EUI WORKING PAPERS

ROBERT SCHUMAN CENTRE

European Union Legal Studies in Crisis? Towards a New Dynamic

Jo Shaw

EUI Working Paper RSC No. 95/23

European University Institute, Florence

The Robert Schuman Centre was set up by the High Council of the EUI in 1993 to carry out disciplinary and interdisciplinary research in the areas of European integration and public policy in Europe. While developing its own research projects, the Centre works in close relation with the four departments of the Institute and supports the specialized working groups organized by the researchers (International Relations, Environment, Interest Groups, Gender).

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

ROBERT SCHUMAN CENTRE

European Union Legal Studies in Crisis? Towards a New Dynamic

JO SHAW

EUI Working Paper RSC No. 95/23

BADIA FIESOLANA, SAN DOMENICO (FI)

Printed in Italy in November 1995
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

I Introduction

This paper seeks to explore the proposition that there is something akin to a crisis of direction in European Union ("EU")[1] legal studies (at least in the United Kingdom[2]), to argue that this stems to a large extent from a decline in the old certainties about the forward march of European integration, and to offer some suggestions about how scholars working in the field might approach the problem of reconciling both the strongly integrationist and also the increasingly evident disintegrationist elements in the EU legal order. It begins by looking at the assured, but limited role which scholars of EC law originally carved out for themselves,[3] and then examines how the challenge to scholarship and research about the EU legal order has changed since the Treaty of Maastricht. Finally it sets out an argument for a new dynamic of integration and disintegration in the law of the EU which offers one path down which EU legal studies could now fruitfully move.

Many might disagree with the foundations on which this paper rests. It could be said to be counterintuitive to link law with disintegration. Ever since the early 1960s, the legal forum and the operation of the integration principle within the EC have been, or at least appeared to be, inextricably linked. For the purposes of this paper we can take as a definition of "integration" that put forward by Dehousse and Weiler:

> "integration must be regarded as a *process*, leading gradually, with the passage of time, to an increase in the exchanges between the various societies concerned and to a more centralized form of government."[4]

In similar terms Schlesinger defines "Euro-integrationism" as "one quest for ultimate statehood."[5] In contrast, disintegration is not so easy either to identify or to define. It is not being used here to denote wholesale opposition to the integration process, in the sense of a desire to see, for example, UK withdrawal from the EU or the collapse of the EU as a political or geographical entity. In one sense disintegration is the counterpoint to the centralization element of integration, involving the preservation and enhancement of diverse legal, political and cultural structures which presently mark out the limits of integration. In that sense it is closely linked to one well-established conception of subsidiarity.[6] Disintegration provides the "difference" which integration strives against. Consequently, the two concepts are forever linked by a relationship of tension. Disintegration is not in the same way a process, but rather a state of affairs identified by a set of value judgements about the necessary protected preserves of the individual, the locality, the region and the nation state.

Very often, law and integration have been implicitly linked in what could be described as the "commonsense" view about Europe and its law, neatly expressed in the following comment by Dagtoglou:

> "The European Community's legal order simultaneously presupposes and creates unity - and vice versa. The Community is above all a "Community based on law" in the sense that the relations between the Community's subjects are relations between subjects of law and "legalised" to a high degree under the control of the Court, which must "ensure that...the law is observed" (Article 164 EEC). For this reason Community law is important as a unifying factor, especially because not only the Member States, but also individuals, have been recognised as directly subject to that law."[7]

The key role of the European Court of Justice as the "motor of integration" can hardly be denied by lawyers, and indeed this is a view shared by many political scientists.[8] The Court played its part when it embarked upon a task of *sui generis* constitution building within the context of the process of economic integration. The importance of this is generally agreed upon. Where differences might be expected to arise amongst those working in the field is in relation to the interpretation of the *meaning* of that task. Yet, the legal voices of caution about the role of the Court such as Rasmussen[9] have generally been denounced[10] as unhelpful, unjustified and largely unsupported in their attacks, or worse.[11] While it has not been wholly immune from attacks by politicians,[12] the criticisms have not posed a sustained challenge, in spite of the existence of research which sharply challenges the popular legitimacy of some of the legal interventions which the Court has made.[13] However, it is not my intention in this paper to discuss existing or emerging politico-legal theories of the Court's role in the integration process or about the Court as a constitutional adjudicator, which have helped to develop a forum within which lawyers and political scientists can converse.[14] Rather, I shall go back and look in a schematic and necessarily superficial way at the basis on which EU legal studies developed, concentrating on the situation in the United Kingdom, since this will highlight a historical link which has been formed between much writing about the EC (and now the EU) and a largely unexpressed but nonetheless symbolically powerful principle of integration. This allows me to challenge the assumption that law and integration are somehow *naturally* compatible - comfortable European bedfellows, as it were.

II EC law: the assured role

Since 1987, when Francis Snyder first published his paper "New Directions in European Community Law",[15] the case for developing critical analysis in the field of EC/EU legal studies has been well known and has received increasingly wide acknowledgement.[16] His argument is based on the assertion that

> "European Community law represents, more evidentally perhaps than most other subjects an intricate web of politics, economics and law."

Moreover, it

> "virtually calls out to be understood by means of a political economy of law or an interdisciplinary, contextual or critical approach."

Nevertheless, Snyder regrets that

> "it has often been regarded (and taught) simply as a highly technical set of rules, a dense doctrinal thicket into which only the ignorant or the foolish would "jump in and scratch out their eyes",[17] still less try to understand in terms of social theories of law."[18]

This echoes an earlier criticism directed at a body of work on the constitution of the EC coming from the American political scientist Shapiro:

> "[the work] is a careful and systematic exposition of the judicial provisions of the "constitution" of the [EEC]...But it represents a stage of constitutional scholarship out of which American constitutional law must have passed about seventy years ago... It is constitutional law without politics. [The work] presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional teleology....[S]uch an approach has proved fundamentally arid in the study of individual constitutions..."[19]

How, and why, did EU legal studies reach the position where such criticisms could be levelled?

In the United Kingdom's community of academic lawyers, the importance - in practical and constitutional terms - of EC law was proselytized by a small but vociferous and articulate band of early converts, who rightly saw it as having a precarious existence in its first years. The approach taken by many EC lawyers has been likened to the tendency towards self-censorship shown by

journalists in times of war or national emergency.[20] But as in all such cases, sacrifices were made. During the formative years of the EC, an informed critical stance towards the development of the EC/EU and its legal order was rarely maintained by academics, at least in public written form.[21]

There is an irony in the fact that the early missionaries unwittingly created a monster which now dominates its own environment. By stressing the dynamic, difficult and unusual nature of EC law, the pioneers effectively warned off most of the academic community from confronting or addressing the new entrant. EC law was the province, almost exclusively, of the "specialist" EC lawyer, untouchable by outsiders not initiated into its special techniques. This created a mystique about the nature of EC law, as well as generating a certain hostility amongst those who did not acknowledge the reasons for ascribing a special status to this new field of study. One example of boundary marking by EC lawyers is their strong insistence on the *sui generis* teleological approach of the Court of Justice to the interpretation of the Treaties and the secondary legal texts.[22] Lawyers outside the specialism for the most part merely paid lip service to EC law and dealt with it only tangentially (e.g. in so far as it came into UK labour law or company law). Yet at the same time as wanting EC law to be different, EC lawyers have also wanted it to be the same; that is, to be part of the so-called "core" of legal studies, which, in a practice-oriented discipline, effectively means that it should be included as one of the subjects which law students must study if they want to practice law.[23] The sameness aspect was also stressed by the development of a body of commentary which was largely doctrinal and descriptive in its approach to the texts. As Snyder has commented,[24] EC law has "been incorporated to some extent into the English textbook tradition,"[25] as part of the heritage of the common law. It is an example of "orthodox legal scholarship"[26] that is work

> "patterned on the work of common law judges. Such work took it for granted that in the common law - the distilled wisdom of generations of lawyers - answers were to be found for all legal problems. One started, naturally, from the cases and either developed existing doctrine in slightly different ways or tidied up the work of the less gifted of the judges."[27]

Clearly there is a limit to which such precepts can successfully be applied to a composite legal order such as that of the EU, or indeed to such an unstable legal order.

