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Reflections on the Draft Constitutional
Treaty's regime for legislative and
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A previous version of this paper was presented at the 2004 Maastricht Forum on "European Integration: Making the Constitution Work" which was held at EIPA on 19 November 2004

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Robert Schütze¹

European University Institute, Florence (I)

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1. robert.schuetze@iue.it

Table of Contents

	Pages
1. Introduction: Separation of Powers and the Legislative Function	5
2. Separation of Powers in the European Union: Legislative Procedural Variety	6
3. The Unitary and Amorphous Nature of Community Legislation	7
4. From “Unity” to “Diversity”: Towards a Parliamentary Conception of European legislation?	9
5. Sharpening the Separation of Powers: Transforming the Constitutional Regime for Executive Law-Making	12
a) The <i>status quo</i> under the EC Treaty: Executive federalism and Comitology	12
b) The constitutional Regime under the DCT: Delegated and Implementing Acts	13
6. Conclusion: Sharpening the Separation of Powers through Legal Hierarchisation	17

1. Introduction: Separation of Powers and the Legislative Function

The soul-searching for a modern constitutional role for the separation of powers doctrine has led to a number of theoretical conclusions, the most important of which is the “relativity” thesis offered by H. Kelsen. Approaching constitutional law with the instruments of his pure theory of law, his re-evaluation of the three classic governmental functions has given rise to a “relativistic turn” in the understanding of the separation of powers doctrine: The separation of powers doctrine, so Kelsen argued, “presupposes that the three so-called powers can be determined as three distinct coordinated functions of the State, and that it is possible to define boundary lines separating each of these three functions from the others. But this presupposition is not borne out by the facts. (...) [T]here are not three but two basic functions of the State: creation and application (execution) of law, and these functions are not coordinated but sub- and supra-ordinated.”² The classic triadic organisation of public power is thus replaced by a functional dichotomy: law-creation and law-application.

Absent any “natural” distinctions between the legislative and the executive branch, the character of each normative act is, according to Kelsen, “relative” in so far as its nature must be determined in relation to the status quo of the legal order. The three classic branches of government – legislature, executive and judiciary – share in the law-making function since they all may create legal norms. The concept of executive power is therefore also “relative”, for each positive act below the constitution can be constructed as “executing” a higher norm in the legal order.³

Two competing conceptions of the notion of legislative power have emerged in the modern era. The choice among the two is difficult as each has its respective advantages and advocates. The *parliamentary* conception of legislation has been innately tied to our modern understanding of who should be in charge of the legislative function. Legislation is formally defined as every legal act adopted according to the *parliamentary legislative procedure*. Parliament’s legislative power is viewed as unlimited and supreme. This procedural conception of legislation has traditionally shaped British and French constitutional thought and recently started to strongly influence German constitutionalism.⁴

In materially defining legislation as legal rules with general application, the *functional* conception of legislation also appeals to our historical precepts. Indeed, the thought that a legislative act represents a *general and abstract legal norm* runs through legal history.⁵ The requirement to decide specific cases according to general rules has been developed as a defence to arbitrary government in absolutist States. The constitutional limit on the legislature to adopt only generally applicable norms had been cultivated by classic separation of powers accounts.

2. H. Kelsen, *General Theory of Law and State* (HUO, 1945), 269 (emphasis added)

3. “Insofar as the so-called executive and judicial function consists in the creation of individual norms on the basis of general norms and in the final execution of the individual norms, the legislative power, on the one hand, and the executive and judicial power, on the other, represent only different stages of the process by which the national legal order – according to its own provisions – is created and applied.” (Cf. H. Kelsen, *ibid* at 256) The constitution is “executed” by parliamentary norms, parliamentary norms are executed by executive norms, executive norms are “executed” by judicial norms. The constitutional order is thus viewed as a hierarchically layered pyramid (*Lehre vom Stufenbau der Rechtsordnung*) at whose apex Kelsen deposits the mysterious “basic norm” (*Grundnorm*).

4. Consider the classic definition of the doctrine of British parliamentary supremacy by A.V Dicey, *Introduction to the Study of the Law of the Constitution*.

5. H. Schneider, *Gesetzgebung* (C.F. Müller, 1982), 19

2. Separation of Powers in the European Union: Legislative Procedural Variety

The European Union – born in 1958 with the genetic code of an international organization – could hardly be viewed to reproduce the *trias politica* of a nation state. Article 4 of the EEC Treaty modestly provided: “The tasks entrusted to the Community shall be carried out by the following institutions: an Assembly, a Council, a Commission, a Court of Justice. Each institution shall act within the limits of the powers conferred upon it by this Treaty.”⁶

When the European Community was established, its “regulatory” competences were not immediately conceived of as of a “legislative” quality.⁷ The nature of the Community in general, and its legal instruments in particular, defied parliamentary conceptions of legislation: The law-making function was until the SEA (almost) exclusively in the hands of the Council with the European Parliament playing, at most, a consultative function. From a (national) democratic perspective, it seemed that all decision-making powers of the European Community were “executive” in character. Only the subsequent ascendancy of the European Parliament to become co-legislator with the Council under the co-decision procedure – today applicable to the majority of legal competences of the European Union – has cleared the way for the gradual emergence of a parliamentary definition of legislation in the Union legal order.

