

The Spaces of European Union Government

By

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(Theory cannot be brought to bear upon the world of daily political practices without finding ways to embed it in the materialities of place, space and environment (Harvey 1996: 44-45))

I. Introduction

The European Union's government of its subjects presents a paradox. Spatial metaphors are the mantra of EU government. The area without internal frontiers, the economic and monetary union and area of freedom, security and justice have, after all, been the refrains of the last three IGCs. Yet the central task that spatial theory sets itself, namely that task, set out in the quote above, of analysing how government intricates itself in the practices of daily life is largely neglected. Yet a despatialised analysis of a system of government is incapable of conceiving of that system as anything other than a 'rational unity' (Lefebvre 1991: 281). It is a 'sovereign' without power, for power requires a space within which to concretise itself (Foucault 1982). It is a polity without identity, for identification presupposes a process of classification and closure which provides for an ontology between a 'core' and a 'constitutive outside' (for a survey of the considerable literature on this see Natter and Jones 1997). Without space European Union law cannot act as a channel of communication between political, economic and social practices for the simple reason that each of these domains embraces a series of locations and formations embedded in space (Lefebvre 1991: 33). In short, without space the Union becomes a phenomenon existing at such a level of abstraction that it becomes no more than a metaphor. Concepts such as discursive democracy, sovereignty, citizenship, flexibility, polity become infinitely elastic, but also correspondingly abstract and reified. Such empirical analyses, as exist, therefore,

present a far more messy picture of Union government than many of the highly elaborate and articulate meta-theories would suggest. Public choice analyses of the EC Budget and EC legislation suggest a high level of targetting at a select number of groups (Peirce 1991; Vaubel 1994). Ongoing research by myself has found that over 65% of all court/tribunal activity that involves EC law concerns itself with just two Directives (Chalmers 1999).

To be sure, it is mainly through empirical analyses that a more complete picture will emerge. The central contention of this piece is that it also requires a paradigmatic shift. The paper consists of a number of sections. In the first two sections this article considers the two pillars on which the most of the claims for the foundations of EC government are based, namely that it has established a sovereign system of law and new forms of governance structures. It argues that for a variety of reasons neither of these can explain how EU government actualises itself. For this, it is argued in the third section, one must look to the techniques of problem-solving that the EC has adopted. These not only structure the style of EC policy-making but decenter power far more radically than the multi-level governance literature would suggest. This leads to a corresponding centering of social relations, with the center of gravity of much of EU government being vested in two forms of social institution, the locale and those organisations that institutionalise expertise. The fourth section examines the manner in which this feature is exacerbated by the resources available to the EU Institutions to affect change. Legal instruments are the central resource available to the EU Institutions, but a quality of this resource that differentiates it from other forms is that it transforms government into a dialectical, mutually constitutive process. In the fifth section it is argued that much of the crisis of confidence in EU government stems from the style of problem-solving that it has adopted, which creates a fissure between interests and identities. It then examines how EU government could possibly 'legitimise' itself through being more receptive to the politics of identity.

II. The European Community as Weightless Legal Sovereign

As a metaphor for political authority, sovereignty remains one of the most powerful paradigms in modern government. This is no less true of the EC. The sovereign qualities of the EC Treaty, first claimed for it in *Van Gend en Loos*, are alleged to provide an absolute authority for EC law (Mancini 1989, 1998) tempered, more thoughtful authors admit, by the vicissitudes of judicial politics (Weiler, Stone Sweet & Slaughter 1998). They are also

alleged to provide an anchor for EU governance. By characterising the EC as both an autonomous politico-legal entity and one that is subject to a 'set of ascertainable rules which regulate the exercise of public power' (De Burca 1999: 64; Walker 1996:) they have allowed EU government as to be perceived as something that acts within and derives from a quasi-constitutional framework both by the Court of Justice and other institutions and actors. The sovereign qualities of EC law have thus been used as a meaning-generating device by the Court of Justice, which has used them as the ten-plate for the development of its jurisprudence on such matters as fundamental rights, national judicial duties, institutional rights and duties and duties of cooperation between Member States and the EC Institutions. They have been used in like vein by other actors – notably the Parliament and academics – through the establishment of the discourse of constitutionalism, to develop an imminent critique of the EU institutional arrangements (Craig 1997; Curtin 1993, 1997; Weiler 1997; Walker 1996; De Burca 1999).

Given its centrality, the notion of sovereignty is remarkably unproblematised. This is a pity, for when it is, as shall be seen, it moves from being the prima donna in the opera of European integration to being little more than the dispenser of interval ice creams. The history of sovereignty suggests that the praxis of those actors who have invoked it have given it a distinct meaning in each time-space within which it has been used. Its meanings and locations were thus quite distinct in Roman law, the mediaeval era, the classical era and that of the absolutist State (see especially Bartelson 1995: 88-236; Teschge 1998: 350-355; Pottage 1998). Even within the modern era one finds two contradictory dominant paradigms. The liberal or positivist paradigm which considers sovereignty to be vested in the law, legislative sovereignty, so that obedience is 'exclusively given to the law' (Eulau 1942: 7). Emanations of this paradigm include the rule of law, the *Rechtstaat*, the *état legal*. The other powerful paradigm, the republican paradigm, considers sovereignty as something vested in the 'people', who have the ability to amend the constitutional settlement and for whose benefit legislation must be enacted (Castiglione 1996, and, within an EU context, Craig 1997).

The genealogy of sovereignty suggests that it is too lazy to associate it, uncritically, with 'ultimate authority'. In any individual case it represents a series of 'different figures' each with a 'distinctive mode of binding persons and things' (Pottage 1998: 8). The most useful comparison is to that of a parergon (Bartelson 1995: 51).¹ This concept was first used

¹ The term is not used but in like vein see Kennedy 1992.

by Kant to describe the relationship of a frame to a picture. It both borders the picture and the picture's environment but is part of neither (Kant 1951). A parergon exists in what it helps to constitute but is simultaneously distinct from that which it has constituted. If this is correct in relation to sovereignty, then it will both be impossible to draw any analogous inferences about sovereignty from previous arrangements and its meaning can only be derived by locating it within the context of the particular institutional arrangements which it was deployed to help constitute.

This can be illustrated by contrasting the emergence of the 'sovereign' qualities of the modern nation State and the EC legal order. In the historical sociological literature the development of the secular sovereign State is connected to that of private property rights and the establishment of a capitalist economy. The classification of the State as sovereign both enabled the economic sphere to be separated from the political sphere and also, through centralised laws, gave political backing to the private property rights which are the mainstay of a capitalist economy (Brenner 1985: 284-299; Giddens 1985: 148-152). A feature of such differentiation was that it empowered both spheres in two ways. First whilst it allowed each to act upon the actions of the other, as neither could be reduced to the other, it implied possibilities of resistance and autonomy for each (Foucault 1982). Secondly, as power could only be realised and concretised through the actions of the subject, the latter's subjectivity and internal processes become an active relay for the exercise and organisation of power. Political measures could only take effect within the economic sphere, therefore, only through reliance upon the structures, discourses and social relations of the latter (v Krieken 1996).²

The thrust of the development of the EC sovereign legal order is more problematic still. It consists of a three-fold differentiation, which results in sovereignty centering authority far more weakly than in unitary arrangements.

The first and most commented upon is the separation of EC law from national law. Writing exploring the nature of EC legal sovereignty has been configured around this differentiation and correspondingly bounded by the nature of this sovereignty. It notes that

² A good example of this is happening within the political sphere is provided, paradoxically, by the albeit unconvincing principal-agent models which see the supranational Institutions as no more than agents of the Member States (eg Moravcsik 1998). The distinction between principal and agent implies some autonomy/resistance upon the part of the agent, which, the more perceptive advocates of this model have noted, is likely to increase in a process such as the Community's where there are very few controlling mechanisms available to individual principals/Member States (Pollack 1997). Secondly, the preferences of the Member States can only be expressed through the processes and languages of the agent. Even as an agent of national preferences the Court of Justice (Alter 1998) can only express national preferences in terms of individual rights, win-lose (as opposed to mediated) scenarios and on the basis of the limited information that parties, constrained by processes of standing and intervention, can put before it.

such differentiation involves political cleavage which the legal settlement must reflect (MacCormick 1993, 1995, 1996; Bellamy & Castiglione 1997), suppress (Grimm 1995; Mancini 1998) or mediate between (Weiler 1995, 1998; Joerges 1996, Richmond 1997). Yet this differentiation implies the possibility of resistance with the various national politico-legal fora, which have to apply EC law. Within judicial fora this has taken the form of the *Kompetenz-Kompetenz* debate that has followed the long lineage of national court decisions - culminating most recently in the decision of the Danish Constitutional Court on the compatibility of the Treaty on European Union with the Danish Constitution³ - which explicitly reject the claim of the Court of Justice to be the ultimate arbiter on the formal authority of EC law (Schilling 1996; Weiler & Haltern 1998; Eleftheriardis 1998). It also manifests itself in the manner various national courts have adapted the application of EC law to different legal traditions (Legrand 1996, 1997; de Witte 1998), judicial cultures (Chalmers 1997) and time-space contexts (Maher 1998).

Less dwelt upon within the legal literature are that the possibilities for resistance by national administrations in the transposition, application and enforcement of EC law are equally great. The only duties which have been measured are those on the formal transposition of directives. This is the narrowest of all the administrations' duties as it involves no more than adoption of an administrative act. Yet in the single market, for example, despite intense targeting by the Commission in its Action Plan on the Single Market, 13.2%, 181, of the Directives remained untransposed in at least one Member State some six years after the 1992 deadline.⁴ The position is even more patchy as one moves to national application of EC law. One of the least onerous duties on national administrations was to notify obstacles to free movements to goods under Decision 3052/95/EC.⁵ Since 1 January 1997 only 101 of these have been notified to the Commission. Of these 86 were notified by two States, Germany and Greece, and, of the twelve sectors identified by the Commission, 65 were in one sector, foodstuffs, alone.⁶ On the question of enforcement there is simply no data available, but the limits to which civil society can be monitored by national

³Case I 366/1997 *Carlsen v Rasmussen*, Judgment of 6 April 1998.

⁴The state of play as of 2 December 1998. See <http://europa.eu.int/comm/dg15/en/update/action/128.htm> (accessed 10 April 1999).

⁵OJ 1995, L 321/1.

⁶EC Commission, *Single Market Scoreboard No.3 October 1998* (OOPEC, Luxembourg) 15.

authorities is recognised in there only being a qualified duty upon the latter's part to do no more than what is reasonable to ensure EC law is applied (Haas 1998).⁷

The second differentiation is between the judicial arm of government and other arms of government. To be sure, these were always separate but the manifestation of the sovereign qualities of EC law did not take the form of private rights, but rather institutional duties imposed upon national courts - what Raz would call S duties (Raz. 1980) - with private rights and obligations only developed only through a form of *Drittwirkung*, as a corollary of these institutional duties. These empowered both the Court of Justice and national courts (Weiler 1993) by giving them a whole battery of new tools to be used against both the executive and legislative arms of government. Yet this has in turn provoked resistance on the part of these arms of government. The most high-profile forms of resistance are the various amendments to the Treaty that have eroded national judicial and Court of Justice powers of review. These now include opt-outs; governmental interpretations posited as Declarations; the exclusion of the Court of Justice's powers of review from the second pillar and from much of the third; the limitation of national judicial powers of review under the third; the subjection of national judicial reference procedures in that pillar to individual national government behest, and the limitation of powers of reference to national courts against whose decision there is no judicial remedy for matters that fall under Title IV of the EC Treaty. Far more pervasive, however, is the increasing resort to soft law and framework Directives, not to mention opt-outs, whose centrality to the integration process has been entrenched in the Protocol on the Application of the Principles of Subsidiarity and Proportionality. Not one reference has yet asked the Court of Justice to clarify whether particular EC legislation adopted since the TEU generated individual rights in national courts.⁸ In other words, not once has the 'constitutional' qualities of any post-Maastricht legislation been sought or affirmed by the Court of Justice

⁷ Eg Case C-265/95 *Commission v France* [1997] ECR I- 6959.

⁸ As of 10 April 1999, there had been no Article 234 EC references on legislation adopted later than 1993 with one exception. This concerned the direct applicability of the Uruguay Round Agreements, which was ironic as the Decision adopting them, Decision 94/800/EC/ECSC, OJ 1994, L 336/1, had made it quite clear that these were not directly applicable – See Case C-304/96 *Hermès International v. FHT Marketing Choice* [1998] ECR I-3603. There had been a small number, mainly in the field of public procurement, concerning Directives adopted in 1993. None addressed the question of whether particular provisions in these were directly effective. See Joined Cases C-69/96-C-79/96 *Garafolo et al v Ministero della Santà* [1997] ECR I-5603; Case C-44/96 *Mannesmann Anlagenbau Austria AG et al v Strohal Rotationsdruck GesmbH* [1998] ECR I-73; Case C-304/96 *Hera Spà v Unità Sanitaria* [1997] ECR I-5685; Case C-360/96 *Gemeente Arnhem v BFI Holding*, Judgment of 10 November 1998; Case C-93/97 *Fédération Belge des Chambres Syndicales v Flemish Government*, Judgment of 16 July 1998; Case C-162/98 *Generalstaatsanwaltschaft v Harmann*, withdrawn by Order of the Court 12 November 1998.

