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Presidential Self-Regulation through Rulemaking

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PRESIDENTIAL SELF-REGULATION THROUGH RULEMAKING: COMPARATIVE COMMENTS ON STRUCTURING THE CHIEF EXECUTIVE'S CONSTITUTIONAL POWERS*

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Editor's Note: This is the second part of a two part article by Professor L. Harold Levinson dealing with executive rulemaking. The first part† appeared in Volume 9, number 4, and examined the law of the United States and the United Kingdom. This part deals with France and the European Communities, and concludes with comparative comments.

* While retaining sole responsibility for the paper, the author gratefully acknowledges helpful comments on preliminary drafts of the manuscript of Part II by Mr. Michael J. Remington (on France), and by Professor Harold G. Maier (on the European Communities).

Part I of this article appears at 9 VAND. J. TRANSNAT'L L. 695 (1976). The footnotes to Part II are numbered in sequence to follow those in Part I.

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† The footnotes in Part I of this article should be corrected as follows. The material appearing in footnote 47 should be deleted and the material originally appearing in footnote 16 should be inserted therein. Footnote 16 should be revised to read as follows:

16. Literally hundreds of federal statutes not only authorize but also require agencies to promulgate rules. *See, e.g.*, 42 U.S.C. § 1857c (1970) (Administrator of Environmental Protection Agency shall promulgate regulations providing standards for ambient air quality, stationary sources, and aircraft emission); 10 U.S.C. § 1444 (1970) (President "shall prescribe regulations to carry out the retired servicemen's family protection plan"); 16 U.S.C. § 971d (Supp. V 1975) (Secretary of Commerce is authorized and directed to adopt such regulations as may be necessary to carry out the provisions and objectives of the Atlantic Tunas Convention); 15 U.S.C. § 1604, 1691b (Supp. V 1975) (Board of Governors of Federal Reserve System "shall prescribe regulations to carry out the purposes" of the Consumer Credit Protection Act and the Equal Credit Opportunity Act). With regard to the procedures to be followed in rulemaking, see notes 46-52 *infra* and accompanying text.

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IV. FRANCE

The Fifth Republic was established in 1958, when a referendum approved the innovative constitution submitted by General De Gaulle.[154] The basic goal of De Gaulle and his draftsmen was to

154. The discussion generally follows L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW (2d ed. 1973); A. DE LAUBADÈRE, TRAITÉ DE DROIT ADMINISTRATIF, TOME I (6e ed. 1973); 1 D. PICKLES, THE GOVERNMENT AND POLITICS OF FRANCE (1972); G. VEDEL, DROIT ADMINISTRATIF (5e ed. 1973); and Nicholas, *Loi, Règlement and Judicial Review in the Fifth Republic*, 1970 PUB. L. 251.

Historical sources are cited in notes 156-57 *infra*. Other useful sources on contemporary French law are J.-L. DEBRÉ, LES IDÉES CONSTITUTIONNELLES DU GÉNÉRAL DE GAULLE (1974); Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972); Brown, *De Gaulle's Republic and the Rule of Law: Judicial Review and the Conseil d'Etat*, 46 B.U. L. REV. 462 (1966); Drago, *General Comparative View of the French Constitution*, 21 OHIO ST. L.J. 535 (1960); Friedrich, *The New French Constitution in Political and Historical Perspective*, 72 HARV. L. REV. 801 (1959); Tunc, *The Fifth Republic, the Legislative Power, and Constitutional Review*, 9 AM. J. COMP. L. 335 (1960).

The French Constitution, in English translation, appears in D. PICKLES, *supra* at 300; in 3 A. PEASLEE, CONSTITUTIONS OF NATIONS 312 (3d ed., rev. D. Xydis, 1968); with introduction and bibliography, in Flanz & Almany, *France*, in 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD *(A. Blaustein & G. Flanz, eds. 1971)*; and in Pickles, *French Constitution of October 4th, 1958: A New Translation and a Commentary*, 1959 PUB. L. 228. The October 1974 amendment of article 61 of the French Constitution, broadening the class of parties who can invoke the jurisdiction of the *Conseil Constitutionnel* (see text preceeding note 179, *infra*) appears in [1974] Recueil Dalloz-Sirey, *Législation* 344.

stabilize French government by strengthening the executive in relation to the legislative branch. This purpose was advanced by the referendum approving the 1962 constitutional amendment. Pursuant to this amendment, the President of the Republic is directly elected by the people, rather than indirectly by the electoral college created in 1958.[155] Before the functions of the executive under the 1958 Constitution are discussed, the pre-1958 situation will be briefly noted.

A. *From the Ancien Régime to the Second Empire*[156]

Hereditary kings ruled France, under a claim of divine right, for the six centuries of the Ancien Régime, ending in 1789. Legislative, executive, and judicial powers were all concentrated in the hands of the kings. The revolution of 1789 led to a limited monarchy (1791) and the First Republic (1792-1799), in which substantial powers were exercised by elected legislative assemblies. Executive power in the First Republic was vested in a committee of five directors, whose functions were strictly separated from those of the legislature. Friction between the directors and the legislature, and among the directors themselves, led in large part to the collapse of the First Republic, and the subsequent dictatorship of Napoleon I (1799-1814). Under Napoleon, extensive formal powers were vested in a single chief executive (designated Consul until 1804, and Emperor thereafter). Napoleon did not hesitate to legislate, by decree, outside the limits of the powers formally conferred upon him by the Constitution.

The Charter of 1814 established a parliamentary monarchy, in which the legislature and the king were given collaborative roles. In addition to participating in the enactment of statutes, the king possessed the power to promulgate regulations to assure the execution of the laws. Moreover, the king could promulgate his own security ordinances. A specific exercise of this power precipitated the Revolution of 1830. This Revolution led to the 1830 Charter which reduced the king's ordinance-making power.

155. French Constitution, arts. 6, 7, as amended by the referendum of October 28, 1962.

156. The discussion accompanying this and the next note generally follows M. DUVERGER, DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES 395-580 (2e ed. 1956); and Flanz & Almany, *supra* note 154, "Chronology." Additional valuable sources are A. COBBAN, A HISTORY OF MODERN FRANCE (2d ed. 1961); G. LEPOINTE, HISTOIRE DES INSTITUTIONS DU DROIT PUBLIC FRANÇAIS AU XIXE SIÈCLE, 1780-1914 (1953).

The Second Republic (1848-1852) introduced an American-inspired separation of powers. Executive power was vested in a President, elected by universal suffrage, while legislative power was exercised by an elected assembly. Louis-Napoleon Bonaparte, the only President to serve under this regime, later became Emperor Napoleon III when it was replaced by the Second Empire (1852-1870). During all but the final three years of this Empire, the Emperor had exclusive authority to initiate legislation, and also had an absolute veto power.

B. *The Third and Fourth Republics*[157]

After its provisional governments (1871-1875), France adopted a series of constitutional statutes that established the Third Republic, which lasted from 1875 to 1940. In the Third Republic, the legislature was dominant. The Prime Minister and other ministers constituting the "government" were responsible to the legislature. The President was a ceremonial head of state, with limited discretion to invite a new Prime Minister to form a government upon the fall of the predecessor government, much as the Sovereign functions under the constitutional monarchy of the United Kingdom.

The legislature enjoyed unlimited power to enact statutes. The Prime Minister and the government had inherent authority to implement statutes by promulgating rules, deciding matters affecting individuals, assuring enforcement, and supervising the bureaucracy. This authority was interpreted flexibly, especially during times of emergency. The *Conseil d'Etat* held that even when no statute had been enacted, the Government could promulgate rules to preserve the public order or the functioning of public services.[158] From time to time, the legislature delegated power to the executive to issue rules having the effect of statute. These delegations were especially frequent during national emergencies or political crises. While the validity of statutes could not be challenged, acts of the President, Prime Minister, other ministers, or bureaucrats were all regarded as "administrative" acts, and were subject to review by the *Conseil d'Etat*, and to collateral attack by defendants in criminal proceedings.

157. In addition to the sources cited in *supra* note 156, see frequent references to the Fourth Republic in many of the works cited in *supra* note 154, including especially J.-L DEBRÉ, D. PICKLES, and G. VEDEL.

158. Labonne, Conseil d'Etat, 8 août 1919; Heyries, Conseil d'Etat, 28 juin 1918; G. VEDEL, *supra* note 154, at 20-23; L. BROWN & J. GARNER, *supra* note 154, at 6-7.

Following the Vichy Régime (1940-1944) and the provisional post-War governments (1944-1946), the wfourth Republic was established in 1946. In many respects it resembled the Third Republic, but some differences between the two are noteworthy. In the Fourth Republic, general rulemaking power was vested in the Prime Minister, rather than in the President as in the Third Republic; but this difference was more a matter of form than of substance, since under the Third Republic the President had generally acted in accordance with the advice of the Prime Minister. One innovation of the Fourth Republic was the availability of review of the validity of statutes by the *Comité Constitutionnel.* This review was available, however, only before, not after, the promulgation of a statute.

C. *Basic Changes Under the 1958 Constitution*

The 1958 Constitution, as amended in 1962, brought about two basic changes. First, the office of President was greatly strengthened, and since the 1962 amendment, the President has been directly accountable to the people. He must, however, coexist with the Prime Minister, who exercises considerable power and is responsible to the legislature. The second major change was the enumeration in the Constitution of certain subjects within the power of the legislature. The executive has retained its traditional power to implement statutes, and in addition, now has the authority to legislate on any matter not included in the legislature's enumerated powers. Responsibility for resolving disputes about the boundary between legislative and executive power is divided between the *Conseil Constitutionnel* and the *Conseil d'Etat.*[159]

D. *Executive Officials*

Executive power is shared by the President of the Republic and the "Government." The Constitution does not spell out the composition of the "Government," but clearly implies the inclusion of the Prime Minister, the Council of Ministers as a collegial body, and individual ministers. The Government "determines and directs

159. The extent of the jurisdiction of the *Conseil d'Etat* is regulated by the *Tribunal des Conflits,* which determines whether a specific controversy falls within the ambit of the *Conseil d'Etat* or the judicial court system under the *Cour de Cassation.* L. BROWN & J. GARNER, *supra* note 154, at 76-80; A. DE LAUBADÈRE, *supra* note 154, at §§ 698-722.

the policy of the nation."[160] It is responsible to the legislature, and may be collectively dismissed by a legislative vote of censure or lack of confidence after the Government has made confidence an issue. Government members may not concurrently serve in the legislature. The Government has the sole right to introduce legislative bills or amendments that reduce revenues or increase expenditures. Either the Government or any member of the legislature may introduce bills on other subjects. Bills introduced by the Government must first be discussed in the Council of Ministers, after nonbinding consultation with the *Conseil d'Etat.* The Government enjoys extensive control over the legislative calendar.

1. *President of the Republic.*[161]—The President of the Republic is elected by nationwide balloting. He is Head of State, Commander-in-Chief, and organ of foreign policy. He grants pardons. He appoints civil and military officers and the Prime Minister, and, upon the recommendation of the latter, other members of the Government. He promulgates statutes after their passage by the legislature, and while he has no veto power, he can require the legislature to reconsider a statute. The President's role is expressed as follows in article 5 of the Constitution:

> He sees that the Constitution is respected. He ensures, by his arbitration, the regular functioning of governmental authorities, as well as the continuity of the State. He is the guarantor of national independence, of the integrity of the nation's territory, and of respect for treaties and Community agreements.

Article 16 confers special power upon the President, in certain emergencies, to "take the measures commanded by [the] circumstances." Before declaring the existence of an emergency, the President must have nonbinding consultations with the Prime Minis-

160. French Const., arts. 20 (government determines and directs policy), 49-50 (may be dismissed by Legislature), 23 (members of government may not serve in Legislature), 40 (prohibition against private members of Legislature introducing financially burdensome bills), 39 (general ability of Prime Minister or private members to initiate legislation; deliberations in Council of Ministers and consultation with *Conseil d'Etat* before introduction of government bills), 41-48 (government's control over legislative calendar).

