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Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot

CAROL HARLOW

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Jean Monnet Chair Papers

Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot

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1. Why codify?

A well-known British Prime Minister (who incidentally paid scant heed to her own precept in her dealings with the public administration of her country) was fond of quoting the American maxim, "If it ain't broke, don't fix it". This prompts the question whether Community administrative procedures need fixing. In practice, the Community bureaucracy is seen as relatively open and accessible, while the informality of its procedures is widely appreciated. Rideau, for example, in a study of administrative transparency[1] in the Community, observes that "les standards de motivations et de publications sont très élevés dans les Communautés européennes par rapport à ceux qui prévalent dans certains Etats membres". Again, the authors of a review of competition procedures felt able to conclude that the "rights of anyone effected by an anti-trust decision are adequately guaranteed at a procedural level" and, of anti-dumping procedures, that the "procedural guarantees during the administrative process are substantial"[2]. The Commission is conscious of its responsibilities and has recently affirmed[3] that it "has always been an institution open to outside input", believing this dialogue to be of value to both sides. It is the political, rather than the administrative, side of the Community which attracts censure and the Council rather than the Commission at which criticism is directed, though the tangled Comitology attached to the latter receives serious condemnation for its lack of transparency and, it has been argued, impinges directly and unfavourably on citizens' rights[4].

Why then an interest in codifying Community administrative procedures sufficient to generate two academic conferences over the past two years[5]? Certain markers are undoubtedly present in the Treaty of European Union (TEU), the Preamble of which speaks for the first time in terms of "common citizenship". After confirming "respect for human rights and fundamental freedoms and the rule of law", it goes on to talk directly of the desire "to enhance further the democratic and efficient functioning of the institutions", to

1 "La transparence administrative dans les Communautés européennes" in C. Debbasch (ed.) *La transparence administrative en Europe* (Aix-en-Provence; Ed. du CRNS) 1990, p. 248.

2 P. Kuypers and T. van Rijn, "Procedural Guarantees and Investigation Methods in European Law, with Special Reference to Competition" [1982] 2 *Yearbook of European Law* 1, 26, 33.

3 See *An open and structured dialogue between the Commission and special interest groups*, OJ C63 p.2 (5 March 1994)

4 R. Dehousse, "Institutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue?" EUI Working Paper RSC No 95/4 (Florence: European University Institute) 1995, p. 11. See further, G. della Cananea, "Cooperazione e integrazione nel sistema amministrativo delle Comunità europee: La questione della 'comitologia'", (1990) 40 *Riv. Trim. Dir. Pub.* 331.

5 For the second, see the Special Issue of the *European Review of Public Law* (hereafter REDP), 1993.

provide for decisions to be taken "as closely as possible to the citizen", and, in Art B, sets itself the objective of "strengthening the protection of the rights and interests of the nationals of its Member States". The TEU also goes some way towards settling the controversy over human rights protection in the EEC, by requiring the Union to respect fundamental rights, as guaranteed by the European Convention (ECHR).

This development has a two-fold relevance. First, reflecting the provisions of Articles 6 and 13 ECHR, which provide for the justiciablity of issues concerning the civil rights of citizens, the Commission and Court of Human Rights are alert to the requirements of administrative justice and "sont fréquemment amenées à censurer le caractère insuffisament protecteur de la justice administrative de nombreux pays membres du Conseil de l'Europe"[6]. Further, the Council of Europe has a longstanding interest in the protection of citizens against maladministration and has tackled the subject of administrative procedures in two Resolutions[7]. Clearly, the fact that the organs of the Convention are active in this field, impinges, if only indirectly, on Community law.

Secondly, the TEU merely restates an established Community position. The move to view procedural protection of citizens as a human rights issue was visible within the Community long before the Maastricht Treaty. In the first place - though perhaps almost accidentally - Articles 190 and 191 EEC give Treaty protection (not necessarily identical to constitutional status) to the obligation (i) to state the reasons on which administrative decisions and regulations are based (ii) to issue reasoned decisions, referring to proposals or opinions which underlie decisions and rules and (iii) to notify administrative decisions to their addressees. Furthermore, as long ago as 1976, an important Commission paper on human rights[8] had stated

> Le citoyen ne doit pas être sans protection a l'égard des pouvoirs publics. Un noyau inviolable des droits doit lui être reconnu. C'est là un des éléments essentiels de l'identité et de la cohérence communautaire.

The point was underlined by Dr. Bernhardt, in a comparative study made for the Commission, who percipiently remarked that it was not always the grand rights like freedom of opinion or religion which had the greatest impact

6 M. Fromont, "La justice administrative en Europe: convergences", in *Mélanges René Chapus* (Paris: Montchrestien) 1992, p.201. And see note 76 below.

7 Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities (28 September 1977 and Resolution (80) 2 on the Exercise of Discretionary Powers by Administrative Authorities (11 March 1980), the content of which is further discussed below. There are further relevant Resolutions, e.g., R (86) 1 (23 January 1986) on Data Ptoection in Social Security matters.

8 *La protection des droits fondamentaux dans la Communauté européene*, EC Bulletin, Supp. 5/76 (Commission), pp.8, 63.

on the citizen but procedural rules such as the principle of judicial recourse or the need for administrative action to be founded on a legal base.

Finally, the jurisprudence of the Court of Justice had, before ratification of the Treaty of Maastricht, drawn on the ECHR to stress the importance of procedural law in protecting the fundamental rights, or "four freedoms" of the EEC Treaty. The *Heylens* case[9] established as general principles of EC law, the principle of effective judicial protection coupled with a duty to inform parties to an administrative decision of the reasons for that decision. The formulation suggests that the procedures themselves possess constitutional weight. This principle finds further expression in the celebrated *Johnston* case[10], where the Court struck down an ouster clause on the ground that rights granted to individuals in Community law must always be the subject of a judicial process.

For Schwarze[11], "the Court's reasoning may be interpreted as a manifestation of an evolution which leaves behind the initial preoccupation with administrative efficiency (mainly influenced by the concepts underlying French law) towards [sic] a Community administrative procedure under the rule of law". In other words, the Court acknowledges the importance of procedural guarantees in acting as a counterweight to administrative discretion.

Schwarze is also saying that the move towards viewing at least some administrative procedures as a fundamental or constitutional right is reflected in the legal systems of some of the Member States; in other words, the reasoning of the Court of Justice in its latest caselaw is moving towards the German *Rechtstaat* model and away from the standpoint of French administrative law, often described as weighted too heavily in favour of the administration[12]. It is true that, in Germany, where fundamental rights are protected by the Basic Law, a right of access to the courts in cases involving the state is specifically included by Art 19, para 4, while Art 20 formally insists that the executive power is bound by statute and the law. According to Starck[13]:

> Nous avons donc affaire en Allemagne à une complète constitutionnalisation du contexte normatif de la procédure administrative; cela signifie que les droits fondamentaux et les principes mentionnés ont part à

9 C 222/86 *UNECTEF V Heylens* [1987] ECR 4097.

10 C222/84 *Johnston v Chief Constable of the Royal Irish Constabulary* [1986] ECR 1651.

11 "The Procedural Guarantees in the Recent Case-law of the European Community" in *Festschrift for H.J. Schermers*, 1994, p.494.

12 For a classic exposition, see, A. Mestre, *Le Conseil d'Etat, protecteur des privilèges de l'administration*, (Paris: Librairie générale du droit français) 1974.