EC/EU legal studies have also been, at least until very recently, to a large extent insulated from the theoretical, methodological and contextual influences which have been felt in most other fields of legal study, from, for example, critical legal studies and marxism, postmodernism, socio-legal studies,

economics, social and political theory or feminist theory. Even positivist jurisprudence has barely touched upon the supranational legal phenomenon.[28] That is not to say that EC legal studies were not subject to strong outside influences, but these came primarily from legal practice and from linkages between the academic community and the institutions, with many commentators crossing the divide between practice, bureaucracy and academia on a number of occasions.[29] Ironically, too, perhaps the most influential voice of theory in the anglophone[30] world of EC legal studies came from outside Europe. The person and the work of Joseph Weiler,[31] based in the United States and Italy, tower above all others in terms of the development of reflective comment upon the form and content of the EC legal order,[32] the legitimacy of the European Court of Justice and its work[33] and, more recently, the values underlying the integration process.[34]

Yet to describe EC lawyers in the United Kingdom simply as a rather unreflective bunch, and to lump them together unhelpfully under the headlines of black letter, doctrinal, uncritical, atheoretical, unidisciplinary, and so on, is, it is suggested, rather to miss the point about the undoubted question marks which do still hang over EC/EU legal studies as a mature field of academic study. There may be some truth in the criticisms, but they are, at least today, now significantly overstated and do not address the "real" problem of EC/EU legal studies. As will be shown in the next section, the advent of the Treaty of Maastricht has been one of the factors triggering a body of work which is not only more strongly influenced by the ebbing and flowing of the political movements which lie behind many current legal developments, but which is also beginning to question the hitherto unassailable shibboleths about the "unity" of the EC legal order and about the "uniformity" of EC law, against the backdrop of the newly established Union.[35] In short, they are beginning to address the self-evident role of "integration" in the continuing evolution of the EU legal order. For it is, in reality, a largely unarticulated but immanent and symbolically pervasive concept of integration which has informed (and continues to inform) much work on EC law.

This emphasis is entirely unsurprising. In conventional wisdom it is the process of integration which gave the EC legal order an impetus and a purpose and EC law, conversely, which structures, disciplines and pushes forward the process of integration. Law and integration - structural and socio-economic - exist in a cosy, intimate and entirely positive relation. Law is a useful form of glue for the supranational enterprise, as it brings with it an ideology of obedience which substitutes for the absence of force or violence within the EU legal order.[36] The Member States adhere to the rule of law within the EU sphere, the dominant narrative runs, because they adhere to it to a large extent within the domestic sphere. They are, simply put, liberal democratic states,

whose basic instinct in relation to legal authority is one of compliance and obedience. When they do so, Member States also implicitly sign up for more integration, because - in EC rhetoric - law (and obedience to law) has traditionally meant integration. In this way, two circles are squared through integration and through the rule of law. Integration is what is natural for the EU and equally what is natural for the law. The essence of this argument is eloquently encapsulated by Kutscher:

> "The special nature of the Community, which must be regarded, not as an association of States subject to international law, but as a community *sui generis* orientated to the future and designed with a view to the alteration of economic and social relationships and progressive integration, rules out a static and requires a dynamic and evolutionary interpretation of Community law. The Community judge must never forget that the Treaties establishing the European Communities have laid the foundations of an ever closer union among the peoples of Europe and that the High Contracting Parties were anxious to strengthen the unity of their economies and to ensure their harmonious development (Preamble to the EEC Treaty). The principle of the progressive integration of the Member States in order to attain the objective of the Treaty does not only comprise a political requirement; it amounts rather to a Community legal principle, which the Court of Justice has to bear in mind when interpreting Community law, if it is to discharge in a proper manner its allotted task of upholding the law when it interprets and applies the Treaties."[37]

To leave behind this narrow conception of the relationship between law and integration, EC lawyers need, first, to abandon a vision of the EC/EU's legal development as comprised of, at the most, small deviations from a straight line directed towards an integrationist outcome. They must accept that neither the legal order of the old EC nor that of the new EU in fact had or have a simple linear relationship with contemporary events. But by abandoning the fervent zeal of the newly converted proselyte, not only will those now working on EU legal studies find their field of study accepted more readily as a mature component of legal studies, but they can also begin to open their eyes to the richness of the legal terrain which lies in front of them. As a dynamic and unstable force, driven as much by context as by content, the law of the new EU deserves (and now increasingly receives) more than a static and sterile body of commentary and needs the attention of a diversity of influences, both theoretical and methodological. The next section, which addresses briefly the legal challenge of the post-Maastricht Union, seeks to illustrate the urgency of this task.

III The legal challenge of the post-Maastricht Union

Much has now been written about the three pillar structure of European Union,[38] the role given to subsidiarity under the new constitutional dispensation[39] and the nascent caution of the Court of Justice in the post-Maastricht era.[40] Curtin's description of a Europe of "bits and pieces" post-Maastricht is strongly evocative of the new situation.[41] The theme which links much of the work is the possibility that the Court of Justice will no longer be able to bind together the diverse institutional structures of the Union and the EC proper. This possibility arises for the Court with its exclusion from the domain of Common Foreign and Security Policy, its restricted role in relation to Cooperation in Justice and Home Affairs, and the seemingly impossible task which it faces in reconciling the "law" of the Social Policy Agreement in which the UK does not participate and the law of the EC Treaty itself on social policy matters in which the UK does participate. In a sense, the high water mark of the Court's influence over the juridical nature of the EC came in 1991 when, in Opinion 1/91 on the proposed agreement to create a European Economic Area, it intervened directly in the exercise of sovereign will by the Member States (and others) when they were seeking to design new institutional structures for wider economic integration across Europe, and prevented the creation of an EEA Court which might have undermined the particular qualities of EC law, the *acquis communautaire*.[42] Echoing the classic early cases,[43] and building upon them in certain key respects, the Court commented:

> "the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, *in ever wider fields*, and the subjects of which comprise not only Member States but also their nationals."[44]

However, in a Europe of "variable geometry", in which "differentiated institutional structures pose significant problems, potentially even calling into question basic precepts of the entire integration project",[45] the old simplicities propounded by the Court of Justice in these terms will no longer suffice. Of course, these debates about the flexibility of law are not entirely new,[46] but they must now be confronted with a new urgency. Weatherill has asked whether EC law is fragmenting. "Can one," he enquired, "accommodate diversity within the common market without irretrievably compromising and fragmenting the integrity of the legal order?"[47] Not only must the Court itself find a new language and a new method for protecting the constitutional essence of the EC/EU, but it must do so within a context in which the entire value structure of the old Community-based integration framework has been called into

question.[48] Even the old certainties of the single market as the basis for economic integration no longer hold true as before, as the Court continues to redefine the scope of the primary principles of free movement in the light of possible conflicts with Member State autonomy and other Union policies such as those on the environment,[49] and as the scope and nature of legislative preemption continues to be limited by a combination of judicial action and Treaty amendment.[50] The vague and rather unhelpful terms in which some of these cases are drafted highlight perhaps most strongly the uncertain mood of the Court.[51] Finally, as the Court's caution in relation to the direct effect of directives has shown,[52] the simple legal truths of direct effect and supremacy can dissolve into the increasingly complex questions which arise when these basic principles are applied in practice within domestic legal systems. For it is difficult to give full effect to EC law while respecting the autonomy of the national legal systems and the distinction between judge-made law and legislation.[53] Yet at the same time as these difficulties emerge, the challenge to develop a coherent model of the EU legal order has never been greater, as the concept of national sovereignty continues to appear increasingly untenable in both legal[54] and political economy[55] terms. There can be no return to the Europe pre-1952.

Against this background, one way forward is to seek deliberately to explore the disintegrationist as well as the integrationist strands of the EU legal order, by developing a principle of integration and a counter-principle of disintegration. In this context, disintegration should not be viewed as a negative, destructive or malign concept or process, but as one which accommodates processes of decentralisation or non-centralisation, which themselves highlight weaknesses in the integration process as it has been hitherto conceived.

IV Towards a new dynamic of integration and disintegration in the EU legal order

The introductory sections of this work have highlighted a strand of thinking about the Court, its law and the integration principle perhaps best exemplified by the quotations above from Dagtoglou[56] and Kutscher.[57] In this work, a dominant integration principle emerges which has four key strands which will be explored in this section: consensus; unity and cohesion; centrality; legitimacy and authority. These strands will then be set against a counterprinciple of disintegration likewise comprising once again four opposing elements: diversity and difference; fragmentation; disruption; illegitimacy and weakness. What this section aims to show is that the elements of both the

principle and the counterprinciple are strongly sustained by a combination of textual authority and praxis within the EU legal order.

