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European Union Law as a Legal System in a Comparative Perspective

VINCENZO ZENO-ZENCOVICH AND NOAH VARDI

Comparative law scholars – and legal scholars in general – are familiar with the century old distinction between common law systems and civil law systems. The distinction is very broad as the two great “families” (as Renè David calls them) encompass a variety of legal systems with significant differences between them. It is quite obvious that apart from a common language – English – the American legal system widely differs from the one it originated from.¹ And it is equally obvious that the “latin” version of civil law systems (France, Italy, Spain and most of Latin America) is substantially different from the “German” one (Austria, Germany, Switzerland). Moreover the two “families” are seen mainly from a private law perspective and there are serious doubts whether the distinction holds from a public law one.²

¹ A diverging legal reasoning method (“substantive” in the United States and “formal” in England), differences in legal education and in the role of statutory law, are often quoted as significant elements that distinguish the two legal systems. See for example PS Aytiah and RS Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (London, 1987); see also D Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge, Mass, 1997). That this divergence within the common law is due to the groundbreaking role of legal realism in the United States is the opinion of several scholars: see M. Hesselink, *The New European Legal Culture* (Deventer 2001); H Muir Watt, “*La fonction subversive du droit compare*” (2003) 3 *Revue internationale de droit compare* 503; M Reimann, *Einführung in das US-amerikanische Privatrecht* (München, 1997); U Mattei, “Why the Wind Changed: Intellectual Leadership in Western Law” (1994) 2 *American Journal of Comparative Law* 195; see also N Duxbury, *Patterns of American Jurisprudence* (Oxford, 1995). Further still, it has been pointed out (M Hesselink, *The New European Legal Culture*, p 22) that the unity of European legal culture (comprising the English common law) may be stronger than the unity of the common law. See also R Zimmermann, “‘Common law’ und ‘civil law’, Amerika und Europa” in R Zimmermann (ed), *Amerikanische Rechtskultur und europäisches Privatrecht* (Tübingen, 1995).

² As several scholars have pointed out, the classification of the legal systems into families is inevitably of a relative nature, depending on the both the areas of law and the period which are considered (see K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung*, Band I: *Grundlagen* (Tübingen, 1996), transl by T Weir, *Introduction to Comparative Law* (Oxford, 1998)). See also for a definition of the “layered complexity” inherent to all systems, RB Schlesinger et al, *Comparative Law* (New York, 6th ed, 1998), p 287. The same multiplicity of layers emerges in R Sacco’s theory on legal formants: R. Sacco, “Introduzione al diritto comparato” in R Sacco (ed), *Trattato di diritto comparato* (Torino, 5th ed, 1992) p 43.

Indeed, the most recurrent criticisms to David’s classification point out on one hand, that from a public law perspective, the systems should be regrouped according to their form of government, or

Whatever the criticisms, however, the distinction has been useful not only in legal education, helping law students to understand more about their own and other systems, but has enabled scholars to focus on the aspects where there are significant differences, and point out those where these are only apparent.

This article does not aim at re-discussing the validity or the flaws of the common law/civil law distinction, but intends to point out the growing importance of what can be called, for the moment being, an alternative model, the European law model, which is nor common law, nor civil law but is significantly influencing both of them.³ The relevance of this alternative model is not relegated to schol-

according to the existence and characteristics of a Constitution and to the type of judicial review which can be exercised in those systems. On the other hand, David's classification, "Eurocentric" as it tends to be, narrows its focus on the great distinction between the two families of "civil law" and "common law". See A Gambaro and R Sacco, "Sistemi giuridici comparati", in R Sacco (ed), *Trattato di diritto comparato* op cit, at p 19; U Mattei, "Verso una tripartizione non eurocentrica dei sistemi giuridici", in *Studi in onore di G. Gorla*, I (Milan, 1994), p 775; F Reyntjens, "Note sur l'utilité d'introduire un système juridique "pluraliste" dans la macro-comparaison des droits", in *Rev droit int et droit comp.* (1991); J Vanderlinden, "A propos des familles de droit en droit civil compare", in *Hommages à R Dekkers* (1982), p 363.

Recent tendencies in comparative law studies have striven to demonstrate that it is not so much a "great divide" which characterizes the two legal systems, but rather, to use Markesinis' powerful expression, a "gradual convergence". See BS Markesinis, *The Gradual Convergence: Foreign Ideas, Foreign Influences and English law on the Eve of the 21st Century* (Oxford, 1994); Id (ed), *Millenium Lectures: The Coming Together of the Common Law and the Civil Law* (Oxford, 2000). See also *ex multis*, G Gorla *Il diritto comparato in Italia e nel mondo "occidentale" e una introduzione al "Dialogo Civil Law - Common Law"* (Milan, 1983); RC van Caenegem, *European Law in the Past and the Future* (Cambridge, 2002); J Gordley, "Common law" v "Civil law". *Una distinzione che va scomparando?* in *Scritti in onore di R Sacco*, Vol I (Milan, 1994); A Gambaro and R Sacco, "Sistemi giuridici comparati", op cit; JH Merryman, "Convergence of Civil Law and Common Law" in M Cappelletti (ed), *New Perspectives for a Common Law of Europe* (Florence, 1978), according to whom legal convergence follows as a "natural" process whenever there is convergence in society and in the economies of different legal systems. This is especially true for private law and more specifically for contract law. On the reciprocal influences and the points of contact between the two systems see M Reimann (ed), *The Reception of Continental Ideas in the Common Law World 1820-1920* (Berlin, 1993).

This does not obviously imply that the distinction between common law and civil law ceases to exist. On the contrary, it is rather of a narrowing of the distance that one must speak. On the persisting differences which distinguish the two great families, see P Stein, *Legal Institutions. The Development of Dispute Settlement* (London, 1987), and Id, "Roman Law, Common Law and Civil Law" (1992) 66 *Tulane Law Review* 1591 who singles out six persisting distinctive features; on the historical reasons see RC van Caenegem, *Judges, Legislators and Professors. Chapters in European Legal History* (2nd ed, Cambridge, 1993). See also the P Legrand, "European Legal Systems are not Converging" in (1996) 45 *International and Comparative Law Quarterly* 52. On the common historical origins of the Western legal tradition see M Lupoi, *Alle radici del mondo giuridico europeo* (Rome, 1994); HJ Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass., 1983).

³ Several arguments show that the traditional classification in families may today be reargued, considering the new elements and the reciprocal influence that civil and common law systems have had on each other. And this seems to be true both in a public law (see the European Union and its institutions and rules) and in a private law perspective. Indeed, as far as the latter is concerned, the existence of a new "European" system, which does not necessarily coincide with the "communitarian" dimen-

arly debate, but is of great importance for the development of legal systems both within and outside the boundaries of the European Union. The characteristics of this new model should be seen comparing them with those – well known – of civil law and common law systems. The features that will be examined in the following pages are:

- a) Economic and social aspects prevail over legal ones
- b) European law as an instrument of economic and social policies
- c) The dominance of administrative law
- d) European law as a product of bureaucracy
- e) The secondary role of the legislature and of the courts
- f) The European legal process
- g) Comparative law as an essential technique in the European legal process
- h) European law as a model for other legal systems.

A) The most striking feature of EU law is that it appears to be overwhelmed by the economic and social aspects of European society.⁴ This appears quite obvious to non-lawyers. But legal scholars, whether they come from a civil law tradition or from a common law tradition have, throughout the last ten centuries, built, from both an intellectual and a technical point of view, their systems as independent from the economic and social process. Legal concepts, institutions, structures, remedies were there to stay and fare any weather. Lawyers – whether speaking in a university classroom or sitting on a bench in court – would hardly consider the aspects that now are seen as so important. Which is quite obvious: legal reasoning

sion, emerges significantly in the field of European private law, where the circulation of models and rules, although filtered by the communitarian institutions, operates regardless of the common law/civil law distinction. The harmonization of this field of the law implies that not only new rules enter into national legislation, but also that the judicial and the doctrinal formants are obliged to refer to the original model in order to assure the correct interpretation of these new rules. There is therefore a multilevel exchange which has as its side-effect the creation of a new system. Significant examples are offered by the very existence of new legal concepts which have a “European” *nuance* that is different from the various national ones, and by the fundamental role played by judicial interpretation even in those systems that do not traditionally refer to the binding value of precedents. See G. Benacchio, *Diritto privato della Comunità europea. Fonti, modelli, regole* (3rd ed, Padova, 2004). On the other hand, the role of statutory law (in the communitarian form of directives and regulations) is no less undeniable in common law systems than it is in civil law ones. See on the new role of courts in England, after the recent judicial reforms and the adoption of the Human Rights Act in 1998, V. Varano, “Verso un nuovo ruolo del giudice in Inghilterra” in *Rivista di diritto civile*, (2002) at I, p 763.