13 Starck, "Droits fondamentaux, état de droit et principe démocratique en tant que fondements de la procédure administrative non contentieuse", *REDP*, numéro hors série, 1993, p. 31, 32.

la primauté de la Constitution. Ils doivent être respectés par le législateur qui règlemente la procédure administrative et par l'administration qui l'exécute. Le citoyen partie à la procédure administrative peut faire prévaloir ce contexte normatif devant le tribunal administratif par la voie d'un recours ou devant la Cour constitutionnelle fédérale par la voie d'un recours constitutionnel.

Fromont, however, in an article[14] describing convergence of the administrative law of the Member States, remarks of Decision No 86/224 (23 January 1987) of the French Conseil Constitutionnel, which accords constitutional value to the *droits de la défense*, that it is "un veritable statut constitutionnel de la justice administrative". Anglo-American lawyers would undoubtedly see in these developments a clear parallel to the "legal process" theories which have dominated Anglo-American administrative law in the last decades[15].

To summarise therefore, we might tentatively deduce a general tendency both inside the Member States and at Community level to sanctify at least some administrative procedures as "higher law". It is important to bear in mind, however, that these procedures are normally those, such as the rights of the defence, most closely associated with or adjunct to the expressed basis of the Community legal order and several of its component States in the *Rechstaat* or Rule of Law ideal.

2. Two models of codification

a. "Principles of good administration"

In Anglo-Saxon terminology, the term "rules" tends to be reserved for legislation or regulation. Rules characteristically take the shape of detailed and precise provisions which attempt to foresee and provide for all eventualities. Rules are thus classically contrasted with "principles", a term associated with adjudication and case law[16]. As Kotz has remarked[17], Anglo-Saxons tend wrongly to conceptualize codes as stylistically uniform and comprising

14 op cit., note 6.

15 J. Mashaw, *Due Process in the Administrative State* (New Haven: Yale University Press) 1985.

16 See, J. Jowell, "The legal control of administrative discretion", [1973] *Public Law* 178 and "Courts and Administration in Britain: Standards, Principles and Rights", (1988) *Israel L.R.* 409.

17 "Taking Codes Seriously", (1987) 50 *Modern Law Review* 1, 2 (my emphasis). See further, W. Dale, *Legislative Drafting: A New Approach - A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom* (London: Butterworths) 1977.

"generalized statements of *principle*", a misconception which probably stems from a view of the French Civil Code as the prototype of all codification.

There is, inside the Community, a clear trend towards codification. A majority of the Member States have codified administrative procedure, some of them, such as Italy and Spain[18], relatively recently. The codifications are, however, by no means uniform in style and content. Moreover, Cassese numbers amongst the "uncodified" systems both France and England. Both systems are heavily regulated and possess at least partial codifications. In the former case it will be suggested that the difference is one of style rather than content.

Perhaps ironically, it is the common law systems which have shown a preference for flexible, over-arching "principles" of procedural law. *Justice*, the English arm of the International Commission of Jurists, which views its function as being to act as a pressure group for better protection of fundamental rights and of citizen against administration, was early in the field in proposing a codification of administrative procedure. In 1971, *Justice* published a report[19] in which it argued that administrative law possessed a dual function. It was not simply a question (as this paper has tended so far to suggest) of giving the citizen greater protection against government in the context of growing, though admittedly necessary, governmental powers. It was seen as "equally important in any reform to encourage good administration" and to protect the public interest by ensuring that "any fresh remedies given to the citizen cannot be exploited to disrupt administration or merely to delay the making of effective decisions".

With these objectives in mind, *Justice* proposed a "legislative framework of principles" as an essential prerequisite for the satisfactory development of administrative law. *Justice* proposed ten principles, designed to govern all administrative decisions relating to individuals and to cover all steps in the decision-making procedure: notice, right to make representations, fact-finding procedures, time-limits for decision-making, reasons, etc. The style is broad and general; typically, the provision governing fact-finding merely provides:

> It shall be the duty of an authority in proceeding to a decision to take all reasonable steps to ascertain the facts which are material to the decision.

Thus *Justice*'s "principles of good administration" are really no more than "standards". They would not, for example, be adequate to notify a subject of his procedural entitlements under EC competition law. Although broadly

18 For Italy, see Act 241/1990 (and see further below). For Spain, see Law No 30 of 1992 (26 November 1992).

19 *Administration under Law* (London: Stevens) 1971, pp. 2, 14. The initial proposals are expanded and more fully discussed in the *Justice*/All Souls Review, *Administrative Justice, Some Necessary Reforms* (Oxford: Clarendon) 1988, pp. 7-24.

educative, they are not much help in devising a complex administrative process, such as the EC state aids procedures. How are facts to be ascertained? What rights of access to documentation is to be provided? Does the person affected have obligations to co-operate in the fact finding process? Enforcement would thus be difficult, though to *Justice* this was unproblematic since - in common with many EC lawyers today - it was content to rely on the courts for amplification and enforcement.

At a similar point in time, a very similar formula was employed by the Council of Europe in its consideration of the relationship between citizens and administration. In its final Resolution[20], the Council listed five essentials: right to be heard; access to information; assistance and representation; statement of reasons and indication of remedies. In 1980, two were added: publication or notification of policies governing discretionary decisions and the need for a reasoned decision in the event of deviation from existing policy. These are typically encapsulated in a single sentence, such as "The person concerned may be assisted or represented in the administrative procedure", an uninformative formula which does not specify whether, for example, a right to professional representation is envisaged and, if so, whether legal aid would be a prerequisite.

In considering this type of document, the question naturally arises whether it affords any greater protection to the citizen than a court - especially a court as powerful and uninhibited as the Court of Justice. The position one takes depends ultimately on one's view of the legitimacy of judicial policy-making and to canvass it widely would entail a long diversion into jurisprudential territory[21]. It is sufficient here to illustrate the variant viewpoints by noting, on the one side, Schwarze's decided preference for jurisprudence[22]. Stressing the role of the Court in harmonisation, Schwarze concludes that it

> has been able to integrate different principles into the Community's legal order and it has been particularly successful in finding an appropriate synthesis between common law and continental European standards... the development should, at least in my opinion, stay in the court's hands and not be turned over to legislation, at least not in the sense of a fully-fledged codification of administrative law.

20 Resolution dealing with the Protection of the Individual in Relation to the Acts of Administrative Authorities, above, note 7.

21 R. Dworkin, *Taking Rights Seriously* (London: Duckworth) 1967; *Law's Empire* (London: Fontana) 1986. For the Court of Justice, see H. Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking* (Martinus Nijhoff) 1986.

22 "Developing Principles of European Administrative Law", [1993] *Public Law* 229, 238.

Judge Due, on the other hand, in a lecture discussing the rights of the defence[23], has hinted that the time may have come for codification. His reasoning is the converse of Schwarze's: since codification has become the norm in Member States, harmonisation would be assisted.

Three arguments are normally advanced in favour of codes. The first concerns legitimacy, allocating the normative function to the legislature. The argument notably omits to say what is to happen in the case of legislative inertia. In the case of the Community, troubled with serious problems of "democratic deficit"[24] but with a court which sees its mission as the creation of a principled body of constitutional law[25] and accustomed to see its rulings observed, this argument is hard to advance. It is made harder by the presence in some Member States of Consitutional Courts which play at least a quasi-legislative role[26]

The second argument, which concerns legal certainty, contends that rules are clearer and less ambiguous than jurisprudential principles. But we have so far been discussing a code of the type which establishes standards to be fleshed out in case law. Such codes invite the intervention of the judge. This prompts the question whether the policy-making instincts of the judiciary can be curbed by greater specificity and, if so, whether this has any relevance to the question (discussed below) of optimum format for codification of Community administrative procedures.

