EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

LAW DEPARTMENT

E U I W O R K I N G P A P E R No. 27

LEGAL ANALYSIS OF ECONOMIC POLICY

by

TERENCE C. DAINTITH

June 1982

BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in October 1982
European University Institute
Badia Fiesolana
I - 50016 San Domenico (FI)
Italy

INTRODUCTION

1. The systemic approach to public law

A leading recent text on British constitutional law, having listed a number of measures adopted by the Conservative and Labour Governments between 1970 and 1977 for the furtherance of their economic policies, concluded:

> 'Potentially some of these developments were of considerable constitutional interest; but so many of them were influenced by economic and political vicissitudes that the most appropriate commentator was the journalist.' [1]

The feeling here expressed, that the writer on public law matters should deliberately distance himself from the hurly-burly of economic events and political action and conflict, and should draw a picture of constitutional and administrative law which is purified of non-legal, short-run influences, is one which has commanded wide acceptance in both academic and practising legal circles in the United Kingdom.[2] There are good intellectual, pedagogical and professional reasons underlying this attitude. The absence of any formal and comprehensive written constitution for the United Kingdom compels a vigorous effort of systematisation and abstraction if the constitutionally significant features of a long, and continuing, political and legal history are to be apprehended at all, and at the same time eliminates any risk that such a

... / ..

systematic treatment of the constitution will amount to no more than an arid textual commentary without reference to real life. A more mundane, but equally important consideration is that the lawyer must defend his métier: with few authoritative texts on which to deploy his recognised interpretative skills, he runs the risk, in dwelling too long on "economic and political vicissitudes" in his treatment of the constitution, of being mistaken not for a journalist but - a worse fate, perhaps - for a political scientist. In the result, the mainstream of British writing by lawyers about the constitution analyses constitutional principles and structures largely to the exclusion of any consideration of the activities in which the organs of government are engaged or the purposes with which they pursue them - an interesting exception being the area of governmental activity which bears most directly upon personal liberty, the actions of the police. Certainly, innumerable examples of the behaviour of constitutional organs are cited, but always with the objective of illustrating a confirmation of or a change in the constitutional system, rather than the legal framework of the particular activity of government from which the example is drawn.

The merits of this approach - the distillation of a reasonably coherent system of public law out of a sprawling mass of political and legal events and behaviour - have off-

... / ..

setting disadvantages. Constitutions must reflect the changing powers and responsibilities of government if they are not to risk irrelevance and displacement, whether by peaceful or less than peaceful means. One of the strengths, it may be argued, of the British constitution is an inherent flexibility and responsiveness which makes it unlikely ever to suffer the fate of the Constitution of the French Fourth Republic; but the practitioner of the systemic approach to constitutional law, dismissing the current activities of government as mere ephemeridae, may be slow to appreciate, and reluctant to acknowledge, the flexible response of our constitution to such facts and events and their consequent potential for engendering constitutional changes of continuing importance.

A visible aspect of this approach in the literature is an attitude of suspicion towards the very existence of governmental power. In general, the emphasis is still placed heavily on analysis of the capacity of the law and legal institutions to restrain governmental action, rather than on the exploration of their ability to further governmental purposes. Indeed, the very possibility that law may be shaped (or reshaped) more by government policy than policy is constrained by existing law seems hard for some to accept: administrative law, for one of our leading modern writers, has for its only object "to keep the powers of government within their legal bounds" and to prevent "powerful engines

... / ..

of authority" from "running amok".[3] The more dangerous invisible aspect is the failure to see the constitutional problems of the present which arise from the constant adaptations of the instruments of governmental power and action in order to discharge the current range of governmental responsibilities amid the economic and political vicissitudes of the hour. I would argue, for example, that government's use of its contractual powers to influence private and public sector behaviour was a significant constitutional problem long before their deployment in the contentious context of pay restraint lifted them to the status of a first-rank political issue and won them a place in the constitutional law literature.[4]

2. An alternative "policy" approach

Implicit in these criticisms is the idea that a truer picture of current constitutional and public law problems may be obtained by exploring the material hitherto set to one side by the mainstream approach, that is to say, aims and activities of government. I do not suggest that such an exploration can be a substitute for traditional systematic analysis; its role is rather a complementary and corrective one. It would start not from constitutional principles, but from government policy, and ask what demands government makes of the constitutional and legal systems in

... / ..

seeking to achieve its objectives, how those systems respond to those demands, and what problems those responses create for government and for the citizen. This approach might be expected to produce a profile of constitutional problems differing, at least in some significant respects, from that yielded by the systemic approach of mainstream literature. One simple and already familiar example that could be documented in this way is that of government rule-making: unresolved problems of Parliamentary control of delegated legislation dwindle into insignificance beside those revealed by the government's modern preference for informal rule-making.

The problems of such an approach to public law scholarship are considerable. How is the vast and shifting mass of data to be organised? How is the investigator to deal with bewilderingly frequent changes in government policy, and in the administrative apparatus used to carry those policies into effect? How are baselines to be drawn for the observation of trends in government activity? This paper seeks to contribute to the study of government policy by the public lawyer, by furnishing some elements of a system for the description and study of policy which can be related to the structure of the constitution and of the legal system. Such a system should ideally be applicable to any country which accepts the idea of purpose-

ful governmental activity within a legal framework, and within such a country, to the analysis of any field of government policy. In the present paper, however, the system is elaborated with reference only to the United Kingdom.

Moreover, within the sphere of governmental activity in the United Kingdom, the ideas here have been worked out in the course of extended study of the economic policy of the period since 1945. The argument in the paper will be couched in terms of economic policy, will draw on the literature of applied economics, and will use illustrations from the economic sphere. My view is that the same structure should be applicable, perhaps with minor modifications, to other fields of policy, but I do not claim to have demonstrated that this is so. By itself, however, the economic policy area is broad and overlaps substantially with other areas of policy, such as social policy and defence policy: conclusions reached through study in this field may claim some presumptive general validity.

GOVERNMENT POLICY: COMPONENTS, CONTEXT, ACTORS

1. Components

The term "government policy" can be used narrowly, so as to refer only to statements by government about the ob-

jectives it sets itself and the means it proposes to use for attaining them. Alternatively, it may bear a broader meaning, and be used to refer to the whole of the purposeful activity of government. Such activity forms part of a complex process of interaction between government and other actors in the national and international social and economic environment. In this process government seeks to modify the behaviour of those actors by reference to determined objectives, which are themselves continually amended in response to changing circumstances and to feedback from affected actors. [5]

This concept of policy as purposeful activity forms my starting point. The need is to analyse the activity in a way which shows as clearly as possible its relationship with legal operations: the making, application, and interpretation of law. Here I attempt a partial analysis which concentrates on the implementation phase of economic policy: the process of formulation and amendment of policy objectives is not systematically discussed. For my present purpose a fruitful line of approach is suggested by the analysis originated by Tinbergen. [6] At its core is a clear and rigid distinction between objectives of policy and instruments of policy. Criticism by political scientists [7] of this ends-means distinction, as not reflecting the blurriness of the policy-making process or the tendency of politicians to attach electoral and other values to instruments as such, without regard for the objectives they serve, does not detract from the utility of the approach as a means for clarifying the role of law in the implementation of economic policy. Tinbergen's aim, in fact, was to provide

tools for the mathematical modelling of economic policy and the prediction of outcomes, a quest pursued with increasing sophistication by some of his followers.[8] Others, like Kirschen,[9] have elaborated Tinbergen's approach as a framework for orderly comparison of the policies actually pursued by governments of both capitalist and socialist countries. In formulating a legally-relevant analysis of economic policy I have drawn heavily on Kirschen, so that it may be helpful, in order to avoid confusion, to set out first the elements of his system, so that the nature of my own adaptations can be clearly seen.[10]

Kirschen distinguishes, as elements of policy, aims, objectives, instruments, and measures. Aims are a series of abstract concepts which represent the desirable ends of government action: economic welfare, physical security, equality, liberty, and so on. Objectives are "the economic translations of political aims into concepts which can be given some quantification".[11] In his two large collaborative works Kirschen offers rather different lists of objectives, but the nature of his concept can be adequately conveyed by listing a selection: full employment; price stability; expansion of production; improvement in the distribution of income and wealth; reduction of regional disparities; protection of specific branches of industry. Instruments are the means by which objectives

... / ..

are pursued, and are grouped into such categories as money and credit; budgetary and fiscal; direct controls, such as rationing or price controls; and institutional changes, such as the nationalisation of an industry. Finally, a measure is the use of a particular instrument at a particular time in order to promote one or more objectives.

In adopting this taxonomy I use the terms aims, objectives, and instruments in the same sense as Kirschen. Aims are briefly discussed in the next paragraph. The concept of objectives allows considerable freedom as to the degree of precision with which objectives are specified. Most writers on economic policy confine their attention to the classical quartet of general macro-economic policy objectives: full employment, price stability, external balance, economic growth. [12] The lawyer may, however, find it helpful to break down these general ideas into a series of more specific objectives to which particular instruments and measures can be more certainly related. If he wants to analyse policy "areas" such as energy policy, manpower policy, and so on, he will need to analyse their content in terms of precise objectives in this way. [13] The concept of instruments is explored in detail later in this paper, but it should be made clear now that the concept is an economic, not a legal one. Legal rules and other acts are thus not themselves instruments, but may be measures, which I prefer to define

... / ..

as the acts through which instruments are brought into operation. Such acts are usually "legal", in that they are recognisable as formal elements of the legal order; but they need not necessarily be so. An agricultural subsidy is an instrument: the Act authorising its payment, the statutory instrument under which it is administered, the making of payment to the farmer (whether analysed as contract or as gift), are all (legal) measures. A restriction of bank credit is likewise an instrument: the Bank of England "request" bringing it into effect is a measure, but has no formal legal status.