⁴ As G. Majone, whilst examining the problem of the so-called “democratic deficit” of the EU, has observed, “Community law has developed as an autonomous legal system precisely on the basis of the economic and social rights – the four freedoms, a system of undistorted competition, prohibitions of discrimination for reasons of nationality or gender, and now also a high level of protection and improvement of the quality of the environment– created by the Treaties”. The author further observes that the European Court of Justice has played a fundamental role in assigning to the Community the protection of these diffuse interests, often against Member State laws; this protection being one of the most important consequences of European economic integration (G. Majone, “Europe’s Democracy Deficit” (1998) 4 *European Law Journal* 12–13).

is well ahead already at the times of the Greeks, and Roman law is an extremely articulated and sophisticated system which not only was used to run an Empire but has had far reaching effects through the following two millennia. Economic and social studies appear, as a discipline of their own, only around the XVIII Century and are moulded in their present form in the following one.

Lawyers have therefore perceived – historically – economists and social scientists as *parvenus* with no tradition, empirical methods and fuzzy concepts. And if one takes a look at most law handbooks it is quite clear that the perspective in which they are written is that society is out of (and under) them, waiting to receive the rules that run the whole system.

This is a quite common mentality of most lawyers and is even more striking if one considers that in the last century there has been a growing awareness of the importance of economics and social behaviour in setting the rules and interpreting them. This is particularly true with the American legal tradition, but – apart from those who adhere unconditionally to the law & economics approach – no lawyer is willing to admit he is in a subordinate position in respect of other professionals.

But this is exactly what happens in European law and for many and very clear reasons. As it is well known, the 1957 Rome Treaty aimed at creating a common market eliminating custom barriers and other restrictions to the free circulation of goods, services, persons. This original matrix – which lies entirely in economic policies – has not, substantially, been changed by the expansion of the scope of the EU towards foreign policy, external security and judicial cooperation introduced by the Maastricht Treaty of 1992.⁵

The economic origins of the EU are deeply embedded in its way of thinking and bring about a very clear approach towards law and legal issues, which is quite different from what one finds in the traditions of the countries which are members the EU.

⁵ Significantly enough, if one looks at the areas of law which have been at the center of contemporary harmonization debates, especially in the field of private law, it is clear that they concern the typical instruments of commercial transactions (contracts and to a certain extent torts), whereas branches such as family law, although undoubtedly part of “private” law, have only very recently received attention. See for example D Martiny, “Is Unification of Family Law Feasible or even Desirable?” in A Hartkamp, M Hesselink, E Hondius, et al (eds), *Towards a European Civil Code* (3rd ed, Nijmegen, 2004), p 307. M.R. Marella, “The Non-Subversive Function of European Private Law: The Case of Harmonization of Family Law” (2006) 12 *European Law Journal* 78. What may however, be signalled as a possible turning point, is the ongoing constitutionalisation process of the European law, significantly defined (S Rodotà, “Il codice civile ed il processo costituente europeo” in *Rivista critica del diritto privato*, I, (2005), p 25) as a transition from “a Europe of the markets to a Europe of rights”. Further still, after the approval of the European Constitution, which has incorporated the European Charter on Fundamental Rights, one can observe that alongside with the expansion of scope of the EU, there is also a process of “constitutionalisation of several aspects of private law with the result of modifying the hierarchies of private juridical situations and of creating a new source of law that is paramount” (see V Zeno-Zencovich, N Vardi, “The Constitutional Basis of a European Private Law” in A Hartkamp, M Hesselink, E Hondius, et al (eds), *Towards a European Civil Code* (3rd ed, Nijmegen, 2004), at 205).

B) This brings us to the second feature: EU law is – in fact and in the intentions of the law-makers – merely an instrument, one of the instruments, of economic and social policies. These come first, they are studied, the goals are defined and subsequently a decision is taken on what legal instrument may be used to forward them.⁶ The ancillary role of the law is favoured by two pillars of EU powers: the principle of subsidiarity and that of proportionality.⁷ EU legislation is required only if that of the member States is inadequate and anyhow it must be limited to what is strictly necessary to pursue the goals that have been fixed. This means tailoring legislation to the specific economic and social policies, using it as a tool, which can be fashioned and discarded at will.⁸

⁶ One of the consequences is supranational delegation, (mostly in favour of technocratic organisms), of normative and regulatory power, for the pursuance of policies and objectives set down by treaties and international trade agreements. See for example MA Pollack, “Delegation, Agency, and Agenda Setting in the European Community” (1997) 51 *International Organization* 99; A Moravcsik, “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach” (1993) 31 *Journal of Common Market Studies* 473; see also IJ Sand, “Understanding the New Forms of Governance: Mutually Interdependent, Reflexive, Destabilised and Competing Institutions” (1998) 4 *European Law Journal* 271; F Scharpf, “Community and Autonomy: Multi-Level Policy-Making in the European Union” (1994) 1 *Journal of European Public Policy* 219, 220; R Dehousse, C Joerges, G Majone, F Snyder (with M Everson), *Europe After 1992: New Regulatory Strategies*, EUI Working Paper Law 92/31, 1992.

As many authors have observed, the process of supranational delegation is indicative of the shift of normative power from the legislative to the administrative sphere (see for example PL Lindseth, “Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community” (1999) 99 *Columbia Law Review* 632, and bibliographical references therein). The role played by administrative institutions in this process has opened a debate on the democratic legitimacy of this form of supranational delegation. For arguments on efficiency as a qualified source of legitimation, see M Jachtenfuchs, “Theoretical Perspectives on European Governance” (1995) 1 *European Law Journal* 129.

For a law and economics approach to the constitutional problems of the EU (including the decisionmaking process, comitology, federalism, subsidiarity and competition rules), see D Schmidchen, R Cooter (eds), *Constitutional Law and Economics of the European Union*, (Lyme, NH, 1997). See also, A von Bogdandy, PC Mavroidis, Y Mény (eds), *European integration and international co-ordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann* (The Hague, New York, 2002).

⁷ On the principles of subsidiarity and of proportionality, see *ex multis*: A Estella de Noriega, *The EU Principle of Subsidiarity and its Critique* (Oxford-New York, 2002); N Emiliou, “Subsidiarity: An Effective Barrier Against ‘The Enterprises of Ambition’?” (1992) 7 *European Law Review* 383; E Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford, Portland Oregon, 1999); N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, (London, Boston, 1996); N MacCormick, “Sovereignty, Democracy and Subsidiarity” in R Bellamy et al (eds), *Democracy and Constitutional Culture in the Union of Europe* (London, 1995); G De Burca, “Proportionality in EC Law” (1993) 13 *Yearbook of European Law* 105. See also *infra*, n 9. For observations and case law on the different degrees of strictness adopted by the European Court of Justice in applying the proportionality test, with special reference to the restrictions on freedom of competition, see W Sauter, “The Economic Constitution of the European Union” (1998) 4 *Columbia Journal of European Law* 27, at 63–64.

⁸ A consequence is that EC legislation is very voluminous, a fact which has led operators and scholars to call for consolidation and codification. Among the main causes which have been identified for

This is one of the reasons for the lack of systematicity of the EU legal system.⁹ There is broad framework, but already the multiplicity of treaties which are at the basis of the various community institutions causes inevitable overlapping.¹⁰⁻¹¹

such a large volume of legislation, it is worth signalling the fact that the legislation no longer serves to codify an existing situation, but rather, to implement and adapt policies which are often of transitional nature, and have to be modified to keep up with the varying economic and social objectives set by the Community.

⁹ The lack of systematicity of the EU legal system is one of the major problems that not only the scholar, but the lawyer and judge have to face when trying to construct the existing law of the member States. In first place, there is a general problem concerning the delimitation of powers and competences between the Community and the member States. This delimitation does not, as a matter of fact, always clearly emerge from the Treaties, and in the past the European Court of Justice has intervened to define these spheres (starting from the famous judgments of the 1960's establishing the primacy of Community law over domestic law: Case 26/62, *van Gend en Loos v Nederlandse administratie der belastingen*, in [1963] ECR, 10; and case Case 6/64, *Costa v Enel*, in [1964] ECR, 585). The uncertainty in the areas of competence have as a consequence the coexistence of both communitarian and national legislation in the same fields, and the interaction of these legislations originating from different sources is not always smooth.

Secondly, even after the "constitutionalisation" of the principles of subsidiarity and proportionality, the boundary between "shared" and "exclusive" competences remains confused. This is due to the fact that according to the principle of subsidiarity, the exclusive competences rule out any intervention by the member States, whereas in the shared competences member States can act if the Community has not yet acted. However the shared competences may become exclusive because of the principle of preemption, if the Community adopts exhaustive and complete legislation in a certain area. For these observations, see AG Ibañez, *The Administrative Supervision and Enforcement of EC Law* (Oxford-Portland, 1999), 38–39; K Lenaerts and P Van Ypersele, *Le principe de subsidiarité et son contexte: étude de l'article 3B du traité CE in Cahiers de Droit Européen*, 1–2, (1994).

Another problem with the principle of subsidiarity is due to the fact that member States may have different views as to when Community action is necessary. To this scope, the Protocol on the Application of the Principles of Subsidiarity and Proportionality was added to the Treaty of Amsterdam. See TC Hartley, *Constitutional Problems of the European Union* (Oxford-Portland, 1999), p 86; see also M Verdussen (ed), *L'Europe de la subsidiarité* (Bruxelles, 2000); AG Toth, "The Principle of Subsidiarity in the Maastricht Treaty" (1999) 29 *Common Market Law Review* 669; G.A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 *Columbia Law Review* 332.