It is the third form of differentiation that most belies any claim on the part of the EC Treaty to any central authority. The EC's claim to authority over other political actors has been achieved at the expense of authority over other social actors. The reason for this are that the central objectives through which the EC realises its *raison d'état*, autonomy over the member States - the customs union, the single market, economic and monetary union - are liberal ones (Chalmers 1997). The cornerstone of these is the 'rationality of the free conduct of governed individuals' (Burchell 1993: 271) - a plea for less government rather than a plea for sovereign administrative authority. The European Union, as a liberal regime must therefore 'confront itself with realities - markets, civil society, citizens - that have their own internal logics and densities, their own intrinsic mechanisms of self-regulation' (Rose 1993: 289). Perhaps the most acute example of this are the Commission's regulatory powers in the field of anti-trust. This is the most area of most sustained focus of bureaucratic control in EC law. The breadth of Articles 81 and 82 EC should result in most large commercially significant practices being notified to the Commission for prior vetting and prior authorisation. The powers of control seem considerable, yet in 1997 the Commission adopted only 27 Decisions in the field of anti-trust.⁹ In the case of even these, it is not clear how far it adjusted its position to accommodate the arguments of the parties. To be sure, another 490 notifications were settled informally.¹⁰ Yet in these latter cases, a process of adaptation will have taken place within which the relationship is heterarchical rather than hierarchical in place, with there being a synergy between the manner in which the Commission is steered by the industry-specific arguments of the applicants and that between the way in which the latter are suborned by the formal arguments of the Commission.

The authority of the liberal paradigm of sovereignty is further vitiated by its being not only contingent upon the acceptance of the sovereign by the subject, but also reliant upon that contingency to prove itself (Pottage 1998: 16). The supremacy of EC law is only validated (and retroactively at that) through its subsequent invocation. Its quest becomes not 'implementation of a political programme .. but simple recognition of its name' (Pottage 1998:7).

This self-referential quality has two implications. The first is sovereignty is virtually useless as an instrument of government. As it is incapable of conceiving of societal processes as anything other than 'some homogenous plain peopled by an abstract homo juridicus'

⁹ EC Commission, *XXVIIth Report on Competition Policy (1997)* (1998, OPEC, Brussels – Luxembourg) 36.

¹⁰ Even more practices will not have been notified on the grounds that they fell within a Block Exemption or, more illicitly, that it was not worth the regulatory cost.

(Blomley & Clark 1990: 441; for further detail on this see Blomley 1994: 40-56), it is infected with a blindness, which renders it incapable of possessing sufficient steering capacity to act strongly upon others. It is from this passivity that the second, far more significant implication flows. Outside the narrow political sphere sovereignty is not something that allows the EC to act upon others but rather something that allows others to act upon the EC. The few case studies of the sovereign qualities of the EC therefore show that these are used by 'outside actors' – Sunday traders (Rawlings 1993), gender equality pressure groups (Barnard 1995; Alter & Vargas 2000) or national civil servants (De Areilza 1995) – both against other parties but also to imprint a particular vision of the law that furthers their particular interests. Similarly, in the arguments of those who allege that the EC has created a 'constitution without constitutionalism' (Weiler 1997) there is an acknowledgement that sovereignty confers authority not so much upon the EC as upon private actors – there is just concern about which actors it is enfranchising.¹¹

Sovereignty therefore postulates a triangular relationship. At the apex there will be the party invoking it. At one of the other points will be the party against whom they are invoking it and at the third will be the EC itself. The paradox within this, however, is that this triangle will always be 'centered around the social'. This suggests that the tools of the EC political authorities may lie elsewhere. Yet there is also a positive message. Insofar as this triangle feeds back into EC government, it suggests that EC government must be a dialectic process, much of whose brains lies not in national or EC courtrooms, legislatures or executives but in the societal processes with which they interact.

III. The Unpopulated Territories of EU Government

The territorial trap into which EU studies has fallen has a long lineage. Territoriality, the delimitation and assertion of exclusive control over a geographic area, has been claimed to be the central feature which characterises the modern political geography in Europe from the series of personal allegiances and vassalage of Mediaeval Europe (eg Anderson 1986; Spruyt 1994; Teschge 1998). The emergence of the modern State has been linked to its ability to implement the strategy of territoriality. Michael Mann, in particular, has argued that, because

¹¹ From the author's argument, it will be clear that the creation of a series of sovereign rights does not stop this, as sovereignty has no say over who disposes of it. A constitutional right to freedom of expression, therefore, is as much, if not more likely, to be invoked by a media baron as by a civil liberties group.

it is territorially centralised and bounded unlike other 'power actors', the State is, thus, not only entrusted resources by these actors but also gains an autonomy which allows it to act upon these actors and structure social processes (Mann 1984, 1993; Johnston 1990; Taylor 1994; Hobson 1998). Territorial sovereignty is also 'introduced both as the defining property of the state and in explaining the presence of an international system' (Bartelson 1995: 23). This is reflected in most traditional, positivist conceptions about both the respective fields of application and the nature of domestic and international law. Domestic law is applied within a State's territory and, within that territory, it is not only sovereign, but, formally, has an equal and universal coverage (on this and its 'geographical nonsense' see Pue 1990). International law, by contrast, is the normative regulation of relations between sovereigns. Impoverished, its is reduced to the regulation of a largely self-interpreting 'negative community' – not based around any common vision but only around common practices and a mutual recognition of rights, predominantly territorial ones (Kratochwil 1986: 33).

Yet territoriality is an essentially hollow concept. Its binary code is the colonisation of an abstract, unitary space. The sheer hollowness of this latter concept results in a vagueness both as to the material political and social processes which led to the emergence of the nation-State and to the meaning – generating processes – eg the myths, totems and imagined communities of nationalism – by the nation-State. Unsurprisingly, therefore, the historical role of territoriality as the transliterative principle of secular, political modernity has been found to be overstated (Spruyt 1994: 183-194; Grosby 1995: 153-155). More substantially, it gives no account of the various other processes - be they secularisation, mercantilism, the Westphalian balance of power or the development of modern bureaucratic powers of control (starting points in this regard are Tilly 1975; Poggi 1978; Spruyt 1994) - that are alleged to have contributed to the emergence of the modern State. Likewise, territorial descriptions of the nation-State have also been rightly criticised for their overtotalising views of the State and their failure to account for the 'internal pluralisation and fragmentation' of the State apparatus' (Offe 1996: 63).

Territoriality has been no less central to analyses of the European Union, albeit in a slightly differently configured manner. It is the 'relative deterritorialisation' of the European Union that marks it out. Both its distinctive governance structures, which see it replicating comfortably neither the collective will-formation of the fifteen Member States nor the features of a unitary State, and the pooling of these around such spatial configurations as the 'Common Market' or 'Economic and Monetary Union' suggests to many an 'unbundling of territoriality' (Ruggie 1993: 171; Anderson 1996: 144-147). This reconfiguration has lead to

a schism within the political studies literature as to how the European Union should be conceptualised. One account conceives of it as a new multilevel form of governance, which distinguished from the territorial State by being decentered, pooled, non-hierarchical and based upon interdependent relationships between a wide number of administrative and private actors (Kohler Koch 1996; Caparaso 1996, Hurrell and Menon 1996; Marks et al. 1996; Laffan 1997; Armstrong & Bulmer 1998). Others posit as creating new centres of hierarchy, albeit ones that do not rely upon territoriality but rather based around new agenda-setters such as the Parliament, the Commission and the Court (Majone 1994; Tsebelis & Garrett 1996; Hix 1996; Pierson 1996) or new public spheres (Sandholtz & Stone Sweet 1999).

For both forms of analysis, the European Union thus poses as fundamental a break from the past as the emergence of the modern State itself (Bull 1977, Ruggie 1993) New political vocabularies have been invented to accommodate this new 'polity' (eg Ruggie 1993; Schmitter 1996:130-136). This analysis has been paralleled in legal theory, with the EC being credited with creating a new shared, 'relatively deterritorialised' legal sovereignty (Joerges 1996; de Sousa Santos 1996: 284-288, 376; Bellamy & Castiglione 1997). This is seen as posing difficulties for standard positivist legal theory (MacCormick 1993; Mortelmans 1996), so new terms such as an 'entity of interlocking legal spheres and 'contested polity' are invented (Maccormick 1997; Bankowski & Christoloudis 1998). Similar developments are emerging in EU administrative law with proposals for its rationale to be reconsidered not as providing a form of substantive review but of guaranteeing appropriate interest representation and deliberative rationality (Joerges & Neyer 1997; Everson 1998; Harlow 1998)

In all this the European Union is treated as something that creates a new centre and new style of government that stands in opposition to the member State (Peterson 1995; Carter & Scott 1998). Yet in this it shares an ontological complicity with the literature on the territoriality of the nation-State. The emptiness of the latter concept results in 'deterritorialised' accounts of the EU playing a legerdemain by being no more than a negative of a negative. By focusing on changes in the *representation* of government that are of little descriptive value rather than in how material processes are embedded or meaning generated, they give the impression of greater rupture and discontinuity than is actually is the case.

This leads to too great a contrast being drawn between 'EC' and 'national' practices (whatever these are and as if the two could be separated). The multi-level governance model both obfuscates the hierarchical, centered and autonomous qualities of the European Union that parallel those of the nation-State (Hix 1998) and the extent to which the network model,

upon which it draws, is applied in areas of regulatory complexity outside the domain of EU governance (Jachtenfuchs 1995; Lateur 1997; Glasbergen 1996). Hierarchical 'centered' accounts of the Community, by contrast, understate the extent to which the EC public sphere is constituted through 'national' political actors. Thoughtful accounts have therefore illustrated that many of are informed by processes of administrative interaction, fusion and bureau-shaping by national civil servants inform much of the Union's executive and quasi-legislative processes (Bigo 1994; De Areilza 1995; Wessels 1997a, 1997b). Others have pointed to the reciprocal relationship that now exists between much domestic and EC policy-making in both the EC's meso-legislative processes (Anderson & Liefferink 1997: especially 10-35) and its micro ones (Egan 1998).

Yet these are not the worst sins of such approaches. By failing to embed EC decision-making processes sufficiently within their surrounding context these approaches create a politics that is apolitical. For as it is unclear who or what is to be affected, combated, refuted or negated by Union decisions it becomes a politics without power and a politics without enemies.¹² They also create a weightless form of law. It is a law that acts as no more than a handmaiden to these processes bereft of much of its communicative power. Both the wider coercive powers of law are lost as well as the potentially emancipatory features 'which not only keep(s) one foot in the medium of ordinary language, through which everyday communication achieves social integration in the lifeworld; it also accepts messages that originate there and puts these into a form that is comprehensible to the steering codes of the power-steered administration and the money-steered economy' (Habermas 1996: 81).

IV. The Style of European Union Government

(i) The Development of Social Government

A feature of government in Europe since the eighteenth century has been the onset of liberal intergovernmentality. Government has ceased to become interested in increasing authority for authority's sake (*raison d'etat*) but becomes enmeshed in the things that it manages and 'the pursuit of the perfection and intensification of the processes which it directs' (Foucault 1991:

¹² This paragraph draws on the work of Carl Schmitt. For him, politics was characterised by two features. The first was the adoption of measures which were considered singular, authoritative and final. The second was that such measures were tied to resolution of a specific conflict. This leads inevitably the generation of a friend-enemy axis in that decisions taken will always create a form of closure, which will simultaneously include and exclude (Schmitt 1996: 67-68).

95). A consequence was that government could no longer be exclusively interested in, what Scharpf terms, input-oriented legitimacy, namely the constitution and structures of the public sphere (Scharpf 1999: 7-10). It had to consider itself, increasingly, also in terms of output-oriented legitimacy- namely how far measures promoted common welfare (Scharpf 1999:6). The European Community represents one of the most extreme forms in this shift.

