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SOFT LAW AND THE RULE OF LAW IN THE EUROPEAN UNION:  
REVISION OR REDUNDANCY?

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## **Abstract**

The increasing use in the EU of soft law norms has created an extensive debate over the centrality of law as the principle instrument of European integration. Under a certain understanding of legality – one that sees the function of law as the provision of stable normative expectations - the development of methods like the OMC appears as an explicit threat. By another, the complex nature of the EU polity - and the functional tasks it must carry-out - places an impossibly high burden on any attempt by the EU to model its conception of legality this way. While this seemingly leaves the EU with a stark choice, the very features – the dispersion of normative authority between different national orders, and the need for rapid and iterative regulatory interventions – that have borne soft law also point towards the development of new conceptions of legality and its limits in a post-national setting. Soft law has both empirically challenged law's place in the integration project, and demanded a re-evaluation of its contemporary meaning.

## **Keywords**

European Law, Open Coordination, Rule of Law, Social Policy, Soft Law





## I. Integration Through Law – Chronicles of a Death Foretold?\*

It is now over twenty years since Weiler and Cappelletti published their seminal work on integration through law in the European Union.<sup>1</sup> Many of its conclusions were captured by Weiler's reliably repeated observation that law was both the object and the agent of integration.<sup>2</sup> As agent, law has been assigned with much of the 'heavy lifting' in the EU's development.<sup>3</sup> As object, *the integration of law itself* has been perhaps the decisive achievement of 'Europe' as a political and normative project. The creation of a self-sustaining and authoritative legal order has been the very standard by which we have *measured* the EU's development, or seen its 'success'. 'Object' and 'agent' successfully captured a self-image of law's role in the EU; it is no wonder the distinction is so often, and so forcefully, repeated.

What though about now? In a broader sense, the 'decline of law' has been an enduring theme of scholarship in law and society over recent decades. The advent of globalization has been seen as constraining the ability of law to effectively discipline complex, and rapidly changing, social relationships. This decline – in Richard Posner's words, 'of law as an autonomous discipline' - has also been registered at the academic level.<sup>4</sup> Not only have we seen a blurring of the territorial boundaries upon which the institutions of the law most often rest, but also the rise of other dominant logics – economics, sport, media and so on - each claiming to provide society with an overriding 'integrative' frame. It is in this context that we have to see the contemporary meaning of law in the EU – why, in view of this, has EU law been posited as bucking the trend?

In truth, the EU has also evidenced elements of the 'legal decline' thesis. In the course of the last two decades, the idea of law as integration's central disciplinary template has received a series of setbacks. This can be observed on both sides of the object/agent distinction. As agent, the EU has also seen the rise of other powerful functional logics. The domineering presence of the internal market project in the last two decades – and the increasing concern for security and home affairs in the present one – has led to the addition of several areas of 'enhanced cooperation' between states, dominated by inter-governmental bargaining, where the Court has been denied, or given limited, supervisory competences.<sup>5</sup> As agent, it is not law, but politics, that has become the dominant 'integrative' medium.

This decline can also, however, be registered on the second side of the distinction. If the use of a constitutional frame for the integration project was a step to use law as an anchoring mechanism for an emergent European polity, the rejection of the Union's Constitutional Treaty in France and the Netherlands would seem to be another nail in the coffin for the Weiler and Cappelletti paradigm. While the move to inter-governmentalism in the second and third pillars displaces the idea of law as 'agent', the rejection of the Constitution would seem to indicate that the notion of law as 'object' of integration has been relegated as well. European law, under the new reality, is neither seen, nor desired as part of a constitutional *finalité*, but destined to be a project in motion; one that can neither be

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<sup>1</sup> M. Cappelletti, M. Seccombe and J. Weiler, *Integration Through Law* (De Gruyter, 1986)

<sup>2</sup> R. Dehousse & J. Weiler, 'The Legal Dimension' in W. Wallace (ed.), *The Dynamics of European Integration* (Pinter, 1990) at 234

<sup>3</sup> See also, N. Walker, 'Legal Theory and the European Union' (2005) *EUI Working Papers (Law)* 16 at 12

<sup>4</sup> By virtue of this thesis, lawyers are less and less confident in being able to evaluate legal rules through the categories of law itself; instead preferring to observe legal change through the 'translation' of legal rules into other disciplinary categories – law and society, law and literature, law and economics, and so on. R. Posner, 'The Decline of Law as an Autonomous Discipline' (1986) 100 *Harvard Law Review* 761

<sup>5</sup> For a summary of recent positions vis-à-vis the Court's jurisdiction over second and third pillar matters, see D. Chalmers *et al. European Union Law: Texts and Materials* (Cambridge University Press, 2006), 120-122

captured nor settled with reference to an enumerated constitutional frame.<sup>6</sup> Perhaps – in the story of law’s ‘decline’ – the EU is therefore not an exception, but a paradigm case, for the increasing marginalisation of the legal discipline.

On its face, the debate over soft law should simply be logged as another argument in favour of this ‘expulsion of law’ thesis.<sup>7</sup> As object, soft law mechanisms (such as the one this paper will focus on, the OMC) do not aim towards the development of a European legal order, but only the advancement of particular functional objectives. As agent, they arguably represent a retreat from law-mediated rule, by acting in areas where the community has weak ‘coordinative’ competences.<sup>8</sup> Norms under the OMC are ad-hoc and non-binding; neither creating stable regulatory standards, nor providing mechanisms of redress before the European court. If there is such a thing as ‘integration through law’, soft law is either not a part of it, or worse, a symptom for how weak law’s integrative force has become.

In another sense, however, the development of soft law challenges this thesis. The debate over soft law methods within the European Union has not only produced anxieties about law’s role in the EU, but also a number of conceptual accounts which posit the development of instruments such as the OMC not as indicative of a move *away* from law, but as part of a distinct and novel stage of legal integration. This stage has produced opportunities to adapt legal institutions, to a new post-national environment, where neither the cultural and normative values, nor the available pool of social knowledge upon which law rests, can ultimately be taken for granted. Law must be able to both accommodate normative difference, and adapt appropriately to rapid technological and scientific change. In this context, for every claim that soft law is ‘extra-legal’, or an attack on the foundations of the legal system, we have also seen claims that soft law is a mirror onto the future; a way of uncovering the changing rationalities of law *itself*, in the process of ‘integrating Europe’.<sup>9</sup>

These claims raise questions which this essay will attempt to tentatively answer. Can the rise of soft law be posited not as antithetical, but complementary to the development of the ‘integration through law’ paradigm in the EU, or towards a law in which the conventional assumptions of European legal scholarship – of a set of hierarchical rules, or ‘harmonising’ regulatory standards – have been decisively subverted?<sup>10</sup> Or alternatively, is soft law better described as a displacement of ‘the lawyer’; can it be posited as a re-assertion of the political sphere - or of other functional logics, like economy, science and administration - against the attempts of law and lawyers (charted in other essays in this volume) to themselves take charge of the EU’s integrative story?