An interpretation of the EU legal order in these terms could be termed a type of "expanded" or "deviationist" doctrine which offers a method for the internal development of law and social relations through legal scholarship.[58] It shares in common with "orthodox legal scholarship"[59] a concentration on the work of judicial bodies; however, the approach taken here does not look at the Court in isolation but sees it in the context of the work of the other institutions - in a "multilogue".[60] For a number of reasons, this approach represents a conceptually distinctive method of analyzing the body of EC/EU law. First, by dealing with the disintegrationist aspects of the EU legal order not as exceptions to an integrationist norm, but as autonomous facets of the whole, it asserts that scholarship which highlights the alleged primacy of integration should not be able to claim the status of a privileged discourse.[61] It is useful to take the legislative instrument of the Directive as illustrative of this point. The Directive is used as the main instrument by the EC/EU institutions for achieving the harmonisation of national legal systems. It has a dual nature under Article 189. It mandates the achievement of a particular objective by the Member States, but allows them a choice of form and methods in so doing. Consequently, the Directive can be seen as much as an means for preserving diversity as of requiring uniformity. There is no *a priori* justification for preferring one interpretation over the other. Second, it teases out the unstated importance of assumptions about integration and its relationship to legal development in the EU in much existing legal doctrine, and makes it easier to confront the intense political importance of integration in the development of EU legal studies. Conversely, it allows a challenge to the future role of integration. Third, as the work of Unger has shown, "conflicts between legal principles...duplicate deeper contests among prescriptive conceptions of society".[62] This is a technique that Collins terms "interpretivism".[63] It makes it possible to place a greater emphasis upon those elements which normally receive less attention and to "challenge the institutions and imaginative preconceptions which compose the current formative context of society."[64] In other words, conflicts between those elements of the legal order which buttress directly the integration process and those which highlight and even strengthen its limits and limitations are reflective of deeper conflicts between what Dagtoglou identifies as the "centripetal" and "centrifugal" tendencies in the EC. As Harmsen argues, "variable geometry" within the EU political and legal orders "corresponds to deep-seated political trends" which are reshaping Western state structures.[65] Law itself will not reconcile these tendencies, and the assertion that law is "inherently" on the "side" of integration simply distorts the argument. The debates about the future of Europe, with the possibility of an expanded but multi-stranded Union will be

settled at the political level. The task for the lawyers is develop a conception of the legal order which can adequately reflect the sophistication of new models and go beyond the old simplicities of the unified legal order.

The discussion of the elements of integration and disintegration which follows is not intended to be exhaustive, but to exemplify the points made to the extent necessary to substantiate the argument. An exhaustive statement of the evidence would clearly outgrow the constraints of a single paper.

A The principle of integration

1. Consensus

Much of the strength derived by the EC legal order comes from an assumed consensus of support. This comprises both support by "Europeans" for an "idea of Europe", and support by lawyers engaged in EU legal studies for the underlying political and economic project. These points are exemplified by the following quotations.

> According to Delors,
> "There is a European model of society to which the great majority of Europeans are committed. Everyone agrees that we must adapt it, in order to respond better to the dual challenge of economic competition and solidarity. Nevertheless, most people want to retain its spirit and its political foundations."[66]

Slynn makes a parallel judgment about lawyers, *à propos* the analyses of the Treaty on European Union published in *Legal Issues of the Maastricht Treaty*.[67]

> "The papers in this book .... are written by lawyers of considerable experience and standing in the different spheres. They are often highly critical of what has been done - that is the function and the joy of the academic lawyer - yet they are written, as I see it, by lawyers who are wholly in favour of the aims of the Community and of developing integration ("union") and this must be kept in mind by those who read their criticisms of what has been agreed. The criticism is fundamentally constructive and forward-looking."[68]

In the legal domain, it is in fact possible to a large extent to paint the EC as a picture of (relative) compliance and consent - by the Member States who generally comply with their EC obligations, for whatever reason;[69] by national courts, whose ever increasing recourse to Article 177 references to the Court of Justice is a source of difficulty of its own;[70] by individuals, in fields where

direct compliance is required, such as Articles 85 and 86 EC, where significant economic incentives in the form of sizeable fines encourage obedience. In the political domain, the final ratification and coming into force of the Treaty of Maastricht, when all had earlier appeared lost, is a marked triumph of consent and acceptance, which comes hard upon the heels of the consensual completion of most aspects of the single internal market.

Moreover, the Court itself has repeated on so many occasions and with such apparent authority that the Treaties are the EC's constitutional charter that it is difficult for commentators to argue otherwise. What is needed, in fact, is a critique of what is meant by a "constitutional charter". Even so, EC lawyers wishing to paint a unidimensional picture of the EU legal order can draw strength from what Weiler[71] has called the "constitutional (self)-positioning" of the Court, exemplified by its key early rulings in which it was making what could be described as "normative assertions by the Court about what it wished that legal order to resemble"[72] rather than descriptions of an actually existing supranational legal order.

2. Unity and cohesion

The simplicity of EC law, based on a picture of "unity", can emerge almost as a thing of beauty in writing about the EU legal order. This is well illustrated by the eloquent phrasing of Dagtoglou[73] and Kutscher[74] cited above. The religious imagery used in this paper is by no means coincidental; it was adopted earlier also by Shapiro in the passage quoted above.[75] It well portrays the reverential attitude of many EC lawyers, one sustained, rather surprisingly, right up to the present day in a significant body of academic commentary "close to the Court". Another way of portraying the relationship between national courts and academia on the one hand and the European Court on the other hand is to use the language of love.[76]

While the nature of the EU legal order may now be slowly changing, it still possible to find much recent material coming from the Court to support the thesis that the dominant theme within the legal order is still unity and cohesion. For example, there is the continued development of the so-called "effectiveness principle".[77] The constitutional foundation of this is now clearly identified as Article 5 EC - the duty of Community loyalty. Continued jurisprudential support for an increasingly cohesive remedial system for the protection of individual rights can be drawn from the case of *Marshall (No. 2)*[78] and, although ultimately rejected by the Court itself in *Dori*,[79] the proposition that the contours of the direct effect of directives should be extended has received support from several Advocates General.[80] In Opinion 1/91 on the Draft Agreement Creating a European Economic Area[81] the Court asserted the strength of its dominion over the so-called *acquis communautaire*, indicating

that (at least without an explicit Treaty amendment) it is not possible to dismantle what, in legal terms, has been achieved and reasserted the developing nature of Community competence.[82]

It is certainly clear from the Treaty on European Union that its drafters were aware of the importance of the unity of the historical process of integration, since it includes a number of references (eg. Article B TEU) to the protection of the *acquis communautaire*, notwithstanding the introduction of the principle of subsidiarity. It has been argued that the preservation of the *acquis* means that subsidiarity is almost meaningless in legal terms.[83] It is, of course, possible that the Court of Justice may be able to give a strongly cohesive interpretation to the Treaty of Maastricht, perhaps using the objectives of the Common Provisions to guide its jurisprudence, and thus lending to the Treaty the status of a new "stage" in the immutable process of integration, as it did with the Single European Act. That could be one way of ironing out some of the most glaring ambiguities and contradictions within the Treaty.[84]

Above and beyond the *acquis communautaire*, Harmsen has suggested the development of a notion of "supraconstitutionality", comprising "principles or positive law norms which are logically prior to and therefore in some sense "above" the written constitution"[85] as the basis for a "core" or *noyau communautaire* which offers "a conceptual framework within which an increasingly variability of institutional structures might be reconciled with the need to preserve the basic tenets of the Union as an economic, legal and political order."[86] He suggests that while the contours of this core are as yet unclear, "its constituent elements must reasonably include the basic precepts of the common market, the underlying principles of the legal order, and some sense of a common political destiny".[87]

3. The centrality of law

It is one of the most outstanding features of some work on the EU legal order - of which that by Dagtoglou[88] and Kutscher[89]is a good example - that it displays a quiet confidence in the immutable claim of law to a central position within the overall political system. That is part of the claim to a commonsense understanding of the force of EC law as "naturally" integrative which, in turn, feeds off conceptions of a common European identity such as those portrayed by Delors.[90] The role of law as central to the Community project operates at a number of different levels.

The first level is ideological, and here it is the simplicity of EC law which is stressed. In the paradigm analysis, the nature of EC law needs no deeper investigation than a simple act of comparison to national law and international law. Since EC law is neither, it is *sui generis* and separate. *Ergo* it is autonomous. In the paradigm analysis, this answer is self-sustaining, with

evidence drawn, where necessary, from the two other levels of analysis within which the centrality of law is empirically observable, namely in *intra*-institutional relationships and relationships between the EU and the Member States, and in relationships involving individual citizens or legal persons.

This can be illustrated by reference to the resolution of disputes between the institutions or between the institutions and the Member States. It is common for such disputes to be resolved judicially, with actions, for example, before the Court of Justice in which the legal basis of legislation is challenged in order to establish the vertical or horizontal contours of Community competence.[91] The frequency of recourse to law by the Member States and the institutions can be cited as evidence of the centrality of the legal process and of the types of legal sanctions (most notably the nullity of a challenged act) which can be ordered in this context by the Court, rather than as evidence of a weakness in the political process or the political legitimacy of the EC.