The reasons for this are well-established. At its root lay an increasing gap between expectations of national governmental problem-solving capacities and national governmental abilities to meet these expectations. The reasons for this gap include an increase in the functions of the State with the development of welfarism (Wallace & Wallace 1996: 15-16; Wessels 1997; Scharpf 1997); increased autonomy from the State on the part of many private actors (Rose 1993; Teubner 1997), and a diminution in the tools available to national governments in a range of fields eg fiscal, monetary and environmental – that arose from the variety of external pressures that go under the umbrella of globalisation (Castells 1996: 92-99; Held 1997; Ruggie 1997; Graham 1998). The processes of efficiency, specialisation and rationalisation offered by the European Union offered both a new ‘field of forces’ and enhanced problem-solving capacities that were and continue to be attractive to a wide range of national institutional actors, and could be exploited by a wide variety of transnational and supranational institutional actors once put in place (Milward 1992: 21-45; Caporaso 1996; Wessels 1997; Armstrong & Bulmer 1998: 256-260; Moravscik 1998: 35-50).

Whilst the self-legitimation of the Community, thus, became centrally tied, in the first instance, to the realisation of a series of institutions - eg the single market, the common agricultural policy, common transport policy, economic and monetary union, citizenship, area of freedom, security and justice - the quintessentially liberal nature of these institutions rendered them institutions of government *for* the actors and processes upon whom they acted. The consequence was that these institutions had to be governed from a ‘social point of view’ (Procacci 1989; Rose 1996). As Deleuze has observed ‘the social’ meant in this context ‘a particular sector in which quite diverse problems and special cases can be grouped together, a sector comprising specific institutions and an entire body of qualified personnel.’ (Deleuze 1979:ix) The centring of government around the ‘social’ transforms it into a mutually constitutive process. To be sure, government shapes the actions of those subject to its structures, but government must also react according to the autonomous densities, qualities and demands of these subjects so that these also act to reconfigure

government. This has led over time to these institutions becoming instrumentalised in that they became increasingly reduced to their problem-solving capacities.

This affected not merely the quality but also the ambit of EU government. Whilst the formal and territorial limits to EU competencies limited the instruments available to it, they did not determine its reach. The attunement of social government to the properties of its subjects results in the determination of the parameters of EU government being a dialectic process, whereby EU government's reach is determined by its cognition of the densities and the properties of those subjects upon whom it impacts. In turn, it steers these as much as those who are formally subject to its competencies. To give one example, the EC has no formal competences in the field of family policy. Indeed, were the Commission to propose such a formal competence, the rhetoric of subsidiarity would be outpoured to deny it such a competence. Yet since 1963, when legislation was passed to facilitate aids for the transfer of agricultural workers and their families,¹³ all EC policies have been adapted so that the family – in contrast to other long-term relationships of mutual commitment – is both subsidised and becomes a source of rights and responsibilities.¹⁴ The consequence is that, over time, the EU has begun to exert an effect on the shape of the institution, increasingly setting out responsibilities that it creates between its members.¹⁵

Whilst there is a danger in pointing to milestones, as it suggests greater rupture than is actually the case, it is possible to speak of a qualitative shift towards social government by the EEC from the mid 1970's onwards. Prior to that, the self-legitimisation of the Community was realised almost exclusively in the formal realisation of a set of institutions set out in the Treaties. From the 1970s it moved, increasingly, towards a 'government of the population' – a concern with general welfare, so that any measure had to be assessed against how it contributed to the general good. This manifested itself in three ways.

The first was through a quantitative and qualitative shift in EC law-making. Quantitatively, there were increases in the number of measures adopted and proposed and a decrease in both the backlog of measures to be adopted and the time they took to be adopted (Sloot & Verschuren 1990; Golub 1997; Wessels 1997). Perhaps more importantly, more diverse use was being made of Community law-making powers, particularly Article 308 EC. Law-making became less attached to realisation of the institutions explicitly set out in the Treaties. The doctrine of conferred powers ceased therefore to act as a meaningful constraint

¹³ Directive 63/261/EEC, OJ Special Edition (English Edition), Series I (1963-64) 17.

¹⁴ For more on this see pp 30-31

on the exercise of Community powers (Weiler 1990; Tschofer 1991). Instead, these became increasingly bounded by the problem they were responding to and the manner in which it was constructed.

The second was the growth in comitology committees, Working Groups and Expert Groups both quantitatively and in terms of the subject-matter they addressed during the late 1970's. Between 1975 and 1985 the number of committees listed in the EC Budget increased from 93 to 239. Whereas agriculture and taxation accounted for 57/93 committees in 1975, they accounted for only 86/239 of the committees by 1985 (Falke 1996: 136). The importance of this lay not just in the growth of the Community administrative apparatus and the acquisition of executive power (De Areilza 1995). They also allowed for a continuous and adaptive relationship between the legislation and the processes it was regulating. This process of adaptation was however a highly charged one. On the one hand, it led to institutional fragmentation as vertical synergies and symbiotic relationships developed between these committees and the processes they regulated which subvert their links with the formal institutional arrangements.¹⁶ On the other, by becoming the central intermediary through which legislation is able to adjust to and immerse itself in these processes, over time these committees also created new cognitive frames. Problems became reconstructed increasingly in terms of risk management discrete from questions of socio-economic, political or cultural importance.¹⁷

The third, and least commented upon, development was a change in the use of statistics. Arguably, this seemingly arcane area was the most telling. Immersed in its own subjects, social government requires information about these to determine its qualities, intensity and reach. Statistics thus lie at the heart of social government, as they enable 'reflexively monitored system reproduction, involving the regularized gathering, storage and control of information applied to administrative ends' (Giddens 1985: 178). The collection of information has therefore tended to indicate both the ambit and intensity of State governance in modern systems of political economy (Harley 1988; Turnbull 1996; Black 1997: 17-28). Founded in 1953, EUROSTAT started to collect 'Social Statistics' since the early next 1960's. These were initially, however, applied to discrete issues such as agricultural prices,

¹⁵ Council Conclusions on Safety at School, OJ 1997, C 303/3, para 2; Council Act drawing up the Convention on Jurisdiction and Recognition and Enforcement of Judgments in Matrimonial Matters, OJ 1998, C 221/1.

¹⁶ As early as 1983 the Parliament expressed concern about the level of autonomy that these committees enjoyed from the Commission, OJ 1983, C 277/195.

¹⁷ The most celebrated example of this was the ban on British bovine products and cattle during the BSE crisis, Decision 96/239/EC, OJ 1996, L 78/47. It was, however, already an issue as far back as 1984 (Demmke et al 1996: 64-65).

external trade, social conditions in particular industries, and transport. Information was not collected on general welfare or, its institutional expression, demography. The largely inward-looking nature of this task was felt to be insufficient to make EEC policies sufficiently reflexive. In 1973 Directive 73/403/EEC synchronised national population censuses to enable the Community to fulfil the task assigned to it by the Treaty, in particular Articles 2,3, 117, 118 and 122¹⁸ – the provisions of the Treaty which set out the need for the Community to engage in social government. This was taken a step further 1977 with EUROSTAT publishing its first statistics on demography.¹⁹

An intensification of these pillars of social government – law, administration and information – took place at the beginning of the 1990s. There was, on the one hand, a ‘constitutionalisation’ of some existing policies and acquisition of new competencies with the adoption of the Treaty on European Union, most notably in the field of Trans-European Networks, Cohesion Policy and Economic and Monetary Union. On the other, there was an increase in the amount of law that was generated by the Community with the number of binding acts adopted by EC institutions increasing from about 600 pa in 1987 to just under 2,500 in 1992 (Fligstein & McNichol 1998: 76). There was also an increase in the use of comitology with the number of committees and the expenditure they incurred rising by over 60% between 1989 and 1992 alone (Vos 1999: 117-118; House of Lords 1998-99).

Finally, there was an increase in the range and intensification of statistics covered. In 1986 the EUROSTAT Catalogue of Publications ran to 38 pages and contained 8 themes (General statistics, Economy and Finance, population and Social Conditions, Energy and industry, Agriculture, forestry and fisheries; foreign trade; services and transport, miscellaneous). In 1996 it run to 107 pages and contained two additional themes, environment and research and development. The statistics had ceased to be territorial in nature with statistics developed on a number of third countries - particularly intensively – and this is consistent with the level of governance - on the countries of Central and Eastern Europe.²⁰ There were important qualitative changes as well. EUROSTAT increasingly positioned itself at the network of a fulcrum of national statistical centres across the EEA through the intensification of the European Statistical System. This led to a fusion of administrative practices, which include development of common classifications, an increased

¹⁸ OJ 1973, L 347/50, Preamble, alinea 3.

¹⁹ EUROSTAT, *Demographic Statistics 1960-1976* (1977, OOPEC).

²⁰ The framework for this is set out in Decision 93/464/EC, OJ 1993, L 219/1, on the framework programme for priority actions in the field of statistical information.

number of common surveys using harmonised methods, injection of ‘Community know-how’ into national statistical programmes and promotion of convergence through training activities.²¹ Secondly, there was increased concern with ensuring that the statistics gathered were sufficiently germane to EC policies. The European Advisory Committee on Statistical Information was therefore established in 1991 to finesse statistics to the requirements of European integration.²² Action Programmes on Community Statistics were established to ‘provide the European Institutions and governments of the Member States with the information needed to implement, monitor and evaluate Community policies’.²³ This resulted in EC statistical activities increasingly reflecting, if not contributing to, the central areas, priorities and ideological claims of EC government.²⁴

ii. The Impact of Social Government on the Style of EC

Social government has served to configure the qualities of EC policy-making within the narrow EC public sphere in a number of ways.

The first was the development of new micro-processes to structure and legitimate government. The instrument, par excellence, for this has become the Action Plan. Since the original ones in 1973 and Social and Environmental Policy, these have proliferated to cover most areas of activity in the EC and JHA pillars. The enabling role of Action Plans stems not from the formal nature of the commitments in the Action Plan. For these are frequently broken and there is no sanction for their breach. It is rather that the Action Plan serves as a form of rationalisation to knit and systematise legislation around wider policies and processes of problem-solving. It is this position as an intersection point that results in the Action Plan having enabling and legitimating qualities, which both allow it to create new discrete fields of action and to justify further legislation.²⁵ It also allows it to structure legislation through providing panoramas which simultaneously create linkages between individual pieces of

²¹ Ibid., Annex, Outline Programme 1993-1997 – Major Activities Envisaged for Community Statistics.

²² Decision 91/116/EEC, OJ 1991, L 59/21.

²³ Decision 93/464/EC, OJ 1993, L 219/1, on the framework programme for priority actions in the field of statistical information, Annex, Outline Programme 1993-1997 – Major Activities Envisaged for Community Statistics. See also Decision 1999/126/EC on the Community Statistical Programme 1998 to 2002, OJ 1999, L 42/1, Preamble alinea 7 & 8.

²⁴ The three ‘major’ Community policies for 1998 to 2002 are therefore stated to be Stage 3 of EMU, competitiveness, growth and employment and enlargement. Ibid, Annex I, Introduction (iii).

²⁵ Examples of whole new policy domains being created which are not explicitly listed in the TEU or would otherwise be extremely contentious, include, in recent years, the Action Plan on ameliorating internal taxation in the Internal Market (Fiscalis Programme) OJ 1998, L 126/1; the Action Plan for Learning in the Information Society COM (96) 471; and the proposed Action Plan for the Integration of Refugees COM (98) 731.

legislation and compartmentalise issues, thereby providing processes of closure which not only separate some 'problems' off from others but also prioritise some legislation over others.²⁶

The second feature of EC government is a concern with an economy of government. Government becomes a process of striving to 'do more with less'. This created a tension because the development of problem-solving capacities and structures led, paradoxically, to more government as a symbiotic relationship developed between governmental intervention and the emergence and solution of new problems. The most prominent early structures to curb these tendencies were the creation of individual economic rights through the development of the Treaty's sovereign qualities and the development of general principles of law. The proportionality principle, most notably, establishes a strong presumption in favour of private autonomy, so that public intervention will be illegal unless it can be justified in terms of social government. The atomistic qualities of these principles rendered their steering potential weak. They were only suitable for application in the judicial sphere with the result that they were invoked in an ad hoc and selective manner. Furthermore, their focus on the individual interest resulted, in practice, in many collective interests being rendered invisible and the prejudice to a particular individual interest having to be severe before a measure was declared illegal.²⁷

The tension were resulted far more effectively through the development of the subsidiarity principle in Article 5(2) EC. Whilst this principle gained prominence in the negotiations on the Treaty on European Union, its existence, in fact, tagged behind the growth in EC law so that inchoate expressions can be found in Community instruments from the mid 1980's onwards.²⁸ The principle amounts to an expression of the dilemma of liberal governmentality in its requirements that the Community only take action if, by reason of the scale or effects of the proposed measure, its objectives can be better realised by the Community. Within this has proved its effectiveness. It is above all an administrative tool of government which provides for a balance of collective interests rather than a particular individual interest against a collective interest and thus acts a far more nuanced and powerful

²⁶ The most salient example of this is the Action Plan on the area of Freedom, Security and Justice, OJ 1999, C 19/1.