In exploring these two options, the paper will be divided into four parts. In the first two (ss. II-III), it will attempt to analyse the various institutional and academic objections to soft law. The objection to its use is not only based on the potential threat they pose to an ‘institutional balance’ in the Community, but also on the values and forms of law-making that soft law embodies. The paper will argue that these objections take as their starting point a particular ‘Fullerian’ conception of EU law-making.<sup>11</sup> Under this reading, legal rules are prospective and stable; they apply equally to all; and they

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<sup>6</sup> See the metaphor of the journey in Z. Bankowski and E. Christodoulidis, ‘The European Union as an Essentially Contested Project’ (1998) 4 *European Law Journal* 4 at 342

<sup>7</sup> See C. Joerges, ‘Integration Through De-Legislation: An Irritated Heckler’ (2007) *European Governance Papers* 3 at 12

<sup>8</sup> J. Zeitlin, ‘Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?’ (2005) 5 *European Governance Papers* 4 at 5

<sup>9</sup> Along with the literature cited below, see S. Deakin and O. de Schutter (eds.) *Social Rights and Market Forces: Is the Open Method of Coordination the Future of Social Europe?* (Bruylant, 2005); O. Gerstenberg and C. Sabel, ‘Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?’ in C. Joerges and R. Dehousse (eds.) *Good Governance in Europe’s Integrated Market* (Oxford University Press, 2002)

<sup>10</sup> C. Sabel and J. Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the European Union’ (2008) 14 *European Law Journal* 3

<sup>11</sup> On the Fullerian definition of legality, see L. Fuller, *The Morality of Law* (Yale University Press, 1969); L. Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 *Harvard Law Review* 4

are to be formulated independently of the circumstances into which they are applied. By comparison, soft law threatens one or all of these features. If we take this view, it is easy to see the OMC's development as a part of a 'legal expulsion'.

What, however, if we take another view? In the paper's third section (s. IV), this Fullerian conception will be challenged. Its problem is not that it fails to capture key normative values, but that the Fullerian account of the rule of law would struggle to be met by *any* form of European law-making, including the 'classical' forms that soft law is said to have replaced. In a European polity made up of diverse national cultures, invoking complex regulatory structures, no law can stand independently of the cultural and functional context into which it is to be applied.<sup>12</sup> The demands placed upon law by the Fullerian view – while being strained in the national context – are more improbable still in the 'divided', post-national EU.

In its final part (s. V), the paper will briefly consider both the difficult choices the undermining of the Fullerian paradigm poses, and the possible emergence of new readings of legality. On the one hand, the emergence of soft law signals an end – the difficulties of translating normative concepts found on the national level into a more dense EU setting; on the other, it could yet represent a new beginning – a search for 'reflexive', 'dynamic' or other ways of achieving legal values under conditions where the assumptions of a stable and coherent legal order continue to be forcefully challenged. The 'legality challenge' of soft law, like all challenges, has both provoked defensive attitudes amongst lawyers, and demanded a thorough re-evaluation of what we take 'the rule of law' in the contemporary EU to mean.

## **II. The OMC as a 'Legality Challenge'**

The origins of soft law are both deeper and broader than the contemporary OMC.<sup>13</sup> Charting the use of soft law since the Community's development, Frances Snyder identified soft law recommendations and opinions less as a surrogate, than as a preparatory mechanism, for the negotiation and development of 'hard law' proposals. Often, where the necessary agreement was lacking, soft law could provide an opportunity space for consensus to emerge on broad goals and principles, while more contentious details were still being worked-out.<sup>14</sup>

The OMC differs from this usage in important ways. First, it acts primarily in areas where the Community has limited legislative competences. It is not therefore intended 'to lead to' a more permanent agreement that can be called 'law proper', but used in an arena of 'permanent compromise' where a stable and enforced policy equilibrium is explicitly ruled-out. Second, it is not simply that forms of 'hard law' are hobbled by a lack of political agreement, but that harmonisation in areas of social and employment policy is deemed undesirable in and of itself. The significant diversity of national welfare systems, and the attachment of such policies to a sense of national 'social solidarity' – through which the active are willing to subsidise the less well-off – has led national governments to see diversity in the policy areas where the OMC works not as a pesky obstacle to further supra-national integration, but a significant end in and of itself.<sup>15</sup>

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<sup>12</sup> J. Lenoble, 'OMC and the Theory of Reflexive Governance' in S. Deakin and O. de Schutter, n. 10 above at 26

<sup>13</sup> See F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 1; F. Snyder *New Directions in European Community Law* (Weidenfeld and Nicholson, 1990)

<sup>14</sup> 'Communications play a vital role in Commission efforts to secure the effectiveness of Community law. They identify what is settled and what is dispute, circumscribe the arena for debate, and define the agenda for negotiation and, if necessary, litigation.' *Ibid* at 33

<sup>15</sup> See F. Scharpf, "Legitimate Diversity: The New Challenge of European Integration" (2003) *Law, Politics and Society* 79

These aspects of the OMC's character have led its designers to market its 'legitimacy' in a distinct way.<sup>16</sup> Rather than be seen as either a preparatory mechanism, or replacement!, for 'hard' proposals, the method was posited as a parallel process of 'political' or 'policy' integration, to be considered separately from ordinary law. As its recommendations and targets are non-binding, the due process commitments inherent in ordinary community law-making are hardly necessary. They would slow the process down while adding little to its legitimacy (to be supplied through the 'ultimate' legislator – the national government itself).<sup>17</sup> The original OMC process – the EES – and its successors, were thus designed without ordinary judicial supervision, or the need to involve the European Parliament in the formulation of EU-level recommendations or objectives.

While we see evidence of this marketing strategy to this day, it has notably failed to convince either the European institutions, or broad swathes of legal academia.<sup>18</sup> Indeed the OMC falls-foul of a foundational paradox (soft law's 'double-bind'). This paradox emerges from the very attempt by the method's proponents to illustrate its steering potential. On the one hand, the OMC must claim to be 'effective' in pursuing particular goals. Facing the accusation, from rationale choice-oriented political science, that it is a mere rhetorical device, or 'paper tiger', proponents of the OMC have forcefully attempted to illustrate mechanisms of policy diffusion, mutual learning and 'naming and shaming' by which the method can aspire to be a real instrument of policy change.<sup>19</sup> In the words of one set of cautious optimists 'soft law may be harder than you think' in shaping the contours by which national social policies are chosen or evaluated.<sup>20</sup>

On the other hand, the more the method is 'effective', the more its claim to be a mere 'parallel' process of coordination, lacking the coercive power to bind its participants, is likely to be found wanting. Proponents of the 'external' thesis are placed in a double-bind – the OMC must generate power in order to be credible, yet the more it does so, the more the question of the legitimacy of that power, and the overriding of the necessary due process guarantees the Union's legal structure offers, is likely to be asked. The idea of the OMC as a merely 'complementary' and 'soft' legal process – while superficially convenient - has not therefore diffused suspicion of its activities, but rather re-enforced the view that it is an external threat to the anchoring of the EU in a 'law-mediated' form of rule.

We can observe the response of legal academia to this threat in two different senses. Firstly, if we consider legality in the European Union in terms of the institutions that are charged with protecting, applying or enforcing the law, the development of soft law is an obvious challenge to the existing institutional balance of power. This fact is something recognised by both sceptics and proponents of soft law alike. Not only has the labelling of the recommendations and objectives of the OMC as 'non-binding' excluded judicial interventions by the European Courts, but the need for a rapid and iterative coordination procedure has more or less side-lined the other two members of the EU's 'institutional triangle' – the Commission and Parliament - as well.