Furthermore, once again in consideration of the policy-oriented character of EU legislation, the EU institutions have not excluded that areas that are currently part of shared competences may shift into the exclusive competence sphere, as may be the case when interpreting the four fundamental economic freedoms in a dynamic way, so as to include policies such as environment or cohesion. See Commission Communication to the Council and the European Parliament on "The Principle of Subsidiarity", 27 Oct. 1992 (SEC (92)1990 final); AG Ibañez, *The Administrative Supervision and Enforcement of EC Law*, at p 38.

¹⁰ See B de Witte, "Simplification and reorganization of the European Treaties" (2002) 39 *Common Market Law Review* 1255; R Bieber and C Amarelle, "Simplification of European Law" (1998–9) 5 *Columbia Journal of European Law* 15; JP Jacque, « *La simplification et la consolidation des traités* » (1997) 33 *Revue trimestrielle de droit européen* 903. K. Lenaerts, M. Desomar "Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures" (2005) 11 *European Law Journal* 744.

¹¹ Another problematic feature of EC law is its degree of uncertainty. Among the most significant causes which have been singled out there are the result-oriented character of many EC rules, multilin-

These remarks can be easily confirmed by a historical analysis of EU policies in the last five decades: there are several turning points, some due to the entrance of new member States (the most important, from a legal point of view, being that of the United Kingdom), others to the modifications in the structure and competencies of the Union (Single European Act, 1987; Maastricht Treaty 1992; Amsterdam Treaty 1998). One can trace the EU policies in the different phases and relate to them specific Directives and certain, important, Regulations. But on the whole the plans that are behind these legal instruments and that are generally set out in their preambles give us the sense of why they were enacted.

Preambles are, in fact, a distinctive feature of EU legislation, in sharp contrast with European tradition – whether British or continental – for which legislation is, once voted or approved, an impersonal text, whose intentions are not explicit and, generally, irrelevant. Anyhow it is left to the interpreter – commonly the judiciary – to establish the *mens legis*. Even so, it is not frequent that this operation is done: the law can stand on its own and does not require to be justified by external needs or objectives.

When we turn to EU legislation we realize that what is stated in the preamble is an essential part of the text and it guides us in constructing the single provisions, telling us not only when they should apply, but also, and mainly, why they should apply.

There is an obvious consequence of this approach to legislation, which might be called an, implicit or explicit, *rebus sic stantibus* clause: the law applies only inasmuch its premises and the surrounding circumstances have not changed: and these circumstances, naturally, are or economic or social.

This is quite unthinkable of in traditional national legislation, especially in continental one, where the law is thought of something nearly perennial, which is changed only over extremely long periods: the process of codification (the *Code Napoleon* is of 1804, the ABGB of 1811, the BGB of 1896) is a good example of this mentality.

In EU legislation there is, instead, a growing use of a final article fixing a date within which the whole text, and its reasons and conditions, is to be reviewed. Which is quite natural if a piece of legislation is seen as instrumental to reaching certain goals. If the objective has been reached there is no need any longer for that text, or for part of it. If the circumstances have changed, the text too must be changed.¹²

guism, poor drafting, the deliberate use of ambiguity in Community measures, the existence of secret agreements between the member States, and the way in which the European Court of Justice interprets Community law. See TC Hartley, *Constitutional Problems of the European Union*, op cit, p 66; see also H Xanthaki, “The Problem of quality in EC legislation: What on earth is really wrong?” (2001) 38 Common Market Law Review 651.

¹² The practice of inserting a final “sunset clause” in the normative acts adopted by the EU (according to which the text may be reviewed within a certain number of years) may be also associated with the problem of the division of competences between the Community and the member States. Where the communitarian intervention is justified by recalling the principle of subsidiarity, the provision of a

C) Some of the reasons of the ancillary role of law in the EU have been pointed out. There are further reasons that somehow are internal to the system. EU law is dominantly administrative law, in the sense that in the legal relations that stem from it one of the parties is generally a public body acting directly or supervising the activity of private persons and entities: requirements, certifications, authorizations, licences, permits, standards, limitations.¹³ No economic activity can be started or

future review of the regulation may respond to the possibility that in the meantime the member States have provided on their own, (under compliance of EC norms), and thus the communitarian provision may have become obsolete or no longer necessary.

¹³ The perception of the Community as being mainly an administrative body and the analysis of EC law from the standpoint of administrative law is a recurring *topos* in European studies. See among the early studies adopting this perspective: J Schwarze, *European Administrative Law* (London-Luxembourg, 1992). There have been several efforts to construct a "European administrative law", bearing distinctive features from the administrative laws of the member States. To quote but a few others from an extremely vast bibliography, one can mention: MP Chiti, *Diritto amministrativo europeo* (2nd ed, Milan, 2004); P Birkinshaw, *European Public Law* (London, 2003); P Craig & R Rawlings, (eds), *Law and Administration in Europe. Essays in Honour of Carol Harlow* (Oxford, 2003); S Cassese, *Il diritto amministrativo europeo presenta caratteri originali?*, in *Rivista trimestrale di diritto pubblico* (2003), p 35; and ID, *La signoria comunitaria sul diritto amministrativo*, in *Rivista italiana di diritto pubblico comunitario* (2002), p 291; C Joerges & R Dehousse (eds), *Good Governance in European Integrated Market* (Oxford, 2002); AG Ibañez, *The Administrative Supervision and Enforcement of EC Law* (Oxford-Portland, 1999); HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, 1999); PL Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community", *op cit*; M Everson, "Administering Europe?" (1998) 36 *Common Market Law Review* 195; MP Chiti e G Greco, *Trattato di diritto amministrativo europeo*, 2 vols, (Milan, 1997); J Schwarze, U. Becker & C Pollak, *The Implementation of Community Law: Studies in the Legislative and Administrative Policies of the European Community and its Member States* (Baden-Baden, 1994); G Majone, "The Rise of the Regulatory State in Europe" (1994) 17 *West European Politics* 77; H Siedentopf & J Ziller (eds), *Making European Policies Work: the Implementation of Community Legislation in the Member States* (London, 1988); S Cassese, (ed), *The European Administration, L'Administration Européenne* (Brussels, 1987); M Cappelletti, M Secombe & JHH Weiler, (eds) *Integration Through Law*, 5 vols (Berlin- New York, 1985). On the relation between administration and bureaucracy see DL Coombes, *Politics and Bureaucracy in the European Community: A Portrait of the Commission of the EEC* (London, 1970). See also E Chiti, "The Emergence of a Community Administration: the Case of European Agencies" (2000) 37 *Common Market Law Review* 309; G Majone, "The New European Agencies: Regulation by Information" (1997) 4 *Journal of European Public Policy* 262.

As M Chiti (*Diritto amministrativo europeo* at p 134) has recently pointed out, the fact that European norms apply directly to the citizens and not only to the member States, and as such create rights which can be invoked and applied both by national and European courts (and as far as administrative law is concerned, the institution of the Tribunal of first instance is particularly relevant); the fact that the implementation of the different communitarian policies is regulated by the typical instruments and norms of administrative law (from the organization of public institutions to the principles of proportionality and reliance); and finally the fact that the Community operates within the rule of law set down in the Treaties and further developed by the European Court of Justice, comprising relevant principles of administrative law such as impartiality, lawful reliance, compulsory motivation, etc., indicate the existence of a genuinely European administrative law. To those who object that the implementation of EU law is still largely carried out through indirect rule, that is, by the national administrations of the member States, the author responds that the indirect execution merely concerns the subjective profile

run without abiding by a jungle of administrative regulations set out by the EU authorities. These regulations set out substantial rules but also procedural ones in order to ensure compliance.

Obviously this is not an original feature of EU law: since the XIX Century public bodies have been widening their competencies and trying to exert control over practically every economic activity.¹⁴ But administrative law was – and is – not alone: it is surrounded by constitutional law, by private and commercial law, by criminal law. In other words by a legal system in which private persons and entities are entitled to rights, act *vis-à-vis* each other on an equal footing, and the role of public bodies – mostly of the courts – is that of protection of private interests, rather than their control.

(national agencies and offices) of those in charge of implementation, whereas not only the administrative law applied is European in character, but the very same national administrative bodies are progressively operating in function of European law, to the extent that one can speak of “common European administrations” (Chiti, cit, at 136).