²⁷ The most clear example of this is those cases which uphold the principle of the right to property, but almost never find it to be infringed. Most recently see Case C-15/95 *Kerlast v Union Régionale des Cooperative Agricoles* [1997] ECR I-1961; Case C-1152/95 *Macon v Préfet de l'Aisne* [1997] ECR -5429; Case C-189/96 *Demand v Trier*, Judgment of 17 December 1998.

²⁸ Thus in the 3rd Action Plan on the Environment it is stated: 'It is necessary to seek the level of action best suited to the problem in question: consequently the Community level should be reserved for those measures which can be most effective there.' OJ 1983, C 46/1, para 9.

counterweight against action.²⁹ This process was internalised into EC administrative procedures through the requirement that all EC Institutions must give reasons which justify measures in subsidiarity terms.³⁰

The concern with an economy of government has led, thirdly, to EC government becoming an endlessly reflexive process, which continually seeks to improve itself. This has manifested itself in a number of ways.

The first, and possibly most ephemeral, is a concern with both the formal and actual effectiveness of EU measures. Examples of this include the Annual Reports on the Monitoring of Community Law; the scoreboard on the implementation of single market Directives; the numerous Scientific and Technical Committees, which have the power to update legislation across a variety of sectors according to technological and scientific developments; the use of Annual Reports to monitor the impact of EC legislation on particular sectors; the various expressions of concern at both an Intergovernmental³¹ and EC Institutional level on the correct application and enforcement of EC law.³²

At a more deep-rooted level there is, secondly, a continuous preoccupation with regulatory reform. This is so entrenched that it has become a mantra of EC government since the early 1980's. This can be traced from the onset of the internal market with its shift from 'old style harmonisation' to the 'New Approach';³³ the subsidiarity discussions and the Sutherland Report (Maher 1995); through the Essen European Council and Molitor Report on the relationship between regulation and competitiveness; the debate on Better drafting and Law-making³⁴ and the Annual Reports of the Commission thereon³⁵ (Burns 1996); the current SLIM programme, which considers the single market as a launchpad for more wideranging national regulatory reform.³⁶

²⁹ For this reason the principle has proved difficult to apply judicially (De Burca 1998; Chalmers 1998: 227-233).

³⁰ Protocol on the application of the principles of subsidiarity and proportionality, Articles 9 and 11 which require the Commission, Parliament and Council to review and justify all proposals and amendments in terms of the principle.

³¹ Eg Most saliently, Declaration to the TEU on the Implementation and Community Law and, most recently, Conclusions of the Vienna European Council 11-12 December 1998, paragraph 49.

³² Eg Council conclusions of 21 December 1992 on the effective implementation and enforcement of Community legislation in the area of social affairs, OJ 1993, C 49/6; Council Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law OJ 1997, C 321/1

³³ And the concern with the latter's effectiveness. See EC Commission, COM (98) 291

³⁴ eg Council Resolution on the Quality of Drafting of EC Legislation, OJ 1993, C 166/1. Declaration attached to the Treaty of Amsterdam on the Quality of Drafting of Community Legislation.

³⁵ eg. Most recently, EC Commission, *Better Law-Making – a shared responsibility* COM (98) 315.

³⁶ Council Resolution on Legislative and Administrative Simplification in the Single Market, OJ 1996, C224/5; Conclusions of the Vienna European Council 11-12 December 1998, paragraph 50. On the reaction of the European Parliament see OJ 1998, C 80/292.

This has led, thirdly, to an ever diverser array of instruments. There are now 17 types of instrument listed in the TEU alone,³⁷ with the number increasing with each Treaty amendment. In addition, institutional practice has led to the deployment and creation of a number of other instruments.³⁸ Whilst the boundaries between many of these instruments are obscure, the heterogeneity of formal legal effects produced has resulted in the division between formal and informal forms of control becoming increasingly blurred.

As a corollary, the formal hierarchies set out become increasingly nuanced. Legislation concerns it less explicitly with the imposition of classical rights and duties upon subjects of government. Instead, it is more concerned with augmenting the capacities of government. It therefore focuses increasingly upon the articulation and institutionalisation of processes of cooption and management. In some domains, such as environment, consumer, social and structural policy this results the EU resembling the ‘animator-State’, desired by Delors, which organises and provokes patterns of cooperation and confrontation between public actors and civil society (Delors & Clithesne 1992 quoted in Barry 1993). Examples of this include the attempt to create ‘European social space’ administered by the two sides of industry,³⁹ the Fifth Action Programme which seeks to coopt the citizen, local government, industry and the consumer into promoting its objectives;⁴⁰ the partnership structures set up by the Commission in the administration of the Structural Funds; the cooption of national consumer association and local consumer offices into ‘providing a more powerful voice for the consumer’ in the 1999-2001 Consumer Action Programme.⁴¹ Yet, as this process is primarily about increased management capacities, in others there is no ‘privatisation of government. Instead, skeins of administrative actors are created, each of which serve to facilitate the other’s powers of control over its territory. The most notable example of this is in the field of police cooperation where the brunt of the measures taken in this field concern themselves with increasing national surveillance capacities – be it through cooperation in

³⁷ In the EC pillar the Regulation, Directive, Decision, Recommendation and Opinion are listed in Article 249 EC. To these instruments must be added the international agreement (Article 300 EC), multiannual programmes (eg Articles 166 & 179(1) EC), guidelines (eg Article 156 EC) and the Action Programme (eg Article 175(3)). In CFSP there are general guidelines, common strategies, joint actions and common positions (Article 12 TEU). The third pillar provides for common positions, framework decisions, decisions and conventions, Article 34(2) TEU).

³⁸ Eg the framework Directive and the Resolution.

³⁹ For a recent statement on this see the EC Commission, *Social Action Programme 1998-2000* COM (98) 259

⁴⁰ Decision 2179/98/EC, OJ 1998, L 275/1.

⁴¹ Details of this can be found on http://europa.eu.int/comm/dg24/library/legislation/ap/index_en.html. See, in particular paras. 9-12.

maximising the efficacy of police operating techniques and procedures;⁴² enhanced extradition facilities,⁴³ or the creation of the panoply of networks for the exchange of information⁴⁴ (Chalmers 1998). A feature of all these areas, however, is that as inclusion in the legal framework is about participation in governance, whilst government imposes responsibilities it also confers enabling and facilitating qualities upon its subjects, which privilege them vis-a-vis those outside these arrangements. The politics of the European Union consequently increasingly becomes that of organisation and recognition –who is on the network and where and who is not.

The fourth manifestation of this reflexivity are attempts made to make EC policies ever more cognisant of other policies. The most salient example of this is the ‘mainstreaming’ of policies. Since almost their inception, it has been stipulated that consumer and environment policies should be integrated into other policies.⁴⁵ Problems with these policies is increasingly portrayed as their not being integrated enough into other policies. Their ‘integration’ has therefore been constitutionalised⁴⁶ and new administrative tools and procedures established to facilitate it.⁴⁷ Increasingly, additional policies, such as public health at Maastricht⁴⁸ and gender equality at Amsterdam,⁴⁹ are being mainstreamed. Cognisance must also be paid to other interests, such as protection of persons with a disability⁵⁰ and sporting associations,⁵¹ even if, in formal Treaty terms, these do not constitute Treaty

⁴² eg The Directory on Counterterrorism techniques to be prepared by the British Government, Decision 96/610/JHA, OJ 1996, L 273/1. The OISIN programme on the exchange of personnel; training in other Member States’ languages, laws and operating procedures. Decision 97/12/JHA, OJ 1997, L 7/5.

⁴³ The (as yet unratified) 1995 and 1996 Conventions on Simplified Procedures for Extradition, which provide for extradition for any offence punishable under the law of the requesting State by a deprivation of liberty of at least 12 months OJ 1995, C 78/2 & OJ 1996, C 313/2. See also the Protocol on Asylum for Nationals of Member States of the Union

⁴⁴ These include discrete programmes for the provision for the exchange of DNA, Council Resolution of 9 June 1997, OJ 1997, C 193/2 and sizeable groups which pose a threat to law and order Decision 97/339/JHA, OJ 1997, L 147/1 as well as the more wideranging ones of the European Drugs Unit and the Schengen Information System. The former – when implemented by the now ratified Europol Convention -will contain information on all persons who have committed or are suspected of committing illegal drug trafficking; motor vehicle crime; trade in human beings; terrorist activities against life/limb/property; illegal immigrant smuggling; trafficking in nuclear substances.

⁴⁵ On consumer policy see Council Resolution on a preliminary EEC programme for a consumer protection and information policy, OJ 1975, C 92/1, pt.4. See also, on this, EC Commission, First Report on the Integration of Consumer Policy Into Other Policies COM (87) 616 final. On the environment see Council Declaration on a Programme of Action on the Environment, OJ 1973, C 112/1, Title II, para 2.

⁴⁶ On the environment see Article 6 EC. On consumer protection see Article 153 (2) EC.

⁴⁷ Declaration 12 to the TEU on Environmental Impact Assessment. On internal Commission administrative reforms see Commission Press Release DG XI IP/97/636. Most recently see EC Commission, *Partnership for Integration - A Strategy for integrating Environment into European Union Policies* COM(98)333.

⁴⁸ Article 152 (1) EC.

⁴⁹ Article 3(2) EC.

⁵⁰ Declaration No. 22 on Disabilities.

⁵¹ Declaration No 29 to the TEU on sport.

policies. This should not be seen, however, as some one-way colonisation of the economic institutions of the Treaty by postmaterial values. The process is a symbiotic one, which seeks to 'economise' these latter institutions by requiring them to be reflexive to economic concerns. This is done not explicitly, but through the debate on regulation and competitiveness, which, at its crudest, requires all policies to be evaluated through the prism of cost-benefit analysis.⁵²

The fourth feature of social government is that as government now measures its success in terms of problem-solving, there is a strong concern with the authority of expertise (Sand 1998: Chalmers 1999a). This has guided the internal organisation and normative structures of EU decision-making processes. Organisationally one can point to five manifestations. The first is the internal pluralisation within the Commission and the proliferation of Council working groups, all organised around relatively discrete areas of activity. The second has been the development of comitology. Much is made of how these committees of national civil servants act as a curb on the exercise of Commission powers (Joerges 1996), but the majority of committees are Scientific and Technical Committees (House of Lords 1998-99: Appendix 5). The form of mediation taking place is rarely 'deliberative supranationalism' – a mediation that revolves around an opposition of national vs. supranational interests but, rather a mediation between scientific and lay values. The third lies, partly, in the much discussed proliferation of agencies whose authority lies in their specialisation and 'technocratic nature' (Kreher 1996). It also lies in the creation of quasi-autonomous institutions whose role is not representative and who enjoy little power to disseminate information, but whose sole is to augment the efficiency of decision-making by the EU Institutions through the garnering and provision of information. Examples of this include the Policy Planning and Early Warning Unit in CFSP and the Monetary Committee in EMU. Fourthly, there is a permanent concern with improving and systematising the processes of information collection. This can lead to two developments. The first example in consumer policy is the creation of Scientific Committees to oversee the organisation and processes of individual scientific committees.⁵³ The other is a perennial concern with improving processes of rationalising and specialising the collection of statistics.⁵⁴ The fifth lies in the development

⁵² Declaration to the TEU on Estimated Costs under Commission Proposals.

⁵³ Decision 97/404/EC on the setting up of a Scientific Steering Committee, OJ 1997, L 169/1. This must be read alongside Decision 97/579/EC setting up Scientific Committees in the field of Consumer Health and Safety, OJ 1997, L 237/1.