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<sup>16</sup> For a classic statement, see the justifications offered by a prominent proponent (the Belgian social minister): F. Vandebroucke, 'European Social Policy: Is Cooperation a Better Route than Regulation?' (2001) 8 *New Economy* 1

<sup>17</sup> For more optimistic voices, therefore, that legitimacy would be better fostered, not through general political input but by 'direct' forms of participation e.g. stakeholder involvement through social NGO's, regional bodies, and other associative groups. See Presidency Conclusions, Lisbon European Council (24/03/00) at [38]. See also, Zeitlin, n. 9 above

<sup>18</sup> For a contemporary invocation of this thesis, see the Commission's response to the critical resolution of the Parliament discussed at n. 24 below: 'Under an OMC, the Community's institutional character and Treaty-based decision procedures do not apply, and it is therefore not possible to have the corresponding institutional guarantees. By contrast, whenever action is undertaken according to Treaty competencies, normal procedures apply and guarantee that the European Parliament can play its proper role.' Available electronically at: [http://www.europarl.europa.eu/oeil/DownloadSP.do?id=13809&num\\_rep=6798&language=en](http://www.europarl.europa.eu/oeil/DownloadSP.do?id=13809&num_rep=6798&language=en) at 2

<sup>19</sup> See D. Trubek and L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the OMC' (2005) 11 *European Law Journal* 3, 356-361

<sup>20</sup> *Ibid* at 356

Their response has been predictable. The first answer of the Commission to the OMC's development – captured by the Commission's 2000 *White Paper on Governance* - was to warn against the use of the OMC, 'to dilute the achievement of common objectives in the Treaty or the political responsibility of the Institutions.'<sup>21</sup> The European Parliament quickly joined in the chorus. While the last two decades has seen a continual expansion of the Parliament's powers, the method has effectively operated as an extra-parliamentary procedure, with its official guidelines and objectives agreed by the European Council, implemented by national governments and monitored by the Commission. In such a process, even national Parliaments have been left almost completely marginalised.<sup>22</sup> It is perhaps then unsurprising that the Parliament has seen the OMC – and the increasing use by the Commission of soft law 'recommendations' and 'opinions' – as a set of 'ambiguous' and 'pernicious' instruments.<sup>23</sup>

In its most recent resolution on soft law, the Parliament has thus insisted that, while legally:

'The use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality.'<sup>24</sup>

Politically:

'Soft law tends to create a public perception of a 'super-bureaucracy' without democratic legitimacy, not just remote from citizens, but actually hostile to them, and willing to reach accommodations with powerful lobbies which are neither transparent, nor comprehensible to citizens.'<sup>25</sup>

On the one hand, the OMC is deemed a direct contravention of the European order's most basic constitutional principles. On the other, its expansion is deemed 'bad political business', entrenching ever further the idea of the EU as a distant and intransparent regulator.

Perhaps we should be cynical about these objections. The Commission – once a die-hard sceptic – has slowly come round to the OMC's cause, largely because it has seen, in the creation of benchmarks and indicators, a new role for itself in the policy-making process. The Parliament's hostility can also be explained in these terms – it argues not just for the 're-invigoration' of the classical community method, but for the defence of its own place within it. The institutional objections to soft law, even if they are concerning, can partly be put down simply to inter-institutional wrangling, rather than a broader concern for the fate of law in Europe's ongoing integration.

Part of the institutional complaint, however, also concerns a second objection to the OMC's expansion. This objection suggests that the 'expulsion of law' the method has created is not just an exclusion of one institution or another, but an exclusion of the basic values or features which underlie the law. It is no less than an expulsion or subordination of the *conceptual idea* of the EU as a polity bound and mediated not just with reference to particular objectives but through legal *rules*.

While part of this complaint is captured through the institutional commentary, the full nature of the conceptual challenge the OMC poses to a European idea of the rule of law requires a deeper engagement with that we take legality itself, and its use in the EU polity, to mean. If we conceptualise the OMC as a threat to the rule of law in Europe, what are the templates upon which that judgement is

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<sup>21</sup> *European Governance: A White Paper*, (Commission of the European Communities, 2001) at 22

<sup>22</sup> See F. Duina and T. Raunio, 'The Open Method of Coordination and National Parliaments: Further Marginalization or New Opportunities?' (2007) 14 *Journal of European Public Policy* 4; J. Zeitlin, 'The Open Method of Co-ordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy', in J. Zeitlin and P. Pochet (eds.) *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang, 2005) at 488

<sup>23</sup> Resolution of the European Parliament 'on the institutional and legal implications of the use of soft law instruments' 2007/2028(INI), at 1

<sup>24</sup> *Ibid* at Point X

<sup>25</sup> *Ibid* at Point Y

being made? The standards of ‘legality’ cannot be merely assumed, but must be brought out into the open, and analysed in light of the political and constitutional features of the present-day EU.

The next section will offer one route to tackling this task. As it will argue, the institutional and academics objections to soft law are often based on a ‘Fullerian’ view of legality – one that sees law as a medium designed not only to advance public purposes, but provide citizens with generalisable and stable legal expectations. This view, as the following section will argue, not only challenges the OMC, but may present a high hurdle for all forms of EU law-making to meet.

### III. The Morality that Makes Law Possible

To begin the argument, one must turn to the master himself – the legal and political theory of Lon L. Fuller. In his landmark book on *The Morality of Law* Fuller distinguishes between two types of morality in law-making.<sup>26</sup> The external morality of law refers to the moral purposes or conditions that the law seeks to advance. Most legal programmes contain a moral dimension in this sense, in seeking to forward a particular public objective or value. Laws outlawing criminal behaviour or attempting to limit unsanitary or unsafe working conditions are examples of this type. This ‘external morality of law’ is the basis of the positivist dictum that while law may carry particular normative claims, it does not rely – for its validity - on the moral worth, or substantive content, of any particular norm.

Fuller describes law’s ‘inner’ morality in a different sense. This is not simply a morality from which we can pick and choose. It is not equally amenable to any public programme, however totalitarian or unjust. Instead, it represents values that do not simply carry public purposes, but that exist as a *pre-condition* for a functioning legal system to arise. His 8 procedural features of the rule of law are thus ‘the morality that makes law possible’.<sup>27</sup> They represent the means of avoiding a descent into a form of arbitrary rule that would ‘not simply result in a bad system of law, but something that is not properly called a legal system at all.’<sup>28</sup>

The hapless story of Rex - the unfortunate leader who attempts to construct his own legal system - illustrates the pitfalls of an order designed without their help. The inhabitants of Rex’s kingdom are subject to rules which they cannot know or obey. They live their lives unable to tell whether a particular act involves following the law or breaking it. Can we apply the metaphor of Rex to the European case? And does the development of the OMC, and other soft law mechanisms, enhance or attack our commitment to the rule of law in the Fullerian sense? We can in fact see a cacophony of conflicts between the OMC, and law’s ‘inner morality’. Fuller categorised that morality through 8 features; almost all of which are in some way traversed by the method’s procedures.