As an organic understanding of the separation of powers doctrine had been marred with difficulties, a functional conception of the separation of powers doctrine emerged early on. The three EC governmental branches have therefore been defined in the following terms: “[T]he *legislative* power relates to the function of enacting rules with a general and abstractly defined scope of application (this is what a Continental European lawyer would call the “*lois matérielles*”); the *executive* power relates to the function of applying the said legislative rules to individual cases or specific categories of cases; finally, the *judicial* power relates to the function of settling litigation that arises on the occasion of the application of the legislative rules to individual cases or specific categories of cases[.]”⁸

The legislative procedural variety characterizing Community law-making equally brought a functional perspective to the concept of legislation.⁹ The plurality of legislative bodies and legislative procedures should not be viewed as a constitutional anomaly of Europe’s legal order: National constitutions also share out legislative competences horizontally across a variety of public authorities. These non-parliamentary law-making bodies are however vested with *their* specific legal instrument. These “executive” legal instruments are typically positioned on a hierarchically inferior rank so as to guarantee parliamentary supremacy. A legal hierarchy – and the category of “rank” within it – thus structures a national legal system into a pyramid of layers, providing a mechanism for solving legislative conflicts. The theory of legal instruments – and the hierarchical relationships among them – is thus intrinsically connected with the separation of powers doctrine and parliamentary democracy.¹⁰

6. Article 4 (1) EEC

7. Early commentators therefore speak of the „Beschlussrecht“ of the Community (cf. H. Wagner, Grundbegriffe des Beschlusßrechts der EG (Köln, 1965)).

8. K. Lenaerts, Some Reflections on the Separation of Powers in the European Community, [1991] 28 CML Rev 11-35 at 13

9. Today, six legislative procedures co-exist in the Community pillar (cf. P. Craig & G. de Búrca, EU Law (OUP, 2003) 139-150).

10. In a similar vein, we find the theory of instruments structuring the legal regime of judicial protection.

3. The Unitary and Amorphous Nature of Community Legislation

We should expect to discover analogous techniques of solving horizontal competence conflicts in the European Union's legal order. Surprisingly, we hardly find any traces of a legal hierarchy structuring the legislative function in the Community legal order. To the present day, the European Union's secondary law represents a relatively amorphous and un-layered entity. The "unity of secondary law" has been the result of a near total absence of hierarchical relationships in three respects.¹¹

First, no hierarchical order had been established among the *institutions* mentioned in Article 4 EEC: "Unfortunately, Article 4, even combined with the various provisions which grant specific powers to each institutions [sic], does not prevent confusion and calls, therefore, for a greater dose of hierarchy. Such a hierarchy could be introduced according to various criteria, e.g. the degree of direct legitimacy, according to the nature of the tasks (legislation or implementation) or according to the type of acts adopted (general acts or individual measures). In all cases, it would lead to a greater specialization and hence come closer to a traditional system of separation of powers."¹²

Second, there was no hierarchical differentiation depending on which "*legislative*" procedure had been used to adopt a Community act: An act passed under the consultation procedure would share the same legal rank as an act passed under the co-decision procedure. There was no *parallélisme des formes* as under French constitutional law, but a simple *lex posterior* rule. In national legal orders, by way of contrast, the establishment of a hierarchy according to the procedure of adoption was a common technique. "In order to render such a criterion operational in European law", in the prophetic words of Bieber and Salomé, "it would first be necessary to systematically separate procedure from substance in the Treaties. Subsequently, *one legislative procedure of general application* should be designated. This procedure would have priority over others, and acts adopted according to different procedures."¹³

Third, the neutrality of the Community's constitutional regime also resurfaces in relation to the typology of legal *instruments*: Article 249 EC did not classify its legal acts according to a constitutional scheme.¹⁴ Unlike national constitutions, those regulatory instruments are neither hierarchically ordered nor do they correlate with a specific regulatory organ of the Community. From an institutional perspective, therefore, the "grammar"¹⁵ of Community law is unstructured: Where the Treaty so provides, the Council of Ministers or the Commission can speak through regulations, directives or decisions. Nor does the EC Treaty envisage different decision-making procedures for the adoption of each regulatory instrument.

11. The following section will be limited to the internal law of the European Union and not discuss the hierarchical status of international agreements in the EU legal order.

12. R. Bieber & I. Salomé, *Hierarchy of Norms in European Law*, [1996] 33 CML Rev. 907-930 at 915

13. *Ibid.*, at 926

14. Article 249 reads: "1. In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. 2. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. 3. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. 4. A decision shall be binding in its entirety upon those to whom it is addressed. 5. Recommendations and opinions shall have no binding force."

