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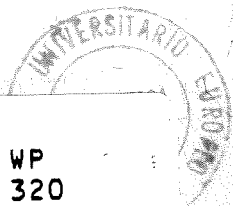
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SUPRANATIONALISM REVISITED -  
RETROSPECTIVE AND PROSPECTIVE

The European Communities  
After Thirty Years

by

J o s e p h H . H . W e i l e r



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European University Institute, Florence

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*In memory of Sir Andrew Shonfield*

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The European Communities After Thirty Years

by Joseph H.H. Weiler<sup>++</sup>

I - THE THIRTIETH ANNIVERSARY--A TIME FOR REFLECTION?

The thirtieth anniversary of the European Community<sup>1</sup> does not provide a mere formal occasion for engaging in a retrospective analysis of the evolution of the main framework<sup>2</sup> for European integration. The early 80's have been a focal point for several developments which are likely to affect fundamentally the future shape, direction and mode of operation of the Community. Three such developments deserve special mentioning.

a. The accession of Greece<sup>3</sup> has opened the second phase of enlargement. Once completed the number of Member States originally parties to the Treaties of Paris and Rome will have doubled. The quantitative increase is likely to put serious strains on the Community's decision making apparatus as well as raising a host of technical problems; the social and economic character of the new Members is likely to put no less a strain on the substantive policies of the Community and the precarious balance of Member State interests which they represent<sup>4</sup>.

b. The impact of the European Parliament--directly elected in the closing months of the last decade--on the institutional balance is likely to increase. The newly legitimized chamber has already flexed its muscles indicating its growing awareness of the discrepancy between its self-perceived functions and its constitutional powers. Institutional conflict is likely to increase<sup>5</sup>.

c. The third development is a combination of several factors the coincidence of which goes beyond the periodic crises to which the Community has become accustomed<sup>6</sup>. The Common Agricultural Policy, one of the mainstay Community policies, the elaboration of which in the '60's was not only a major addition to the Community jurisdiction but also a political indication of the communion of interests between France and Germany, seems to be on a crisis course.

Not only are its effects criticized from without but even by its own internal budgetary rules the Community will not be able to finance it from 1982 onwards. The process of reformulating this basic policy is to take place in an economic climate of stringency, unemployment, energy shortages and balance of payment deficits which are likely to sharpen national differences and test the Community cohesion to its limit. The difficulties are already apparent with an ominous resurgence of protectionism. The commitment of the British Labour party to withdraw from the Common Market and the Debré-Foyer Bill in the French Assembly are indications of strong grass roots feelings<sup>7</sup>. The French outright defiance of a European court decision--the first incident of its kind in thirty years<sup>8</sup>--poses a much more direct and immediate threat, since if non-compliance became widespread, one basis on which the day to day operation of all Community policies depends will have been destroyed.

My purpose is not to try to predict solutions for these dilemmas nor even to examine the substantive issues which they raise. Rather, taking the 80's as a turning point in the evolution of the Community, I shall attempt to analyze afresh the framework within which these and other problems will have to be resolved. My direct concern, through a retrospective analysis of legal and structural political developments and a prospective assessment of the future challenges to these developments, will be to give a clear picture of the special character of the European Community--still defying the traditional definitions of an international organization--as it appears today.

## II - SUPRANATIONALISM -- RETROSPECTIVE

### A. Supranationalism -- An Amorphous Concept

The term traditionally employed in attempts to conceptualize the Community's politico-legal character -- even if currently out of vogue -- has been that of supranationalism<sup>9</sup>.

To define and give meaning and content to this term is to capture the essence of the particular model of integration experienced in Europe. The literal meaning of "... over and above individual states"<sup>10</sup> gives too general and antiquated a notion of supranationalism. For we know that whatever the dreams of the past, the Community's present system of governance involves "bits and pieces of the national governments ..." <sup>11</sup> with a crucial say in all aspects of Community activity. But even so, in the transfer of certain functions to Community organs and in relation to certain constitutional hierarchies there remains a measure of "aboveness" in the old sense. Further, like all "federal" models<sup>12</sup> the Community presents a tension between the whole and the parts, centrifugal and centripetal forces, central Community organs and Member States. In some ways the balancing of this tension in the Community system departs -- perhaps even radically -- from most other "federal" models. In the term supranationalism one must thus seek to give expression to these special phenomena; to map the "bits and pieces", to define the aboveness and to explain the European balancing of the "federal" tension. Yet trying to do so despite the passage of thirty years is an uneasy task. For although supranationalism is a term well established in the political and legal lexicon its usage is not unambiguous or without difficulty. It is possible to identify four interconnected issues around which these difficulties and ambiguities revolve.

a. The definitional problem

The need to revert to a novel term in characterizing the Community was indication that existing terminology was not felt to give adequate expression to the new venture<sup>13</sup>. But since the new term, supranationalism, derives from, indeed is the explication of, the phenomenon it seeks to define a measure of circularity is inevitable. For one must employ the distinguishing features of the Community to give meaning to the term supranationalism which in turn is the concept used to express distinctions between the Community and other international organizations. Thus, to the extent that the European Community experience was and remains unique one cannot usefully speak of a strict definition but only of one or more hallmarks which either identify it with, or--more importantly--distinguish it from other forms of association of states and legal orders<sup>14</sup>. In the earlier analyses the concept was tackled by reference to the known juridical-political categories of public international law (which embodies the formal traditional modes of international relations) and municipal law (which embodies the variety of non-unitary state arrangements).

In a powerful study of synthesis, Hay<sup>15</sup> analyses the most important of these attempts<sup>16</sup>. Few writers adopted extreme positions of total assimilation<sup>17</sup>. More often the analyses, using an analogical method, characterized supranationalism as veering towards one or the other of the two known systems. In-sistence on finding a positive definition could only resolve itself in characterizing the system as sui-generis. But to so characterize it with no more is hardly helpful<sup>18</sup>. And to say more leads inevitably to the necessity of fixing the distinguishing marks. Thus although the current trend is to include the Community among international organizations its distinguishing supranational character--whatever this may be--is always emphasized<sup>19</sup>.

Even if one cannot, as a result, have a fully fledged definition, the exercise of determining the most relevant hallmarks as indicia for supranationalism remains of interest. First, these may serve as a significant comparative tool for evaluating the similarities and differences between on the one hand both older and novel associations of states and on the other hand the European Community. Also, should a true pattern of resemblance between other such associations and international organizations and the Community begin to emerge, the hallmarks may become a proper definition.

Secondly, in relation to the European experience itself, the hallmarks may provide a tool which will enable us to tackle the problem deriving from the dynamic nature of the Community and supranationalism.

b. The dynamic nature of supranationalism -- the Community experience as a process

In attempting to fix certain distinguishing features there is a danger of failing to give expression to the dynamic nature of supranationalism. The Community experience has not been a static one, neither in the substantive activities pursued by it nor -- more significantly for our discussion -- in the internal principles of its operation be they in the institutional framework, the location and exercise of decision making power, and, generally, the relationships between the Community as a whole and its constituent parts. The interplay of centripetal and centrifugal forces -- manifesting itself in different equilibria at different times -- is a constant feature of the Community as a "federal" creature. Indeed, as will be readily accepted, in many ways the Community can only be understood as a type of dialectical process of action and reaction among the various forces shaping it. This poses a double edged problem:

one may select hallmarks reflecting the evolution of the Community at a fixed point in time. But with the passage of time these may be overtaken by events and cease to give a true reflection of supranationalism. Thus, for instance, studies which concentrated --as the primary distinguishing factor-- on the ability of Community organs to take decisions immediately binding on individuals within the national legal systems<sup>20</sup> would, today, in the light of subsequent developments in the Community, no longer reflect the mature evolution of that factor. Alternatively, a completely fluid set of hallmarks constantly changing with events would become no more than a description thereby losing its value as a comparative tool and its potential as an embryonic definition the importance of which was underlined above.

A compromise could be to shape as a dynamic tool a set of criteria within which the hallmarks would feature. The criteria would be sufficiently wide so as to be applicable to different legal orders and international organizations and so maintain their utility in comparative analysis. The hallmarks related to these criteria but changing with the evolution of the Community would provide the elastic element enabling us to understand supranationalism as a processual rather than fixed relationship or structure. This feature is particularly important in a retrospective analysis. The processual character highlights, however, two further difficulties: the cleavage between legal and political assessment and the diffuse nature of the term supranationalism.

c. Evaluating the supranational process - The cleavage between political and legal assessment

Acceptance of the processual character of supranationalism and its subject, European Integration, entails the possibility of evaluating it in the sense of establishing, with whatever measure of precision, the progress or retrogression of supranationalism and integration. It has been common to divide the process of Eu-

ropean integration into "phases" and "periods" characterized by different degrees and levels of supranationalization and integration<sup>21</sup>. So as to avoid confusion in illustrating the legal-political cleavage it is necessary to draw a distinction between European integration and supranationalism. "European integration" is a concept wider than supranationalism for whereas the focus of the latter is on the constitutional, institutional and decision making process within the Community, the former incorporates these processes but includes also the substantive developments in the areas covered by Community activities and their social and economic impact on the system as a whole. In this sense it could be said that supranationalism is concerned with the "means" and European integration with the totality of social, political and economic results. The separation is, naturally, not total since a strengthening of the means available for substantive integration, e.g. establishing that Community measures in general override national measures, may in itself, be regarded as a substantive achievement. Thus, a diagnosis of stagnation in European integration as a whole would seem necessarily to entail a stagnation in the process of supranationalization. Conversely substantial progress of supranationalism would indicate progress in an important facet of European integration generally<sup>22</sup>.

The cleavage between the legal and political evaluation of the progress of European integration and supranationalism is most apparent by reference to contrasting assessments of different "phases" in the process.

The chasm appears both in the choice of phases and, more strikingly, in the evaluation of progress. Thus in a useful study synthesizing three decades of political theories on European integration, the period of 1958-1969 is signalled out as a "distinct phase"<sup>23</sup>. Evaluating this period the learned writer comments that "Throughout these eleven years

during which General de Gaulle [who was "allergic to anything supranational"<sup>7</sup>] remained in power, no notable progress could be made in integration, either in the political domain, the institutional domain, the monetary domain or in the geographical extension of the Common Market"<sup>24</sup>. Yet, from the juridical point of view -- as shall be analyzed in detail below -- it was precisely during this period that certain fundamental facets of supranationalism took crucial, even revolutionary, strides ahead establishing, e.g., the doctrines of direct effect and supremacy of Community law<sup>25</sup>. This, of course, is not a unique example of the cleavage<sup>26</sup>. To be sure the departure point of each discipline is different. The political theories of European integration were to a large measure wedded to a certain notion about the outcome of the process and embodied to a larger or smaller extent a certain predictive element about continuous progress. In addition political theory laid great emphasis on the social, political and economic substantive achievements and lesser emphasis on means and ways. The starting point was thus one of high expectation and failure to maintain the visible social political momentum led to a measure of disillusion in the reassessment of European integration<sup>27</sup>.

The juridical point of departure was different. The constituent instruments of the Communities were traditional multi-partite international treaties which even if including certain novel institutional features were, in line with precedent, expected to be interpreted in accordance with the normal canons of treaty interpretation one of which is, for example, a presumption against loss of sovereignty by states. The process of integration which in the legal sphere was accomplished by a "constitutionalization" of the Treaties<sup>28</sup> was set against limited initial expectations. This conditioned among lawyers a far more positive evaluation of the process<sup>29</sup>.

Besides, legal preoccupation especially in Europe has been concerned traditionally with means and tools, the legal instruments, and somewhat less with their political-social impact. Important as the supranational developments were, they formed only part of the total picture of European integration.

This attitudinal explanation cannot obscure the fact that in dealing with the same subject matter, such a cleavage has emerged. Thus even in reviewing the narrower instrumental notion of supranationalism one of our concerns must be to try and provide some mechanism which will bridge, at least partially, this cleavage.

Finally, the existence of the cleavage within the context of the processual character of supranationalism, points to the last difficulty deriving from the complex nature of the term.

#### d. The "diffuse" nature of supranationalism

In discussing the definitional problem we noted the need to rely on a multiplicity of distinguishing attributes--hallmarks--to give meaning to the term. We also noted the evolutionary nature of supranationalism reflecting the developments in the Community.

But how are these two factors to be related? The difficulty may best be illustrated by reference to the relationship between sovereignty and supranationalism.

Hay correctly suggests that "With few exceptions, . . . the criteria for the loss of sovereignty coincide with those which much of the literature regards as the elements of supranationalism. Thus, the concept of a transfer of sovereignty may be the legal-analytical counterpart of the political-descriptive notion of supranationalism."<sup>30</sup>



The criteria which Hay distilled from the literature as elements of supranationalism include one or more of the following:

- i) The "independence of the organization and of its institutions from the member states ..."
- ii) The "... ability of an organization to bind its member states by a majority or weighted majority vote."
- iii) The "... direct binding effect of law emanating from the organization on natural and legal persons."
- iv) The attribution to the organization of certain powers, functions and jurisdictions which in terms of sheer quantity result in a qualitative difference from non-supranational organizations.
- v) The nature of supranational institutions -- principally the Parliament and Court.<sup>31</sup>

It is not necessary at this stage to examine in depth these criteria and evaluate the extent, if any, to which they fulfil a distinguishing function and meet the other problems mentioned above.

In general, in trying to choose the most apt hallmark one could of course focus on a single criterion such as the creation of a parliament or court as representing the most critical distinguishing factor and evaluate the process by reference to this single factor. The danger there would naturally be one of missing the complexity of supranationalism and indeed of European integration. The political-legal cleavage described above can, in some cases, be explained by an emphasis on one or some of the criteria to the exclusion of others by political scientists and jurists respectively. By selecting a multiplicity of factors a different danger is created--that of treating them as an integrated complex progressing or retrogressing as one whole<sup>32</sup>. A cursory examination of the list of criteria cited above will reveal that it is quite possible that in respect of some there may be "a loss of sovereignty" whereas in relation to others much less or none at all.

How then is one to evaluate the progress or retrogression of supranationalism? To recognize the complexity of supranationalism which calls for a multiplicity of factors but to fail to realize that the processual character may take a different evolutionary direction in relation to each of these factors is to deny the diffuse nature of the term and to deprive the dynamic analysis of one of its important elements.

#### B. Normative and Decisional Supranationalism

In order to overcome some of the difficulties outlined above it is submitted that a distinction should be drawn -- if only for use as an analysis tool -- between two facets of supranationalism. For convenience, I shall call them normative and decisional<sup>33</sup>.

Normative supranationalism is concerned with the relationships and hierarchy which exist between Community policies and legal measures on the one hand and competing policies and legal measures of the Member States on the other. Decisional supranationalism relates to the institutional framework and decision making processes by which Community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed<sup>34</sup>. The make up of both these terms may include factors which can be stated at sufficient a level of generalization so as to serve as criteria for evaluating the progress or retrogression of the two particular facets of supranationalism.

A high measure of normative supranationalism will denote, in general, a hierarchy in which Community measures will take effective precedence over national ones. The choice of criteria is relatively simple since we may use the traditional principles by which relationships between on the one hand national and/or state law and, on the other, federal, confederal and international law are expressed: The principle of self-execution (direct effect), the principle of

supremacy and the principle of preemption. The hallmarks will be the specific manifestation in the Community of these principles.

A high measure of decisional supranationalism will denote a process in which measures will be adopted and policies formulated and promulgated by means departing from traditional diplomacy and intergovernmentalism. Specifically in the Community context this will be indicated in relation to decisions taken

- a. by Community organs the composition and mode of operation of which are autonomous (communautaire) and not intergovernmental in the traditional sense,
- or b. by Community organs the composition and political functions of which are intergovernmental but the process of decision making--e.g. the voting procedures--is not strictly that of intergovernmental diplomacy,
- or c. in pluri-institutional decision making where the role of the autonomous organs may be said to be critical, and in which the execution of these measures will be
- d. either directly by, or under the supervisory authority and responsibility of, the autonomous bodies<sup>35</sup>.

Although all four factors are expressed in relation to the institutions of the Community, by virtue of the composition of these institutions, they contain the involvement, both direct and indirect, of the Member States in the decision making process.

The separate treatment of these two facets covers the essence, if not the detail, of both the "juridical" approach which focuses on formal relationships, demarcation of competences and resolution of conflicts, and the more "political" approach which is concerned with the actualities, influenced by legal and non-legal factors, of cooperation and coordination of the different

elements in the association of states. Having a clearer view of developments in both spheres may be helpful in drawing composite conclusions.

A final factor--relating to the Community's implied and additional powers--falls uneasily between the two facets and will consequently be treated separately.

Having introduced these distinctions it is now possible to analyze and trace the dynamic nature of supranationalism as a key to understanding the evolution of the legal-political framework of the Community.

C. The Dynamics of Normative and Decisional Supranationalism: Diverging Trends--And A Resulting Balance

Examination of the European Community's evolution in the last three decades reveals the apparently paradoxical emergence of two conflicting trends. One may have expected in the process of integration a parallel evolution in the transfer of power from the periphery to the centre--an increase in central normative competence accompanied by a strengthening in the "centralized" decision making process. In the Community, however, we can trace on the one hand a, more or less, continuous process of aprofondissement of normative supranationalism whereby the relationship between the (legal) order of the Community and that of the Member States has come to resemble increasingly a fully fledged (USA type) federal system. On the other hand, and contemporaneously, we can detect a, more or less, continuous process of diminution of decisional supranationalism, stopping, in some respects, only short of traditional intergovernmentalism. The very existence of supranationalism--in both its forms--in itself distinguishes the Community from most other international organizations. The di-

vergence in the evolution of the two forms may be one of the special--perhaps even unique--features of the Community as a process of integration and as a form of governance. The possible meaning to be given to these diverging Community trends will be discussed and assessed below. First, however, I will examine in greater detail the two facets of supranationalism with a view both to a clearer understanding of their meaning and so as to illustrate the respective evolutionary processes.

1. Normative Supranationalism: the Process of Approfondissement

a. Self-Executing Measures--The Doctrine of Direct Effect

The first distinguishing feature, or hallmark, of supranationalism in its early ECSC days was the power vested in the Community's main autonomous institution, the High Authority, to adopt self-executing measures which were directly binding on individuals--mainly undertakings in the coal and steel sectors<sup>36</sup>. Once the Treaty of Paris was ratified by the Member States this power could be executed regardless of the monist or dualist character of the municipal legal order of the Member States. Hitherto, traditional international organizations had the powers ". . . to negotiate agreements ad referendum; . . . to take decisions which were binding on the members<sup>37</sup> but which would depend on national governments for their implementation . . . and to take decisions which the organization itself could implement."<sup>38</sup> The power of the Community's High Authority directly to bind individuals, subjects of national law, was, thus, a major innovation introduced by the Treaty of Paris which was acknowledged in most analyses of that period as the central characteristic of the Community. Despite the novelty of this feature, at least in modern times<sup>39</sup>, the international law character of the Treaty of Paris remained largely unaffected, since this manifestation of self-executing rule-making power was explicitly agreed upon by the Mem-

ber States which were signatories to the Treaty.

Later, however, this first characteristic of normative supranationalism was judicially developed in relation to the Treaty of Rome. In a series of landmark decisions the European Court of Justice, throughout the 60's and 70's took this doctrine far further than the limited provisions in the Treaties<sup>40</sup>.

It first held that subject to certain conditions, provisions of the Treaty of Rome--a Treaty which on its face resembled other treaties establishing international organizations--could become self-executing (have direct effect) bestowing enforceable rights as between individuals and the Member States<sup>41</sup>. Important as this celebrated decision may be in relation to the substantive consequences which would follow in respect of all Treaty Articles which could be shown to satisfy the conditions for direct effect, the main interest lies in the fact that this was the first major step in the "constitutionalization" of the Treaty of Rome<sup>42</sup>--its transformation by adopting a "constitutional interpretation" method into a quasi-constitution of the supranational entity. Implicit in the decision of the Court was the notion that the Member States were bound in their internal legal orders by their international treaty obligations. The individual was put, in certain respects, on a par with the state, a feature which usually appears only in municipal law. In other words, breach of international obligations, at least those which were self-executing and materially capable of bestowing rights on individuals, became a matter of internal law.

