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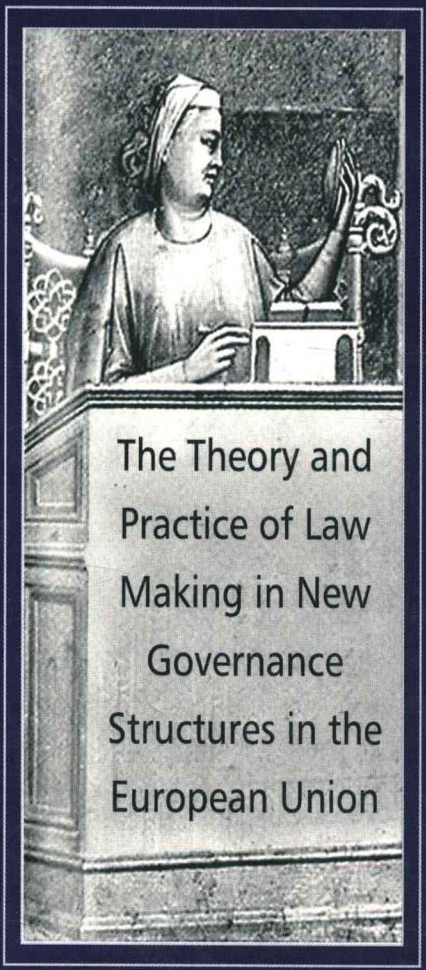
Law's Practical Wisdom



The Theory and Practice of Law Making in New Governance Structures in the European Union

Katerina Sideri

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Contents

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Chapter One

Introducing the Problématique of Law and New Governance: From *Phronesis* to *Compromise*

Toute définition de la liberté donnera raison au déterminisme.
Henri Bergson, *Essai sur Les Données Immédiates de la Conscience*

The exercise of questioning the function of law in new governance structures implies the adoption of a wide definition of what counts as law. In the legal pluralist tradition, state law appears to coexist with autonomous normative orders produced by groups, networks, and social systems in an increasingly complex and globalized social world.[1] This approach radically revisits the conceptual boundaries of the notion of law, by casting a critical eye on the traditional hierarchy between formal law and social norms, in other words, between 'law' and 'non-law'. Legislation enacted by Parliaments is not the ultimate source of authority, as state law coexists in a heterarchical fashion with the proto-law of various communities, global networks of economic, cultural, academic, and technological nature.[2]

What is then the role of state law in such a fragmented world inhabited by autonomous systems, networks, and groups having their own codes of conduct regulating their behaviour? *Proceduralization* is directly related to these processes, denoting the relocation of governmental functions to the market or the civil society.

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[1] For a detailed exposition of legal pluralism, see Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford, 2001), 112–117.

[2] There is extensive literature on the possibility to conceptualize state law (whose production is linked to the state apparatus) as coexisting with autonomous normative orders, emerging from the codes of conduct of social groups, and potentially presenting a source of resistance to the dominant ideology, see for example Jean Comaroff and John Comaroff, *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* (Chicago, 1991). Anthropologists and sociologists have pointed out long ago that rules governing conduct need not emanate from the state, while the extensive literature on the constitutive role of law also embraces a heterarchical understanding, see for instance Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W.L. Moll (Cambridge, 1936). On the other hand, Simon Roberts reminds us that equating state law with informal legal orders may be problematic, as their function and mode of ordering remains distinctively different, see Simon Roberts, 'After Government? On Representing Law without the State', *Modern Law Review*, 68/1 (2005): 1–24. For a rich analysis of these points, see Tamanaha, *A General Jurisprudence of Law and Society*.

It may also indicate the partnership between the state and private actors with the aim of achieving public ends. Alternatively, it may suggest the shift from state regulation to community self-regulation, with state law establishing the general conditions of negotiation. Finally, it may point to the inclusion by governments of interest groups in the decision making process.[3]

Examples of the way such processes are institutionalized in the European Union can be found in the consultation that followed the proposal for a Directive on the patentability of computer-implemented inventions, and in the comitology and other advisory committees, which play an important role in the implementation of the European Union's Research and Technological Development Framework. Internet filters and technological fences, developed by the industry to block harmful material on the net and to prevent unauthorized copying, present us with more instances of industry self-regulation, where enforcement and coordination is retained by the European Commission.