161. *Id.* arts. 6-7 (election), 5 (Head of State), 15 (Commander-in-Chief), 14 (foreign affairs), 17 (pardons), 13 (appoints civil and military officers), 8 (appoints Prime Minister and other Ministers), 9 (presides over Council of Ministers), 10 (promulgates statutes, and may ask legislature to reconsider). As indicated in the accompanying text, this is an incomplete listing of the powers of the President of the Republic, intended only to convey the general attributes of the office.

ter, the president of each house of the legislature, and the *Conseil Constitutionnel.* He must again consult with the *Conseil Constitutionnel* on the measures he proposes to take. The legislature must be called into session and must remain in session for the duration of the emergency.[162]

2. *Prime Minister.*[163]—The Prime Minister directs the operations of the Government. He is responsible for national defense and ensuring the execution of the laws. Subject to the constitutional powers of the President of the Republic, the Prime Minister is vested with general regulatory power (to be discussed below). He also has the power to appoint civil and military officers. He may delegate certain of his powers to ministers. Finally, he may replace the President of the Republic as chairman at a meeting of the Council of Ministers by an explicit delegation and for a specific agenda.

3. *Council of Ministers.*[164]—The Constitution mentions the Council of Ministers, but does not specify its composition. Until 1969, as a matter of practice, all ministers were included. In that year, however, the practice was changed. Now, membership in the Council is limited to the relatively senior members of the Government, approximately twenty in number, who form about half of the total number of ministers. The Council meets regularly as the government's decision-making organ, dealing with the legislative program as well as executive responsibilities. It is analogous to the British Cabinet with two important exceptions. First, British Cabinet members must be members of the legislature, and second, British constitutional law has no equivalent to the role played by the President of the Republic in the French Council of Ministers.

4. *Ministers.*[165]—Ministers are mentioned in the Constitution,

162. Article 16 has been invoked only once, in 1961. The occasion resulted in the case of *Rubin de Servins*, Conseil d'Etat, 2 mars 1962. *See* A. DE LAUBADÈRE, *supra* note 154, at § 116; Pickles, *Special Powers in France—Article 16 in Practice,* 1963 PUB. L. 23.

163. French Const., art. 21.

164. *Id.* arts. 9 (President of the Republic presides over Council of Ministers), 13 (President of the Republic signs such ordinances and decrees as have been considered in the Council of Ministers); and articles of the Constitution cited in *supra* note 160, on the government. *See also* D. PICKLES, *supra* note 154, at 78-84; J.-L. DEBRÉ, *supra* note 154, at 301, quoting President De Gaulle's memoirs regarding the weekly meetings of the Council of Ministers over which he presided.

165. French Const., art. 8 (appointment of ministers by President of the Republic, upon recommendation of Prime Minister); and articles of the Constitution cited in *supra* note 160, on the government.

but only with sparing detail as has already been discussed. A minister is a member of the Government, appointed by the President of the Republic upon the recommendation of the Prime Minister. He may not concurrently serve in the legislature. Senior ministers participate in the Council of Ministers, but junior ministers do not. This is a matter of current practice not covered by constitutional text. The Prime Minister may delegate powers to ministers.

E. *Allocation of Jurisdiction Between the Legislature and the Executive*

Article 37 of the Constitution declares: "Matters other than those that fall within the domain of law (*loi*) shall be of a regulatory character (*caractère réglementaire*)." Thus, unless a topic is included among the enumerated subjects upon which the legislature may enact a law (*loi*), the topic is subject to rulemaking by an executive organ since the topic will be deemed to have regulatory character (*caractère réglementaire*). The executive retains its traditional power to implement statutes and also possesses the residual lawmaking power remaining after enumeration of the powers of the legislature.

1. *Legislative Powers.*—Complications arise because the Constitution contains three separate groups of enumerations defining the legislative power. In one group, the legislature may determine only the fundamental principles, leaving the details to be filled in by the executive.[166] The topics dealt with in this group include the general organization of the national defense, the administration of local government, education, property rights, civil and commercial obligations and employment, unions, and social security. With regard to a second group of subjects, the legislature has plenary power to spell out the details (*la loi fixe les règles*).[167] Included in this category are civil rights, nationality, personal status, marriage, inheritance, the definition of and penalties for felonies and misdemeanors (implying that petty offenses are not included), criminal procedure, amnesty, the creation of new courts, the status of judges, taxation, currency, elections for legislative office, public institutions, the fundamental guarantees granted to civil service and military personnel, and the nationalization and denationalization of industry. A third group of subjects is simply listed as part of the legislative domain, without any specification whether the

166. *Id.* art. 34, para. 4.
167. *Id.* art. 34, paras. 2, 3.

legislature may determine only fundamental principles or may spell out the details.[168] This last group includes finance, national planning, war, and martial law continued for more than twelve days after its declaration by the Council of Ministers.

2. *Executive Rulemaking Power—A Residual Concept.*—As indicated previously, article 37 vests the executive with rulemaking power on all subjects not included in the enumerated powers of the legislature. In addition, the executive retains its traditional power to promulgate rules, in the nature of subordinate legislation, to fill in the details of matters within the legislative domain.[169] This executive power of subordinate legislation is derived from three general sources. First, with respect to one group of subjects listed in article 37, the power of the legislature is limited to determining fundamental principles;[170] the clear intent of article 37 is, therefore, to empower the executive to fill in the details by rulemaking. Second, many statutes expressly authorize the executive to promulgate implementing rules, much as the British Parliament and the United States Congress authorize their respective executives to adopt subordinate legislation.[171] Third, French tradition recognizes that the executive enjoys inherent power to adopt rules for the purpose of implementing statutes, and that rules may be adopted even without statutes when necessary to maintain public order or the functioning of public services.[172] All of these forms of executive rulemaking are apparently preserved within the framework of article 37.

The 1958 Constitution also provides mechanisms permitting the executive, in limited circumstances, to exercise primary rulemaking power on subjects that would normally fall within the legislative domain, as indicated under the next two headings.

3. *Transition to the 1958 Constitution—Derogation of Legislative Powers.*—Article 92 established a mechanism for transition from the old Constitution to the 1958 text. The Council of Ministers, after nonbinding consultation with the *Conseil d'Etat,* was authorized to adopt ordinances having the effect of statute (*ordonnances ayant force de loi*) to create the institutions required by the 1958 Constitution, and, until they could be set up, to pro-

168. *Id.* art. 34, paras. 5, 6; arts. 35 (war), 36 (martial law).

169. L. BROWN & J. GARNER, *supra* note 154, at 8; G. VEDEL, *supra* note 154, at 20, 42-43.

170. French Const., art. 37.

171. Nicholas, *supra* note 154, at 254; G. VEDEL, *supra* note 154, at 20, 42-43.

172. *See* note 158 *supra,* and accompanying text.

vide for the functioning of the governmental authorities. These ordinances could evidently cover any subject, including those that would normally fall within the enumerated powers of the legislature. The Council of Ministers enacted large numbers of ordinances on important legislative matters during the transitional period at the beginning of the Fifth Republic.[173] Many of these ordinances subsequently came up for review before the *Conseil Constitutionnel* under a procedure discussed below.[174]

4. *Delegation of Legislative Power to the Executive.*—Article 38 authorizes the legislature, upon request by the Government, to delegate power to the Government, for a limited period of time, to adopt ordinances (*ordonnances*) on subjects that would normally be within the legislative domain. These ordinances are enacted by the Council of Ministers after nonbinding consultation with the *Conseil d'Etat.* Ordinances come into effect upon publication. If the enabling act requires legislative ratification by a specified date, however, the ordinances become void if they are not submitted to the legislature by that date. After expiration of the time established by the enabling act for the exercise of the delegated power, jurisdiction returns to the legislature, which alone may modify ordinances enacted by the Government on subjects within the legislative domain.

5. *The Conseil Constitutionnel.*—The 1958 Constitution established the *Conseil Constitutionnel,* with considerably broader powers than those of the *Comité Constitutionnel* of the Fourth Republic.[175] The *Conseil Constitutionnel* renders final, nonappealable decisions in a number of situations, and its decisions are binding on all governmental, administrative, and judicial authorities.[176] The primary role of the *Conseil Constitutionnel* is to help the Government confine the legislature to its enumerated powers.[177] Another organ—the *Conseil d'Etat*—bears responsibility for keeping the executive within its domain.[178]

Article 56 sets the membership of the *Conseil Constitutionnel* at nine appointed members, serving nine-year staggered terms, to-

173. Nicholas, *supra* note 154, at 257.

174. *See* text accompanying notes 176-181 *infra.*

175. The comparison between the 1946 and 1958 Constitutions is made in Waline, *Constitutional Council of the French Republic,* 12 AM. J. COMP. L. 483 (1964).

176. French Const., art. 62.

177. Nicholas, *supra* note 154, at 256.

178. *See* text accompanying notes 184-192 *infra.*

gether with all former Presidents of the Republic, who are *ex officio* members for life. Three members are appointed by the President of the Republic, and three each by the presidents of the two houses of the legislature.

6. *Review of Legislative Proposals by the Conseil Constitutionnel Before Passage or Promulgation.*—Article 41 states that upon the request of the Government, or of the president of either house of the legislature, the *Conseil Constitutionnel* can rule upon two types of challenges to the validity of a pending legislative bill: (1) challenges raising the question whether the bill exceeds the enumerated powers of the legislature; and (2) challenges raising the question whether the legislature has temporarily relinquished its power over the subject by a delegation of ordinance-making power to the Government.

Article 61 authorizes the *Conseil Constitutionnel* to rule upon the constitutionality of any statute, after passage by the legislature, but before promulgation by the President of the Republic. In this context, the "constitutionality" of the statute depends upon whether it is within the enumerated powers of the legislature. This review *must* be initiated for certain types of enactments, namely, organic laws and legislative rules of procedure. For any other statute, review *may* be initiated at the request of the President of the Republic, the Prime Minister, the president of either house of the legislature, or 60 members of either house of the legislature.

The fact that constitutional review is available, but not mandatory (except for organic laws and legislative procedures), permits the Government to tolerate, and even to encourage, the enactment of statutes which encroach upon the executive domain.[179] Such statutes are perfectly valid unless and until an eligible party seeks and obtains a determination of invalidity from the *Conseil Constitutionnel.* Political factors sometimes motivate the Government to refrain from complaining to the *Conseil Constitutionnel* about a legislative encroachment. The Government, however, never loses its right to seek relief under article 37.

7. *Review of "Legislative Texts" by the Conseil Constitutionnel After Enactment.*—Article 37 makes the crucial statement, previously noted, that matters falling outside the enumerated powers of the legislature are subject to the rulemaking power of the

179. Nicholas, *supra* note 154, at 262, citing P. Louis-Lucas, refers to the government's discretion in this matter as a "safety-valve," needed to prevent an "explosion" which could result if the government is too rigid in insisting upon the exclusive right to legislate within its domain.

executive. It also specifies that the executive may issue decrees to modify "legislative texts" on matters that are within the executive domain, after nonbinding consultation with the *Conseil d'Etat.* This "nonbinding" consultation with the *Conseil d'Etat* is highly persuasive to the Government since litigation could bring the matter back to the *Conseil.* Even though the consultation would involve an administration section, while the litigation would involve the litigation section of the *Conseil,* the two sections are unlikely to reach different interpretations of the executive domain under article 37.

For "legislative texts" that were enacted after the effective date of the 1958 Constitution, article 37 imposes an additional requirement—the *Conseil Constitutionnel* must determine that the subject matter is within the executive domain. In this context, "legislative text" means not only statutes passed by the legislature and promulgated by the President of the Republic, but also ordinances adopted by the executive under the transitional provisions of article 92.[180]

The effect of article 37, then, is to give the Government a free hand to issue decrees in derogation of *pre*-1958 "legislative texts" on matters that the 1958 Constitution places within the executive domain, subject to consultation with the *Conseil d'Etat.* As regards *post*-1958 "legislative texts," the Government may not take such action without first asking the *Conseil Constitutionnel* to declare that the subject matter is within the executive domain. The Government may seek this relief, even if it failed to complain when the legislative text was adopted, or previously asserted that the matter was within the legislative domain, or sponsored the statute, or adopted the ordinance under article 92 under the theory that the matter was within the legislative domain. The *Conseil Constitutionnel* has, in fact, entertained numerous petitions in which the Government has asserted the executive nature of a matter that the Government had previously regarded as legislative, and the *Conseil* has not held the Government estopped from changing its mind.[181]

8. *The Conseil d'Etat.*[182]—The *Conseil d'Etat* was created by

180. *See* text accompanying and preceding note 173 *supra.*

181. Nicholas, *supra* note 154, at 257-58.

182. *See generally* L. BROWN & J. GARNER, *supra* note 154, at 19-26; C. FREEDEMAN, THE CONSEIL D'ETAT IN MODERN FRANCE (1961); M. RENDEL, THE ADMINISTRATIVE FUNCTIONS OF THE FRENCH CONSEIL D'ETAT (1970); Cake, *The French Conseil d'Etat: An Essay on Administrative Jurisprudence,* 24 AD. L. REV. 315, 317-19

Napoleon I in 1799. Its structure and composition have been changed by statutes from time to time, but its processes and decisional principles are, to a great extent, the product of its own case law (*jurisprudence*). Until 1872, the *Conseil d'Etat* was, in theory, an advisory body. Since then, the *Conseil d'Etat* has possessed statutory authority to decide cases brought against the administration, rather than merely to advise how the cases should be decided.