- Firstly, the Method undermines *generality* in law-making. Generality implies that rules should have a broad application, rather than one tailored to specific persons or issues. The OMC, however, violates this tenet as a matter of explicit institutional design. It addresses its norms not to the Community as a whole, but to specific states; at the same time, it has no general form or procedure, but one tailored to the policy area in question (with the actors involved, and the level of prescriptiveness, varying significantly). If generality connotes the use of law as a universal register, the OMC subjects EU law to clear fragmentary tendencies.
- Second, it undermines *publicity* in law. While associated in documents like the Commission’s 2000 *White Paper on Governance* with principles of ‘transparency’, frequent academic appraisals of the method have evidenced the opaqueness of its governing committees and

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<sup>26</sup> Fuller, n. 12 above. See Chapter 1: The Two Moralities

<sup>27</sup> *Ibid* at 33

<sup>28</sup> *Ibid* at 39

procedures.<sup>29</sup> The OMC's indicators and objectives are commonly not subjected to public scrutiny (e.g. the review of the European Parliament), but elaborated in secretive committees, made-up mainly of national and European administrators.<sup>30</sup> In such circumstances, how can an individual 'know the law'?

- Thirdly, it undermines *clarity* in rule-making. While the method's objectives are sufficiently abstract that almost *any* legislative programme could be said to meet them, it is also unclear to what extent its procedural rules are binding (i.e. how participation under the method is to be organised, and *who* is responsible for ensuring it).<sup>31</sup> If law requires clarity, the method is unclear both in its substantive outcomes, and in its procedures.
- Fourthly, it creates *contradictions*. The prohibition on contradiction entails that by following one law we should not be guilty of disobeying another. What if, however, the very appeal of a coordination procedure lies in its capacity to encourage fractured responses to common problems? Social assistance programmes that provide extensive benefits to those on minimum income, and those that exclude them in order to encourage individuals to find work could *both* potentially meet the first objective of the OMC process on 'preventing and addressing social exclusion.'<sup>32</sup> If law prohibits contradiction, soft law too frequently leads to standards that can effectively work against one another.
- Fifthly, soft law is not *prospective*. Whereas prospectivity implies that individuals should not be held to retrospective standards, under the OMC, the evaluation of what is 'good' and 'bad' practice does not depend on an *a priori* agreement, but on standards continuously elaborated and re-negotiated by the parties themselves. Not only does the method lack prospective rules, but it intentionally encourages actors to make commitment to obligations, the substantive content of which will only be enumerated in the future.<sup>33</sup>
- Finally, it violates the requirement that rule-making should evidence some level of *congruence* between a 'declared rule' and the 'official action' taken to enforce it. In the OMC, the distinction between these two elements is broken-down. As the 'declared rule' only achieves full normative force when it is considered at the national level i.e. where national governments draft their legislative plans in light of European objectives, the only actor that could answer whether legislation 'meets' EU-level objectives is precisely the actor *to whom the law applies* (the national government, which carries its own understanding of the meaning of particular policies in the domestic context). The distinction which Fuller relies upon – between the law's

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<sup>29</sup> See, as three examples, J. Zeitlin, n. 23 above at 484; S. Smismans, 'New Modes of Governance and the Participatory Myth' (2006) *European Governance Papers* 1; E. Radulova, 'The OMC: An Opaque Method of Consideration or Deliberative Governance in Action?' (2007) 29 *European Integration* 3

<sup>30</sup> It is perhaps for this reason that the EP's resolution calls on the Commission 'to make a particular effort to guarantee transparency, visibility and public accountability in the process of adopting non-binding Community acts.' N. 24 above at 2

<sup>31</sup> This point could potentially apply more generally to other soft law forms. In the Case of *Grimaldi*, the Court both affirmed that soft law was 'non-binding' and that: 'the national courts are bound to take [soft law] recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them.' This leaves a further ambiguity – if soft law is being relied upon for 'interpretive' purposes, to what extent can it now be seen as part of the corpus of Community Law? Case 322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407 at [18]

<sup>32</sup> See, for example, the varying policy responses accepted (and even commended) in the 2008 *Joint Report on Social Inclusion and Social Protection* (Office for Official Publications of the EC, 2008), 8-12

<sup>33</sup> This also potentially undermines two further features of Fuller's definition that I have not elaborated upon – constancy (on the grounds that procedures and objectives are considered 'reflexive' or open to future elaboration) and impossibility (on the grounds that actors may have to commit to standards e.g. cuts in spending, that may later prove impossible to fulfil).

application ('official action') and its framing ('declared rule') is sacrificed, in order that differences in national social contexts can be effectively accommodated.<sup>34</sup>

While these conflicts have not checked the OMC's expansion, they have presented plenty of easy pickings for its critics. Given the distance of soft law from so many of the values the legal system is supposed to promote, how can it be seen as anything but a threat to legality, or to the European legal order as a whole? This argument has been based on many of the assumptions crafted by Fuller nearly four decades ago.

By these normative readings, soft law lives in a legal purgatory; a space in which normative effects are produced, yet the formal presence of soft rules as 'non-binding' at the same time protects its norms from democratic and popular scrutiny. If Europe is no longer being 'integrated through law', soft law instead suggests its integration through functional objectives and outputs – the 'completion' of the internal market; or, in the words of the Lisbon Strategy, 'making the EU the most dynamic economic area in the world' - the achievement of which are sufficient conditions in and of themselves. Legality is treated not as an end in itself, but as a language of legitimation; a way of giving the veneer of legal credibility to acts and decisions determined in advance, by executive or other 'expert' actors. As Christophe Möllers writes, 'as long as certain goals are achieved, it is irrelevant if this happens by use of legal forms or by informal means.'<sup>35</sup>

While these objections have been most forcefully developed in the academic realm, they have also framed some of the objections given by the European institutions. The European Parliament's resolution on soft law mourns the OMC's development, not just because it is 'legally dubious, as it operates without sufficient parliamentary participation', but also because it may bring 'confusion and insecurity to a field in which clarity and legal certainty should prevail.'<sup>36</sup> In this way, the institutional objection to the relation between soft law and rule of law is also founded on a conceptual understanding of what legality itself means – the perceived violation by the OMC of the normative and processual guarantees that the Treaties, and their commitment to a European 'rule of law', were meant to offer.

This leads to a pertinent question. Is soft law leaving the integration through law paradigm behind? Under the Fullerian view that we have explored, soft law's legality challenge is obvious. If our commitment to legality is a commitment to a legal system capable of providing citizens with normative certainty, the iterative and flexible norms of the OMC instantly set-off alarm bells. In the words of Sabel and Simon, the question of soft law and legality quickly becomes either/or: 'either new governance with its capacity to contextualise and update rules, or the rule of law, by means of stable and constraining rules?'<sup>37</sup> We seem to be left in a perilous position; either reject the OMC, and the presence of EU 'social regulation' in a number of policy fields, or embrace it, but in doing so, place the role and values of the law in lasting peril

One wonders, however, if this is really the choice we have to make. While this section has attempted to consider the vision of legality that animates the OMC's supposed 'legality challenge', perhaps that vision is no longer an adequate one; or one that poses utterly unrealistic burdens on the 'traditional' legislative processes of EU law themselves. In such circumstances, the very terrain by which the choice between soft law and rule of law has been made may alter beneath our feet.

