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Preface

The papers which make up this book were first presented to the Hart Workshop at the Institute of Advanced Legal Studies in July 1996. The editors are grateful to everyone who helped to make that occasion a success. As convenors we received encouragement from two Directors, Professors Daintith and Rider. Belinda Crothers and David Phillips and, at the London School of Economics, Elizabeth Durant, handled the complex administration calmly and competently. We are grateful to participants for the good-natured and lively debate which followed the papers. Finally, we thank the contributors for turning up to present well-structured and interesting papers and afterwards, meeting deadlines, following instructions, co-ordinating their IT and generally making the editors' task an agreeable one.

The papers which form the basis for these chapters were of course conceived and drafted before the IGC and presented almost concurrently with it. They were visualised before the Treaty of Amsterdam (TOA), so that the first opportunity for the authors to take its final text into account was at proof stage. Some authors have been more affected than others, but all have done their best to incorporate the Treaty, including the awkward, unfamiliar renumbering. In this we have taken a risk since, as our final text goes to press, we are conscious that the Treaty has not been ratified and are aware of possible problems.

Paul Craig
Carol Harlow

Introduction

CAROL HARLOW

It is hardly surprising if European Community lawyers initially saw their task as being the systematic exposition of European Community law with a view to educating an audience often resistant to the demands of "the new legal order". Understandably, the resultant body of doctrine veered towards the descriptive rather than the critical. There was a tendency too to focus on the Court of Justice and, since the European Court was playing a central role in "constitution-building",[1] lawyers found themselves documenting the evolution of European Community constitutional law. In this context, integrationism, famously described as a "genetic code transmitted to the Court by the founding fathers"[2] went largely unchallenged; it seemed both normal and in key with the current political climate;[3] besides, lawyers tend to prefer their public law without politics.[4] In "the old institutionalism",[5] so-called because of its "emphasis on formality and objectivity", the state was omnipresent. Confederation was merely a halfway house which must, it was argued, either move decisively towards federalism[6] or revert to the looser and impliedly less effective arrangements of international law.[7]

But as the "Jacobin component to Community federalism"[8] became more perceptible, the opportunity costs of transnationalism began to take precedence in the public imagination over the opportunities afforded by it.[9] It is hardly

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[1] See, Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration" (1993) 31 J.C.M.S. 417.

[2] Mancini and Keeling, "Democracy and the European Court of Justice" (1994) 57 M.L.R. 175 at p. 186. See also, Mestmacker, "On the Legitimacy of European Law" *RabelsZ* 58 (1994) 617.

[3] Wallace and Smith, "Democracy or Technocracy? European Integration and the Problem of Popular Consent" (1995) 18 *West European Politics* 137.

[4] Shapiro, "Comparative Law and Comparative Politics" 53 S. *California Law Review* 537 at p. 538 (1980).

[5] Hix, "The Study of the European Community: The Challenge to Comparative Politics" (1994) 17 *West European Politics* 1 at pp. 18–19.

[6] See, Laenarts, "Some Reflections on the Separation of Powers in the EC" (1991) 28 C.M.L.Rev. 11; Everling, "Reflections on the Structure of the European Union" (1992) 29 C.M.L.Rev. 1053. See also, Craig, "Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law" (1992) 12 O.J.L.S. 453, arguing that the early case law in practice had federalising effects.

[7] Though see, Cooper, *The Post-Modern State and the World Order* (Demos, 1996).

[8] Meny, "Le système politico-administratif en Europe" (1992) *Rivista Trimestriale di Diritto Pubblico* 952 at p. 964.

[9] See, Strange, "The Defective State" (1995) 124 *Daedalus* 55 and *The Retreat of the State, The Diffusion of Power in the World Economy* (Cambridge, 1996); Schmidt, "The New World

original to describe Maastricht as a watershed in European Community politics. The political mood changed sharply, puncturing legal complacency. The basis of the European constitution in a constantly revised Treaty was seen as fragile and a movement for codification found allies in the European Parliament.[10] The Treaty on European Union strengthened concerns; its three pillared constitutional structure and consequential increase in "democratic deficit"[11] opened the vista of a fractured and fragmented European Union, earning the disparaging designation of the "Europe of bits and pieces".[12] Scholarly debate acquired a new tone. For the first time, integrationism came up against sustained competition from proponents of "disintegration".[13] Subsidiarity and pluralism became respectable terms in scholarly usage. The proper boundaries of the national and supranational legal orders were called into question. A growing body of scholars emerged willing to question "the hitherto unassailable shibboleths about the 'unity' of the EC legal order and about the 'uniformity' of EC law".[14] European Community legal scholarship, in the process of developing a more interdisciplinary, contextual and critical approach,[15] followed national example by registering a subtle shift in terminology. Where once issues of sovereignty and separation of powers had dominated the agenda, legitimacy had now become the staple fare of public law debate[16] and arguments for transparency and accountability were increasingly heard.[17]

