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Law as an Instrument of Economic Policy: Comparative and Critical Approaches

edited by

Terence Daintith

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Foreword

Under the less-than-elegant title "Law and Economic Policy: Alternatives to Delegalisation", a programme of research was conducted from 1982 to 1985 at the European University Institute by my colleague Gunther Teubner and myself, culminating in a colloquium held in Florence in March 1985. Reproduced in this volume in revised and developed form are thirteen of the papers presented at that colloquium. Some of these papers represent the final product of a collective research endeavour by the members of a working group which set out to study the legal implementation of economic policy in France, Germany, Hungary, Italy, the Netherlands and the United Kingdom through a systematic comparative examination of recent legal developments in the fields of energy and manpower policy. Underlying this collective research was the sense of a need to test and perhaps to respond to a current of criticism of the way in which and the extent to which law is used as an instrument of State policy, criticism which, in our view, threatened to be destructive of the positive contribution which legal ordering could make in the field of policy implementation. "Legalisation" is the term used by some of these critics to describe what they see as an overburdening of the social and economic system with detailed legal regulation. As well as furnishing some modern data on legal implementation by reference to which such claims may be judged, our research has also been designed to offer a comparative perspective through which the influence on legal implementation of different legal systems, and of the characteristics of the different policy fields involved, may be discerned.

Of the seven working group papers here presented, six are accompanied by papers prepared by colloquium participants not involved in the working group but who were made aware of its objectives and methods and were invited to offer, on the basis of their own outlook and experience, an alternative treatment of the same topic. Our hope is that in this way the empirical work the group has done can be readily situated in an appropriate critical context. Also relevant, perhaps, to an appreciation of our investigation are the results of the parallel inquiry conducted within the general project framework under the direction of Gunther Teubner, an inquiry which examined the concept of legalisation (Verrechtlichung, which Teubner now translates as "juridification") in the four fields of labour law, competition law, company law and social security law. The papers read on these themes at the March 1985 colloquium were published in 1987 in a companion volume edited by Gunther Teubner under the title *Jurification of Social Spheres*.

This book does not contain the whole of the results of the working group's activities. Members of the group also produced detailed inventories of measures in the fields of energy and manpower policy in their respective countries, along with comparative reports of an interim nature which have served as the basis of the

thematic papers presented here. These documents, which are on file at the European University Institute, are listed in detail in Appendix 4 to the Methodological Note which follows my introductory paper, where there are also listed the names and activities of members of the working group who participated in the early stages of its work but who do not appear here as authors of the final studies: Giuliano Amato, Jean-Michel de Forges, Jacqueline Dutheil de la Rochère, Patrick Nerhot, Claudio Franchini and Tony Curran. Their contributions were essential and are much appreciated. A first attempt, within a limited compass, to apply the methodology of the project in the field of energy policy in Europe may be found in a companion volume, Daintith and Hancher, *Energy Strategy in Europe: The Legal Framework*, published in 1986.

As editor, I am deeply conscious of my debt to the contributors to this volume, both the members of the working group whose papers appear herein – Brian Bercusson, Attila Harmathy, Leigh Hancher, Hans Jarass, Kamiel Mortelmans and Dietrich von Stebut – all of whom also participated in the burdens of the preliminary work above described; and the "external" commentators, some of whom have furnished us with major contributions on their appointed themes. Special thanks also go to Anne-Lise Strahtmann for her efficient typing and secretarial work, Iain Fraser for his translations of the papers by Fromont and Ost, Tony Curran for editing and referencing, Ralf Rogowski for preparing the index, and Brigitte Schwab for seeing the book through a complex publication process.

Terence Daintith
San Domenico di Fiesole
October 1986

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I. Introduction

To formulate and operate an economic policy is generally accepted to be a necessary and legitimate responsibility of European governments. Law is a powerful social guidance mechanism: those governments enjoy, at the least, a

highly privileged position in their State's law-making process,[1] and may often have independent if constitutionally circumscribed law-making powers of their own.[2] It would be surprising, therefore, if such governments did not deliberately set out to use law as a means to the achievement of their ends in the economic policy field – and, indeed, in all other policy fields. And in fact, ever since governments have had "policies" in the modern sense, they have supported them with laws. Yet many lawyers still react with unease or even distaste when invited to view law as an instrument of policy, and even those who find nothing strange about the notion will readily admit that the relationship between law and policy remains a problematical one. What problems lawyers perceive seems to depend a lot on where they come from. For the English – to start at home – the main problem is of law's use as a vehicle of arbitrary power,[3] or of "policy without law".[4] The Germans – or some of them – worry about "Verrechtlichung", and assume that everyone else does too.[5] Among Francophones, one's allegiance as a public or private lawyer appears to be an important factor: while public lawyers are concerned about law's inefficiency as a control mechanism,[6] private lawyers are more inclined to fear "legislative inflation"[7] or the decline of "droit" in the face of "loi":[8] a decline which appears to correspond to Weber's "materialisation of law". American concerns focus on the regulatory process, which some hold to be in "crisis"[9] and others would restrict or dismantle,[10] though there remain voices asking for more extended legal ordering of governmental action.[11] This variety may reflect subjective differences among academic lawyers of different nations – their propensity to anxiety, for example – but it may also suggest the existence of a

[1] Thus while the United Kingdom government has negligible powers of extra-parliamentary law making, it enjoys commanding procedural advantages in the parliamentary legislation process: see D. Miers and A. C. Page, *Legislation* (1982, London), ch. 5.

[2] As in France, under the 1958 Constitution, art. 37.

[3] See e.g. Viscount Hailsham of St. Marylebone, *Elective Dictatorship* (1976, London), H. W. R. Wade, *Constitutional Fundamentals* (1980, London), ch. 4.

[4] J. T. Winkler, "Law, State and Economy: The Industry Act 1975 in Context", (1975) 2 *Brit. Jl. of Law and Society* 103; Wade, *supra*, note 3, esp. at pp. 55–57.

[5] G. Teubner, "Juridification: Concepts, Aspects, Limits, Solutions" in G. Teubner, ed., *The Juridification of Social Spheres* (1987, Berlin) (hereinafter cited as Teubner, "Juridification").

[6] See e.g. M. Fromont, "Le contrôle de aides financières publiques aux enterprises privées", *Actualité Juridique Droit Administratif* (A. J. D. A.) 1979.3; D. Loschak, "Le principe de légalité: mythes et mystifications" A. J. D. A. 1981.387; R. Savy, *Droit Public Economique* (1977, Paris); G. Farjat, *Droit Economique* (2d ed., 1981, Paris), at pp. 757–766.

[7] N. Nitsch, "L'inflation juridique et ses conséquences", *Arch. Philos. Dr.* 1982.161.

[8] B. Edelman, "La dejuridicisation du fait de la loi (regards un peu sombres sur les lois Auroux" *Droit Social* 1984.290.

[9] See D. Trubek, ed., *Reflexive Law and the Regulatory Crisis* (1984, Madison).

[10] See text at notes 23–25 *infra*.

[11] Though these are mostly to be found in the legislature, rather than among academics: see R. Stewart, "*'Reform' of American Administrative Law; The Academic vs. the Political Agenda*" (1984, mimeo).

series of different national sets of problems with the law/policy relationship, and the futility of grand generalisations about it.

These expressions of concern about instrumental law, and the sense of national differences of intensity and emphasis, prompted the comparative empirical enquiry, into law's use as an instrument of economic policy, whose results are presented in the six thematic papers[12] which form the bulk of the present volume. Three of these papers take as their subject matter a type of instrument of economic management (regulations, subsidies, manipulation of the public sector), the others address issues which affect the entire field of economic policy implementation: private, as opposed to state, ordering of the economy; the significance of the time-scale of policy for legal implementation; and the influence of different legal systems on modes of implementation of policy. On their specific themes, these papers speak for themselves, as also do the related critical papers and comments prepared by scholars outside the group. The thematic papers all result, however, from an extended period of work which has had an important collective, as well as individual, dimension. The tasks of this introductory paper, therefore, are to identify, explain, and so far as possible justify the collective approach chosen; and to point to some results of the enterprise as a whole. This involves explaining the background to the investigation, the choice of the fields which have been the subject of detailed study and from which the data analysed in the succeeding papers have been drawn, the concepts and methods used, and the working hypotheses which have structured the analysis as a whole.

II. Background

Our questions[13] about the problematic relationship between law and economic policy have been three. First, what forms of law are used for the implementation of economic policy? Second, what factors determine whether law is invoked for the resolution of policy problems and, if invoked, the forms of law that are used? In particular, are the characteristics and demands of the national legal system as important, in shaping such choices, as the nature of the problem or of the policy field concerned? Third, can one differentiate between countries in terms of the quality or intensity of legal implementation of policy, so as to explain some of the varied reactions to the law/policy relationship to which I referred at the beginning

[12] *Viz*, H. Jarass, "Regulations as an Instrument of Economic Policy" (hereinafter "Jarass"), below pp. 75–96; D. von Stebut, "Subsidies as an Instrument of Economic Policy" (hereinafter "von Stebut"), below pp. 137–152; L. Hancher, "The Public Sector as Object and Instrument of Economic Policy" (hereinafter "Hancher"), below pp. 165–236; A. Harmathy, "The Influence of Legal Systems on Modes of Implementation of Economic Policy" (hereinafter "Harmathy"), below pp. 245–266; K. Mortelmans, "Short and Long-term Policy Objectives and the Choice of Instruments and Measures" (hereinafter "Mortelmans") below pp. 283–321; B. Bercusson, "Economic Policy: State and Private Ordering" (hereinafter "Bercusson") below pp. 359–420.

[13] In this paper, the plural pronoun is used to refer to the work and opinions of the study group as a whole, the singular pronoun to express the personal views of the writer.

of this chapter? To explain this choice of questions I begin by looking at the kinds of problems which others have identified in the relationship: in particular, in the use of law as an instrument of policy. Such an examination forms the object of this section. By way of preliminary, however, it will be helpful to explain exactly what I mean by "economic policy".

A. "Economic Policy"

What is policy? The Oxford English Dictionary gives as its chief sense "a course of action adopted as advantageous or expedient". This definition implies action guided by deliberation, purpose and choice. There are common uses of the term "policy" which imply no action (as when a government's statements about its objectives and the means it proposes to use for attaining them are referred to as its "policy") or little deliberation (as when any sequence of government actions is retrospectively called its "policy" in a given field). *Purposeful activity,* however, expresses the essence of the term's use here. The adjective "economic" is used in a broad sense, and is not intended to confine discussion to the area of actions which are explicitly directed to the attainment of macro-economic policy objectives such as high and stable employment levels, balance of payments equilibrium, price stability or economic growth.[14] By way at least of a general definition (I discuss later the considerations that led to the selection of the particular policy areas and objectives that figure in the comparative study) economic policy includes *all purposeful governmental action whose actual or professed primary objective is the improvement of the economic welfare of the whole population for which the government is responsible or of some segment of that population.* This definition is broad enough to subsume government's attempts both at more nearly optimal allocation of resources and at fairer distribution of wealth, while at the same time acknowledging that a government's descriptions and justifications of its economic policy measures may sometimes lack truth or candour. That it is broad enough to subsume much (but probably not all) of what is also termed "social policy" does not matter: clear distinctions between what is economic and what is social may be important for some purposes, but there is nothing to suggest that analysis of the law/policy relationship is one of them.