⁵⁴ In the last fifteen months there has therefore been a plethora of legislation on specialised statistics e.g Regulation 410/98/EC on structural business statistics, OJ 1998, L 52/1; Regulation 1165/98/EC on short-term statistics, OJ 1998, L 162/1; Regulation 1172/98/EC on statistical collection on carriage of goods by road, OJ

of ideologies, notably that of ecological modernisation, which enjoys a hegemony in the field of EC environmental law which make scientific expertise the medium for determining political disputes (Chalmers 1999a).⁵⁵

The fifth feature of EU government is that it is particularly vulnerable to the modern phenomenon of private parties taking over many of the roles traditionally reserved to bureaucratic agencies (Burchill 1993: 276). The origins for this lie in liberal government having always had to harness private forms of expertise to augment its capacities. The most striking example of active private engagement is the 'New Approach to EC Legislation' where private standard-making bodies determine levels of consumer and health protection for goods on the EC market. After a hesitant start, the density of this law-making process is increasing with CEN, the main standards-setting body having set 3517 standards by mid 1997 at rate of 750 pa.⁵⁶ Active private involvement permeates other areas of the Single European Market, most notably where governance structures rely upon the principle of mutual recognition. Such a paradigm is based around the politics of knowledge as it presupposes a core of expertise around which the notion of functional equivalence can be assessed. The task of supplying and assessing this knowledge is almost exclusively the domain of private agencies. Mutual recognition has thus become a euphemism for the development of network of (non Statal) professional bodies in the field of services⁵⁷ and private standardisation bodies in the field of goods.⁵⁸

iii. The Resources Available to the EC for Social Government

The diffuseness and 'decenteredness' of EC government may result in its being unable to be controlled by the EU political institutions. Yet the networks and relationships established by these institutions enables EU government to both exist as a construct and to operate as a

1998, L 1631/; Regulation 1615/98/EC Regulation 1110/98 amending Regulation 1615/89/EEC establishing a European forestry information and communication system (EFICS), OJ 1998, L 157/10; Regulation 2533/98/EC on the collection of statistical information by the European Central Bank, OJ 1998, L 318/8;

⁵⁵ Ecological modernisation, developed in Germany in the mid-1980's sees environmental degradation as a form of institutional or market failure. It therefore seeks 'win-win' situations which are simultaneously economically and environmentally beneficial. To measure environmental cost it relies heavily upon existing scientific definitions, which are then used as the central mediator in balancing ecology and economy.

⁵⁶ Annual Report of CEN 1996/97 at <http://www.cenorm.be/annual.htm#over>.

⁵⁷ eg Directive 89/48/EC on a general system for the recognition of higher education diplomas awarded on completion of professional education and at least three years duration, OJ 1989, L 19/16, Annex.

⁵⁸ The most recent example of this is Directive 98/34/EC on the provision of information in the field of technical standards and regulations, OJ 1998, L 204/37, which addresses a series of duties to provide information and standstill requirements directly to national standardisation bodies, almost of all whom are non-Statal, Annex II.

dialectic process. Within this, the importance of the political institutions lies, firstly, in the sanction that they carry. The sanction they bestow shapes both who and what contributes to the process of government and the nature of the relationship between the participants in government. The influence of the EU political institutions derives, secondly, from their continuing to be an important node of government after its establishment whose resources can be deployed to influence the actions of others.

The European Union has three forms of resource available to enable it to carry out this task. These are the provision of information, the deployment of economic resources and the enactment of legal acts. It shall be argued that the most important of the three has been the last one. To such an extent, in fact, that it is possible to make a claim that 'integration by law' has been the hegemonic mode of integration, albeit not in the manner suggested by some.

The resources devoted to the dissemination of information have increased over the years. The establishment of the European Central Bank has led to a second central institution, in addition to the Commission having information disseminating powers. This has been combined with a proliferation in the number of agencies established, now eleven, who have the power or indeed whose primary function is to disseminate information. The power of information as a tool of government, it is argued, lies in its ability to mobilise bias. It constructs understanding and thus how groups conceive of their interests.⁵⁹ There is thus a whole literature on regulation by information and some have seen the creation of EU agencies as policy-making by subterfuge based on the processes of specialisation and technocratisation (Shapiro 1996). The sanctioning effects of the tool are limited by its being unable to construct who can participate in EU government, as it is available to all. Clearly, the hope is that political institutions will make use of the information to develop policies, but the development of these policies and the construction of the corollary networks and relationships will be through other instruments. A more specific limitation in the case of the EU is that these bodies do not hold a monopoly over most of the information they provide. The Centre for Monitoring Xenophobia and Racism and the European Environment Agency may be the only bodies which provide information on racial hatred and the ecology at a pan-European level but the information is also collected by others, albeit not assembled under this frame. The pan-European reality constructed by the agencies is likely to have a limited mobilising force as it will have little resonance with the cognitive frames of most social

⁵⁹ For an excellent case study on this within an EC context see Hajer 1995: especially Chapter 2.

actors which are shaped by traditional self-identities and familiar experiences, both normally developed within strongly local contexts (Burningham & O'Brien 1994; Adam 1996; Macnaghten & Urry 1998 : Chapter 7).

The second resource available to the European Union is economic, in particular the distribution of expenditure. Much is made of the Union's financial resources, as a proportion of GNP, being small (only 1.27%) in relation to those available to federal authorities. In absolute terms the sums are not insignificant, however. The total Budget for the financial year 1999 amounts to 96,629 million euros in commitment appropriations and 85,558 million euros in payment appropriations.⁶⁰ To be sure, about 60 billion euros of this goes on two fields, agriculture and Objective 1 regions, but this concentration would lead one to assume considerable EC influence in these two fields. Such a resource casts a network of government, but one mainly cast in terms of beneficiaries. The frame that accords the EC political institutions greatest influence within this network is where these beneficiaries respond in a calculative, profit-maximising manner to the inducements it offers. There is of course a wealth of literature which claims that 'social embeddedness' prevents this from happening. Yet such literature can be as dogmatic as the economic approach it criticises. It ignores that all forms of exercise of power (and not just economic ones) can generate resistance and unpredictable responses, and suggests that economic instruments have no effect – a simply naïve suggestion. More nuanced accounts observe that the social networks that condition actions are vary according to the dynamics of the relations entered into at the time (Granovetter 1985). No actor is therefore always framed by any one network. As Callon has observed, the degree to which any actor participates in any economic network will be predicated not by the perfectness of the response of the agent in classical economic terms but by the degree of calculation on the part of that actor. Economic instruments, per se, can not provide the information for that calculation. Further tools are necessary, such as accountancy instruments to calculate the amount of benefit and legal tools to enforce the benefit (Callon 1998).

If economic instruments always require further enabling instruments to exert an influence, they face two further obstacles in today's modern political economy. The first is that the sums of money that can be transferred from public funds cannot match the flows from private capital. Their effect is thus only likely to be significant if targetted at a very narrow range of beneficiaries. There is thus a hotly contested literature on whether structural

⁶⁰ EC Commission, *General Budget of the European Union for the Financial Year 1999*, SEC (99) 150.

policy funds have made much difference to Objective 1 regions (Leonardi 1993, 1995; Keating 1995). The second is that expenditure can destroy the social institution it was designed to support. The CAP is almost an example *par excellence* of Habermas' critique of the welfare state. Money became the steering mechanism of the social institution rather than other forms of communicative interaction. Price support has therefore led to only marginal increased competitiveness but to lay-offs, destruction of agricultural communities, bureaucratic domination and fraud. The latter brought further repressive measures to curb it leading to yet further impoverishment of agricultural lifeworlds.

The third form of resource available to the EU is legal acts. This is the most widely used of all. Estimates suggest that the number of binding acts grew steadily by about 11% a year up until 1994, and levelled at about 2,500 binding acts per year. This is considered by author to be at 'levels near or above the range of the legislative acts of many Member States (Wessels 1997; 276). Recent official studies suggest that 53% of the legislative measures adopted in France in 1991 were EC inspired and that 30% of Dutch legislation implements EC Directives (Mancini 1998: 40).

The central feature of legal acts as tools of government is that they consist of textual communications. As a text, they can serve to set up relationships not just directly between the EC Institutions and third parties but between third parties, inter se, through the identification of parties in the legal act. The manner in which the instrument can characterise these relationships can be as varied as language permits. The textual qualities of the legal act therefore make them the instrument *par excellence* for both generating expectations and establishing networks. The relationships established are primarily adaptive in nature. As was argued earlier, the liberal qualities of EU law and the limits on administrative resources constrain its ability to coerce, irrespective of the formal qualities of the instrument. To these two limitations must be added a third, namely that that, even prior to the TEU, the number of instruments which generated individual rights and duties is not large. As of 31 December 1998, the number of judgments in which the Court of Justice has found a provision other than a Treaty article to be directly effective is only 59 (out of 3,902 references).

This process of adaptation determines the reach of EC law in temporally and spatially. In temporal terms, power is not something that once exercised, remains exercised and continues to be exercised. Paradoxically, as convergence between regimes emerges, the power of EU government diminishes. It not only ceases to act to change things, but the new regimes start to develop autopoietic qualities of their own which serve to close them off from EU influence. An example of this might be found in EU waste policy. At its inception, very

few States either comprehensively catalogued waste or had national waste management plans. The influence of the EC here as therefore been significant. Yet over time, the national waste management plans have developed internal structures and self-sustaining qualities of their own that are only modestly influenced now by EC government.

Secondly, these relationships of adaptation determine the reach of EC law spatially in a way that command-based relations are unable to do. A process of adaptation allows those even those not formally subject to EU law to adapt to it. That said, it acts upon their actions no less effectively. Thus the actions of the Argentinian Supreme court in *Café La Virginia*⁶¹ who rule on the legal effects of the Treaty of Asuncion establishing the Mercosur on the basis of *Van Gend en Loos* are as much steered by that judgment as many of the decisions of the national courts of the EC member States. Similar comments can be made about the decision of the Venezuelan legislature to base its 1994 competition legislation on Articles 81 and 82 EC.⁶² It might be countered that these cases are distinguished by there being no possibility for the EC institutions to target these bodies as subjects of its government. In some cases this is true but only because the EU lacks other resources – be they moral, economic or coercive – to make these a subject of government. In some cases, notably the PHARE programme and Agenda 2000 EU power is targeted as focussedly and effectively on the CEECs as on any Member State. Indeed, the greater the resources available to the EU the more intensively it is able to exercise influence over individual CEECs. Thus, the assessment by the Commission on which of the applicants met the accession criteria made accession more likely for all and imminent for some. This carrot has facilitated the development of a new instrument, the Accession Partnership, which provides for a far more tightly timetabled and heavily policed adoption of the *acquis communautaire* by the applicant States.⁶³

The textuality of law also allows it to transform government into a dialectical process. It allows not merely the EC political institutions to act upon the actions of the subjects of EC law but also enables these subjects to shape the actions of the political institutions. Classically, this is done through litigation before the courts, which leads to new articulations of the law, which, in turn, steer the future conduct of the political institutions and, in some exceptional cases of judicial review, attempt to undo the past actions of these institutions.

⁶¹ *Café La Virginia SA*, Judgement of 13 October 1994. See, in particular, the Opinion of Judge Antonia Boggiano.

⁶² Official Gazette No. 34.880 of the Republic of Venezuela. For commentary see Brewer-Carias (1996).

There is a more pervasive manner in which this dialectical process takes place. As ‘moments of communication’ legal acts translate and crystallise the objects of their discourse. The continued articulation of these objects through legal communications leads to these becoming ‘actants’ in their own right, as others adapt their behaviour to the articulated qualities of these objects. (Callon 1986; Latour 1993). Although this occurs in all fields of EC law, this occurs most evidently in the field of EC environmental law. In one sense, as it is not a conscious being, it makes no sense to talk of Special Areas of Conservation (SAC) set up by the Habitats Directive⁶⁴ as actors in the process of government. Yet the qualities ascribed to these, namely their high conservation status, and the need for member States to restore or maintain that status⁶⁵ has shaped a number of policies. The establishment of both the specific guidelines on TRENDS and proposals for individual networks must take account of the needs of these areas.⁶⁶ They are eligible for specific funding under the funds earmarked for the environment⁶⁷ and grants under the Cohesion Fund will be influenced by whether a project contributes to a SAC.⁶⁸ The need for a development project to undergo an environment impact assessment will also depend upon whether it impairs a SAC.⁶⁹ It is difficult to deny that they do not steer policy. The SAC, moreover, impacts upon relatively few other EC fields compared to more influential actants such as the school, the workplace, the hospital and the family.

If one of law’s qualities is to empower non-human actors, a corollary of this that the distinction between humans and non-humans becomes blurred. As the importance of the actant stems from how it is articulated by other actants, everything comes to be seen in relational and objectivistic terms. This leads to the body, the locale and the activity becoming mutually constitutive (Haraway 1991, 1997). As an actant within the network, a human may only derive claims from her status as a student. Yet the student only enjoys these, however, because of its status within the school or university (who is mutually constituted by the presence of students) not because of some essentially humanistic,

⁶³ The framework Regulation for these (which will be signed, on an individual basis, with all applicant States) is Regulation 622/98/EC, OJ 1998, L 85/1. A typical example of these agreements is that concluded with the Czech Republic, OJ 1998, L 121/41.

⁶⁴ Directive 92/43/EC, OJ 1992, L 206/7, article 3.

⁶⁵ *Ibid.*, article 4(4).

⁶⁶ Decision 1692/96/EC, OJ 1996, L 228/1, article 6. See also the proposal for a high speed train network, OJ 1994, C 134/6.

⁶⁷ Regulation 1404/96/EC, OJ 1996, L 181/1, article 2(1)(a) (LIFE).