In choosing as our subject the European lawmaking process, our primary objective was to challenge a view of the European Union and its legal order which lawyers had found appealing and had perhaps accepted too readily. Lawyers are inveterate court-watchers and legal scholarship everywhere seems

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Order Inc: The Rise of Business and the Decline of the Nation-State" (1995) 124 *Daedalus* 75; Sally, "Public Policy and the Janus Face of the Multi-national Enterprise", in Gummett (ed.), *Globalisation and Public Policy* (1996).

[10] See, Report of the Herman Committee (Draft Constitution for the European Union).

[11] See, JUSTICE, *The Democratic Deficit, Democratic Accountability and the European Union* (Justice, 1996).

[12] Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 C.M.L.Rev. 17.

[13] A term borrowed from Shaw, "European Union Legal Studies in Crisis? Towards a New Dynamic" (1996) 16 O.J.L.S. 231.

[14] *ibid.*, at 237.

[15] As urged by Snyder, *New Directions in European Law* (Weidenfeld and Nicolson, 1990), p. 167.

[16] See, *e.g.*, Prosser, "Towards a Critical Public Law" 9 *J. of Law and Soc.* 1; Galligan, *Discretionary Powers, A Legal Study of Official Discretion* (Clarendon, 1990); Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990); Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press, 1991).

[17] Curtin and Mejers, "The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?" (1995) 32 C.M.L.Rev. 390; Lodge, "Transparency and Democratic Legitimacy" (1994) 33 J.C.M.S. 343. And see, [1988] OJ C49/174; A7 Council Decision 93/731/EC, OJ 1993 L 340, p. 43, *Code Of Conduct Concerning Access To Documents* (6 Dec 1993, Council and Commission) [1993] OJ L340.

inevitably to prioritise adjudication.[18] Like the Hart Workshop on which it is based, *Lawmaking in the European Union* sets out to redress the balance by inviting lawyers to think more deeply about the legislative process. The book is divided into four broad parts. Part I is theoretical. It aims to set the context and to explore some of the new constitutional themes. Part II focuses on parliaments and their place in the European institutional machinery. It looks both at the developing European Parliament and at a possible role for national parliaments. Part III considers the interplay between the European institutions. Case studies are used to illustrate the role played by the institutions and other actors in the lawmaking process in various sectors. In part IV, we move to the national level to consider implementation, increasingly a question of concern.

PART I – DEMOCRACY AND LEGITIMACY

Although we may choose to conceptualise disempowerment as a problem of legitimacy, that is not necessarily the issue. A highly centralised, autocratic and even bureaucratic system of government may be perfectly legitimate, as in their different ways the centralist constitutional arrangements of the United Kingdom (currently undergoing a process of radical change) and those of the elitist European Economic Community, legitimate as institutions of international law, demonstrate. The dominant feature of Europe, however, is a steady leaching of power away from smaller to larger entities, leaving a significant feeling of disempowerment. What worries citizens about transnational orders is a practical concern over their increasing impotence to affect or exercise any control over government action.[19] This fear determined the results of both the French and Danish Maastricht referenda and provided the partial stimulus for the subsidiarity provisions in the Maastricht Treaty.[20] It is this fear which infuses the often inconsequential debate over European Union citizenship.[21] Will European citizenship succeed only in devaluing its national equivalent? Will the concept of European citizenship, defined so far in largely economic terms, prove less "thick" than its national equivalent, grounded in civil and political rights and obligations and the new social rights associated with the growth of the welfare state?

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[18] Although this is partly a common law bias: see, van Caenegem, *An Historical Introduction to Private Law* (Cambridge, 1988), especially Chap. 6; Sugarman, "Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition", in Twining (ed.), *The Common Law and Legal Theory* (Blackwell, 1986).

[19] Gustavsson, "The European Union: 1996 and Beyond – a Personal View from the Side-line", in Andersen and Eliassen (eds), *The European Union: How Democratic Is It?* (Sage, 1996).

[20] Wallace and Smith, above, n. 3.

[21] Everson, "The Legacy of the Market Citizen", in Shaw and More (eds), *New Legal Dynamics of European Union* (Clarendon, 1995), pp. 73–91; Preuss, "Citizenship and Identity: Aspects of a Political Theory of Citizenship", in Bellamy, Bufacchi and Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press, 1995), Chap. 8.