Thus, Member States, vis-à-vis individuals, could no longer break their international treaty obligations relying on the weakness of traditional public international law. A weakness based in part on the exclusion of the individual as a direct subject of rights and duties (and of individual standing to sue) and on the traditional tardiness of states in bringing international claims on behalf of individuals when their national interest is not in-

volved. The Court's ruling had another dimension since it gave a new vigilant and efficient guardian to international obligations--the individual.

Since that 1963 decision the doctrine of direct effect has been extended, deepened and elaborated. Important steps in its evolution have been its extension to create directly enforceable Treaty rights between individuals inter-se<sup>43</sup> and its application, step by step, even to types of Community secondary legislation (e.g., directives) which are addressed to Member States and which on their face would not suggest the possibility of bestowing rights and duties on individuals<sup>44</sup>. The process of refinement continues to date.

#### b. The Doctrine of Supremacy

During the same period the European Court evolved its second crucial doctrine, the doctrine of supremacy, which, again, encapsulates a major aspect, in this sphere, of fully fledged federal legal systems. In another landmark case, Costa v. ENEL<sup>45</sup>, the Court established a clear hierarchy of norms. In its view, which, according to the Treaty of Rome, is the authoritative view regarding the interpretation of that Treaty, Community law within the sphere of competence of the Community, be it primary or secondary, is superior to Member State law even if the latter is subsequently enacted and of a constitutional nature. As in the case of "direct effect" the derivation of supremacy from the Treaty depended on a "constitutional" rather than international law interpretation<sup>46</sup>. The Court's reasoning that supremacy was enshrined in the Treaty was contested by the Governments of Member States in this case and others. Acceptance of this view amounts in effect to a quiet revolution in the legal orders of the Member States. For, in respect of any matter coming within the competence of the Community<sup>47</sup>, the legal Grundnorm will have been effectively shifted, placing Community norms at the top of the legal pyramid.

It follows that the evolutionary nature of the doctrine of supremacy would -- necessarily -- be bi-dimensional. One dimension would be the elaboration of the parameters of the doctrine by the European Court. But full reception thereof,

the second dimension, would depend on its incorporation into the constitutional orders of the Member States and its affirmation by their supreme courts. It is relatively easy to trace the evolution of the Community dimension of the doctrine. In the Costa v. ENEL decision, where it was launched, the Court was concerned with the paradigmatic conflict between substantive national and Community law. One may single out from the numerous cases in which it was affirmed the decisions in Walt Wilhelm<sup>48</sup> and Simmenthal<sup>49</sup> as illustrations of subsequent development. In the former, the Court accepted the possible legitimacy of having national competition policy operating besides the Community policy with each proceeding ". . . on the basis of the considerations peculiar to it"<sup>50</sup>. Thus the issue was not about the possible co-existence of conflicting substantive law. But despite the legitimacy of having a parallel national competition policy which the Court did not dispute, the principle of supremacy required that a national court in proceedings before it in cases of national competition law must keep an open eye that its decisions even in their procedural, civil or penal aspects would not prejudice any concurrent Community--as yet incomplete--proceedings<sup>51</sup>. In the Simmenthal case the issue was not whether supremacy should exist but which court, in the national order, would decide this. The European Court, controversially<sup>52</sup>, but consistently with its earlier jurisprudence, insisted on the immediacy of supremacy so that even national procedural rules which did not deny the ultimate supremacy of Community law but designated internal procedures as to the court in which the review of the national legislation should take place, were prohibited<sup>53</sup>.

As regards the second dimension, the evolutionary character of the process is more complicated. It should be remembered that in respect of the original Member States there was no specific

constitutional preparation for this European Court inspired development. The process of approfondissement may be thus seen in the gradual acceptance of the doctrine by the supreme courts of the Six. The pattern although uneven is clearly progressive. In some Member States the reception of the principle caused little problems<sup>54</sup>, in others, the Courts accepted the doctrine with reservations regarding the possible incompatibility of Community law with fundamental human rights enshrined in their constitutions<sup>55</sup>. Now that the European Court has indicated its willingness to review Community law itself in relation to a "higher law" of human rights based, in part, on the common constitutional traditions, these objections will have been somewhat quelled<sup>56</sup>. In others still, the judiciary split, with one branch accepting the doctrine and the other refusing it<sup>57</sup>. As regards the new Member States, especially those with a written constitution, the matter was simpler since at the time of accession supremacy was already an established principle and could be regulated formally in the process of accession<sup>58</sup>. The U.K. however presented a special problem since doubts remain as to the very theoretical possibility of a shift in the Grundnorm of the type discussed above. The problem derives from the lack of written constitution and the conceptual difficulty of entrenching legislation--such as an Act giving prospective supremacy to Community law--so as to bind subsequent parliaments<sup>59</sup>. The matter is not fully resolved since no clear case involving U.K. legislation contradicting earlier Community law has come before the Courts. In those cases in which the House of Lords occupied itself with Community law<sup>60</sup> it has, judiciously, avoided making a direct pronouncement on the subject. The Court of Appeal under the tutelage of Lord Denning has been less inhibited; its pronouncements--always obiter--see-sawed but have now settled on a halfway house acceptance<sup>61</sup>.

So far we have treated the doctrine of direct effect and supremacy as distinct concepts, whereas analytically--linked by the Court's vision of the exigencies of a cohesive and integral legal order and its insistence on the principle of uniform interpretation and application of Community law--the two are tightly connected; in this sense supremacy is consequential of direct effect. Consideration of this connection will highlight another aspect of the evolutive nature of normative supranationalism. In Van Gend en Loos the Commission of the European Communities in its submissions stated that

. . . analysis of the legal structure of the Treaty and of the legal system which it establishes shows . . . that the Member States . . . /intended/ . . . to establish a system of Community law and . . . that they did not wish to withdraw the application of this law from the ordinary jurisdiction of the national courts . . . /that Community law/ must be effectively and uniformly applied throughout the whole of the Community. The result is . . . that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later<sup>62</sup>.

By contrast, the Advocate General in that case argued against the extension of direct effect to Treaty articles. He suggested that such extension--at a time in which the principle of supremacy was not established (and according to his exhaustive comparative analysis at least in some Member States Treaty law was decidedly not supreme over national laws)--would have the ". . . consequences of an uneven /non-uniform/ development of the /substantive/ law involved in the principle of direct application, consequences which do not accord with an essential aim of the Community"<sup>63</sup>.

The Commission and Advocate General reached different conclusions in their submissions but were ad idem in seeing the in-

evitable linkage between supremacy and direct effect once the need for uniformity was established. It is submitted that the fact that the Court rejected this cue and preferred to introduce the two concepts into the Community legal order in two separate cases--even if, inevitably, using the very similar "uniformity" argumentation--indicated a deliberate and politically wise attempt to phase out the progressive evolution of normative supranationalism so as to ensure as far as possible a smooth reception in the national legal and political orders. The strict connection between the two is evident also in Simmenthal where at times it is difficult to tell if the Court was applying the principle of supremacy or that of direct effect.

#### c. The Principle of Preemption<sup>64</sup>

It is here that one finds the third and final hallmark of normative supranationalism. In its purest and most extreme form preemption means that, in relation to fields in which the Community has policy making competence, the Member States are not only precluded from enacting legislation contradictory to Community law (by virtue of the doctrine of supremacy) but they are preempted from taking any action at all. Initially, before the full ripening of the doctrine, the European Court achieved this objective by its earlier decisions which forbade the disguise of the Community nature of regulations<sup>65</sup>. This however was clearly insufficient. Subsequently, the principle came to its own even though it is still in an evolutionary stage. The Court of Justice is striving to attain an equilibrium between, on the one hand, the need to consolidate the policy making capacity of the Community (which is at the essence of the preemption doctrine) and, on the other hand, the pragmatic necessity of regulation in fields in which the Community has competence but in which--for various reasons such as problems in its decision making processes--it has not been able to evolve compre-

hensive Community policies. The Court has felt that in these situations the policy lacunae could be filled by Member State action implying a more flexible rendering of the pure preemption principle. In this the Court will be following in the footsteps of all federal systems none of which apply pure preemption. This shift in the Court's formulation may be illustrated by a number of decisions in the field of external economic relations. One of the questions in the ERTA Case<sup>66</sup> was whether the competence to negotiate and conclude an international agreement in the transport field rested in the Community or the Member States. Since, in its Transport Chapter, the Treaty does not refer specifically to Community competence to engage in international agreements, it was argued that such matters were to be left within Member State powers. In a judgment the importance of which goes beyond the specific question before us, the Court laid down an emphatic absolute principle of preemption:

/E/ach time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole<sup>67</sup> sphere of application of the Community legal system.

In the OECD Case<sup>68</sup> this emphatic statement was even strengthened whereby the Court said that the occupation of a field may be determined by the external act rather than by an initial internal measure:

A commercial policy is in fact made up by the combination and interaction of internal and external measures. . . Sometimes agreements are concluded in execution of a policy fixed in advance, sometimes that policy is defined by the agreements themselves<sup>69</sup>.

In the case of Kramer<sup>70</sup> there is a certain retreat from the earlier emphatic position in ERTA. The Court stated that despite the fact that the Community had adopted internal measures, these ". . . limit themselves to providing the Community institutions with the power to take measures similar to those which the Member States . . . did take. . . The Community not yet having fully exercised its functions in the matter . . . the Member States had the power to assume commitments . . . and . . . the right to ensure the application of those commitments within the area of their jurisdiction."<sup>71</sup>

On the wide ERTA formula one may have expected absolute preemption and yet the Court in Kramer, mindful of the practical difficulties which such an approach might have had, was more lenient. This leniency was not, at that stage of the evolution of the principle, unqualified. The Court added that this concurrent Member States competence was transitional. The Treaties<sup>72</sup> had stipulated a deadline for the Council to adopt a fully fledged common policy and the prospect of adoption could have been an alternative explanation to the Court's pragmatic approach.

In the International Rubber Agreement Case<sup>73</sup> the Court accepted concurrent jurisdiction of the Member States in a field "occupied" by the Community "if . . . the financing (of the agreement in question) is to be by the Member States". The Court acknowledged however that as, unlike Kramer ". . . no formal decision has been taken on the question as to whether the Community of Member States should finance the agreement, and as there is no certainty as regards the attitude of the various Member States. . . The exclusive competence of the Community could not be envisaged in such a case"<sup>74</sup>. In other words, the pragmatic approach was accepted even without the definite future prospect of a common policy. A pragmatic approach implies inevitably more difficulties in

the determination of parameters and in the application thereof. Only through successive court decisions will these be clarified.

On its face then it would seem that in relation to the principle of preemption there has been a retardation rather than a deepening of the scope of the principle in the Community legal order. For, in the terminology aptly adopted by Professor Waelbroeck, there seems to have been a shift by the Court from a "Conceptualist-federalist approach" which corresponds to preemption in its purest and most exclusive form to a "pragmatic approach" which leaves the Member States concurrent competence with the Community. It should first be pointed out that in its second approach the Court has displayed, characteristically, a measure of political acumen. To insist on pure preemption when the Community institutions are not yet ready for their task could be retrogressive for the general evolution of the Community. At the same time the Court has insisted that in certain cases the pragmatic approach is transitory in nature. With the full occupation of a field by a Community policy, national measures (even if not contradictory and thus not in violation of the supremacy principle) could become prohibited per se. In other cases concurrent jurisdiction may remain constant. The approfondissement of preemption may thereby be explained in two ways. First, by its maturing from a crude even dogmatic statement of pure principle to a relatively sophisticated doctrine sensitive to Community needs. Secondly, preemption is seen to be spreading from one substantive field of Community law to another. It now affects sectors such as fisheries, competition policy and agriculture<sup>75</sup>.

d. The Evolution of Normative Supranationalism--An Interim Assessment:

The evolution of normative supranationalism has been both de-

terminated and rapid and, until recently, largely consistent. The moving force behind it, as we have seen, has been the European Court of Justice, the self perception of its role in the process of integration being the key to understanding the development. As a supreme adjudicator in a non-unitary system in which inherent tensions exist between central institutions and the constituent member states, the Court of Justice had the choice between two different visions of its role. Article 164 EEC which charges the Court with ensuring ". . . that in the interpretation and application of the Treaty the law is observed" may indicate a vision in which the Court would be cast as an aloof and remote arbiter decidedly detached from the national-Community conflicts related to supranationalism and European integration. According to this vision the role of the Court could even be to prevent the normative evolution unless specifically agreed upon by the Member States. The entire jurisprudence of the Court of Justice represents a rejection of this approach, and, not surprisingly, it has come under acute criticism for this. Thus, in a critical even if sympathetic article, Hamson<sup>76</sup>, implicitly adopting the restrictive view based on Article 164, charged the Court in relation to the Van Gend en Loos case and its progeny of severing ". . . the legal world--the world in which it operates--from the world of what we called real or actual events", of "short-circuiting the scheme elaborated in the Treaty" and warned of the danger of the Court trespassing ". . . outside its province and attempting to establish by its own fiat what the Treaty directs to be established by a very different process"<sup>77</sup>.

Although it is clear that the Court has not remained aloof in interpreting the Treaty and has taken a decidedly integrationist approach, even Hamson has been careful not to charge the Court of actually overstepping the limits of the powers conferred

upon it by the Treaty. The first question that has to be answered nevertheless is whether the integrationalist approach adopted by the Court is juridically legitimate within the scheme of the Treaty.

The key to answering this question and to understanding the Court's own vision of its role--which contrasts sharply with the narrow interpretation of Article 164--must be found in the Preamble and Part One of the Treaty dealing with the principles upon which the Community is founded. The Preamble and Articles 1 - 2 - 3 declare the main objectives the attainment of which guided the founding fathers and the specific tasks and means to be pursued and employed in attaining these objectives. Thus we find, as the first provision in the Preamble, the objective of laying down foundations for an ever closer union among the peoples of Europe, in Article 2 the task, inter alia, of establishing a Common Market and in Article 3 the elimination of custom duties. For our purposes Article 4 is of importance. It provides that the tasks entrusted to the Community (namely the provisions indicated generally in the Preamble and outlined more specifically in Articles 2 and 3) shall be carried out by the Assembly (Parliament), the Council, the Commission and the Court, each institution acting within the limits of the powers conferred upon it by the Treaty. It is clear that the Court, within its powers and while faithful not only to the Treaty but also to the general fundamental guarantees of due process, is charged alongside the other institutions with forwarding the tasks entrusted to the Community. In Van Gend en Loos, the Court can be seen as taking its philosophy from Article 4 to which Article 164 is subordinate. Van Gend en Loos is a specific case which links the elements of uniting the Peoples of Europe (Preamble), establishing a Common Market (Article 2) and eliminating custom duties (Article 3) in one maverick



doctrine which simultaneously achieved all three effects. The entire pattern of decisions creating the normative framework represents a grand design to achieve the same effect.

In the light of Article 4 the Court has not stepped outside the province entrusted to it. It has, in a committed manner, fulfilled its task as perceived by the Treaty. This however does not preclude us from pointing out the implications of this perception according to which the Court "regards itself as the trustee of the hopes and aspirations, the purposes and the objectives of the founders of the Community . . ." <sup>78</sup>.

The Court was able--at least for a time--to maintain the momentum of normative evolution because of the traditional insulation which separates courts from direct pressures from the other political actors. At the same time the very vision adopted by the Court--a vision which, in the wide sense, gives it a measure of partizanship in the Community-Member State tensions--has the possible effect of eroding the traditional insulation and diminishing the authority with which the Court may speak. This in turn may lead to a curtailment of the Court's power to preserve and even continue the process of normative evolution. This interrelationship between the judicial process and the political process will be discussed in the light of the analysis of decisional supranationalism.

#### e. Limits to Jurisdiction?

Direct effect, Supremacy and Preemption are the core attributes not only of supranationalism, but can be found also in fully fledged federal systems. Whence then, the acknowledged paramountcy of the Member States in the Community system?

First, it should be recorded that even today the Community remains, functionally, a multi sectoral condominium <sup>79</sup>. The Commu-

nity legal order, with all its above attributes, extends only to those fields for which the Community has competence. But this alone would not be sufficient explanation. Several developed federal systems are based on a doctrine of enumerated powers which <sup>80</sup> however did not prove an obstacle to subsequent wholesale expansion. Indeed the evolution of European integration from the limited spheres of the Coal and Steel Community to an "Economic Community" indicated a great increase in the number and breadth of these sectoral condominiums. Further, the Common Market itself has seen a continuous process of extending the limits of Community competence often through the Community's own variant of judicially created doctrines of additional and implied powers <sup>81</sup>. The impact of Community law and the range of Community policies extend in some cases far beyond that which a literal reading of the Treaties might have suggested. One may perhaps talk here of "substantive approfondissement". Nevertheless, there are many fields, some even critical such as defence, fiscal and monetary policy and education, to mention just a few, which remain--for the time being--outside the Community sphere.

As regards the Community's expanding jurisdiction, although the very existence of Article 236 EEC, which specifies the method of Treaty amendment, indicates that theoretical limits do exist to this expansion, from the normative point of view the European Court of Justice--true to its integrationalist ethos--has consistently attempted to narrow those limits interpreting widely and creatively existing provisions so as to allow jurisdictional expansion without recourse to complicated Treaty amendment <sup>82</sup>. In this, it has somewhat emulated the jurisprudence of another court--the US Supreme Court--in the latter's treatment of, say, the USA Commerce Clause <sup>83</sup>. However, the expansive approach adopted by the European Court of Justice is explicable, at least partially, by

the different political structure of the Community, a structure which highlights in another way the centrality and paramountcy of the Member States. For in Europe, unlike the USA, national governments are responsible, by and large, for decision making at the national level and at the Community level. When policies are adopted, even at the jurisdictional limits of the Treaty and beyond, the central decision making organs of the Member States will have partaken in the process, thereby diffusing the debate on ultra vires competences<sup>84</sup>.

This then is another clue to Member State centrality. For the principles of normative supranationalism provide only a framework into which substantive rules and policies must be fitted. The Community system did not opt for a classical federal governmental structure characterized by a federal legislature directly elected "by the people", and a federal executive likewise selected, both bodies separate and independent of their would-be national counterparts. Instead the Treaty provides for a system in which the Member States governments play a key role in "filling in" the normative framework. However, the Fathers of the Treaty hoped that by creating a hybrid structure of decision making which would differ substantially in its operation from traditional intergovernmental organizations, the Community interest would prevail despite the prominence of the Member States. Decision making was also to be supranational. We must turn then to examine the evolution of decisional supranationalism.

## 2. The Diminution of Decisional Supranationalism

Decisional supranationalism and its expression in the evolution of decision making in the Community are, by comparison to normative supranationalism, less easy to trace and ana-

lyze. Several reasons account for this difficulty. Strangely (or, perhaps, wisely), the Treaties are rather cryptic in their institutional provisions. A literal reading of texts gives little indication as to the function of the institutions and only a formal indication as to their competences and powers. Inevitably, there is an enormous gap between these formal provisions and the actual Realpolitik manifestation of power in Community life. We noted, in discussing normative supranationalism, the preeminent role played by the European Court of Justice in widening and deepening the scope and meaning of normative supranationalism. Apart from all other features the judicial process is characterized by a high measure of transparency which facilitates the task of the Community observer. It was possible to identify with relative ease and precision the evolving stages of normative supranationalism. By contrast the process of political decision making and policy formulation is much more obscure<sup>85</sup> and its evolution is marked less by clear cut landmarks -- although some critical ones exist -- and more by a subtle process of institutional interplay<sup>86</sup>. The tension between "whole and parts" is, naturally, a constant feature of this field as well. It manifests itself here in two, sometimes converging, axes: 1) Community versus Member States; and, within the Community, 2) non-intergovernmental versus more intergovernmental institutions. It would, naturally enough, be far too simplistic to suggest that decision making may be explained by simple reference to these axes. The formulation of Community policies is a complicated and multi-phased process and the duality of axes manifests itself at almost each stage<sup>87</sup>. This will be illustrated below. At the same time, if a global view is adopted -- one which would correspond to that which was adopted in relation to normative supranationalism -- it is possible to detect a clear enough evolutionary line in decisional supranationalism -- namely its

decline. This decline is apparent in relation to all criteria which were used to characterize decisional supranationalism.