2. Context

The concept of aims is nebulous, but valuable in that it reminds us that economic welfare is not the only end for which government was created, and prompts the question of how we relate to the categories of economic policy the means of pursuit of other aims such as equality and liberty. There are certain economic objectives whose attainment may promote such aims as well as that of economic welfare, but it is clear that such "goods" as full employment and price stability are neither sufficient nor, some would add, necessary to a just and free society. At the level of objectives, however, it might well be possible to specify a series of concepts through which such aims are concretised

... / ..

in a given society, and which would represent the political or constitutional counterpart of the economic objectives detailed by Kirschen. In the United Kingdom, sample objectives of this type might be formulated as "democratic endorsement of public spending and taxation decisions", or "performance of (certain) governmental functions within a legal framework supervised by an independent judiciary". Similarly, one might pursue the parallel further in seeking to identify instruments for the achievement of these objectives, to be found in procedural or substantive constitutional principles which, in the United Kingdom, would probably be expressed in the form of constitutional conventions, common law rules, and canons of judicial interpretation.

For the purposes of this discussion I do not think it necessary to elaborate fully a parallel structure or structures of this type. The important point is to be aware that the pursuit of aims other than economic welfare engenders values, principles, and rules which bear upon governmental choice at all three operative levels of the Kirschen classification: choice of economic objectives, choice of instruments for their achievement, choice of measures for the operationalisation of those instruments. Many of these values, principles and rules form part of the constitutional and legal system. It is the interaction between these elements of public law and of economic policy

... / ..

that defines and justifies the public lawyer's interest in economic policy, for we may postulate that not only do the constitutional and legal systems shape economic policy choices, but that the pursuit of economic policy objectives may also demand and secure changes in these systems. The Kirschen taxonomy provides part of the framework for a systematic discussion of these influences.

A related set of ideas that need to be taken into account in any development of the Kirschen taxonomy for legal purposes are those revolving around the concept of a state's "economic order". Such orders may be labelled as "laisser faire", "social market", "collectivist", "corporatist" and so on, terms designed to express fundamental orientations of economic activity. In recent years this concept has been most intensively developed by German scholars of the theory of economic policy, who commonly distinguish between "ordering policies", which alter the shape of the framework within which economic activity is carried on, and "process policies", which operate in the free space within that framework.[14] This space/framework distinction has been traced back to the English classical economists,[15] and is reflected, in the Tinbergen/Kirschen analysis, in their distinctions between "reforms", "qualitative policies" and "quantitative policies", and between instruments that do, and do not, make "institutional" changes. [16] In so far as the economic order of state is expressed in its formal political constitution

... / ..

- as is the case in West Germany - the distinction between space and framework, ordering policies and process policies, institutional and non-institutional instruments, is clearly a vital one for public lawyers. In the United Kingdom, with its flexible constitution which is largely empty of substantive principles, the distinction does not have the same normative weight: institutional change is, in legal terms, as easy to effect as non-institutional change.[17] Its value lies rather in reminding us, once more, that legal rules may operate not only as agents of change ("measures" in the Kirschen terminology), but also as constituents of the economic framework within which change takes place and which may itself be subject to change. The institution of property, in the United Kingdom largely defined and protected by the common law, is one vital element of such a framework. The relevant common law rules cannot be assimilated to any element of Kirschen's taxonomy, but help to define the space within which that taxonomy operates. And as we shall now see, while they may be changed by the operation of the economic policy process, this is not their only source of development.

3. Actors

Having situated this analysis in its proper context it is still necessary to provide a further element of definition, by way of reply to the question: whose economic policy? Obviously I intend to discuss "the government's"

... / ..

economic policy, and by this I mean, primarily, the activity in this field of the central government, composed of ministers of the crown and their departments, co-ordinated by the cabinet, guided by the treasury. But even in a unitary and centralised State like the United Kingdom, the term "government" in such a context is not unequivocal.

In the first place, there exists, at any given moment, a diffusion of power among various organs of government. We need to take into account both the territorial diffusion of power and functions among local authorities, and the functional diffusion of power, both to specialist executive organs like the public corporations which are responsible for the nationalised industries and for certain regulatory and public service functions, and to organs outside the executive altogether, such as Parliament and the courts. Within the United Kingdom constitutional context, it is of course true that none of these power-holders is in any sense autonomous: Parliament, in the exercise of its sovereign powers, can at any moment withdraw or change their functions or the conditions of their exercise, and the massive (though not unlimited) influence exercisable by the central executive government over the legislative process in Parliament gives it a large measure of ultimate control over the activities of all organs of government in the United Kingdom. This centralisation of ultimate power is not, however, a good reason for treating the economic policy activities of all organs of government in an undifferentiated way. Even within the framework of

... / ..

the executive branch of government, local authorities and public corporations do not stand in a relationship of hierarchical subjection to the departments of central government. They are separate legal entities, whose status and competences are guaranteed by law (and in the case of local authorities, reinforced by their democratic and representative character), and which are therefore - at any given moment - subject to the control of central government only to the extent provided for by the law or secured by other means (such as financial dependence) against the background of the law. Given however that that control is frequently considerable, and that the economic importance of these institutions is, by some measures, as great as that of central government itself, we shall find that the manipulation of the behaviour of the whole, or particular parts, of the non-central government part of the public sector is a frequently employed instrument of policy. To define "government" in a broad sense, so as to include the whole of the public sector, would be to treat as internal, and therefore beyond our concern, these processes of manipulation, and to neglect the importance of the varying degrees of legal independence possessed by these bodies, which may often make it more appropriate to treat them as subjects, rather than executants, of policy.

Different arguments apply in relation to non-executive bodies. Parliament, in the British system, should not be viewed as the maker or possessor of economic policies. Its

... / ..

role is rather one of scrutiny, discussion and legitimation of policies formed elsewhere. In almost every case, these are policies presented by central government as its policies; in the formation of such policies groups of members of Parliament, or even individual members, may exercise some influence, but it is clear that in general, Parliament today has a less significant influence in the formation of policy than do a variety of other bodies, from the political parties to the trade unions, employers' organisations, and other major interest groups. Occasionally (though with great rarity in the field of economic policy) an interest group may short-circuit the normal process of policy formation and implementation, addressing itself directly to Parliament, via sympathetic Members, for the enactment of legal measures to secure its policy objectives. Such measures are too rare (and given the present balance of constitutional powers in the United Kingdom, unobtainable in this way unless the government itself adopts an attitude of neutrality or tolerance) to warrant treating Parliament's role in economic policy as other than an essentially reactive one. [18]

The same cannot be said about the courts. Courts do, after all, take decisions with binding effect, not only for the individual parties before them but also, through the operation of doctrines of judicial authority and precedent, for all parties who now or in the future find themselves in the same situation. In the civil sphere, the decisions are usually reached without the help or intervention of any

... / ..

other organ of government. Such decisions might, in my terminology, be measures, if in arriving at them courts are seeking, consciously or even unconsciously, to achieve goals in the nature of economic objectives. In developing the common law of restraint of trade, for example, the courts may be seen as attempting to inhibit, through a judicial policy of non-enforcement, the use of contractual devices to create or consolidate dominant positions in local and other markets. [19] More fundamentally, the whole activity of the courts in developing and maintaining the principles of the common law is viewed, by the economic analysts of the Chicago School, [20] as promoting a basic economic objective of rational allocation of resources for which all policy-makers should strive. Part of the Chicago prescription, in fact, is that courts, in administering the common law of tort and contract, may offer better economic policy than do governments and legislatures engaged in market-distorting regulation. [21] These considerations raise the question whether we should therefore regard the common law, in the hands of the courts, as a source of economic policy independent of the actions of central government.

The answer is a qualified 'no'. What the restraint of trade example and the work of the economic analysts of law demonstrate is that the common law has an economic content, and that rules of law shape economic relationships. As I have already argued, the essentials of the common law - rights of personal security and property, for example - should be viewed not as part of economic policy itself, but as a framework within which that policy is contained

... / ..

and against which it may react.

Some parts of the common law, however, can be seen changing and developing: the restraint of trade doctrine, already cited, is an obvious example. Here the courts are not affirming or reinforcing a fundamental principle but are setting the appropriate scope of an exception to such a principle, [22] a task which may be viewed as falling within the ambit of the activity of economic policy. Even here, however, the process of change has generally been slow, and the courts have echoed policy developments that were occurring elsewhere, rather than themselves leading the way. Thus the vigour of judicial application of the restraint of trade doctrine has waxed, and waned, and waxed again, responding first to legislative condemnation of monopolies and combinations in Tudor and Stuart times, then, as already noted, to laisser faire ideas and the repeal of restrictive legislation, and now to the rebuilding of a structure of competition legislation since the Second World War. There have, it is true, been time-lags in this process, where slowness of judicial adaptation to legislative policy has resulted in a distinctive judicial attitude, as in relation to combinations of workmen at the end of the nineteenth century. [23] There may also be abrupt changes of direction, as the judiciary attempts to follow, in its common law doctrine, the sinuous and ill-marked track of executive and legislative policy: a recent example is

... / ..

afforded by the apparent espousal, by the House of Lords, of inequality of bargaining power as a ground for invoking the restraint of trade doctrine. [24] At such times, perhaps, the courts may be regarded as in independent source of economic policy; but the scope left by legislation for the development of the common law in areas relevant to economic policy objectives is so small that the courts' importance, in this role, is minimal. This is not to say, of course, that their importance in relation to economic policy is minimal: their approach to, and their decisions in, their tasks of interpreting, reviewing and enforcing, legal measures of economic policy remain matters of central concerns.

THE RELATIONSHIP BETWEEN OBJECTIVES AND INSTRUMENTS

1. Quantifiability, aggregation, and modes of action

For Kirschen, it will be recalled, an economic objective was a concept which could be given "some quantification". [25] Quantification of objectives is both an essential tool of processes of economic modelling and forecasting, and a largely accurate description of how government assesses its performance in the economic sphere. Progress in full employment policy, for example, may be measured in terms of the ratio of unemployed workers to job vacancies, or of unemployed workers as a percentage of the total labour force. Progress towards price

... / ..

the motorway network. A difference of degree should however be noted. It is usually meaningless to speak of success in economic policy otherwise than in quantitative terms, whereas in other areas, though there is a continuing search for new and more subtle quantitative indicators, there remains some recognition that not every aspect of human happiness lends itself to numerical measurement. Economic policy, of course, addresses precisely those aspects that have this quality.