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<sup>34</sup> J. Lenoble, n. 13 above at 26

<sup>35</sup> C. Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 2, 316-317

<sup>36</sup> Resolution of the European Parliament, n. 24 above at Point N

<sup>37</sup> See C. Sabel and W. Simon, 'Epilogue: Accountability without Sovereignty' in G. de Búrca and J. Scott (eds.) *Law and New Governance in the EU and the US* (Hart, 2006) at 397



As the next section will argue, the terrain precisely *has* altered. While the Fullerian objections to the OMC are pressing, the distinct features of the European polity, and of the regulatory challenges the EU faces in the areas where soft law operates, makes the burden imposed by the Fullerian view near impossible for any form of European law-making, including the ‘hard’ methods to which soft law has most often been compared. It instead forces us to search for new means of achieving the values and purposes of which Fuller’s ‘inner morality of law’ spoke.

#### **IV. Legality in the European Union**

The image of legality and the rule of law that Fuller has provided is a powerful one. It captures much of what we mean when we commit ourselves to ‘government by law.’ Following a rule of law tradition suggests that law is not merely a political or functional imperative; it is about mediating conduct through rules.<sup>38</sup> The important question for our purposes is whether or not Fuller’s definition is applicable to the EU. At some levels, nothing has changed. Surely if we need clarity and stability in rule-making at the national level, we also need it in Europe. The European institutions share the fate of Rex – they must construct a legal order that everyday citizens can know and rely upon.

At the same time, there *is* something that has changed. There is something that has changed in all law-making; a factor simply exacerbated in the European experience. This ongoing factor of change is the social basis on which law rests. The regulatory environment in which soft law methods must operate is qualitatively complex, in a way that neither the frequent critiques of soft law, nor the traditional Fullerian definition of legality, fully comprehend. While at the national level, the primary driver of this complexity is functional – the rapid expansion of the state’s regulatory functions, the EU faces a double division – in the first case, into a multitude of national legal orders, and in the second, into a series of specialist discourses (in competition policy, energy, telecommunications, fiscal reform, and a host of other areas), that make the division between ‘governor’ and ‘governed’; ‘legislation’ and ‘enforcement’; more difficult to achieve than ever before.

These two types of complexity can be explained through the erosion of this latter distinction in particular. In Fuller’s work, it is represented through the need to maintain a level of congruence between a ‘declared rule’ and the ‘official action’ undertaken to enforce it. By virtue of this distinction, the question of ‘what the law is’ is not something left in the hands of officials, but enumerated in advance, according to legal procedures. Officials are to be constrained by rules, which also provide guidance to citizens over the nature and scope of their obligations. These rules stand as an independent or *a priori* yardstick through which the conduct of individuals and states can later be judged.

In the EU case, however, there are a number of problematic assumptions which underlie this distinction. First of all, it is assumed that there is a party that *has the authority to declare what the law is*.<sup>39</sup> The content of the law is to be laid down by a legislator, who can legitimately determine a legal programme’s scope, and its substantive content.

Secondly, it is assumed that this party *knows what their objectives are (and how they can be achieved)*. The parameters of a legal programme can be elaborated in advance, without the possibility to retro-actively take account of new facts or information. The legislator is assumed to carry the necessary knowledge and intent to say what the law means, and is able to lay down a common mechanism for her objectives to be put into practice.<sup>40</sup> The basis or means by which law is to be

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<sup>38</sup> Fuller, n. 12 above at 106

<sup>39</sup> See Sabel and Simon, n. 38 above, at 399

<sup>40</sup> Sabel and Simon outline this assumption in particular as pre-conditions for a – in their view - now defunct model of principle-agent accountability. ‘For the sovereign to perform the role assigned to it in principle-agent accountability, it

applied is not to be in a state of flux, but knowable to citizens, who can then rely upon public norms, either in day to day life, or in cases of conflict with others.

Finally, it is assumed that the party to whom the law applies *can follow the law*. Legislation can be declared in such a way that its meaning and purposes are relatively clear. Law in Europe is not to have conflicting meanings or purposes, but one that can be officially demarcated, and furthermore, used as a basis for the coherent application of rules to the polity as a whole. This assumption is the basis of the Fullerian emphasis on ‘generality’ in law-making – namely that the law should apply equally to all of its addressees.

While many of these assumptions may be met in the domestic context, in the EU they are far more problematic; a difficulty further exacerbated in the areas where the OMC now operates. Firstly, they face a set of territorial divisions. In the EU order, the national governments who must execute EU-level obligations are no mere ‘law appliers’ to whom power can be ‘delegated’, but sovereign powers in their own right, vested, in areas from labour law to environmental protection, with exclusive legislative authority. Even where the EU has stronger legislative competences, the EU administration – in both its judicial and political branches – remains uniquely dependent on the cooperation and consent of national administrations, and national courts (e.g. via the preliminary reference procedure).<sup>41</sup>

In the face of the Fullerian idea of a common and democratic sovereign, the EU thus exists in a state of perpetual ‘divided sovereignty’, where the authority of the law both relies upon better resourced (and more obviously legitimate) national intermediaries, and is subject to potentially significant re-framing efforts in the domestic sphere.<sup>42</sup> The spatial divisions inherent in post-national law-making thus pose a first challenge to envisaging the rule of law as a guarantor of universal legal standards.

Secondly, however, Fuller’s model faces a series of functional pressures. At the national level, Fuller’s work was already criticised in his lifetime as understating the influence that demands for social and physical security would have on the legal medium.<sup>43</sup> Whereas general and abstract laws may be suitable for an era in which law’s primary task is to govern private disputes, the complexity of the modern state’s regulatory functions places pressure on the Court’s traditional adjudicative role. Many of the state’s functions could no longer be delivered through general legislation alone, but only through specialised agencies, with such deep and changing technical knowledge that they could not be controlled either by their initial legislative ‘principals’, or by Court’s seeking to hold them *ex post* to their original institutional mandates.<sup>44</sup>

(Contd.) \_\_\_\_\_

must know what it wants, and it must know this at a level of detail that meaningfully circumscribes its agents discretion.’  
*Ibid* at 398

<sup>41</sup> This observation – that the Commission has such a tiny budget and staff as to overwhelm its capacity to police the EU is an important starting point for compliance research – the existence, and attempt to monitor – ‘gaps’ in the national implementation of EC rules. For a more thorough analysis of the relationship between compliance and soft law, see G. Falkner, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press, 2005)

<sup>42</sup> N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999), at 137-157

<sup>43</sup> Particularly notable is the liberal critique offered by Friedrich Hayek – that the welfare state’s development, and its preference for a teleological conception of law’s role – was likely to hand ever-more power to the administration, leaving universal conceptions of legality redundant. See F.A. Hayek, *The Constitution of Liberty* (Routledge, 1976). For a criticism (of Hayek **and** Fuller) from a perspective more sympathetic to law’s ‘welfarist’ turn, see J. Habermas, *Between Facts and Norms: Contributions Towards a Discourse Theory of Law and Democracy* (MIT Press, 1996), 194-237