The third and weightier argument involves subject matter. Judges undoubtedly suffer from a professional deformation which inclines them to approach the administrative process with trial procedure as their ideal-type. It is sufficient in this context to point to the extent to which the rights of the defence and the principle of access to a judicial tribunal have been prioritised by both the Court of Justice and the Court of Human Rights. I have argued elsewhere[27] that the Court of Justice has been altogether less sympathetic to the rights of access necessary for democratic participation in rulemaking. Similarly, a passage from the well-known *Heylens* judgement[28] hints at the possible attitude of

23 "Le respect des droits de la défense dans le droit administratif commun" 23 *Cahiers de droit européen* 383, 396 (1987).

24 Dehousse, op. cit. And see generally, J. Weiler, "The Transformation of Europe" 100 *Yale LJ* 2403 (1990).

25 F. Mancini, "The Making of a Constitution for Europe"x (1989) 26 CML Rev 595; F. Mancini and D. Keeling, "Democracy and the European Court of Justice" (1994) 57 MLR 175; G. Slynn, *Introducing a European Legal Order*, The Hamlyn Lectures (London: Stevens) 1993.

26 See further, "Judicial Politics in Western Europe", 15 (3) *West European Politics* (Special Issue, Volcansek ed) (1992); "The New Constitutional Politics of Europe", 26 (4) *Comparative Political Studies* (Special Issue, Shapiro and Stone eds) (1994).

27 C. Harlow, "Towards A Theory of Access for the European Court of Justice" (1992) 12 YEL 213. And see further below.

28 C 222/86 *UNECTEF v Heylens* [1987] ECR 4097, para. 15 (emphasis mine).

the Court to reasoned decisions in the absence of legislative signal in Art 190 EEC. Heylens, it will be remembered, had been prosecuted on the basis of a finding of non-equivalence of qualifications as a football trainer by a committee which gave no reasons for its decision. The Court reasoned that workers

> ...must also be able to defend [their rights] under the best possible conditions and have the possibility of *deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts*. Consequently, *in such circumstances* the competent national authority is under a duty to inform then of the reasons on which its refusal is based, either in the decision itself or *in a subsequent communication made at their request.*

What the Court seems to be saying is that the right to reasons is simply one of the rights of the defence, dependent on the right of access to a court[29].

To summarise once more, the procedural rights protected by courts are usually individual in character and biased inevitably towards judicial procedures, a point discussed further below. The codified, general statements espoused both by *Justice* and the Council of Europe are, in sharp contrast, advantageous in being written primarily from the standpoint of the good administrator. Yet even here both remain largely individuated in character, premissed on a relationship between a single individual and a corporate state. Neither contains any requirement of consultation nor any other provisions with respect to rulemaking nor, indeed, any reference to collective citizen action or group rights.

b. Codification

There may be a distinction between the use of the term "code" to indicate a system of general principles and "codification", describing a collection of regulatory material dealing with the same subject-matter. To put this differently, codes can be seen primarily as a convenient way to index and articulate connected and inter-locking rules[30].

There is certainly scope for codification of the untidy, though highly regulated, English system. The Tribunals and Inquiries Acts of 1958 and 1971 are partial codifications in the first sense which, since they are notably incomplete, do not really satisfy the second usage. The Supreme Court Act 1981 is a consolidation of the procedures for judicial review. Unfortunately, however, it is neither a code nor a codification being only partial, and leaves the judges to

29 See to the same effect, M. Shapiro, "The Giving of Reasons Requirement" (1992) *Univ of Chicago Legal Forum* 179.

30 See, Matticella, "La codification du droit: réflexions sur l'expérience française contemporaine" 10 *Revue française du droit administratif* 1994.668. And see, "L'expérience française de codification", ibid., at p. 663.

construe two texts which cover the same ground but are not identical[31].Again, in the area of access to government information, England possesses, in addition to the Official Secrets Act 1989, a Data Protection Act 1984, the Access to Personal Files Act 1987, the Access to Individual Reports Act 1988 and the Access to Health Records Act 1990. Since several began as Private Members Bills, none is complete in itself. Other statutes, such as the Environmental Protection Act 1990, contain important provisions on access, while the position is further complicated by reliance on "soft law", in the form of a Code of Practice policed by the Parliamentary ombudsman[32].This position is simply indefensible.

Although France has a "roll on" codification programme, the French *Commission supérieure de codification* is not in too great a hurry to "codify" the procedural rules for the *contentieux administratif*[33]. It may be that they are seen as already codified in the sense of being complete in themselves or, on the other hand, it may be recognised that further simplification would be counter-productive. This was certainly the experience of the English Law Commission, when it set out recently to "rationalise" the arrangements for appeal from administrative tribunals to the High Court. In its Working Paper, the Commission considered two ways forward: either (i) it could make proposals for a detailed, rationalised general codification, allowing for exceptional cases; or (ii) it could develop a number of model procedures to serve as precedents when new procedures were introduced or old ones reformed, a project leading in the long term towards simplification and rationalisation. The second approach received some support from the more experienced Council on Tribunals, which had been working towards a codification of tribunal procedure for ten years[34]. In the end, however, the Law Commission abandoned all attempt at rationalisation, accepting that sectoral appeal procedures varied too greatly for standardisation to be appropriate[35]. In comparing this uncodified system with that of France, the reader must remember that the French procedural code covers a unitary set of administrative tribunals and not, as in England, a disparate body of specialist tribunals, ultimately answerable to the ordinary courts. We might conclude that the second model more closely

31 See, for the consequences, *R v Dairy Products Tribunal ex p. Caswell* [1990] 2 AC 738.

32 See, White Paper on Open Government, Cm 2290 (1993) noted P. Birkinshaw, "'I only ask for information' - the White Paper on open government" [1993] *Public Law* 557. See generally, R. Austin, "Freedom of Information: The Constitutional Impact" in J. Jowell and D. Oliver, (eds.) *The Changing Constitution* (Oxford: Clarendon) 3rd edn 1994; P. Birkinshaw, *Freedom of Information: the law, the practice and the ideal* (London: Weidenfeld and Nicolson) 1988.

33 See, "La relance de la codification" 5 RFDA 1989.303. The code is contained in Loi 79-587 (11 July 1979) and published in the Dalloz *Code administratif.*

34 See, Council on Tribunals, *Models Rules of Procedure for Tribunals*, Cm 1434, (London: HMSO) 1991.

35 Compare the Consultation Paper, "Remedies in Administrative Law", Law Com No 126 (London: HMSO) 1993, p. 115 with the Final Report, "Remedies in Administrative Law", Law Com No 226 (London: HMSO) 1994, p.103.

resembles the Community situation, where a specialist, agency-style administration with access to good legal advice undertakes a narrow range of activities and is answerable to powerful courts of high calibre.

The Italian Law 241/1990 could best be described as a "halfway house". General in character, it is administration oriented, forming an integral part of the Ciampi Government's programme for administrative reform. At the time, there was apparently widespread dissatisfaction with the "opacity" of both legislative and administrative procedures and the "modest performance of most public services". Thus the Law was specifically put in place with a view to improving the administrative ethos, making it less introverted and more user-friendly[36]. Its "prudent" objective was to dignify Italian administration with a number of general principles, to identify particularly meaningful procedures and to shorten leisurely administrative proceedings. It was hoped that administration would thus be rendered more transparent and more accountable. We should not, however, make the mistake of thinking that Italian administrative procedure can be compressed into this handful of articles; the Law contains express provision for secondary legislation which could take the form either of more detailed horizontal provision (e.g., a code of data protection) or detailed vertical provision (e.g, a code of planning procedure). Thus the closest parallel to the Italian model is probably that of the American Administrative Procedures Act (APA), a "residual" statute which applies only when no other federal statute specifically provides procedural rules for a particular kind of governmental action and when the specific enabling statute is silent on the point[37].