Equally the paradigm analysis insists upon the importance of the individual remedial structure for the maintenance of individual rights under EC law in order to exemplify the point that the status of individuals is juridified by EC law. Good examples can be drawn from the fields of sex discrimination and vocational training. In the latter case broad rights to equality of access to education in other Member States, based on Community citizenship, were developed as a result of "citizen pressure". *Gravier*[92] is perhaps the best example of integration from below. Yet as with recourse to the legal process in any field of law, there is very little authoritative or non-anecdotal evidence to buttress claims for the centrality of individual rights as the key to the connection between so-called "Community citizens" and the EC constitutional order. The only evidence which has been collected takes as its model litigants (rather than potential litigants, or a class of aggrieved citizens).[93]

4. Legitimacy and authority

Few dare challenge the pre-eminent position of the Court of Justice for a number of reasons. First, it runs counter to the centrality of the law in the modern liberal democratic state. In that sense, for most lawyers it is counter-intuitive to argue that EC law should not be regarded as an authoritative command of a legitimate sovereign. Second, empirically, the Court has proved to be a broadly progressive force within the EC, not only in the sense of promoting the pursuit of economic Treaty objectives, but also in its jurisprudence on sex discrimination and in other fields of social law. This has leant it "popular" legitimacy in a certain sense of making it the central focus in litigation campaigns,[94] even though in other senses it has arguably overstepped the mark by interfering in national competences or by making policy choices.[95] Third, it has written a language of the rule of law and of fundamental rights for

the EC - which, while it may only be a smokescreen for the better pursuit of integrationist goals[96] - is nonetheless a more significant achievement than that of any of the other institutions.[97]

Much of the power of EC law derives from its ability to appear natural and inevitable, amidst a process of unstoppable historical evolution. It draws succour both from the self-evident inadequacies of the nation state as a political form, and from the forces of globalisation in the spheres of the economy and technology. One way to undermine the false power of EC law, and simultaneously also to reveal its reality, is to treat as elements of a counterprinciple of disintegration (not merely as "exceptions" to a quasi-universal truth) all the observable elements which run counter to the integration thesis.

The counterprinciple of disintegration

1. Diversity and difference

There is within the Member States of the EU an increasing scepticism about the ability of the current integration process to deliver upon its promises.[98] However, there is little consensus about what alternative route the EU should follow. The contested territory of the concept of subsidiarity provides a good example of the tensions within the preservation of difference and diversity: for some, subsidiarity simply equates to nationalism, a new, and more respectable way of asserting the refusal to abandon national sovereignty. For others, subsidiarity connotes decentralisation, regionalism (a "Europe of the Regions"[99]), divestiture of state power, and similar "buzz words". It could mean a new form of interest intermediation in the EC and a new way of holding power.[100] For the purposes of this analysis, it is not important to identify one or other strand of thinking as correct, but to celebrate the diversity of approach, which should not be seen necessarily as a weakness but the sign of a maturing polity within which it is no longer necessary to see political issues in terms of a stark division between the Community interest and the national interest. There may be a variety of different Community and national interests.

Lawyers are also beginning follow political scientists and others in fixing upon problems of identity as one of the keys to a critically defined European order.[101] In practical terms, notions of European identity can be linked to the deeply problematic "European" response to the issue of citizenship (and consequent problems of entitlements within the European polity[102]), involving the recreation of a new "Us" and "Them" at the European level:[103]

> "In the very concept of citizenship a distinction is created between the insider and outsider that tugs on their common humanity. The potential

corrosive effect on the values of the community vision of European integration is self-evident. Nationality as referent for interpersonal relations, and the human alienating effect of Us and Them are brought back again, simply transferred from their previous intra-Community context to the new inter-Community one. We have made little progress if the Us becomes European (instead of German or French or British) and the Them becomes those outside the Community."

2. Fragmentation

The celebration of a diversity in approach is unlikely to be seen on its own as a serious challenge to the hegemony of the sacred paradigm, at least so long as it is essentially confined to the political domain. A much more serious threat emerges from what appears to be the increasing fragmentation of the EU/EC legal order from within, already referred to in Section III.

A good example is offered by developments in the field of free movement of goods and the interpretation of Articles 30-36 EC. The first clear sign of a trend away from ever more far reaching attacks upon national measures which had any conceivable impact upon trade between Member States came in July 1992 with the decision of the Court of Justice in the *Wallonia Waste Ban Case*.[104] With regard to waste which did not come within the category of dangerous waste, the Court held that the regional authorities of Wallonia in Belgium were justified, on environmental protection grounds, from setting up temporary safeguard measures against waste originating in other countries. In justifying what appeared to be a very generous treatment of a discriminatory measure (previously only so-called indistinctly applicable measures had been justifiable on environmental protection grounds under the Cassis de Dijon[105] principle), the Court made reference to the special nature of waste and the importance of waste materials being eliminated as close as possible to the site of their production. More recently, in a series of judgments handed down since Autumn 1993, but most strikingly in the case of *Keck*,[106] the Court of Justice appears to have placed some stark limitations upon its earlier approach to certain types of restrictions on trade in goods. In *Keck* the Court overruled certain earlier cases (without, sadly, explicitly naming which ones) and held that there is a fundamental distinction to be drawn between measures which are concerned with the general conditions in which goods are marketed and those which are concerned with the nature of the goods themselves. It held that the former fall, in principle, outside the scope of Article 30 EC.

Academic reaction to what one commentator has termed the Court's "November Revolution"[107] has varied: some have seen the Court's judgment not only as a relinquishment of all rigour in legal reasoning,[108] but also as significant retrenchment in the scope of primary Community principles

protecting free movement.[109] Others have broadly applauded the Court for bringing Article 30 back into line with reality, and beginning the process of creating a limit upon the justiciability of national rules which allegedly limit free trade.[110] However, read in conjunction with other subsequent developments in the interpretation of Article 30 in relation to intellectual property,[111] *Keck* provides evidence that Court is aware that while pursuit of a narrow integration conception through liberalisation may have been a necessary condition for promoting the interests of the EC at an earlier stage of its development, such a uniform regime is no longer satisfactory.[112] In the first place, Article 30, interpreted in a formalistic way such as to threaten all national measures of public policy, will come into conflict with the EU's own flanking policies such as that relating to the environment. Second, the Court appears to have no wish to provoke unnecessary conflicts between the single market programme and a variety of national public policy measures such as those which restrict Sunday trading or place restrictions on certain types of advertising. In other words, the Court can see the need to protect diversity, in the face of the threat of uniformity.

The developments in the judicial interpretation of Article 30 should also be seen in the light of with the process of institutional fragmentation of the strict requirements of the single market which began with the introduction of Article 100A(4) by the Single European Act which allows derogation by Member States from harmonised EC rules, subject to authorization by the Commission.[113] Together these developments pose a significant challenge to the thesis that the process of the integration of the market through both negative and positive integration is unstoppable and inexorable.

3. Disruption

At first sight, there is no obvious reason to see a body of law which performs the functions of EC law as necessarily or naturally cohesive. It can equally well be portrayed as a disruptive force within the context of an old consensus of nationalism, albeit one which has proved itself to be tragically flawed. Moreover, EC law, by its very nature, brings norms into conflict with each other: vertically in the EC/Member State interface and horizontally as between Member States. Working with EC law by its very nature involves working with the interplay of different legal orders.[114] It solves conflicts with simple mechanisms which do not always acknowledge the full complexities of the conflict - supremacy and preemption; mutual recognition doctrine in the field of economic law. The fundamental propositions of the EU/EC legal order are beguiling simple. In reality, they conceal more than they reveal. A simple principle of supremacy cannot resolve the deeprooted division between Ireland and the rest of the EU on the matter of abortion, freedom of choice and the

rights of the unborn child.[115] Furthermore, the allegedly unified legal order, which claims respect for the rule of law, is itself based on a fundamental and deeprooted discrimination between nationals of Member States and third country nationals which "lies at the heart of the EC".[116] As it includes citizens within its jurisdiction, giving them new economic and social rights which they would not have had otherwise, so it also operates a set of criteria, largely based on nationality, which set the boundaries of its application. The new, and entirely artificial, construct of Community citizenship in the Treaty of Maastricht is likewise evidence of the disruptive force of Community law. To give one final example, one way of conceiving of the single market project is to see it as as creating competition between legal orders.[117] In that way, the disruptive element of competition is put to the service of closer economic integration by breaking down artificial barriers based on differences of legal norms. A competitive element can also be introduced into the vertical relationship governing the division of powers; this is a further meaning which has been attributed to the principle of subsidiarity, namely as a

> "rule that issues should be addressed at the level where they can be addressed most effectively"...establishing "a competition for governmental effectiveness among levels of government".[118]

A number of questions follow from this: has EC law become too closely identified with the normative values of European economic integration - freedom of trade, free movement, economic liberalism, etc. - to operate effectively as a cohesive element in a European society? Ward[119] has developed this point further out of Derrida's argument for an "ethic".[120] EC law has lacked an ethic if it is not economic liberalism. It is difficult to see the pursuit of "integration" as an ethic, since its ultimate objective - the elimination of differences - will paradoxically render the integration process itself otiose. Attempts to identify the EU Treaties, as an "economic constitution" within the traditions of ordoliberalism and image of the social market economy have not so far proved wholly successful.[121] Even where hitherto the Court has been able to identify "higher" values as underlying its case law - such as the field of sex discrimination[122] - the evidence of recent cases, particularly on pensions,[123] has been that the Court can easily be persuaded by considerations of cost to equate equality with equalisation and to abandon the mandate in Article 2 EC to have regard to improvements in the standard of living of workers.[124]