<sup>44</sup> See J. Mashaw, ‘Structuring a ‘Dense Complexity’: Accountability and the Project of Administrative Law’ (2005) *Issues in Legal Scholarship* 4 at 6; R. Stewart, ‘The Reformation of American Administrative Law’ (1975) 88 *Harvard Law Review* 8, 1676-1681

Europe has not been immune to this pressure. The original child of the ‘new governance’ debate – the complex system of comitology – illustrates the need to hand-over extensive discretion to elaborate and update rules to non-legislative ‘expert’ bodies. While these committees are only intended to elaborate ‘non-essential’ items, and hence ‘assist’ the Commission and Council in its formal decision-making, few doubt that they play a quasi-legislative role, adjusting primary rules in order to take account of both diverse national preferences, and rapidly changing perceptions of scientific and social risk.<sup>45</sup> The expansion of the Union’s regulatory functions – particularly the adoption of the Common Agricultural Policy – has thus historically led to the multiplication of more specialised (and more intransparent!) legal intermediaries, able to adjust and re-frame legislation in the very process of its ‘implementation’ in different functional contexts.<sup>46</sup> Just as, at the national level, more particular and ‘flexible’ legal standards have been developed as a response to functional demands, so we see evidence of this process within the EU system.

As a result, on top of risks of territorial fragmentation, EU law also faces further functional and temporal pressures. The idea of law as an *a priori* and stable set of standards is challenged by the need for social regulation to remain relevant in the face of rapidly changing societal conditions. In such a context, whereas ‘generality’ in law is undermined by the need to tailor rules to specialised functional contexts, ‘stability’ is targeted by the shifting nature of a regulatory landscape in which solutions to public problems can rarely be fully articulated in advance.

This may be particularly important than in the areas – of social and labour law – where the Open Method is most developed. At the territorial level, not only do states deliver social protection policies under different institutional arrangements e.g. in terms of the involvement of the private sector, or the need to consult trade unions, but they disagree over the state’s very *role* in providing for the social welfare of the individual.<sup>47</sup> Whereas the countries of the Mediterranean rim have relied extensively on an extended family to meet burdens of long-term care, in the UK and Ireland, much of the short-fall is made-up by the private sector, and in Scandinavia, by state institutions.<sup>48</sup> Not only are these differences thoroughly entrenched but they are intrinsic to the very legitimacy and political culture of the governments which operate them.

At the functional level, social and labour law carries a precarious position within the Union’s legal framework – at once excluded from it in order to protect the national welfare state’s ‘social autonomy’, yet at the same time able (given the significant proportion of national GDP spent on social protection) to carry a significant knock-on impact on both the internal market, and the ‘competitiveness and growth’ goals of the Union’s 2010 Lisbon Agenda. Whereas the first spatial pressure has on countless occasions made impossible attempts to build-up a more ‘Social Europe’, the second functional one makes efforts to place social policy outside the Community framework altogether fool-hardy.<sup>49</sup>

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<sup>45</sup> See C. Joerges and J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’ (1997) 3 *European Law Journal* 3; P. Lindseth, ‘Agents Without Principals? Delegation in an Age of Diffused and Fragmented Governance’ in F. Cafaggi (ed.) *Reframing Self-Regulation in European Private Law* (Kluwer Law, 2006)

<sup>46</sup> On this ‘explosion’, see E. Vos, ‘The Rise of Committees’ (1997) 3 *European Law Journal* 3

<sup>47</sup> See M. Ferrera, A. Hemerijk and M. Rhodes, ‘The Future of Social Europe: Re-casting the European Welfare State’ (Celta Editora, 2000); F. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) 40 *Journal of Common Market Studies* 4

<sup>48</sup> Scharpf, *ibid*, 649-652

<sup>49</sup> On the original ‘road not taken’, see Scharpf, *ibid* at 645. For a discussion of some failed later attempts e.g. the ambitious 1974 Social Action Programme, see L. Hantrais, *Social Policy in the European Union* (Palgrave MacMillan, 2007), 2-14

The outcome of both pressures has been a gradual ‘proceduralisation’ of EU law’s categories.<sup>50</sup> In the OMC case, the inability of states to agree on acceptable ‘baselines’ of worker protection and social security led the designers of the European Employment Strategy to enact a ‘constitutional compromise’.<sup>51</sup> While the Commission and Council were empowered to adopt common indicators and objectives, and a procedure for national reporting, they were also forced to refrain from stipulating the *substantive means* by which common targets were to be met, allowing national administrations the flexibility to achieve them according to their own practices.<sup>52</sup> EU law, under this model, lays out a framework for coordination, but at the cost of giving-up on uniform or ‘harmonising’ social standards.

The significance of this procedural move, however, was that it was not confined to the OMC; but also included other legislative forms (including those synonymous with ‘traditional’ or ‘hard’ law). Firstly, the Union increasingly experimented, during the period of the OMC’s formation, with ‘framework’ legislation, containing broad goals and principles, but leaving the national level with some autonomy over how they were to be concretely incorporated into domestic practice. In such circumstances, while European legislators carried a need for shared action, its specific details and delivery mechanisms could invoke disagreement, such that a broader formulation of a directive’s content was desirable.

In the second case, the period was also marked by the adoption of important social directives under the social dialogue – an instrument of ‘hard law’, but one that both superseded the traditional ‘institutional triangle’ of Commission, Parliament and Council, and handed considerable legislative authority to ‘new’ constitutional actors.<sup>53</sup> While all of these examples differed in important ways, they illustrate a common willingness to see European law not as a unified expression of a public will, but as a series of broad and flexible normative frameworks, to remain cognitively open to adaptation and re-appraisal either at the level of the nation-state, or through negotiation by ‘directly concerned’ social parties.

What do these developments mean? They mean, in the field of social law, that EU norms do not exist as stable and prior-defined normative standards, but are open to negotiation and deliberation *at the national level*, where new contextual information may still be considered relevant (precisely in order to give full force to the original purpose or intent underlying a legislative act). If these objections are valid, ‘declaring a rule’ is not an ‘ultimate’ guide upon which the citizen can legitimately rely – the Fullerian view - but also opens-up possibilities for future re-appraisal and negotiation, in precisely the manner that soft law embodies.<sup>54</sup>

While one would be tempted to repeat the litany of nefarious complaints against this development listed in the first section of this paper, this compromise does no more than lift to the European level,

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<sup>50</sup> J. Habermas, ‘Paradigms of Law’; J. Lenoble, ‘Law and Undecidability: A New Vision of the Proceduralization of Law’ both in (1996) 17 *Cardozo Law Review* 5

<sup>51</sup> See Zeitlin, n. 9 above

<sup>52</sup> This interpretation is in contrast to the thesis of Daniel Keleman in this volume – namely that these gaps or deficits provide power to Courts to interpret provisions that politicians leave vague. The difficulty is that government may have anticipated this possibility – moving to ‘softer’ forms of law, that both escape judicial supervision, and provide them with greater control over any eventual legislative outcomes. D. Keleman, ‘American Style Adversarial Legalism and the European Union’, RSCAS Working Paper 2008/37.