15. The linguistic metaphor has been employed by J. Bast, *On the Grammar of EU Law: Legal Instruments*, NYU J. Monnet WP 9/2003 (<http://www.jeanmonnetprogram.org/papers/03/030901-05.pdf>)

The only exception to the amorphous unity and hierarchical “evenness” of Community secondary law has been the linear hierarchical relationship between a “basis act” and the tertiary law derived from it. In that specific context, the Community legal order recognizes a “relational” hierarchical relationship: Where the “implementing act” conflicts with its “basic act”, the latter will prevail: “The relationship between acts directly based on the Treaties and those based on an act of derived law would then be just the same as between primary and secondary law.”¹⁶ While some academic voices favour a general legality review of tertiary law against the entire body of secondary law,¹⁷ the dominant view restricts the hierarchical subordination of the implementing act to its basic act. Not recognizing a subordinate layer of implementing acts, Community law has so far resisted the general hierarchical bifurcation of Community legislation into “secondary” and “tertiary” law.¹⁸

16. J. Bast, *ibid.*, at 24

17. K. Lenaerts & A. Verhoeven have claimed that the implementing act must also be consistent with “other rules of a legislative nature” (cf. K. Lenaerts & A. Verhoeven, *Towards a legal framework for executive rule-making in the EU? The Contribution of the Comitology Decision*, [2000] 37 CML Rev 645-686 at 652 (citing Case 22/88, *Vreugdenhil and Others*, [1989] ECR 2049))

18. The relationship between a “basic act” and its “implementing legislation” has been analogized to the Spanish *decreto legislativo*. This national instrument represents a form of governmental legislation that enjoys the same rank as a parliamentary statute, but cannot derogate from the delegating statute itself: A *decreto legislativo* that derogates from its basic act is *ultra vires*. According to J. Bast, this relational hierarchy “is exactly the legal relationship between a habilitated act of Community law and all other acts directly or indirectly derived from the Treaties. Following the model of *decreto legislativo*, there are partial hierarchies within secondary law insofar as a habilitated act cannot derogate from its specific basic act unless the latter explicitly permits this. The hierarchy so established is only *relative* and does not imply a generalized hierarchy with respect to other acts of derived law.” (See, J. Bast, *supra* n.15 at 25.)

4. From “Unity” to “Diversity”: Towards a parliamentary Conception of European legislation?

The amorphous equality governing the European Union’s secondary law has been the subject of repeated criticism for some time. The European Parliament has continuously demanded the recognition of a superior layer of Community parliamentary legislation above “normal” secondary law.¹⁹ Declaration n°16 annexed to the TEU even gave a mandate to the 1996 IGC to “examine to what extent it might be possible to review the classification of Community acts with a view to establishing an appropriate hierarchy between the different categories of acts”.²⁰ Various academic suggestions also championed the introduction of a “European law”.²¹

These reform efforts have now been addressed by the Convention’s Working Group IX on Simplification.²² In its final report, a clearer hierarchy of legislation was identified as “the consequence of a better separation of powers”.²³ The Community’s instruments should be classified in three normative categories:

1. Legislative acts: acts adopted on the basis of the Treaty and containing essential elements in a given field.
2. "Delegated" acts: these acts would flesh out the detail or amend certain elements of a legislative act, under some form of authorisation defined by the legislator. This would be in cases where the legislator felt that essential elements in an area, as defined by it, necessitated legislative development which could be delegated, although such delegation would be subject to limits and to a control mechanism to be determined by the legislator itself in the legislative act.
3. Implementing acts: acts implementing legislative acts, "delegated" acts or acts provided for in the Treaty itself. With delegated acts, it would be for the legislator to determine whether and to what extent it was necessary to adopt at Union level acts implementing legislative acts and/or delegated acts, and, where appropriate, the committee procedure mechanism (Article 202 TEC) which should accompany the adoption of such acts. It is the legislative act – and therefore the legislator – which would determine on a case-by-case basis whether and to what extent it was necessary to have recourse to "delegated" acts and/or to implementing acts and what their scope would be.²⁴

The definition given to legislative acts by the Working Group seems to have followed a “relativistic” and material conception of legislation: Legislative acts are those essential policy choices made directly

19. The 1991 Resolution of the European Parliament on the nature of Community Acts (O.J. 1991, C 129/136-139) proposed to classify Community acts into legislative (“laws” and “framework laws”) and regulatory acts. A 1995 European Parliament Resolution demanded that the volume of legislation “should be limited by introducing a certain hierarchy of acts. This could be achieved by introducing a new category of implementing acts, responsibility for which would lie with the Commission where so empowered by the legislative authority”. (O.J. 1995, C 151/51, para.32 (i))

20. Declaration n. 16 annexed to the TEU (cf. B. Rudden & D. Wyatt, *Basic Community Laws*, 5th Edition (Clarendon Press, 1994), 210)

21. For a recent plea in favour of introducing the category of “European law”, see: A. von Bogdandy, J. Bast & F. Arndt, *Handlungsformen im Unionsrecht – Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel*, [2002] 62 *ZaöRV* 77-161 at 154. However, it still “cannot be said that the question of the hierarchy of norms can boast a tradition of research in Community academic writing” (cf. A. Tizzano, *The Instruments of Community law and the Hierarchy of Norms*, in J.A. Winter, D.M. Curtin, A.E. Kellermann, B. de Witte (eds.), *Reforming the Treaty on European Union – The legal Debate* (Kluwer, 1996) at 208).