Long before the watershed of Maastricht, the European Commission, and later the European Parliament, which regards citizenship and democracy as its special remit, were concerned to cultivate a concept of citizenship in the sense of a "belonging". The European Court of Justice moved in, devising a different model, in the more limited sense of a pool of potential litigants, endowed with legal rights.[22] Later this vision came under challenge as too narrow, sparking a debate over human rights. After Maastricht, the European Community institutions, formerly comfortable with integration, have each prepared proposals to strengthen democracy, legitimacy and transparency.[23] In Weiler's dualist vision of European integration,[24] the pluralist and confederalist Europe which he seems to favour contrasts with "a statal Europe, albeit of a federal kind". Weiler urges opening up the debate by total abandonment of the statal paradigm, pushing his argument further to explore developing problems of citizenship.[25] Yet for Weiler, Europe remains an incipient democracy without a demos, a problem of multiculturalism which he hopes to resolve through a pluralist or consocial solution.

The conceptual framework for European Community legal scholarship has largely been borrowed from other disciplines. Given the origins of the European Community, the popularity of international relations theory is hardly surprising. For a long time, the debate centred on functionalism and neo-functionalism, broadly embracing the argument that a distinctive European polity can emerge as and when national actors shift their loyalties and political activities from the national level to the centre;[26] and institutionalism, borrowed from political science, which seeks to provide explanations of the European Community policy-making process in terms of interplay between the institutions. These are by no means the only alternatives. For example, the European Union's supranational structure invites analyses in terms of policy network analysis,[27] laying the ground for a "theory of supranationality" emancipated from the constitutional baggage of the nation-state.[28] Again, the revival of pluralist attitudes

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[22] See, Szyszczak, "Making Europe More Relevant to its Citizens" (1996) 21 E.L.Rev. 351.

[23] See, de Burca, "The Quest for Legitimacy in the European Union" (1996) 59 M.L.R. 349.

[24] Weiler, "The Transformation of Europe" 100 Yale L.J. 2403 (1991); "The Community System: The Dual Character of Supranationalism" (1981) 1 Y.B.E.L. 267.

[25] See also, Chryssochoou, "Europe's Could-be Demos: Recasting the Debate" (1996) 19 *West European Politics* 787.

[26] Haas, "International Integration: The European and the Universal Process" (1961) 3 *International Organization* 366. See also, the well-known debate between Burley and Mattli, "Europe before the Court: A Political Theory of Legal Integration" (1993) 47 *International Organization* 41; Garrett, "The Politics of Legal Integration" (1995) 49 *International Organization* 171; Mattli and Slaughter, "Law and Politics in the European Union: A Reply to Mattli" (1995) 49 *International Organization* 183.

[27] See, Kassim, "Policy Networks, Networks and European Union Policy Making: A Sceptical View" (1994) 17 *West European Politics* 15.

[28] Ladeur, "Towards a Legal Theory of Supranationality – The Validity of the Network Concept" (1997) 3 E.L.J. 33.

after Maastricht has led to a revival of interest in pre-war consociationalism.[29] Armstrong, however, urges the claims of the "new institutionalism"[30] as a basis for European Union constitutional theory, setting the scene for the third section of this book, which focuses on institutional game-playing in the European Community legislative process.

Craig, in rather different mode, builds on more traditional constitutional foundations. He seeks a broader European legitimacy in the concept of a new "republicanism". Firmly grounded in European sources, this ideal at the same time provides a link with modern United States constitutional writing.[31] In sharp contrast to Andersen and Burns, who have described the European Union as "an instance of *post-parliamentary governance*, where the direct influence of the people through formal representative democracy has a marginal place",[32] Craig believes that the republic must find room for its citizens. He advocates well-tried methods of citizen participation developed and enforced by administrative law elsewhere as a solution for the "democratic deficit", using them to steer towards a Europe whose citizenship is meaningful.

Guild's contribution highlights the problems of the third pillar, a murky subject where legitimacy, citizenship and democracy are all very much in issue. Outlining the dubious policy-making processes and lawmaking procedures, Guild attacks the machinery of secret, unaccountable and unreviewable bargains which characterises the European Union's dealings with third country nationals under TEU Title VI (justice and home affairs). She argues that these are, on the one hand, quite simply not consonant with a legal order which claims both to be democratic and to observe the rule of law;[33] on the other hand, they bring the democratic credentials of the European Union into doubt. The decision to bring parts of this title inside the EU framework, giving control functions to the EP and limited jurisdiction to the ECJ, is of course welcome. It has to be remembered, however, that these concessions have serious limitations. Even in the areas of asylum and immigration, Ireland and the UK have insisted on opt-outs. Policing is still covered by the secret policy-making processes deplored by Guild. Thus the Treaty of Amsterdam (TOA) by no means supersedes her chapter.