<sup>53</sup> A good example of proceduralisation comprising both ‘framework’ legislation and the use of the social dialogue is Directive 96/34/EC on Parental Leave, which lays-out minimum levels of parental and sick leave, but allows the Member States and the Social Partners to flexibly negotiate other elements under Article 3 (such as the length of notice needed, and the necessary period of qualification). It is notable that subsequent legislation by the Social Partners has also often taken a ‘framework’ form e.g. Council Directive 99/70/EC ‘Concerning the Framework Agreement on Fixed Term Work’ and the recent amendments to Council Directive 2006/109/EC ‘on the Establishment of a European Works Council’

<sup>54</sup> J. Lenoble, n. 13 above at 37. See also, Sabel and Simon, n. 38 above at 400

practices that have been an important part of the social and employment law edifices of the nation state. A more differentiated or ‘procedural’ solution to social problems has been a long-standing part of national practice, where the perils of central intervention by the national government has given way to the idea that social standards should be seen as part of an ongoing process of negotiation, contingent both upon economic conditions, and the bargaining power and demands of ‘constitutionalised’ social partners. As Claire Kilpatrick argues:

‘Employment policies have never typically been associated with a hard law ‘command and control’ model. Instead, the governance tasks employment policies perform generally require, on the one hand, the spending of money, and on the other, the creation of guidelines, targets, indicators and plans in attempt to steer labour markets in directions considered desirable... it should come as no surprise that employment policies at EU level similarly predominantly involve the same set of tools.’<sup>55</sup>

While this approach carries important political advantages, it leaves us with precisely the dilemma of which the last section spoke. On the one hand, the ‘proceduralisation’ of EU law in the social field has allowed Union to create a common orientation in social policy, without reducing or overriding the autonomy upon which much of the national welfare state has been based.<sup>56</sup>

On the other, what is its outcome? The compromise of soft law seemingly faces the boundaries implicit in the Treaty structure by going around them, or by creating legal instruments deemed sufficiently ‘soft’ that ordinary legal safeguards hardly seem necessary.

While this has been defended on the basis that the OMC, and other ‘framework’ laws, provide new and more participatory means of legitimating EU law-making, in practice, the actor with the most power to elaborate standards under methods like the EES has been the national or European administrator.<sup>57</sup> Potentially, he or she has been empowered by an ‘iterative’ OMC procedure (or the ambiguity of a ‘framework law’) to adapt European objectives according to his or her own conception of their meaning. Not only is the individual given little guidance about what any particular norm really means, but their own input is largely discretionary, dependent on the decisions of executives over whether their contribution is ‘worthy’ of inclusion in national reports, or secondary law-making, or not.<sup>58</sup> Even if the Fullerian test is failed by much of hard law as well as soft, this does nothing to make its normative concerns any less pressing.

In basic terms, the idea of a ‘continuity’ between hard and soft law is not a strong normative claim. It is not intended either to claim that one form of law can be collapsed into the other, nor to normatively reify soft law as the future of EU law in a broader sense. The marginalisation of general political bodies, and the lack of transparency and political accountability within OMC procedures, is likely to remain a legitimate concern for soft law’s many critics.

Its continuity thesis is simply designed to say, firstly that there is a basic spectrum in European law between hard and soft legal methods – one that is particularly strong in the social field – and secondly, that our depiction of soft law as a threat to law’s rule should be based on a real rather than mythical view of the extent to which hard law itself can meet the tests of stability and coherence that are so strictly applied to the soft law case. While ‘hard’ forms of legislation may strive towards these values,

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<sup>55</sup> C. Kilpatrick, ‘New EU Employment Governance and Constitutionalism’ in de Búrca and Scott (eds.), n. 38 above, at 124

<sup>56</sup> See Lisbon Presidency Conclusions, n. 18 above; also Zeitlin, n. 9 above

<sup>57</sup> See Zeitlin, n. 23 above, 468-470; M. Büchs, ‘How Legitimate is the Open Method of Coordination?’ (2008) 46 *Journal of Common Market Studies* 4 at 767; V. Hatzopoulos, ‘Why the Open Method of Coordination is Bad for You: A Letter to the EU’ (2007) 13 *European Law Journal* 3, 327-328

<sup>58</sup> C. de la Porte and P. Nanz, ‘The OMC: a Deliberative-Democratic Mode of Governance? The Case of Employment and Pensions’ (2004) 11 *Journal of European Public Policy* 4, 278-281

it faces many of the same pressures towards flexibility, negotiation and specialisation that both encumbers, and provided justifications for, the development of OMC-like methods.

## V. Conclusion – Towards a ‘Dynamic’ Rule of Law?

15 years after Francis Snyder’s influential essay, and 25 since the project of ‘integration through law’ began, the debate over soft law rages on. It is of little surprise – given the institutional implications of mechanisms like the OMC – that the emergence of soft law has caused so much academic and institutional consternation. The preferred example the paper has used - of Open Coordination in social and employment policy - presents a challenge not just institutionally (to the ECJ, or to ‘traditional’ legal instruments), but also to some of the most important normative values that we associate with European law-making. The conflict between soft law and the rule of law is real, and it should not simply be wished away by references to the OMC as a ‘parallel’ or ‘complementary’ structure to Community law as it stands.

This essay has tried to show, however, that this should not lead us to dismiss the ‘rule of law’ as a redundant concept in the present-day EU; instead it merits a more robust exploration of what ‘legality’ in the EU has been taken to mean. The Fullerian definition upon which many criticisms of soft law have rested is certainly difficult to operationalise in the EU’s post-national context. The diversity of national polities has often led to attempts to provide the national level with some flexibility in incorporating EU law obligations in the domestic realm, where new cultural or political factors, may require rules to be re-framed precisely in order to give force to their original meaning. As such, our normative evaluations of the relationship between soft law and ‘legality’ have often been based on concepts and categories that barely survive the translation from a national context to a supra-national one.<sup>59</sup>

The larger question may be over where this now leaves us. On the one hand, the Fullerian model seems particularly difficult. It fails to capture both the structures of European law in a general sense, and the features unique to the fields in which soft law methods like the OMC operate. If we stick to the mainstream view, we are left in a situation where the distinct features of the European polity, and the development of social law within a national context, are ignored, or else cast-out of the realm of legality altogether.

On the other hand, what is our alternative? If the development of the OMC says something about the strains placed upon traditional rule of law virtues in a post-national context, it also seemingly says little about how these values can be re-constructed. The normative failings identified in the second section are not side-stepped, even if the Fullerian picture of a European society governed by determinate and *a priori* legal standards is deemed unsuitable.

To conclude, we must consider whether the debate over soft law also provides some answers to this dilemma. While this task requires a more normative lens than has been the focus and approach of this paper, it must be acknowledged that the debate over soft law has seen a number of significant attempts to see the development of the OMC as re-creating and evolving some of the very foundational values of ‘legality’ itself.