22. Final Report of Working Group IX (“Simplification”), CONV 424/02.

23. *Ibid.*, at 2.

24. *Ibid.*, at 10.

under the Constitution. Yet, at the same time, a procedural angle is brought to the distinction between legislative and executive power: The “co-decision” procedure was recommended as “the general rule for the adoption of legislative acts”.²⁵ Regarding delegated acts, as well as, *mutatis mutandis*, implementing acts, the Working Group recommended the adoption “by the Commission as a general rule and in particular and duly justified cases by the Council acting by a qualified majority”.²⁶

The reform proposals have been taken up by the Convention. The legal instruments of the Union were (re-)defined in Article I-33 of the Draft Constitutional Treaty (DCT) in the following manner:

A European law shall be a *legislative act* of general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a *legislative act* binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A European regulation shall be a *non-legislative act* of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A European decision shall be a *non-legislative act*, binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.²⁷

Article I-33 DCT clearly represents an attempt to redesign the typology of Union instruments alongside the horizontal separation of power axis by means of a clearer division between legislative and executive law-making. Unfortunately, the text omits a definition of what constitutes “legislative power”. Article I-33 (1) DCT accomplishes the definitional fiat of characterizing European laws and European framework laws as “legislative acts”, but the mere linguistic speech-act will not much clarify the constitutional conception of legislation *underlying* the DCT.

Different pointers as to the Draft Constitution’s philosophical underpinnings can however be identified. Article I-34 DCT adopts a procedural definition of the concept of legislation: European laws and European framework laws shall be adopted under the co-decision procedure which constitutes the “*ordinary* legislative procedure”.²⁸ Community legislation is thus defined as the joint product of the European Parliament and the Council and therefore approximates a parliamentary conception of legislative power. Unfortunately, the article’s second paragraph envisages the qualification of Community acts as European legislation even where adopted under “special legislative procedures”.²⁹ The lack of courage to exclusively link the concept of “European (framework) law” to the co-decision procedure inflates to some extent the parliamentary conception of legislation developed under national constitutional laws.³⁰

The procedural perspective underpinning the distinction between legislative and executive measures is reinforced when comparing the typological definition given to European regulations with that of European laws. European regulations share the instrumental matrix of European (framework) laws and will supposedly only differ in respect of their lower hierarchical place within the system of legal sources.³¹

25. Ibid.

26. Ibid., at 12.

27. Article I-33 (1) DCT (emphasis added).

28. Article I-34 (1) DCT (emphasis added).

29. Paragraph 2 reads: “In the specific cases provided for in the Constitution, European laws and framework laws shall be adopted by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, in accordance with special legislative procedures.” Nor seems a Commission proposal indispensable for the qualification of a Community measure as European legislation as the third paragraph of Article I-34 DCT shows: “In the specific cases provided for in the Constitution, European laws and framework laws may be adopted at the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.”

30. Here, the DCT did not completely follow the recommendation of the Simplification Working Group. The latter had pointed out that: “[t]he democratic legitimacy of the Union is founded on its States and peoples, and consequently an act of a legislative nature must always come from the bodies which represent those States and peoples, namely the Council and the Parliament. *Procedures must therefore be reviewed to ensure that they respect this simple principle: acts which have the same nature and the same legal effect must be produced by the same democratic procedure.*” (Cf. Final Report, supra n.22 at 2 (emphasis added)).

But is the dichotomy between legislative and executive acts solely controlled by a procedural criterion? The answer is in the negative. There indeed exists a subtle functional criterion that comes into operation under the DCT. Considering that European (framework) laws will be confined to the instrumental matrix of old-style “regulations” and “directives”, individual “decisions” can *a priori* never be elevated to the highest legislative rank in the European Union’s legal order. The Draft Constitution therefore *indirectly* introduces a material limitation around its otherwise procedural definition of legislation: The Community legislature will be constitutionally prevented from dressing individual decisions into the form of a “European law” or “European statute”.³² Being confined to “material legislation”, the European Union’s legislature will therefore not enjoy the same degree of parliamentary “omnipotence” that traditionally characterized British constitutionalism.

