EUI WORKING PAPERS

ROBERT SCHUMAN CENTRE

Constitutional Dialogues in the European Community

ALEC STONE SWEET

EUI Working Paper RSC No. 95/38

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

Constitutional Dialogues in the European Community

ALEC STONE SWEET

Department of Politics and Society,
University of California, Irvine, CA 92717

EUI Working Paper **RSC** No. 95/38

BADIA FIESOLANA, SAN DOMENICO (FI)

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

The convenors initiated *The European Court and National Courts—Doctrine and Jurisprudence* project in order to focus scholarly attention on a crucial but understudied component of European legal integration: the reception and implementation of EC law by national jurisdictions. Six national reports have been produced, each of which traces how one national legal system accommodated the European Court of Justice's (ECJ) jurisprudence of supremacy. This jurisprudence constitutionalized the Founding Treaties, and with the Treaties, the European Community (EC). In addition, reporters were asked to describe (or ponder the potential for) the emergence of a jurisprudence, developed by national courts from national sources of law, capable of controlling the legal limits of European integration (an aspect of *Kompetenz-Kompetenz*). These reports demonstrate why an exclusive focus on the ECJ's case law gives us an incomplete, and at times erroneous, picture of the dynamics of constitutionalization. The construction of a constitutional, rule of law Community has been a participatory process, a set of constitutional dialogues between supranational and national judges.

This paper presents a preliminary, comparative evaluation of these dialogues. I begin by examining the central tenets of the European Court's constitutional jurisprudence, before turning to existing scholarly approaches to the construction of the EC legal system (I). I then elaborate on two linked sets of constitutional dialogues, or sites of ongoing inter-institutional interaction. The first is a set of intrajudicial dialogues between the ECJ, conceived as a supranational constitutional court, and national judges on the primacy of EC law in national legal orders (II). The second is the dialogue between the ECJ, national courts, and national legislators in the making of public policy (III).

I Constitutionalizing the Treaty System

By "constitutionalization" I mean the process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory. Put differently, it is the process by which the sources of EC law -- the treaties, secondary legislation, and the jurisprudence of the ECJ—have penetrated into national legal systems, and are enforced as law in proceedings before national judges. Two points deserve emphasis. First, constitutionalization was neither preordained by the treaties, nor an unforeseen consequence of them (e.g., a result of functional spillover). Rather, judicial will—the consistent interpretation, in the jurisprudence of the European Court, of the nature of EC legal norms and of the place of those norms within the legal system—provided

the catalyst. Any account of constitutionalization must begin with this jurisprudence. Second, the level of constitutionalization can only be measured, at any given moment or across time, by how national courts have actually received this jurisprudence. The study of Community law is thus, *per force*, the study of comparative law. Put baldly, we can not begin to understand the constitutionalization process until we take the second point as seriously as we do the first.

Constitutionalizing the Treaty System

What is innovative—what is constitutional—about the ECJ's jurisprudence is that it requires national judges to apply EC law as if it were an integral part of the national legal order. Simplifying, there have been two waves of constitutionalization. In the 1962–79 period, the Court secured the core, constitutional principles of supremacy and direct effect. The Court made these moves despite the declared opposition of the member states.[2] The doctrine of supremacy lays down the rule that in *any* conflict between an EC legal norm and a norm of national law, the EC norm must be given primacy.[3] Indeed, according to the Court, every EC norm, from the moment it enters into force, "renders automatically inapplicable any conflicting provision of . . . national law."[4] The doctrine of direct effect holds that provisions of EC law can confer on individuals rights that public authorities must respect, and which must be protected by national courts. During this period, the ECJ found that treaty provisions[5] and directives[6] were directly effective, and the Court strengthened the direct effect of regulations.[7] As a consequence of the jurisprudence of direct effect, individuals and companies are empowered to sue member-state governments or other public authorities for either not conforming to obligations

---

[2] Eric Stein, "Lawyers, Judges, and the Making of a Transnational Constitution," American Journal of International Law 75 (1981): 1–27.

[3] Costa, ECJ 6/64.

[4] Simmenthal, ECJ 92/78.

[5] Van Gend en Loos, ECJ 26/62.

[6] Van Duyn, ECJ 41/74.

[7] Regulations are the only class of EC legislation recognized by the EEC Treaty to be "directly applicable." The ECJ has strengthened this applicability by, among other things, declaring that national implementing measures are "contrary to the Treaty" if they "have the result of creating an obstacle to the direct effect of Community Regulations," e.g., Commission v. Italy, ECJ 39/72.

contained in the treaties or regulations, or for not properly transposing provisions of directives into national law. The jurisprudence of supremacy prohibits public authorities from relying on national law to justify their failure to comply with EC law, and requires national judges to resolve conflicts between national and EC law in favor of the latter. The ECJ thus constituted a Community legal order on the basis of a sophisticated monism, demanding that the orthodoxies of dualism, like *lex posteriori derogat leggi priori*, give way.[8]

In the second wave, the Court supplied national judges with enhanced means of guaranteeing the effectiveness of EC law. In 1983, the doctrine of indirect effect was established, according to which national judges must interpret national law in conformity with EC law.[9] The Court subsequently ruled that when a directive has either not been transposed or has been transposed incorrectly into national law, national judges must interpret existing national law to be in conformity with the directive.[10] The doctrine empowers national judges to rewrite national legislation— an exercise called "principled construction"—in order to render EC law applicable in the absence of implementing measures. Once national law has been so (re)constructed, EC law (in the guise of the national rule) can be applied in legal disputes between private legal persons (i.e., non-governmental entities). Thus, indirect effect substantially reduces the problem that the Court's doctrine of direct effect only applies to disputes between a private person and a governmental entity. Finally, in 1990, the Court declared the doctrine of governmental liability.[11] According to this doctrine, a national court can hold a member state liable for damages caused to individuals

[8] Simplifying, according to monist theories, international law and national law are part of a single hierarchy of norms, wherein international law is superior to national law. In dualist theories, international law and national law are conceived as separate legal orders, to be coordinated by national constitutional law. Although there are exceptions (discussed below), European legal systems have traditionally tended toward dualism: treaty law enters into the national legal order only after having been transposed—ratified—by a statute passed by the legislature. Once transposed, legislation and treaty law possess equivalent status, since they are produced by equivalent acts of the legislature. The juridical relationship between these two legislative acts is traditionally governed by the doctrine of *lex posteriori*, which states that when an irresoluble conflict between two otherwise equivalent legal norms arises in the context of a legal dispute, the judge must resolve the dispute by applying the most recently produced law. Thus, in a conflict between a statute adopted *after* the ratification of a treaty provision, the judge must refuse to apply the treaty law on the grounds that parliament's latest word on the matter is controlling.

[9] Van Colson, ECJ 14/83.

[10] Marleasing, ECJ 106/88.

[11] Francovich, ECJ 6, 9/90.

due to the failure on the part of the member state to properly implement or apply a directive. The national court may then order member states to compensate such individuals for their losses.

In summary, the ECJ's jurisprudence of supremacy *imagines* a particular type of relationship between the European and national courts: a working partnership in the construction of a constitutional, rule of law Community. In that partnership, national judges become agents of the Community order—they become *Community judges*—whenever they resolve disputes governed by EC law. The Court *obliges* the national judge to uphold the supremacy of EC law, even against conflicting subsequent national law; *encourages* her to make references concerning the proper interpretation of EC law to the Court; and *empowers* her (even without a referral) to interpret national rules so that these rules will conform to EC law, and to refuse to apply national rules when they do not. The ECJ has derived as much from the doctrine of supremacy.

