to the light, and empowerment' ('Note on presentation of Phase 2', p. 1). It is designedly 'concerned with a reconsideration of the relationships among individuals (and) bureaucrats in democratic States' (Draft Phase 1 Report, p. 4), and could be seen as a move towards 'the concept of stake holding as modifying the traditional model of representative democracy' (Draft Phase 1 Report, p. 6). The concepts of 'parent power' and *Patients first* (the title of the National Health Service charter), as principles of the delivery of public education and health services, seem to uphold a 'process of knowledge construction by and with those whom that knowledge is deployed to serve' (Draft Phase 1 Report, p. 4). It lays down clear rules for 'Kantian universality' of process and punishes departures from them.

In other ways, however, the Citizen's Charter idea (at least up to its relaunch by the Blair Government) is contrary to the spirit of the 'proceduralisation hypothesis' — in particular, to its 'participation' value. As several of its academic critics have pointed out (e.g. Chandler, 1996; Wilson, 1996), the use of the word 'citizen' is a misnomer: the charters are for the customer or consumer, not the citizen. The philosophy is one of liberal individualism, not membership of a self-ruling community. Hood, Peters and Wollman (1996), in a cross-country comparison dimensionalising consumer 'empowerment' as active/passive and direct/indirect, classify the UK Citizen's Charter as a passive/indirect form of public service consumerism.

The initiative in fact is of a piece with all the other moves to impose private sector disciplines on the public sector. The original White Paper of 1991 identified four main themes across the whole of the public sector (quality, choice, standards, and value), to be achieved through privatisation, competition, contracting-out, per-

formance-related pay, published performance targets, comprehensive publication of information, effective complaints procedures, tougher and more independent inspectorates, and better redress for the 'citizen' (Cm 1599, 1991, pp. 4 and 5). That is what the charters fit into.

The Citizen's Charter scheme displays a degree of *éclairage*, of constitutionalism, of 'empowerment', but hardly any 'participation'. There was no democratic (or even user) consultation about what standards would be appropriate in any service; there is confusion between minimum, average, and 'best practice' standards (Pollitt, 1994). The charter provisions substitute for an 'exit' reaction (Hirschman, 1970) where that is not available to the public service consumer (paradigmatically, an individual and even discourseless proceeding, taking one's business elsewhere). But with few exceptions, they make no provision for the 'citizen' role — essentially a collective one, achieving 'voice' through representative organs. The only 'democracy' involved is the 'democracy' of the market place or regulatory substitutes for it.

The main manifestation<sup>5</sup> under recent Conservative Governments of the institutionalisation of 'voice' through electoral machinery is 'parent power' in schools. As already noted, critics argue that the establishment of school boards of governors was a political move against what were seen as Labour-dominated local education authorities and teacher unions. There is, for instance, no formal representative organ for prisoners, soldiers, pensioners and other benefit recipients, or taxpayers; and existing quasi-representative 'user councils' for patients, passengers, and utility consumers were in fact gravely weakened under these governments. 'Greater participation and inclusion' in the definition of objectives is not one of the aims of the 'charter' idea.

Other (non-governmental) evidence of 'proceduralisation' in the United Kingdom more generally makes a rather mixed bag. The last two decades have seen a burgeoning of the kind of private research institution known (somewhat absurdly) as the 'think-tank'. The current list of privately-funded bodies investigating public policy questions and publishing reports might reach a score, of varying sizes and authoritativeness. These are complemented by the spread of 'investigative journalism', some of it specialising in making fullest critical use of the statistical and other information which government publishes but to which it does not necessarily draw attention ('privishing', as it has been called by one of us (Hood, 1983, p. 27)).

In the sphere of local and regional government structural reform, a number of non-governmental initiatives occurred, in the face of what often appeared as Conservative hostility to subnational government as such. Most notable was the 'Scottish Convention', a grouping of representatives of local authorities and other interests in Scotland (including the Labour Party and Liberal Democratic Party but not the Conservatives or Scottish Nationalists), which met over several years to arrive at an agreement on the general form of a Scottish Parliament and devolved government — an agreement closely followed by the ensuing Labour Govern-

<sup>5</sup> Along with provisions, already noted, for public housing tenants to opt out of local authority housing management, and for compulsory balloting for leadership, strikes and political funds by trade union members.

ment's devolution statute. A comparable initiative was the setting up in 1993 of the Commission for Local Democracy, a purely non-governmental body of self-selected individuals including journalists, academics, consultants, and former public servants, which commissioned and produced a score of detailed research papers, and its own main reports in July 1995 (CLD, 1995).

On a smaller scale and a narrower focus (notably on crime and punishment), there have been at least two 'experimental' citizens' forums, exercises in 'deliberative democracy' organised by academics and TV companies. These have had as their ostensible social science purpose the measuring of difference in people's responses to a question, before and after an intense bombardment of facts on the question and participation in argument about it. Less theoretically ambitious has been the Labour Party's reported reliance on consulting 'focus groups' — discussions among invited 'experts' and non-experts on a given topic — before policy changes. Many political parties, broadsheet newspapers and other types of organisation, now mount private opinion polls to gauge reactions to events and proposals. All such ventures may enhance openness, empowerment and participation in public policy-making, to different degrees.

A similar series of 'openings-up' has been seen in the spheres of business, law, and parliamentary practice. The Cadbury Committee on the Financial Aspects of Corporate Governance (Cadbury, 1992), set up by the Stock Exchange, suggested *inter alia* that the posts of company chairman and company chief executive should not be held by the same person, and that the remuneration of executive directors and senior management should be fixed by non-executive (i.e. part-time) directors — a clear attempt to improve constitutionalism. The apparently inexorable rise in company top salaries, however, continues to cause concern, in spite of further reports in 1995 and 1997. The result has been to open up the discussion of 'corporate governance' and the **public** responsibilities of private firms and their directors. Opacity is at least reduced, though empowerment and participation are minimally recognised, even in annual shareholders' meetings.

In the legal sphere, the then Lord Chancellor (Lord Mackay), the political head of the judicial system, removed the ban on judges giving interviews to the press or appearing on television, and the then Lord Chief Justice (the most senior judge) announced that the judges themselves should decide whether and on what conditions they should accede to any such requests. This decision has not led to any great rush among judges to become TV pundits, but it has enabled some judges, notably the two succeeding Lord Chief Justices, to speak for themselves in respect of certain current disputes about the legislative plans of the Home Secretary, informing the public and enhancing the constitutionalism of the legal system.

Finally, we might allude to the enormous increase in public enlightenment on the processes of government in the United Kingdom which accompanied two inquiries by High Court judges appointed by the then Prime Minister to investigate (1) certain alleged malpractices in government departments in relation to the supply of armaments (Scott, 1995); and (2) matters concerning the non-Parliamentary income and lobbying activities of MPs in the House of Commons (Nolan, 1995), fol-

lowing allegations about the putting of Parliamentary Questions to Ministers in return for cash. This is not the place to expound these matters further, but each inquiry to some extent lifted a curtain, and revealed to everyone what actually went on behind the scenes of public life; and thus contributed to *éclairage* and constitutionalism, if also to the great embarrassment of officialdom.

These judgments upon the conformity of recent UK administrative reforms to the core values of the proceduralisation hypothesis (as we see it) are summarised in Table 1. From that table it can be seen at once that, although these UK reforms have contributed very well to the first proceduralisation value, *éclairage* or increased transparency of administration, and to only a slightly lesser extent to the value we have called **constitutionalism** or universality of maxims, they have been much less productive of empowerment, and even less of the 'democratic' value of inclusion or participation.

Table 1: *UK public-sector reforms and proceduralisation*

UK administrative changes	Values of the proceduralisation hypothesis			
	<i>Éclairage</i>	Constitutionalism	Empowerment	Inclusion
Privatisation	indirect	indirect	indirect	—
Contracting out	—	—	—	—
Quango expansion	minus	minus	minus	minus
Growth of oversight	yes	yes	some	—
Civil service changes	—	—	—	—
Executive agencies	indirect	—	—	—
More open government	yes	some	—	—
MPs' register	yes	yes	—	—
Public appointments Csr	yes	yes	—	—
Security service changes	—	yes	—	—
Market testing	indirect	—	—	—
Performance measurement	indirect	—	—	—
League table comparisons	yes	—	yes	yes
Compliance cost assessment	—	yes	—	yes
'Parent power'	yes	yes	yes	yes
Citizen's Charter	yes	yes	yes	—
Think-tanks etc.	yes	—	—	—
Scottish Convention	yes	yes	—	yes
Citizens' Forums	yes	—	yes	yes
Cadbury & Greenbury Ctte	yes	yes	—	—
Judges & media	yes	yes	—	—
Scott & Nolan Cttees	yes	yes	—	—



## Alternative understandings of governance in contemporary society

The 'Note on presentation of Phase 2' suggests in its final paragraph that authors might address themselves to administrative developments which, though far removed from procedural solutions, bring an interesting response to the regulative problems of public action. We would like to accept this invitation and discuss briefly three alternative responses in recent literature to the spreading and deepening of social complexity and pluralism. Those ideas are **network theory**, **reflexive law theory**, and ideas that we have been developing under the term **collibration theory**.

**Network theory** is a product of the same social changes as have brought forth 'the procedural hypothesis'. It describes a 'centreless' system of endemic bargaining between organisational agents who need to exchange resources (not only money, but goods, land, information, skills, etc.) in order to survive and achieve their (different) objectives (Marsh and Rhodes, 1992). From such a perspective, an agent of government is seen as only one player among many, with few cards to play that are intrinsically different from those in other players' hands. It is a card game in which no actor holds 'trumps'.

**Reflexive law**, associated principally with the name of Gunther Teubner (1986), refers to 'rules about rules' — for example, a law prescribing internal procedures for organisations of a specified type, which will govern the process of their internal decisions although leaving the substance of these decisions unregulated. Reflexive law is closely bound up with Niklas Luhmann's version of 'autopoiesis theory' (1986), emphasising that each sphere of society, or social subsystem (the economic system, the legal system, the educational system, and so on), has its own unique institutions, processes, and codes, exhibiting 'closure' and 'self-reference' — the **impossibility** of doing other than making its own decisions according to its own lights without interference from outside. The political system is just another subsystem.

For all such analyses, the idea of 'governance' presents a severe theoretic problem, and **central** governance an even greater one. Yet any approach which simply ignores or sets aside intersocietal, international, or interorganisational aggression and defence, or the facts of democratic electoral platforms and voting majorities (with the consequent responsibilities and drives of national and other central State authorities), is a very incomplete analysis. It can be argued (both at a factual and normative level) that the State retains a responsibility not held by other social actors, for the defence of the society from external and internal threats to its integrity, and has legitimate grounds for imposing other social goals for which the governing group has gained an electoral mandate (Dunsire, 1996). If that is so, State authorities need 'trump cards', means of governing, of controlling, of steering and influencing behaviour within these 'closed' social spheres — the economy, the law, medicine, education, religion; even sport, entertainment and the arts.

The second important question inadequately dealt with by network theory and the analyses of Luhmann and Teubner concerns the debate about greater participation and the 'democratic deficit'. At its narrowest, this can be expressed as: how in a democratic polity is the State's use of its 'trump cards' to be kept under the people's control?

**Collibration theory** begins from an observation that — even in a complex society of pluralist ('centreless') interaction — social systems tend to be remarkably robust. They persist through perturbation. Social stability is more likely than instability. Societies are not constantly in danger of flying apart or imploding into stillness.

It is of the very definition of 'society' that it is grounded in interdependencies and mutualities, which are binding agents. One type of analysis, paradoxically, bases social stability in the very strength of its mutual antagonisms<sup>6</sup>. The doctrines of political pluralism echo these analyses of societal stability. There, it is precisely the absence of an overarching principle, the equal value of all political goals, the rights of all to form groups and to pursue their own interests in interaction with rivals, that produces the 'checks and balances' which ensure political stability at system level (Lindblom, 1965).

A second observation is that a typical advanced society does indeed contain a large number of organisations which come into existence precisely to 'check and balance' some other organisation, institutionalising a policy or interest conflict. Employers' associations are set up because trade unions have been founded. Landlords organise because tenants do so; and so on. The identity, the *raison d'être*, of such organisations is not (in current jargon) self-referential, but only comprehensible when taken **together with their counterpart**; it is the pair-system which is self-referential. If left alone, the mutual monitoring and corrective action within this pair-system can render it self-regulating<sup>7</sup>.

The literature on 'regulatory failure', both American and European, after showing that the 'classic' methods of central steering (legislation and the imposition of rules) work very imperfectly in the kind of complex and pluralist society we are speaking of, canvasses alternative modes of central action, more compatible with the 'closure' and self-referentiality of modern social structures. Three types are usually found: subsidy, partnership or co-production of steering; and reflexive law.

<sup>6</sup> For example, the claim that society is 'held in place' by the tension between its internal opposing forces (Simmel, 1908/1955, p. 15); society is 'sewn together' by its criss-crossing inner conflicts (Ross 1920, p. 165); conflicts within the organism produce tensions which 'lend firmness to the whole system, much as the stays of a mast give it stability by pulling in opposite directions' (Lorenz, 1966, p. 80); the routinisation of conflict behaviour produces an 'institutionalisation of precariousness' (Luhmann, 1982; p. xxvii).

<sup>7</sup> The most conspicuous recognition of such self-regulation through conflict of interest is the economic theory of market competition, based on the twin principles of voluntariness and rivalry. Trades between 'willing buyer and willing seller', rivalry among buyers and among sellers, will 'clear the market' in the most efficient way if left to their own devices. But the adversarial theory of legal process, as practised in common law countries, rests on a similar philosophical foundation; as indeed does competitive international sport, and the theory of scientific advance.

**Subsidy**, through grant or other forms, is the most familiar device. At its simplest, it merely ensures that an organisation whose output is valued by a State authority is able to continue in operation. When a grant becomes overhung with conditions and stipulations, it becomes subject to all the problems of regulation.

**Co-production of steering** means that State authorities bargain with the target social realm (often through an 'intermediary body', an association of organisations or a representative guild), so as to be able to harness its internal self-regulating capacities to political ends (often designated 'the public interest') (Mayntz, 1983). Most of the regulation that takes place in the United States, say Bardach and Kagan (1982, p. 217), is the work of inspectors, auditors and assessors employed within private organisations, often policing standards drawn up by the industry association or a guild of technical experts.

**Reflexive law**, as discussed by Teubner, involves measures such as the statutory establishment of collective bargaining, and co-determination or 'industrial democracy' laws in Germany (Teubner, 1986). The American literature has many illustrations of similar procedural regulation, involving imposition of minimum standards, requiring the appointment of specialist staff, criminalising certain behaviour, and so on (see e.g. Bardach and Kagan, 1982).

These three modes of intervention combat complexity and pluralism by not attempting to make **substantive** internal decisions for social organisations, but by harnessing for the purposes of the State, respectively, their **outputs**, their **internal control capacity**, and their **internal differentiation of tasks**. Many of these ideas are present in the proceduralisation hypothesis. But none attempts to harness the mechanisms of social stability just discussed — the 'checks and balances' of their mutual antagonisms. The fourth alternative mode of intervention we want to put forward, under the term **collibration**, works by doing just that.

**Collibration** uses the idea that the stable state at which, left alone, a social subsystem will arrive, can with care be disturbed, influenced, or manipulated without destroying stability. The stability involved is not an equilibrium, and the process is not one of **homeostasis** (the return to a designed steady state), but rather what chaos theory calls a 'far from equilibrium' situation, where there may be a very large number of possible steady states, no configuration being exactly repeated (Gleick, 1988; Laszlo, 1986, p. 154).

The principle of manipulating the conflict of others for one's own benefit is a very ancient one, explicit in traditional 'Macchiavellian' maxims of statecraft and colonialism, like 'divide and rule'. But it is in much more endemic use in current processes of governance today than such pejorative precedents might suggest. One less associated with connotations of the *Obrigkeitstaat* is the fertile notion of 'handicap' used by governing bodies in sport. For instance, in horse-racing and golf, some contestants are constrained (within the rules of the game) in the interests of achieving a 'fairer' (or more exciting) competition.

A few leading examples of governmental collibration can be given. In the industrial relations field, the Social Democratic Government in Sweden in the early

1970s passed a long series of laws, covering safety at the workplace, holidays, retirement and so on, to 'tip the balance' in favour of employees. In the 1980s, exactly the opposite handicapping took place in the United Kingdom, when the Conservative Government passed a similar series of laws, restricting picketing, enjoining a ballot before a strike, nullifying 'closed shop' agreements, and so on, in the interests of employers. Yet neither government wanted to end the traditional 'two sides of industry' bargaining system over wages and conditions of work — as happened in other European countries at the same time, where governments imposed wage-freezes or specified permitted increases; not so much intervening in collective bargaining as destroying it altogether (Baglioni and Crouch, 1990).

It is a use of the same stratagem of 'loading the scales' to obtain a policy objective, when judicial outcomes in the courts are 'tweaked' by altering rules such as who has legal standing to bring an action, or where the burden of proof is placed. But perhaps the most unremarked feature of this mode of steering by the State is its ubiquity in the economic subsystem.

It has been well accepted since Adam Smith that, despite strong ideological defences against 'government interference', any real market is embedded in law and politics one way and another. State authorities ensure the keeping of contracts, provide good coinage, legislate against monopoly, compensate for externalities, and so on. The State can also become a participant in the market, using its large purchasing power to drive down a price, selling foreign currency to prop up its own, exerting labour market leverage as a large employer, etc.

But State authorities habitually act in the market-place in many ways which are neither 'regulating' nor 'participating' in these senses. Large areas of macroeconomic operations summed up as 'Keynesian' (including demand-management through public spending, pump-priming by supplying cheap factory premises, providing or subsidising industrial or technical training, and influencing financial markets by altering central bank interest rates), are actions to avert an undesired outcome of a 'free' market and steer it towards a desired outcome: in the sporting metaphors, not so much 'levelling the playing field' as 'moving the goalposts'.

These are all interventions towards 'economic' ends; but State authorities also routinely use the potent market mechanism to further **non-economic** policies. There are three notable types of such action: using the taxing power as a programme tool; loan guarantees; and the provision of 'remedial information'.

**Taxation** of commodities and services not to raise revenue but to alter costs (and so prices) differentially, and affect consumption patterns, is almost as old as markets. High taxes on tobacco and alcohol, lower taxes on diesel fuel than on petrol, a carbon tax for environmental ends — these are all social engineering via the market-place.

A **loan guarantee** is, likewise, a State authority putting its thumb on the scales of a private transaction in the money market, to make balance what other-

wise probably would not — the banker's criterion of loan-worthiness and the applicant's financial standing.

**Remedial information** is State action to redress an asymmetry of information between buyer and seller. It appears in the food industry in compulsory labelling of many kinds, in the money market in mandatory expression of interest rates in a standard form, in the obligatory display of bar prices in a hotel, and so on. The ubiquitous taxi meter represents mandatory disclosure of remedial information. A Freedom of Information Act is an example of remedial information that the legislature imposes on the executive<sup>8</sup>.

It may be clear that there is a common factor in all these idiomatic expressions that are the metaphors of this surprisingly universal stratagem of social intervention by State authorities: divide and rule, loading the scales, thumb on the scales, rigging the market, tweaking the rules, levelling the playing-field, moving the goal-posts, and so on. All signify an intervention to manipulate what would otherwise stabilise on one configuration ('find its own level'), so that it stabilises on another, more desirable one. Yet there does not seem to be any generic term for this mode of government action. We therefore invented **co-libration**, or collibration. When weights placed in one pan of a letter balance begin to equal the weight of a letter in the other, the scales **librate**, oscillating gently around the horizontal. Co-libration means taking a hand in this, introducing a compensator into the field so that it arrives at a desired steady state.

Making comparisons between these four alternative perspectives on the relations between individuals, organisations, bureaucrats and politicians — network theory, reflexive law theory, collibration theory, and the proceduralisation hypothesis — is no simple task, and especially where (as here) the characterisation of each perspective is more of a caricature, so skeletal are the outlines. All of the four theories, considered as descriptions, are attempts to make sense of contemporary societies like the EU Member States, the United States and other advanced countries. Each focuses on the complexity of their problems and internal relationships; the relative lack, in any of them, of a single dominating ideology or source of social legitimacy; and the wide distribution of social power. All of them had their genesis in the consciousness of 'government failure' (see analyses of 'market failure' in economics), which, however, turned out to mean the inability of only one of the 'tools of government' (Hood, 1983) available to the State; namely, the use of law and legal regulation, to produce the results desired<sup>9</sup>.

Where the four perspectives begin to differ, or specialise, is in the degree to which they focus on two aspects of the problems of governance. One is the ac-

<sup>8</sup> Away from the 'market', in the field of party politics, the art of the political 'dirty trick' is, similarly, to rig the adversarial electoral machinery in favour of one side, by gerrymandering constituency boundaries, by supplying 'pork barrel' expenditures, and so on, down to stuffing ballot boxes. At more elevated levels, a trick on the scale of the 'political business cycle' (Nordhaus, 1975), even a declaration of war for domestic political advantage, is far from unknown.

<sup>9</sup> This 'regulatory crisis' was being noted and analysed in the United States as long ago as the 1970s (Stigler, 1971; Horowitz, 1977; Nonet and Selznick, 1978; Savas, 1977), as was the necessity of getting private institutions to regulate themselves (Stone, 1975; Schultze, 1977).

knowledge of continuing responsibilities for central State authorities of some kind even in a highly-pluralistic society. The other is attention to the growing and deepening 'democratic deficit' — not only the perceived impotence of parliaments and representative institutions in controlling the executive arms of the State, let alone the rest of society, but a much more significant lacuna in administrative rationality: the purely instrumental folly in a complex society of excluding the potentially crucial knowledge and experience of 'end users', and those affected by governmental and other decisions, from participation in the processes of arriving at these decisions, and of putting them into practice.

For the first of these two problems, proceduralisation theory and collibration theory seem to us to be more successful than network theory and reflexive law in encompassing the continuing need for State authorities with effective means of carrying out the will of the people. For the second, the integration of the knowledge and preferences of all 'stakeholders' into the processes of policy-making and implementation, the proceduralisation hypothesis, it seems to us, is superior to both network theory and reflexive law, and even to collibration theory. The latter, however, is the only one to include the harnessing of existing social stabilising mechanisms in its analysis of alternative solutions to 'regulatory failure'. Table 2 summarises this evaluation of the four theories.

Table 2: *Comparison of four theories of public action*

Capacity of theory	Types of theory			
	Network theory	Reflexive law theory	Proceduralisation	Collibration
Recognises contemporary social complexity	yes	yes	yes	yes
Recognises contemporary societal pluralism	yes	yes	yes	yes
Recognises 'regulatory failure'	yes	yes	yes	yes
Harnesses social actors' internal control processes	yes	yes	yes	yes
Recognises State's continuing responsibilities			yes	yes
Recognises the 'democratic deficit'			yes	
Recognises societal stabilising mechanisms				yes
Harnesses societal stabilising mechanisms				yes

## Conclusion

A number of the administrative developments in the United Kingdom over the two decades up to 1996, when this paper was originally written, appear to be compatible with the proceduralisation hypothesis; and a number of developments under the subsequent Blair Labour Government also appear to fit that hypothesis. That applies particularly to those changes which form the mirror-image of 'managerialisation', namely, the expansion of grievance adjudication systems, the so-called 'audit explosion' (Power 1994, 1997), and the more elaborate 'contractorisation' of many aspects of public services (even when they are not outsourced). But moves towards *éclairage* and 'constitutionalism' seem rather easier to demonstrate than empowerment and inclusion. This may well be partly because interpreters differ sharply as to who has been empowered against whom by these changes. And indeed it could be argued that any general social empowerment (if such a thing is possible) is an unintentional by-product of political tactics intended to achieve relatively narrow partisan ends.

However, it is also possible to interpret many of these changes as manifestations of 'collibration', namely the deliberate steering of social systems by State authorities selectively inhibiting antagonistic forces that are more or less formal role-antonyms. Collibration is an empirical generalisation intended to identify mechanisms of governance, at all levels of government from EU to regional and local level, which are by no means new, but not previously recognised to form a class of effective intervention in complex plural societies. While collibration and proceduralisation may in many cases overlap, they need not always do so. That is, while proceduralisation may often be adopted in the service of collibration, the reverse does not necessarily apply. Indeed, some instances of administrative change, in the United Kingdom at least, seem to have entailed 'deproceduralisation' (for example, some of the shifts from elected local authority to quango delivery of services or, according to Foster (1996), breakdown of once-established civil service conventions for record-keeping and policy clarity). But it is hard to find a case of 'decollibration'.

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# Social knowledge and governance: the promises of evaluation

**Bernard Perret**

## Introduction

The aim of this paper is not to take stock of the French system of interministerial evaluation of public policies, but to use experience there — and, in particular, the methodological approach of the Scientific Evaluation Council — to highlight some of the most promising implications of the concept of evaluation, in line with the hypotheses on the proceduralisation of collective action put forward by the leaders of this seminar. After decades of evolution of the concept, evaluation has come to be seen as a **new way of looking at the rationalisation of collective action**, broadening the traditional view of the relationship between the social sciences and political/administrative practice.

## Evolution of ideas on the method and social uses of evaluation

Programme evaluation emerged in the United States before the Second World War and really took off in North America and certain European countries from the 1960s onwards. It was originally seen as a technique for rationalising public decision-making that was almost exclusively based on the use of quantitative methods. This positivist, instrumental approach gradually turned out to be inadequate **both in theory and in practice**, and, while it has not been completely rejected, it has now broadly given way to other approaches, which vary greatly but share the characteristic of taking seriously the many types of knowledge and the many types of interaction between knowledge and action.

## The paradigm of medical ‘treatment’

From an epistemological point of view, evaluation, particularly the evaluation of social programmes, was originally based on the model of protocols used to measure the effectiveness of experimental medical treatments. This approach reflected the behaviourism which pervades the social sciences in the United States, particularly in the fields of psychology and education<sup>1</sup>. American writers on evalu-

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<sup>1</sup> With regard to the disciplines of origin of the evaluators T.D. Cook describes the American situation as follows (addressing the first world conference on evaluation, in November 1995 in Vancouver): ‘Within the

ation often use the term 'treatment' to refer to all the measures to which the social 'targets' of a policy are subject: 'In the 1960s, ... the key evaluation issue was the black-box task of generating unbiased, precise estimates of the causal consequences of programmes or their major constituent parts. The preferred analytic designs for doing this were experimental, and the preferred analytic techniques were quantitative'<sup>2</sup>.

## The rational decision-maker model

Similarly, the advocates of evaluation saw it as a way of applying rational scientific thought to public decision-making: 'Twenty years ago, many evaluators naively anticipated that their results would be routinely used as the central input into policy decisions. The advocacy of experimentation at that time fed into this *naïveté* because the decision logic underlying experimentation seems to mirror the rational actor model from public policy. In this model, a problem or need is first clearly defined (in experiments, the analogue involves specifying outcome criteria); alternatives for solving the problem are determined and implemented (the various treatments are put in place); the outcome criteria are then monitored (in experiments, data are collected); and finally a decision is made from the data about which alternative is best for solving the problem (a statistical test is conducted to assess which treatments are more effective)<sup>3</sup>.

This ideology culminated in Donald Campbell's work on the 'experimenting society'; a virtuous utopia of a society in which the quest for truth through experimentation would be made central to socio-political regulation.

## Towards a more complex vision of the method and purposes of evaluation

Since the 1970s, we have been witnessing a dual challenge to evaluation, on both the epistemological and political fronts. In terms of epistemology, a critique has emerged of the positivist presuppositions which inspired experimental protocols and modelling. In most real social situations, it is very difficult to rigorously establish the existence of causal links, and even more difficult to measure their extent. Moreover, the re-examination of the social sciences' claims to objectivity in the fields to which evaluation applies is not confined to questions of extent and causality: researchers today are more aware of the impossibility of adopting a totally ob-

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United States, members of the American Evaluation Association (AEA) are mostly trained in psychology and education and evaluate programmes with a corresponding disciplinary flavour. Economist and political science evaluators tend to be in the Association for Public Policy and Management (APPAM) and concentrate on policies more than programmes. Most evaluators in the American Public Health Association (APHA) examine policies and programmes designed to improve physical health. This disciplinary fractionalisation is not necessary, and we need to build more bridges'.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

jective standpoint, independent of the subjective perception of those affected, to describe the result of actions whose purpose is to serve the interests or change the living conditions of certain categories of the population. One of the crucial points, as Chen notes, is that there are many ways of defining the result of a policy: 'The outcome criteria finally selected in an evaluation are only a limited set of a large pool of potential outcomes that might be affected by the programme'<sup>4</sup>.

On the political front, evaluators have had to face the fact that little direct use is made of the results of evaluations. This is disturbing but not surprising. It is not enough for information to be intrinsically relevant to a problem for it to be used, because, as Jean Leca notes, 'multiple, changing interests introduce new standards for action without warning: from these the "political decision-maker" has a much better and more effective knowledge than the knowledge specialists'<sup>5</sup>. Faced with these practical interests (the political influence of a lobby, the practical impossibility of undertaking reform immediately) or ideological interests, the abstract concern for truth has little weight, particularly since the decision-makers cannot spare much time for gathering information: in a world where attention is among the rarest of major resources, information may be a costly luxury because it may deflect our attention from what is important to what is not. We cannot afford to process an item of information simply because it is there<sup>6</sup>.

This crisis has prompted two developments. First, it has led to a reassertion of 'qualitative' methods, based on the use of verbal material or texts, on the 'naturalistic' observation of social reality (monographs, ethnosociology), or on the development of group work techniques (group of experts or actors) — methods which, it was seen, were likely to provide information that was often more directly useful for the action than quantitative methods: 'Qualitative methods are very useful for making explicit the theory behind a programme; for understanding the context in which a programme operates; for describing what is actually implemented in a programme; for assessing the correspondence between what the programme theory promised and what is actually implemented; for helping to elucidate the processes that might have brought about programme effects; for identifying some likely unintended consequences of the programme; for learning how to get the programme results used; or for synthesising the wisdom learned about a programme or a set of programmes with similar characteristics; or even for 'answer(ing) the same questions about generalisation and descriptive causal relationships to which quantitative methods are primarily addressed'<sup>7</sup>. However, there is no denying the power of objectivisation of figures, which have the merit, among others, lending themselves better to comparison (in time and space) and to aggregation (putting partial findings together). It is now broadly accepted that evaluation requires the combined use of the two types of information.

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<sup>4</sup> *Theory driven evaluation*, London: SAGE, 1991, p. 42.

<sup>5</sup> Jean Leca, 'Le rôle de la connaissance dans la modernisation de l'Etat', *Revue française d'administration publique* No 66, April to June 1993, p. 187.

<sup>6</sup> Herbert Simon.

<sup>7</sup> T. D. Cook, conference cited.

Having adopted a more qualitative orientation, evaluation has also become more **participatory**, since cooperation by the different stakeholders in the policy evaluated, and, in particular, actors on the ground, is a precondition for the mobilisation of the practical knowledge that they possess.

A second development has consisted of a more complex view of the social impact of evaluation gradually being imposed. Without denying the practical use of evaluation, it became apparent that its main use in practice was to provide enlightenment of the decision-making context. And, furthermore, it started to become clear that decision-makers are not the only users of evaluation: knowledge of the way in which a public action is implemented and the results it achieves is a **useful resource for all actors**. Hence the stress laid on the 'educational' dimension of evaluation (evaluation as a process of training and increasing involvement), and, more recently, on the fact that evaluation may serve to increase the autonomy and capacity for action of a group of people (described by D. Fetterman as **empowerment evaluation**).

## The 'doctrine' of the Scientific Evaluation Council: from the 'tool method' to the 'process method'<sup>8</sup>

### A pluralistic view of the purposes of evaluation

This coexistence of purposes and increasingly diversified methodological references has, inevitably, led to complex disputes about theory. In its annual reports on the development of evaluation practices, the Scientific Evaluation Council has always challenged the entrenched opposition between 'managerial' and 'democratic' evaluation. The development of evaluation has responded to a set of closely interwoven problems: budgetary difficulties, crisis of legitimacy of public action, complexity of policies and interpenetration of levels of government, dysfunction in public services, etc. Evaluation may be seen as having a variety of purposes, which may vary in importance, depending on the case, but which are in no way incompatible:

- (a) An 'ethical' purpose: to give an account to politicians and the public of the way in which a policy has been implemented and the results it has obtained. This dimension covers the improvement in the accountability of systems of public action, the informative purpose and the 'democratic' purpose of the evaluation.
- (b) An educational purpose: to contribute to training and to increasing the involvement of public officials and their partners by helping them to understand the process in which they are participating and to adopt its objectives.

<sup>8</sup> Concepts taken from Setbon, M. and Lascoumes, P., *L'évaluation pluraliste des politiques publiques*, Groupe d'analyse des politiques publiques, research funded by the Commission for the National Plan, 1996.

- (c) A management purpose: to distribute human and financial resources more rationally between different actions and improve the management of the services responsible for implementing them.
- (d) A decision-making purpose: to prepare the decisions involved in running, adopting or adjusting a policy.<sup>9</sup>

It should be added that, in the current context of collective action, one of the main purposes served by evaluation is to catalyse cooperation between autonomous public actors involved in the same action (it has been called the 'language of partnership').

### **Mobilising all the relevant information and the contributions of all the different disciplines**

The Scientific Council has likewise stressed the multi-disciplinary nature of evaluation, and the complementarity of the quantitative and qualitative methods. Taking the utility criterion into account requires the mobilisation of all the relevant cognitive resources, without taking account of divisions between disciplines: 'unlike scientific research carried out within the framework of a specific discipline, which gives priority to a limited number of arguments, evaluation tries to use all "heuristics" and to adapt to the real conditions in which the deliberation and decision take place. Like any discussion or reflection carried out for practical purposes, evaluation does not automatically exclude any element of information concerning its subject, whatever its nature (quantitative or qualitative) and origin, as long as it appears to be relevant'<sup>10</sup>.

In practice, this means that evaluation uses a wide variety of information sources, either exploiting existing data or documents (previous studies, administrative data, legal texts, press cuttings), or carrying out ad hoc surveys or investigations to gather new data (statistical surveys by questionnaire, monitoring a panel of beneficiaries of a measure, in-depth interviews, monographs, hearings, groups of actors or experts).

### **New methodological issues**

This increasing complexity of the concept of evaluation can be seen in the emergence of new methodological issues. Originally, questions of method posed by evaluation were no different from those habitually encountered in the collection, processing and interpretation of information in the various social sciences (observer neutrality, validity of experimental protocols, problems of modelling and statistical inference).

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<sup>9</sup> *Petit guide de l'évaluation*, La Documentation française, 1996.

<sup>10</sup> *Ibid.*



Once the diversity of models integrating knowledge into the operation of systems of action and decision-making is taken into account, the methodological and ethical principles applicable to the political and organisational management of evaluation take on greater importance. In addition to the social science 'toolbox', evaluation must therefore form its own corpus of methodological principles, based on both epistemological and socio-organisational — even political — principles. Of course this does not mean abandoning the ideal of a reliable, objective knowledge of social reality, but this is not enough to define the aims and requirements of evaluation. In practice, the method responds to several challenges.

First of all, the variety of methods must be organised. In order to come to clear conclusions, it is not enough to simply juxtapose information of different kinds: on the contrary, there is a risk of confusion. The conditions in which heterogeneous data and arguments are compared and integrated therefore constitute a new field of methodological development.

Secondly, the extension of the debate on the social use of evaluation has brought to light the question of the **conditions in which the results are usable**: it is not enough for an item of information to be scientifically accurate for it to be considered credible, relevant and useful by its users. In practice, therefore, great importance is laid on (i) the **quest for consensus (or, more precisely, working out a politically and socially legitimate standpoint) on the definition of the subject and wording of the questions which the evaluation must answer**, (ii) the **credibility of the information used** and, (iii) the **legitimacy of the interpretations and value judgments** which underlie the conclusions, recommendations and proposals.

Solving these problems is not a matter of proven technical expertise: it requires a specific methodological construct for each evaluation operation and makes the quality and productivity of the reports drawn up between the different stakeholders crucial. At the very most agreement can be reached on the list and the order of the questions which must be addressed during the preparatory work before a study is launched (see Annex, the main stages in drawing up an evaluation project).

## **Institutionalisation, an alternative to self-regulation of a professional milieu?**

One of the difficulties of formulating the regulatory principles of the 'method-process' in a uniform fashion is the diversity of the social situations to which evaluation applies. Furthermore, the degree of institutionalisation of the evaluation procedures is a key variable. Basically, a North American tendency to make the professional evaluator the guarantor of a specific evaluation ethic can be contrasted with a more European tendency to institutionalise the procedures. In the American context, the evolution of the concept of evaluation has been interpreted in disciplinary and professional terms: evaluators increasingly consider

themselves to be methodologists, 'facilitators', even 'midwives' or analysts ('fourth generation' evaluators according to Guba and Lincoln). It is in this sense that T. D. Cook's remark must be understood that 'the interest in method is one source of potential unity in a field where evaluators work in different substantive areas and have been trained in many different disciplines'.

It is particularly significant that handbooks for evaluators specifically address ethical questions: 'Because of the acknowledged political nature of the evaluation process and the political climate in which it is conducted and used, it is imperative that you, as the evaluator, examine the circumstances of every evaluation situation and decide whether conforming to the press of the political context will violate your own ethics'<sup>11</sup>. Likewise, the definition of **quality criteria** specific to evaluation is understood as an internal matter for the evaluator's profession.

In the European context, the development of evaluation often has a more institutional character. There is more talk about evaluation of 'public policies' (not just programmes), and initiatives by the public authorities are playing a decisive role in the emergence of a range of evaluation practices distinct from both auditing and other study and research practices. The distinction between evaluation research on the one hand and institutional evaluation that is integrated into the operation of political/administrative systems on the other is more marked in Europe than in the United States. At the recent world conference on evaluation in Vancouver, it was also noted that European researchers gave more attention to political influence on the process and uses of evaluation than their American colleagues. The situation in France, with the role of institutionalised referee conferred on the Scientific Evaluation Council, is typical of this approach.

### **The Scientific Council, institutional guarantor of the autonomy of the process and the suitability of the methods for evaluation's social purposes**

In view of the powers conferred on it<sup>12</sup>, the Council considered that its role was to be the guarantor of the political usefulness, the scientific rigour and the ethics of evaluation. In the words of Jean Leca, president of the Scientific Evaluation Council, evaluation of a policy is **within** the policy (it constitutes, in a way, an extension or enlargement of the system of action which that policy sets up), which does not mean that it must be used or manipulated by the policy. The paradox of evaluation is that it is a useful policy resource only if it is accepted that it is partially detached from the policy in order for it to have its own credibility. The concept of an 'evaluation auton-

<sup>11</sup> *Evaluator's Handbook*, London: SAGE, 1991, p. 24.

<sup>12</sup> The annex summarises the way in which the interministerial evaluation procedure, set up in 1990, which the Scientific Council is subject to, works. Since this paper was written, the interministerial evaluation procedure has been considerably modified (decree of 18 November 1998, see Annex, Part B). However, there is a clear continuity between the new system and its predecessor in terms of the methodological principles of evaluation.

omy zone'<sup>13</sup> is particularly important: it means that, by agreeing to play the game of evaluation, politicians (and any other actors that may be involved in the decision to evaluate) take the risk of putting their practical knowledge, their ideological conceptions and their 'theories of action' to the test, in a collective process to which they are party but which they do not totally control. In other words, they must pay the price for the credible information and shared references which the evaluation aims to put together. In practical terms, this idea of an 'autonomy zone' is implemented by negotiating a **draft** evaluation which formalises the agreement of the stakeholders in the evaluation on a subject, an approach and a cognitive strategy, and by setting up, for each evaluation, an **evaluation committee**, which is a steering committee with broadened and formalised functions (see annex).

The aim of the two opinions given by the Scientific Evaluation Council mentioned in the annex is to ensure that this conception of evaluation is adhered to. At the stage of the first opinion (quality of the draft evaluation), the purpose is:

- to encourage the political sponsors of the evaluation to explain their concerns, their 'preliminary diagnosis' of the policy to be evaluated and what they expect from the evaluation;
- to help them to translate this general issue into questions which make sense for the social sciences;
- to orient the evaluation committee towards a choice of methods which are realistic and suited to these questions, in order to produce cogent arguments for the readers of the evaluation report (this means, in practice, that they should be based on several complementary types of argument: descriptive arguments, logical or theoretical arguments, opinion-based arguments);
- to ensure that the composition of the evaluation committee reflects the main relevant points of view, allows effective steering of the study programme and does not produce any malfunctions which could block the process (which, in practice, is not that simple).

The second opinion, on the quality of the evaluation report, has the dual purpose of:

- validating the results of the evaluation. There is no question of the Scientific Council expressing an opinion on the conclusions of the evaluation, let alone the relevance of the recommendations made by the evaluation committee; it should merely 'assess both the degree of coherence between the evaluation report and the various studies carried out to this end, and the logical link between the recommendations and the findings and analyses of the report as a whole. The primary aim is to provide decision-makers with an external guarantee of the scientific value of the arguments put forward by the committee'<sup>14</sup>.

<sup>13</sup> See article by J. Leca cited above.

<sup>14</sup> Extract from *Petit guide de l'évaluation*, cited above.

— identifying the methodological lessons applicable to other evaluations.

These opinions are based on a set of quality criteria similar to those suggested by Chen in his book *Theory-driven evaluation* (utility-relevance, reliability, objectivity, possibility of generalising the results, transparency).

To ensure 'transparency' in the evaluations, the Scientific Council lays great importance on the formal rigour of the arguments put forward in the evaluation reports: 'an effort should be made in evaluation reports to rigorously articulate the judgments and the facts: ideally, all normative statements should be backed up by reasoned arguments, themselves based on duly documented observations .... Evaluation reports should comprise methodological sections, descriptions, reminders of the conclusions of previous reports, analyses based on new information, and, finally, interpretations by the evaluation committee. These various types of text must be distinguished as far as possible. In particular, imputations of cause and effect (X public action produces Y individual effect) and normative judgments must be clearly identified as such and backed up with reference to the studies carried out as part of the evaluation. The most commonly found flaw is the inclusion of unsupported value judgments in a descriptive exposition'<sup>15</sup>.

This requirement of formal rigour is designed to warn readers of an evaluation report against an erroneous interpretation of its conclusions by drawing their attention to the gaps and uncertainties which limit its scope. It also attempts to satisfy didactic and even rhetorical concerns: the evaluation report must be a rigorous, readable and cogent communication tool.

## **Evaluation and procedural rationality: challenging the two rationalities of action and social knowledge**

Although the Scientific Council has never conceptualised its doctrine in these terms, it can be described as 'procedural', in the sense that it attempts to organise and systematise in the form of procedures the complex processes of reciprocal adjustment between the work of social science researchers and the practical knowledge of actors and decision-makers.

In the traditional view, there is an absolute dichotomy between scientific rationality and the specific rationality of the way in which systems of collective action work: the constitution of a scientific knowledge of social reality and the instrumental action within social systems are governed by fundamentally differing practices, with no possibility of interaction. Evaluation, in contrast, has to deal with the paradoxical proximity of these two systems of logic in the sense that it tries to organise the interaction between them: researchers and actors share the duty to constantly carry out more or less arbitrary tasks of describing reality, making judgments, con-

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<sup>15</sup> Ibid.

structuring representations, generalising, etc. Any scientific activity can be regarded as a normative activity, and any complex social activity as an activity which includes theoretical aspects. The result is a double deconstruction of the rationalities of public action and of social knowledge.

## **A critical unveiling of the theoretical approaches and normative sets of criteria which underlie public policy**

Any public policy or action is based on a 'theory of action', a set of representations and ideas (often implicit) on which its initiators and/or actors predicate its operating mechanisms and cause-and-effect relations between the measures taken and their expected social impact. One of the advantages of evaluation is that it requires the objectivisation of this theory (since it involves formalising its objectives and setting out an initial schema of the operating mechanisms) and therefore enables it to be put to the test. One of the leitmotifs that run through the evaluation reports is that key decision-makers' theories of action are over-simplistic and that they need to be refined and reformulated in the light of real social processes. Apart from the fact that they are almost always contradictory (it is not in politicians' interest to make their choices between different objectives too clear), theories of action generally do not know how capable the different protagonists of the 'system of action' are of superimposing their own rationality on that of the 'official' objectives of a policy. If carried out properly, evaluation provides political and administrative leaders with a more realistic vision of the 'co-production' of public policies, and leads them to give greater attention to the conditions in which they are implemented (including, primarily, informing and training the actors). In other words, evaluation contests the 'ballistic' vision of the way that public decisions impact on society, and highlights the constant temptation for the key actor to underestimate the autonomy of the other actors and the various unintended effects of his or her action on society.

It should be noted that the aim of this deconstruction is not to delegitimize the actors' rationality, let alone replace it with an all-embracing substantive rationality, such as economic rationality, which is likely to relativise the specific objectives of the various public policies. Unlike the public economy, which attempts to translate the value of public action into monetary terms (the concept of **value for money**), for example by simulating the existence of a market in fields where it should not normally play any role<sup>16</sup>, the evaluation of public policies implicitly endorses the heterogeneity and the vagueness of this value. The criteria against which the results of the policy which have been observed are to be compared are still built on goals which have been democratically set for it, even if these almost always need to be interpreted and updated in line with current priorities. It is true that these results must be weighed up against the cost of the policy, but no conclusive consequence can automatically be deduced from this comparison. The question of value thus changes from a **measure** to a **value judgment**: in general there is no one single answer that can be given, but one can be given in reference to a given social and political context, in

<sup>16</sup> Through methods such as implicit prices or contingent evaluation.

which legitimate players have asserted their interests and expressed preferences and aims regarding the costs and effects of this policy. The evaluation assessment must not, however, be confused with a political assessment, which belongs to the voters; in a way it constitutes a *sui generis* type of social construction of the value of a public action which is based on both science and common sense.

## A procedural approach to the regulation of scientific work

For its part, any social knowledge that is supposedly useful for the action can be suspected of being based on the arbitrary choices and conventions needed to identify a line of enquiry, determine the objectives of research, build information systems and describe observations. The academic structuring of different scientific disciplines imposes a de facto regulation on this normative activity by researchers by instituting **scientifically legitimate modes of questioning**. But this form of regulation of scientific activity has the disadvantage of making interdisciplinarity difficult (think how difficult it would be to construct a dialogue between the economic, sociological, historical and anthropological approaches to the problem of employment). Evaluation could, in theory, have the effect of replacing this type of regulation by discipline with an institutional regulation of how research topics are established, perhaps giving the multidisciplinary approach to certain complex problems a better chance: 'In evaluation, the position of researchers is not the same as it is in the usual research context. It is important that they should be able to find the right balance between the interpretation grids specific to their discipline and the interpretations most likely to be discussed by the evaluation committee within the framework of its own subject area'<sup>17</sup>.

Similarly, evaluation shifts and enriches the debate about the validation of knowledge. The rigorous approach cannot hope to produce a single truth about social reality, but 'merely' a legitimate, credible and useful representation of this reality. The 'constructivist' conception of objectivity developed in certain texts by the Scientific Evaluation Council is particularly significant in this respect: 'In the context of experimentation, the word 'protocol' refers to the aim of constructing a 'social experiment' analogous to a scientific experiment, i.e. by giving themselves the means of rigorously controlling the influence of exogenous factors on the effects of the policy or programme evaluated. By transposing the concept, we can talk of 'protocol' in the more general sense of organising the conditions in which the information supporting the evaluation assessment is produced and interpreted. Just as in the case of the experimental protocol, the conditions of validity of the knowledge must be monitored. The objectivity in question is not the same thing as scientific objectivity: it could be defined as the fulfilment of what is required to establish a shared belief in a given social context. The pluralism of opinions and skills brought to bear in the work of synthesising and interpreting the information is an essential condition of the construction of objectivity in the sense it is given here'<sup>18</sup>.

<sup>17</sup> Extract from *Petit guide de l'évaluation*, cited above.

<sup>18</sup> Perret, B., Seibel, C., 'Evaluation et systèmes d'information statistique', in *L'évaluation en développement 1992*, La Documentation française, 1993, p. 157.

The risk nonetheless exists that the requirement of scientific rigour will dissolve in the quest for a consensus between the relevant actors. This is why the quotation above must be supplemented and qualified by this other definition of objectivity, given by the *Petit guide de l'évaluation*: 'objectivity is understood as the fact that the results of the evaluation have not been influenced by the personal preferences or institutional positions of those responsible for the evaluation (consultants or members of the committee), or at least that these preferences have been explained or checked to the extent that it can be supposed that another evaluation answering the same question and using the same methods would lead to the same conclusions.'

In other words, the Council established a (theoretical?) distinction between the desirable pluralism of opinions and skills on the one hand and the influence of personal and institutional interests, which must be carefully monitored, on the other. In practice, the Council has frequently warned the evaluation committees against their natural tendency to become places of negotiation between vested interests. Discussion of interpretations must not be manipulated for strategic purposes, but rather regulated twice over, first by the values common to the various stakeholders of a policy, and second by the 'standards' of validity specific to the various scientific disciplines used. The aim of the Council's supervision is to check that the summary report is written in line with this ethical approach to the treatment of conflicts of interpretation, and that the methodological eclecticism of evaluation does not lead to the confusion of styles of argument: 'unlike an ordinary discussion, carried out without formal method, evaluation endeavours not to mix the different types of argument, but rather to rank them, weight them and link each one to specific conclusions' (*Petit guide de l'évaluation*). The Council's approach leads to a conception of the forms of objectivity that is not only relativistic and pluralistic, but also differentiated and prioritised.

## Final observations

Is the conception that has just been developed at least partially validated by the analysis of evaluation practices? As noted in the introduction, this review, deliberately theoretical and forward-looking, is not a critical assessment of the *modus operandi* of the institutional system set up in 1990. The experiment has also come up against difficulties of various kinds which we will not analyse here, and it has remained, if not marginal, at least too limited for it to be possible to draw definitive conclusions from its results which, in any case, vary depending on whether the focus is on the quality of the evaluation reports or their actual impact. In spite of the apparent weakness of these reports (confined, depending on the case, to a few technical measures or a partial clarification/reformulation of the problem and the objectives of the policy evaluated), the interest and potential usefulness of the practical conclusions which could have been drawn from the evaluation reports should not be underestimated. Without going further into this point, we can at least make an assessment of sorts as a provisional hypothesis: evaluation has failed as a technique for renewing the work of government, but it has proved its capacity

to give new meaning to officials' activity. This tallies with the diagnosis of two researchers who have analysed the implementation of the first interministerial evaluations and the social effects produced by them: 'The experiment shows a huge gap between the expectations, depending on whether they are political or administrative in origin, the resources mobilised, and the uses made of evaluation results. While, in theory, evaluation of public policies should be a tool to make the effects of public action democratically intelligible, the apparent consensus on this function barely conceals a difference of opinion (or a misunderstanding) on its limits. It is clear that while political actors do not see it as a solution to their problems, administrative players have a vague sense that it may be a means of renewal ... the usefulness of evaluation is more tangible and more profound at the administrative level: it is a means of clarifying problems, a broader feedback on atomised public action, a place where isolated rationalities can be compared, even a means of embarking on an oft-called for, but rarely found, cooperation. Most administrators concerned have a strong impression of learning and development that is generally irreversible'<sup>19</sup>.

However, the lack of involvement of the political players (in spite of the number of official declarations in favour of developing evaluation), means that evaluation cannot fully play its role in redefining public policies at government level: 'evaluation is not currently a factor in reconstructing public policies, i.e. putting the problem back on the public agenda. Currently, other ways of getting issues on the agenda and developing public policies are the rule: social demands, interest groups and pressure groups, crises, etc.'<sup>20</sup>.

If evaluation is to act as a lever to reform modes of government, it must first become a factor in the balance of powers, in other words Parliament must make it a means of shedding light on the democratic debate and a routine instrument to help draft legislation. Politicians will get involved in evaluation when it has become the stuff of a power relationship between the legislative and the executive, or, alternatively, a place for developing and testing their action (it goes without saying that the way in which the media use the results of evaluation may play a role in this development). It is clear that, as things currently stand, political players are not ready to play along with a practice which appears to restrict their liberty to act 'politically', i.e. on the basis of the traditional mechanisms of aggregation of social demand, expression of values and representation of interests. In this case they will almost always reduce evaluation to surveys or covert forms of control. However, it can still be hoped that, though politicians are unlikely to participate, this will not discourage administrative players from making use of evaluation.

The list of policies evaluated (see annex) illustrates the way in which evaluation has been kept on the margins of mainstream politics and, at the same time, been perceived as an instrument allowing new forms of political/administrative regulation. These are complex policies involving a number of actors and simulta-

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<sup>19</sup> Michel Setbon and Pierre Lascoumes, *L'évaluation pluraliste des politiques publiques*, op. cit.

<sup>20</sup> Ibid.



neously pursuing many objectives, and there are even 'thematic' evaluations looking at a set of heterogeneous public actions concerning a single problem (e.g. combating poverty, protection of wetlands). In purely decision-making terms, it would have been more effective to give priority to developing programme evaluation within each ministerial department or, more ambitiously, to carry out evaluations directly linked to immediate and important political issues (e.g. immigration, monetary policy). On the positive side, evaluation does appear to have been used as a means of clarifying complex but relatively uncontroversial questions, and of getting round the obstacles within interministerial work. This is linked to the fact that evaluation is developing rapidly at regional level within the framework of partnership policies involving several levels of public decision-making (State–Region Planning Contracts, European programmes); this way of using evaluation is probably one of the more promising, in view of the increasing complexity of public action systems.

# Annex

## Some facts on the French system of evaluation of public policy

The 1990 system (to which this paper directly refers) will be presented first, followed by the new system established by the decree of 18 November 1998.

### A. The decree of 22 January 1990

Setting up an interministerial system for evaluating public policy was one of the components of the policy for the renewal of government initiated by the Rocard Government at the end of the 1980s, the main thrusts of which were: a revamped industrial relations policy; a policy for the development of responsibilities; a requirement to evaluate public policies; and policy to improve accessibility and service to the public. The decree of 22 January 1990 set up an Interministerial Evaluation Committee (Comité Interministériel de l'Évaluation — CIME), responsible, in the words of the decree, for 'coordinating government initiatives on the evaluation of public policies'. As such, it had the right to choose evaluation projects which would be eligible for the National Evaluation Development Fund (Fonds National de Développement de l'Évaluation — FNDE), also set up by the decree. Once the result of the evaluations was known, it deliberated on the action to be taken. A Scientific Evaluation Council (Conseil Scientifique de l'Évaluation — CSE) was also set up. This was made up of 11 members appointed for six years (not renewable) by the President of the Republic, on the basis of their expertise in the field of evaluation or of economics, social science or administration.

The CSE was given the task of 'promoting the development of evaluation methods and defining an ethical approach'. More specifically, it was made responsible for 'ensuring the quality and objectivity of work eligible for the National Evaluation Development Fund (FNDE)' (a budgetary fund created to finance interministerial evaluations decided on by the Interministerial Evaluation Committee). To this end, it drew up two opinions on the evaluations covered by the interministerial procedure:

- the first concerned the methods and conditions under which the evaluation projects funded by the FNDE should be carried out;
- the second concerned the quality of the work carried out; it was issued at the same time as the evaluations themselves.