There are various different theoretical articulations of proceduralization. For Habermas proceduralization interweaves with the notions of deliberative democracy and public sphere, the latter facilitating public participation and debate over key issues.[4] Law should provide structures enabling fair discussion and discursive opinion formation by equally entitled citizens, while, at the same time, it should be the outcome of deliberation, reflecting consensus that stems from shared practice. Rawls's liberal articulation of justice describes the process where constitutional consensus on basic rights and liberties can be established in a morally fragmented world. According to Teubner's formulation of proceduralization inspired by systems theory, law should avoid direct intervention; instead it should encourage communities to reflect over selected considerations by means of steering activity rather than imposing goals. In all these instances, the question of proceduralization links to the problem of governance in modern societies.

Governance depends on decisions relevant to who is governed, who participates in governing, and how power is dispersed amongst governing bodies. Law constitutes the relevant arrangements, hence reflects the sum of ways in which public purposes are authoritatively decided on and implemented,[5] with various actors being active in the shaping of their content. The move away from government to governance is marked by the simultaneous shift of attention from the formal legal order to informal ones; from representative democratic structures to deliberation and engagement of citizens in new governance structures; from command and control rules to procedural rules communicating local knowledge; from the sovereign state

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[3] Julia Black, 'Proceduralizing Regulation-Part I', *Oxford Journal of Legal Studies*, 20/4 (2000): pp. 597–614. However, what is exactly included in such reinvention of regulatory mechanisms is quite ambiguous, see Jody Freeman, 'Collaborative Governance in the Administrative State', *UCLA Law Review*, 45/1 (1996): pp. 18–98.

[4] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, 1989).

[5] Richard H. Pildes and Cass R. Sunstein, 'Reinventing the Regulatory State', 62 *University of Chicago Law Review*, 62/3 (1995): pp. 1–129.

to the responsible citizen; from hierarchies to networks; from state imposed control and ordering of social relations to facilitation, mediation and freedom. This trend coincides with the challenge to the capacity of the institutions of democracy and political representation to correspond to the need to advance fairness, regulate markets, and secure participation of interested parties in decision making. The role of state law is also challenged, since it is viewed as having failed to deliver social justice. Law does not mirror social norms and custom, which find their way into the law making process through the mediation of academics and jurists drafting legal codes, or judges creating common law. Instead, law is generated by representatives of citizens and special commissions, and in this instance law emerges as a technical field of practice, with its own logic and function, often alien to people's concerns. Procedural law and new governance structures seek to remedy these problems.

In the light of the above, the book seeks to articulate a critique of our current understanding of the function of new modes of legal ordering and progressively propose a new framework to come to grips with law making. In a nutshell, the thesis advanced is that for one thing, when the state acts as a mediator or facilitator, when it provides enforcement structures, steers activity to make informal orders reflect over selected problems, or carries the fruits of agreement amongst interested parties, it always seeks to create obedient bodies. For another, I here adopt a wide definition of both the notions of state and legal orders, to examine the processes whereby a legal proposal is made and a legal measure is implemented, as these stages acquire considerable importance in new governance structures. The proposition here is that, for a sociological understanding of law making, it is equally important to consider the function of courts and Parliaments and the workings of forums of discussion, committees, and networks involved in the early and later stages of the law making process. In other words, law has two facets, the one feeding into the other: the stage where law appears as an instance of verticality, and order and the stage where it is created, negotiated, and applied by a multitude of agents. The study of law should include both stages, while being attentive to *phronesis* experience embedded in minds and legal texts.

Phronesis

Aristotle distinguishes amongst three different ways of arriving at truth: *episteme*, *techne*, and *phronesis*. Episteme concerns the possibility of developing universal explanatory frameworks. Techne is attentive to technical know-how. Finally, phronesis is concerned with prudent action, calling attention to practical knowledge and practical ethics.