It will be seen that the definition refers to the *governmental* origin of economic policy. In a sense it goes without saying that economic policy will be governmental, in that the State, today, assumes explicit responsibility for the economic welfare of its citizens.[15] In another sense, however, this State connection has to be seen as part of the problem, for if the legal structures common to most Western democracies embody or reflect *any* guiding principle of economic welfare, it is that of the "invisible hand" of the market rather than State direction, and I shall argue that this bias both shapes the instrumental role of law and creates unease

[14] See e.g. A. K. Dasgupta and A. J. Hagger, *The Objectives of Macroeconomic Policy* (1971, London).

[15] E.g., in the United Kingdom Government's White Paper on Employment Policy (1944), Cmd. 6527; or the German Stabilitätgesetz of June 8, 1967.

about this role. A second point to keep in mind is that departures from the market principle of economic organisation do not lead ineluctably to substantive State control or guidance. The last hundred years have witnessed the steady development of private, usually associational centres of economic power, to some extent free to determine and pursue their own economic objectives. Companies and trade unions are the obvious examples. The State may adopt a variety of strategies in relation to such private power-centres, combining in different proportions *control*, on the one hand, and *reliance* – for policy input, for policy implementation, or, at the extreme, for policy-*making and* implementation, on the other. Brian Bercusson's contribution to this volume represents a sustained attempt to apply the general methodology of this study to the deployment of private economic power, and thereby to cast further light on the choice of forms and occasions for implementation of policy through State law. Every strategy save that of pure control demands that we pay some attention to the "private" dimension of economic policy.

Notwithstanding these important possible variations, the State today remains at the centre of the economic policy stage in Western no less than in Eastern Europe, and it is the legal instrumentalisation of its actions that accordingly form our primary focus. The State, however, is not monolithic: at any given time there exists a diffusion of power, both territorial and functional, among its various organs. Territorial diffusion involves not only the constitutional division of competences in a federal state like West Germany, but also the diffusion of powers and functions to regional and local levels, strongly marked in Italy and not absent even in the most centralising of States. Some economic policy functions, whether of formation or, more commonly, of execution, may be discharged at these sub-State levels. We have not atempted any systematic analysis of sub-State competences in the economic sphere, nor have we chosen our fields for detailed study with this issue in mind. I should signal here, however, that the way in which competences are divided could have an important influence on the choice of legal means for the implementation of policy.[16]

Functional diffusion takes two forms. Within the executive branch, power may be diffused through the use of specialist executive organs falling outside the departmental framework of central government, charged with the running of public enterprises and with a variety of regulatory and public service functions. While such bodies will not normally occupy a privileged role in policy-making, their functions in relation to implementation are important and complex. In particular we may encounter them both as objects of economic policy on a similar footing to private bodies, and as instruments through which central government seeks to carry out its policy aims.[17]

Power is also functionally diffused across the dividing line between the executive and non-executive organs of the State, between the central government on the one hand, and Parliament and the courts on the other. This type of

[16] See below, p. 39, and R. Stewart, "Regulation and the Crisis of Legalisation in the United States", below pp. 100–102.

[17] Below, p. 27.

dispersion of power is obviously of importance to an investigation of the law/policy relationship, but does not operate to diminish the executive's role as the lead policy player. Parliaments, it is suggested, should not be viewed as the makers or possessors of economic policies.[18] Their role is rather one of scrutiny, discussion and legitimation of policies formed elsewhere – usually within the executive. In the formation of such policies groups of members of Parliament, or even individual members, may exercise some influence, but it is clear that, in general, Parliaments today carry less weight in the formation of policy than do a variety of other bodies, from the political parties to the trade unions, employers' associations and other major interest groups.

The possible role of the courts as policy-makers cannot be so readily dismissed. Courts do, after all, take decisions with binding effect, not only for the individual parties before them but also, through the operation of doctrines of judicial authority and precedent, for all parties who now or in the future find themselves in similar situations. In the civil sphere, the decisions are usually reached without the help or intervention of any other organ of government. Courts may, in arriving at their decisions, be seeking, consciously or unconsciously, to arrive at goals in the nature of economic objectives. In developing the common law of restraint of trade in the United Kingdom, for example, the courts may be seen as attempting to inhibit, through a judicial policy of non-enforcement, the use of contractual devices to create or consolidate dominant positions in local and national markets.[19] While codification, and the vigour of executive-inspired legislative activity, have left the courts little space in which to play such a role, the possibility of judicial decisions figuring as a significant feature of instrumental law in a given country and policy area cannot be wholly discounted.[20] Current debates about the relationship of law and policy, however, treat policy as a matter of executive inspiration and legislative expression, and judicial activity as falling wholly within the legal system with which policy implementation is problematically related.[21]

B. The Tensions in the Law/Policy Relationship

To recapitulate, therefore, economic policy here normally connotes purposeful activity on the part of central government whose primary objective is the improvement of economic welfare. From the very beginnings in the nineteenth century of the development of such a systematic State approach to economic improvement, the instrumentalisation of law in its service has provoked concern

[18] This is a Eurocentric remark. For a transatlantic contrast see, again, Stewart, below.

[19] For an account of the common law of restraint of trade see J. D. Heydon, *The Restraint of Trade Doctrine* (1971, London); *Chitty on Contracts* (25th ed., 1983, London), vol. I, paras. 1082–1142.

[20] See P. Del Duca, *Legitimating Bureaucratic Decisionmaking: A Comparative Investigation of Air Pollution Control Policies* (unpublished Ph. D thesis, EUI, Florence, 1985), at pp. 219–238, explaining how judicial activism has compensated for administrative inertia in this field in Italy.

[21] Below, esp. at pp. 8–10. In fact our inquiry has not turned up any major judicial contributions to policy-making or implementation.

which, as already noted, still persists. I need to spend a few moments in analysing these expressions of concern, because dissatisfaction with the terms in which some of the principal arguments are posed has helped to shape the present inquiry.

A key to these arguments may be obtained by substituting for "economic policy" the more suggestive term "State intervention in the economy". This familiar image is based on the liberal conception of a separation of the State from the economy, which constitute distinct worlds operating according to different principles: commandment for the State, market exchange for the economy. The State is seen as coming into the economy – from the outside. Law normally enters the scene in two guises: as public law, organising the structure of the State and expressing its command functions, and as private law, underpinning the system of market exchange with a structure of rights and duties whose observance is ultimately guaranteed by State power. Most, if not all, of the modern critiques of "instrumental law" draw directly or indirectly upon this conception. This should not surprise us, in the light both of the continuity of the liberal tradition in modern times and of the reflection in Roman law of a similar image of State/law/economy relations. Both West and East European legal scholars have pointed out that the threefold distinction of the Roman Digest between ownership, obligations and public law had an ideological significance in so far as it recognised the existence of a set of principles and concepts governing the acquisition and keeping of property flowing not from national law but from the *ius gentium* of mankind. The rules – of private law – operative in this sphere thus formed a separate corpus isolated from politics and linked with public power essentially through the category of *actions*, within which the enforcement machinery of the State could be called in aid to vindicate claims based on independently derived rights of property.[22] In the modern-dress version of these ideas the courts appear as the only organ of the State properly concerned with the protection of these property rights.

Against this background the instrumental deployment of law at the instigation of central government in aid of its economic policies is said to lead inevitably, or to have led in fact, to a variety of negative results. These arguments may be ordered according to whether they are more concerned with negative effects on the economy or on the law itself, though this distinction is far from clear cut.

At one extreme the laissez-faire position is very simple: State interference in the economy will lead to misallocation of resources, economic inefficiency, and a net wealth loss; any law which is the vehicle of such interference must be bad. This argument has been elaborately reworked in legal terms by the lawyer-economists of the Chicago School, who conduct detailed analyses of legislative regulation of economic activity to show its inefficient character, and similarly detailed analyses of common law rules and principles to show how the judges, perhaps without knowing it or even in spite of themselves,[23] have plodded steadily along the golden

[22] G. Samuel, "Roman law and modern capitalism", (1984) 4 *Legal Studies* 185, 187–8; G. Eorsi, *Comparative Civil (Private) Law* (1979, Budapest), pp. 85–88.

[23] P. H. Rubin, "Why is the Common Law Efficient?", (1977) 6 *Journal of Legal Studies* 51; G. L. Priest, "The Common Law Process and the Selection of Efficient Rules", *ibid.*, at 65. For the subsequent development of these ideas see J. Hirshleifer, *Evolutionary*

road to allocative efficiency. In its extremer forms[24] this argumentation would deny any place for redistributive legislation, and even where a place is seen for law to promote ends other than efficiency, or to cope with market failures, there is suspicion of the regulatory style of legislation (fears of "agency capture") and of legislation generally (legislators as personal, rather than social, utility maximisers).[25] Appropriate adjustments of common law rights and duties are thus preferred where possible.

A similar position is reached via a different route by Hayek. His key point is that the dynamics of the market are too complex and variable to be grasped by the policy-maker who, continually erring in his appreciations of market malfunctions, enacts "corrective" legislation which leads sooner or later to visibly inefficient results and calls for further "correction". A properly functioning economy can therefore only be attained by avoiding this kind of intervention and relying on the free play of competition guaranteed by appropriate permanent legal rules. Hayek, however, joins to this essentially economistic approach[26] a concern with State power in general, and with the risks of its "arbitrary" use, which links him to the broad preoccupations of many modern public lawyers confronted with the instrumental use of law. In the interests of freedom, he propounds the idea that the only rules of law that are acceptable are general and abstract, at least in the sense that any legal discrimination between groups (as between, say, men and women, old and young) is equally recognised as justified by those within and those outside the favoured group.[27] The necessary characteristics cannot be possessed by interventionist laws, such as laws for the regulation of prices. Unless the rules for price determination are constantly changed in response to the ever-changing circumstances of the market (which implies individual decisions and a lack of essential generality), they will produce legal prices which are out of line with market prices. Supply and demand will not then balance, and if price control is to be maintained some form, of rationing system, itself involving arbitrary discretionary decisions, will need to be introduced.[28]

In effect, Hayek purports to identify, and to explain the operation of, the disease whose legal symptoms had for decades been the anxious concern of what Harlow and Rawlings term "red light" theorists,[29] guided by Dicey's dictum that the "rule of law" required the absence of wide, arbitrary or discretionary powers

Models in Economics and Law (1982, Greenwich) vol. 4 of *Research in Law and Economics).*

[24] See R. Posner, "Utilitarianism, Economics and Legal Theory" (1978) 8 *Journal of Legal Studies* 103; "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication", (1980) 8 *Hofstra Law Review* 487.