4. Illegitimacy and weakness

It is possible to challenge the legitimacy of the EC/EU at a number of different levels. Clearly there are difficulties at the level of institutional

arrangements including the limited role of the European Parliament, the so-called democratic deficit in the legislative process, and regulatory arrangements such as comitology,[125] and at a political level with the impact of crises caused by weaknesses in the political structures which triggered settlements such as the Luxembourg Accords and, much more recently, the Ioannina Compromise on Qualified Majority Voting after the fourth enlargement.[126] Do these and other defects fatally challenge the EC/EU legal order's claim to legitimacy as an emerging confederal or federal political entity? The democratic deficit, although not an unproblematic concept in itself, nonetheless fatally harms many of the claims of the Community and its law to legitimacy and authority. On the other hand, the Community can lay claim to a formal commitment to the rule of law[127] in that citizens do have access to an adjudication process, although whether this is effective in reality is questionable.[128]

Yet despite the formal legitimacy of the Court in these terms, doubts must still exist about its role. The important scientific work undertaken by Rasmussen,[129] which questions the role of the European Court as a judicial instance, is now being buttressed by empirical work by political scientists, based on public opinion surveys.[130] In a different context, the work of McBarnet and Whelan[131] on the creative compliance by international economic actors with Community regulatory norms in the field of international finance has cast doubt upon not only the effectiveness of the Community legislative effort, but also the perceived legitimacy of the regulatory structures it seeks to put in place. Finally, as Weiler has shown,[132] the emerging "European polity" so far lacks legitimacy at a more fundamental level, as it does not so far have either the democratic structures, or the active commitment of its citizens to justify the overriding of significant minority national interests in the greater good of the majority (as will occur through increased use of qualified majority voting). Weiler argues that increased power for the European Parliament is no panacea for a "social" as opposed to "formal" legitimacy gap identified in those terms.

V Conclusions

The bulk of this paper has been descriptive in character. It has not sought to judge the content of the legal order or the conduct of the Court of Justice but to portray the existing strands of development and tensions within the EU legal order, and to show the inaccuracy of a view of law and integration as immutably linked. It suggests a methodological approach to the EU legal order and an intellectual framework for analysis which allows the integrative and disintegrative elements to stand side by side, making it possible to envisage a positive outcome from conflicts which do flare up. These can be used creatively to identify and to challenge the deeper social conflicts which they portray.

Ultimately, however, an element of prescription in any analysis is difficult to avoid. This paper has highlighted many of the difficulties which the Court of Justice currently faces in attempting to preserve the relevance of the EU legal order to the developing political realities. The Court needs to be able to reconcile its practical role in terms of providing clear guidance to litigants, the Member States, and the other institutions with its symbolic duty to create a legal order which reflects the diverse elements of the "idea of Europe". This is no longer a single idea but a set of increasingly fragmented and diffuse images. As Schlesinger comments Europe (both West and East) is "simultaneously undergoing processes of centralisation and of fragmentation. These processes....are more and more thowing into relief questions of collective identity."[133] The Court needs to concentrate on creating a form of legal framework for integration which preserve cultural diversities within Europe, does not create a divisive European identity which excludes non-Europeans and non-privileged groups from within Europe, and which respects the principles of democratic accountability and popular legitimacy. This cannot be achieved without a willingness on the part of the Court (and its critics - friendly or otherwise) to use the richness of the law in full. In reality, diversity is already creeping into the legal order; one of the tasks for the Court is to make its rhetoric of constitutionalism match the reality. This may mean a less grand role for the law. It certainly means that a number of difficult questions need to be confronted. For example, is there more to the shift from "Community" to "Union" than first meets the eye? Is the EU/EC (still) striving to match up to the rather elusive values inherent in the dual meaning of the word "community"?[134] Does the EU legal order now possess the tools needed for the challenge of development identified here? By way of conclusion, this latter question will be briefly answered here.

It is, for example, clear that the principle of subsidiarity could be useful in reconciling the fundamental tensions at work within the EU legal order and equally evident in EU legal studies. Few have put it more clearly than Delors himself:

> "I often find myself invoking federalism as a method, with the addition of the principle of subsidiarity. I see it as a way of reconciling what for many appears to be irreconcilable: the emergence of a united Europe and loyalty to one's homeland; the need for a European power capable of tackling the problems of our age and the absolute necessity to preserve our roots in the shape of our nations and regions".[135]

Equally, it is apparent that the 1996 Intergovernmental Conference foreseen by Article N(2) TEU to review the Treaty of Maastricht will need to establish a

modus vivendi for the institutions and the legal order with concepts of "variable geometry" and "multispeed Europe".

Yet while subsidiarity may allow us to set the "limits of Europe", it does not necessarily assist us in deciding in what "Europe" really is. To that end, this article has sought to make a methodological contribution, by breaking the hitherto immutable link between law and the integration process and by highlighting the strong disintegrationist elements in the present EU legal order. Placing integration and disintegration side by side makes it easier to make a realistic assessment of the current state of the EU legal order.

NOTES

* Earlier versions of this paper were presented to the Critical Legal Studies Conference, 1993, a University of Durham staff seminar, the ECSA 2nd World Conference on *Federalism, Subsidiarity and Democracy* and the SPTL EC Section. Many people have made helpful comments, but none more so than Anne-Marie Slaughter.

1. There is clearly a great deal of ambiguity about the use of the term European Union, in particular in relation to law, given the uncertain legal status of the Union, as opposed to the narrower conception of the Community. In this paper I shall use the term "EU" in all circumstances where I am referring broadly to the legal incidents of the integration process originally begun under the European Coal and Steel Community Treaty in 1952, and now continuing under the umbrella of the European Union established by the Treaty of Maastricht in 1993. In certain narrow circumstances, I shall refer to the "EC" or "Community law" (e.g. when examining older, pre-Maastricht work, or when looking at particular legal aspects of the policies pursued under what is now termed the "European Community" Treaty).

2. This paper is largely limited to an assessment of developments in the UK, although it is not possible ever to view EC/EU legal studies in national isolation.

3. It should be stressed from the outset that this paper is not intended to be a criticism of particular individuals or even of Community lawyers in general; rather the scholarly activities of Community lawyers are painted, rather schematically it must be said, simply as the basis for the theoretical analysis of integration and disintegration which follows. It is to be hoped that this contribution may stimulate debate, and the author would welcome replies and comments from all quarters.

4. "The legal dimension", in Wallace (ed.), *The Dynamics of European Integration*, RIIA/Pinter, London, 1990, 242 at 246; emphasis in original.

5. Schlesinger, "'Europeanness' - A new cultural battlefield?", (1992) 5 *Innovations* 11 at 17.

6. Peterson, "Subsidiarity: A Definition to Suit any Vision?", (1994) 47 *Parliamentary Affairs* 116; Emiliou, "Subsidiarity: an effective barrier against "the enterprises of ambition"?" (1992) 17 ELRev. 383.

7. Dagtoglou, "The Legal Nature of the European Community", in Commission of the European Communities (ed.), *Thirty Years of Community Law*, OOPEC, Luxembourg, 33 at 40. This comment, along with one by Kutscher (*infra* n.37 will be taken as emblematic of a particular tradition of scholarship on EC law.

8. According to Seurin, for example, the "prestige of the law" lends authority to the Court: "Towards a European Constitution?", [1994] PL 625 at 634; see also Burley and Mattli, "Europe Before the Court: A Political Theory of Legal Integration", (1993)

47 *International Organization* 41, and subsequent debate: Garrett, "The politics of legal integration in the European Union", (1995) 49 *International Organization* 171 and Mattli and Slaughter, "Law and politics in the European Union: a reply to Garrett", (1995) 49 *International Organization* 189. Cf. Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach", (1993) 31 JCMS 473.

9. Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking*, Martinus Nijhoff, Dordrecht, 1986; ibid, "Towards a Normative Theory of Interpretation of Community Law", (1992) U. Chi. Legal Forum 135; Coppel and O'Neill, "The European Court of Justice: taking rights seriously?", (1992) 12 LS 227.

10. Cappelletti, "Is the European Court of Justice "Running Wild"?", (1987) 12 ELRev. 3; Weiler, "The Court of Justice on Trial", (1987) 24 CMLRev. 555.

11. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", in Bulmer and Scott (eds.), *Economic and Political Integration in Europe*, Blackwell, Oxford, 1994.

12. There have been attacks by Chancellor Kohl in 1992 (see Weiler, op. cit. *supra* n.11 at 158, and, more recently by the UK Government, which has proposed that the IGC in 1996 should allow decisions of the Court to be overridden by a majority vote in the Council of Ministers (Agence Europe, Feb. 3 1995, p3); see also Editorial, "Quis custodiet the European Court of Justice", (1993) 30 CMLRev. 899.

13. Gibson and Caldeira, "The European Court of Justice: A Question of Legitimacy", (1993) 14 *Zeitschrift für Rechtssoziologie* 204.