### **Policies evaluated under the 1990 system**

- Computerisation of government
- Regeneration of social housing
- Reorganisation of school, childcare and leisure time in line with children's needs
- Making public services accessible to the disadvantaged
- Policies to help young people in difficulty
- Protection of the wetlands
- Social and cultural measures by the State for civil servants
- Support for location of activities in conversion areas
- Measures to help workers aged over 55
- Individual help with housing
- The five-year law on employment
- Policies to combat poverty
- The prevention of major natural disasters
- Policy on mountainous areas
- Integration through the economy
- Energy management
- Policy to combat smoking and alcoholism

### **B. The new system established by the decree of 18 November 1998**

The 1998 reform demonstrates the will to relaunch interministerial evaluation, continuing to follow the main guidelines laid down in 1990: the link between evaluation, democracy and the modernisation of government; the requirements of pluralism, transparency and scientific rigour; the involvement of the administrative authorities in the evaluation of policies which concern them. Features which distinguish the 1998 decree from its predecessor are a determination to increase the involvement of local authorities in the evaluation of national policies and a determination to integrate the methodological work and the management of the evaluations to a greater extent. This was probably done at the cost of weakening the role of methodological authority that the Scientific Council had previously held.

The Interministerial Evaluation Council was abolished and the Scientific Council was replaced by a National Evaluation Council (CNE) made up of 14 members appointed for three years by decree of the Prime Minister (renewable once). Because of the way it is made up the CNE has a more political/administrative and

less scientific nature than the former CSE. In fact, the CNE's job is both political and methodological:

- every year it proposes an evaluation programme to the Prime Minister;
- it defines the main conditions for carrying out the evaluations (content and motives for the evaluation, mode of composition of the evaluation body, criteria for choosing consultants to carry out the studies, evaluative research etc.);
- at the end of the evaluations, it gives an opinion on the quality of the work done (as was the case in the previous system).

The Commission for the National Plan also had its powers increased in terms of leading the development of evaluation in government and in the management of the interministerial system. It itself provides secretarial services for the CNE.

The first annual evaluation programme drawn up by the CNE was approved by the Prime Minister in July 1999. It applies to the following policies:

- prevention and treatment of AIDS;
- public housing policy in the overseas departments;
- employment promotion measures in the non-market sector;
- the 'new services — youth employment' programme in the youth and sport sector;
- the policy on drinking water quality.

### **C. The main stages in drawing up an evaluation project**

- Definition of the scope of the evaluation
- Identification of the official or implicit objectives of the policy
- Identification of the purposes of, and issues involved in, the evaluation
- Initial diagnosis and hypotheses
- Drawing up of a framework of reference
- Formulation of the evaluation questions
- Organisation of the evaluation plan
- Survey of information available
- Planning of a study programme
- Choice of operators

## **D. Structure of the questioning (categorisation of the questions to be examined)**

- Implementation of the policy
- Achievement of objectives and indicators of results
- Effectiveness, own effects, impact
- Cost–benefit efficiency
- Cost-effectiveness
- Study of the action mechanisms
- Context of the implementation and conditions for generalisation

## **E. Role of the ‘evaluation body’**

(Extract from the *Petit guide de l'évaluation*)

‘Evaluation is neither pure knowledge nor pure political mechanism. An **autonomy zone** for evaluation, between science and action, must be recognised and organised. When the complexity of the subject warrants it, this may be done by setting up an ‘evaluation committee’, a group charged by the commissioner with supervising the evaluation. The evaluation committee is more than a steering committee: it must enjoy broad responsibility within the framework of a written mandate from the sponsor. Specifically, it has two types of task:

- (a) **To steer** the evaluation work, i.e. to oversee the putting together of the evaluation project, to translate the evaluation questioning into specifications for studies and research, commission and monitor the various studies, hold hearings with the resource people, administrators, experts or other ‘witnesses’, or even make group on-site visits.
- (b) **To integrate** the evaluation work, i.e. collate the documentation and the studies, validate their results, interpret these results in the light of the other information collected (from hearings or previously available information), answer the questions posed by the evaluation project, formulate some general conclusions and, if necessary, suggestions, and write the final report.

The committee is generally the place where reasonable conclusions are deduced by deliberation from the analysis and interpretation of studies. It should be seen as an **arbiter** between the different points of view and not a **mediator** between the different interests which need to be accommodated.

# From State action to collective action: France in a process of change: and the Commission?

**Jean-Claude Thoenig**

## **Notice**

This document accompanies a presentation made on 17 September 1996 as part of the seminar on governance organised by the Forward Studies Unit of the European Commission.

It looks at whether public action in France has changed over the last two or three decades and in what way. This should form the basis for a subsequent examination of whether the proceduralisation hypothesis adopted at the seminar with regard to action by the European Union, is applicable to France.

Given the amount of discussion which has already been devoted to the subject, and to avoid the usual pitfalls of intellectual radicalisation, this document confines itself to an empirical analysis of a long and comprehensive series of surveys carried out in France. I will speak neither of governance nor of crisis, as neither of these concepts applies to the results of the surveys.

1. Outwardly, the national system of government is characterised by the relative continuity of its institutional, political and administrative arrangements. The State remains unitary. Presidential power is strong and central. Parliament has a weak role as regards control of the executive. The restrictive and elitist higher echelons of the civil service monopolise administrative posts. National politicians are weighed down by local council mandates. Regulation by the budget is the main instrument of coordination. The official social partners (unions, employers associations and economic organisations) try hard to maintain their representativeness at a time when demands and requirements are sometimes vicariously — and often unexpectedly — expressed from certain quarters. The administrative sector has continued to grow in size and in status despite economic uncertainties. Finally, 95 % of the staff of government departments work in the outlying regional and local offices scattered throughout the country.
2. State reform has been undertaken periodically. The 1960s introduction of a planning-based budgeting system (RCB — Rationalisation des choix budgétaires) ended in disappointment. It was the end of the 1980s before the subject of management and administrative reform came up again, given the cautious approach taken by governments. A succession of initiatives followed which were much vaunted by the various prime ministers. In 1988, Michel Rocard termed his idea for reform 'administrative modernisation'. Ministries were asked

to set up 'centres of responsibility' to identify operational objectives and use techniques involving negotiation and instilling a sense of responsibility to motivate staff. Use of outside consultants, particularly those from industry, was encouraged. An interministerial mechanism to assess State policies was also introduced. Edith Cresson, as Prime Minister, used another method: she favoured decentralising administrative and public bodies from Paris to other parts of the country (including the ENA). Édouard Balladur and Alain Juppé had their own approaches. While with each successive government, the stated aims of reform were the same — improving quality, simplifying administrative procedures, bringing public services closer to their users (it should be noted that there was no productivity objective), the actual measures and their underlying philosophy changed. The lack of continuity in these efforts reflected the lack of governmental continuity. Overall, the results achieved were modest, but there were some notable and lasting exceptions<sup>1</sup>, at the initiative of particular departments (Ministries of Equipment and Defence), where certain principles of human resources management and the matching of resources to objectives were adopted, while respecting the sacrosanct rules on public accounting and the terms and conditions of officials.

3. The symbolic value of administrative reform — which is at least as important as the operational side — is part and parcel of good government. It is true that in the 1980s many new ideas and fashions emerged. Thatcher's methods of government in Great Britain made an impression, even though, in France, the consensus was that they would not travel. The paradox of Michel Rocard's approach was to try to keep French administrative methods while introducing management methods from industry, even though it meant making them compatible with the legal provisions applicable to government departments. The Right continued the same policy once back in power: the objective was to restore the State, not to privatise the public sector. The core of the public service, of which ENA was one of the symbols, was left untouched.

Outside factors played an important role in the taking of initiatives. Three of these factors were: enlargement of the market (which led to a proliferation of independent administrative agencies, free of the usual ministerial structures, regulating sectors such as audiovisual affairs, competition or financial markets, billing for their services and competing with international organisations and private companies, for example in the field of telecommunications or banking), the increase in Community aid, particularly to sub-national operators and, above all, the spectacular increase in the power and autonomy of local and regional authorities as a result of the decentralisation measures taken by the State from 1981 to 1985.

To a greater extent even than the budgetary constraints in the Maastricht Treaty, political decentralisation was the challenge facing State and government. Towns, counties and regions threw themselves into the breach, taking on

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<sup>1</sup> Gibert P. and Thoenig J.-C., 'La gestion publique: entre l'apprentissage et l'amnésie', in *Politiques et management public*, 11.1.1993.

powers delegated by the State (initially to divest itself of certain areas and financial burdens) and considerably extended their range of activities<sup>2</sup>. In many ways, their dynamism, the quality of their work and their flexible management surpassed what the State could offer (in terms of economic aid, social action, culture, etc.). The power held by the prefects over activist bureaucrats and somewhat apathetic local politicians before 1981 was followed by an open situation, which arose from competition between groups — including the State — to take charge of particular areas or problems. The power held by local authorities has left some government departments marginalised, through lack of legitimacy or resources, and rendered them obsolete, through lack of adequate organisation and technical skills. The questions of what the State's external services — which are the main instruments at the disposal of government departments — should be used for, and what new role should be given to the *préfet* — who symbolises the State and daily life — are vital for the State, which is still caught up with its outdated network of regional offices. The administrative problems associated with devolution are related to political decentralisation. This is, however, a rather empty statement at the moment, because decentralisation and devolution are not dealt with together.

4. In two decades, huge changes have taken place in local and regional government in France. From a self-reliant and even hierarchical system in which the State was dominant and public action was taken only within a clear institutional framework, a largely acentric State has emerged which is exemplified by the breaking down of barriers — between the public and private sectors and between local, national and supra-national affairs — and by the diversity of the protagonists.

Political and administrative affairs in France in the 1960s were defined by a set of relations linking the State — through its administration — to local communities under a system known as cross-regulation<sup>3</sup>. This was based on the principle of exchange between government departments and local elected officials (mayors, chairpersons of county councils etc.). It fostered arrangements whereby collective action at local level filled in the gaps left by central administration. The national territory was administered vertically. The State was predominant. It produced goods and services, enlisting the help of a few representative dignitaries from the regions. Public action was based on a combination of centralised technical and statutory rules for each sector and the implementation of strongly regionalised public policies, within the framework of a doctrine for action in which the values of public power and public service were tightly interwoven. The result was a close intermingling of local and national areas of activity. This was a subtle but effective solution to the key problem of how to integrate a varied social and geographic area through public action. The bureaucratic or technocratic hegemony of the central ministries combined with the co-opting of local dignitaries favoured growth and the sectoral approach.

<sup>2</sup> Thoenig J.-C., 'De l'incertitude en gestion territoriale', in *Politiques et management public*, 13.3.1995.

<sup>3</sup> Thoenig J.-C., 'La relation entre le centre et la périphérie en France', in *Bulletin de l'Institut international d'administration publique*, 36, October 1975.



Public territorial management in the 1990s, however, is based on a completely different model: that of the institutionalisation of collective action<sup>4</sup>. This is suited to a world in which regulation is no longer the only long-term answer, in which integration from the top or at national level is rarely or ineffectively imposed, while becoming increasingly relevant at grassroots level. Managing public affairs is becoming very problematic, with increasingly heterogeneous regions and fragmentation (depolarisation) of political power. Multiple interdependencies are emerging, between players, problems and sectors of public activity. New principles of cooperation have to be invented from one day to the next. The region, rather than the State, defines what constitutes a problem which should be dealt with in the public sector. Deprived of its control, the State contrives to be one of the many negotiating players. It manufactures opportunities for dialogue (policies on cities, the environment, town planning, safety, etc.), it does nothing by itself any more.

The State offers procedures which aim to provide a solution to multi-partner cooperation by suggesting medium to long-term avenues of action in a non-coercive fashion. Alongside law, statistics and politics, it sets itself up as one of the available tools with which a public authority may classify and identify empirical situations and problems as areas for action. It is not about allocation of services or resources but about encouraging debate and identifying issues. To identify the specific attributes of institutionalisation in accounting terms, it can be compared to the cross-regulation model. Cross-regulation is an adjustment which comes into play after public action in implementing policies, in the gaps in the bureaucratic system. It produces shifts within the generally accepted boundaries that apply to universalist problems and decisions. The system of action and the social scene are also strictly delimited. The institutions and the procedures are not a problem. The policies of the State are essentially distributive, redistributive and in conformity with regulations.

Institutionalisation is a completely different thing. The process of adjustment starts before any public intervention. It deals with defining the nature of public problems, with priority and arbitration between issues, and with the distribution and content of the principles on which decisions are based. Public action is built collectively. Institutions and political and administrative procedures become a problem. Because, in many ways, the boundaries which should separate collective issues from public policies, decision-makers from those affected by their decisions, the general from the particular, are blurred. Public power no longer manifests itself through the setting of universalist criteria, through overall or even hegemonic solutions or through the use of independent technical expertise. It acts essentially by formulating constitutive policies.

A constitutive policy lays down rules on rules or organisational procedures. It does not define the problem or recommend practical courses of action. It confines itself to setting out framework procedures to be used without prejudice to the level of agreement or involvement of the parties concerned. Scenarios for

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<sup>4</sup> Duran P. and Thoenig J.-C., 'L'État et la gestion publique territoriale', in *Revue française de science politique*, August 1996.

action and situations are created which offer scope for exchange and adjustment and which are given value, legitimacy and recognition by public power. A constitutive policy delegates action on content. It exercises constraint or a weak form of coercion on those affected by the policies it presumes to deal with. Finally, the number of players called upon to adapt is high and variable, as are their representativeness and relevance as partners in the exchange. The search for collective interlocutors leads public authorities to make use of constitutive policies.

In other words, constitutive policies are made in the hope that they will create windows of opportunity for collective action. In more precise terms, they can be thought of as potential policy windows, possible interfaces between the problems, resources and parties concerned. Their legitimisation is important, as it recognises that public power does not have a dominant or major role in the formulation of public policies. New policy systems, which are different from those set up by the official division between political and administrative work, are thus given an official stage and credible capabilities.

The institutionalisation of collective action is based on the principle of compulsory cooperation. The challenge is to build networks which can be used to provide ad hoc solutions to problems. Such compulsory cooperation leads to compulsory communication, for once it is no longer simply a question of direct benefits, protecting oneself by non-communication is a losing game. Someone who does not communicate is not up to date with things. There is no sense in hiding. Achieving quality relationships with others and being a team player have become virtues. The negotiations are open. When no one person has the key to a problem, informal relations are legitimate.

Acting in partnership allows risks to be mutualised, refusing openness leads to marginalisation. This is like the deskilling of social policies: social workers have lost exclusive ownership of the problems they deal with. In the same way, failure at school is no longer the sole responsibility of the national education system, and public safety is not under the complete authority of the police force. This underlines the importance of cognitive mechanisms when trying to build cooperation. What is needed is a collective lesson in 'joint conceptualisation'. Part of the activity of coordination is the creation of reference frameworks common to the interests concerned, without which subsequent efforts will come to nothing. Coordination should be based on collectively endorsed arguments; it should not be imposed regardless. In the educational context, it is strengthened by the pooling of experiences. The acceptable approach is not that of objectives but that of procedures of choice.

The challenge of institutionalisation lies in the production of informal but pragmatic systems, oriented towards problem management rather than the ratification of values and objectives. Informality as a mode of action has a new status which is not the same as that of cross-regulation, which is harnessed formality. It has to be invented each time and stands on its own merits. It is not adaptation. Innovation is at its core. It provides interdependent parties with a collectively identified solution. It does not hide but proclaims itself to be institutionalisation. It carves out a method of coordination which is an alternative to the

orthodox vision of public administration. While institutions emphasise durability, informality is defined as a management method which is always flexible and does not treat relationships as governed by strict rules.

The passage from the implicit to the explicit, from the latent to the manifest, has become legitimate in the name of efficiency. The State is distancing itself from a purely legal interpretation of its role. Each strategic dimension is subject to one condition: it must allow involvement in open negotiation. The balance of power replaces preferential treatment.

In these circumstances, money, authority and technical expertise become instruments of limited capacity and legitimacy where the State is concerned. The State's central position with regard to the peripheral regions it manages is not a sufficient basis for action by the State. Nodality — the ability to assemble the parties concerned, and to make them work together — or at least to identify and mobilise them and provide them with a mutual framework for adjustment, is becoming a decisive vehicle for State action. Contractualisation is a common institutional and management mode, whether in relation to policy on the city, social action or culture, not to mention town and country planning, economic development or the construction of communications infrastructures. Negotiation involves many partners, from both the public and private sectors, often new to the public arena and operating on a local or regional basis.

Institutionalisation is fostered by a division of public roles and policies which has become obsolete, together with the advanced state of fragmentation of the regions, competences and parties involved. It tries to tie together disparate elements and to make those who are still attached to their sectoral frame of reference assume collective responsibility. To achieve this, it works on two areas simultaneously: organisation and legitimisation. Organisation because it is structures and procedures that define the division of tasks. Legitimation because it specifies who can legitimately create value through dialogue and negotiation.

The 'cities' policy illustrates this dual approach. Complex procedures stipulate the conditions and limits set for joint tasks involving both public and private sectors. At the same time, institutionalism designates local players — sometimes well-established but more often little known, like young people's or immigrants' associations, to which it attributes considerable capacity and rationality — in relation to the problems tackled — and a semblance of independent representativeness in relation to the established channels of representative democracy.

Use of institutionalisation makes for greater differentiation between areas of public action. Outwardly it appears that the unity safeguarded by the political and administrative territorial system is being watered down and replaced by a chaotic and unworkable breakdown into individual cases and knee-jerk reactions. Looked at more closely, this is not the whole truth. Territorial management is not spinning uncontrollably towards anarchy: it is changing. To be more precise, the familiar set-up of electoral and administrative constituencies is being replaced by more specialised scenarios classified by type of issue and mode of exchange, each with a specific group of players. This principle of differentia-

tion, which is accompanied by the increasingly commonplace involvement of third parties, requires public authorities to be constantly vigilant and to adapt to the changing nature of problems. At the same time, differentiation complicates the game by placing political conflicts in a more autonomous context than other types of conflict relating to the statement and resolution of collective problems. Compartmentalising problems by type draws demarcation lines between the partisan approach and the management approach. Though locally elected representatives may not retain sole ownership of problems, they retain their monopoly over the legitimacy of political decisions. At the same time, the players which institutionalisation seeks to place in each area remain largely free to take part in collective action and to accept the modes of exchange proposed to them. They can, at any time, default, negotiate other arrangements or redefine the collective problem.

There is another dimension besides the differentiation of problems and those involved: institutionalisation creates the conditions under which problem areas can be distinguished. If the nature of a problem justifies making one area independent from others, there is still a need for some means of adjustment so that the problems and persons concerned can situate themselves in relation to each other and share some common reference framework. Specification takes the form of drawing up management rules for one particular area and only for that area. Special rules are established not only by the State but also by practical experience on the ground. Such rules apply to one area only and are not transferable to others. The rules on water are not at all the same as those on the city or on town planning. Such codes of conduct and arbitration are based on the particular nature of the sector or the area they concern: that is the basis for the operational procedures which regulate individual roles, including that of the State. At the same time, such codes of conduct evolve rapidly because new solutions and arrangements which emerge on the ground are constantly being added.

**5.** The role of lowest common denominator sits uneasily on the shoulders of the State. Two factors influence it:

- the globalisation of economic and political spaces (centrifugal force from above),
- subnational changes to regional planning (centrifugal force affecting public action from below).

The latter raises at least two questions:

- that of the failure to define territories (failure to cover the political territory and the area of public action),
- that of the break up of democracy into several areas.

In a situation where guidance from the centre is weak, the State allows the grassroots to act while keeping in reserve the arbitration solution and fixing the rules of the game: redistributive (through the tax and social welfare systems) and constitutive (through the institutionalisation of public action at territorial

level). At the same time, government departments are out of line because they continue to act as if they had a productive role.

6. Two models coexist in France: that of public regional planning (which takes differentiation as a starting point and moves towards the problem of integration) and that of European integration (which takes the problem of integration as a starting point and moves towards differentiated management, but in which the reality of differentiation is masked).

European integration has a centralising effect. Where centralisation takes place, it is because there is no 'confidence' in the periphery and the hierarchy imposes itself as the only mode of affirmation of specific political ideas. In terms of political sociology, consolidation of the centre could require the setting up of a strong hierarchy as soon as the risks of centrifugation appear. Everything depends on the origin of the uncertainty. If it is 'global' and concerns all parts of the organisation, it is important that each of these has the capacity to respond in a consistent manner. The standardisation of responses therefore becomes an effective procedure, provided that the hierarchy can lay down a doctrine on which action by decentralised units could be based. The theory of public power is based on this sort of construction. Centralisation and hierarchy are ways to manage turbulent areas.

French decentralisation coincides, however, with a political situation in which belonging to a national community is not a problem. The surge in local power and local independence is based on a lack of political uncertainty as regards the reality of the centre. The uncertainty relates more to taking charge of and dealing with public problems. Overall political unity authorises the decentralisation of management solutions.

Under these circumstances, the development of Europe has added its own, very different mechanisms. Quite apart from the strictly political decision-making procedures, the nature of the uncertainty being managed (the creation of an integrated geographic area) explains the intensive bureaucratisation of European policies and their high degree of standardisation. In other words, French decentralisation and European integration are based on different political issues and reasons for action, even if the latter favours the use of the principle of subsidiarity. At the local level, however, they produce similar effects — bringing about a radical transformation of the place of the State, rather than its disappearance.

7. The European Commission is faced with national realities which, as France's case suggests, do not present a single institutional architecture visible from the outside (from Brussels) or even from the capital (for example, from Paris). At the same time, the instruments of legislation and the budget are relatively weak, limited and unreliable.

To my mind, in the wake of proceduralisation (which is more a slogan than an operational instrument), I would recommend that the Commission adopt concrete measures to ensure:

- (a) mobility of all management officials, not just between directorates and services within the Commission, but also — above all — between Brussels and

the countries of the European Union — managers should have personal experience of work on the ground, both at national and subnational level, in at least two countries;

(b) a slightly more solid base for the Commission either in the Member States or in the regions — the question of Commission branch offices in the Community is both crucial and delicate;

(c) an inventory of the practices already in use, both formally and informally, in the Commission with regard to constitutive policies, with an impact assessment of each of these and an evaluation of the ability of officials to conduct them;

(d) a programme of training/awareness for all management staff on the conduct of constitutive policies and the running of networks — all managers recruited (or almost all) should receive such training fairly soon after recruitment;

(e) aid to certain countries or sectors of the Union so that they can adopt a more substantial and less bureaucratic approach to managing collective affairs — ‘institution building’ is vital in some cases to make up for the weaknesses and gaps in traditional administrative tools;

(f) an end to the representation of sectoral and national interests solely by official institutions or approved lobbies. Listening through local and sectoral channels can ensure that all sides of the story are heard.

In practical terms, proceduralisation requires that we free ourselves from that formidable duo — official slogans and informal routines.



# **PART III: GOVERNANCE IN THE EUROPEAN UNION**





# **Institutional reform: independent agencies, oversight, coordination and procedural control**

**Giandomenico Majone and Michelle Everson**

## **Introduction**

At its simplest, the core message of this paper is that the consensual approach, traditionally characteristic of regulatory policy-making in the EC, is no longer viable; instead, a clearer assignment of individual responsibilities for achieving policy objectives is urgently needed. In particular, the Community must be able to assume responsibility for the consistent and effective enforcement of European rules throughout the Union.

The experience of several decades shows that mutual trust and loyal cooperation among the Member States are not sufficiently developed to achieve economic integration without an adequate administrative infrastructure at EC level. Similarly, regulatory expertise and management skills vary too much across the Member States — and will vary even more in an enlarged Union — to justify exclusive reliance on traditional modes of decentralised enforcement.

The need for a clearer separation between political and technical-administrative responsibilities is also made more urgent by the growing politicisation of EC policy-making. The procedure introduced by Article 214 of the Consolidated Treaties introduces a deep transformation in the relationship between the European Parliament and the Commission. The 'parliamentarisation' of the Commission is becoming inevitable as more and more tasks involving the use of political discretion are shifted to the European level. It is also a positive development from the point of view of democratic legitimation, but it does force us to rethink the core insight of functionalism — that integration is most likely to occur within a domain shielded from the direct clash of political interests — and to identify domains which must still be shielded from such conflicts.

The main reason why all mature democracies choose to delegate powers to non-majoritarian institutions such as independent central banks and regulatory agencies is the need to preserve policy continuity against the changing preferences of variable parliamentary majorities. In turn, policy continuity is seen as a necessary condition of policy credibility. Similarly, the need to preserve the credibility of the integration process, notwithstanding the growing politicisation of the Commission, provides the strongest argument in favour of an increased recourse to non-majoritarian institutions of regulatory policy-making at European level.

For all these reasons, the question is no longer whether European agencies are needed, but rather how they should be designed so that their accountability

may be secured and so that their sectoral responsibilities can be coordinated with broader horizontal concerns.

At the European level, one particular legal barrier to the consolidation of existing European agencies, as well as the foundation of new independent institutions better adapted to the EC's demanding regulatory tasks, is the continuing influence of the *Meroni* doctrine of the European Court of Justice (ECJ); a reading of Article 4 of the Rome Treaty which allows for the delegation of EC competences only under very limited circumstances. It is the contention of this paper, however, that the time is now ripe for a reassessment of the constitutional and legal limits to the delegation of powers within the EC (*infra* III) and for the detailed consideration of new procedural controls, which will not only secure the accountability of European agencies, but will also ensure that they form a coordinated part of a consolidated programme of European regulatory activity (*infra* IV).

## The need for European agencies

We have already noted the strength of the *prima facie* case for European agencies. The more detailed arguments which underline our assertion that the primary question is not one of whether Europe needs agencies, but rather one of how such European agencies should be structured, fall into four closely interrelated categories. (1) Europe is experiencing a period of institutional change and a politicisation of hitherto largely administrative bodies, such as the Commission. This situation (2) requires us more closely to consider the evolution of institutions which can imbue European law-making with a visible degree of regulatory commitment. Equally, however, European regulatory activity is currently characterised by (3) a perceptible institutional deficit. In this regard, many reasons speak for (4) the 'filling in' of the institutional gap by means of agencies in preference to other regulatory solutions such as self-regulation.

## The perils of politicisation

Policy-makers and students of European integration have been so absorbed by concerns over the democratic deficit that they have generally failed to probe the consequences of the increasing level of politicisation of EC policy-making. The idea of reducing the democratic deficit by assigning a larger role to the European Parliament (EP), and, in particular, by involving the Parliament in the appointment of the Commission, is an old one. It featured in the solemn declaration on European Union adopted in Stuttgart in 1983; it has always been high on the list of the EP's demands; and it has figured prominently in the arguments of those who advocate the development of the Union in the direction of a parliamentary system.

The procedure introduced by Article 214 of the Consolidated Treaties, contains a number of radical changes with respect to previous practices — the custom of the newly appointed President of the Commission to be heard by the EP's en-

larged Bureau, and for the Commission to present its programme to the full house of the EP shortly after it takes office — but also with respect to the new Article 158 of the Treaty on European Union. If, under Article 158, the national governments could nominate a new Commission President only after consulting the EP, now their nomination must be approved by Parliament. Moreover, the President and other members of the Commission are subject to a vote of approval by the EP, as in classical parliamentary systems.

A further institutional innovation is offered by the link, established in 1995, between Parliament's term of office and that of the Commission. Since a newly elected Parliament takes part in nominating the Commission, any significant changes in the EP's composition can be reflected at Commission level.

Already, the difficulties surrounding the appointment of the Santer Commission showed that the EP intends to influence the distribution of portfolios among Commissioners. The events of March 1999, further strengthened these tendencies. Influential MEPs are even advocating a 'Parliamentary Commission' in which the composition and programme of the Commission would reflect the will of the parliamentary majority.

As Renaud Dehousse has pointed out (Club de Florence, 1996), these developments augur a deep transformation in the relationship between the EP and the Commission. The Commission will, henceforth, be fully responsible to the EP, whose influence will be felt in all its activities, whether administrative or legislative. Thus, the right given to the EP to request the Commission to 'submit any appropriate proposal on matters in which it considers that a Community act is required' (Article 143 Consolidated Treaties), may be seen as coming close to a true right of legislative initiative. It appears that the signatories of the Maastricht and Amsterdam Treaties, in their desire to establish the Union's democratic legitimacy, have radically modified the balance of power between Commission and Parliament. President Prodi's recent declaration that the Commission should augment its political rather than technocratic functions may, in part, be seen as a response to this increased politicisation.

These developments have been informed, more or less consciously, by a particular model of democracy — the strict majoritarian or 'Westminster' model — which views parliaments as the sole, or, at the least the main, source of legitimation for policy-making and governance. Under the strict version of this model, all institutions that are not directly accountable to the voters or to their elected representatives — independent central banks and regulatory commissions, but even the courts — are democratically suspect.

The tendency to equate democracy with majority rule is quite common, but is nonetheless puzzling, since the pure majoritarian model of democracy is the exception rather than the rule: most democratic polities, with the partial exception of Britain and of countries strongly influenced by the British tradition, rely extensively on non-majoritarian principles and institutions. This is particularly true of federal or quasi-federal systems. Federalism is fundamentally a non-majoritarian, or even an-

ti-majoritarian, form of government since the component units often owe their autonomous existence to institutional arrangements that prevent the domination of minorities by majorities.

We must acknowledge that an increasing level of politicisation of Community policy-making becomes unavoidable as more and more tasks involving the use of political discretion are shifted to the European level. Thus, a significant part of the third pillar, as well as the Schengen arrangements have been moved to the first pillar. These developments and the problems connected with the next enlargement, not only increase the administrative tasks of the Commission, but also emphasise the Commission's political responsibilities. In this context, the demand for a greater role of the EP becomes understandable.

At the same time, we should not be blind to the risks which politicisation entails for the process of European integration. It may be worthwhile to recall the core insight of functionalist theories: integration is most likely to occur within a domain shielded from the direct clash of political interests. This should not be interpreted as a rejection of democracy in favour of an abstract model of technocracy. Rather, it is the realistic appreciation of the fact that in the early stages of integration, political conflicts are about divergent national interests rather than the conflicts along ideological or party political lines with which we are familiar at national level. The same functionalist line of reasoning explains the many non-majoritarian features of the founding Treaties. Hence, for several decades, law and economics — the discourse of legal and market integration — provided a sufficient buffer to achieve results that could not be directly obtained in the political realm. The increasing politicisation of the Commission forces us to rethink the core insight of functionalism — and to identify domains which still have to be shielded from the direct clash of political interests.

## **Agencies as an instrument of regulatory commitment**

The growing politicisation of the Commission — a process which is both inevitable and positive in terms of perceived legitimacy — is perhaps the strongest argument in favour of an increased recourse to non-majoritarian institutions of regulatory policy-making at the European level. In particular, it forces us to consider the problem of achieving credible regulatory commitments.

The commitment problem is a direct consequence of the nature of the democratic process. One of the defining elements of democracy is that it is a form of government *pro tempore*. The time limit inherent in the requirement of elections at regular intervals is one of the main arguments for democracy, but it also implies that the policies of the current majority can be subverted, legitimately and without compensation, by a new majority with different and perhaps opposing interests. Hence, political executives tend to have shorter time-horizons than their counterparts in the private sector and lack the ability credibly to commit themselves to a course of action.

At the same time, between elections there are few limits to what a cohesive majority can do. The discretionary power of the current majority gives rise to the problem known to economists as 'time inconsistency'. Time inconsistency occurs when a policy which appears to be optimal at time  $t_0$  no longer seems optimal at a later time  $t_n$ . Without a binding commitment holding them to their original plan, governments will use their discretion to switch to what now appears to be a better policy. The problem is that if private actors anticipate such a policy change, they will behave in ways which prevent policy-makers achieving their original objectives. For example, a policy of low inflation may be optimal over the long run, but at any time there can be short term gains from surprise inflation. If policy-makers have the possibility of revising the original policy to achieve such short-term gains, private actors will recognise this and change their behaviour in such a way that the outcome is worse than if the *ex ante* optimal policy had always been adhered to.

Such arguments provide the main theoretical justification for the independence of central banks; *mutatis mutandis*, they also justify the independence of regulatory agencies. Rogoff (1985) supplies us with the classic reference: selection of a central banker whose preferences are different from the preferences of a majority of voters implies that the banker must be independent. Otherwise the voters would be tempted to dismiss him when he is trying to implement a restrictive monetary policy. Hence, it is important that delegation to the central bank is credible. In fact, the Statute of the European Central Bank gives the Bank a very high level of independence, which should guarantee the Bank's ability credibly to pursue its main objective of price stability.

The logic of the model of an independent central bank, however, holds also in the area of economic and social regulation. In most countries, regulatory policy-making is now delegated to specialised agencies operating at arm's length from government. The point of insulating regulators from the political process is to enhance the credibility of regulatory commitments. The head of an independent agency will, normally, attach more importance to the agency's statutory objectives than the government, parliament or the average voter. Agency heads generally expect, and are expected by others, to have a well-defined agenda, and to measure their success by the amount of the agenda they accomplish. They also are aware that courts can review their decisions and can overturn them if they seem to depart too greatly from the language and the aims of the enabling statute. Thus, regulators have an additional incentive to pursue the statutory objectives of the agency, even when those objectives, because of changed economic or political conditions, no longer enjoy popular support.

To summarise, the delegation of policy-making powers to non-majoritarian institutions, such as an independent central bank and regulatory agencies is a means whereby governments can credibly commit themselves to policies which would not be credible in the absence of such delegation. This credibility problem will become increasingly severe at European level with the growing influence of the EP upon the nomination and performance of the Commission, and the consequent politicisation of Community policy-making. For example, one can expect renewed interest in the idea — advocated, among others, by the German Federal

Ministry of Economics — that the administrative powers of the Commission in the areas of cartels, abuse of a dominant position, mergers and perhaps also State aids, be transferred to an independent European Cartel Office, while legislative powers in this area would remain with the Commission.

## The institutional deficit

### *(a) Foodstuffs, pharmaceuticals and technical harmonisation*

A second reason for proposing the creation of European agencies in several areas of economic and social regulation is the perception of EU citizens and economic actors alike, that the present system — with its heavy concentration on rule-making and its weak control of the enforcement process — is no longer able to cope with the regulatory challenges of globalised markets. This negative perception has been powerfully reinforced by the recent series of crises in the food safety area. In this regard, it may be worthwhile to recall that a political decision was taken in 1990 that a consolidated European Food Agency was not needed. Instead, an attempt was made to foster better coordination of national scientific expertise.

Such efforts notwithstanding, the current approach to issues of food safety lacks credibility, not only in the eyes of EU citizens, but also internationally — when, at the June 1999 meeting of the G8, President Chirac proposed the creation of a World Scientific Council on Food safety, the US reaction was noteworthy for its heavy sarcasm. American officials commented that should Europe require a strong regulatory body for food safety, they need only copy the US Food and Drug Administration (*Financial Times*, 21 June 1999). Perhaps because of this reaction, France is now proposing the establishment of a European Agency for Health and Environmental Safety (*Le Monde*, 25 June 1999).

Another highly instructive example of the limits of a highly decentralised regulatory framework is the failure of an early form of mutual recognition for the approval of pharmaceuticals. The old procedure for EC-wide approval included a set of harmonised criteria for testing new products, and the mutual recognition of toxicological and clinical trials conducted according to EC rules. In order to speed up the process of mutual recognition a 'multi-State drug application procedure' (MSDP) was introduced in 1975 (Council Directive 75/319/EEC, OJ L147/13). Under the MSDP, a company that had received a market authorisation from the regulatory authority of a Member State could ask for the mutual recognition of that approval by at least five other countries. The authorities of the countries nominated by the company were required to give their approval, or to raise objection, within 120 days. In case of objections, the Committee for Proprietary Medicinal Products (CPMP) had to be notified. The CPMP would express its opinion within 60 days, and could be overruled by the national authority that had raised objections.

The procedure did not work well. Actual decision times were much longer than those prescribed by the 1975 directive, and national regulators did not appear to be bound either by decisions of other regulatory bodies or by the opinions of

the CPMP. Because of these disappointing results, the procedure was revised in 1983. Now, only two countries need be nominated in order to set a multi-State approval application in motion. However, even this new procedure failed to streamline the approval process, since national regulators almost routinely continued to raise objections against each other. These difficulties finally induced the Commission, strongly supported by the European pharmaceutical industry, to propose the establishment of a European Agency for the Evaluation of Medicinal Products, and of a new centralised procedure, compulsory for biotechnology products and certain types of veterinary medicines, and available on an optional basis for other products, leading to an EU-wide authorisation. Both the agency and the centralised procedure are established by Council regulation (No 2309/93 of 22 July 1993).

The 'new approach' to technical harmonisation likewise leaves a number of issues still unresolved. The crucial problem here is the tension between the essential safety requirements of the 'new approach' directives, which are legally binding, and the voluntary character of the harmonised standards, which provide the technical framework for risk assessment. According to the Council Resolution of 7 May 1985 on the New Approach to technical harmonisation and standards (OJ C 136/1), the essential requirements should be worded precisely enough to create, upon transposition into national laws, legally binding obligations. They should also be 'so formulated as to enable the certification bodies straight away to certify products as being in conformity having regard to those requirements, in the absence of technical standards'. It is not clear, however, how the risks may be addressed without the technical framework which the European standardisation bodies are supposed to provide. With few exceptions, such as the safety of toys and pressure vessels directives, most new approach directives involve essential requirements expressed in such general terms that risk assessment is impossible without the support of detailed technical standards.

It has been argued (Previdi, 1997) that the serious difficulties experienced by European standardisation in a number of areas, perhaps most strikingly in the area of construction products, derive directly or indirectly from the artificial separation that has been made at European level between regulation and standardisation. The artificial nature of the distinction is reflected in the persistent tensions that characterise relations between the Commission and the European standardisation organisations — a situation which industry has often deplored. The point is that the Commission is confronted by a dilemma that cannot be resolved within the existing institutional framework. On the one hand, the separation of regulation and standardisation, and the independence of the standardisation bodies were necessary in order to allow internal market legislation to advance rapidly. On the other hand, independence implies that harmonised standards must be voluntary — since delegation of the power to adopt binding standards would require a real executive power which the Commission does not possess under the Treaty — with all the legal uncertainty which this situation entails. A way out of this dilemma, according to Previdi (1997, p. 241) would be the creation of regulatory agencies 'endowed with autonomous decisional competences independent from those of the Member States (thus, excluding any decisional procedure of a comitology type!), and responding to the professionalism requirements indispensable for risk regulation'. It



would be the task of such agencies to set all the parameters and reference values to flesh out the legislative objectives, which by their nature cannot be part of the voluntary area now set consensually through technical negotiation, thus achieving the principle stated in the 1985 resolution, namely that binding regulatory precepts ought to be reflected in sanctionable obligation.

*(b) Telecommunications*

As the examples discussed above indicate, legislative harmonisation is not sufficient to create and sustain a truly integrated European market. Regulation is not achieved simply by passing a law, but requires detailed knowledge of and intimate involvement with, the regulated activity. In all industrialised countries this functional need has led, sooner or later, to the creation of specialised bodies — agencies, commissions, boards, tribunals — capable of fact-finding, rule-making, and enforcement. The lack of such administrative infrastructure at the European level is a serious obstacle to the completion of the internal market.

The limits of the legislative approach to market integration are also becoming apparent in the case of telecommunications. Telecoms regulation is particularly interesting not only because of the economic and political significance of the industry, but also because the principles of open network provision (ONP) legislation provides the basic framework for future regulation of other trans-European networks (TENs). Although the telecom market is, by now, more or less completely liberalised, it is doubtful that the legislative framework already in place will be sufficient to achieve a well-functioning market for telecoms equipment, services and infrastructure. Among the shortcomings of the current, highly decentralised regulatory system are: imprecise obligations and pricing rules for interconnection; the absence of a one-stop-shop for licenses; inconsistencies between competition policy and industry regulation at both national and European levels; mechanisms of dispute resolution which fall far short of the standards of judicial review; uneven quality of national regulation in terms of independence, as well as expertise; and, poor coordination of the national regulatory authorities among themselves and with the European Commission (Pelkmans, 1997).

While some of these shortcomings could be corrected by improved legislation, the deeper problems of the present regulatory system are institutional. This explains the recurrent demands for a European telecommunications agency. A well-publicised plea for such an agency was made by the High Level Groups on the Information Society (Bangemann Group) in a report to the European Council meeting at Corfu in June 1994. According to the report of the Bangemann group, the European regulator, in addition to advising the national regulatory authorities, would be charged with issues of a Community-wide nature such as licensing, interconnection, frequency allocation, and numbering.

More recently, in the spring of 1997, the EP, in the conciliation procedure on the interconnection directive, forced the Council to agree that the Commission study the merits of a European Telecommunications Agency, and that the result of the study should be used in the review of the present system to be carried out in

1999. Thus, the issue of the European Telecoms Agency is now on the political agenda. However, opinions on the structure and powers of the new regulatory body still differ widely.

The present decentralised system of telecoms regulation is supported by the Council and by the incumbent operators. The Member States argue that the national regulators and the newly established regulatory regimes should be given a fair chance to prove themselves. The compromise on a highly decentralised set-up was necessary in order to establish an internal market for telecom services in the first place. However, because of the shortcomings noted above and also of the poor record of implementation and enforcement of non-voice liberalisation between 1990 and 1995, the present system suffers from serious credibility problems. Hence, it is unlikely to represent a stable institutional solution of the complex problems of telecoms regulation in Europe.

Here, perhaps the best solution would be an intermediate body lying between the model of a European FCC — the US FCC (Federal Communications Commission) has all the necessary powers to declare that its regulation supersedes State regulation if inter-State telecoms are significantly affected, and to settle disputes that cannot be resolved at State-level — and the current decentralised regime. The European telecoms regulator would be neither a centralised body, nor a collection of national representatives, but a network built on the ONP Committee.

### *(c) Public utilities*

Telecoms regulation is, however, only one special case of the general problem of regulating public utilities based on large physical networks such as electricity, gas, water and railways.

Technically, economically and politically, public utilities are special industries. Their technology exhibits, in general, important economies of scale; a large proportion of their assets are specific or, in the language of economics, non-redeployable; and their customers comprise the entire voting population. Each of these characteristics has significant regulatory implications.

First, as natural monopolies, utilities have always been subject to some form of regulation. Second, public utility regulation is constantly exposed to political interference because the social significance of the services offered by these industries naturally attracts the attention of politicians. No government can ignore the utilities, whether they are publicly or privately owned. Finally, the non-redeployable nature of their assets makes the utilities particularly fragile industries. Once the investments have been made, politicians may be tempted to use regulation to set prices below long-run average costs, de facto expropriating the utilities' sunk costs. Hence, without a credible regulatory commitment to allow a fair rate of return on capital, the companies will refuse to invest or will not invest enough to satisfy actual demand.

History is full of examples of attempts to gain political advantages by manipulating the prices of public services and of attempts by the public utilities to

fend off such actions. For example, recent research suggests that the initial creation of State public utility commissions in the United States was related to the inability of the municipalities to commit to stable regulatory regimes. Throughout the 19th century, American public utilities were typically regulated at the municipal level. Between 1907 and 1922, nearly 30 States created utility commissions, apparently to prevent cities from imposing onerous regulations that would discourage future investments (Troesken, 1996).

In contemporary Europe, the problem of public utility regulation is complicated by the fact that, until recently, most public utilities were, and some still are, State monopolies. Because of this close association with the national governments, the former monopolists still enjoy enormous political and economic power with respect to would-be competitors and the consumers at large. Indeed, the managers of the newly privatised utilities have played an important role in the definition of the regulatory system which was supposed to control their companies. Thus, because of the 'regulatory bargain' struck between the utilities and the British Government at the time of privatisation — a bargain generally slanted in favour of the utilities — regulators operate within a regulatory system which was the outcome of an earlier capture. As Veljanovski (1991) has shown, this happened in the very formulation of the authority of the regulatory agencies and the structure of the industry itself. Such pre-emptive regulatory capture has occurred not only in the United Kingdom, but in all the other Member States.

Because of this situation, the doubts expressed above about the adequacy of the current decentralised system of telecoms regulators, are even stronger in the case of other public utilities, in particular, electricity. It seems highly unlikely that the equivalent of the ONP Committee established by Directive 90/387 for telecommunications, would be forceful enough to restrain the power of the former monopolists, and the tendency of national governments to intervene in their favour. The members of the ONP Committee are drawn from the national regulatory authorities, but many Member States still lack credible public utility regulators.

Also Directive 92/44 on the application of ONP to leased lines, introduced a number of significant innovations. Thus, Article 8 of the directive requires the Member States to establish a dispute-settlement procedure which should be easily accessible, capable of settling disputes in a fair, timely and transparent manner, and respect due process and the rights of parties to be heard. Article 12 introduces a conciliation procedure for disputes that cannot be resolved at the national level, or involve telecommunications operators from more than one Member State, through review by a working group of the ONP Committee. However, the working group is charged solely with non-binding arbitration and, thus, can be seen, at most, as a first step in the direction of centralised conflict resolution.

It is possible to argue that the establishment of a European Public Utility Commission (EPUC), responsible for the implementation of all ONP legislation, would remedy the defects of the current system, and create a countervailing force to the power of the former State monopolies. Given the special characteristics of the public utilities, the EPUC should enjoy direct democratic legitimation. It should

also be credible as a quasi judicial body, capable of settling transboundary disputes in a fair, timely and transparent manner. These requirements could be satisfied if the majority of the 'Commissioners' (for example, four out of a total of seven members) were designated by the European Parliament and the Court of First Instance.

## **The institutional preference for agencies**

Here we discuss the more general justifications for the delegation of powers to regulatory agencies rather than other institutions. The main institutional alternatives to regulatory agencies are government departments (or Directorates-General), control by Courts, or self-regulation. A number of factors may influence the placing of new regulatory tasks on agencies, rather than allocating them to existing departments, or giving more work to courts. In some cases, the new activities may not match the already existing duties of departments or courts. In other cases, functions are thought likely to be better administered if they are the sole or central interest of a specialised agency, rather than a peripheral matter dealt with by someone whose attentions are primarily directed elsewhere.

The increasing technical and scientific complexity of many regulatory issues has also led to the establishment of agencies which are seen as experts in these substantive matters. The required expertise might have been developed inside existing departments or courts, however, the need for expertise is often found in combination with a rule-making, decision-making or adjudicative function that is thought to be inappropriate for a government department or court (Baldwin and McCrudden, 1987, pp. 4 and 5). Moreover, a department is often seen as not able to provide the independence from government needed in some of these applications of expertise. This is because experts are oriented by goals, standards of conduct, cognitive beliefs and career opportunities that derive from their professional community, giving them strong reasons for resisting interference and directions from political outsiders. Thus, any expert agency provides a much more attractive working environment than a bureaucratic organisation.

Delegation of rule-making powers, may also be needed where constant fine-tuning of the rules or standards, and quick adaptation to technical progress are required. As the experience of technical standardisation in the EC prior to the new approach demonstrates, a collegial body, such as the Council of Ministers, often cannot justify devoting the time needed to these matters, or else they simply cannot act quickly enough.

Agencies' separateness from government may also make them a preferred mechanism for co-opting certain groups into the decision-making process. This seems to have been an important consideration in the creation of such agencies as the European Foundation for the Improvement of Living and Working Conditions and the European Agency for Health and Safety at Work. In more general terms, agencies are intermediary institutions between State and civil society, in that they

are an instrument of State action, but at the same time they open the door of governmental institutions to civil society.

Equally, when regulatory responsibilities are delegated, not to agencies, but to private or semi-private bodies, one speaks of self-regulation. Self-regulation plays a significant role in highly technical areas, such as standardisation and wherever product quality is an important consideration. A self-regulatory organisation (SRO) can normally command a greater degree of expertise and detailed knowledge of practices within the relevant area than a public authority. A second advantage is that the rules issued by a private body are less formalised than those of public regulatory regimes. This informality reduces the cost of rule-making, facilitates quick adaptation of the rules to new technical knowledge and changing conditions, and permits more flexible enforcement. Another attraction of SROs in a period of fiscal austerity is that the administrative costs of self-regulation are normally internalised in the trade or activity which is subject to regulation.

However, as we have seen with regard to the 'new approach to technical harmonisation and standardisation within the EC', self-regulation may also pose problems. In the EU context, the *de facto* binding nature of voluntary standards as elaborations of general 'essential requirements' causes problems of liability should a harmonised standard turn out to be defective: the European standardisation organisations are private-law associations with which the Commission has only contractual relations as it has with hundreds of private consultants. In this case, an agency structure might be a preferable solution.

Equally, self-regulation also poses the problem of the risk of capture by the regulated interests. Capture is also a problem for agencies, but with self-regulation, regulatory capture is there from the outset. Precisely to reduce this risk, the European standardisation organisations are required to allow all interested parties to participate in standard-setting. However, this requirement may not be sufficient to give adequate representation to diffuse, ill-organised, interests. Public regulatory agencies may provide better protection of such interests than an SRO.

Monitoring is a third potential problem. As already mentioned, an important advantage of entrusting regulation to SROs is that practitioners are likely to be better informed than the public authorities about what is happening in their field of activity: their ability to discover and expose malpractice is superior. The disadvantage is that the willingness of an SRO to publicise and punish wrongdoers is likely to be less than that of a public regulator. One possible solution is a two-tiered system where a public agency acts chiefly as a regulator of regulators, with the SRO's handling day-to-day rule-making and supervision.

In conclusion, self-regulation — at both national and European level — may be a useful adjunct to statutory regulation administered by a public, independent agency, but cannot replace it.

## **The Meroni doctrine reassessed: preserving the institutional balance**

### **The delegation problem: the separation of powers and democratic accountability**

In a recent article (Dorf and Sabel, 1998), two prominent American academics have reiterated the vital and responsive governmental role played, in the United States, by the founders of the new deal commissions of the 1930s and the regulatory agencies of the 1970s. In the 1930s, a desire to increase congressional activity in the area of economic regulation led to a vast increase in governmental tasks, which the Congress itself did not have the resources to undertake. Similarly, in the 1970s, the complexities of social regulation overtaxed and overburdened both the expertise and the technical legislative resources of the congressional arm of government. However, rather than abandon ambitious regulatory programmes, or be satisfied with sub-optimal legislative regulation, the founders of the new agencies responded innovatively to the 'serious mismatch between the increasingly specialised functions of government and the administrative instruments at its disposal' (Majone, 1996). They established new and experimental institutions, which were not foreseen within the scheme of American Government, or the American Constitution.

In this sense, boards, commission and agencies, operating at arms length from traditional governmental structures, have long existed and have always possessed a form of functional legitimation of their own. Where the initial choice is one of giving up ambitious legislative programmes, or alternatively of being content with their sub-optimal legislative execution, a third way, or recourse to unforeseen and experimental institutions brings obvious advantages through its ensuring of efficient and responsive government. However, as also noted (Dorf and Sabel, 1998), the use of such innovative institutions also gives rise — in law — to important legitimacy concerns, and, in particular, raises the question of how to ensure the faithfulness of these bodies to the long-term aspirations and more immediate political goals of the citizenry as a whole.

Traditionally, such legitimacy concerns are grouped together under the heading of the 'delegation problem'. Generally-speaking, however, this problem is twofold. First, it entails, a 'high-level' constitutional dilemma, relating to the maintenance of a constitutionally-stipulated 'separation of powers', or a clear distinction between the exercise of judicial, legislative and executive functions; and thus encompasses a concern, dating back to the 18th century, that civil society must be protected from any intrusive or overextensive exercise of governmental functions by any one institutional actor. But, secondly, it also entails a more practical consideration about how the law might ensure democratic accountability, or the adherence of independent institutions to the policy goals identified by the political community and the citizenry.

## Meroni and the European balance of powers

In the setting of the European Communities and European Union, however, the traditional delegation problem has taken on an added complexity by virtue of Article 4 of the Rome Treaty's stipulation that the legitimacy of European institutions must be based, not simply upon the general principle of the separation of powers, but, more particularly, also upon the European principle of the 'balance of powers' (Laenerts, 1993). In this sense, then, the delegation of competences to 'new' institutions created outside the structures of the EU must not only satisfy the dual requirements (found in the shared constitutional traditions of the Member States) of democratic accountability and the strictly delimited exercise of governmental power. Instead, delegation within Europe must also be compatible with the functionalist treaty scheme that sees the relative powers of (self-interested) national and (integration oriented) European institutions, as well as the vital core sovereignty of the Member States, balanced, consolidated and preserved by the provision that each of the institutions named within Article 4 Rome Treaty act only 'within the limits of the powers conferred upon them by the Treaties'. Accordingly, in this manner, the functionalist commitment to consolidated integration embodied by European institutions might be institutionally weighed against the more nationally self-interested concerns of the Member State Governments.

The European Community's complex threefold commitment to the strictly delimited exercise of European competences, democratic accountability within the European scheme of government and the European balance of powers was, accordingly, early confirmed by the 1958 case of *Meroni v High Authority* (case 9/56 (1957-8) ECR 133, p. 151). Relating specifically to the ECSC Treaty, *Meroni* remains 'good law', applies *mutatis mutandis* to all European Treaties, and, in effect, seems to act as an immutable barrier to the wide-ranging delegation of complex modern administrative tasks to institutions not named within the European Treaties. In the Court's 1950s reasoning, the Commission could, in fact, delegate tasks to experimental institutions of European administration. However, in line with the primacy of the European balance of powers, as well as 'democratic' and power-delimiting concerns that continuing oversight need be maintained, such a delegation was subject to certain strict constraints:

- (i) delegation might only relate to powers which the Commission itself possessed;
- (ii) such assignment must relate to the preparation and performance of executive acts alone;
- (iii) as a consequence of this, independent bodies may not be afforded any discretionary powers;
- (iv) the Commission must consequently retain oversight over the delegated competence and will be held responsible for the manner in which it is performed;
- (v) and finally, delegation must also not disturb the 'balance of powers' within the European Community (Laenerts, 1993).

As a natural consequence of these limitations, whilst European agencies have developed, they have also, to date been severely restricted in their sphere of operation and subordinated, in the institutional framework, to the European Commission.

## The modern administrative challenge

Notwithstanding the continuing validity of the normative concerns and constitutional ideals that underlie general notions of the separation of powers and the more particular European emphasis upon the balance of powers, the current, somewhat ad hoc, environment of European regulatory institutions (of agencies, committees and regulatory networks) contains many indicators that the strictness of the *Meroni* doctrine is no longer fully compatible with the complex demands now being made of European regulation.

Most striking in this respect is the clear paradox between the ECJ's traditionally restrictive reading of Article 4 Rome Treaty, and the consequent retardation in the development of fully independent — or 'external' to named treaty institutions — European agencies and the motivation which led to the insertion by the SEA of Article 145 into the EC Treaty; demanding, and indeed obliging the Council to delegate a wide-range of 'implementing' powers to the Commission. With the Court of Justice confirming (most recently, in *Germany v Commission*, C 240, p. 90) that the Community concept of 'implementation' indeed does entail a wide rather than restricted measure of discretion, the case of 'internal' delegation within the Communities and Union seems, thus, to reflect a more modern view of administration, which accepts that delegatee authorities must be afforded a wide room for policy-forming and implementing manoeuvre in their daily activities.

One possible explanation for the dichotomy between these two views of administration within the Union, is nonetheless provided by the growth within the institutional structure of the EU of a series of regulatory, management, scientific and advisory committees, retardedly given a legal basis under the Council's comitology decision (derived from Article 145 EC Treaty, (1987) OJ L 197, p. 33), and grouped under the Commission umbrella, though with subsidiary Council/Member State representation. The comitology system accordingly plays a major part in the exercise of the implementing powers delegated to the Commission by the Council and so engages in the specification of framework directives, and thus of regulatory standards, within the internal market.

With its threefold emphasis upon continuing national representation within the delegatee body or committee, the primacy of the Commission's policy initiative and the reference to scientific and technical expertise, the committee system is thus argued to supply the vital connection between delegatee bodies not foreseen by the Treaties and the 'balance of powers principle' contained within Article 4 Rome Treaty (Vos, 1997). First, national representation within the all-powerful regulatory committees is argued to ensure the continuing core sovereignty of the Mem-



ber States, particularly with regard to their own constitutional duties to secure the health and welfare of their citizens. Secondly, the Commission's right of initiative is claimed to maintain the credibility of the Community's functionalist/integrationist goals, ensuring that policy-making within the committee system is not directed to subsidiary or short-term political goals. Finally, committees of experts are also said to contribute to the functionalist/integrative credibility of the Community, seeking to ensure that decision-making is not merely rational, but may be proven to be such.