[25] R. Posner, "Theories of Economic Regulation", (1974) 5 *Bell Journal of Economics and Management Science* 335; G. Stigler, "The Sizes of Legislatures" (1976) 5 *Journal of Legal Studies* 17; R. E. McCormick and R. D. Tollison, *Politicians, Legislation and the Economy: An Inquiry into the Interest-Group Theory of Government* (1981, Boston).

[26] For which he is criticised by Teubner, "Juridification", at pp. 31–33.

[27] F. von Hayek, *The Constitution of Liberty* (1960, London), p. 154.

[28] *Ibid.* pp. 227–228.

[29] C. Harlow and R. Rawlings, *Law and Administration* (1984, London), ch. 1.

of constraint in persons of authority.[30] Law in the age of the welfare State, however, exhibits constant departures from these requirements. British commentators have been particularly exercised by rule-less laws (which simply make broad grants of decision-making power to administrators), laws explicitly or impliedly excluding judicial review of administrative decisions,[31] the shifting of powers of substantive rule-making from Parliament to central government departments through legal delegation,[32] and the detailed and pettifogging nature of many of the rules so made.[33] The way in which these complaints are expressed is strongly influenced by a conception of Parliament as the only legitimate law-maker under the United Kingdom constitution[34], but the same essential concerns find expression in systems which recognise in the executive a broad capacity of implementation of laws[35] or even an independent regulatory capacity.[36] Recent writings like those of Ost and Loschak resemble those of British public lawyers in the sense that they are likewise concerned about the amount of discretionary power detained by the executive as a result of its assumption of broadening economic and social responsibilities, and concerned also about the difficulty of judicial control of such power.[37] There is, however, an important difference of emphasis. British writers, obsessed by the sovereignty of Parliament, tended to see the problem as one of improper abnegation or delegation by Parliament of its responsibility for the enactment of substantive law. They wrote as though they would have had no complaint had Parliament itself laid down all the substantive rules needed to give effect to economic and social policy (the unstated premise being that if this were impossible – as proponents of discretion and delegated legislation claimed it was – the remedy was to drop the interventionist policies). Modern Continental writing attributes these effects to the combination of a much wider range of factors, which includes not only delegation (within as well as to the executive) and discretion[38] but also multiplication of laws and sources; instability of laws; diminution of the binding force of laws by reason of ineffective or selective enforcement, or the deliberate creation of laws without sanctions; and the use of laws not as binding

[30] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., by E. C. S Wade, 1950, London), pp. 187–196.

[31] S. A. de Smith, *Judicial Review of Administrative Action* (4th ed., 1980, London, by J. M. Evans), ch. 7.

[32] G. Hewart, *The New Despotism* (1929, London).

[33] The *locus classicus* is C. K. Allen, *Law and Orders* (3d ed., 1965, London).

[34] As to whether this is a correct deduction from sovereignty of Parliament doctrine, see T. C. Daintith, "Public Law and Economic Policy" (1974) *Journal of Business Law* 9, at pp. 11–16.

[35] See e.g. A. Jacquemin and B. Remiche, "Le pouvoir judiciaire entre l'opportunité et la légalité économiques", and F. Ost, "Entre jeu et providence, le juge des relations économiques", in A. Jacquemin and B. Remiche, eds., *Les magistratures économiques et la crise* (1984, Brussels) at pp. 9–36 and 37–90 (Belgium).

[36] See references at note 6, *supra.*

[37] Loschak, *supra* note 6, at p. 392; Ost, *supra* note 35, at pp. 54–58.

[38] Loschak, *ibid.* Farjat, *supra* note 6, at pp. 761–762.

rules but as negotiating counters.[39] This wider range of questions is now being addressed in Britain as well.[40]

Most of this recent writing is less concerned about the unbalancing of the constitution by inappropriate legislative practice, than with the changes in the character of law that are said to be occurring as a result of the attempt to use it for complex instrumental ends. These changes are not necessarily seen as bad. For Farjat they are the essence of "economic law", which he terms the antithesis of the liberal model of law;[41] Ost speaks of them as characterising "la justice normativetechnocratique", which he contrasts with "la justice légaliste-liberale".[42] For Teubner, however, such changes, at least if carried too far, will produce a deformation or even disintegration of law, by threatening its essential characteristic of normativity.[43] Following Luhmann[44] Teubner picks out as particularly worrying the volume and rapidity of change of legislation (Luhmann also makes a remarkably sweeping attack on legislation as "bad law" by reason of defective conceptualisation and drafting),[45] and the introduction of purposive criteria into law, placing on judges the burden of "controlling results".[46]

These anxieties – or at least those which are concerned with the qualities of instrumental law, as opposed to its very existence[47] – are expressed as if the function of instrumental law must necessarily be to alter, by commandment, the

[39] See references in notes 6 and 35 *supra*.

[40] Winkler, *supra* note 4; Daintith, "The Executive Power Today", in J. Jowell and D. Oliver, eds., *The Changing Constitution* (1985, Oxford) at pp. 174–197.

[41] Farjat, *supra* note 6, pp. 701–716.

[42] Ost, *supra* note 35, pp. 46–90.

[43] "Juridification" at pp. 25–27.

[44] N. Luhmann, *The Differentiation of Society* (1982 English ed., New York) ch. 6; "The Self-reproduction of Law and its Limits", in G. Teubner, ed., *Dilemmas of Law in the Welfare State* (1986, Berlin) at pp. 111–127.

[45] *The Differentiation of Society*, at p. 132.

[46] "Juridification" p. 26. This complaint, it may be said in passing, sounds odd to a public lawyer, particularly in the British context, where legislation regularly confers powers on the executive without any mention of the purposes for which those powers are to be exercised. In recent years courts have become readier to infer a legislative purpose in such cases from an examination of the statue as a whole, thus enabling them to check whether the relevant powers have in fact been exercised with this purpose: see e.g. Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997. Checking purpose in this way does not, of course, necessarily lead to checking results; where the law *does* explicitly ask for the checking of results (take, for example, the EEC Treaty provision forbidding "measures having an effect equivalent to a quantitative restriction on imports", article 30), the tendency of courts has been to develop rules of thumb by reference to which such measures may be recognised, without the necessity for a case-by-case examination of actual effects. (See, e.g. European Court of Justice, Case 8/74, Dassonville [1974] E. C. R. 837). There is no evidence that this has led either to the ineffectiveness of these provisions or to judically-induced distortions of trade. Perhaps this would be seen by Luhmann as a self-defence mechanism on the part of the legal system; the interesting thing is that it appears to work.

[47] See text at notes 23–25 *supra*.

operation of an economy which has been comprehensively organised by private law. The property rights, and liabilities, created and ordered by private law are taken to regulate all actual and potential economic relations, with the consequence that in a State which subscribes to the rule of law, any State policy seeking to influence the economic operations of the private sector – other than by pure exhortation – must operate by imposing changes in the private law set of property rights and liabilities. There are a number of familiar ways in which such changes may be effected: specific adjustments of property rights or civil liabilities (which affect only the content, not the scope of the private law system); new or revised criminal prohibitions, policed in the ordinary way, which restrict some property rights and may reinforce others; the installation of regulatory systems placing areas of economic life under State supervision and thus imposing detailed restrictions on the play of private law rights and duties therein. It is hard to trace clear boundaries between these categories, though some have tried.[48] What I would stress here is not the possible differences between the categories, but what links them: the actually or potentially[49] mandatory character of the legal dispositions involved. The assumption that economic life is exhaustively ordered by private law, to which the State is linked principally through its courts, thus furnishes an explanation of both the *need* to use law as an instrument of economic policy, and the mandatory *character* of that law.

If the use of law as an instrument of policy necessarily involves the unilateral alteration of private law rights, and the changing of the landscape of legal coercion, it is natural to expect it to assume a similar shape to the law (be it code or case law) which maintains those rights: to be general in coverage, precise in form, abstract in expression, individual in focus, long-standing in duration. When instrumental law fails to take this shape, holders of these expectations accuse it of deformity and talk of excessive burdening with detail,[50] of purely technical content,[51] of excessive mobility,[52] of lack of standards and conferment of arbitrary power,[53] of badly drafted legislation.[54] There is no doubt that much of the law through which the State alters private rights is open to criticism of this kind. The scope of "instrumental law" cannot, however, be properly restricted by reference to laws of this type. There exist, and have long existed, types of law which are not concerned with the alteration of private rights, but which are no less capable of being put to use as an instrument of policy. They stem not from the State's concern with the

[48] *E.g.* R. S. Summers, "The Technique Element in Law", (1981) 59 *California Law Review* 733.

[49] Potentially, in that changes to civil rights or liabilities may only operate with mandatory effect when invoked by one of the parties to a transaction. In many cases a party may be allowed by the other to contract out of a liability, or the liability may simply not be enforced.

[50] Teubner, "Juridification", at pp. 37–38.

[51] A. Supiot, "Délegalisation, normalisation et droit de travail", *Droit Social* 1984.296.

[52] Loschak, *supra* note 6.

[53] Hewart, *supra* note 32.

[54] Luhmann, *supra* note 45.

definition and protection of the legal position of *individuals*, but from the desire to provide formal recognition and protection for collective interests, in particular to interests of the whole collectivity as expressed through democratic or other representational procedures. Such interests might include the proper management of State funds and property and, more generally, of "public" goods in which private rights cannot (e.g. national defence) or do not (e.g., in the United Kingdom, roads) exist.[55] Such laws, whose mandatory effect is either indirect, or is confined to organs or individuals within the State apparatus, may assume shapes which differ considerably from that associated with laws for the maintenance or alteration of private rights.

Consider the case of laws relating to public finance; in particular, that of annual budget laws. Apart, perhaps, from the precision with which they are normally expressed, such laws do not stand up too well against the criteria mentioned earlier in the previous paragraph. They are neither general nor abstract, but express a variety of specific decisions; in their spending provisions, at least, they focus upon aggregates, not on individuals; they are of short duration. It is difficult to deny that they are law, however:[56] seen from the standpoint of the public administration, the spending limits they impose imply precise prohibitions – there is no lack of normativity. What accounts for their existence is a desire not to protect private rights, but to assure democratic control over the public purse by resort to solemn means. Their link with private rights is slender, being confined to the alteration, by their tax provisions, of the level or incidence of the taxes which private persons are legally obliged to pay to government. It is possible to assimilate those obligations to private law obligations insofar as they constitute one among a number of legal constraints on the free disposition of income and capital, others among which are furnished by rules of private law. Tax laws, are, however, distinctive in that they involve a purely bilateral "vertical" relationship between individual and State, as opposed to the "horizontal" relationships with other

[55] It is of course true that there may be a collective interest in the protection of individual rights. There is also an "individual" aspect to the task of managing public goods, in the sense that an element of management may consist in forbidding or controlling individual behaviour which damages those goods or the enjoyment of them by others (e.g. spying in relation to defence, dangerous driving in relation to roads). Lawyers tend, however, to emphasise the individual impact, rather than the collective inspiration, of such legal prohibitions, and they are here treated as examples of our "private rights" model.