- i) The independence and the autonomous policy and decision making role of the intergovernmental institutions is declining;
- ii) the weight of non-intergovernmental institutions in pluri-institutional decision making processes is declining;
- iii) within quasi-intergovernmental institutions there is a decline of their unique supranational features;
- iv) in the execution of Community policies there has been a shift to Member States domination.

To understand this decline we must first discuss briefly the political institutions themselves and then turn to the decision making process.

The main European Community institutions are sufficiently well known and do not need detailed description here. In the first three decades of Community life, apart from the Court, the institutions which dominated the scene were, clearly, the Commission (and High Authority) and the Council of Ministers. Also clear enough is the general role assigned to both organs. The Commission and its staff -- although reflecting the national composition of the Community<sup>88</sup> -- is undoubtedly the more communautaire and less intergovernmental of the two. The Commissioners are required by the Treaty "in the performance of [their] duties [neither to] seek nor take instructions from any Government or from any other body. . . Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks."<sup>89</sup>

The Commission as a body is thus notionally autonomous from the Member States and specifically free to pursue the Community interest. The functions of the Commission are varied. It has the exclusive role of initiating legislation (in the formal sense); according to this scheme it is also the central administrative organ of the Community<sup>90</sup>; it has a potentially important "diplomatic" role in acting as broker between the Member States; it acts as "federal agency" in those spheres where the Community has assured fully fledged federal powers (e.g. competition policy); it supervises the execution of the Treaties and Community law by Member States and acts as a "supranational public attorney general" in case of violation. According to early theory of the Community it was to be the technocratic "functional" core which would engineer and precipitate the famous spillover leading the Community towards political union.

The Council of Ministers by contrast is the main formal legislator--clearly indicating the centrality of the Member States. It would be wrong, stricto sensu, to characterize the Council as an intergovernmental institution. Its rules of voting and procedure, the role of the President and the formal reliance on Commission draft legislation distinguish it from classical intergovernmental organs and characterize it as supranational as well--albeit in a limited way<sup>91</sup>. Also, one important feature must be emphasized if the supranational character of the Council is to be fully appreciated. It is true that the Council can refuse to enact any legislation put before it by the Commission even if the policy is clearly in the interest of the Community. In rejecting such legislation, or amending it<sup>92</sup>, the Council can be--and often is--motivated by interests which are contrary to the "Community spirit"<sup>93</sup>. The Member States are, however, obliged to act jointly, though not necessarily unanimously, within the framework of the Council of Ministers. This is one of the striking interactions of normative and decisional supranationalism. In any given field

which is regulated by Community law and for which competence has been transferred to the Community organs, the individual Member States are precluded from taking unilateral action in implementing and/or changing the policy; they must act jointly as the Council of Ministers within the normal decision making procedures of the Community.

Thus, in the field of agriculture the Community has evolved a Common Policy which determines inter alia annual price rises. The Council is free to reject any proposal from the Commission or from one of its members. Any member may veto any given proposal and thus block a decision. This is an indication of the low measure of decisional supranationalism in the Council. What is, critically, not permissible is for one Member State -- or more -- to "go it alone" in the face of Council deadlock. That is the expression of high measure of normative supranationalism. If decisions in the particular field are to be taken, they must be taken by the Ministers acting qua Council. At least to that limited extent the Council of Ministers remains a supranational institution. In theory, then, the tandem of Commission -- charged with policy initiative, a secondary legislative<sup>94</sup> function and with execution and supervision tasks -- and Council -- charged with policy decision making and actual "primary" legislation thereby representing directly the interests of the Member States -- was meant to achieve the balance in the decision making process between Community and Member States. The real story has been very different, its main theme being the ever increasing strengthening in the weight of the Council and Member States and a corresponding decline of the Commission<sup>95</sup>. This process has manifested itself in several ways:

a. The decline of the Commission: the signs

In the early years of the Coal and Steel Community, the High Authority enjoyed a large measure of autonomy. Its responsibilities were fairly narrow -- confined

to these two sectors -- and its functions resembled the current Commission functions in, say, the field of competition. Its main addressees were sectoral undertakings and the governmental departments directly concerned. This relative narrowness explains perhaps its measure of autonomy. The effect of High Authority activity on the Member States was ex hypothesi rather limited. Politically it did not emerge as a serious focal point of real power. Moreover, normative supranationalism was as yet fairly embryonic. The High Authority was king in its Court.

With the conclusion of the Treaty of Rome the sphere of activities of the Communities received an enormous qualitative and quantitative boost. Despite the deliberate attempt to play down the supranational character of the Community, since 1958 Community decisions have had a much greater effect on national life: establishment of the Customs Union, the pursuit of the Communities' four "freedoms" (free movement of goods, labour, services and capital) and the creation of Community common policies inevitably and increasingly encroached on national policies, national legislative competences and national administrative freedom. One could expect an a priori greater interest and greater involvement of the Member States in the Community process. A further problem was bound to develop -- the emergence of the Community "democracy deficit"<sup>96</sup>. The democracy deficit has two tightly connected aspects. In the first place given the possible, often exaggerated, tensions between Community interests and national interests there was a fear that Community programmes would be developed which did not pay due respect to national interests. The European Assembly (Parliament) was denied by the Treaties any meaningful say in the evolution and supervision of policies and law. Its members were not directly elected to their posts but nominated by and from national parliaments. The Commission for its part lacked any direct popular legitimacy and the Council of Ministers -- the main legislative body -- represented the executives of the Member States. It was only to be expected that uneasiness about the Community legislative process would develop. In the absence of an effective democratically legitimate Community check on the legislator, it was inevitable

that there would be a shift to national scrutiny. Alas, national parliaments have created largely unimpressive mechanisms for control of Community actions<sup>97</sup>. Instead a powerful Council of Ministers which was, at least in theory, answerable to national parliamentary control could be seen as some answer to this aspect of the democratic deficit<sup>98</sup>. This solution is largely illusory. Much of the Council work is done by the civil servant COREPER members which are no more "legitimate" than the Commission and with the possible exception of Denmark, there is little direct control, except on major issues, on ministerial work within the Council. Indeed--and this is the other aspect of the deficit, which remains unanswered to date -- the national ministers may use the legislative forum of the Council so as to pass legislation which may have been checked and even vetoed in the national parliaments. The other traditional check on the legislature was of course to be the Court of Justice. In the early 60's, however, the Court saw as its main task the evolution and consolidation of European institutions and policies. Thus, for example, when a Community measure allegedly violating fundamental rights enshrined in a Constitution of a Member State was brought before it for judicial review, the Court adopted a narrow formalistic approach and declared in effect that the Treaties did not impose a duty to respect those rights<sup>99</sup>. The Court was concerned not to impede in any way the function of the Community institutions nor to threaten the primacy of Community law. Later the Court learnt that the process of integration would be enhanced rather than impeded by a bold policy of judicial review<sup>100</sup>. The Court's early attitude added thus to the democracy deficit.

Despite these two factors, the enormous increase in the range of Community activities and competences, and the emergence of the democracy deficit -- both of which would seem to suggest an inevitable increase in the importance of the Council of Ministers -- the eclipse of the Commission was not immediately apparent. Two interrelated factors contributed to the maintenance of Commission power. First, the proximity in time to the conclusion of the Treaty of Rome bestowed legitimacy on the activities of the EEC in its first years. The Treaty and its provisions were debated in all six national parliaments and were approved.

Secondly, so long as the Community was seen to be confined to an implementation of the explicit operative parts of the Treaty, the democratic deficit did not come to the fore. Given that the Commission's main task was the execution of these explicit policies--principally the establishment of the Customs Union--it did not come into major policy conflicts with the Council. (There were in fact certain personality clashes, in itself indication of the political self-perception of the Commissioners and their President in the early years.)<sup>101</sup>

The Commission was thus able to gain immense prestige by the rapid and professional manner in which it coordinated the process of implementation and by its skill in fulfilling its "broker" role in securing the agreement of, and settling the disputes among, the governments of the Member States. Once these first tasks were substantially achieved, however, the process of erosion in the Commission's position began to become more transparent.

The signs of the Commission decline are clear enough and discussed ably elsewhere<sup>102</sup>. Of the more important signs one should mention the rise to eminence of the Committee of Permanent Representatives (COREPER) as a powerful intermediary between the Commission and Council and the initial exclusion and subsequent toleration of the Commission in the new policy-shaping European body--the European Council. The European Council was set up dehors the Treaties and became the institutionalized forum for the meeting of Heads of State and Government. Its function was not only to shape new "second generation" policies but also to serve as the main arena for the settlement of inter-governmental disputes regarding Community issues. The rise of COREPER meant that Commission initiatives were subject to inter-governmental influence at an extremely early stage in their formulation thereby detracting from the Commission role as repre-

senting the Community vision<sup>103</sup>. The emergence of the European Council contributed to the detraction from the Commission's role as a source of Community fresh ideas and as the broker between the Member States<sup>104</sup>. The Commission was hemmed in by two new bodies "usurping" both its technical and political-diplomatic functions.

b. The Council of Ministers--Erosion of supranational features:  
the signs

The erosion of decisional supranationalism has not only been apparent in the decline of the Commission vis-à-vis the Council (in both its derivatives: European Council and Council of Ministers). Within the Council of Ministers itself there has been a decline in its supranational characteristics. We have already noted the emergence of the European Council. This, it is submitted, is an indication of the failure of the Council of Ministers' "First Eleven"--the Foreign Ministers--to assert themselves as an institutional body capable of giving direction to the Community and solving its problems. The need to resort to old style loosely structured summitry is a clear regression in the role of the Council of Ministers qua Community body.

The second, perhaps more, important landmark in the decline of decisional supranationalism was the retreat by the Council of Ministers from majority voting--which had been designed as the clearest manifestation in the decision making process of the precedence of the Community interest over the national interest --to consensus decision making. This move, precipitated by France and at first grudgingly accepted by the other five in the legally dubious Accord of Luxembourg<sup>105</sup>, was to become, with the accession of the three new Member States, an accepted Community norm. Thus, one of the truly outstanding supranational features of the Council's procedure was reduced. Majority voting itself

is not entirely exceptional in international organizations. It is the law making power of the Council and the effect of that law on and in the national legal orders as expressed in the concept of normative supranationalism which made the prospect of majority voting so unique. The existing veto power which each Member State now holds does not necessarily paralyze the Council because, as we have seen, in areas controlled by the Community the Council must at the end of the day take a decision if entire policies are not to come to a halt. The power to veto does not give an individual Member State the power to impose its own desire as to the eventual outcome of the decision making process. Rather the effect has been to force the nine partners into "package-deal decision making" with compromises being sought not only as regards each policy but among various policies. This development was no doubt instrumental in the emergence of the European Council as a forum for this high powered political horse-trading although, as submitted above, the Council of Foreign Ministers could have assumed this function.

The Luxembourg Accord and the power of veto did not completely destroy Community superiority in decision making. First, there is the simple fact that, albeit by consent of the Council, many issues are still decided by majority voting<sup>106</sup>. Secondly, the veto power of the Member States in itself does not necessarily entail, as most commentators assume, the blocking of the Community supranational process. What is crucial is the legislative context in which the veto is exercised. When the Treaty provides explicitly for Council unanimity in adopting certain policies<sup>107</sup>, the veto power thereby entailed gives the individual Member State the ability directly to block any unacceptable measure. And to the extent that the Luxembourg Accord extends this power to measures in which the Treaty provides for majoritarian or qualified

majoritarian voting, the same ability will naturally exist.

However, Article 149 EEC provides that when acting on a proposal from the Commission "unanimity shall be required for a Council act constituting an amendment to that proposal". In this case, then, the veto power available to the individual Member State gives it the power to prevent any tampering with a Commission proposal--i.e. a "supranational veto"--but not the ability to force an amendment. The only way open to a recalcitrant Member State whose proposed amendments are "supranationally blocked" by the veto of another state insisting on the Commission original proposal, is to veto the entire measure which of course is a much more serious matter and demands a higher threshold of national interest. Indeed Parliament made astute use of this principle in its latest budgetary wrangle with the Council. The ability of three Member States to block by a "qualified veto"<sup>108</sup> the changes which Council wished to introduce to the 1980 Parliamentary supplementary budget enabled that budget to be adopted by the President of Parliament.

c. Decline of Decisional Supranationalism--the execution of policies

The strict doctrine of separation of powers according to which the executive is concerned solely with implementation of policies adopted elsewhere was probably never tenable and the crucial policy making role of executives is so apparent as to obviate any analysis. The definition of the executive function in the Community system is not easy. We have already noted that one traditional function of executives in contemporary Western democracies, that of initiating and submitting policy proposals to the legislative branch--a task initially associated with the Commission--has, except in the narrow technical sense, been taken over to a large extent, by the Council of Ministers and the European

Council.

Has there been a similar decline in the post-legislative phase? The issues here are complex and our conclusions must be regarded as rather tentative and speculative. In some limited fields, such as competition, the Commission acts like a federal agency with full executive powers although even here it has to rely for enforcement measures on the national systems. In most matters, however, the practical execution of Community policies and rules, be they in the field of agriculture, external imports and the like, is performed by the national administrations acting as "agents" for the Community in such things as collecting charges, issuing clearances and dispensing grants. To the extent that the "agency" is automatic, acting directly on Community measures and Commission instructions, this feature cannot be viewed as a weakness in the executive role of the Commission and as a sign of decline in decisional supranationalism.

However, the Communities as a political system have not escaped the world-wide trend of increased government by administrative legislation and action. Thus, whereas the legislature (the Council) enacts enabling measures or issues policy mandates, it is left to the executive to implement the policies by series of secondary legislative measures and administrative acts. Just as the COREPER was introduced by the 1965 Merger Treaty as an extra tier of Member State representation designed ostensibly to facilitate the technical preparation of Council meetings but in practice precipitating an erosion in the policy initiatory role of the Commission, it is possible to identify a similar trend in the establishment of Member State Committees in relation to the executive functions of the Commission. I shall focus, by way of illustration, on two aspects of this development: first, by way of micro-analysis on the role of one Com-

mittee already provided for in the Treaty of Rome, and, secondly, by way of overview on the general proliferation of Committees set up by Council secondary acts.

i. The "Article 113 Committee"

Article 113 EEC dealing, inter alia, with conclusion of trade agreements by the Community bestows responsibility on the Commission for negotiating agreements although acting on a mandate given by the Council. The Commission must consult with ". . . a special committee appointed by the Council to assist the Commission in this task . . .". This "113 Committee" was duly set up<sup>109</sup>, composed of representatives of the Member States; its presidency held in rotation by the Member States holding the presidency of the Council. Its mode of operation is a useful illustration of the diminishing executive role of the Commission<sup>110</sup>. On the one hand a Council-Member State Committee would be useful especially if amendments to the mandate were needed and could be provided at the locus of negotiations. The Committee would also ensure that agreements negotiated would receive the ultimate assent of the Council upon which the constitutional power to conclude the agreement is bestowed. At the same time it has been pointed out that the role assigned to the Committee (and to national observers in other types of Community agreements) has meant that ". . . the Member States are able to oversee the Commission's behaviour in every negotiating session and insure that its application of the mandates to concrete issues comports with their wishes"<sup>111</sup> and that thus the ". . . picture of the Commission . . . is that of Community spokesman and agent or, more technically, plenipotentiary of the Council. The term 'negotiate' has clearly not been interpreted by virtue of the role assumed by the Member States and the Council to accord the Commission an authoritative role in forming EEC negotiating policies of

directing the negotiations themselves<sup>112</sup>. To the extent that the Commission has managed to re-build its role it has not relied on a reinterpretation of the Treaty provisions but on the sheer technical expertise which it can bring to the treaty making process. But in this sense it is no more than an equivalent to a competent national civil service.

It is perhaps worth pointing out that use of a "democracy deficit" argument to justify these developments is hardly convincing for, except in the most formal sense, curtailment of Commission power has reduced the role of one set of (European) civil servants and elevated another (national) set. The continued reluctance of the Council to increase the role of the European Parliament in the process of treaty making<sup>113</sup> testifies to the fact that national interests play a greater role than does concern for democracy.

ii. The proliferation of Committees

With the substantive expansion of Community activities, especially in the agricultural sector, a wide ranging network of Committees has been set up, many of them to partake in the "legislative implementation" of Community policies. Some of these are advisory committees the consultation of which is obligatory but the opinion of which once consulted is not binding<sup>114</sup>. Others, the Management and Regulatory Committees, have a more decisive role.

As regards the Management Committees, particularly prominent in the agricultural and fishery fields, the Commission must submit its draft measures to them. The Committee may approve the measure--by a qualified majority--or fail to reach a decision (if no qualified majority is reached either way) whereupon the Commission is free to adopt the measure which will have full legislative force. If the Committee manages in fact to "reject the



measure" (qualified agreement against) the Commission may still adopt the measure but this measure will come into effect only after a certain period in which time the full Council may--by qualified majority--reject it. The Regulatory Committees procedure is slightly more restrictive on the Commission<sup>115</sup>.

It is difficult to assess this proliferation of Committees in relation to the power of the Commission. Unlike, say, the "113 Committee", the Commission presides in all these Management and Regulatory Committees. And since executive power is exercised here through legislative means the involvement of the Council would seem to be natural. Pragmatically, the involvement of representatives of the Member States may also contribute to smooth functioning of whatever policy is executed regardless of the implications to the institutional balance. Besides, in the decision making process the qualified majority rule means that--as regards Management Committees--the vetoing power of a few States may actually assist the Commission in adopting the measure. All these elements would tend to point to the conclusion that the proliferation of Committees serves the ends of open end efficient government<sup>116</sup>.

At the same time--taking a longer term view--one cannot avoid noting that these mechanisms indicate an unwillingness of the Council and Member States to entrust the execution of policy to the Commission with, say, safeguards of reporting and information. In this sense, then, the proliferation of Committees may be regarded as one element in the decline of decisional supranationalism<sup>117</sup>.

#### d. The Reasons for Decline

It now remains to try to give some reasons for this erosion in the position of the Commission and the general decline of decisional supranationalism. Several such reasons may be given.

i. We noted the early success of the Commission in implementing the explicit policies in the Treaties. The need to evolve a "second generation" of Community policies based on broad indications in the Treaties but not explicitly set out imposed a much more delicate and politically sensitive task on the Commission. The power of "initiative" now called for was less formal and technical, that is it no longer called for proposals which gave legislative form to explicit Treaty obligations but rather it called for wide, reflective and more "value" prone proposals. Whereas the first generation of policies were negative--in the sense that the Member States undertook to refrain from certain actions and the Commission was charged with implementing this negative regime--the new policies were to have an actual positive content on which agreement was more difficult. The ability of the Commission to propose new initiatives and get them accepted was thus considerably weakened. The importance of the Council of Ministers and European Council was strengthened. It was those bodies which could give the drive to new policies. To be sure, the Commission retained its position as a source of ideas and vision for developments on the Community level. The environmental policy, to give but one example, would not have emerged without an internal Commission initiative. But it was for the European Council to sanction the policy, to balance it and officially to launch it. The Commission was left somewhat in the background.

ii. The need for "second generation" policies brought the democracy deficit to the fore. What is more, with the widening of Community activities, national parliaments felt threatened by a process which would wrest even more power from them. The Commission which had little formal democratic legitimacy became an easy target for attack.

iii. The Commission itself, although growing in experience, put on much bureaucratic fat. This expressed itself not only in its numerical staff growth but also in the evolution of traditional bureaucratic ailments which significantly reduced its internal efficiency<sup>118</sup>. Lack of internal (lateral) coordination, distortions in the pattern of promotion, and personal and national rivalries all contributed to an internal drop in morale and an external drop in esteem. The materially privileged position of Commission employees (alongside all other Community employees) in the current harsh climate may also have contributed to this process.

iv. The independence of the Commission and its judicial impartiality began breaking down in a bizarre dialectical process. The very importance of the Commission prompted the Member States to take not only--as was constitutionally permissible--an active interest in the appointment of the Commissioners themselves but also in the promotion of personnel within the Commission and in the allocation of portfolios among Commissioners. The Commission was thus seen to be losing its impartiality, a singular handicap when considering its intended mediatory role in Council disagreements. Internally, this governmental intervention contributed both to a strain on the collegiate nature of the Commission and the authority of its President<sup>119</sup>.

v. Finally, it may be that the process of approfondissement of normative supranationalism, as described above, had a negative effect on decisional supranationalism both in the Council-Commission relationship and within the Council itself. Normative supranationalism meant that the impact of Community policies and law was perceived as growing not only in scope--to cover more fields--but also in depth--so as to have a more

immediate and binding legal effect from which the Member States could not escape. Thus, the politically delicate issue of supremacy was countered by an insistence of the Member States on their control of the making of this "supreme" law and their ability to block its making. This view of the role and power of national governments was emphasized strongly by "pro-marketeters" in the 1975 U.K. Referendum, using it (somewhat misleadingly) as a tool against charges of the "loss of sovereignty" which Community membership entailed. It is thus suggested that the correlation between the approfondissement of normative supranationalism and the diminution of decisional supranationalism is not accidental but at least partially causal. Thus as we noted, the European Court of Justice had not excluded the sensitive field of foreign economic relations from the effects of normative supranationalism--giving one of its decisive rulings--the ERTA decision--on the doctrine of preemption in relation to the treaty making capacity of the Community. The Council of Ministers and the Member States, for their part, have ensured that in the execution of the Community's external policy the Commission is kept--by devices such as the 113 Committee--on a very tight rein and that the Member States, by a legal interpretation of the limits of Community competence, are active parties in many Agreements<sup>120</sup>.