Not wishing to challenge this reading of the manner in which Committees supply the essential bridge to the notion of the balance of powers, it needs nonetheless immediately to be noted, that, for all its value, the comitology system has not satisfied public demands that administration be made politically accountable. Thus, notwithstanding the wide-ranging committee practice of publishing their agendas and reports (also on the Internet), commentators continue to bemoan their opacity; the threefold political/executive/scientific divide perhaps serving the 'balance of powers' within the EU, but also making it very difficult immediately to identify and assess the dominant rationality behind each individual decision. Such concerns were brought to a head by the BSE crisis, where public suspicion of the motives of national representatives within the committee system reflected the traditional constitutional concern that delegation within opaque institutional structures might, in fact, conceal a case of institutional 'self-aggrandisement' or the perversion of decision-making to serve the interests of only one institutional actor; in this case, with regard to certain Member States, who, in the public mind at least, could conceivably have used their position within the comitology system to further national economic interests, rather than Community health and safety concerns.

Such worries, however, are, vitally, also augmented by the various procedural shortcomings within the committees system. In other words, the vital balancing between political goal setting and expert/functionalist rationality is ultimately a matter for political discretion, or negotiation between Member State representatives (Joerges & Neyer, 1997), and not one for supranational legal oversight. The large national political element within decision-making, thus proves a barrier to the attempt to mount an effective legal challenge to individual decisions.

Given such considerations, the retarded status of agencies within the European Union requires reassessment in order to ascertain whether the various normative shortcomings traditionally associated with their use might not be overcome. To reiterate, the legal problems are threefold and interrelated regarding: first, the European agencies' relationship with the European notion of 'the balance of powers'; second, their status in relation to the principle of the separation of powers; and third, the identification of a scheme of control which might ensure the continuing accountability to Europeans of such independent bodies.

## Meroni restated

The key to a modern reassessment of the *Meroni* doctrine is, perhaps, an understanding of the judgment as a creature of its time. Tackling the issue of the delegation of powers in the context of the 1950s, the Justices of the European Court were thus, on the one hand, addressing the maintenance of a European balance of powers in the light of the institutional arrangements and dynamics of that time. On the other hand, they were also denied recourse to the body of literature which has since grown up to demonstrate how the normative requisites of the principle of the separation of powers may be satisfied and the situation be created whereby 'no-one controls the agency, yet the agency is under control' (Moe, 1987).

### (a) The balance of powers as a dynamic principle

It should thus be noted that the principle of an 'institutional balance of powers', especially as it is formulated in Article 4 EC Treaty, has always been strongly criticised (Läuffer, 1990, pp. 219–220). In this view, the instrumentalism inherent to the European institutional balance of powers — and, in particular, its legally formalistic anchoring in the notion of the exercise of Treaty-enumerated competences — weakens its power as a normative principle of governmental organisation within the European Communities and Union. Thus, or so it is argued, with each Treaty revision and consequent re-apportioning of competences between European institutions, the balance of powers in the Treaty is altered, determining that it has no more status than a mere 'snapshot' of existing institutional arrangements.

By contrast, however, such a view also clearly fails to pay due regard to the fact that the European balance of powers is representative less of a traditional constitutional desire to preserve a European civil society from the illegitimate use of a sovereign State power, and more of a need to ensure and support the complex evolution of an international community, which seeks to consolidate and further its own goals of economic integration, while at the same time preserving the core sovereignty of its constituent Member States.

Seen in this light, the European notion of a balance of powers accordingly represents a 'dynamic' rather than 'static' (constitutional) principle of governmental organisation. In other words, it is not to be read simply as a negative obligation to limit the encroachment of State power into a civil sphere (in the manner of a principle of the separation of powers), but also and, indeed, more as a positive duty to ensure — regardless of all institutional realignments — the continuing credibility of the European integration project, as well as the core place within that project of the Member States. On the one hand, this dynamism inherent to the European notion of balance of powers helps to explain why the ECJ has never, in fact, taken its formalist stance in relation to Article 4 EC Treaty to its 'delegation ban' limit and has instead allowed — in the interest of efficient EC government — the delegation of a wide range of European tasks (if not, strictly-speaking, competences) to institutions, such as agencies and committees, which are not even listed within that arti-

cle. On the other hand, it also explains the very positive role which agencies may, if they are allowed to do so, play in relation to recent realignments of competences within the EU.

As noted above (*supra* II.1), recent institutional reform within the EU has not only seen very many once exclusively-held Member State competences 'communitarised' through their transference from the third to the first pillar of the Union Treaty, but has also witnessed a vital change in the make-up and role of the institutions of the European Union. First, the continuing empowerment of the European Parliament, designed to overcome certain of the democratic deficits of the EU, has introduced an element of direct democratic participation within European policy-formulation. Secondly, the right of the EP to approve the Commission and its programme of policy-making has similarly augmented political activity within that institution. Thirdly, the process of politicisation of the Commission has also been given added impetus by the enhanced powers of the President of the Commission to choose his Commissioners. Fourth, and as a consequence of such realignments within the Commission and Parliament, the Member States' political precedence over the integration project has been, if not weakened, at least challenged by the growing politicisation of Community organs.

Accordingly, it may be argued that a Community reliance upon European agencies, specifically operating 'at arm's length' from the political branches and in close association with national bodies (transnational regulatory networks), can help preserve the institutional balance: (a) between the European institutions; (b) between the European institutions and the Member States; and (c) between political and non-political branches of the Union (ECJ, ECB). Thus, on the one hand, 'depoliticised' agencies might, in no small measure, reassert the credibility of the Union's functionalist/integrationist policies; on the other hand, they might equally — through both their assumption of policy-implementation tasks from the politicised Commission and their networking with national administrations — preserve a core national presence within the European project.

### **(b) The separation of powers and democratic accountability**

Briefly recapping, the creation of innovative institutions, such as agencies, which often perform all three executive, legislative and judicial functions, and which are further not recognised by the national constitution, has historically given rise to very particular legal problems. Thus, or so it is argued, the delegation of tasks from the legislative, executive or judicial arms to constitutionally unforeseen institutions, creates an essential problem of control: first, upsetting the regulative balance between the powers of the named executives, legislatures and judiciaries; and secondly, distancing the exercise of power from citizens. Tricky as such a constitutional dilemma may be, however, solutions are there to be found and here the US example provides us with a valuable insight.

Thus, the US Constitution's historical commitment to a plural scheme of government, which strictly apportioned powers between President, Senate, Congress,

Supreme Court, Federal Government and the individual States in an effort to lessen the danger that minorities of citizens might be subject to misrule by the majority, initially appeared to stand in the way of the evolution of independent regulatory agencies. The American Constitution separated and thus controlled power on the basis of the apportioning of executive, legislative and judicial competences to particular institutions; within this scheme, new institutions accordingly seemed to have no formally legitimated place. However, the Supreme Court, mindful of the need to allow a government, established by ancient and static legal texts, to evolve in order to deal efficiently with modern problems, nonetheless opened the door to the establishment of independent agencies (for full details of a long and tortuous body of case-law, see Strauss 1984).

The argument deployed was simple, highly effective and generalisable for constitutional schemes of government throughout the world: if the underlying logic of the separation of powers was to control power by spreading its exercise among many bodies, then, while any attempt by any named constitutional organ to wrestle power from another would certainly constitute an injury to this principle, the delegation of powers to new and independent institutions was not, in any sense, an act of institutional 'self-aggrandisement', but, on the contrary, a contribution to the fragmentation of power and, thus, supportive of the basic pluralist principles underlying the separation of powers. Certainly, agencies might appear concurrently to exercise executive, judicial and legislative functions; nonetheless this mixing of tasks served efficient government. In the final analysis, the threefold and functional executive, legislative and judicial divide was only one means of fragmenting power, and other pluri-institutional solutions might also legitimately serve the same ends.

The second, and in a certain sense, more pressing legal problem that agencies pose, however, is that of the need to ensure that independent bodies are adequately controlled by the law, so that their adherence to the immediate political aims of the citizenry can be assured. This essentially democratic concern that the law must ensure that the will of the polity is done, is thus the flip-side to a legal principle of 'non-delegation' which applies to legislative bodies and their competences. In other words, most national bodies of constitutional and administrative law — and both civil and common law systems — start from the assumption that any delegation of legislative functions from the parliament to other policy-making institutions is *de facto* an abuse of the democratic imperative of the citizenry, which finds representation within the legislative arm of government. In this, its strictest form, the non-delegation principle is clearly a barrier to the evolution of independent regulatory bodies (and might also, in its broadest terms, be used to block the activities of all non-majoritarian institutions, including the courts). It has, therefore, slowly been modified as the need to ensure efficiency of government has proven to be imperative and the legislative arm has sought the regulatory aid of new regulatory institutions.

In brief, the legal historical attempt to modify the non-delegation principle and to create some other form of democratic accountability for agencies, is littered with pitfalls and has ultimately only come close to resolution as legal science has

begun to take on board studies from non-legal disciplines, which demonstrate how, with the aid of various institutional design and procedural mechanisms, a situation can be created whereby 'no-one controls the agency, and yet the agency is under control' (Moe, 1987).

To explain further: the once widely accepted legal notion of 'transmission belt' administration and control, based upon the assumption that the legislature would give very strict direction to delegatee bodies to guide their daily activities, while the judiciary would simply ensure that such rigid mandates not be deviated from, was, for example, to be quickly frustrated throughout the legal world. Modern administration was a matter of constant interaction between policy-making and execution and thus necessarily required a far greater degree of operative flexibility than such mandates allowed (Craig, 1994). Equally, however, the very democratic impulse, or desire, to create some form of connection between the citizenry and independent agencies, proved equally difficult to accommodate solely within the doctrines of the law of standing, or *locus standi*. Thus, on the one hand, individual citizens might challenge agency decisions if their individual rights were affected; yet, such a rights-based reading of administrative review, achieved little with regard to ensuring that the interests of **all** citizens be respected. Similarly, on the other hand, allowing interest groups to challenge the activities of independent regulatory authorities did ensure added political representation for groups of citizens within the administrative process; however, once again, this was surely only a partial reflection of the public interest of citizens and the political community as a whole (Croley, 1998). Clearly, some more comprehensive mix of oversight mechanisms was required to ensure the accountability of independent institutions.

In this respect, academic literature has accordingly recently developed a series of more comprehensive administrative oversight mechanisms. These instruments of control of democratic accountability may be divided into four categories; the vital point to note, however, is that such instruments derive their major strength in the controlling of accountability from their ability to complement one another to give rise to an overall scheme of control.

**Independence:** one of the primary causes of intransparent administration is thus argued to be a close linkage between government departments, or political actors, and the administration. Thus, where administration is buried within or answers directly to governmental departments, political goals may be easily adjusted, or subverted, without any public debate. Accordingly, it is apparent that ensuring that agencies, and similar bodies, enjoy a degree of independence from government, can, in fact, serve democratic transparency, determining that all policy changes are discussed in the public debating arena.

**Founding statutes:** though the exact mandating of agencies to perform specific 'daily' tasks has proven not to be possible, well-constructed 'founding statutes' which lay down the general policy goals which agencies must pursue, as well as the level of performance which they must achieve, nonetheless play a major part in ensuring the accountability of independent bodies. Such founding

statutes thus furnish the vital yardstick against which agency performance may be evaluated.

**Accountability to the named institutions of government:** though the independence of agencies needs to be safeguarded, they may still be subject to a subtle control by the named institutions of government. In the United States, for example, the President retains a degree of control through his power to nominate the chiefs of individual agencies. In the United Kingdom and US, the power of the legislative arm to review agency budgets also furnishes greater accountability since agencies may be allowed or denied the funding which they have requested to follow particular policy goals. Similarly, courts retain a major power to review the actions of agencies through mechanisms such as the US Administrative Procedure Act, which requires agencies to follow set patterns in their policy, rule and decision-making processes.

**Accountability to the public:** various 'soft' and 'hard' mechanisms may be used to ensure accountability to the general public. Primary amongst soft mechanisms of control is the stipulation that agency staff must be suited to the tasks which they are required to perform. They must be 'experts' in their field, so ensuring the core convergence between the policy which the agency pursues and the goals which it is set by the public (a primary legitimating plank within the new deal agencies). Such expertise can thus be assured through the publication of decisions — allowing experts external to the agency to review the work of their peers — or through review by parliamentary committees. Similarly, soft control can also be furnished through review (budgetary or otherwise) of annual agency reports by other independent auditing bodies. In contrast, 'hard' mechanisms of public control are the classical instruments of judicial review, which allow individuals (and sometimes groups) to challenge decisions which have personally affected them. In law, individual 'rights' provide the vital basis for standing before the courts, while procedural legal instruments, such as the American Administrative Procedures Act, furnish the courts with a legal quality yardstick with reference to which they may review individual decisions. Where procedures have been incorrectly followed, or decisions poorly-reasoned, they may be overturned.

Interestingly, in the EU setting various such mechanisms have already been developed to ensure the accountability of the nascent agencies now operating. Thus, for example, a measure of budgetary control over the agencies is provided through a review of their reports and activities by the Commission, European Parliament and European Court of Auditors. Equally, the notion that 'expertise' can ensure commitment to the well-defined political goals laid down in founding statutes, has found a hold at the European level. Thus, Council regulations stipulate the policy aims which European agencies are required to pursue; while the independent staffing policies of the agencies, as well as their large degree of more informal networking with independent and national scientific/technical expertise (EIONET is a credible example here), secure the quality of the expertise employed. Similarly, the possibilities for a judicial review of agency action at the European level are increasing. For example, the ECJ's recent willingness to deploy Article 190 EC Treaty to ensure that the decisions of Community institutions are 'well-reasoned' and are taken with adequate reference to

expert advice, indicate that Community law can evolve a scheme of judicial oversight which will increase the public accountability of the European agencies through rights of individual review (see, in particular, the case of *Hauptzollamt München-Mitte v Technische Universität München*, Case C-269/90, (1990) ECR I-5469, requiring the Commission to consult 'experts' prior to giving a decision).

In conclusion then, the process of restructuring the Community's legal environment to allow for the control of tasks delegated to bodies outside the treaty structures has already begun, and current analytical and practical efforts must now focus more rigorously upon the refinement of mechanisms of agency design, control and coordination.

## **Means of agency control and coordination**

### **Agencies and regulatory networks**

Prior to expanding upon mechanisms of agency design and control, it is important to note that 'agency' is not a technical term, but rather an omnibus label to describe a variety of organisations — commissions, directorates, inspectorates, authorities, services, offices — which perform functions of a governmental nature, and which often exist outside of the normal departmental framework of government. The most comprehensive definition is probably provided by the US Administrative Procedures Act (APA). According to this important statute which regulates the decision-making processes of all agencies of the federal government, an agency is a part of government that is generally independent in the exercise of its functions and that by law has authority to take a final and binding action affecting the rights and obligations of individuals, particularly by the characteristic procedure of rule-making and adjudication.

It should therefore be noted that agency status does not require that an agency exercise its power with complete independence, either vertically (in terms of being subject to administrative review), or horizontally (in terms of being required to act in concert with others). If an authority is in complete charge of a programme, it is an agency with regards to that programme, despite its subordinate position in other respects.

To exemplify, the independent regulatory commissions, such as the Interstate Commerce Commission or the Securities and Exchange Commission are agencies in the sense of the APA, but so are the Occupational Safety and Health Administration (located within the Department of Labour) and the Army Corps of Engineers. Thus, in the EU context, most European agencies of the first and second generation, as well as Eurostat, are *de facto* agencies in the same sense.

Equally, however, the term 'agency' includes a great variety of activities, objectives and institutional designs. In the United Kingdom, for example, the next

steps agencies are very varied. Thus, some of these agencies have a monopoly status over their activity while others do not; some agencies are self-funding, while others rely on departmental funding; and a number of agencies perform regulatory functions while others are primarily concerned with service delivery.

Such functional differences can have a significant impact upon the practical operations of the agencies, and should therefore be reflected in their institutional design. This point should be emphasised as the European Union has — to date — followed essentially one institutional model for all the agencies created since 1990. A more sophisticated approach must instead rely on a sufficiently rich taxonomy of agency types and functions, especially to enable the definition of appropriate standards of effectiveness and of accountability.

In particular, note should also be made of the fact that an agency can operate as a part of a network including both national and European regulatory authorities. In fact, the new European agencies have not been designed to operate in isolation, or to replace national regulators. Rather, they are expected to become the central nodes of networks including national agencies as well as international organisations.

National and EU representatives and experts sit in the management boards and the scientific committees of the new agencies. These committees formulate the scientific opinion of the agency, and may perform other important functions. Thus, the two scientific committees of the medicines' agency, EMEA — one for proprietary medicinal products, CPMP, and one for veterinary medicines, CVMP — also arbitrate disputes between pharmaceutical firms and national authorities. The CPMP, like the CVMP, consists of two members nominated by each Member State, while the Commission is no longer represented in the committees, no doubt in order to emphasise their functional independence.

The committee members represent the national regulatory authorities, but it would be wrong to assume that, through their power of appointment, the national governments effectively control EMEA's authorisation process. In fact, both committees — which already played a significant role in the old multi-state drug application procedure — have not only become more important, but more independent since the creation of the EMEA. This is because it is in their interest to establish an international reputation for good scientific work, and for this purpose the degree to which they reflect the views of the national governments is irrelevant.

This change in the incentive structures of regulators operating in a transnational network deserves to be emphasised by making use of a distinction introduced by sociologist Alvin Gouldner. In his work on the sociology of the professions (1998), Gouldner introduced the distinction between 'cosmopolitans' and 'locals'. Cosmopolitans are likely to adopt an international reference-group orientation, while locals tend to have a national, or sub-national (e.g., organisational) orientation. Hence, local experts tend to be more submissive to the institutional and hierarchical structures in which they operate than do cosmopolitan experts, who can appeal to the standards and criteria of an international body of scientific



peers. Using this terminology, we may say that the EMEA is pioneering the transformation of national regulators from 'locals' to 'cosmopolitans'. It does this by providing a stable institutional focus at European level and important links to extra-European regulatory bodies, such as, the US Food and Drugs Administration.

Another interesting network structure is emerging in the area of competition policy. The recent Commission White Paper on the modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (European Commission 1999), represents a significant move toward a coordinated partnership between national and European authorities in the implementation of Articles 85 and 86 of the Rome Treaty, and, in particular, towards a decentralisation of the Article 85(3) exemption procedure.

For such a transnational regulatory network to function properly, however, several conditions have to be satisfied. First, there must be a good deal of mutual trust and cooperation. In the case of competition policy, for example, if a national authority comes to the conclusion that a case has a Community dimension and requires action by the Commission, it should be able to forward its file, including any confidential information, to the Commission. Conversely, if the Commission finds that the effects of a disputed practice are felt primarily in one Member State, it should be entitled to send the whole of the file to the competent authority in that Member State, so that the authority can continue the investigation, making direct use in evidence of the information supplied (European Commission, 1999, p. 33).

A second condition is a high level of professionalisation of the regulators. One reason why Regulation 17, which was adopted in 1962, established a centralised authorisation system for all restrictive practices requiring exemption under Article 85(3), was that in the early years, the contours of competition policy were not widely known in many parts of the Community. A decentralised authorisation system is possible today because national competition authorities everywhere are becoming more professional and increasingly jealous of their independence. Professionals are oriented by goals, standards of conduct and cognitive beliefs that derive from their professional community, giving them strong reasons for resisting interference and direction from political outsiders (Moe, 1987, p. 2).

The importance of professionalisation is clearly recognised by the recent White Paper; for example, where it states that '(I)n the context of pre-accession strategy, the Commission will devote particular attention to the development of competition in the candidate countries and will provide their competition authorities with increased assistance' (European Commission 1999, p. 37). A similar pre-accession strategy should be followed in all other areas of regulation in order to facilitate the development of similar Trans-European Networks.

A common regulatory philosophy is a third important condition for the proper functioning of a regulatory network. A good example is again provided by competition policy where a high level of harmonisation has already been achieved spontaneously in the Member States. However, regulatory philosophies evolve in response to changing economic, technological and social conditions. Hence, some

institutional mechanism should be provided in order to facilitate a continuous exchange of views among national and Community regulation. To this end, the White Paper (European Commission 1999, p. 37) proposes to reinforce the role of the Advisory Committee on Restrictive Practices and Dominant Positions. According to the Commission's proposal, the Committee:

*would become a full-scale forum in which important cases would be discussed irrespective of the competition authority dealing with them. It would continue to be consulted on legislation drafted by the Commission and on draft Commission decisions in the same way as today, but the Commission, acting on its own initiative or at the request of a Member State, could also be empowered to ask the Committee for its opinion on cases of application of Community law by national authorities.*

Some of the new European Agencies, such as EMEA, could provide a similar forum in their respective areas of regulation.

Typically, these conditions for the viability of a transnational regulatory network — mutual trust, professionalism, and a common philosophy — will not be fully satisfied at the beginning. However, the very existence of the network provides an environment favourable to their development. A national agency that sees itself as part of a transnational network of institutions pursuing similar objectives and facing analogous problems, rather than as a marginal addition to a large central bureaucracy pursuing a variety of objectives, is more motivated to defend its professional standards and policy commitments against external influence, and to cooperate with the other members of the network. This is because the agency executives have an incentive to maintain their reputation in the eyes of their international colleagues. Unprofessional, self-seeking or politically motivated behaviour would compromise their international reputation and make cooperation more difficult to achieve in the future.

Thus, the function of a network is not only to permit an efficient division of labour and the exchange of information, but also to facilitate the development of behavioural standards and working practices that create shared expectations and enhance the effectiveness of the social mechanisms of reputational enforcement.

There is no reason why the network model, given the right conditions, could not be extended to all areas of economic and social regulation of Community interests, and indeed to all administrative activities where mutual trust and reputation are the key to greater effectiveness.

## **Agency costs and transaction costs**

However varied their form, agencies — as the term indicates — are the agents established by some principal(s) to carry out their single or joint purpose. An agency problem accordingly arises because of the possibility that the administrative agents will not comply with the policy preferences of the principal. This problem creates

'agency costs' — that is, the costs incurred during the effort to induce the agents to implement faithfully the principals' objectives, and the losses which principals sustain where they are not able to control their agents perfectly. Agency costs include the costs associated with selecting the executives of the agencies and monitoring their compliance, the costs of using corrective devices (rewards, sanctions, and legislative direction), and the cost of any residual non-compliance that produces a difference between the policy enacted and what is implemented.

Agency problems can be addressed in a number of ways. For example, the same level of administrative compliance can be achieved with less monitoring if *ex post* rewards and sanctions are made more effective at aligning the incentives of the agents with the principals' policy preferences. Similarly, neither monitoring nor incentive devices are as important if it is possible to appoint agency executives who share the objectives of the principals. The objective of institutional design is to identify the mix of selection, monitoring, and *ex post* incentive and correction devices that will reduce agency problems at lowest cost to the principal(s).

The decision to delegate certain tasks to an agency does not depend only on agency costs, but also on other 'transaction costs', such as, the cost of decision-making *per se* and the cost of achieving credible policy commitments. Moreover, the two classes of cost are closely related. Thus, a broad delegation reduces decision-making costs since the principal does not have to invest resources in working out the details of regulation, but it increases the cost of controlling the agency's discretion. Similarly, a high level of agency independence increases the credibility of regulatory commitment by reducing the influence of political considerations in agency decision-making, but it increases the risk that the agency will not comply with the policy preferences of its principals.

Though rather abstract, these considerations do have practical application — and may in fact be illustrated by the Commission's current stance that the benefits of delegation to the comitology system may outweigh its costs — and prepare the ground for a general discussion of the relevant decision variables in the following pages.

## **Institutional choice**

It is up to the principals to structure relationships with their agents so that the outcomes produced through the agents' efforts are the best the principals can achieve, given the choice to delegate in the first place. The following institutional choices are crucial for the design of an efficient and accountable agency (Horn, 1995):

- (i) The extent to which decisions are delegated to the agency rather than taken by the principals themselves — i.e. institutional variable D, ranging from 0 ('no delegation') to 1 ('full delegation').
- (ii) The governance structure of the organisation to which powers are delegated: ministerial departments, single-headed agency, multi-headed commission,

self-regulatory organisation, court, etc. The single most important dimension along which these organisations vary is their degree of independence from their political or bureaucratic principals. Thus, institutional variable G can range from 0 ('no independence') to 1 ('full independence').

- (iii) The rules that specify the procedures to be followed in agency decision-making: rules of evidence, reason giving requirements, rules defining the rights of various groups to participate directly in the decision-making process. This variable P is clearly multi-dimensional. If, however, we focus on participation, we can again scale P from 0 ('no participation') to 1 ('full participation').
- (iv) The extent of *ex post* monitoring through ongoing legislative and executive oversight, the budgetary process, judicial review, citizens' complaints, expert criticism, and so on. This variable M can be scaled from 0 ('very easy') to 1 ('very difficult').

The institutional design problem facing the principal can be represented in very general terms as: choose the values of the variables D, G, P and M so as to minimise the sum of agency costs, decision-making costs, and commitments costs, subject to some constraints.

These constraints indicate how agency and transaction costs are related to the four choice variables. Thus, agency costs increase with increasing values of D, since more delegation means greater agency discretion, and with increasing values of G, since more independence implies more discretion; they decrease when the cost of *ex post* monitoring (M) is low and procedural requirements (P) are tight. Again, principals' decision-making costs are inversely related to the degree of delegation, as already discussed, and positively related to P, because of the time and effort taken in setting tighter procedures; while G and M should not have much of an impact on the decision-making costs of the principals. Finally, commitment costs decrease with increasing levels of independence and tighter procedures, while *ex post* monitoring will have different effects according to who does the monitoring (e.g., judicial review will typically increase the credibility of regulatory commitments, while administrative sanctions will have the opposite effect).

This analysis is not meant to suggest that agencies can be designed by mathematical algorithms. Rather, its purpose is to identify the crucial institutional choices to be made in designing an agency, and to call attention to the relationships between these choice variables and the different categories of cost. Moreover, these choice variables are important not only from an efficiency perspective — the minimisation of the sum of agency and transaction costs — but also for the design of an effective accountability structure.

## Executive oversight

Even a country like the United States, with its century-old experience of statutory regulation at State and federal level, had no executive branch oversight of regulatory agencies until the 1970s. After the emergence of the health, safety and

environment regulatory agencies in the 1970s, however, it became important to verify that these regulations were in society's best interest and, in particular, that the costs they imposed were justified by the benefits they were expected to produce.

Traditionally, agencies were constrained by little other than their legislative mandate and potential judicial review as to whether they were adhering to the mandate. Congress can, of course, pass legislation requiring that an agency take a particular type of action, but routine regulatory actions seldom receive congressional scrutiny. Most important, there is no need for congressional approval for a regulatory agency to take action provided that it can survive judicial review. Hence the need for executive oversight of the agencies. Such oversight is the responsibility of a specialised unit within the Executive Office of the President, the Office of Management and Budget (OMB).

A regulatory clearing house is needed also in the EU in order to ensure that actions taken by different agencies and Directorates-General meet basic standards of consistency and efficiency. Moreover, such a unit would help the President to fulfil his responsibility of providing political guidance to the Commission's work under Article 214 of the Consolidated Treaties. A European OMB could be established within the framework of the present treaties. It would systematise and generalise what the Commission is already doing, for example, in the case of the Medicines Agency. For all these reasons it is instructive to analyse in some detail the role of the American OMB in controlling and coordinating the work of federal agencies.

The first stage of the development of a federal regulation occurs at the time when an agency decides to regulate a particular area of economic activity. Once a topic is on the agency's regulatory agenda, it must be listed as part of its regulatory programme if it is a significant regulatory action that is likely to have a substantial cost impact. OMB has the authority to review this regulatory programme, where the purpose of this review is to identify potential overlap among agencies, to become aware of particularly controversial regulatory policies that are being developed, and to screen out regulations that appear to be particularly undesirable. These reviews have essentially an informational function, alerting OMB to potential inter-agency conflicts.

The next stage in the development of a regulation is to prepare a regulatory impact analysis (RIA). This requires the agency to calculate benefits and costs and to determine whether the benefits of the regulation are in excess of the costs it imposes on the regulated activities. The agency is also required to consider potentially more desirable policy alternatives, such as information strategies instead of a command-and-control approach. After completing the RIA, the agency must send the analysis to OMB for its review, which must take place 60 days before the agency issues a notice of proposed rulemaking (NPRM) in the *Federal Register*. During this period OMB reviews the proposed regulation and the analysis supporting it. In the majority of cases, OMB simply approves the regulation in its current form. In some instances, OMB negotiates with the agency to obtain improvements in the regulation, and in a few instances OMB rejects the regulation as being undesirable.

At that point, the agency has the choice either to revise the regulation or to withdraw it.

This OMB review is generally a secret process. The secretive nature of the review process is intended to enable the regulatory agency to alter its position without having to admit publicly that it has made an error in terms of the regulation it has proposed. Keeping the debate out of the public arena prevents the parties from becoming locked into positions for the purpose of a public image. The disadvantage of secrecy is, of course, that it excludes Congress and the public from the regulatory policy debate. For this reason, under the Clinton administration, OMB has made a major effort to open up more aspects of this review process to public scrutiny.

If the proposal does not receive OMB approval, the agency can make an appeal to the President or to the Vice-President if the latter has been delegated authority for this class of regulatory issues.

After receiving OMB approval, the agency can publish the NPRM in the *Federal Register*. Included in the material inserted in the official journal is typically a detailed justification for the regulation, which often includes an assessment of the benefits and costs of the regulatory measure. Once the proposal has been published in the *Federal Register*, it is open to public debate. This is a 30 to 90 day period for public notice and comment. After receiving and processing these public comments, the agency must then put the regulation in its final form. In doing so, it finalises its regulatory impact analysis, and it submits both the regulation and the accompanying analysis to OMB 30 days before publishing the final regulation in the *Federal Register*.

OMB has roughly one month to review the regulation in its final form and decide whether to approve it. The overwhelming majority of regulations are approved and published as final rules in the official journal. Generally-speaking, one can say that the OMB review process alters regulations in minor ways, such as introducing alternative methods of compliance that will be less costly but equally effective as those proposed by the agency. The main function of OMB review is to force the agencies to support their proposals by well-developed analyses. OMB has also been successful in screening out some of the most inefficient regulations, such as those with costs per life saved, well in excess of USD 100 million (Viscusi, Vernon and Harrington, 1996, Chapters 2 and 20).

## **Coordination and regulatory budgets**

In addition to monitoring the quality of individual agency proposals, a regulatory clearing house located at a sufficiently high level in the Community bureaucracy, preferably in the office of the President, could also coordinate all regulatory activities by imposing a novel type of budgetary discipline.

Coordination is a serious problem in all complex organisations, but it is especially acute in the case of regulatory activities. While the size and priorities of

non-regulatory, direct-expenditure programmes are determined by political executives through the normal budgetary process, budgetary constraints have a limited impact on regulatory activities. This is because the real costs of regulations is borne not by the regulators, but by the individuals and organisations that have to comply with the regulations. The result is a serious lack of coordination both within and across regulatory programmes and agencies.

Regulatory issues tend to be dealt with sector by sector, and even within the same sector it is often difficult to see that regulatory priorities are set in a way that explicitly takes into consideration either the urgency of the problem or the benefits and costs of different proposals. For example, the imbalance between water and air pollution control existing in the EC can hardly be explained by differences in the seriousness of the relevant problems. Also, the marginal health benefits produced by certain environmental directives, such as the one on the quality of drinking water, appear to many analysts to be out of proportion with the very substantial costs imposed on the water industry and, ultimately, on all citizens. Again, the piecemeal procedure of the Commission in proposing new regulations has resulted in directives in areas where harmonisation is a low priority, while neglecting other areas that need a considerable amount of harmonisation. Such problems are compounded whenever previously centralised responsibilities are allocated to various decentralised agencies.

If lack of budgetary discipline is a serious defect of the regulatory process, one can attempt to create coordination and control mechanisms similar to those traditionally used for direct public expenditures. This is the idea of a **regulatory budget**. In its basic outline, the regulatory budget would be established jointly by Congress and the President for each agency, starting with a budget constraint on total private expenditures mandated by regulation, and then allocating the budget among the different agencies. Simultaneous consideration by OMB of all major regulatory proposals would permit an assessment of their joint impact on particular industries and on the economy as a whole.

Thus, the administrative procedure for implementing a regulatory budget would mirror that of a fiscal budget. In addition to the traditional budget submissions, the President would send to Congress a budget limiting the regulatory costs that could be imposed on the national economy. After hearings by the relevant committees, each house would vote on the specifics and a conference committee would produce a compromise bill. After enactment by both houses, the regulatory budget would be forwarded to the President to sign into law. Like the fiscal budget, the regulatory budget would be open to political debate. In fact, the actual level of the regulatory budget can only be determined through the political process, as in the case of the fiscal budget.

Again like the fiscal budget, the regulatory budget focuses on the costs rather than the benefits of regulation. However, since each regulatory agency would face a constraint that limits its total mandated spending, it would have an incentive to allocate its resources in the most efficient manner to achieve its policy objectives. If forced to choose between programmes, agencies would be encour-

aged to choose those that provide the greatest benefit per unit of cost. By formalising this portion of the budget allocation process, Congress and the President would have an added interest in ensuring that regulatory funds are allocated to the agencies which produce the most substantial benefits for society. They would also assume responsibility for the overall magnitude and priorities of regulation, and for inter-agency coordination.

The primary difficulty in implementing a regulatory budget is cost estimation. Without a reliable, consistent estimate of costs (broken down by agency and by regulatory programme), it is impossible for a budgetary authority to make sensible allocations of resources across different agencies and regulatory programmes.

Regulatory costs fall into three distinct categories:

- (i) Operation of the regulatory agency. These costs are represented by salaries, administrative costs and capital expenditures needed to operate the agency.
- (ii) Compliance by firms, consumers and government organisations. This category includes the direct expenditures that are needed to comply with a given regulation. So-called process costs — the costs of filling out paperwork and dealing with administrative requirements — also fall into this category of direct costs.
- (iii) Indirect economic costs in the form of reduced output and efficiency loss. For example, if a regulatory agency mandates a new safety device on a product, then the price of that product will almost certainly rise because of higher production costs. Because of this, some consumers who would have bought the product at the old price will now find themselves priced out of the market. In addition, producers will earn lower profits, and some marginal firms may go out of business. These combined effects are often termed 'dead-weight loss' to reflect unrecoverable costs to society of reduced production due to regulation.

Now, operating costs are relatively easy to quantify, as they are already reported as part of the fiscal budget; they are by far the smallest part of the cost of regulation. Compliance costs are generally obtained through surveys or audits of affected firms, or through engineering studies. Indirect economic costs would have to be calculated by means of general equilibrium models simultaneously examining the interactions of all consumers, all firms and all markets. Whatever the theoretical interest of such general equilibrium analysis, its usefulness in a policy structure such as the regulatory budget is probably limited. In practical terms, the most important inputs into the regulatory budgetary process are estimates of compliance costs.

Sophisticated techniques of compliance cost assessment (CCA) have been developed in recent years, not only in the United States, but also in Europe. In the United States, for example, the Environmental Protection Agency has carried out extensive analyses to estimate the cost of recent amendments to the Clean Air Act (CAA) and to the Safe Drinking Water Act (SDWA). Estimates of pollution control expenditure mandated by the CAA amendments indicate a 'budget' of USD 79 billion in compliance costs borne by economic agents between 1993 and 2000. Similarly,



private expenditures resulting from new regulations for water treatment have been budgeted at USD 1.5 billion to USD 2.4 billion a year, or USD 20 billion for the entire 1993–2000 period.

In the United Kingdom, all government departments must prepare a CCA when evaluating policy proposals likely to affect business. Similarly, all papers for cabinet and cabinet committees, and minutes to the Prime Minister for collective discussion that deal with proposals, which may have an impact on business, must clearly spell out likely compliance costs.

Departments are also asked to prepare a CCA for all EC regulations and directives likely to be burdensome to business, whether or not the Commission is preparing an impact assessment. A CCA should also be prepared for all UK legislation to implement agreed EC directives, as well as for Community acts, which, though not binding on Member States, may lead to burdensome regulations.

In 1986, the European Commission introduced a system similar to the UK CCA system for EC legislative proposals. Originally, every draft legislative proposal being considered for adoption by the Commission was to be accompanied by an impact assessment (*fiche d'impact*) outlining the impact of the proposed measure on small and medium sized enterprises. Since 1990, however, assessments have only been completed on the most burdensome legislative proposals contained in the Commission's work programme. The DG XXIII (now Enterprise DG), at the beginning of each year, identifies those measures on which impact assessments should be completed. Others may be added to the list during the course of the year.

Thus, important elements of a regulatory budget are already available at the EC level and at least in some Member States. This mechanism could be developed further in selected policy areas such as water pollution control. A Community OMB would provide the necessary focus for such efforts.

## Procedural controls

There are two main forms of control of agency decisions: **oversight** — monitoring, hearings, investigations, budgetary review, sanctions — and **procedural constraints**. We have already tackled the role of a regulatory clearing house in overseeing and coordinating the behaviour of agencies, now we examine in greater detail how procedural requirements discipline agency discretion. Administrative law views procedures primarily as a means of assuring fairness and legitimacy in regulatory decision-making. This is, of course, a very important function of procedures, but the point we wish to stress here is that procedures also serve control purposes, for example, by mitigating informational disadvantages faced by political principals in dealing with expert agencies.

It should be noted that oversight does not deal directly with the problem of asymmetric information. If agencies have better information than their principals do, they have a range of discretion that is undetectable to external overseers.

Moreover, resources devoted to monitoring have an opportunity cost, since they could be devoted to achieving politically more rewarding objectives. Finally, most of the methods for imposing meaningful sanctions for non-compliance also create costs for the overseers. Thus, a publicly visible investigation and punishment of an agency may raise doubts in the mind of citizens about the efficiency and honesty of the principals themselves. At the same time, the sanctioning process lowers morale and distracts the agency from the pursuit of its statutory objectives.

In sum, direct oversight of agency behaviour is unlikely to be a completely effective solution to the control problem; it needs to be supplemented by more indirect and less costly mechanisms of a procedural nature. An optimal mix of control strategies, where each strategy complements the strengths of the other and substitutes for the other's weakness, will ensure less costly and more effective control of agency behaviour than exclusive reliance on any single control mechanism, however powerful. What is at least as important, a diversified system can reconcile accountability and independence by creating a situation whereby 'no one controls the agency, and yet the agency is under control'.

Also in the area of procedural controls, the American experience is highly instructive. We refer specifically to the Administrative Procedure Act (APA) of 1946 and to its later extensions: the Freedom of Information Act (FOIA) passed in 1966 and amended in 1974, 1976, 1986, and 1996; the Government in the Sunshine Act (GITSA) of 1976; and the Federal Advisory Committee Act (FACA), enacted in 1972 and amended in 1976 to incorporate the GITSA standards for open meetings. APA codified over a half-century of court decisions affecting agency proceedings. Prior to the APA, procedural requirements imposed by the courts differed across agencies. These included procedures relating to information gathering and disclosure, and standards of evidence. Two important affects of the APA, therefore, were to impose greater uniformity across agencies and to raise the minimum evidentiary standards to which an agency must adhere.

The FOIA gives citizens the right to inspect all agency records that do not fall within any of 10 specified categories, such as, trade secrets and those files, the disclosure of which reasonably could be expected to constitute an invasion of privacy or compromise a law enforcement investigation. However, even these exceptions are not absolute. To reduce even further the chances that an agency can manipulate the FOIA to its own advantage, the law requires the agency to prove that it need not release the information (rather than requiring the citizen to prove that it should release it). The FOIA was adopted in response to claims that many core documents and other information underlying important agency decisions were not available to the public, thereby impairing the right of citizens and of the media to monitor government performance.

The Sunshine Act is similarly designed to prevent secrecy in government, but its reach and impact are more limited than the FOIA's. The GITSA applies to agencies headed by collegial bodies, such as the independent regulatory commissions. It obliges such agencies to provide advance notice of meetings at which agency business is to be conducted, and to meet in public unless the members, by

majority vote, decide that the subject matter falls within one of nine statutory exemptions. Yet, Congress recognised the legitimacy of protecting oral deliberations on issues whose resolution could be undermined by premature disclosure and thus Section 9(B) of the Sunshine Act permits closure if discussion would:

*disclose information, the premature disclosure of which would... be likely to significantly frustrate implementation of a proposed agency action... but (this exception) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or... is required by law to make such disclosure on its own initiative prior to taking final agency action on such a proposal.*

The narrow terms of this exception, however, make closure difficult in most cases.

The FACA establishes requirements that agencies must follow when consulting groups of individuals who are not federal employees, and it prescribes how such advisory committees shall proceed in rendering their service to the agency. The main requirements for the creation of an advisory committee are the existence of a charter, which must be approved by the General Services Administration; selection of members to assure diverse views on the issues to be considered; and mandatory expiration, or rechartering after two years. The main obligations of established committees are to publish advance notice of their meetings and to deliberate in public, subject to the GITSA exceptions permitting closure.

While the APA and the other laws mentioned above have affected the content of agency decisions by bringing new information and views to the attention of regulators, Congress was not seeking through their enactment to affect specific policies. Other statutes do have clear substantive objectives, though they often employ procedural means. The following are two examples of procedural statutes with substantive goals.

The National Environment Policy Act (NEPA) of 1969 sets forth procedural requirements to assure agency consideration of environmental values in the formulation and implementation of policy. Its core is the requirement that before taking any major action that may significantly affect 'the quality of the human environment,' an agency must prepare an environmental impact statement (EIS) identifying those effects, detailing their significance, and evaluating their alternatives. NEPA authorises the Council on Environmental Quality to coordinate the consideration of environmental issues among federal agencies and, with presidential support, the Council has periodically issued guidelines for the preparation of EISs. NEPA has served as a model for other statutes that seek to broaden the range of values and the types of information which agency executives weigh in making decisions. Our second example, the Regulatory Flexibility Act (RFA) of 1980, is an illustration.

The RFA was a product of mounting concern about the impact of environmental and health regulation on economic growth and, in particular, on small businesses. The focus of the Act is ostensibly procedural; it does not alter, or require an

agency to alter, substantive regulations. Rather, it compels each agency to gather information about the impact of regulatory requirements on small business.

The RFA requires all federal agencies to modify their rule-making procedures and to consider regulatory alternatives to rules, 'likely to have a significant economic impact on a substantial number of small entities'. Before issuing a proposal, the agency has to prepare an 'initial regulatory flexibility analysis' that estimates the proposed rule's impact on small business and explores alternatives that would accomplish the same objectives. A final 'flexibility analysis' is required to be part of the record of the agency's published rule.

Congress left unclear the issue of how compliance with the RFA was to be assured. The original Act specified that an agency's failure to prepare a 'regulatory flexibility analysis' for a rule not certified as exempt shall void the rule. But it went on to provide that agency determination of the Act's applicability, as well as their analysis, shall not be subject to judicial review.

The RFA was extensively amended in 1996. Probably the most significant feature of the amendment statute is the provision allowing the judicial review of the contents of an agency's final 'regulatory-flexibility analysis', of the agency's certification that a rule will not have significant impact on small businesses, and of the agency's fulfilment of its obligation to review existing rules to see if they should be amended or rescinded in order to minimise significant economic impacts on small businesses. The 1996 legislation also prescribed additional steps that certain agencies, notably, the Environmental Protection Agency and the Occupational Safety and Health Administration, must take to elicit the views of small business firms, and requires agencies generally to publish guides for small businesses on how to comply with agency rules (Mashaw, Merrill and Shane, 1998).

The examples just given show quite clearly that procedural rules are not only a means of assuring fairness and legitimacy in agency decision-making; they also fulfil important control functions, providing cost-effective solutions to problems of non-compliance by agencies. Specifically, procedures can first, reduce the informational disadvantage of political executives, stakeholders and citizens at large; and, second, they can be designed to assure that agency decisions will be responsive to the constituents that the policy is intended to favour, even when the statutory objectives are vague and seemingly give an agency great policy discretion (McCubbins, Noll and Weingast, 1987, pp. 243–277).

Thus, the procedural requirements under the APA, FOIA and GITSA reduce an expert agency's advantage over its political sponsors in a number of ways. First, agencies cannot present political principals with a *fait accompli*. They must announce their intention to consider an issue well in advance of any decision. Second, the notice and comment provisions assure that the agency learns who are the relevant stakeholders, and takes some notice of the distributional impacts associated with various actions.

Third, the entire sequence of agency decision-making — notice, comment, deliberation, collection of evidence and construction of a 'record' (dossier) in favour

of a chosen action — affords numerous opportunities for political principals to respond when the agency seeks to move in a direction that officials do not approve of. Finally, the broad public participation, which the several statutes facilitate, also works as a gauge of political interest and controversy, providing advance warning about serious distributional consequences of the decisions the agency is likely to make, in the absence of political intervention.

By controlling the extent and mode of public participation, legislators can strengthen the position of the intended beneficiaries of the bargain struck by the coalition that created the agency. This has been called 'deck-stacking'. Deck-stacking enables political actors to cause the environment in which an agency operates to mirror the political forces that gave rise to the agency's legislative mandate, long after the coalition behind the legislation has disbanded. The agency may seek to develop a new clientele for its services, but such an activity must be undertaken not only in full view of the members of the initial coalition, but following set procedures that, in relation to the RFA, for example, automatically integrate the interests of small business in agency decision-making. This in turn has led to exemptions procedures that are designed to favour them.

The National Environmental Policy Act provides another clear example of deck-stacking. In the 1960s, environmental groups sought to affect the programmes of almost every federal agency. However, the political cost of passing legislation for each agency that would alter its decision-making procedures in ways favourable to environmentalists, was too high. Sweeping procedural change that would affect the decision-making of every federal agency was a more attractive strategy. As we saw, NEPA imposed procedures that required all agencies to file environmental impact statements on proposed projects. These procedures gave environmental actors an effective avenue of participation in agency decisions and enabled participants to voice their concerns at a much earlier time than had been possible previously. The requirements of the statute also provided environmental groups with an increased ability to press suits against agencies. Thus, the passage of NEPA effectively projected the new political environment of the 1960s and 1970s into the proceedings of any federal agency whose decisions could affect environmental interests.

The Regulatory Flexibility Act of 1980 is similar to NEPA in its approach and effect. As mentioned above, the RFA requires analysis of the impact of rule-making (but not adjudication) by public agencies on the cost to small business. The effect has been to enfranchise automatically the interest of small business in agency decision-making. This in turn has led to exemptions for small business in the requirements of many proposed regulations.

This section has reviewed a number of administrative and procedural mechanisms to control agency discretion, reduce the informational disadvantage of political executives and citizens, and to induce specialised agencies to take into account broad concerns such as the environment or the competitiveness of small enterprises. It may be useful to add a few comments concerning the last point, which relates directly to a central dilemma of regulatory policy-making.

The delegation of powers to independent agencies is basically legitimated by the agencies' expertise in a fairly narrow range of technical issues. To go beyond this range would seriously compromise not only the legitimacy, but also the credibility of an agency's determinations. However, these determinations may affect concerns and interests outside the agency's mandate. As indicated above, procedural requirements cannot go so far as to require the balancing of conflicting values. This is a political responsibility that should not be delegated to technicians. Hence, it must be possible for the political executives to intervene whenever an authoritative resolution of value conflicts is needed. Such interventions cannot be arbitrary, however, but must follow well-defined procedures; they should be transparent (that is, plain for everybody to see), and should entail significant costs whenever they are perceived to be motivated by partisan considerations. A good model is provided by the procedures, which the German Government must follow when it wishes to overrule a decision of the independent Federal Cartel Office.

## Conclusion

The central theme of this report is that the current crisis of EC regulation is, above all, a crisis of credibility. Like paper money, regulation is only as good as the confidence people have in it. Popular confidence in the efficacy of EC regulation has been badly shaken by the series of crises that have crippled the market for foodstuffs; but these episodes are only the symptom of a more widespread dissatisfaction with a system which seems to be increasingly unable to deliver what it promises — or what consumers and economic actors expect it to deliver. Moreover, because rule-making — positive integration — is so central to EC policy-making, any systemic shock, such as the events which led to the resignation of the Santer Commission, poses a direct threat to the credibility of Community regulators.

That the EC distinctive approach to regulation is seriously flawed, is hardly a new observation. Indeed, many reforms undertaken since the 1980s — the shift from total to minimum harmonisation, the new approach to technical standardisation, the establishment of mutual recognition as a pivotal regulatory principle, qualified majority voting for internal market regulation — may be interpreted as attempts to increase the credibility of European regulations. However, these important reforms were driven more by immediate policy concerns than by a clear perception of the credibility problem.

This problem has several roots which, for the sake of simplicity, we may categorise into internal and external threats to credibility. Internal threats arise from the way the regulatory system has been designed and is operated, while external threats originate in the social, economic, or political environment in which the system is embedded.

The major internal threat to credibility identified by the present report, is the serious mismatch between the Community's highly complex and differentiated tasks, and the available administrative instruments. In sector after sector, experience

has shown that legislative harmonisation is not sufficient to create and sustain a truly integrated market. Regulation is not achieved simply by passing a law — or, by approximating national laws — but requires detailed knowledge of, and intimate involvement with the regulated activity. In all industrialised countries, this functional need has led, eventually, to the creation of specialised bodies — agencies, boards, commissions, tribunals — capable of fact-finding, rule-making or adjudication, and enforcement. The lack of such administrative infrastructure at European level is a serious obstacle to the completion of the internal market.

In some areas, such as the public utilities, the problem is compounded by the fact that many Member States still lack regulatory authorities that are sufficiently credible in terms of expertise and independence. In other cases, the credibility of Community regulators is threatened less by a lack of administrative and legal instruments than by scarcity of resources. For example, only the limited resources available to EC competition regulators can explain why the Antitrust Division of the US Department of Justice, rather than the Competition DG, discovered and successfully prosecuted the 'vitamin cartel' — a cartel composed by European firms. To reduce such internal threats to credibility, the Community must be able to assume responsibility for the consistent and effective enforcement of European rules throughout the Union.

Among the external threats to credibility, this paper emphasises the risks inherent to the process of progressive parliamentarisation of the Commission. We view such a process as both unavoidable and positive from a normative viewpoint. At the same time, we believe that the increasing politicisation of the Commission is the strongest argument in favour of an increased recourse to non-majoritarian institutions of regulatory policy-making at the European level. In this respect, too, national experiences are instructive. All mature democracies delegate the implementation of regulatory law to specialised agencies operating at arm's length from government. The point of insulating regulators from the political process is to enhance the credibility of regulatory commitments. Independent regulators have strong incentives to pursue the statutory objectives assigned to their agencies, even where the objectives are no longer politically popular.

In short, we argue that independent agencies represent an appropriate response to internal, as well as, external threats to the credibility of EC regulation. This conclusion is based on the general characteristics of the regulatory process, but also on the specific features of the Community system, such as, the need to preserve the balance between the European institutions and the Member States, and between the political and non-political branches of the Union.

To prevent misunderstandings, however, it is important to keep in mind that the independence of regulatory agencies is relative. Even the powerful Independent Regulatory Commissions in the United States, are independent only in the sense that they operate outside the presidential hierarchy, and that 'Commissioners' cannot be removed from office by simple virtue of their disagreement with presidential policy. All Commissioners are created by congressionally enacted statutes; their legal authority and their objectives are defined and limited by such statutes.

In short, political principals have at their disposal a large number of substantive and procedural means to oversee agencies and keep them accountable, without interfering in their day-to-day decision-making. In sum, agency status does not require that the agency exercises its power with complete independence, but, rather, that it possesses the legal authority to take a final and binding action affecting the rights and obligations of individuals.

Equally, this model raises doubts about the wisdom of a generalised use of the principle of collegial decision-making — even for decisions not involving political discretion — but it does not in any way challenge the EC/U Treaties-based powers and responsibilities of the Commission. On the contrary, the delegation of implementing power to autonomous agencies would permit the Commission to concentrate on the tasks that are truly essential to the process of European integration.

Similarly, European agencies are not meant to replace national regulatory authorities; rather, they would form the central node of transnational networks including national regulators, as well as international organisations. Agency networks thus possess 'super-additive' qualities. By this, we mean that a well-functioning network is a good deal more than a mere sum of administrative bodies: the nature of each agency in the network is positively changed by the very fact of membership. An agency that sees itself as part of a transnational network of institutions pursuing similar objectives, rather than as a marginal addition to a large central bureaucracy pursuing a variety of objectives, is more motivated to defend its professional standards and policy commitments against external influences, and to cooperate with the other members of the network. This is because the agency executives have a strong incentive to maintain their reputation in the eyes of their international colleagues. Unprofessional, self-seeking or politically motivated behaviour would compromise their international reputation and make cooperation more difficult to achieve in the future.

According to the jurisprudence of the ECJ, Article 5 of the Rome Treaty imposes a reciprocal obligation of cooperation, not only between Community institutions and national authorities, but also between the national authorities themselves. Traditionally, this general principle has been honoured in the breach, but networks of autonomous agencies may provide the best conditions for its political implementation.

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# European governance in search of legitimacy: the need for a process-based approach

**Renaud Dehousse**

The heated debates that have preceded the ratification of the Maastricht Treaty have brought to the fore the question of the legitimacy of the integration process. They have made clear that the European Union can no longer be regarded as a 'classical' international organisation, the decisions of which are legitimated by the consent of their members. Not only is the EU system a greater producer of binding norms of all kinds than most of its international counterparts, but various elements, from the resort to majority voting to the role of NGOs, make it impossible to simply reconduct all its decisions to the sovereign will of EU Member States.

While there seems to be a broad agreement on the fact that traditional intergovernmental approaches no longer suffice to make sense of (let alone legitimise) the complex patterns of decision-making that characterise contemporary European governance, there is no real consensus as to how the present institutional structure ought to be amended to improve the legitimacy of European decisions in the eye of public opinion. As a result, Europe has engaged in a phase of 'mega-constitutional politics'<sup>1</sup>, in which a substantial part of the political debate is devoted to institutional issues. The Maastricht Treaty has been amended only four years after its coming into force, and a new Treaty round is already under way.

This contribution attempts to shed new light on this mighty problem by suggesting that the traditional, parliamentary-based, approach to the reform of European institutions is defective, normatively as well as analytically. Taking as a starting point the transformation of modern governance, it advocates an alternative, procedural approach, in which concepts of openness, transparency and participation play a central role.

## **The limits of representative democracy**

For many years, discussions on the legitimacy of the European institutions have revolved around the place of the parliamentary branch in the institutional system. The alleged weakness of the European Parliament and the inability of most national assemblies to significantly influence the behaviour of their executive were perceived as the core of the Union's 'democratic deficit'. The European Parliament

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<sup>1</sup> The expression is borrowed to Peter Russell, *Constitutional odyssey — can Canadians become a sovereign people?*, Toronto University Press (1992).

itself was not slow in raising the issue. From the mid-1980s onwards, it has repeatedly emphasised that while the competences transferred to the European Community were mostly of a legislative nature, its own legislative powers remained weaker than those of national legislatures, which was said to result in a weakening of the democratic quality of European decision-making<sup>2</sup>.

Interestingly, this parliamentary vision of democracy has featured prominently in the positions taken by institutions that did not share the European Parliament's vested interest in promoting its own role. Thus, in the discussions on institutional reform that have spanned the last 15 years, many national governments have regularly advocated an increase in the powers of the European Parliament — a position which apparently had the support of large layers of the population in countries like Germany<sup>3</sup> or Italy. Similarly, in its now famous ruling on the Maastricht Treaty, the German Constitutional Court identified in the institutional weakness of the European Parliament the main shortcoming in the democratic credentials of the European Union:

'Where (the European Union) assumes sovereign tasks and exercises sovereign powers to carry them out, it is first and foremost for the national peoples of the Member States to provide democratic control via their national parliaments. Nevertheless, as the Community's tasks and powers are expanded, so the need grows to add to the democratic legitimacy and influence imparted through the national parliaments by securing the representation of the national populations of the Member States in a European Parliament, as a source of additional democratic underpinning for the policies of the European Union<sup>4</sup>.'