[56] Note, though, that German doctrine might allow them to be "formal" law, but not law in a substantive sense, the latter referring only to measures authorising interference with the life, liberty or property of citizens. See M. Rheinstein, ed., *Max Weber on Law in Economy and Society* (1954, Cambridge, transl. by E. Shils and M. Rheinstein from M. Weber, *Wirtschaft und Gesellschaft* [2d ed., 1925]), at p. 47, n.14, explaining Weber's classification of the State budget as administrative rather than legislative in character. The distinction, or at least its use to mark off separate areas of activity for legislature and administration, was not absorbed by the Grundgesetz and is now not observed in practice, Parliament legislating regularly and in detail in such areas as state aids, temporary laws, "action programmes" and so on: see M. Fromont and A. Rieg, *Introduction au Droit Allemand*, tome 1 (Les fondements) (1977, Paris), at pp. 175–177.

private parties that are the normal material of private law.[57] On the spending side, however, private rights are neither reduced nor enlarged by the attribution of spending power to the executive, though the use of that power may well involve legal arrangements such as contracts, gifts or loans. The fact that the legal interface between annual budget laws and private legal rights is minimal in no way prevents such laws from having massive effects on economic activity, by way of a process of diffusion through the economy effected, almost entirely, through the transmission mechanism of private contracts. In this way taxes are passed on, distributed or absorbed; the effects of public expenditures are multiplied as the funds are disseminated through contract payments, contractors' wage payments, employee savings payments, building society investments, and so on. The understanding of these processes (though not necessarily of their legal articulation) permitted the transformation of the budget from an enactment of State "housekeeping" to an instrument of economic policy, but this instrumentalisation has involved no change in the structure of budget laws (though it has had important effects on the procedures through which they are discussed). By reason of this change of function, such laws may today be seen as a form of instrumental law which uses the private law relations of the economy without their unilateral alteration.

Budget, laws, which present, by their form, the most striking contrast with laws altering private rights, cannot simply be dismissed as a quirk of Parliamentary procedure, a fortuitous borrowing of the clothes of the law for essentially financial decision-making. Were this so, new names would need to be found for a great part of what today fills the statute books. Budget laws are, after all, only the most general and short-term sub-class within a class of laws whose function it is to order the management and distribution of the patrimony of the State: its financial wealth, its land, goods and manpower and the public services it provides therewith. These are the laws that provide for grants and subsidies to farmers and to industrialists; that organise State systems for the provision of health care, education, professional training, defence; that constitute and control State enterprises; that regulate the award of social security and social assistance payments. Such laws are explained not by the need to alter existing private rights – they do not do so – but by the need to furnish a formal and binding organisation for the performance of public functions. They may create new private rights vis-à-vis government, in the way that tax laws create new private duties, but they are not to be explained by reference to such creation. Social security payments, for example, are normally available as of right in the United Kingdom, but it is extremely rare for subsidy payments to industry and agriculture to be other than wholly discretionary. Yet the legal provisions regulating the award of such subsidy payments, particularly in the agricultural sector, are almost as detailed as those for social security. This ceases to be puzzling when it is realised that the function of the law here is not to ensure that payments are made to those who qualify for them (the interest of the government in ensuring the success of the policy of which the payments are an instrument is thought to be sufficient for that), but rather to ensure that payments

[57] Third-party involvement in tax administration (e.g. of employers in PAYE) does not belie this distinction.

are not made to those who do not qualify for them. There may well be a case for extending, in countries such as the United Kingdom or the United States, the range of payments, goods or services obtainable as of right, on a variety of grounds such as institutionalised reliance, equality of opportunity, and so on.[58] The award of such rights would change the content and function of such legislation; but not the reasons for its existence in the first place. The key to these reasons remains the collective interest in the correct, regular and efficient organisation of the tasks of the State.

This interest, of course, exists independently of any particular line of government economic policy. So far as the constitutional rules which underpin this democratic preference require, rules of law will be promulgated to express, or authorise, schemes of government spending, to prescribe the structure of public bodies and to provide for their mode of operation, whatever the importance of such measures to government policy objectives. One may therefore speak, as in relation to the law affecting private rights, of the instrumentalisation of an independently-existing body of law. The functions of that body of law are, however, different, reflecting as it does the need for collective control of the non-coercive action of the State as opposed to that for protection of the individual against its coercive action.

By reason of these differences, what I will here call "collective interest" law could offer a rather different set of standards for judging legal developments connected with economic policy. The presumptions about the impersonality, dynamism and circumstantial variety of market relations which have helped to shape the preferences for generality, abstractness and stability as characteristics of private law rules apply with much less force to the highly organised public sector. Moreover, where the legal rights of individuals are not directly affected, the rationale for formulating all legal rules in terms of the position and conduct of individuals (whether these be natural or legal persons) is greatly weakened, and legal rules expressed in aggregative terms (budget ceilings, etc.) can perform a legitimate function. At the same time, the concern of collective interest law with the structure, competences and behaviour of organisations in the public sector still demands that it share the capacity of private law for the effective resolution of conflict, and hence be sufficiently precise to afford guidance to those involved in this process. It must be normative and not just descriptive: but this does not mean that to be effective it need look anything like private law. An illustration, from United Kingdom law relating to public enterprise, may help to make the point.

When transport was nationalised in 1947, the industry was placed in the hands of a statutory public corporation, the British Transport Commission. The Transport Act 1947, its constitutive statute (which was of course neither abstract nor general, being concerned solely with the Commission and its functions) provided that it should be

[58] As argued by C. Reich, "The New Property", (1964) 73 *Yale Law Journal* 733. For a critical review of the case, in the context of the extension of fourteenth amendment protection in the United States, see S. Williams, "Liberty and Property: The Problem of Government Benefits" (1983) 12 *Journal of Legal Studies* 3.

> the general duty of the Commission so to exercise their powers under this Act as to provide, or secure or promote the provision of, an efficient, adequate, economical and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods with due regard for safety of operation; and for that purpose it shall be the duty of the Commission to take such steps as they consider necessary for extending and improving the transport and port facilities within Great Britain in such manner as to provide most efficiently and conveniently for the needs of the public, agriculture, commerce and industry.[59]

Here, it appears, is purposive law with a vengeance. Hearing across the years, perhaps, the pre-echo of modern concern about the ability of the judge to engage in the sort of controlling of results that appears to be envisaged by such legislation, Parliament went on to provide that nothing in the foregoing provision should be

> construed as imposing on the Commission, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court or tribunal to which they would not otherwise be subject.[60]

In *Fife C. C.* v. *Railway Executive* [61] a Scottish court held that this exclusionary provision meant exactly what it said, so that the court could not entertain a complaint on behalf of railway users that certain actions of the Commisssion were inconsistent with this statutory duty. So what is the nature of the Commission's statutory duty? Is this merely "soft", sanctionless law? or law with a purely symbolic function? Private law paradigms make it hard to think otherwise. In fact, provisions of this type, which are to be found in all public enterprise statutes – sometimes with, sometimes without, an express judicial ouster clause – have an important legal function in regulating conflicts between the enterprises and the central government departments which enjoy legal powers of "general direction" of their activities.[62] The provisions operate as standards by reference to which public corporations may seek to resist formal directions or, more often, informal pressures, which they see as inconsistent with the proper discharge of their functions. In elevating to the status of law the targets and orientations of the public enterprise, they legally restrict the ability of government to determine policy through the exercise of its directive power. Even in this context, the courts have not been called upon, but on several occasions public corporations have pressed their resistance to the point of requiring government to secure the enactment of new legislation to authorise changes which might otherwise have been seen as in conflict with these statutory duties.[63]

[59] S. 3(1). The Act was repealed and replaced by the Transport Act 1962, installing a new organisational structure, but one regulated according to the same legal principles.

[60] S. 3(5).

[61] 1951 S. C. 499.

[62] E.g Transport Act 1947, s. 4(1): "The Minister may, after consultation with the Commission, give to the Commission directions of a general character as to the exercise and performance by the Commission of their functions in relation to matters which appear to him to affect the national interest, and the Commission shall give effect to any such directions." There are many other "direction" provisions in similar form.

[63] Examples include the Civil Aviation (Declaratory Provisions) Act 1971 arising out of

As between powerful actors, therefore, this kind of law operates to determine the space within which highly political arguments about the discharge of economic functions will take place, and to require that if the boundaries of that space are to be altered without the consent of one of the participants, this be done in an overt and solemn way. The fact that this can be effectively done by law which is at once vague, purposive and not suitable for judicial enforcement[64] suggests that one needs, in order to judge fairly the quality of legal rules, to develop a second set of criteria, based on the organisational functions of collective interest law. Just what such criteria might be I am not presently equipped to indicate in detail, but their *general* inspiration, given the collective and democratic origins of this body of law, might not be very different from the demand for public law to guarantee and structure a more participatory democracy which is today voiced by British critics of "traditional" public law scholarship.[65] The function of such criteria should not, in my view, be to replace the set derived from the private law model. Such a claim would imply an absolute pre-eminence of State organisation, as a basis for economic relations, over economic actor rights. This seems an unattractive goal; we might feel unhappy if the above-quoted terminology of the Transport Act 1947,[66] and no more, applied to regulate the activities of a State body with *coercive* powers over the property of individuals. West European States do not seem to be moving in this direction, and even in Eastern Europe, where the idea has been enthusiastically embraced, the private law foundations of economic activity have in most places survived the switch to socialist ownership. Despite the challenge of a radical conception of economic law as a mass of legal means attached to economic-technological processes, wholly internal to a comprehensive mechanics of State organisation of the economy ("staatliche Leistungspyramide"),[67] private law concepts have continued to furnish criteria for the design of economic law.[68]

In evaluating instrumental law today, therefore, there should be a place for both sets of criteria. This is not simply to say that some laws alter private rights and

governmental attempts to transfer route licences from the nationalised airlines to private competitors; and the Oil and Gas (Enterprise) Act 1982, ss.9–11, arising, in part, out of attempts to divest the British Gas Corporation of its oil interests.

[64] F. Cassese, "Public Enterprises and Economic Policy: A Comment", below p. 238, seems less optimistic about the effectiveness of the constitutive statutes of public enterprise, but is there treating such statutes only as a potential vehicle of governmental control, not as a means of structuring, and hence constraining, it. See also p. 240.

[65] See e.g. J. P. W. B. McAuslan, "Administrative Law, Collective Consumption and Judicial Policy", (1983) 46 *Modern Law Review* 1; T. Prosser, "Towards a Critical Public Law", (1982) 9 *Journal of Law and Society* 1; A. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship", (1985) 48 *Modern Law Review* 293.

[66] See text at note 59 *supra*.

[67] Eorsi, *supra*, note 22, pp. 213–225. Note how Eorsi's comments on the "thinning" of law in the Leistungspyramide model (pp. 223–224) ("which might prove to be a healthy trend") parallel Luhmann's anticipations of the "de-differentiation" of law (*op.cit.* note 45 *supra*, p. 135).