Without too much distortion, therefore, one can view economic policy as the attempt, by government, to influence the movement of certain economic quantities or indicators, whether by restraining movement away from specified targets or promoting movement towards them. The means at the government's disposal for exercising such influence are almost entirely indirect, that is to say, they operate on the actions and decisions of persons outside the government, whose aggregated results determine the level of the relevant economic indicators. The popular vocabulary of economic management does not reflect this quality of indirectness: we speak of government "creating jobs", "restricting imports", "boosting investment", all phrases which suggest the capacity of government, of and by itself, to secure the results referred to. We do not, however, live under the kind of centrally planned economy within which the policy-maker has direct control over the factors of production and can issue orders for large-

... / ..

scale changes, in, for example, the balance of production as between consumer and investment goods. Even in developed socialist states such as the USSR and other countries of Eastern Europe, the reality of the planned economy is far more complex and uncertain than the simple model of plan and command would suggest; and in the United Kingdom, as in other Western "mixed" economies, it is only in the public sector - indeed, only within that part of it directly controlled by central government - that the possibility exists of altering the quantities expressive of economic policy objectives by direct executive decision.

Notwithstanding the present size of the public sector in the United Kingdom - since 1974 public expenditure has varied between 40 and 47 per cent of gross domestic product - [26] the scope for such direct executive decision is limited. Central government expenditure, which runs at about 66-69 per cent of the total, is heavily concentrated in the areas of defence and social security, and only a minor proportion (about 40 per cent) goes on the purchase of goods and services (including labour), where direct effects may most readily be produced. [27] The rest is spent on subsidies, grants and loans to individuals, enterprises and other public authorities. While this 40 per cent is still a tidy sum in money terms - roughly £25,513m. in 1979-80 - its redeployment in the extent necessary to produce significant changes in any major economic aggregate would have major adverse effects - at least in the short term - on the discharge of public

... / ..

functions.

Unless, therefore, the government is hypocritical and its policy is hollow, in the sense that it adopts as an objective a quantity which it thinks would occur anyway, without intervention (a possibility not to be excluded as unthinkable), the setting of a policy objective implies setting out to affect the behaviour of others: the "others", in the public sector no less than in the private, who charge prices, pay wages, export and import goods, invest capital, borrow and lend money, make take-over bids, purchase goods and services. It is their actions which in aggregate or on average make up the greatest part of all the quantities which government is trying to manipulate; their actions, therefore, which must be made different from what they would otherwise, in the absence of the policy, have been. More precisely, some of those actions, some of that behaviour, must be different: zero and 100 per cent are not necessarily the only quantities that government aims at. A government that wants a rising birthrate for economic reasons may not wish every wife to bear an extra child. It is important to understand that though government is interested only in totals or averages, the relevant actions cannot be manipulated in the mass; each separate economic actor must be addressed, but only with a view to getting a sufficient number to change their course of action to satisfy the demands of the policy. Aggregated ends are pursued by individualised means.

... / ..

2. Television imports: a hypothetical case

These propositions may be clarified by a hypothetical example. Suppose that an object of governmental concern is the viability of the domestic television manufacturing industry; that a situation has arisen in which imports are capturing an ever-increasing share of the home market. Foreign sets are, it appears, more reliable and technically more advanced than their home-made counterparts. The domestic industry represents to government that given time and opportunity to invest in new manufacturing facilities and equipment, it could be fully competitive and could recapture and retain an adequate market share. The need, therefore, is to provide a breathing-space by securing that for a certain period, imports of foreign sets are held at the current level or, better, reduced by some indefinite amount. Let us assume that the government, worried about de-industrialisation and unemployment generally, accepts this argument for temporary protection. It confronts a market in which two chains of supply - on the one hand that of foreign manufacturers, their importers and distributors, on the other that of domestic manufacturers and their distributors - merge at the retail level where sets are sold to their ultimate users. Even with the specific objective mentioned, this situation offers a wide choice of points and modes of intervention. [28]

... / ..

The government may decide to address itself directly to those who are exercising choices as between domestic and foreign sets, that is to say, consumers and retailers. It may do this by means of a "Buy British" campaign of ministerial speeches and public advertisements; by offering a financial inducement to purchase a British set, such as a reduced licence fee; by imposing a financial penalty on the purchase of a foreign set, such as a point-of-sale tax, purchase tax, or discriminatory rate of VAT; or, most forcefully, by securing legislation to make it an offence to buy, or as a retailer to sell, a foreign television set. Alternatively it may intervene at an earlier point in the supply chain, as by reducing the costs of British sets by a subsidy to manufacturers, or by increasing those of foreign sets by an import tariff payable by importers, or by the stipulation of unusual manufacturing standards for the British market which foreign manufacturers would find it difficult and expensive to meet. Finally, the government may aim directly for a reduction in supply, by negotiating export restraint with foreign manufacturers or with their governments, or by the temporary prohibition of imports, or the fixing of an import quota.

3. Distinctions between instruments

This example may be used to suggest a variety of distinctions which may be drawn among the instruments available in

... / ..

relation to a given policy objective.

(i) We can contrast instruments by reference to their connection (or lack of it) with legal norms. A publicity campaign, or an "understanding" about export levels, seem *prima facie* to have far less to do with law than do prohibitions and quotas.

(ii) Another point of differentiation is by reference to the number of people addressed by each instrument. Generally speaking, the further back up the supply chain the government goes in search of its point of intervention, the fewer the number of individuals whose choices it needs to affect. At the level of purchasers of television sets, numbers may be counted in thousands; at the level of manufacturers or governments, on the fingers of the hand. Interventions at this level are obviously more convenient in administrative terms because of the smaller number of enterprises and transactions on which they need to operate, but this convenience may be offset by the disadvantage of a lesser degree of certainty as to the effects of the instrument. If manufacturers or importers decide to absorb themselves the costs of a tariff on imported television sets, rather than pass it on to the ultimate purchaser in the form of increased prices, the desired effect of reducing import penetration may be greatly attenuated. Whatever the merits or demerits, from the efficiency point of view, of interventions at different points of the supply chain, it should

... / ..

be obvious that instruments which address large numbers of people may call for different techniques, and hence different kinds of measures, from those appropriate where only small numbers are involved.

(iii) The example also illustrates the point that the government may not be aiming to alter all relevant choices. Its aim, in this respect, will depend, once more, upon its chosen point and method of intervention. If the choice falls on a reduced licence fee for all who purchase a British set within a given period, the government may be taken not only to have accepted the fact that some who buy British and obtain the reduction would have bought British anyway (so that the measure's only effect in this respect may have been an acceleration of the purchase) but also to have calculated that not all who would have bought an imported set will be led to change their mind: the aim of the policy is that a sufficient number should do so. If on the other hand the chosen weapon is an import quota, operated by awarding to existing importers individual licences for a fixed fraction of the quantities previously imported, then it is of the essence that every individual addressed should alter his import decisions in full accordance with the stipulations of the quota. [29] Precision of effect, in this latter case, is purchased at the cost of administrative complexity and the ossification of the market structure, a price which may, or may not, be too high.

4. The concept of relative cost : the principle

While these distinctions between instruments are important, more important still is the fact that the instruments illustrated all operate with the same basic purpose and effect. In each case, the aim of government is to change the behaviour of individuals by altering the relative costs of behaviour which is, and is not, in accordance with its policy. This may be done either by reducing the costs of behaviour in accordance with the policy; or by increasing the costs of behaviour which is contrary to it. The costs involved may be money costs; but they need not necessarily be so. Quite obviously, a discriminatory sales tax will make an imported set relatively more costly than its untaxed domestic rival; a discriminatory licence fee reduction will make a domestic set less costly to own. But a "Buy British" campaign, without any deployment of taxes or subsidies, may also make the domestic product relatively less costly, in that for the same money the consumer now gets not only a television set but also the satisfactions of expressing patriotism and solidarity, satisfactions which, though not marketable, are nonetheless real and valuable. The same analysis may be applied to measures which involve the creation of criminal penalties. The relative cost of the imported set whose purchase is prohibited on pain of a fine is increased - doubtless in a different amount for each potential purchaser - by the amount of the likely fine together with

... / ..

the costs, financial, psychological and social, of undergoing prosecution, all discounted by reference to the degree of probability of detection and prosecution; and to this must be added a further increment representing the "moral cost" to any particular individual of breaking the law, as this affects his personal integrity and self-esteem, as opposed to threatening him with external consequences. A comparable calculus of costs and benefits is presented to the potential importer of foreign sets when faced with an import prohibition. He, however, may also take into account, on the benefit side of the balance, the increase in the value of the imported set, deriving from its scarcity, which may enable him to recoup in money the costs associated with risks of prosecution.

The value of the idea of relative costs is that it provides a unifying framework within which we can discuss a variety of instruments of policy which may, as already noted, "invoke the law" in different degrees and different ways, or not at all. It offers us a common point of reference for the analysis and comparison of such diverse legal measures as criminal prohibitions, licensing schemes, expenditure legislation and public contracts, and may permit us to develop hypotheses to explain, within the framework of a given economic order and constitutional-legal system, the choice of legal measures in relation to particular policy objectives and instruments, as well as the mode of enforcement of such measures.

... / ..

5. Relative costs: some clarifications

(i) Individuals

When referring in general terms to the relative costs concept I have spoken of affecting "individuals'" decisions, choices, or behaviour. As the television imports example suggests, this term is to be understood as including a wide variety of economic actors: not only real people, acting singly as consumers, employees, and so on, but also enterprises, decentralised units of government, even foreign governments. "Individual", therefore, is used as a shorthand description for the distinct decision-taking unit whose choices government seeks to affect, whatever may be its nature or size, and regardless of its legal status. As used here it connotes neither the singular physical person nor the incorporated legal person: it refers uniquely to the capacity, as a matter of fact, to take decisions and follow courses of behaviour which are of concern to government in relation to its economic policy objectives. An unincorporated association that possesses this capacity - a trade union, for example - is therefore for us an individual, no less than is the consumer purchasing a television or the company manufacturing it. Naturally we cannot be indifferent to the colossal disparities - of numbers, size, wealth, power and organisation - existing as between members of this broad class. One object of any legal discussion

... / ..

of economic policy must be to examine what distinctions have been drawn, in the framing and application of legal measures, between different types of "individuals", and with what effect.