Discussing the strengths and weaknesses of the German and Italian codifications, Cognetti advances a more general argument concerning the effects of over-regulation. Rules frequently produce effects entirely contrary to those desired, fuelling conflict and leading to obstructionist attitudes on the part of the administration. Procedure is ossified and experiment and innovation blocked. In short, the impact of codification on administrative conduct is not always propitious; there are often significant behavioural costs in terms of bureaucratisation[38]. In the EC context, for example, it is by no means certain that the open Commission attitude, helpful in providing access to less powerful interest groups, will survive the rationalisation of access procedures (described below) which is presently taking place. The administrator, fearful of the judge

36 G. della Cananea, "Reforming the State: The Policy of Administrative Reform in Italy under the Ciampi Government", Discussion Paper No 37 (Oxford: Nuffield College Centre for European Studies) p.5. See also, S. Cassese, "Le système administratif italien ou l'art de l'arrangement" 67 *Rev. française d'administration publique* 339 (1993).

37 On the operation of which see, "The Administrative Procedure Act: A Fortieth Anniversary Symposium" 72 *Virginia Law Rev* 215-492 (1986).

38 S. Cognetti, "Normative sul procedimento, regole di garanzia ad efficienza" (1992) 40 *Riv trim. di diritto pub.* 94, 96. The *locus classicus* is M. Crozier, *Le phénomène bureaucratique* (Paris: Seuil) 1963.

or hierarchical superior over his shoulder, holds tenaciously to the rulebook in the knowledge that the least deviation may have serious costs in the shape of litigation, cost, delay and even disciplinary action. If, in the majority of administrative law systems, courts cannot substitute their policies for those of the administrator, they can ensure that unpopular policies are put on to the back burner for ever because the cost of doing again what has been done incorrectly is too great.

Ensuring administrative change is diffcult, entailing as it does radical changes in bureaucratic ethos and codification of administrative procedure may not be the best way forward. The British "Citizens' Charter"[39] approach, geared to clear and simple targets, performance indicators and managerial monitoring, may in the long run be more effective. A similar preoccupation with the twin goals of administrative effectiveness and service to citizens led France in 1992 to adopt a "Charte des services publics". This charter, however, adopted the more conventional technique of enunciating "principles of good adminstration" - including here fashionable notions of transparency, accountability, clarity and accessibility - linked to recourse through the principle of access to an (administrative) court[40].

The best example of codification is in fact the German Adminstrative Procedures Code[41]. This mammoth piece of legislation represents a systematic attempt to codify large areas of administrative activity. This, on the one hand, appealed to the German ethos, which views administration as a mere executant of the law. On the other hand, such an ambitious project was probably only possible because of the high quality of German administration. The effect according to one observer[42] has been to transform the administration into a sort of "court of first instance" with the administrative jurisdictions as Court of Appeal. This is not an outcome which everyone would see as desirable[43]!

In the modern world, everything points to the inevitable predominance of this style of codification. Writing about developments in the civil law, Irti has described[44] a process of "decodification", a term which he uses to describe the way in which the general law of contract has been supplemented by statutory provision to deal with standard form and consumer credit contracts. Irti

39 *The Citizens' Charter*, Cm 1599, 1991 (London: HMSO). For discussion, see, A. Barron and C. Scott, "The Citizens' Charter Programme" (1992) 55 MLR 526, 529-532.

40 Conseil d'Etat, Rapport Public 1994 (Paris: La documentation française) 1995, p. 111.

41 Enacted 25 May 1976, published *Bundesgesetzblatt 29 May 1976 I.1253*

42 Cognetti, op. cit., p.117.

43 e.g., S. Rabin, "Some Thoughts on the Relationship between Fundamental Values and Procedural Safeguards in Constitutional Right to Hearing Cases" 16 *San Diego Law Rev.* 301 (1979). See also, J. Mashaw, *Bureaucratic Justice* (1985).

44 *L'età della codificazione* (Milan: Giuffrè) 1979 cited Kotz, op. cit. note 17, p.13. The *locus classicus* is F. Hayek, *Law, Legislation and Liberty* (London: Routledge: Kegan Paul) 1976-8.

argues also that "decodification" represents the response of the legislator to the situations of rapid economic, political, societal and, in particular, technological change to which we are becoming accustomed - and to which, incidentally, the foundation of the European Communities is itself a political response. He concludes that the policy-loaded legislation used to implement consequential legal change, alien though it is to the basic philosophy of the codes, will gradually supersede the codes and transform them into residual law to be resorted to only if no more specific provision can be found. Atiyah's conclusion is similar[45]: the process is inevitable. "Legislation, even when fleshed out by detailed subordinate regulation, simply cannot anticipate and provide for the great variety of cases which are likely to occur".

Shapiro reminds us that this move will not be without effect on the courts, arguing that technological change inevitably weakens the position of a reviewing judge[46]. This is one explanation of the move to instal "general principles" at the constitutional level. In *Hauptzollamt München v Technische Universität München*[47] duty was payable on a Japanese scanning telescope imported by the University. The Hauptzollamt had first nil rated the machinery but later changed its decision in reliance on a Commission decision. Pointing out that this was an area of technical expertise in which the case law restricted review to manifest error of appreciation, the Advocate General nonetheless urged the Court to intervene. The Court agreed to review the fact-finding process on the ground that "respect for the rights guaranteed by the Community legal order is of even more fundamental importance" than the Commission's power of technical appraisal. Only an adequately reasoned decision, based on a careful examination of the facts and properly communicated to the party affected would fulfil the Commission's procedural obligations. In the event, the Court annulled on the ground that the committee of experts consulted by the Commission could not be shown to be sufficiently expert. Lurking behind the fidgetty procedural ruling, one senses the Court's discontent with the substantive decision; the inference is that it felt that a "manifest error" had indeed been made. To quote Shapiro, "judges will accept plausible reasons only for those outcomes that are reasonable"[48]

45 "Common Law and Statute Law" (1985) 48 *Modern Law Review* 1, 5. And see, R. Livock, "Science, Law and Safety Standards: A Case Study of Industrial Disease", (1979) 6 *J. of Law and Society* 172.

46 "Administrative Discretion: The Next Stage" 92 *Yale Law J* 1487, 1507 (1983). And see, P. Schuck, "The new ideology of tort law" 92 *The Public Interest* 93 (1988)

47 C 269/90 *Hauptzollamt München v Technische Universität München* [1991] ECR I-5469.

48 op. cit., note 29 at 187.

3. Arguments against rules

Thus far, arguments for codification have been expressed largely in terms of the classic legal paradigm; the emphasis, in other words, has been on values such as fairness and legal certainty. Important though these are, other views of the administrative world exist whose values have so far been minimised. Baldwin has argued[49], that lawyers are inclined to

> take too much for granted that justice is an agreed, unproblematic, apolitical bench-mark. Not only may "justice" mean different things to different individuals or groups but it is arguable that governmental processes should serve other values beyond those encompassed in such a term.

Politicians and policy-makers may prioritise different objectives, notably administrative efficiency and the need to get things done.