Understanding Constitutionalization

Two deep, yet unresolved, mysteries accompanied the constitutionalization process. First, why would the member states acquiesce to such a profound, structural transformation of the Community's legal order? In declaring the doctrines of supremacy and direct, the Court had, after all, radically rewritten the treaties (the treaties contain neither supremacy clause nor textual support for the direct effect of treaty provisions and directives). Further, the Court had accomplished this revision without overt member state support, at a time when Member state governments, *via* the Luxembourg compromise, had sacrificed progress on economic integration in order to preserve the essential intergovernmental elements of the Community. Our project is animated by a second mystery: why would national judges be willing to accept the ECJ's vision of a Community legal order? The Court's jurisprudence, after all, requires profound changes in the role and function of the national courts. To accept supremacy, for example, is to abandon, in every domain governed by EC law, the prohibition on judicial review of legislation—a Continental orthodoxy in place in every legal system under study in this project—as well as deeply entrenched *lex posteriori* solutions to coordinating international and national law. Although we do not have a theory of legal integration capable of solving either mystery, existing approaches to understanding European legal integration provide some guidance.

Implementing the Law

Simplifying a great deal, two types of legal scholarship dominate the field: (a) doctrinal analyses of the ECJ's case law, and (b) single-country, doctrinal analyses of the reception of that case law by national courts. In the first, scholars have worked to synthesize and publicize the Court's jurisprudence. Because the Court's jurisprudence is designed to ensure the unified application of EC law, the approach implicitly assumes that there will be a crossnational unification of doctrine and practice, and treats resistance to constitutionalization on the part of national judges as anomalous, deviant behavior. Yet, as the national reports document, such resistance has been a permanent feature of the Community's legal order. In the second, scholars assume that national law—and especially the judicial interpretation of constitutional provisions governing the relationship between municipal and treaty law—mediates the reception of EC law and the ECJ's jurisprudence. National deviance from the blueprint laid down by the European Court is treated as normal rather than pathological, to the extent that the blueprint conflicts with the national constitutional law of treaties. The approach suggests that even if we maintain a formal legal-doctrinal perspective (ignoring factors external to the law), we have no reason to presume that in a conflict between an EC norm and a subsequent national statute, national judges would follow supranational precepts, newly constructed by the ECJ, rather than long-lived precepts developed and curated by national judges. Although often in conflict, both perspectives are valuable in their own right: the first provides us with a clear benchmark for measuring compliance with the dictates of EC law; the second provides us with data on the extent of that compliance. Taken together, these approaches signal to us that the process of constitutionalization, being the enmeshment of two legal systems, will likely be one of conflict, compromise, and accommodation. That advantage stated, neither can predict the patterns of accommodation that have actually emerged.

Implementing the Preferences of the Member-States

This is an approach most explicitly elaborated by Garrett, who employs a "modified structural realist" (political science-international relations) approach[12] to the EC legal system.[13] Garrett notices that the EC is a regime

[12] For a survey of international relations theory relevant to the EC and international law and institutions more generally, see Alec Stone, "What is a Supranational Constitution? : An Essay in International Relations Theory," Review of Politics 56 (1994): 441–74.

[13] Geoffrey Garrett, "International Cooperation and Institutional Choice: The EC's Internal Market", International Organization 46 (1992): 533–560.

unique in the world, possessing a capacity to generate legal norms which are both binding among and within the member states. He notices, further, that these norms are capable of being enforced by courts at both the national and supranational levels. Both of these findings conflict with fundamental precepts of his theory, which do not easily (if ever) allow for a meaningfully autonomous role for institutions and law in international affairs. Garrett resolves this tension by arguing that the development of the legal system was "consistent with the interests of the member states," and especially the most powerful of them. By providing a relatively cheap system of monitoring compliance and reducing the incentives of non-compliance, the system is an unusually sophisticated means of reducing bargaining and information costs in an unusually complex, multi-sectoral international regime. Although virtually no evidence is marshalled to support the claim, Garrett asserts that the ECJ, in its case law, codifies the policy preferences of the dominant member states, thus reinforcing their dominance. The advantage of the approach is that it brings the political world —governments, national interests, and policy choices to be made—into the picture. Garrett's account is nonetheless riddled with problems (the approach has been strongly criticized elsewhere[14]), and nothing in it helps us to understand ECJ-national court interaction. Under his assumptions, we would at least expect that national courts would refuse to apply an EC norm if the government or legislature signalled to the courts that it ought to apply conflicting national norms. But we know that all national courts have embraced supremacy and direct effect, in one guise or another, and regularly apply EC norms over conflicting, subsequently-enacted national norms.

Pursuing Judicially-Bounded Interests

Building on the insights of legal scholarship,[15] Slaughter and Mattli have proposed an ingenious solution to both mysteries.[16] The answer to the first, they argue, is that legal processes are conducted in an insular, specialized discourse meaningfully distinct from the "normal", power and interest-based language of politics and political science. Put baldly, governments simply did

[14] See Walter Mattli and Anne-Marie Slaughter, "Law and Politics in the European Union: A Reply to Garrett", International Organization 49 (1995): 183-90.

[15] Especially Stein, op cit.; Joseph H.H. Weiler, "The Community System: The Dual Character of Supranationalism," Yearbook of European Law 1 (1981): 268–306; Joseph H. H. Weiler, "The Transformation of Europe," Yale Law Journal 100 (1991): 2403–83.

[16] Anne-Marie Burley (now Slaughter) and Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," International Organization 47 (1993): 41–76.

not understand what was happening until it was too late, presumably, until the costs of changing the system had risen to unacceptably high levels. Their account of the reception of the ECJ's doctrines by national courts is a dynamic and process oriented. Simplifying, the EC legal system resembles a machine, animated by self-interested actors operating both above and below the nation state.[17] Litigation of EC law provides fuel for the machine. Litigators are seeking to force governments to comply with EC law, or to obtain redress for damages suffered as a result of non-compliance. National judges have an interest in referring these cases to the ECJ to the extent that the system will provide them with powers (of judicial review, for example) that they would not otherwise have. The ECJ encourages such referrals as a means of strengthening its own position by facilitating the penetration of EC law into the national legal order. Thus, the EC legal system functions to mutually legitimize, and thus mutually empower, judicial authority at both the national and supranational levels. Finally, the machine creates its own momentum, as an ever expanding jurisprudence opens up both EC and national law to ever more litigation.

Sensitive to the social agency of law, to the complex interactions of official and non-official actors, and to the power of judicial process to socialize, the approach is an indispensable starting point for any serious research on European legal integration. Nevertheless, it is just as clear that the model distorts the constitutionalization process in important ways. According to Slaughter and Mattli, for example, the institutional interests of courts (or the self-interest of judges) work in only one direction: toward an ever deepening legal integration. Yet as the reports make clear, powerful disincentives to cooperating with the ECJ are also present.

Deriving Hypotheses

In the absence of systematic, crossnational research on the reception of EC law and the jurisprudence of the European Court by national courts, we should not expect that any of the approaches surveyed can adequately explain the dynamics or mechanics of legal integration processes in the EC. Nor was our project designed to adjudicate among these approaches. Existing explanations can be extraordinarily valuable nonetheless, to the extent that they can be distilled into a set of propositions which are: (1) capable of generating research

[17] The supranational equivalent of the "jurisprudential transmission belt" that is at the heart of European constitutional politics. See Alec Stone, "Governing with Judges," in J. Hayward and E. Page (eds.), Governing the New Europe (Oxford, UK: Polity, forthcoming 1995; Alec Stone, "Judging Socialist Reform: The Politics of Coordinate Construction in France and Germany," Comparative Political Studies 26 (1994): 443-69.

questions; (2) useful in analyzing and evaluating data; (3) falsifiable. I have derived four such propositions as follows:

> Proposition 1a: Legal integration processes, driven by the pedagogical authority of the ECJ's jurisprudence, will ultimately result in a relatively coherent and unified legal system across institutional and national boundaries. Whatever doctrinal variance has existed will continue to narrow over time, in the direction of a more or less unified position.
>
> Proposition 1b: The more a national constitution provides for the supremacy of international law over national law, the more likely it will be for national courts to implement the ECJ's constitutional vision as pronounced.
>
> Proposition 2: The ECJ's case law codifies the preferences of the dominant member states, and will thus be faithfully implemented by the national courts. If, however, governments enact legislation that conflicts with prior EC law, the national courts will give national law effect.
>
> Proposition 3: The interaction of self-interested litigators and judges will unify and render increasingly effective the EC legal system. The number of EC law cases in each system will rise not fall, the jurisprudence of constitutionalization will advance not retreat, and judicial control over national policy outcomes will deepen in old areas and widen in new areas touched by EC law.