Nor should we neglect the fact that decision-taking units involving more than one person are not monolithic: decisions are the product of a structure of power within the unit. That structure may be highly complex, involving both the aggregation of the preferences of individual people into group viewpoints of interests, and the balancing of those viewpoints or the resolution of conflict between them. Even within a medium-sized manufacturing company, for example, there are likely to exist distinct groups such as shareholders, managers, and one or a number of groups of workers (divided by factors such as trade union allegiance, possession of skills, mode of remuneration) and while each of these groups will have an interest in the survival and prosperity of the company they may have quite different short-term aims in specific situations such as expansion, redundancy or takeover. In relation to many areas of policy, and to the use of most kinds of instruments, these structures, and the diverse interests they encompass can be viewed purely from the standpoint of their decision-taking capacity as collective entities, which is their passport to "individual" status. In two situations, however, an analysis of policy requires investigation of the structure as such. The first case is where the power-relations within the decision-taking unit affect the way in which the government approaches

... / ..

the task of affecting its decisions. Recent British Government policy towards the National Coal Board, which has been largely conditioned by the acceptability of decisions to the Board's employees, affords a good example. The second is where the alteration or creation of structures is itself the instrument, or an instrument, of government policy. New corporate forms as a support for technological innovation in small enterprises, worker participation as an instrument for greater productivity though increased industrial harmony, are but two possible examples from a rich field. In such cases, however, the relevant individuals are those who operate or will operate within the structure, whose relative costs are affected by the changes proposed in their opportunities or constraints.

(ii) Control and choice

Implicit in the relative costs concept is the idea that the individual decision-maker always retains a choice as to whether he will align his conduct with the demands of government policy, no matter what instrument government deploys. It is not difficult to imagine - though much harder actually to find - situations in which the physical control and supervision exercised by governmental agents is so tight as to eliminate even the possibility of non-compliance, so that choice is absent and non-compliance beyond price. The rarity of such cases, however, serves essentially to emphasise the element of choice existing in all normal cases, even in the face of express prohibitions. The point is worth stressing, not least

... / ..

because there is a tendency among writers who set out to assess the costs and benefits of using different kinds of instruments in fields such as pollution policy, to assume that people always obey mandatory legal rules. [30] On this basis regulatory standards are argued to be inflexible and productive of sub-optimal results, in contrast to "market-type" instruments such as taxes, subsidies, or tradeable pollution entitlements. These are said to leave sufficient discretion to the individual to permit him to adjust his activity in a way which is capable of achieving the best available balance of compliance costs and policy benefits. Behaviour in response to mandatory rules is in fact much more complex than this model allows for : in the economic sphere, at least, calculated and negotiated non-compliance are common phenomena, and are based on the same kind of cost-benefit analysis as is explicitly demanded by the use of "market-type" instruments. [31] There may still be very good reasons for preferring, in a given case, a tax-based to a regulation-based scheme (for example, greater economic transparency or the reduction of administrative discretion) : but the evaluation must take account of the individual's "discretion to disobey". [32]

Even the use of criminal sanctions to support prohibitions does not disrupt the essential unity of the relative cost concept. The traditional association of the criminal sanction with moral imperatives has been weakened almost to the point of disappearance in the field of economic policy by its frequent use in situations which imply no moral stigma, as is indicated by the

... / ..

fact that governments often interchange economic instruments which involve reliance on criminal penalties with others that do not - for example, substituting import duties for import quotas, and vice versa. In the context of an inquiry into the deployment of legal measures in the service of economic policy objectives, any residual moral implications attaching to criminal prohibitions are important only in so far as they affect the processes of choosing and operating legal measures. It is conceivable that in a particular case the moral implications associated with the criminal sanction may make a criminal measure inappropriate, or, once enacted, may inhibit its application; conversely the presence of such a sanction may in some cases reinforce the efficacy of a measure by adding specific moral costs to detection and conviction. The fact that the criminal sanction may, in certain applications, possess these distinctive qualities in no sense requires its separate treatment, but reinforces the need for a common concept to which these distinctive qualities, along with those of other kinds of measure, may be related.

(iii) Knowledge and experimentation

Government, it may be said, can surely never know the individual economic agent's calculation of the costs and benefits of a particular decision. In such a state of ignorance, can it make sense for government to set out to alter such a decision by adding in further costs and benefits whose value to the individual it likewise cannot know? In most

cases, however, such knowledge is not vital. What is important to government is not any specific individual decision, but the economic aggregate, the sum total of such decisions. It may well not care which individuals change their decisions in response to its policy, so long as a sufficient number of them do so. Indeed, the policy may not even aim at any specified quantitative effect on the relevant aggregate, but may simply seek to increase or reduce it. In the latter case, the imposition of a tax of an arbitrary amount will produce an observable reduction, changing the decisions of those agents for whom the calculated benefit from the proposed decision was less than the amount of the tax. Assuming that it can get accurate information about such aggregate changes, government can then use this information to refine its policy and improve its powers of predicting the results of future tax changes. The technique is essentially experimental in character and does not depend for its success on knowledge of the decision-making of individuals. It nonetheless remains the case that the measures actually adopted produce their effects through the process of altering individual decisions already described. To avoid confusion, it is worth reiterating that this experimental approach is not the only one which may be pursued by government. By intervening at a point, and in a manner, which enables it to deal with smaller numbers, govern-

ment may put itself in a position to acquire the information needed for the refinement of policy by other means, such as negotiation, bilateral discussion, and so on. At the same time it may seek, as in the example of import quotas, to change the behaviour of this smaller number of individuals in a more precise way.

6. Choice of instruments : an hypothesis

I said earlier that government may seek to change behaviour in two ways : by reducing the costs of behaviour which is in accordance with its policy; or by increasing the costs of behaviour which is contrary to it. These two ways of proceeding may come to much the same thing, if the individual has before him only two choices which are relevant to the policy. Say the government decides to resolve its television imports problem by approaching the consumer directly. Since it is reasonable to suppose that a much higher degree of substitutability exists between domestic and imported television sets than between either kind of set and other things, government can confine its interest to those consumers who are going to buy a television set. These people will be confronted with a wide range of choice (colour/black and white, large screen/small screen, portable/fixed etc.), but their only choice that matters to government is between foreign and domestic makes. [33] There being only, for this particular set of consumers, two possible choices, an increase in the costs of one is equivalent to a reduction in the costs of the other. Government may therefore produce the same kind

... / ..

of result by either of the two ways of proceeding (though a given cost reduction will not give exactly the same quantitative result as the same cost increase). [34]

The picture changes when the relevant individual choices cannot be reduced to two. If government takes the view that the only available solution to the problems of British television manufacturers is modernisation of plant to secure lower-cost or higher-quality production, and takes modernisation as its policy objective, its obvious course is to reduce the costs, to manufacturers, of investment programmes for modernisation. The alternative is to try to design a cost-increasing measure or measures that would bear upon all choices as to use of funds alternative to investment for modernisation, choices which might range from increased dividend payments, through increased wage and salary scales, to such sumptuary expenditures as increases in the number of executive washrooms or of the Chairman's poules de luxe. The only measure which would cover and penalise all such choices would be a requirement, backed by civil and criminal penalties, that certain funds of the manufacturers be applied to such investment programmes. This would cost the government less, in money terms, than an investment subsidy. The adoption of such a measure in normal circumstances is hard to imagine, by reason of its incompatibility with prevailing ideas about the general relationship between government and private individual and corporate property-holders. In

... / ..

terms of the present analysis, such a choice of instrument is, in the United Kingdom, practically (though not legally) precluded either because it offends against values engendered by the pursuit of non-economic aims, or because it falls outside the space set for "process policies" by the national economic order, or both. [34a]

The examples in the two previous paragraphs suggest a general hypothesis which can be tested in any detailed review of economic policy implementation. It is this : the more precise the policy objectives government sets itself, the more likely it is to see an advantage in proceeding by way of reducing the costs of desired choices, rather than in-

creasing the costs of undesired choices. [35] The more precise the objective, the narrower the segment of the range of individual choices that are consistent with it, and the wider the segment of inconsistent choices. To revert for a moment to the first example in this section, if government's only preference is for consumers to buy domestic, rather than imported television sets, the cost-reducing and the cost-increasing approaches may do the job equally well; government's main concern may be with the costs - financial, social, political, administrative - that it incurs in carrying either type of approach into effect. But if government's preference is for consumers to buy in substantially larger numbers a range of colour sets made by a particular British manufacturer, the design of a measure to increase the costs of all available alternatives is all but impossible, and a cost-reducing measure (for example, a subsidy on each such set) will be preferred.

THE NATURE OF POLICY INSTRUMENTS

1. Power-Resources

If government is to change the relative costs attached to individual behaviour, it must be in a position to deploy certain resources. In this it does not differ from any person who seeks to influence the actions of others : that person, if his attempts are not to be vain, must have avail-

... / ..

able some store of sanctions and inducements, some source of power. The resources that constitute power will vary according to the nature of the relationship within which that power is to be exercised : power in the family may be far more multi-faceted than power in national politics. Tears are a potent weapon between lovers; they have their uses in the courtroom; but as the sad case of Lord Lundy showed, [36] they melt no hearts in Parliament. Within the framework of economic policy, we are concerned largely, if not exclusively, with impersonal relationships, where people interact as representatives of institutions (for example civil servants, company executives), or in the performance of given functions (for example, judges), or for the purpose of private economic interests (for example, consumers and retailers). In this context natural affection is of little consequence, and the resources we are concerned with are, it is suggested, essentially three : force, welath, and respect. [37] When government forbids the purchase or importation of foreign television sets, or taxes their importation or sale, it employs (if only by way of threat) force; when it subsidises domestic manufacturers or consumers it employs wealth; when it urges us to buy British it invokes respect - for itself as the duly elected and constituted holder of economic responsibilities. There are of course interconnections between these three resources. Particular instruments may rely on an inextricable combination of two or more of them : voluntary import restraint

... / ..

agreements with foreign governments perhaps provide an example. In the last resort, the government's possession of force is dependent both on its use of wealth to pay its soldiers and police and their respect for its authority. The wealth of government, in turn, stems largely from its predecessors' use of force to acquire and subjugate territory and from its own continuing threat of force in the raising of taxation.