The *Conseil d'Etat* has approximately 250 members, of whom as many as 100 are likely to be serving at any one time on "detached service," that is, as temporary, full-time consultants to various ministries or governmental departments.[183] The remaining members are divided between the two major functions—litigation and administration. Members of the *Conseil d'Etat* rotate, to some extent, between the litigation section, the administration sections, and detached service. The litigation section, working through its specialized subsections under a highly developed procedure, decides cases involving the validity of administrative actions. In the great majority of these cases the plaintiff is a private citizen, association, or business, and the defendant is an administrative agency or official. The four administration sections—Interior, Finance, Public Works, and Social—serve as legal advisors to the Government. Among other functions, these sections consult with the Government, as required by the Constitution, before the Government introduces any legislative bill, or adopts a decree under article 37, or adopts an ordinance under article 38.

Most of the *Conseil d'Etat* members are recruited from the top of the graduating class of the elite National School of Administration. The remaining recruits join the *Conseil d'Etat* at later stages of their careers, after having distinguished themselves in active administration. Once recruited, members generally serve until retirement age. All members have equal votes, but the amount of influence attached to the vote, and the functions assigned to individuals vary according to age and experience.

9. *Role of the Conseil d'Etat in Resolving Jurisdictional and Other Disputes.*—The 1958 Constitution requires nonbinding consultation with the *Conseil d'Etat* in a number of situations,[184] but

(1972); Remington, *The Tribunaux Administratifs: Protectors of the French Citizen,* 51 TUL. L. REV. 33, 38-48 (1976).

183. L. BROWN & J. GARNER, *supra* note 154, at 31-42; Remington, *supra* note 182, at 48-53; Brown, *Participation of the French Conseil d'Etat in Legislation,* 48 TUL. L. REV. 796 (1974).

184. French Const., arts. 37 (decrees modifying "legislative texts"), 38 (ordi-

does not create the *Conseil d'Etat* or describe its composition or process. Neither does the Constitution mention the vital role played by the *Conseil d'Etat* in resolving jurisdictional and other disputes arising from the exercise of executive rulemaking power.

Until 1953 the *Conseil d'Etat* itself was the tribunal of original and final jurisdiction in most administrative law litigation.[185] Decrees designed to relieve the overburdened *Conseil* were promulgated in that year, pursuant to enabling statutes. The decrees created a nationwide network of administrative tribunals (*tribunaux administratifs*), which took over most of the original jurisdiction, leaving the *Conseil d'Etat* with original jurisdiction only in limited situations and appellate jurisdiction to review the decisions of the *tribunaux administratifs* and certain other bodies. The original jurisdiction of the *Conseil d'Etat,* although limited by the reform of 1953, includes matters especially relevant to the present article, such as proceedings to annul a decree or a rule promulgated by a minister, and proceedings to challenge the validity of any administrative act applicable beyond the geographical jurisdiction of any single *tribunal administratif.*

Case law of the *Conseil d'Etat,* as interpreted by scholarly *doctrine,* has developed four basic grounds on which an administrative act may be declared invalid: *incompétence* (lack of jurisdiction); *vice de forme* (improper procedure or failure to adhere to the correct formalities); *détournement de pouvoir* (improper purpose); and *violation de la loi* (literally, "violation of statute," but used more generally to include various other grounds recognized by case law, such as errors of fact or errors in applying the law to the facts).[186] In examining the challenged administrative act to determine whether a declaration of invalidity would be justified on any of these grounds, the *Conseil d'Etat* considers not only the relevant constitutional and statutory provisions, but also *principes généraux du droit* or general principles of law. These principles, emerging from the decisions of the *Conseil d'Etat* as decisional rules emerge from common law precedents, encompass many standards

nances under delegation of power from Legislature), 39 (government bills), 92 (transitional ordinances).

185. The history and current status of the administrative tribunals and their relationship with the *Conseil d'Etat* are presented in Remington, *supra* note 182, at 54-67; and L. BROWN & J. GARNER, *supra* note 154, at 23-29.

186. A. DE LAUBADÈRE, *supra* note 154, at §§ 930-73; L. BROWN & J. GARNER, *supra* note 154, at 126-34; Remington, *supra* note 182, at 86.

that approximate American notions of due process and equal protection.[187]

The *Conseil d'Etat* has been willing to review the validity of *all* executive acts, whether they were adopted as a result of delegations of power from the legislature, or in reliance upon the constitutional authority of the executive over matters within the executive domain.[188] When the executive seeks to justify its action by asserting that the matter falls within the executive domain, this assertion becomes one of the issues for examination by the *Conseil d'Etat* in its review of the validity of the executive act. The *Conseil d'Etat* can declare an executive act invalid on grounds of *incompétence* (lack of jurisdiction) if the *Conseil* finds that the executive was erroneous in asserting that the matter was within the executive domain. Thus, the *Conseil d'Etat* can confine the executive to its own domain, somewhat as the *Conseil Constitutionnel* can use its own peculiar methods to confine the legislature to its constitutional domain.

10. *Review of Executive Acts by Collateral Attack in Criminal and Civil Courts.*—The French administration has various methods of enforcing compliance with its rules.[189] One method, available in many but by no means all situations, is criminal prosecution for the petty offense (*contravention*) of violating an executive rule.[190] A defendant may raise the defense of *l'exception d'illégalité*, which asserts that the rule is invalid and can therefore be disobeyed with impunity.[191] The criminal courts are required to examine the validity of a rule when *l'exception d'illégalité* is asserted. This departs from the general principle that the validity of executive acts is

187. A. DE LAUBADÈRE, *supra* note 154, at § 423; L. BROWN & J. GARNER, *supra* note 154, at 118-26.

188. L. BROWN & J. GARNER, *supra* note 154, at 7; Nicholas, *supra* note 154, at 262-67; Soc. Anon. Librairie François Maspéro, Conseil d'Etat, 8 octobre 1971, Note, Dreyfus, [1972] D.S. Jur. 212.

189. *See generally* Levinson, *Enforcement of Administrative Decisions in the United States and France,* 23 EMORY L. J. 11, 321 (1974).

190. The French penal code is supplemented by a series of *Règlements d'administration publique,* which, among other things, define *contraventions de police* (petty offenses). One such *contravention* is defined in art. R.26.15°, as follows: "Ceux qui auront contravenue aux décrets et arrêtés légalement faits par l'autorité administrative ou aux arrêtés publiés par l'autorité municipale" (those who disobey decrees or ministerial rules legally adopted by the executive, or rules published by the municipal authorities). *See* note 191 *infra.*

191. *See generally,* R.-G. SCHWARTZENBERG, L'AUTORITÉ DE CHOSE DÉCIDÉE 329-45 (1969); Levinson, *supra* note 189, at 47-48, 59-61; L. BROWN & J. GARNER, *supra* note 154, at 74-75; G. VEDEL, *supra* note 154, at 145-48.

reviewed only by the *tribunaux administratifs* and the *Conseil d'Etat.* Thus, if the executive promulgates a rule on a subject matter within the legislative domain without proper authorization under the delegation provisions of article 38, a defendant prosecuted for violation of this rule may successfully assert its invalidity as a defense in the criminal court.

The civil courts are authorized only in rare circumstances to determine the validity of executive acts.[192] The civil courts have broader latitude to interpret executive acts. This power to interpret can significantly affect the impact of the executive act upon the parties.[193]

F. *Types of Executive Rulemaking*

The rulemaking power of the executive is exercised in various forms.

1. *Ordinances.*—Article 38 authorizes the legislature to delegate power to the Government, for a limited time, to enact ordinances (*ordonnances*) on matters that are normally within the legislative domain. Ordinances must be enacted in meetings of the Council of Ministers, after consultation with the *Conseil d'Etat,* and signed by the President of the Republic, with countersignatures by the Prime Minister and any other appropriate ministers.

2. *Decrees Issued by the President of the Republic.*—The President of the Republic exercises his rulemaking power by issuing decrees.[194] When the President of the Republic declares the existence of an emergency pursuant to article 16, he may take appropriate "measures" through decrees signed only by himself. In normal circumstances, the President may take only a few types

192. Such a determination can be made when executive acts seriously prejudice a property right. Drago, *Appréciation de la légalité d'un acte administratif réglementaire par une juridiction non répressive de l'ordre judiciare,* [1975] D.S. Jur. 671.

193. G. VEDEL, *supra* note 154, at 143-44.

194. The constitutional provisions dealing with the need for a countersignature refer to the *actes* (acts) of the President of the Republic (art. 19) and of the Prime Minister (art. 22). The term *décret* (decree) is used in the text of the Constitution only to refer to formal actions of the Council of Ministers (arts. 13, 37) other than *ordonnances* (ordinances) under art. 38. However, doctrinal writing seems to use the term *décret* to refer to all rulemaking acts of the President of the Republic and Prime Minister, whether or not these result from meetings of the Council of Ministers. *See* D. PICKLES, *supra* note 154, at 83; G. VEDEL, *supra* note 154, at 181-82; J.-L. DEBRÉ, *supra* note 154, at 303-05 (on President of the Republic).

of action on his own signature. These actions, which can hardly be regarded as rulemaking, include the appointment of the Prime Minister, dissolution of the legislature, messages to the legislature, and petitions for review addressed to the *Conseil Constitutionnel*.[195] Other acts of the President of the Republic require the countersignatures of the Prime Minister and other appropriate ministers;[196] such "acts" are issued in the form of decrees.

Some of these decrees result from meetings of the Council of Ministers, but others do not. The President of the Republic, as permanent chairman of the Council of Ministers, effectively controls its agenda, and can thus determine which matters will be considered at its meetings.[197] He may include any type of executive business on the agenda of the Council of Ministers. Once a matter has been considered by the Council, the President can issue a decree with appropriate countersignatures.[198]

President De Gaulle extended his decree-making power, not only by bringing items of his choice before the Council of Ministers, but also by personally intervening in other matters that did not come before the Council. He believed that the general constitutional mission of the President of the Republic justifies personal intervention, at his discretion, in a wide range of matters that would otherwise be handled by the Prime Minister or by individual ministers. De Gaulle drew up a list of topics on which he expected to be personally consulted and regarding which he would sign decrees, with appropriate countersignatures by the Prime Minister and other appropriate ministers, without deliberation in the Council of Ministers.[199] The *Conseil d'Etat* approved the validity of decrees

195. French Const., arts. 8 (appointment of Prime Minister), 12 (dissolution of Legislature), 18 (messages to Legislature), 61 (petition to *Conseil Constitutionnel* for review of constitutionality of pending legislative bill). These matters, and a few others in which the President of the Republic may act without countersignature, are listed in art. 19.

196. *Id.* art. 19.

197. J.-L. DEBRÉ, *supra* note 154, at 301; D. PICKLES, *supra* note 154, at 139-40. Pickles states at 139: "[the] President's domain could be extended at any time and anywhere by personal interventions in affairs that happened to interest him, perhaps only temporarily."

198. French Const., art. 13.

199. J.-L. DEBRÉ, *supra* note 154, at 303-04. The following major categories are included: organization and functioning of the government; publication and implementation of international treaties; judges and the guarantees of their independence; certain categories of civil servants; basic policy of national defense and military affairs; and rules regarding the national Legion of Honor. *See also* Avril, *Les décrets réglementaires du président de la République non délibérés en*

resulting from this practice.[200]

3. *Decrees Issued by the Prime Minister.*—Article 21 confers regulatory power (*le pouvoir réglementaire*) upon the Prime Minister, subject to the powers conferred by the Constitution upon the President of the Republic. In exercising the regulatory power, the Prime Minister issues decrees, which must be countersigned, "when circumstances so require, by the minister responsible for their execution."[201] Thus, the Prime Minister may issue decrees in areas not preempted by the President of the Republic.