### 3. The Diverging Trends--an Assessment

It is this last reason which gives the clue to one possible significance of the diverging trends. For, it is submitted, the outcome of the process represents a certain balance of action and reaction, whereby the permeation and expansion of Community influence--expansion in breadth expressed by the growing number of fields where Community impact is felt and expansion in depth as

expressed by the approfondissement of normative supranationalism --is matched by an ever closer national control exercised in the decision making processes. To the extent that the approfondissement and diminution are causally connected the relationship is surely two way: a cyclical interaction of the judicial-normative process with the political-decisional one. Here then is one dimension of the Community formula for attaining an equilibrium between whole and part, centripetal and centrifugal, Community and Member States. It is an equilibrium which explains a seemingly irreconcilable equation: a large, surprisingly large, and effective measure of transnational integration coupled at the same time with the preservation of strong--unthreatened--national Member States. Shonfield, in his seminal political analysis of the Community<sup>121</sup>, noted this duality juxtaposing on the one hand ". . . the extent to which the detailed operation of the Community powers is today jealously observed and controlled by the member governments"<sup>122</sup> with, on the other hand, two European Court cases<sup>123</sup> which demonstrated the high level of what I have called normative supranationalism. He created the "bag of sticky marbles" metaphor to express this duality and, correctly, sought the explanation in the substantive features which both draw and repel the members of the Community: A Community characterized on the one hand by a shared, historical, political and cultural background which, since repeatedly threatened by strife and conflict in the past and finding common economic and political exigencies in the present, was and is being pushed and drawn towards integration. But also a Community which is, on the other hand, equally characterized by a rich diversity which has evolved in a history of separate tribal, religious, linguistic, economic and political development confinement of which into a fully fledged federal framework is neither feasible nor desirable<sup>124</sup>. The analysis of normative and decisional supranationalism complements

the substantive explanation of the "bag of marbles" by giving it its instrumental expression. It also gives us a clue about the future of European integration. The divergence between normative and decisional supranationalism indicates that many of the tools for integration in the normative armory of the Communities --even the more subtle tools, like the directive--are likely to remain underemployed because of decisional difficulties. In the preparation of new policies and programmes the Commission will have to shift emphasis. In present conditions it is no longer sufficient to introduce grand programmes for Community policies, based on a reasoned presentation of Community needs and potentials. In relation to each policy the Commission will also have to engage in a micro-analysis of the barriers to Council decision making, which may vary from issue to issue, with a view to presenting programmes particularly sensitive to decisional obstacles as well as to normative ones. In this context the discussion of committees takes a different turn. For what could be seen as a reduction in the Commission's autonomous executive role could be usefully employed, by that very Commission, as a device to reduce the decisional barriers. The greater the involvement of the representatives of the Member States, the less reluctant may they be to new Commission proposals.

The Commission can, in certain fields, radically reassess its own role. Where the decisional barriers seem insurmountable it could abandon, selectively, its function as initiator of policies and engage in direct-voluntary-contact with the Member States to assist them to develop independent policies which may however serve Community ends.

Finally, relating the two facets of supranationalism--while recording that the distinction between the two was made so as to give us an additional tool of analysis--provides us with a dif-

ferent set of terms of reference, albeit a tentative set, with which to examine the jurisprudence of the Court of Justice and the type of integrationalist philosophy which, as we saw above, was at the basis of its judicial policy. The Court's case law and judicial policy may be subjected to four different orders of analysis.

The first--technical-legal--order is concerned with ascertaining the precise meaning and parameters of the Court's judicial decisions. Thus, for instance, whereas the case law pertaining to supremacy seems consistent and clear there remains, as regards the doctrine of direct effect, especially as it applies to directives, a measure of obscurity with which the Court is currently grappling.

The second order of analysis is concerned with evaluating, in the strict legal sense, the correctness and legitimacy of the Court's case law. The challenge of the French Conseil d'Etat in the Cohn-Bendit Case as regards alleged constraints which Article 189 imposes on the European Court is a judicial reflection, even if feeble, of this order of analysis.

The third order of analysis is concerned with the evaluation of the Court's case law as regards its impact on European legal integration. It hardly needs repeating that without the bold steps taken by the Court, the most important of which were discussed briefly in our analysis of the evolution of normative supranationalism, the legal structure of the Community would manifest only a fraction of its present cohesion. So, unlike the second order of analysis the terms of reference here go well beyond a strict legal evaluation of the legitimacy of the Court's judicial policy. They are widened to incorporate the impact of these decisions on the general architecture of the legal

order. But even here the analysis is still confined to an area which flows almost directly from the Court's jurisprudence. The evaluation, to use our terminology, remains at the level of normative supranationalism.

The fourth order of analysis then will try to widen the terms of reference even further. The questions which will be asked--and to which, at this stage of research, only extremely tentative answers may be given--concern the relationship between the Court's case law and its impact in the normative field on the one hand and the decisional facet of supranationalism on the other. This is, of course, a two-way relationship. I have already suggested that in evolving its doctrine of preemption the Court will have been cognizant of decisional difficulties in the Communities policy and rule making structure. To insist on pure preemption and expect it to work necessitates efficient central organs; the absence of these in the Community gives one explanation to the pragmatic--less pure--approach adopted by the Court in this instance. It was on the basis of this analysis that I had argued that what appeared as a retrogressive judicial approach was in fact part of the approfondissement process. One could at this stage only speculate whether the Court would have taken a different approach as regards preemption had the decline in decisional supranationalism not occurred. Looking at the relationship the other way round one may speculate whether the ongoing process whereby the Court is, say, giving a higher normative value to directives (e.g. construing even non directly effective directives as a

basis for judicial review of Member State legislation) -- a process motivated undoubtedly by the integrationalist approach of the Court -- may be one of the reasons for the decisional difficulties in adopting certain directives. Even if one cannot expose a direct causal link, the mere possibility should certainly feature in the minds of the European judicial policy maker.

#### D. Towards an "All or Nothing Effect"

There remains one crucial factor missing from the instrumental analysis. What are the ties that keep the framework together? By what means has it been possible to take normative supranationalism to the degree that it was taken despite the evident decline in decisional supranationalism, the outright hostility from certain national quarters<sup>125</sup> and the lack of independent federal enforcement mechanisms the evolution of which one would normally expect to accompany the development of normative supranationalism?

##### 1. Withdrawal or Selective Application

The natural departure point for a reply would be an examination of the possibilities of Member State withdrawal from the Community. Here again we find if not a cleavage between legal and political analysis at least a sharp difference of emphasis. Juridically, in discussing withdrawal from the Community a distinction is drawn between the European Coal and Steel Community on the one hand and the European Economic Community and Euratom on the other. As regards the former, Article 97 ECSC provides that "This Treaty is concluded for a period of fifty years ...". As regards the latter, Articles 240 EEC and 208 Euratom provide respectively that "This Treaty is concluded for an unlimited period." A recent study<sup>126</sup> based on general international institutional law,<sup>127</sup> cogently argues "... that no right of withdrawal can be implied in the case of treaties like ECSC ...".<sup>128</sup> The same view is reached as regards the EEC and Euratom, namely that the aforementioned Articles "... exclude any implied possibility of unilateral withdrawal" since "... no other meaning which

could be given to these provisions would not make them redundant"<sup>129</sup>.

This juridical argument is curtly dismissed in a political analysis of the Community system: Pryce argues that "The question of unilateral withdrawal is not dealt with in any of (the Treaties)--for the good reason that none of the partners was willing to tie its own hands with regard to this matter. . . . The silence on this means quite clearly that each of the signatories maintains absolute authority to take such a decision at any point in the future. The fact that the Treaty of Paris was concluded for a 50-year period and the other two for an unlimited period is irrelevant in this context."<sup>130</sup>

This legally dubious statement has a strong measure of political truth behind it. Should a Member State be determined to withdraw, lack of legal consent from its partners will not be an obstacle in its way. The general Hobbesian maxim that covenants without swords are but words is accurately reflected by Pryce in his statement that in the Community "there is no army to convince a reluctant partner"<sup>131</sup>. The real glue that binds the Community together is the bond of common vision and common interest in pursuing what has aptly been called "Alliance politics"<sup>132</sup>.

Does this mean that the supranational system is irrelevant to the discussion of withdrawal? It is submitted that the question of unilateral withdrawal is the wrong one to ask. Unlike pre-World War II practice it is rare in the life of contemporary international organizations for states to withdraw their membership<sup>133</sup>. The more common pattern is one of selective application by states of those duties and obligations of membership which seem to conflict with national interests. Given the wide

range of duties and obligations which flow from Community membership such practice, if adopted, would be lethal to the Communities. Equally common is the failure of international organizations to adopt sanctions against breach and --on those occasions when measures are adopted-- to enforce them effectively. The essence of what for convenience I call the "all-or-nothing effect" in the European Communities is that whereas Member States retain the ultimate political option of withdrawing from the Community and thereby disengaging from their obligations of membership (an option which the process of economic and political enmeshment has made increasingly theoretical), they are -- as long as they opt for membership -- largely unable to practise selective application of Community obligations. There still remain, for reasons which will be explained below, certain lacunae in the full realization of the "effect", but it has certainly reached a stage where it can be stated as a fundamental distinguishing mark of supranationalism in both its facets.

We have already noted the central role of the Court of Justice in the evolution of supranationalism.<sup>134</sup> But the existence of a court as part of the institutional framework of an international organization is not unique and cannot, as such, explain the "all-or-nothing effect", nor can the existence of a compulsory jurisdiction *per se* be sufficient explanation since-- as recently exemplified<sup>135</sup>--submission to the compulsory jurisdiction and subsequent obedience to an award are among the obligations which in the current state of international law can often be flouted with impunity. Rather it is the entire system of judicial review involving both national courts and the European Court, which transnationalizes mechanisms hitherto used only in the context of

municipal judicial review<sup>136</sup>, which produces the "effect".

## 2. The Functional Division of Adjudicatory Tasks and Judicial Review<sup>137</sup>

The Community features a double-limbed system of judicial review which operates on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: a) (the first limb) those of the Community legislative and administrative institutions (principally Council and Commission) which are reviewable for conformity with the provisions and principles of the Treaties and with an emerging unwritten higher law based on the constitutional traditions of all Member States as well as international treaties such as the European Convention on Human Rights<sup>138</sup>; and b) (the second limb) acts of the Member States which are reviewable, in accordance with the principle of supremacy, for conformity with Community law itself. Needless to say, in the context of compliance of Member States with Community obligations, effective review of the latter set is the crucial issue<sup>139</sup>.

Judicial review may take place at the exclusive level of the Community Court. As regards the first--less critical--limb, the organs of the Community and the Member States, as well as individuals, may, in accordance with the Treaty<sup>140</sup>, challenge Community acts and measures directly before the European Court. As may be expected the rules of standing for individuals are quite narrowly defined and the Court has added to this narrowness by interpreting them rather strictly<sup>141</sup>.

As regards the second--critical--limb the Commission and Member States may, in accordance with the Treaty<sup>142</sup>, bring an action against a Member State for failure to fulfil its obligations under the Treaty. Failure to fulfil an obligation may take the form of inaction in implementing a Community obligation or enacting a national measure contrary to Community obligations. Although, as

indicated above, not unique, the very existence of a non-optional judicial forum for adjudication of these types of disputes sets the Community above most international organizations. At the same time the "intergovernmental" character of this process and the consequent limitations on its efficacy are clear enough. Four weaknesses are particularly glaring.

In the first place, the decision of the Commission and/or Member States to bring an action against an alleged violation by another Member State will often be influenced by political considerations; the Commission might not wish to risk a political crisis which may be precipitated by a Court decision on a sensitive issue<sup>143</sup>. Secondly, effective supervision will depend on the ability of the Commission to monitor the implementation of Community law. Given the vast range of Community measures this becomes an impossible task<sup>144</sup>. Thirdly, the type of action which is likely to be brought will relate largely to abject Member State failure to implement a national measure required by Community law or to a national measure which is in clear violation of Community law. It will be far less suited to review of the ordinary application and enforcement by Member States of Community obligations especially as they affect individuals<sup>145</sup>. That type of violation becomes normally transparent only through cases and controversies affecting individuals. Even if alleged violations were brought to the attention of the Commission, it is unrealistic to expect them to take up all but the most flagrant violations. Finally, given the intergovernmental character of this process, a Member State found to have failed to fulfil an obligation may simply disregard the judgment against it<sup>146</sup>.

These weaknesses are to an extent remedied by the review of both limbs at the national level, a process possible through the functional division of judicial tasks between the European Court of Justice and national courts and which essentially produces the "all-or-nothing effect". It is hardly worth mentioning that of

all Treaty provisions the single most important Treaty Article is 177<sup>147</sup>. This multi-functional Article provides inter alia that when a question concerning either the interpretation of the Treaty or the validity and interpretation of acts of the institutions of the Community is raised before national courts, the latter may (and in the case of courts of final instance, must) refer the issue for a preliminary ruling of the European Court of Justice. Once this ruling is made it will be remitted back to the national court which will give, on the basis of the ruling, the decision in the case pending before it. The national courts and the European Court of Justice are thus integrated into a unitary system of judicial decision making. The two limbs of judicial review exist on this level as well. A reference to the Court on the validity of acts of institutions is clearly a mode for judicial review of Community acts at the instance of individuals. One will note that the question of locus standi from the point of view of the European Court does not arise. Thus it may even be possible for an individual to be denied standing in a direct challenge before the European Court but have the act reviewed if he has standing in accordance with national procedural law. The individual will be able to challenge the Community act in the national courts (Community law being, of course, part of the "law of the land"), whereupon it will be remitted to the European Court of Justice for an interpretation on validity and returned back to the national court for pronouncement<sup>148</sup>. Taking then judicial review of Community measures as a whole, the trend, in respect of individual challenges, is one of a restrictive attitude to actions brought directly before the European Court with a shift to national courts as the forum for adjudication, using, when necessary, the preliminary reference for an interpretation or check of validity, of a Community measure<sup>149</sup>.

Turning to the second limb concerning the judicial review of national measures for conformity with Community law, the European Court has made astute use of that part of Article 177 which provides for references on the "interpretation" of Community law. On its face the purpose of the procedure is to guarantee uniform interpretation of Community law in all Member States. However, often the factual situation in which Article 177 is employed is when a litigant pleads in the national court that a rule or measure of national law or an administrative practice, should not be applied as it is in contradiction with Community law. On remission to the European Court it renders its interpretation of Community law within the factual context of the case before it. Theoretically, a division exists in the adjudicatory tasks of the two courts: the European Court states the law and the national court applies it--using of course the principle of supremacy where necessary--to the case in hand. Thus the traditional formula of the Court is to state that:

. . . The Court of Justice ruling under Article 177 of the EEC Treaty does not hold that a given national law is incompatible with Community law. . . Within the context of the judicial cooperation established by the provision it is for the national courts, applying the fundamental rule that Community law takes precedence, to uphold the right, of the subjects based, under the Treaty itself on the direct effect of the provisions concerned when disputes are brought before them by those concerned<sup>150</sup>.

But as usefully concluded in a study on the role of the European Court in judicial review:

It is no secret, however, that in practice, when making preliminary rulings the Court has often transgressed the theoretical borderline . . . it provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision<sup>151</sup>.

What is important--indeed crucial--is the fact that it is

the national court acting in tandem with the European Court which gives the formal final decision on the compatibility of the national measure with Community law. The main result of this procedure is the binding effect and enforcement value which such a decision will have on a Member State--coming from its own courts--as opposed to a similar decision handed down from Luxembourg by the European Court of Justice wearing its intergovernmental hat. This then is a procedural dimension of the Constitutionalization of the Treaties and a European confirmation of Mr. Justice Douglas' maxim that ". . . it is procedure that marks much of the difference between rule by law and rule by fiat"<sup>152</sup>. It is also one of the clearest distinguishing marks of the supranational system. The quest for an effective law of nations in the traditional international legal order has been characterized by the creation of a succession of international courts, tribunals, arbitration bodies and other judicial and quasi-judicial fora. With a few exceptions these bodies have all been victims of the inherent weakness of international judicial bodies by comparison to their national counterparts. International jurisprudence, with all the attention it receives from scholars, has remained on the periphery of international law and international relations. By contrast, the supranational system--in a synthesis of international law and constitutional law -- puts the inherently stronger national system in the service of the transnational order.

The above analysis helps to express the current limitations of the evolution of the "all-or-nothing effect" in the Community. If all issues involving alleged violations of Member States Community obligations became matters involving private parties triable before national courts the "all-or-nothing effect" could be said to be complete. Inevitably, however, there are certain matters which concern directly Member States only and which can not



realistically become case-and-controversy issues. Violation of these would still remain a matter for "Community level" intergovernmental judicial review. In addition, even in those situations where an individual action--a case and controversy--could, by virtue of the subject matter, take place, there may be an array of additional barriers to overcome. These may be connected with ignorance by the individual of his "higher" Community rights, the barriers of expense and time of litigation and the low stakes which the individual may have in vindicating a right despite its wider Community importance. (In Costa v. ENEL

the actual controversy concerned<sup>a</sup> sum of £ 1).

Finally, the use of Article 177 as a method for judicial review of Member State measures depends on the full acceptance by the national courts of the doctrine of supremacy and on a willingness to utilize 177 to its full potential. We have noted that both in Britain and in the administrative judicial branch in France the first issue is not clearly resolved and as regards the latter there are mixed trends<sup>153</sup>. Nevertheless, even if incomplete, the existing "all-or-nothing effect" remains a singular expression of supranationalism distinguishing the Community from most other international organizations. Its preservation and consolidation must surely be one of the important challenges of the future.

### III - SUPRANATIONALISM--PROSPECTIVE

It is not my purpose in this section to engage in an exercise of political or legal futurism. The volatility of European integration renders questionable the utility of such an exercise. Rather I propose to concentrate on certain concrete recent developments which would seem to pose challenges and raise question marks as regards the future functioning of supranationalism as analyzed above.

Two of these developments are specific "tangible" occurrences already mentioned in the introduction: (a) the commencement of the second round of enlargement which, with the accession of Greece, has already taken the Community of Nine to Ten and which prospectively will bring it up to twelve; and (b) the direct elections to the European Parliament. These two developments will be analyzed in relation to their possible impact on decisional supranationalism. The third development is less tangible. It is concerned with the consequences and implications of normative supranationalism resulting from the lateral expansion of Community policies into new fields but, as we shall see, also from the very process of approfondissement.