This viewpoint has been taken further by the British administrative lawyer, Gabriele Ganz[50], whose perspective is primarily that of a regulator and anti-capitalist. Basing her argument on the antipathy shown by British courts both to inquisitorial procedure and to regulatory agencies more generally, Ganz contends that judge-made principles of administrative procedure inevitably veer towards the tried and tested judicial procedures of any given society. Ganz instances the Monopolies and Mergers Commission (MMC), whose procedure has been subjected to sustained criticism centred on "the inquisitorial nature of the proceedings" and covering: private hearings; the absence of rights of cross-examination; the ill-defined nature of the "charges"; and the dual role of the MMC as "judge and prosecutor". Ganz concludes that the bias towards trial-type procedure has here resulted in procedures which

> combine the worst of both worlds. Its procedure is not judicial enough for a quasi-criminal hearing but too judicial for a fact-finding body... The criticisms of [its] procedure show the difficulties of combining judicial safeguards with an investigatory procedure.

Similar criticism could certainly be addressed to some of the caselaw of the Court of Human Rights[51].

49 "Governing with Rules: the Developing Agenda", in G. Richardson and H. Genn (eds) *Administrative Law and Government Action* (Oxford University Press) 1994, at p. 160.

50 *Administrative Procedures* (London: Sweet and Maxwell) 1974, p.23, in reliance on the parliamentary debates.

51 Below, note 76.

The example of monopolies and mergers chosen by Ganz is especially relevant to our subject-matter, since anti-trust or competition proceedings form the core of the Single Market programme and entail both overlap between national and EC competencies and also close collaboration between national and EC authorities. Formidable as this grouping sounds, it is important to consider whether the big guns are always and only at the disposal of the administration[52]. Experience shows that insistence on precise conformity with every detail of administrative procedure can be extremely stultifying. Consider the land use planning procedures of any national state. The importance of the hallowed property rights at stake, which demand and usually receive the highest level of judicial protection, combines with the crucial importance of sensible land use to the national economy and the intervention of environmental considerations to produce a clash between public and private interests in which resolution is inevitably controversial[53]. Detailed procedural regulation of the planning process actually embodies a series of hard-fought political bargains. Trying to push the bargains further, or operating altogether outside the bargain, to which they may not be parties, the well-resourced and well-informed environmental movement, whose interest often lies in preventing all development, can turn the complexity of planning procedures to good account. (I shall not stop to exemplify)[54]. A process of de-regulation then begins, in which the authorities respond by removing certain developments entirely from the planning process; by substituting less complex procedures; or even by resorting entirely to negotiated and bargained positions. To translate this from national to EC level, British environmental groups have made excellent use of EC requirements for environmental impact assessments to challenge or delay planning decisions taken at national level, on several occasions provoking an angry response from government[55].

Partly for such reasons, studies of the use of rules in administration prove conclusively that it is one thing to introduce rules and quite another to see them implemented[56]. In the European Community, where administration is typically indirect and execution is in the hands of the administrations of the Member States, a double problem of compliance inevitably arises; at one level, the rules may not be transposed into national legislation while, at the second,

52 For a striking example, see *Adams v Commission (No 1)* [1986] 1 *CMLR* 506, a confidentiality case where the Commission failed miserably to protect its informant against a multinational pharmeceutical company.

53 P. McAuslan, *The Ideologies of Planning Law* (Oxford: Pergamon) 1988; "The role of courts and other judicial-type bodies in environmental management" 3 *J of Env Law* (JEL) 195 (1991). And see, S. Tromans, "Roads to Prosperity or Roads to Ruin? Transport and the Environment in England and Wales" 3 *JEL* 1 (1991).

54 But see, R. Carnwarth, "The planning lawyer and the environment" 3 JEL 57 (1991).

55 *Twyford Parish Council and others v Transport Secretary* 4 JEL 274 (1992). And see, C. Harlow and R. Rawlings, *Pressure Through Law* (London: Routledge) 1992, Chap 6.

56 R. Baldwin "Why Rules Don't Work" [1990] 53 *MLR* 321.

they are not implemented[57]. Schwarze[58], who is a firm supporter of judicial values and control, points to the "very complex" and "detailed and technical" system of rules and regulations' governing agriculture, leading to substantial non-compliance in "at least some" of the Member States. For this reason, Schwarze notes a "trend towards simplification and especially alignment of the type of rules in force".

In areas such as environmental or consumer law, where the States are often unwilling to take strong action, much Community regulation remains a dead letter or depends for enforcement on interest and social action groups[59]. They may either trigger Art 169 infringement proceedings or take action on their own behalf in national courts. Although this type of action is normally addressed at substance rather than procedure, breaches of procedural law may be used as a peg on which to hang substantive complaints. The *Bureau européen des consommateurs* (BEUC) has, for example, fought several actions to secure access to Commission documentation and to secure a right to be consulted both in rulemaking and individual decisions[60].

In monopolies and anti-trust regulation, which forms the core activity of the Community, the actors are also usually "repeat players"[61]: on one side, multinational corporations, well versed in the use of legal techniques, on the other the Commission. The result is the "Eurolaw saga"[62], where each procedural requirement is used as a step in a bargaining game, resulting in prolonged litigation in national courts and the Court of Justice. In *Kirklees BC v Wickes Building Supplies*[63], an English local authority brought proceedings to enforce the terms of the Shops Act 1950, which prohibits Sunday trading. The defendants asked for an "undertaking in damages" to cover their estimated profits if the case were ultimately to be lost by the local authority. The English Court of Appeal, implementing the rule of Community law that effective protection must be given in cases of directly effective Community rights, ruled that no

57 F. Snyder, "The Effectiveness of Eurpean Community Law: Institutions, Processes, Tools and Techniques" (1993) 56 *MLR* 19. See also, R. Baldwin and T. Daintith, *Harmonization and Hazard: Regulating Health and Safety in the European Workplace* (London: Graham and Trotman) 1992.

58 op. cit., [1993] PL 229, 235.

59 Snyder, op. cit.; S. Krislov, H. Ehlermann and J. Weiler, "The Political Organs and the Decision-making Process in the United States and the European Community" in M. Cappeletti, M. Seccombe and J. Weiler (eds) *Integration Through Law* (vol I (Berlin: de Gruyter) pp. 61-85; L. Kramer, *EEC Competition Law* (Deventer: Kluwer) 1986.

60 See note 86 below.

61 M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" 9 *Law and Soc Rev* 95 (1974).

62 C. Harding, "Who Goes to Court in Europe? An Analysis of Litigation against the European Community" (1992) 17 *EL Rev* 105.

63 [1990] 1 WLR 1237 (CA). The ruling was subsequently (and sensibly) reversed by the House of Lords: [1992] 3 All ER 717. For comment, see R. Rawlings, "The Eurolaw Game: Some Deductions from a Saga" 20 *J. of Law and Soc.* 309 (1993).

interim injunction would be granted without such an undertaking. The sums of money involved were such as the enforcement agents, local authorities, were simply not in a position to underwrite. In consequence, the Shops Act, though never invalidated by the Court of Justice, became a dead letter[64].

We should not underplay these sociological arguments. "Law-games" are a symptom of an increasingly litigious society, already reflected in logistical problems for the Community legal systems and causing serious problems in the shape of a mounting docket not entirely resolved by the creation of, and extensive delegation to, the Court of First Instance. We are all familiar with the arguments for a "new architecture", allowing for the creation of alternative fora and an appellate jurisdiction for the Court of Justice[65] of which one commentator has significantly remarked that the appeal rights are "likely to be taken up by most undertakings in competition cases who fail at first instance"[66]. Art 177 reference procedure is also incapable of stemming the flow of cases to the Court and may, indeed, have added to corresponding problems of delay and overload at national level.