14. The seminal early work was Weiler, "Community, Member States and European Integration: Is the Law Relevant?", (1982) 21 JCMS 39; for a review of more recent work see Burley, "New Directions in Legal Research on the European Community", (1993) 31 JCMS 391. An emerging field of politico-legal work involves the use of theories of new institutionalism; see Bulmer, "The Governance of the European Union: A New Institutionalist Approach", (1994) 13 *Journal of Public Policy* 351; Armstrong, "Regulating the Free Movement of Goods: Institutions and Institutional Change", in Shaw and More (eds.), *New Legal Dynamics of European Union*, Oxford University Press, Oxford, 1996 (forthcoming).

15. (1987) 14 *Journal of Law and Society* 167; reprinted in Snyder, *New Directions in European Community Law*, Weidenfeld and Nicolson, 1990, Ch. 1. Page references are to the latter source.

16. See also Scott, "European Law" in Grigg-Spall and Ireland (eds.), *The Critical Lawyers' Handbook*, Pluto Press, London, 1992; Ward, "In Search of a European Identity", (1994) 57 MLR 315; Bankowski, "Comment on Weiler", in Bulmer and Scott, op. cit. *supra* n.11.

17. A reference to Llewellyn, *The Bramble Bush*, Oceana, Dobbs Ferry, NY, 1930, reprinted 1951.

18. Snyder, op. cit. *supra* n.15 at 167.

19. Shapiro, "Comparative Law and Comparative Politics", (1980) 53 *South California Law Review* 537 at 538, principally à propos Barav, "The Judicial Power of the European Economic Community", (1980) 53 *South California Law Review* 461, but applicable also to a larger range of scholarship.

20. I am grateful to Joanne Scott for this insight.

21. Rasmussen continues to suggest (in remarks made when chairing a panel on "Institutional Structures: Federalism and the Courts", at the 2nd ECSA World Conference on *Federalism, Subsidiarity and Democracy*, Brussels, May 5, 1994) that there was always an oral tradition of critique in the field of EC law, but that there have, until recently, been few opportunities to publish such critiques. The pathbreaking work in this respect is, of course, his own, op. cit. *supra* n.9 where he likewise refers, unspecifically, to the "oral tradition" (at p184). For a criticism of this see Cappelletti, op. cit. *supra* n.? at pp8-9. See also Alter, "Legal Integration in the European Community and Integration Theory: A Focus on the National Judiciaries of the Member States - the Case of Germany", Paper delivered to the 2nd ECSA World Conference (*supra*).

22. Mackenzie Stuart, *The European Communities and the Rule of Law*, Stevens, London, 1977, esp. pp71-76.

23. See now the achievement of this ambition: The Law Society and The Council of Legal Education, *Joint Announcement on Qualifying Law Degrees*, January 1995 covering degree studies begun in the academic year 1995/95 and beyond.

24. Snyder, op. cit. *supra* n.15 at p10.

25. See Sugarman, "Legal Theory, the Common Law Mind and the Making of the Textbook Tradition", in Twining (ed.), *Common Law and Legal Theory*, Blackwell, Oxford, 1986, 26. It is perhaps interesting to note that reflections upon Community law were not included in this influential collection, albeit that by the date of publication Community law had been for thirteen years indubitably part of English law (and indeed the law of the United Kingdom as a whole).

26. Collier, "Interdisciplinary Legal Scholarship in Search of a Paradigm", (1993) 42 *Duke LJ* 840.

27. Gava, "Scholarship and Community", (1994) 16 *Sydney LR* 442 at 444.

28. Although see now MacCormick, "Beyond the Sovereign State", (1993) 56 MLR 1; Bengeotxea, *The Legal Reasoning of the European Court of Justice*, Clarendon Press, Oxford, 1993.

29. The institutional linkages between bureaucracy and academia are, perhaps significantly, at their strongest where they involve the two most "communautaire" of the institutions - the Commission and the Court of Justice.

30. There has long been a stronger German tradition of developing theories of legal integration in a market context; see, for a review of theories of economic constitutionalism, ordoliberalism and the social market, Joerges, "European Economic Law, the Nation-State and the Maastricht Treaty", in Dehousse (ed.), *Europe After Maastricht. An Ever Closer Union?*, Law Books in Europe, Munich, 1994, 29 at 37 *et seq.*

31. It will be apparent that this article likewise draws heavily on the work of Weiler.

32. "The Community System: The Dual Character of Supranationalism", (1981) 1 YEL 268; "The Transformation of Europe", (1991) 100 Yale LJ 2408.

33. "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities", (1986) 61 *Washington Law Review* 1103; "A Quiet Revolution: The European Court of Justice and its Interlocutors", (1994) 26 *Comparative Political Studies* 510; "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration", op. cit. *supra* n.11.

34. "Fin-de-Siècle Europe", in Dehousse (ed.), op. cit. *supra* n.30.

35. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", (1993) 30 CMLRev. 17; Weatherill, "Beyond Prememption? Shared Competence and Constitutional Change in the European Community", in O'Keeffe and Twomey (eds.), *Legal Issues of the Maastricht Treaty*, Chancery/Wiley, Chichester/Colorado Springs, 1994. Similar work is also being done by political scientists working at the law/political science interface: Harmsen, "A European Union of Variable Geometry: Problems and Perspectives", (1994) 45 NILQ 109; Wincott, *The Treaty of Maastricht: An adequate "Constitution" for the European Union?*, European Public Policy Institute Occasional Paper 93/6, University of Warwick, 1993.

36. See Seurin, op. cit. *supra* n.8 at 633, who refers to Lecourt, *L'Europe des juges*, Bruylant, Brussels, 1976.

37. *Proceedings of the Judicial and Academic Conference*, OOPEC, Luxembourg, 1975, at p?.

38. See works cited *supra* n.35; see also Laffan, "The Treaty of Maastricht: Political Authority and Legitimacy", in Cafruny and Rosenthal (eds.), *The State of the European Community. The Maastricht Debates and Beyond*, Lynne Rienner/Longman, Boulder, Col, 1993 and Weiler, "Neither Unity nor Three Pillars - The Trinity Structure of the Treaty on European Union", in Monar *et al* (eds.), *The Maastricht Treaty on European Union. Legal Complexity and Political Dynamic*, European Interuniversity Press, Brussels, 1993.

39. See Peterson, op. cit. *supra* n.6; Emiliou, op. cit. *supra* n.6; ibid, "Subsidiarity: Panacea or Fig Leaf?", in O'Keeffe and Twomey (eds.), op. cit. *supra* n.35; Teasdale, "Subsidiarity after Maastricht", (1993) 64 *Political Quarterly* 187; Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States", (1994) 94 *Columbia Law Review* 331.

40. Editorial, "Safeguarding the Union's Legal Order?", (1994) 31 CMLRev. 687.

41. Op. cit. *supra* n.35.

42. Opinion 1/91 on the Draft Agreement between the Community and the countries of the European Trade Association relating to the creation of the European Economic Area [1991] ECR I-6079.

43. Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

44. [1991] ECR I-6079 at 6102.

45. Harmsen, op. cit. *supra* n.35 at 131.

46. Ehlermann, "How flexible is Community Law? An unusual approach to the concept of "Two Speeds"" (1984) 82 *Michigan Law Review* 1274; Langeheine and Weinstock, "Graduated Integration: A Modest Path Towards Progress", (1985) 23 JCMS 185.

47. Op. cit. *supra* n.35 at 22.

48. Weiler, op. cit. *supra* n.34 at 203.

49. Demiray, "The Movement of Goods in a Green Market", *Legal Issues of European Integration*, 1994/1, 73.

50. Weatherill, op. cit. *supra* n.35.

51. See CMLRev. Editorial op. cit. *supra* n.40; Gormley, "Reasoning Renounced? The remarkable judgment in *Keck & Mithouard*", [1994] EBLR 63. Further evidence can also be adduced from the Court's recent case law in the field of pensions and sex equality.

52. Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325. See further *infra* at n.79.

53. See, on the development of a concept of subsidiarity in the context of the enforcement of the EC competition rules: Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-(24.1.95); Editorial, "Subsidiarity in EC competition law enforcement", (1995) 32 CMLRev. 1.

54. See MacCormick, op. cit. *supra* n.28.

55. Held, "Democracy, the Nation-State and the Global System", in Held, *Political Theory Today*, Polity, Cambridge, 1991; Christiansen, *European Integration between Political Science and International Relations Theory: The End of Sovereignty*, EUI Working Paper RSC No. 94/4, Florence, 1994.

56. *Supra* at n.7.

57. *Supra* at n.37.

58. See Unger, *The Critical Legal Studies Movement*, Harvard University Press, Cambridge, 1986, pp15-22. See the detailed discussion and articulation of Unger's ideas in Collins, "Roberto Unger and the Critical Legal Studies Movement", (1987) 14 JLS 387, esp. pp404-407. For an example of work which draws freely upon Unger's methods, see Collins' own work on contract, especially, *The Law of Contract*, 1st Edition, Weidenfeld and Nicolson, London, 1986.