This apparent concession to orthodoxy was all the more remarkable, given that the *Bundesverfassungsgericht* ruled out any possibility for democratic government ever to emerge at the European level, on the grounds that the European polity lacks the ethnic and cultural homogeneity that are indispensable for the proper functioning of any democratic system. Why bother about institutional engineering if it is unable to ensure the results that one seeks to achieve anyway?

This convergence in the political discourses on European democracy shows how deeply anchored a model representative democracy is in the western European political culture. To assess the relevance of this model in the EU context, it is however useful to identify clearly a number of underlying assumptions. First, in its most basic understanding, the system is based on what one could call an **input-oriented** form of democratic legitimation<sup>5</sup>: people elect their representatives, the latter take decisions affecting the fate of the polity, and they must be accountable for their choices before voters. Central to this assumption is the fact that all political choices can somehow be reconducted to the will expressed by citizens through

<sup>2</sup> Resolution on the democratic deficit, OJ C 187 1998, p. 229.

<sup>3</sup> Larat, 'L'Allemagne et le Parlement européen', (1999) *Critique internationale*, No 5,

<sup>4</sup> Case Nos 2 BvR 2134 and 2159/92, 12 October 1993, reprinted in Oppenheimer (ed.), *The relationship between European Community law and national law: The cases*, Cambridge: Cambridge University Press, 1994, pp. 524–575 at p. 553.

<sup>5</sup> Scharpf, 'Democratic policy in Europe', 2 *European Law Journal*, (1996) pp. 136–155.

their votes. Secondly, laws passed by representative bodies are *par excellence* the instruments whereby such political choices are made. In this vision inherited from Jean-Jacques Rousseau, legislative bills are the expression of an axiomatic 'general will'. Thirdly, there is often an implicit equation between the 'general will' and the common good: what legislators decide is supposed to serve the interests of the whole polity.

Applying such a model to the governance of the European polity is however problematic. Indeed, I would argue that this model is analytically weak, and normatively ill-adapted to the specificity of the European Union.

The vision of representative democracy that is used in discussions on the legitimacy of European institutions often seems to have more to do with 18th century models of democracy than with the governance of complex post-industrial societies. It fails to take account of the many problems this form of government has been confronted with at national level. To mention but a few: we have known since Schumpeter that it is wrong to assume that the people itself decides issues through the election of representatives<sup>6</sup>: elections are better described as a way to choose — or, better said in our times of growing dissatisfaction with politics, to get rid of — those who govern, and this choice is far from being merely influenced by competing visions of the common good. Likewise, phenomena such as the emergence of large-scale bureaucracies, technological development and the growing importance of expert advice in public policy make it difficult to argue that all decisions affecting the fate of the polity are taken by people's representatives. The decision-making process is generally much more complex: in many countries, legislation to be adopted by parliaments is almost always drafted by the executive, and is often conditioned by expert advice or by complex negotiations involving representatives of organised interests. Political parties, the role of which was not contemplated in liberal constitutions, also play an important mediating role. In other words, the somewhat ethereal vision of representative democracy which is referred to in discussions on the would-be European democracy has little to do with the way this model actually operates in our times<sup>7</sup>.

Applying the representative model at European level is also problematic from a normative standpoint. Its use often rests on an implicit assumption: if it works at home (a risky statement, as was just said), it will also work at European level. Indeed, the institutional reforms of the last 15 years, with their steady increase in the powers of the European Parliament, seem to be inspired by the idea that parliamentary democracy is a valid model at the European level as well as at national level. This, however, fails to take into consideration the fact that moving from the national to the supranational level entails a change in the level of analysis. Because the European Union is not a State, but some sort of union of States, it would be fal-

<sup>6</sup> Schumpeter, *Capitalism, socialism and democracy*, London: Allen & Unwin, 1942.

<sup>7</sup> Interestingly, parliaments themselves now seem to realise that the complexity of contemporary society requires a redefinition of their traditional role. See Working group of European Union speakers on the quality of legislation, *The complexity of legislation and the role of Parliaments in the era of globalisation*, mimeo, Lisboa 1999.

lacious to imagine that such a transposition can be done mechanically<sup>8</sup>. On the contrary, the exercise is fraught with problems. Recent analyses have highlighted the limits inherent in an input-based approach to the question of democracy in the European Union. In a conglomerate where people's primary allegiances tend to remain with their State<sup>9</sup>, the legitimacy of supranational institutions remains problematic. The development of a democratic debate is hampered by the absence of a common language and of pan-European media<sup>10</sup>. Moreover, and more fundamentally, the heterogeneity of the European polity is such that the adoption of a purely majoritarian system, in which decisions can be taken by a majority of representatives of the people, is difficult to conceive. The lack of any strong collective identity makes it difficult to believe that minorities would easily accept that their fate be decided against their will<sup>11</sup>. Already now, it is far from rare to hear the EU being accused of ignoring the traditions or the interests within the Union, in spite of the many safeguards that exist in the decision-making process to protect Member States' interests. This kind of tension would be likely to grow exponentially if some strict majoritarian rule were to be adopted. Ultimately, majority rule would end up feeding centrifugal forces.

Does it follow that the best way to ensure the democratic functioning of the EU is simply to return to a pure intergovernmental system, in which no decision could be taken but with the explicit consent of all Member States, as is often argued in these days of creeping Euro-scepticism? That would be a simplistic conclusion. Even leaving aside the transaction costs inherent in pure intergovernmental models, it ignores the fact that negotiations in a multi-veto system cannot reach an optimal outcome unless negotiators depart from their 'democratic' mandate, namely the preferences of their fellow citizens<sup>12</sup>. It also overlooks the fact that at national level too, the State machinery can easily be captured by specific interests, or even be simply concerned with interests of its own. What is conveniently presented as **the** national interest often corresponds more the interests of specific groups of people, rather than the public good. France's traditional tough stance on agricultural issues in trade discussions may serve farmers' interests, but does it really serve those of industrial producers or of consumers? Likewise, Britain's attitude in the BSE crisis appeared to be motivated more by a concern for the fate of beef producers than by the interests of consumers.

This is not without analogy with the motive given by James Madison to justify the establishment of some kind of constitutional democracy at continental lev-

<sup>8</sup> I have developed this point in an earlier essay: 'Comparing national law and EC law: the problem of the level of analysis', *American Journal of Comparative Law* (1994), pp. 201–221.

<sup>9</sup> Frogner and Duchesne, 'Is there a European identity?' in O. Niedermayer and R. Sinnott, *Public opinion and international governance*, Oxford University Press, 1995, pp. 194–226.

<sup>10</sup> Grimm, 'Does Europe need a constitution?', 1 *European Law Journal* (1995) pp. 282–302, Meyer, 'European public sphere and societal politics' in Mario Telo (ed.), *Démocratie et construction européenne*, Bruxelles: Presses de l'Université libre de Bruxelles, 1995, pp. 123–131.

<sup>11</sup> Dehousse, 'Constitutional reform in the European Community: are there alternatives to the majoritarian avenue?', *West European politics*, (1995), pp. 118–136, Weiler et al., (1995) *West European politics* (1995), pp. 4–39, Scharpf, 'Legitimacy in the multi-actor European polity', in *Essays for Johan Olsen*, 1999, pp. 260–288, at pp. 276–78.

<sup>12</sup> Scharpf, *supra* note 10 at p. 282.

el. Rejecting Montesquieu's idea that the public good was easier to achieve in a small, homogeneous republic, Madison argued that it was easier to ignore the interests of minorities in smaller polities:

*the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression*<sup>13</sup>.

To protect republican government, he wrote, the remedy is to extend the 'sphere' of the polity. By taking in 'a greater variety of ideas and interests', this change of scale will 'make it less probable that a majority of the majority of the whole will have a common motive to invade the rights of other citizens.'<sup>14</sup> Applied to contemporary Europe, such an approach might lead one to view the integration process as a source of value added in terms of democracy. For a British trade unionist in Mrs Thatcher's Britain, or for a French industrialist interested in greater freedom of trade, the Europeanisation of social policy or of trade relations, respectively, might appear as a way to secure a policy less hostile to their preferences, rather than as a loss of collective sovereignty. Indeed, behind calls for European interventions, we often find groups of people who somehow have failed to secure from public authorities the kind of decision they wanted.

Reflections on European constitutionalism must therefore avoid two kinds of evils. Statism — the tendency to reason as if one could simply transpose at supranational level solutions experienced at national level — is likely to lead to conclusions that might threaten the stability of the whole system. At the same time, however, one should take account of the fact that the EU is in many respects unlike traditional international organisations, be it only because it decides on a wide range of issues that affect people's daily life. Advocating a return to the good old days when national sovereignty, embodied in national parliaments, was the answer to all legitimacy concerns will not help, as a large number of issues appear to require transnational cooperation. Some sort of democratic input in European decision-making is therefore needed — urgently, one might argue, given the lack of enthusiasm displayed by citizens of all Member States in Euro-elections. The best way to achieve this objective, I would argue, is to go beyond classical discussions on the kind of institutional arrangement that should exist at the end of the integration process, and to pay greater attention to the evolution of European governance. Normative analysis should be grounded on a careful analysis of reality, if it is to avoid the pitfalls of excessive abstraction.

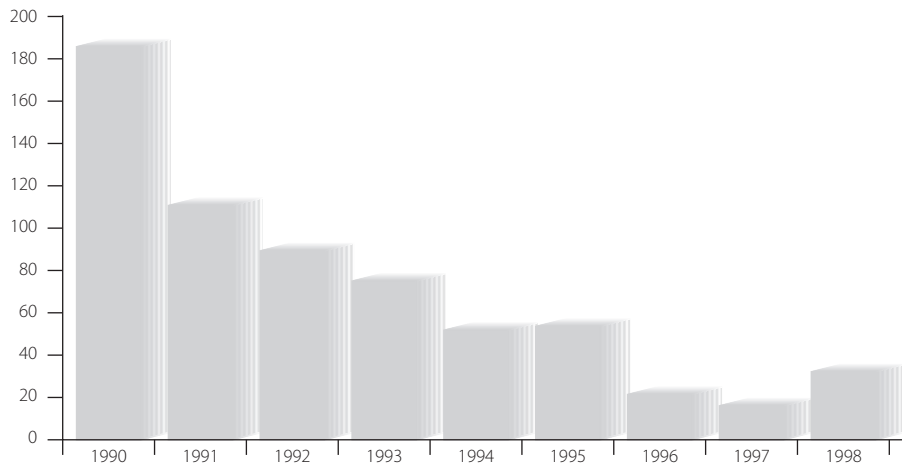
## The growth of bureaucratic governance

As indicated above, so far normative discussions on how to improve the legitimacy of European institutions have essentially focused on the powers of the European Parliament. In many respects, this is but a corollary of a tendency to regard

<sup>13</sup> *The federalist*, 10.

<sup>14</sup> *Ibid.*

Figure 1:  
*Proposals of primary legislation introduced by the European Commission*



Sources: *Reinforcing political union and preparing for enlargement, Commission Opinion for the Intergovernmental Conference 1996*, 1995, p. 87, for years 1990–95; COM (95) 512 final for year 1996; SEC(96) 1819 final year 1997; [http://europa.eu.int/comm/off/work/1998/index\\_fr.htm](http://europa.eu.int/comm/off/work/1998/index_fr.htm) for year 1998

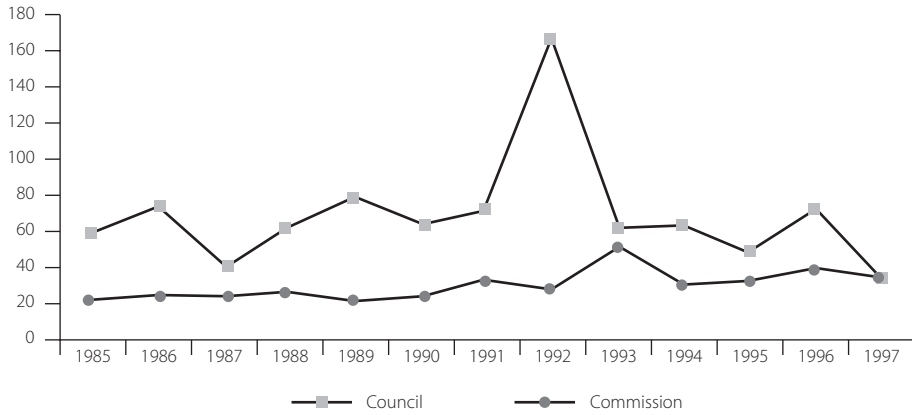
harmonisation, i.e. the approximation of substantive rules, be they contained in laws or in administrative regulations at domestic level, as a key instrument in EU policies. Harmonisation being primarily a legislative exercise, it was only natural to pay so much attention to legislative procedures. However, this emphasis on legislative procedures overlooks a fundamental transformation under way in the governance of the European Union. Now that the legislative framework for the internal market is nearly complete, there seems to be a slowdown in the Community's legislative activities. Figure 1 shows that the number of primary legislative proposals has declined in recent years.

It would be wrong to conclude from this that the overall volume of Community regulatory activity is declining. Indeed, the overall volume of Commission rule-making, most of which takes place in the comitology framework, remains rather high, as shown in Figures 2 and 3.

The Commission has long been — and by far — the main producer of Community regulations. Moreover, in 1997, the number of directives adopted by the Commission exceeded for the first time that of directives adopted by the Council.

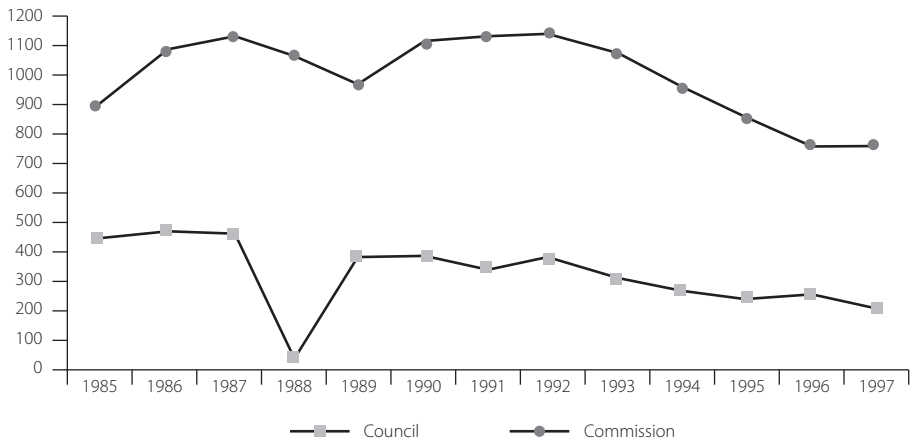
In other words, in sheer numbers, the importance of secondary (non-legislative) rule-making appears to be considerable. The combination of these two elements — the decline of purely legislative activity, and the respectable size of secondary rule-making — suggests that we should reconsider the traditional emphasis on legislative procedures in discussions on the legitimacy of European institutions. The legislative phase is but one part (admittedly important) of the decision-making

Figure 2:  
Number of directives adopted by the European Institutions



Source: *General Report on the Activities of the European Union\** Data retrieved from CELEX, the interinstitutional computerised system on community law, excluding instruments not published in the OJ and instruments listed in light type (routine management instruments valid for a limited period). For years 1993 to 1997, directives adopted by the European Parliament and Council in accordance with the co-decision procedure are included in the category 'Council'

Figure 3:  
Number of regulations adopted by the European Institutions



Source: *General Report on the Activities of the European Union\** Data retrieved from CELEX, the interinstitutional computerised system on community law, excluding instruments not published in the OJ and instruments listed in light type (routine management instruments valid for a limited period). For years 1993 to 1997, regulations adopted by the European Parliament and Council in accordance with the co-decision procedure are included in the category 'Council'



process. A growing number of salient political issues are likely to arise in the post-legislative phase, be it in rule-making or the concrete application of Community rules. Should a given product be authorised? What kind of precautionary measures are needed to protect human health in the case of scientific doubts related to our alimentary habits? The management phase may gain even more importance in the future, as the Amsterdam Treaty has enhanced the powers of the European Community to deal with what is known as 'risk regulation' in areas such as human health, consumer policy and environmental protection<sup>15</sup>. As risk regulation decisions are often made on the basis of complex scientific evidence, they cannot always, or indeed most of the time, be made *in abstracto*, once and for all, in legislation, but rather require individual, ad hoc decisions, taken by administrative bodies.

If this analysis is correct, a growing number of important decisions at European level are likely to be taken by bureaucratic structures of some kind. In practice, as the EU largely remains a system of decentralised administration, in which legislative rules are implemented by the Member States' administration, this suggests that the role of intergovernmental committees, known as comitology in the Euro jargon, is bound to increase in the years to come. However, the way those committees operate may be the source of a variety of legitimacy problems. First, the system is striking in its opacity. Who does what and how is nearly impossible to tell for a lay audience. This lack of transparency may undermine the authority of Community decisions: citizens may find it difficult to accept decisions based on recommendations from obscure bodies, the composition and functioning of which remain a mystery. Secondly, it is not clear that the social prestige of committee members will be sufficient to command obedience. While scientific experts may derive some authority from their technical knowledge, bureaucrats are the focus of widespread mistrust in European countries. Thirdly, the little we know of the way comitology works may also become a source of concern. The convergence of concerns, interests and language among experts which is said to be the hallmark of comitology seems to enable the system to operate fairly smoothly<sup>16</sup>. However, while positive from the standpoint of efficiency, this consensus may undermine the legitimacy of the system, as it can easily be depicted as one more instance of power in the hands of a closed circle of élites. The risk of collusion is quite real: can experts be regarded as neutral in areas where research is largely financed by industry? Can we really assume that they will not be influenced by their national origins? The BSE crisis has shown that issues of this kind are far from moot. They must therefore be addressed squarely if one is to put comitology on firmer grounds for legitimacy purposes.

How may this objective be achieved? Generally speaking, five different types of arguments are traditionally used to legitimise bureaucratic processes<sup>17</sup>. Given the specificity of the Community regulatory process, it would be wrong to assume

<sup>15</sup> Dehousse, 'European institutional architecture after Amsterdam: parliamentary system or regulatory structure?' (1998) *CML Rev* pp. 595–627; Ludlow, *Preparing Europe for the 21st century: The Amsterdam Council and beyond*, Brussels: CEPS, 1997.

<sup>16</sup> Joerges and Neyer, 'From intergovernmental bargaining to deliberative political processes: The constitutionalisation of comitology', (1997) 3 *European Law Journal* 3, pp. 255–272.

<sup>17</sup> I am using here in a slightly adapted fashion a terminology borrowed from Baldwin, *Rules and government*, Oxford: Clarendon Press, 1995 at pp. 41–45.

that they can be mechanically transposed to the European level. However, they furnish good yardsticks for assessing the legitimacy of bureaucratic decisions taken at that level.

- The 'legislative mandate' approach is the most traditional. Parliament is seen as the main repository of legitimacy and the administration must strive to achieve the objectives that are set out in governing legislation.
- In the 'accountability or control' model, legitimacy is grounded in the fact that the administration is somehow under control, i.e. that it is held accountable for its decisions by a representative body (generally the legislature) or by courts.
- The 'expertise' claim stresses that as a result of their technical character, many decisions cannot be taken by the legislature: expert judgment is needed to judge the respective merits of competing options, and experts must be granted sufficient discretion.
- The 'procedural' approach emphasises the fairness of decision-making processes. It demands that consideration be given to the interests of persons affected by administrative decisions. Procedures designed to associate such persons to the decision-making process are therefore viewed as essential. They tend to vary according to the kind of decisions that are taken. Under 'due process' requirements, administrative bodies must consider the interests affected by individual decisions. As regards rule-making, the same concern for fairness may lead to the adoption of rules guaranteeing transparency and participation or consultation rights.
- **Efficiency** is also often claimed as a grounds for legitimacy, particularly in recent times, as the ability of government structures to deliver results is becoming increasingly important. While there are many ways of defining efficiency, two meanings are particularly relevant for our purposes: decision-making efficiency (the ability to take decisions when needed) and substantive efficiency, i.e. the ability to take the 'right' decisions.

Obviously, these approaches are not necessarily mutually exclusive. Accountability and control can be used to monitor the effective implementation of legislative mandates or the compliance with the procedural requirements of the 'due process' model. Likewise, the resort to experts is often advocated on efficiency grounds, and can be balanced through various accountability techniques. Nevertheless, there are clear differences among various claims. The degree of discretion required in the 'expertise' model is at odds with the idea of exhaustive legislative mandates. Similarly, the vision of the public interest inherent in the 'legislative mandate' approach often assumes the existence of a collective body — the people — whose interests are represented by Parliament, while the 'procedural' model is informed by a more polycentric vision of the polity, in which the coexistence of a wide variety of interests, which must all be given due consideration, is acknowledged.

At this stage, my concern is not to endorse any one of these models, but rather to discover how suitable they may be, given the specific character of Community decision-making. To streamline somewhat the discussion, I will take as a

starting point the limits of an approach that would rest exclusively on the 'expertise' model. Involving experts at various levels of the decision-making process is undoubtedly necessary, particularly when the decisions to be taken have a technical dimension. Providing much-needed expertise is clearly an important achievement of the European committee system. It can even be argued that the quality of deliberations among experts will not only contribute to the quality of the regulatory process, but also to its legitimacy, as was suggested by Joerges and Neyer<sup>18</sup>. Yet, this does not suffice. For one thing, there is no guarantee that experts' 'deliberations' are actually exclusively inspired by the public good: all sorts of considerations, ranging from their vision of their country's interests to possible links with the industry they are supposed to regulate, may influence the positions they take within committees. Moreover, even assuming that their attitude is **in fact** influenced by purely disinterested concerns, would this suffice to ensure the legitimacy of their decisions? I don't think so: granting experts *carte blanche* is likely to be unpopular in a period of widespread mistrust of technocrats of all kinds. Right or wrong, lay people may also have views on the decisions to be taken, and insist that they too should be considered. Some sort of control over their deeds is therefore necessary.

Our reflections should therefore focus on the remaining approaches. Various versions of the 'legislative mandate' and the 'accountability' models have been invoked by those who argue that the European Parliament, now that it has acquired the status of a co-legislator in many areas, should have more power over delegated legislation. Both types of arguments are part of the same, **supranational** avenue: the European Parliament, it is said, being the institution most representative of the European people at large, should play a greater role in overseeing comitology. In contrast, as was just indicated, the **procedural** model rests on a radically different vision of legitimacy, one which would require the opening of comitology to representatives of all interests affected by its decisions. Each of these two options will now be reviewed in turn.

## The supranational avenue: legislative mandates and parliamentary control

Since the introduction of legislative co-decision in 1993, the European Parliament has insisted on being treated as a Council co-equal in supervising Commission-implementing decisions. It has opposed particularly vigorously management and regulatory committees, which it regards as a way of circumventing its newly acquired legislative powers: in the four years since co-decision was introduced, comitology was an issue in about two-thirds of the dossiers that were subjected to the conciliation procedure. Disagreement over the proper implementing procedure was also at the root of Parliament's rejection of the directive on voice telephony — the first time that Parliament used its co-decision prerogatives to reject a Council common position.

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<sup>18</sup> *Supra* note 15.

There are several ways in which the European Parliament could become more closely involved with the decisions currently being taken within the comitology framework.

The first, 'legislative mandate' approach would suggest that the current balance between legislation and administrative decisions be altered in order to ensure that the most salient policy decisions are taken as legislative measures. A return to legislative policy-making is a technique widely advocated in order to combat the growing influence of bureaucracies<sup>19</sup>. Surely, it would be historically incorrect to describe comitology as having robbed the European Parliament of its legislative prerogatives, as comitology pre-dates Parliament's rise to the status of a full-fledged legislature. However, MEPs have consistently called for a clearer demarcation between decisions that can be taken through comitology and those that require a proper legislative procedure<sup>20</sup>, a position that underlies Parliament's support for a clear hierarchy of Community acts. The European Court of Justice itself has suggested that 'the **basic elements** of the matter to be dealt with' must be adopted in accordance with the legislative procedure laid down by the Treaty, while 'the provisions implementing the basic regulations' may be adopted according to a different (i.e. comitology) procedure<sup>21</sup>.

However, there seem to be clear functional limits to what can be achieved along these lines. As indicated above, it is not always possible for legislation to anticipate all the problems that may arise in the implementation phase. Parliaments may lack the time or the necessary expertise to solve all problems in advance, and they may find it expedient to delegate part of the problem-solving task to implementing agencies. Moreover, the borderline between policy choices and implementation 'details', between legislation and administration, is often blurred when scientific or technical choices must be made. Prior to the BSE crisis, who would have thought that animal feed was an issue that would gain considerable public attention?

Parliamentary control over the executive, another traditional oversight instrument, seems equally difficult to adapt to the specific features of Community governance. While at national level, parliamentary control over the administration is a by-product of its control over the cabinet via the institution of ministerial responsibility, no such thing exists at European level. Although Parliament has gained considerable control over the Commission in the post-Maastricht years, functionally comitology committees are not under the Commission's authority<sup>22</sup>. The vertical chain of command thought to exist at national level (parliament-executive-bureaucracy) is broken at European level, where delegated legislation is, at least partly, in the hands of networks of national experts. The European Parliament's role must be adapted to this network-based reality if it is to be of more than symbolic relevance.

<sup>19</sup> Lowi, *The end of liberalism*, second edition, (New York: Norton, 1979).

<sup>20</sup> Bradley, 'The European Parliament and comitology: on the road to nowhere?' 3 *European Law Journal* (1997) pp. 230–254.

<sup>21</sup> Case 25/70, *Köster*, (1970) at p. 234.R 1161.

<sup>22</sup> Even though the Court of Justice has recently ruled otherwise, at least as regards access to committee documents. See case T-188/97, *Rothmans International BV v Commission*, 19 July 1999, not yet reported.

Parliament's response to that structural difficulty has been to put pressure on the Commission, as the latter plays a leading role in implementation procedures, and appears to be extremely influential in comitology committees. The Plumb-Delors agreement of 1987 stipulated that the Parliament would be notified by the Commission of most draft implementing measures. These were then to be forwarded to the responsible parliamentary committee so that it could voice its concerns whenever necessary. Clearly, the effectiveness of such an agreement depends primarily on the Commission's willingness to keep the Parliament informed and to take its views into account. In both respects, the first years of the agreement have been rather disappointing: many drafts have not been sent to the Parliament and, in all but a handful of cases, parliamentary committees have failed to react<sup>23</sup>. The strengthening of Parliament's grip over the Commission in recent years has led to a formal recognition of its right to be informed of committees' proceedings<sup>24</sup>. Even if this were to occur, however, a question would still remain: how should Parliament process this information, and react if need be? Here, two problems must be addressed: lack of time and expertise. Can Parliament effectively scrutinise the hundreds of decisions adopted each year by committees, given its heavy agenda and complex organisation? Will MEPs have the relevant expertise?

Entrusting supervision to Parliamentary committees, as was decided in the wake of the Plumb-Delors agreement, is a sound division of labour. Members of committees are likely to be better equipped than many of their colleagues to make sense of the technical issues addressed in draft implementing measures; further, decentralisation is needed to deal with the masses of documents involved. But what kind of relationship should be established between Parliamentary committees and their counterpart(s) in the web of Comitology committees?

Interestingly, Parliament's ambitions seem to have increased in parallel with the emergence of its legislative profile. Parliament has at times expressed an interest in being more closely involved with the work of committees, e.g. by including its own observers in the committees<sup>25</sup>. This proposal raises a delicate but fundamental issue: in a system where influence appears to be directly related to the degree of expertise enjoyed by the various participants in the debate<sup>26</sup>, what can be the impact of elected representatives, namely politicians? True, the European Parliament could set up its own expert networks to control the work of committees. But in terms of legitimacy, the 'value added' of another layer of experts would be rather thin. Rather than have politicians clothe themselves as technical experts, as they at times seem tempted to do<sup>27</sup>, would it not be preferable to limit their role to a number of basic pol-

<sup>23</sup> Bradley, *supra* note 19 at 237; Corbett et al., *The European Parliament*, 3rd ed., London: Catermill (1995), pp. 254–255.

<sup>24</sup> Council decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184 of 17 July 1999, p. 23.

<sup>25</sup> Bradley, *supra* note 19 at p. 234.

<sup>26</sup> See the analysis of Eichener, *Social dumping or innovative regulation? Process and outcomes of European decision-making in the sector of health and safety at work harmonisation*, Florence: European University Institute, EUI Working Papers SPS pp. 92/28.

<sup>27</sup> Landfried, 'Beyond technocratic governance: the case of biotechnology', (1997) 3 *European Law Journal*, pp. 253–272.

icy choices and to grant them the right to intervene when issues they deem fundamental arise in the implementation phase? Indeed, this seems to be the solution contemplated in the recent comitology decision as regards regulatory decisions. Rather than systematically participating in the adoption of implementing legislation, the European Parliament has been given the right to step in whenever it feels a political input is needed, and to ask that a proper legislative procedure be followed<sup>28</sup>. Although such an opinion would not be binding, it would be likely to enjoy considerable weight, only because Parliament has given ample evidence of its willingness to go to Court whenever it feels its prerogatives are being ignored.

Admittedly, such a division of labour would better correspond to the respective functions of legislator and executive in modern societies. Of particular importance, given the technical character of many issues tackled within European committees, is the Parliament's power to hold hearings. This technique could be used more systematically, as a means of obtaining independent expertise and facilitating a dialogue with interested parties. It would also enable the Parliament to exert greater control over the Commission, as the latter would be called upon to react to the views expressed by witnesses. Furthermore, hearings would very likely attract media attention to particular issues, thereby contributing to improved public awareness of the decisions taken at the European level. Such an approach, which emphasises accountability and the European Parliament's function as a forum where the important political issues of the day can be debated, would be better suited both to the structure of comitology as a system of regulatory networks, and to the technical character of the issues tackled through comitology, than parliamentary involvement in the day-to-day work of committees.

But would enhanced monitoring by a supranational legislature suffice as a grounds for legitimacy? There are reasons to be sceptical. Representative democracy has become the focus of widespread criticism in western Europe, where it is often perceived as a system that enables a cartel of élites to exert tight control over the policy agenda<sup>29</sup>. Arguably, the gap between the rulers and the ruled may be even wider at the Community level. To many European citizens, the Parliament still appears a remote assembly, whose work remains largely unknown and whose members do not always represent the mood of the populace. More importantly, in a system where primary allegiances remain firmly rooted at the national level, national ties may prove to be more important than the supranational logic of parliamentary democracy. To put the matter bluntly, German or Danish consumers might feel more effectively represented by, say, a delegate from a national consumer organisation than by Greek or Portuguese MEPs.

Reflections on the legitimacy of the European policy process must also come to terms with the polycentric character of the European populace. Not only is there no European '**demos**'<sup>30</sup>, but 'we the people' cannot simply be read in the

<sup>28</sup> Article 5(5) of Council decision of 28 June 1999, *supra* note 23.

<sup>29</sup> Mény, *The people, the elites and the populist challenge*, EUI Florence, Jean Monnet Chair Papers RSC No 98/47.

<sup>30</sup> Weiler, 'Does Europe need a constitution? Reflections on Demos, Telos and the German Maastricht decision', 1 *European Law Journal* (1995), pp. 219–258.

plural as a reflection of the coexistence of different States within the European Union. The truth is that the peoples of the Member States, too, are a kaleidoscope of regions, cultures and interests not always identified with the State apparatus, and can all legitimately claim to voice their views and be heard at the European level. After all, even at national level, the reductive nature of representative democracy, distorted even further by the structure of many electoral systems, makes it impossible for parliaments to mirror perfectly the broad range of interests and feelings that coexist within a single polity. Hence the attractiveness of alternative forms of legitimation, which provide for some form of direct participation of affected parties in the decision-making process.

## The procedural avenue: transparency, openness and participation

So far, I have argued that several of the approaches traditionally used in order to legitimate delegated legislation are ill-adapted to the specific needs of comitology. Reliance on the expertise model is no longer sufficient in a world where technocracy has become the focus of much mistrust. Legislative mandates cannot always be sufficiently clear, as it is impossible to consistently set down precise standards and objectives. Although more promising, an approach based on Parliamentary control over expert decisions is still far from sufficient, as the European Parliament cannot claim to represent **all** the interests, be they national, local or sectorial, that coexist within the European Union. Additional techniques ought therefore to be considered if the legitimacy of European governance is to be put on firmer ground.

Bearing in mind what has just been said about the growing gap between citizens and government in Europe, one such technique might be to empower all the parties affected by comitology decisions to express their concerns before the relevant committees. The main advantages of such an approach would be twofold. An extensive dialogue with the various segments of civil society would obviate some of the shortcomings of representative democracy at the European level, by enabling those who so wish to have a say in the decision-making process<sup>31</sup>. In so doing, one might enhance the legitimacy of decisions taken by European bodies, for there is empirical evidence to suggest that decisions taken by public bodies (even non-representative ones, such as courts) are more readily accepted when they appear to be taken according to fair procedures<sup>32</sup>. A greater openness of the decision-making process also improve public awareness of the issues discussed at the European level, thereby contributing to the emergence of a truly pan-European public sphere.

From the standpoint of openness to the populace at large, the present situation is defective in several respects. As any scholar who has done research on comi-

<sup>31</sup> See Curtin, 'Civil society and the European Union: opening spaces for deliberative democracy', *Collected courses of the Academy of European Law* (1998).

<sup>32</sup> Tyler, *Why people obey the law*, New Haven, Connecticut: Yale University Press, 1990.

tology knows, information on the actual operation of committees is difficult to find. The total number of committees remains a mystery<sup>33</sup>. In 1994, Parliament had to freeze a share of the appropriations for committees in order to obtain more information from the Commission on the number of meetings and their work output<sup>34</sup>. Committees' rules of procedure are difficult to get hold of. When formal rules do exist, they appear to focus on the internal operation of committees: regulating deliberation among experts, i.e. relationships between the Commission and national representatives, is their main target<sup>35</sup>. In contrast, little or no attention is paid to the relationship between the comitology web and the outside world. True, in some areas, committees have been created specifically for the purpose of allowing organised interests to give their input. In the food sector, for instance, an ad hoc committee has been set up to represent the views of various socioeconomic interests. Yet the Advisory Committee on Foodstuffs offers a good illustration of the limits of what have been achieved so far<sup>36</sup>. As its members are appointed by the Commission, the latter may privilege certain interests; for instance representatives of environmental interests have been excluded. Moreover, the committee can only act at the Commission's request, which explains why it has remained inactive for long periods.

Rather than ad hoc representative fora, greater openness in the work of **all** committees is needed. This could be achieved with a standard set of procedural rules regulating the interface between comitology committees and civil society at large. What kind of principles should these rules contain? Without entering into a detailed examination of the question, it may be useful to point out some basic elements. Thus, for instance, the agenda of committee meetings, the draft proposals to be discussed, and the minutes should be made public<sup>37</sup>. Interested persons should be given the opportunity to express their views on any item on the agenda; public hearings could even be envisaged for matters of particular importance. Committees should also be required to explain the considerations that underlie their eventual choices.

How could such a proceduralisation be brought about? A number of scholars have warned against the danger of 'ossification' of administrative procedures through codification in a legislative act<sup>38</sup>. It is fair to say that both the European Court of Justice and the Court of First Instance have displayed a growing awareness

<sup>33</sup> See e.g. Vos, 'The rise of committees', (1997) 3 *European Law Journal*, p. 210 at p. 213; Falke, 'Comitology and other committees: a preliminary empirical assessment', in R.H. Pender/G.F. Schaefer (eds.), *Shaping European law and policy: the role of committees and comitology in the political process*, (Maastricht, 1996), pp. 117–165, at pp. 136–137.

<sup>34</sup> Bradley, *supra* note 19, at p. 242.

<sup>35</sup> See e.g. the rules procedure of the standing committee for foodstuffs, a consolidated version of which has been prepared by the Commission (doc. III / 3939 / 93 83/ 260 / 90-EN of 11 May 1993).

<sup>36</sup> Commission Decision 75/420/EEC of 26 June 1975, OJ L 182/35 of 17 July 1975; amended by Commission Decision 78/758/EEC, OJ L 251/18 of 14 September 1978. See the analysis of Vos, 'Institutional frameworks of Community health and safety regulation: committees, agencies and private bodies', PhD Thesis, Florence, 1997 at pp. 152–54.

<sup>37</sup> This could be achieved by exploiting the potential of Internet. See in this respect the proposals put forward by Joseph Weiler, 'The European Union belongs to its citizens: three immodest proposals', 22 (1997) *European Law Review*, 150, 153.

<sup>38</sup> Schwarze, *European Administrative Law*, London: Sweet & Maxwell, 1992; Harlow, 'Codification of EC administrative procedures? Fitting the foot to the shoe or the shoe to the foot', (1996) 2 *European Law Journal* 3-25.



of the necessity to protect 'process' rights such as the right to be heard and the duty to state reasons, when individual rights are directly affected by Community decisions<sup>39</sup>. However, judicial decisions are necessarily ad hoc, rendered in concrete cases; they are therefore not the best avenue for injecting new principles into decision-making processes. Moreover, the overall object of the exercise should not be forgotten. What matters for legitimacy purposes is not only that justice be done, but also that it be **seen** to be done. Put together, these considerations point in the same direction: the best way to introduce the principles discussed here would be through a basic decision, adopted in the most solemn of manners, and that would apply to all kinds of bureaucratic decisions.

The framework comitology decision of 17 July 1999<sup>40</sup> has already made a significant number of steps in the right direction. It provides for the adoption of standard rules of procedure, which will be used by committees to draft their own rules of procedure, although they retain the right to make the adjustments they deem necessary<sup>41</sup>. It also renders applicable to the committees the principle and conditions governing public access to Commission documents<sup>42</sup> — a decision of considerable importance as both the Amsterdam Treaty and recent rulings of the European Court of First Instance appear to have reversed the hierarchy of values that prevailed in the past: public access to documents has become the rule, and confidentiality an exception to be interpreted narrowly<sup>43</sup>. In a ruling rendered only two days after the adoption of the framework decision, the European Court of First Instance has indicated that as most committees do not have a staff of their own, for the purpose of access to documents, they are deemed to be under the Commission, which is in charge of their secretariat<sup>44</sup>.

All these developments should ease access to committee documents, thereby enabling those who so wish to keep track of their work. In terms of public awareness of policies conducted at the European level, this is certainly more important than the annual report on the working of committees which the Commission is now required to produce<sup>45</sup>. However, does this suffice? In my opinion, the answer can only be negative. Transparency is of course important, but only as a means to ensure a greater openness of decision-making procedures. For the latter objective to be attained, some provision must be made for participation of individuals in such procedures<sup>46</sup>, and on this the framework decision is remarkably silent.

<sup>39</sup> See e.g. cases C-269/90 *Hauptzollamt München v Technische Universität München*, (1991) ECR I-5469; T-364/94, *France Aviation v Commission* (1995) ECR II-2845 and the comments by Nehl, *Procedures Principles of Good Administration in Community Law*, LLM Thesis, Florence: European University Institute, 1997.

<sup>40</sup> Council decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184 of 17 July 1999, p. 23.

<sup>41</sup> Article 7 (1).

<sup>42</sup> Article 7 (2).

<sup>43</sup> See e.g. cases T-105/95, *WWF v Commission*, (1997) ECR II-313, *Svenska Journalistförbundet v Council*, (1998) ECR II-2289, T-188/97, *Rothmans International BV v Commission*, 19 July 1999, not yet reported, T-14/98, *Hautala v Council*, 19 July 1999, not yet reported.

<sup>44</sup> Case T-188/97, *Rothmans International BV v Commission*, 19 July 1999, not yet reported, at paragraph 62.

<sup>45</sup> Article 7(4) of the framework decision.

<sup>46</sup> A similar plea can be found in Craig, 'Democracy and rule-making within the EC: an empirical and normative assessment', 3 *European Law Journal* (1997), pp. 105–130.

Moreover, if the idea is really to enhance the legitimacy of EU decision-making by granting individuals a say in decisions affecting their fate, then this right should be granted adequate recognition. From that standpoint too, the solution that has prevailed falls short of the objective. True, the standard rules of procedures to be adopted could formally sanction some participatory rights, but it would remain legitimate for each committee to adopt more restrictive procedures if it so wishes. For the process-oriented approach to legitimacy outlined here to be taken seriously, the rights in question should be given a legal status that would protect them against arbitrary decisions of the rulers. In other words, what appears to be required is a decision of constitutional nature, namely a formal recognition of participatory rights to be enshrined in the Treaty itself.

A procedural approach of this nature, with its participatory ethos, would bolster the legitimacy of comitology. It should not however be seen as an alternative to parliamentary control. On the contrary, proceduralisation, because it would foster public debate, might significantly reinforce the accountability of committees. One can imagine, for instance, that if a committee were to overlook the concerns of, say, consumer groups, the European Parliament might be interested in knowing why. In this case, procedural and accountability concerns, far from being at odds with one another, would actually be mutually reinforcing.

## Conclusion: the need for a process-based approach

It is often said that the functionalist approach followed by the Founding Fathers is no longer able to ensure the legitimacy of the integration process. True, integration can be credited with a number of benefits — peace and prosperity being the most important — but now that it has become clear that decisions taken at European level influence people's lives in so many ways, **legitimation by outputs** is not sufficient. People no longer accept that the quality of decisions is all that matters: they want a say in policy choices that affect their destiny. As a result, calls for an **input-based** approach have gradually intensified. However, such calls are often inspired by an idealised, Rousseauian, vision of parliamentary democracy, in which representatives of the people serve the collective interest of a polity and translate it into legislative decisions. This understanding of democracy is so deeply rooted in western European political culture that it is espoused by two camps that are at odds with each other: the self-professed European Federalists, advocating the upgrading of the powers of the European Parliament, and the *souverainistes* and Eurosceptics of all kinds, for whom there can be no real democracy outside national parliaments.

This approach is fraught with difficulties. It rests on a mechanical, transmission belt, vision of public policy, in which voters control the Parliament, Parliament controls the executive, and the latter is supposed to keep the bureaucracy under control. However, real-life situations tend to be much more complex. Each link of the chain develops interests of its own and may be captured by specific interests of some kind. Moreover, the sovereign which is to be represented, the people, is far

from being an homogeneous creature: behind this convenient abstraction, one finds a complex constellation of conflicting interests and preferences, which cannot easily be reconciled. These structural problems, which undermine the functioning of representative democracy at national level, are magnified at European level. The sheer size of the polity affects the representativeness of governing bodies: an assembly of some 600 members cannot claim to mirror all the interests that coexist within a polity of over 400 million people. The longer the command chain gets, the looser the ties between rulers and ruled. Consider, for instance, the position of citizens vis-à-vis the two dominant institutions of the European Union. The European Council is composed of 16 members, out of whom 14 escape their control: they are without any influence on their appointment or their dismissal. As to the European Commission, even though the European Parliament now exerts an incommensurably higher control over its destiny than used to be the case in the past, it embodies a complex compromise between the partisan backgrounds and the national origins of the commissioners, which makes it difficult for citizens to identify with the institution. Finally, the existence of multiple vetoes at various levels makes it near impossible to assign the responsibility for most decisions to a single body, thereby weakening democratic accountability<sup>47</sup>. All these elements are undoubtedly necessary to preserve the consensus-based character of the decision-making process, which is as crucial a constitutional feature in the EU as in any polycentric community. However, they make it illusory to hope that representative democracy will suffice to endow European institutions with all the legitimacy they need. As Robert Dahl has shown, changes in the scale of the polity unavoidably affect the way in which a democratic political system must respond to the preferences of its citizens: new paradigms are needed<sup>48</sup>.

This contribution has pleaded for a radically different approach. Adopting a resolutely inductive approach, it has taken as a starting point the growing importance of the post-legislative phase in public policies, and the difficulties faced by parliaments to keep abreast of complex decision-making processes, which often invoke delicate technical issues. Some may of course deplore this evolution, but one should take notice of structural developments of this magnitude, rather than insisting on a romantic vision of the past. Thus, it is argued, the input-oriented approach which has so far dominated discussions on the legitimacy of European institutions needs to be supplemented by a **process-oriented** one, in which interested citizens would be given a say in the post-legislative, bureaucratic, phase. Unlike other approaches, this one attaches less importance to the quality of the inputs received by decision-makers (citizens' votes, legislative mandates) than to the fairness of decision-making procedures: what matters is not that the eventual decision can be formally reconducted to the will of the citizenry, but rather that those who so wish be given a chance to express their views. Not only would such an approach, with its emphasis on transparency, openness and participation, appear to be more finely tuned to the evolution of European governance, but it could also contribute to in-

<sup>47</sup> This latter point is developed in Scharpf, *supra* note 10 at pp. 270–75.

<sup>48</sup> 'A democratic dilemma: system effectiveness versus citizen participation', 109 *Political Sciences Quarterly* (1994), pp. 23–34.

form the citizenry of the problems that are addressed at the European level, thereby facilitating the development of public deliberation, which is as essential an element of democracy in a transnational system as it is in a national one.

Admittedly, such an approach departs from classical understandings of European constitutionalism, which focus on the demarcation of the respective powers of the Union and of the Member States and on the balance of power between European institutions. At the same time, however, its ambition is identical to that of liberal constitutions: to keep power, wherever it lies and whatever its form, under control, and to ensure the fairness of decision-making processes. Moreover, the procedural avenue outlined here should not be seen as substitute to the control exercised by political institutions. On the contrary, the emergence of a public debate on 'implementing' decisions might reinforce the accountability of otherwise obscure bodies, ultimately contributing to the emergence of a transnational public sphere. Governance, particularly in present-day complex societies, is a multifaceted phenomenon, which cannot be encapsulated into one single model.



# Proceduralising European law: institutional proposals

**Olivier De Schutter**

This analysis proceeds from two diagnoses, substantially shared by those who attended the seminar that yielded this report<sup>1</sup>. The first relates to the crisis in our positivist conception of knowledge. This crisis is manifested in the virtually unanimous acknowledgement that our rationality is limited in scope and that there is accordingly a need to think in terms of procedures rather than of substance. The point of the first diagnosis is, instead of the expert approach of unilaterally determining the ideal solution to a problem, to establish the institutional set-up which will allow an acceptable solution to be discussed in context on the basis of shared rather than individual knowledge. The second diagnosis, however, is that we lack the political, and above all the institutional imagination, that we need if we are to translate this need for proceduralisation into the practice of governance and decision-making patterns.

The purpose of this report, proceeding from what was said at the seminar, is to take the first diagnosis as a basis for a response to the second. It relates specifically to the art of governance in the European Union. The general philosophy underlying it is that certain still relatively marginal developments in European law that are sometimes regarded as deviations rather than norms can be taken as a basis for devising potentialities in terms of the proceduralisation of law. The power of imagination that will be deployed will not be inventive so much as an effort to observe and reconstruct. What we shall be trying to do is highlight certain practices and experience and see how they can be put into general application.

The report's starting point is the point currently reached in reflections about legal regulation. Everywhere, both in the Member States and in the European Union, the same feeling is being expressed — the feeling that traditional modes of thinking about law and the rules governing public intervention have reached their limits. This has been copiously documented at State level. The welfare state was designed as a response to the inequalities generated in reality by the formal rationality of the liberal State<sup>2</sup>. The crisis in the welfare state is a crisis in its very ra-

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<sup>1</sup> Seminar organised by the Forward Studies Unit of the European Commission with the Centre for the Philosophy of Law which, from the end of 1995 to October 1997, when this paper was presented, brought together university researchers and officials of the European Commission to consider the question of transformations in the art of governance in the European Union. The seminar looked chiefly at the evolution of the Commission's role. The report, however, also considers the European Court of Justice's potential contribution to the proceduralisation of Community law.

<sup>2</sup> The establishment of the welfare state after the crises of the first third of the century and in the post-war years, can be analysed in terms of a re-socialisation of the economy, which means abandoning the belief

tionality since the welfare state, which sometimes jeopardises the autonomy of the individual, has above all revealed large-scale dysfunctions, an inability to solve part of the problems which it was created to solve, and today, when it has to evolve, a high degree of rigidity acting as a disincentive to structural reform. Deregulation was thought for a while to offer a way out. But the limits of that have been perceived in the last 10 years: the trust placed in private initiative and competition between private-sector operators has been a cause of exclusion on a now massive scale, whereas economic growth is becoming purely speculative. The shift in the paradigms of economics as a science itself is evidence of this, since neoclassical theses are taking over from the theses of the regulatory school of thought and the theses of the economic analysis of agreements, which have as their common feature their opposition to the autonomy of the discipline of economics.

The same type of limits have now been reached in the European Union, albeit in a slightly different form and in a shorter timescale. The legal strategy which presided over the attainment of the internal market went through a phase of mutual recognition of national legislation, followed by a policy of high-profile harmonisation, chiefly by means of directives. But it has now become clear that the attainment of the internal market will not be complete until the implementation of harmonisation instruments, and in particular the transposal of directives, has been put firmly in the hands of the national authorities. What is at stake here is not just the tendency of the Member States to remain in a competitive mindset at a time when they are no longer entitled to compete with each other, within the scope left to them by the transposal function — penalties for infringements, systematic nature of prosecutions, thoroughness of administrative controls, effectiveness of redress procedures<sup>3</sup>. Something more fundamental is also at stake — the different national administrative cultures, which recreate the same barriers to free movement when Community law is implemented as were supposed to be removed by the enactment of this Community law. Might a solution to these new barriers be found in a fresh transfer of powers to the European Community? Neither public opinion nor the national administrations appear to think so. A new type of law will have to be invented to meet these apparently contradictory demands — pursue the actual harmonisation exercise but without conferring new powers on the Community, which would in any case be incapable of exercising them with the means currently at its disposal<sup>4</sup>.

That is the situation in which we are now. At both State and Union levels, the traditional models have revealed their shortcomings one after the other. Their limits have taken us by surprise and left us without an answer to the new questions now facing us. There is now general scepticism about public action. Yet the seminar's initial assumption was that a new burst of institutional imagination could

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that the economic system has a capacity for internal regulation that can be shielded from every form of intervention. See K. Polanyi, *La grande transformation: aux origines politiques et économiques de notre temps*, (trad. fr. C. Malamoud), Paris: Gallimard, 1988 (orig. 1944).

<sup>3</sup> See F. Snyder 'The effectiveness of European Community law: Institutions, Processes, Tools and Techniques', (1993) *M.L.R.*, pp. 19–54.

<sup>4</sup> R. Dehousse, 'Regulation by networks in the European Community: the role of European agencies', *Eur. J. of Public Policy*, 1997.

emerge from a better understanding of the crisis of knowledge evidenced by the failure of the existing models of public intervention — at bottom, this failure is the result of a crisis in the rationality underlying these models. The real point is to reflect on modes of governance which take account of social complexity and the resultant inadequacy of expert knowledge, the rich potential of different national administrative cultures, the need for ongoing revision of the rules, the importance of application in context, rather than denying these phenomena — ultimately, the aim should be to translate into institutional reforms the diagnosis flowing from realisation of the failure of the classic modes of regulation. This is the backdrop to our concern to see that all who are affected by the rules of law are involved in producing and enforcing them, as well as in monitoring their effects and revising them accordingly: our hypothesis is that accentuating this involvement in making and changing the law is a break with the idea that it is enough for a rule to be laid down unilaterally on the basis of expert knowledge. This is also the backdrop to our insistence on the grounds given each time a rule is laid down and each time it is put into practice by the bodies empowered to do so: our hypothesis here is that the demand for grounds to be given in response to the questions raised by the rule in the minds of those affected by it constitutes a source of dialogue, which is evidence in its turn that nobody today can claim a monopoly of the objectivity required when a rule is to be laid down or enforced.

The time has now come to specify what such a change in attitude might entail for each of the institutions concerned.

## **The affirmation by the courts that everybody has the right to make his or her views known**

To consider the potential contribution of the European Court of Justice to this shift, we can begin by considering the requirement it imposes whenever a national government department withholds the benefit of a Community rule from someone who enjoys entitlements under it. The relevant government department is then required to provide reasons for its refusal so that the person concerned can if he wishes seek judicial review<sup>5</sup>. There is no reason why this requirement, whether it applies to a national authority or a Community authority, should not be extended not only to the guarantees securing fundamental rights conferred by the Community legal order but also to the interests protected by it. The Community courts are reluctant to acknowledge a general right of parties affected by the adoption of

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<sup>5</sup> ECJ Case 222/86 *G. Heylens v Unectef* (1987) ECR 4097 (judgment given on 15 October 1987): 'Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.'



a decision to be consulted, and a correlative general duty of decision-makers to give grounds for their decisions, in situations where the legislation is silent on the matter<sup>6</sup>. To our knowledge, absent an express provision, an assurance to this effect exists only where the decision actually concerns a clearly identified economic operator and the case involves a situation in which that operator is by definition most familiar with the subject-matter, the information that he can furnish being therefore indispensable for the adoption of a properly informed decision<sup>7</sup>. But this is an exceptional situation and is hardly likely to warrant the assertion that a general right is enjoyed by all interested parties to be consulted prior to a decision concerning them<sup>8</sup>. Imposing these requirements — consultation of interested parties and giving grounds for the decision as a satisfactory response to the objections raised — and making them subject to judicial review by the Community courts would ensure that the decision taken takes account of all the interests affected by the decision and does not disregard any of them without universally acceptable reasons; it would enhance the rationality of administrative decisions, assuming, as we do, that this refers not to a decision adopted on the basis of unilateral expert knowledge but to a decision adopted as the culmination of an exchange involving the greatest possible number of interested parties directed towards finding a solution that gives the greatest possible satisfaction to all.

Our proposal is therefore that the Community courts should assert a duty to give parties affected by the adoption of an implementing decision the opportunity to make their views known to the decision-making authority and to add to that a duty incumbent on that authority to respond to all such views. This should be a general duty incumbent both on the national authorities when they give effect to Community law and on the Community authorities. This duty to consult all parties affected by the decision should not be subject to the definition of the material and territorial powers of the authority on which it is imposed. If a decision by this or that local authority has effects beyond the limits of its territory, as in the case of en-

<sup>6</sup> In the specific field of competition law (Article 3(2)(b) of the first regulation implementing Articles 85 and 86 of the Treaty: Council Regulation (EEC) No 17/62 of 6 February 1962 (OJ L 13, 21.2.1962, p. 204, subsequently amended and amplified on numerous occasions)) and merger control (Article 18(1) and (4) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 11)), and regarding anti-dumping and subsidies for goods from non-member countries (Article 5 of Council Regulation (EEC) No 3017/79 of 20 December 1979, on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ L 339, 31.12.1979, p.1)), the Community legislation provides for the possibility for certain interested parties to make their views known to the Commission when it is adopting a decision. *Similiter*, in State aids, Article 88(2) (formerly 93(2)) of the EC Treaty, which requires the Commission to take a decision 'after giving notice to the parties concerned to submit their comments'. More recently, the Court would appear to have pointed to a similar obligation regarding Commission decisions enforcing Article 86 (formerly 90) of the Treaty, relating to public undertakings and undertakings to which Member States grant special or exclusive rights (Case C-107/95 *Bundesverband der Bilanzbuchhalter eV v Commission* (1997) ECR I-0947 (judgment given on 20.2.1997)).

<sup>7</sup> Case C-269/90 *Technische Universität München*, (1991) ECR I-5469 (para 14) (judgment given on 21.11.1991); as recently applied by the Court of First Instance in Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens et al. v Commission des C.E.* (1995) ECR II-2941 (paras 56 and 57) (judgment given on 13.12.1995).