One example of such an attempt is the model of ‘dynamic accountability’ advanced by Charles Sabel and William Simon.<sup>60</sup> While the OMC’s dispersal of normative authority seems to undermine simple models of ‘principal-agent’ accountability, Sabel and Simon argue that its ‘multiplication’ of

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<sup>59</sup> Another case perhaps, of what Michael Zürn has termed ‘methodological nationalism’. See M. Zürn, ‘On the Conceptualization of Postnational Politics: The Limits of Methodological Nationalism’, Paper presented to Workshop on Global Governance, Robert Schuman Centre, Florence, April 2001

<sup>60</sup> Sabel and Simon, n. 38 above

concerned actors also creates other forms of accountability in its place.<sup>61</sup> So long as the states party to the OMC carry a mutual interest in the achievement of particular goals – like achieving budgetary stability, or sustainable levels of employment – they carry the necessary incentives to demand justifications from, and check the activities of, *each other*.<sup>62</sup>

This ‘dynamic’ version of accountability potentially attempts both to deal with shifting goals and priorities, and to use the diversity of the policy community as a whole to bring different forms of social knowledge to the table. Diversity is seen not as a testy obstacle to common standards, but rather as a means to experimentally test, and comparatively assess, fractured responses to regulatory problems. In this way, moves to further develop robust systems of peer review within the OMC, and its governing inter-governmental committees, could provide new accountability relationships, just as it has been seen to undermine ‘vertical’ accountability to Parliaments, or other legislative bodies.

This account carries an important advantage to be acknowledged. It undeniably attempts to take more seriously both the wider social and economic conditions in which modern law finds itself, and the ‘divided’ nature of the European legal order. It respond to this complexity through seeing law not as a stable compass for the future (as a medium whose basic parameters are fundamentally decided upon) but as a mechanism *through which* a larger set of political actors can influence the ongoing interpretation of European rules. Legality is protected not in seeking a divorce between law and its surrounding social environment (a separation that can protect law’s independent and normative character), but in striving to ensure that the dependence of law upon the national and functional contexts into which it is to be applied can be used to foster more responsive and legitimate forms of decision-making in the future.<sup>63</sup>

The problem is that the question of how law is to gain a more ‘dynamic’ or ‘responsive’ character remains rather unspecified. Firstly, there is an empirical problem – numerous analyses of the inter-governmental committees of the OMC (the Social Protection, Economic Policy, and Employment Committees) have argued that they rarely carry-out the ‘peer review’ function envisaged by Sabel and Simon’s model.<sup>64</sup> As states are reluctant to publicly criticise each other, they often see peer review structures as opportunities for mutual learning or the sharing of information, rather than as bodies where the *critical* analysis of national reports is called-for. While an exercise in ‘mutual learning’ may be useful to the governments concerned, it falls significantly short of the demand for a robust process of explanation and justification demanded by the ‘dynamic’ model.

Secondly, it is questionable whether Sabel and Simon’s model fully addresses the fears and concerns which have animated the critique of soft legal methods in the first place. Sabel and Simon place their faith, not in general political bodies like the European Parliament, but in networks of mutually accountable executive actors, able to demand justifications from each other on a ‘rolling’

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<sup>61</sup> See, for a similar view in the national context, Colin Scott’s ‘inter-dependence’ accountability model. C. Scott, ‘Accountability in the Regulatory State’ (2000) 27 *Journal of Law and Society* 1, 44-48

<sup>62</sup> ‘The alternative, instead of looking backwards to a prior enactment, and upwards towards a central sovereign, is to look forward and sideways. Forward to the ongoing efforts at implementation. Sideways to the efforts and view of peer review institutions.’ Sabel and Simon, n. 38 above at 400

<sup>63</sup> This element dovetails significantly with Deakin and de Schutter’s ‘reflexive governance’ approach to the OMC, namely, as they put it, that ‘the conditions under which a deliberative process may succeed can be identified, and once identified, must be affirmatively created rather than taken for granted’. See, for an introduction, S. Deakin and O. De Schutter, n. 10 above at 3

<sup>64</sup> For a broader analysis of the empirical limits of the Sabel/Simon view, see M. Dawson, ‘New Governance and the Transformation of EU Law: The Case of the Open Method of Coordination for Social Inclusion’ (2008) *Harvard European Law Working Papers* 2; S. Kröger, ‘The End of Democracy as we know it? The Legitimacy Deficits of Bureaucratic Social Policy Governance’ (2007) 29 *Journal of European Integration* 5, 575-578

basis.<sup>65</sup> While this can allow new issues to be placed on the table, the ‘very real risk’ of such accountability networks (as Carol Harlow and Richard Rawlings put it) is that they could:

‘De-generate into a complacent ‘old boys network’, their accountability function blunted by mutual interest. Mutual accountability networks tend to be more concerned with policy in-put and long-term relationships than retrospective evaluation; even external actors may then be ‘captured’ and sucked into the network rendering the possibility of thin accountability remote, and thick accountability even more so.’<sup>66</sup>

In the case of soft law, this possibility is real. The operation of dense peer review structures may lead less to a more accountable form of rule than a network of mutual interest, where states refuse to rock the boat. While one of the objections to the OMC was that it insulated decision-making from the external input of national and European Parliaments, creating an ‘insider’s club’ of executive administrators and ‘invited’ participants, ‘dynamic’ forms of accountability seemingly re-enforce, rather than address, this objection. In this sense, while the OMC has invoked a search for new means of imagining legal values, these models are not without significant challenges of their own.

This is not a problem without answers. Schools emphasising the ‘hybridity’ of hard and soft law provide one potential set of remedies.<sup>67</sup> By this view, traditional instruments are to address soft law’s failings through a form of coupling with ‘traditional’ community law. We may be able to operate soft law mechanisms ‘in the shadow of hierarchy’, or even with provisions like the EU Charter of Fundamental Rights as a ‘baseline’ to protect against functional or procedural de-generation.<sup>68</sup> The insights of the last section – that there is a level of ‘continuity’ between hard and soft legal mechanisms – potentially re-enforces this thesis.

The point is merely to illustrate the quandary we face. What is to be the respective balance between ‘dynamism’ and ‘stability’? How - and who – can decide upon the pre-conditions which make the dynamic vision of legality realisable? And what might be the relation between the theories which Sabel, Simon and others have tentatively sketched-out and other values, particularly the commitment in the Treaties to democracy; to a closer connection between popular participation and legal rule? These questions both challenge the reflexive reading, and illustrate the essential nature of the task addressed in this essay: how to square the development of soft law with the presence of the EU as a polity integrated, in Fuller’s famous words, ‘through the governance of rules’.

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<sup>65</sup> See e.g. Zeitlin’s objections to Parliamentary oversight of OMC procedures. Zeitlin, n. 23 above at 488

<sup>66</sup> C. Harlow and R. Rawlings, ‘Promoting Accountability in Multi-level Governance: A Network Approach’ (2006) *European Governance Papers* 2 at 7

<sup>67</sup> See Trubek and Trubek, n. 20 above; G. de Búrca, ‘EU Race Discrimination Law: A Hybrid Model?’, in de Búrca and Scott, n. 38 above

<sup>68</sup> See Scharpf, n. 50 above, 662-665. On the potential for combining the OMC with the Charter, see S. Smisman, ‘How to be Fundamental with Soft Procedures? The Open Method of Coordination and Fundamental Social Rights’ in G. de Búrca and B. de Witte (eds.) *Social Rights in Europe* (Oxford University Press, 2005); O. de Schutter, ‘The Implementation of Fundamental Rights Through the Open Method of Coordination’ in de Schutter and Deakin, n. 10 above



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