An even stronger material criterion in separating legislative from executive acts has been proposed by K. Lenaerts and M. Desomer: “The distinction between legislative and executive acts should, in our opinion, be based not on the identity of the author of the act, but on the type of procedure for adopting the act *and on the content of the act*. (...) [The] second, content-based, criterion aims at guaranteeing that the legislative procedure is reserved for the adoption of those acts implying *basic policy choices*. (...) Following these parameters, a legislative act is any act, directly based on a Treaty provision, adopted in compliance with the co-decision procedure [Article 251 TEC] and expressing a *basic policy choice*.”³³

The incorporation of such an “essential choice” criterion into the definition of legislation is, from a theoretical perspective, highly contestable and furthermore finds no support in the German *Wesentlichkeitstheorie*. The latter has been conceived as a negative limit to the capacity of parliament to delegate essential decision-making powers to the executive.³⁴ Admittedly, a second dimension has been added to the *Wesentlichkeitstheorie* by an influential constitutional school arguing that all non-essential legislative powers should belong to the sphere of powers *shared* by Parliament and the executive.³⁵ This positive aspect of the *Wesentlichkeitstheorie* does, however, not set a constitutional limit to the legal powers of the German legislator! It only provides an argument affirming the autonomous law-making competences of the executive. On a more general theoretical level, there simply are no convincing constitutional reasons to limit the competence of the national or Union legislator to adopt *only* essential policy choices – “essential” according to whose constitutional taste? From the point of view of maximising democratic legitimacy, it is, on the contrary, preferable to allow the Community legislator itself to define what it believes to be essential or not.

31. On this point see especially P. Craig, who argues that “[t]he depiction of European regulations in Article I-32(1) [in the final version of the DCT: Article I-33(1)] as being non-legislative acts is misleading. These acts are only non-legislative in a formal sense that they are not primary laws: they are not European laws or European framework laws. This does not mean that they are not legislative in nature. They clearly are, and this conclusion is reinforced by the fact that they are said to be of general application, that they can supplement or amend certain elements of primary law, and because there is a separate provision dealing with administrative decisions. The reality is therefore that a European regulation will often be what would be regarded in domestic legal systems as secondary or delegated *legislation*.” (Craig, *The Hierarchy of Norms*, at 8 (emphasis added)).

32. The Convention thus went against the suggestions made by J.-C. Piris: “The “classic” instruments (regulation, directive, decision) would probably have to be retained so that they could continue to be used for regulatory [i.e. legislative] and executive as well as for implementing powers.” (Cf. J.-C. Piris, *Simplification of legislative procedures and instruments*, Working Document 6 of the Simplification Working Group.) The DCT also disregards the identical proposal made by A. von Bogdandy, J. Bast and F. Arndt, *supra* n. 21, at 154.

33. K. Lenaerts and M. Desomer, *Simplification of the Union’s Instruments*, in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe* (<http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf>) at 110-1 (emphasis added).

34. The constitutional role of the “fundamentality theory” in limiting the ability of the parliamentary legislator to delegate powers to the executive is now enshrined in Article I-36 (1) DCT: “European laws and framework laws may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain *non-essential elements* of the law or framework law. (...) *The essential elements of an area shall be reserved for the European law or framework law and accordingly shall not be the subject of a delegation of power.*” (emphasis added).

5. Sharpening the Separation of Powers: Transforming the Constitutional Regime for Executive Law-Making

What, after all, is “executive power” in the modern era of administrative law, where “there is no more characteristic administrative activity than *legislation*”?³⁶ In most modern constitutions, the executive branch often assumes a residual character: Anything that is neither *legislative* nor *judicial* is summed up under the umbrella concept of executive power.

In *whom* does the EC Treaty vest executive power, and executive power in relation to *what*? The uncertainties of the *Kelsian* relativism have particularly haunted the European Union’s legal order. Attempts to find objective criteria that distinguish between legislation and implementation have only been partly successful. The following passage illustrates the “relativity” of the concept of executive power in the Community legal order: “Although the Treaties use the terms “legislation” and “implementation”, they do not define them. The question whether a Community act is a legislative or an implementing measure depends in the first place on the legal basis for the act in question: an act based on a Treaty article is in principle legislative in nature, whereas an act based on a legislative act (or an earlier implementing measure) is in the nature of implementation. (...) Yet the legal basis test is not conclusive: some acts of the Council (or of other institutions, such as the European central bank), although based on a Treaty article, are not general and abstract in nature, *and hence are hard to regard as legislation.*”³⁷

In this section of this article, we will first look at the constitutional *status quo* of executive rule-making under the EC Treaty (a), and then move on to a (probabilistic) analysis of the constitutional regime designed for “delegated acts” and “implementing acts” under the DCT (b).

a) The status quo under the EC Treaty: Executive federalism and Comitology

Inspired by the German doctrine of executive federalism and a literal reading of Article 10 EC,³⁸ the argument has been made that the execution of Community law falls into the competences of the Member States. The enumeration principle, on which the Community legal order is built, would not only apply to the distribution of legislative power, but also structure the sharing out of the *executive* function: Unless the EC Treaty specifically allocates executive power to a Community organ, the execution of Community legislation would fall within the *exclusive* competences of the Member States.