Phronesis according to Aristotle is a virtue of those who manage households or states. Such individuals advance their own good, and the good of a tradition, on the basis of stocks of practical knowledge as to how a particular situation should be handled. Phronesis is a tacit skill, common sense, practical wisdom, such as the one possessed by a housewife in respect to the management of everyday activities in the

household. This type of knowledge results from the accumulation of experience in a particular social setting. In other words, it presents us with practical understandings held by a layman ('honey helps wounds and burns heal'), contrasted with the knowledge of universal rules by a doctor ('a healthy wound bed assists the regrowth of tissue'). Similarly, this type of common sense reasoning is different from the knowledge of general principles about politics, law, and economy. It is a process of learning and acting by experience, which should underpin any inquiry of socio-political nature.[6]

Reason triggers the choice of our beliefs; however, action is underpinned by phronesis. This implies that although we may agree on the theoretical principles that should underlie the function of new modes of legal ordering, the application of these principles in practice will supersede this logic. This is because, the context of the particular circumstances involve the practical judgment of the situation by reference to a wider background of personal experience. This type of practical knowledge forms expectations, tacit understandings underpinning our judgment of what a situation requires, in both cognitive and ethical terms. In the context of the present study on the function of law in new governance, relevant tacit understandings include conceptions about the role of law, what counts as a good legal argument, who should be included in the making of laws, and what makes dialogue fruitful in forums of discussion.

In other words, the notion of phronesis, broadly conceived, is particularly important, as we can address questions such as: is the interpretation of law dependent on the social background of those engaged in its application? Legal procedures advancing deliberation, do they reproduce common sense understandings, such as the centrality of property and contract, and the importance of legal certainty and continuity? If yes, how is the illusion of objectivity created? How does this affect choices as to what topics should be subject to deliberation and whose voice is important to be heard?

Elements of a Theory of Law Making

In a nutshell, I here adopt a phronetic analysis of law making that is attentive to the question of who is involved in the production of law; it examines the typified impetus triggering the making, application, and interpretation of law; it comes to grips with law as a field of practice primarily concerned with reproducing its existence; it seeks to uncover the forgotten history carried in legal concepts, reminding us of the alternatives which became unthinkable; it inquires on the conditions under which tacit understandings embedded in legal rules are challenged and altered; it points to the importance of examining the particular, as opposed to the universal; finally, it incorporates the notion of power in the relevant analysis of the practical and the particular.

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[6] Αριστοτέλης, *Ηθικά Νικομάχεια* (3 τόμοι, Αθήνα, 1992).

In this instance, following Nietzsche, Foucault, and Bourdieu amongst others, the present study is skeptical to a rational understanding of the legal/political discourse, being devoted to a historical analysis of the relationship between truth and power, and incorporating a critique of reason as disguising domination. In the light of such an analysis, the focus here is also on the ways in which the ordering of social relations is exercised in indirect ways in legal rules.

Following this intuition, law making can be conceptualized as a flexible process, whose final product is crystallized in vertical legal rules, aiming at ordering social relationships by means of objectifying practices, and ensuring legal certainty and continuity. This view implies the recurrent movement from multiplicity and flexibility to order, while providing the possibility to conceptualize the opposite movement, from order back to difference. In this framework, the instance of law making in new governance structures, promoting proceduralization, engagement and dialogue, has three idiosyncratic characteristics: it brings to the foreground of analysis the notion of compromise as an anthropological category of praxis, it draws attention to the novel ways in which state power may be exercised, and finally, it requires examination of the conditions under which such novel reconfigurations of power may be challenged.

Law Making and New Governance

Legal texts and principles, and agents applying them or debating them, present the crystallization of experience. When agents apply legal principles, they apply these in the light of tacit understandings, experience accumulated in the course of interaction in work settings, or during receiving particular education and professional training.

Following this intuition, one of the main propositions of the book is that new governance structures may fulfill their promise to promote deliberation, and bring more democratic legitimacy into the lawmaking process in the EU, when compromise becomes a phronetic category of praxis. Compromise provides the theoretical tools to move away from the notions of consensus and bargaining. Consensus denotes reaching agreement on universal principles anchored in citizens' democratic common sense. Strategic bargaining advances a view of maximization of egoistic interests. Instead, the notion of compromise indicates the simultaneous operation of several truth claims in the law making process, and in this instance it loses its derogatory meaning. When it emerges as a category of praxis, dialogue and communication between different views of the world becomes possible, and order is always open to question. This is because legal rules encompass a temporary balance ordered by the force of the written text to temporarily objectify practices and simultaneously ensure legal certainty and continuity. Compromise as a category of praxis is socially constructed, as it emerges in a state of interdependence with strong ties. Only if we need the 'other' will compromise emerge, sacrificing personal ends, while taking into consideration other alternative views for the sake of acting jointly. The elaboration of this proposition will be taken up in Chapter Three of the book, where

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a case study on the European Commission seeks to uncover tacit understandings regulating the conduct of officials engaging in the production of a legal proposal or the implementation of a legal measure.