<sup>8</sup> A recent judgment confirms the Court's reluctance to impose on the Commission an obligation to consult in the absence of a specific provision requiring it to do so: Case C-142/95 *Associazione agricola della provincia di Rovigo et al. v Commission* (1996) ECR I-6669 (judgment given on 12.12.1996).

vironmental decisions or of decisions that attract investments, people in neighbouring areas are affected by it and should therefore be consulted through representative associations or local elected officials. If the Community courts were to impose the requirement, that might mean obliging an authority giving permission to build a waste-treatment facility to have regard to the views of environmental associations, including those in another Member State if the question had an impact transcending national borders<sup>9</sup> and at the very least seeking the views of associations in neighbouring municipalities.

## The proceduralisation of the principle of proportionality

We believe that a revamped general principle of proportionality could give the European Court of Justice a second basis for contributing to the proceduralisation of Community law.

In our view, the demand for proportionality in a decision adopted following these consultations must be considered in terms of the principle itself, which is to say that proportionality must be defined in more procedural terms<sup>10</sup>. The traditional demand of proportionality, which is that the means used must be commensurate with the ends pursued and that there must be a reasonable degree of proportionality between the means and the ends, owes a twofold debt to the form of rationality which is now agreed to be obsolete: for one thing, it presupposes that the relation between means and ends is determinable, in other words the environment in which the decision is taken is assumed to be foreseeable and stable, whereas it is in fact not<sup>11</sup>; for another, it presupposes that the values pursued by public intervention are unequivocal, as is clear from the possibility of 'balancing' the means deployed and the ends to which they are deployed (this balancing act presupposes a common rule which, in the traditional presentation of the proportionality principle, is assumed to be known in advance and not open to discussion)<sup>12</sup>. But

<sup>9</sup> See Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175, 5.7.1985, p. 40) and K. Lenaerts, 'Nuclear border installations: a case study', *E.L.Rev.*, 1988, p. 159.

<sup>10</sup> See also point 9 of the protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty establishing the European Community by the Amsterdam Treaty of 2 October 1997: this provides that the Commission should 'except in cases of particular urgency or confidentiality, consult widely before proposing legislation and, wherever appropriate, publish consultation documents'.

<sup>11</sup> Conversely, the review for proportionality is purely marginal where note is taken of the context of uncertainty in which the measure was taken. The Court of Justice has held that 'since in the present case it is a question of complex economic measures, which for the purpose of their efficacy necessarily require a wide discretion and moreover as regards their effects frequently present an uncertainty factor, the observation suffices that these measures do not appear on issue as obviously inappropriate for the realisation of the desired object' (Case 40/72 *Schröder KG v Germany*, (1973) ECR 125 (judgment given on 7.2.1973)).

<sup>12</sup> The Court has specified the terms on which it will allow a restriction on the free movement of goods imposed to preserve a country's economic independence; it has acknowledged that 'petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 allows states to protect' (Case 72/83 *Campus Oil Ltd. v Ministère de l'Industrie et de l'Énergie* (1984) ECR 2727 (judgment given on 10.7.1984)).

what significance can still be attached to the demand for proportionality if these presuppositions are abandoned? The proceduralisation of proportionality would mean that what is now up for review is the fact that the decision has been adopted only as the culmination of a procedure in which all interested parties have been able to make their views known, all those views having been taken into account. Either the author of the decision has acted in response to the views made known to him in the decision adopted; or, if he has declined to accept them, he must have given clear reasons in a statement of grounds that properly reflects the relevance of the objections made. The review for proportionality can no longer proceed from the assumption that there is automatically a stable, foreseeable environment: what the reviewing body looks at is not whether everything has been properly foreseen but whether all relevant views have been properly taken into account and therefore whether all unknown quantities have been properly brought into the equation by proper institutional means. By the same token, the review for proportionality does not assume that there will be no problems with the values pursued, as the traditional balancing act between means and ends did: the values underlying the decision are those set out in the grounds given for the decision adopted, in response to the full set of the views objections raised against it, bearing in mind that the origins of these objections may be found in different and even conflicting legislative environments<sup>13</sup>.

Proceduralisation conceived in these terms, it may consequently be noted, provides a way out of the eternal debate between judicial review based purely on compatibility with the legislation, where the reviewing court can do more than rule against manifest errors of assessment, and a form of review verging on verification whether the decision should ever have been taken, the reviewing court now having the power to strike down a decision which goes beyond what is strictly necessary for the attainment of an acceptable end, along the lines of the practice in matters of fundamental rights<sup>14</sup>. Proportionality as interpreted in the sense that flows from the principle of the proceduralisation of law cannot be defined in detail in advance, bearing in mind the attitude we have called for. It has to be seen purely in context: the intensity of the review will be heavily dependent on the specific features of each decision, as it is only the context of its adoption that will define the parties who are likely to be affected and, as a result, the scale of the duty to give reasons and to have regard to the views made known to the authority empowered to take the decision.

These first two proposals concern consultations prior to the adoption of the decision and the review for proportionality. They concern the requirements that the Community courts might impose on the author of the decision, be it a national authority acting as the indirect Community administration or the author of the Community measure itself. The affirmation and development of these principles by

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<sup>13</sup> On this aspect of our present situation, in which different legislative environments coexist, see M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, New York, Basic Books, 1983; and L. Boltanski et L. Thevenot, *De la justification: les économies de la grandeur*, Paris, Gallimard, 1991.

<sup>14</sup> This demanding form of proportionality is described by W. van Gerven, 'Proportionality, abus de droits, droits fondamentaux', *J.T.*, 1992, p. 305.

the Community courts could precede the adoption of a European equivalent of the *Administrative Procedures Act* which has governed procedures in federal administrative agencies in the United States since 1946<sup>15</sup>. The advantage of an instrument of this kind<sup>16</sup> is obviously that it guarantees greater transparency in administrative procedures, to the special benefit of those who are interested in being involved; legislation along these lines would give them the formal guarantee of their rights to be consulted and to receive an answer to their preoccupations. But it is necessary to be vigilant, as there is a risk that by being over-precise in determining the categories of people consulted and the manner of their involvement they are prevented from evolving in any way, even if the need is felt to arise, so that formalisation generates a loss of flexibility and ability to respond to new situations. And there must be a link between participation by interested parties and judicial review. This is a two-way relationship: the right to be consulted is meaningless if the party enjoying the right has no possibility of applying to the courts for review of the relevance of the response to his questions; seen from the other side, the decision-maker's duty to give grounds for the decision is meaningful only if the content of the grounds given is a matter solely for the person giving them — the decision-maker must be bound not only to stand by the grounds given, however full and detailed, but also to respond to all the comments received by him and even to give reasons for not responding at all or for not responding in satisfactory detail. Since the Community courts are responsible for reviewing the grounds given for a decision when an action attacking it is brought — this is the real significance of the proportionality requirement as seen in procedural terms — the point may well be that the court, in the specific context of each decision, must spell out the procedural requirements to be respected, without the Community legislator necessarily having done so in advance.

### **The involvement of the parties concerned in the proceedings before the Community courts or the national court responsible for giving effect to Community law**

But the implications of the proceduralisation of Community law are such that requirements must also be imposed as to the *modus decidendi* of the Community courts themselves, or the national courts where they apply Community law.

<sup>15</sup> See R. Dehousse, Ch. Joerges, C. Majone, Fr. Snyder, with M. Everson, 'Europe After 1992. New regulatory strategies', *E.U.I. Working Paper*, Law, No 92/31, Florence, 1992, pp. 29–31.

<sup>16</sup> Certain communications may be seen as forerunners of this: see the communication of 2 December 1992 on increased transparency in the work of the Commission (OJ C63, 5.3.1993, p. 8); the communication on an open and structured dialogue between the Commission and interest groups (OJ C63, 5.3.1993, p. 2); and the communication of 2 June 1993 on transparency in the Community (OJ C166, 7.6.1993, p. 4). The communication on transparency was in response to the call made by the Member States in the 'Declaration on the right of access to information' annexed to the Treaty on European Union. The Birmingham European Council on 16 October 1992 also highlighted the need to 'make the Community more open, to ensure a better informed public debate on its activities'.

The possibilities for action in the Community courts are notoriously limited. Where the Court of Justice acts on a request for a preliminary ruling on a question of validity or interpretation of Community law, the only parties who have standing to deposit pleadings or observations are the parties to the principal action in the referring court, the Member States and the Commission, plus the Council 'if the act the validity or interpretation of which is disputed originates from the Council'<sup>17</sup>. The point would now be to extend this possibility to all interested parties: since the Court's answer to a question as to the validity of an instrument of Community secondary legislation or the interpretation of Community law has effects extending well beyond the parties to the case, it deserves discussion by other persons and firms, and the Member State to which they belong — assuming there is one — cannot be assumed always to present their views properly. Where the Community court is hearing a direct action, the normal rule is that the right to intervene is 'open to any ... person establishing an interest in the result' of the case<sup>18</sup>. But this provision is given a restrictive interpretation since, in principle, a mere interest in the interpretation of Community law given in the case will not suffice to justify the intervention. And there is no scope for interventions in cases 'between Member States, between institutions of the Community or between Member States and institutions of the Community'. The problem with this exclusion clause is that it does not take account of the fact that certain interests, particularly collective interests, are affected by the application and interpretation of Community law in such cases — an example is the interest of consumers where an action is brought against a Member State for failure to comply with Community law by maintaining health-protection provisions in national law that also constitute barriers to intra-Community trade<sup>19</sup>, and another is the interests of workers where a Member State is accused of breaching Community law by maintaining a benefit for a firm engaged in business in the public service.

The enlargement of possibilities for intervening in the Community courts, either through a fresh interpretation of the relevant provisions or through amendment of them, would be one way of duly reflecting the fact that Community legality can be properly reviewed only after an exchange that is open to all interested parties, nobody, for example, having the power to determine whether the proportionality requirement has been met or whether there has been *ultra vires* action from a privileged standpoint in relation to all the standpoints that might be adopted on the same problem. It is submitted that there is no reason why this same paradigm-shift in the *modus decidendi* should not be imposed on national courts hearing cases in the course of which they are asked to apply Community law. It would be quite conceivable for the European Court of Justice, in cooperation with the national courts through the preliminary ruling procedure, to impose on the national courts, as on the national administration when it implements Community law, a duty to refrain from taking a decision until all the parties have been heard — the very principles of adversary proceedings and natural justice already impose this — but

<sup>17</sup> See Article 20 of the Statute (EC) of the Court of Justice, in the protocol signed at Brussels on 17 April 1957.

<sup>18</sup> See Article 37(2) of the Statute (EC) of the Court of Justice.

<sup>19</sup> See commentary by M. Goyens in: Th. Bourgoignie (dir.), *L'action collective et la défense des consommateurs*, Brussels, Story-Scientia, 1992, pp. 242–243.

also until it has received the views that will enable it to build its decision on a foundation of diverse points of view, proceeding from information drawn from multiple sources, and manifesting the concern to protect interests going beyond those of the parties alone<sup>20</sup>.

## The role of the European Commission in the proceduralisation of Community law: the problem

In describing the need for consultations which, it is submitted, should accompany the adoption of a decision by the European Commission, we have given some indication of the transformations that the proceduralisation of Community law might imply for that institution<sup>21</sup>. But what we have said so far is far from adequate for three immediately identifiable reasons. First, taking as our example the requirements imposed by the Community case-law where a restriction is put on a fundamental right conferred by the Community legal order on a given individual, we have still to consider what consultations might be envisaged when the measure to be adopted is not an individual measure or a measure affecting only a limited number of individuals but has general effect, as is commonly the case of regulations and directives — which are formally-speaking addressed only to the Member States but have quasi-legislative impact on a large number of addressees within their jurisdiction. Secondly, the consultation procedure, even regarding measures with a limited scope and a limited number of addressees, is still far from precise. And thirdly, what has been said so far relates only to the time of adoption of the decision and not to the monitoring of its effects and the revisions which it may undergo.

The first two questions can be taken together. The difference between an individual or limited-scope decision and regulations having general effect must be

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<sup>20</sup> The benefit of such an obligation on the national courts would not only lie in the quality of its decision — the rationality underlying it. It would also constitute an additional degree of realism. As we know, a court decision, even if it is directly of concern only to the parties to the case, can have wider-ranging consequences, especially if it relates to the extent of the obligations of certain classes of player such as business, the unions or the state. If all parties interested and not just the parties to the case, who are the ones bound by the decision, were to be represented before the court, that would constitute no more than a means of reflecting the reality of the effects produced by the solution to the problem underlying the case. The pattern of events is currently leading this way. Mr W. van Gerven has drawn my attention to a paragraph in the recent judgment in *Krüger* (Case C-334/95: *JTDE*, 1997, p. 159, judgment given on 17.7.1997), where the Court of Justice, giving a preliminary ruling on the conditions in which a national court can suspend implementation of a national measure based on an apparently illegal Community measure, was not content merely to recall that the Community interest must be considered but went on to conclude that the national court 'must ... give the Community institution which adopted the act whose validity is in doubt an opportunity to express its views' (para 45), and must 'decide, in accordance with its own rules of procedure, which is the most appropriate way of obtaining all relevant information on the Community act in question' (para 46). This is interesting for us since it is acknowledged that the interested parties are the only ones who can define their own interest precisely enough — the author of the Community instrument can alone identify properly the Community interest in implementation not being suspended — and it is also implied that the procedural autonomy of the Member States' legal orders may have to yield to an obligation to allow interested parties to express their views in the national court.

<sup>21</sup> There may be an opportunity for this when the Commission is reorganised, as provided by the *Declaration on the organisation and functioning of the Commission* adopted by the Amsterdam Conference, this being scheduled for 2000.

relativised. It has just been stressed that even a decision apparently concerning only one or a few persons can in reality have an impact on a wide range of interests, and the procedure for adopting it must give them an opportunity to make themselves felt and thus to impose on the decision-maker a greater obligation to state reasons<sup>22</sup>; conversely, a general regulation, stating the grounds on which it was adopted, *ipso facto* specifies the interests which it is specifically calculated to serve, even if these are general interests such as the interests of consumers, large families, or producers of this or that, and it affects certain interests more than others, for instance, those of producers who are required to comply with consumer-protection legislation, or employers who must recognise certain rights for the people they employ. Admittedly, the more the regulation is general in effect and broad in scope, the greater also is the risk that the interests affected by it will be dispersed and too disorganised to make their voice heard in the adoption procedure, which intensifies the importance of the question whether these interests are adequately represented by associations, unions or whatever. But none of this should deter us from thinking about also proceduralising the adoption of general regulations rather than just individual or limited-scope decisions (considering the traditional demand for adversarial approach to them). On the contrary, this is something which it is all the more urgent to think about as there are definite difficulties which are by no means always easy to solve.

## **The role of the European Commission in the proceduralisation of Community law: the Commission's multiple functions**

Two difficulties operate in conjunction. The first lies in the fact that different functions, not easy to reconcile, are exercised by one and the same institution. The Commission exercises the legislative initiative function, a function of implementing the general Community law and a function of enforcing Community law. The first two functions presuppose the establishment of relationships of trust with all the private and public parties interested in the creation of Community law and a smooth flow of information between them and the Commission. But the last of these functions, which demands a degree of independence from the same parties, is bound to weaken the relationship of trust that the Commission has established. This difficulty, highlighted by L. Metcalfe<sup>23</sup>, can be seen as justifying a sharper distinction between the various activities undertaken within the Commission, with a

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<sup>22</sup> I prefer not to overload the text with an excess of detailed examples: the authorisation of a merger interests not only the relevant firms but also their workers' organisations, the consumers of the goods they produce, their competitors and their distribution networks; a Commission decision not to commence proceedings against a State which maintains certain legislation protecting consumer health is of interest not only to that State but also to economic operators wishing to export to it and consumer associations whose interests may have been poorly represented by that State (consumers may prefer a wider choice of low-price goods to a higher level of protection).

<sup>23</sup> L. Metcalfe, 'Building capacities for integration: the future role of the Commission', Lecture given at the Schuman-Seminar: 'Maastricht in Maastricht, the Treaty revisited', held at the Provincial Government House, Maastricht, 13 May 1996.

visible institutional expression. To be more precise, the Commission could be split up into separate relatively autonomous bodies, structured either on a bipartite basis (one for the functions traditionally exercised by a prosecution department — action against infringements of Community law by the Member States and, where there is a definite Community element, private citizens; another exercising the right of legislative initiative and the detailed implementation of Community regulations), or on a tripartite basis (which would be predicated on a formal distinction between the legislative initiative and the implementation function). This type of division should not imply that action against infringements would no longer proceed with full regard for considerations of expediency, as is currently the case and indeed required by the Treaty, leaving extensive scope for pre-litigation negotiations. Nor should it exclude collaboration between the various divisions of a Commission organised along these functional lines; this collaboration is, on the contrary, essential if the implementation of Community regulations is to reflect the difficulties inherent in the effective application of Community law and if legislative proposals are to draw on the lessons learned from obstacles encountered in the formulation of implementing instruments and in the implementation of Community law. The chief interest of a sharper separation would depend on the quality of the Commission's relationships with the outside world and, in particular, in the completeness and reliability of information it received from those to whom Community law is addressed.

## **The role of the European Commission in the proceduralisation of Community law: the multiple forms of consultation**

The second difficulty concerns the practice of consultation, prior to the adoption by the Commission of a proposal for an instrument or measure conferring implementing powers in the form of a regulation. The tabular presentation on p. 200 will help, as the difficulty reflects at a number of distinct levels what boils down to a single dilemma.

To coin a cliché, this presentation shows us two idealised types of consultation — negotiated rulemaking and expertise. The crisis of rationality underlying our approach suggests a shift in patterns of consultation. In the expertise model, the idea was to supply the decision-maker with the information he needed in order to come to an informed decision, but the purpose of consultations would now be to ensure that all parties interested in the formulation of the decision are involved in it and to bring consultations closer to the negotiation model. If this is the shift, then several of its potential consequences will have to be considered. Analysing them will enable us to identify the apparently insoluble complexities of consultation as hitherto encouraged, notably within the structures of the welfare state, based initially on the idea that the interests that are to be represented can be pre-defined. Assuming heuristically that consultations on the **negotiation** model could be introduced in a structure that remains dominated by the **expertise** mod-



Purposes of consultation	Negotiation between interested parties resulting in their agreement	Improvement of information underlying the Commission decision
Selection criteria	Representativeness of players, in terms of e.g. an industry or a segment of the population	Expertise of persons consulted, quality of information in their possession
Commission activity in organising consultation	Equal resources for participants in the consultation (passive or active)	Persons consulted selected for their privileged access to certain information, no equalisation of resources required
Relation between consultation and the adoption reforms	Risk of bias as players consulted have specific interests in the reform being negotiated	Risk of underestimation of practical difficulties in implementing the planned reform; no guarantee that persons directly interested in the planned reform will actually be involved
Consultation as source of legitimacy	Legitimacy flows from the fact that the solution adopted has been negotiated	Legitimacy flows from the objectivity of information received and from apparent impartiality of participants in the consultation

el would bring us to a definition of a form of consultation that cannot be reduced to one of these idealised types. The table above gives a few features of the types of consultation that will first be contrasted. The transition from the expertise model to the negotiation model is reduced to two main aspects:

1. The players in the consultation process will be selected in the light of their ability to **represent** the interests of a given sector of activity or a given segment of the population. This presupposes determining the criteria for what constitutes adequate representativeness and, particularly, whether representativeness is to be seen in a formal sense, being recognised by certain institutional procedures (such as an organisation representing workers and acting as spokesman for their interests), or in a more substantive sense, being recognised each time in the light of the specific issues at stake in the consultation process (such as trade-union delegates who have been given a mandate to defend a predetermined position on the question on which they are being consulted, following internal discussions within the labour movement). But two difficulties immediately arise.

The first is that the decision to bring players representing certain interests into the consultations makes a discussion in which the various players can revise their starting position in the light of the arguments put forward in the course of the consultation delicate, possibly even illusory. True enough, representation does not necessarily have to be conceived in terms of a mandate. There is no conceptual

reason for excluding the possibility that the representative, having the task of speaking for himself and for others, might shift his original position and thereby contribute to the emergence of a consensus between all those involved in the consultation process. But representation does presuppose limits on what the representative can do: even if he is allowed some room for manoeuvre, it will be all the more limited as he is truly representative rather than fictitious and at the end of the day he must give an account of how he has acted as representative.

The second difficulty, linked to the first, concerns the relation between the consultation — in the form of a negotiation between players representing certain interests — and the reforms that are the possible outcome. The dilemma is between the identity as interested parties of those involved in the consultation and the scale of the reforms that constitute its outcome: the greater their interest, the greater their spontaneous tendency will be to defend vested rights and situations, and the stronger, likewise, will be their tendency to react coolly to the reforms; conversely, the less those involved in the consultation process have their own interest in the outcome of the reforms under discussion, the more they will tend to be ignorant of the consequences of these reforms **for them**, and the more, therefore, the reforms will be adopted in the interest of everybody, without their scale or the radicalness of their consequences constituting a barrier to their being proposed; the modern contractual theory, incidentally, takes this basic insight as its starting point.

These difficulties in no way detract from the advantages flowing from the fact that players who are directly interested in the effects of the decision are involved. These advantages materialise in terms of the legitimacy of the decision and the attention paid to practical difficulties of implementation, and also in the fact that the specific interests of the players concerned can themselves be brought into the equation and, if need be, revised or reformulated. But these difficulties are an incentive to thinking about the manner in which the various players should be involved so as to overcome the rigidity which, as we have seen, may constitute the price to be paid, whether this rigidity flows from a definition adopted by the interests represented or from the strategic manipulations that are made possible by the consultation process.

2. The heuristic shift presented here — from consultation in expertise mode to consultation in negotiation mode — has a second consequence. This concerns the fact that, if the shift is to be made, it will be necessary to **equalise the resources** of all the players involved in the consultations. If it remains purely passive, this equalisation of resources consists merely of taking account of inequalities between participants, bearing in mind that there may be multiple sources (access to information, budgetary resources, accumulated experience, frequency of contacts with the Commission). But it can also be more active: information in the possession of some participants can be made accessible to the others, and the activity of the less well-off among them can be subsidised.

But there are two limits on what such activism can really mean. The first is factual: there are inequalities that no positive measure can offset precisely. There is no getting away from the structural factor that a given player will have no past ex-

perience of consultation, or has less experience than some of the others; and there is no obvious way of restoring the balance between a player who has frequent contacts with the Commission, enabling him to gradually acquire credibility and to give way on one issue so as to gain a more sympathetic hearing on another. The second is legal: there are certain interests, some of them ill-defined and still emergent, that are insufficiently organised and not represented by a spokesman able to express their concerns in the consultation process where the style is along negotiation lines involving all the players; if the Commission were to prompt the emergence of a spokesman, its independence would be doubted, legitimately enough<sup>24</sup>, and its intentions in creating a spokesman would also be suspect — clearly, being so actively involved in structuring the consultations can be tantamount to manipulating the consultation, prejudging the outcome.

But these two limits are not the only barriers encountered in actively equalising the resources of parties to a negotiation. Two further barriers are worth highlighting. First, equalising resources presupposes distinguishing between representative groups, depending whether, in the terminology with which D. Sidjanski has familiarised us, they are 'promotion groups', meaning 'ideological groups or groups defending a cause', or 'interest groups', meaning 'professional organisations, firms, business groups and multinational companies'<sup>25</sup>. Interest groups act for their members alone, whereas the advantage sought by the promotion groups is for the general benefit — a collective benefit accessible even to those who have in no way contributed to the effort needed to secure it: this explains why, compared with the importance of the interest they defend, the resources available to interest groups are on a substantially greater scale than those available to promotion groups<sup>26</sup>. But the distinction is not as sharp as the theory of collective assets would have it. For one thing, the groups always pursue several objectives at the same time — whereas some do so for the sole benefit of their members or those who share in the collective effort, others do so for the benefit of society at large, defending the cause that the promotion group defends; for another, as soon as a group has been constituted, even if initially it works only for the benefit of its members, the collective interest which it represents becomes distinct from the members' individual interests, as they would originally have defined them in the absence of a decision to pool them — it would, for example, be thoroughly artificial to regard a workers' representative organisation as an interest group consisting of the workers belonging to it when the advantages obtained by the organisation are for the benefit of all workers, whether or not unionised, and there can be a wide gap between the interests of the union and the interests of the individual worker. The distinction be-

<sup>24</sup> This is the concern expressed by the European Parliament when it 'points out that political institutions must observe the principle that social players and organisations are independent; notes that the role of the former is not to bring the latter into being, but rather to provide them with a legal framework and the means of obtaining information and gaining real access to the institutions' (resolution adopted on the basis of the report on participation of citizens and social players in the Union's institutional system (A4-0338/96, PE 218.253/déf.) ('Herzog report'), para. 35).

<sup>25</sup> D. Sidjanski, 'Les groupes de pression dans la Communauté européenne', *Il Politico*, No 473, 1982, pp. 539–560, at pp. 540–541.

<sup>26</sup> See O. De Schutter, 'Les groupes de pression dans la Communauté européenne', *C.H. du CRISP*, No 1398–1399, 1993, 53 pp., at pp. 5–13.

tween categories of groups, depending whether they defend 'interests' or 'causes', is accordingly both a decisive factor for the active policy of equalisation of resources between parties involved in a negotiation and a factor that is so difficult to interpret as to raise doubts as to its real usefulness. This, then, is our first difficulty.

The second barrier encountered in actively equalising the resources of parties to a negotiation lies in its potentially infinite nature. We have no valid yardstick whereby we can define whether the inequality between parties to the negotiation has been adequately offset. Equality between parties is by definition an unattainable horizon, each of them having a different perception of the real impact of his demands, unless the whole question is reduced to certain aspects of a fundamental principle of equal entitlements, such as the possibility for each of them to contradict the information taken by the other as a basis for negotiating. The upshot is that an active policy of equalising resources as between parties will lead the Commission to arouse hopes that it can only dash, given that it cannot keep everybody happy.

## **A proceduralised version of consultation**

These, then, are the main difficulties that arise if, in our desire to abandon the expertise model as being excessively compromised with a type of positivist rationality that has now been adequately discredited as illusory, we go on to encourage forms of consultation conceived in terms of negotiation between interested parties. The purpose of reviewing these difficulties (we have highlighted only the more striking among them) was simply to illustrate the need to escape the spontaneous dichotomy between the two idealised types we are positing. On the one hand, the effect of consultation on the expertise model is that those who are directly affected by the decision that is to be adopted<sup>27</sup> lose their proprietary rights in the decision; the effect of the other model is that these rights are restored, to such an extent that a negotiated policy decision begins to resemble a contract. But in reality what has to be overcome is the very idea that the decision is a form of property that can be appropriated and, by being conferred on some, is taken away from others, for this idea creates dilemmas that constrain us. What are the prospects for institutional reform if that is the objective we are pursuing? Let us offer a first avenue to be explored before going on to consider two others.

The first is the idea that the parties to the consultation should be required to give grounds for the positions they defend, and it has a sound philosophical pedigree based on the ethics of discussion. The point here is to import into social theory and political philosophy a number of tenets of the philosophy of language, and especially the fundamental notion that whoever makes an assertion binds himself to make it for reasons that will be universally acceptable, since that is a pragmatic presupposition for the assertion. This insight would seem to be essential from the

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<sup>27</sup> The word 'decision' should be understood in a generic sense rather than in the technical sense in which it is used, alongside directives and regulations, in Article 189 of the EC Treaty.

point of view of a critique of ideologies. But it is less clear that it offers the key to an institutional rule that can govern political decision-making. There are actually two reasons for doubting this.

First, the ethics of discussion force us to idealise: idealisation being necessarily the precursor to any linguistic act is at the very centre of its construction. This idealisation gives the signal for a critique and provides the instrument for it. But the scale of the critique on which we embark is infinite, given the inevitably contextual nature of the framework for the discussion. The good reasons, of course, are those that are valid irrespective of the context in which they are accepted. But how are we to tell when this will actually be the case? What other criterion of acceptability can there be, *de jure*, for this or that justification than the fact of actual acceptance, *de facto*, in a given context? Since the good reasons for a given assertion are given in a given context, they are inevitably predicated on the context in which they are given; in a different context, they will have to be reviewed in order to restore their universal nature.

Moreover, the ethics of discussion are based on the universal ambition of breaking down the barriers between the standpoints of each of the participants in a process of interchange focusing on an objective of mutual understanding. But we have seen the difficulty that arises when the parties to the dialogue are not in full control of the position they are defending, precisely because they are representatives and bound by the mandate they have been given or, at the very least, because they are bound to give an account of what they have said to those on whose behalf they speak. Consequently the advantages offered by the ethics of discussion, which constitute a valuable contribution as a theoretical critique, also impose limits if it is to operate as a form of guidance to institutional reform.

There are two other potential avenues to be explored. They can be seen as complementing each other. They are presented here from two angles — a right of persons interested in the adoption of an instrument or decision to be consulted and a general obligation to evaluate public policies, whatever form they may take — legislative instrument, programme, investment. This places us at the two ends of the conventional political decision-making chain: the purpose of evaluation is to introduce an element of retroactivity into the chain; reflexivity is further encouraged by the fact that, as is the case upstream of the decision, the participation of all interested parties downstream of it is also necessary. But let us go into a little detail on these two proposals.

## **A general right to consultation**

We are already familiar with the first proposal: it is the one we have already encouraged the Court of Justice to act on, of asserting a general principle of Community law that any person with an interest in a given matter should have the right to make his views on a planned decision known to the Commission and to receive a reply to his objections — the adequacy of the replies, being a statement of the

grounds on which the decision is to be taken, being amenable to judicial review. This would also seem to be the approach to which the European Parliament gives pride of place: its resolution on participation of citizens and social players in the European Union's institutional system 'stresses the importance of a general principle (to be written into the Treaty) proclaiming the right of every citizen and every representative organisation to draw up and promote their opinions and to receive replies directly or indirectly, without that right however implying direct participation in decision-making'<sup>28</sup>. The explanatory memorandum is so explicit on this point that it must be quoted:

*We propose that the general right to be consulted should extend to all those who are interested in a text or decision in preparation and the effects thereof. By consultation we mean the possibility of delivering opinions and receiving answers. The decision-making power delegated to the central institutions is not being called into question .... A clear distinction, however, needs to be made between consultation, a very broadly based procedure, and dialogue and negotiation, in which representative social players confer with governing bodies<sup>29</sup>.*

Our proposal, which is echoed by Parliament's resolution, cannot be properly understood unless two further points are made. First, the 'interest' concerned here — an interest in being consulted when an instrument is being prepared and, as we shall see, assessed — must extend to the collective interest defended by groups in accordance with their freely determined objects. We are not thinking of a restricted concept of interest, such as the interest referred to in Article 173 of the Treaty, which is by deduction 'individual' and 'direct' and is the basis for admissibility of a direct action for annulment in the Community courts. This is the *sine qua non* for consultation to meet its veritable function of contributing to a better rationality and greater legitimacy in Community decision-making.

Are we to fear that the consultation process will be opened up so far as to jeopardise the efficiency of administration? The Court of Justice has feared as much on occasion<sup>30</sup>. Then there is the fear that the result would also be to overload the

<sup>28</sup> Resolution adopted on the basis of the Herzog report, para. 24. The resolution terms such a right a 'right to freedom of expression'. It states that the right 'must be capable of being exercised on each territory with public institutions, Community information centres and representative organisations, as well as through cross-border exchange networks'. The novelty here consists of giving everybody the right to receive a reply to opinions expressed, not only public institutions addressed but also representative organisations which are assumed to act as spokesmen addressing the Community institutions in the defence of their interests. This concern to secure internal democracy in representative organisations should be welcomed. It simply confirms the difficulty of conceiving 'consultation' in the form prompted by the discussion ethic, where people speaking on behalf of the representative organisations to which they belong are involved.

<sup>29</sup> Herzog report, p. 11.

<sup>30</sup> See submissions by Mr Advocate-General Warner in Case 113/77 *NTN Toyo v Council* (1979) ECR 1185, at p. 1262 ('...there is no doubt that the right to be heard is subject to the general proviso that it must be compatible with the requirements of efficient administration'); and Case 9/83 *Eisen und Metall AG v Commission* (1984) ECR 2071, at p. 2086 (in relation to Article 36 of the ECSC Treaty, which requires the Commission 'to give the party concerned the opportunity to submit its comments' before imposing a penalty, the Court held that this 'obligation cannot be understood as requiring the Commission to put forward its counter-arguments in relation to the arguments put forward in its defence by the party concerned. The rights of the

Community courts. It is submitted that the possibility of applying for judicial review of the quality of the grounds given in response to objections made in the course of the consultation procedure is one of the essential conditions of such consultations<sup>31</sup>. But the question arises whether the risk is that the floodgates will open to a mass of court actions seeking either to enforce a right to be consulted which a Community institution has seen fit to withhold or to obtain an assessment by the Court of Justice of the legality of a decision adopted following the consultation. And this is the subject of our second point. In our view the extent of the grounds which the Commission would be required to give — how detailed, if at all, should its response to views made known to it in the course of a consultation process be? — must depend on the relevance of the views in question; the Court of Justice has said as much. Moreover, if a general 'right of expression', as the European Parliament puts it, is to be recognised, and if it is to be backed up by the possibility of a court action for review of the legality of the decision taken at the end of the consultation process, as indeed it must, the Court of Justice, it is submitted, should be left free to select the cases which it sees as most deserving of a ruling on this point, applying the certiorari system that operates in the Supreme Court of the United States. A system like this has been seen as present in embryonic form in decisions of the Court of Justice, which has dismissed as inadmissible certain references for preliminary rulings on the interpretation of Community law which it regarded as manifestly not relevant to the subject matter of the principal action or which came before it only by reason of procedural complexities set up by the parties bringing the action in the national court and therefore struck it as being 'fictitious' or 'artificial'<sup>32</sup>. But the paradox in these decisions is that they have a curious side effect: instead of ensuring that only the most significant cases come before the Court, their effect is to give these cases a suspect appearance so that the Court actually removes them from the Register<sup>33</sup>. The effect of our suggestion would be to open up extensive rights of action in the Community courts, including class actions, but also to enable those courts to manage their own caseload by selecting the cases that really seem to deserve their attention.

## A general duty to evaluate public policies

The second avenue we are proposing to explore is also in the same Parliament report. The explanatory statement describes the assessment of policies as 'an essen-

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defence are guaranteed by that article since it provides the party concerned with an opportunity to put forward its arguments. The Commission cannot be required to reply to those arguments, to carry out further inquiries or to hear witnesses for the party concerned, where it considers that the preliminary investigation of the case has been sufficient, for that would be likely to render the procedure for establishing an infringement too cumbersome and extend its duration unnecessarily' (para. 32)).

<sup>31</sup> This, of course, has been acknowledged by the Community courts themselves. See, for instance, Case 26/76 *Metro v Commission* (1977) ECR 1875 (judgment given on 25.10.1977); Case 191/82 *Fédération de l'industrie et de l'huilerie de la CEE (FEDIOL) v Commission* (1983) ECR 2913, at p. 2935 (para 29) (judgment given on 4.10.1983); Case T-37/92 *BEUC and NCC v Commission* (1994) ECR II-285, at p. II-307 (para 36) (judgment given on 19.5.1994).

<sup>32</sup> Case 104/79 *Foglia v Novello ('Foglia I')* (1980) ECR 745 (judgment given on 11.3.1980); Case 244/80 *Foglia v Novello ('Foglia II')* (1981) ECR 3045 (judgment given on 16.12.1981).

<sup>33</sup> See for example W. ALEXANDER, 'La recevabilité des renvois préjudiciels dans la perspective de la réforme institutionnelle de 1996', *C.D.E.*, 1995, p. 561, at p. 574.

tial democratic right' and defines it as 'a system whereby information about the impact of Community measures on European societies is gathered and processed from and by a variety of sources and the effects compared with the objectives officially being pursued'<sup>34</sup>. Assessment, meaning not so much *ex ante* assessment as, above all, *ex post* assessment (after a policy or programme has been carried through) and ongoing assessment (while a policy is being implemented)<sup>35</sup>, is a key component of a proceduralised legal system. The purpose of introducing it is to generate positive effects that will involve all those interested in the legislation or the policy in the uncertainty faced by the author of the relevant instrument or policy. Contextualising the grounds given for the instrument or policy (as the rapporteur, P. Herzog, put it, 'legislation ... plainly does not operate in a vacuum') implies that the grounds originally given for the adoption of an instrument or the initiation of a policy may be reviewed in the light of the real effects of applying the instrument or implementing the policy, just as the actual instrument or policy must be open to review; and it presupposes that, since application can be in multiple contexts, as can the perspectives from which the instrument or policy can be assessed, the assessment will involve all the players interested at all stages of the decision-making process. We shall clarify what is meant by the assessment we are thinking of as a component of the proceduralised law, in contrast with the cost/benefit analysis of a given policy that operates in purely budgetary terms and presupposes a quantification both of the benefits and of the disadvantages of the relevant policy. This kind of assessment would be extended in no less than three directions: it becomes **democratic**; it assumes the public policy being assessed to be **experimental**; and it is amplified by a **meta-assessment**<sup>36</sup>.

1. There is a transition from an exclusively 'managerial' assessment to a more 'democratic' assessment<sup>37</sup>. The sharpest evidence of this is the fact that the objectives of the policy under assessment are highlighted in the course of the exercise, rather than just the means deployed for the attainment of the objectives that originally warranted them. This, I think, is what Bernard Perret calls the transition to a ballistic conception of the impact of public decisions on society. Assessment must not be confined to the effects sought by the decision and the question whether it has had them or not. It must pay attention also to the externalities of the decision, to its unforeseen effects, be they positive or negative. And consideration of these externalities can prompt a kind of retroactive change in the original grounds given — this policy, adopted to attain the stated objective, being ultimately capable of being implemented only because its implementation has shown that, the original objective not being attained, the positive externalities suffice to give it an acceptable basis.

<sup>34</sup> Herzog report, p. 13.

<sup>35</sup> Regarding this distinction, see *Petit guide de l'évaluation des politiques publiques*, Conseil scientifique de l'évaluation (France) (CSE Guide'), March 1996, p. 12.

<sup>36</sup> These paragraphs are based on the discussion introduced by the presentation by B. Perret to the Forward Studies Unit of the European Commission on 27 March 1996.

<sup>37</sup> See the CSE Guide, which contrasts 'managerial' assessment, which seeks to make public administration more efficient, and 'democratic' assessment, which seeks to improve the quality and transparency of public debate (p. 5). The guide disputes the relevance of this opposition, noting that successful assessments satisfy several functions. But our analysis also encourages this kind of 'multi-tasking', which entails abandoning an approach to assessment based solely on a cost/benefit analysis.



2. An assessment to decide whether the policy should be pursued or not, or only on condition that this or that point is rectified, gives way to an assessment with, among others, the objective of prompting proposals for institutional reforms, affecting the context in which the policy is implemented. In other words, the aim is no longer to reason in a given institutional context that is itself beyond assessment. The policy under assessment may fail because it was ill thought out, or because the incentive effects on those responsible for implementing it were underestimated, because no account was taken of potential detrimental side effects; it may also fail because the institutional context is inadequate to secure its success.

Admittedly, the integration of this into the functions of the assessment adds new angles to the assessment. I shall mention only three of these here. They relate to the **experimental** nature of the policy when the assessment aims among other things, to prompt reform proposals ranging beyond its specific scope. First, the prospect of reform can incite the participants in the assessment exercise to withhold information that might be interpreted in a manner that is less favourable to their own situation or to distort the information that they agree to divulge: here we have a dilemma that was already encountered when we considered whether the players interested by the implementation of a decision should be consulted on it. Second, the experimental nature of the policy might make the players responsible for implementing it to over-invest in it to ensure the success of the experiment: the guide prepared by the French Scientific Evaluation Council refers in this context to the ‘Hawthorne effect’ — ‘every experiment begins by succeeding’<sup>38</sup>. Thirdly, just as the success of an experimental policy may be explained by the experimental nature itself<sup>39</sup>, so conversely the local nature of the experiment may explain its failure — for instance, where a more effective policy is tried out but has to be coordinated with less effective existing policies, its failure to get off the ground may not mean that the experiment has failed but that, on the contrary, it should be tried out on a larger scale to boost the prospects of success<sup>40</sup>.

These difficulties would seem to imply that any assessment that ranges beyond the policy itself to the institutional and other structures in which it is operated is open to manipulation. But if there is an adequate definition of the policy under assessment from the commencement of its operation, specifying the degree of its extension, this risk should be averted<sup>41</sup>. And there is another point that must be stressed: there can be no question of manipulation unless it is assumed that the responsibility for the successes and the failures of the policy is objectively attributed either to the policy itself or to the context in which it is implemented. Yet the purpose of this extension of the assessment is to provoke

<sup>38</sup> CSE Guide, p. 50.

<sup>39</sup> The ‘Hawthorne effect’ is not the sole issue here. It is possible that the success of an experiment is due entirely to the fact that there is an innovation-friendly environment, or it may be the exception in a cooler environment.

<sup>40</sup> The phenomenon is familiar to the social sciences: see for example J. Elster, *Solomonic judgments. Studies in the Limitations of Rationality*, Cambridge University Press, Cambridge, 1989, reed. 1992, pp. 184–187; P. Livet, *La Communauté virtuelle. Action et communication*, Paris, L’Éclat, 1994, pp. 215–220.

<sup>41</sup> CSE Guide, p. 14.

discussion of what may need changing in the policy, its context or even both. Provoking discussion of the assessment is a third form of extension from the more conventional approach taken hitherto.

3. The transition now is from an assessment of a public policy, whatever its subject matter and whatever its degree of sophistication, to the possibility of a **meta-assessment**, in other words a second-degree exercise which assesses the assessment. There are several factors warranting the addition of this new level of assessment of public policies.

One of the assessment functions is a learning function. The point here, to quote again from the guide produced by the French Scientific Evaluation Council, is to 'contribute to the training and mobilisation of public officers by helping them to understand the processes in which they are involved and to adhere to their objectives'<sup>42</sup>. Meta-assessment, which we can define as the presentation for public discussion of the results of the assessment (reforms called for, consequences in terms of whether or not to pursue the policy being assessed, whether the experiment should be moved to a more general level) and its methods (bodies or individuals running the assessment, criteria used, whether or not instances of bias have been identified) fully serves this objective if all the layers interested in the relevant policy are involved (those who design it, or implement it, or operate it on the ground, and end-users (general public)).

Meta-assessment is a means of involving a whole series of players (including representative organisations, the target public and associations) who, for primarily practical reasons, would not have been able to be directly involved in the preparation of the assessment report itself. Their involvement is essential, and not only on account of the learning function just mentioned but also because the same policy can have diversified effects and be perceived in very different ways, depending on the assessment criteria but also on the context in which it is implemented, for reasons that may be inherent in the specific local context (spatial contextualisation) or in a specific set of circumstances (contextualisation in time). It is all the more important to give pride of place to contextualised assessment as we have seen that assessment can provide an opportunity for re-viewing the grounds originally given for the policy now being assessed; since these grounds are generally inspired by the need to satisfy certain needs, such as those expressed by users of public services or some segment of the population, it is indispensable for the assessment to consider the possibility that these needs may have changed under the impact of the relevant policy — for example, its negative side effects might prompt the target category to reconsider their original preference<sup>43</sup>.

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<sup>42</sup> CSE Guide, p. 5.

<sup>43</sup> The CSE Guide introduces the assessment technique by observing that 'Control and audit refer to norms that are internal to the system being analysed (accounting and legal rules and operating standards), whereas what assessment seeks to do is to measure the effects and value of the activity in external terms' (p. 4). But the use of a singular is misleading: there can be a multitude of external points of view, none of which can claim a monopoly of 'correct' assessment.

## The deployment of independent agencies

R. Dehousse recently drew attention<sup>44</sup> to a phenomenon to which the European University Institute has devoted a number of studies<sup>45</sup>: the emergence, especially since 1990, of European-level agencies consisting of experts from national administrative bodies in specific fields — trademark registration, drugs, the environment — the regulation of which demands technical expertise in areas where development is rapid. The function of these agencies is generally to facilitate coordination between these administrative bodies, the exchange of information between them and ultimately the emergence of a common administrative culture that will help to overcome the barriers to the uniform application of Community law without any new transfers of power.

It is paradoxical to affirm that the problems which the art of governing consists of treating together are interdependent and then to attribute a degree of autonomy to certain matters which are treated on the basis of specialist expertise and in relative isolation from the broader context in which they are situated. The advantages of this development are undeniable, but they appear more closely linked with the specific situation of Community law — which must develop yet further the degree of uniformisation but has neither the legitimate powers nor the means to go for greater centralisation — than with the special advantages of setting up agencies. By setting up a specialised agency the Community legislator ensures that the matters it is empowered to regulate enjoy a higher profile, which in turn prompts the players concerned to formulate demands which otherwise would not receive such favourable treatment. The dependence of an agency, which is not financed from the Commission operating budget like the committees set up under what has come to be known as the comitology system, means that it must supply certain gaps in the European integration process in the areas where it is active, for otherwise its remit may be terminated or its resources amputated.

But these arguments are reversible. The value of giving an agency a clear remit lies in the visibility that the agency then enjoys and the specific responsibility for the matters that it is to regulate. But at the same time, since certain agencies have the function, not only of organising the flow of information between national administrative bodies and setting up networks of national experts, but also of presenting legislative proposals to the Commission, the question arises whether setting up agencies might not lead to over-regulation. Moreover, raising the level of responsibility of the agency, once it is responsible for coordinating initiatives in a given area, runs the risk of diminishing the Commission's responsibility to a correla-

<sup>44</sup> R. Dehousse, 'Regulation by networks in the European Community: the role of European agencies', *op. cit.*

<sup>45</sup> See A. Kreher (ed.), *The new European agencies*, EUI Working Paper RSC No 96/49: contributions by J.-CL. Cambaldieu on the Office for Harmonisation in the Internal Market (trademarks, designs and models) (pp. 49–63), G. Estievenart on the European Monitoring Centre for Drugs and Drug Addiction (pp. 15–21), and D. Jimenez-Beltran on the European Environment Agency (pp. 29–41) (cited with comments in the article by R. Dehousse (*op. cit.*)).

tive extent, for the Commission, being less active in that area, will be incapable of taking clear initiatives and will therefore be tempted to pass the buck on to the agency where there has been a failure to come up with a common definition of the problem or to come to a shared diagnosis as to the solutions required. In *Meroni v High Authority*, the European Court of Justice deduced from the need to prevent the institutions from evading the responsibility conferred on them by the Treaty that there must be limits to the delegation of powers in the Community system, especially where an institution is required to reconcile contradictory objectives, which entails exercising a discretionary power<sup>46</sup>:

*... the consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.*

*A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility'.*

In our context, this decision can be taken as a basis for two different conclusions. If we deduce from it that, where the delegation of certain responsibilities to agencies exceed the limits set by the Community case-law, the Court of Justice has the means to condemn it: the delegation accordingly cannot entail the risk that the European Commission will not fully exercise its responsibilities that is often perceived here. Alternatively, it might be thought that the risk highlighted by the *Meroni* judgment will not disappear fully by reason of the protection given against a delegation of powers not relating exclusively to implementing or information functions or not offering those to whom Community legislative instruments are addressed.

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<sup>46</sup> Case 9/56 *Meroni v Haute Authority*, 9/56, (1958) ECR, English Special Edition 133 (judgment given on 13.6.1958). The submissions of Mr Advocate-General K. Roemer are eloquent as to the fears expressed by the Court of Justice regarding the shift in responsibility that is liable to flow from a delegation of powers to interest groups. In Mr Roemer's view, 'it is necessary to require that the guarantees laid down by the Treaty as to legal protection shall continue to exist even in the case of delegation. Those guarantees include the rules relating to the publication of decisions together with a statement of the reasons on which they are based and also the provisions relating to proceedings before the Court. The High Authority cannot evade those guarantees by leaving it to agencies to which powers have been delegated to adopt in its place the decisions which it is incumbent on it to adopt itself. On the contrary, the decisions of these associations should be assimilated to decisions of the High Authority or otherwise the latter should itself adopt the real decisions, the supporting preparatory work and the purely technical implementing measures being left to others' (at p. 190).

In any event the development of agencies in Europe can be properly analysed only in the light of the 'comitology' system which, following the logic of Community law, is the alternative to it: the establishment of advisory, management and regulatory committees to assist the Commission in its task of implementing instruments enacted by the Council<sup>47</sup>.

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<sup>47</sup> See Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L197, 18.7.1987, p. 3), determining three categories of committee to assist the Commission. For the situation prior to the comitology decision of 13 July 1987, see V. Ayrat, 'Essai de classification des groupes et comités', *RMC*, 1975, p. 330; 'Council and Commission Committees', *Bull. EC*, Suppl. 2/1980; Commission communication of 12 March 1983, COM(83)116 final, *Bull. EC*, 3/1983, p. 83. On the academic side, regarding the comitology decision, see Cl.-D. Ehlermann, 'Compétences d'exécution conférées à la Commission, la nouvelle décision-cadre du Conseil', *R.M.C.*, 1988, p. 232; and C. Blumann, 'Le pouvoir exécutif de la Commission à la lumière de l'Acte unique européen', *R.T.D.E.*, 1988, p. 23. The Amsterdam Conference called on the Commission to submit to the Council by the end of 1998 a proposal to amend the decision of 13 July 1987.

# **Giving shape to a European civil society and opening up the institutional system**

**Philippe Herzog**

The European Union is finding it immensely difficult to become a polity. No progress was made on political union or institutional reform at either Maastricht or Amsterdam. The Intergovernmental Conference taking place throughout 2000 and set to conclude in Paris in December already seems to be setting itself only limited ambitions. At a time when questions are being raised about global governance, the Union has not opted for a scheme or a regional identity with a sustainable future. Not only has enlargement made the question of political unity more acute, it also raises the question, to which there is still no answer, of whether the Community is capable of safeguarding diversity and being enriched by it, and developing true solidarity at the same time. The need for competitiveness is bound to be heightened by the single currency, yet nothing has been done to assess and allow for the impact of the currency on Europe's societies; it will not be a real asset unless the economic system is under control, which is not yet the case. The public will certainly not support a European Union which has no clear design or identity and does not nurture its values as a basis on which we can all live together. So, as Jacques Delors never tires of saying: Europeans must specify the objectives they are prepared to share and accept the responsibilities which will enable them to achieve those goals. This raises fundamental questions of method and substance.

## **Towards a new relationship between society and politics**

At the moment we are seeing the Member States reasserting themselves, but also a renewed will to coordinate national policies. No doubt this is a necessary step towards the day when the Council will assume more responsibility, but the past has shown there are limits to the intergovernmental approach. The Commission has started doing more too, but the impact of its action is dulled by pressing social and economic considerations, and because the terms of reference governing it basically spring from the internal market agreement. The Commission cannot and never will be able to perform the tasks of government, namely to give impetus to the process of pooling the interests of various groups and taking final decisions on collective choices. We believe that involving the public, their associations and organisations is the definitive challenge for future European integration. We must find our way back to our societies and try to bring them together so that in conjunction with nations they can be shaped into a European society. Political union cannot become a reality without a European society. In Germany, the debate over

a Europe-wide democracy among philosophers and legal experts, especially in the Karlsruhe constitutional court, made it clear that democracy cannot emerge unless it is underpinned by a people, in the sense of a society. Such a society does not yet exist. Along the same lines of thought, Dominique Wolton, the sociologist, clearly demonstrated that the standard bearers of the idea of political union have underestimated the revolution in attitude it entails. Above all, it presupposes a cultural scheme, but State and Union institutions are still raising objections to such a goal. Yet again, we need reminding of the lesson taught us by Hannah Arendt and Paul Ricoeur: any institutional system exercising authority which is not supported by a society aware of its identity and motivated by the wish to live together will be built on sand. The 'authority' of the political class derives solely from the collective will, and politics is the concentrated moral and active force of a society. Therefore, we have to think in terms of a European society and devise an interactive relationship between it and the institutional political system if we really mean to bring its peoples together. Shaping a society, opening up the institutional system and recasting it so that ordinary citizens and their organisations can be involved and participate in it implies an immense programme of research and action.

These problems are general ones, given the change in society's relationship to the State, and specific ones, now that the transnational dimension of the exercise of political power in the face of economic globalisation has become a fact of life.

The shaping of **civil** society and that of the modern State have become totally intertwined. On the one hand, the economic aspect of society has become distinct from the political aspect while, on the other, the two aspects have become linked together in a way not seen before. As Norberto Bobbio points out in his discussion of Hegel: society is regulated and governed by law ... the State under the rule of law being distinct from the State as an ethical and political construct<sup>1</sup>. Civil society was not established by the rule of law, it existed before it, but depends on it for its existence, while at the same time it is starting to be capable of choosing a representative political system and controlling it. Regulatory systems and government then act according to the values and commitments of individuals and their organised mediators. Nowadays, since the information revolution and globalisation, regulating everything is clearly less effective, does not reflect people's aspirations and does not provide a foundation for cohesion. The ongoing historical trend towards individualism challenges hierarchical structures at work and in the State. As the call for State protection sounds ever louder, the crisis in popular representation has become more acute, owing to the loss of regard for politics in its present form. Political organisations do not properly play their role as intermediaries for the people, and as a result are perceived as offering merely an appearance of representation. Does that mean that fashioning a European society in such a climate is just a fantasy? No, on the contrary, it would be a catalyst for finding a better solution to these problems by prompting a rethink of relationships between the people and politics.

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<sup>1</sup> *The State and international democracy, European studies, Complexe, 1998, p. 179.*

Constructing Europe is a process of mediation through which nations can react to changes in the world, and at the same time it contributes to the specific problems of transnational regulation and governance. The problem is that at international level no societies share a common existence or way of regulating public order. The European Union is fairly close to the Kantian ideal — revolutionary at the time — of a group of States governed by law and institutional consensus-seeking. But it is not a community. Yet, we are clearly seeing the emergence of transnational bodies calling for regulation and aspiring to be political entities themselves. This is apparent at world level, for example in response to questions raised by the World Trade Organisation, despite evident contradictions and limits. It is even more obvious in the European Union, where social and civil dialogue has begun, and European social partners have emerged; these developments go beyond the simple function of coordinating the work of national organisations<sup>2</sup>.

The quality of such mediation and participation must be assessed and looked at from the political perspective, and further steps will have to be taken to respond to the next challenge: constructing a genuine civil society, regulating it and determining the implications in terms of defining a general European interest and within an open, recast institutional system.

## **A new social model can never be put together unless the economic sphere is under control...**

What is it we want to do together? In the past, the Community's task was to achieve peace and reconciliation. Today, when globalisation is more often perceived as generating deep insecurity than as creating opportunity, Europeans dream of defending and transforming their ways of living and developing, by drawing strength from their values and refurbishing them. In so doing, they will also be better equipped to become players in a world of brotherhood.

Transforming the social model and building on its achievements, and above all innovating, is on every country's agenda and is the subject of research and consensus-seeking in Europe. What is needed are more substantial, more visible efforts which can be identified and understood. A juridical approach involving the establishment of social citizenship is one answer, but a society cannot just be legislated into existence, it must be built on a foundation of contacts and real shared commitments. There can be no effective answer to the social question unless we successfully reconsider action in the economic sphere. Karl Polanyi, a student of 19th century civilisation, wrote that the conflict between the market and the basic requirements of organised social life gave impetus to the century and generated the characteristic stresses and constraints which finally destroyed that society<sup>3</sup>. In the

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<sup>2</sup> Concerning the European Trade Union Confederation (ETUC), see the study by Jon Erik Dølvik: *The emergence of an island? The ETUC, social dialogue and the Europeanisation of trade unions in the 1990s*. European Trade Union Institute, 1999.

<sup>3</sup> *La grande transformation. Aux origines politiques et économiques de notre temps*, 1944, Gallimard, 1983, p. 320.