⁶⁸ Eg Decision 93/707/EC on the grant of aid to the Closa rising bog in Ireland, OJ 1993, L 331/20; Decision 93/714/EC on the restoration of natural resources in natural parks in Spain, OJ 1993, L 331/83.

⁶⁹ Directive 97/11/EC, OJ 1997, L 73/5, Annex III, 2(e).

cosmopolitan qualities. It becomes therefore increasingly difficult to disentangle student from school rights within such a network.

IV. EC Law and the Spaces of Government

To argue that the relations generated by EU law are based upon adaptation rather than command begs the further question of explaining the resilience of EU law. In particular, what distinguishes it and gives it a weight separate from the whole host of structures, whose capacities to generate cognitive and adaptive processes, cultural institutionalists would claim (Boli 1987; Meyer et al 1997) are increasingly framing government globally? Undoubtedly, the 'normative qualities' of EU law, the official sanction that is conferred upon the language that it contains plays a part. Yet this cannot explain its steering powers given the increasing gap that is developing between norms and identities in Europe as a result of the increasing universalisation of norms and particularisation of identities (Soysal 1999).

EC law's resilience, it will be argued, results from its extraordinary ability to embed itself in and reconstitute itself around loci of social control - nodes in society whose organisational abilities is extremely intense.

The first type of node, it will be argued, are locales. These are particular physical settings of social interaction - the workplace, the household, the football stadium - which derive a considerable amount of their power from their territoriality, namely their ability to 'affect, influence or control people, phenomena and relationships by asserting control over a geographic area' (Sack 1986: 19). This grants an autonomy from their outside environment, whilst allowing power to be focused, concentrated and distributed internally. The power of the locale lies in its organisation and impact upon the senses (Lefebvre 1991: 61). Identity theory, therefore, has noted how meaning and identity is created partly through 'sign meanings' - signals from the environment, unmediated by social convention, which impact directly upon the senses (Freese and Burke 1994). This is carried through in some of the writing on the arts, which see the art object not as a text to be deconstructed but a sensory object, thus favouring music, dance, painting and sculpture over the novel (Sontag 1967). These features enable locales to generate processes of organisation or 'regionalisation', which include differentiation, demarcation and distance-ordering within the locale. These, in turn,

induce patterns of routinisation, hierarchy and proto-organisation on the part of the subject (Goffmann 1959; Thrift 1980; Giddens 1984: 110-126; Soja 1989: 145-152).

Much of EC law latches itself onto these locales, notably the workplace, and relies upon their resources for its effect. It also constitutes itself around them and facilitates them.

- Facilitating devices are drawn up to induce subjects into these locales. This can be done directly as, with the new Title on Employment Policy, or indirectly. The initial legislation providing for gender equality in the workplace attempts to corral women into the workplace, through use of the language of career opportunities, career structure and promotion rather than concerning itself with the qualities or needs of biological identities or with any form of substantive equality. Similarly, the central plank of free movement legislation was for movement from one workplace to another, thereby providing benefits, paradoxically, for those who least need it, those already integrated into the labour markets or service economies of neighbouring States whilst denying it to denizens located outside those arenas (eg the longterm unemployed, casual labour, those not looking for work).
- There is also State subsidisation of these institutions, directly, through programmes such as ERASMUS or COMET (universities) or the State aids provisions (workplaces). Once again, one also finds indirect support for them. These include the adaptation of broader policies to accommodate them. Examples of this include the 'failing firm' defence in EC merger law or the requirements of family viewing policies set out in Directive 97/36/EC on broadcasting.⁷⁰ Alternatively, individual rights are given to subjects of the locale, viz the grant of a series of welfare,⁷¹ employment⁷² and civil entitlements⁷³ to individual family members.
- These social institutions are constructed by EC law, so that the features which enable them to exercise control are enhanced. The family is therefore constructed in nuclear

⁷⁰ OJ 1997, L 202/60 article 22b.

⁷¹ Case 32/75 *Cristini v SNCF* [1975] ECR 1085.

⁷² Most notably Regulation 1612/68/EEC, OJ Special Edition, L 275/2, 475, Article 11, on migrants' families employment rights. Even in areas where rights are bestowed independently of the family, such as those on parental leave, additional family rights are provided (the right to time-off for family reasons) Directive 96/34/EC, OJ 1996, L 145/4.

⁷³ Eg Directive 64/221/EEC, OJ Special Edition, Series I (1963-64) 117, article 1(2); Regulation 1251/70/EEC, OJ 1970, L 142/24, article 3(1); Directive 90/34/EEC, OJ 1990, L 180/26, article 1 (migrant entitles); Directive 84/5EEC, OJ 1984, L 8/17, article 3 (insurance entitlements).

terms, therefore, as an edifice of long-term commitment, cohabitation, owed duties and shared responsibilities rather than in the terms of free association prescribed by some feminist theory. There are thus Resolutions on marriages of convenience,⁷⁴ the Reconciliation of Work and Family Life,⁷⁵ equal opportunities for girls and boys for the sharing of family responsibilities.⁷⁶ The School is constructed as an institution which is to serve to keep idle youth off the streets and to inculcate the young in responsible citizenship. There has been a series of Resolutions on School Effectiveness,⁷⁷ evaluation of quality in school education⁷⁸ and measures to combat failure at school.⁷⁹

- The ability of these institutions to act as point of social control has obviated the need for bureaucratic intervention in some. Neither EC health and safety legislation⁸⁰ nor legislation on protection of young people at work⁸¹ applies to family employment. Similarly the Rome Convention on Contracts does not apply to contracts made within the aegis of the family.⁸² In others, such as the workplace one can look at the deference to collective self-regulation that is increasingly permeating EC labour and EC environmental law (on this see Armstrong 1999).

In contrast to sensory control, a second source of social power is said to be discursive power. The weight given to language to formulate power through the construction of interests is heavily contested. (cf Foucault 1972:53-54; Lefebvre 1991). Yet even those who have limited time for discourse theory acknowledge that discourse is still important, as it is through discourse that wider social processes are translated into communication between humans, thus enabling action and transformations to take place (Harvey 1996: 78-88). Yet

⁷⁴ OJ 1997, C 382/1.

⁷⁵ OJ 1998, C 30/1.

⁷⁶ OJ 1998, C 166/1.

⁷⁷ OJ 1997, C 7/1.

⁷⁸ OJ 1998, C114/1.

⁷⁹ OJ 1996, C 27/1.

⁸⁰ Directive 93/104/EC, OJ 1993, L 307/18, article 17(3).

⁸¹ Directive 94/33/EC, OJ 1994, L 216/12, article 2(2).

⁸² A Consolidated version of the Convention is to be found in OJ 1998, C 27/34. See article 1(2)(b).

language can only have power to the extent that is taken up. It is, indeed, this adoption of language that empowers it. (Davies & Harrè 1990; Hajer 1995: 56-58; Wiener 1997, 1999). Particularly important, therefore, are the points which institutionalise and refine language which, by dint of their specialisation, becomes the dynamo for the development and the regulation of application of knowledge. These centres – professional and regulatory authorities, the workplace, bureaucratic agencies – are the second loci of social control around which the EU wraps itself. Once again, this has taken a number of manifestations.

- Discussion has already taken place of the way these bodies, particularly within the context of the standardisation bodies and mutual recognition have become involving in the making and the administration of EC law.
- The increased specialisation of private expertise and the one-off nature of much research development have resulted in many regulatory agencies being unable to engage in meaningful prior or subsequent evaluation of activities in ways predicated by standard command and control models (Nonaka 1994, Ladeur 1997: 625). EC law has responded to this in these fields by letting the levels of expertise determine the centre of government. The systems of prior authorisation in the field of EC environmental law required for substantial development and polluting activities have at their heart a system of self-review by the undertaking. This can only be monitored in a perfunctory manner by the regulatory authorities and which is relatively easy for the undertaking to change subsequent to the authorisation. In the field of financial services, one finds, in a parallel manner, that supervision of much of the activities is based upon reporting duties imposed upon the firm.⁸³ Under both such arrangements the substantive content of the norms are determined by the undertaking with the regulatory authorities seeking no more than certain procedural and minimal substantive guarantees.⁸⁴
- The onset of the informational age has led to an increased concern with the accumulation of knowledge and the increased action of knowledge upon itself

⁸³ Eg Directive 85/611/EC on the harmonisation of laws on UCITS, OJ 1985, L 375/3, article 32; Directive 92/121/EEC on the control of large exposures of credit institutions, OJ 1992, L 29/1, article 3; Directive 98/78/EC on supplementary supervision of insurance undertakings, OJ 1998, L 330/1, article 8.

⁸⁴ For empirical studies on this in the US and UK respectively Ackerman & Stewart (1985); Mehta & Hawkins (1998).

(Castells 1996a: 17). As information becomes cheaper to store, this has led to the creation of new forms of local knowledge and private actors acquiring new control and surveillance facilities (eg interactive television, supermarket switch cards, insurance risk analysis) (Castells 1996b: 299-301; Lyons 1994). EC policing measures have responded to this by increasing tapping in on this local knowledge and private surveillance facilities. One thus finds the development of media strategies to cater for football hooliganism.⁸⁵ In the field of drugs intensive use is to be made of information available from all business sectors, notably the transport sector.⁸⁶ In the Action Plan on Organised Crime there is to be increased self-regulation by the professions to protect them against corruption.⁸⁷

- Perhaps the most pervasive manner in which the EC has tapped into private forms of expertise is through the development of EC consumer law. Consumer requirements that producers play safe goods on the market⁸⁸ or are liable for defective products⁸⁹ do not merely generate ‘consumer rights’ but transfer the norm-setting power in these fields to industry. For a good will be determined to be safe not according to the strictures of EC legislation but according to the technological developments set by industry. Industrial laboratories do not therefore merely generate the pace of technological and industrial change but also become the arenas in which the normative consequences of it are set.

The consequence of all this is that health and safety, consumer protection etc. is not created or conceived of as a new problem through the generation of EU law. Instead, it serves to create a European space of a series of ‘competitive and cooperative networks’ (Barry 1993: 321-322). This is not to say that these networks do not transformative effects beyond acting as some form of ‘signifier’ for Europe.. These networks exclude non-participants. They put conditions on entry which require participants, possibly, to reconstitute themselves to enter

⁸⁵ Resolution of 9 June 1997, OJ 1997, C 193/1.

⁸⁶ Decision 97/372/JHA, OJ 1997, L 159/1

⁸⁷ OJ 1997, C 251/1.

⁸⁸ Directive 87/357/EEC on products which endanger health and safety, OJ 1987, L 192/49; Directive 92/59/EEC on general product safety, OJ 1992, L 228/24.

⁸⁹ Directive 85/374/EEC on product liability, OJ 1985, L 210/29.

the network. Within the network they require participants to position themselves vis-à-vis one another, which will allow them to act upon one another. All these generate dialectical processes, often unpredictably, which will have transformative effects upon both participants and non-participants.

V. Rectifying the Problems Caused by Problem-Solving

(i) The Growing Disjuncture between Interests and Identities

The problem-solving capacities of EU government have been shaped not just by the pressures of liberal governmentality but also by the absence of any thick, collective European identity. The absence of this has led not just to the convoluted maze of 32 legislative procedures that currently exist (Hix 1999: 486-487), it also suggests the impossibility of majoritarian or deliberative models ever producing sufficient self-legitimatory effects.⁹⁰ For, in the absence of an 'US', adversely affected members of the polity, unconstrained by collective ties, can never believe that measures are being taken on their behalf, but only against them. Any form of interregional or interpersonal redistribution becomes, therefore, deeply problematic (Scharpf 1999: 8-9). The European Union has therefore had to rely exclusively (unlike other polities) upon an output-oriented form of self-legitimation, which is interest-based (Scharpf 1999: 12). This asymmetry was always likely to provoke a crisis once the outputs of the Union were sufficiently dense and acted upon a sufficient variety of actors for a critical mass to feel both 'outside' and subject to the process (Weiler 1993: Westendorp Report 1995). Yet this implies integration/disintegration nexus, so astutely observed by a number of commentators (Ward 1994; Shaw 1996), revolves around two axes.

The traditional model revolves around claims of inclusion and exclusion. Such a model not only takes rather a physicalist view of what is constituted by inclusion/exclusion. It also implies that the existence of the EU will be threatened where two conditions are met - where the interests excluded/marginalised are greater than those included/enhanced and those

⁹⁰ Scharpf rightly observes that this is as much a constraint on any deliberative model as these only allow 'generalisable' interests to be taken into consideration. They inevitably imply a sacrificing of non-generalisable interests (Scharpf 1999: 19).

marginalised have a greater Voice than those who do not. This scenario is unlikely if only because the Cost-Benefit-Analysis of problem-solving will usually seek to avoid these conditions as these generate new 'problems'.