These propositions will be evaluated, in light of the national reports and other research, in the two sections which follow. Propositions 1a and 1b direct our attention to an ongoing *doctrinal* dialogue between the ECJ and national courts as to the nature of the EC polity (part II). Propositions 2 and 3 direct our attention to the policymaking impact of constitutionalization. In part III, this impact is largely conceived as a set of *policy* dialogues.

II Constitutional Dialogues: Three Problems of Supremacy

The ECJ broadcasted its vision of a constitutional order to national legal systems in the form of the doctrines of supremacy and direct effect. Not only had the ECJ consciously targeted an audience, that of national lawyers and judges but, over the past three decades, its message has been a remarkably

consistent one. National courts did not just receive this message passively, but talked back, fully conscious that their response would be registered by the European Court. The national reports provide detailed assessments of the national responses to the supremacy-direct effect cluster in six member-states. What is clear from the reports is that legal integration processes have been driven as much by intra-judicial *conflict* as they have been by *cooperation*. Three interrelated, but nonetheless analytically separable, doctrinal "problem" areas have structured these interactions: (1) the problem of constitutional review, (2) the problem of fundamental rights, and (3) the problem of *Kompetenz-Kompetenz*. These interactions have in turn produced a wide reaching supremacy doctrine, induced the construction an enforceable charter of rights for the Community, and provoked a still unsettled controversy about the nature and legitimacy of the EC polity.

Supremacy and the Problem of Constitutional Review

The supremacy doctrine evolved out of a delicate, often conflictual, dialogue between the Italian Constitutional Court (ICC) and the ECJ. As the Italian reports document, the evolution of the Italian constitutional law of treaties and the doctrine of supremacy have gone hand in hand. The story begins in 1962, when Mr. Costa went on trial for refusing to pay a three dollar electrical bill in protest of the nationalization of electrical companies in Italy. Costa, a shareholder in one of the companies expropriated, defended himself on the grounds that the nationalization violated art. 37 of the EEC Treaty (which seeks to ensure that "national monopolies" are not managed in a discriminatory manner). The trial judge referred the matter both to the ECJ and the ICC.

The Italian Court, which disposed of the case first, was faced with determining the relative primacy of two sets of constitutional provisions. The first governs the relationship between international and national law: art. 10 provides that "the Italian legal order conforms to the general principle of international law," and art. 11 authorizes the state to "limit" its sovereignty in order to "promote and encourage international organizations" like the EC. The second, art. 80, states that treaty law enters into force upon an act of parliament. In its decision, the ICC declared that because treaty law possesses the same normative value as legislation, the *lex posteriori* rule controls, and Costa lost his case.[18] Five months later, the ECJ rejected Costa's claim as unfounded, at the

[18] ICC decisions mentioned here are reported in Ruggeri Laderchi, "The European Court and National Courts. Legal Change in its Social Context. Report on Italy", Working Paper n° 95/30, Robert Schuman Center, European University Institute, Firenze, 1995.

same time announcing the doctrine of supremacy.[19] The decision repudiated all national *lex posteriori* doctrines to the extent that they inhibit the effective application of EC law.

Ignoring the ECJ's jurisprudence, the ICC let stand its position on *lex posteriori* until its 1977 ruling in Società industrie chimiche (ICC 1977). Simplifying, whereas in *Costa* the ICC had allowed article 80 to govern the case, in Società industrie chimiche it shifted control to articles 10 and 11. At this point, however, the ICC's conception of constitutional review got in the way. Arguing that the prohibition of judicial review prohibited the direct enforcement of treaty law against subsequent, conflicting legislation, the Court declared that judges would only be permitted to abandon the *lex posteriori* rule upon authorization by the ICC, that is, after a preliminary reference. Thus, in the cases where the supremacy doctrine comes into play, the applicability of EC law would be subject to the enormous delays attending Italian constitutional review processes. From the perspective of EC law, directly applicable rights would be held hostage to an idiosyncratic, national procedure.

Some Italian judges, apparently hoping to gain a measure of autonomy from the ICC, worked to undermine this jurisprudence. The crucial case involved the importation of French beef into Italy by the Simmenthal company. In 1973, Italian customs authorities billed Simmenthal nearly 600,000 lire to pay for mandatory health inspections of its meat as it crossed the border. The border inspections, mandated by legislation passed in 1970, conflicted with the EEC Treaty and with two EC regulations dating from the 1960s. Simmenthal challenged the border inspections in an Italian Court, which referred the matter to the ECJ. The European Court,[20] ruled that the border inspections violated principles of free movement and EC regulations, and authorized the Italian judge to order the Italian government to return Simmenthal's payment. The Italian government appealed the judge's order, partly on the grounds that only the ICC could authorize an Italian court to set aside national legislation, whereupon the judge requested the ECJ to declare the ICC's *Società industrie chimiche* jurisprudence incompatible with the supremacy doctrine! The European Court (Simmenthal II, ECJ 1978) agreed,[21] declaring that EC norms, from their entry into force, become immediately enforceable in every courtroom throughout the Community. Consequently, "any provision of a national legal system and any legislative, administrative, or judicial practice which might impair the

[19] Costa, ECJ 6/64.

[20] Simmenthal I, ECJ 35/76.

[21] Simmenthal II, ECJ 92/78.

effectiveness of Community law" —such as a mandatory concrete review process —"are incompatible with . . . *the very essence* of Community law."

The ICC let stand its Società industrie chimiche jurisprudence for nearly a decade. Finally, in Granital (ICC 1984), the Italian Court ruled that EC law is directly applicable by ordinary judges, without a preliminary reference to the ICC.[22] In its decision, the ICC was careful to stress that the Italian constitution and not the ECJ governed the relationship between Community law and national legislation, and that, contrary to the European Court's vision of things, the European and national legal orders are "independent and separate" of each other.

In this saga, both the ECJ and the ICC have remained stubbornly attached to their own "inalienable conceptual orders."[23] Nevertheless, the ICC has been forced to adapt far more than has the European Court. The European Court, for its part, has refused to back down, using its interactions with the ICC to clarify and extend its message. Cross-nationally, it has been in those states where constitutional review by constitutional courts exists—France, Germany, and Italy—that supremacy has proved to be the most problematic.

In France, despite what looks on the surface to be friendly terrain, the story is one of confusion. The constitution of 1958 is resolutely monist, art. 55 declaring that treaty law is both part of French law and superior to statute. Given the fragmentation of the legal system, it is unsurprising that each of France's three autonomous high courts would have to take a position on art. 55 and its relationship to supremacy. In 1975, in a decision having no relationship to EC law, the Constitutional Council ruled (contrary to the ICC's position) that constitutional review and the review of the conformity of national legislation with treaty law were inherently different juridical exercises, and that its powers were limited exclusively to constitutional review.[24] This decision is now commonly read as constitutional authorization, granted by the Council to the judiciary, to accept supremacy. Although the interpretation has found its way into Jens Plötner's report, it should be resisted or at least relativized. The fact is that the civil courts needed no such authorization. In Vabre, four years *before* the Council's ruling, a Paris trial court had set aside certain customs rules, adopted in a law of 1966, that effectively taxed imports from other EC countries

---

[22] The ICC finessed the constitutional review issue, ordering judges simply to ignore national law conflicting with antecedent EC law.