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[29] Chryssochoou, "Democracy and Symbiosis in the European Union: Towards a Confederal Consociation?" (1994) 17 *West European Politics* 1. See also, Chalmers, "Judicial Preferences and the Community Legal Order" (1997) 60 M.L.R. 164.

[30] See further, March and Olsen, "The New Institutionalism: Organizational Factors in Political Life" (1984) 78 *American Political Science Review* 734; Bulmer "The Governance of the European Union: A New Institutionalist Approach" (1994) 13 *J. of Public Policy* 351.

[31] Sunstein, *The Partial Constitution* (Harvard, 1993). See also, Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, 1990).

[32] Andersen and Burns, "The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance" in Andersen and Eliassen, *The European Union: How Democratic Is It?* (Sage, 1996) p. 227 (emphasis mine).

[33] See also, *The democratic deficit, Democratic accountability and the European Union* (Justice, 1996) pp. 15–17; *The Union divided, Race discrimination and third country nationals in the European Union* (Justice, 1997).

In the last chapter of this part, Stone considers judicial lawmaking, basing his argument on empirical studies of the practice of constitutional courts in Member States.[34] His thesis is that courts with a constitutional mandate may see themselves, and ultimately emerge, as an auxiliary "third legislative chamber". Thus the chapter epitomises our projected change of focus and sets the scene for studies of the place of the European Court of Justice in law-making to be found in part III.

PART II – PARLIAMENTS

When the idea of "democratic deficit" first became prevalent, attention centred largely on the European Parliament's lawmaking powers. Couched in terms of sovereignty, debate was dominated by the symbolism of parliament as the "sovereign lawmaker",[35] a focus which tended to blind critics to the fact that nowhere in Europe did parliaments retain this status; some, indeed, have never had it. To quote Norton, "parliaments in western Europe have had some modest impact on the content of legislation", their real functions being to influence policy and "represent", maintaining the fiction of consent or legitimacy in the political system.[36] Boyron's empirical study of the co-decision procedure certainly suggests that the European Parliament is fast working its way up Norton's list of strong, policy-making parliaments and, partly in consequence, that the European Commission is working its way down.

But is this a step towards greater legislative accountability? The sobering truth is that, while no clear-cut means of controlling the regulatory Leviathan unleashed by the advent of the single market has yet been found, the bureaucracy continues to expand. In the untouchable third pillar machinery, neither court nor parliament had jurisdiction. As Guild warns, politicians have made the running and national civil servants set the agenda. Improvements made by the Treaty of Amsterdam change this position. The competence of parliament and court is agreed. The downside of the new provisions is, however, the opt-out demanded for Ireland and the United Kingdom – a new addition to the Europe of "bits and pieces".

We find, too, a number of other unregulated lawmakers. High on the list figures the comitology,[37] a low-visibility network of regulatory and advisory committees established by the European Council with the purpose of keeping

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[34] Stone, *The Birth of Judicial Politics in France, The Constitutional Council in Comparative Perspective* (Oxford, 1992); "Governing with Judges" in Hayward and Page (eds), *Governing the New Europe* (Polity, 1995) and "Constitutional Dialogues in the New Europe" RSC WP No. 95/38 (European University Institute, 1995). See also, Landfreid (ed.), *Constitutional Review and Legislation, An International Comparison* (Nomos, 1988).

[35] See, *e.g.*, S. Williams, "Sovereignty and Accountability in the European Community" (1990) 61 *Political Quarterly* 299.

[36] Norton, "Introduction: Adapting to European Integration" (1995) 1 *J. of Legislative Studies* 1.

[37] See, Decision 87/373, [1987] OJ L197/33 and Bradley, "Comitology and the Law: Through a Glass, Darkly" (1992) 29 C.M.L.Rev. 693.

a grip on European Commission rule-making. Nothing suggests, however, that the European Council is in control of the hydra-headed monster it has created.[38] The threat posed to institutional balance by the comitology and the legal problems originating from the insertion of committees into the lawmaking process are considered by Vos and Sauter. They contrast the role played by committees in the sensitive area of telecommunications with the highly technical regulation required in the areas of food and pharmeceuticals. These studies point also to the new "bits and pieces" beginning to clutter the constitutional landscape, as semi-autonomous agencies, here the European Agency for the Evaluation of Medicinal Products, arrive on the scene.[39] Their role, though largely indirect, is likely to grow swiftly as they take their place in policy networks.