I shall not deal with all the impact on the Community of these developments but only with those aspects which touch on the essential features of the retrospective typology. By necessity the treatment will be synoptic; the questions can be posed but answers only guessed.

#### A. Normative Supranationalism--the Challenges of Implementation, Uniform Application and Enforcement

It is difficult to give precise time limits to the evolution of normative supranationalism as outlined in the retrospective analysis. As far as the starting point is concerned, although academic and political literature existed long before the actual

conclusion of the Treaty of Paris, the Schuman Declaration probably represents the political point of transformation from theory to practice. At the other end we already noted that not all strands in the process have come to full fruition so that in a sense the trends identified continue today. The thrust of these developments took place, however, in the 50's, 60's and up to the mid-70's. Taking all these developments as a whole it would be possible perhaps to describe them as establishing the relational principles of normative supranationalism and to characterize the period as the constitutional phase. For as we saw the major developments were concerned with the relationships between the two merging legal orders and the constitutional hierarchy therein; it was in this sense that we described normative supranationalism as being concerned with the effective precedence of Community policies and laws over national measures.

But effectiveness cannot be guaranteed solely by the existence of solid constitutional principles and accepted relational hierarchies. These only ensure a certain type of resolution to Community-national conflicts. Substantive Community policies and law must be applied and the duties and rights they bestow vindicated and enforced. Should concrete application of policies or vindication of rights be impaired -- or executed in a manner inconsistent with Community norms -- the relational principles of normative supranationalism will be rendered constitutionally arid. Effective application may be inhibited by several factors both legal and meta-legal. I propose to deal with three of these factors each indicative of a larger problem and each operating at a different level in the complex Community social, political and legal order: the quantitative challenge, the procedural challenge and the Access-to-Justice challenge.

### 1. Monitoring, Supervising and Adjudicating the Implementation of Community Law: The Quantitative Challenge

So far we have refrained from discussing directly the various legislative tools available in the Community. Taking the EEC as an example the Treaty distinguishes among three principal binding tools<sup>154</sup>. These are the regulation, which is generally binding, directly applicable and if conforming with the prescribed requirements<sup>155</sup> has automatic direct effect; the decision, which is binding only on its addressee; and the directive which is binding as to the result to be achieved upon the Member State to whom it is addressed but leaves national authorities the choice as to the form and methods of implementation and introduction into the municipal legal order. It is clearly regulations and directives which are the main general legislative instruments. To be sure, the doctrine of direct effect as applied to directives has blurred some of the distinctions between the two. But direct effect of directives remains exceptional<sup>156</sup> and the instruments maintain their substantive distinction. The choice of instruments is determined in the first place by explicit provisions in the Treaty. In some cases the Treaty is neutral -- speaking of "measures"<sup>157</sup> to be adopted; in others specific, giving the Council and the Commission choice between regulations, directives<sup>158</sup> and decisions<sup>159</sup>. In other instances it stipulates the use of a directive -- noticeably in dealing with the general provision for approximations and harmonization of laws, one of the principal instruments for effective integration<sup>160</sup>.

The directive is a more subtle tool than the regulation: it is mindful of the social and political fabric to which laws belong and the intricate relationships which frequently operate between apparently disparate rules. By imposing on the Member States the duty as to the result to be

achieved but allowing them to find the best methods of internal implementation, the framers of the Treaty were making allowances for the disadvantages of fully centralized legislation which, although being generally binding and directly applicable and thus more likely to produce direct effect, could produce disruption in national systems.

The price to be paid for the choice of directive as a tool lies in the efficacy of implementation. For unlike the regulation, which can come into effect immediately, the directive, by definition, has to give a measure of time for Member State adjustment and--apart from the exceptional cases where directives will produce direct effect--implementation depends on Member State compliance; it is this last link which exposes the main quantitative challenge. To be sure, the systems of judicial review and the principles of normative supranationalism provide for legal remedies in case of failure to implement a directive. But before the Commission--one task of which is to "ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied"<sup>161</sup>--can take legal action against a recalcitrant or dilatory Member State, it has to be cognizant of non-compliance. To be cognizant of non-compliance it must have effective monitoring mechanisms. In the retroactive analysis we noted the role of the individual as a guardian of the Treaty achieved by the decentralized component in the Community's system of judicial review<sup>162</sup>. But the individual can come into direct play only in respect of measures which produce direct effect which is very often not the case in relation to directives or in situations where the directive has already been incorporated into national law. The Commission remains itself the main guardian of implementation of directives.

The magnitude of this problem can be gauged by reference to the numerical explosion in the number of directives. In 1970,<sup>28</sup>

directives<sup>163</sup> were in force. Ten years later it would appear that within the legal order of the Community there are no less than 700 directives in force<sup>164</sup>. Even on an assumption of only one national measure to implement each directive, in a Community of Ten this would mean that the Commission has to monitor the introduction of 7,000 implementing measures. Admittedly these are spread over a number of years but the trend is likely to continue into the future. The Commission has introduced data processing equipment to try and fulfil this task. It has also introduced, in certain directives, a duty on the Member States to report on incorporation measures, failure of which could trigger enforcement proceedings under Article 169 EEC. But even should the Commission eventually be able to put tags on all the implementing measures three further problems immediately arise.

Firstly the sanction against non-compliance depends on direct judicial adjudication before the European Court of Justice--albeit after a conciliatory phase in which the Member State is given time to put its house in order. The prospect of a flood of actions which may congest and even choke the Court is no less alarming than non-implementation especially since the Court is already working under a heavy case load. A further increase of such case load will not only threaten the Court's efficiency but also dilute its normative-constitutional role as a supreme court<sup>165</sup>.

In the second place, even on the optimistic assumption that the Commission would indeed be able to monitor the introduction of implementing measures (and pursue an enforcement policy not too influenced by illegitimate political considerations<sup>166</sup>), the fact of implementation alone would not in itself be sufficient to ensure effective application and enforcement. The national legislative act might after all misconstrue the enabling directive. Admittedly, the implementing measure can be judicially reviewed

against the enabling directive at the instance of individuals<sup>167</sup> affected by it. But often in order to test the validity or legality of an implementing act the individual would first have to violate it in order that the validity may be contested<sup>168</sup>, a risky course of action which many individuals would be loath to take<sup>169</sup>. In addition the Community origin of the implementing act may be oblique<sup>170</sup> so that the individual is not aware of the possible ground for judicial review.

In certain classes of directives--say in the agricultural field--the Member States are required to submit the draft of the implementing measure to the Commission for commentary. But even this would not completely solve the final problem since even a well drafted national implementing measure has to be executed and applied. In the Community system this is done by national administrative authorities which creates a new tier of potential misapplication which would need Community supervision.

Monitoring the incorporation of directives into national law, controlling the conformity of the national measure with the directive and supervising execution are problems which are inevitable consequences of the system. The Council and Commission are primarily legislative organs, the execution of their positive policies being entrusted--unlike most federal states--to the Member States. The quantitative explosion may be the result of a legislator not fully responsible for the execution of policies. Be that as it may, the quantitative challenge renders a problem which has always existed very acute. Approfondissement in this area will mean the creation of mechanisms, legal and otherwise, which will enable the Community despite the large numbers concerned not only to introduce the Community normative measure but to ensure that in complying with it--from implementation through execution--the Member States will meet their full Treaty obligations.

## 2. The Uniform Protection of Community Law--Unequal Remedies: the Procedural Challenge

Even in those situations where individuals are able to invoke Community law directly before the national courts (and thus serve as indirect guardians of incorporation and application of Community law by Member States), the special character of supranationalism produces a problem which touches on the fundamental issue of uniformity and diversity with which all "federal" systems have to grapple. I shall be concerned here with the situation in which Community law has already been introduced either directly, by a measure having direct effect, or through state implementation. My focus will be on the use of such laws by individuals in seeking to protect the rights bestowed upon them.

The uniform application of Community measures throughout Member States has been among the most consistent principles upon which the Court of Justice has insisted in its jurisprudence. It has been used amongst other reasons as a justification for evolving the doctrines of direct effect and supremacy<sup>171</sup> and was one of the strongest arguments used by the Court in resisting the national constitutional challenge in the context of the human rights debate. Should this principle be unjustifiably compromised one of the very foundations of normative supranationalism would be threatened. Thus in a recent restatement of its human rights position, the Court affirmed<sup>172</sup> that

the introduction of special criteria for assessment of the compatibility of Community law with fundamental human rights/ stemming from the legislation . . . of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community<sup>173</sup>.

And in another case the Court elaborated this general constitutional principle by stating that

the binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril<sup>174</sup>.

The explicit underlying value of this unity principle is clearly integrationalist. Its counterpart in the Treaty is the very Article 177 which provides the mechanism for ensuring that Community measures will be uniformly interpreted and, as we saw in the retrospective analysis, applied throughout the Community<sup>175</sup>. Beneath the explicit integrationalist value lies an even deeper one. Non-uniform protection in similar situations, without a meaningful distinguishing criterion, would violate the per se principle of equality before the same law. Thus from the strict, almost idealist, integrationalist point of view the existence of unequal remedies--remembering that rights and duties are only meaningful and measurable in terms of the remedies available for their vindication<sup>176</sup>--for the protection of the same substantive Community based rights, would be inconsistent with fundamental principles of equality acknowledged in democratic legal systems<sup>177</sup>. In this sense the constitutional principle and procedural principles become interchangeable. To the extent that this inequality would coincide with national boundaries, thereby redividing nationally the integrated legal system, it would represent a serious gap in the normative edifice of supranationalism.

And yet the very enmeshment of the legal Community and national orders, whereby Community derived rights and duties are often vindicated--by the logic of the system--through the national courts by means of national procedural law, has come to produce this very result--a disturbing inequality of remedies. Given that the Community system is not a unitary one, it is unavoidable that differences of protection will, in some cases, justifi-

ably exist among the constituent parts--a fact accepted even in well developed federal systems like the USA<sup>178</sup>. This problem, solution to which must necessarily be one of the main future challenges in the evolution of normative supranationalism, may be best illustrated by reference to a number of concrete judicial decisions.

a. Unequal remedies--a conflict of principles

As a background to understanding the emergence of the problem of unequal remedies and non-uniform application one must recall two aspects in the process of judicial review. We noted in the retrospective analysis that a reference under Article 177 for an interpretation of Community law often serves as a means for judicial review of national laws or administrative practices for their compatibility with Community law. Frequently, the review takes place when a litigant challenges a national charge, levy or tax (often on imports) which, he claims, violates a superior Community norm.

The matter is rendered particularly complex since the European Court in the first place, has insisted on the declaratory rather than constitutive nature of its interpretative judgments. "The interpretation which, in the exercise of the jurisdiction conferred on it by Article 177 . . . the Court of Justice gives to a rule of Community law clarifies and defines . . . the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force<sup>179</sup>.

In the context of challenging a national charge or levy, the ex tunc effect of the judgment would mean that in situations where the national measures were in fact to be declared incompatible with Community law the full vindication of Community rights would entitle the individual not only to a moratorium on future charges of the same kind but also to a repayment of all sums previously illegally exacted from him.

In the second place, despite certain doctrinal considerations which insist on the strict individual binding force of European Court judgments of this type<sup>180</sup> the better and more widely accepted view is that these judgments have at least de facto, erga omnes effect.

The Paris Court of Appeal went so far as to state that

The decisions of the Court of Justice of the European Communities rendered for interpretation are of a general nature because they are designed to unify the case law of the courts of the Member States; they are therefore binding on those courts<sup>181</sup>.

This means that not only would the individual claimant be entitled to retroactive redress but all others, even in other Member States, from whom unlawful charges were exacted would be equally so entitled. The economic stakes can be very large: in one case after a decision of the Court of this kind<sup>182</sup> the Dutch authorities were obliged to repay in excess of seven million Florins in respect of a charge illegally levied<sup>183</sup>.

Yet in many cases characterization of the Court's decisions as declaratory (with ex tunc effect) is quite artificial especially in situations in which a widespread diverse understanding by individuals and Member States prevailed prior to the decision. The Court, so far only in one instance,<sup>184</sup> has recognized the "serious effects" its judgment might have if given erga omnes ex tunc validity and accepted the possibility of a "constitutive" judgment.

In that exceptional case the Court gave a prospective ruling its applicability to past relationships extending only to those claims already lodged at the time of judgment. But in its subsequent jurisprudence the Court emphasized the exceptional nature of that judgment, and the fact that only the Court itself could exclude general ex tunc or erga omnes effect<sup>185</sup>. It is submitted

that, in addition to the vertical relation, between public authorities and individuals, a decisive factor in applying retrospectivity was the fact that horizontal legal relationships were established in good faith among individuals on the basis of the previous understanding of the law<sup>186</sup>. Prospectivity thus is unlikely to be used frequently by the Court in future cases involving solely individuals and Member States. In principle, then, in all cases involving monies illegally exacted, the individual claimant and all those in his class would be entitled, pursuant to the direct effect of Community law, to reimbursement going back to the commencement date of the Community measure.

In practice, since the vindication of these rights takes place necessarily through the national courts and national legal systems, successful claimants will have to satisfy the procedural requirements of their national legal system, say, as regards time limits. And it is the procedural variations among the different systems which gives rise to the problem under discussion. The issues became concrete in two cases in the mid-70's<sup>187</sup>. It has been brought into sharper focus and magnified in a spate of recent cases<sup>188</sup> and is likely to arise in a variety of manifestations until the source of the problem is tackled in the future. The complex issues are best discussed by reference to some of these cases.

b. The case of Rewe and its progeny

The facts in this case are as simple as the law and issues raised therein are complex. The plaintiff, a German importer of apples was claiming the reimbursement of a charge imposed on him in 1968 by the German authorities for a phyto-sanitary examination of his imported fruit. In fact the charge had been unlawfully exacted, a fact which came to light in a decision of the Court decided some years after 1968<sup>189</sup> which found the charge to be contrary to the directly effective Article 13 EEC and a Council requ-



lation<sup>190</sup>. It should be pointed out that there are many hundreds of diverse non-tariff barriers to trade in the Community and to most intents and purposes only the European Court can authoritatively decide which of these are prohibited in accordance with the rules of the customs union. The facts of these cases may seem trivial but it should be remembered that, apart from the procedural-constitutional principles which concern us, the economic stakes are very large; further, the smooth operation of the customs union is a mainstay policy which the Common Market ought to achieve. The fact of illegality was undisputed in the present case by the defendants, the German administrative authorities. But an application for refund by Rewe was met by the defence that they were time barred by the German limitation period<sup>191</sup> which had expired long before the illegality came to light.

The question which the European Court had to answer was

. . . whether where an administrative body in a state has infringed the prohibition on charges having an effect equivalent to customs duties . . . the Community citizen concerned has a right under Community law to the annulment or revocation of the administrative measure and/or to a refund of the amount paid even if under the rules of procedure of the national law /through which, by necessity, the citizen must vindicate his rights/ the time limit for contesting the validity of the administrative measure is past<sup>192</sup>.

In its laconic judgment<sup>193</sup> the Court first affirmed the direct effect of the Community measures in question--and it is worth noting that Article 13 of the Treaty comes within Part One of the Treaty dealing with Principles, a fact which the Court had often adverted to in its jurisprudence--and the duty, in accordance with the supranational system, of national courts to protect the rights those measures confers on citizens. It also noted that as far as the remedies for violation of the principles were concerned the Community did not have its own procedural rules to

grant a remedy. Hence, and herein lies the crux of the problem, it was for ". . . the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions . . ."194.

The Court did insist--delphically--that these must be "reasonable", and that the national procedural requirements<sup>195</sup> should not make it completely impossible in practice to exercise the rights which the national courts are bound to protect. It also said that within the national system the procedural requirements in respect of Community measures should not be less favourable by comparison to requirements concerning purely national claims. On the facts, the German limitation period of one month was not considered "unreasonable". The Court accepted the fundamental reciprocity between remedies and rights in that total exclusion of the former was seen to extinguish the latter. And yet, as stated by the Commission in its submissions, the time limits laid down by national law vary between one month, as is the case in Germany, and 30 years<sup>196</sup>.

The effect of the Court's decision, leaving the vindication of Community rights almost exclusively to the procedural requirements of national law, was to create the unsatisfactory situation whereby the measure of protection afforded the individual in respect of the wrongful application of Community law by national authorities would vary considerably depending on the national forum where the case would be tried and its rules of procedure.

The differences are not mere discrepancy between constitutional-substantive Community rights and national procedural rules. For to the extent that in the Community system in many situations national law and national courts become willy-nilly Community law and Community courts, and further, to the extent that civil procedure defines and limits the remedy (and therefore

the right), these differences imply a contradiction in the constitutional right itself.

In principle and as a permanent solution the European Court could not have excluded completely the legitimacy of imposing a time limit for bringing an action to redress wrongs caused by national administrative measures violative of Community law. Time limits serve the essential legal principle of certainty, and balance the interests of the individual with that of society<sup>197</sup>. The Court was also probably correct in judging that the ultimate rectification of this diversity--leading both to the non-uniform protection of Community rights throughout the Common Market and to unequal treatment of individuals before the same substantive law--could be achieved by harmonization of procedural law, a matter coming within the legitimate domain of explicit legislative action the precise technical details of which are best left to the Member States. Thus the Court stated that "Where necessary, the harmonization provisions of Articles 100 to 102 and Article 235 enable appropriate measures to be taken to remedy differences between the procedural provisions in Member States if they are likely to distort or harm the functioning of the Common Market"<sup>198</sup>. It may, nevertheless, be useful to examine whether the Court, so impactful in the "Constitutional Phase" of normative supranationalism is obliged to leave this important next evolutionary step entirely in the hands of the political organs. The arguments are too finely balanced to give a decisive reply. On the "integrationalist" side one could make the following observations:

There is a certain tension--at least in tone and emphasis--between Rewe and, say, the decision of the Court in Simmenthal<sup>199</sup>. In the latter case, the integrity of the legal order of the Community was regarded as sufficient to prohibit the internal Italian procedural requirement which obliged lower Italian courts to refer

any questions of supremacy to the national court designated for this purpose--the Italian Constitutional Court. In Rewe, and its progeny, by contrast the Court stated that ". . . in the absence of Community rules . . . it is permissible for the domestic legal system of each Member State to designate those Courts having jurisdiction and to determine the procedural conditions . . ."<sup>200</sup>.

At first sight Simmenthal is distinguishable since in that case there was no absence of Community rules: Article 177 itself fills the gap. But it was only the creative interpretation of the Court which enabled it to do this--a similar interpretation by which could not therefore be excluded in the present instance. Especially if we are to remember that the very purpose of Article 177 is to ensure the uniform interpretation and, necessarily, application and enforcement of Community law.

A more fundamental distinction is tied to the fact that by contrast to Simmenthal where the Court could strike down an incompatible procedural requirement of the Italian legal system, in Rewe and its progeny it would appear that the Court could not merely strike out but would have to provide a replacement since, as stated above, time limits are an essential feature of any legal system. It would be unrealistic to expect positive judicial legislation on such intricate and technical issues; although in relation to Community rules of procedure the Court has not been completely impotent<sup>201</sup>. As a permanent solution, undoubtedly specific Community legislation or harmonization measures are called for. But this in itself does not exclude the possibility of judicial action by way of striking out the national time limits as an interim measure until such time as a unifying instrument is introduced. Qualitatively the Court would be doing no more than it did in any of its previous "grands arrêts" such as Costa v. ENEL. Making Community rights procedurally unconditional would be stiff



medicine indeed, but this would provide a strong incentive for Community legislative action. This proposal for judicial action is less alarming than might seem at first sight. Two legal principles are locked in conflict: the integrity of the Community legal order which calls for the uniform protection of Community rights and equality before the law, as against the principle of legal certainty which is at the foundation of the national time limit. The thrust of my argument is that there was no compelling reason for the Court to compromise almost completely the first principle at the expense of the second one.