[23] Ami Barav, "Cour constitutionnelle italienne et droit communautaire: le fantôme de Simmenthal," Revue trimestrielle de Droit européen 21 (1985): 314.

[24] Reported in Jens Plötner, "The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context. Report on France", Working Paper 95/28, of the Robert Schuman Center, European University Institute, Firenze, december 1995.

more than the same products produced in France.[25] The French administration had argued that the civil courts could not apply EC treaty law without overruling the *lex posteriori* rule and thus "making of themselves judges of the constitutionality of laws." The trial court disagreed, basing its decision on both art. 55 and the autonomous nature of EC law. The ruling was upheld by the Paris court of appeal and by the high civil court, the *Cour de Cassation*.

France's administrative courts refused to accept supremacy until 1989 in Nicolo.[26] Before Nicolo, the position was that while art. 55 provided for the supremacy of treaty law over statute, the administrative courts could not enforce this supremacy, because (1) judicial review was prohibited, and (2) the authority to set aside legislation conflicting with a constitutional provision rested exclusively with the Constitutional Council. In Nicolo, the Council of State simply empowered the administrative courts to enforce article 55, while avoiding mention of the ECJ, the status of Community law, the Vabre line of decisions, or the Constitutional Council's jurisprudence on article 55. Further, in Nicolo the the Council of State's legal advisor went out of his way to criticize the ECJ and its monist and "supranational" vision of the Community.

The tortuous accommodation of supremacy by French, Italian, and—as we will see below—German legal systems contrasts sharply with how smoothly supremacy was received by judiciaries of the other three member legal systems included in our project. In each of these systems, judicial review is prohibited, and constitutional review by a specialized constitutional jurisdiction does not exist. Claes and DeWitt's report on the Netherlands documents the clearest case we have of reception proceeding according to the design of the European Court. In the Dutch constitutional order, the authors demonstrate, "monism reigns without dispute." Articles 65 and 66 (dating from 1953, today renumbered as articles 93 and 94) provide both for the direct applicability of international agreements and their primacy in any conflict with national legal norms, whether the latter norms were produced prior or subsequently to the former. The next article extends the rules governing direct applicability and primacy to decisions taken by international organizations. Even more extraordinary, the doctrinal community interprets the supremacy clause as bestowing upon international agreements supremacy even over the constitution itself. Given the prohibition of constitutional review, write Claes and DeWitt, "treaties are more effectively enforceable than the Constitution."

Belgium provides a more rigorous test of the power of the ECJ's jurisprudence to reshape national legal orders. In Belgium, the constitution tends

---

[25] Vabre, Paris District Trial Court 1971, reported in 1976 Common Market Law Reports (17): 43.

[26] Reported in Jens Plötner's report, op. cit.

toward a dualist relationship between international and municipal law; further, prior to the constitutionalization of the treaties, the *lex posteriori* doctrine was securely in place. But, as Hervé Bribosia's report (HB) documents, Belgium courts easily swept aside these potential obstacles, on their own, without formal constitutional authorization. The doctrine of *lex posteriori* was abandoned in the Le Ski judgement, rendered in 1971 by the *Cour de Cassation*.[27] *Cassation* was supported in this endeavor by the *Procureur général* and the doctrinal community, both of which had been won over by the European Court's jurisprudence. The judgement proclaims its acceptance of supremacy and direct effect in monist terms: "The primacy of the Treaty results from the very nature of international law." Although one notices that this formulation differs from the European Court's insistence on the "autonomy" and "specificity" of the EC legal order as the basis for supremacy, the decision would probably not have been rendered in the absence of the ECJ's jurisprudence. In any event, according to Bribosia, there appear to be "no substantial legal consequences" to be drawn from this difference in language.

In terms of formal constitutional doctrine, supremacy and direct effect should arguably have met their chilliest reception in the courts of the United Kingdom (UK). In the UK, the organizing precept of constitutional law is the doctrine of parliamentary sovereignty: the only legal limitation to legislative power is that a parliament of today cannot, with legislation, bind a parliament of tomorrow. The doctrine prohibits judicial review of legislation, and implies a rigid *lex posteriori* solution. Further, the UK constitutes the archetype of a dualist regime.[28] The formal acceptance of supremacy by the House of Lords, the UK's sole final judicial authority, came in 1991, in Factortame II.[29] Before this decision, when faced with statutory provisions that seemingly did not conform to Community norms, Paul Craig reports, UK courts either (1) applied the UK provisions, invoking *lex posteriori*, under the guise of "implied repeal"

---

[27] Reported in Hervé Bribosia, "The European Court and National Courts. Doctrine and Jurisprudence. Legal Change in its Social Context. Report on Belgium", Working Paper n° 95/24 of the Robert Schuman Center, European University Institute, Firenze, December 1995. Bribosia asserts but does not explain exactly how this judgement could settle the question for the administrative courts, an autonomous judicial order.

[28] That is, any norm of international law that modifies the legal rights and obligations of UK citizens must be transposed to have effect within the UK. This law is then subject to implied repeal (*lex posteriori*).

[29] Reported in Paul Craig, "The European Court and National Courts - Doctrine and Jurisprudence: Legal change in its Social Context. Report on the United Kingdom", Working Paper n° 95/29, Robert Schuman Center, European University Institute, Firenze, December 1995.

of the EC norm, a solution in open violation with the ECJ's jurisprudence of supremacy; or, (2) engaged in "strong principles of construction," in order to "read" the UK norm "so as to be compatible with Community law requirements." This latter practice, aided and abetted by an increasing use of article 177 references, appears to have prepared the way for full acceptance of supremacy, since it involved UK judges in techniques of interpretation associated more with Continental than with native judging.

In Factortame II, the House of Lords implemented an ECJ ruling which all but required the construction of a theory of national sovereignty capable of receiving the supremacy doctrine. This the Lords did at the cost of abandoning, but only with respect to EC law, the implied repeal doctrine: the EC Act of 1972, which states that the effect of all British statutes is subject to the terms of Community law, binds UK courts, at least unless parliament *expressly* states that it wishes to derogate from Community law. Although Lord Bridge asserts that the nature of the 1972 Act "has always been clear," and that "there is nothing in anyway novel in according supremacy to rules of Community law," the fact remains that no court would have recognized either in 1972. The acceptance of supremacy is a surface manifestation of a much deeper process—a "Europeanization" of British judging.[30] Europeanization has enhanced the power of judges to control policy outcomes, to the detriment of traditional conceptions of parliamentary sovereignty.[31]

Supremacy and the Problem of Fundamental Rights

One hugely important, but wholly unintended, consequence of the ECJ's elaboration of the supremacy doctrine has been the progressive construction of a charter of rights for the Community. The EEC treaty originally contained no such charter, although several provisions of its treaty—including the principles of non-discrimination based on nationality (art. 7), and equal pay for equal work among men and women (art. 119)—can be read as rights provisions. Their purpose was not so much to create rights claims for individuals, as to remove potential sources of distortion within an emerging common market. If, in 1959, the ECJ declared itself to be without power to review Community acts with reference to fundamental rights,[32] in 1969 the Court ruled that it had a positive

[30] Jonathan E. Levitsky, "The Europeanization of the British Style," American Journal of Comparative Law 42 (1994): 347–80.

[31] See also P.P. Craig, "Sovereignty of the UK Parliament After Factortame," Yearbook of European Law (1991): 221–56.