[68] For numerous examples see J. N. Hazard, "Socialism, Legalisation and Delegalisation", below, pp. 267–279.

should therefore be judged according to the "private rights" set of criteria, while others do not and should therefore be judged according to the collective interest set. Life is more complex than that. Over the past hundred years or so in Western Europe the State has steadily become a more important participant in the economy, operating as often as not according to the forms of private enterprise; at the same time, through concentration of economic power, the economy has become ever less atomistic and ever more "organised".[69] In consequence the difference between large private organisations and State organisations, both in terms of internal structure and of relations with other economic actors, is sometimes hard to perceive,[70] and their relations with each other are hard to classify in terms of any public/private dichotomy.[71] This process of assimilation and interpenetration of public and private suggests at least that it may sometimes be appropriate for laws changing existing private rights to be structured according to collective interest criteria, and for laws which do not have this effect to meet the standards of the private rights model.[72]

In order, therefore, to give sensible answers to the sorts of questions asked in the debate about instrumental law, such as whether modern economic management can be structured and controlled by law, or whether law is being dangerously deformed by the attempt to adjust its structure to the task of economic regulation, we need to undertake an analysis which differentiates between types of law, explores their characteristics when used in an instrumental fashion, and relates that use to the characteristics of economic policy itself. We cannot assume that economic policy will necessarily be implemented through law at all, still less that that law will be "regulatory" law.[73] Such an analysis ought to be such as to enable us to explain when and why law is used as a policy instrument, and why it takes on particular shapes (in terms of detail, source, duration and so on) in response to given policy stimuli. If we understand why the instrumental law of the economy takes the shape it does, we might be in a position to say whether there is, in fact, inadequate legal control or serious instrumental deformation; and if so, whether this can be cured by adopting different alternatives among available legal choices, or only by changes in the substance or style of policy itself.

III. The Design of the Inquiry

To answer the initial question – what forms of law are used for the implementation of economic policy, and why? – in a way which has any pretensions to accuracy, requires a first-hand and comprehensive study of relevant legal materials. Secondary sources, though more manageable, are likely to date quickly and to distort

[69] Farjat, *supra* note 6, *passim*.

[70] Cf. M. Horwitz, "The History of the Public/Private Distinction", (1982) 130 *University of Pennsylvania Law Review* 1423.

[71] G. Poggi, *The Development of the Modern State* (1978, London), ch. VI.

[72] The scope for, and means for the exercise of, private economic power are extensively explored in Bercusson, below.

[73] Cf. Teubner, ("Juridification", pp. 36–37).

perceptions by concentrating on problematical cases. A first-hand study, however, poses serious problems of selection of material and method of working. Our approach to questions of selection has effectively been determined as a consequence of the decision to pursue a comparative approach, and in this section I look first at its promise and constraints. As to method, it is implicit in the foregoing argument that a scheme of analysis and classification of legal measures must be developed, by reference to which the incidence of given types of law can be measured, and the incidence of significant characteristics (stability, source, sanctions etc.) likewise assessed. These observations, however, need to be made by reference to the substance and style of the economic policies to which the legal measures are instrumental. So that this may be done in a systematic way, economic policy itself must be broken down into a series of component elements to which relevant legal measures can be directly or indirectly related. These processes of analysis are described in the succeeding parts of this section.

A. The Comparative Approach

I have already noted[74] the suspicion that perhaps there do not exist any general problems in the use of law as an instrument of policy, only a series of local difficulties occasioned by specific characteristics of national legal systems. Our investigation tests this hypothesis, and even if it shows that similar problems in legal implementation occur in several countries, may also permit the identification of ways in which differences in national systems affect the use or shape of instrumental law. Such comparative findings have at least two kinds of practical applications.

First, comparative findings, by clarifying the relationship between legal system characteristics and features of instrumental law, can indicate what is involved, in terms of adaptations to the system, in securing "improved" legal implementation of policy.[75] "Improvement" may be in terms of effectiveness (though it should immediately be acknowledged that unambiguous indicia of effectiveness are hard to find in the economic policy sphere), or of the reduction or elimination of the various disfigurements of instrumental law to which the commentators have pointed. Some such improvements may be shown to be easy, others to require the displacement of deeply enracinated system values.

Secondly, a comparative approach to the legal implementation of economic policy may make specific contributions to an understanding of the possibilities and difficulties of the European Community enterprise of policy harmonisation or convergence in the economic field. Particularly by illuminating the complex relationship between laws and legal structures on the one hand, and economic policy implementation on the other, and showing to what extent inconsistent national implementation choices are shaped by ephemeral or incidental factors on the one hand, and by ingrained and hard-to-alter legal structures on the other, a comparative inquiry may suggest both promising directions for harmonisation

[74] Above, pp. 4–5.
[75] See Mortelmans, below, pp. 317–320.

(towards the most deeply enracinated positions), and areas where harmonisation is unlikely to succeed. It is noteworthy that in one key area, that of energy policy, the Community has already abandoned harmonisation on the ground that there is too much diversity in the relevant situations of the Member States.[76] Investigation along the lines here described has shown that an important element of that diversity is expressed through the relevant legal structures of the Member States.[77]

While offering these advantages, the comparative approach also imposes constraints. Most important of these is the need to ensure that the variables compared have adequate explanatory power. If we assemble a cross-national set of legislative enactments at random and trace each back to its policy origins, we encounter differences – of political, economic and legal circumstances – at every step of the way. Not least among these will be differences of perception among governments as to *what* their problems are, as distinct from how to solve them. As we are primarily concerned here with the instrumental functions of law, examination of differences in problem situations is not likely to help us much. We seek, therefore, to get rid of this element of diversity by concentrating the investigation on some restricted *fields of policy,* in which the States whose law is subject to comparison see their problems as similar and are pursuing similar policy objectives under constraints which, if not the same, differ in well-known and -understood ways. For this reason also the starting point must be fields of policy and not fields of law: the general recognition of a substantive field of law, such as social security law or competition law, carries no guarantee that States will confront similar problem situations, or will pursue similar policy objectives through their instrumentalisation of law in these fields.[78]

The choice of policy fields obviously has to be related to the choice of countries for inclusion in the comparison. Located as we are, it seems natural to focus the inquiry within the framework of the European Community: the question then becomes that of how many countries one needs to examine. The four major countries, France, Germany, Italy and the United Kingdom, not only provide an irreducible minimum for a study which would have some significance from the point of view of Community policy: earlier studies have also shown that these countries exhibit interesting contrasts in their approaches to the choice of policy instruments in the economic sphere, the relative dirigisme of France and Italy contrasting with a more relaxed or market-oriented approach in Germany and the United Kingdom,[79] so that a study of this small group of countries should ensure that a reasonable range of policy experience is examined. All this experience,

[76] EC Commission, The *Development of an Energy Strategy for the Community* (1981), COM (81)540 final.

[77] T. C. Daintith and L. Hancher, *Energy Strategy in Europe: The Legal Framework* (1986, Berlin).

[78] K. Hopt, "Restrictive Trade Practices and Juridification: A Comparative Law Study" in G. Teubner ed. *supra* note 5 at pp. 291–332.

[79] P. VerLoren van Themaat, *Economic Law of the Member States of the European Communities in an Economic and Monetary Union: An Interim Report* (1974, Luxembourg), ch. 2.

however, may be shaped by the basically mixed character of their economies. There seems to be no reason why the study should not also offer insights about whether the debate about instrumental law is in some way tied to the circumstances of mixed economies or whether it may also be relevant to socialist economies, as is in fact suggested by the long-running arguments in Eastern Europe about the proper structure and scope of "economic law".[80] The scope of the inquiry has therefore been extended to include Hungary, whose relatively open system of economic management suggested that it may present the fewest problems of non-comparable variables to which I have already alluded.

Relating countries to policy areas, two such areas emerge as offering the strongest possibilities for useful comparison: energy policy, and manpower policy, in each case, over the period since 1973. The energy crisis that occurred in late 1973 created, for all European Community countries, a profound "energy shock", and caused a major reappraisal of energy policies hitherto in force (or of the absence of such policies) and intensive co-ordination activities among consumer States, both in the context of the Community and of the Organisation for Economic Co-operation and Development (OECD). There consequently exists a high degree of similarity between the policy objectives pursued by Community Member States since 1973 for the general purpose of reducing oil import dependence, notwithstanding their significantly different energy endowments and energy use patterns. Hungary, though cushioned from the violent swings of the world oil market by the availability of Soviet supplies, has also adopted similar energy policy objectives. In the context of an inquiry which thus has energy policy as an important focus, it seems sensible to add, as a representative of the smaller Community countries, the Netherlands, a major energy producer which, in the period under review, was also encountering re-adaptation problems as a result of the fast depletion of its domestic resources of natural gas.

The second area is that of manpower policy. Here again, the recession, triggered by the oil crisis has forced a concentration of attention by policy-makers on a fairly coherent set of objectives which presently vary little from place to place and are pursued with similar degrees of intensity; creation and maintenance of jobs, and manpower adjustment policies which smooth the working of the labour market and facilitate its adjustment to changes in the international division of labour. Some comparable policies, it is clear, are pursued in Hungary, though against an economic and social background which is more distinctive than was the case in the energy policy field. Despite this problem, manpower policy is an attractive object of investigation, not least because it presents a major economic contrast with energy policy. Energy policy may be described as sectoral in the sense that much policy activity is directed towards the energy industries themselves. Its instruments, and even its objectives, may thus be strongly shaped by the characteristics of that particular sector. Even though other areas of energy policy – energy conservation, for example – affect the whole economic population, it is desirable to select, as a second policy area, one which is cross-sectoral in character

[80] Eorsi, *supra* note 22, at pp. 213–225 and see the reports from East European countries in G. Rinck, ed., *Begriff und Prinzipien des Wirtschaftsrechts* (1971, Frankfurt and Berlin).

in order to have a fair representation of types of economic policy within the inquiry.

Apart from this coverage of both sectoral and cross-sectoral policy, there is no sense in which the fields chosen are designed to be *representative* of the whole of a State's economic policy activity. Comparability, not representativity, is the key criterion. The search for comparability may, indeed, have led us to policy areas that are a little unusual, in that the pressures dictating common approaches to the problems have been closely associated (at least in the case of the five Community Member States) with a sense of a *crisis,* experienced on a *regional scale;* and this cannot be said for most national policy areas. The sense of crisis under which government has acted in these fields should however strengthen rather than weaken the significance of our comparative findings on the way in which law has been used, in that one might expect governmental attention to the niceties of proper relationships between law and policy to be at its lowest at such times. Solutions developed here to problems in the policy/law relationship should be capable of generalisation to areas of less rapid policy change.

B. Policy Objectives

So far I have simply defined economic policy as "purposeful activity on the part of central government whose primary objective is the improvement of economic welfare"[81] and have specified a concern with energy and manpower as fields of policy. Some further analysis and specification is necessary if we are to be able to explain the incidence and shape of instrumental law by reference to the characteristics of policy, and to determine with precision exactly what examples of instrumental law we need to look at.