35. Advocates of that theory have argued, “daß die Exekutive aus einer in ihrer Funktion begründeten generellen Ermächtigung befugt sei, nicht-wesentliche, wenngleich außenwirksame rechtliche Normen zu erlassen. Für eine solche Auffassung gibt es nicht nur im Schrifttum, sondern auch in der Rechtsprechung sowohl des Bundesverfassungsgerichts wie des Bundesverwaltungsgerichts deutliche Belege. Folgt man ihr, so existiert neben dem abgeleiteten ein originäres, funktionsimmanentes, selbständiges Verordnungsrecht der Exekutive, welches freilich auf nicht-wesentliche Regelungen beschränkt und dem Vorrang des Gesetzes unterworfen bleibt sowie den Primat des gesetzgebenden Parlaments unberührt läßt.“ (F. Ossenbühl, *Rechtverordnung*, in J. Isensee & P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band III: *Das Handeln des Staates*, (C.F. Müller, 1996), 394).

36. H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 8th Edition (OUP, 2000), 839 (emphasis added).

37. K. Lenaerts & A. Verhoeven, *supra* n. 17 at 650-1 (emphasis added).

38. Article 10 EC states: “1. Member States shall take appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions or the Community. They shall facilitate the achievement of the Community’s task. 2. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

But why should the Community legislature not be entitled to delegate *its* powers to another Community institution? The reference to the executive *domaine réservé* of the national level appears to evade this important constitutional question rather than solve it. The better view therefore leaves it to the Community itself to organize Community law-making. Ever since the SEA inserted the third indent to Article 202 EC, the existence of *Community* implementing powers is beyond serious doubt. According to the constitutional regime set out in that provision, the Council may “confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself.”³⁹

Article 202 EC does not itself specify the conditions where, when or how the Council may delegate its legislative powers to the Commission. The specifics of the EC’s constitutional regime for executive rule-making have therefore been left to the Community legislator and the European Court of Justice. Suffice to say that the Council has made extensive use of its power to “impose certain requirements” setting up a labyrinthine procedural system known as “comitology”.⁴⁰

Two inter-institutional tensions soon emerged under the Comitology regime: First, ever since the emergence of a delegation doctrine, the Commission has claimed to be exclusively responsible for the implementation of these delegated legislative powers. Casting itself as the Community’s executive branch, the management and regulatory committee procedures are regarded as encroaching upon its *inherent* executive powers. Particularly, in those “special cases”, where the Council could reserve to itself the executive function, “the separation-of-power principle is at its lowest ebb, since one branch of the legislature acts as executive”⁴¹ Secondly, the Comitology procedures marginalized the European Parliament’s legislative power in those situations, where the EC Treaty provided for co-decision. The sidelining of the parliamentary co-legislator in formulating the mandate for delegated powers gravely distorted the inter-institutional balance in the European constitutional order.

b) The constitutional Regime under the DCT: Delegated and Implementing Acts

The Commission and the European Parliament have fought long and hard against what they perceived as distortions in the horizontal balance of power among the Union’s institutions. Insisting on a sharper separation of powers within the Community legal order, the Council’s legislative control over the executive function was recently attacked in the Commission’s White Paper on Good Governance.⁴² Here the Commission argued for a “return” to the Community method and a “re-focusing” on the core tasks of each institution.⁴³ To quote the Commission’s constitutional creed in more detail:

It must also be clearer who is responsible for policy execution. This constitutes the pre-condition for making the EU system more open and accountable to all European citizens. The main responsibility for executing policy and legislation by adopting implementing regulations or decisions is normally conferred on the Commission. The conditions under which the Commission adopts those executive measures should be reviewed. In the end, this should lead to a situation where

- legislation defines the conditions and limits within which the Commission carries out its executive role, and
- a simple legal mechanism allows Council and European Parliament as the legislature to monitor and control the actions of the Commission against the principles and political guidelines adopted in the legislation.

39. Article 202 EC, third indent.

40. The European Court confirmed the constitutionality of the Comitology regime as early as 1970 in *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Koster et Berodt & Co* (Case 25/1970), [1970] ECR 1161. The 1987 Comitology Decision introduced three procedures and it fell in the discretion of the Community legislator which procedure would govern the implementation regime. The present constitutional regime for Comitology was designed by Council Decision 99/468/EC (O.J. 1999, L 184/23), whose Article 2 introduces certain objective criteria for the choice of procedure.

41. K. Lenaerts, *Some Reflection on the Separation of Powers in the European Community*, supra n. 8 at 31.

42. EC Commission, *European Governance: A white Paper*. (Brussels, 25.7.2001), COM(2001) 428.

43. *Ibid.* at 20.