[32] Stork, ECJ 1/58.

duty to ensure that Community acts conform to fundamental rights[33]; and, in 1989, the Court secured the power to review the acts of the member states for rights violations.[34] The Court has thus radically revised the treaties, "wisely and courageously" in Weiler's terms.[35]

The move, however, was not voluntary.[36] An incipient rebellion against supremacy, led by national courts, drove the process. Just after the the doctrine of supremacy was announced, Italian and German judges noticed that supremacy would work to insulate EC law from national rights protection. They began challenging—in references to the ECJ and to their own constitutional courts—the legality of a range of EC legislative acts, on the theory that these acts violated national constitutional rights. The International Handelsgesellschaft case provides an important example. The case involved a financial penalty (the forfeiture of an export deposit) permitted by EC regulations adopted in 1967, and administered against a German exporter by the German government. In its referral to the ECJ, the administrative court of Frankfurt complained that the regulations appeared to violate German constitutional rights. In its response, the ECJ declared that EC law could not be overridden by national rights provisions "without the legal basis of the Community itself," i.e., supremacy, "being called into question." But recognizing the seriousness of the challenge, the Court declared that "respect for fundamental rights"—"inspired by the constitutional traditions of the member states"—"forms an integral part of the general principles of law protected by the Court of Justice." Although the German government argued that the Court had no power to do so, the ECJ then reviewed the regulations for their conformity with these fundamental rights, but found no violation.[37] As Juliane Kokott reports, the case did not end there. Disappointed with the ECJ's ruling, the Frankfurt court asked the German Federal Constitutional Court (GFCC) to declare the EC rules unconstitutional. Although the GFCC refused to do so, it declared (by a 5–3 vote) that "*as long as* the integration process has not progressed so far that Community law also possesses

---

[33] Stauder, ECJ 26/69.

[34] Wachauf, ECJ 5/88.

[35] Joseph H. H. Weiler, "Eurocracy and Distrust," Washington Law Review 61 (1986): 1105–06.

[36] Mancini and Keeling are careful to state that the ECJ was not "bulldozed" but only "forced" by national courts into recognizing fundamental rights, G. Federico Mancini and David T. Keeling, "Democracy and the European Court of Justice," The Modern Law Review 57 (1994): 187.

[37] ECJ 11/70.

a catalogue of rights . . . of settled validity, which is adequate in comparison with a catalogue of fundamental rights contained in the [German] constitution," the GFCC would permit German constitutional review of EC acts.[38] The decision is today known as the Solange I (the first "as long as") decision.

In response to cases like these, the ECJ became increasingly explicit about the fundamental rights it had promised to protect. In Nold,[39] the Court declared that it would annul "[Community] measures which are incompatible with fundamental rights recognized and protected by the constitutions of the member states." In the same case, the Court also announced that international human rights treaties signed by the member states, including the European Convention on Human Rights, would "supply guidelines" to the Court. The Court has thereafter referred to the Convention as if it were a basic source of Community rights, and has invoked it in review of member state acts (Rutili,[40] Commission v. Germany[41]). Although some uncertainty remains, national courts have generally been persuaded by these moves. In 1986, the GFCC set aside Solange I. In Solange II, it declared that "a measure of protection of fundamental rights has been established . . . which, in its conception, substance and manner of implementation, is essentially compatible with the standards established by the German constitution." The GFCC then prohibited preliminary references from German courts attacking the constitutionality of EC acts "*as long as* the EC, and in particular the ECJ, generally ensures an effective protection of fundamental rights."

The European Court's jurisprudence of supremacy and fundamental rights are tightly linked, to each other, and to a particular vision of the Community. Without supremacy, the ECJ had decided, the common market was doomed. And without a judicially enforceable charter of rights, national courts had decided, the supremacy doctrine was doomed. The ECJ could have maintained its original position which, in effect, held that fundamental rights were part of national—but not Community—law; the courts of the member-states could have begun to annul EC acts judged to be unconstitutional. In either event, legal integration might have been fatally undermined. As it happened, no EC act has

---

[38] GFCC decisions mentioned here are reported in Julianne Kokott, "The European Court and National Courts. Doctrine and Jurisprudence. Legal Change in its Social Context. Report on Germany", Working Paper n° 95/25, Robert Schuman Center, European University Institute, Firenze, December 1995.

[39] ECJ 4/73.

[40] ECJ 36/75.

[41] ECJ 249/86.

ever been censored, by the ECJ or a national court, for violating Community or national rights provisions.

Supremacy and the Constitutional Limits to Integration

Interactions between the European and national constitutional courts have led to stable accommodations on rights and to the obligation of ordinary courts to enforce EC law. But they did not resolve the fundamental problem posed by supremacy: who has the *ultimate* authority to determine the constitutionality of EC acts? I believe that the problem, however worrying to some, is in fact irresoluble. On the one hand, the logic of supremacy suggests that the ECJ alone should have such authority, as guardian of the constitutional order of the EC, and the Court—in Foto Frost[42]—has declared as much. On the other hand, as all of our reports show, national constitutional courts, guardians of their own constitutional orders, view Community law as a species of international law which must either conform to national constitutional rules or be invalid as law. These courts, even at their most integration-friendly, have always been careful to reserve for themselves the final authority to determine the constitutionality of EC acts.

The German constitutional court's decision on the Maastricht Treaty on European Union (TEU) is the most unequivocal such ruling to date. Because of its far-reaching scope, the Maastricht Treaty required an accommodation between the European and national constitutions. The TEU (which also commits EC member states to enhanced cooperation in foreign policy, security, and social policy) established European citizenship for all EC nationals and a step-by-step process to European Monetary Union (EMU). These provisions forced most member states to amend their constitutions: the granting of a right to vote in local elections to all EC citizens, wherever they lived within the Community, conflicted with those constitutional provisions restricting voting rights to nationals; and the transfers of sovereignty involved in the EMU, the core of which is a single European currency managed by an independent European Central Bank, also required constitutional authorization.

In December 1992, four articles of the German constitution were amended to enable ratification, and the German Bundestag (by a 543-25 vote) and the Bundesrat (unanimously) then ratified the Treaty. In amending the constitution, as Juliane Kokott reports, the government and the legislature were careful to pay tribute to the GFCC's jurisprudence on legal integration. Art. 23, which even before revision had constituted one of the most international law-friendly

[42] ECJ 314/85.

constitutional provisions to be found in the Community (allowing transfers of sovereignty by ordinary legislation), now states that Germany:

> shall cooperate in the development of the European Union in order to realize a united Europe which is bound to observe democratic . . . principles . . . and which guarantees the protection of basic rights in a way which is substantially comparable to that provided by this constitution.

Further, rules (art. 23) governing transfers of governmental authority from Germany to the EC were tightened: such transfers, which previously could be effected by a simple majority, now must be approved by 2/3 of the Bundestag and the Bundesrat.

The law ratifying the Treaty was suspended[43] when four members of the German Green Party and a former German EC Commissioner attacked its constitutionality in separate constitutional complaints. Although a dozen often contradictory arguments were invoked, complainants focused on the alleged "democratic deficit" afflicting the EC: that the expansion in the Community's policymaking powers had so far outpaced democratization in the Community that in many areas Germans do not effectively participate in their own governance.

In a long and complex ruling rendered in October 1993, the GFCC dismissed the complaint as unfounded, clearing the way for German ratification of the Treaty. Given the care in which art. 23 and other constitutional provisions had been revised, this outcome was hardly surprising. More extraordinary, the Court used the opportunity to introduce a new basis in which to challenge EC norms: the *ultra vires* nature of EC acts.[44] The ruling thus repudiates the ECJ's doctrine in Foto-Frost.

The decision rests on two interpretive pillars, both revelatory of how the Court understands the nature of the EC polity and Germany's place within it. First, the Court subjugated art. 23 to art. 38, which establishes that the Bundestag is to be elected by "general, direct, free, equal, and secret" elections. The GFCC read art. 38 to mean not only that Germans possessed a right to participate in such elections, but that "the weakening, within the scope of art. 23, of the legitimation of state power gained through an election" was prohibited. Thus, a vote of the Bundestag, issuing from legislative elections, constitutes the sole means of conferring legitimacy to all acts of public authority within Germany, *including acts of the EC*. Second, the GFCC announced that it would

---

[43] The German President refused to sign the bill pending the GFCC's decision.