It is implicit in what I have already said about policy fields that we are operating on the basis of a distinction between the ends and the means of economic policy and are taking the ends as given. We do not seek to criticise them here nor to explain how they are adopted or amended. This is not to deny the existence of organic links between policy implementation and the possible reformulation of policy ends, as well as of policy means, on the basis, *inter alia,* of feedback from affected actors.[82] The ability to make contributions to this feedback process may, indeed, be a relevant criterion of assesment of instrumental law, but is not one that we have been able to apply systematically in the course of our investigation. The distinction does, however, imply that we are treating the *ends* of economic policy as being extra-legally determined. This is a conventional instrumentalist position, but it is criticised by Summers on the ground that law may itself be a source and definer of the very goals which it exists, as a means, to service.[83] Obviously law may be used to express, and thereby perhaps to solemnise, policy goals, as my

[81] Above, p. 6.

[82] For an example within our field of investigation see Hancher, below p. 230.

[83] R. S. Summers, *Instrumentalism and American Legal Theory* (1982, Ithaca and London), pp. 60–61, 74–78.

example from the United Kingdom Transport Act shows,[84] but if it could *determine* them the analysis here would be defective in so far as it ignored the possibility of legal system influences on the choice of policy goals (which we shall be calling "objectives"), no less than on means to attain them. The difficulty raised by Summers is, however, essentially semantic, in that he treats as the "immediate goal" of a law compliance with its own prescriptions,[85] a usage which simply forces us back to look for the higher-level goals – in whose formation legal influence is hard if not impossible to discern – which are capable of explaining the content of those prescriptions, and which are the subject of our concern here. One might also ask, however, what if anything it can mean to say that a law (as opposed to a legislator, an administrator, or other user of the law) "has a goal":[86] one should certainly not assume that any of these people actually desires the situation which would come about as the result of the perfect implementation of the law.[87]

In order, therefore, to define our field of inquiry, we begin by identifying two sets of policy objectives, in the energy and manpower sectors respectively, which (subject to certain qualifications for Hungary) all States in our study appear to have pursued over the ten-year period starting in 1973. In energy the main selected objectives are short-term management of disturbances in energy supply,[88] alteration of the structure of energy demand (through conservation and changes in consumption patterns), and alteration of the structure of supplies, through development of domestic (especially nuclear), and diversification of overseas, supplies.[89] In manpower policy we distinguish the objectives of job maintenance, job creation, and manpower adjustment through the efficient movement of workers into, within and out of the labour market.[90] These objectives, further broken down for convenience of investigation, are set out in tabular form below.[91]

[84] Above, pp. 16–18. Other examples are furnished by the expression of national planning objectives in the form of legislation, as in Hungary, see Harmathy, below, pp. 245–266, and by the enunciation of general economic principles in the German Stabilitätsgesetz of 1967.

[85] Summers, *supra* note 83, at pp. 75–76.

[86] *Ibid.*, pp. 76–77.

[87] See further below, p. 30.

[88] See Council Directive 73/238/EEC, O.J. 1973, L 228/1. In Hungary the availability throughout the 1970s of Soviet energy supplies made the problem of short-term market disturbance much less important than in the West: see Hancher, Comparative Report on the Management of Short-term Energy Disturbances (1984) pp. 4–6, on file at EUI.

[89] See EEC Council Resolutions of September 17, 1974, O.J. 1975, C 153/1, and May,? 1980, O.J. 1980, C 149/1. For a systematic substantive treatment of the policies of the five EC Member States here in question, arranged according to this schema, see Daintith and Hancher, *supra* note 77, chapter 5.

[90] See O. E. C. D., *Ministers of Labour and the Problems of Employment* (1976, Paris), vol. I, pp. 85–88 (Employment, Manpower Policy Measures: Appendix to the Recommendation of the Council on a General Employment and Manpower Policy). Again, higher levels of employment in Hungary have meant a different emphasis, with objectives in the job maintenance and creation areas being related more precisely to the needs of specific groups.

[91] See Methodological Note, pp. 47–50.

Governmental pursuit of such objectives is attested by their adhesion to collective policy statements,[92] by explicit commitments in policy and planning documents,[93] and in some cases by inference from the nature of implementation measures actually adopted.

C. Legal Measures and Their Analysis

Settling this list of detailed policy objectives in the two fields has enabled us to proceed to the identification of the legal and other formal measures adopted by States for the achievement of the objectives over the period covered by our investigation (1973–82), or adopted previously and in active operation during the period. These measures provide the basic data for analysis and comparison. Analysis has been conducted according to a standard scheme with six main elements: the general or specific character of the measure; its duration; its source in the legal hierarchy (broadly conceived to include not only Parliament, government, Ministers etc., but also courts, regional or local authorities, the European Communities, as well as non-legal measures); its unilateral or bilateral character; its content (in terms of whether it is purely declaratory, whether it creates duties and how it sanctions them, whether it creates powers, transfers funds or property etc.); and finally the procedures associated with its operation. A full table of the headings and subheadings in the analysis is set out below.[94] Together, these headings are designed to pick up most of the characteristics which have been said to be sensitive from the point of view of the debates on the instrumental role of law.

On the basis of this analysis we are able to say what is the incidence of general as against specific legal measures, of short-term as against long-term ones, what is the frequency of amendment and substitution of legal measures (at least over our rather restricted period of inquiry), what is the incidence of "high-source" (Parliament) as against "low-source" (departments, Ministers) measures, and so on; and to compare these profiles of legalisation as between one country and another.

D. Policy Instruments

This information has considerable intrinsic value in so far as it provides up-to-date empirical evidence to support or refute the various impressionistic descriptions of trends in instrumental law which have fed the debates on this subject. By itself, however, it can do little to explain why instrumental legislation should assume particular forms or why particular sources should be favoured, nor why such preferences should vary from one country to another. To obtain such explanations we need to introduce into our analysis a typology of *means* of economic policy (here termed economic policy *instruments*). Such instruments form the link

[92] As cited in notes 89 and 90 *supra*.

[93] For a collection of such commitments relating to energy, see Daintith and Hancher, *supra* note 77, ch. 3 and appendix 3.

[94] See Methodological Note, below, pp. 50–54.

between the objectives of economic policy, on the one hand, and the specific legal measures of implementation, on the other. Only by introducing some such intermediate concept can we take account of the fact that the very existence of *legal* measures of implementation of economic policy results not from economic policy alone but from the fact of pursuing such a policy *within the framework of a given legal system* – that framework being understood to include both the constellation of legally protected private rights, duties and freedoms, and a constitutional structure for the exercise of all State power. If we are to understand how such a legal system determines the incidence of legal, as opposed to non-legal, implementation of policy, and how it shapes the relevant legal measures, we need some non-legal standard by reference to which we may observe and compare national variations in legal implementation. This we do by making each legal measure appear as the operationalisation, according to the demands of the national legal system, of one of a range of possible instruments of policy.

A variety of typologies of policy instruments have been offered, both by economists[95] and by political scientists.[96] Mayntz's classification, in particular, into regulative norms, financial transfers and incentives, public provision, procedural regulation, and persuasion, has considerable intuitive appeal.[97] Rather than simply adopt it, however, it seems desirable to attempt to trace out the steps through which a typology of instruments can be derived *a priori*, without relying on inferring a categorisation from examination of the characteristics of implementing measures: we need to avoid the circularity implicit in defining instruments by reference to legal measures and then comparing measures by reference to instruments. We may then check our results against the categories already proposed by others.

The first step is to consider the nature of the economic objectives which form our starting point. Kirschen has defined such objectives as "the economic translations of political aims into concepts which can be given some quantification".[98] While he had in mind objectives of a more general character than those we have picked out here, quantifiability remains a key characteristic even of such highly specific objectives as development of domestic energy supplies, or job maintenance or creation. Performance in relation to these objectives is likewise quantitatively assessed. Progress in job maintenance or creation will obviously be measured by the number of jobs created or maintained; in domestic energy development, by quantities of production or reserves. Even for objectives which might seem harder to quantify, such as diversification of imported energy supplies or

[95] The most elaborate is perhaps that of Kirschen, developed in E. S. Kirschen et al., *Economic Policy in our Time* (3 vols., 1964, Amsterdam), and in E. S. Kirschen, ed., *Economic Policies Compared: West and East* (2 vols., 1974, Amsterdam). See also VerLoren van Themaat, *supra* note 79, using a classification derived from Zijlstra.

[96] R. Mayntz, "The Conditions of Effective Public Policy: A New Challenge for Policy Analysis" (1983) 11 *Policy and Politics* 123; C. Hood, *The Tools of Government* (1983, London).

[97] Mayntz, *supra* note 96, pp. 127–128.

[98] See *Economic Policy in Our Time* (1964), vol. 1 at p. 17.

efficient manpower adjustment, some numerical measures are normally available and used, such as the number of suppliers of a given energy source and the proportion of needs met by the largest supplier; or for manpower, the composition of the labour force, particularly by reference to age, the length of waiting periods between jobs, and so on. Non-quantifiable elements are in most cases relegated to a secondary position.

Without too much distortion, therefore, one can treat the essence of economic policy as being the attempt by government to influence the movement of a range of economic quantities or indicators, by promoting movement in a preferred direction or toward specified targets. Though the popular vocabulary of economic management suggests the capacity of government, by itself, to secure such results – we speak of government "creating jobs", "restricting imports", "boosting investment" – its ability to do this by direct action is in fact restricted by reference to the economic resources and activities which it has under its immediate control. Outside this area its means of influencing economic quantities must be indirect, in the sense that they operate on the actions and decisions of persons outside the government, whose aggregated results determine the level of the relevant economic indicators. This distinction between direct and indirect action forms the first element of an instrument typology.

Governmental self-management is clearly an instrument of policy in so far as government uses its direct control over its own finances, labour, property, equipment and so on for the purpose of advancing policy objectives. Government may, for example, be able to make a worthwhile contribution to energy saving by ordering a reduction of working temperatures in its offices, schools and barracks. The size of the contribution will depend on the extent to which central government *directly* controls the provision of public sector activities; where there has been diffusion of responsibility for such activities to separately-constituted bodies, even within the public sector, such changes may be beyond the reach of government managerial power, and may require the use of the same kinds of instruments as are used to affect the behaviour of actors in the private sector. The public character of the bodies may, however, lead to those instruments being operationalised in such cases in a distinctive way. At the same time non-government public sector bodies may be made the object of legal (or non-legal) measures simply in order that they may serve as a transmission mechanism, through which the aim of affecting the behaviour of private sector actors is attained. The position of public sector banks and credit institutions offers an example of this type. This means that delineation of the instrumental role of the public sector as a whole is a highly complex matter.[99] On balance it seems best to take, as an instrument-type, the whole phenomenon of "public sector management", understood as comprising both governmental self-management in the strict sense of direct, hierarchical control, and the distinctive application of policy instruments to public sector bodies outside central government.