An important function of national parliaments is to secure accountability and we might hope to replicate this picture at European level. Shapiro believes in countering experts with experts. He advocates rapid development of European parliamentary committees, offering a convincing United States prototype. Yet, in the same way as congressional committees or ombudsmen have failed to root themselves in the less favourable soil of the United Kingdom parliament, so one fears that the culture of the hemicycle will not allow committees to root in Brussels. Westlake reminds us that the European Parliament has achieved the most when building pragmatically on existing powers, a process culminating in the imperfect co-decision procedure which Boyron suggests has already been turned to good account. Westlake's prophecy is for a period of incremental growth in legislative power. Further rapid progress seems – temporarily at least – blocked by the European Council, jealous of its own lawmaking prerogatives.[40] Instead Westlake foresees a shift of interest to budgetary powers, a prime weapon of parliaments for securing accountability. This technique would have its use in establishing control at an early stage over the agency world.

Norton's account of the contribution of national parliaments is ultimately pessimistic about an increased role in the lawmaking process, whether individually – though here we must recall that substantial reforms have been put in place in several national parliaments – or through an extended co-operation procedure, described below.[41] But the genie released during the process of Maastricht ratification cannot easily be returned to the bottle. Indeed it has received approbation in a Declaration annexed to the Treaty of Amsterdam calling for a greater input from national parliaments into the EU lawmaking

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[38] See, Vos, "The Rise of Committees", (1997) 3 E.L.J. 210. In 1995 alone 141 committees, 3283 mandatory consultations and 2951 advices were involved!

[39] See further, Everson, "Independent Agencies: Hierarchy Beaters" (1995) 1 E.L.J. 180.

[40] See, Hayes-Renshaw and Wallace, "Executive power in the European Union: the functions and limits of the Council of Ministers" (1995) 2 *J. of European Public Policy* 559; Hayes-Renshaw, "The Role of the Council" in Andersen and Eliassen, *The European Union: How Democratic is it?* above, n. 32.

[41] On which see, *The European Parliament and the Parliaments of the Member States, Parliamentary scrutiny and arrangements for co-operation* (European Parliament, 1994).

process. Chryssochoou has argued that the extension of majority rule and democratic institutions at European Union level may actually *reduce* the chances of stable democracy if the indicator of system cohesiveness is taken to be "the extent of consensus-building achieved by the segments".[42] Contrary to Norton, who largely discounts the role played by national parliaments in legitimation, the author sees national parliaments as providing the primary legitimation device in the European Union, a judgment admittedly easier to make for citizens of countries with established and sturdy parliamentary traditions. Some Member States whose parliamentary tradition is relatively weak may, on the other hand, look to the European level to *strengthen* national parliamentary traditions. Here the effect of widening the European Union to include countries where representative institutions are less well ensconced must not be forgotten.[43] So far neither Euro-democracy nor pan-European political parties have taken root nor can such a development be foreseen in the near future.[44] European elections tantalisingly remain "second-order elections" in which "the outcomes are determined more by domestic political allegiances than by attitudes towards Union matters".[45] This leaves a clear space for alarmed national legislatures,[46] notably that of the rebellious United Kingdom and watchful Denmark, to argue that national parliaments, "with their diverse characters matched to their national cultures . . . are closer to the citizen, and are uniquely qualified to provide an element of responsiveness and democratic control that the Union needs".[47]

In such a context, the European legislative process should assume a rather different character. The European Parliament would retain its present role in the co-decision procedure, whose ambit would be extended (as it has been by the Treaty of Amsterdam), and play a larger part in securing accountability, using its budgetary powers to secure gradual control. This is not to argue that the representative role of the European Parliament would become redundant,

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[42] 17 *West European Politics*, above, n. 29.

[43] See, Hesse, "Constitutional Policy and Change in Europe: The Nature and Extent of the Challenges" at pp. 16–18, and Preuss, "Patterns of Constitutional Evolution and Change in Eastern Europe", in Hesse and Johnson (eds), *Constitutional Policy and Change in Europe* (Oxford University Press, 1995), for an idea of some of the problems.

[44] Pedersen, "Euro-parties and European Parties: New Arenas, New Challenges and New Strategies" in Andersen and Eliassen, above, n. 32, Andeweg, "The Reshaping of National Party Systems" (1995) 18 *West European Politics* 58.

[45] Obradovic, "Policy Legitimacy and the European Union" (1996) 34 J.C.M.S. 191 at p. 203. See also, Handley, "Public Opinion and European Integration: The Crisis of the 1970s" (1981) 9 *Eur. J. of Political Research* 335; Hix, "Parties at the European Level and the Legitimacy of EU Socio-economic Policy" (1995) 33 J.C.M.S. 527.