[44] *Ultra vires* acts are governmental acts that are not legally valid to the extent that the governmental entity taking them has exceeding its legally prescribed authority.

view the EC integration as compatible with the German constitution to the extent that member-state governments "retain their sovereignty," and "thereby control integration." Willfully ignoring a good deal of reality, the GFCC declared the EC to be a strictly "intergovernmental Community," in which the government of each member-state is a "master" of the treaties, possessing the power to veto Community acts and the right to withdraw from the EC.

The operative part of the judgement is derived from these two interpretive moves. Most important, the Court declared that integration must, in order to conform to constitutional dictates, proceed "predictably," that is, intergovernmentally. At the Community level, the German government negotiates and authorizes, by treaty law, whatever there is of EC governance; at the national level, the Bundestag legitimizes and transposes these authorizations in national law. The Court then asserted its jurisdiction over EC acts:

> If . . . European institutions or governmental entities were to implement or develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German [ratification act] is based, any legal instrument arising from such activity would not be binding within German territory. German state institutions would be prevented, by reasons of constitutional law, from applying such legal instruments in Germany. Accordingly, the GFCC must examine the question of whether or not [these] legal instruments . . . may be considered to to remain within the bounds . . . accorded to them, or whether they may be considered to exceed these bounds.

Thus, the GFCC possesses the authority to void any EC act having the effect of depriving German legislative organs of their substantive control over integration. In terms of constitutional review processes, litigants now possess the right to plead the *ultra vires* nature of Community acts before all German judges, could then initiate concrete review processes before the GFCC.

Not surprisingly, the GFCC's decision has been the target of sharp criticism, particularly by Community lawyers who see a repudiation of the underlying bases of European legal order. A glaring irony runs through the decision. Supranational aspects of the TEU, such as the enhancement of certain powers of the EP and the establishment of a general right to vote in local elections, sought to close, however slightly, the Community's democratic deficit. The revision of the German constitution, necessary for ratification of the Treaty, also strengthened democratic controls over integration.[45] Nevertheless, in privileging a traditional international law and organization approach to the EC,

[45] In addition to the revisions of art. 23 discussed above, the powers of Bundestag and Bundesrat committees to be informed of and to scrutinize the government's activities at the EC level were enhanced.

the Court legitimizes the very source of the alleged deficit: the Community's intergovernmental elements. The irony can be drawn out further. The process by which the treaties were constitutionalized, widely viewed as both strengthening the supranational and the democratic character of the EC, escaped the control of national governments. Had the rules the GFCC laid down in its Maastricht decision been in place two decades earlier, the construction of an EC charter of rights, which the GFCC itself required in the name of democracy, would presumably have been unconstitutional.

Both the French[46] and Italian[47] constitutional courts have also, at different points of time and by different means, asserted their power to set national constitutional limits on European integration. In France, this has occurred in the guise of a convoluted jurisprudence on the constitutional limits to how much sovereignty national governments can "transfer" to EC institutions. In 1992, the French Council, in it's decisions on the constitutionality of the Maastricht Treaty, definitively abandoned an integration-hostile case law dating from the 1970s, a case law that had, in any case, undergone significant modification. The Council has signalled that it will use its power to review the constitutionality of international agreements only to instruct the government and parliament as to how the constitution must be revised in order to permit the agreement to enter into force. It has further signalled that the constituant assembly's authority to revise the constitution is virtually without limits. Nevertheless, as Jens Plötner's report implies, the Council seems to have reserved for itself the power to defend certain core values, first identified in a 1985 decision, namely "the respect for republican institutions, the continuity of the life of the nation, and the guarantee of civil rights and liberties."

The Italian court's jurisprudence locates *Kompetenz-Kompetenz* in Italy. In the words of a former ICC judge:

> Italy applies Community law because the Constitutional Court interprets Italian constitutional principles as indicating that the Italian legal order chooses not to impede the application of Community law, not because Italian law is subordinate to Community law as maintained by the Court of Justice.[48]

After the ECJ's decision in Simmenthal and before the ICC's decision in Granital, at least parts of the Italian judiciary refused to be bound by the

---

[46] See Alec Stone, "Ratifying *Maastricht*: France Debates European Union," French Politics and Society 11 (1993): 70–88.

[47] See Antonia La Pergola and Patrick Del Duca, "Community Law, International Law, and the Italian Constitution," American Journal of International Law 79 (1985): 598–621.

[48] La Pergola and Del Duca, op cit.: 615.

latter, one court even declared the Simmenthal judgement *ultra vires*.[49] But even at its most accommodating, the ICC has declared, in Frontini and Granital and contrary to the ECJ in Simmenthal, that preliminary references to the ICC continued to be required in three cases: (1) when a national law conflicts with an EC norm in an area in which EC competence had not beforehand been exercised; (2) when the national law expresses, explicitly, the legislator's will to derogate from the Community regime; and, (3) when an EC rule may violate core, unspecified "values" of the constitution or the constitutional rights of Italian citizens. More recently, in Fragd (1989), the ICC signalled that it is willing to begin "to test the consistency of individual rules of Community law with the fundamental principles for the protection of human rights that are contained in the Italian constitution."[50] (Unlike the German constitutional court, the ICC has not formally acknowledged the development of a rights jurisprudence by the ECJ.)

In the other three member states, again, the problem of determining the constitutional limits to European integration, or the "who is competent to decide" problem has, notwithstanding an interesting new development in Belgium, been largely irrelevant. What drama exists in the Belgian case is of recent vintage, developing along with the consolidation of the institutional position of the *Cour d'arbitrage*, a constitutional jurisdiction that began functioning in the mid-1980s. The *Cour d'arbitrage* exercises those constitutional review powers necessary to defend the new Belgian federal order and to protect the fundamental rights of equality and education. Beginning in 1991, the Court asserted the power of indirect review of treaty law, indirect because review occurs after treaty law has been transposed into national law. Its subsequent jurisprudence has made it clear that treaty law that violates the constitution will be voided, a position criticized, according to Hervé Bribosia's report, by the doctrinal community, the Procureur général, and the Belgian Prime Minister. Although Bribosia reports that the issue of *Kompetenz-Kompetenz* had been seemingly settled by Le Ski (it rested with Community organs), the *Cour d'arbitrage* has laid the foundations for a (German or Italian-style) constitutional jurisprudence on supremacy. The next stage will be the Belgian Court's decision on the Maastricht Treaty, now pending.

[49] Reported by Barav, op cit.: 328.

[50] Giorgio Gaja, "New Developments in a Continuing Story: The Relationship Between EEC Law and Italian Law," Common Market Law Review 27 (1990): 94.

A Preliminary Assessment

Whether one considers Proposition 1a to be more or less valid depends heavily on one's relative tolerance for deviance. In support of the proposition, we see that the high courts of each of the national court systems have accepted judiciary supremacy and—with at least two exceptions[51]—are doctrinally positioned to enforce the direct effect of EC law. National solutions to the doctrinal problems attending the reception of supremacy differ, but the desired end—the uniform application and effectiveness of EC law across the Community—can surely be achieved by various means. This pragmatism may not satisfy everyone. Schermers, for example, has argued that, in order to resolve potential conflicts about rights between the ECJ and national constitutional courts, that the ECJ should be placed under the tutelage of the European Court of Human Rights, by way of a preliminary reference procedure.[52] We do not have to take legal coherence this far. After all, we ought to admit that intra-judicial conflict has driven the constitutionalization process in important ways, and more often than not to the benefit of the European Court. Further, the new reticences of the German and Italian constitutional courts may turn out to be essentially rear guard actions—the erection of symbolic firebreaks to legal integration—in response to an ever deepening constitutionalization of EC law. On the other hand, constitutional courts may begin to actually exercise powers of review over Community acts.