4. *Rules Issued by Ministers.*—Article 21 authorizes the Prime Minister to delegate certain of his powers to ministers. Under such a delegation, or under an express provision of statute, a minister may promulgate his own rules. The most formal ministerial rule is the *arrêté.*[202] Although the Prime Minister issues his rules in the form of decrees when acting as head of government, he issues rules in the form of *arrêtés* when acting as the minister in charge of certain departmental functions.[203]

5. *Informal Statements by Ministers.*—Ministers also issue less formal statements, including *circulaires, instructions de service, mesures d'ordre intérieur,* and *directives.*[204] These statements are generally regarded as internal agency documents, subject to review by the *Conseil d'Etat* only when the agency takes further action that specifically affects parties outside the agency. The affected parties may seek review of such specific action, including review of any relevant aspects of the informal statement underlying the specific action. In some situations, however, the *Conseil d'Etat* has recognized that an informal statement, by its own force, affects the citizen. In these situations, an affected citizen may either require the minister to be bound by the informal statement, under a type of estoppel, or the citizen may be permitted to seek review of the validity of the informal statement before the *Conseil d'Etat.* In essence, then, a statement that is informal on its face may be treated as if it were formal if this more closely reflects its effect.

Conseil des ministres, 1976 ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 116.

200. *Sicard,* Conseil d'Etat, 27 avril 1962, noted in J.-L. DEBRÉ, *supra* note 154, at 305; G. VEDEL, *supra* note 154, at 182.

201. French Const., art. 22.

202. D. PICKLES, *supra* note 154, at 83-84; G. VEDEL, *supra* note 154, at 182.

203. G. VEDEL, *supra* note 154, at 183.

204. Delvolve, *La notion de directive,* 1974 ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 459; G. VEDEL, *supra* note 154, at 175-80. A citizen has no standing to challenge an interpretative circular. *Escard,* Conseil d'Etat, 23 avril 1975.

G. *Procedure for Preparing Executive Rules*

The Constitution does not detail the procedure for preparing executive rules other than the requirements previously discussed, including participation of the Council of Ministers in some situations, nonbinding consultation with the *Conseil d'Etat* in specially defined circumstances, signatures and countersignatures by the appropriate officials, and legislative authorization before the executive may issue ordinances under article 38.

Statutes sometimes require the executive to follow special procedures before promulgating a rule. An important example is the *règlement d'administration publique.*[205] When this procedure is mandated, the executive must proceed by means of decree, after consultation with the *Conseil d'Etat.* In practice, this often means that the *Conseil d'Etat* serves as a drafting agency for the Government.

In other situations, statutes require an agency to consult with the affected parties or their purported representatives, such as student organizations, when proposed university rules are under consideration.[206] In rare situations, an agency is required to conduct *enquêtes* (public meetings) in order to receive citizen input, primarily in zoning and development matters.

H. *Statement of Reasons*

The Constitution does not address the question whether decrees and other executive acts must be accompanied by a statement of reasons. As a general principle, French administrative law does not require all administrative acts to be accompanied by a *motivation* stating the reasons underlying the act.[207] Some statutes impose such a requirement in connection with delegations of rulemaking authority. In addition, some decisions of the *Conseil d'Etat* have selectively imposed the *motivation* requirement, even when not imposed by statute, if it appears to be necessary to aid review by the *Conseil.* Even if the administrative act does not have to be

205. A. DE LAUBADÈRE, *supra* note 154, at § 103; G. VEDEL, *supra* note 154, at 186-89; M. RENDEL, *supra* note 182, at 279.

206. Ferrier, *La participation des administrés aux décisions de l'administration*, 1974 REVUE DU DROIT PUBLIC 663.

207. A. DE LAUBADÈRE, *supra* note 154, at § 502; Sur, *Sur l'obligation de motiver formellement les actes administratifs*, 1974 ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 349; ENCYCL. DALLOZ, RÉPERTOIRE DE DROIT PUBLIC ET ADMINISTRATIF, V° "Décret," § 33 (mis à jour 1974).

issued with a *motivation,* a reviewing tribunal can insist upon a statement of reasons during the review proceedings. In practice, decrees appear to be accompanied by extensive *motivation.*

I. *Publication and Effective Date*

The Constitution provides that ordinances adopted under article 38 shall become effective upon publication, but does not describe what type of publication is required. The Constitution contains no other provisions on publication or effective date. A decree adopted in 1870, and still in effect, requires all statutes and decrees to be published in the *Journal Officiel* and to become effective on or after the date of publication.[208] Evidently, ordinances adopted under article 38 must also be published in the same manner.

Specific statutes may provide for publication of *arrêtés* and other types of executive rulemaking in a particular manner. In the absence of any statutory provision, "general principles" require publication in a manner reasonably appropriate for the class of persons affected by the rule.[209] Citizens do not appear to have general access to the *dossiers* of background materials prepared by agencies in connection with rulemaking.

J. *Binding Effect—Parallel Jurisdiction and Form*

French doctrine recognizes the dual concepts of *parallélisme des compétences* and *parallélisme des formes.* According to these concepts, the act of an agency is binding upon the agency as well as upon other parties unless and until it is superseded by a later act issued pursuant to the same grant of jurisdiction, and in the same form as the original—unless a higher authority intervenes.[210] This means that in an individual case, an agency may not take action inconsistent with a pre-existing rule of the same agency.

The agency may abrogate its own rules at any time, provided that the abrogation is accomplished in a form parallel to that used when the rule was adopted, and provided also that the abrogation has no retroactive effects. The agency is further obliged to abrogate its rule, upon the request of any affected party, if necessary to

208. Décret du 5 novembre 1870, in ENCYCL. DALLOZ, RÉPERTOIRE DE DROIT PUBLIC ET ADMINISTRATIF, V° "Décret," § 206 (mise à jour 1974).

209. G. VEDEL, *supra* note 154, at 193-94.

210. A. DE LAUBADÈRE, *supra* note 154, at §§ 418, 476, 503. In section 418, De Laubadère states that an agency may not violate its own rules, in view of the maxim: *Patere legem quam fecisti.*

conform the rule to changed circumstances. This obligation is enforced by the *Conseil d'Etat.*[211] No other situation has been found in which French law recognizes the right of an affected party to compel an agency to consider the adoption, repeal, or modification of a rule.

V. EUROPEAN COMMUNITIES

A. *The Three Communities*[212]

The Treaty of Paris, signed in 1951, and effective in 1952, established the European Coal and Steel Community (ECSC). The original Member States were Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands. The basic purpose was to establish a common market for coal and steel, and to promote economic expansion, increased employment, and a rising standard of living in the Member States. The same six states extended the scope of their cooperation by signing the two Treaties of Rome in 1957 (effective in 1958), establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The mission of the EEC, as stated in article 2 of the EEC Treaty, is "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it." The mission of Euratom is to promote and control atomic power industries.

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211. A. DE LAUBADÈRE, *supra* note 154, at § 563.2.

212. The European Communities were established by Treaty Establishing the European Coal and Steel Community (ECSC), April 18, 1951, 261 U.N.T.S. 140 (1957) ("Treaty of Paris"); Treaty Establishing the European Economic Community (EEC), March 25, 1957, 298 U.N.T.S. 3 (1958); and Treaty Establishing the European Atomic Energy Community (Euratom), March 25, 1957, 298 U.N.T.S. 167 (1958) ("Treaties of Rome"). The authoritative English texts of the treaties may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (Office for Official Publications of the EUROPEAN Communities, 1973).

The original six members of the communities were joined by other members, pursuant to Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, The Kingdom of Norway, and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community, January 22, 1972 ("Treaty of Brussels"). On the same date, the Council of the European Communities rendered a "decision" approving the accession of the same new members to the ECSC, under authority of art. 98 of the ECSC Treaty.

The treaties and other documents of the European Communities are compiled in SWEET & MAXWELL, ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW. The EEC Treaty receives primary emphasis, together with annotations, in 2 COMM. MKT. REP. (CCH), ¶¶ 4300-4916.

The 1972 Treaty of Accession offered membership in all three communities to Denmark, Ireland, Norway, and the United Kingdom, subject to ratification by each of the prospective new members. After a referendum Norway declined to ratify. Denmark, Ireland, and the United Kingdom joined the original six, bringing the total membership of the communities to nine states.

B. *Institutions of the Communities*[213]

The Treaty of Paris created four institutional organs for the ECSC: the Special Council of Ministers (Council), the High Authority, the Common Assembly (Assembly), and the Court of Justice.[214] The Treaties of Rome established similar institutions for the EEC and Euratom.[215] A convention signed the same day as the Treaties of Rome provided that a single Assembly would serve as the assembly for all three communities, and that a single court of justice would serve as the court for all three communities. Each

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The Commentaries found most useful in preparation of this article are D. LASOK & J. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (1973); R. LAUWAARS, LAWFULNESS AND LEGAL FORCE OF COMMUNITY DECISIONS (1973); and P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (1972).

Other useful general sources are BASIC PROBLEMS OF THE EUROPEAN COMMUNITY (P. Dagtoglou ed. 1975); N. ELLES, COMMUNITY LAW THROUGH THE CASES (1973); D. GIJLSTRA, H. SCHERMERS, E. VÖLKER & J. WINTER, LEADING CASES AND MATERIALS OF THE LAW OF THE EUROPEAN COMMUNITIES (1975); F. JACOBS & A. DURAND, REFERENCES TO THE EUROPEAN COURT: PRACTICE AND PROCEDURE (1975); P. KAPTEYN & P. VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES (1973); A. PARRY & S. HARDY, EEC LAW (1973); A. ROBERTSON, EUROPEAN INSTITUTIONS—COOPERATION: INTEGRATION: UNIFICATION (3d ed. 1973); THE LAW OF THE COMMON MARKET (B. Wortley ed. 1974); Ehlermann, *Legal Status, Functioning, and Probable Evolution of the Institutions of the European Communities,* 10 COMM. MKT. L.R. 195 (1973); Henig, *rapporteur, The Institutional Structure of the European Communities,* 12 J. COMM. MKT. STUDIES 373 (1974); Norton, *Overview of the European Community Law: A Primer for Businessmen and Attorneys,* 29 SW. L.J. 347 (1975); Van Hulle, *The Institutions of the European Communities in a Changing Political Climate,* 58 MARQ. L. REV. 589 (1975).

213. The institutions of the ECSC, EEC, and Euratom were merged by the Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), April 8, 1965, [1967] O.J. EUR. COMM. 2. The authoritative English text may be found in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 745 (1973). The Merger Treaty did not centralize the consultative bodies serving the communities. *See* notes 259-263 *infra* and accompanying text.

214. ECSC, art. 7.

215. Euratom, art. 3; EEC, art. 4.

community had its own separate council and its own separate high authority (or commission, as the equivalent organ was described in the Treaties of Rome). The merger treaty of 1965 (effective in 1967) provided that all three communities would be served by one council, one commission, one assembly, and one court. These centralized institutions perform the various missions imposed by the three treaties. The powers and procedures of the institutions vary somewhat depending on which treaty is involved.

1. *Council.*[216]—The Council is composed of one representative of the government of each Member State. In practice, this does not mean that a single individual serves as permanent representative of his government on the Council. Instead, the government of each Member State assigns various ministers to serve, one at a time, as its Council member. A nation's foreign minister normally attends Council meetings, together with other ministers, with one succeeding the other as various points come up on the agenda.[217] The Council is assisted by a committee of the permanent representatives of the Member States to the communities.[218] This committee prepares projects for the periodic meetings of the Council and follows through with tasks assigned by the Council.

Under all three treaties the Council controls the accession of new states and the submission of amendments to the treaties.[219] The Council also endeavors to harmonize and coordinate the activities of Member States with the policies of the Communities.[220] The Council approves budgets for community operations, subject to limited supervision by the Assembly.[221] Beyond these generalities, the powers of the Council vary according to the three treaties.