The administrative perspective has also been adopted by P Lindseth (*Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community*, cit.), to explain the legal nature of EC institutions and of supranationalism generally. The author views the evolution of the EC institutions as part of a “political and legal strategy by which Member States (the democratically-legitimate principals in the system) have sought to limit the normative autonomy of the Community as their agent, while not unduly impeding the progress of legislative and regulatory harmonization. This balancing act – characterized by the desire to retain a measure of political control while also allowing integration to proceed – is particularly pronounced in the so-called “comitology system,” or the regulatory committee system through which much of the subordinate legislation of the Community must now pass.” (Lindseth, cit, at 639, also quoting A Moravcsik, K Nicolaïdis, “Keynote Article: Federalist Ideals and Constitutional Realities in the Treaty of Amsterdam” (1998) 36 *Journal of Common Market Studies* 13). The author further describes the EC as “a kind of administrative agency of the several Member States’, and this characterization best accounts “both for the Community’s undoubted participation in the exercise of sovereign power like national administrative bodies, and its lack of direct and independent legitimacy apart from lawful delegations from the member States. The administrative characterization is also more consistent with the predominant role played by national executives in the intergovernmental conferences and in the Council of Ministers, as well as national and supranational technocrats in the comitology system and in the Commission, in the production of Community legal norms. In this sense, the Community is best understood as an extension of the executive-technocratic governance that has characterized the development of the modern administrative state at the national level over the course of the twentieth century.” (Lindseth, cit, at 659, also quoting, on the executive-technocratic characteristic of the EC: DM Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (The Hague, Boston, 1997); W Wallace, J Smith, “Democracy or Technocracy? European Integration and the Problem of Popular Consent” (1995) 18 *West European Politics* 137; J de Areilza, *Sovereignty or Management? The Dual Character of the EC’s Supranationalism – Revisited*, Harvard Jean Monnet Chair Working Paper Series no 2/95; PD Marquardt, “Deficit Reduction: Democracy, Technocracy, and Constitutionalism in the European Union” (1994) 4 *Duke Journal of Comparative and International Law* 265).

¹⁴ For an overview on the changing nature of legislation, see for example EL Rubin, “Law and Legislation in the Administrative State” (1989) 89 *Columbia Law Review* 369.

In EU law administrative law is practically all EU law: it is meant to direct and control economics and social activities and therefore what is only one of the aspects of a national legal system is the distinctive feature of EU law.

From this point of view one can register an interesting phenomenon: on one side the EU – always on the basis of economic policies – has opened to competition, and therefore to private law, vast areas which were in the exclusive (or nearly exclusive) domain of public bodies (telecommunications, air transport, banking, energy, employment offices). But in order to do this it has set out an extremely intrusive regulatory system, sometimes fostering or imposing independent authorities.¹⁵ Private enterprise can now enter certain markets which were precluded to it, but only if it complies with the regulatory framework. To use an expression taken from the XIX Century French constitutional experience one would say that the freedom of the market is *octroyée*, and therefore can be widened or restricted in accordance to the economic and social policies of the EU.

This implies that in the future, if different contingencies should arise – mass unemployment, lasting economic crisis, overall loss of competitiveness towards the US and the Far East – what now appears to be an acquired right of private business, could be substantially reduced.¹⁶

¹⁵ On the growing role of agencies in the EU system, see E Chiti, “Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies” (2004) 10 *European Law Journal* 402; G Majone, *Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions*, European University Institute, Working Paper RSC No 96/57, 1996; M Everson, “Independent Agencies: Hierarchy Beaters?” (1995) 1 *European Law Journal* 180; E Vos, “Reforming the EU Commission: What Role to Play for EU Agencies?” (2000) 37 *Common Market Law Review* 1113. For a characterization of the Community as akin to an “independent fourth branch of government”, with reflections on the problem of democratic deficit, accountability and transparency of the rulemaking process see G Majone, “The European Community: An “Independent Fourth Branch of Government”?”, in G Brüggemeier (ed), *Verfassungen für ein Ziviles Europa* (Baden-Baden, 1994), p 23.

¹⁶ A fundamental role in the construction of the freedom of the market has been played by the jurisprudence of European Court of Justice, which has identified the so-called constitutional law of the EC. The defence of the four fundamental economic freedoms, guaranteed with the aid of the key principles of direct effect and supremacy, has been the starting point of the expanding intervention of the European Court of Justice in the affirmation of a European rule of law (see *infra* n 24).

The interesting classification of the constitutional law developed by the European Court of Justice adopted by one author (see W Sauter, “The Economic Constitution of the European Union”, cit, at 40) distinguishes between a) political and legal principles, b) general principles of law and principles of Community law, c) principles that bind the member States and principles binding the Community. As far as the four economic freedoms and competition are concerned, while it seems ascertained that they are binding for the member States, the question whether they also address as such the Community has been strongly debated.

The view that considers these principles binding for the Community assumes that the economic freedoms and competition are constitutional principles, and further still, that competition is the guiding principle of the economic constitution of the EC (Sauter, cit at 45, with ample bibliographical references). According to this interpretation, which derives from the German “Ordoliberal” theory of economic order (depicting a society based on private law, with minimal public intervention and in which

D) EU law is principally administrative law also for another reason: it is the product of bureaucracy (the term is used without any disparagement, but in its political science sense).

Over a century of comparison between the civil law tradition and the common law one has reached a firm point in stressing the importance of the actors on the legal scene. When the legal system is the product of university professors and of legal scholars – as in the continent – the result is one; if it is the product of practitioners and judges, the result is another one.¹⁷ It is obvious that both systems

competition is a fundamental right that must be guaranteed by the economic constitution with equal status to traditional political rights and freedoms), the original Rome Treaty, because it apparently concerned exclusively economic rights, established an ideal economic constitution, in which the market was the central mechanism of integration (Sauter, cit. at 47, also quoting DJ Gerber, “Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe” (1994) 42 *American Journal of Comparative Law* 25; M Streit & W Mussler, “The Economic Constitution of the European Community: From “Rome” to “Maastricht”” (1995) 1 *European Law Journal* 5; FA Hayek, “Competition as a Discovery Procedure”, in FA Hayek (ed), *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago, 1978), pp 179–90). Under this reading, the subsequent modifications of the Treaties, from the SEA to Amsterdam, represented, because of the increase in policy coordination as opposed to pure market-driven integration, flaws in the original liberal economic constitution caused by political compromise (Sauter, cit at 50–54).

Whether or not one adheres to this economic reading of the EU, what is interesting to note, is that freedom of the market and individual economic liberties although acquired constitutional rights, are not immune from restrictions when other policies and legitimate objectives come into play; especially when a strong regulatory mechanism overtakes the political majoritarian governance mechanisms (as is the significant case not only of comitology procedures and European independent agencies, but also of the EMU, where the pursuance of precise and stringent economic policy goals, is implemented by a regulatory and technocratic institutional system).

¹⁷ The new prominent role of bureaucracy characterizes the “European legal system” in a uniform way, independently of the traditional differences in sources of law that used to distinguish civil and common law. Furthermore, another phenomenon that emerges is the “Europeanization” of the national administrative law of the member States. See for example on recent English case law on judicial review, C Hilson, “The Europeanization of English Administrative Law: Judicial Review and Convergence” (2003) 9 *European Public Law* 125; see also C Knill, *The Europeanisation of National Administrations* (Cambridge, 2001); J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Oxford, 2000); CF Graham, “Towards a European Administrative Law, the English Case” (1993) *Rivista trimestrale di diritto pubblico* at p 3.

Alongside with the studies that have observed the development of a genuine European administrative law (see *supra*, n 11), the second phenomenon that has recalled the attention of scholarly debate is that of the possible convergence of the various national administrative laws (general principles, legal institutes, procedural and organizational rules) of the member States. Justifications of this convergence (which however is not unanimously accepted as a working hypothesis, nor is it considered an irreversible process), include arguments such as horizontal interaction between the administrative laws of the member States (favoured by such principles as that of mutual recognition, which gives relevance throughout the EC to interests and rights that have been certified or conformed by the administrative laws of a single member State); and vertical harmonization, as operated by the growing direct intervention of EU law in sectors of administrative law (market regulation, regulation of productive processes, public tenders, environment). These arguments have been thus summarized by M Chiti, *Diritto amministrativo europeo*, cit, at 155–157.

have always had a bureaucracy that ran the day-to-day affairs of each country. But it has never been in a prominent position. From a constitutional, institutional and sociological point of view it has always been well below political, parliamentary, judiciary power. And it has been conscious of its subordinate position.

Compare this historical situation with that of the so called “eurocracy”: a body of persons selected on the basis of typical administrative abilities (knowledge of rules and regulations, ability to put order in files – the “*dossier*” exam -, aptitude to hierarchical relationships, respect of internal procedures – “comitology”).¹⁸

On the various theories on the possible convergence of the different national administrative laws see also: P Beaumont, C Lyons, and N Walker, *Convergence and Divergence in European Public Law* (Oxford, 2002); L Torchia, “Diritto amministrativo nazionale e diritto comunitario: sviluppi recenti del processo di ibridazione” in *Rivista italiana di diritto pubblico comunitario* (1998), p 589; J Schwarze (ed), *Administrative Law Under European Influence: On the Convergence of the Administrative Laws of the EU Member States* (London and Baden-Baden, 1996); P Legrand, “European Legal Systems are not Converging”, cit; G Marcou (ed), *Les mutations du droit de l’administration en Europe, pluralisme et convergences* (Paris, 1995); E Klein, “L’influenza del diritto comunitario sul diritto amministrativo degli stati membri”, in *Rivista italiana di diritto pubblico comunitario* (1993), p 683; S Cassese, “L’influenza del diritto amministrativo comunitario sui diritti amministrativi nazionali”, in *Rivista italiana di diritto pubblico comunitario* (1993) p 329; S Gonzalez-Varas Ibañez, “Convergences and Divergences in European Administrative Law” in *Rivista italiana di diritto pubblico comunitario* (1992), p 3; J Bell, “Convergences and Divergences in European Administrative Law”, in *Rivista italiana di diritto pubblico comunitario* (1992), p 393; S Cassese, “Il problema della convergenza dei diritti amministrativi: verso un modello europeo?” in *Rivista trimestrale di diritto e procedura civile* (1992), p 467.