It appears that Proposition 1b can not be sustained. Two findings are relevant here. First, the nature of constitutional provisions themselves appear to have no impact across cases. The Dutch case provides evidence for the proposition that the more monist the constitution, the smoother the reception of supremacy. The Belgian case tells us that a dualist tendencies can facilitate an equally smooth reception, while the French case provides an example of a legal system that, despite strongly monist constitutional provisions, partly operated in dualist terms (until 1989 in the case of the administrative courts). Generally, constitutional provisions tell us little in and of themselves. We have to know how they are interpreted by judges. The French, German, and Italian constitutions expressly provide for transfers of sovereign powers to international organizations, for example, yet these provisions have not always been enough

[51] The French Council of State and the Spanish Supreme Court refuse to give direct effect to directives under certain circumstances. See the Plötner report and Diego J. Liñan Nogueras and Javier Roldán Barbero, "The Judicial Application of Community Law in Spain," Common Market Law Review 30 (1993): 1135–54. There may be other exceptions as well.

[52] Henry G. Schermers, "The Scales in Balance: National Constitutional Court v. Court of Justice," Common Market Law Review 27 (1990): 97–105.

to legitimize the legal effect (i.e., supremacy) of such transfers within the municipal legal system. In the UK, judges, who had not done so before, swept aside a central precept of parliamentary sovereignty in order to make supremacy juridically effective.

This brings up my second point, one which can only be arrived at by examining the constitutional dialogues on supremacy comparatively. Member-states possessed of specialized constitutional courts—France, Germany, and Italy—invariably develop problems associated with the *Kompetenz-Kompetenz* issue. Constitutional courts, far from facilitating the reception of supremacy, make that reception contingent. Most important, constitutional courts insist, whereas other high courts often do not insist, that it is the national constitution, and not the ECJ or the EC treaties, that mediates the relationship between EC law and national law. Constitutional judges work to weaken integration-friendly provisions by interpreting them into a subordinate relationship to other constitutional provisions. That is, they engage in intra-constitutional interpretation in order to establish an intra-constitutional hierarchy of norms governing European integration. This exercise serves to establish formal, constitutional limits on European integration as well as to reserve for national constitutional courts the ultimate authority to control the legality of European integration. Member-states that do not possess such courts are precisely those in which the *Kompetenz-Kompetenz* issue has been of little or no interest. Belgium provides dramatic validation of this point: its situation resembled the Dutch situation, until a new constitutional jurisdiction was established. That constitutional court has now begun to behave as have other constitutional courts.

A Criticism

However excellent on their own terms, the national reports (and studies like them) collectively suffer from a fatal flaw: the privileged focus on formal doctrine. Far more important is what is ignored: how courts are actually resolving EC legal disputes. The distinction between doctrine and (for lack of a better phrase, case law) is endemic to traditional European legal scholarship. Whatever its virtues, it seriously undermines our capacity to evaluate the impact of constitutionalization on the work of national judiciaries. Most important, although the national reports document a general move to embrace supremacy, this move appears to mask some extremely important differences in the day-to-day implementation of EC law. These differences, further, appear to be patterned across national and jurisdictional boundaries. If we are to progress in our understanding of legal integration processes, we need to begin mapping and accounting for these differences. This is the subject of the next section.

III Constitutional Dialogues: Supremacy, Litigation, and Policymaking

The constitutionalization of the treaty system generated an structured an ongoing, intra-judicial dialogue, judges speaking to each other through the medium of legal discourse. Constitutionalization also upgraded the capacity of European courts to intervene in policy processes and to shape policy outcomes. Approaches 2 and 3 direct our attention to another highly structured set of interactions, between legislators, litigators, and judges. Although our project was not designed to assess propositions 2 and 3, the national reports make it clear that the evolution of the EC legal system has been a messier, far less coherent process than the proponents of these imagined it to be. What follows is the urging of a research agenda capable of better explaining the dynamics of legal integration.

This agenda integrates the following four research priorities:

Study the Case Law of National Courts

It is crucial that we abandon the widespread, but artificial, distinction between doctrine and case law, and study what judges actually are doing when they resolve legal disputes involving EC law. This is not an argument for lawyers to behave as political scientists. On the contrary, research into how courts construct a living jurisprudence from litigation and legal materials is essentially a lawyer's business. Three interrelated research questions appear crucial. Each asks us to consider the importance of EC law and supremacy doctrines in light of the day-to-day work of national judges. First, how many and what kinds of EC law disputes are national courts adjudicating? Astonishingly, neither the national reports nor existing published research is much concerned with what areas of EC law are being litigated and with what intensity. Second, what differences exist—within nation states and crossnationally—in how national judges "implement" EC law and the ECJ's jurisprudence? We have to disaggregate EC law along sectoral lines—e.g., free movement, labor law, environmental protection, etc.—and plot how judges are deciding these cases. Is the French *Cour de Cassation* more receptive to enforcing EC law in some areas than it is in others? Is *Cassation* more receptive to enforcing EC law than is the French *Conseil d'Etat*? Are Dutch courts more environmentally-friendly than Italian courts? I could go on for a very long time. Third, under what circumstances—that is, how and with respect to what kinds of cases—do judges invoke supremacy and apply Community law against conflicting national law?; and under what circumstances do judges choose to ignore relevant Community law in order to maintain national policies? The logic

of supremacy, of course, suggests that this choice does not exist; and the national reports generally assume that once supremacy is secured, judges behave as expected, according to the logic of supremacy. Yet we know (the next priority below) that judges may accept supremacy as a matter of doctrine, while ignoring it for the purposes of deciding certain kinds of cases. These questions are of practical as well as scholarly importance for lawyers.

Without answers to questions like these, theorizing about legal integration is putting the cart well before the horse. As will become clear, we can not move beyond speculation—of which we have had more than enough—until we have some minimal comparative understanding of how EC law is being adjudicated.

(Re)Specify Judicial Interests

When adjudicating EC law, judges are subject to conflicting pressures, pressures from which we can deduce individual and institutional interests. These deductions can imply either compliance with, or resistance to, the penetration of EC law within national systems. As a first cut, I have identified three clusters of interests which, taken together, appear to organize the most important non-legal, contextual factors suggested by the reports and by scholarship elsewhere.

The first is a judge's personal self-interest conceived as a career interest. Although the reports do not emphasize this factor, the self-interest of judges may conflict with the "judicial empowerment" hypothesis—the putative bureaucratic interest in seeing the courts gain in power at the expense of the political branches. As Shapiro has neatly put it, it is a "surprise" that some national courts have gone along with the ECJ, given that "such judges must attend to their career prospects within hierarchically organized national systems" of recruitment and promotion.[53] We would need to know more than we do about the bureaucratic pressures individual judges may be under to conform to national rather than supranational norms of judging. It appears from the data collected by our project that disincentives to playing the Eurolaw game are surprisingly low or non-existent in many systems. But the national reports, again, do not take us beyond the formal reception of supremacy to what really counts: how supremacy is used or ignored by judges.

The second interest is in "judicial empowerment," by which I mean a court's institutional interest in enhancing its autonomy in and control over legal, and therefore policy, processes. The reports give us some clues as to how these interests actually play out. Constitutional courts are simply not empowered by

[53] Martin J. Shapiro, "The European Court of Justice," in A. Sbragia (ed.), Euro-politics (Washington, D.C.: Brookings Institution): 128.

the ECJ's jurisprudence of supremacy and its vision of a partnership with national judges. Constitutional courts instead develop their own vision of the relationship between the EC and national legal orders, which not surprisingly never quite fits with the ECJ's vision. Courts prohibited from reviewing the legal validity of national legislation have, *a priori*, a powerful institutional interest in obtaining such authority. Perhaps this explains why the civil courts, including the supreme courts of civil jurisdictions, have had the least difficulty accepting, without complex, the ECJ's authority and the specificity of the EC legal order as interpreted by the ECJ.