20th century, social and political action successfully challenged the treatment of labour, land and money as goods. Karl Polanyi thought that it meant the end of the self-regulating market and the market society. He believed many sorts of societies could then emerge, that the freedom to organise the life of the nation at will would go hand in hand with close international cooperation between States. At the end of the 20th century, however, we have not yet reached that point, and the challenge now is from the formation of a would-be self-regulating global market. Countries do, of course, have powerful means of acting when crises strike, and their skill in managing stock market crashes was displayed in 1987 and 1998. It is self-evident, however, that severe social and economic problems are emerging worldwide and still more can be expected to strike in future. Even if growth continues, which is what everyone in western Europe and elsewhere is banking on but cannot take for granted, it will put severe stresses on the environment and create more marked inequalities. Such growth is not sustainable from the ecological and social standpoint. The goals of sustainable development and social cohesion written into the European Union treaties are still, to all intents and purposes, categoric. Given that historically the problem has been how to make the life of society consistent with the workings of the economy, it is vital for individuals and organisations to become involved in the process and give it international impetus.

### **...which presupposes involving all the interests in society in the exercise of participatory democracy**

The first aspect to be considered is the effectiveness of decision-making processes. Herbert Simon stressed that when people are confronted with immensely complex problems and when crucial information is lacking, it is necessary to develop the various players' capacity to cope and communicate by invoking rationality as a process<sup>4</sup>. The challenge of involvement can also be considered from the point of view of an ethical system grounded in democracy, which is how it is seen by believers in the proceduralisation of law<sup>5</sup>. Starting with these two lines of enquiry, we can also look at proceduralisation of the substance of the matter. The interests at work in society would be involved in bringing the economic system under control, incorporating the need for a redesigned social model, and in defining the general interest in an institutional system designed to facilitate participatory democracy<sup>6</sup>.

Needless to say, the cultural practice of those concerned must be consulted as regards social action, identity and political representation. In addition to its tra-

<sup>4</sup> *Rationality as a process and as a product of thought*, Richard T. Ely lecture, American Economic Association, Vol. 68, No 2, 1988/1989.

<sup>5</sup> Jean De Munck and Jacques Lenoble, *Les mutations de l'art de gouverner*, May 1996; J. De Munck, J. Lenoble and M. Molitor, 'Pour une procéduralisation de la politique sociale', *Transnational Associations* vol. XLVIII, 4, 1996, pp. 208-239.

<sup>6</sup> In the same vein, I wrote a number of papers in recent years, in particular: *La participation des citoyens et des acteurs sociaux au système institutionnel de l'Union européenne*, report to the European Parliament, October 1996; *Reconstruire un pouvoir politique — dialogue pour gouverner en partenaires*, La Découverte, 1997; *Avec l'euro, construire les relations sociales européennes*, mission report to the French Government, June 1998; *Manifeste pour une démocratie européenne*, Editions de l'Atelier, 1999.

ditional functions, organised civil society has become involved in the process of shaping the general interest, historically by means of the class struggle, and by securing positions of power in the system of political representation. These methods are by no means obsolete, but their limits are well known. The class struggle does not look beyond the antagonisms in society to its essential unity and the cooperation between its parts; representation gets caught up in an intra-institutional view of the balance of forces. Negotiations and joint management are a sort of third way which looks set to go further; it does not exclude the other two, but for it to be responsive to the general interest, the composition of the interests involved would have to be changed and social representativeness redefined. All these areas have to be given a European dimension. Where is the European right to strike? Where is there a political spokesman to respond to social action? Do we want to overcome the impediments to social dialogue and, if so, how? Do we want consultation or consensus-seeking on matters of substance, and joint management of action programmes? These questions are addressed both to the culture of the Community institutions and to national societies.

The problem of developing a European political power centre is bedevilled by the sovereignty question. As Bobbio wisely points out, sovereignty has two faces, one turned in and one turned out. It is circumscribed by two matching sets of limits: internally by the relationships between governors and governed, and externally by the relationships between States<sup>7</sup>. If the sterile stand-off between sovereignty (the State) and federalism is to be overcome, the shackles of citizens' identification with their nation State must be loosened to some extent so that they are free to enter into an association which transcends them. Existing political and institutional systems can oppose such a movement, but they can also accept it and help it to mature and become responsible. Rulers and elected politicians should then strive to disseminate and share power, while taking care not to use civil society as instruments but to govern in partnership. Let us be open about this, this would mean going a stage beyond traditional forms of representation and hierarchical structures at work.

It would be instructive to study early research and participatory practices. Tocqueville considered that association and commitment in public life were the very foundations of a viable democracy. Robert Owen believed in workers' and employers' cooperation to subordinate machinery to society; Proudhon imagined social ownership; Jaurès advocated worker participation in management. De Gaulle dreamed of a society founded on involvement, but inconsistently made it subject to a leader. *Mitbestimmung* in Germany is an example of workers' participation in management which we could rethink today. Generally speaking, what we must do now is go beyond these great thinkers' ideas, and hopefully Europe will become a laboratory of ideas and experiments. These ideas are closely linked to the specific proposals briefly set out below, illustrating ways of actively giving shape to a European civil society.

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<sup>7</sup> Op. cit. p. 237.

## **A few serious workshops are working on finding a new social model**

Rethinking our national social models and the European social model, which at present is only a concept which underlines the fact that they have many features in common: the quest is on.

Leaving aside ideologies advocating the end of work and work-sharing, we are faced with the crucial question: refusal to let our values be destroyed means we must first reassert the value of work and find a new definition of it. These are major challenges for society: work which is more creative and gives workers more responsibility, more independence, greater security and opportunities for mobility in their working lives, and lifelong training, in order to make the most of human potential and to combat exclusion.

The European Trade Union Confederation has formulated five new negotiating proposals which tend in that direction. The Supiot report on the future of labour law in Europe<sup>8</sup> has been the subject of exchanges and discussion, and thought is being given to ways of following up his suggestions. Questions of method are getting an airing. One suggestion is the proceduralisation of law combined with a strategy to establish basic rights and social citizenship. The Supiot report also advocates another approach, involving drawing up a schedule for the interests at work in society and politics to take action on the key issues, giving due weight to negotiations at appropriate levels and establishing a legislative framework. However, the effectiveness of the law necessarily depends on how the economy is managed and regulated. Workers' status cannot be redefined unless the social obligations and identity of European companies are also defined. We cannot build up a more universal body of law and make sure it lasts, or open up new prospects for people's lifetimes in which each individual would have more control over his work, his training and his activities in society as a citizen and as a private individual, and could make them more consistent with each other, unless resources are mobilised and shared, for there would be a price to pay. Redefining work and rethinking the structure of solidarity go together.

Another important aspect of a social model and sustainable development is the defining of common assets, the cultural and organisational processes whereby Europeans could appropriate goods and services considered to be essential for the common interest. This would entail specific regulations and agreements and involve setting up European networks of services in the general interest. It is patently obvious that it is very difficult for Europe to grasp the concept of common assets. The ambition is not even stated. More generally, Europe cannot reconcile the kind of society we want to live in and market rules, as society calls upon it to do. It advocates a balanced approach to the WTO, but very often a definition of what that

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<sup>8</sup> *Au-delà de l'emploi. Transformation du travail et devenir du droit du travail en Europe*, Rapport pour la Commission Européenne, Flammarion, 1999. (Transformation of labour and the future of labour law in Europe: final report.)

means is lacking in the Union itself. For example, for external purposes culture is not to be treated as marketable goods, but internally the Commission treats it (and is only authorised so to treat it) as an economic good subject to the rules of competition. The Treaties and the Member States rule out a cultural policy, but the Commission implements a cultural policy on behalf of the market.

The Union hopes that competition will stimulate Member States to reform their structures. This means that no priority is given to structural choices governed by non-market ethical principles. Thus, the primary aim of the procedure to coordinate structural reforms launched at Cardiff is to stimulate the national deregulation seen as being necessary for the purposes of completing the internal market; this perpetuates existing tendencies, and its effectiveness is assessed only through the lens of competition.

The environment and information are areas particularly affected by problems of common assets, where non-market and market principles clash and for which social priorities have to be established so that the two can be reconciled. How can European cultural products be circulated and shared in the Union? To cover membership of the Union, should there perhaps be a policy on European education, designed to be one aspect of our national educational systems? While the Union is reviewing its information technology directives, perhaps it could devise some joint operations to give its peoples access to the Internet. These are just a few examples. Meetings, dialogue and measures to achieve these objectives would bring a European society a step nearer and make it more meaningful.

These matters should be approached from a local angle. The Community becomes meaningful wherever people work and live. A local approach necessarily entails a specific, major feature: it means finding practical ways to achieve cooperation and solidarity. Currently, the impact of the cohesion policies implemented through the Structural Funds is being assessed. Their effectiveness depends largely on the ability of local players at national level to find ways of coping with the implications of the European economy. In this instance, too low a degree of outward devolution by national government is a handicap. Forward thinking on the post-euro situation and enlargement suggests that in view of the severe inequalities present, very firm action will have to be taken to consolidate our efforts towards achieving cohesion. In fact, the level of per capita pre-accession aid allocated for the new applicant countries to help them bring their development levels up to scratch is markedly lower than it was for previous applicant countries. The Union unilaterally requires them to assimilate its procedures and practices as they stand rather than restructuring itself as an area where States with different structures coexist and support each other.

Local interests everywhere will have to make much more effort to get to grips with competition. Can they do it on their own? Will it be enough to promote the feeling of belonging to a Community? Perhaps it will be necessary to set up social agreements, forms of cooperation, and specifically European networks of services at local level. The CEEP is putting forward ideas to that effect. A very enlarged Europe would lose its identity and splinter if contacts and dialogue are not fostered

between civil societies in the West and the East, notably for the purpose of devising ways of achieving economic and political solidarity — a field largely overlooked by policy-makers today.

## **Who regulates the economy, what criteria are they applying and what are the structural options?**

The societal issues facing us need to be resolved by taking control of the European economic system which is now emerging. Basically, the solutions we find will be dictated by underlying cultural differences in the approach to intervention. The majority of interest groups and political organisations believe that we can only act from outside the market system. This is the modern notion of ‘regulation’ as the setting of rules by an outside agency, to be yoked to macroeconomic government policy by mobilising its specific tools. Others — and there are still too many of them — believe that action should and can be taken within individual businesses and the economic system by altering the balance of power and the terms of management. From this viewpoint, the problems of individual businesses, of regulation and of market structures become matters to be determined by society.

The plan for a European company statute is still deadlocked after 30 years of trying<sup>9</sup>. Far from giving up, we must now go beyond the purely juridical approach and embark on far-reaching discussion and action. We need a definition of what a European company is, for reasons which go to the very heart of what concerns people in Europe today; what social obligations should European companies have? How can we set up a system to monitor companies when global financial investors take over and lay down their criteria for profitability and governance?

‘National’ supervision of companies becomes problematic when they are multinational. Control has to be shared. When is somebody going to start working on transnational social ownership of companies? The Gyllenhamar report on dialogue and keeping control of changes gives little space to company obligations and union negotiating powers. A system of transnational shareholding by employees, in group funds with risk-pooling to prevent conflicts of interest between different groups of employees, could be a ground-breaking formula for what a European company would be. In practice, employee shareholding is a strictly national matter and is not one of the Community’s objectives. Only an organised civil society with increased confidence could remove these taboos and establish a culture of participation, with the ultimate goal of setting original criteria for effective social management to offset capitalism’s criteria of financial profitability.

The company question has to be tackled head on if the issue of regulation is to be broached with an even chance. As we stated earlier, a tendency for a self-regulating global market emerged in the latter part of the 20th century. Since new

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<sup>9</sup> This only includes limited companies and takes no account of the need for a statute for partnerships as well.

forms of information technology are involved, the idea has gained credit. Operators would settle their disputes and allow for ethical considerations when drawing up their agreements; when States advocate 'joint regulation' the agreement would be rubber stamped or a public endorsement appended legitimising the private agreement. Another possibility would be joint regulation, where the social partners would play a part in laying down the rules and assessing their effectiveness. Take the case of intellectual property rights. This is a matter of major importance which at the moment is designed to protect a legacy of copyright material for the benefit of large-scale operators and, as such, is rightly condemned by the poorer countries of the south. A new approach here could be to share our assets, knowledge and creations. In the Community an entirely new approach could be taken to the regulatory process, based on reconciling non-market and market principles, and organised civil society would become a joint regulator.

The Union would still have to wish to be a regional player in the global arena. In commercial terms, Europe could lose its way in multilateral negotiations and fail to consolidate its own regulatory model. In financial terms — the key issue — prudential regulation is emerging at global level. The call for a specifically European finance regulation seems to be dying down. Is it because this question has been raised too late and has already been left behind by globalisation? Rightly or wrongly, we believe that the way the European financial system is structured will have a major effect on social issues in Europe, especially the answers found to the question of the need to find ways of funding the collective development of solidarity. There is at the moment a Commission and Council action plan to draw up European directives with the almost sole purpose of developing an integrated financial market fully accessible to the global market. The plan has not been discussed in public at all, nor have the social partners been consulted. There is an urgent need to set up a forum and a set of methods for financial dialogue. It is wrong to assume that regional regulation in the common interest would be impossible. Global prudential regulation currently reinforces the arguments for value creation and capital asset formation. Surely, consultations and discussions should be held regarding strategic choices for restructuring banking and financial institutions? When the call for investment by the public becomes trans-European, can we manage without rules in the general interest governing the organisation and management of funds, preventing exclusion and pooling risks? Now that major moves are afoot to set up pan-European stock exchanges, can we stand by without laying down some official rules to cover investment by the public, taxation policy for financial revenue and operators' profits?

In system theory, a system of regulation concerns the mechanisms which provide incentives for development and the restoration of order in response to dysfunction. Not only the regulation system but the choice of structures and the way the system is organised have to be looked at when change and/or crisis occur. Economics is mainly concerned with private and public structures and their relationships. There is no space in the European institutional system for any discussion of what type of mixed economy to opt for. In principle each nation State is free to choose. The Cardiff process, favoured by some countries and obstructed by others, goes back to this principle of national subsidiarity but concerns itself with struc-

tures almost exclusively in the context of competitiveness. Countries which stress macroeconomic policy for growth and employment are reticent on the subject of how to coordinate any structural reforms. The urge to preserve national control is understandable: market forces push for convergence towards flexible models of markets and financing which conflict with certain societal values which some want to defend or promote. But this is the crux, for if we do not want the choice of structures to be dictated increasingly by the market, there will have to be strong European cooperation to ensure diversity, complementarity and efficient private and public structures.

This issue has far-reaching implications for the shaping of a civil society. How effective would European rules and macroeconomic policies be if they were established solely in the institutional sphere? The grass roots have to be organised and to work together to assess the rules and make sure they work, as well as to share access to knowledge, benefit from the experiences of others and together set up innovative and development schemes in different sectors of activity and at local level.

## **Proceduralisation in terms of substance**

Starting from these thoughts about how to involve civil society, let us look more closely at some questions of method relating to governance by the nation-State and the European Union.

The main reason why the interests at work in organised civil society fail to secure a role in regulatory, consensus-seeking and joint management procedures is that there is no upward-moving, interactive European dialogue. It should be possible to be involved in the life of the Community at any work place or in any public forum. To achieve this, we should establish a right for people to say what they think. To enable individuals to express their views and take action, civil society organisations, the Member States and the Union should be jointly and specifically responsible for providing information and education, and would facilitate interactivity across national borders. The Commission is considering a proposal whereby European public administration tasks would be carried out by decentralised local agencies. Could citizens have access to the agencies to exercise their rights? In a mission report we did for the French Government in 1998, we advocated regional missions where civil society organisations would work in partnership with the political institutions to give citizens access to Europe.

With respect to negotiating powers, any future collective agreements between the European social partners now have the force of law. There are few of these, however, so we will also have to define the responsibilities of legislative bodies: without a framework laying down the obligations of companies and financial operators, employers will feel quite free to negotiate at the most decentralised level.

When drafting its projects and programmes, the Commission makes instruments of those it consults (experts and special-interest groups). In particular, it calls

on the know-how of companies when their experience is needed. But does it really listen to the advice and recommendations it gets from independent bodies? Before any decision is taken, trade unions and associations should have the right to make an assessment or take the initiative, not simply react to Commission blueprints. Closely related to this, the dialogue between the institution and the players should not be cut into separate segments: putting the various players face to face with one another could produce a discussion of the general interest, going beyond the expression of specific interests.

When it comes to moving towards this, the information skills and know-how of the organised interests in civil society are, as everyone knows, inadequate: Commission expertise should be shifted outwards towards civil society and the elected representatives of the people. This recommendation in my 1996 report was adopted by the European Parliament, and has just been taken up by Ms Ranzio-Plath, who has called for the establishment of an independent institute.

Let us take a look at the process of coordinating national policies too. Civil society has no place in the Cardiff process. Since November 1999 the social partners have been entitled to a say on economic policy guidelines: this is the macro-economic dialogue initiated at Cologne. This formula looks like a modified version of the proposal we put to Parliament in 1996 for an annual conference with the players in civil society where they would discuss economic policy options and whether they were compatible with each other. This proposal was adopted but not acted on. It is a pity, since the dialogue initiated by the Council on predetermined guidelines is in no sense a substitute for a working relationship between members of Parliament and the social players, or for measures in which they would be jointly involved to try to set up a public discussion focused towards ordinary citizens, before decisions are taken. With respect to the Luxembourg process to coordinate European employment policies, which was launched in 1997, it is an appeal to the social bodies who are involved in it, particularly in countries where national social pacts are drawn up. However, coordination on these lines must go beyond just making a catalogue of juxtaposed national policies, accompanied by principles and details of arrangements incomprehensible both to the common man and to social bodies which are uninitiated and non-professional. For this to happen, two things will be needed: first, we will have to work together to recast our social values and models — and not just compare various public administration programmes — and, second, we must, as a matter of course, set up a link to the economic challenges which have to be faced.

Setting up more and more coordination procedures just produces more opaqueness and incoherence. Happily, the Portuguese Presidency is aware of this and is thinking about ways of establishing some coherence. The economic policy choices, though, are likely to be the unifying factor. Under the treaties the institutions responsible for economic affairs and finance pull much more weight than the social affairs institutions. Those hoping for 'government by economists' look to the Council of Ministers for Economic Affairs and Finance of the Member States in the euro zone to provide it. Such procedures will not produce coherent choices that give priority to a social model and a development model; it would require genuine



public debate and, to put it bluntly, capable government. 'Government by economists' could only mean that social issues will be marginalised, or at least their structures will be placed outside the economic order.

The European Union is not a government, but the three political institutions between them could in fact share the function. There should be a political agenda for the social and economic forward movement of the Union. Each year for a five-year period, the Member States and the Union would undertake certain essential tasks to which they would be fervently committed. We suggest a strategy plan: a joint commitment to work towards solidarity, to make full use of human skills all over Europe. The Union would use the method of the Single Act which served in the past as a means of constructing the single market. This will involve working to an eight-year deadline, with decisions by majority voting. The problem of Europe is not simply the high level of unemployment: it is compounded by very low employment levels in several countries, structural exclusion, lack of retraining throughout working life, an imbalance between creativity and innovation, in short, a glaring under-employment of human skills. The Union could set itself ambitious objectives such as lifelong training, workers' right to both security and mobility, a duty of integration and reintegration, sharing and exploiting information and knowledge — in short, options for the society we live in, involving new approaches to business, regulation and financing.

## **European citizenship and the behaviour of elected politicians**

Civil society would be motivated by and committed to inspiring objectives involving the benefits of Union membership to bear on individuals and on our shared living conditions. A process of identifying with the Union and belonging to a Community would then start to take root. These are the foundations of a political union. At present, people identify with the nation and the State, not with the European Union. Citizenship begins with wanting to get involved. There is (still) great untapped potential among ordinary members of the public who want to be involved in European integration. Yet participation is impossible without organised mediators, without media support which ensures that relevant information is accessible at the grass roots and can be used interactively, without public institutions capable of promoting education in things European.

At the present time, the NGOs and trade unions want to incorporate fundamental rights into the treaties. To formulate universal human rights is to mobilise a force capable of withstanding any State and tackling the international dimensions of the present-day insecurity. National legal systems maintain separate and divided identities. Although in the past there was interest in unifying the law, this is not automatically the case today. Nations and governments fight shy of it. Such an approach to common law is useful, but should not obscure other issues at stake, such as agreements and the organisation of powers without which the economic system cannot be brought under control and, consequently, there is no real prospect

of progress for society. Therefore it is essential to maintain a linkage between civil and social dialogue and the task of structuring EMU.

Opening up the political institutions by removing the barriers to participation has to do with how they exercise and organise their powers.

The way they operate is handicapped by two structural defects: the system is not designed to explore the views of society, and the impact of its choices is very poorly assessed, if at all. These two defects could be rectified if organised civil society were to be involved in discussions upstream, and in assessment and retroactive action downstream, using the channels of proceduralisation we have discussed above.

The workings of the Council are the least open. If public debate could take place in advance of its decisions, it would be forced to keep to an agenda and agree to more openness.

The Commission mainly uses participatory management methods. It needs to be propelled towards participatory democracy, meaning it must share its power of initiative and power of assessment with organised civil society. If its role as a political mediator between nation States could be enhanced — enlargement should bring this about — the Commission might be encouraged to keep company with organised civil society at the level of businesses and local authorities. This would mean, however, that disputes with national governments would have to be considered from the political viewpoint, not simply referred to the courts.

Europe's elected politicians should be closer to the grass roots, and Parliament should reconsider how it obtains expert opinion. Its method is inadequate because it is too dependent on national political parties and the European Commission. I believe it is crucial to set up a working relationship between political parties and the interests active in civil society on the basis of a genuine desire for European integration. Then the European Parliament could begin to carry out its function of engaging in an open public debate about choices in the common interest.

The question of how good and how representative the bodies active in European civil society actually are cannot be evaded. But they do at least exist, which is by no means a foregone conclusion. It would also be a good thing if elected politicians asked themselves how well they represent their voters. This being said, a few comments can be made here.

There is some dispute over what constitutes civil society. Some NGOs claim that it consists of them and nothing else, and some parts of the media support this idea among the general public. Some business representatives, on the other hand, claim that they are the foundation stone of society. In fact, there is too much jockeying for power and too many divergent interests, and no single group should claim that it alone represents all the structures and defines the general interest. This is why we advocate a broad definition of organised civil society as consisting

of representatives of the business sector, social institutions, local authorities, trade unions, NGOs, think tanks and so on<sup>10</sup>. We urge them to cooperate in solving the historic problems facing society today, the new models of society, shared control of the economic system and the democratic momentum towards participation. We emphasise, too, the need for new forms of relationship between the social and political movements, both of which are being reconstructed.

Certain criteria have been laid down for social representativeness, particularly for the purposes of conducting negotiations. These are the ability to mobilise and mutual recognition. On the ground it should probably be supplemented by elections, reinforcing the coordination function carried out by the social partners. In addition, more work should be done on making use of the referendum. Civil society organisations should think about achieving unity and the contribution they can make to society as a whole, above and beyond their sectoral interests. Forums like the Economic and Social Committee and the Committee of the Regions could be given a mandate for this purpose; it would call for reforms which political leaders would be ill-advised to ignore. Other autonomous forums should be set up to carry out forward studies and assessments.

Breathing new life into democracy is a challenge for the 21st century, and Europe must find answers, regarding both the shaping of civil society and the building of political authority. We suggest exploring ways towards a civil society in which private-public relationships would be based much more on partnership, and where political authority would be more open to rotating functions and participation.

Can it be done? Let us try. To quote the New Testament, 'the wind bloweth where it listeth'. Man can exercise his right to be free and choose his own path. The poet René Char urges us forward in these words: 'Confront the risk. As they watch you go ahead, others will get used to what they see.'

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<sup>10</sup> A similar view is put forward in the Economic and Social Committee opinion on the role and contribution of civil society organisations in building Europe (Rapporteur: Ms Sigmund).

# Active subsidiarity: reconciling unity and diversity

**Pierre Calame**

## Summary

'Active subsidiarity' is a practical approach to governance which starts from a realisation that one of the most important needs of the modern world is to reconcile unity and diversity.

Our world is both deeply interdependent and infinitely varied. Interdependence unites us, and globalisation of the criss-cross flows of goods, services, information and money is binding us daily a little more closely together. Man's grip on the biosphere and the resulting risks of imbalance are forcing us to adopt a joint approach towards managing our common heritage, whose vulnerability is becoming each day more obvious. But the infinite diversity of environmental, cultural and social situations is something which enriches us. The more the world becomes one large village, technology becomes knowledge-based and the economy is globalised, the more the importance is recognised of geographical areas and local environments that are capable of cohesion, initiative, partnership, innovation, mobilisation, fine adjustment to local conditions and the assumption of responsibility.

Very large corporations, the only players that so far operate on a truly global level, have had to devise methods of organisation that satisfy the need for both unity and diversity. They have achieved this in a multitude of different ways, by centralising strategy decisions and devolving operational responsibilities, by disseminating experience and knowledge through movements of people, by creating room for independent decision-making within the organisation, by breaking down large entities into units of more human size, by achieving uniformity through audit rules and procedures rather than by imposing standard working methods, and so on, but the problem to be addressed by corporations is simpler than the challenge facing public authorities.

For public authorities, combining unity with diversity poses a set of radically new problems. No major problem can be solved satisfactorily at a single level: in future, the distribution of powers will be the exception and the interlinking of powers the rule.

But political science and administrative traditions give no guidance for tackling this new situation. With a view to organising responsibilities at the different levels, they traditionally propose a choice between two alternatives: centralism and subsidiarity.

For the centralist, unity comes first. The nation, one and indivisible, is the only legitimate body politic. The people are sovereign. Equality is the rule, and this is reflected in concrete terms in the near-geometrical uniformity of public action throughout the territory. But, as a result, public action is essentially standardised, compartmentalised and directed towards individuals taken in isolation, in turn as citizens, members of the public, beneficiaries and users. A loyal civil servant is (in theory) a transparent official who applies to citizens the rules drawn up by their elected representatives meeting in Parliament.

Those rules lay down obligations regarding the means to be employed, specifying how things must be done and not the aims to be pursued. How can diversity be taken into account in these conditions? By decentralising, devolving areas of responsibility away from central government and towards other levels. Public action is the outcome on the ground of the superimposition of responsibilities exercised at different levels. Cooperation between those levels is often ensured by hybrid entities, which are necessary but complex, and through joint financing, whereby the two systems check their convergence.

For the advocates of subsidiarity, on the other hand, it is diversity which comes first, as should the free association of small groups united by common ideals and interests. Public authority and its intrusion into the private lives of individuals and groups is a necessary evil but an evil that must be kept to the strict minimum and whose encroachments must be relentlessly resisted. The sovereignty which belongs by right to the people is delegated to a wider and wider community as the requirements of interdependence become more compelling.

At European level, the choice between centralism and subsidiarity translates into a conflict between the advocates of intergovernmentalism and federalism. For the former, supranationality is an evil, a negation of the sacred and indivisible nature of the nation State. In their view, the only solution is negotiation, pacts and treaties between sovereign nations. For the latter, supranationality flows from a pragmatic realisation that the extent to which today's world is interdependent demands a consistent approach and the shaping of strategy at a 'regional' level, since the 'national' level has become decidedly too narrow.

But what the two systems have in common is that they both address decision-making only in terms of the distribution of powers, seeing in that process the only way of clarifying responsibilities, the theoretical condition for obtaining the endorsement of citizens through the electoral system. Unfortunately, it is increasingly rare for real situations to fit into these theoretical pigeonholes, and one day the need to manage the complexity of the modern world, composed of a combination of local environments and networks, none of which is closed, will have to be accepted as a basic fact of life.

It is significant that the current disillusionment with political circles is expressed in similar terms at the different levels of decision-making, from the EU to the municipality: too much bureaucracy, too much overlapping of procedures and

not enough consistency, not enough collective vision. This is the challenge, both theoretical and practical, that the concept of active subsidiarity is meant to face.

Subsidiarity, because it is firmly believed that the justification for public action is to be found only at grass-roots level, in a global and collaborative understanding of a reality which is itself global and systemic and cannot be broken down into smaller pieces, and that it is through carrying out shared projects that dynamic local environments can be created and the fabric of a society in which individuals are not isolated can be created. But why active subsidiarity? Active, because it is recognised that in an interdependent world the levels of power must be interlinked and that, unlike the distribution of areas of responsibility, the levels at which strategies are formulated are varied and separate from the levels at which affairs are managed on a day-to-day basis.

Active, again, because we do not believe that the reasoning adopted at the higher levels can be summed up by handing down regulatory instruments or obligations regarding the means to be used, but is reflected at grass-roots level by permanent negotiation and partnerships. Active, because the interests guaranteed by the higher levels are expressed not through the implementation of uniform rules applying to isolated individuals but through the formulation of obligations regarding the results to be achieved.

These obligations to achieve certain results are addressed to a community of partners: national civil servants, local government officials, private-sector businesses and voluntary associations. They force those involved to work in partnership and create a permanent learning process focusing on appropriate and meaningful action: action is no longer judged in relation to its outward forms but in relation to the way in which it is devised and implemented locally, with reference both to the aims pursued (some of which will have been formulated by regional or national authorities) and the specific circumstances of each context.

We have mentioned interests that are guaranteed by the higher levels. This is meant only in the geographical sense — a higher scale — and not in the sense of the 'overriding interest of the nation'. There is therefore no superior knowledge that transcends the local level and whose intrinsic wisdom or legitimacy would make it possible to lay down abstract obligations as to the results to be achieved. Obligations to achieve given results are built up in the light of experience, by pooling local knowledge.

Active subsidiarity means collectively and constantly working out obligations regarding results to be achieved. This must be done collectively, because it is through dialogue between those involved in concrete action that a general approach to action can emerge; it must be done constantly, because that approach has to be forever fine-tuned in the light of experience. In such a process, the central administration of the State derives its legitimacy not from hierarchical authority exercised through handing down general rules but from its ability to organise work in a network bringing different categories of players together.

A revolution in our way of thinking must go hand-in-hand with a revolution in the way we do things in practice. This will determine the feasibility of reforming the State in France.

The ensuing text is a resolutely personal and chronological account of how I arrived at the conclusion that the concept of active subsidiarity is not only necessary in theory but also workable in practice.

## **Active subsidiarity: emergence of the concepts**

### **Europe, social exclusion and exchange of experience**

I used the term 'active subsidiarity' for the first time in May 1993 when preparing the European seminar on social exclusion held in Copenhagen. Since 1989 and the organisation of an initial meeting of the European ministers responsible for housing on the topic of housing the poorest sections of the population, I had come to be working at European level. Housing in Europe is an extremely interesting issue. No one denies the close link between housing and social exclusion; the idea of a genuine right to housing, even for the poorest members of society, is apparently taking root throughout Europe. But, at the same time, housing is not one of the European Commission's areas of competence and, furthermore, the allocation of responsibilities for housing between the different levels of government varies widely from one country to another. Sometimes it is the central government, sometimes the regions, sometimes the basic local administrative units which play a leading role, but the final outcome, namely the conditions in which people and particularly the poorest citizens are housed, is always determined by the combination of actions and finance coming from the various levels. As a result, what does the fact of proclaiming a right to housing at European level mean in practice? No rule, no directive that is binding on the Member States can guarantee that a given result will be achieved. Does this mean that Europe, as a human community, should give up the ambition of asserting a right to housing? We think not. The fact is that, in order to turn the diversity of situations in Europe to good account, in the wake of the 1989 ministerial meeting we created with different networks the European Charter for the right to housing and the fight against exclusion, which, from the outset, launched a working method based on the exchange of experience. This enabled us to discover that exposure to other people's experience was a source of enrichment for each and every one of us, even though the contexts differed greatly and the 'solutions' found in one country could not therefore be transposed to another. What we can transpose is not answers but questions: it is identifying the issues through comparing experience in tackling common difficulties, it is this identification process which enables us to draw up what we have called the specifications for European housing policies.

## **A 'third way' between centralism and subsidiarity**

At the Copenhagen seminar on exclusion, I happened to be the spokesperson for the working group on extending the rights of the poorest members of society. A heated discussion of the concept of economic and social rights provoked a rift between experts from the Mediterranean countries, on one side, and Germans and Anglo-Saxons on the other. In the opinion of the Germans in particular, introducing a constitutional guarantee of social rights, at either European or national level, was a misuse of language since in Germany it was the responsibility of the *Länder* or the municipalities to create the necessary economic and social conditions for the exercise of such rights, and proclaiming a constitutional right to housing would be tantamount to enacting a dead letter which the intended beneficiaries would be unable to rely on vis-à-vis third parties. What I was witnessing was a clash between the centralist and Germanic views of the State. In that clash, the notion of subsidiarity lay at the heart of the discussion. It became clear to me at that point that the alternative between centralism and subsidiarity no longer corresponded to the realities of our time, precisely because, in the sphere of social exclusion, the existing situation and the policies pursued are necessarily the combined result of actions and initiatives taken at all levels, ranging from marginalised persons themselves, through voluntary associations, basic local administrative units, the regions, etc. right up to the European institutions. It appeared to me that the inappropriateness of the concepts being handled by the lawyers who dominate the European scene was the source of many blockages in Europe. I was in fact witnessing the rise of a paradoxical anti-European movement: paradoxical because it embodied a coalition of two sets of criticisms that apparently contradicted each other: on the one hand, too much Europe, too many directives, an excessively fastidious straitjacket that complicated and stifled any activity and initiative and, on the other hand, not enough Europe, a lack of vision for society at European level, a lack of responsibility for Europe over cultural, social and political issues that were alone capable of giving Europe an influence commensurate with its real economic power. If these two contradictory trends of anti-European opinion were joining forces, was it not because the very form taken by the links between Europe and the grass-roots administrative units were inappropriate for dealing with the problems to be faced? Why not draw on the forms developed in other large organisations in order to achieve the necessary combination of unity and diversity? The 'proposal for a solemn declaration on Europe' which I submitted to Jacques Delors in 1993 was set out broadly along these lines.

## **The parallel between the situation in Europe and the situation in the French conurbations**

I was all the more sensitive to these contradictions with regard to Europe as they reminded me in every detail of the blockages I had experienced in the French town planning system between 1968 and 1983. In France, the interdependent economic, technical, social and cultural realities are organised at the level of the conurbations and, in rural areas, at the level of the country as a whole. All French cities of a



certain size consist of several municipalities: the greater Paris area alone groups together more than 600 municipalities. In most cities the core municipality has historically been the largest and most populated, but from the 1960s and 1970s onwards, apart from a few exceptions like Marseille and Toulouse, the majority of the population has no longer been living in the core and most of the growth has taken place in peripheral municipalities further and further away from the centre, leading to a process of urbanisation, i.e. the development of main residences in the countryside.

The whole of Europe, from the post-war period until the 1970s, was swept by debates about town planning. It was clear that transport networks, land markets and housing markets could no longer be organised at the territorial level of the pre-industrial city as it had been demarcated before the development of the private car. In a number of countries these problems were solved after the war by amalgamating municipalities. This trend, which appeared unstoppable in the 1960s, met with stiff resistance in France, where the dimension of the municipality was universally identified with the idea of local democracy. 36 000 municipalities means 500 000 councillors, most of whom are unpaid and whose work is an essential component of community life and citizenship in France. In the history of the country, only authoritarian regimes, and in particular the Second Empire and the Vichy Government, have succeeded in amalgamating municipalities, with the Second Empire creating in particular Paris as we know it today. Now the debates on the organisation of conurbations are strikingly similar to the debates about Europe. The institutional problem that we have to tackle in the modern world is not therefore fundamentally different at each tier of administration: the fitting together of territorial structures poses identical problems from the smallest to the largest scale, from the neighbourhood to the entire planet. Hence the importance of basing the organisation of these structures on concepts that are appropriate to the problems to be solved, something that is not at present the case. The debate drags on in France from decade to decade. Many different systems have been tried out and there is not a single government which does not put the issues of inter-municipal cooperation and reform of local taxation on the agenda before passing them on to the next government, like a hot potato, having failed to find the right solution. This is because we have boxed ourselves into a contradiction through using the wrong concepts: imprisoned in the mindset of the distribution of powers, we find it difficult at both European and municipal level to imagine the combination of action at different levels in a system of shared sovereignty, because we have a vague feeling that this would remove local administration from fair and proper assessment by the electorate — an absurd idea when one thinks of how much both local and national electoral campaigns are devoted to blaming others (globalisation, Europe, the central government) for what is going wrong in order to claim the credit for what is going right.

### **Uniform procedures: an attempt to fit square pegs into round holes**

Looking back with hindsight, the thinking that led me to the concept of active subsidiarity began very early in my professional career. From 1970 onwards I worked, first as a project officer and then as a district engineer for the Infrastructure

Ministry, in the region of Valenciennes in northern France. My first task was to help draw up what were called at the time modernisation and infrastructure programmes, i.e. the plans for the public infrastructure necessary to support urban development. This work was in turn linked to the preparation of the infrastructure and urban development masterplan (SDAU). Both planning processes were governed by national procedures that had been established during the previous decade in order to cope with rapid urban development for which traditional institutions, and in particular municipalities, were not prepared. The departments of the Infrastructure Ministry were responsible for implementing the procedures. But the Valenciennes region was an atypical case. The problem was not to support rapid urban growth but to prepare for an impending severe industrial crisis. The region's prosperity depended on the triangle of coalmining, steel and basic metal industries, each of which was tottering. We were therefore faced with the challenge of using, in order to prepare for an industrial conversion that was certain to be extremely painful, procedures that had not been devised for that purpose. The challenge involved not only procedures but also administrative practices; it forced us to reconsider the relationships between sectoral administrations. When a region benefits from a growth dynamic that is virtually exogenous and is independent of its own local development potential, the central government and the regional and local authorities can support that growth through public infrastructure. The segmentation of administrations and services, albeit regrettable, can still be tolerated: roads, schools, green spaces and housing are added together willy-nilly, resulting in something mediocre but more or less coherent since coherence is ensured by the growth itself, which carries along the infrastructure in its wake. In a crisis, the situation is completely different. The action of the central government and of the regional and local authorities has to be reconstructed around the crisis itself.

We had at the time a slogan which summed this up neatly: the infrastructure and urban development masterplan should not merely be a design in the sense of a plan, it should be a design in the sense of an ambition for the future of the region. In the circumstances, we could not as officials sincerely see ourselves as simply in charge of implementing national procedures. We had, on behalf of the State, to play our role to the full and exercise the powers that we had in practice by virtue of the financial resources at our disposal and our recognised know-how or our legal or regulatory powers, for the benefit of a common vision. We had, to put it briefly, to shift from complying with an obligation regarding the means to satisfying an obligation regarding the ends.

## **The objective of meaningful action and the importance of local case-law**

In the 1970s — i.e. before decentralisation — I was responsible for issuing building permits in the Valenciennes region. I found it a fascinating task. Officials doing this job often have a bad press: they tend to be seen as petty bureaucrats blindly applying the rule-book. However, I very soon came to realise the extent of the difficulties involved. The building code, in the name of the unity of the country

and the principle that all citizens are equal before the law, lays down rules at national level. Again, unity prevails. But since the regions of the country are infinitely varied, the specific features of each of their component parts have to be taken into account, and specific rules for each area are therefore laid down in land-use plans (POS). From then on, everything should be plain sailing — in theory at least. The national building code and then the local land-use plans would appear to be sufficient to determine unambiguously what is and what is not allowed. That is true in 80 % of cases. But local rules, even if they are detailed, cannot cover the infinite variety of situations that can arise, not least because there has to be room for qualitative assessments, for example to determine whether a project is appropriate to the site chosen. Area rules, however detailed, lay down obligations as to the means to be used, whereas harmonious town planning constitutes an obligation as to the results to be achieved. I therefore had to recognise, along with the other officials responsible for examining applications for building permits, that anyone who cared about the final outcome was frequently faced with a dilemma: Should a project be allowed? Should permission be withheld? The rules allowed us to decide either way. From 1976 onwards we were able to make progress by building up a body of local case-law. This idea came to me through reading the letters of complaint I received from persons whose application for a building permit had been refused or, conversely, from neighbours who were offended by what we had allowed others to build. Most of those letters dwelt largely on the inequality of citizens before the law, an argument that carried a great deal of weight with me. The majority of people are prepared to accept the public authorities rejecting their plans in the name of the general interest but cannot tolerate what they perceive as unfairness and inequality of treatment. A major challenge for the administration is to reconcile the need to take into account an infinite variety of situations (in the strict sense of the word: no plot of land is identical to another) with the principle of the equal treatment of citizens. The only way of providing a satisfactory response is neither to deny diversity so that equality can prevail nor to accept arbitrariness in the interests of diversity but to build up a case-law of decisions by the public authorities. We established such a case-law by comparing our own approaches with the diversity of situations. Each Friday morning, I called a meeting of all the people involved in examining applications for building permits throughout the district and together we looked into the difficult cases, of which there were around a dozen each week. We arrived at decisions collectively and took care to write down details of each case in order to make sure that we would adopt the same approach when a similar situation arose again. During the first year, we had the impression that we never encountered the same situation twice. But a pattern gradually emerged, and the approach we took towards problems became more even. Succeeding in shifting the principle of the equality of citizens before the law away from a uniform obligation regarding the means to be used and towards an obligation of rigour and fairness in the way in which public officials responsible for achieving a given result deal with citizens was for us a major step forward.

Such an approach brings about a fundamental change in the attitude of public officials: instead of being simply guardians of the law, they become the guardians of good sense. But if the power thus conferred on them is to be exercised democratically, their actions must be public.

## **The wrong turnings taken in the 1982 decentralisation process**

In 1980 I was moved to Paris and put in charge of the department for economic affairs and land use. Imbued with what we had achieved in northern France during the preceding decade, I felt the full force of the decentralisation process. I had been hoping for decentralisation, for the reasons I have just set out: I was convinced of the need in France to build up and consolidate the ability to take initiatives at local level in order to respond to a future that looked much less clearly mapped out than it had been in previous decades. To build up this local power, two important conditions had in my view to be met: solidarity in terms of taxation had to be created at the levels where interdependence was essential, in other words at the level of the housing area or of the country; and the levels at which strategy was framed had to be dissociated from the levels of day-to-day management.

I had seen on the ground how much the lack of solidarity in the taxation field was detrimental to any effort to administer the territory in a spirit reflecting the real phenomena of interdependence and how essential it was to frame long-term strategies for conurbations without weighing down day-to-day management with burdens resulting from amalgamations of municipalities or the creation of urban communities. But, in the name of local democracy, the French method of decentralisation did not devolve powers upwards to conurbation level.

The first mistake was to decide not to reform local taxation. We are therefore left with a system in which — to simplify matters a little — a town's revenue comes from supermarkets and its expenditure goes to the poor. Not surprisingly, therefore, it is in the municipalities' interest to attract the former and drive away the latter. And this creates a vicious circle. We witness, in the greater Paris area for example, the formation of tax-rich oases such as the City of Paris itself and the Hauts-de-Seine department. Because they are tax-rich, these areas have a three-fold attraction for businesses: tax rates are low, other businesses are close at hand with which they can work, and the areas concerned have high social status (it is more prestigious to locate your company headquarters in the Hauts-de-Seine than in the Seine-Saint-Denis department).

The second mistake was to overlook the relationship between unity and diversity, failing to recognise that there are levels at which long-term strategies can be worked out and levels at which affairs can be administered closest to the ground. In the 1982 Act, the definition of areas of responsibility verged on an obsession. Responsibilities had to be clarified and the entire debate revolved around the distribution of powers between the different levels, with a view to eliminating overlaps in matters where the department, the municipality and the region each had their say. In the interests of clarification the reform ignored the major challenge of acknowledging the need for overall strategies and, at the same time, recognising the full value of local initiatives. By failing to conceptualise the links between the overall and local levels and the relationship between strategic vision and

day-to-day reality, the decentralisation that was carried out in France in the 1980s was both feudal and rural whereas what was needed was a decentralisation that would prepare the country for the 21st century.

## **The interaction between businesses and local development and the parallel between the private and public sectors**

In 1987 Loïc Bouvard, a Member of the French Parliament, and I were asked by Pierre Méhaignerie, then Minister for Infrastructure and Spatial Planning, to produce a study on the new challenges in spatial planning. The Minister felt that the results of the efforts made during the 1960s in order to decentralise economic activity in France were gradually being cancelled out by the reverse trend towards the re-concentration of decision-making powers in Paris. This survey gave us the valuable opportunity of meeting over 60 business leaders, in Paris and large provincial cities, and of gaining an understanding of the transformations that were taking place in businesses and what those transformations implied for spatial planning policy. I drew two major conclusions from the exercise.

The first is that the trend towards knowledge-based technology, the reduction of transport costs and the globalisation of markets is paradoxically upgrading the importance of location. At first sight, the growth of trade links at European and world level would appear to cancel out any advantages due to physical proximity; in actual fact, the importance of proximity is not reduced but merely altered. The time when the availability of raw materials close at hand was a crucial factor that determined the location of industry has gone. On the other hand, the modern economy is a complex system. If it is to succeed, a business needs to avoid having to deal with all that complexity itself. Even the largest companies would not have enough resources to do so, and that is why, after the waves of upstream and downstream integration we witnessed at the beginning of the century, giving birth to huge integrated corporations, the trend has gradually reversed, with each firm now endeavouring to focus on its 'core business'. This refocusing does not mean that dependence on other sectors of activity has disappeared; on the contrary, it makes each company and each activity highly dependent on the surrounding conditions, and in particular on all the factors that contribute to the quality of the physical, social, economic and institutional environment in which the business operates. That is why the quality of the local surroundings, their dynamism and the abundance of the links that can be created and the services that can be found therein have become so important; it is what explains in particular the centripetal attraction of large metropolitan areas, a trend that can be observed throughout the world, when some 20 years ago we were foretelling the death of the city in the mistaken belief that the development of transport and remote communications would definitively do away with the economies of scale on which yesterday's cities were built.

The second conclusion I drew from the study was the importance, again for large companies, of simultaneously coping with interdependence and diversity. All large organisations must satisfy this twin requirement. Businesses succeeded dur-

ing the 1980s, fairly uniformly, in meeting this challenge by grouping together their strategic functions (management of long-term issues, finances and the human potential of their executives) while on the other hand granting increasing independence to small units that operate on a human scale, the only scale at which it is possible to mobilise human resources and adapt to varied and changing contexts.

The concept of active subsidiarity and the practical methods for putting it into practice occurred to me during an interview with the managing director of an international company specialised in carrying out major projects. A large engineering project is typically a situation in which everything hinges on the ability to combine many different kinds of technical knowledge in cultural, economic, technical and political contexts that are different each time round. Each project is a one-off; there is no room for mistakes. A large project that gets off to a bad start can be a disaster for the company. How can the company put the greatest possible chances of success on its side? The managing director we interviewed described to us the radical change of approach they had made in answering that question. Previously, the strategy had been to multiply procedures: to avert the risks of failure, the company had imposed on project managers obligations as to the means they had to use in order to deal with such and such a situation. But how could those obligations regarding the means to be used cover all the varied situations that can arise? The approach taken was merely reducing the project manager's room for manoeuvre and gradually relieving him of responsibility, whereas what was needed was on the contrary to make him fully responsible while enabling him to draw on all the company's experience. The managing director therefore decided to set up a small working party which met for two years fairly intensively (one week per month) in order to review all the experience that had been personally acquired by each of its members, all of whom were qualified professionals. What gradually emerged from that comparison and exchange of experience was not a collection of recipes for success but the broad lines of the conditions that had to be met in order to succeed, irrespective of the individual situation. Consistency is therefore not to be sought in the means to be employed but in the problems to be solved, and those problems can only be identified through the comparison and exchange of experience.

### **The Caracas Declaration: discovering structural constants through the exchange of experience**

Since 1988 I have been working full time for the Foundation for Human Progress, an independent foundation set up under Swiss law with the general objective of harnessing knowledge in the service of the major challenges for the future. That task prompted us to reflect on what constitutes knowledge that is useful for action. We were struck by the mismatch between the tremendous accumulation of scientific and technical knowledge (over 90% of all research conducted by mankind has been undertaken since the Second World War) and the fact that on the ground, in trying to tackle the basic problems facing the human race — resolution of conflicts, the fight against social exclusion, protection of the environment,

relations between the State and society, to name but a few — the protagonists lacked, or appeared to lack, knowledge that would be useful to them. We soon reached the simple conclusion that knowledge useful for action springs from action itself, a fact which I had already experienced many times in my professional life: information coming from people in situations similar to our own is what appears to us to be most reliable and readily usable. We therefore began to develop networks and methods for exchanging experience. One of the most fruitful methods is to organise meetings: not formal gatherings where each participant arrives to give a speech or listen to a talk and then departs, but genuine opportunities for communication where practitioners can describe their own experience and share in that of others. Experience cannot be acquired in splendid isolation.

One of the most significant encounters and the one which in some respects led to the very idea of active subsidiarity was the meeting we held in Caracas in December 1991 in conjunction with the Venezuelan Government. We brought together some 20 people from different continents, all of whom were exercising political or public administrative responsibilities in the field of the rehabilitation of poor neighbourhoods or the upgrading of Third World shanty towns. Bringing together people from such different backgrounds was a feat in itself. Conditions in poor quarters vary very widely from one country to another: what do an African shanty town, and Indonesian *kampung*, a Venezuelan or Mexican *barrio*, a Brazilian *favela* or a housing estate in the Paris suburbs have in common? Drawing common conclusions from our different experiences seemed an even greater challenge. But that is what we achieved thanks to the momentum generated by the encounter. We asked each participant in turn to outline what, in their experience, was the most difficult objective to be attained, what were the basic obstacles to be overcome. And it very soon became clear that those obstacles were the same everywhere. In other words, despite differences between individual contexts, the relationship between public action and situations of poverty and socioeconomic vulnerability involves structural constants that can be identified through exchanging experience. It was that discovery which prompted us to draw up, at the end of the meeting, the Caracas Declaration, which identifies six fundamental principles for public action in poor neighbourhoods. The challenge facing public action in these circumstances is not to apply a uniform procedure in all areas in difficulty but for the players to put themselves in a position to apply those six principles by finding each time the answers that are most appropriate to the specific local conditions and the partners available.

We therefore demonstrated, and were able subsequently to confirm in other areas, that it is possible to formulate for public action obligations regarding the ends rather than the means, and we established a simple and democratic method for doing so: instead of being imposed from above, obligations to achieve a result are the fruit of a bottom-up approach involving the exchange of experience and of knowledge concerning the structural constants in the situations to be tackled.

Active subsidiarity can therefore be compared to a yo-yo movement: it starts with grass-roots experience, experience in different areas is compared and

contrasted, the fundamental principles that should govern action are then deduced, these principles constitute obligations to achieve results, they are again measured against practice, and so on. But this process calls for a fundamental change of administrative culture, a shift from a hierarchical system to a network-based system, something which will take some doing. The mindset currently governing the relations between central and local administration in France is the following. Local innovations are stimulated or, more often, existing ones are identified. These innovations are then translated into models which are disseminated in the hope that they will be generalised. The same mistake is committed each time: because the system operates in a hierarchical manner, no one can imagine that the role of the central administration can be to orchestrate a network and nurture constant innovation, exchange of experience and the collective framing of obligations to achieve results.

### **Evaluation of public policies and obligations to achieve results**

In 1992 I led the 'grass-roots' assessment of the rehabilitation of low-cost housing. True to my method of working, I was firmly opposed to the 'scientific' approach, according to which evaluations have to be carried out by a team of outside assessors who are completely separate from the people who have worked on a project. This approach stems in my opinion from a totally unrealistic view of public action: policy-makers decide on the policy to be pursued, and civil servants implement it; a 'scientific' evaluation is then made, the findings of which are fed back to the policy-makers, who take them into account and adjust the policy; the new policy is then implemented by the civil servants, and so on. Instead of this mechanistic approach, inspired by artillery practice (aiming, firing, observation of accuracy, adjusting the fire), I propose a 'constructivist' view. A key factor contributing to the quality of public policies is the desire for meaningful action on the part of the civil servants implementing them. And it is because I am convinced of this that I believe that it is possible in practice to introduce in France obligations regarding the ends instead of obligations regarding the means.

To evaluate the rehabilitation policy, we set up 10 groups at local, city or department level by co-opting persons belonging to the different institutions that were involved locally in the rehabilitation of low-cost housing. These local groups worked for one year according to a common methodology, at the end of which they drew up a 'local rehabilitation platform' by comparing and contrasting a large number of examples of rehabilitation. We then put these local platforms together and, without great difficulty, we succeeded by consensus in drawing up a national rehabilitation platform. This means, to put it plainly, that if confidence is placed in civil servants' desire for meaningful action and if adequate structures for exchanging experience are set in place, it can be fairly straightforward to draw up the specifications for effective rehabilitation and to initiate a process of change among the protagonists themselves, since they have themselves arrived at the conclusions and have a sense of ownership of those conclusions.



## **From a hierarchical approach to networks that are constantly learning from experience**

All these examples show that active subsidiarity brings about a number of simultaneous breaks with the past:

- thinking in terms of the links between the different tiers of administration and no longer in terms of the distribution of powers;
- thinking systematically in terms of stimulating a local environment and combining public actions in that environment and not in terms of juxtaposing separate regulatory actions by different ministerial departments;
- thinking in terms of obligations regarding the ends and not in terms of obligations regarding the means;
- thinking in terms of networks rather than hierarchical systems;
- thinking in terms of a constant process of learning and managing the collective memory and intelligence and not in terms of discontinuous processes for adopting, implementing, evaluating and adjusting public policies.

To sum up, active subsidiarity requires a transition from a mechanistic approach to public action to an approach that is much closer to the organisation of living systems.

# Governance in a larger and more diverse European Union: lessons from scenarios Europe 2010

Gilles Bertrand and Anna Michalski

## Scenarios Europe 2010<sup>1</sup>: a focus on governance

The project Scenarios Europe 2010 was undertaken in 1997 on the initiative of the Forward Studies Unit of the European Commission. The purpose of the exercise was to produce a number of thought-provoking internally coherent pictures of the future Europe. Its aim however was more wide-ranging. Externally, the FSU wanted to give itself a tool with which it could engage in an open and structured debate on the future of the continent with different audiences in Europe and beyond. Internally, it wanted to put together different strands of forward-thinking and policy research that is produced by the services of the Commission.

The scenario exercise was based on structured brainstorming and step-by-step analysis with some 60 Commission officials from 15 different directorates-general divided into five thematic groups. By participating in the working groups, it was hoped that the officials would gain a deeper understanding of the limits and opportunities offered in policy areas other than their own. They would also acquire a fuller insight into the implications that advances in their own area may have on others and thereby become more open to different views and sensitivities. An awareness-enhancing process like the construction of scenarios may also help officials acquire a common language that in the medium to long-term can help to increase coherence between different policies. It is also a potent tool in constructing a common vision within an organisation pursuing many different, potentially competing, policy objectives.

Coherence of policies, a holistic approach to policy-making and a constant need for internal and external dialogue is not applicable only to the European Commission. All organisations and administrations are acting in a context marked by changing values in society, globalisation of markets and an intensification of communications and social and economic interactions which renders policy-making increasingly complex. In the contemporary world where objectives and outcomes of policies are questioned daily, a more versatile understanding of the inter-

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<sup>1</sup> Bertrand, G. (coord.), Michalski, A. and Pench, L. R., *Scenarios Europe 2010: five possible futures for Europe*, European Commission, Forward Studies Unit, 1999. This publication can be obtained from the Forward Studies Unit or can be found on the Internet ([http://www.europa.eu.int/comm/cdp/scenario/index\\_en.htm](http://www.europa.eu.int/comm/cdp/scenario/index_en.htm)).

play between different elements of change is necessary. The construction of scenarios as a process of collective learning is a tool that can be adapted to various contexts and serves to increase the awareness of policy-makers in various situations. Scenarios may also be used to set the terms of reference for citizens who would like to participate more actively in the decisions that concern them or quite simply to gain a deeper insight into the interplay between driving trends, structural elements, ideologies and policy outcomes.