[46] For national studies, see, Special Issue, *National Parliaments and the European Union* (1995) 1 *J. of Legislative Studies* 1–193 and particularly, Rizutto, "The French Parliament and the EU: Loosening the Constitutional Straitjacket" at p. 46.

[47] *The 1996 Inter-Governmental Conference: The Agenda; Democracy and Efficiency; The Role of National Parliaments* HC 239–I (1994–5) (HMSO, 1995) para. 107. See also, *The Role of the National Parliaments in the European Union* HC 51 (1995–6) (HMSO, 1996).

though it might introduce questions over the mode of selection.[48] With other interest groups, its primary function would be to widen the range of voices to whom the European elite has to listen. We would, however, be able to abandon the quest for legitimation through the European Parliament. We might go for a strategy of integration in which national parliaments combine with the European Parliament, strengthening liaison bodies, such as the COSAC, which meets twice-yearly in the country of the presidency or the Conference of Parliaments, which has met only once at the Rome assizes.[49] This too has been suggested in the Treaty of Amsterdam. It might on the other hand be preferable to extend accountability at national level, tightening the grip of national parliaments on their governments.[50] The Danish Folketing, with its Market Committee which can mandate ministers in their dealings in the European Council, is a commendable experiment and one approved by Jarvad, who describes its operation in Chapter 10.[51] Could it be copied? Or would this mean that all dealings, especially in a widened European Union, would come to a grinding halt?

Part III – Institutional Interplay

Getting legislation on to the European Community statute book is comparable to a game of snakes and ladders in which ladders are strictly rationed and every institution is a potential snake. The European Commission is possessor of the right of initiative (EC, Art 100; TOA, Art 94), but in practice its need for allies means it can be prodded into action by the European Parliament.[52] Blocking devices are built in at every stage of the complex procedure. These result frequently in time-consuming references to the Court whose outcomes are unpredictable. Failure to consult the European Parliament may, for example, result in a Court reference; so equally may delaying tactics by the European Parliament. Fredman argues that in the field of social policy the variety of lawmaking powers presently available to the European Commission has shaped substantive outcomes, largely accounting for lack of consistency. Balked in the political process, any of the institutions may challenge the legal basis of regulations or directives as may the Member States. Faulty choice of legal basis represents another long snake, returning the players towards the start. Successfully implemented, they may be challenged again in national courts, a

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[48] Dehousse, "Constitutional Reform in the European Community. Are There Alternatives to the Majoritarian Avenue?" (1995) 18 *West European Politics* 118.

[49] See, M. Westlake, "The European Parliament, the National Parliaments and the 1996 Intergovernmental Conference" (1995) 66 *Political Quarterly* 59 at pp. 61–4.

[50] See, *The European Parliament and the Parliaments of the Member States, Parliamentary scrutiny and arrangements for co-operation* (European Parliament, 1994).

[51] See also, Arter, "The Folketing and Denmark's 'European Policy': The Case of an 'Authorising Assembly'" (1995) 1 *J. of Legislative Studies* 110.

[52] See, Nicoll, "The 'Code of Conduct' of the Commission towards the European Parliament" (1996) 34 J.C.M.S. 275.

slide down the slow and costly snake of legal process. The process is highly dependent too on consensus and alliance between the players, institutional or otherwise.

Whether the lawmaking power rests technically with the European Council or the European Parliament is largely an academic question, since in practice the last word so often lies with the Court or the Commission. If this is necessarily true, as Guild reminds us, of the 'third pillar' arrangement, it is equally true of the social policy agreement. Brinkmann describes the use of this in making the parental leave and European Works Council Directive. The much-publicised accession of the United Kingdom to the social chapter will not render this procedure redundant. Indeed, with the inclusion of the social policy agreement in the EC Treaty by the TOA, the problems raised in Brinkmann's paper will remain all-too relevant.