It could be argued that by provisionally striking down national time limits another type of inequality would be created within the national legal system whereby different time limits would be applied depending on the source of the right at the basis of the claim--national or Community. This inequality is more illusory than real, however, since differentiation of time limits depending on substantive source of law (e.g. contractual or delictual) is quite normally accepted in most national legal systems. Furthermore, substantive Community law in any event does not always fall easily into the procedural categories of national law for the purpose of determining the national procedural rules which should apply to it<sup>202</sup>.

This conclusion leads to a further point. The eventual legislative correction which will be required need not involve a wholesale harmonization of national procedural law but rather specific Community regulatory action to establish relevant time limits in respect of Community acquired rights. This would be legally justifiable and, it is suggested, politically feasible. One can only speculate whether the efforts already made in this direction<sup>203</sup> would not have received a considerable boost had the Court of Justice taken a bolder stand on the normative principles.

At the same time one should not forget that the existence of different municipal legal systems which include a diversity of procedural rules is not a mere technical obstruction to uniform protection of Community rights to be removed--with or without the Court's prompting--by a simple technical exercise. Rather, arguably, the strict connection between procedure and substance may indicate that the national procedural diversity is a reflection of deeper differences depending on societal values such as the relationships between the citizen and the administration, the privileges of the executive and the general balance between communal and individual interests.

If the latter hypothesis is correct--and comparison with non-unitary systems may point in this direction<sup>204</sup>--then the Court's decision becomes more understandable. Integration in this case would clearly become a matter for a slower, orderly and voluntary process of harmonization--as provided e.g. in Articles 100-102 EEC. And, as far as equality is concerned, this alternative hypothesis would suggest that given that the "belongingness" of individuals to different legal systems is not a mere technicality, and that, as a result, similar factual claims based on identical Community rights are in effect objectively "unlike situations", this reasoning would justify unlike treatment.

Pending final resolution of this issue it may be possible for the Court to take a midway position. The Court could perhaps consider a policy of judicial abstention as regards the actual national time limits but impose a Community judge-made rule as to the moment time must start running. A possible commencement point could be the moment when the plaintiff should reasonably have become aware of his rights, such as the date on which the Court itself clarified the issue. This would not affect the ex tunc nature of the judgment, although it would favour the individual's

ignorance of his rights as against the Member States' ignorance of their wrong. This may be a useful via-media between the need for equal and uniform protection on the one hand and the acknowledgment of Member State legitimate procedural diversity on the other.

The issues raised in Denkavit, Just and Ferwerda<sup>205</sup> were broadly similar. The basis for non-uniformity in those cases was not the diversity of time limits but the basis for calculating the loss suffered as a result of the illegally exacted charges and levies. Apparently in some systems the question of whether the trader has passed on the cost of the illegal charge to the customer is relevant in calculating monies to be repaid. In other systems this matters not. Once again the Court employed the formula that ". . . in the absence of Community rules concerning the refunding of national charges which have been unlawfully levied, it is for the domestic legal system of each Member State . . ." <sup>206</sup> to prescribe the remedies. The Court specifically allowed considerations of unjust enrichment to be taken into account so that it would not be contrary to Community law to consider whether or not the unlawful levy was passed on to the customer and full repayment would constitute an unjustified windfall to the importer<sup>207</sup>. Once again, individuals, in apparently equal factual situations would be treated differently according to the jurisdiction in which they sought or were obliged to seek Community derived protection. In Ferwerda the reverse situation arose. The question was under what conditions could the national-Community authorities claim from individuals the repayment of a subsidy erroneously granted. The Court accepted that (Dutch) national rules of legal certainty should govern the question, leading of course to the same type of diverse treatment.

A peculiar twist to this problem occurred in the Express Dairy case<sup>208</sup>. There the illegal charge was collected by the Mem

ber State acting as an agent for the Community in respect of a Community measure held to be illegal. This then was a situation in which a Community measure created a wrong applied across the board throughout the Member States<sup>209</sup>. And yet vindication of rights, dependent on the national legal systems with their procedural diversity was acknowledged as leading to "... difference in treatment on a Community scale"<sup>210</sup>. As a result, individuals affected similarly by the same illegal Community measure may receive different redress, in terms of time limits, quantum of repayment, interest charges and so forth.

In this context the procedural challenge is particularly stark, since in this situation there would undoubtedly be uniform enforcement of the Community rule but no uniform redress should the rule be found to have been illegal.

#### c. Unequal protection--other instances

Rewe and its progeny illustrate most clearly the emerging constitutional-procedural gap and one of the prospective challenges to the evolution of normative supranationalism. Two other illustrations will serve to demonstrate that this line of cases is not unique and that the procedural challenge is likely to creep up in a variety of other situations.

It will be recalled that one way of sidestepping the restrictive approach of the European Court regarding direct individual challenges to general Community legislation under Article 173 was by way of reference on the validity of Community law under Article 177. The substitution is not complete since the effects of annulment (under 173) are different from those of declaration of invalidity under 177<sup>211</sup>, but it undoubtedly ameliorates the almost completely blocked avenue under 173. Yet, again the ability of the individual to use the 177 challenge to validity will depend on the range and

form of national forms of action. Thus for example in the Royal Scholten Hoenig case<sup>212</sup>, an English plaintiff was able to challenge the application of a Community measure (through the intermediary of the British administrative authorities) by way of an application for a "declaration" in the English High Court--a specific form of action suited to judicial review of administrative action. The High Court duly referred the matter to the European Court of Justice which in turn gave its decision on (partial) invalidity which was applied by the High Court. The plaintiff had his redress. This is a particularly efficient remedy since the law can be clarified in advance of any action the legality of which is unclear. This satisfactory result depends of course on the availability of the declaration and its scope. Thus, if the Community measure, say a directive, were not merely a matter for national administrative action but called for legislation to be introduced by an Act of Parliament, it is doubtful whether in England a declaration would lie. By contrast it would seem that in Denmark and Ireland, if the individual could establish sufficient interest it probably would. Once again we have the prospect of unequal remedies in relation to a Community norm which presents itself identically throughout the legal order.

Finally, it is easy to imagine that as regards the non-contractual liability of the Community the policy of the Court of Justice to encourage the processing of claims through national courts<sup>213</sup> will similarly lead to a diversity of remedies--including perhaps the quantum of damages--depending on the specific national delictual rules.

There are no easy solutions to these problems. They involve profound policy issues about the measure of diversity which the Community system can tolerate and no less difficult pragmatic questions about the feasibility of Community regulation and harmonization in so technical a legal field. Nevertheless, the centrality

of the principle of uniform interpretation and application of Community law to the entire normative structure of supranationalism is such that the present difficulties cannot but be a major challenge to be resolved in the future. The per se value of non-discrimination only adds moral acuteness to the integrational problem.

### 3. Application and Enforcement of Community Law--The Access to Justice Challenge<sup>214</sup>

This final challenge to normative supranationalism is only beginning to reach the consciousness of the European policy maker<sup>215</sup>. Access to justice is concerned with the need to transform formal rights into effective rights. In its basic manifestation it is concerned with the essential constitutional requirements in civil (and criminal) procedure to ensure a process which corresponds to societal notions of justice<sup>216</sup>. At a second level it is concerned with facilitating the access of individuals and groups to dispute resolution fora and questioning the adequacy of the existing fora with a view to developing new processes and bodies more suited to the exigencies of the contemporary problems which face individuals in a mass society. Questions such as legal aid, the mechanisms, procedural and institutional, to vindicate diffuse and fragmented rights such as consumer and environmental rights, the role of individual litigants, public authorities, prosecutors and special conciliation and arbitration bodies are among the questions with which the search for effective access to justice has to grapple.

At first sight there seems little connection between this range of problems and the evolution of normative supranationalism. It is possible to take the view that since, in most instances, the application of Community law and the vindication of Community based rights are achieved through the municipal legal system and national courts, the issues of access to justice do not rise at the suprana-

tional level<sup>217</sup>. A closer look reveals, however, several points of contact.

a) Accessible justice even in its extra-legal manifestation can be viewed as extension of procedural law; the availability of effective legal services is no less crucial to the party seeking to vindicate his rights than is the need to satisfy procedural requirements such as locus standi and time limits. Substantial differences in the range of legal services affecting, inevitably, the protection of Community based rights will lead to the same type of fragmentation and inequality along national lines discussed in relation to the "procedural challenge". Harmonization in this field, however, is far more difficult, for whereas it was possible to argue that procedural requirements such as time limits need not be, within the municipal system, identical for national and Community rights, the same cannot as a general principle be argued as regards the provision of legal services. It would be difficult and undesirable to argue for certain legal or meta-legal services to Community migrant workers which would be denied to non-Community migrants<sup>218</sup>. The harmonization effort would have to be therefore in most cases universal.

b) In those fields where the Community exercises a very frequent direct jurisdiction over individuals such as competition and agriculture and where there is a correspondingly frequent direct recourse by individuals to the European Court for legal protection, there is scope for investigating the procedural rules before the Court with the concerns of access to justice in mind. Issues such as locus standi for consumer groups and the role of the Commission as a supranational public attorney have already emerged in the competition field<sup>219</sup>. With the expansion of Community jurisdiction to environmental and consumer protection the classical fields in which fragmented and diffuse rights and duties arise and with

the emergence of potentially interested parties constituted on transnational rather than national lines, this problem is likely to be magnified in the future. Issues such as Community class actions widening the roles of standing to allow individuals--or groups of individuals--to challenge more easily directives will all have to be tackled as part of this new consciousness.

c) The emergence of access to justice as a major prospective preoccupation goes to the very social and human credibility of the Community and its organs, a Community often accused of being concerned solely with businessmen and trade. As has been argued elsewhere:

. . . By its very nature, the Community, to give but one example, has encouraged the transnational mobility of labour and goods. In so doing, it has incurred responsibility for resolving the special problems created by these phenomena. If we consider the plight of the migrant worker in contemporary Europe, and the problems he may have in finding housing, claiming social security and confronting immigration laws, problems which are exacerbated by the difficulties of language, social adjustment and family and educational disruption, we can appreciate that integration at the level of governments raises a corresponding set of new problems at the lowest levels in society. Likewise, the free movement of goods creates its own range of problems for the consumer. It will be argued, correctly, that solutions to these transnational problems can best be found, and in some cases have been found, by the Community at the transnational level. Indeed, the response of the Community--and the Court--has been to create transnational rights protecting migrant workers and the like. However, if these rights are to become more than "paper rights", institutions and machinery must be created to make them truly accessible to those whom they were designed to protect<sup>220</sup>.

The problem also takes on a quantitative dimension since:

As the Community branches out into new embryonic fields such as Consumer Protection, Environment and Workers' Participation, one can envisage that quantitatively the number of cases coming before national and transnational "Eu-

ropean Courts", and possibly choking the system, will be drastically increased. Moreover, movement into new substantive areas will no doubt give rise to a new set of substantive rights and these would, in turn, inevitably increase pressure for procedural developments within institutional frameworks. The problem is not one of simply creating new safeguards . . . important as these may be. Rather, the problem is essentially how to make existing rights effective within these new situations. One of the most pressing tasks, then, will be in assisting the evolution of new types of legal services, prototypes of which exist in several Member States and towards which the Community has already taken certain steps<sup>221</sup>.

d) Finally, there is an access to justice dimension which is unique to the supranational system. The traditional concerns of access to justice are with giving increased protection to the individual and his rights and with the improvement of dispute resolution processes in society. It will however be recorded that a central feature of the supranational system was the function of the individual as a guarantor of inter-state obligations. The so-called "all or nothing effect" depended, in part, on the ability of the individual to bring actions before the national courts the judgments of which--when applying Community law--would be binding on the respective governments. In this sense improved access by way of raising the level of Community law consciousness, and generally removing obstacles to Community based actions will have the integrational consequence of strengthening an important dimension on which supranationalism partly depends. Increased access will not only work for individuals but for the Community system itself.

#### 4. Normative supranationalism--tentative prospective conclusions

The Golden Thread linking the quantitative challenge, the procedural challenge and the access-to-justice challenge making these the necessary next phase in the evolution of normative supranationalism is the notion of effective and equal Community-wide implementation and protection. If this analysis were concerned

with the prospects of both European integration and the Community as a whole, I would have tried to point out those substantive areas of social and economic policy where Community action is needed. Supranationalism as discussed here is, however, concerned with the framework and instruments within which the policies may be adopted. In this sense it precedes the concrete policies. The "constitutional" phase of normative supranationalism was the necessary first step in laying down the hierarchical relationships. These principles may have been sufficient in a period in which the common rules and principles called primarily for elimination of certain Member State practices. In a period increasingly characterized by the need for positive Community policies<sup>222</sup>, normative supranationalism must develop so that the application of these policies, within, and mostly by the organs of, the Member States will be equal and efficient and will not destroy or contradict the principles already pioneered. A sound normative basis will thus be a condition for the success of all present and future substantive policies.

B. Decisional Supranationalism -- Barriers to Change

The constitution of the new directly elected Parliament and the commencement of the second round of enlargement are new, potentially important, factors in the decision making process of the Community. They may be the keys--in the medium and long term--to the future pattern of the decisional process. My purpose here will be limited to a brief analysis of some of the incentives and barriers to such change.

1. The Directly Elected Parliament--A New "Reliance"?

On its face it would appear that the new Parliament has a ready slot in the Community decision making process<sup>223</sup> into which it may fit: initially, even if denuded of formal legislative power it could make up, by virtue of its newly acquired legitimacy, for the decline of the Commission and become the proposer of new Communautaire policies; it could, by virtue of its much strengthened composition which includes leading personalities drawn from the national political areas, become a political match to the European Council and Council of Ministers and assert a Community check or Community boost to the activities of these bodies; it could become a new focal point for galvanizing the political will which is a necessary condition for any further qualitative advances in the process of integration; further, by virtue of its more direct and immediate link to its constituents, it could bestow a new "legitimacy" on the entire Community apparatus and commence a new reliance of Community action. It could thus fill the democracy deficit in both its aspects by providing at the Community level effective representation of national interests and by preventing the Council from using the Community legislature as a means for passing measures which on the national level would be subject to various checks and controls. According to this admittedly optimistic vision the Commission, while maintaining its formal initia-

tory function, would--because of its need for an influential ally in promoting policies hitherto received sceptically by a reluctant Council -- associate closely with the Parliament in the formulation of new programmes and measures. The Council on its part, whether out of democratic respect to a directly elected chamber, or by political need would, according to the same vision, concede at least de facto co-decision to the new chamber. At a later stage there could be a formalization of this process by actual changes in the current de jure competence of the Parliament. Such changes, were they to occur, could not only suggest an arrest in the decline of decisional supranationalism but perhaps even a reversal of trend.

Mindful of the connection between the two facets of supranationalism, this reversal would follow a certain legal logic of the system. It will be recorded that in its landmark constitutionalizing decisions the European Court stated as one justification for making the normative supranational leap that "... it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament..."<sup>224</sup>. There was, with respect, a measure of judicial tongue-in-cheek in that reasoning since in 1963 both in terms of parliamentary decision making power<sup>225</sup> and in terms of Parliament's political composition<sup>226</sup> this alleged cooperation by nationals was extremely tenuous. And yet, given that the normative supranational leap was taken for a good many other reasons, it would be possible, even justified, to turn the Court's reasoning on its head and suggest that instead of the cooperation being a justification for the development of normative supranationalism, that very development which in any event took place should be the justification of effective cooperation, namely a much strengthened Parliament. The call by the supreme German Constitutional Court for a fully fledged

European Parliament to which the Council of Ministers would be answerable, as a condition for accepting completely the supremacy rule, follows the same logic.

It is beyond the scope of this analysis to suggest with any degree of precision what shape a reconstructed Parliament-Commission-Council triangle may look like and even what steps the Community organs may take short of a complete overhaul of the entire institutional framework. Rather I would like to suggest some of the barriers which any such initiatives would have to overcome in granting a new role to Parliament.

i. The fact of direct elections is the single most important immediate factor which gives both justification and political power to the demands for a new institutional role for the Parliament. And yet it should not be overlooked that the pattern of voting -- especially in those Member States which show least enthusiasm for the Community -- was disappointingly low even by comparison to national elections<sup>227</sup>. The claim for "legitimacy" must therefore be treated with caution. Probably, the next direct elections, where the novelty factor will have disappeared, will be a more telling fact in this respect. Furthermore, in those Member States where -- by and large -- the European Parliamentarians are distinct from national political leaders, there would appear to be evidence of a noticeable divide between electors and elected<sup>228</sup>.

ii. This divide leads in turn to a further "legitimacy" problem. The European Parliament may be perceived as being part and parcel of the Community bureaucracy. There is a danger of a vicious circle emerging in the delicate relationships among the Community organs on the one hand and the Community as a whole and the Member States on the other. It was suggested above that in its first phases of asserting its political potency Parliament is more likely to challenge

directly the Council of Ministers than the Commission. In its exercise of parliamentary budgetary competence this tendency has recently been illustrated<sup>229</sup>. The Parliamentary call will often be for more Community policies and more Community spending<sup>230</sup>. In the present economic climate and given a growing national grassroots reaction to the Community, this may be a source for a widening of the divide between Parliament and electorate. Finding the midway between electoral credibility and institutional reassertion will thus be another important challenge and barrier to overcome.

iii. That the Council may resist Parliamentary resurgence seems obvious. This resistance does not result merely from an inherent unwillingness to concede power to a different forum. Council opposition is rooted in the very structure of the Community which rejected both maximalist and minimalist, Proudhonian and Hamiltonian versions of federalism<sup>231</sup>. The emergence of the European Parliament would, according to this perception, be a dangerous revival of those federal inclinations to be resisted by the Council. The prospect then for a formal change involving, say, an amendment to the Treaties is highly unlikely. In the foreseeable future Parliament will have to utilize its existing powers and political will to carve itself a meaningful policy making role. What is perhaps surprising is the naissance of opposition from the Commission. Here as well the peculiar dialectics of the institutional balance produce slightly bizarre if not entirely unexpected results. The Commission, acutely cognizant of its weakening position, is not going to concede lightly to an assault from yet a new body, the directly elected chamber, even if the latter is concerned with the strengthening of the totality of the Communautaire effort. There are already signs of such strains between Commission and Parliament<sup>232</sup>.

iv. Finally, it must be noted that Parliament itself is not the

cohesive Community minded body with a unitary self-perception of its role as is often imagined. It include factions--important ones--which not only resist further strengthening of supranationalism in its twin facets<sup>233</sup> but which also resist any strengthening of the role of Parliament itself<sup>234</sup>. Apart from these internal, democratically understandable, divisions there is the question of pure functional credibility. The new Parliament--with its numerous members and committees, beset by different traditions, languages and priorities, struggling under a proportionality principle under which each internal parliamentary organ must square political affiliation and national origin<sup>235</sup>--will need considerable time before it finds the modus operandi to balance the conflicting demands coming from within and without. After the first two years it is evident that Parliament has not yet settled into a groove which will enable it to realize the potential inherent in its existence<sup>236</sup>. Certainly, these factors are among the most important challenges which the Parliament will have to tackle if the process of reshaping decisional supranationalism is to succeed.

## 2. The Second Enlargement--The Question of Numbers

In a useful analysis of association of states in the Canadian context<sup>237</sup>, Soberman and Pentland draw a distinction between two-member associations, associations in the order of six to ten (Canada, EEC, Australia) and large associations in the order of say fifty such as the USA. The decisional consequences of this distinction are significant.

The two-member association is both promising<sup>238</sup> and dangerous. The small number may facilitate the actual process of negotiation and cooperation with less interests to square and less technical communication barriers to overcome. Arriving at concordance may be simply shorter<sup>239</sup>. However, in situations of

conflict and polarization--assuming de facto or de jure veto power of each of the members--deadlock may, as Soberman and Pentland suggest, have to be resolved by dissolution.