This change would make decision-making simpler, faster and easier to understand. It would improve accountability, helping Council and the European Parliament to make political judgements on how well the executive process is working.

If these orientations are followed the need to maintain existing committees, notably regulatory and management committees, will be put into question.

This institutional position resonates with the legal credo of the Simplification Working Group, which believed the key to clarifying the hierarchy of Community legislation to lie in “demarcating, as far as possible, matters falling within the legislative area and by adding a new category of legislation: *delegated acts*”.⁴⁴ The Group bemoaned the absence of a constitutional mechanism *besides Comitology* that would enable the Community legislator to delegate the technical aspects of legislation, while retaining control over such delegation.⁴⁵ The introduction of a new procedure would go hand in hand with the introduction of a “new type” of legal instrument: the “delegated regulation”. Typologically identical to European (framework) laws,⁴⁶ the legal instrument’s lower hierarchical position would reflect the subordination of executive law-making under parliamentary law-making. In the hope to replace the *ex ante* and input-centred safeguards under the current Comitology regime, the Working Group suggested a number of alternative control techniques, such as the “right to call-back”, “tacit approval” and “sunset clauses”.⁴⁷

Let us now look at the constitutional regime established by the Draft Constitutional Treaty: Dealing specifically with “delegated European regulations” Article I-36 DCT clarifies that European (framework) laws “may delegate to the Commission the power to adopt delegated European regulations to supplement or amend certain non-essential elements of the law or framework law”. Paragraph 2 specifies the conditions for such a delegation:

European laws and framework laws shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;
- (b) the delegated European regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the European law or framework law.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

The following reflections on this provision shall be offered: First, the Commission seems to have won the inter-institutional battle against the Council and appears to emerge as the sole repository of the executive function in relation to delegated legislation. A textual reading suggests that – unlike the *status quo* under Article 202, third indent – the Council will not be able to pass “delegated European regulations” in special cases.⁴⁸ Moreover, there is no reference to “certain requirements in respect of the exercise of these [delegated] powers” – an omission that indicates a departure from the old-style Comitology regime for delegated acts. Instead of the direct input control through management and/or regulatory committees, the DCT will rely on a call-back mechanism and a tacit approval technique to control the exercise of delegated legislation.⁴⁹ Secondly, the DCT will also ease (if not resolve) the inter-institutional tensions between the European Parliament and the Council, as Article I-36 (2) provides for the “democratisation” of the delegation mandate. Since the latter will be granted by a European (framework) law, i.e. principally under the co-decision procedure, Parliament’s legislative prerogatives will be safeguarded.

What the text of Article I-36 DCT does *not* expressly answer is the hierarchical rank of delegated acts vis-à-vis European (framework) laws in general. Will the new constitutionalism under the DCT move from the “relational” inferiority of executive legislation to a categorical hierarchical bifurcation of EU legislation? Did the Convention desire to create a general subordinate hierarchical level for “dele-

44. Final Report, supra n.22 at 8 (emphasis added).

45. Ibid. The parallels with the reasoning of the Commission’s White Paper are obvious.

46. For the definition of “delegated acts” offered by the Working Group, see text supra n.24.

47. Final Report, supra n.22 at 11.

48. The “specific cases” exception for the Council has, however, survived in relation to implementing acts (cf. Article I-37 (2) DCT).

gated regulations” positioned under Union laws? Arguably, this ought to have been among its primary motivations.

Another intriguing question relates to the distinction between “delegated regulations” and “implementing acts”. While the former have been consciously presented as a new type of legal instrument, the definition of the latter is reminiscent of “classic” implementing acts under Article 202 EC. Article I-37 (2-4) DCT state:

2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Article I-40, on the Council.
3. For the purposes of paragraph 2, European laws shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. Union implementing acts shall take the form of European implementing regulations or European implementing decisions.

What are then the respective differences between delegated and implementing acts? First, the concept of implementing measures is wider than that of delegated acts: The category of implementing acts not only covers regulatory acts (i.e. European regulations) but also individual acts (i.e. European decisions). Whereas the concept of delegated regulation is functionally limited to generally applicable acts,⁵⁰ implementing measures may be general or specific in nature. Second, unlike the new control techniques devised for delegated regulations, the wording of Article I-37 (3) DCT suggests that the Comitology regime has survived in relation to implementing acts adopted by the Union.⁵¹ This constitutional heritage from the *status quo* of the EC Treaty is, however, modified in one important aspect: Since the control conditions are to be laid down in a European law – principally adopted according to the co-decision procedure – the European Parliament will act as co-legislator in setting the mandate for implementing measures. Will this, however, mean – as M. Dougan has insightfully asked – that the Convention intended to “involved Parliament in the adoption of control mechanisms over *all* Commission implementing acts – even in situations where Parliament would play no significant role in passing the relevant parent measure?”⁵² No conclusive answer can be given at the moment.