In this particular exercise, the construction of the scenarios was organised around five main themes including, governance and institutions, economic adaptability, social cohesion, enlargement of the European Union (EU) and the external environment. The work of these groups was then drawn together into five global scenarios intended to present contrasted, consistent, images of the future.

In what follows, we focus on governance which is a strong dimension running through all five scenarios. This specific focus renders inevitably the presentation of the scenarios less comprehensive than in their original form. The reader who wishes to study economic and social aspects or the external affairs dimension should refer to the final report.

## **Triumphant markets**

In a world that was increasingly characterised by the fluidity of the markets, instant transfers of information, sustained communication among networks in constant mutation and by a climate in which anything could be traded and exchanged, Europe had to shed its aspiration to combine social considerations with economic competitiveness. At the turn of the century signs were multiplying that the European economy was hopelessly losing out in comparison with the superior American performance. Pressure to follow suit brought a new political elite to power in Europe that was determined to reduce the State's stranglehold on the economy and release the individual's full entrepreneurial potential.

The reforms of the public sector that followed resulted in a rollback of the State and a limitation of State intervention to a minimum. More costly policies directed at social security, the environment or regional development were abandoned in the name of fiscal restraint and because it proved difficult to show a clear economic impact in the short run. A minimal social security safety net was maintained but means-testing is a standard procedure and provisions for insuring against the risks of life now largely fall on the individual. European countries are today concentrating on the core policies of external and internal security, upholding the judicial system, lending support to a European-wide competition policy and overseeing regulatory processes. It is precisely in its role of ensuring public security and an open and fluid climate for business and entrepreneurs that the State has retained popular legitimacy.

In a context of minimal governance, governments concentrated initially on managing the process of downsizing the public sector by outsourcing services and

functions to private entrepreneurs. In recent years, governmental agencies and departments have been involved in a process of deregulation and in the fields where re-regulation was deemed necessary they have striven towards a central place in the regulatory processes. Pressure is great on the State to also reduce its role in this function, but on the whole big and small companies have come to appreciate the certainty that a stable economic framework and common rules and their enforcement provide them.

As the 'demos' of European societies is quietly sliding into irrelevance, the locus of ideological battles is shifting from national parliaments to the courts. It is here that aggrieved groups in society, be they consumers, recipients of services, or simply activists of various kinds, are fighting out claims for defective products, failing services or the breach of contracts of a varying nature. Other forms of control and complaint procedures have gradually emerged as regulatory processes are now often outside the direct reach of the State. Specialised supervisory bodies to which the public has limited access have grown in number partly as compensation to the growing inability of parliamentarians to fully appreciate the full range of parameters that are relevant for new legislation. In quite a few domains the leading role of elaborating and enforcing common rules has been delegated to economic actors of varying kinds, for instance, professional organisations are being overtaken by groups of multinational companies. Strong regions have taken over many of the functions and attributes of the State, and compete ferociously with other economically strong entities of the world.

With the strong tendency towards individualisation of social and economic relations, European populations are nowadays characterised as consumers rather than citizens. The time of ideological mass movements underpinning traditional politics is over as political parties are in decline to the benefit of pressure groups pursuing issue-specific goals without overall coherence or purpose. As a result the public administration is increasingly partisan to special interests and the principle of a neutral civil service seems to be a thing of the past.

Throughout the decade the EU has progressively reduced its political objectives. Integration is now seen as an instrument for enhanced international competitiveness and there is consensus that common policies should only be pursued to the extent that they promote this over-arching goal. In fact, the wide enlargement to 15 new Member States and the growing socioeconomic disparities that followed led to a marked decline in the ambitions of cohesion and financial solidarity among EU Member States. For long periods during the past decade, the European Council has been locked into budgetary disputes where the fault lines have surfaced between net payers and net receivers and between old and new Member States. As enlargement of the EU was quick and wide and application and enforcement of common rules and regulation is lax, today the EU looks more and more like a free trade area than an integrated political community.

As the policy mix of the EU has come to concentrate on the internal market and the competition policy, more costly policies such as the common agricultural policy or the structural funds have been dismantled. The European Commission

spends considerable time preparing and managing regulatory process while the monitoring of compliance and application of common rules and regulations are left to voluntary/professional organisations.

The growing competition among regions has benefited those regions that were able to make the most out of the possibilities offered by global markets while others are struggling to keep up. The power of rich regions impacts on the workings of the EU institutions, in particular the Council of Ministers and the European Council. With some Member States bowing to the demands of powerful regions their actions on the European level is increasingly unpredictable.

The Intergovernmental Conference at the beginning of the decade mustered only a limited institutional reform. This reform did not enhance the coherence between different policies, nor did it improve the functioning of the common policies or the Community programmes. In fact, many of the Community actions became so complicated and their results so diffuse that in the name of 'value for money' actions on the European level were seriously scaled back. Only in the areas of judicial cooperation and internal security has some progress been achieved, although this is based rather on cooperation than integration. Approximation of civic law and procedures has arisen as a result of the increased mobility among a vocal, and increasingly mobile, European elite but only in the form of enhanced cooperation among some Member States.

The world in 2010 is in many ways a vibrant place driven by the energy released from the exchange of communication and information offered on global markets. Many European players are present on the markets, be it the regions, SMEs or individual entrepreneurs. However, many of the systemic risks that can only be tackled through a concerted approach on a global level remain unsolved. These risks include global environmental degradation, organised crime, and rising inequalities within and between regions in the world. International organisations are hopelessly devoid of resources and legitimacy to shape policies that could address these issues while national governments have lost the capacity and will to do so.

The only remaining global superpower is content with this state of affairs and as it draws its economic strength from the markets and its uncontested advances in technology, there is little incentive to become burdened with costly and intractable issues.

## **Hundred flowers**

Since the beginning of this century, Europe has been beset by a growing political and economic fragmentation, which in some parts of the continent is reaching an alarming level. There is no doubt about the underlying reason for this development, namely the failure of political and administrative structures to anticipate and adapt in response to a rapid technological advance and society's reaction to it.

As the signs of the width and depth of this revolution were multiplying, people became increasingly wary of political leaders' promises to tackle an all-too-obvious inability of the public sector to follow. Clumsy and ineffective attempts to reform only further demonstrated the authorities' inability to understand the needs of SMEs, students, regions or municipalities, the unemployed or those otherwise excluded and forced many people to turn away from the State and public sector to search for solutions nearer to hand. In the face of wide public discontent at the beginning of the century, the political leaderships in most European countries made half-hearted attempts to reform the public sector and some deeply entrenched systems such as pensions, social security, education, and taxes. Resistance was too great and the reform drive ended in a situation of muddling-through where tinkering on the margins of policies and administrative structures only resulted in their increasing irrelevance. The State is today retreating *de facto* from economic and social sectors as the effective implementation and application of policies has been abandoned. Individual citizens and economic actors no longer take much notice of rules and regulations and tax-dodging is rife.

The return to local life emerged as a spontaneous movement without overall direction or leadership. Some local or regional communities have managed to replace the State by providing basic public services and ensuring forms of participatory decision-making while others are dominated by clan-like groups tying power in the hands of a few of dubious respectability. Today, most individuals have direct access to information and communication worldwide via the Internet and many groups in civil society base their internal organisation and their ability to establish external contacts on the same medium. In such a context it is not surprising that inequalities of many different kinds (socio-economic, educational, access to new technologies) have arisen and that they vary between States, regions, towns and within the world at large. In Europe some of the most cohesive Member States or regions have managed to recreate structures and policy systems that make sense while in other parts the traditional public sector and political structures are disintegrating.

As the model of representative democracy is in crisis due to widespread abstention and record low membership in political parties, central government and parliaments have lost much of their popular legitimacy. Since no one cares much, nothing has as yet occurred to formally challenge the position of the central State administration and MPs elected on a low rate of participation continue to form governments that have largely lost contact with society.

Public services have undergone a spontaneous decentralisation mostly to regions and municipalities or to organisations of civil society, which have taken the place of the State. Today there are local services ranging from personalised assistance to the most needy, small-scale-lending to basic education and training. Local communities have also organised skill exchanges and other forms of bartering. Economic life is largely self-regulated in the best cases by professional organisations but otherwise through non-transparent and rapidly fluctuating agreements among initiated companies.

The weakness of the State and public structures has brought with it a serious deterioration of the rule of law. This transcends the whole range of public policies, but also economic and social relations where uncertainty and lack of trust is seriously impeding economic growth. In fact, organised crime is set on a steep rise and criminal groupings are making inroads into the weaker urban areas and regions.

The incoherence of public policies and the lack of implementation have led to less transparency of public action — one of the factors that sparked off public discontent with the public sector. Accountability of public agents and political leaders has also suffered seriously as the locus of decision-making and democratic responsibility for laws and regulations has become extremely blurred.

The lack of leadership and a widespread sense of loss of direction have led in some cases to de-localised ministries or specialised public agencies looking for alternative sources of legitimacy in regional and local authorities.

The European Union is in many ways mirroring the situation in many European countries as the weakening of its structures and institutions and the lack of coherence in its policies have considerably reduced its legitimacy. Its Member States (except for those, the most homogeneous ones, that decided to leave) still see the European level as an opportunity to escape from their own domestic weakness by joining together in political statements and declarations. The politicians care little about the fact that they have neither the capability nor the resources to implement these proudly presented initiatives and action plans. The common policies have been seriously affected by the crisis of governance in the Member States; those based on financial interventions (CAP and the structural funds) have suffered from the lack of resources while those with a regulatory content (the internal market, competition policy etc.) have been discredited due to the lack of enforcement. The abstention that has struck national parliaments was of course manifest in the elections to the European Parliament already in the 1990s.

Internal relations among Member States have grown increasingly tense during the last two decades with richer regions refusing to fund the European budget. The instability that characterises the continent in the wake of the rising fragmentation has led to attempts of weaker States to forge special relations with stronger and richer neighbours. This tendency is a serious threat to the founding principle of the EU of equality among States and alliances based on power reminiscent of the 19th century are emerging in Europe.

Nevertheless, and despite its poor record of keeping international engagements, Europe is seen as the only relevant level for tackling some of the systemic risks that beset the international environment, be they organised crime, rising poverty or climate change. However, these risks coupled with fragmentation and ethnically-inspired tension are elements present throughout the world. The international system is close to a standstill as both governments and international organisations are unable to instil some logic into it.

## Shared responsibilities

It is a refreshed Europe that approaches the end of the first decade of the 21st century filled with more self-confidence than some 10 years ago when the first steps of radical reforms were undertaken. Faithful to its values of a just and open society the European States have consolidated the main features of socio-economic and democratic life while undertaking changes that have enabled them to enter the era of the knowledge society as winners. Reforms were initiated by the European governments at the beginning of the century as it became clear to all that the traditional welfare state had become too costly, that Europe was lagging behind in adopting new technologies and that its populations resented the inflexibility of central administration and political systems. At the same time, it was clear that people held on to values of solidarity, responsibility and trust and saw the State, albeit reformed, as the best guarantor for a human society.

The public sector was reformed through a coordinated initiative in all Member States along the lines of transparency, efficiency and accountability. Its role was defined as a mediator and animator of networks in which stakeholders of a particular area should be guaranteed a say in the formulation of policies. There has been a strong drive towards decentralisation so that decisions are now taken as close as possible to the citizens. A system of active engagement (*subsidiarité active*) between various actors on different levels (European, national, regional and local) has ensured the proper functioning of a system built on partnership and a duty to cooperate. Ever since the reforms were set about various new actors (regions, municipalities, large towns, NGOs, SMEs, universities and large businesses) have been involved in drawing up the guiding principles and objectives of different policies (in particular those with a socioeconomic or educational content) and have entered into contractual relationships with the EU or the national State for managing the policies in a particular area. Ways have been found to render these non-governmental actors accountable to European citizens and their true representability is assessed regularly.

There are now institutional channels that guarantee citizens' involvement in the formulation and evaluation of various activities, mostly in the form of citizens' juries and write-in mailboxes on the web sites of authorities on various levels. On the whole, European States have adopted a mixed democratic model in which features of representative and participatory democracy coexist. Popular legitimacy of European, national and regional actions now resides in these entities' capability to encourage debate and to organise fora and networks necessary to establish a common understanding on policies. This system of horizontally and vertically connected structures has, however, one significant downside in its complexity and lack of transparency due to overlapping structures and multitude of networks. This means that the real locus for decision-making and responsibility there for is often blurred. The search for consensus is slowing down decision-making and is hampering the capability to take rapid action.

The European level is today firmly tied into this multi-level system of governance. As a matter of fact, the European level was seen as crucially important in the



beginning of the reform process as a locus for debate and consensus-building. The European Commission did not spare its efforts in producing convincing arguments backed up by comparative data to show the necessity for a new way forward. In particular, its white papers on governance, sustainable development, the reform of social security and pensions are today considered cornerstones for a concerted approach to change. Today, European institutions are managing the construction of consensus involving the many different partners involved. At the same time, they insist strongly on the principle of subsidiarity to avoid overload. Nevertheless, European agencies, the European Court of Justice and even the European Council have often to take on the role of mediator or arbitrator between conflicting interests. In particular, the European legal system that now stretches far beyond economic questions has become the centrepiece of this complex system. The integrated system of European Courts with the European Court of Justice at the top is the guarantor of interest arbitration and legal certainty. With the law as the backbone of the system, trust and cooperation are rendered possible among widely different players.

Consolidation of its internal structures and policies has resulted in an enhanced popular legitimacy of the European institutions. The EU is now more than ever founded on a sense of shared destiny and slowly a European identity is emerging based on shared political values. It is the EU's success in upholding democratic principles and human values in the face of growing radicalisation of national politics, in the first half of the decade that gave a real boost to common values. The adoption of the Charter of Fundamental Rights, the European system of governance and law and the euro have been the decisive factors that paved the way for a gradual constitutionalisation of the European treaties.

The EU's common policies have developed gradually to embrace a new approach to technological innovation, social cohesion and education and training. The euro has been extended to some of the new Member States and the European budget has been increased. The emphasis is less on lawmaking and more on benchmarking, best practices and peer pressure.

On the external side, the EU foreign and security policy is upgraded with trade, international finance, security and defence all being conducted according to the same principles so as to enhance policy coherence. One of the most significant developments on the external dimension is the adoption of integrated partnerships with the EU's immediate neighbours that combine external policies with policies in the areas of social cohesion, trade, education and student exchange, environment, transport, energy and research. These partnerships enjoy crucial political support, an institutional framework and the necessary budget resources that are today rendering them a serious alternative to EU membership for the countries in the neighbourhood.

## **Creative societies**

It is a very different Europe that enters into the second decade of the third millennium: gone are the old structures of the industrial era replaced by a new approach to wealth and economic growth; gone is the view of the individual as a

productive unit now replaced with a more human and respectful attitude to citizens; gone is the materialism that so dominated the second half of the 20th century as people's craze for consumerism has given way to creativity, respect for the environment and a constant search for harmony with the world around. Europeans have grown less rich in terms of money, but many of them have more time for leisure and are able to pursue social and creative activities without being penalised too much in terms of standard of living or social security. There is, however, a pronounced isolationism in western Europe as it struggles to explain to its external partners the meaning of the reforms that resulted in a radically different organisation of society.

The violent demonstrations that took place at the beginning of the century were sparked off by governments' repeated attempts to boost the economy by reducing unemployment and labour costs and companies' relentless pursuit of profit. The outburst of public anger was in fact symptomatic of a deep-seated disagreement with the way in which society had developed in the last 25 years. People in general were incredulous towards the logic that ruled private business which gave more importance to short-term benefit than to the long-term well-being of employees or the environment. They also resented national administrations which were deeply out of touch with the realities of life of most citizens and whose proclamations seemed increasingly absurd.

It was the Europe-wide forums that helped to diffuse the tension within the European populations by acting as a safety valve where people could vent their anger and as a place for dialogue with bureaucrats and politicians about the need for change. Throughout Europe a new class of politicians came to power on a mandate for radical reform. This new elite has gained popular legitimacy by translating people's urge for transformation of existing structures into new forms of economic organisation, including an overhaul of national accounting systems, new taxes on pollution and international financial movements while reducing taxes on work and consumption.

The credo of the public sector is now based on an egalitarian-ecological imperative where government action is based on socially inspired intervention in economic domains and stringent application of environmental legislation. Social reforms have virtually abolished unemployment, as full activity was one of the centrepieces of reform. The extensive consultation period with the public resulted in a close interrelationship between the organised civil society and national administrations. In fact, the permanent dialogue between NGOs, professional associations or interest organisations of different kinds has become one of the main sources of public legitimacy of government, much at the expense of the national parliaments. The executive has, throughout the decade, been busy organising and carrying out comprehensive reforms while the role of the legislative has changed substantially. Not only have national parliaments (as well as the European Parliament) had to open up to different sources of representation, but traditional political parties have undergone a radical change both in their composition and their approach to the citizens. Some of the dominant parties of the 20th century that had problems in transforming themselves have fallen into oblivion while new kinds of interest con-

stellations have emerged. The courts are today more politicised than was the case before the reforms. They are now composed of judges who are keen on enforcing tough legislation on environmental pollution or dubious business practices. Due to the emphasis on internal security the courts have also become tougher on enforcing legislation on organised crime, illegal immigration and, more often than not, expel asylum seekers from distant countries.

The relationship between different levels of government is characterised by a high degree of decentralisation where the subsidiarity principle implies that the responsibility for decisions and their application now falls on the level closest to the citizens. NGOs, particularly in the social field, have been awarded the task of supplying services to local citizens. The popular forums have been made permanent institutions organised at all levels, from local to European. They are integrated into the policy-making processes, but remain largely self-organised units.

The postmodern principles of popular empowerment, individual responsibility and egalitarianism have profoundly altered the relationship between the elite and the populations. New forms of participation and the imperative of debate and dialogue have made public policy much more transparent. On the down side, there is a greater confusion about who is accountable at what stage of the decision-making process and who is to bear the responsibility for actions that have been carried out. To improve this situation NGOs and local authorities have set up popular courts of arbitration that accord responsibility in the case of contention or complaints.

The European Union was fairly isolated during the period of upheaval and subsequent reforms. Overcoming its initial suspicion towards European institutions, the new political elite has gradually warmed up to integration at European level. In particular, it is interested in pursuing policies that deal with trans-border issues such as pollution. Also, in the reform of economic and social structures, including harmonisation of some social policies, a concerted approach was necessary, e.g. the European directives on lifelong learning, working time management or reform of the tax system. Also in the case of justice and home affairs, the spread of organised criminality and the growing pressure of immigration at the external borders of the EU have resulted in deeper integration and common policies. At the European level NGOs are closely involved in the shaping of decisions. They are, in the same manner as on national, regional and local levels, often engaged in the management of programmes and projects with a European-wide coverage.

The relations between EU Member States were at least initially characterised by tension between the most reform-minded politicians and the more reticent ones. Another fault line appeared between the richer and the poorer Member States where the latter insisted on being compensated for paying a relatively higher price for reform. A general downturn in economic growth increased budgetary pressures in EU Member States and further raised the tension among Member States.

In the international context the EU and its Member States are not practising what they preach, in the sense that they do not invest enough political will or money to tackle difficult global issues, such as global warming, increasing poverty in de-

veloping countries or organised criminality. The EU, however, is strongly in favour of modernising international organisations by giving an enhanced voice to global NGOs.

## Turbulent neighbourhoods

It has been a difficult decade for Europe. The armed conflict that erupted between warring groups in an area in the neighbourhood of the EU spread into the EU Member States in the form of terrorist attacks and tension among ethnic groups. The disruption to the life of ordinary citizens and business in the Member States became so great that, after the Americans' refusal to get involved, European troops were dispatched to restore peace in the neighbouring area. The EU military intervention with the big Member States in the lead succeeded in securing an end to outright war, although instability and confusion remain widespread in the region. The hostilities have deeply coloured Europeans' outlook; their main concern today is security and stability but in the form of an urge to erect barriers and isolation from the world around.

The siege mentality taking hold of western Europe has changed the role of public administration and government whose priorities are to secure internal stability through a set of heavy-handed measures in home affairs. There is also a strong emphasis on Member States' military capabilities, which has a direct influence on their economic policies and the allocation of budgetary resources. This is coupled with a widespread tendency to protect strategic industries from international economic competition through trade barriers and direct State aid.

Popular legitimacy is directly linked to the authorities' display of force by patrolling soldiers on the streets, expulsion of illegal immigrants or otherwise harsh treatment of asylum seekers and the tough, even violent, police methods in the fight against organised crime. Since law and order is nowadays a top political priority little attention has been given to social and economic reform, reform of the central State administration or the management of public policies. In fact, traditional political parties and bureaucrats have regained their legitimacy, as has the traditional model of representative democracy. The courts have a tendency to **look through their fingers** even with some of the most flagrant abuses of human rights. The courts, together with various enforcement agencies, take a lenient view on the link between the authorities and big industry, including non-conformity of business practices such as price fixing, abuse of dominant positions, State aid, etc. Also many cases of political interference in the conduct and management of large enterprises have been registered but they passed almost unnoticed in the media and in the public at large.

There is a strong tendency towards centralisation in the hands of key ministries and the principles of transparency and public accountability are largely sacrificed in the name of efficiency and a need for rapid action. Budgetary resources

are awarded to the various ministries managing security and the status of internal security agencies has been upgraded.

Overall, the public has given its passive consent to authoritarian policies and, in the face of instability and a feeling of insecurity, it has turned passive and inward-looking. There is today a much less pronounced will of the public to get involved in public policy-making with the exception of the very local level. The European public is characterised by political passivity and satisfied with general elections as an expression of democratic engagement. The role of NGOs in public life is much reduced in comparison to the last decades of the 20th century. In particular, those with a strong engagement in civil rights, democratic watch, the environment or the developing world have suffered from a lack of popular support and hostility on behalf of public authorities.

The development of the EU is deeply influenced by the outbreaks of violent conflict in its neighbourhood. The decision to dispatch a peace-enforcing mission outside its borders gave rise to the setting-up of a European Security Council with the bigger Member States being permanent members and the smaller participating on a rotating basis. Justice and home affairs has been firmly established as one of the core pillars of the EU with several new policies being adopted accompanied by new agencies, such as the European border police and customs service and a European intelligence agency. These policies put the emphasis on repressive measures rather than cooperative and inclusive ones.

On the whole, the EU has taken a decisive intergovernmental turn resulting in a weakening of the supranational European institutions, the European Commission, the European Parliament and the European Court of Justice. The intergovernmental conference at the beginning of the decade resulted in a limited institutional reform which, after the very limited enlargement to central and east Europe, led to further erosion of the capabilities of the institutions. Big Member States are able to impose their will not only in security-related questions, but also in economic and social affairs. The application of the internal market regulations has suffered from national abuses and the weakness of the Commission while enforcement of European legislation is eroding under political pressure of Member States. The turndown in economic growth that followed after the end of the war led to pressure from the net-contributing Member States to reduce the size of the redistributive policies of the EU, namely the structural funds and the cohesion fund. Also large parts of the common agricultural policy have been re-nationalised.

It is not only Europe and the surrounding regions that are characterised by instability. In other parts of the world, perhaps with the exception of North America, increasing poverty, depletion of natural resources, especially water, pollution and the spread of ethnic tension and organised criminality is rendering the world an explosive place. Building walls against the outside world can only be a short-term solution. It is also one that is bound to break given the global imbalances between the rich few and the many poor, particularly as, up to now, the latter have suffered disproportionately from environmental damage and demographic imbalances.

## **Some reflections on governance in the European Union**

On the basis of the scenarios and the indications they give us concerning the five possible models of governance (or lack of governance), the following reflections are meant to bring the debate on European governance one step further.

The point of departure of this reflection is the observation that our societies are undergoing rapid change. This change is neither linear in time nor homogeneous in its geographical application. National cultures, values and traditions shape institutions and modes of governance. The interaction between the basic characteristics of a society and the structure of national institutions determines the dominant mentality of public administrations. Even though the public administrations of the EU are reportedly showing more similarities than differences, they remain distinct and are driven primarily by national interests and concerns. A European governance system will have to integrate different systems while at the same time forging a distinct model of operation and identity. In the light of the profound changes that are affecting the structures and policies of the EU, the following dimensions seem particularly important.

### **Managing increasing diversity**

The EU is facing one of the most decisive challenges of the future, that of managing diversity. This is obvious given the prospect of enlarging the EU to include a further 13 countries. New Member States will bring with them different policy needs, political and administrative cultures and popular perceptions of Europe and the EU. Enlargement, however, is not the only source of greater diversity; other deep-rooted trends acting at social and economic levels impose greater diversity in people's values, ways of living and outlooks on the world and politics. Economic developments demand more flexible ways of regulating the labour market, simplified rules for taxation and accounting and easier access to investment capital for entrepreneurs and business start-ups.

Diversity will not only put greater pressure on the resources and objectives of European policies, but also demand a higher degree of understanding and flexibility in regard to the context in which policies will be applied. Contextualisation asks for delegation to national, regional and local authorities and greater decentralisation of competencies in managing and controlling community policies and programmes. A concrete example is the delegation of the Community competition policy that in the future will involve national enforcement agencies and courts to deal with cases under a certain size. In the context of managing diversity, partnerships between European, national, regional and local actors will be crucial in some policy areas, while networks of stakeholders will be required in others.

Increasing diversity will also be felt in the implementation and application of Community rules and regulations. Complete homogeneity in legal approximation

and application of rules is not obtained among the EU-15 and the new approach based on mutual recognition allows for a much higher flexibility as to the practical measures of implementation. With the enlargement of new Member States, some with obvious weaknesses in national administrative and enforcement structures, the application and implementation of rules and regulations becomes a real challenge. The key argument here is not to seek homogenisation in a larger EU, nor to fall back on national solutions for implementation, but rather to determine the tolerance threshold of diversity in application, above which trust between Member States will erode and threaten entire sectors of EU policy.

### **Participation: the case for wide consultation**

A wider area with a greater degree of diversity will require from EU institutions a more strategic policy of consultation with different groups and players with a stake in EU policy. What may today be seen as a 'passive' openness to stakeholders should be shaped into a deliberate 'active' policy of consultation of all players who have a direct interest in the policy area in question. Such a policy should also seek the participation of weaker or non-traditional players and therefore be prepared to offer support (financial or institutional) to weak, but essential groups in society. The public actor, on the European level the Commission, should develop its capacity to set up and manage networks, permanent or ad hoc, in order to organise an ongoing consultation process. However, it is also part of the task of the public actor to make these networks transparent and accessible from the outside. Their accountability to the general public should be ensured by regular reports on their activities, appearances before elected parliamentary bodies when necessary and regular information to the European or national ombudsmen. A wider institutional representation on the European level could be achieved by a reform of the Economic and Social Committee.

Linked to the question of consultation of stakeholders is the issue of substantial debate and consultation in advance of a major reform of existing policies. It seems an unavoidable step given the resistance to shake up 'old' or 'sensitive' policies that otherwise run the risk of eroding into irrelevance in a context of change. In this context, the possibility offered by the Internet and through other forms of information technology could be employed in order to diffuse Green and White Papers and collect comments. Other forms of interaction with the general public and the organised civil society should be explored and tested.

### **Flexibility: governance by objective**

In a more diverse Union it seems increasingly important to emphasise governance by objectives. Greater diversity as to national interests and outlooks could partly be compensated by debate and prior agreement on the objectives of new legislation and policies. In such a perspective implementation and enforcement would be measured against the capacity of new measures to achieve over-riding

objectives and could therefore allow for a wider scope of variation as to the actual form of implementation of detailed legislation. An essential part of the governance process would in this perspective be devoted to consultation and debate. On the European level, the European Commission's Green Paper on the relations between the EU and the ACP countries constitutes an example since the principles and main ideas of the reform of the EU's development policy was preceded by extensive consultation with the countries concerned.

However, a greater use of governance by objective in the EU begs the questions of how to ensure tolerant levels of deviation in implementation and enforcement, with what measures could deviant behaviour be sanctioned and, finally, how should the EU react to deviant behaviour or political direction of a Member State?

### **Support from the public at large**

Public support of EU policies in a context of increasing fluidity of markets and societies seems dependent on the formulation of some over-arching policy goals to which adequate resources should be devoted. Public support will be dependent on whether or not the EU is perceived to be achieving these goals. The EU should, therefore, concentrate on those key elements that will have a direct impact on people's social and economic well-being, security and inter-generational solidarity.

At another level, the EU could build popular support by encouraging and underpinning networks in various areas. These should be made open and include players representing different interests. They should also be made accountable to democratic bodies and be subjected to judicial scrutiny when required. These networks should not, however, replace parliamentary bodies but rather complement them or, in technical areas, contribute to a deeper understanding of the various issues at stake.

For the sake of democratic accountability and enhanced popular legitimacy, a constitutionalisation of the EU political system and administrative processes seems increasingly crucial. A constitutional structure would make explicit the locus of decision-making, attribute the level of competence in different areas and make explicit institutional representation. Political accountability of European institutions would benefit from more clearly defined areas of responsibility and the citizens would benefit from explicit access to administrative and judicial complaint procedures.

In the future context, a European system of governance would require a European judicial system that spans over a larger number of areas and that has the power to act as an arbiter of last resort between conflicting interests. This would constitute a necessary counterbalance to the fuzziness that multiple networks and partnerships imply. It could also act as guarantor of unity in a context of diversity by upholding a minimal level of homogeneity in the application of policies and implementation of legislation, and so help to promote trust among the players involved.



Finally, a European constitution could be a potent way of enhancing the political discourse on the European level. By creating a political arena, competing views on the direction of policy developments and political priorities would have to present clear options to European citizens.

A constitutional development on the European level constitutes one way to re-invigorate our democratic systems and renew the role of traditional political parties. And to the extent that relevance and interests influence public support of a political system, it is also an effective way to enhance the Europeans' support of the EU.

## **PART IV: CONCLUSIONS**



# Developing new modes of governance

Notis Lebessis and John Paterson

## Recent developments in institutional and administrative reform

### Introduction

For those who have been involved in the discussions about European governance instituted by the Forward Studies Unit at the beginning of 1996 and continuing by way of seminars, workshops, working papers and ultimately this book, these are surely very encouraging times. Reform of the way in which the European institutions go about their business has not had such a high profile — and the feeling that genuine change is possible has not been so tangible — since the days of the Delors Commission. But whereas the emphasis then was on the adaptations necessary to complete the single market, now the focus of attention is upon what must be done to achieve **political integration**. This is a project that is perhaps fraught with even more difficulty than its economic counterpart in so far as it raises serious questions about the nature and practice of democracy in contemporary conditions, but it is one that, for the same reason, offers the possibility of rich dividends, if successful.

It is possible to identify three key initiatives in this regard. Two of these, the Intergovernmental Conference (IGC) on institutional reform<sup>1</sup> and the process of administrative reform within the Commission<sup>2</sup>, are relatively clearly defined. The third, 'Shaping the new Europe', is at present more nebulous — of necessity given that it represents the Commission's strategic objectives for 2000–05<sup>3</sup>. It is possible to predict that because of the background to the first two and the consequent political will that underpins them, they will be driven to completion with relative efficiency. The third, by comparison, because of its particular status and because it raises more difficult questions for all of those involved in the European project, is just as likely to have a more painful progress and its success is by no means assured.

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<sup>1</sup> Launched on 14 February 2000 at the General Affairs Council, Brussels.

<sup>2</sup> 'Reforming the Commission: A White Paper' Communication from Mr Kinnock in agreement with the President and Ms Schreyer, 1 March 2000 — hereafter referred to as the White Paper on administrative reform.

<sup>3</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions; strategic objectives 2000–05 'Shaping the new Europe'. COM(2000) 154 final, 9 February 2000 — hereafter referred to as the strategic objectives.

We argue in this paper, however, that this third initiative is the most important for the future of Europe — so important indeed that the processes of institutional and administrative reform need to be understood in its context if their impact is not to be entirely lost or if they are not in fact to become counter-productive. This is a serious contention and one that needs to be carefully justified. We begin, therefore, (Section 1) by examining briefly the first two reform initiatives, drawing out the implications of the precise circumstances in which they arose and thus identifying the limitations and opportunities inherent in each. We suggest that the opportunities can only be realised in the context of a **more adequately complex understanding of the environment in which the European institutions must work in the years to come**. We recognise that the third initiative, the Commission's strategic objectives, appears to respond to some extent to such an understanding (in particular the focus on governance with the promise of a White Paper in the early part of 2001) but conclude that the foundations remain incomplete and unsteady and that the necessary linkages to the processes of institutional and administrative reform are not yet explicit.

The paper thus continues (Section 2) with one possible account of the emerging policy environment, drawing out the trends to which the institutions must respond and allowing us to identify the main implications for the policy process — specifically the limitations of existing instruments and the consequent need for innovative methods<sup>4</sup>. Building on this understanding, we go on (Section 3) to try to identify the key features of such new modes of governance and then (Section 4) to make some initial suggestions for the White Paper on governance.

Our view, in short, is that this is a time of unique opportunity for the Commission. Reform is underway and there is both the public expectation and the political will to sustain it. But the euphoria of action after inaction must not produce action for its own sake. Undue haste at this juncture may result in an unduly restricted view both of the nature of the problems and of the possible responses. There is a need, then, for calm reflection and for nerves strong enough to resist pressure for change which has not been located within the bigger picture of governance reform. If it is a time, therefore, of unique opportunity for the Commission, it is surely also a time of unique challenge.

The tone of caution apparent in the introduction may be a source of frustration for those who have waited long and patiently for concrete steps towards improvements in the legitimacy, effectiveness and efficiency of European governance. There is certainly no denying the progress represented by the IGC and by the White Paper on administrative reform. It is necessary, nevertheless, to be clear about just how much can be realistically expected from these initiatives.

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<sup>4</sup> Throughout the paper, we draw on ideas first articulated in the following papers: Notis Lebessis & John Paterson (1997a) 'Evolutions in Governance: What Lessons for the Commission? A first assessment'; (1997b) 'The Future of European Regulation'; (1998) 'A Learning Organisation for a Learning Society: Proposals for Designing Tomorrow's Commission'; (1999) 'Improving the Effectiveness and Legitimacy of EU Governance' all in the series *Working Papers of the Forward Studies Unit, European Commission*.

## The IGC on institutional reform

The level of resolve behind this initiative is immediately evident from the fact that it has both clearly defined objectives and a strict timetable. In this last regard the Helsinki European Council made a 'firm political commitment to make every effort to complete (it) by December 2000' with rapid ratification thereafter and implementation of the resultant reforms by the end of 2002<sup>5</sup>. In order to be able properly to assess its objectives, we need to be clear about the preoccupations of the European Council meeting in December 1999. Confirming the importance of the enlargement process launched at Luxembourg two years earlier, it stated bluntly that '(a)n efficient and credible enlargement process must be sustained.'<sup>6</sup> The commitment to a precise timetable for the IGC on institutional reform and to ratification of the necessary Treaty amendments is therefore a function of the European Council's belief that the EU 'should be in a position to welcome new Member States from the end of 2002.'<sup>7</sup> The agenda for the IGC can accordingly be understood as determined in large part by the institutional issues which must be resolved if the EU is to be able to operate efficiently with an enlarged — indeed almost doubled — membership. The list thus includes the so-called Amsterdam triangle (the size and composition of the Commission; the weighting of votes in the Council; and the possible extension of qualified majority voting) together with a catch-all 'other necessary treaty amendments in connection with the above issues and implementing the Treaty of Amsterdam.'<sup>8</sup>

All of this is unquestionably essential if there is not in future to be a completely unwieldy institutional structure continually bogged down in tortuous decision-making procedures. But there could be no serious suggestion that these changes will be sufficient if the Union is to integrate more members, many of whose political, economic, social and administrative histories are very divergent from the existing Member States. Of course, work proceeds at other levels to ensure that the relevant institutions and procedures in these countries are made compatible with those of the existing members. But as difficult as the adoption of the increasingly complex *acquis communautaire* will be for these prospective members, the question remains as to whether the envisaged process of accession is in any way as sophisticated as both the current crisis of legitimacy within the EU and the further diversity the new members will introduce demand. It must of course be acknowledged that the IGC has taken steps to cope with diversity in so far as it has broadened its agenda to consider the possible future use of reinforced cooperation — a mechanism already foreseen in the Treaty of Amsterdam and designed to al-

<sup>5</sup> Helsinki European Council, Presidency Conclusions, 11 December 1999 — hereafter referred to as the Conclusions, paragraph 5.

<sup>6</sup> Conclusions, paragraph 3.

<sup>7</sup> Conclusions, paragraph 3.

<sup>8</sup> See the Finnish Presidency Report 'Efficient institutions after enlargement: options for the Intergovernmental Conference' (Council of the European Union 13636/99) 7 December 1999. The Helsinki European Council followed this report in deciding the agenda for the IGC (see the Conclusions paragraph 16). The subjects listed under 'other necessary treaty amendments' are responsibility of the members of the Commission; allocation of seats in and legislative procedures of the European Parliament; the problem of the workload of the ECJ and Court of First Instance; and possible reforms to other institutions and bodies.

low certain Member States to proceed further and faster than others without subverting the *acquis communautaire* or fragmenting the internal market<sup>9</sup>. But the implementation of this mechanism remains a matter solely for the highest levels of intergovernmental cooperation and thus does not necessarily respond to the diversity internal to a given Member State.

It could thus be said that the reforms in prospect at the IGC are a necessary first step but that it remains to be seen whether other aspects of the process of governance — perhaps well below that which would require Treaty amendment or intergovernmental agreement — are in need of attention. Nor is such a question remote from the higher level of reform. Rather, it is intimately bound up with that process. While the resolution of the issues on the agenda of the IGC may indeed produce more **efficient** institutions, this does not necessarily say anything about whether they will be regarded as any more **legitimate** or whether they will be seen to be **effective** by those whom they ultimately exist to serve. In other words, improving the capacity to act does not necessarily improve the substantive merit of the ultimate action. It is not obvious, for example, that the reforms in prospect will do anything significantly to address the perception that the European institutions are remote and undemocratic. Indeed, it is always possible that changes needed to accommodate an enlarged membership may be seen to dilute democratic legitimacy further. Nor do the planned reforms address the pressures placed on the policy process by an ever more complex environment and manifest, for example, in the increasing difficulty it experiences in coping with risk issues or in adequately representing the range of views and interests of which modern societies are composed. The increased diversity implied by enlargement merely serves, therefore, to add to the complexity of the environment confronting the European institutions. If the existing policy process is showing signs of strain in the face of complexity, it seems clear that enlargement will only add to the pressure for change. That being the case, the question becomes one of considering what further reforms need to be carried out and how they must be articulated with the highest level changes.

It needs to be recognised immediately that the Helsinki summit was not indifferent to such lower level reform. It approved, for example, the Council's recommendations for internal reform<sup>10</sup>. Similarly, it recalled its commitment in support of reforming the Commission's administration in order to enhance efficiency, transparency and accountability and looked forward to the 'comprehensive programme of administrative reforms'<sup>11</sup> which that body has now produced in the form of the White Paper — the second reform process with which we are concerned.

## The White Paper on administrative reform

The mass resignation of the Commission in March 1999 was a crisis in every sense of the word for that institution. It was, first of all, a moment of great difficul-

<sup>9</sup> Informal meeting of the IGC negotiation group, Sintra, 14 and 15 April 2000.

<sup>10</sup> Conclusions paragraph 20. See Annex III to the Conclusions for the Council's reform proposals.

<sup>11</sup> Conclusions paragraph 21.

ty whose importance cannot be overestimated. That the guardian of the Treaty had been found wanting to such an extent by the Union's most democratic body raised very profound questions about the way in which the Commission operated. It was also, however, a crisis in the sense of being a decisive moment, a turning point. The swift and unanimous response of the Member States to the resignation in the nomination of Romano Prodi as President was viewed positively by an expectant European public who shortly afterwards delivered a further wake-up call to the politicians and bureaucrats (if one were needed) in the miserable turn-out at the elections to the European Parliament in June. These signals seemed, however, to have been received and understood. The incoming President made it clear from the outset with his early speeches to the Parliament that reforming the Commission would be a central concern of his period of office. And this promise was made good with the appointment of a Vice-President with specific responsibility for administrative reform, the swift publication of a consultative document<sup>12</sup> and the adoption of a White Paper on 1 March 2000<sup>13</sup>.

The reform process certainly appears ambitious and unequivocal. In the preface to the consultative document, a clear objective is identified: to ensure that efficiency, accountability, transparency, responsibility and service are universally applied within the Commission as working conventions<sup>14</sup>. Then, encouragingly, the process was identified as having started with two questions which do not appear to impose any restrictions on the reforms that are possible: (a) what are the tasks and functions of the Commission in the years to come? and (b) what sort of organisation must it be in order to fulfil them<sup>15</sup>? Despite such an apparently blank-sheet approach, the White Paper that emerged from the short consultation period is rather limited in its ambitions — its own proclamations to the contrary notwithstanding<sup>16</sup>. The reform strategy proposed is composed of three related themes. The first of these does offer some hope (reform of the way in which political priorities are set and resources allocated) but the remaining two (changes to human resources policy and reforms of financial management) look relatively mundane — at least as they are presented in the White Paper. Dealing first of all with the latter two pillars, these can be very readily assessed: they represent the bare minimum in terms of human resources policy and internal financial management that should be in place in an organisation with the position and responsibility of the Commission and the fact that they can be presented respectively as 'important' and as 'an overhaul'<sup>17</sup> at the turn of the 21st century would be a cause for embarrassment if they were not so obviously and urgently required. Taken in the round, they betray an overwhelming concern with efficiency which, while commendable, is conspicuously not qualified by a commensurate concern with legitimacy and effectiveness de-

<sup>12</sup> 'Reforming the Commission: consultative document' Communication from Mr Kinnock in agreement with the President and Ms. Schreyer CG3(2000) 1/17 18 January 2000 — hereafter referred to as the consultative document.

<sup>13</sup> See footnote 2 above.

<sup>14</sup> Consultative document, p.iii.

<sup>15</sup> Consultative document, p.1.

<sup>16</sup> For example, 'the scope and ambition of the reform programme far exceeds that of any previous exercise' White Paper on administrative reform p. 2.

<sup>17</sup> White Paper on administrative reform pp. 2–3.



spite occasional passing references. That brings us back to the first theme of reform concerning the allocation of political priorities. While the establishment of a strategic planning and programming cycle with a key coordination role for the Secretariat-General looks promising, the limitations of the other themes must raise doubts here too. And, indeed, the emphasis is again very much upon efficiency, with activity-based management, more efficient use of internal and external resources and more efficient, performance-oriented working methods being the key factors identified<sup>18</sup>.

Given the nature of the events of March 1999, however, it is not at all surprising to find that the consultative document manifests the emphases that it does. This merely serves to highlight the extent to which this reform process too is a **re-action** to a particular issue rather than a planned and measured development. There certainly were reforming processes underway before the crisis<sup>19</sup> but the fact that they are hardly trumpeted in the White Paper speaks volumes for their adequacy in coping with the problems that eventually brought the college down — not to mention their utility in dealing with the more profound questions of legitimacy and effectiveness.

The extent to which the two initiatives considered so far are responses to rather narrowly defined crises or problems is, therefore, productive of relatively limited reform agendas. But more than that, the desire, indeed the need, to be seen to be responding rapidly and substantively to these issues leads to a relatively restricted view of the environment in which the institutions must operate. In the case of the IGC, the view is of enlargement understood principally in terms of the mechanics of decision making at the highest levels in the context of a possibly doubled membership. In the case of administrative reform, the view is of the fundamental shortcomings of the Commission exposed by the crisis of March 1999. In this respect, the strategic objectives of the Commission for 2000–05 represent an important opportunity to broaden the view.

## Shaping the new Europe 2000–05

Published on 9 February 2000, the Commission's strategic objectives for the next five years were effectively the first opportunity for the Prodi Commission to set out its distinctive vision of the EU as it enters a critical phase of its existence, the previous months having been spent essentially coping with the immediate fall-out from the demise of the Santer Commission. This is, then, a crucially important document, but one nevertheless which only a couple of months later appears to have sunk from public view. This is all the more surprising given that the document is unequivocal about the priority in the years to come of **political integration**, a process which runs the risk of impinging most directly upon national sovereignty and of bringing to the forefront the vexed and vexing question of the true nature

<sup>18</sup> White Paper on administrative reform pp.4–7.

<sup>19</sup> For example MAP 2000, SEM 2000, Decode.

of the European project. Is the ultimate aim a United States of Europe? Is the progress unrelentingly towards a strong-form federalism, a European superstate? The relative public and media indifference in the face of a stated drive towards political integration is perhaps explained by the fact that the document uses no such language and more importantly seems to contain no such hidden agenda<sup>20</sup>. Instead the focus is very firmly upon a political integration which takes 'full account of ... national and regional identities, cultures and traditions'<sup>21</sup> and one which strikes 'a new balance between action by the Commission, the other institutions, the Member States and civil society' bringing 'Europe much closer to the people it exists to serve'<sup>22</sup>.

Specifically, the Commission is proposing four strategic objectives for the next five years: promoting new forms of European governance; a stable Europe with a stronger voice in the world; a new economic and social agenda; and a better quality of life. Given our discussions in the foregoing subsections, it will be clear that it is the first of these objectives which is of greatest interest. But beyond our current concerns, it is also the case that the remaining objectives very much depend upon the first for their successful attainment. With these points in mind, therefore, we need to try to have a clearer idea of just what the Commission has in mind when it speaks of promoting new forms of European governance.

In particular, the attainment of this key objective is seen as related to five components: giving people a greater say in the way Europe is run; making the institutions work more effectively and transparently; adapting the institutions to the needs of enlargement; building new forms of partnership between the different levels of governance within the EU; and ensuring an active and distinctive European contribution to the development of global governance. It is immediately clear that this initiative is proactive in stance and broad in scope where the others discussed previously are reactive and narrow. Furthermore, it explicitly recognises the need for wider and deeper reform in the face of enlargement, as well as for legitimacy and effectiveness to complement efficiency more fully in the drive for change. It therefore possesses considerable potential with regard to the further development of the European project at this critical juncture. But what form will its contribution take? What is the Commission to do in order to promote new forms of governance? What are these new forms of governance in any case?

To all of these questions at present there appear to be no readily available answers. But given the degree of innovation presumably envisaged this is hardly surprising. What is in view is a White Paper due for publication in the spring of 2001 in which the Commission will clarify the content of this key strategic objective. It is our contention that this White Paper is precisely the place where the Commission

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<sup>20</sup> It may also be accounted for by the fact that the period following the publication of the strategic objectives has been one of intense speculation about the position of the President himself — a matter apparently more to the media's taste than the substantive question of political integration. See especially *FAZ*, 4 April 2000.

<sup>21</sup> Strategic objectives p. 3.

<sup>22</sup> Strategic objectives p. 4.

can begin to address the limitations that currently beset reform: firstly, by developing a more adequately complex picture of the emerging policy environment than is visible in the narrow focus of the IGC or the process of administrative reform; and secondly, by developing a vision of the policy process that marks a break with the traditional models which currently restrict the range of reform options. This will be a complex and difficult process and one in which the Commission must try to engage as many stakeholders as possible. By way, however, of trying to establish some starting points and to provide some indications, we go on in the following sections to discuss some of the findings of the governance project with regard to these issues.

## **The emerging policy environment**

### **A diagnosis of current problems**

There is general recognition of the relevance of the European project when it comes to addressing global challenges such as sustainable development, north-south inequalities and related reforms of the international system. There is equally a desire for more European action in the field of common foreign and security policy (most recently manifested in relation to the Balkans) and with regard to issues such as migration and refugees, international crime, and so on. In each case, it is understood that concerted action at a level beyond the nation State is required if desired ends are to be achieved<sup>23</sup>.

And yet the public perception of European action is often negative. This can be due to the fact that the debate on European issues is often heavily skewed by the interests of national politics, with European action being portrayed as 'unnecessary interference' in more and more areas of daily life. But it is also due to the fact that to a great extent the 'democratic deficit' has not yet been successfully addressed despite the express intentions of the framers of both the Maastricht and Amsterdam Treaties. Decision-making at the European level is all too often a matter for the opaque and confusing process of comitology which tends to favour a limited group of powerful and professionally represented actors in any given policy area. This leads to a situation where it is easy for European action to be portrayed as not being properly accountable and as lacking legitimacy<sup>24</sup>.

Meanwhile, the public increasingly feels that their lives are being shaped by forces which appear to be outside the control of political actors whether at the national, European or international level. Problems in recent years such as the Asian fi-

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<sup>23</sup> This is a recurring theme, for example, in Eurobarometer. See, most recently, Report No 52 (April 2000), pp. 53–58.

<sup>24</sup> For a succinct discussion see Baldwin, R. and Cave, M. (1999) *Understanding Regulation: Theory Strategy and Practice* Oxford: Oxford University Press Chapter 6. See also Vos, E. (1997) 'The rise of committees' *ELJ* 210–229.

nancial crisis and a seemingly endless succession of food safety scares only add to the widely-held impression that the globalised economy and technological systems are following their own logics irrespective of the needs of individuals and despite the interventions of political actors. As a consequence, the political reliance on scientific and other expertise that has been a feature especially of the post-war era is increasingly called into question and doubts are expressed about 'technical solutions' which supposedly obviate the need for wider debate. There is accordingly ever greater scepticism about the ability of conventional political arrangements to produce detailed plans for medium- to long-term action and to implement them with any significant degree of success<sup>25</sup>.

Closer scrutiny of the operation of the policy process has also raised further concerns which are not unrelated to this last point. The fact that there may be democratic representation at the point of formal decision making is seen to be inadequate where there are problems with both the earlier and later stages of the process — stages which are increasingly understood to be just as determinant of eventual outcomes. Thus, the predominance of experts and administrators — and, more worryingly, of an often very narrow range of represented interests — in the initial phases of the process where options are formulated can unduly restrict the choices to be considered at the point of decision-making. Similarly, technocratic hegemony at the stages of the implementation and evaluation of policies can raise doubts about the extent to which decisions are responsively translated into action and to which their effects are measured in terms which are meaningful to all interested actors<sup>26</sup>. It is all too easy to suggest, as a consequence, that accountability and legitimacy are increasingly a matter of public relations to sell a *fait accompli*, rather than key components of a political process.

It is evident, then, that however vital are the institutional reforms under consideration, they will not by themselves be sufficient to address this range of problems and concerns. Even if the IGC were to be extended to encompass, for example, proposed reforms which focus on the empowerment of the Parliament<sup>27</sup>, these would not address problems of legitimacy and accountability which are now understood to permeate every stage of the policy process. Nor indeed will any reforms guarantee the effectiveness of European action in so far as they fail to tackle the restricted views offered by technocratic understandings of the implementation and evaluation of policy. Europe needs to address issues of legitimacy and effectiveness in a comprehensive manner and must be prepared to consider new methods of achieving them beyond those suggested by traditional majoritarian parliamentary models.

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<sup>25</sup> See generally Beck, U. (1992) *Risk society: towards a new modernity*. London, etc.: Sage and Giddens, A. (1991) *The consequences of modernity*. Cambridge: Polity

<sup>26</sup> A wide range of literature makes related points. See, in addition to Lenoble & De Munck, De Schutter and Ladeur in this volume, Teubner, G. (ed.) (1985) *Dilemmas of law in the welfare state*. Berlin & New York: De Gruyter; Habermas, J. (1984 & 1987) *Theory of communicative action*. Cambridge: Polity Press and (1997) *Between facts and norms: contributions to a discourse theory of law and democracy*. Cambridge: Polity Press.

<sup>27</sup> See most recently 'From confederacy to federation: thoughts on the finality of European integration', speech by the German Foreign Minister, Joschka Fischer, at the Humbolt University, Berlin, 12 May 2000.

While these are problems that also confront national level public actors, it is possible to identify a number of reasons why they particularly concern the European level — reasons associated essentially with the trajectory of the European project. Generally speaking, **the European project has followed a trajectory from negative to positive integration**. In other words, at the outset, the project was concerned to remove barriers to the establishment of a common market (such as tariffs) and to guarantee the four freedoms. As time went on, however, it became progressively apparent that the completion of a single market required active intervention in more and more policy areas which may not at first sight have been identified as representing barriers to trade but which, if left untouched, could allow Member States to enjoy unfair competitive advantages<sup>28</sup>.

This is a significant shift, but it is a question whether the structure of the European policy process has adapted sufficiently to reflect it. At the outset, there were two complementary forces which encouraged an essentially **vertical structure**. On the one hand, Member States recognised the advantages in sharing sovereignty in areas where there were already significant interdependencies. On the other, and perhaps more importantly in the immediate aftermath of the war, there was a recognition among the political élite driving the project that it was important to achieve an institutional structure which provided **strong, centralised control** of these policy areas<sup>29</sup>. The independence of the Commission, for example, was crucial in maintaining a long-term European vision<sup>30</sup>. Similarly, the European Court of Justice was active from the outset in establishing the pre-eminent position of European law vis-à-vis any contradictory national measure<sup>31</sup>.

For as long as the Community was concerned with issues of negative integration, this vertical and centralised structure was not subject to serious sustained challenge. Over time, however — and especially with the signing of the Single European Act in 1986 and the subsequent drive towards the completion of the single market in 1992 — the Community's involvement with positive integration developed exponentially<sup>32</sup>. This shift has raised problems which have strained the vertical structure of the European policy process and exposed weaknesses in centralist arrangements which were crucial to the success of the early stages of the project.

As a consequence, decentralising pressures have built up on the Community. This was already evident, for example, in the principle of subsidiarity in the Maastricht Treaty<sup>33</sup> and reappeared in the banner under which the Amsterdam Treaty was drafted of 'bringing Europe closer to the citizen'<sup>34</sup>. And yet it seems clear that

<sup>28</sup> See Giandomenico Majone (1996) *Regulating Europe* London: Routledge.

<sup>29</sup> See Urwin, D. (1995) *The Community of Europe: a history of European integration since 1945* (Second edition) London: Longman.

<sup>30</sup> See Fitzmaurice, J. (1994) 'The European Commission' in Duff, A., Pinder, J. & Pryce, R. (eds.) *Maastricht and beyond: building the European Union*. London: Routledge.

<sup>31</sup> See Weiler, J. (1981) 'The Community system: the dual character of supranationalism' 1YBEL 267.

<sup>32</sup> See Weiler, J. (1991) 'The transformation of Europe' 100 *Yale LJ* 2403.

<sup>33</sup> Now Article 5EC.

<sup>34</sup> See, for example, 'A strategy for Europe', Final report from the Chairman of the reflection group on the 1996 Intergovernmental Conference, Messina, 2 June 1995.

to date only limited progress has been made in achieving decentralisation to a degree and of a sort that meets either the expectations of civil society or the demands of complex problems. It is certainly true that the process of administrative reform within the Commission envisages greater decentralisation, but again the stated emphasis raises concerns about its responsiveness to the nature of the problem: '(e)xternalisation should only be chosen when it is a more efficient and more cost-effective means of delivering the service or goods concerned'<sup>35</sup>.

Nor is it the case that the difficulties confronting the European policy process are associated only with its vertical and centralist arrangements. Problems also arise because of its **functional segmentation**. At all levels from the Council and the Commission downwards, administrative bodies are characterised by their division into a range of directorates-general or ministries or departments, each responsible for clearly defined policy areas. The main aim of this arrangement is to **reduce complexity**. Instead of attempting the impossible task of regulating the entire policy environment from the vantage point of one government actor, that environment is divided up into more manageable pieces and allocated to specialised departments. These departments can then develop the expertise necessary to solve the problems associated with their particular area, and the locus of responsibility for any given task is relatively easy to determine.

For public actors, this structure has been flexible enough to allow newly-arising tasks associated with the shift from negative to positive integration to be allocated either to existing or to newly-formed departments. At the level of the European project, for example, the establishment of a largely functioning market and the progress made towards the single currency are testament to the success of this approach to the management of complexity.