The Council's power is at its minimum when it is functioning under the ECSC Treaty. Under this treaty, if the Commission fails to act with regard to certain matters, a Member State may complain to the Council, which may then act, but only by unanimous vote. In general, however, under the ECSC Treaty the Council functions merely as a consultative body, and the Commission

216. ECSC, arts. 26-30; EEC, arts. 145-53; Euratom, arts. 115-22; Merger Treaty, arts. 1-8.

217. SWEET & MAXWELL, *supra* note 212, at B10-332.

218. Merger Treaty, art. 4; SWEET & MAXWELL, *supra* note 212, at B8-038, B10-343; D. LASOK & J. BRIDGE, *supra* note 212, at 113-15.

219. ECSC, art. 98; EEC, art. 237; Euratom, art. 205 (accession of new states), ECSC, art. 96; EEC, art. 236; Euratom, art. 204 (amendments).

220. ECSC, art. 26; EEC, art. 145; Euratom, art. 115.

221. ECSC, art. 78; EEC, art. 203; Euratom, art. 177.

makes decisions.[222] The EEC and Euratom Treaties confer regulatory power upon both the Council and the Commission.[223] These treaties include significant detail concerning the types of regulatory action permitted, the legal effect of each, and the procedures necessary before and after promulgation of regulations. The EEC and Euratom Treaties place a number of subjects within the control of the Council, which is generally authorized to act upon a proposal from the Commission.[224] The Council may amend a Commission proposal only by unanimous vote; otherwise, the Council can accept, reject, or remand the proposal to the Commission for reconsideration. Thus, Commission proposals may be redrafted a number of times during the dialogue between Council and Commission preceding approval. The Council also enjoys residual power under the following provision of the EEC and Euratom Treaties:

> If action by the community should prove necessary to attain one of the objectives of the community and this treaty has not provided the necessary powers, the council shall, acting unanimously on a proposal from the commission and after consulting the assembly, take the appropriate measures.[225]

2. *Commission.*[226]—The Commission is composed of thirteen members, or such other number as the Council may provide by unanimous vote.[227] Commissioners are appointed by mutual agreement between the Member States. Commissioners serve four-year renewable terms; they may not engage in any other occupation, paid or unpaid; and must neither seek nor accept instructions from any national government or other body. Each commissioner must be a national of one of the Member States, and not more than two commissioners may be nationals of any one state. The whole Com-

222. ECSC, arts. 58, 59, 61. The same treaty confers regulatory power upon the Council, art. 14, but only "[i]n order to carry out the tasks assigned to it." These tasks are significantly less comprehensive than those conferred upon the Council under the EEC and Euratom Treaties. *See* notes 223-25 *infra* and accompanying text, and D. LASOK & J. BRIDGE, *supra* note 212, at 111.

223. EEC, art. 189; Euratom, art. 161.

224. EEC, art. 149; Euratom, art. 119; D. LASOK & J. BRIDGE, *supra* note 212 at 111-12. The weighted voting of Council members is provided by EEC, art. 148; Euratom, art. 118.

225. EEC, art. 235; Euratom, art. 203. A more limited type of residual power is vested in the Council under the ECSC, art. 95.

226. ECSC, arts. 8-19; EEC, art. 155; Euratom, arts. 124, 134-35; Merger Treaty, arts. 9-19.

227. Merger Treaty, art. 10.

mission must resign if the assembly passes a vote of censure by two-thirds majority, and an individual commissioner can be removed by order of the Court of Justice, upon the application of either the Commission or the Council, if the Court finds him guilty of serious misconduct.[228] The Commission supervises a staff of several thousand, organized by subject matter departments,[229] and each commissioner is assisted by his personal staff.

The relative functions of the Commission and the Council vary depending on which treaty is involved. Under the ECSC Treaty the Commission is the general decision-maker and need only consult with the Council. The reverse is generally true under the EEC and Euratom Treaties, where the Council makes decisions upon the proposal of the Commission. Another noteworthy distinction is that the ECSC and Euratom Treaties spell out, in considerable detail, the specific norms to be followed by the Communities. The discretion of the Council and the Commission is thereby narrowly restricted. The broader EEC Treaty, however, permits great discretion in its implementation.[230] This is generally carried out by the Council, upon the proposal of the Commission. In some areas, particularly with regard to Community agricultural policy, the Council has delegated some of its authority to the Commission to fill in the details of the Council's basic policies.[231]

The ECSC Treaty requires the Commission to ensure the attainment of the objectives of the Treaty,[232] and the EEC and Euratom Treaties require the Commission to see that the provisions of the treaties and the measures taken pursuant to them are carried out.[233] This responsibility empowers the Commission to exercise its regulatory power through formal action and to engage in direct but informal contacts with states or commercial enterprises to encourage or coordinate compliance with the policies of the Communities.

Under the ECSC the Commission investigates allegations of infringements of Treaty obligations.[234] Upon finding a violation, the Commission notifies the state of the corrective action needed. If

228. Merger Treaty, arts. 10, 13; ECSC, art. 24; EEC, art. 144; Euratom, art. 114.

229. D. LASOK & J. BRIDGE, *supra* note 212, at 103.

230. SWEET & MAXWELL, *supra* note 212, at B10-329, B10-352; D. LASOK & J. BRIDGE, *supra* note 212, at 104, 111.

231. D. LASOK & J. BRIDGE, *supra* note 212, at 106.

232. ECSC, art. 8.

233. EEC, art. 155; Euratom, art. 124.

234. ECSC, art. 88.

the state refuses to act, the Commission may, upon a two-thirds vote of the Council, authorize the withholding of money due to the defaulting state by the Communities or by other Member States. The Commission may also impose a monetary penalty upon any commercial enterprise. All of these sanctions are subject to review by the Court of Justice.

Under the EEC and Euratom Treaties a simpler procedure is provided.[235] When the Commission believes that a Member State has failed to fulfill any of its obligations under the treaties, the Commission shall, after giving the state an opportunity to submit comments, issue a reasoned opinion. If the state does not comply with the opinion, the Commission may bring the matter before the Court of Justice.

All three treaties confer a number of financial and administrative functions upon the Commission.[236] It represents the legal personality of the Communities and speaks for the Communities in negotiations with non-member states and international organizations, subject to the authority of the Council to make decisions regarding external affairs. The Commission is custodian of the communities' funds and executes the budgets after approval by the Council.

3. *Assembly.*[237]—The Assembly consists of 198 members, of whom France, West Germany, Italy, and the United Kingdom are allocated 36 each, Belgium and the Netherlands 14 each, Denmark and Ireland 10 each, and Luxembourg 6.[238] Delegates are nominated by the respective national legislatures according to their own procedures. The treaties provide for the formulation of a procedure for election of members by direct universal suffrage, but this has yet to be accomplished.[239]

The Assembly has adopted the title "European Parliament," and in some respects is organized like continental European legislatures, with multinational political groups, and with standing committees that examine and report on business before debate

235. EEC, art. 169; Euratom, art. 141.

236. ECSC, art. 78; EEC, art. 205; Euratom, art. 179.

237. ECSC, arts. 20-25; EEC, arts. 137-44; Euratom, arts. 107-14; Convention on Certain Institutions Common to the European Communities, March 25, 1957, arts. 1-2 in SWEET & MAXWELL, *supra* note 212, at B8-029.

238. ECSC, art. 21; EEC, art. 139; Euratom, art. 108.

239. SWEET & MAXWELL, *supra* note 212, at B10-314; COMMUNIQUE ISSUED BY THE HEADS OF GOVERNMENT OF THE NINE STATES OF THE EUROPEAN COMMUNITY AT THEIR MEETING IN PARIS ON DECEMBER 9 AND 10, 1974 CMND. 5830, *in* SWEET & MAXWELL, *supra* note 212, at B13-016, B13-018.

begins in plenary session.[240]

The treaties vest only limited power in the Assembly. It can force the resignation of the Commission by a vote of censure passed by a two-thirds majority.[241] The Assembly members may propound written or oral questions to the Commission, and the Assembly debates the Commission's annual report on activities of the Communities.[242] The EEC Treaty requires the Council, acting on a proposal from the Commission, to consult with the Assembly before adopting regulations or directives to implement the Treaty provisions on unfair competition.[243]

4. *Court of Justice.*[244]—The Court of Justice consists of at least nine judges, assisted by at least four Advocates-General.[245] The number of judges and Advocates-General can be increased by unanimous vote of the Council, upon request of the Court. The current number of officials reflects such an increase, made after the 1972 Treaty of Accession. Judges and Advocates-General are chosen "from the persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence."[246] They are appointed for six-year staggered terms by common accord of the governments of the Member States and are eligible for reappointment.

Each treaty requires the Court to ensure legality in the interpretation and application of the treaty, and each treaty expressly authorizes the Court to review acts of the Council and of the Commission, and to invalidate them on certain grounds.[247] The Court is authorized to entertain complaints alleging Council or Commis-

240. SWEET & MAXWELL, *supra* note 212, at B10-312.

241. *See* note 228 *supra.*

242. ECSC, arts. 23-24; EEC, art. 140; Euratom, art. 110.

243. EEC, art. 87. Pursuant to this procedure, the Council adopted Regulation 17/62, effective March 13, 1962, *in* SWEET & MAXWELL, *supra* note 212, at B10-202, C4-009. Practice under this Regulation is discussed by Meessen, *The Application of the Antitrust Rules of the EEC Treaty by the Commission of the European Communities*, in K.C. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 75 (1976).

The terms "regulations" and "directives," used in art. 87, are defined by other Treaty provisions. *See* notes 267-75 *infra* and accompanying text.

244. ECSC, arts. 31-45; EEC, arts. 164-88; Euratom, arts. 136-60; Protocols on the Statute of the Court of Justice (annexed to each of the treaties); Convention on Certain Institutions Common to the European Communities, arts. 3-4.

245. ECSC, arts. 32, 32(a); EEC, arts. 165-66; Euratom, arts. 137-38.

246. ECSC, art. 32(b); EEC, art. 167; Euratom, art. 139.

247. ECSC, arts. 31, 33; EEC, arts. 164, 173; Euratom, arts. 136, 146.

sion inaction, and to order the necessary measures for performance of the functions required by the treaties.[248] In some specified areas the Court may not only invalidate the act of the Council or Commission, but may also award other relief, such as damages arising from torts.[249] As previously indicated, the Court has jurisdiction to remove Commission members from office for serious misconduct, and to decide complaints against Member States for treaty violations, after considering the report prepared by the Commission.[250] In addition to its powers of final decision, the Court is authorized to render preliminary rulings upon referral from courts or tribunals in Member States.[251]

C. *Relationship Between the Council and the Commission*[252]

The above sketch indicates that the Council and the Commission jointly perform the functions of the chief executive, subject to the very limited supervisory and consultative powers of the Assembly, and to the very significant legal controls of the Court.

Policy and attitudinal differences have developed between the Council and the Commission as a predictable and even intended result of the different composition of these two institutions. The Council, consisting of senior ministers from each Member State, provides a forum for protecting and asserting the interests of individual Member States, but the Commission, consisting of full-time commissioners under pledge to serve the Communities rather than their home states, tends to articulate Community values. When a treaty requires unanimous action by the Council, the government of each of the Member States in effect has an absolute veto available through its minister serving on the Council. The French Government, during the mid-1960's, favored extension of the unanimity requirement to more subjects on the theory that Member States should be able to exercise a veto whenever important national interests are at stake. The other five governments were not disposed to extend the availability of the veto. Under the Luxembourg Accord of 1966 all six members of the Council reached an

248. ECSC, art. 35; EEC, arts. 175-76; Euratom, arts. 148-49.

249. ECSC, art. 40; EEC, art. 178; Euratom, art. 151.

250. *See* note 228 *supra* (on removal powers); notes 234-36 *supra* and accompanying text (on deciding complaints against Member States for treaty violations).

251. *See* notes 321-26 *infra* and accompanying text.

252. D. LASOK & J. BRIDGE, *supra* note 212, at 110-23; Van Hulle, *supra* note 212, at 592-96.

agreement that has since served as a guideline though without the formal effect of a treaty amendment.[253]

The Luxembourg Accord stresses the need for close cooperation and coordination between the Commission and the Council. Before the Commission adopts "any particularly important proposal,"[254] it should contact the Committee of Permanent Representatives of the Member States. This committee, which assists the Council in preparing matters for deliberation, can then explore the project informally with staff personnel before the Commission develops a formal proposal. The way is then smoothed for subsequent Council action when the Commission's proposal comes up for formal approval.