In their study of social policy, Cullen and Campbell describe the European Commission as a "change agent", seeking to exploit windows of opportunity to achieve its own goals of integration and harmonisation before the windows close against integrationist measures. When the European Commission finds its policies or proposals blocked by other players, it increasingly resorts to soft law to fill the gap, a strategy traced by Snyder to a European Commission White Paper – itself a form of soft law – in 1985. The trend has accelerated more recently and has a dual use, as Snyder puts it, "in part a comprehensible response to institutional inertia, and in part a questionable attempt to circumvent or avoid the implications of failures to reach political agreement".[53]

Beveridge and Nott, anticipating a possible ice age of gender politics, ask whether soft law can offer socially marginalised groups, including women, a road to change. Ideally they hope for "gender audit", a social parallel to environmental impact assessment. Soft law, they conclude, has some problems, including the very obvious one of legitimacy. Nonetheless it does possess some potential for change and can form the starting point for hard law measures. Howells, in a sectoral study of European Community consumer law, sees soft law as an essential element of complexity and a way to counter the costs of high legislation. Soft law also reaches parts where "real" law finds it hard to go, offering a way for government or agencies to intervene in the market on behalf of consumers. In European Community consumer law, it has frequently offered the only window of opportunity.[54] Howells concludes that soft law is a two-edged weapon whose true function, like that of self-regulation, may be "simply to provide industry and governments with an excuse for failing adequately to protect consumers".

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[53] Snyder, "Soft Law and Institutional Practice in the European Community" in Martin (ed.), *The Construction of Europe, Essays in Honour of Emile Noel* (Kluwer, 1994) pp. 199–200. The White Paper was "Completing the Internal Market" COM(85)310.

[54] For the parallel with state aids see, della Cananea, "Administration by Guidelines: The Policy Guidelines of the Commission in the Field of State Aids" in *Schriftenreihe der Europaischen Rechtsakademie Trier* (1993).

It is of course always open to the Court of Justice to give soft law a hard edge by incorporating it into jurisprudence. The soft law technique is therefore particularly fruitful if a Commission/Court alliance can be built. In the contentious area of fisheries policy, for example, the European Court of Justice has been accused of turning a failed European Commission proposal into law after enough members in the European Council had voted against it to block its passage as a Directive.[55] Superior Treaty norms may be prayed in aid to promote European Commission policy at the expense of Member States: in the same area of fisheries policy, the European Court of Justice has been accused of proceeding by "drawing the broadest, most concrete and *communautaire* conclusions from provisions of the European Economic Community Treaty which are notable for their generality and vagueness".[56] Similar accusations have been made in other areas.[57] Here Andenas points to a more positive picture of the interplay of the Court of Justice and the Commission in the field of financial services: without the Court, he concludes, policy in this area would quite simply have run into the sand. The theme of institutional interplay is continued in Beltrame's empirical survey of the consultation process surrounding the evolution of the Directive on pluralism and media concentration. Beltrame focuses on the role of the European Commission as a "policy entrepreneur". The European Commission's concern that new technology would foster the already cosy relationship between national governments and monopolistic media has brought an unexpected role in consumer representation.

To focus too narrowly on institutions ignores both the role of representative bodies in surrogate interest representation and also the growing input from other actors. In her discussion of the contribution of the "social partners" to policy and lawmaking, Obradovic highlights the democratic ambiguities of the former. The Economic and Social Committee could be analysed in terms of public participation; it could do something to lessen the democratic deficit and provide some legitimacy to European Community policies; it could feature in the civic republican arrangements envisaged by Craig. Alternatively it could be seen as deriving from a paternalist French model of representation, smacking strongly of corporatism. Fredman provides further material for analysis with an examination of the concept of "social dialogue". Here again we find a paternalist form of interest representation which originated informally in European Commission practice, hardened into law with the Single European Act in 1986 and crystallised at Maastricht into a process whereby (as Fredman puts it) "management and labour are given a pivotal role in the process of lawmaking in the social policy field".

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[55] Garrett and Weingast, "Ideas, Interests, and Institutions: Constructing the European Community's Internal Market" in Goldstein and Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Ithaca, 1993) pp. 195–6.

[56] Churchill, *EEC Fisheries Law* (The Hague, 1987) p. 45.

[57] See, *e.g.*, Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union" (1996) 112 L.Q.R. 95.

Perhaps symbolically, the public enters only in the final chapter of part III with Radford's case study of animal welfare legislation at European Community level. Even then participation is indirect – through the agency of a social action group, the Royal Society for Prevention of Cruelty to Animals, a formidable and well-funded pressure group in the United Kingdom which has contributed much to the development of animal welfare politics at European Community level.