Nevertheless, the concomitant increase in the number and range of responsibilities lying with public actors has exposed the limitations of this vertical, segmented approach. In particular, while focusing on a given aspect of the policy environment serves from one perspective to reduce complexity and to render it more manageable, it can equally serve to **mask complexity by hiding the interdependencies which may exist between policy areas**. Such interdependencies may take the form either of **negative externalities** which because of an overly restricted focus at the point of policy formulation may only become evident when they are irreversible or at least very expensive to resolve (for example, the BSE crisis); or of **synergistic opportunities** which again may be missed at the outset because of an inability to appreciate a broader context and only recognised when the degree of policy implementation makes it impossible to take them up or to do so only with reduced effectiveness or efficiency (for example, the interrelationship between transport and environment policy).

The tendency to consult with only a limited set of powerful actors at the stage of policy formulation mentioned above merely serves to exacerbate the

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<sup>35</sup> White Paper on administrative reform p. 7.

problem of segmentation. And similar concerns arise later in the policy process when evaluation is considered. In too many cases the fact that evaluation criteria are not framed by all of those with a direct interest in policies and that, in any event, evaluation results are often not fed back into the process of revision, only increases the likelihood that policy interdependencies will be missed.

As a growing range of issues has come to be dealt with at the European level and as this development looks set to continue, policy conflict is likely to pose an increasing problem for the institutions. Such issues have in the past been dealt with on a reactive and ad hoc basis and it is by no means clear that the overriding efficiency focus of the current reform proposals will do anything to remedy this problem. There is, therefore, a need for a consideration of institutional options that are proactive, flexible and less restricted in outlook.

### **Implications for the policy process**

The work of the governance project stresses that the current understanding of the European policy process, which focuses almost exclusively on the moment of decision-making, needs to be modified. The growing evidence of the pressures on the existing approach needs to be responded to in a proactive and systematic way rather than as at present on a reactive and ad hoc basis. In other words, the entire process from the framing of problems, through the formulation of policy, to its implementation, evaluation and revision needs to be opened up and liberated from the shadowy world it currently inhabits — civil society needs to be engaged in and by European action.

As matters stand, European policy risks being developed on the basis of a partial (in the sense both of being incomplete and biased) picture of the issues and of the range of possible responses. There is a lack of public debate on the evolutions which actually shape the lives of Europeans, and thus the European agenda does not accurately reflect the priorities of civil society. The functionally-segmented policy process only serves to reinforce this situation by effectively imposing pre-established understandings of the limits of problems and thus restricting openness both to interdependencies and to other stakeholders. Likewise, the vertical structure of the policy process reduces responsiveness to contextual differences and details which may have a profound impact on effectiveness as well as on perceived legitimacy.

Such an approach denies the policy process the benefit of the full range of available expertise and knowledge as well as of a better informed and engaged civil society. It will thus remain the case that policy is seen to emerge as a compromise among the limited set of actors who dominate a particular field, rather than on the basis of consensus or cooperation among all of those who are actually affected, irrespective of whether they have traditionally been recognised as having an active role to play.

There is a need, in short, to abandon ideas of central planning and control which years of experience have revealed to be entirely unrealistic and to rest on in-

adequate understandings of the policy environment. Instead of being obsessed with the control of outcomes which in any event escape the best intentions of public action, attention should shift to the control of processes which aim to enhance the responsiveness of public action to the nature of the environment in confronts.

Reform needs, therefore, to focus on possible means to increase the opportunities for and improve the quality of public debate on European issues throughout the policy process — not least in ways which allow functional boundaries to be overcome and the predominantly vertical alignment to be moderated by complementary horizontal structures. Such a focus will have implications for the possibilities that may emerge for civil society and for the roles that may be envisaged for European public actors.

Romano Prodi has identified the next tasks for the Union as moving from a single market and single currency towards a single economy and a single politics. We can now characterise such a move as involving further progress along the trajectory of positive integration and, on the analysis presented here, as further increasing pressure on the institutions of the Union (and indeed all levels of public actor involved in the European policy process) in terms of accountability and legitimacy, policy conflict and decentralisation. It would appear, then, that this move can only be achieved, not by addressing the simple **distance** between Europe and the citizen, but by **reappraising the nature of the relationship** between Europe and the citizen. It can no longer be a paternalistic relationship, but rather must be one of **partnership**.

These findings further highlight the importance of the Commission's promotion of new forms of governance as a priority among its strategic objectives. They also draw attention to the fact that the work of the IGC on institutional reform and the process of administrative reform within the Commission will only be meaningful if they are set in the broader context of such an understanding of the policy environment and not unduly restricted by their immediate concerns. Enlargement will only serve to increase the strains on legitimacy and effectiveness if it is not accompanied by appropriate reforms at all stages of the policy process rather than simply at the institutional decision making stage. The reformed Commission may be more efficient but it needs to consider the relevance of those reforms to the new forms of governance it seeks to stimulate as well as its place within the resultant architecture.

The potential importance of the White Paper on governance therefore becomes all the clearer. The White Paper on the completion of the single market was the defining act of the Delors Commission and the driving force behind the significant progress that has been made since the mid-1980s towards economic integration<sup>36</sup>. If similar progress is to be made towards political integration, the forthcoming White Paper will have to provide the driving force and thus become the defining act of the Prodi Commission. The difficulty, as we noted above, is that it is not

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<sup>36</sup> COM(85)310.



yet clear what the Commission has in mind when it talks about promoting new forms of governance. In this regard, the diagnosis and implications presented in this section can perhaps provide some indications — at least of the broad themes the White Paper might address. In the following section, therefore, we present some of the key features of new modes of governance that emerged from the Forward Studies Unit's project. To be clear, these features are not intended as a blueprint or as an exhaustive list. Rather they are offered by way of stimulating debate in a field whereby definition there will be little existing material or experience on which to draw as Europe strives to define new ways of coping with the political challenges thrown up the increasingly complex policy environment.

## Key features of new modes of governance

Given the lack of clarity about what is implied by new modes of governance mentioned at the end of the foregoing section, we might usefully preface our discussion of what we see as their key features with an attempt to define the word 'governance'. Without this, we will not know what is properly our concern — and indeed the concern of the forthcoming White Paper on this subject. We can state first of all and quite straightforwardly that, for us, governance is concerned with the organisation of collective action. Now, clearly, a wide variety of alternatives could be subsumed under this very brief definition and we would need, therefore, to be more specific about what we understand by organisation and by collective action. In this regard, we find ourselves very much in agreement with the more elaborated definition of governance provided by Calame and Talmant:

*Governance is the capacity of human societies to equip themselves with systems of representation, institutions, processes and intermediary bodies in order to manage themselves by intentional action. This capacity of conscience (the intentional action), of organisation (the institutions and intermediary bodies), of conceptualisation (the systems of representation), of adaptation to new situations is a characteristic of human societies<sup>37</sup>.*

In the foregoing section, we have essentially attempted to offer initial answers to two broad questions. What is the nature of the emerging policy environment? What are the implications for the policy process? In this section, we build on the answers arrived at and, through a series of sequential though interrelated steps, try to develop a set of key features which appear to be indispensable to modes of governance which are aimed at responding to the new understanding of the context of public action. Because of this development in a series of interrelated steps, the key features need to be understood as mutually supportive components in an overall framework, rather than as 'pick and mix' accessories for more traditional policy mechanisms and instruments.

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<sup>37</sup> Calame, P. and Talmant, A. (1997) *L'Etat au Cœur: Le Mecanno de la Gouvernance* Paris: Desclée de Brouwer, p. 19.

## Overcoming limited understandings of problems

For reasons both of effectiveness and of legitimacy, there appears to be a need to escape from the constraints imposed on the policy process by the current emphasis on expert or bureaucratic constructions of the problems that are perceived to require intervention at the level of public authorities. In so far as this emphasis allows only a narrow understanding of problems to inform the policy process, there is a danger, first of all, that their full nature will not be appreciated (including the possibility that problems may be overlooked entirely or may be overstated) and, secondly, that the solutions developed to deal with them will prove ineffective or counterproductive to the extent that they produce unforeseen side-effects.

Apart from this basic question of effectiveness (with all that it implies for efficiency, particularly in the medium to long-term) there is also the question of legitimacy. If citizens routinely perceive that the expert and bureaucratic definition of problems, desired objectives and means of achieving them are remote from their concerns, then the legitimacy of that public action is seriously undermined. At one time, of course, it would have been possible to point to a periodic democratic mandate to justify action by public authorities. Whether this mandate, offered as it is to the legislature, was ever truly sufficient to cover the delegation of authority to lower and less obviously accountable levels of government, it is increasingly understood to be woefully inadequate in the context of ever more diverse societies and of the complex tasks now confronting public actors.

This is hardly a new observation and governments have for long undertaken various forms of consultation as part of the process of developing and implementing policy. The difficulty is that this consultation has frequently been a relatively hidden process conducted with an established list of comparatively well-organised and well-funded groups representing often quite narrow interests. Thus, in promoting new forms of governance the Commission needs to ensure that it does not simply follow a well-trodden path and repeat current practices which, while formally open and inclusive, are in fact closed and exclusive. Overcoming the constraints of narrow bureaucratic and expert constructions of problems and solutions means taking seriously the need to break the cartels of representation and consultation which currently exert a covert stranglehold on key stages of the policy process.

The issue of overly restricted views of problems is not, however, confined to the division that can exist between expert and lay knowledge. Bearing in mind the contribution of Lateur in this volume, the fragmentation of knowledge that is characteristic of modernity extends to — and indeed is most marked insofar as it relates to — the division between different types of expert knowledge. The problem of overcoming limited understandings is thus as much one of overcoming the limits imposed by expert disciplines and the shift away from current consultation practices must accordingly reflect this fact as well.

## Guaranteeing wider participation — sensitivity to context

If this break from current limited practices of consultation is to be achieved, new forms of governance will need to include guarantees about the participation of stakeholders. It should be clear from what was said at the end of the foregoing subsection that ‘stakeholder’ must be understood broadly here. In other words, the term is not intended here in the sense that it has come to embody in everyday speech — that is, as a shorthand for those areas of civil society habitually excluded from direct involvement in policy decision making. Instead it is meant literally, to encompass **all** of those who have a stake. Thus, not only are the experts and bureaucrats from within the policy area traditionally associated with a particular issue included, together with those actors from civil society that a more enlightened regulatory approach might bring in, but also experts and bureaucrats from other policy areas, other disciplines who are understood to have a stake in the context of a policy process which acknowledges interdependencies.

Seeking to ameliorate the problems of narrow understandings of problems is not, therefore, about displacing expert opinion in favour of its lay counterpart. This would rightly be subject to criticism. It is, however, about taking seriously the nature of the scientific process which underlies expert opinion and incorporating the implications into the policy process. In particular, the concern is with the fact that the scientific rationality produces **knowledge** not **certainty**, and with the fact that this knowledge is not absolute but rather provisional and inherently and necessarily subject to ongoing testing, revision and even replacement. As a consequence, the policy process needs to be able to accommodate not only the possibility that expert opinion may be wrong or perhaps only relatively right, but also the probability that different expert disciplines deploying the same scientific rationality will conceptualise issues in different ways. In other words, it needs to be able to cope with the fragmentation of knowledge that is an ever more important characteristic of the emerging policy environment.

If we are not advocating the displacement of expert opinion in favour of lay opinion, but are nevertheless concerned with the limited understanding of problems that the former can impose on the policy process, we need to be clear that we do not see improvement only in the better integration of different expert disciplines. Despite our insistence on a proper understanding of the scientific process and on the status of the knowledge it produces, we nevertheless insist also that it remains the best means at societies disposal for the production of knowledge. Accordingly, lay opinion that is brought to the policy process without the underpinning of scientific rationality must be treated with due caution. But it must not simply be dismissed out of hand as has happened in the past. There are a variety of ways in which it can make a contribution. At the most basic level, for example, it might represent further empirical information. It might also assist experts in developing more targeted and understandable communications with civil society. More importantly from our point of view, however, is the opportunity it provides for a more meaningful exchange, a mutual enhancement of competing perspectives — not just an education of civil society, but a means of forcing expert opinion to justify

and explain the assumptions and causal connections of the models it deploys. We will elaborate on this point in Section 3.4 below.

What this acceptance of plurality leads to is a need for the policy process to be sensitive to context — what is appropriate for one context may not be suitable for another. Whether we are primarily concerned with legitimacy, effectiveness or efficiency, we will surely agree that the blanket implementation of policy irrespective of contextual specificities is unlikely to produce a result that could be positively evaluated. To work these points through to their conclusion: the content of public action aimed at the attainment of outcomes deemed socially desirable cannot be pre-established outwith the context of application and other than with the collective involvement of **all** of those with an interest — expert and lay alike, and irrespective of who has been included in previous approaches.

### **Taking account of inequalities**

If the policy process is to operate so as to accommodate a plurality of views beyond those of traditionally-involved public actors and existing habitual consultees, and is to be sensitive to context, then there will be an attendant need to ensure that those coming into the process for the first time are not disadvantaged by their relative lack of organisation and resources. If this issue is not addressed, then the result would be similar to many current consultation processes where there is a formal universal right to participate which nevertheless presupposes a certain minimum level of material and cognitive resources possessed in fact only by certain actors. New forms of governance, therefore, will at the most basic level need to take account of any inequality of resources and make allowances accordingly.

Beyond that most basic level it may also be appropriate to consider the ways in which active steps may be taken to compensate less well-resourced stakeholders, perhaps by offering material help or perhaps by providing access to neutral expertise. This may seem to some to be a rather radical step, but it can be seen as analogous to the situation in all Member States where, if individuals involved in litigation lack the means to provide legal representation, the State will step in to assist. Understood in this light, the idea of active support for stakeholders in the definition of problems and the development of solutions — issues which may affect them as much as litigation — appears much less extreme.

Quite how this assistance would be directed, however, is at this point an open question and there may be legitimate fears that what is being proposed could sow the seeds of increased debate — and perhaps even litigation — over issues about which there is in principle no reasonable disagreement. We need to move on to the next step, therefore, to achieve some greater clarity about the nature of the policy process which until now has been characterised mainly by the need to consider more viewpoints and to get more stakeholders actively involved. How is the process constructed from new forms of governance to operate? How is its basic approach to be understood?

## Encouraging collective learning

If we return to the point made above about the provisional nature of scientific knowledge, it is frequently the case that such a suggestion provokes a defensive reaction from the public actors and experts who have been its traditional champions. They have tended, as we said, to equate the knowledge generated with certainty, and thus to justify the removal of questions treated in this way from the realm of politics. If the outcome of research whether in the realm of social policy, economics or technology is certain, then there is simply no need to debate it. So runs the traditional argument. For one thing, non-specialists will not be able to understand the processes involved. For another, the debate will be useless because the result **must** be the same as that produced by research if the development and implementation of policy is not to be subverted by irrationality. When we insist, to the contrary, on the **provisional** nature of the knowledge produced, and also upon the **fragmentation** of knowledge that is such a striking characteristic of the emerging policy environment, this traditional approach appears increasingly inadequate — and, more importantly, indefensible from a strictly scientific point of view.

What, then, are the implications of such a recognition for the policy process itself? Accepting that there is now no privileged viewpoint in the sense that none can claim to have an unquestionable understanding of problems, objectives and means, it seems immediately apparent that reform must seek to increase opportunities for collective learning. What we understand by this last idea is more than just negotiation and compromise. Opportunities for collective learning would need to encourage an acceptance of the necessarily incomplete and provisional nature of any perspective brought to a given interaction and seek to facilitate a mutual critique of those perspectives by the various stakeholders whether expert or lay. This might take the form of obliging stakeholders not only to formulate their position explicitly, but also to explain the effects of that position on other stakeholders and on other aspects of the problem that they bring to light. Different stakeholders, both expert and lay, would, in other words, be required to demonstrate the coherence of their constructions, not only in terms of their initial position but also in terms of the positions of others which have emerged as part of the process of collective learning.

This process has implications for both effectiveness and legitimacy. The first relates to the fact that each perspective must learn from the others if there is to be an adequate understanding of the problems in hand. This does not mean that one or more perspectives cannot simply be wrong. It means only that there is no pre-judgment in this regard, but rather that there can only be such an assessment on the basis of a reasoned discussion. Overcoming the limited understandings of existing approaches thus involves informing expert opinion with lay judgment to the extent that that is appropriate and equally assisting other perspectives to understand the reasoning behind expert findings and their impact. It also means, of course, in the context of fragmented knowledge, assisting mutual learning between different expert understandings of given issues.

Far from representing a threat to scientific expert rationality, a collective learning approach offers a significant opportunity to bolster it by ensuring that it does not close off options unduly on the basis of untested assumptions and by engaging stakeholders who are otherwise suspicious and even sceptical. This leads on to the second implication of the collective learning approach, the fact that by bringing bureaucratic and expert decision making back into the political process in a way which is not obstructive to it but rather enhances it in terms of effectiveness, also offers the possibility for increased legitimacy.

To be clear, this emphasis on collective learning is not at all about producing a definitive account of problems and solutions (a point explained further in the next subsection). Rather, it is a question of establishing processes which allow for the ongoing enrichment of each representation. The essential aim of such collective learning opportunities is to attempt to enhance communication among diverse rationalities which increasingly seem to be mutually indifferent or to 'talk past' each other. To that extent, the aim is to move towards a common language which can maintain a coherence that is otherwise threatened.

## **Ensuring ongoing evaluation and revision of policies**

The recognition of the importance of collective learning discussed above, implies that the implementation of policies cannot be regarded as a one-off exercise. Learning, after all, is not an activity that is limited by time but rather must be regarded as ongoing. It is therefore necessary to put in place mechanisms which ensure meaningful ongoing evaluation of policies and their ultimate revision on the basis of the information generated by such evaluation.

In the same way that we saw the benefits that could accrue from seeking to increase opportunities for collective learning at the stages of problem-setting, the definition of socially desirable objectives and the choice of means, so the stages of evaluation and revision could be enhanced by a similar approach. At present, it is too often the case that the criteria of evaluation are the product of the same expert or otherwise closed processes which define the initial problem, the consequent objectives and the choice of solutions. There is accordingly a risk that these criteria will produce evaluations of implemented policies that are even more remote from the concerns of other stakeholders or significantly at odds with an adequate understanding of the problem at hand. Similarly, irrespective of the quality of such evaluations, the results are too often simply consigned to the shelf instead of being fed back into the process of revising policies. If the evaluation and revision of policies was enhanced by opportunities for collective learning, both of these problems would be reduced — the quality of evaluation would be improved and there would be no opportunity for a lack of feedback. Again, there are obvious effectiveness and legitimacy gains to be had from this approach, to say nothing of improvements in efficiency. The increasingly obvious difficulties facing public actors as they seek to plan in detail for the range of issues that fall within their area of responsibility must act as a strong incentive for the systematic use of enhanced eval-

uation and revision mechanisms to maximise the quality of the information available and its impact upon the policy process.

The ideas of evaluation and revision as they are discussed here can serve to enhance the function of memory that is already performed by public actors. Institutions and rules essentially act as a collective memory, crystallising knowledge at a given point and acting as a basis for future action. These institutions and rules are, of course, subject to modification on the basis of ongoing experience, albeit that this is frequently a slow and reactive process. In the context of the emerging policy environment described above however, characterised by an ever increasing rate and scope of change, by a fragmentation of knowledge and by a growing awareness of the interdependency of problems and issues, there is a need to increase the opportunities for such modification — specifically in ways which can respond to these characteristics. Seeking to enhance the evaluation and revision of policies by means of a collective learning approach is a means of responding to this need.

### **Improving policy coherence**

The recognition that collective learning is a key response to the difficulties thrown up by the emerging policy environment has further implications for ways in which the policy process might be enhanced. Problem and objective-setting, the choice and implementation of means, and the evaluation and revision of policy must not focus solely on a given policy domain. Rather, steps should be taken to ensure that these different stages of the policy process in a given domain are aware of the impact of decisions taken on other policy areas. It is already the case that the more inclusive approach envisaged above — encompassing broader expert and lay input — will heighten the likelihood that trans-boundary or cross-cutting problems will be identified and incorporated into decision making. But this cannot be left to chance. Rather, new modes of governance need to address the question of policy coherence from the outset and build in procedures for ensuring that negative externalities and synergistic opportunities are identified and acted upon.

### **Collective learning and a new understanding of control and responsibility**

Collective learning is clearly the overall theme connecting the key features of new modes of governance discussed above and this has implications for the way in which public actors understand their precise role. In particular, the control aims of governmental action are shifted away from the top-down definition of ends and means and towards the establishment of and support for inclusive, participative procedures oriented towards collective learning.

There is no question of public actors no longer being concerned with the attainment of objectives. It is simply that these must come to be understood as collectively-generated and inherently mutable goals which are expressions of a con-

textualised rather than of a general will which in any case is increasingly understood to be more symbolic than real. Nor is there any diminution or dilution of responsibility as regards public actors. As guardians of a policy process understood as being enhanced by opportunities for collective learning, the location and the weight of responsibility are as clear and as onerous as ever.

## **Bridging the gap between citizen and Europe: the key features and the White Paper on governance**

Can we then, on the basis of these first steps, move on to offer some more concrete indications for the Commission as it begins to prepare the White Paper on governance? In this section we follow the same steps, identifying some examples of specific problems that it appears the Commission will have to address and attempting to suggest some solutions in terms of the key features. We should emphasise that this is not intended as an exhaustive list; the examples are purely illustrative and intended as a contribution to the general debate on governance stimulated by the announcement of the White Paper.

### **Improving the opportunities for and quality of public debate on European issues**

The need to escape from the confines of expert and bureaucratic understandings of policy problems, objectives and solutions was identified as the first step on the road towards the development of new modes of governance, for reasons both of legitimacy and of effectiveness. Guaranteeing the participation of stakeholders was proposed as the second step, ensuring that **all** of those with an interest or a contribution — whether expert or lay — should be able to contribute to the policy process. This key second step, however, risks being of limited impact if no attempt is made to bridge the widening gap between expert and bureaucratic institutions on one hand and civil society on the other. In other words, the specialisation and sophisticated resources which characterise the former put them at a significant advantage over lay stakeholders with the consequent risk that any guarantees of participation become merely formal. While no area of politics is immune from this problem, it is clearly one which particularly afflicts the European level. If the traditional structures of representation which are supposed to ensure contact between public actors and citizens are perceived to be inadequate — and indeed in crisis — at the national and even local levels, how much more is this the case at the European.

In seeking to address this problem, reform is hampered in so far as there is a continuing tendency to speak of a 'democratic deficit' and thus to seek inspiration for reform in the nation State model of representative democracy. The problem, however, runs much deeper than this much-used phrase indicates and consequently requires a similarly more profound response. Rather than a democratic



deficit, it seems to us to be more accurate to speak of a more fundamental **deficit of mutual awareness** between civil society and public authorities and accordingly more appropriate to focus the reform process on options aimed at addressing this problem. As we noted above, there is at the most basic level an urgent need to improve the level of public awareness of the major themes of European policy and to provide opportunities for civil society to contribute to their development — and this is an area where new modes of governance can play a significant role.

The Dialogue on Europe exercise<sup>38</sup> designed to engage the public in the institutional reform process is an excellent example of such an approach and, quite apart from the knowledge and information it will generate for the process of reform, careful study of its implementation can yield valuable lessons for the White Paper on governance. Similar — and indeed more ambitious and ongoing — projects in the future would appear to be a key way of ensuring that the gap between public actor and civil society continues to narrow and that the problems of overly restrictive perspectives are minimised. Failure to adopt such a second-order approach means that there is a danger of the Dialogue on Europe becoming a notable one-off exercise in participative governance, merely a product of the fortuitous conjunction of the IGC and the publication of the strategic objectives.

Without pre-empting the outcome of any such study, we might at this point try to identify the sort of issues that the Commission should consider in the context of the White Paper on governance and the sort of mechanisms it might propose. It would seem, first of all, that it is necessary to address the question of how European issues can be brought **systematically** into the public eye and their relevance made **tangible** to civil society. This will not be a simple task, nor will it be one that is amenable to one-off, quick-fix solutions. Rather it is one that will require a long-term commitment and involve the institution in seeking to take full advantage of a range of opportunities to engage with civil society. There are at least two major considerations to be borne in mind in this regard. The first is that, at present, the public in any Member State are often confronted with news of 'Europe' only when EU policies are perceived by local politicians or media to conflict with national, often short-term, interests. The second consideration is that the European agenda, in so far as it is presented at all at Member State level, is frequently perceived to be complex and remote from everyday concerns or to be disproportionately concerned with essentially trivial problems. Consequently, the White paper on governance needs to address these issues and look for ways to overcome them.

As regards the first consideration, it may be fruitful to examine ways in which national debates on issues of common concern could be better aligned in terms of timing and of themes. This would involve making better use of the opportunities presented by the media and by information technology. Such an alignment would restrict the chances of important issues being reduced to short-term national concerns and allow the European dimension to emerge with greater clarity. The em-

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<sup>38</sup> 'Dialogue on Europe: the challenges of institutional reform' Memorandum to the Commission from the President, Mr Barnier and Mrs Reding, in association with Mr Verheugen, adopted 15 February 2000.

phasis on new information technology evident in a range of Commission initiatives should be refocused so as to support such an aim rather than being a response only to efficiency concerns. It is important to appreciate, however, that this aim to improve the visibility and understanding of the European dimension at the Member State level is not simply about improving the quality and targeting of information flowing from public actor to civil society. If legitimacy and effectiveness are to be enhanced there has to be both an effort to ensure the genuine relevance of European policy to the concerns of civil society at every level and a willingness to engage in dialogue, in establishing the basic channels of communication that will allow for the collective learning that lies at the heart of new modes of governance. These observations bring us back to the second consideration mentioned above.

As a step towards democratising the relevance of the European agenda, it would be helpful to concentrate on establishing clear and explicit links between it and important events on the global stage such as WTO meetings and climate conferences. Such an approach would have the advantage of demonstrating the relevance of EU policy to such questions as climate change and globalisation which are among the highest priorities for European civil society. It would also possess the advantage of emphasising the importance of the EU as a global player, again strengthening its position as against narrower interests. Apart from the link with new modes of governance, this would also be a key means of furthering progress as regards the second strategic objective. Among existing developments which could be drawn upon in this regard are recent efforts to achieve 'structured dialogues' — for example in relation to social, environmental and trade policy<sup>39</sup>.

But combating perceptions of complexity and remoteness is not just about making explicit the links between the European agenda and the global level, it is equally importantly about connecting that agenda with national, regional and local levels in ways which allow citizens to feel that they are engaged in the policy process. This perhaps presents the greatest challenge to bodies such as the Commission because it involves the possibility of coming into conflict with the sensitivities of political and public actors at those levels. Whatever the means by which civil society is engaged, therefore, they must seek to achieve an articulation with all levels of public actor and utilise the resources they offer. Among the initiatives that may assist in commencing this process of engagement between the different levels might also be the establishment of more regular meetings on general policy issues such as the annual conference proposed by the Parliament<sup>40</sup>. In order to ensure a collective learning orientation, the organisation of such meetings should be characterised by openness and participation.

Progress in this direction can also be achieved by building upon the emerging trend at national, European and international levels to make use of more innovative means and channels of representation. A key point to note, however, is that

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<sup>39</sup> See the examples cited in the recent draft discussion paper produced by an interdepartmental working group of the Commission, 'The Commission and non-governmental organisations: building a stronger partnership', Brussels, 13 March 2000.

<sup>40</sup> Resolution of the European Parliament (A4-0338/96)

this trend is often the result of crises which have served to highlight the shortcomings both of existing policy processes and of emergency response mechanisms — there has been widespread dissatisfaction with the degree of secrecy and with the unwillingness to listen to public concerns which have characterised these processes<sup>41</sup>. In such circumstances, therefore, public actors such as the Commission should be more ready to promote the use of ad hoc representative or consultative mechanisms on specific issues of concern such as citizens' conferences, deliberative opinion polls, citizens' juries, public hearings, focus groups and forums. It is more important, however, to realise that crisis situations are very frequently the result of a lack of appropriate information that other stakeholders could have readily provided, an overly narrow focus on the part of the policy process, an unwillingness on the part of experts to look beyond their immediate concerns or to admit other viewpoints, and so on.

It is also possible to improve the quality of information available to the ongoing policy process by enhancing monitoring and early warning resources throughout Europe. Without such capacities, there is a danger that the European agenda will more often be reactive than proactive, with all that such a situation implies for efficiency as well as for any other measure of the success or failure of policy. The Parliament or the Commission could be envisaged as playing a part in the fulfilment of such a role, where they would aim in particular to enhance two aspects of the development of policy. First of all, in seeking to improve the quality and quantity of data available, and as a means of providing a better perspective for current choices, these institutions should focus upon a long-term vision for policy to act as a counterweight especially to politically and economically-driven short-term goals. Secondly, they should seek to reframe problems, issues and questions in ways which transcend the boundaries of the currently segmented policy process, with a view to revealing their frequently cross-cutting nature. In each case, the amount of resources required to carry out such a role meaningfully would be beyond what is available to either institution. It would be a case, therefore, of their seeking to animate networks of actors at Member State and perhaps lower levels as a means of increasing the level of resources available, while simultaneously ensuring broad and deep coverage for these monitoring and early warning capacities throughout the EU.

### **Improving the transparency and openness of European policy making**

As regards the question of guaranteeing the participation of especially lay stakeholders, there might be a temptation to suppose that this is a relatively simple matter of establishing some basic rights of audience. In order to be meaningful,

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<sup>41</sup> Perhaps the key example is the case of the Brent Spar which has been acknowledged to be a turning point in government and industry thinking in the involvement of civil society in such issues. See the House of Lords Select Committee on Science and Technology, Third Report April 2000 and Rice, T. & Owen, P. (1999) *Decommissioning the Brent Spar* E & FN Spon.

however, and bearing in mind always the overarching concern with collective learning, the guarantees must be more far-reaching. First and foremost, we are concerned here with improving the transparency and openness of the policy process. For as long as these issues are not properly addressed, civil society will continue to feel disengaged — indeed disenfranchised — from European action. In considering new modes of governance therefore, there would appear to be a need first of all for the EU institutions to consider a **general policy of transparency**, with more systematic use of a range of media, especially information technology, to ensure that precise and straightforward details about the European policy process are easily available to civil society.

Among further steps to be considered in this regard could be the adoption by the EU institutions of a **general policy of inclusion** which would guarantee the systematic involvement of representatives of all affected interests at all stages of the policy process from the framing of problems to the evaluation and revision of policies. This would be a significant move and one that would not be without considerable difficulty, but the onus should be upon those opposing such a step to make their case rather than vice versa — and it ought by now to be clear that considerations only of efficiency should not be regarded as a sufficient reason to block a policy of inclusion. To repeat, enhancing the capacity to act is no indication of an enhanced quality of action.

Beyond these initial steps, and in order to seek for ways to support them, it would be instructive for the White Paper on governance to include consideration of relevant experience in the United States — a jurisdiction with a relatively long history of administrative procedures which appear both relevant to our immediate concerns and generally more developed than their European counterparts. To be clear, it would not be a matter of slavishly following US administrative law in every detail but rather of seeking to draw appropriate lessons from both positive and negative experiences in that jurisdiction.

The precise lessons to be drawn would, of course, be a matter for those drafting the White Paper and for the process of consultation it initiates. Significant among them, however, might be the value of formalising certain basic rights which could underpin the broader developments in the policy process entailed by the promotion of new forms of governance. Such basic rights might include those of information, consultation and expression. These would be linked to corresponding obligations on the part of public actors, such as the requirement to give reasons for decisions (explaining the grounds on which they have been reached, explaining why any representations have been disregarded, etc.). While these rights already exist to a greater or lesser extent in many Member States, and indeed at the European level, the impact of their formalisation in a new European Charter of Political Rights should not be underestimated. Again, it would be possible to point to an existing development in order to suggest that progress is already being made in this regard. The report of the expert group on fundamental rights<sup>42</sup> is a sign of the EU's

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<sup>42</sup> 'Affirming fundamental rights in the European Union: Time to Act' Brussels, February 1999.

commitment to protecting especially the rights contained in the European Convention on Human Rights. It should be clear, however, that we have in mind a broader set of rights than those immediately mentioned by the Expert Group — albeit that this would by no means be beyond what the ultimately envisage as emerging insofar as they see the initial specification of rights only as an intermediary act paving the way for further completion. In particular, '(t)he guarantee of rights must be seen as open process, based on dialogue within civil society and responding to new challenges.'<sup>43</sup> In this regard, the Aarhus Convention<sup>44</sup> provides useful guidance on how rights relating to access to information, involvement in decision making, and so on, could be added so as to enhance the ECHR list in ways which would support a collective learning orientation for the policy process. That such an enhanced charter would by no means be alien to the EU is evident from the fact that, relating as it does to environmental issues, the EU institutions will be subject to the correlative obligations when the Aarhus Convention comes into force, probably in 2001.

In addition to such a charter, the passing of a framework act codifying common principles for regulatory authorities at European and national levels, as discussed by Dehousse in this volume, would constitute the concrete implementation of these rights and obligations as regards public actors. The uniformity offered by this approach would assist transparency insofar as it would provide fixed reference points for the public to assess the decisions of authorities responsible for formulating and implementing European policy.

A further lesson that might be drawn from such an examination of US experience might be the utility of adopting a form of negotiated rulemaking<sup>45</sup>. Again, there are certainly indications that the experience is not all positive but the opportunity would be there to examine the possibility of promoting the positive aspects while seeking to minimise the negative. And, of course, while the United States presents a particularly rich and obvious source for such examples, this is by no means to say that there are none comparable within the EU — at both the European and at Member State levels. For example, in the social domain, a number of directives have emerged from what is essentially a process of negotiation among the social partners. While this, therefore, represents a step towards the kind of approach envisaged by new modes of governance, it needs to be recognised that questions as to the representativeness of such actors remain, as well as questions over sensitivity to contexts. A further example, which is frequently cited as indicative of the successful involvement of a fuller range of stakeholders in the development of policy, is that of the process which led to the auto-oil directives<sup>46</sup>. It should also be mentioned in this respect that the concept of co-regulation has recently been advanced as a means of ensuring both that the general public interest is

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<sup>43</sup> *Ibid.* p4.

<sup>44</sup> 'The convention on access to information, public participation in decision-making and access to justice in environmental matters' adopted at the fourth Ministerial Conference 'Environment for Europe', Aarhus, Denmark, 25 June 1998.

<sup>45</sup> Negotiated Rule-making Act 1990 (5 USC sections 561–570) supplementing the rule-making provisions of the Federal Administrative Procedure Act 1946 (5 USC section 553).

<sup>46</sup> For a convenient review, see *European Dialogue*, May–June 1999, Issue 3.

maintained and that flexibility is permitted in the definition and implementation of policy goals<sup>47</sup>. There is clearly a resonance between these aims and the message of this paper, and we would propose that new modes of governance and hence the White Paper are seen as part of the exploration of these ideas that the proponents of co-regulation urge.

The physical implementation of any such proposals would no doubt require new mechanisms and there would be implications for the role and function of each of the European institutions. It is important to stress that although the White Paper is a Commission initiative, new modes of governance clearly impact upon all stage and levels of the policy process and will thus call for changes in the other institutions. In terms of the implementation of basic rights and obligations, therefore, it would be possible to envisage that the Economic and Social Committee and the Committee of the Regions, for example, could be given a role of regulating consultation processes, channelling communication between civil society and the institutions. A role as procedural regulator could be envisaged for the Committees of the European Parliament, while the European Court of Justice and the national administrative courts could be given the task of enforcing procedural rights and obligations.

Many of these proposals would require Treaty amendment, but that is not a reason to exclude them from the White Paper on governance. On the contrary, they are commensurate with the degree of ambition revealed by the strategic objectives as regards political integration and with the degree of renewal required if the European project is to cope with the emerging policy environment. It may no doubt be felt that such proposals which potentially involve in some cases a significant shift in the operation of the policy process, risk inflaming eurosceptic opinion in certain Member States. But the White Paper can in fact be an opportunity in this respect to build bridges. Much that is pejoratively dismissed as eurosceptic is, on closer analysis, criticism of precisely the sort of issues that new modes of governance seek to address. There is accordingly a chance for traditionally europhile and eurosceptic opinion to come together in a project which at first sight may appear divisive. After all, developments which aim to enhance transparency, accountability and access must surely be as attractive to those Member States who are sometimes characterised as reluctant Europeans as to those who are frequently identified as belonging to the core.

## **Redressing material and cognitive inequalities**

Of course, providing civil society with rights of participation and imposing corresponding obligations on public actors only goes so far towards ensuring that new modes of governance address the deficit of mutual awareness that exists be-

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<sup>47</sup> In this regard, see now the recent paper 'Meeting policy objectives through co-regulation at community level' Cab/Services ECOM34.

tween the two sides in the policy process. There remains the question of differential resources, both material and cognitive.

In seeking to deal with this question, it should not be assumed that less-advantaged stakeholders are already in existence as relatively easily identifiable entities, and organised to a greater or lesser extent. It may be the case that, as an issue arises, important stakeholders are not at all organised, and may not be at all well-informed about the potential impact them. Redressing material and cognitive imbalances may therefore, first and foremost, involve public actors in assisting the emergence of stakeholders as organised entities in order that they may make a meaningful contribution to the policy process.

The possibility of dealing with material inequalities by means analogous to legal aid was discussed in the foregoing section, and it is possible to develop this idea with some more concrete examples. There is at present, for example, a debate within the Commission about the possibility of financing the core activities of certain NGOs<sup>48</sup>. This would certainly go some way towards redressing imbalances in some cases, but leaves open the question of the legitimacy and accountability of such groups. In this regard, first steps are being taken by the Commission towards the publication of a list of NGOs, detailing such information as where the organisation derives its funding, who are its principal officers, and so on. The availability of such information would assist in decision-making about which organisations might properly receive funding. A further possible answer to this question is provided by Schmitter<sup>49</sup>. In particular, he proposes a voucher system in which citizens would be able to influence the allocation of public finances to those groups they would prefer to see taking an active part in the policy process. Again, the availability of information about the background and operations of NGOs would appear to be indispensable to such a system.

There are, then, possibilities for the redress of material inequalities but we must also consider ways in which cognitive differences could be addressed. In this regard, there a number of options which could be included for debate in the White Paper on governance. Here we will look specifically at the use of prospective studies and the development of pluralistic scientific expertise.

In order to further clarify the importance of developing the new modes of governance implied by the White Paper, it is worth emphasising here that such enhancements of the cognitive resources available to civil society would also have a direct impact on the achievement of the third and fourth strategic objectives. In other words, we should be clear that the White Paper is not just about promoting new modes of governance for their own sake but about developing the means required to deal effectively with the most pressing issues confronting Europe.

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<sup>48</sup> See note 39 above.

<sup>49</sup> Schmitter, P. C. (2000) *How to democratise the European Union ... and why bother? (Governance in Europe)* Rowman and Littlefield Publishers Inc.

## Opening up the process of expert and bureaucratic decision-making

We noted earlier that there is a growing recognition that the traditional reliance on technical fixes and expert solutions which preclude democratic debate serves frequently to mask problems which may then emerge in a catastrophic form. A series of events (such as global warming, the difficulties associated with nuclear waste management and a succession of food safety scares) has revealed the limits of this approach and emphasised the extent to which apparently technical problems are intimately related to vital political choices. Encouraging the development of pluralistic scientific expertise would help to improve awareness of scientific uncertainties and assist in the more open deliberation of collective choices. At issue in this regard is the need to develop a culture of risk in which the priorities are to address unequal risk distributions and to ensure that risk-related activities and research pay attention to the societal concerns and needs expressed in open political processes rather than to those imputed by experts and bureaucrats in confidential procedures behind closed doors<sup>50</sup>.

Pluralistic scientific expertise is, therefore, needed essentially for three reasons. First of all, it is required in order to make scientific decision-making more responsive. To be clear, it is not a question of holding scientific rationality hostage to irrational fears and unfounded concerns. Rather, it is a matter of **reconnecting** science and society as a means of coping with such fears and concerns. Secondly, such a pluralistic approach is needed in order to help transcend the boundaries of segmented scientific expertise. It is a truism that experts in different and even closely-related disciplines often find themselves unable to communicate with each other because of the ongoing specialisation and differentiation of science. There is no way that this process can be reversed as it is the inevitable attendant of progress. Indeed, insofar as such progress is socially desirable then it would be counter-productive to even attempt such a reversal. It does, however, have an undesirable side effect in that progress within the confines of one specialised discipline may be carried out in ignorance of unintended knock-on effects elsewhere. The aim, therefore, is to improve communication between disciplines. Whether between such disciplines or between science and society, the third reason that pluralistic scientific expertise is needed is precisely to encourage the systematic exposure of unspoken or even unexamined assumptions and uncertainties underlying both expert and lay opinion. The aim is thus to render political those choices which have traditionally been regarded as a matter purely for experts, irrespective of the extent of their ramifications and the scale of their error costs.

It is thus possible to make out a rather strong case for the development of pluralistic scientific expertise. The question then becomes one of how it might be implemented. This is certainly a matter for careful consideration, but whereas it might at one time have been extremely controversial to suggest any intrusion of

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<sup>50</sup> See note 25 above.



the lay into the scientific, experts are now increasingly aware of the extent to which they have in many cases lost the trust of the public and are much more willing to seek for solutions. Some examples can be given from recent developments in the United Kingdom and in France. First of all, hybrid mechanisms involving both expert and lay input could be so structured as to influence the dynamics of scientific knowledge development. In this regard, a range of options is reviewed in a recent report by the UK House of Lords Select Committee on Science and Technology, including consultation at the different levels of government, deliberative polling, standing consultative panels, focus groups, citizens' juries, consensus conferences, and so on<sup>51</sup>. Secondly, following especially from the work of Philippe Roqueplo, public procedures could be established which would permit expert testimony to be given in a court-style setting where each side would be able to question competing expert opinions, and the information produced could be fed into the policy process to enhance the quality and acceptability data available. The aim in each case is to improve communication between science and society by encouraging the exposure of assumptions mentioned above and to make political the choices that have been reserved to experts. As Roqueplo clarifies, the idea is not so much to reach the truth (which he describes as practically a mission impossible), but rather to open a public space which contains the truth<sup>52</sup>.

## Supporting collective learning

All that has been discussed so far will count for nothing, however, if new modes of governance are not structured in such a way as to encourage collective learning — the unifying theme of all the key features discussed in this paper. In circumstances where it is increasingly understood that predictability and detailed planning are problematic, ideas of centralised control are recognised as unrealistic and give way to a new focus on the need to coordinate collective action. This in turn places the emphasis on communication among different rationalities, perspectives and contexts — where communication is understood as a genuine mutual critique of positions involving a requirement to take account both of the impact of other perspectives on ones own position and vice versa.

In addition to the ideas discussed in the foregoing subsection where the focus of attention is communication between lay and expert rationality or between different expert disciplines, progress can also be made insofar as an exchange of experiences is encouraged between different contexts, as suggested by Calame. He observes that we are often essentially confronted by **generic** problems which affect us all, but in **specific** contexts which each imply individual aspects and particularities. The specificity of contexts can both obscure the structural components of problems and demand carefully adjusted responses. This tension means that on the one hand there can be a failure to fully comprehend the underlying nature of a given problem which is common to all contexts while on the other an understand-

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<sup>51</sup> See note 41 above.

<sup>52</sup> Philippe Roqueplo (1997) *Entre savoir et décision, l'expertise scientifique (Sciences en Question)* INRA Editions.

able desire to respond to those aspects of a problem which appear most pressing in a specific location. There are obvious efficiency and effectiveness implications of any failure to resolve this tension. What Calame proposes, therefore, is to approach problems first of all at the local level, attempting to describe the essential features of the given context without attempting to be exhaustive. As a means of seeking to distinguish between those characteristics which are purely contextual and those which are structural, the task is then to compare the information produced by different contexts. This examination allows the basic questions which make up the essential problem to be discerned and refined, while simultaneously retaining the information on the diverse ways in which those questions have been answered. The net result is thus a better picture of the common structural components of a given problem as well as a range of illustrations of how they might be addressed, without of course attempting to prescribe solutions. Common principles can accordingly be developed and a shift can be made away from the command and control notion of the obligation of means towards an obligation of outcomes — where this is understood as an obligation to respect these common principles, rather than as indicating a fixed substantive result.

Further progress towards promoting collective learning would be achieved by the formalisation of basic rights and obligations discussed above — especially such obligations as reason-giving. There is no question, however, that this vital aspect of new modes of governance poses one of the most significant challenges to the future development of the policy process. It should, therefore, have a prominent place in the White Paper with a view to raising its profile and seeking to stimulate debate on existing experience, best practice, innovative approaches, and so on.

In addition, as we will suggest below, it will be difficult to increase opportunities for collective learning unless and until such an approach is systematically adopted by public actors as between different policy areas. It is accordingly the case that a key role in developing and promoting a collective learning approach will be played by the Commission itself as it seeks to orient itself as a learning organisation.

## **Developing collective evaluation and revision of policies**

If prospective studies and pluralistic scientific expertise can enhance the information deployed in the development of policy, independent evaluation can ensure that when the impact and effectiveness of that policy comes to be examined, the criteria to be tested are meaningful to affected actors. It can also assist in achieving greater transparency in the policy process as a whole and equally make it less likely that evaluation results are left to gather dust but rather are fed back into the process to inform the revision of policy. In this regard the proposals made by the Parliament for an independent office to carry out evaluation should be closely examined in the context of the White Paper on governance<sup>53</sup>. To be clear, such an

<sup>53</sup> European Parliament (1997) *La participation des citoyens et des acteurs sociaux au système institutionnel de l'Union européenne* Exposé des motifs et Résolution A4/0338/96

office would have the role of encouraging, supporting and coordinating evaluation throughout the EU, rather than attempting the impossible task of carrying it out centrally, and would also be involved in overseeing methodological coherence.

There are, of course, already examples within the Commission of developments which seek to improve information provision and to achieve pluralist approaches to evaluation. In addition, these practices have been progressively enhanced by methods such as Green Papers, new modes of involving socio-economic actors in the formulation of research objectives, and so on. But these remain ad hoc and often one-off exercises entered into at the discretion of the Commission. A more systematic approach can assist not only in enhancing the evaluation and revision of policies, but also in developing the collective memory adequate for the emerging policy environment. In this regard, the Commission might well be able to draw lessons from successful organisations of longer standing.

What is required, in sum, is a more developed consideration of the ways in which Europe can be brought closer to civil society by providing opportunities for ongoing active and meaningful engagement throughout the policy process on a more systematic basis. Such an approach, implying a more deliberative orientation, can allow legitimacy and accountability to be achieved on a continuing basis. At the very least, the systematic development of these tools would allow best practice to be diffused throughout the EU. The White Paper on administrative reform in discussing the strategic planning and programming function emphasises the importance of the proper use of ex ante and ex post evaluation<sup>54</sup> but there is no mention of the concerns raised here about the quality, source and relevance of that information. These should, therefore, be among the key issues to be considered in the context of the White Paper on governance.

## Achieving policy coherence

The segmented structure of EU policy making structures contributes significantly to a situation where policy coherence is more difficult to achieve and where the probability of policy conflict is increased. Synergistic opportunities can go unnoticed until it is no longer efficient to take them up, while negative externalities can remain undetected until their effects are irreversible or extremely expensive to correct. In short, the potential effectiveness of European action can be seriously compromised.

Given the understanding developed in Section 3 of how policy coherence is achieved (as a matter of concern at all stages of the policy process from the formulation of choices through to the stages of evaluation and revision) and given the Commission's particular role in this process, this is an issue of fundamental importance for the White Paper. The proposals for the regrouping of responsibilities already made by Mr Prodi<sup>55</sup> indicate a recognition of this problem but it is a question

<sup>54</sup> White Paper on administrative reform pp. 5–6.

<sup>55</sup> The groups created are as follows: growth, competitiveness, employment and sustainable development; equal opportunities; reform; interinstitutional relations; and external relations.

whether these will allow sufficient flexibility to deal with, for example, opportunities and problems that emerge unexpectedly as between regrouped broader policy areas. Furthermore, elements of the process of administrative reform offer some potential in this regard, notably strategic planning and programming. As we indicated earlier, however, the emphasis appears to be very much upon financial and efficiency considerations, a narrowness of focus that could further exacerbate segmentation while appearing to ameliorate it. Addressing this issue will therefore involve a consideration of further alternatives.

A key example would be the systematic use of the cross evaluation approach where one policy is evaluated from the point of view of another. This entails the development of programmes, objectives and indicators in each policy area which demonstrate how other policy objectives are taken into account, synergistic opportunities are sought and acted upon, and early warning of negative externalities is ensured. In other words, collective learning is applied to the relationship between policy areas. In this regard, the developments regarding environmental policy (including the requirement in the Maastricht Treaty that other sectors give an account of their environmental orientation and specify which instruments and indicators they have developed to achieve it) should be closely examined with a view to applying this approach in a more systematic manner. The fact that the Cardiff summit already took steps to encourage these developments and that similar requirements now also apply to consumer protection and employment provide a clear indication of the importance of this type of reform. The White Paper on governance is an opportunity to examine how these developments are operating in practice and to seek to stimulate a collective learning understanding of their implementation.

Beyond this example drawn from existing EU level experience, it would also be instructive to consider initiatives at Member State level which seek to enhance policy coordination. The UK government's report on such coordination issues, for example, lists a series of actions which are aimed at improving 'the formulation and management of cross-cutting policies and services.'<sup>56</sup> These include: achieving appropriate leadership from senior political and administrative actors to create a culture where a cross-cutting approach is encouraged and rewarded; improving policy formulation and implementation by engaging other stakeholders; and developing appropriate skills in public services by improved human resources policy.

## **Enhanced vertical and horizontal articulation in the policy process**

We concluded Section 3 by suggesting that the collective learning orientation which unites new modes of governance has implications for the questions of control and responsibility as they apply to public actors. It is a matter now of seeking to offer a somewhat firmer indication of what such a modified understanding

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<sup>56</sup> 'Wiring it up: Whitehall's management of cross-cutting policies and services' Cabinet Office, Performance and Innovation Unit, January 2000, p. 5.

of these dimensions could mean as the Commission prepares the White Paper on governance. The ongoing debate about subsidiarity provides a useful context in this regard — albeit that a full discussion of the links between new forms of governance and subsidiarity is well beyond the scope of this paper.

Those who have championed the idea of subsidiarity over recent years might indeed claim that they are somewhat in advance in responding to the motivations behind this paper, and that the concept is already a means of coping with the emerging policy environment we have outlined above. Stressing as it does the relationship between the different levels of government, there are certainly superficial similarities between subsidiarity and the new forms of governance discussed here. The differences between them, nevertheless, seem to us to be more important. Most strikingly, whereas proponents of subsidiarity often seek to produce a catalogue of competencies or a clear division of labour (and thus an essentially Taylorist version of the concept), the approach adopted here emphasises the difficulties associated with any such hierarchical rigidity. It focuses instead on the means required to facilitate both vertical and horizontal articulations more flexibly and responsively. In other words, whatever benefits subsidiarity might offer as compared to an overly-centralised and top-down approach, its inherent rigidity risks exacerbating the problems associated with segmentation and the narrow focus of expert and bureaucratic rationalities highlighted here.

New modes of governance are, therefore, more in tune with the notion of **active** subsidiarity discussed by Calame in this volume. Whereas the traditional form effectively presupposes the ability to divide tasks on a once-and-for-all basis, and thus to plan in detail on the basis of readily identifiable problems and straightforwardly implemented programmes, active subsidiarity recognises the need for a more modest approach. As mentioned above, therefore, in place of an obligation with regard to **means**, the focus is on an obligation with regard to **outcomes**, where this is understood as an obligation to respect common principles rather than to reach substantive results. Accordingly, in place of rigid problem-setting, the aim is to establish mechanisms fundamental to the policy process which facilitate an ongoing exchange of experience and thus a flexible and responsive posture in the face of the complex and dynamic policy environment.

The aim of such an approach would be to seek for a collective agreement on the conditions for success of public action, and thus to achieve a policy process characterised both by the wide range of perspectives apparent in modern society and by ongoing opportunities for each of those perspectives to be enriched through interaction with the others. Such an **active**, as opposed to a Taylorist, approach to subsidiarity is better able to produce the flexibility necessary to accommodate the diversity of contexts and the ongoing modifications of framings that are defining features of the emerging policy environment. In this way, there is a chance to ensure that a dynamic equilibrium is maintained between standardisation on the one hand, and context-specific solutions on the other.

In this regard, despite the apparent preference for a 'catalogue of competencies' approach to subsidiarity that is evident at different levels of government with-

in Europe, there are already examples of an approach much closer to the active subsidiarity suggested by Calame and developed here especially in terms of collective learning. This is not to suggest that they are pure examples of this approach, but rather that they suggest a move in that direction which might usefully be continued. We can mention especially in this respect the structural funds. Their operation was explicitly intended to be a matter of the collective construction of policy through ongoing vertical and horizontal interactions between public actors and social partners. Further, recent developments in European social policy (such as the coordination of employment policy) indicate a shift away from an approach based on the imposition of top-down solutions and towards the development of policy in an organised process of the exchange of experience<sup>57</sup>. Again, then, the White Paper is an opportunity to examine past and present experience in terms of new modes of governance and to assess the extent to which promising ideas have been realised in practice.

## Conclusion

Reform is very much on the agenda of the EU as it faces up to the prospect of enlargement and as it comes to terms with the shortcomings of the past. A key message of this paper, however, is that the process of reform must not be restricted by the issues that happen to dominate for the time being. Coping with enlargement and responding to the problems that have beset the Commission are vitally important exercises. They do not, however, represent the totality of what will need to be done if the institutions — at all levels — concerned with the development and implementation of European policy are to be able to operate effectively and accountably, as well as efficiently, in the emerging policy environment.

Characterised by the fragmentation of knowledge, diversity, an ever increasing rate and scope of change and complex interdependencies, the environment confronting public actors and civil society and of which they form a part will require a broader vision which incorporates existing reform processes and articulates them with more far-reaching exercises. In this regard, the White Paper due in the spring of 2001, represents a perfect opportunity for the Commission to launch the debate required to begin the process of developing the new forms of governance that can be designed from the outset to cope more adequately with these complex demands.

Drawing on the discussion instituted by the Forward Studies Unit on the question of governance in recent years, this paper has attempted to outline the key features of the new modes of governance that might serve to complement the existing structures of the policy process in ways which can achieve such an improved accommodation. Linked by a common theme of seeking to increase opportunities

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<sup>57</sup> See, for example, 'Community policies in support of employment', Communication from the Commission, COM(2000) 78, 1 March 2000.

for the encouragement of collective learning, such new modes of governance can be characterised as being concerned with:

- overcoming the limited understandings of problems which appear to be at the root of many of the difficulties faced by public actors, masking as they do both negative externalities and synergistic opportunities between policies and contexts;
- guaranteeing and supporting the participation of stakeholders as a means of enhancing the setting of problems and objectives, and of developing and implementing solutions;
- improving the communication between different expert disciplines, not least with the aim of enhancing coherence among policies; and
- developing the process of evaluating and revising policies to reflect this emphasis on overcoming narrow expert approaches by enhancing exchange among all stakeholders whether expert or lay.

In short, new forms of governance are about seeking for ways to improve the articulation between the different levels of government (vertically) and between different policies and contexts (horizontally). In this regard, they are characterised by flexibility rather than rigidity since they focus on the need to facilitate the exchange of experiences among all of the different actors who have an interest in the policy process. Existing methods of developing and implementing European policy have served the Community and the Union well, but they need to be complemented and enhanced if the momentum they have built up is to be continued in a setting where traditional politics and government struggle to accommodate growing complexity and diversity. The forthcoming White Paper is a key opportunity to move the debate forward in this direction.

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