The third is a court's interest in using its decisions to make good policy. Garrett raises this point directly but in an unusably simplistic form: courts are machines whose work governments have set in motion and whose output they ultimately control. But the point can be refined, by assuming what Garrett denies: that courts have a meaningfully autonomous capacity to evaluate the policy impact of their decisions. In doing so, the legal integration process instantly becomes much more complex. In adopting a policy perspective, some important puzzles emerge, puzzles that we can only begin to explain by combining the first and second research priorities. Two examples:

Jens Plötner's report suggests that the ease in which the civil courts accepted supremacy simply "fit" with civil judges' own self-conception as guarantors of a kind of economic constitution. As national and Community economies merged, we might say, the distinction between national and EC law became untenable. Supremacy, civil courts may have (at least implicitly) understood, enables the judiciary to ensure that economic actors are regulated on an equivalent basis. Plötner further speculates that the French *Conseil d'Etat*'s conversion to supremacy occurred in the context of an increasing number of cases of a commercial, rather than a traditionally administrative, nature. Thus, we might propose, informed by the approach proposed by Slaughter and Mattli, that the more a court is faced with commercial litigation, the more pressure a court comes under to function as a Community court. But, again, we would need to know more than we do about litigation patterns and how national courts are actually deciding commercial disputes to evaluate this proposition.

In contrast, courts may also have good reasons for maintaining existing lines of case law, case law that they have produced and which they control, rather than participating in that law's demise. In her report, Juliane Kokott documents the fascinating behavior of the high tax and labor courts of Germany who, in their references to the ECJ, are challenging the ECJ to be more sensitive to national solutions to legal problems of a mixed national and Community law nature. These courts have thus engaged the ECJ in a dialogue whose purpose is

to inform the European Court of the difficulties German courts might have in implementing the ECJ's decisions, in the hope that the European Court will revise its own case law. These initiative have even succeeded at times. Similarly, the House of Lords combines the doctrine of supremacy with its discretionary power over article 177 referrals to enhance its own autonomy and what I would call policymaking capacity. The Lords have not hesitated to use the powers afforded by supremacy not only to enforce EC law but to reshape the national law on sex discrimination in the workplace.[54] But, as Jonathan Golub has shown,[55] in the area of environmental policy, the Lords regularly enforce national legislation in clear violation of EC directives, without bothering first to refer the matter to the ECJ. Unfortunately, apart from the example provided by Kokott's report, none of the other national reports examine such instances of discrete, case-law specific, judicial resistance to supremacy with reference to EC law or the case-law specific policies of the European Court. Yet such resistance may be widespread. A proposition: when judges are convinced of the superiority of national policies, they ignore the rules attending supremacy. Put differently, supremacy enables judges to pick and choose from a menu of policy choices; in so choosing, judges determine which rule will do the most good and the least harm to the society it helps to govern.

Correlate Judicial Outcomes with Factors External to the Law

Taking Proposition 2 seriously, the research on judicial outcomes ought to be correlated with certain social and economic data. Garrett has asserted, for example, that the ECJ's decision in *Cassis de Dijon* ratified the policy goals of Germany and France, since both of these states benefit from an open market. In contrast, Hervé Bribosia, in his report on Belgium, proposes that the courts of small states may be more open to enforcing EC law precisely because small states depend relatively more heavily on external markets for their prosperity. One could test propositions such as these (i.e., those derived from an alleged "national interest") by correlating economic data—the ratio of trade receipts to GDP, for example—with levels of litigation of selected areas of EC law. It may be, for example, that Bribosia is right, and the more dependent upon trade is a

[54] Sally J. Kenney (University of Minnesota), "Pregnancy Discrimination: Toward Substantive Equality," unpublished manuscript (1995) 41 pp. Sally J. Kenney, "Pregnancy and Disability: Comparing the United States and the European Community," The Disability Law Reporter Service 3 (1994): 8–17.

[55] Jonathan Golub (European University Institute) "Rethinking the Role of National Courts in European Integration: A Political Study of British Judicial Discretion," unpublished manuscript (1995), 36 pp.

member-state, the more courts encourage litigation of EC law by enforcing that law. It may also be that in non-economic areas of EC law—social policy and the environment, for example—that we find a very different dynamic, similar to the one Golub and Kokott have identified, where courts are engaged in meaningful policy evaluation on an ongoing basis, vigilant about protecting their own national policies when deemed superior to EC policies.

Study the Behavior of Litigators

As Slaughter and Mattli have emphasized, the fuel for legal integration is the pursuit of private interests by legal means. Yet we know surprisingly little about the behavior and organization of litigators of EC law,[56] and nothing from a comparative perspective. Who litigates what and where? We desperately need comparative studies of whether, how, and why national and transnational litigation groups form; the impact of the case law of the European and national courts on litigation behavior; and the extent to which this behavior has risen or fallen over time. As with the study of case law, litigation activity must be studied cross-sectorally and cross-nationally.

Conclusion

The constitutionalization of the EC treaties begat the complex process of coordinating national and supranational systems of law and policymaking. Cataloguing the jurisprudential techniques and mechanisms by which national jurisdictions have received the ECJ's doctrines of supremacy and direct effect is an indispensable first step towards a better understanding of the dynamics of European legal integration. The most important questions, however, have been left unanswered: does the constitutionalization of the treaties make a difference to legal and political outcomes, and if so how?; to what extent does the law and politics of litigating European law vary across jurisdictional and national boundaries?; are some jurisdictions more receptive than others to enforcing EU law? I have been asking too many questions, but they are crucial. To answer them, we will need a much better understanding of the constitutional dialogues currently underway than we now possess. The general lines of inquiry, however, are clear. We need contextually-sensitive, policy-relevant studies of the interaction between legislators, litigators, the ECJ, and the national courts.

[56] What exists is recent and impressionistic. For a review of the literature, see Carol Harlow, "Towards a Theory of Access for the European Court of Justice," Yearbook of European Law 1992: 213–48.

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

*out of print

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

*out of print

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 or 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

RSC No. 95/24
Hervé BRIBOSIA
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Report on Belgium

RSC No. 95/25
Juliane KOKOTT
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Report on Germany

RSC No. 95/26
Monica CLAES/Bruno DE WITTE
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Report on the Netherlands

RSC No. 95/27
Karen ALTER
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration

RSC No. 95/28
Jens PLÖTNER
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Report on France

RSC No. 95/29
P.P. CRAIG
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Report on the United Kingdom

RSC No. 95/30
Francesco P. RUGGERI LADERCHI
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Report on Italy

RSC No. 95/31
Henri ETIENNE
The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context
Report on Luxembourg

RSC No. 95/32
Philippe A. WEBER-PANARIELLO
The Integration of Matters of Justice and Home Affairs into Title VI of the Treaty on European Union: A Step Towards more Democracy?

RSC No. 95/33
Debra MATIER
Data, Information, Evidence and Rhetoric in the Environmental Policy Process:
The Case of Solid Waste Management

RSC No. 95/34
Michael J. ARTIS
Currency Substitution in European Financial Markets

***out of print**

RSC No. 95/35
Christopher TAYLOR
Exchange Rate Arrangements for a Multi-Speed Europe

RSC No. 95/36
Iver B. NEUMANN
Collective Identity Formation: Self and Other in International Relations

RSC No. 95/37
Sonia LUCARELLI
The European Response to the Yugoslav Crisis: Story of a Two-Level Constraint

RSC No. 95/38
Alec STONE SWEET
Constitutional Dialogues in the European Community

*out of print