In this instance, value systems are always open to restructuring, and the sociology of law becomes attentive to the process of actualization of power relations in a field of possibilities. Hence, the notion of compromise provides the theoretical tools to come to grips with the relationship between deliberation and the force of law; it inquires on the discursive formation of statements embedded in law, while considering the ideas and practices never actualized; it considers agents as active participants constructing the social world; it seeks to discover the process of formation of forms of ordering, which are always open to restructuring and reform. This can be accomplished if the question of what justice is, is accompanied by a query about why, when, and who wants justice, implying an analysis on the subtle ways in which power may be exercised. This point links to the *problématique* concerning the bureaucratic mode of thinking.

In decentralized law making structures it appears that the role of administrations is strengthened. As already noted, having expanded the boundaries of law to relocate its operation as being scattered throughout the social milieu, led to debating the nature and role of state law. If the legitimacy of state law depends upon its consistency with social norms, then it should not order social relations but should seek to facilitate inclusion, promote participation, and communicate local knowledge. This expansion implies the shift of the focus of attention from parliaments and courts to forums of discussion and networks, with the administration establishing the general conditions of negotiation; coordinating the creation of networks furnishing the raw material feeding into legislative proposals; securing enforcement in self regulatory regimes; steering activity on the part of autonomous groups of actors to make them reflect upon selected problems.

It is wrong however to conceive their role as being limited to the mere execution of the legal mandate. Moving beyond the concepts of impartiality and neutrality, the analysis of chapter four of the book seeks to illustrate the indirect ways, often operating beyond the conscious level, in which administrations strive to maximize their position as major think tanks. When providing for the impartial management of practical affairs, administrations recognize some social problems, while simultaneously neglecting some others. They appreciate some solutions, while disregarding alternatives. They reproduce socially accepted stereotypes, often deeply embedded in the dominant rhetoric of policy and legal analysis, which go without saying. As Foucault reminds us, normalization and the production of docile bodies is a property of disciplinary power, reproduced in technical administrative assessments and regulation. To this effect, Chapter Four will consider the employment of technological fences by the industry to protect their intellectual property rights. The chapter will also concentrate on domain name allocation by the Internet Corporation for Assigned Names and Numbers (ICANN), and on the regulation of harmful and illegal content on the Internet.

However, such an analysis is not meant to trap social relations in the melancholy of irreversible relations of domination. True, a phronetic approach reminds us that the faith in the efficacy of law making in new governance structures reproduces historically contingent assumptions, such as the belief in scientific objectivity, in the responsible emancipated rational agent able to regulate itself, in law's impartiality and neutrality, and in the potential of consensus building amongst agents with a free will. In the same spirit, legal rules carry a forgotten history, as Chapter Two of the book will seek to illustrate, in the course of examining the political and legal traditions of the European Union, and engaging in a brief historical overview of the political economy of innovation. Nevertheless, as Chapter Five of the book will endeavour to show, ruptures in the normal flow of events and the increase in the capacity and will of social groups to change the world, may trigger the need to reconsider dominant patterns of praxis, promoting novel understandings. To this effect, Chapter Five will consider the proposal for a Directive on the patentability of computer-implemented inventions, which failed to be adopted. The aim here is to examine the conditions under which law and social norms come into fruitful contact.

Uncontested tacit knowledge and stereotypes embedded in legal documents can be brought onto the conscious level and be challenged. In this instance, embedded 'commonsensical' taxonomies open to embrace different forms of experience, alternative types of culturally informed understandings about what counts as justice. Law and the practical wisdom it embraces can then be altered, and communication amongst different views of the world becomes possible. Yet, these new, revolutionary visions will always present us with new attempts to control conduct and impose the right way to conceptualize justice.