¹⁸ The bureaucratic characteristic of EU legislation is particularly striking when taking into consideration the EU Commission, which has been compared to a sort of national bureaucracy (see M Egan and D Wolf, “Regulation and Comitology: the EC Committee System in Regulatory Perspective” (1998) 4 *Columbia Journal of European Law* 500), and whose increasing regulatory policymaking power has been a consequence of the need to enact ever more detailed and sectorial law. One of the instruments that the member States developed to avoid an excessive growth of a supranational bureaucracy is the comitology procedure, having the scope of monitoring the decisional procedure of the Commission. The creation of comitology has on one side favoured the “Europeanization” of national bureaucrats called upon to assist and control the Commission in its decisions. On the other side, the lack of transparency in the decision making process, and the absence of accountability pointed out by recurrent criticisms (no democratic control nor political responsibility for the committee members), favoured the development of a strong connection between the communitarian bureaucrats (working in the committees) and various interest groups. See M Egan and D Wolf, *op cit*. See also CF Bergström, *Comitology: Delegation of Powers in the European Union and The Committee System* (Oxford, 2005); K Leanaerts and A Verhoeven, “Towards a Legal Framework for Executive Rule-Making in the EU?: The Contribution of the new Comitology Decision” (2000) 37 *Common Market Law Review* 645; M Andenas & A Türk, *Delegated Legislation and the Role of Committees in the EC* (The Hague- London- Boston, 2000); F Bignami, *Accountability and Interest Group Participation in Comitology: Lessons from American Rulemaking* (Florence, 1999); C Joerges & E Vos (eds), *EU Committees: Social Regulation Law and Politics* (Oxford, Portland (Oregon), 1999); P Craig & G De Burca, *The Evolution of EU Law* (Oxford, 1999); R Dehousse, *Citizens’ Rights and the Reform Of Comitology Procedures: the case for a pluralist approach* (Florence, 1998); C Joerges & J Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology” (1997) 3 *European Law Journal* 273; RH Pedler and GF Schaefer (eds), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (Maastricht, 1996); AM McLaughlin and J Greenwood, “The

They have rather weak external constraints: no spoils system, no political obedience, very limited control by other powers (parliamentary, judiciary).¹⁹

And, on the opposite, they have very good reasons for maintaining a strong cohesion, which is not based on political or national affiliation, but simply on the fact of being members of a solid group of civil servants: bureaucracy feeds itself and finds its justification in itself.

There are many factors – status, high wages, career perspectives – that attract highly intelligent and able persons that understand and interpret very well their role. At the higher level there is not much turn-over, as commonly happens with bureau-

Management of Interest Representation in the European Union” (1995) 33 *Journal of Common Market Studies* 143; K St Clair Bradley, “Comitology and the Law: Through a Glass, Darkly” (1992) 29 *Common Market Law Review* 693. See also D Guéguen, *Comitology and other EU Committees and Expert Groups: The Hidden Power of the EU: Finally A Clear Explanation* (Bruxelles, Europe Information Service, 2004).

¹⁹ Ministerial responsibility is notoriously absent in the EU system nor do the Treaties establish a precise legal link between the political level and the administrative body. The only provision of the EC Treaty containing any notion of personal liability of the members of the Commission is art 216 EC Tr, regulating the compulsory resignation which the ECJ can impose on a single Commissioner on application of the Council or the Commission, in case he no longer fulfils his duties or in case of serious misconduct (and very significantly the European Parliament has no standing to employ this procedure as a means of control). See V Mehde, “Responsibility and accountability in the European Commission” (2003) 40 *Common Market Law Review* 430. As the case of the resignation *en bloc* of the Santer Commission in 1999 has demonstrated and confirmed, the Commission either stands or falls together, and except for the hypothesis ex article 216 (formerly article 160) EC Treaty, there is no individual responsibility for the Commissioners. Even the possibility for the Parliament of adopting a motion of censure ex article 201 (formerly article 144) EC Treaty, defined as a “nuclear option” because of its devastating consequences, refers to the resignation of the Commission as a body. For a detailed account of the events that led to the resignation of the Santer Commission because of allegations of fraud and mismanagement see A Tomkins, “Responsibility and Resignation in the European Commission” (1999) *Modern Law Review* 744; see also the Report: Committee of Independent Experts, *First Report on Allegations of Fraud, Mismanagement and Nepotism in the European Commission*, 15 March 1999, available at <http://www.europarl.eu.int/experts/>; W van Gerven, “Ethical and Political Responsibility of EU Commissioners” (2000) 37 *Common Market Law Review* 1; See also M Cini, *The European Commission: Leadership, Organisation and Culture in the EU Administration* (Manchester, 1996); Williams, “Sovereignty and accountability in the European Community” (1990) *The Political Quarterly* 299. The characteristics of “eurocracy” as identified above in the text, refer, according to the distinctions proposed by one the major scholars on the issue of democratic deficit of the EU, to “problems (technocratic decision-making, lack of transparency, insufficient public participation, excessive use of administrative discretion, inadequate mechanisms of control and accountability) that arise whenever important policy-making powers are delegated [...] to non-majoritarian institutions”, and are recurrent not only in the EC, but wherever government shifts from the positive towards the regulatory state. See G Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards” (1998) 4 *European Law Journal* 15; ID, “From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance” (1997) 17 *Journal of Public Policy* 139.

A relevant example of this type of non-majoritarian institution is the European Central Bank. See LW Gormley & J de Haan, “The Democratic Deficit of the European Central Bank” (1996) 21 *European Law Review* 95; F Amténbrink, *The Democratic Accountability of Central Banks. A Comparative Study of the European Central Bank* (Oxford, Portland (Oregon), 1999).

cracies. The EU Commission is renewed every five years; the EU Council varies in accordance to the political fortunes of the majorities in each member State; eurocracy is extremely stable and with very strong roots that make it scarcely affected by external events.²⁰

Bureaucracy has a very distinctive approach to legal problems: professors and scholars try to present a systematic solution which fits in neatly in what they believe is the correct and general framework. Lawyers are focused on winning the case, no matter how consistent their arguments may be with the previous cases they have defended. Judges, not only common law ones, are inevitably bound by the facts of the case they are deciding and influenced by what they perceive as the specific merits of the parties that are litigating. Bureaucracy is running the business of government. It feels strongly the principle of authority (“we set the rules, you follow them”).

It prefers uniformity to diversity, the run-of-the-mill to exceptions. It often has – and in the EU experiences it always has – goals to reach, mostly set out by

²⁰ It is significant to note that the absence of a constituency to whom the EU Commission must respond, along with the absence of a proper spoils system in the EU constitutional system, favour the growth and strengthening of the system of lobbies that permanently reside and operate in Brussels. On the role of lobbies and interest groups see: RH Pedler (ed), *European Union lobbying: changes in the Arena* (Basingstoke- New York, 2002); F Traxler and PC Schmitter, “The Emerging Euro-Polity and Organized Interests” (1995) 1 *European Journal of International Relations* 191; RH Pedler and MPCM Van Schendelen (eds), *Lobbying the European Union: Companies, Trade Associations and Issue Groups* (Dartmouth 1994); S Mazey and J Richardson (eds), *Lobbying in the European Community* (Oxford, 1993).

As far as the problem of the democratic deficit in the EU is concerned, an interesting perspective is that of G. Majone, (*Europe’s ‘Democratic Deficit’: The Question of Standards*, op cit at 6), according to whom, the key issue consists in identifying the correct standard of legitimacy and accountability; most studies adopt one of the following four: standards based on analogy with national institutions, majoritarian standards, standards derived from the democratic legitimacy of the member States, and social standards, all of which lead to the perception of a democratic deficit in the EC. According to Majone, however, these standards are inadequate, as they do not reflect the fact that the process of European integration “is inherently non-majoritarian”, because “economic integration without political integration is feasible only if politics and economics are kept as separate as possible”. Thus, the author concludes that depoliticisation of EU policy-making is the price to pay to preserve national sovereignty (Majone, cit, at 7).