PART IV – HARMONISATION, INCORPORATION AND IMPLEMENTATION

The very real difficulties of implementation on which we focus in part IV are often ignored by commentators, who have consistently shown a tendency to confuse transposition with implementation.[58] Munch suggests that problems of implementation, already attracting concern from Member States and the European Council, may escalate. As integrationist policies operate to divest Member States of traditional powers,

> "[m]ore and more frequently, regulations and directives will be passed which will not be enforced in the individual Member States (or at least their enforcement will be delayed considerably). More and more often, these regulations and directives will become the target of heavy opposition from those groups affected by them, they will be circumvented or simply ignored."[59]

Nowhere has the European Court of Justice demonstrated its "Jacobin tendencies" more clearly than in the area of implementation. It has, for example, jealously guarded the European Commission's exclusive enforcement powers under (EC, Art 169; TOA, Art 226). Recent case law retains traces of an unsophisticated "agency" theory of incorporation, according to which national parliaments are no more than "administrative agents" of the European Community for purposes of implementation.[60] The principle of state liability set in motion by *Francovich*[61] seems to be founded in an agency model, confirmed by the Court's view of Member States' responsibility for the action or inaction of their constituent parts.[62] A contrast might even be drawn in this

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[58] But see, Snyder's seminal article, "The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques" (1993) 56 M.L.R. 19.

[59] Munch, "Between Nation-State, Regionalism and World Society: The European Integration Process" (1996) 34 J.C.M.S. 379 at p. 391.

[60] See, per Advocate General Mishco, Opinion in *Francovich*, below, n. 61, para. 47. And see, Steiner, "From direct effects to *Francovich*: shifting means of enforcement of Community law" (1993) 18 E.L.Rev. 3.

[61] Joined Cases 6, 9/90 *Francovich and Bonafaci v. Italy* [1991] ECR I–5357.

[62] Case C–392/93 *R v. HM Treasury ex p British Telecommunications* [1996] Q.B. 615, where it was said that for liability to accrue in the case of incorrect transposition of directives, there must be a "manifestly wrong" action by the national authority, may represent a welcome step back.

field with harmonisation.[63] In short, we have moved quite rapidly from a position where the paramount value of economic freedom went largely unquestioned, a "genetic code" carrying with it a bias towards harmonisation, to one in which a wider range of values is acknowledged[64] while the divergent traditions obtaining in Member States are perceived as deserving of recognition. To put the last point differently, economic questions are slowly being constitutionalised.[65]

A central problem for incorporation lies in the quality of European Community texts.[66] Recognised at the Edinburgh Inter-Governmental Conference by the European Community institutions,[67] quality has moved squarely on to the political agenda and is here the subject of scrutiny in a paper by Burns. Generally welcoming the recommendations of the Molitor Group[68] for simplification, deregulation, substitution of regulation by standards and soft law for detailed regulations, Burns optimistically predicts a "simpler, clearer and more accessible" European Community statute book.

On the other hand, this development may to a certain extent be countered by the tendency of Member States to transpose directives into detailed and specific statute law. Arrowsmith's assessment of the transposition of the public procurement directives into law of the United Kingdom directs particular criticism at the vague formulation of the directives, causing consequential difficulties of implementation at national level. Assessing the pros and cons of a variety of different techniques, Arrowsmith concludes that there is no certain recipe for success and that implementation by reference, often criticised, at least "eliminates the need for consideration of a number of separate legal texts". In the neglected area of patent law, argues Leith, the problem does not lie with transposition – the European Patent Convention has been implemented by legislation in every national system. Unfortunately, however, the Convention

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[63] For the debate surrounding Case 8/74 *Procureur du Roi v Dassonville* [1974] E.C.R. 837, Case 120/78 *Rewe Zentral v Bundesmonopolverwaltung fur Branntwein* [1979] E.C.R. 649 ("Cassis de Dijon") and Joined Cases C–267, 268/91 *Keck and Mithouard* [1993] E.C.R. I–6097, see Reich, "The 'November Revolution' of the European Court of Justice: *Keck, Meng* and *Audi* Revisited" (1991) 28 C.M.L.Rev. 459.

[64] A watershed here was the decision in Case C–159/90 *SPUC v Grogan* [1991] 3 C.M.L.R. 849. For aspects of the ensuing debate, see Phelan, "Right to Life of the Unborn and Promotion of Trade and Services: the European Court of Justice and the Normative Shaping of the European Union" (1992) 55 M.L.R. 670; O'Leary, "The Court of Justice as a reluctant constitutional adjudicator: an examination of the abortion information case" (1992) E.L.Rev. 138; Forder, "Abortion: A Constitutional problem in a European Perspective" 1 Maastricht Journal of European and Comparative Law (1994) 56.

[65] Maduro, "Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights" (1997) 3 E.L.J. 55, 74.

[66] See Barendts, 'The Quality of Community Legislation' (1994) 1 Maastricht Journal of European and Comparative Law 101.

[67] See, Edinburgh Resolution of European Council: 11–12 December 1992 and Council Resolution 8 June 1993, OJ 1993 C166/1.

[68] Report of Independent Experts on Legislative and Administrative Simplification, Com. Sec(95) 1379 (2 August 1995).