When the treaties permit the Council to act by majority vote, the Council will, nevertheless, endeavor to reach unanimity within a reasonable time when "very important interests"[255] of one or more Member States are at stake. The French representative added a comment to the Luxembourg Accord, not supported by the other five member states, that in such situations the discussions must be continued until unanimity can be reached, implying that a veto will ultimately be available if unanimity cannot be reached. All six delegations agreed that there was a "divergence of views on what should be done in the event of a failure to reach complete agreement."[256]

The result tended to slow down the work of the Council since it attempted to reach unanimity even when the treaties impose no such requirement.[257] Commission proposals tended to bog down while awaiting Council approval. Although the Commission could, theoretically, ask the Court to invalidate the Luxembourg Accord as an unauthorized change in the processes of the Council, practical considerations have persuaded the Commission to tolerate the

253. The Luxembourg Accords, January 28-29, 1966, in SWEET & MAXWELL, *supra* note 212, at B13-001 - 002.

254. *Id.*

255. *Id.*

256. *Id.* The French position appears to have been modified. The Communique issued at the Paris summit meeting of the Nine on December 9-10, 1974, *supra* note 239, includes the following:

> In order to improve the functioning of the Council of the Community, [the Heads of Government] consider that it is necessary to renounce the practice which consists of making agreement on all questions conditional on the unanimous consent of the Member States, whatever their respective positions may be regarding the conclusions reached in Luxembourg on January 28, 1966.

257. D. LASOK & J. BRIDGE, *supra* note 212, at 118-21.

Accord as the only feasible means of continuing the business of the Communities under prevailing attitudes and conditions. Summit meetings of the heads of government of the Member States have been held on a fairly regular basis in recent years to facilitate top-level discussion of issues arising in the Council.[258]

D. *Consultative Organs of the Communities*[259]

The consultative organs established by each of the three treaties have not been centralized by the merger treaty. The EEC Treaty establishes the Economic and Social Committee;[260] the Euratom Treaty establishes the Scientific and Technical Committee;[261] and the ECSC Treaty establishes the Consultative Committee.[262] These organs are not regarded as "institutions" of the Communities, and they have neither decision-making power nor standing to file petitions for review in the Court of Justice. The consultative committees must be consulted by the Commission and the Council in certain situations specified in the treaties and may be consulted at any time deemed appropriate. If the Commission or Council breaches these procedural rules by failing to consult with the committee when required, the resulting act is voidable by the Court.[263]

E. *Rulemaking and Other "Executive" Acts in the Exercise of "Constitutional" Powers*

The "constitution" of the Communities (consisting of the three

258. In the 1974 Paris Communique, *supra* notes 239, 256, the heads of government stated that they had "decided to meet, accompanied by the Ministers of Foreign Affairs, three times a year and whenever necessary, in the Council of the Communities and in the context of political co-operation . . . . These arrangements do not in any way affect the rules and procedures laid down in the Treaties or the provisions on political co-operation in the Luxembourg and Copenhagen reports."

259. D. LASOK & J. BRIDGE, *supra* note 212, at 135-45, discusses consultative organs established by the treaties, as well as other ancillary institutions created by regulation, termed "management and rule-making committees." On the latter, *see also* Schindler, *The Problems of Decision-Making by Way of the Management Committee Procedure in the European Economic Community*, 8 COMM. MKT. L.R. 184 (1971).

260. EEC, art. 193.

261. Euratom, art. 134.

262. ECSC, art. 18.

263. SWEET & MAXWELL, *supra* note 212, at B10-386, begins the discussion of "[i]nfringement of an essential procedural requirement" under EEC, art. 173, with the statement: "There would fall under this head, the failure of an institution to consult another as required by the Treaty . . . ."

major treaties and the related accords among the Member States) authorizes the "executive" (consisting of the Council and the Commission) to take various types of actions without the need for enabling legislation from the Assembly. Thus, the acts taken by the Council and the Commission are generally based directly upon their constitutional powers. The treaties specify a variety of actions that can be taken by the Council and the Commission, some of which can be regarded as rulemaking for the comparative purposes of this paper.

The EEC and Euratom Treaties authorize the Council and the Commission, in the exercise of their respective functions, to "make regulations, issue directives, take decisions, make recommendations or deliver opinions."[264] The ECSC authorizes the Commission (but not the Council) to "make decisions, made recommendations or deliver opinions."[265] However, the definitions of "recommendations" and "decisions" in the EEC and Euratom Treaties differ from those in the ECSC Treaty. The ECSC empowers the Council to exercise its powers "in the cases provided for and in the manner set out in this Treaty,"[266] without any general elaboration of the types of action that may be taken by the Council. The following discussion is organized under headings corresponding to those in the EEC and Euratom Treaties.

1. *Regulations.*—Under the EEC and Euratom Treaties: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."[267] The closest equivalent definition in the ECSC Treaty is the "decision," which is "binding in its entirety."[268] The ECSC Treaty recognizes that "decisions" may be either general or individual.[269] The "general decision" under the ECSC Treaty is regarded as corresponding to the "regulation" under the EEC and Euratom Treaties.[270] As indicated by the definition, regulations go into effect in all Member States without the need for implementing legislation at the national level. Community regulations supersede inconsistent national legislation. Member States and citizens can invoke

264. EEC, art. 189; Euratom, art. 161.
265. ECSC, art. 14.
266. ECSC, art. 26.
267. EEC, art. 189; Euratom, art. 161.
268. ECSC, art. 14.
269. ECSC, art. 33, para. 2.
270. SWEET & MAXWELL, *supra* note 212, at B2-021, commenting on ECSC, art. 14, reaches this conclusion; *accord,* R. LAUWAARS, *supra* note 212, at 9.

Community regulations in national courts.[271]

2. *Directives.*—The EEC and Euratom Treaties state:

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.[272]

The ECSC definition of "recommendation" is almost identical.[273] Directives are issued when the Council or the Commission agrees on a general result to be achieved, but is willing to let each Member State work out its own means of implementation. Directives generally include time limits within which the Member States are required to take implementing action.[274] Although addressed to Member States, directives may sometimes confer rights that citizens can invoke in national courts.[275]

3. *Decisions.*—Under the EEC and Euratom Treaties: "A decision shall be binding in its entirety upon those to whom it is addressed."[276] The "individual decision" under the ECSC Treaty is regarded as the equivalent.[277] The addressee of a decision may be either a Member State or a legal or natural person. Typical subjects include the granting of exceptions or authorizations and the imposition of fines.[278] One of the difficult questions arising under this provision is the extent to which a decision addressed to a Member State confers rights upon individuals. This will be explored later in conjunction with the discussion of review by the Court of Justice.

4. *Recommendations and Opinions.*—The EEC and Euratom Treaties state that "recommendations and opinions shall have no binding force."[279] The ECSC makes a similar statement about "opinions."[280] Professor Mathijsen explains that under the EEC/Euratom terminology:

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271. R. LAUWAARS, *supra* note 212, at 8-27; D. LASOK & J. BRIDGE, *supra* note 212, at 75-77.

272. EEC, art. 189; Euratom, art. 161.

273. ECSC, art. 14.

274. D. LASOK & J. BRIDGE, *supra* note 212, at 77.

275. R. LAUWAARS, *supra* note 212, at 27-37; D. LASOK & J. BRIDGE, *supra* note 212, at 77-78.

276. EEC, art. 189; Euratom, art. 161.

277. SWEET & MAXWELL, *supra* note 212, at B2-021, commenting on ECSC, art. 14, reaches this conclusion. *Accord,* D. LASOK & J. BRIDGE, *supra* note 212, at 78-79. More complexities are developed in R. LAUWAARS, *supra* note 212, at 37-50.

278. P. MATHIJSEN, *supra* note 212, at 186.

279. EEC, art. 189; Euratom, art. 161.

280. ECSC, art. 14.

> Generally speaking, "recommendations" aim at obtaining a certain action or behavior from the addressee while "opinions" express a point of view at the request of a third party; this distinction however is legally irrelevant.[281]

F. *Form*

Under the EEC and Euratom Treaties:

> Regulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.[282]

The ECSC imposes a similar requirement not only with regard to acts with binding effect (the ECSC's equivalents of regulations, directives and decisions), but also for opinions, which are nonbinding under all treaties.[283]

G. *Publication, Notification, and Effective Date*

The EEC and Euratom Treaties provide:

> Regulations shall be published in the Official Journal of the Community. They shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication. Directives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification.[284]

The ECSC provision is similar.[285] The publication requirement of the treaties, as indicated by the above text, is limited to regulations. In practice, the Official Journal publishes many directives and decisions as well. The Court of Justice has encouraged expanded publication.[286]

H. *Proceedings Before the Court of Justice for Annulment of Council or Commission Acts*[287]

A previous heading included a general sketch of the Court of

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281. P. MATHIJSEN, *supra* note 212, at 187.
282. EEC, art. 190; Euratom, art. 162.
283. ECSC, art. 15.
284. EEC, art. 191; Euratom, art. 163.
285. ECSC, art. 15 is less elaborate than the EEC and Euratom provisions cited in *supra* note 284.
286. P. MATHIJSEN, *supra* note 212, at 190-91.
287. In addition to works previously cited, see Kavass, *The Court of Justice*

Justice, as background material on the institutions of the Communities. The following discussion explores in more detail the role of the Court in the annulment of acts of the Council and Commission.

1. *Acts Subject to Review.*—All three treaties authorize the Court of Justice to review the legality of "acts of the Council and the Commission other than recommendations or opinions."[288] This terminology is in the EEC and Euratom Treaties. Equivalent terms used in the ECSC Treaty produce a similar result.[289] The discussion will continue to use EEC and Euratom terminology and will make separate reference to the ECSC Treaty only when the result differs.

The quoted provision clearly allows the Court to review regulations, directives, and decisions (since these are the types of actions described in the treaties other than recommendations or opinions). Moreover, in *Commission v. Council,*[290] the Court determined that it could review other types of action if the act at issue had been "intended to produce a legal effect."[291] Thus, the Court agreed to review the validity of Council deliberations concerning the EEC's approach to the European Agreement on Working Conditions in Road Transport. The Court observed that these deliberations were "designed to define a course of conduct that was mandatory for the institutions as well as for the member states . . . ."[292]

2. *Standing of Private Parties Under the EEC and Euratom*

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of the European Communities: An Annotated Bibliography—1951-1973, 8 VAND. J. TRANSNAT'L L. 523 (1975); D.G. VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (1965); Note, *Jurisdiction and Procedure of the Court of Justice of the European Communities,* 8 VAND. J. TRANSNAT'L L. 673 (1975).

288. EEC, art. 173; Euratom, art. 146. The ECSC Treaty reaches a similar result by slightly different wording; *see* note 289 *infra* and accompanying text.

289. ECSC, art. 33 confers jurisdiction to review "decisions or recommendations." These are the acts of binding authority that can be taken under ECSC, art. 14, corresponding to the EEC-Euratom acts described in those treaties as "regulations, decisions, and directives." These constitute all acts that can be taken with binding authority under EEC, art. 189 and Euratom, art. 161. The only other possible acts under those treaties are "recommendations and opinions," and these are declared non-reviewable by EEC, art. 173 and Euratom, art. 146. The result is that in the ECSC Treaty, as in the EEC-Euratom Treaties, the Court of Justice can review all acts of binding authority and no others.

290. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8134, 10 Comm. Mkt. L.R. 355 (1971).

291. [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) at 7526, 10 Comm. Mkt. L.R., at 357.

292. *Id.*

Treaties.—Under all three treaties, suit for annulment may be brought by a Member State, the Council, or the Commission.[293] In addition, limited standing is conferred upon private parties. The Treaties of Rome (EEC and Euratom) differ in this respect from the Treaty of Paris (ECSC).