See also: B Crum, “Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce Democratic Deficit?” (2005) 11 *European Law Journal* 452; A Follesdal and P Koslowski (eds), *Democracy and the European Union* (New York, 1997); P Craig, “Democracy and Rule-making Within the EC: An Empirical and Normative Assessment” (1997) 5 *European Law Journal* 112; SS Andersen and KA Eliassen (eds), *The European Union: How Democratic is it*, (London, 1996); G de Burca, “The Quest for Legitimacy in the European Union” (1996) 59 *Modern Law Review* 349; K Armingeon, “The Democratic Deficit of the European Union” (1995) 50 *Aussenwirtschaft* 67; R Dehousse, “Constitutional Reform in the European Community: Are There Alternatives to the Majoritarian Avenue?” (1995) 18 *West European Politics* 118; H Hauser and A Muller, “Legitimacy: The Missing Link for Explaining EU-Institution Building” (1995) 50 *Aussenwirtschaft* 17; JHH Weiler, “European Democracy and Its Critique” (1995) 18 *West European Politics* 4; S Garcia (ed), *European Identity and the Search for Legitimacy* (London- New York, 1993).

the political authorities. It is therefore inevitable that the law that is produced by bureaucracies should reflect the qualities – and defects – of its authors: precise but narrow-minded, orderly but not systematic, penetrating but not flexible.

One can only acknowledge that this is – and cannot be otherwise – the natural result of a bureaucratic approach to law-making.

Nothing is more illuminating than the numerous attempts to improve EU law drafting: more committees and regulations written by the same institutions which prepare the legislation that should be improved.²¹

E) EU law is the result of a bureaucratic process because the institutions that in civil law and common law tradition are the law makers are noticeably absent: Parliament and the courts.

In the European tradition – which is largely influenced by the British one – government finds its legitimacy in Parliament. And although the relationship between the executive power and the legislative power may vary significantly (compare the British, French and German forms of government), the sovereignty of Parliament is a cornerstone of the constitution, and government cannot ignore that it is under constant parliamentary scrutiny.

Anyway legislation is the business of Parliament, and administrative law, if not set out directly by Parliament itself, must conform to its directives and is clearly subordinate to the primary source of law.

In the EU constitutional system, the balance is completely different: the Commission prepares the draft legislation which only subsequently is submitted to the European Parliament, which does not have the final saying but can only propose amendments which the Commission may accept or not. But whatever role the Parliament may have – here or in the future – the spirit of law is marked by its original authors, the EU bureaucracy.

The European Parliament appears to be well aware of its secondary role, and apart for occasional lip service in favour of different forms of legislation, it does not substantially modify the character of the legal system. Legislation by Parliament, in the Western legal tradition, is different because of the eminently political background of its members: they must favour their constituencies but at the same time they cannot forget the public good. They are much more interested in the impact of the legislation on the public opinion than in the details of its implementation, which is left to government bureaucracies: “*l’intendence suivra*”. In draft-

²¹ The difficulties arising from the complexity and voluminosity of EC legislation has led the Commission to propose various initiatives for the simplification of EC legislation. Among these: “The internal market after 1992: meeting the challenge”, Sutherland Report, (SEC(92) 2044), the Molitor Report 1995 (legislative and administrative simplification, COM(95) 288), the SLIM (Simpler Legislation for the Internal Market, 1996, COM(96) 204), the BEST (Business Environment Simplification Task Force) related to the 1996 Action plan for the single market, and the Commission Report to the European Council “Better Lawmaking 1997” (COM (97)626 final). See also AE Kellermann, et al (eds), *Improving the Quality of Legislation in Europe* (The Hague, 1998); CWA Timmermans, “How Can One Improve the Quality of Community Legislation?” (1997) 34 Common Market Law Review 1229.

ing law, if they are not experienced draftmen themselves, they are assisted by a skilled body of parliamentary officials whose main task is to write laws and not to implement them. This does not mean that legislation by Parliament is better than legislation by the EU bureaucracies. It is simply different.

If the European Parliament does not alter the style and the characteristics of EU Law, the same can be said for the European Court of Justice. Here we are in front of an extremely selected group of persons, generally chosen among the best experts in EU law that each country can offer; most of them are judges or professors with vast experience. These elements, however, do not appear sufficient to give EU law the characteristics of a legal system in which court made law is the most significant feature. Let us set aside the common law experience – which is *ex se* court made – and focus on continental systems. It is easy to see that in the last half century – which coincides with the EU's history – the courts have gained an evergrowing role. Not only in the fields where general legislation has left gaps and ample possibilities for innovative construction (typically: tort law and personality rights), but the whole substantive law system, whether commercial, criminal, administrative, is indefinable without taking in account the jurisprudence of the courts.²² That is because the authors of the law know very well that whatever dispute may arise it will naturally be presented to the courts. There may be some frictions, especially when Government or Parliament feel that their prerogatives have been invaded. But

²² This is true both for common law and civil law legal systems. See BS Markesinis, *Comparative Law in the Courtroom and Classroom. The Story of the Last Thirty-Five Years* (Oxford-Portland (Oregon), 2003); M Hesselink, *The New European Legal Culture* (Deventer, 2001); L Vacca (ed), *Lo stile delle sentenze e l'utilizzazione dei precedenti* (Turin, 2000); JM Carbasse and L Depambour-Taride (eds), *La conscience du juge dans la tradition juridique européenne* (Paris, 1998); DN McCormick, RS Summers, AL Goodhart, *Interpreting Precedent. A Comparative Study*, (Dartmouth, 1997); R Jacob (ed), *Le juge et le jugement dans les traditions juridiques européennes. Etude d'histoire comparée* (Paris, 1996); RA Heiner, "Imperfect Decisions and the Law : On the Evolution of Legal Precedent and Rules" (1986) 15 *Journal of Legal Studies* 227; G Gorla, *Diritto comparato e diritto comune europeo* (Milan, 1981); M Cappelletti, "The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference – or no Difference at All?" in H Bernstein, U Drobnig, H Kötz (eds), *Festschrift für K Zweigert zum 70. Geburtstag* (Tubingen, 1981). See also the seminal works of J Chipman Grey, "Judicial Precedents- A Short Study in Comparative Jurisprudence" (1895) 27 *Harvard Law Review* PAGE?; R Pound, "The Theory of Judicial Decision" (1923) 36 *Harvard Law Review* 641; E Lewis, "The History of Judicial Precedent" (1930) *The Law Quarterly Review* 207; Goodhart, "Precedent in English and Continental Law" (1934) *The Law Quarterly Review* 40; K Lipstein, "The Doctrine of Precedent in Continental Law with Special Reference to French and German Law" (1946) 28 *Journal of Comparative Legislation and International Law* 34.

Further still, with reference to the role of national courts in the application and in the evolution in EC law, as JHH Weiler ("The Transformation of Europe" (1991) 100 *Yale Law Journal* 2403, at 2426) has observed, the procedure designed by article 177 EC Treaty, together with the affirmation by the European Court of Justice of the principles of direct effect and supremacy of EC law (binding on governments and parliaments), resulted in "an overall strengthening of the judicial branch vis-a-vis the other branches of government" since national courts at all levels, through the preliminary ruling procedure, "were given the facility to engage with the highest jurisdiction in the Community and thus to have de facto judicial review of legislation".

on the whole the community, not only the legal community, perceives the courts as one of the sources of the law.

This is a role that the ECJ has generally reached.²³ There are some fields such as competition law and public procurement in which to state the rule of law one refers to a land-mark decision of the ECJ.²⁴

There are, however, some major limitations to this process and surely not for the lack of quality of the judges, who are hand-picked, but because they are few even after the multiplication of the sections of the Court and the institution of the Tribunal.²⁵

²³ The bibliography on the role of the ECJ is the construction and development of European law is extremely vast. See however *ex multis*: KJ Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford, 2001); FG Pizzetti, "Il ruolo delle corti di giustizia nei modelli federali", in AM Petroni, *Modelli giuridici ed economici per la Costituzione europea* (Bologna, 2001), p 123; A-M Slaughter, A Stone Sweet & JHH Weiler (eds), *The European Courts and National Courts* (Oxford, 1998); R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (New York, 1998); D Chalmers, "Judicial Preferences and the Community Legal Order" (1997) 60 *Modern Law Review* 164; R Bakker, WA Heringa & F Stroink (eds), *Judicial Control: Comparative Essays on Judicial Review* (Antwerp, 1995); F Mancini & D Keeling, "Democracy and the European Court of Justice" (1994) 57 *Modern Law Review* 175; A-M Burley & W Mattli, "Europe before the Court" (1993) 47 *International Organization* 41; P Craig, "Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law" (1992) 12 *Oxford Journal of Legal Studies* 453; E Stein, "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 *American Journal of International Law* 1. For general discussions on the role of the European Court of Justice in policy-making in Europe, see S Bulmer, "New Institutionalism and Governance of the Single European Market" (1998) 5 *Journal of European Public Policy* 365; P Pierson, "The Path to European Integration: A Historical Institutional Perspective" (1996) 29 *Comparative Political Studies* 123; P Pierson & S Leibfried, *European Social Policy: Between Fragmentation and Integration* (Washington DC, 1995).