59. See *supra* at n.26.

60. See Weiler, op. cit. *supra* n.11 and Bankowski, op. cit. *supra* n.16.

61. For an introduction to this (and other) central claims of critical legal scholarship, see Kelman, *A Guide to Critical Legal Studies*, Harvard University Press, Cambridge MA, 1987, esp. p3 *et seq*.

62. See Collins, "Roberto Unger", op. cit. *supra* n.58 at p406.

63. Ibid.

64. Ibid.

65. Harmsen, op. cit. *supra* n.35 at 129.

66. *Our Europe*, Verso, London, 1992, p157.

67. O'Keeffe and Twomey (eds.), op. cit. *supra* n.35.

68. Slynn, Preface, in O'Keeffe and Twomey (eds.), op. cit. *supra* n.35 pvii.

69. EC Commission, *Tenth Annual Report on Commission Monitoring of the Application of Community Law*, OJ 1993 C233; ibid, *Eleventh Annual Report*, Com (94) 500.

70. See Activities of the Court of Justice Nos. 38/93, 34/94. As part of an ever accelerating trend, in 1993 204 references were made to the Court, as against 162 in 1992. The figure remained steady in 1994 at 203 references, although a slight reduction in the number of decisions handed down in reference cases (128 in 1993 to 119 in 1994) means that more cases are now pending, and delays will be consequently longer.

71. Weiler, "Journey", op. cit. *supra* n.11 at 418.

72. Shaw, *European Community Law*, Macmillan, London, 1993, p152.

73. *Supra* at n.7.

74. *Supra* at n.37.

75. Op. cit. *supra* n.19.

76. Weiler, "Quiet Revolution", op. cit. *supra* n.33 at 531.

77. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, tools and Techniques", (1993) 56 MLR 19.

78. Case C-271/91 *Marshall* v *Southampton and South West Hants AHA* [1993] ECR I-4367.

79. Case C-91/92 *Dori* v *Recreb Srl* [1994] ECR I-3325; see generally Tridimas, "Horizontal effect of directives: a missed opportunity?", (1994) 19 ELRev. 621.

80. AG van Gerven in *Marshall (No. 2)* (*supra* n.78) (at [1993] ECR I-4387); AG Jacobs in Case C-316/93 *Vaneetveld* v *SA Le Foyer* [1994] ECR I-763 at 774 *et seq*; AG Lenz in *Faccini Dori* (*supra* n.52) (at [1994] ECR I-3338 *et seq*).

81. [1992] 1 CMLR 245.

82. See *supra* at n.42 *et seq*.

83. Eg. Toth, "The Principle of Subsidiarity in the Maastricht Treaty", (1992) 29 CMLRev. 1079.

84. See Wincott, op. cit. *supra* n.35 at 22. The Court of Justice has already shown its willingness to refer to parts of the Treaty which are formally outside its jurisdiction, namely Article F2 TEU on the guarantee of fundamental rights protection: Case T-10/93 *X* v *Commission* [1994] ECR-SC I-A-119; I-387 at 403.

85. Harmsen, op. cit. *supra* n.35 at 131.

86. Ibid, at 133. See also Weatherill, "EC Law in Retreat", paper delivered to the SPTL EC Section, December 1994, who works this idea through in four separate spheres: retreat in the scope of judge-made law, retreat from legislative preemption; retreat from the single pillar in the sphere of Treaty-law and the possibility of new Member States acceding only to the "core" of the Union.

87. Harmsen, op. cit. *supra* n.35 at 132.

88. *Supra* at n.7.

89. *Supra* at n.37.

90. *Supra* at n.

91. E.g. Case 22/70 *Commission* v *Council (ERTA)* [1971] ECR 263; Cases 281/85 etc. *Germany et al* v *Commission (Migration Policy)* [1987] ECR 3203; Case 242/87 *Commission* v *Council (ERASMUS)* [1989] ECR 1425. See generally, Lenaerts, "Some thoughts about the Interaction between Judges and Politicians in the European Community", (1992) 12 YEL 1; Berlin, "Interactions between the Lawmaker and the Judiciary within the EC", *Legal Issues of European Integration* 1992/2, p17.

92. Case 293/83 *Gravier* v *City of Liège* [1985] ECR 583.

93. Harding, "Who Goes to Court in Europe? An Analysis of Litigation Against the European Community", (1992) 17 ELRev. 105.

94. Barnard, "A European Litigation Strategy: the case of the EOC", in Shaw and More (eds.), op. cit. *supra* n.14; for a rather different type of litigation strategy see Rawlings, "The Eurolaw Game: Some Deductions from a Saga", (1993) 29 JLS 309.

95. Rasmussen, op. cit. *supra* n.9.

96. Coppel and O'Neill, op. cit. *supra* n.9.

97. See generally Clapham, "A Human Rights Policy for the European Community", (1990) 10 YEL 309.

98. Note the warning words of Franklin *et al*, "Uncorking the Bottle: Popular Opposition to European Unification in the Wake of Maastricht", (1994) 32 JCMS 455.

99. Majone, "Preservation of Cultural Diversity in a Federal System: The Role of the Regions", in Tushnet (ed.), *Comparative Constitutional Federalism*, Contributions in Legal Studies no. 61, Greenwood Press, New York, etc, 1990.

100. Emiliou, "Subsidiarity: Panacea or Fig Leaf", op. cit. *supra* n.39 at 65.

101. See Ward, op. cit. *supra* n.16; ibid, "Identity and Difference: The European Union and Postmodernism", in Shaw and More (eds.), op. cit. *supra* n.14; Derrida, *The Other Heading: Reflections on Today's Europe*, Indiana University Press, Bloomington, 1992; Raworth, "A Timid Step Forwards: Maastricht and the Democratisation of the European Community", (1994) 19 ELRev. 22; Schlesinger, op. cit. *supra* n.5.

102. Hervey, "Migrant workers and their families in the European Union: the pervasive market ideology of Community law", in Shaw and More (eds.), *supra* n.14; Ackers, "Women, Citizenship and European Community Law: The Gender Implications of the Free Movement Provisions", [1994] JSWFL 391.

103. Weiler, "Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique", (1991) 3 EJIL 65 at 68.

104. Case C-2/90 *Commission* v *Belgium* [1993] 1 CMLR 365.

105. Case 120/78 *Rewe-Zentrale AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

106. Case C-267/91 *Keck* [1995] 1 CMLR 101; see also Case C-93/92 *CMC Motorradcenter GmbH* v *Pelin Baskiciogullari* (13.10.1993), Case C-46/90 *Procureur du Roi* v *Lagauche* (27/10/93), Case C-317/91 *Renault* v *Audi* (30.11.1993) and Case C-292/92 *Hünermund* v *Landesapothekerkammer Baden-Württemberg* (15.12.1993).

107. Reich, "The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* revisited", (1994) 31 CMLRev. 459.

108. Gormley, op. cit. *supra* n.51.

109. Chalmers, "Repackaging the Internal Market - The Ramifications of the *Keck* Judgment", (1994) 19 ELRev. 385.

110. Moore, "Re-visiting the limits of Article 30 EEC", (1994) 19 ELRev. 195.

111. Case C-9/93 *IHT* v *Ideal Standard* [1994] ECR I-2789: voluntary splitting of trademarks and the operation of the exhaustion of rights doctrine.

112. See Reich, op. cit. *supra* n.107; Chalmers, "The Single Market: From Prima Donna to Journeyman", in Shaw and More (eds.), op. cit. *supra* n.14.

113. Case C-41/93 *France* v *Commission* [1994] ECR I-1829 on the interpretation of the Commission's role in controlling national rules under Article 100A(4).

114. Darian-Smith, "Double Trouble. Implications of Co-existing Legal Systems in the European Community", Law and Society Association Annual Meeting, Chicago, 1993.

115. Case C-159/90 *SPUC* v *Grogan* [1991] ECR I-4685.

116. Twomey, "The European Union: three Pillars without a Human Rights Foundation", in O'Keeffe and Twomey (eds.), op. cit. *supra* n.35 at p123; see further Weiler, op. cit. *supra* n.103.

117. Reich, "Competition between legal orders - A new paradigm of EC Law?", (1992) 29 CMLRev. 861; Siebert and Koop, "Institutional Competition versus Centralization: Quo Vadis Europe?", (1993) 9 *Oxford Review of Economic Policy* 15; Woolcock, *The Single European Market*, RIIA, London, 1994.

118. Trachtman, "L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity", (1992) 33 *Harvard International Law Journal* 459 at 469.

119. Ward, op. cit. *supra* n.16.

120. Derrida, op. cit. *supra* n.101.

121. E.g. Gerber, "Integration, Disintegration and the Protection of Competition: of Images, Stories and Myths", (1992) 68 *Chicago-Kent Law Review* 229; Joerges, op. cit. *supra* n.30 at p37 *et seq*; Constantinesco, "La constitution économique de la C.E.E.", (1977) 13 *Revue Trimestrielle de Droit Européen* 244.