4. Mandatory or directory?

National courts have all developed their own juridical techniques to circumvent this type of problem. Some use a "mandatory/directory" classification to dispense with procedural failures which are seen as negligible, (e.g, where adequate notice has been given and the applicant is aware of the terms of the decision, though the precise format required by statute or regulation has been disregarded). Similarly, a distinction may be drawn between penal and administrative regulation to exclude the rights of the defence in some administrative processes. A "void/voidable" distinction is also common in administrative law.

Schwarze has argued[67], partly relying on the *Technische Universität* case[68], that the Court of Justice is averse to this type of compromise, stressing its insistence on "the strict conformity of the decision-making process to procedural requirements" and the "willingness of the court to insist on strict observance of the rules of administrative procedure". We have already noted the

64 The response of the Court of Justice to Sunday trading litigation suggests that it is alert to such dangers, moving to strengthen the national legal order: See, Cases 267, 268/91 *Keck and Mithouard* [1993] ECR I-6097. For comment, see J. Steiner, *Textbook on EC Law* (London: Blackstone) 4th edn 1994, pp. 103-4.

65 J-P Jacqué, J. Weiler, "On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovermental Conference" 27 *CMLR* 192 (1990).

66 J. Shaw, *European Community Law* (London: MacMillan) 1993, p.73.

67 op. cit., [1993] *Public Law* 229, 231-2.

68 Above note 46.

Court's obvious discomfort with the substantive decision here and it must be said that a second case also cited by Schwarze involves a gross breach of procedure, hard for any court to overlook. The French Ministry of Industry had issued a permit for the disposal of nuclear waste without consulting the Commission, mandatory under Art 37 EAEC. The day after suit was filed in the Strasbourg administrative tribunal, the Commission was consulted and replied inside the time-limit of 6 months. Questioned as to whether consultation must precede the authorisation rather than the start of disposal, the Court naturally approved the former interpretation[69]! The *British Eurospace* case discussed below seems inconclusive.

Judge Due believes the Court is more flexible[70]:

> Il ne faut pas considérer ces différentes formules comme la preuve d'une indulgence de la part de la Cour à l'égard des irrégularités commises par la Commission, mais plutôt comme l'expression d'un souci de ne pas annuler, pour des irrégularités non substantielles des décisions dont le contenu est pleinement justifié et qui devraient donc être reprises après une reouverture éventuelle de la procédure administrative.

The statements can in fact be reconciled if we look at a well-known group of cases concerning the rights of the defence in competition law[71]. On the basis of Art 14 (3) of Reg 62/17, the Commission had taken a series of decisions ordering the applicant undertakings to submit to investigations concerning a price-fixing ring in the distribution of polyethylene. Most cooperated under protest, though Hoechst did not, so that a judicial warrant was obtained. After comparing national procedures, shown to diverge greatly, the Court of Justice followed a *jurisprudence constante*[72] to hold that the rights of the defence are *in principle* "fundamental" in character, including a right to a reasoned decision as "essential indicators" of the Commission's approach. The Court went on, however, both to hold that the possibility of contesting the validity of the Commission's decision before it and applying for suspension was a sufficient protection for the undertakings and also to reject all the specific procedural complaints (such as signature by a single Commissioner rather than the Commission as a whole). This recalls the earlier *Nold* decision[73] where it was said that regard must be had to the "objectives of general interest" pursued by the Commission.

69 C187/87 *Saarland v French Ministry of Industry* [1988] ECR 5037.

70 op. cit., p. 392.

71 *Hoechst v Commission* Cases 47/87, 227/ 88 [1989] ECR 2859; *Dow Benelux v Commission* C85/87 [1989] ECR 3137; *Dow Chemicals Iberia v Commission* Cases 87-99/87 [1989] ECR 3165; *Orkem v Commission* C374/87 [1989] ECR 3283.

72 *San Michele v Commission* [1962] ECR 449; *National Panasonic v Commission* C136/79 [1980] ECR 2033.

73 C 4/73 *Nold v Commission* [1974] ECR 491.

A similar technique was used in *Enichem*[74], where Directive 380/87 EEC required Member States to notify the Commission before regulating to restrain the use of non-biodegradable packaging. The validity of a commune's byelaws was questioned. Advocate General Jacobs made a comparison to procedures under Directive 189/83 to argue that notification was directory rather than mandatory. The Court, however, preferred to rule that there was an obligation to communicate but that failure to do so did not either invalidate the byelaws nor create any interest enforceable by individuals[75]. Similarly, in the *Scottish Football Association* case[76], where the applicants complained of disproportionate and peremptory procedure by the Commission in failing to answer their letters and then moving suddenly to threaten penalties under Art 11(5) EEC 17 for non-compliance with Commission procedures, the CFI refused to annul. It went out of its way to remark that the applicant's own conduct could not be regarded as "active cooperation with the Commission" but rather "as a polite but explicit refusal to cooperate":

> In those particular circumstances, the Commission was under no obligation either to pursue lengthy informal correspondence or to engage in oral discussions with the applicant, which had provided only part of the information requested. It was entitled to proceed to the second stage of the preliminary investigation procedure, involving a request for information by way of a decision, and that step cannot be regarded as excessive.

This case law is notable for the Court's realistic appreciation of the true nature of competition procedures and the Commission's difficulties in implementation. It is interesting to note, however, that there may be a danger that the more legalistic attitudes of the Commission and Court of Human Rights may produce a clash between the jurisprudence of the two courts[77].

74 C380/87 *Enichem v Municipality of Cinisello Balsamo* [1989] ECR 2491.

75 Compare the stricter attitude of the French Conseil d'Etat in *Association Force Ouvrière Consommateurs* CE 9 July 1993 Rec. 212 (annulment of non-reasoned decision); *Union des transporteurs en commun de voyageurs des Bouches-du-Rhône (UTCV) et autres* CE Ass 11 March 1994, 10 RFDA 1994.1004 concl. du Marais (annulment of regulation promulgated without consultation of EC Commission).

76 C T-46/92 *Scottish Football Association v Commission* (9 November 1994).

77 See especially, *Funke v France* [1993] 15 EHRR 297, noted with other, similar jurisprudence from the Court of Human Rights at [1993] *EL Rev* 465, 468 where A. Sherlock makes the same point.

5. Process, function and procedure

The emphasis of this paper has so far been on the stylistic merits and demerits of various forms of code, while the nature of the administrative process has received only cursory consideration. Contemporary rulemaking theory suggests, however, that for rulemaking to be successful there must be a "good fit" between objectives and the regulatory technique selected. Baldwin[78] mentions three main functions for rules - though his list does not pretend to be all-embracing - which are (i) to instruct officials; (ii) to encourage consistency and (iii) presentationally, to enhance the perceived legitimacy of decisions. Unfortunately, this crucial question of "fit" is often subordinated to political ends: for example, "soft law" may in practice be a more effective way of securing a certain goal[79], yet the rulemaker may prioritise legitimacy, causing him to turn to "hard law". If the codification of Community administrative procedures is to be more than a symbol, we need to tailor it carefully to the needs of administration.