²⁴ Not only. The European Court of Justice has certainly played a fundamental role in constructing what may be called the "constitutional law" of the EU. Starting from its landmark decisions of the early 1960's, the ECJ has affirmed the doctrines (direct effect, supremacy, doctrine of implied powers, principles of exclusivity and preemption, doctrine of human rights) which establish the relationship between EC law and member State law (see JHH Weiler, *The Transformation of Europe*, cit at 2413–2419).

Later observations have pointed out however, that despite the considerable achievements of the ECJ in constitutionalizing community law, these efforts have run up against a series of obstacles over the last decade, including "the insertion of the so-called "subsidiarity" principle into the EC Treaty, the establishment of the "pillar structure" to govern the relationship between the supranational EC and the intergovernmental EU, and the move towards "variable geometry" in a number of substantive domains through opt-outs, derogation rights, and procedures for "closer cooperation" among certain Member States" (see Lindseth, cit at 639). This is indicative of the reassertion of the primary role of the member States in the integration process, which has shifted from a judicial to a political character (Lindseth, cit at 638).

²⁵ While distinguishing between judicial review at the community level (with the procedure envisaged by article 169–72 EC Treaty, now article 226–229 EC Treaty) and judicial review at the member State level (with the preliminary ruling procedure of article 177 EC Treaty, now article 234 EC Treaty), Weiler (*The Transformation of Europe*, cit, at 2419) has emphatically summarized the merits and flaws of the judicial review which take places in front of the ECJ. Referring to judicial review at community level, the author observes that, due to the "intergovernmental" character of this procedure

Few for the vastness of the competences of the EU and for the population it comprises. This means that the decisions of the Court are only a drop in the ocean of the Commission's activity and do not result in an effective scrutiny.

This is favoured by the difficulty of access to the Court and its very clear directive to leave as many cases as possible to the decision of national judges who should – and must – apply directly EU law.²⁶

Furthermore careful analysis of the Court's jurisprudence indicate that it has acted, over the decades, more as a watch-dog towards national legislatures and courts, rather than towards the Commission.²⁷ No doubt this was needed, especially during the years in which it was difficult for many member States to understand the deepness of the transition from a simple economic community to a political

(where it is either the Commission or a member State that brings an action against a member State for failure to fulfill its obligations under the Treaty), “four weaknesses are particularly glaring:(1) the procedure is political in nature; the Commission (appropriately) may have nonlegal reasons not to initiate a prosecution;(2) a centralized agency with limited human resources is unable adequately to identify, process, and monitor all possible Member State violations and infringements;(3) Article 169 may be inappropriate to apply to small violations; even if small violations are properly identified, dedicating Commission resources to infringements that do not raise an important principle or create a major economic impact is wasteful; and finally, and most importantly,(4) no real enforcement exists; proceedings conclude with a “declaratory” judgment of the European Court without enforcement sanctions.” (Weiler, *cit*, at p 2419–2420).

Weiler further notes that part of the weaknesses of the procedure ex article 169 (now article 226) are remedied by the preliminary ruling procedure, since on the one hand, the rulings of the ECJ ex article 177(now article 234), (usually involving private litigants claiming that a national rule or measure should not be enforced since it violates Community law), have often gone beyond the theoretical statements on the uniform application of the EC law, leaving the national judges with little or no discretion on questions of the law applicable; and on the other hand, the fact that the final judgment is pronounced by national courts gives the ruling a binding authority which the ECJ rulings ex article 169 do not possess. However, even this mechanism of judicial review remains incomplete, since “not all violations come before national courts; the success of the system depends on the collaboration between national courts and the European Court of Justice; and Member States may, and often have, utilized the delays of the system to defer ruling.” (Weiler, *cit* at 2420–2421).

See also KJ Alter, (*Establishing the Supremacy of European Law*, *cit*) on the key role assumed by the national courts in enforcing European law against their governments and on the acceptance by the national governments of such institutional changes compromising national sovereignty. Alter indeed affirms that “the European Court of Justice played a decisive role in the transformation of the European legal system by declaring the direct effect and supremacy of European law. But the linchpins of the European legal system are the national courts of the member States.” (Alter, *cit* at 33).

²⁶ See T Eilmansberger, “The Relationship between Rights and Remedies in EC law: in Search of the Missing Link” (2004) 41 *Common Market Law Review* 1199; G de Burça and JHH Weiler (eds), *The European Court of Justice* (Oxford, 2001); C Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (Oxford, 2000); W Van Gerven, “Of Rights, Remedies and Procedures” (2000) 37 *Common Market Law Review* 501; A Ward, *Judicial Review and Rights of Private Parties in EC Law* (Oxford, 2000); J Lonbay and A Biondi (eds), *Remedies for Breach of EC Law* (Chichester, 1997); see also T Tridimas, *The General Principles of EC Law* (Oxford, New York, 1999).

²⁷ See the data collected and analysed by KJ Alter, *Establishing the Supremacy of European Law*, *cit*, p 11–16.

union. Therefore the ECJ has appeared more engaged in knocking member States into shape, rather than in checking and balancing the Commission's role.

The result is that although the ECJ's jurisprudence has been and is important, it is not the distinctive feature of EU law and it is not strong enough to change the bureaucratic approach to legislation.

F) If EU law is explicitly instrumental to economic and social policies and is the product of a strong and deeply rooted bureaucracy, there is a further aspect that should be underlined and that is another distinctive aspect of EU law: legislation and regulation as the result of an extremely standardized legal process. There is a clear relationship with the bureaucratic source of the legal system and with its natural tendency to apply procedures to all of its activities.

What happens in the EU is surely not new, but it reaches a very high degree of evolution and is extremely widespread.

Once a topic is selected, data is collected on its various aspects: not only statistics but also analysis of the economic, social and legal implications; comparison among the different options and solutions.

Research centers are chosen to prepare ample reports which are the basis of what subsequently will become a "green paper" presented to public debate.

Comments are asked for and often public hearings are held. The result is, generally, a draft directive (or other legal instruments) which thereafter begins a new round of discussions ending up at the European Parliament, with its proposals for amendments.

The various phases are marked by a constant and overt role of interest groups and lobbies, each trying to introduce changes in the text or, sometimes, to block its approval.²⁸

Behind these very organized procedures there is the idea of an enlightened government which intervenes knowing the facts and adopting solutions which have been discussed and analyzed in advance.

It is debatable whether the good intentions behind these procedures reach their intended goals. What is interesting to note is that this procedural approach gives a considerable strength to the legal process. Again one can compare what commonly happens in parliamentary legislation where often government bills (let alone private ones) are bogged down by the opposition and are subject to significant modifications during parliamentary debate, often on an extemporary basis.

In EU law, once the machinery has been put into action, only a very strong opposition can bring it to a halt, and, as already said, it is the Commission that always has the last saying.

In any case, from a comparative point of view, a legal system is characterized not only by who sets the rules, but also by how they are set down. This is partic-

²⁸ On the different aspects of the drafting process of European private law, see V Zeno-Zencovich, "Il modo di formazione della legislazione europea di diritto privato: un laboratorio comparatistico", in R Pardolesi (ed), *Saggi di diritto privato europeo* (Naples, 1995).

ularly evident in the common law tradition where the rules, historically, are the result of an adversarial trial.

G) One aspect that has been examined in detail by legal scholars is the role of comparative law in EU law: in its making, in its spreading, in the decisions of the ECJ.

The point, therefore, does not need to be analyzed in depth here. There is a general agreement on the fact that from the point of view of substantial law there is an ascending phase, when the various national models are presented to the EU authorities in order to pick the most appropriate solution; a “melting pot” phase when the various national models which have been chosen are blended with the “*acquis communautaire*” and a final, descending, phase when the product of EU law returns into the national systems and becomes part of them.²⁹

What must be pointed out in this paper is:

- i. the content of EU law does not have the characteristics nor of common law nor of civil law because many models have been used.
- ii. when it comes to substantive administrative law, there does not seem to be a significant difference between civil law models and common law models,