122. See generally More, ""Equal Treatment" of the Sexes in European Community Law: What Does "Equal" Mean?" (1993) 1 *Feminist Legal Studies* 45.

123. Of the six cases decided on September 28 1994 see in particular Case C-200/91 *Coloroll Pension Trustees* v *Russell* [1994] ECR I-4389 and Case C-57/93 *Vroege* v *Stichting Pensioenfonds NCIV* [1994] ECR I-4541.

124. Whiteford, (1995) 32 CMLRev. forthcoming.

125. Winter, "Drei Arten Gemeinschaftlicher Rechtssetzung und Ihre Legitimation", in Brüggemeier (ed.), *Verfassungen für ein ziviles Europa*, Nomos, Baden-Baden, 1994.

126. Europe Documents, No. 1879, April 14 1994; Editorial, "The Ioannina Compromise - Towards a wider and a weaker European Union?", (1994) 31 CMLRev. 453.

127. See the declaratory statements of the Court of Justice on the rule of law as a cornerstone of the Community legal order in Case 294/83 *Parti Ecologiste "Les Verts"* v *Parliament* [1986] ECR 1339 at 1365.

128. Harlow, "Towards a Theory of Access for the European Court of Justice", (1992) 12 YEL 213.

129. Rasmussen, op. cit. *supra* n.9.

130. Gibson and Caldeira, op. cit. *supra* n.13.

131. McBarnet and Whelan, "International Corporate finance and the Challenge of Creative Compliance", in Fingleton (ed.), *The Internationalisation of Capital Markets and the Regulatory Response*, Graham and Trotman, London, 1992, p129, reprinted in Wheeler (ed.), *The Business Enterprise*, Oxford University Press, Oxford, 1994.

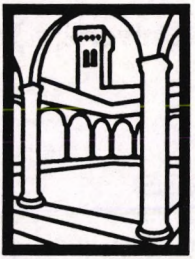
132. Weiler, "After Maastricht: Community Legitimacy in Post-1992 Europe", in Adams (ed.), *Singular Europe. Economy and Polity of the European Community after 1992*, University of Michigan Press, Ann Arbor, 1992; ibid, "Problems of Legitimacy in Post 1992 Europe", (1991) 46 *Aussenwirtschaft* 411.

133. Schlesinger, op. cit. *supra* n.5 at 22.

134. Bankowski, op. cit. *supra* n.16; Weiler, op. cit. *supra* n.34. See generally Boswell, *Community and the Economy. The Theory of Public Co-operation*, Routledge, London, pbk ed, 1994.

135. Speech given at the opening of the 40th academic year of the College of Europe,

Bruges, Belgium October 17 1989; quoted and translated by Trachtman, op. cit. *supra* n.118 at 469.



EUI WORKING PAPERS

EUI Working Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge
– depending on the availability of stocks – from:

The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf

Publications of the European University Institute

To The Publications Officer
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI) – Italy
Telefax No: +39/55/4685 636
E-mail: publish@datacomm.iue.it

From Name .....
Address.....
.....
.....
.....
.....

❒ Please send me a complete list of EUI Working Papers
❒ Please send me a complete list of EUI book publications
❒ Please send me the EUI brochure Academic Year 1996/97

Please send me the following EUI Working Paper(s):

No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....
No, Author .....
Title: .....

Date .....

Signature .....

Working Papers of the Robert Schuman Centre

RSC No. 94/1
Fritz W. SCHARPF
Community and Autonomy Multilevel Policy-Making in the European Union

RSC No. 94/2
Paul McALEAVEY
The Political Logic of the European Community Structural Funds Budget: Lobbying Efforts by Declining Industrial Regions

RSC No. 94/3
Toshihiro HORIUCHI
Japanese Public Policy for Cooperative Supply of Credit Guarantee to Small Firms - Its Evolution Since the Post War and Banks' Commitment

RSC No. 94/4
Thomas CHRISTIANSEN
European Integration Between Political Science and International Relations Theory: The End of Sovereignty *

RSC No. 94/5
Stefaan DE RYNCK
The Europeanization of Regional Development Policies in the Flemish Region

RSC No. 94/6
Enrique ALBEROLA ILA
Convergence Bands: A Proposal to Reform the EMS in the Transition to a Common Currency

RSC No. 94/7
Rosalyn HIGGINS
The EC and the New United Nations

RSC No. 94/8
Sidney TARROW
Social Movements in Europe: Movement Society or Europeanization of Conflict?

RSC No. 94/9
Vojin DIMITRIJEVIC
The 1974 Constitution as a Factor in the Collapse of Yugoslavia or as a Sign of Decaying Totalitarianism

RSC No. 94/10
Susan STRANGE
European Business in Japan: A Policy Crossroads?

RSC No. 94/11
Milica UVALIC
Privatization in Disintegrating East European States: The Case of Former Yugoslavia

RSC No. 94/12
Alberto CHILOSI
Property and Management Privatization in Eastern European Transition: Economic Consequences of Alternative Privatization Processes

RSC No. 94/13
Richard SINNOTT
Integration Theory, Subsidiarity and the Internationalisation of Issues: The Implications for Legitimacy *

RSC No. 94/14
Simon JOHNSON/Heidi KROLL
Complementarities, Managers and Mass Privatization Programs after Communism

RSC No. 94/15
Renzo DAVIDDI
Privatization in the Transition to a Market Economy

RSC No. 94/16
Alberto BACCINI
Industrial Organization and the Financing of Small Firms: The Case of MagneTek

RSC No. 94/17
Jonathan GOLUB
The Pivotal Role of British Sovereignty in EC Environmental Policy

RSC No. 94/18
Peter Viggo JAKOBSEN
Multilateralism Matters but How? The Impact of Multilateralism on Great Power Policy Towards the Break-up of Yugoslavia

RSC No. 94/19
Andrea BOSCO
A 'Federator' for Europe: Altiero Spinelli and the Constituent Role of the European Parliament

RSC No. 94/20
Johnny LAURSEN
Blueprints of Nordic Integration. Dynamics and Institutions in Nordic Cooperation, 1945-72

***

RSC No. 95/1
Giandomenico MAJONE
Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market

RSC No. 95/2
Ute COLLIER
Electricity Privatisation and Environmental Policy in the UK: Some Lessons for the Rest of Europe

RSC No. 95/3
Giuliana GEMELLI
American Influence on European Management Education: The Role of the Ford Foundation

RSC No. 95/4
Renaud DEHOUSSE
Institutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?

RSC No. 95/5
Vivien A. SCHMIDT
The New World Order, Incorporated: The Rise of Business and the Decline of the Nation-State

RSC No. 95/6
Liesbet HOOGHE
Subnational Mobilisation in the European Union

RSC No. 95/7
Gary MARKS/Liesbet HOOGHE/Kermit BLANK
European Integration and the State

RSC No. 95/8
Sonia LUCARELLI
The International Community and the Yugoslav Crisis: A Chronology of Events

RSC No. 95/9
A Constitution for the European Union?
Proceedings of a Conference, 12-13 May 1994, Organized by the Robert Schuman Centre with the Patronage of the European Parliament

RSC No. 95/10
Martin RHODES
'Subversive Liberalism': Market Integration, Globalisation and the European Welfare State

RSC No. 95/11
Joseph H.H. WEILER/ Ulrich HALTERN/ Franz MAYER
European Democracy and its Critique - Five Uneasy Pieces

RSC No. 95/12
Richard ROSE/Christian HAERPFER
Democracy and Enlarging the European Union Eastward

RSC No. 95/13
Donatella DELLA PORTA
Social Movements and the State: Thoughts on the Policing of Protest

RSC No. 95/14
Patrick A. MC CARTHY/Aris ALEXOPOULOS
Theory Synthesis in IR - Problems & Possibilities

RSC No. 95/15
Denise R. OSBORN
Crime and the UK Economy

RSC No. 95/16
Jérôme HENRY/Jens WEIDMANN
The French-German Interest Rate Differential since German Unification: The Impact of the 1992-1993 EMS Crises

RSC No. 95/17
Giorgia GIOVANNETTI/Ramon MARIMON
A Monetary Union for a Heterogeneous Europe

RSC No. 95/18
Bernhard WINKLER
Towards a Strategic View on EMU -
A Critical Survey

RSC No. 95/19
Joseph H.H. WEILER
The State "über alles"
Demos, Telos and the German Maastricht
Decision

RSC No. 95/20
Marc E. SMYRL
From Regional Policy Communities to
European Networks: Inter-regional
Divergence in the Implementation of EC
Regional Policy in France

RSC No. 95/21
Claus-Dieter EHLERMANN
Increased Differentiation of Stronger
Uniformity

RSC No. 95/22
Emile NOËL
La conférence intergouvernementale de 1996
Vers un nouvel ordre institutionnel

RSC No. 95/23
Jo SHAW
European Union Legal Studies in Crisis?
Towards a New Dynamic