These interconnections may be peculiar to government, but the possession of these resources, in some form and in some measure, is not. All but the very weakest can deploy force in at least some personal interactions, and in the economic sphere, such force - or the threat of it - is regularly employed by private individuals to affect the choices of others. Examples include armed robbery, the patrolling of land by armed keepers or guard dogs, and the operation of protection rackets. A high degree of sophistication and systematisation in the employment or private force may be attained, as exemplified by the activities of the Mafia in Sicily and Southern Italy. The employment of wealth by individuals in pursuance of economic objectives is of the essence of everyday life : every consumer transaction can be analysed, both from the viewpoint of the buyer and of the seller, as the use of wealth (on one side in the form of money, on the other in the form of goods or services) to alter the

... / ..

decision of the other party from that of retaining to that of transferring what he holds. Bribery and corruption exemplify other uses of this resource. Examples of the private possession of respect are perhaps harder to find in the economic sphere (there must be some form of non-governmental authority that is the subject of respect, such as the authority possessed by the church in the moral and religious sphere), but we may perhaps see its deployment - not always with great effect - in the publication of economic forecasts and commentary by private institutions.

2. Private power-resources and the law

The treatment in the legal order to these private resources of power is fairly complex, and varies substantially as between one national legal order and another. In the United Kingdom, the law closely restricts the private use of force, permitting it only for the protection of person and property, and then subject to fairly stringent limitations. While legitimate private force is therefore exceptional, the legitimacy of the deployment of private wealth remains, in the United Kingdom, the rule rather than the exception. Certainly, specific limitations on the use of wealth become more numerous almost day by day : entire bodies of law with this function - planning law, environmental law, consumer law - have grown up on the present century, adding to older pro-

... / ..

hibitions, as of bribery, which attacked different evils. Though there amy come a point where this multiplicity of singular restrictions combine to cut the heart out of the right of property, that point has not yet been reached in the United Kingdom : money, or money's worth, still buys most things somehow. Moreover it is the law which, through the institutions of property, contract and inheritance stabilises the possession of wealth and enables it to be used as a resource. As to respect, this is a resource with which the law has always found it hard to grapple, doubtless because its working, unlike that of the other resources, is seldom manifest to the senses. In pluralist and libertarian societies like that of the United Kingdom, attempts at its control by law are, in addition, likely to be controversial insofar as they involve the control of speech and opinion.

3. Governmental power-resources and the law

i) Force

While government must share with private individuals the resources of force, wealth and respect, it does not suffer the same legal restrictions on their use. Clearly, government is in a privileged position when it comes to the lawful use of force. Seen as a temporal process, the restriction of private force is but the corollary of the development of a near-monopoly of force in the hands of government, as self-

... / ..

help and private revenge were replaced by public enforcement, and private, local, merchant and ecclesiastical jurisdictions were all gradually mastered and dismembered by the King's law. This was not, however, a process of concentration of unfettered physical force. What was being accumulated in the King's hands was power subject to law and for the enforcement of law, and while the steady destitution of other centres of physical force made the King harder and harder to challenge on the basis of might, there was present at almost all times the conception that his power was to be exercised according to right. The determination of what was a right exercise of the King's undoubted power was a matter for law. The issue, in the legal, constitutional, and physical battles waged through the seventeenth century in Britain, was not whether there were legal restraints on the King's power - none sought to deny that - but whose law was to furnish those restraints, who was to make, interpret and apply that law - the King, his administration, and its internal courts? or parliament and the common law courts? [38]

Few will need to be reminded that the result of that struggle was a virtually complete victory for the interest of Parliament and the common lawyers, as expressed in the Revolution Settlement of 1689 and its constitutional documents, the Bill of Rights in England and the Claim of Right in Scotland. What this signified in terms of the argument here was that the wishes of the Crown, so far as they depended for their

... / ..

sanction on the deployment of force, could no longer be made binding on the subject save through the device of parliamentary legislation. [39] The King, in the person of James I and VI, had been told by the courts as early as 1611 that he could not impose by proclamation even such sensible policies as the restriction of new building in London or the prohibition of the making of starch from wheat : for such regulations to be legally effective they must be embodied in Parliamentary legislation. [40] This had not prevented frequent recourse to proclamations by later Stuarts, [41] and their vigorous enforcement through the prerogative courts, principally the Star Chamber in England and the Privy Council in Scotland; but with the disappearance of such courts this disputed instrument of policy was finally wrested from the hands of the Crown. [42] Today, therefore, legislative authority, direct or delegated, is neeeded not only to create criminal prohibitions and other legal restrictions on behaviour and to impose taxes, [43] but also (since the ultimate sanctions of private rights are remedies which rely on public enforcement) to alter legal relationships between private individuals. Remarkably enough, there is still room for dispute, three centuries after Parliament purportedly abolished the royal suspending and dispensing powers, [44] as to whether legislative authority is likewise necessary for the relaxation

... / ..

or systematic non-enforcement, or partial enforcement, of such restrictions, or the non-colleciton of taxes. [45] Apart from this exception, and the preservation of certain limited prerogative powers, [46] we may categorically assert, as a constitutional principle, that policy instruments involving the deployment of force by government require legislative expression or authorisation.

(ii) Wealth

It is hard to maintain such a clear view when we approach the second power-resource in the hands of government, wealth. For a start, government, in the United Kingdom as in other Western States, enjoys no monopoly of wealth or of its lawful use. Even when we look at particular kinds of wealth, at the legal regime relating to the possession of particular resources, we find that relatively few are reserved for the exclusive use and enjoyment of the State. With the exception of certain minerals - gold and silver, [47] petroleum, [48] the mineral resources of the continental shelf [49] - most such reserved resources are closely associated with the government's monopoly in the legal use of force : military equipment is the obvious example. [50] So long, however, as the possession and use of most forms of wealth is considered, by a society, to be sufficiently benign to warrant leaving such power in private hands, it is unlikely that we shall see the kind of determined quest for its control and restriction when in the hands of government that characterised the approach of seventeenth-century Parliamentarians and lawyers to the royal monopoly of force.

... / ..

At one time we might, indeed, have expected to find the possession of vast wealth viewed as a positive attribute in a monarch, in so far as it was likely to restrict his resort to taxation for the financing of royal activities. If this now seems an anachronistic viewpoint, it is because over the centuries there has always been a gap - and it has been an ever-widening gap - between the costs of the activities undertaken by government and the capacity of government to defray those costs from the fruits of its "own" wealth. The demand of Kings and Governments for aids from the population in the form of taxes, intermittent and of varying intensity up to the seventeenth century, has been permanent and of increasing insistence ever since. It lies at the root of the development of a specialised legal regime to regulate government's deployment of its wealth, a regime which, with one possible exception, [51] has a quite different historical finality from that which, as we have seen, gives expression and authorisation to governmental deployment of force.

One of Parliament's main concerns, in the period when it was the occasional recipient of requests for aids from the Crown, usually for the purpose of defraying the costs of military adventures, was to ensure that the funds raised by way of the taxation it consented to were in fact expended for the purposes for which they had been demanded.

... / ..

Such a control of the application of the funds might reduce, though it could never eliminate, the risk that the King would shortly return, pockets empty, with renewed requests for the same objectives. Thus there were, in the fourteenth century, occasional parliamentary attempts to appropriate taxes to defined uses and to secure an accounting for expenditure. [52] In the Tudor period Parliament was too weak to achieve any success in this direction. As the expenses of government under the Stuarts outran ever further the wealth of the Crown, and their defrayment from taxation became continuous and generalised, so too did the concern of Parliament; the desire to ensure that specific taxes were applied to the specified ends became the desire to see a regular and provident deployment of the funds raised from general taxation. Little progress in this sense was made during the Stuart period itself, [53] but the attachment of appropriations to tax legislation became regular practice after 1688, and gradually developed into a process of annual appropriation to specified purposes of all revenues enjoyed during the year, a process which arrived at something like its present form by the beginning of the nineteenth century. [54] By reason, no doubt, of its origins in the earmarking of specific taxes, themselves authorised under the forms of legislation, the act of appropriation of funds by Parliament has always taken legislative form, though there exists no judicial or other constitutional declaration, comparable to the Case of Proclamations, [55] to the effect that government spending must be covered by such legislative appropriation. [56] In fact

... / ..

the practice and procedures of annual legislative appropriation are now too well established for the requirement to be seriously called in question, though there remains ample room for argument on the related question of when some permanent and detailed, as opposed to annual and outline, legislative authorisation of government expenditures is constitutionally requisite. [57]

While, therefore, we may say that it is today commonplace and normal to find that the deployment of wealth by government is authorised in some form by legislation, we cannot be as categorical as in relation to the deployment of force. Nor can we assume that legislation serves the same function in each case. Certainly there is a common factor, in that the legislative process secures the civic benefits of comprehensive discussion, democratic consent, publicity and formal promulgation for governmental measures. It controls, in short, the deployment by government of its power-resources; though in these years of stable Parliamentary majorities and comprehensive governmental concern for all aspects of public and private welfare, the government so continuously seeks the enactment of legislation, and obtains it with such facility, that this control function is easy to forget. But the historical reason for invoking control is different in the two cases. Force is seen as dangerous in itself, and the purpose of the constitutional requirement of legislative consent is to protect the subject against the

... / ..

oppressive ruler. Wealth, however, with the exception of its use to maintain armies, always the subject of a specially strict Parliamentary scrutiny, [58] is seen as in principle benign, and the purpose of requring legislative consent is not to protect the subject against its oppressive use but to protect the collective interests of the taxpaying public against its improvident use.

The contrast here drawn, which is central to my analysis of law in relation to policy, is between the different bases of the constitutional requirement to legislate. It is not concerned with the reasons for which the government may seek to persuade Parliament to pass particular pieces of legislation. Often government will have no choice but to propose legislation if it wishes to employ given instruments of policy, by reason of the operation of the constitutional principles which have just been discussed. Where the government does have a constitutional choice whether to legislate or not (as when it has to decide whether to constitute a new public body as a chartered corporation or limited company, which will not need legislation, or as a statutory public corporation, which will) its decision is more likely to be determined by considerations of administrative and political convenience, or of the importance of publicity, than by any worries about its propensity to act oppressively or improvidently.