[99] See Hancher, below.

Outside the scope of its managerial powers, government action in pursuit of economic policy goals involves attempting to change other people's behaviour,[100] the "others", in the public sector as well as in the private, who charge prices, pay wages, export and import goods, invest capital, borrow and lend money, make take-over bids, purchase goods and services. It is their actions which in aggregate or on average make up the greatest part of all the quantities which government is trying to manipulate; their actions, therefore, which must be made different from what they would have been in the absence of the policy. More precisely, *some* of those actions, *some* of that behaviour, must be different: zero and 100 per cent are not necessarily the only quantities that government aims at. A government that wants a rising birthrate for economic reasons may not wish every wife to bear an extra child. Government would appear to possess a bewildering variety of means for use in this enterprise, ranging from criminal sanctions to mentions in the Honours List, but it is possible to order their discussion and inter-relation by resort to two reference concepts: of the *costs* of behaviour, and of the *resources* of government.

All behaviour choices involve a weighing of the costs of the alternative courses of action, measured not just in money but also in terms of time, of satisfactions foregone, of self-esteem, of reputation and so on. Government's aim is that such choices should, so far as is possible and necessary, be compatible with its policy objectives. This involves changing choices, either by showing the decision-makers that they are misguided as to their own balance of costs, or by altering those balances. The first approach will be realised simply by the presentation of appropriate information to those confronted with choices – as by indicating to householders how much in heating bills they may save by installing roof insulation. To change the relative costs of different choices requires stronger measures, which may be aimed either at increasing the costs of the choices which are incompatible with the government's programme – as by fining builders who do not install roof insulation – or reducing the costs of choices which are compatible with it – as by offering subsidies to householders who do install insulation. All government measures which are addressed to third parties, whether legal or non-legal, formal or informal, can be analysed in terms of this relative cost concept. To be sure, the kinds of costs imposed or relieved will vary: a criminal prohibition backed by imprisonment creates costs in terms of loss of liberty and reputation, while heavy taxes impose money costs. This difference in nature does not, however, make them non-comparable. In their daily decision-making economic actors balance bundles of costs including these different elements; they may discount such costs by reference to the likelihood of detection, prosecution and conviction for a criminal offence no less than they may calculate the likelihood of successful evasion of taxes.

[100] With the arguable exception, on the margins of our subject, of social welfare policy for such ends as the relief of poverty, where transfer payments by government may *in themselves* meet the policy goal, without any need for behavioural change on the part of recipients. But even social assistance schemes usually have *some* elements designed to affect behaviour, to encourage obtaining of work, retraining, etc.

Viewing policy implementation, including legal implementation, in terms of the relative costs of economic actors' decisions helps to elucidate two important points, which tend to be disguised by differences in legal technique.

First, it is implicit in the relative costs concept that the individual decision-maker always retains a choice as to whether he will align his conduct with the demands of government policy, no matter what instrument government deploys. One may imagine – though it is much harder actually to find – situations in which the physical control and supervision exercised by governmental agents is so tight as to eliminate even the possibility of non-compliance, so that choice is absent and non-compliance beyond price. The rarity of such cases, however, serves essentially to emphasise the element of choice existing in all normal cases, even in the face of express prohibitions. The point is worth stressing, not least because there is a tendency among writers who set out to assess the costs and benefits of using different kinds of instruments, in fields such as pollution policy, to assume that people always obey mandatory legal rules.[101] On this basis regulatory standards are argued to be inflexible and productive of sub-optimal results, in contrast to "market-type" instruments such as taxes, subsidies, or tradeable pollution entitlements. These are said to leave sufficient discretion to the individual to permit him to adjust his activity in a way which is capable of achieving the best available balance of compliance costs and policy benefits. Behaviour in response to mandatory rules is in fact much more complex than this model allows for: in the economic sphere, at least, calculated and negotiated non-compliance are common phenomena, and are based on the same kind of cost-benefit analysis as is explicitly demanded by the use of "market-type" instruments.[102] There may still be very good reasons for preferring, in a given case, a tax-based to a regulation-based scheme (for example, greater economic transparency or the reduction of administrative discretion): but the evaluation must take account of the individual's "discretion to disobey",[103] as well as the capacity of regulatory schemes to offer more satisfying protection to certain kinds of non-economic values than can taxation.[104]

[101] For an example see S. Breyer, "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform", (1979) 92 *Harvard Law Review* 549, at 581: "The very fact that taxes do not prohibit an activity, or suppress a product *totally,* means that those with special needs and willingness to pay may obtain it. Taxes thus lessen the risk, present with standard setting, of working serious harm in an unknown special case."

[102] For some evidence in a United Kingdom context see D. Storey, "An Economic Appraisal of the Legal and Administrative Aspects of Water Pollution Control in England and Wales", in T. O'Riordan and G. D'Arce, ed., *Progress in Resource Management and Environmental Planning,* vol. 1 (1979, New York), ch. 9. For a contrary view of the general point made here see R. Cooter, "Prices and Sanctions", (1984) 84 *Columbia L. Rev.* 1523.

[103] The phrase, but not the thought, is borrowed from M. R. Kadish and S. H. Kadish, *Discretion to Disobey: a study of Lawful Departures from Legal Rules* (1973, Stanford). For the contrary view see Jarass, below, p. 81. As he points out, in the fields covered by our investigation the practical significance of this classificatory issue is limited.

[104] See Stewart, below, pp. 113–115.

Second, and in some sense a corollary to the above point, the idea that all government measures work by changing relative costs reminds us of the essential imprecision of much government action. If government is dealing with small numbers of actors, it may acquire the necessary information about the effect of proposed measures by such means as bilateral discussion and negotiation, and operate with some degree of precision. The attractiveness of working in this way is an obvious reason for government encouragement of private interest associations. But many areas of economic life obstinately remain as unorganised, large-number situations. Here government moves in a fog: it cannot know the individual cost balances of the large numbers of economic actors it addresses, and can only judge the likely impact of its measures by observation of the effects of past measures, by sampling, and other aggregative techniques. In consequence it is unrealistic for government to think in terms of obtaining precise results from its measures, and in fact it seldom does so; yet if it uses legal measures shaped by the private rights model – such as criminally sanctioned prohibitions – precise and uncompromising drafting will be required. Thus what appears from a reading of the statute book or the Official Gazette to be a clear and unqualified prohibitory measure may from the standpoint of government policy be the means of effecting a reduction of uncertain extent in the incidence of the prohibited behaviour, an element of an implementation programme which may yield different results depending upon such variables as the strength of economic counter-forces and the resources devoted to enforcement. The persistence of prohibited conduct does not, therefore, *necessarily* denote a failure of implementation or the "symbolic" character of the prohibition; government may be satisfied with the results it is getting. There is here an important but seldom-remarked conflict between lawyers' and policy-makers' pictures of instrumental law. Lawyers see hard-edged individual obligations, which should be uniformly observed and impartially applied;[105] policy-makers see a change in the general conditions of decision-making, whose aggregate results can be guessed at but whose effects on any given individual are both unknowable and uninteresting. The conflict disappears only when individuals get big enough to matter to policy-makers.

Turning back to the development of an instrument classification, then, the relative costs concept suggests a broad division into cost-revealing instruments (information), and cost-altering instruments. For the moment we may simply divide the latter group into cost-increasing instruments, directed to the reduction or elimination of behaviour incompatible with policy, and cost-reducing instruments, directed to the promotion of compatible behaviour. To break the group down further, we need to take into account the different *resources* on which government may be able to rely for the purpose of effecting changes in relative costs.

Three types of resources may be distinguished. First, there is the physical force which is at the disposal of government; normally, the threat of exercise of such

[105] This expectation does not, of course, extend to instrumental changes to private law rules, where the discretion of the right-holder to invoke, or not to invoke, the (changed) rule is assumed: cf. D. Black, "The Mobilization of Law" (1973) 2 *Journal of Legal Studies* 125.

force in response to undesired behaviour – as by imprisonment or confiscation of property – is all that is needed to induce its renunciation. Second, there is the wealth of government, in the sense of its capacity to use offers of money or other forms of property as an inducement to economic actors to behave in desired ways. Third, there is the respect it may enjoy as a recognised or duly constituted government, as a legitimate repository of secular authority. Each of these resources may be possessed in varying degrees by different governments; their possession and use are not dependent upon the existence of any particular form of legal or constitutional system, though obviously their deployment is shaped by the characteristics of the legal system actually obtaining in any given State. In relating these resources with the alteration of economic actors' costs, one might at first sight assume a pairing between force and the increasing of costs (the paradigm case being a force-backed prohibition of undesired behaviour), and between wealth and cost-reduction (through grants and subsidies for desired behaviour). In fact, if one considers not a hypothetical initial position, but the situation of economic actors within an existing policy framework at a given moment, one sees that each resource may be used either "positively", for cost-reducing purposes, or "negatively", for cost-increasing purposes. Thus a threat to withdraw government benefits previously enjoyed may discourage undesired behaviour as may a new prohibition; a reduction of taxes, or the relaxation of a prohibition, may encourage a specific course of desired behaviour just as may a financial reward. From the standpoint of the economic actor, in fact, government's resources appear as positive and negative sanctions.[106]

Instruments appear within this framework of impacts and resources as distinctive ways of employing resources to produce impacts. The threat of force is used to increase costs both through regulations (including prohibitions) and through taxes, both through the unilateral imposition of regulations and through their consensual acceptance. As well as underpinning different instruments in this way, resources may be recombined within a given instrument: thus the incentive to make consensual arrangements with government which are restrictive of private behaviour may derive both from the fear of imposed regulations backed by force, or from the fear of withdrawal of existing benefits, or both. In the light of these possibilities of differentiation and recombination, and of the need to be able to relate specific legal and other implementing measures to instrument-types in an unambiguous way, the following typology of instruments has been adopted for the study:

1. Unilateral regulation
2. Taxation
3. Consensual constraints, i.e. control of activity through contractual and other agreements with government
4. Removal or relaxation of regulations
5. Removal of taxation or the granting of tax exemptions

[106] Cf. V. Aubert, *In Search of Law: Sociological Approaches to Law* (1983, Oxford), at pp. 159–169.

6. Public benefits, e.g. subsidies and other financial assistance, provision of public services and other forms of assistance in kind
7. Public sector management
8. Information.

The similarity to Mayntz's list[107] is obvious. Apart from some differences of grouping of instruments, which are not important here, the main element in her scheme not represented is that of procedural regulation, which she defines as "norms establishing decision and conflict resolution procedures for private parties".[108] She argues that particular significance attaches today to this instrument by reason of the degree to which the State relies upon private organisations for participation in the formulation and implementation of policy, under the banner of self-regulation. Procedural regulation is the means by which the State creates or ratifies the structures of internal decision-making within, and of inter-relationship between, such organisations. Self-regulation is undoubtedly an important modern phenomenon: for Schmitter and Streeck it is an element of an "associative" model of social order equal in significance to the established "community", "market" and "State" models;[109] for Teubner it is part of a style of "reflexive" law which offers *the* way out of an otherwise unavoidable "regulatory trilemma".[110] Why then does it not figure in our analysis?