²⁹ See G. Benacchio, *Diritto privato della Comunità europea. Fonti, modelli, regole* (3rd ed, Padova, 2004), p 157; PG Monateri, “La circolazione dei modelli giuridici e le sue conseguenze per l’Unione europea”, in AM Petroni, *Modelli giuridici ed economici per la Costituzione europea*, (Bologna, 2001), p 87; K Lenaerts, “Le droit comparé dans le travail du juge communautaire” (2001) 37 *Revue Trimestrielle de droit européen* 487; CN Kakouris, “Use of the Comparative Method by the European Court of Justice” (1994) 6 *Pace International Law Review* 267; J Mertens de Wilmars, “Le droit comparé dans la jurisprudence de la Cour de Justice des Communautés Européennes” (1991) *Journal des Tribunaux PAGE ?*; P Pescatore, “Le Recours, dans la Jurisprudence de la Cour de Justice des Communautés Européennes, à des Normes Deducites de la Comparaison des Droits des Etats Membres” (1980) 32 *Revue internationale de droit compare* 337. On the use of comparative law by national courts, see G Canivet, M Andenas, D Fairgrave (eds), *Comparative Law Before the Courts*; London, 2004; AM Slaughter, *A New World Order* (New Haven, 2004); A Somma, *L’uso giurisprudenziale della comparazione nel diritto interno e comunitario* (Milan, 2001); U Drobnig and S van Erp (eds), *The Use of Comparative Law by Courts* (The Hague-London-Boston, 1999). On the different tendencies in the use of comparative law by the House of Lords and the US Supreme Court see BS Markesinis, *Comparative Law in the courtroom and classroom. The Story of the Last Thirty-Five Years* (Oxford-Portland (Oregon), 2003); H Muir Watt, “La fonction subversive du droit compare” (2000) 3 *Revue internationale de droit compare* 518; M Tushnet, “The Possibilities of Comparative Constitutional Law” (1999) *Yale Law Journal* 1225. On the role of comparative law in the formation of a “European” (transnational) legal thought see *ex multis*: M Cappelletti, (ed), *New Perspectives for a Common Law of Europe* (Florence, 1978); AJ Arnaud, *Pour une pensée juridique européenne* (Paris, 1991); T Koopmans, “The Birth of European Law at the Crossroads of Legal Traditions” (1991) 39 *American Journal of Comparative Law* 494; E Levitsky, “The Europeanization of the British Legal Style” (1994) *American Journal of Comparative Law* 347. See also A Watson, *Legal Transplants: An Approach to Comparative Law* (Philadelphia, 1993, (2nd ed)). On the Comparative Law and Economics approach to the issue, see L. Antoniulli Deflorian, *La struttura istituzionale del nuovo diritto comune europeo: competizione, circolazione dei modelli giuridici* (Trento, 1996); U Mattei, *Comparative Law and Economics* (Ann Arbor, 1997); DC North, *Institutions, Institutional Change and Economic Performance* (Cambridge, 1990).

- which is a very clear distinction in private law but not in other branches of the law.
- iii. in the field of private law one can trace the predominant influence of English, French and German models; those of other member States do not appear to have a significant importance (unless they have previously operated a blend of the various models, as in Dutch private law);
 - iv. the style of legislation is surely not the unbearable minuteness of British statutes but, as already stressed, the preamble, which often is longer than the provisions, changes significantly the sense and the construction of the text and deviates from the logical construction of legislation in continental Europe which is still based on rules set out by Leibniz.
 - v. in a number of fields the EU imports models which are an adaptation of US ones; on one side this is because of the greater experience the US have in those fields and of the need to have equivalent regulations in order not to discourage investments and EU-US financial and commercial relations. On the other side it is quite clear that the US model is not, really, a common law model and has very little to do with the English tradition;
 - vi. EU law is both substantive and procedural; and one can say that administrative procedures have been used to modify substantive law (eg public procurements). In anyway the two aspects appear inextricably joined.
 - vii. EU law ignores the traditional partitions of the law which are familiar to both law students and scholars: European private law (eg consumer, contract, company law) is outrightly public regulation of private enterprise. Family, property, torts law receive only a very summary attention. European criminal law – which stems from the “third pillar” of the Maastricht Treaty – is still under construction. Taxation is one the few prerogatives member States have withheld. In other words the foundation of EU law, its basic partitions are different from those of the legal systems of the member States. It prefers a “vertical” organization of the legal system, following each economic sector (transport, banking, food industry, energy, etc.) rather than a “horizontal” one. EU law will eventually grow and cover most areas which are the historical domain of the various European legal systems, but its original starting point will have left its mark.

H) Photographing EU law as a system of its own is only one aspect. What is interesting to notice is that it is becoming a model which is imitated by States both EU and non-EU. In the first place there is the obvious factor of the implementation of EU law in member States. If their legal tradition is strong it is absorbed without many substantial changes to its characteristics. But in other countries, which have a weaker legal tradition EU law super-imposes itself on national law and moulds it. This happens especially in those countries which have not been able to participate significantly in the ascending phase of the formation of EU law and therefore find themselves in front of models that are new to them.

In the second place EU law has become a widespread model for the regulation of economic activities in the member States, even in areas which have not been

occupied by EU law. The latter becomes a model both from a procedural and a substantive point of view. National Governments and bureaucracies tend to imitate what is the Brussels model.³⁰

In third place EU law has become an obliged model for those countries who have recently been admitted in the enlarged EU or aspire to enter in it in the future. Most of these countries are Eastern European and therefore needed to substitute completely their economic legislation after the fall of the communist regimes.³¹ Although many of them have tried to revive their pre-iron curtain legal traditions, enacting civil and commercial codes, the binding force of the economic agreements with the EU, that have imposed the adoption of analogous regulations in the fields of main interest for foreign investors, has been such that one could say that EU law has often penetrated them before a national legal system had been reconstructed.

* * *

³⁰ The EU system has become a significant model of economic regional integration. It is not surprising if other forms of regional integration, such as for example the Mercosur, look at the European model as an example of an economic treaty which has gradually expanded its competences. See for example EJ Aramburu, "Historical Perspective: the Evolution of *Mercosur* in a South American Integration" (2001) 13 *Pace International Law Review* 183; Jorge M Guira, "*Mercosur* as an Instrument for Development" (1997) 3 *Law and Business Review* 53.

The European Union also serves as a model of legislation and regulation outside Europe in various fields, ranging from environmental protection, to antitrust, to data protection and privacy. To have an idea of the influence on the United States' doctrinal forment for example, it is sufficient to take a look at the number of articles in American law reviews which look at the EU legislation as a model. European Union law has gradually become a key factor in international law-making, for example in international trade law and in processes of international regulatory cooperation. See G. Bermann et al (eds), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford-New York, 2000); Id, "European Community Law from a US Perspective" (1995) 4 *Tulane Journal of International and Comparative Law* 1; TC Fischer, *The Europeanization of America: What Every American Should Know About the European Union* (Durham, NC, 1996); E Stein and T Sandalow (eds), *Courts and Free Markets: Perspectives From the United States and Europe* (Oxford, 1982); E Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, cit.

³¹ On the different aspects of integration after the EU enlargement and on the communitarian model for Central and East European countries see for example: J. Přebán, "European Union Constitution-Making, Political Identity and Central European Reflections" (2005) 11 *European Law Journal* 136; W. Sadursky, "Accession's Democracy Divided: The Impact of the EU Enlargement upon Democracy in the New Member States of Central & Eastern Europe" (2004) 10 *European Law Journal* 371; A Grzymala-Busse, A Innes, "Great Expectations: the EU and Domestic Political Competition in East Central Europe" (2003) 17 *East European Politics and Societies* 64; B De Witte, "The Impact of Enlargement on the Constitution of the EU", in M Cremona (ed), *The Enlargement of the European Union* (Oxford, 2003); D Malová, T Haughton, "Making Institutions in Central and Eastern Europe, and the Impact of Europe" in P Mair, J Zielonka (eds), *The Enlarged European Union: Diversity and Application* (London, Portland-Oregon 2002); B De Witte, "Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?" in AE Kellermann, JW de Zwann, J Czuczai (eds), *EU Enlargement: the Constitutional Impact at EU and National Level* (The Hague, London, 2001); A Agh, *The Politics of Central Europe* (London, 1998); C Offe, "Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe" (1991) 58 *Social Research* 989.

The various points that have been summarily presented in this brief paper are not new and are under everybody's eyes. What is suggested is to look at them from a different point of view and try to offer a framework that can be used by comparative law scholars.

EU law is definitely part of European legal systems and its importance is inevitably bound to grow, especially if one views it in the light of the enlargement of the EU and of the approval of the Lisbon Treaty.

Half a century is – in the history of law – a short period and one should therefore be extremely cautious in presenting certain results as acquired. It is sufficient to recollect the efforts spent for decades in theorizing a “socialist model”, swept away in a few months of political crisis and popular uprisings.

Although EU law is deeply rooted in the institutions that the Rome Treaty and its sequels have created, what is striking is the effectiveness of the model it proposes.

Surely one of its distinctive features is the peculiar constitutional and *de facto* position of the EU Commission which does not have equivalents in the political tradition of European countries. And not even in the most eminent example of very strong powers of the executive – the USA – can one say that the situation is comparable to that of the EU.

And if a comparatist believes that he should still study the law in action, EU law by creating a different hierarchy and a different perception of law, new institutions, new partitions, brings about a new model that co-exists with those historically prevailing in the various parts of Europe and tends to impose itself in certain areas of the law.

From a methodological point of view this means that the study of legal institutes, if it is not limited to their history, must take into account also the European law perspective. Looking in this direction the most involved institute is contract law, which appears to be fragmented and bended to the specific needs of public control over economic activities. Traditional topics of civil law – common law comparison such as promise, agreement, intention to enter contractual relations, *causa*, consideration, change of circumstances are pushed in the background or have to be reconsidered in the light of the specific public regulation of that contract.

From a more general point of view lawyers are compelled to broaden considerably their knowledge, well beyond the boundaries of law. If the law is instrumental to economic and social policies, they must understand them and take them into account. This brings – or will bring – to significant changes in the way many lawyers work: no longer by themselves, presenting solutions that are self-explanatory, but having to work in a team in which the legal aspects are only one of many. And behind them looms the shadow of the end of the primate of the law.

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