... / ..

Parliament's current perception of the nature of its legislative task cannot, of course, change the historical bases of that task. When constitutional requirements for legislative action were established they represented the means of securing a system of checks and balances as between the executive government and a Parliament representative of the propertied and merchant classes whose common law rights (and particularly their rights in property) were most sensitive to government action and who were called upon to defray the major (and always increasing) part of the expenses of the State. But the development of universal suffrage and the rise of disciplined mass parties have changed both the character of members of the dominant House of Parliament and the factors affecting their Parliamentary behaviour. There is now a permanent majority of M.P.s for whom the issues over which Parliament strove to assert its right of legislative decision are secondary to the question of the effectiveness of government in working toward its various economic and social objectives. Even the minority - mostly on the right wing of the Conservative Party - whose political priorities are closer to those of the seventeenth and eighteenth centuries can usually be stifled by the application of party discipline. In consequence there is no longer an inherent reluctance to legislate in aid of public policy, and the control function of the legislative process is thereby substantially weakened.

... / ..

This weakness of operation, however, while it may have a significant impact on the results of the legislative process, cannot affect the reasons for which that process is required to be invoked.

(iii) Imperium and dominium

The difference in the historical reasons for requiring legislative expression of governmental deployment of force on the one hand, and wealth on the other, is reflected in differences - persisting till the present day - in the style and effects of these two kinds of legislation, and in their relationship with rules of the common law. Legislation relating to force focusses on the individual and the way in which his legal situation - his existing legal rights, freedoms, powers and duties - is to be affected. This applies whether the law directly alters that situation, as where a new prohibition is imposed or tax levied, or whether, as is more common, it confers powers on government, in broad or narrow terms, to take action which has such effects. Legislation relating to wealth, in contrast, focusses on the commodity itself : it lays down rules, expressed by reference to purposes, conditions or quantities, to regulate the disbursement of funds or property by government. While it may confer on individuals rights to receive such funds or property in accordance with those rules - social security legislation offers an example - it does not necessarily (indeed, in the

... / ..

sphere of economic policy, normally) do so. [59] In cases of the latter type the terms, and even the nature, of the transaction through which the deployment of wealth produces its effects on the individual may not be specified by the legislation at all, the government being left a wide discretion as to the choice and form of legal means. [60] The contrast between these two ways of legislating is presented in an extreme form by British financial procedure, which splits the tax side of the budget from the spending side. On the spending side the annual Consolidated Fund (Appropriation) Act simply indicates the amounts which may be spent during the financial year by the government, both in aggregate and on each specific function. [61] On the tax side the aggregate sum to be raised is no less important to the government's calculations, but the Finance Act says nothing about this: it concerns itself entirely with the rules as to the incidence and amount of tax to be paid by individual persons and on individual transactions. [62]

Many other examples could be adduced to illustrate the point made here : that the nature of the power that government deploys shapes the characteristics of the law through which the power is expressed and controlled. The distinction between force and wealth as governmental power-resources is thus of fundamental legal significance, and merits a specific and unambiguous terminology.

The Latin terms <u>imperium</u> and <u>dominium</u> express, in an approximate way, [63] the contrast I wish to draw here between

the deployment of force, which is an inherent component of rule, and the deployment of wealth or property in the hands of the ruler. I therefore use imperium as a generic term to describe those instruments of policy which involve the deployment of force by government (recalling here that force usually means the threat of force); dominium on the other hand describes those policy instruments which involve the deployment of wealth by government. Imperium-law, therefore, is that body of law which authorises and expresses the use of imperium; dominium-law the body of law which authorises and expresses the use of dominium. In each case the principal component of the category is the body of legislation already referred to; but it will be convenient to use imperium-law to refer also to those few remaining rules of common law - principally concerned with emergency prerogatives and with police powers - which authorise the use of force by government; and to include within dominium-law those legal devices of the common law, such as contracts, gifts and other transfers, through which the wealth of government may be deployed.

Imperium-law and dominium-law are not, it should be stressed, comprehensive categories which can be made to embrace all law or even all legislation. The case above-mentioned in which government has a choice whether to legislate or not provides an illustration. What was in issue there was the establishment of a corporation, an "artificial" legal person. The common law recognised

... / ..

the utility of this device for the permanent holding of collective property, but also recognised its dangers in facilitating the constitution of centres of collective wealth and power which might rival the authority of the King. With certain exceptions based on long usage it therefore required an act of State power for the constitution of such a corporation. [64] The common law mode of satisfying that requirement still subsists in the shape of the Royal Charter, but alongside it there exist also the possibilities of resorting to an individual act of State power in Parliament, for the legislative incorporation of a statutory corporation, or to executive incorporation under general legislative authority, such as occurs whenever a company is registered under the Companies Acts. Here the law's essential function is to remove a common-law disability in regard to the holding and transmission of wealth, and it cannot be directly related to the exercise of either dominium or imperium. This is not to say that no links exist. This kind of law provides a framework for the deployment of wealth in private hands, [65] and may perform the same function in relation to dominium, by constituting the public corporate bodies - local authoorities, public corporations - through which public wealth is to be held or used.

(iv) Respect

Just as imperium-law and dominium-law do not exhaust possible legal categories, so too imperium and dominium

... / ..

do not describe the whole range of power-resources available to government. Earlier I mentioned respect as another power-resource on which government could call. It is in fact a resource on which government frequently draws, particularly when exhorting individuals to accept its diagnoses of the economic situation and to follow the advice it consequently formulates. It cannot, however, be treated in the same systematic way as *imperium* and *dominium*, because of its at best tenuous relationship with legal ordering, already noted. [66] This is not to say that no connections can be traced between law and respect; one or two examples may indicate their nature. Legal rules may have been designed to protect the resource of respect possessed by organs of government, either by protecting the secrecy of their proceedings or by shielding them from criticism. In the United Kingdom rules of the first type are, at least on paper, considerably more restrictive than those of the second : there is a draconian (and largely unworkable) Official Secrets Act, but no offence of insulting the holder of a public office. [67] Legal rules may also be designed to guarantee that the resource is not misused : the common law rules regarding undue influence have this kind of aim. [68] Comparable legal rules relating specifically to government are hard to find, their place perhaps being taken by the operation of procedures of political accountability. We may note, however, that in several West European states there has

... / ..

been an attempt to guarantee, by the creation of appropriate legal structures, the independence and objectivity of public economic forecasting and advisory agencies. [69] The only small step in this direction taken in the United Kingdom has been the legal requirement that the Treasury make available for public use the model it uses for forecasting the development of the economy. [70]

Apart from these particular cases there is the general point that respect may reinforce the operation of imperium. The State threatens its subjects through imperium-law, but in publicly indicating lines of desired or undesired conduct it also exhorts them to compliance with its preferences. Where the threat of the application of force is remote or absent (for example, where the administrative apparatus for the implementation of the legal rules has not been placed in position) the mobilisation of respect may be the only function actually served by the law.

4. Legal categories and policy instruments

How do these discussions of legal categories relate to the earlier development of the argument? I have defined economic policy as the activity of pursuing quantitative objectives through the alteration of individual choices. This is done by changing the relative costs of

... / ..

alternative choices in a way which favours the choices which are in line with a given objective. Government has available for this purpose resources of force (imperium), wealth (dominium) and respect. Dominium and imperium are each deployed through law and subject to the control of law, and imperium-law and dominium-law have distinct characteristics. This is the point reached so far. To complete the model of the relationship of law with economic policy, the categories of imperium-law and dominium-law must be connected with the central activity of economic policy, the alteration of individual choice.

Relative costs may be altered, I argued, either by reducing the costs of the individual behaviour desired by government or by increasing the costs of behaviour which government regards as undesirable. Ways of increasing costs include taxes, and regulatory instruments like quotas, standards and simple prohibitions, whose breach carries the threat of fines and physical and other punishments. These instruments all fall within the category of imperium, in so far as they invoke, directly or at one or more removes, the resources of force that are at the disposition of government. Conversely, the main cost-reducing instrument mentioned earlier, the consumer or manufacturer subsidy, is an example of dominium, the deployment of the wealth of government. Clearly, there is a strong association

... / ..

between imperium and cost-increasing on the one hand, and between dominium and cost-reduction on the other. But there also exists, at the same time, an inverted pair of relationships, between imperium and cost-reduction and between dominium and cost-increase. The creation of an exception to a generalised system of regulation or taxation, or the relaxation or even withdrawal of such a system, reduces, relative to the costs imposed under the general or pre-existing system, the costs of engaging in the excepted or "liberated" behaviour. In like fashion, a selective or general discontinuance of a given exercise of dominium will increase the relative costs of the erstwhile recipients. Industrialists may be encouraged to invest by tax concessions, or relaxation of planning controls, as well as by investment grants; they may be discouraged from discriminatory labour practices by the withdrawal of government contracts no less than by the imposition of fines.

CONCLUSIONS

My primary aim in embarking on this analysis has been to demonstrate, in a systematic way, the main connections between the activity of economic policy and the occurrence of legal change. The resulting model of the law-economic policy relationship is capable, I hope, of a number of practical applications. Here are two possibilities.

... / ..

1. Understanding constitutional "problems"

When in 1975 the government, with a weak parliamentary position, used its power as a major purchaser of goods and services to enforce its incomes policy, political and academic commentators who disapproved of its action found it hard to express their unease more precisely than by use of the term "unconstitutional". [71] Systematic application of the model here presented might make it possible to specify with more precision the sources of this unease. Careful attention to the objectives of the government, for example, would show that they were specified with decreasing precision over the period of the policy, and that in the last, most controversial period, sought only that wage settlements should average 10 per cent over the year. Aiming at an average in this way implies flexibility (excessively large early settlements would mean that later ones would need to be held well below 10 per cent) and a case-by-case approach, of the sort usually associated with licensing schemes and similar regulatory regimes. It is clear that on reviewing the instruments available to it for this purpose, government found that an equal, if not greater, enforcement effect could be achieved by a "negative" employment of dominium, through non-allocation of, and restrictive terms in, its grants and contracts, as through a conventional employment of imperium. This course of action had the additional advantage that no specific legislation was necessary, dominium-law, as we have seen, being by reason of its

... / ..

historical functions considerably less specific about the production of effects on individuals than is imperium-law. What caused unease and cries of "unconstitutional" was the government's exploitation of this discrepancy, particularly within the framework of a policy which required the taking of discriminatory decisions.