The short answer is that self-regulation *does* figure; but it appears as an area for discovery, rather than as a tool for analysis. Our perspective is that of the way in which the State deploys its resources in aid of policy implementation: and the resources which the State may use to create, and then to control, self-regulatory capacity are not different in kind from those which it may use for purposes of "direct" policy implementation. Regulation, benefits, bargains all play their part. What is distinctive is the content of the measures employed (conferment of competences structured by procedural limitations) in conjunction with the nature of the actors addressed (economically powerful organisations). An empirical enquiry like this, whose starting point is the analysis of measures, may therefore enable us to discover the extent of the complex phenomenon of self-regulation in the fields examined and to understand its supports, by identifying the occasions on which competences are conferred on private bodies or rules promulgated for the discharge of such bodies' functions and powers. It appears, in fact, that explicit reliance upon self-regulation as a vehicle of policy is almost unknown in the field of energy policy,[111] but much commoner in the manpower field, where collective agreements, sometimes with regulatory extension, play a major role in the

[107] See above, p. 26.
[108] *Supra* note 96, at p. 128.
[109] W. Streeck and P. C. Schmitter, *"Community, Market, State – and Associations? The Prospective Contribution of Interest Governance to Social Order* (EUI Working Paper No. 94, 1984, Florence).
[110] Teubner, "Juridification", esp. pp. 33–40.
[111] See Jarass, below, p. 79.

furtherance of particular policy objectives or sub-objectives[112] and where labour subsidy programmes may be confided to autonomous bipartite or tripartite organisations.[113] Explicit reliance, however, by no means exhausts the scope and significance of self-regulation in these sectors, as Brian Bercusson's wide-ranging study in this volume convincingly shows.[114]

Two further remarks may be made about self-regulation in the context of this study. First, the measures employed by the State to create and structure self-regulatory capacity offer the clearest example of the determination and revision of "private" legal rights by means adopted from public law: the determination of competences, and the creation of decisional structures for their exercise, are key functions for public law. The self-regulation phenomenon is one of deliberate and explicit organisation or ratification by the State of a diffusion of economic power. It is precisely where economic power is accumulated within private sector organisations (whether by reason of such diffusion, of industrial concentration, of trade unionism or any other cause) that we may expect to encounter legal implementation which draws in some measure on "collective interest" as opposed to "private rights" legal models.

Second, the instrument typology here can be linked with self-regulation in the sense that it is no less applicable to the implementation functions of the organisation than to those of the State itself.[115] Its basic concepts are equally relevant to private power holders, who may also deploy a range of resources in order to change the relative costs of behaviour by others – normally their individual members – the results of whose actions are of concern to them. Essentially the same kinds of resources are available, though the monopoly of legitimate force reserved to the State by most modern legal systems means that the threat of force will usually be available only by delegation from the State or on an illegitimate basis. Both kinds of situation are common. Further pursuit of this application is beyond the scope of this study, but the typology could serve, among other things, to facilitate comparison of the operation of private interest organisations of widely differing types, or to identify ways in which different legal systems affect the governance capacities of similar organisations in different countries.

IV. Hypotheses and Results

The elaboration of a typology of instruments completes the methodological apparatus of our inquiry. The triple typology of measures, instruments and objectives immediately engenders a series of questions, essentially about the relationships of these three elements of policy, among themselves and with national legal systems, which have structured our examination of the mass of legal

[112] For example, their use for the purpose of creating job opportunities in particular areas or sectors, or for facilitating early retirement from the labour market.

[113] See von Stebut, below, p. 150.

[114] Below, pp. 359–420.

[115] As Bercusson demonstrates, below pp. 359–420.

and other data collected and whose answers may help to pinpoint the key elements in the law/policy relationship and to indicate the extent and seriousness of the problems present there. In the following paragraphs of this section I look at these relationships and attempt to draw together a number of specific findings reported in the thematic contributions to this volume.

A. The Design of Measures

I consider first the influences bearing on the design of measures. The key question is whether the shape of legal measures varies according to the nature of the instrument that they operationalise. To some extent this is bound to be so, in that certain characteristics of instruments are replicated in the typology of legal measures we use: thus consensual constraints will obviously be operated by bilateral legal norms, regulations by unilateral ones; measures implementing subsidy instruments will have as their substantive content the transfer of funds or property, those implementing regulations the imposition of duties; and so on. But there are many points in which the measures operationalising the same instrument might vary (as to scope, or period, or source, for example), and the process of tracing such variations should permit the making of empirically-based comments about assertions of the changing shape of instrumental law, of its move away from the "private rights model", both in general terms – is this true? – and in a more discriminating way, by indicating in relation to which instruments, if any, the phenomenon is particularly marked. We might guess that if there are such correspondences, then it is measures which implement the instruments least likely to bear on private rights – relaxations of regulations and taxes, public benefits, information, maybe public sector management also – which are most likely to be temporary, non-general, low level, etc. We might be wrong. Among other things, the guess is dependent upon there in fact being regularities in the relationship between instruments and measures across a number of legal systems. It cannot be assumed, *ex ante*, that these will be found. It may be that demands of the national legal system are a stronger determinant of the shape of legal measures than are the characteristics of the instruments they implement, and that these demands are diverse enough to make all measures from a given system resemble each other more than they resemble the measures from each other system operationalising the same instrument. Despite the fact that Western European legal systems, at least, are said to resemble one another greatly in fundamentals,[116] and that the Hungarian system has abandoned less of its private law underpinnings than one might at first sight assume,[117] the variety of approach to the instrumental law issue by scholars of different nationalities gives some initial credence to this latter hypothesis.[118]

[116] See e.g. R. David, *Les Grands Systèmes du Droit Contemporain* (8me ed. 1982, Paris, by C. Jauffret-Spinosi), pp. 25–26.

[117] Hungary has not, for example, adopted a code of economic law, as have Czechoslovakia and the German Democratic Republic.

[118] Above, pp. 4–5.

The ways in which national legal systems may bear upon the shape of legal measures, and the general significance of system differences in our fields of inquiry, are examined in detail in Attila Harmathy's contribution.[119] In thinking about possible legal system effects, we have had in mind not only the formal and explicit constitutional requirements of the system, but also two other sources of influence which, while properly labelled "legal" as opposed to "political" or "economic", are not capable of such precise expression. The first may be termed legal *style:* the historical evolution of a given legal culture may dictate or encourage certain choices – in terms of "ways of doing things" – which are not easily referable to the effects of constitutional or other rules. One example might be the Anglo-Saxon preference for procedural rules and safeguards as a guarantee of fair administrative action, contrasted with the French reliance on judicial review of administrative action on substantive grounds. Another example, which emerges from the investigations of Leigh Hancher into public sector management, is afforded by the contrast between the German and Dutch preference for the use of general rules of corporation law as the means of structuring and controlling public enterprise activity, and that of the French, Italians and British for a specialised legal regime for this purpose.[120]

The second influence, which might be termed legal *substance*, is that furnished by the existence, at the time when policy is being formulated, of relevant bodies of substantive law, whose adaptation or development may provide one means of achieving the objective at hand. In such a situation the policy-maker may be more likely to resort to an instrument which draws on such a body of law than to one which requires the creation of quite new legal arrangements; and if he does, the shape of the measures he uses will be dictated by the terms in which the existing legal scheme is expressed. In so far as such substantive norms are seen as accidental, as responses to past policy needs rather than as core elements of the legal system, their influence, or lack of it, tells us little about the relationship between a given legal system and modes of implementation of policy therein; but a demonstration of the relevance of existing substantive provisions to the policy-maker's choice of instruments and measures would provide support for incrementalist theories of policy formation and implementation.[121]

Having set out these considerations, let me try to assess their influence by looking briefly at some of the characteristics of the measures examined which seem important from the point of view of a critical evaluation of instrumental law: principally their scope, temporal dimension, source, and certain features of their contents. The task is simplified by the fact only a part of the instrument range needs to be taken into account: taxation measures, relaxations of regulations, and pure information measures were all encountered too rarely in our survey to permit

[119] Below, pp. 245–266.

[120] See Hancher, below, pp. 225–226. In France and Italy, though not in the United Kingdom, this preference is reinforced by formal constitutional requirements: French Constitution, art. 34; Italian Constitution, art. 43.

[121] Leading exponents include D. Braybrooke and C. E. Lindblom: see their *A Strategy of Decision* (1963, New York), esp. ch. 5.

the making of significant findings about them. I consider below the possible reasons for this. In relation to the remaining instrument-types – regulations, consensual constraints, subsidies, and public sector management – it has been hard to identify consistent cross-national relationships between instrument-types and characteristics of measures. At some times legal system influences seem to prevail, at others the characteristics of the policy field may have a direct influence on the shape of measures.

One thing at least is clear: that the law is not dissolving into a "wilderness of single instances", of individual measures of limited duration. Outside the field of public sector management, individual measures are rare,[122] and are even then often connected to the foundation of public bodies which will carry on activities like subsidy distribution.[123] The finding requires qualification in that instruments may be operationalised by a series of measures, issued at descending levels of the legal hierarchy, of increasing degrees of particularity,[124] and individual measures at the lowest level may be invisible to the reviewer of formal or published acts of government; but it is still important to notice the determination of lawmakers to express their precepts – even in fields like territorial or sectoral job creation or maintenance – very largely in general and objective terms.

As for the temporal element, the complexity of the demands addressed by policy-makers to the legal system in this respect is well brought out by Kamiel Mortelmans' contribution to this volume.[125] Different time-scales are involved in the attainment of the various objectives examined, varying between the need to be permanently ready to act quickly and (if possible) briefly to cope with energy supply disturbances, and the need to make steady efforts over a long but not necessarily indefinite period of time to attain a satisfactory national standard in fields like energy conservation. The nature of the time element in measures may therefore depend more on the character of the objective pursued than on either the type of instrument involved or the demands of a particular national legal system, so that it may be misleading to generalise about this particular instrument-measures relationship. Some specific remarks can however be made.

The first is that measures expressed to be of permanent or indefinite duration predominate over the whole field of our inquiry. The most important usage of temporary measures occurs in the field of response to energy disturbances, where substantial numbers of short-term regulatory measures are found; these, however, are normally second-level measures, whose authorisation is found in permanent legislation containing broad powers for dealing with energy crises. (The exception is Italy, which has relied largely on the constitutional emergency power to introduce, by governmental fiat, *decreti-leggi* which lapse after 60 days unless converted into Parliamentary legislation.) The explicit time-limitation in this

122 Note though that in the nuclear field, individual measures dominate even where the industry is privately run, as in Germany. This seems to result from governmental pursuit of subsidy policies in an industry with few actors.

123 Cf. von Stebut, below, p. 143.

124 See Mortelmans, below, pp. 299–304, 308–310.

125 Below, pp. 287–298.