A more pervasive integration/disintegration nexus is that which revolves around the opposition between interests and identities. The paradox of the EU is the number of people who benefit from it in material terms, but who still oppose it.⁹¹ To some extent such opposition is inevitable. Any actor or actant is an intersection point, at any one time, for a variety of social relations. A variety of contradictory tensions and pressures will coalesce, thus, within them (Gupta & Ferguson 1992: 8). Furthermore, the qualities that prevent them being just an intersection point is a 'constitutive inner' – a constitutive identity - which appropriates attributes from these relations as the actor/actants' own and always stands in opposition to these external forces. The European Union has further difficulties, however. Its conceptualisation around hegemonic social institutions and interests generates a bias against concern with how EU law is perceived and lived. That is to say that there is an absence of interest in how these social microprocesses that are the center of EU government characterise and legitimise themselves, evaluate events and press for change. This impoverishes the European Union in two ways. It is the closure of this conceptualisation that leads to the paradox of the European Union being seen as both irrelevant and overbearing. It also deprives European Union law of the imminent potential claimed for law to legitimise and structure social relations through its appropriation by local identities.

ii. The Redistributive Limits and Emancipatory Potential of European Union Law

The most traditional response is to argue that the Union should develop its own catalogue of rights. The catalogues suggested are implicitly redistributive in nature, as they allocate a number of free-standing entitlements (civil rights) to individuals. Such self-standing forms of redistributive justice have been widely critiqued over the last twenty years on a number of grounds. It is claimed that they assume too abstract a notion of justice and conflate moral reflection with scientific knowledge. They are further criticised for being insufficiently malleable to cover many sources of injustice, such as questions of self-respect, opportunities and power.⁹² The position of the European Union makes it particularly unsuited for engaging

⁹¹ Recent opinion polls therefore suggest that the majority of British Conservative voters, a group who do quite nicely from the EU, now favour withdrawal, Independent on Sunday, 30 May 1999 p.2.

⁹² For a survey of the literature see Young 1990: Introduction.

in such an exercise for practical reasons alone. Its structural limits to affect redistributive change are illustrated both by its limited material resources and its inabilities, notably in the social field, to discharge any policy which involves substantial redistribution (Steeck & Schmitter 1991).

A far more fruitful route to take is that suggested by Iris Marion Young, who defines justice as an enabling concept:

‘Justice should refer not only to distribution, but also to the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation. Under this conception of justice, injustice refers primarily to two forms of disabling constraints, oppression and domination (Young 1990: 39).’

This combines more happily with the EU style of governance in a number of ways.

First, it provides a more satisfactory normative basis for EU action. As part of an institutional framework which performs and enables transformative effects to take place in social relations, the EU contributes to the reconstitution of, and therefore participates in, the changes in those social relations. To take an example. The instigation of a free trading regime for the import of footballs contributes to the conditions of bonded labour that are deployed by the producers of such footballs by providing a demand for and an incentive to supply footballs in such conditions. Moreover, the very participation in networks prevents the EU from opting-out of these moral choices as no morally neutral choice is on offer. The EU can either contribute directly to such injustice or indirectly through fostering structures, which enable such conditions to develop. Clearly, therefore, if it does not develop a commitment not to oppress, this implies an opposite direction, a willingness to oppress.

Secondly, it is consonant with the EU’s resources, capacities and style of governance. Justice, as an enabling concept, ‘centers the social’ through fostering conditions in social structures and recognising that most government takes place within these structures in just the same bottom-up manner as the liberal governmentality paradigm. Like the latter, it is also concerned with an ‘economy of government’ in that it does not push directly for a transfer of resources but merely concerns an enjoinder not to oppress.

Thirdly, enabling concepts of justice make the ‘social’ political in that they stress not just that politics must concern itself with the normative dimensions all practices and aspects of institutional organisation that are subject to collective evaluation but that these constitute the centre of political life. They not only avoid the narrow reach of redistributive paradigms.

They also problematise the interest/identity dichotomy that generates the closure and moral ambivalence of the EC's problem-solving frame. The arenas of EC government become not amoral, consensus-filled terrains to be managed but centres of contestation and social justice.

Fourthly, enabling concepts of justice recognise the mutually constitutive nature of individuals and social groups, so that both are accorded protection. Young's model of 'differentiated citizenship' (Young 1990) and certain communitarian liberals (Kymlicka 1989: 162-181) therefore accord recognition to both 'I' rights and 'We' rights rather than seeing the debate between liberalism and communitarianism as some zero-sum game. A profound insight of social geography, however, is that it is not only interpersonal relations, which shape identities. In addition, a dialectical relationship is enjoyed between Society and Place so that not only are places constituted by social practices,⁹³ but these, in turn shape social relations (Cronon 1991; Eder 1995; Castree 1995; Harvey 1996). The school, the workplace, the office, the household, the university, the towncentre, the park, the copse etc. are as central to shaping to what 'I' am and 'We' are as any social group. If this is so, these need to be accorded protection in a similar manner to animate actors. To observe this is in no sense dehumanising but profoundly humanistic, as it recognises the enriching qualities of these institutions for our lives. The network paradigm based, as it is, upon the relational qualities of actors and actants, acknowledges these mutually constitutive qualities and gives inanimate objects claims through the possibility of the articulation of the actant.

iii. The Notion of Integrity Rights

The other benefit of Young's work is the detailed typology of the forms of oppression or domination that exist. Taking, as her starting point, that oppression is a structural phenomenon that disadvantages a group, she lists five. These are exploitation (the transfer of resources from one group to another), marginalisation (a denial of participatory rights in the activities of social cooperation and access to the means of the consumption), powerlessness (a lack of authority and sense of sense), cultural imperialism (the universalisation of a dominant group's experience so as both to stereotype other groups and render their experiences invisible) and violence (Young 1990: Chapter 2). The most central contribution that law can make to institutionalising freedom from these forms of oppression is, it is argued, first

through the grant of *integrity rights*, which would protect the autonomy and dignity of particular actants – be they individuals, social groups, places or social institutions. Such rights, in principle, prevent all forms of oppression listed above other than marginalisation.

Integrity rights rely upon bounding processes, which separate the object from its environment. Central to this are conceptions of identity, which give a more articulated and developed sense of the Self, which is far more sensitive to the plurality of forms in which integrity can be violated than the Imaginary Subject of classic civil rights discourse. So what does it mean to protect identities? Identities comprise a:

‘set of “meanings” applied to the self in a social role or situation that defines what it means to be who one is’ (Burke 1997: 138).

Typically, these meanings control behaviour through the establishment of a feedback loop, which comprises an internal identity standard consisting of a set of self-meanings. These are compared against an ‘input’ – perceptions of the environment that are relevant to the self. This leads to ‘output’, which consists of meaningful behaviour that is derived from this comparison. This process leads to two forms of meaning being generated – relational elements and non-relational elements. Attributes such as honesty, conscientiousness, cruelty are non-relational, whilst elements such as teacher, husband, football fan are relational. A distinction is also made between central and peripheral elements. A changing but, at any one time, stable set of elements are seen as the core of the self or place, whilst others are seen as merely peripheral attributes, which, whilst belonging to the subject, are externally attributed (Conover 1995: 142-143). From these two sets of elements, it is argued, it is possible to build a matrix which explains the extent to which relationships constitute Selves. A distinction is made between contingently shared relations and essentially shared relations. Contingently shared relations affect attitudes and behaviour but do not create identities. Essentially shared relations have a greater centrality. They penetrate identities so deeply that they ‘constitute a part of ourselves’ (Neal & Paris 1990).

From this it is possible to build a typology of the attributes which should be protected. The discourse of civil rights is centrally interested (albeit not exclusively) in non-relational attributes. Freedom from torture, arbitrary arrest and freedom of expression, as constituted, involve interaction with other people but the violation occurs to attributes – the body, the

⁹³ Eg Social practices are the qualities that transform a terrain into a ‘place’. The street becomes a street because of the practices of pedestrians and motorists (de Certeau 1984: 117).

ability to speak – which are non-relational. Identity theory would suggest, however, that it is equally important to protect relational attributes, in particular those that are essentially shared. Acts of hatred against women or ethnic minorities are particularly egregious, for example, because, as a result of their form, they harm not just the individual targets of their action, but render all women or ethnic minorities vulnerable.

It might be argued that the law cannot seek to protect these attributes without becoming culturally imperialist, as these attributes can only be determined by the subjects, communities etc. themselves. There is a truth at the bottom of this argument that law can never fully capture these attributes, (which is why private law-making and legal pluralism have such a strong emancipatory potential) but, at bottom, the argument is a deeply pernicious one. As mentioned earlier, no law can be blind to these claims. To be blind to these rights is to violate these rights. Whilst law might never therefore be able to capture fully all the attributes of ‘integrity rights’, it can be receptive and reflexive to their articulation.

iv. and those of Enfranchisement Rights

Integrity rights cannot however generate processes of participation, which prevent marginalisation or exclusion. In addition, the processes of synthesis and identity-formation that lead to the development of integrity rights can, if unchecked, lead not merely to the violation of others’ integrity rights (eg racist or sexist practices in the school) but generate their own processes of marginalisation through pathologies of exclusion and regionalisation. In addition to the development of integrity rights, there must also be developed a series of *enfranchisement rights*.

These can take two forms. On the one hand, they suggest the opening-up of particular places, which will always take the form of participatory rights. Such rights might take the form of political rights, access to information and the establishment of the sort of deliberative processes and patterns of communication within civil society that constitute the binary code of Habermasian lifeworlds. It should be clear, however, that the sheer variety of locales and places will result in access rights taking many forms. The *Bosman* judgment, for example, concerned a participatory right as it was about access to a particular workplace. Debates about prices of football season tickets and Internet provision in libraries are other examples.

The other form of enfranchisement right, which are important, are *regionalisation* rights, which prevent unfair marginalisation, oppression or hierarchy within the locale. Examples

would include procedures on worker consultation, not just participation rights but dialogic rights for laypeople in environmental impact assessments or best practicable environmental options. It might also include the right not to be subjected, unwarned, to certain images on television or measures which threaten one's health and safety in the workplace.

There is a clear tension between integrity rights and enfranchisement rights, as the enhancement of one can lead to the erosion of the other. Any student of the EC market freedoms soon learns, therefore, how the 'constitutionalisation' and expansion of the economic freedoms (a series of enfranchisement rights) entrenched a universalistic atomism, individualism, competition and materialism at the expense of collective decision-making structures (Poiars Maduro 1998: 159-161). In a multi-tier system of government this provokes questions not just about where the balance should be struck, but also about who take responsibility for striking the balance.

v. The European Union as a Locus of Integrity Rights

The foundational claims for the European Union developing a 'human rights' policy, which would include a series of integrity rights, have been given some credence by its increasing responsibility for migration, refugees and policing - area where questions of moral responsibility and human dignity are particularly pressing. The central claim for a 'human rights policy' across all matters within which the European Union is involved extends further and bases itself on the EU being economically powerful and not being able to sit by idly and leave these matters to member States (Alston & Weiler 1999). Such arguments are unclear about what 'added value' is contributed by action being taken by the EU institutions or what it is about the institutional framework of EU that should locate responsibility for these matters above all within the EU.

Such a catalogue would also pose a number of problems. Studies of citizen identities suggest that these vary greatly not only between individuals, but also between national societies (Conover 1995: 142-152) and different socio-economic backgrounds (McNay 1999). A catalogue of integrity rights or, the latest suggestion, centralised, bureaucratic administration of rights is likely to strike right at the heart of many identities and is likely to be deeply disruptive and strongly culturally imperialist (Shaw 1999). Issues such as the laicism of the French education system, arranged marriages and abortion go right to the center of how many French conceive their schools, many conceive the family unit and many

conceive the identity of the female body. This is notwithstanding that they provoke questions on issues of religion, marital choice and the moral status of the foetus. That it should be the European Union that should subsume these identities through its mediating these disputes purely to bolster some liberal conception of what 'Europe' should stand for seems not so much problematic as deeply totalitarian.

Any claim that the EU has to set integrity rights has, it is submitted, two alternate foundations. The first stems from its participation in and establishment of networks and the mutually constitutive effects they have on participating actants. The second comes from the European Union being the deepest institutional expression of the problematisation of the nation-State. Its tenet, its supranationalism, calls for Member States to engage in reflexive processes of self-questioning and self-justification, as well as placing other forms of governance on the table (de Sousa Santos 1995: 250 etseq). Neither of these can justify the European Union developing integrity rights, which subsume local ones. They can only require that it only engage in networks where integrity rights are respected. This entails that the European Union Institutions check that other actants operate within a context where integrity rights have been drawn up and are protected - a review of self-review. These might have been drawn up by the locale itself.⁹⁴ More realistically, they will have been drawn up at a local, regional or national level.⁹⁵ Such a process would not require the European Union to draw up a list of integrity rights itself, except in the baldest sense possible, nor, crucially, would it have to enter into the difficult task of reconstituting relational identities.