The EEC and Euratom Treaties provide that any natural or legal person may "institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former."[294] In *Confédération Nationale des Producteurs de Fruits et Légumes v. EEC Council,*[295] the Court adopted a literal reading of the text of the treaties. *Decisions* are the only types of act that can be challenged by private persons under this provision; consequently, private parties have no standing to bring suit to challenge regulations or directives. The text further provides that the only decisions that can be challenged by a private party are those that are (1) addressed to the plaintiff, (2) in the form of a regulation, but nonetheless of direct and individual concern to the plaintiff, or (3) in the form of a decision addressed to another person, but still of direct and individual concern to the plaintiff.

Commentators point out that the first category (decisions addressed to the plaintiff) poses no problems because the interest of the plaintiff is readily identifiable.[296] The second category (decisions in the form of regulations that concern the plaintiff) has been interpreted as referring only to acts that have been disguised as regulations, although they are actually decisions. The private party directly affected is thus allowed to challenge the use of the improper form.[297] This is the only situation in which a private party aggrieved by a regulation can bring suit to challenge it under the EEC and Euratom Treaties.

More complex problems are posed under the third category (decisions addressed to another person but nonetheless of direct and individual concern to the plaintiff), especially when the addressee of the decision is a Member State. In *Plaumann & Co. v. EEC*

293. ECSC, arts. 33, 38; EEC, art. 173; Euratom, art. 146.

294. EEC, art. 173; Euratom, art. 146.

295. [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8005 (1962).

296. P. KAPTEYN & P. VAN THEMAAT, *supra* note 212, at 166-72; SWEET & MAXWELL, *supra* note 212, at B10-385 (commenting on EEC, art. 173); P. MATHIJSEN, *supra* note 212, at 156-58.

297. SWEET & MAXWELL, *supra* note 212, at B10-385.

Commission,[298] the Court held that a Member State is a "person" for purposes of this provision. Thus, a decision addressed to a Member State can qualify as being addressed to "another person." However, *Plaumann* and subsequent cases have given very restrictive interpretations to the "direct and individual concern" requirement. Private plaintiffs, therefore, have difficulty in establishing their standing to institute proceedings to challenge decisions addressed to Member States under the Rome Treaties.[299]

3. *Standing of Private Parties Under the ECSC Treaty.*—The ECSC Treaty allows enterprises or associations of enterprises to "institute proceedings against decisions or recommendations concerning them which are individual in character or against general decisions or recommendations which they consider to involve a misuse of powers affecting them."[300] This provision confers standing which is narrower in one respect, but broader in another, than the corresponding articles of the Rome Treaties. Standing under the ECSC is narrower since it is given only to enterprises and associations of enterprises, while the EEC and Euratom Treaties extend standing to any natural or legal person. On the other hand, the ECSC confers broader standing by permitting the private party to challenge "general decisions or recommendations" (the ECSC equivalents of the EEC categories of regulations and directives) if he claims to be affected by a misuse of powers.

4. *Grounds for Annulment.*—Under the EEC and Euratom Treaties the Court must annul acts of the Council or Commission on any of the following grounds: lack of competence; infringement of an essential procedural requirement; infringement of the treaty or of any rule of law relating to its application; or misuse of powers.[301] The ECSC Treaty provides that acts of the Commission shall be annulled on the same grounds.[302] Regarding acts of the Council and the Assembly, however, the ECSC Treaty authorizes annulment only for lack of competence or infringement of an essential requirement of law.[303]

An act is voidable for lack of competence if the institution had no authority to perform the act in question.[304] *Meroni v. High*

298. [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8013 (1963).
299. *See* sources cited in note 296 *supra*.
300. ECSC, art. 33.
301. EEC, art. 173; Euratom, art. 146.
302. ECSC, art. 33.
303. ECSC, art. 38.
304. D. LASOK & J. BRIDGE, *supra* note 212, at 161; P. MATHIJSEN, *supra* note 212, at 158-59.

Authority[305] indicates how this can occur. It involved certain levies imposed by authorities in Brussels, under color of delegations of power from the High Authority. The Court of Justice held that the High Authority had improperly attempted to delegate its power. Therefore, its act of delegation was invalid; the recipient of the delegation had not acquired any lawful jurisdiction; and the acts of the recipient of the delegation were void for lack of competence.

In some cases, the Court of Justice has sustained the validity of acts although procedural errors were committed. This has occurred when the errors were relatively harmless, and the procedural requirement infringed was not "essential" to the outcome. For example, in *ACF Chemiefarma N.V. v. Commission,*[306] the Court found that the Commission's failure to release an investigation of price fixing was harmless error. Similarly, in *Weighart v. Euratom Commission,*[307] the Court ruled that the absence of a member of the Commission during the taking of some of the evidence was harmless error where that member was later given a written summary of the evidence.

The Court is understandably less willing to tolerate procedural irregularities that violate express treaty provisions. Particular attention has been devoted to the requirement that the Commission (under all three treaties) and the Council (under the Treaties of Rome) state the reasons upon which their acts are based, and make express reference to any proposals or opinions required by the treaty.[308] In *Federal Republic of Germany v. EEC Commission,*[309] the Court relied on this requirement as the basis for annulling an import quota, which the Commission had justified only by stating that "information gathered" indicated "that the production of wines of this type is amply sufficient."[310]

Annulment for infringement of a treaty or of any rule of law relating to its application requires subdivision into two component parts. Violations of a treaty are not limited to violations of *essential* requirements, but, instead, extend to violations of *any* requirement. Consequently, the doctrine of harmless error will not protect an act from annulment if *any* treaty violation occurs.[311]

305. [1958] C.J. Comm. E. Rec. 51, cited in 2 VALENTINE, *supra* note 287, at 481.

306. [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8083 (1970).

307. 5 Comm. Mkt. L.R. 1 (1966).

308. *See* notes 282-83 *supra.*

309. [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8012 (1963).

310. *Id.* at 7254.

311. Street, *Administrative Law and Judicial Review in the E.E.C.*, in THE

Violation of a rule of law is comparable to the *violation de la loi* of French administrative law.[312] Professor Street and others have speculated that the European Court of Justice may ultimately use "violation of any rule of law" as the basis for imposing general principles of law upon the organs of the Communities.[313]

Annulment due to a misuse of power is derived from *détournement de pouvoir* in French administrative law.[314] While the *Conseil d'Etat* has made extensive use of this concept in reviewing the acts of the French executive, the European Court of Justice has exercised considerable restraint.[315]

5. *Time for Filing a Petition.*—Under the EEC and Euratom Treaties, a proceeding seeking annulment of an act of the Council or Commission must be filed within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to his attention.[316] The corresponding period under the ECSC Treaty is one month.[317]

I. *Defense of Illegality Against Enforcement of Regulations*

Even after expiration of the time for filing a petition for annulment, the EEC and Euratom Treaties permit a party to proceedings in which a regulation of the Council or Commission is in issue to plead the invalidity of that regulation on any of the grounds available in actions for annulment.[318] Since the challenger is obviously too late to appear as plaintiff after expiration of the time for filing, this provision is designed to permit the defendant to assert the invalidity of a regulation in proceedings in which the regulation is being invoked to his detriment. This defense, which is analogous to the French *exception d'illégalité*,[319] can only be raised with regard to regulations. If the defendant prevails, the regulation remains in general effect but is not imposed upon him.[320]

LAW OF THE COMMON MARKET 40, 48 (B. Wortley ed. 1974).

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 48-49.

316. EEC, art. 173; Euratom, art. 146.

317. ECSC, art. 33.

318. EEC, art. 184; Euratom, art. 156.

319. The analogy is noted in SWEET & MAXWELL, *supra* note 212, at B10-410; D. LASOK & J. BRIDGE, *supra* note 212, at 166-67.

320. Street, *supra* note 311, at 51; D. LASOK & J. BRIDGE, *supra* note 212, at 166.

J. *Preliminary Rulings by the Court of Justice*

Under the EEC and Euratom Treaties, the Court of Justice has jurisdiction to give "preliminary rulings" concerning: (1) treaty interpretation; (2) the validity and interpretation of acts of Community institutions; and (3) the interpretation of the statutes of bodies established by the Council, if those statutes authorize such rulings.[321] Although the text of the treaties authorizes preliminary rulings on the validity and interpretation of the "acts" of community institutions, it has been taken to refer only to acts which have legally binding force. Preliminary rulings on the validity of recommendations and opinions, therefore, appear to be unavailable.[322]

The treaties provide:

> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.[323]

Preliminary rulings under these provisions are not intended to dispose of the entire case between the parties in the national court. Proceedings in the national court are suspended while that court certifies an "abstract" question to the Court of Justice, which renders its response to the national court. The latter can then proceed to adjudicate the rights of the parties.[324] The comparable provision of the ECSC Treaty states:

> The Court shall have sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is at issue in proceedings brought before a national court or tribunal.[325]

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321. EEC, art. 177; Euratom, art. 150.

322. A. PARRY & S. HARDY, *supra* note 212, at 103, supports this position and adds the observation that "an act couched in the form of a recommendation but as a matter of fact having the effect of a binding act in the sense of article 189 would, it seems, be open to annulment in appropriate circumstances."

323. EEC, art. 177; Euratom, art. 150.

324. P. MATHIJSEN, *supra* note 212, at 163-66; F. JACOBS & A. DURAND, *supra* note 212, at 194.

325. ECSC, art. 41.

On the jurisdiction of the Court of Justice to render preliminary rulings under all treaties, Professor Mathijsen comments:

> It is clear from the abundance of questions of interpretation put to the Court of Justice that here lies an essential function, not only in regard to the development of Community law, but also as an instrument put at the disposal of natural and legal persons when confronted with self-executing Community measures whose legality they cannot directly challenge in the Court of Justice.[326]

K. *Summary of Executive Rulemaking in the European Communities*

The treaties establishing the European Communities authorize the Council and the Commission to take various types of action, including some that can be regarded as executive rulemaking. The main attributes of each type are synthesized below.

1. *Regulations.*—Regulations are generally applicable throughout the communities and are legally binding on all Member States and citizens. Regulations must be accompanied by reasons and by citations to any required consultations. They must be published in the Official Journal. The Council, the Commission, or a Member State may bring an action in the Court of Justice for annulment of any regulation. Under the EEC and Euratom Treaties, private parties may not bring such a suit. The ECSC Treaty confers standing upon enterprises or associations of enterprises. Regulations may be collaterally attacked by the defense of illegality. They are also subject to preliminary rulings by the Court of Justice.

2. *Directives.*—Directives are addressed to Member States and are binding as to the result to be achieved, but leave the Member States with discretion to choose appropriate methods. Directives must be accompanied by reasons and by citations to any required consultations. They must be notified to the addressee state, but publication is not required. An action for annulment of any directive is similar to an action for annulment of a regulation, but directives cannot be collaterally attacked by the defense of illegality. Although a directive may be addressed to only one Member State, it nevertheless is intended to bring about general effects within that state. It can therefore be regarded as a "rule," at least from the perspective of the affected state's citizens.

3. *Decisions.*—Decisions are addressed to Member States or to legal or natural persons and are fully binding. A decision addressed

326. P. MATHIJSEN, *supra* note 212, at 166.

to an individual person is evidently not a "rule." A decision addressed to a Member State, however, may be considered a rule, because the intent may be to bring about general effects within the state. Furthermore, a decision addressed to a large number of individuals, or to associations or other representational parties, may have sufficient general applicability to qualify under some concepts of rulemaking.

Decisions must be accompanied by reasons and by citations to any required consultations. They must be notified to the addressee, but publication is not required. An action may be brought in the Court of Justice, for annulment of any decision, by the Council, the Commission, or a Member State. In addition, the EEC and Euratom Treaties grant standing to any legal or natural person who is the addressee of a decision, or who is directly and individually concerned with a decision addressed to another. The ECSC Treaty confers standing upon enterprises or associations of enterprises with slightly less stringent requirements for demonstrating the necessary interest. Decisions are not subject to the defense of illegality. They are subject to preliminary rulings by the Court of Justice.

4. *Recommendations and Opinions.*—Recommendations and opinions are not binding. If intended as general statements of interpretation, they may be analogous to interpretative rules under United States concepts of administrative law. For that reason they are included in this summary of rulemaking activities of the European Council and Commission.

Recommendations and opinions need not be accompanied by reasons or citations to consultations, except under the ECSC Treaty. Neither publication nor notification is required, although obviously these acts are of little use unless brought to the attention of parties likely to be interested. Recommendations and opinions are not subject to the action for annulment in the Court of Justice, nor to the defense of illegality, nor, apparently, to preliminary ruling by the Court of Justice.