Considered from the viewpoint of the administrative lawyer, the European Community is atypical. Its administration is small, centralised and elite. Its activities are, to say the least, one-sided, largely confined to the economic sector. Much of the subject-matter of modern administrative law which impinges most directly on the citizen - tax, welfare, housing and immigration - lies outside the competence of the Community and it is national administrations which possess the executive function. This pattern makes the Commission comparable to a single, generalist, American-type regulatory agency, or perhaps a number of specialised regulatory agencies. Usually, as with the enforcement of the Single Market, the "agencies" are represented by the different directorates of the Commission, more independent than national ministries, hence more like a regulatory agency in their operation. The picture may come to resemble the United States still more closely if the establishment of new, autonomous agencies, such as the European Environmental Agency[80], becomes an accepted precedent.

a. Functional analysis: legislative, judicial, administrative

The classical typology of administrative function and process derives from separation of powers theory. To take the obvious example, jurisdiction in French administrative law is governed by the presence of an *acte administratif*. In classic Anglo-American administrative law, adjudication (or decision-making) and administration (often confused with or classified as discretion) are

78 Baldwin, op. cit. note 48, p. 159.
79 Snyder, op. cit., note 56.
80 Regulation 1210/90/EEC, OJ 1990 L120. Note that the EEA has not as yet acquired executive functions.

again distinguished. In practice, this has led to strong protection of individual interests through the steady subjection of adjudicatory/individuated decisions to the concept of "due process" and to the trial-type procedural protections associated with adjudication[81]. More recently, the area of administrative discretion has been eroded by requirements of transparency: for instance, the formulation of reasons and open expression of policies as rules, a dangerous process which may create entitlements in the shape of "legitimate expectations", whether substantive or of legal process is not yet clear[82]. Rule-making procedures, previously relatively exempt, have also begun to be formalised. Transparency has led to demands for formal rights of consultation and participation, strongly protected by a jurisprudence built on the American Administrative Procedures Act[83]. The lesson from America is, however, that the interface between these supposedly separate areas of administrative activity is highly problematic, creating a substantial cost in the shape of litigation and delay[84].

There is inevitably considerable overlap between the categories of administrative activity, which most political scientists would in any case view as facets of a single function[85] and, as yet, the Commission's output functions remain primarily policy-formation and rulemaking. Nor is the classic, functional analysis strongly marked in Community law. This may be primarily due to the wording of Art 189 EEC, which treats the power to make regulations and directives and individual decisions in the same paragraph. In contrast, the restrictive requirement of "direct and individual concern" for standing to sue under Art 173 EEC has had the effect of introducing an embryonic functional distinction, seen at its worst in the "Fruit and Vegetables" cases[86] which forbid recourse against decisions in the shape of a regulation. Arguably, the Court's jurisprudence is generally weak in dealing with group or collective rights. It has refused to annul regulations on the ground that they made no room for consumer groups to make representations in anti-dumping procedures and has paid scant attention to third-party interests in competition cases[87]. Only recently has it begun to encourage interest groups, fighting for space in the

81 Galligan, op. cit., pp. 355-60.

82 P.P. Craig, *Administrative Law* (London: Sweet and Maxwell) 3rd edn 1994, pp. 293-6 and "Legitimate Expectations: A Conceptual Analysis" (1992) 108 LQR 79.

83 R. Pierce, S. Shapiro, P. Verkuil, *Administrative Law and Process* (Westbury, New York: Foundation Press) 2nd edn, 1992, pp. 35-6. And see, *Citizens to Preserve Overton Park v Volpe* 401 US 402 (1971).

84 The fullest exposition is perhaps by W. Gellhorn, C. Byse, P. Strauss, *Administrative Law, Cases and Comments* (Mineola, New York: Foundation Press) 7th edn 1979, Ch 3.

85 C. Harlow and R. Rawlings, *Law and Administration* (London: Weidenfeld and Nicolson) pp. 130-1.

86 Cases 16, 17/62 *Confédération Nationale des Producteurs de Fruits et Légumes v Council* [1962] ECR 471.

87 C170/89 *BEUC v Commission* [1991] ECR 5709; T37/92 *BEUC and NCC v Commission* [1994] ECR II-289.

policymaking process. Indeed, it is fair to see the Commission as in advance of the Court[88].

Admittedly, the Community lawmaking procedure is complicated enough, without wishing to add to the complexities. On the other hand, it notably lacks legitimacy. One aspect of the lack of trust lies in the absence of those collective procedural rights associated with rulemaking strongly developed and protected by American administrative law; there is, for example, no "notice and comment" procedure[89]. Consultation requirements routinely involve only the Commission or Member States. Provision for non-parliamentary representation is corporatist in character, envisaged solely in terms of the EcoSoc and Comitology, whose procedures can scarcely be described as either transparent or accessible[90]. Without wishing to take the Community down the blind alley of functional analysis, a development already presaged by the prolix jurisprudence on "proper legal basis", there is clearly room for a more thoughtful treatment of rulemaking procedure.

b. Direct and indirect administration

A more pertinent way to classify Community administrative acts is into "direct" acts (where the Community administration impinges directly on the subject) and "indirect" (when its function is to regulate, harmonise, coordinate and influence national administrations). It is important to bear in mind here that, although the Community's activities can be loosely grouped as "economic", they in fact differ sharply in character. What they have in common is that the subject-matter characteristically involves difficult economic judgements and is highly technical. Again, although the actors in a competition process may differ greatly from those in the area of state aids, dominated by the Member States or anti-dumping procedures, where third-party states and parties are most likely to be found, a common feature is that the subject of direct Community action is always more likely to be a corporation than an individual citizen[91]. We have already noted[92] in the context of competition procedures that the Court is aware of the special problems this creates for the Commission. Again, we have seen its willingness to match procedure and party, for example, by holding that to wait 26 months before taking a decision on state aid is a breach of the principle of *confiance légitime* but, on the other

88 See C26/76 *Metro SB-Grossmarkte GmbH & Co v Commission (No 1)* [1977] ECR 1875 and for a critique, Harlow, op. cit. note 27.

89 See K.C. Davis, *Administrative Law Treatise* (St Paul: West Publishing) 3rd edn 1972, especially pp. 140-142.

90 K. Bradley, "Comitology and the Law: Through a Glass, Darkly" (1992) 29 *CML Rev* 693.

91 For confirmation, consider the caselaw already cited and see the analysis of litigants in Harding, op. cit. note 61.

92 Above, text at note //.

hand, that the principle can be relied on only by third parties and not the Member States[93].

In this context, the primary purpose of rules is neither to instruct Community officials, mainly well-advised and expert in their field nor, given the relatively small volume of decisions, to encourage consistency. The primary concern of the different sectoral actors is clearly to understand their rights and entitlements in the administrative process, a need which entails a high degree of specificity. In practice, this is precisely how Community regulation of administrative procedures has evolved. It is typically activity-specific, with procedural and substantive provisions often contained in a single code. To choose examples at random, we know already that Art 14 of Council Regulation 62/17 specifies the procedure to be followed in investigating breaches of the competition rules; similarly, the procedures for export of cultural goods are contained in Regulations 89/594 and 91/447.

Sectoral studies show, however, that the formal provisions of Community law are often underpinned by a complex web of "soft law"[94]: the circulars, directives, guidelines and guidance which increasingly form the fabric of national administrative law. This is particularly true of state aids, where a situation has developed in which the Treaty procedures are too complex to be effectively used by the Commission, while the regulatory powers granted by Art 94 EEC have never been used because of the opposition of Member States[95]. Not surprisingly, the Commission has stepped in to fill the legal vacuum with a mix of individuated decisions, "framework" guidelines, codes of conduct, codes of practice. Their use raises all the legal problems associated with "quasi-legislation" in national legal systems: its binding nature, legality, enforcement, publication in the Official Journal, availability to parties affected, and so on. It is this confusing web of regulation, with its implications for arbitrariness and opacity, which cries out for rationalisation and a measure of codification - as della Cananea, in his detailed study, in fact concludes[96].