This process has happened for some time in the field of the EU's external competencies. Since 1990, in its development cooperation regimes, its humanitarian intervention, its trade agreements, its partnership and cooperation agreements and Agenda 2000 (Brandtner & Rosas: 1998) the EU has pursued a policy which was recently and comprehensively set out in its Declaration of 10 December 1998 on the Occasion of the 50th Anniversary of the Universal Declaration on Human Rights:

'The European Community has included in the agreements it concludes a clause which makes respect for human rights, an essential element for its agreement to be bound. The Union thus assumes its responsibility for the

⁹⁴ For example, in the current climate, notwithstanding the sanctions on Yugoslavia, it would seem positively desirable for the European Union to nurture and work with organisations that promote civil rights in that part of the world.

⁹⁵ It is clear from what was said earlier that this essay eschew territorial distinctions, but this process would obviously apply to those networks that exist within the territory of the European Union and those that exist outside.

promotion and protection of human rights as legitimate concern of the international community, whilst reaffirming that this protection and promotion remain the primary responsibility of each and every government.'

To be sure, the bifurcation in this practice was generated by the desire to respect the territorial integrity of third States, whilst, at the least, being seen to promote human rights in these States. Such a process has, however, been 'internalised' by the insertion of Article 7 TEU by the Amsterdam Treaty,⁹⁶ allowing the Council to suspend the rights of member States committing persistent and serious human rights abuses.

To be sure, there may be some scepticism over the capacity of these provisions to monitor and sanction breaches of human rights obligations by member States and third States. This undoubtedly stems, in part, from the 'joint decision-trap' present in EU voting rules, which through the virtual Commission monopoly on the right of proposal⁹⁷ and the high voting hurdles in the Council and the Parliament creates a bias against action and in favour of the status quo. It is also limited by the failure of these Institutions to make a sufficiently serious internal separations between their regulatory and their other functions, thus undermining the credibility and 'consistency' of any sanctions (Hood et al 1999).⁹⁸

The central weakness of these provisions, however, is that they fall into the 'territorial trap' outlined at the beginning of this essay. Territoriality becomes a 'black box' which renders immutable in political and socio-economic practices within an area, therefore making individual ones largely invisible from scrutiny. As not even the practices within the most wicked of States are all likely to be egregious, this not only acts as a deterrent to action but results in any action inevitably being crude and impacting upon many perfectly innocent practices.

In this respect, it should be said, that the Amsterdam Treaty, in particular, has granted the EC Institutions, notably the Commission, more sophisticated mechanisms, which transcend the territoriality principle, and which can be applied to individual networks. The most notable of these is Article 13 EC, the new discrimination provision, which entitles the EC to adopt legislation prohibiting discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. To be sure, this is an enabling

⁹⁶ The history of this provision originated in conditions placed upon acceding States. There was a concern that these conditions should be continuing in nature rather than lapse on accession.

⁹⁷ This is true in the case of all action in the field of external relations. Sanctions against a member State committing serious and persistent breaches of the principles in Article 6 TEU can also be proposed by a third of Member States, Article 7(1) TEU.

provision, but combined with the duty of cooperation in Article 10 (ex Article 5 EC) it is difficult to believe that it does not require the EC Institutions to observe these principles in discharging their tasks. Thus the Commission may be required to refuse to authorise a subsidy to an undertaking which discriminates against Roma or members of the Church of Scientology. The provisions on education (Article 149 EC), economic and social cohesion (Article 158 EC), the Protocol on the Protection and Welfare of Animals and the Declaration on the status of Churches and Non-Confessional Organisations could likewise be used to require the Union to ensure the protection of the actant rights of schools, regions, churches, philosophical and non-confessional organisations or livestock in any network it establishes. In similar vein, the Declaration on Environmental Impact Assessment requires the Commission to make impact assessments when making any proposals, which may have significant environmental impacts. This could also be used to generate integrity rights for any habitat that will be implicated by the establishment of a Union network.

vi. The European Union as an Agent for Enfranchisement Rights

The Union's claim to play a more central role in the establishment of enfranchisement rights rests upon a number of foundations. First, a claim for these can be made on the same basis as for integrity rights, namely that both the implication of the Union in many of these processes and its qualities as an institutional critique of the Westphalian State call for it. Furthermore, as enfranchisement rights are less intricately bound with processes of bounding and identity-formation than integrity rights, the Union is less vulnerable to charges of cultural imperialism in the establishment of such rights. There are, however, two further grounds.

The first lies in the liberalism of the Community. Despite its limitations, the culture of individualism, private autonomy and mistrust of closure fostered by EC competition law and the economic freedoms has an imminent potential. Commentators on advanced liberalism have noted therefore how both the increased private involvement in government and the increased private autonomy from government has led to an increasing mistrust of many traditional points of private authority. Techniques are increasingly brought in to evaluate the performance of these institutions (Burchell 1993: 271; Rose 1993: 296). Examples include increased client rights against the professions; expansion of techniques of audit, participation

⁹⁸ Sanctions against Burma were therefore stymied by French opposition which stemmed from the presence of an Elf pipeline there. On the limited measures taken see Decision 96/635/CFSP, OJ 1996, L 2871/1 as amended by Decision 98/612/CFSP, OJ 1998, L 291/1.

in school governance by parents and increased performance evaluation. It can neither be denied that these all counter processes of exclusion and regionalisation nor that they increasingly call upon private institutions to justify themselves in governance rather in market terms.

The second reason has to do, once again with the Union setting itself up in opposition to the nation-State. It has not to do, as previously, with the Union's 'supranational' qualities, which urge it to police the contours of the processes that make up the nation-State (Weiler 1999: 344-348). It has to do with the opposition that the Union provides through its being a 'non-State' – a polity that does not claim traditional processes but seeks instead to create alternate opportunity structures. The conception of the Union as a composite of opportunity structures emphasises it, above all, as a source of further enfranchisement or 'democratic surplus' (Eriksen & Fossum 1999).

Both these arguments call for and characterise the Union as a source of direct enfranchisement rights. Within the narrow sphere of government one finds the development of curbs on national governments in the form of the European Parliament and the Court of Justice, which have generated new access rights for social groups, notably in the field of gender and the environment; the broadening of electoral rights and rights to participate in the European Parliament and municipal authorities. There is also the development of technologies in the form of the Court of Auditors, the Petitions Committee, the Inspectorate General and the Ombudsman, which problematise the business of government more generally.

The brunt of the enfranchisement rights developed has been, however, through the 'civicalisation' of the private sphere.

First, increasingly, private mechanisms are having to justify themselves in terms of governance values such as due process, administrative efficiency, transparency and recognition of plurality of interests. The most prominent example of this are the European standardisation bodies who have been enjoined to work on a basis of coherence, transparency, openness, consensus, independence of special interests, efficiency and decision-making based on national representation⁹⁹ and who have engaged in an anguished process to make themselves more pluralist and more efficient (Vos 1999: 262-268).

Secondly, there is concern with problems of regionalisation in a number of fields. The most notable is the enterprise, where some provision is made for more pluralist corporate

⁹⁹ Directive 98/34/EC, OJ 1998, L 204/37, Preamble, alinea 24.

government.¹⁰⁰ Yet, it is also present in other areas. Duties of consultation with interested parties are therefore placed on enterprises engaging in number of industrial and development activities.¹⁰¹ Provision is made for more pluralist corporate governance within enterprises

Thirdly, both the economic freedoms and the competition provisions have been used to curb processes of closure private rule-making or professional bodies.¹⁰² Restriction on market access must be justified in a manner which (formally at least) does not disenfranchise;¹⁰³ reasons must be provided¹⁰⁴ and processes of closure must be susceptible to judicial review.¹⁰⁵

Fourthly, competition provisions are being required to be cognisant of a wider variety of interests. This has led, on the one hand, to their being waived where private actors engage in public activities.¹⁰⁶ On the other, it has generated procedural rights for a greater plurality of actors.¹⁰⁷

Perhaps the area of law with the greatest enfranchising potential is that of EC consumer law.¹⁰⁸ Consumer rights are sniffed at by some on the grounds that they pander to the selfish material interests of *homo economicus* rather than the social responsibilities of citizenship (Sagoff 1988: 7-8). Yet in our discussion of markets, we saw that *homo economicus* as *homo juridicus*. People operate under a calculative frame in their economic relations but no more. Consumer rights have potential, it is argued, therefore precisely because, by bucking the market, they enfranchise those individuals who would be otherwise be disenfranchised by results of asymmetries of information or low bargaining power. One of

¹⁰⁰ The most celebrated example is Directive 94/45/EC on European Works Councils, OJ 1994, L 254/64 as amended by Directive 97/74/EC, OJ 1997, L 10/22. Other examples include Directive 89/391/EEC, OJ 1989, L 183/1, article 3 (Working Environment); Directive 77/187/EEC, OJ 1977, L 61/26 as amended by Directive 98/50/EC, OJ 1998, L 201/88, article 6 (transfer of undertakings); Directive 98/59/EC, OJ 1998, L 225/16, article 2 (collective redundancies).

¹⁰¹ Eg Regulation 1836/93/EC, OJ 1993, L 168/1, article 3(g) (eco-audit); Directive 85/337, OJ 1985, L 175/40 as amended by Directive 97/11/EC, OJ 1997, L 73/5, article 6(2) (environmental impact assessment); Directive 96/61/EC, OJ 1996, L 257/26, article (integrated pollution prevention and control), article 15.

¹⁰² Eg most recently Joined Cases C-51/96 & C-191/97 *Deliège v Ligue Francophone de Judo*, Opinion of Advocate General Cosmas of 18 May 1999. See also the duty to provide information on the environment imposed on private bodies with 'public responsibilities', Directive 90/313/EEC, OJ 1990, L 158/56, article 6.

¹⁰³ Case C-415/93 *Union Royale Belge des Sociétés de Football v Bosman* [1995] ECR I-4921.

¹⁰⁴ Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097. Although compare Case C-70/95 *Sodemare v Regione Lombardia* [1997] ECR I-3395.

¹⁰⁵ eg Case C-340/89 *Vlassopolou v Ministerium fur Justiz* [1991] ECR I-2357.

¹⁰⁶ Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia* [1997] ECR I-7493.

¹⁰⁷ Case T-96/92 *Comité d'Entreprise de la Société Générale des Grandes Sources & Others v Commission* [1995] ECR II-1213. See also Article 16 EC '...Union and member States take care that such services (of general economic interest) operate on basis of principles and conditions which enable them to fulfil their missions' Protocol on the System of Public Broadcasting in member States attached to the Treaty of Amsterdam.

¹⁰⁸ A list of the voluminous amount of 'non-safety related' legislation that performs this function can be found on DG XXIV's website, http://europa.eu.int/comm/dg24/library/legislation/nsrm/index_en.html.

the undoubted success stories of the late 1990's has been the ability of the Union to generate considerable amounts of consumer legislation in a manner that is not dissimilar from the way it generated environmental legislation in the 1970's and 1980's.

The only final question that remains in all this is what should happen under this model if EU enfranchisement rights conflict with local integrity rights. In principle, as each legal order should condition the other to be sensitive to the concerns of each, such conflicts should not be frequent. Once again, the benefits of multi-tier governance is that it can provide a system of checks and balances to deal with this problem of conflict resolution. In principle, it would seem right that national integrity rights should prevail on the grounds that these are central to grounding notions of justice, identity and freedom from oppression. The institutional arrangements of the EU provide, however, that this need not be a trump card for cultural relativism. For it can provide the appropriate institutional checks. In particular, it would seem right that the question of whether this is a bona fide invocation of an integrity right by a local body should be one for the Court of Justice. Such action would not confirm the body's right to assert such a right, but that the right was as central to the body's identity as was claimed.

VI. Conclusion

All the above is not intended as an apology for the limitations of EU government. It is rather to suggest that adequate structures are present for the European Union to develop a meaningful emancipatory role. This is unsurprising given, that as all structures can liberate or oppress, all have imminent possibilities for reflexive reconstruction. The current breadth and influence of EU problem-solving capacities entails that this could be quite a significant role. It might be queried, but how does this legitimate 'Europe'? In a sense, such a question is deeply totalitarian as it suggests the central concern of legitimacy debates is polity building. A more pressing concern, I would have thought, is what can Europe do for you? As stated earlier, it can, in the myriad of social relations that it touches and constitutes, only either disenfranchise or enable. Enabling is no small thing. And if this results over time in the relationships established by the EU becoming central to actants' identities – as in areas such as planning disputes, ERASMUS programmes, and women's employment rights they increasingly are – that might be no bad thing either.

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