In the medium-size association of which the Community of six or even nine and, perhaps, ten is a good example dissolution producing polarization is less likely to occur. Unless one Member State finds itself consistently in a minority of one--and the U.K. has at times come dangerously close to this situation<sup>240</sup>--there is a high probability of a shift of alliances and interests from one group of states to another maintaining thereby useful equilibria of benefits and interests. The balancing within the Community system of the interests of large and small Member States is an interesting example of the use of formal voting in an increasing number of fields, the system eliminated the possibility of either all the small states or all the large states imposing their will on each other<sup>241</sup>. The Luxembourg Accord significantly altered this structure by moving from majority voting to consensus decision making giving each Member State an effective veto power. In a medium-size association the alteration would not be lethal. Apart from the effects of, say, the preemption principle which in certain cases obliges the Member States to reach agreement, the very fact of a Member State finding itself isolated in opposition to the rest of the Community renders a consistent use of the veto power difficult and exceptional.

How will the enlargement to twelve--falling between the medium-size and large categories of associations--affect the decisional process? In the association of fifty, the possibility of a single constituent veto in the decisional process would render any effective governance simply impossible. Assuming that, in principle, all Member States will continue to be represented, even if with a different weighting<sup>242</sup>, in all Community organs,



the shift to twelve may

produce different results. The addition of three new South Mediterranean countries at a substantially different level of industrial development compared to most if not all other Member States coupled with difficult socio-agricultural problems is likely to make consensus decision making much more difficult<sup>243</sup>. It is not improbable that the three new Members will find a common line on many issues. The "embarrassment" factor of consistent isolated vetoing may thus disappear. The common denomination for Community action will be lowered even further. It is possible to envisage four possible outcomes to the process.

- a. The bumbling-on possibility: Continuation of the status quo with an increase in the measure of disagreement and crisis solution by way of ad hoc measures. The pattern of activities of the European Council and the Council of Ministers would according to this scenario continue as it is with the same negative impact on decisional supranationalism;
- b. The irrelevance possibility: The clash of interests will become so irreconcilable that it will in practice produce a debilitating standstill of achievement. The inability to advance and to take Community decisions in the face of new challenges will not lead necessarily to a crisis but to irrelevance<sup>244</sup>, whereby the fora and methods of decision making will simply shift elsewhere;
- c. The "two (or three?) speed" Europe possibility: Accession might bring revival to the idea<sup>245</sup> of a Community posing a different range of duties and obligations and conferring different rights on its Member States. The measure of disunity which this will bring may make this, if a choice is to be made, an unattractive idea. It is certainly being resisted by the Commission<sup>246</sup>; it will have a disastrous effect on normative supranationalism as well.

- d. The dialectical possibility: It is possible that the decisional difficulties which a Community of twelve will present under the current arrangements and the dangers indicated in the previous three options will push the Member States voluntarily to remedy the decisional process, going beyond the technical suggestions made in the Three Wise Men Report. This remodification may take the shape of a rethink of the veto power; a less recalcitrant attitude towards the European Parliament and a reappraisal of the role of the Commission in the 80's, and 90's. In other words, the decisional dangers presented by enlargement may give the drive to a more rather than less supranational decision making process. Which one or combination of several of these possibilities will emerge is a matter one must simply wait and see.

The resilience of the Community in the past thirty years and its ability to survive continuous political and economic crises may be partially attributable to the supranational framework and the balance achieved between the normative and decisional facets. If the Member States, old and new, are to progress as an effective Community, solutions will have to be found not only to the acute substantive economic and political problems but also to the internal challenges to the Community's own system --supranationalism, in both its facets.

FOOTNOTES

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++ B.A. (Sussex); LL.B (Cantab); Diplôme of the Hague Academy of International Law, Assistant to the Department of Law, European University Institute, Florence. © J.H.H. Weiler.  
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1. The Treaty Establishing the European Coal and Steel Community (hereinafter: Treaty of Paris) which launched the Community experience was signed in Paris on April 18, 1951. Treaties establishing the European Economic Community (hereinafter: Treaty of Rome) and the European Atomic Energy Community (hereinafter: Euratom) were signed in Rome on March 25, 1957. The Schuman Declaration of May 9th, 1950 may be regarded as the starting point: See 5/6 European Community 3 (1980) and see also, 13 Bulletin of European Communities 1.2.1. (1980). But see note 36 infra.

Given the measure of institutional integration among the three Communities I shall refer to the combined structure as the Community.

2. The treatment here will be confined solely to the Community experience although other regional organizations such as the Council of Europe have undoubtedly played a role in European

integration and display certain supranational features. See, e.g., Drzemczewski, The Sui Generis Nature of the European Convention on Human Rights, 29 I.C.L.O. 54 (1980).

3. Greece acceded formally on January 1, 1981. The Treaty of Accession was signed in Athens on May 28, 1979. For details of the conditions of accession and the main provisions in that Treaty, see 12 Bulletin of European Communities 1.1.1 - 1.1.19 (1979).

Spain and Portugal are candidates for accession within this decade.

4. For a useful analysis of the possible impact of, and problems created by, accession, see D. Marguand, Parliament for Europe (Jonathan Cape, London, 1979) esp. at 30-33.
5. One should not exaggerate the potential for immediate change in the institutional balance which the new directly elected Parliament may have. For a restrained and cautious analysis emphasizing ". . . the limits to the influence upon public policy of a directly elected European Parliament", see The Policy Implications of Direct Elections (various authors) 17 Journal of Common Market Studies 281-349 (1979).

At the same time the Parliament has already exhibited its constitutional aggressiveness and legal astuteness by such acts as rejecting the 1980 budget in toto and, in a more subtle manner, voting an increased supplementary budget in 1980 deliberately so as to use unspent surpluses in 1981 (see 16 European Parliament Column 1 (1980)). This last move has precipitated a political crisis whereby Belgium, France and Germany have refused to make their full Community budgetary contributions. The Commission has commenced legal proceedings

against the recalcitrant states. In addition, the Parliament, astutely using a provision in the Statute of the Court of Justice (Art. 37) has managed to intervene in Court proceedings in which a Council regulation (Reg. 1293/79) was contested on the grounds that Parliament was not consulted, contrary to Treaty requirements

relating to that class of measure. The Court upheld the Parliamentary contention. See Joined Cases 138 and 139/79 Maizena Gesellschaft v. Council; Roquette Frères v. Council. Decision of 29 October 1980 (not yet reported).

6. "For years the Community has been described as being in crisis. But when crises exist permanently, merely changing their immediate causes, it should be asked if they really are crises, that is to say exceptional conflict situations. It is rather more likely that the conflicts the Community has so far experienced are significant of tensions inherent in the integration process itself". Everling, Possibilities and Limits of European Integration, 18 Journal of Common Market Studies 217 at 217 (1980).

Whilst I accept Everling's analysis of the Community as a system of crises my argument is not that the present problems and challenges are inherently more difficult than previous ones, but rather that conditions for solution--such as the present economic climate--have worsened.

7. Of course when assessing the Labour Party decision, allowance must be made for the traditional licence of Opposition parties out of Government. For the Debrè-Foyer Bill see, Proposition de Loi portant rétablissement de la souveraineté de la République en matière d'énergie nucléaire, No. 917, Assemblée Nationale, 2ème session extraordinaire de 1978-1979.

8. Case 232/78 Commission v. French Republic /1979/ E.C.R. 2729 in which the judgment was given, and Joined Cases 24/80 R and 97/80 R of 28.3.1980 Commission v. French Republic in which non-compliance was established (even though the Commission failed in this latter case to get interim measures against France). See Editorial Comments, The Mutton and Lamb Story: Isolated Incident or the Beginning of a New Era? 17 C.M.L. Rev. 311 (1980).

A case of non-compliance occurred when Italy failed to follow judgment against it in Case 7/68 Commission v. Italian Republic /1968/ E.C.R. 4 and thus had to be prosecuted again, Case 48/71 Commission v. Italian Republic /1972/ E.C.R. 532.

This however was an instance of dilatoriness rather than outright defiance as in the Mutton Case. Even more dangerous has been French judicial defiance by its Conseil d'Etat which, apart from rejecting the principle of supremacy (to be discussed infra), has rejected positive principles of Community law as decided by the Court of Justice. See Cohn-Bendit case (December 1978 D 79 J 155). This defiance is confined to the administrative branch of the judiciary.

9. Although the term supranationalism is used commonly in the literature, within the framework of Treaties establishing the Community it is only mentioned in the Treaty of Paris (Article 9). The term, unjustifiably, became associated too much with extreme integrationalism and was dropped in the Treaty of Rome and Euratom.
10. Robertson, Legal Problems of European Integration, 91 RDC 105 at 143 (1957).
11. A. Shonfield, Europe: Journey to an Unknown Destination (Allen Lane, London, 1972) at 17.

12. In this context I am using the term "federal" in its widest, most fundamental sense of sharing in governance over activities. Elazar usefully records the origins of the term

. . . first in the biblical hebrew term brit, then the latin foedus (literally 'covenant'), from which the modern 'federal' is derived. . . Elaborated by the Calvinists in their federal theology, the concept formed the basis for far more than a form of political organization. . . /T/he original use of the term deals with contractual linkages that involve power sharing--among individuals, among groups, among states. This usage is more appropriate than the definition of modern federations, which represents only one aspect of the federal idea and one application of the federal principle.

D. Elazar (ed.), Self Rule/Shared Rule (Turtledove, Ramat Gan, 1979) at 3.

This overview of the federal principle is particularly important since although the Community is, in this wide sense, a "federal" entity, it decidedly does not conform to the traditional notion of having (or aspiring to have) a strong important centre and a periphery linked thereto.

13. The Community is new in the post-World War II period. The 19th century German Zollverein (Keeton, The Zollverein and the Common Market, in Keeton & Schwarzenberger (eds.), English Law and the Common Market (Stevens and Sons, London, 1963) 1) and the Danube Commission (Smith, Danube, 4 Yearbook of World Affairs (1950) 191) were two antecedents in earlier days. The term supranationalism also predates the Community. Schermers cites Einstein as writing to Freud in 1932 and stating "At present we are far from possessing any supranational organization." H.G. Schermers, International Institutional Law, Vol. 1 (Sijthoff, Leiden, 1972) at 20. It is, of course, possible to adopt an a-priori definition but this theoretical approach depends on a choice of criteria

- which will necessarily be subjective. Schermers prefers this approach adopting a useful list of such criteria but even he is then pushed to conclude that since to be "completely supranational, an international organization should fulfil all [these criteria] . . . no such supranational organization exists." Id. at 21. I have preferred a more inductive approach relying on the experience of the Community itself even if the result is not as theoretically satisfying as the a-priori method. See also, G. Mally, The European Community in Perspective (Lexington Books, Lexington, 1973) esp. at 26.
14. This is perhaps my bias as a Common Law lawyer: "The pursuit of definitions has never appealed much to lawyers because they are aware that the concepts they employ have been rough-hewn by history and stoutly resist philosophical formulation." Pollock, The Distinguishing Mark of Crime, 22 M.L.R. 495 (1959).
15. P. Hay, Federalism and Supranational Organizations (University of Illinois Press, Urbana and London, 1966). In its historical synthesis parts Hay's study offers the most exhaustive treatment of different studies of supranationalism especially in its legal and institutional aspects. Moreover, the analytical parts of the study have retained their value despite the passage of years. Even today the book repays careful study. I have relied on Hay for the brief survey of different treatments in the present retrospective analysis.
16. Id. chapter 2 and appendices pp. 77-78.
17. See, e.g. Nørgaard, The Position of the Individual in International Law (Munksgaard, Copenhagen, 1962) (International Law Approach) and Kohnstamm, The European Coal and Steel Community 90 RDC 1 (1956 II) and comments thereon in Hay, id.

18. ". . . an unsatisfying shrug" Hay, Federal Jurisdiction of the Common Market Court 12 Am. J. Com. L. (1963) at 39. Cf. Hay id. at 44 and note 106.
19. Thus in a leading current treatment Schermers has no hesitation in including the Community in his general treatise on international institutional law but he is careful to distinguish between supranational and intergovernmental organizations. See Schermers, note 13 supra at 19-24.
20. E.g. Robertson, note 10 supra, at 145.
21. In their comprehensive collection of texts, cases and readings, Stein, Hay and Waelbroeck suggest six phases (The Phase of Enthusiasm 1945-1949; Towards Integration by Sectors 1950-1955; Relaunching 1955-1958; A Split--A Bridge--Political "Relaunching"? 1958-1963; Crisis-Consolidation 1963-1968; Enlargement 1969- ). E. Stein, P. Hay, M. Waelbroeck, European Community Law and Institutions in Perspective (Bobbs-Merrill, Indianapolis, New York, 1956) pp. 10-13. Greilsammer, suggesting that "/t/here is virtually no process that can be delimited in time as well as the process of European integration" opts for four periods 1946-1950; 1950-1958; 1958-1969; 1969- . Greilsammer, Theorizing European Integration in its Four Periods 2 The Jerusalem Journal of International Relations 129 (1976) (for the evaluation of the different periods see text to notes 25-26 infra). Dahrendorf suggests three less well-defined phases: The Founding Fathers--Monnet et al. (approx. 50s); Founding sons--Hallstein et al. (approx. 60s), and the present generation. R. Dahrendorf, A Third Europe? (E.U.I., Florence, 1979--Jean Monnet Lecture).
- Pryce also suggests six phases although different from Stein et al.: 1950-51; 1952-54; 1955-57 (Relance); 1958-62 (New Com-

munities in Action); 1963-69 (Conflict, Crisis and Stagnation); 1969-72 (Second Relance). R. Pryce, The Politics of the European Community (Butterworths, London, 1973) at 1-27.

22. Stagnation of supranationalism however, does not imply stagnation of substantive integration.
23. Greilsammer id.
24. At 141 (emphasis added).
25. The major decision on direct effect was given on February 5, 1963. On supremacy on July 15th, 1964. For more detailed discussion see text to note 41 infra.
26. The period of De Gaulle in which UK accession was rejected (on a French "veto") and in which the Luxembourg crisis occurred created a general overhaul of theories of integration. See e.g. Haas, The Uniting of Europe and the Uniting of Latin America 5 Journal of Common Market Studies 315 (1967) at 325-331.

An extremely pessimistic assessment in the mid-sixties--with statements such as "Supranational structures may not survive into 1966"--is that of Heathcote; The Crisis of European Supranationality, 5 Journal of Common Market Studies 140 (1966). The analysis, strongly influenced by the political crises of that period, is instructive in illustrating the cleavage. Heathcote, at 141, adopts an a priori definition of supranationality according to which "a supranational organisation is one which (a) bypasses the nation-state's authority and deals directly with the citizens; which (b) takes over some functions traditionally exercised by the nation-state; and (c) is in the position to originate decisions not only on behalf of the state but despite it" It is interesting that there is almost exclusive concentration on the decision making actors and processes and only oblique--if at all--reference to the validity and status of the decisions adopted vis-à-vis national measures. The latter are

the traditional preoccupations of the lawyer. And yet without this latter type of validity the power to originate measures despite Member State opposition would have precarious value if these measures could subsequently be overturned by a Member State change of mind; Heathcote's first criterion,--the authority to deal directly with the individual--introduced already by the Treaty of Paris (a power which, incidentally, remained largely intact during the Sixties) has been overtaken by developments in the Sixties by decisions on self-executing measures and supremacy which are more revolutionary, have greater impact and could far better serve as distinguishing criteria for supranational organizations.

Puchala, although dealing with the wider concept of international integration captures with his 'blind men and elephant' metaphor neatly, if somewhat acidly, the problem of the disciplinary cleavage: "Each blind man . . . touching a different part of the large animal, and each concluding that the elephant international integration had the appearance of the part he touched." Puchala, Of Blind Men, Elephants and International Integration, 10 Journal of Common Market Studies 267 (1972) at 267. His own sophisticated "concordance system" strangely pays little attention to the constitutional developments which could have been regarded as important supportive elements, at 277-284 but see at 269-271.

27. Note 26 supra, and Greilsammer, note 21 supra at 142-146.
28. "Constitutionalization" implies a combined and circular process by which the Treaties were interpreted by techniques associated with constitutional documents rather than multipartite treaties and in which the Treaties both as cause and effect assumed the "higher law" attributes of a constitution. For an interesting

discussion see Proceedings of the 72nd Annual Meeting of the American Society of International Law 166-197 (1978).

The German Federal Constitutional Court has actually said that "The European Economic Community Treaty is, as it were, the constitution of this Community" Federal Constitutional Court, First Chamber, Decision of October 18, 1967; 1967 AWD 477-78; 1968 Europarecht 134-37 cited by Stein in Proceedings id. 168.

29. See, e.g., Pescatore, note 32 infra.
30. Hay, note 15 supra, p. 69.
31. Hay, id., p. 31 ff.
32. Cf. P. Pescatore, The Law of Integration (Sijthoff, Leiden, 1974). In his excellent study Judge Pescatore tends to play down the institutional crises (e.g. pp. 11-19) such as the Luxembourg accord. Consequently his treatment gives a general impression of continuing progressive evolution.
33. I prefer "decisional" to "institutional" since the former conveys the need to look at the actual processes and not merely at formal functions. Far more sophisticated tools and frameworks have been offered for the analysis of federal models in general and the Community model in particular. Elazar's series of matrixes is a recent most valuable contribution as regards the former (see, Elazar, The Role of Federalism in Political Integration, in D.J. Elazar (ed.) Federalism and Political Integration (Turtledove, Ramat Gan, 1979) 13). See also W.H. Riker, Federalism: Origin, Operation, Significance (Little, Brown, Boston, 1964). Lindberg's model has become something of a classic as regards the latter (see Lindberg, The European Community as a Political System: Notes Toward the Construction of a Model 5 Journal of Common Market Studies

359 (1967) and L. Lindberg & S. Scheingold, Europe's Would-be Polity: Patterns of Change in the European Community (Prentice Hall, New Jersey, 1970). The limited framework here is probably sufficient for our purposes since it concentrates on supranationalism in its instrumental facet and not on the uses to which it has been put in the evolvement of substantive policies and the evaluation thereof. The limited framework will also enable me, in the confines of this essay, to flesh it out so that it does not remain too abstract.

34. A fully fledged decisional analysis would have to take separately each single policy, determine the factors, forces and actions relevant thereto and attempt to trace the decision making process. Puchala, note 26 supra at 278, has constructed such a model as regards the agricultural sector. Inevitably, this cannot be done here and I have to content myself with a general Community analysis even if at a great sacrifice of sophistication. It is submitted however that the general Community analysis remains relevant to individual sectors. Naturally I do not claim that this framework can achieve precise measurement. It fails, thus, one of Deutsch's crucial tests for "theoretically powerful" models. (See K. Deutsch, The Nerves of Government (The Free Press of Glencoe, New York, 1963) Ch. 1.) Still, as providing a rough measuring instrument enabling at least the indications of trends it may be considered adequate for this retrospective analysis. Detailed frameworks such as Puchala's, carry the danger of remaining too theoretical and incapable of practical applications. Thus, in H. Wallace, N. Wallace & Webb (eds), Policy Making in the European Community (John Wiley and Sons, London, 1976) which analyzes policy making in specific fields, the authors, including Puchala himself, had to adopt less detailed frameworks.

35. Lindberg, in his "scale of decision locus", note 33 supra at 356-357, offers a more comprehensive breakdown along a ". . . continuum ranging from decisions taken entirely or almost entirely in the Community system" to "decisions taken entirely by the national systems individually". The full range consists of:

1. Decisions . . . taken entirely in the EC system
2. Decisions . . . taken almost entirely in the EC system
3. Decisions . . . taken predominantly in the European Community system, but the nation states play a significant role in decision making
4. Decisions are taken about equally in the European Community system and the nation-states
5. Decisions are taken predominantly by the nation states, but the European Community system plays a significant role in decision making
6. Decisions are taken almost entirely by the nation states
7. Decisions are taken entirely by the nation states individually

This model is less useful for us, since its main purpose is to determine in relation to a list of substantive functions which political systems fulfil, the degree to which the Community is "substituting" the Member States. In legal terms its purpose would be to delineate substantive Community jurisdiction and competence. It does not focus on the decision making process itself and thus its utility here may be questioned. Since, if there is a measure of truth in the assessment ". . . that the Council of Ministers is in fact no longer a Community Institution, but only a sort of clearing house for national interests, which by using the principle of unanimity prevents any further progress of the European Community" (Aigner, Member of the European Parliament, Debates of the European Parliament 10.7.80 p. 290 (English version)), then in

terms of the instrumental means of supranationalism, the fact that the locus of decision falls within Lindberg's first category, becomes less meaningful. Lindberg's "scale of peripheralization-centralization" (drawing on Riker) and of systems and subsystems goes some way towards this decisional analysis but is, again, too detailed to be of use in a limited survey.