If one accepts that power is at the heart of social relations, then we do away with a view of society and law as moving towards a refined state of affairs untouched by vulgar antagonisms. If one accepts that power is a *modus vivendi*, the study of law should be prepared to come to grips with social phenomena by means of flexible concepts and frameworks of analysis. In the same spirit, recognizing the dual nature of law, as in ordering and compromising, objectifying and negotiating, stabilizing and accommodating, implies the need to study the function of law as in both the process of debating and applying order, and the product of this process encapsulated in the final legal text. The notions of power, phronesis, and compromise are useful tools in this direction, and are indispensable to any effort to develop a theory of law making in new governance structures. Chapter Six of the book will consolidate my theoretical propositions in this direction.

Conclusions

Law's Practical Wisdom critically examines some of the assumptions underlying our understanding of the function of new modes of legal ordering and governance. It recasts the problem of rationality, objectivity, and consensus building, to draw attention to the indirect ways power is exercised in decentralized rules. It further focuses on the invisible avenues through which the notions of free will and consensus

are curbed under the weight of practice, reproducing unuttered cognitive frames. It finally enquires on whether modes of facilitation and inclusion conceal new means of ordering by the administration. The empirical substantiation of the argument is premised on case studies from the European Union, long troubled by the question of democratic deficit, presenting us with fine examples of social complexity, which require solutions beyond traditional command and control rules. Progressively the book proposes elements for a theory of law making in the EU, being attentive to the ideas of domination, inequality, difference, and last but not least, compromise.

Chapter Two

Economy, Polity, and the European Experience

> History is more or less bunk. It's tradition. We don't want tradition. We want to live in the present and the only history that is worth a tinker's damn, is the history we made today.
>
> Henry Ford, Interview in *Chicago Tribune*, 15 May 1916

The object of the this chapter is to trace the assumptions underpinning the idea that law making in new governance structures presents us with the possibility to do away with the gripping effect of command and control rules. It may appear that there was some kind of inevitability in promoting flexible governance structures in Europe. The Union's democratic deficit, the challenge to the capacity of hierarchically organized law and governance systems to effectively order economic and social relations, technological innovation, internationalization, and new economic conditions, can all be said to have led to the need to debate the role of law. True, the discussion on the democratic deficit of the European Union brought to the foreground the need to rethink political participation, and new technological improvements were decisive in uniting markets as well as positioning the European Commission as a key player; however, there are various competing paradigms to conceptualize the above processes.

Against this background, the aim of this chapter is twofold. First, it seeks to show that definitions are the result of specific socio-economic circumstances. Hence, conducting a historical overview of the diverse experiences, and competing theoretical paradigms leading to the genesis of an object of study, is an exercise aiming at examining the set of different statements constructing it. This is important, as we are constantly reminded that things could have been different, since under different socio-economic circumstances a different set of statements could have informed the genesis of a new field of study.[1]

Such an analysis is a powerful tool to introduce ruptures, as it does not only bring attention to the discourses feeding into the emergence of a new object of analysis, but also to the potentialities that were never actualized, in other words to the discarded possibilities. Engaging in such an enquiry requires being able to move

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[1] Pierre Bourdieu, 'Rethinking the State: Genesis and Structure of the Bureaucratic Field', *Sociological Theory*, 12/1 (1994): 1–18; Michel Foucault, *The Archaeology of Knowledge*, A.M. Sheridan Smith (translator), (London, 1972); Friedrich Nietzsche, *On the Genealogy of Morals*, D. Smith (translator and introduction) (Oxford, 1996).

among different disciplines, and deal with never ending sources. This is certainly a difficult task given the limits of space imposed here. It also injects in the analysis the inevitability of being selective as to the themes chosen to unfold the present narrative. A related problem inherent in such an exercise is that overgeneralizations seem to be unavoidable.[2]

The choice of the common thread tying together the unfolding of diverse narratives is crucial. The starting point to unfold the analysis here is the observation that the stages of formation of legislative proposals, and implementation of legal rules, acquire considerable importance in new law making structures. They present us with an instance when the symbolic violence of the state, as manifested in top-down command and control rules, is sought to be counterbalanced by means of including in the law making process autonomous individuals, networks, and social systems. This observation is valuable, as it is underlied by the idea of an objective and neutral administration able to coordinate the participation of civil society and steer activity on their part, with the aim to make them reflect upon selected social problems. In other words, the building blocks of the idea that new governance structures can provide for horizontal rule making, is the concept of objectivity in law, administrative neutrality, and responsible individuality.