This type of application of the model provides no "solutions" to constitutional "problems" : but it may help to organise the debate, by requiring the critics to specify the element, or combination of elements, in this policy process to which they object, and the particular constitutional principles by reference to which those objections are raised. Is "negative" dominium "unconstitutional" per se? [72] Are there some "constitutional" limitations to the range of instruments on which government can theoretically draw, or on the substitutability of instruments within that range? Or does the problem really stem from the adoption of a constitutionally improper objective, that is to say, one apt to lead to discriminations in treatment dependent only on the timing of the individual behaviour addressed? Or is it only the combination of these elements in the particular case that is constitutionally problematical? Answers to such questions, in this and other cases, should provide the starting point for discussions of desirable legal or institutional developments

... / ..

which could better protect constitutional principles while respecting, so far as possible, the government's economic policy choices.

2. Assessing trends in economic policy

In an influential article, [73] Jack Winkler argues that there exists a pattern of change in the deployment of economic policy instruments, according to which the government is moving from a supportive role and a concern with the general conditions of the economy to a more directive role, in which it seeks to operate directly on the income position of given groups in society. For him one legal manifestation of this process is the use of more direct and specific, but at the same time more discretionary and discriminatory, legal powers. As will be seen, some recent events which have been of concern to constitutional lawyers - such as the incomes policy experience analysed above - also figure in the pattern he oberves. Other commentators, looking primarily at different economies within Western Europe, use different terms in describing trends in the methods of economic policy. For the French commercial lawyer Farjat, for example, the important trend is one towards concentration in Western capitalist economies, and the instrumental apparatus of the State is changing in response to this phenomenon. Interventions can, indeed must, be more individualised because economic power is concentrated in fewer centres. [74] Some German lawyers, by contrast, claiming to perceive a general di-

... / ..

minution of the scope and strength of formal legal ordering within society, identify a related process which they call "neo-corporatist proceduralism". This describes a tendency for the State to seek procedural, rather than substantive, solutions to economic problems, contenting itself with establishing machinery within which conflicting economic interests or pressures can be associated in a constructive and balanced way, and eschewing the setting of specific targets, for whose achievement those interests must be somehow subordinated and those pressures controlled. [75]

The analysis here put forward is unlikely to enable us to choose between such theories. It can, however, permit their restatement in a common vocabulary through which we can appreciate their common and diverse elements. Even with such a common vocabulary as is afforded by this analysis, such comparisons require caution in that the events said to evidence the trends identified occur in different countries with different legal systems. There seems no reason to suppose, however, that the model here presented could not be developed so as to be capable of application to the law-economic policy relationship in most Western European legal systems. At that stage, even cross-national comparisons of trends in the legal implementation of economic policy should become feasible.

NOTES

[1] De Smith, Constitutional and Administrative Law (3rd ed., 1977) at 208. The sentence has disappeared from the 4th edition (ed., H. Street and R. Brazier, 1981), along with discussion of the developments it referred to.

[2] For fuller discussion see Elliott, The Role of Law in Central-Local Relations (1981), ch. 1.

[3] Wade (H.R.W.), Administrative Law (4th ed., 1977), at 5.

[4] De Smith, Judicial Review of Administrative Action (4th ed., 1980, by J.M. Evans), at 15; Wade, Constitutional Fundamentals (1980), at 55-57. For more detail on this issue see Ganz, Comment [1978] Public Law 333; Ferguson and Page, "Pay Restraint: the Legal Constraints," (1978) 128 New L.J. 515.

[5] For a concise and realistic discussion along these lines see Peacock, The Economic Analysis of Government and Related Themes (1979), ch. 1.

[6] See in particular his On the Theory of Economic Policy (1952), and Economic Policy: Principles and Design (rev.ed., 1967).

[7] E.g., Lindblom, "Tinbergen on Policy Analysis", (1958) 66 J. Pol. Econ. 531.

... / ..

[8] See, for example, Theil, Economic Forecasts and Policy (2nd ed., 1961) and other volumes in the Contributions to Economic Analysis series (Amsterdam, North-Holland).

[9] See Kirschen et al., Economic Policy in Our Time (3 vols., 1964); Kirschen, ed., Economic Policies Compared: West and East (2 vols., 1974) hereinafter referred to respectively as "Kirschen (1964)" and "Kirschen (1974)").

[10] The following account is drawn from Kirschen (1964), vol. 1, ch. 1, except as otherwise indicated.

[11] Kirschen (1974), vol. 1, at 17.

[12] For general discussion of the specification of economic policy objectives see Hutchinson, Positive Economics and Policy Objectives (1964), ch. 4.

[13] Some such specific objectives (for example security of supply in the field of energy) would apparently be treated by Kirschen only as "quasi-objectives" on the ground that though pursued by policy-makers, they have "no welfare content in themselves": Kirschen (1974), vol. 1, at 18, 23-26. This distinction is without importance for the present analysis.

... / ..

[14] For a general discussion see Pütz, "Zur Typologie wirtschafts-politischer Systeme", (1964) 15 Jahrbuch für Sozialwissenschaft 131, esp. at 141; and for references Schiller, "Wirtschaftspolitik", in Handwörterbuch der Sozialwissenschaften, Vol. XII (1965), at 213-214.

[15] See Robbins, The Theory of Economic Policy in English Classical Political Economy (2nd ed., 1978), at 186-194.

[16] Tinbergen, Economic Policy: Principles and Design esp. at 149, 186; Kirschen (1964), vol. 1, ch. 6 and at 15.

[17] No special procedures were constitutionally necessary, for example, to effect the major programme of nationalisation carried through in Britian between 1945 and 1951.

[18] The same conclusion is reached by the British contributors to Coombes and Walkland, eds., Parliaments and Economies (1980), esp. at 91-95.

[19] For an account of the common law of restraint of trade see Heydon, The Restraint of Trade Doctrine (1971); Chitty on Contracts (24th ed., 1977), vol. I, paras. 961-1011.

[20] The "Chicago School" refers to a major tendency in neo-classical economics centred on past and present teachers

... / ..

at the University of Chicago: see Samuels, ed., The Chicago School of Political Economy (1976), esp. at 5-7. In its application of economic analysis to legal phenomena its chief protagonist is undoubtedly Posner whose book, Economic Analysis of Law (2nd ed., 1977), and articles, "The Economic Approach to Law", (1975) 53 Texas L. Rev. 757, and "Utilitarianism, Economics and Legal Theory",(1979) 8 Jl. of Legal Studies 109, provide perhaps the best introductions. The main vehicles for the work of the school in the legal field are the Journal of Law and Economics and the Journal of Legal Studies.

[21] See, e.g., Posner, Economic Analysis of Law (2nd ed., 1977),

[22] I.e., the principle of the legal enforceability of private bargains.

[23] See generally Kahn-Freund, in Ginsburg, ed., Law and Public Opinion in England in the 20th Century (1959), at 240-244.

[24] Schroder Music Publishing Co. v. Macaulay [1974] 1 W.L.R. 1308; [1974] 3 All E.R. 616; followed in Clifford Davis Management Ltd v. WEA Records Ltd [1975] 1 W.L.R. 61; [1975] 1 All E.R. 237, but strongly criticised by Trebilcock, "The doctrine of inequality of bargaining

... / ..

power: post-Benthamite economics in the House of Lords" (1976) 26 U. Toronto L.J. 359. The enactment of the Unfair Contract Terms Act 1977 may limit the development of this jurisprudence in that, in the important fields of exemption clauses, consumer contracts and standard form contracts, it removes the concept of inequality of bargaining power from the field of common law development to that of statutory interpretation.

[25] Supra, n. 11.

[26] Figures from The Government's Expenditure Plans 1981-82 to 1983-84 (1981; Cmnd. 8175) Table 1.2.

[27] Ibid., Tables 1.7, 1.8.

[28] Some of the alternatives listed may in practice be excluded by moral or political considerations, or by specific legal obligations, but this is not important in relation to the present phase of the argument.

[29] This is, of course, not the only possible form of import quota system; alternatively, for example, a global quota could be allocated to importers on a first-come, first-served basis. While this might lead to some importers being able to obtain their whole requirement, and others none at all, the government would still need to police

... / ..

the activities of all importers to ensure that the quota was not exceeded.

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

[31] For some evidence in a United Kingdom context see Storey, "An Economic Appraisal of the Legal and Administrative Aspects of Water Pollution Control in England and Wales", in O'Riordan and D'Arce, eds., Progress in Resource Management and Environmental Planning, vol. 1 (1979), ch. 9.

[32] The phrase, but not the thought, is borrowed from Kadish and Kadish, Discretion to Disobey: a Study of Lawful Departures from Legal Rules (1973).

[33] I assume, in all uses for this example, that the government is indifferent to the country of origin of imported sets, a condition that may well not obtain in practice.

... / ..

[34] One would expect a subsidy of £ x on each domestic set to cause a greater increase in the purchase of domestic sets than would a tax of £ x on each foreign set, because there will be a number of consumers for whom the effect of the subsidy is to make them renounce the purchase of some quite different good in favour of a domestic set, and some for whom the effect of the tax is the purchase, not of a domestic set, but of some other good.

[34a] Cf. pp. 10-13 supra.

[35] The fact that an objective is pursued by the use of highly specific and detailed measures does not mean that it is precise. Standards in such areas as product quality and safety, workplace safety, etc., may be specified in exhaustive detail, but the objective may be no more precise than "accident reduction".

[36] Lord Lundy, who

> "... from his earliest years
> Was far too freely moved to tears"

rose to be in turn Secretary for India, the Colonies and War: but

> "... if a Member rose to say
> (as Members do from day to day)
> 'Arising out of that reply...!'
> Lord Lundy would begin to cry."