Yet in these highly regulated areas, a German-style general codification is neither practical nor desirable; indeed, consolidation even of apparently simple matters, such as the time within which letters must be answered or decisions taken, would be hard to achieve. This does not mean that there is no room at all for "horizontal" or generalist codification but simply that it too ought to be subject-specific. Some such provisions already exist, such as the new procedures for access to information already mentioned; the rules governing the

93 C223/85 *RSV Maschinefabrieken v Commission* [1987] ECR 4617; C5/89 *Commission v Germany* [1990] ECR I-3437.

94 Snyder, op. cit., note 56.

95 M. Struys, "Questions choisies de procédure en matières d'aides d'Etat" 29 *Rev trim du droit eur* 17, 24.

96 "Administration by Guidelines: The Policy Guidelines of the Commission in the Field of State Aids", in *Schriftenreihe der Europäischen Rechtsakademie Trier* (1993).

provision of information of a technical nature set out in Directive 83/189; or the draft directive on data protection which contains provisions concerning the right to access personal data files. In time these could be collected and published together, as with the public procurement directives.

Turning to the areas of indirect administration where the Community is reliant on national actors, rather different considerations obtain. On the one hand, there is a strong argument that procedure is consitutionally a question for Member States. It would follow that it would be highly inappropriate and, indeed, directly contrary to the principle of subsidiarity now strongly reinforced by Arts A(2) and B TEU, for the Community to intervene directly with any general codification. Arguably, the Court of Justice has already shown itself too prone to intervention in procedural matters, basing its encroachment on Art 5 EEC[97]. On the other hand, the high degree of decentralisation which permits Member States, whose standards and practices are by no means always similar or even compatible, to act as agents for the Community in a wide divergency of processes and situations, ranging from licensing, subsidy or the establishment of agricultural, fish or transport quotas, to the administration of welfare and immigration services, makes such a move particularly desirable. Lack of harmonisation creates an unacceptable degree of inequality in which the European citizens receive markedly different treatment from the diverse administrations of the various Member States. Here it would be both appropriate and possible for the Community to provide a lead in establishing "bottom-up" standards of good behaviour: in other words, to maximise or "level up" Community practices. Presentationally, such a move could logically be connected to the Commission's general desire to "maximise" or "level up" in human rights matters[98].

6. Conclusions

The thrust of this paper has undoubtedly been against a full-scale codification of EC administrative procedures based (eg) on a German prototype. This is just as well, since there is no political momentum for such a measure, a point strongly illustrated in the state aids sector where we saw movement

97 See, E. Garcia de Enterria, "The Extension of the Jurisdiction of National Administrative Courts by Community Law: the Judgement of the Court of Justice in *Borelli* and Article 5 of the Treaty" (1993) 13 YEL 19, a comment on C 97/91 *Oleificio Borelli v Commission* [1993] ECR I-6313. The arguments can be compared to those surrounding the legitimacy of the direct effect doctrine: see especially, D. Curtin, "The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context" (1990) 15 EL Rev 195.

98 op. cit., Bull. Sup 5/76, p. 15 and note 8 above.

blocked by the fact that the regulators were also the regulated. Kramer[99], speaking from years of experience of EC consumer policy, reproaches Member States with similar lack of political will to embark on "legal integration", the necessity of which was first suggested by Lando in 1978. Suggesting a compromise of "framework rules" to establish general principles of product safety, he warns that "the problems normally begin with the details".

Yet although it seems to run counter to the universal trend towards complex legislation, the argument for a codification of "general principles of good administration" is a strong one. Cotterell has recently pointed to the consequence for legal systems of the increasingly opaque and confusing image of legality in modern societies. Like Irti, he argues for rationality, urging an enhanced effort to re-assert the core values of reason and consistency in law[100]. A Community Code or Charter of Good Administration would reinforce basic administrative standards within national administrations and, at the same time, clarify and fortify the twin images of legality and good administration in the public perception.

Some of the proposed standards will already have been accepted by Member States in their capacity of members of the Council of Europe and are not likely to prove especially controversial. Again, a majority of Member States is familiar with the concept of codified administrative procedures. There are Treaty precedents in the shape of Arts 190 and 191. A European Ombudsman, the normal monitor of administrative procedures, was put in place by Arts 8d and 138e TEU[101]. We also have the new transparency provisions urged by Denmark, anxious at the prospect of a watering down of their own excellent procedures[102]. In the wake of the Edinburgh summit of 1992 came the welcome publication of a number of measures designed to improve transparency, in particular a proposal for "Green papers" and a Code of Conduct concerning public access to documents[103].

Yet one can sense in parallel a contrary climate of opinion that the state has ceased to be the real enemy. The modern "robber barons" are the multinational companies with whose depredations both state and Community have insufficient arms to deal. There is concern at the absence of adequate regulation of financial markets. There is concern at the inability of standard criminal procedures - conforming to the adjudicative paradigm on which administrative procedure is based[104] - to conclude cases of serious fraud with

99 *EEC Consumer Law* (Deventer: Kluwer) 1986, pp. 382, 384.

100 "Law's Community: Legal Theory and the Image of Legality", 19 *J. of Law and Soc.* 405, 409.

101 See, Statute of the European Ombudsman, *OJ* L113 (4 May 1994).

102 Intergovernmental agreements on Democracy, Transparency and Subsidiarity, EC Bull 12/1992 p.7 (11/12 December 1992). See also, EP Resolution A3 0356/93.

103 *OJ* L340 (31 December 1993); *OJ* 146/58 (18 February 1994).

104 See text at note 76 above.

any measure of success. There is less concern over the public monopoly of the multi-media and more concern over the private monopolies accumulated by "media barons". A desire for more stringent regulation with less protection for perceived "villains" runs counter to a wish for less "red tape".

At the political level, the battle for deregulation is well under way. Administrative procedures are notably costly in an era when all governments see a need to curtail public expenditure. Other national governments, and even the Community, may be tempted by the precedent of the British Deregulation and Contracting Out Act 1994, which permits the Government to dismantle legislative provisions which place too great a burden on industry without the need to resort to Parliament. Conscious of the dangers and anxious to protect the public service ethos from rapid deregulation and dismantlement, France has been nudging the Commission to prepare a European Charter of Public Service[105]. The Charter would protect a minimum level of public service, as well as some administrative procedures of a type which fall within the scope of this paper: for example, "transparence vis-a-vis des usagers et participation, ou partenariat de ceux-ci". To this list the Commission would add others, especially the cherished proportionality principle. Somewhat surprisingly, the project has received support from six of the Member States.

This initiative can be related to moves by the European Parliament which, in a 1993 resolution, invited the Commission to present a proposition defining "minimum standards" for public services *throughout society*. The Commission's response, though less ambitious than the original French sponsors wanted, is seen as encouraging. The draft Constitution for the European Union projected by the European Parliament[106] also catalogues as human rights some guarantees of fair administrative procedures, notably protection against surveillance in the absence of judicial warrant, a right of access to personal administrative files and a right of access to courts. It seems that there might be a considerable measure of support for an agenda item at the next intergovernmental conference proposing a Code or Charter of administrative procedure. Whether agreement could be secured over the contents and modalities is, however, much less certain.

105 Conseil d'Etat, *Rapport annuel 1994*, op. cit., pp. 111-116.

106 See Report of the Herman Committee, EP Doc. A3-0064/94. The Catalogue forms Title VII and the relevant Articles are 6 (c), 15 and 17.

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