VI. Comparative Comments

Rulemaking by the chief executive, in the exercise of powers derived from the constitution, exists in each of the four legal systems under study. The literature of each system takes its own distinctive approach toward the description and analysis of executive rulemaking, and these descriptions have generally been followed in this study. This concluding section compares the four systems.

A. *Organizational Structure of the Chief Executive*

The single-headed executive of the United States stands in marked contrast to the parliamentary cabinet system in the United Kingdom, the interlocking functions of the President of the Republic and the Prime Minister in France, and the combination of the Council and the Commission in the European Communities. Each system, however, offers remedies from relatively independent organs of government if the chief executive attempts to wield unauthorized or arbitrary powers. Furthermore, in each system the executive must depend upon independent organs of government for the appropriation of funds. These organs are accountable, in one way or another, to a constituency. This study would contain more dramatic, but possibly less useful, contrasts if it extended to other regimes that do not share this view of the rule of law.

B. *Statutory and Constitutional Powers*

In all four systems the chief executive derives powers in certain subject areas directly from the constitution. In addition, in three of the systems—the United States, the United Kingdom, and France—the chief executive is statutorily required as the delegate of the legislature to perform a wide variety of governmental functions. This situation does not exist in the European Communities. The Treaties (regarded as the "constitution" for purposes of this study) confer a broad range of lawmaking power directly upon the Council and the Commission (regarded here as the "chief executive"). Relatively little lawmaking power is left in the hands of the Assembly (regarded here as the "legislature"). The Assembly does not have occasion to delegate its powers to the Council and the Commission, which do not need the Assembly's authorization for their general functions.

The difference between the three systems in which legislative delegation to the executive is a pervasive fact of government and the one system where it is not may reflect the limited usefulness of this article's terminology, describing the Treaties as a "constitution," the Council and the Commission as the "chief executive," and the Assembly as the "legislature."

C. *Presidential Rulemaking in the Exercise of Constitutional Powers*

Although the law varies greatly in amount of detail, from the highly elaborate Treaties of the European Communities to the "unwritten" traditions of the United Kingdom, some common fea-

tures can be discerned.

1. *Types of Presidential Rulemaking.*—Presidents of the United States issue proclamations and executive orders. These acts vary in format and subject matter. In addition, Presidents make "determinations," countersign the acts of subordinate officers, and issue interpretative statements. Some Presidential rules require implementation by the government agencies affected.

The prerogative powers of the British Sovereign are formally expressed, either as Orders in Council signed by the Clerk of the Privy Council, or as proclamations signed by the Sovereign in person. It may be assumed that these are the historical antecedents of the American executive order and proclamation, respectively.

The French executive carries out its constitutional powers by a variety of instruments—decrees by the President of the Republic or the Prime Minister, *arrêtés* by ministers (under delegation from the Prime Minister), and informal statements, including circulars, instructions, and directives.

The European Communities have the most elaborate approach. The Council and the Commission may issue regulations (binding Member States and citizens), directives (binding Member States as to the result to be achieved, comparable to American executive orders addressed to other government agencies), decisions (some of which may achieve sufficient generality to be regarded as "rules"), and recommendations and opinions (comparable to interpretative rules in American administrative law).

2. *Procedures for Presidential Rulemaking.*—A series of executive orders establishes a confidential process within the executive branch of the United States government for processing proclamations and executive orders. This process does not restrict the President, but merely organizes the manner in which his assistants circulate drafts of the documents.

The British system uses the formal procedures of the Privy Council, meeting with the Sovereign and acting upon the advice of the Cabinet or an individual minister. This advice emanates from meetings of the Cabinet, where policies are formulated in a collegial setting.

The central feature of the French system is deliberation by the Council of Ministers, leading to promulgation of a decree. Other types of rulemaking are possible, however. The President of the Republic may issue decrees without deliberation by the Council of Ministers, and individual ministers may issue *arrêtés* without the Council's deliberation. Decrees are countersigned by the ministers responsible for their execution. In some circumstances, the *Conseil*

d'Etat must be consulted before the promulgation of a decree.

The treaties of the European Communities, supplemented by the Luxembourg Accords, establish elaborate deliberative procedures involving both the Council and the Commission. In addition, some matters require consultation with the Assembly or another consultative organ of the Communities.

United States procedure contrasts sharply with that of the other three systems. When exercising functions derived from the Constitution, the President of the United States is subject only to procedural requirements imposed by himself or by a predecessor. By contrast, the chief executives of the other systems studied are subject to procedures imposed by their respective constitutions, which all require significant deliberations with collegial groups possessing some political power.

3. *Statement of Reasons.*—The European Treaties require regulations, directives, and decisions to include a statement of reasons and a reference to any required proposals or opinions. The French Constitution does not impose such a requirement, but the *Conseil d'Etat* has encouraged the executive to give a statement of reasons while a case is under review, even if reasons were not provided at the time of promulgation of the rule. In practice, French decrees are generally accompanied by extensive statement of reasons. Neither British nor American law requires reasons to accompany executive acts.

4. *Publication and Effective Date.*—The European Treaties require regulations to be published, and to become effective on the twentieth day following publication, unless another effective date is specified. Directives and decisions shall be notified to the affected parties. As a matter of practice, many directives and decisions are published, although the Treaties do not impose this requirement.

In France and the United States publication is required, not by constitutional text, but by a self-regulatory act of the executive. The French decree of 1870 requires that all decrees be published and become effective on or after publication. In the United States, executive orders establish the requirement that proclamations and executive orders must be published in the Federal Register. Britain has no general requirement for the publication of prerogative proclaimations or Orders in Council.

5. *Binding Effect.*—The major concept regarding binding effect is the French theory of parallel jurisdiction and parallel form. Under this concept, an act of an agency retains its binding effect upon the agency and other parties until it is superseded by a later

act, which must be issued pursuant to the same grant of jurisdiction, and in the same form as the original—unless a higher authority intervenes. This means that the chief executive is bound by prior executive acts—even the acts of predecessors—until the chief executive promulgates a new act of similar form or a higher authority intervenes. As applied to the United States, this theory would bind the President to executive orders issued by himself and his predecessors, unless and until he promulgates a new executive order repealing the old one, or the Constitution is amended, or a court renders a constitutional ruling invalidating the old executive order.

The Treaties of the European Communities declare that regulations, directives, and decisions are "binding." The theory of parallel jurisdiction and parallel form is presumably part of the "binding" effect of these instruments. The same theory is showing signs of acceptance in the United States, although it is not referred to here by its French name. No comparable theory could be found in British literature.

D. *Judicial and Legislative Controls Over Presidential Rulemaking Under the Constitution*

In all of the legal systems studied, the chief executive is subject to general political pressures from the legislature. In addition, certain specific controls are exercised, either by the legislature or the courts or both, before and after the chief executive promulgates rules in the exercise of powers derived from the constitution.

1. *Specific Controls Before the Issuance of Rules.*—The Congress of the United States has only a limited opportunity to impose prior controls upon the President's exercise of rulemaking authority under the Constitution. Clearly, Congress cannot restrict the scope of the President's constitutional powers. In the twilight zone between presidential and congressional powers, however, Congress may, by its non-use of certain powers, encourage the President to be expansive in interpreting his own powers. It has also been suggested that Congress has the authority to require the President to follow prescribed procedures even in the performance of his constitutional powers.

In the United Kingdom, Parliament has complete power to reduce the scope of the royal prerogative, thereby depriving the executive of future constitutional authority over a designated subject matter. The French *Conseil Constitutionnel,* by its review of statutes before promulgation, directly affects the scope of the legislature's power, thereby conversely affecting the residual power that

can be exercised by the executive. The European Treaties do not provide for pre-promulgation review of executive acts, but the complex structure within the executive itself evidently builds substantial safeguards into the system.

2. *Specific Controls After the Issuance of Rules.*—The American courts have established their authority to review the constitutionality of Presidential actions, including rulemaking, although in practice the review has generally accorded great deference to the discretion of the President. The British courts also review the validity of prerogative actions, but only to ascertain the existence and extent of the prerogative. The French *Conseil d'Etat* engages in penetrating review of all executive acts, and its authority is beyond question, although not spelled out in the French Constitution. The European Court of Justice enjoys review powers, described in detail in the Treaties, resembling in many respects the powers of the French *Conseil d'Etat.*

E. *A Final Comment on Presidential Rulemaking in the United States*

When engaged in rulemaking in the exercise of constitutional powers, the President of the United States is subject to very few controls, compared to his counterparts in the other systems. The President is the chief executive; the Constitution subjects him to no particular rulemaking procedure, and he is subject only to the minimal procedural requirements prescribed by executive orders. He is not required to give reasons for his acts, and the notion that he is bound by previous executive orders is only slowly gaining acceptance. In these respects, the President differs from each of his counterparts in the other three systems.

The great procedural freedom enjoyed by the President of the United States when exercising constitutional powers contrasts not only with other countries, but also with the restraints that are imposed upon him when he acts as a delegate of Congress. He then becomes subject to the Administrative Procedure Act or such other procedural statutes as Congress chooses to impose. Additional procedures and reasons may be required, and prior parallel actions are generally recognized as binding.

The American Presidency should not necessarily be modeled after the executive of any other jurisdiction, nor should the constitutional powers of the President be exercised like delegations from Congress. The President does, however, appear to enjoy more procedural freedom when exercising constitutional powers than is justified by the Founding Fathers' vision of "energy in the executive."

Although the Constitution could theoretically be amended to subject the President to procedural controls in the exercise of constitutional powers, such an amendment can hardly be anticipated. Nor does it appear likely that Congress or the courts will impose significant procedural controls upon the President's exercise of constitutional powers. The remaining source of procedural control is by presidential self-regulation. The existing executive order on executive orders requires expansion to provide a more comprehensive procedural framework for presidential acts in the exercise of constitutional powers.

F. *Executive Rulemaking in the States*

Like the President, state governors can subject themselves to self-regulation by promulgating executive orders establishing procedures for the exercise of constitutional powers. Reform at the state level is also possible through the insertion of new provisions in state constitutions requiring the promulgation of procedural standards for the exercise of the governor's constitutional powers. The relative ease and frequency of amendment of state constitutions suggests that reform by constitutional amendment may be feasible.

G. *Beyond Procedure—Rulemaking as a Preferred Method for Developing Executive Policy*

Part I of this article offered the thesis that the elements, consequences, and opportunities of presidential rulemaking in the exercise of constitutional powers should be clarified, and that Presidents should use rulemaking, to the extent feasible, as the preferred method of exercising their constitutional powers.[327] This proposition suggests that rulemaking be used, not only to establish *procedures* to be followed in the exercise of constitutional powers, but also to promulgate *substantive* rules to reduce the scope of discretion available in solving future individual questions. The President must, however, retain his authority to amend the rules, in compliance with pre-existing procedures established by himself or a predecessor, if the rules no longer conform to presidential policy.

The comparative discussion of Britain, France, and the European Communities has dealt with *procedures* for executive rule-

327. Levinson, *Presidential Self-Regulation Through Rulemaking* (pt. 1), 9 VAND. J. TRANSNAT'L L. 695, 699 (1976).

making, but contains virtually no mention of *substantive* rulemaking. This reflects the content of the constitutions and doctrinal writings of those jurisdictions, which deal mainly with procedure rather than substance in executive rulemaking.

In a comparative study, Professor Kenneth C. Davis notes that British and French tribunals have recently developed a tolerant view toward the voluntary adoption of rules by administrative agencies as a means of cutting back the scope of future discretion in the exercise of powers delegated by statute.[328] While this type of self-regulation by rulemaking may be *permitted* in those countries, it is not *required.* Davis also notes the use of executive rules, in the European Communities, to develop substantive policies for implementation of the treaty provisions on unfair competition.[329]

American law and theory, largely because of Davis' earlier work, has moved at least as far as any of the other jurisdictions studied in developing substantive standards by rulemaking. These American developments, however, have been concentrated in the agencies that carry out statutory programs. The utility of substantive as well as procedural rulemaking should be recognized, not only for agencies performing statutory functions, but also for chief executives in the exercise of their constitutional powers.

328. K.C. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA, 174-75 (1976).

329. *Id.* at 97. *See also* note 243 *supra.*