Concerning the objectivity of legal rules, the present analysis will not engage in a general exposition of the relevant philosophical arguments. Instead, it will proceed in giving a practical example of the argument promoting the view that legal rules crystallize context-dependent understandings. To this effect, the chapter will broadly examine the diverse theoretical frameworks informing the notion of innovation, as elaborated by various political economists. The aim is to show that legal rules as enacted nowadays reflect *one* particular way to come to grips with innovation, its importance, and its development. However, this does not preclude the existence of alternative conceptual paradigms. This is a point whose empirical elaboration will be further taken up in Chapter Five of this book.

One may be tempted to ask what factors led to the choice of the concept of innovation, in order to make the point that legal rules are culturally contingent. The reason is that innovation is a concept that cuts across many areas, such as health and life sciences, the environment, competition, research, and intellectual property rights relevant to biotechnology and software. This has been acknowledged in the EU, and every impact assessment conducted for European legislation (for instance environmental issues) has to take into account the importance of the dimension of innovation.[3] The case studies I have included further illustrate this point, since the

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[2] As this chapter discusses broad themes, about which there is extensive literature, I have kept footnote references to a minimum.

[3] For more on this, see Communication from the Commission on Impact Assessment COM(2002) 276 final. The introduction states:

> The Commission intends to launch impact assessment as a tool to improve the quality and coherence of the policy development process. It will contribute to an effective and efficient regulatory environment and further, to a more coherent implementation of the European

concept of innovation appears to have spurred debate as to the scope and content of regulatory law in various instances. Indeed, innovation and the information society were the ideological luggage for liberalizing markets in the 1980s, a process that appears to have boosted the powers of the European Commission, as it used its quasi-legislative powers to issue the liberalization Directives, and its quasi-judicial powers in the process of competition law enforcement, when taking decisions on individual cases and imposing fines on individual firms.[4] Nevertheless, in order to present the alternative choices available to the dominant rhetoric concerning innovation, it is important to concentrate on the experience of the nineteenth and twentieth century, to consider the ways in which liberalism, economic theory, and conceptions as to the virtues of new technologies and competition interweaved and consequently came under radical doubt, as early as in 1760, but also later in the First World War and during the depression of the 1930s.

However, understanding how the above perspectives acquired meaning in the context of the European Union requires examination of its political and legal traditions. To this effect, the analysis here will also concentrate upon the importance of market integration, expertise, and ordoliberalism as offering powerful paradigms influencing the early attempts to integrate markets in Europe. The argument is that these frameworks are still relevant for us today, in order to come to grips with the role of the European Commission in providing expertise and interest intermediation. Moreover, ordoliberalism shaped an understanding of regulatory law as being neutral and objective, implementing the mandate of constitutional principles, and indirectly intervening in the economy. A different focus is on sudden technological advances and globalization, which gave rise to new understandings as to the merits of cooperation, providing the operating context of all of the above ideas. For an intellectual framework to successfully become dominant, it has to find its efficacy in this real world, and in particular historical circumstances favouring a certain way of thinking.

Finally, I will consider how the above mentioned processes interweaved with the problem of democratic deficit in the European Union, as triggered by the reality of an enlarged European Union of 450 million citizens, internationalization, multiculturalism, and the Enlightenment belief that we can create our own future

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strategy for Sustainable Development. Impact Assessment identifies the likely positive and negative impacts of proposed policy actions, enabling informed political judgments to be made about the proposal and identify trade-offs in achieving competing objectives. It also permits to complete the application of the subsidiarity and proportionality protocol annexed to the Amsterdam Treaty.

Annex 2 Paragraph 4.1 considers the importance of taking into account innovation and technological development.

[4] The European Commission has quasi-legislative, supervisory, executive (for instance administering the budget) and quasi-judicial powers. It is entrusted with the task of preparing legislative proposals, for the various legislative procedures see Paul Craig and Grainne de Búrca, *EU Law: Text, Cases, and Materials*, (Oxford, 2003).

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