This unstatesmanlike trait provoked a rapid slide from political favour, terminating in a posting as Governor of New South Wales. See Belloc, "Lord Lundy" in Roberts, ed., Faber Book of Comic Verse (2nd ed., 1974), at 315-317.

... / ..

[37] Compare Parsons, The System of Modern Societies (1971), at 14 (influence, money and power as "generalised symbolic modes of social interchange").

[38] A helpful introduction to these arguments, illustrated from the cases, is to be found in Keir and Lawson, Cases in Constitutional Law (6th ed., 1980), at 69-111.

[39] Though the Bill of Rights did not purport to abolish all existing prerogative powers; some common law powers to deploy force (e.g. in emergencies) remained: see Att.-Gen. v De Keyser's Royal Hotel [1920] A.C. 508; Burmah Oil Co. Ltd. v Lord Advocate [1965] A.C. 75.

[40] Case of Proclamations (1611) 12 Co. Rep. 74.

[41] For an example see Kenyon, The Stuart Constitution (1966), at 502-3.

[42] While the Court of Star Chamber was abolished in 1641, by the statute 16 Car. 1, cc. 10, 11, many of its functions continued to be exercised in the Privy Council as such (or by its Cromwellian equivalent, the Council of State). The Scottish Privy Council survived until the Union of 1707.

[43] Parliamentary supremacy in taxation is specifically provided for in Bill of Rights, art. 4, Claim of Right, art. 7.

... / ..

[44] Bill of Rights 1689, arts. 1,2.

[45] Recent cases where this issue was raised but not resolved include R. v Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 Q.B. 108; R. v Customs and Excise Commissioners, ex parte Cook [1970] 1 W.L.R. 450; Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All E.R. 93 (H.L.).

[46] Supra, n. 39.

[47] Case of Mines (1567) 1 Plowd. 310, at 315, 316.

[48] Petroleum (Production) Act 1934, s. 1.

[49] Continental Shelf Act 1964, s. 1(1).

[50] Cf. Firearms Act 1968.

[51] Infra, p. 49.

[52] Maitland, Constitutional History of England (1908), at 184.

[53] Specific appropriations were occasionally attached to tax statutes, for example in 1624 (aids for the Protectorate) and 1665 (prosecution of the Dutch War), but Parliament greatly reduced its own capacity for control by granting

both Charles II and James II large permanent revenues at the beginning of their reigns, which meant that they seldom needed to come back for additional sums.

[54] The Appropriation Act first appears in something resembling its modern shape in 1748, but strict annual appropriation is a later development. See generally Chester, The English Administrative System 1780-1870 (1981), at 59-61, 185-191.

[55] (1611) 12 Co. Rep. 74.

[56] The statement of Lord Haldane in Auckland Harbour Board v The King [1924] A.C. 318, at 336, that

> it has been a principle of the British Constitution now for more than two centuries ... that no money can be taken out of the Consolidated Fund ... excepting under a distinct authorisation from Parliament itself ...

approaches nearest to being such a declaration, but is arguably obiter, being given in a New Zealand case, and in any event does not refer to legislative authorisation.

[57] See Beer, Treasury Control (1956), at 51-52n.

[58] For details see Halsbury's Laws of England (4th ed.) vol. 8, tit. "Constitutional Law", para. 977.

[59] Elliott, however, has recently argued that "in certain circumstances legal action may compel the disbursement of money [voted under the Appropriation Act] if the withholding of money has the effect of frustrating a statutory

... / ..

purpose" : Appendix 18 to the Minutes of Evidence taken before the Select Committee on Procedure (Supply), para. 51 (1880-81) H.C.P. 118-III.

[60] For some examples see, e.g., Industry Act 1972. Ss. 7 and 8 authorise the granting of "financial assistance" to industry which "may be given on any terms and conditions, and by any description of investment or lending or guarantees, or by making grants" (s. 7(3)). Compare Part I and Sch. 1 of the Act, which provide only for the making of "grants" and specify, albeit in an incomplete way, some elements of the grantor-grantee relationship.

[61] Spending of these amounts may, of course, also be regulated by permanent spending legislation of the type referred to above.

[62] The example, and the argument, are developed in more detail in Daintith, "The Functions of Law in the Field of Short-Term Economic Policy" (1976) 92 L.Q.R. 62, at 67-71.

[63] In classical legal usage, "dominium", meaning "ownership", may be contrasted with "imperium", meaning "supreme administrative power", as in "Omnia rex imperio possidet, singuli dominio": Seneca, De Beneficiis 7.5.1.

... / ..

[64] See Sutton's Hospital Case (1612) 10 Co. Rep. 1a.

[65] In so far as the encouragement of this process is an end of government policy (cf. p. supra), this third type of law is of direct relevance to our theme.

[66] Supra, p. 42.

[67] In Italy this offence carries a penalty of 6 months' to 2 years' imprisonment: Penal Code, art. 341.

[68] See, in general, Hanbury and Maudsley, Modern Equity (10th ed., 1976), at 627-630; and for a recent example, Re Brocklehurst, dec'd [1978] Fam. 14.

[69] For a brief survey see VerLoren van Themaat, Economic Law in the Member States in an Economic and Monetary Union: Interium Report (1973, Commission of the European Communities Competition - Approximation of Legislation Series No. 20), at 28-29.

[70] Industry Act 1975, s. 27 and Sch. 5.

[71] For general accounts of these events, see references supra, n. 4. Among users of the term "unconstitutional" were Sir Geoffrey Howe, then Shadow Chancellor of the Exchequer, counsel to the John Lewis Partnership (a firm from which government contracts were withdrawn), and

... / ..

Professor Wade, for whom the government's action was "a complete repudiation of primary constitutional principle": op. cit. supra, n. 4, at 56.

[72] Elliott, supra n. 59, seems to wish to lead us in this direction.

[73] "Law State and Economy: The Industry Act 1975 in Context" (1975) 2 Brit.Jl.Law and Society 103.

[74] Farjat, Droit Economique (2nd ed., 1982), passim.

[75] For a brief statement, with notes to sources, see Teubner, "Substantive and reflexive elements in modern law : toward the reconstruction of a theory of legal evolution" (1982) 16 Law and Society Rev. esp. at . Cf. Unger, Law in Modern Society (1976), at 192-223 ("The disintegration of the rule of law in post-liberal society").

[76] Thanks go to Alan Page, Jacques Pelkmans, Dan Soberman, Gunther Teubner, Kumaraswamy Velupillai, and Jack Winkler, who have commented on drafts of this paper and thereby improved it.

PUBLICATIONS OF THE EUROPEAN UNIVERSITY INSTITUTE

EUI WORKING PAPERS :

No. 1 :	Jacques PELKMANS :	The European Community and the Newly Industrialized Countries
No. 2 :	Joseph H.H. WEILER :	Supranationalism Revisited - Retrospective and Prospective The European Communities After Thirty Years
No. 3 :	Aldo RUSTICHINI :	Seasonality in Eurodollar Interest Rates
No. 4 :	Mauro CAPPELLETTI / David GOLAY :	Judicial Review, Transnational and Federal : Its Impact on Integration
No. 5 :	Leonard GLESKE :	The European Monetary System - Present Situation and Future Prospects
No. 6 :	Manfred HINZ :	Massenkult und Todessymbolik in der nationalsozialistischen Architektur
No. 7 :	Wilhelm BÜRKLIN :	The "Greens" and the "New Politics" Goodbye to the Three-Party System ?
No. 8 :	Athanasios MOULAKIS :	Unilateralism or the Shadow of Confusion
No. 9 :	Manfred E. STREIT :	Information Processing in Future Markets - An Essay on the Adequacy of an Abstraction
No. 10:	Kumaraswamy VELUPILLAI:	When Workers Save and Invest : Some Kaldorian Dynamics
No. 11:	Kumaraswamy VELUPILLAI:	A Neo-Cambridge Model of Income Distribution and Unemployment
No. 12:	Kumaraswamy VELUPILLAI:	On Lindahl's Theory of Distribution

PUBLICATIONS OF THE EUROPEAN UNIVERSITY INSTITUTE

EUI WORKING PAPERS:

No. 13:	Gunther TEUBNER	:	Reflexive Rationalität des Rechts
No: 14:	Gunther TEUBNER	:	Substantive and Reflexive Elements in Modern Law
No. 15:	Jens ALBER	:	Some Causes and Consequences of Social Security Expenditure Development in Western Europe, 1949 - 1977
No. 16:	Ian BUDGE	:	Democratic Party Government: Formation and Functioning in Twenty-one Countries
No. 17:	Hans DAALDER	:	Parties and Political Mobilization: An Initial Happening
No. 18:	Giuseppe DI PALMA	:	Party Government and Democratic Reproducibility: The Dilemma of New Democracies
No. 19:	Richard S. KATZ	:	Party Government: A Rationalistic Conception
No. 20:	Jürg STEINER	:	Decision Process and Policy Outcome: An Attempt to Conceptualize the Problem at the Cross-National Level
No. 21:	Jens ALBER	:	The Emergence of Welfare Classes in West Germany: Theoretical Perspectives and Empirical Evidence
No. 22:	Don PATINKIN	:	Paul A. Samuelson and Monetary Theory
No. 23:	Marcello DE CECCO	:	Inflation and Structural Change in the Euro-Dollar Market
No. 24:	Marcello DE CECCO	:	The Vicious/Virtuous Circle Debate in the '20s and the '70s

PUBLICATIONS OF THE EUROPEAN UNIVERSITY INSTITUTE

EUI WORKING PAPERS:

No. 25:	Manfred E. STREIT	:	Modelling, Managing, and Monitoring Futures Trading - Frontiers of Analytical Inquiry
No. 26:	Domenico Mario NUTI:		Economic Crisis in Eastern Europe - Prospects and Repercussions
No. 27:	Terence C. DAINTITH	:	Legal Analysis of Economic Policy
No. 28:	Francis C. CASTLES/ Peter MAIR	:	Left-Right Political Scales: Some Expert Judgement
No. 29:	Karl HOHMANN	:	The Ability of German Political Parties to Resolve the Given Problems: the Situation in 1982