Unfortunately, the hierarchical status of those implementing acts in relation to European (framework) laws *and delegated European regulations* was also not positively answered. Two constitutional options exist: The new constitutional order will either introduce a fourth hierarchical layer beneath that of delegated regulations; or, alternatively, give implementing acts the same hierarchical status as delegated regulations. A hierarchical stratification of the executive function is not unknown in national legal orders and may present the better constitutional choice. Hierarchical priority should be given to “delegated regulations” adopted by the Commission as this will further concentrate executive power in the Commission and thereby sharpen the latter’s responsibility as *the* European Union’s principal executive organ. In subjecting implementing measures to a general legality review vis-à-vis delegated European regulations the federalist control of the Member States under the Comitology arrangements would be diminished: The

49. “The combination of greater use of less detailed primary laws, and increased Commission control over delegated norms, may significantly alter the institutional balance of power in the Community. It will reduce the power of the Council and the EP, and increase that of the Commission. The category of European regulation will fill the ‘space’ presently occupied by norms made pursuant to the Comitology procedure. (...) In essence the pre-existing regime was based on *generalized ex ante input into the making and content of the delegated norms, with the possibility of formal recourse to the Council in accord with the Comitology procedures*. It allowed for regularized, general and detailed input into the content of such norms by Member States representatives, with some control exercised by the EP. We are switching to a system based on *ex ante specification of standards in the primary law, combined with the possibility of some control ex post should the measure not be to the liking of the EP or Council, but this latter control will only operate where it is written into primary law*. The effect of these controls is however questionable.” (P. Craig, *The Hierarchy of Norms*, 8-9, 10-1 (emphasis added)).

50. See text above supra n.32.

51. Moreover, as under Article 202 EC, the Council can in “specific cases” delegate implementing powers to itself. In relation to implementing acts, the Final Report of the Simplification Working Group had suggested Community implementing acts to be adopted “by the Commission (the rule), with or without a mechanism for monitoring by Member States (committee procedure) or by the Council (the exception) in cases where it exercises executive functions” (cf. supra n.22 at 12).

52. M. Dougan, *The Convention’s Draft Constitutional Treaty: bringing Europe closer to its lawyers?* [2003] E.L.Rev. 763 at 786.

Commission could have the last and final word in the execution of EU legislation, since an “implementing act” could not derogate from a (Commission) “delegated regulation”.

6. Conclusion: Sharpening the Separation of Powers through Legal Hierarchisation

Uniformity within diversity should be as suspect as distinctions without differences. The presence of various legislative procedures in the European Union legal order – each representing a specific inter-institutional balance of power – commends a hierarchically differentiated legal order: From a democratic perspective, it seems “suspect” to give the same legal value to a parliamentary act and an executive act; or, specifically applied to the EU: to an act passed under the co-decision procedure as opposed to an act adopted by the Commission. The present unitary and amorphous character of the Union’s secondary law therefore represents a constitutional anomaly when compared to national legal orders. Attempts to move from legislative “unity” to legislative “diversity” date from before the TEU. The project of establishing a legal hierarchy has taken shape with the Convention’s Working Group on Simplification, whose efforts have now been translated into the constitutional philosophy of the Draft Constitutional Treaty.

The DCT introduces the distinction between European (framework) laws and non-legislative EU measures. European (framework) laws will occupy the highest rank below the Constitution. In the event of a conflict with inferior legal acts, European laws will prevail – even where adopted *before* the non-legislative act. The DCT has chosen a procedural conception of “European law”. The definition of European (framework) law is intrinsically linked to the co-decision procedure. There are two qualifications to a purely parliamentary definition of legislation: First, in certain circumstances, the DCT allows for the adoption of European (framework) laws under “special legislative procedures” (Article I-34 (2) DCT). Secondly, the normative matrix of European (framework) laws has been confined to old-style “regulations” and “directives” and will prevent the adoption of individually addressed “decisions” in the form of a European (framework) law. This second qualification sets a material limit to the otherwise purely formal definition of legislation in the DCT.

The innovations of the DCT also concern the executive function and can be summarized as follows: First, “delegated European regulations” represent a new legal instrument whose use will not be tied to the Comitology procedures. They will reinforce the executive power of the Commission. The phenomenon of Comitology is consequently restricted to implementing acts. Secondly, the European Parliament has won a co-equal role in setting the mandate for delegated regulations as well as for implementing acts. Thirdly, the (possible) hierarchical subordination of implementing acts under delegated regulations will further enhance the importance of the Commission vis-à-vis the Council in the execution of European Union law.

The creation of a legal hierarchy, by way of conclusion, will establish legal distinctions into the hitherto unstructured body of Community legislation. The hierarchical layering of the European Union’s law-making procedures will sharpen the respective spheres of responsibility of the EU’s legislative and executive branch and thereby enhance the transparency of the decision-making mechanisms. The constitutional innovations introduced by the DCT would consequently lead to a clearer separation of powers in the European Union’s legal order.