36. Articles 14, 15 ESC. Interestingly, the Schuman Declaration merely states: "Par la mise en commun de productions de base et l'institution d'une Haute Autorité nouvelle, dont les décisions lieront la France, l'Allemagne. . ." indicating decisions binding on states and not in states. The formal supranational leap was effected by the actual Treaty framers who gave the High Authority power to adopt measures directly effective in the legal order of the Member States.
37. Decisions binding on members may be taken by UN organs see, e.g., Charter of UN, ch. VII. For Commentary, see Y. Dinstein, International Law, vol. 5 pp. 53-57 (Schocken, Tel-Aviv, 1979).
38. Robertson, note 10 supra.
39. See note 13 supra. Religious law--especially where given exclusive jurisdiction in, say, family matters--may be regarded as supranational in this sense. The Catholic Church and Jewish Rabbinate could therefore be regarded in old and modern times as being supranational.
40. The literature on the doctrine is immense. For a lucid up-to-date statement see, e.g., D. Wyatt and A. Dashwood, The Substantive Law of the EEC ch. 3 (Sweet and Maxwell, London, 1980). For wider studies, see, Waelbroeck, Effets Internes des Obligations Imposées à l'Etat, in Miscellanea W.J. Ganshof Van Der Meersch, Tome Deuxième (Bruylant, Bruxelles, 1972) 573. Bebr, Directly Applicable Provisions of Community Law: The Develop-



ment of a Community Concept 19 I.C.L.O. 257 (1970).

41. Case 26/62 Van Gend en Loos v. Nederlandse Administratie der Belastingen /1963/ E.C.R. 1.
42. The main operative part of the judgment is so well known as to render citation almost superfluous. For the benefit of non-Europeans, the following are the key elements in the judgment:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to Governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee. . . This confirms that the States have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. . . The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals

at 12.

43. In Case 127/73 Belgische Radio en Televisie v. SABAM /1974/ E.C.R. 51, the European Court held that Articles 85 and 86 EEC were capable of bestowing rights and duties on individuals inter se. It should be noted however that these Treaty articles themselves involved actions of individuals. Cf. case 13/61 Bosch v. de Geus /1962/ E.C.R. 45 in which this development is already anticipated. (See Wyatt and Dashwood, note 40 supra, at 29-30.) The doctrine was evolved further in a subsequent case

which was concerned with the general principle embodied in Article 7 EEC (non discrimination on grounds of nationality) and which, unlike SABAM, did not necessarily involve individuals. Even the Commission--usually very integrationist minded--doubted whether this Treaty principle should be given "horizontal effect". The court took the radical position and held that the Treaty could indeed bestow rights and duties on individuals inter se. Case 36/74 Walrave and Koch v. Association Union Cycliste Internationale /1974/ E.C.R. 1405. See also Case 43/75 Defrenne v. Sabena /1976/ E.C.R. 455.

44. It is not proposed to discuss here the well known distinction between direct applicability and direct effect. (See, e.g., Winter, Direct Applicability and Direct Effect, Two Distinct and Different Concepts in Community Law, 9 C.M.L. Rev. 425 (1972). The extension of direct effect to directives was remarkable. Whereas Regulations by virtue of Article 189 EEC are directly applicable and thus inevitably, if self executing, produce--by analogy to the reasoning of the Court in relation to Treaty provisions--automatic direct effect, directives are only binding as to the result but leave to the national authorities the choice of form and method. It may then have been thought that they could not produce direct effect. See Joseph Aim and Société SPAD v. L'Administration des douanes /1972/ C.M.L.R. 901. The Court of Justice, in a step-by-step approach, has applied the doctrine even though subject to possible different structural conditions (note 155 infra) to directives as well. Cases signalling this evolution are: Case 9/70 Franz Grad v. Finanzamt Traunstein /1970/ E.C.R. 825 (direct effect of a time limit in a directive--"vertical" effect); Case 41/74 Van Duyn v. Home Office /1974/ E.C.R. 1337 (direct effect of a substantive provision of a directive but one which elabo-

rated a substantive right bestowed by the Treaty--"vertical" effect); Case 51/76 Verbond van Nederlandse Ondernemngen v. Inspector der Invoerrechten en Accijnzen /1977/ E.C.R. 113 (direct effect of a substantive provision of directive concerning an obligation not directly bestowed by the Treaty and against which a national implementing measure was reviewed--"vertical" effect. Cf. Case 21/78 Delkvist /1978/ E.C.R. 2327). On the possible extension of "horizontal" direct effect to directives see Easson, Can Directives Impose Obligations on Individuals 4 E.L. Rev. 67 (1979). But see now Case 148/78 Ratti /1979/ E.C.R. 1629 (Advocate General submissions) and Usher, The Direct Effect of Directives E.L. Rev. 268 (1979); see also Timmermans, note 155 *infra*.

45. Case 6/64 Costa v. ENEL /1964/ E.C.R. 585. With the same reservations expressed in note 42 *supra* the following are the main operative elements in the judgment:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community, and more generally, the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reci-

procity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws without jeopardizing the attainment of the objectives of the Treaty set out in article 5(2) and giving rise to the discrimination prohibited by article 7

at 593-594.

46. Another important instance of constitutional interpretation occurred in Case 38/69 Commission v. Italian Republic /1970/ E.C.R. 56 in relation to Community "secondary" legislation. The Italian Government argued that a certain internal Community measure (pursuant to Article 235 EEC and accelerating the realization of the Common Market) had a contract basis as between the Member States and constituted an international agreement to which even reservations could be made. The Court gave short shrift to the argument upholding the institutional rather than contractual nature of Community measures.
47. Here, of course, we have one of the most intractable problems of Community law. The treaty of Rome is in many of its provisions fairly general lending itself to expansive teleological interpretation by the Court. This coupled with certain "elastic" clauses (e.g. Art. 235 EEC) gives a wide measure of latitude to the policy making organs to extend the boundaries of Community competence. Often this meets with national resistance. Cf. Close, Harmonisation of Laws: Use or Abuse of the Powers under the EEC Treaty? 3 E.L. Rev. 461 (1978).
48. Case 14/68 Walt Wilhelm and Others v. Bundeskartellamt /1969/ E.C.R. 1.

49. Case 106/77 Italian Finance Administration v. Simmenthal /1978/ E.C.R. 629.
50. Recital 3 of Judgment.
51. Recitals 7-9 of Judgment.
52. See, P. Barile (ed.) Il Primato del Diritto Comunitario e I Giudici Italiani (Franco Angeli, Milano, 1978).
53. The case involved, naturally, a combination of direct effect and supremacy issues. In relation to supremacy the court stated in Recitals 17-23 that

In accordance with the principle of precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but--in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States--also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community Provisions. . . /E/very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provisions of national law which may conflict with it, whether prior or subsequent to the Community rule. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside na-

tional legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law. This would be the case in the event of a conflict between a provision of a Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary

(emphasis supplied).

The internal Italian provision decided upon by the Italian Constitutional Court whereby any question of conflict between Community law and national law was a constitutional issue, resolution of which must be decided by that Constitutional Court itself by an internal reference from the lower court can be criticized in terms of the general efficiency of the Italian legal system. It resembles the Amparo institution which led to the "degeneration" of an important constitutional mechanism in the Mexican legal order. See M. Cappelletti, Judicial Review in the Contemporary World (Bobbs-Merrill, Indianapolis, 1971) at 20-21.

From the point of view of European law, the European Court's decision contains a possible ambiguity since, as seen, its ruling is applicable to a ". . . national court having jurisdiction to apply such law . . .". It could possibly be argued that in cases of conflict the lower national court, by virtue of the decision of the Italian Constitutional Court, has no such jurisdiction. Since the jurisdictional competence of courts is usually a matter for the national legal order, the Court of Justice could not interfere in this matter any more than if certain lower courts were denied jurisdiction over matters involving a large sum of money even if concerned with Com-

munity law.

54. See generally, Bebr, How supreme is Community Law in the National Courts?, 11 C.M.L. Rev. 479 (1974) 3.

In the Netherlands and Luxemburg, having a monist system which acknowledges the supremacy of treaty law, acceptance was not difficult. (See Articles 63 and 65, 66, 67 of the Dutch Constitution.) Application of the European Court's decision in, say, Van Gend en Loos was in fact non-problematic. As regards Luxemburg see Pescatore, Prééminence des traités sur la loi interne selon la jurisprudence Luxembourgeoise /1953/ Journal des Tribunaux 455.

In Belgium, the situation was constitutionally ambiguous until the landmark decision of the Belgian Cour de Cassation in the Le Ski Case /1972/ C.M.L.R. 373 in which the Belgian Supreme Court adopted the most full-blooded version of supremacy as required by the European Court. The question of a Community provision coming into direct conflict with norms of the Belgian (and French) Constitution arose in a recent decision--Case 149/79 Commission v. Kingdom of Belgium decision of 17.12.80 (not yet reported). The Court remitted the case back to the parties for further clarification before final resolution. The Belgian government in its pleading did not deny that Community rules override national rules but suggested that in interpreting the meaning of a term in the Treaty (in that case "public service") the Court should use an approximation of the Constitutional law of the Member States as an interpretative aid.

55. This was the case in Germany and Italy. See, German Handelsgesellschaft Case /1974/ 2 C.M.L.R. 551 (Decisions of 29.5.1974 BVerfG 37; 271); and Italian Frontini Case /1974/ 2 C.M.L.R. 386. For a useful discussion on the implications of this case see H.G. Schermers, Judicial Protection in

the European Communities (Kluwer, Deventer, 1979) pp. 92-97.

Note that the German Federal Constitutional Court was concerned with constitutional safeguards as regards legislation; the supremacy challenge was only indirect. Otherwise, the German Federal Constitutional Court has fully accepted the supremacy of Community law even over subsequent national law--see, German Lütticke Case, Bundesverfassungsgericht decision of June 9, 1971 /1971/ AWD, 418-420 (BVerfG 31; 145). The German Federal Constitutional Court also rejected the possibility of Verfassungsbeschwerde (constitutional complaints) as against acts of the Community authorities limiting this type of recourse to action by German public authorities. See German Constitutional Rights case, Bundesverfassungsgericht decision of October 18, 1967 /1967/ AWD 477 (BVerfG 22; 293); and note in 5 C.M.L. Rev. 483 (1967-68).

56. However, unless the German Federal Constitutional Court modifies its own position (cf. now BVerfG decision of July 25, 1979, 15 Europarecht 68 (1980)) the conflict cannot be fully resolved until the Community has a written bill of rights which corresponds to the guarantees of the German basic law. Another condition which the German Federal Constitutional Court imposed, which has been only partially fulfilled is the evidence of a democratically legitimated parliament directly elected by general suffrage (which now exists) which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level. Whereas the demand for a codified bill of rights may not be unreasonable the latter demand is fanciful and fails to appreciate the political nature and political potential of the Community. It is doubtful whether the Parliament will ever get full legislative powers. It can hope perhaps for co-decision powers. The Council of Ministers will not--unless fundamental changes in the Treaty take place--be subject to political control by the European Parliament.

57. The French Cour de Cassation (Chambre Mixte) accepted the doctrine in the celebrated case Administration des Douanes v. La Société "Cafés Jacques Vabre" S.A. (1975) 2 C.M.L.R. 336. The Court relied however on Article 55 of the French Constitution which gives Treaty provisions (subject to certain conditions, esp. reciprocity) a force higher than French statutes even those subsequently enacted. This reasoning does not amount then to full acceptance of the shift in the Grundnorm. It should be noted that Procureur Général Touffait had explicitly requested, in relation to Article 55 of the French Constitution, that the Court should not ". . . mention it and instead base [its] reasoning on the very nature of the legal order instituted by the Rome Treaty". This the Court implicitly declined to do. In a subsequent case, however, Clave Bouhaten von Kempis v. Geldolf (Husband and Wife) [1976] 2 C.M.L.R. 152 the 3rd civil chamber arguably ". . . did take the plunge . . ." (March-Hunnings, Rival Constitutional Courts: A Comment on Case 106/77 15 C.M.L. Rev. 483 at 484 (1978)) and accepted the doctrine without reference to Article 55 of the French Constitution. The Criminal Chamber of the Cour de Cassation has also been Community minded--see, Administration des Constitutions Indirects v. Ramel [1971] C.M.L.R. 357; and Republic v. Von Saldern et al. noted in 10 C.M.L. Rev. 223 (1971). By contrast the Conseil d'Etat has, basing itself on somewhat antiquated notions of separation of powers, refused the acceptance of the supremacy principle as applied to parliamentary "loi". The doctrine would probably apply to governmental decrees (cf. Cohn-Bendit case, note 8 supra). See Syndicat Général des Fabricants de Semoules [1970] C.M.L.R. 395. See also, Syndicat des importeurs de vêtements et produits artisanaux C.E. 28.5.1979, and C.E. 22 Oct. 1979 [1980] A.J.D.A. 95. On the ambiguous position of the French Constitutional Court, see, Mitchell, What Happened to the Constitution on 1st January 1973? 2 Cambrian L. Rev. 69 (1980) at 78-79 and notes therein. See also Kovar & Simon, Some Reflections on the Decision of the French Constitutional Council of December 30, 1976 14 C.M.L. Rev. 525 (1977).

58. Ireland actually introduced a Constitutional amendment--see Article 29, Third amendment to Irish Constitution of 1972. And see Temple-Lang, Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty 9 C.M.L. Rev. 167 (1972). The Danish Constitution already had a provision of delegation of powers to international organizations (Article 20 of Danish Constitutions). But see, Due and Gulman Constitutional Implications of the Danish Accession to the European Communities 9 C.M.L. Rev. 456 (1972) which analyzes the debate as to the possibility of Danish compliance with the principle of supremacy especially vis-à-vis constitutional provisions (at 265-267). There have been very few references from Denmark to the European Court so that the matter is still judicially open. See Rasmussen, Survey of Cases 4 E.L. Rev. 484 (1979).
59. See e.g. Wintertorn, The British Grundnorm: Parliamentary Supremacy Re-examined 92 L.Q.R. 591 (1976). But see Mitchell, note 57 supra.
60. In the most recent case--indeed the first case in which the House itself made a reference under Article 177--R. v. Henn & Darby [1980] 2 W.L.R. 597. Their Lordships did not raise directly the question of supremacy. They did however accept the duty to refer and by implication the binding authority of Community law as interpreted by the European Court. Note however that in any event this case was not concerned with British legislation subsequent to Community law. See, Faull, Moralité publique et libre circulation des produits 4 C.D.E. 446 (1980); Weiler, Europornography, First Reference of the House of Lords to the ECJ, 44 M.L.R. 91 (1981).
61. Lord Denning's judicial statements have so oscillated that they must now be taken with a measure of caution. In Blackburn v.

A.G. /1971/ 2 All E.R. 1380 he said "We have all been brought up to believe that in legal theory, one Parliament cannot bind another and that no Act (such as the European Communities Act, Sections 2 and 3 of which sought to entrench the supremacy of Community law) is irreversible . . . if Parliament should /try and revoke the Act/, then I say we will consider that event when it happens" at 1382. It would seem thus that he was acknowledging that the sovereignty principle was a legal rule which could be changed by the Courts and that in the case of the Treaty of Rome that possibility of Grundnorm shift was not excluded. By contrast in Felixstowe Dock and Railway Co. v. British Transport Docks Board /1976/ 2 C.M.L.R. 655 he stated "It seems to me that once a Bill is passed by Parliament and becomes a statute, that will dispose of all this discussion about the Treaty. These courts will then have to abide by the Statute without regard to the Treaty at all" at 664. In two subsequent cases his statements became more subtle. Thus in Shields v. E. Coomes (Holdings) Ltd. /1979/ 1 All E.R. 456 he made the following hypothesis:

"Suppose that the Parliament of the United Kingdom were to pass a statute inconsistent with article 119 /dealing with equal pay for women/ by giving the right to equal pay only to unmarried women. I should have thought that a married woman could bring an action in the High Court to enforce the right to equal pay given to her by article 119. . . If /the courts/ should find any ambiguity in the statutes or any inconsistency with Community law, then /it/ should resolve it by giving the primacy to Community law"

at p. 460. This may look like acceptance of supremacy but Denning was careful to choose a situation of inconsistency rather than conflict that is where the Community provision extended British law and did not directly conflict with it. But in Macarthy's Ltd. v. Smith /1979/ 3 All E.R. 325, he stated that filling the

gaps in this way was on the assumption

". . . that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation. As I said in Blackburn v. Attorney-General: 'But if Parliament should do so, then I say we will consider that event when it happens.' Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty"

(at 329). With which Lawton LJ agreed.

The third judge (who subsequently retracted somewhat: cf. /1980/ 3 W.L.R. at 949) said "If the terms of the Treaty are adjudged Luxembourg to be inconsistent with the provisions of the Equal Pay Act 1970, European law will prevail over that municipal legislation." I.e. adopting a supremacy position although not in relation to subsequent legislation. This position does not change in the light of the final decision of the court of appeal once the reference from Luxembourg was received. Denning said then /1980/ 3 W.L.R. 947 at 949:

". . . It is important now to declare--and it must be made plain--that the provisions of article 119 of the E.E.C. Treaty take priority over anything in our English statute on equal pay which is inconsistent with article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it"

and:

". . . Community law is part of our law by our own statute, the European Communities Act 1972. In applying it, we should regard it in the same way as if we

found an inconsistency between two English Acts of Parliament: and the court had to decide which had to be given priority."

Denning could be read to be saying that the 1972 European Communities Act is no more nor less than any other Act and that supremacy in this case is simply a result of it being enacted after the 1970 Equal Pay Act which was at issue (although several provisions were reenacted in the 1975 Act).

A leading authority summarizes the situation thus:

(1) While the European Communities Act 1972 remains in force, existing directly applicable or effective Community law will be the law in the United Kingdom, notwithstanding any legislation prior to the Act which is inconsistent with such directly applicable or effective law;

(2) Community law which is not directly applicable or effective will have no force in the United Kingdom until given effect by Act of Parliament or by order or regulation enacted pursuant to powers given by the European Communities Act 1972 or other legislation;

(3) Directly applicable or effective Community law will take effect in the United Kingdom, notwithstanding any legislation prior to the 1972 /European Communities/ Act, or even after the Act but prior to the coming into effect of the Community rule;

(4) A subsequent Act of Parliament which is inconsistent with a rule of Community law will be read subject to the rule of construction in s. 2(4) so that Community law can take effect notwithstanding the Act, at any rate if the Court is satisfied that the subsequent inconsistent legislation is not intended, expressly or impliedly, to repeal s. 2(1) or (4) of the 1972 /European Communities/ Act; but

(5) Any subsequent Act of Parliament inconsistent with the European Communities Act 1972, including one which repeals the latter in whole or in part and one which is intended to limit the application of s. 2(1) and (4), will be given effect by the United Kingdom courts.

L. Collins, European Community Law in the U.K. (Butterworths, London, 1980) at pp. 25-26. But see note 153 infra.

62. Note 41 supra at p. 7 (emphasis supplied).

63. Id. at pp. 23-24.

64. I am most indebted here to a paper delivered by Professor M.

Waelbroeck at a conference held in Bellagio, Italy in July 1979 entitled Community Preemption and Related Problems on which I have relied extensively in this part. See also D.J. Gijlstra et al. (eds.) Leading Cases and Materials on the Law of the European Communities (Kluwer, Deventer, 1977 at 88-95).

65. Thereby indirectly prohibiting national legislation even if compatible in fields already occupied by a regulation. See e.g. Case 34/73 Variola /1973/ E.C.R. 990; Case 39/72 Commission v. Italy /1973/ E.C.R. 113.
66. Case 22/70 Commission v. Council /1971/ E.C.R. 273.
67. Recitals 17-18 of Judgment p. 274.
68. Opinion 1/75 /1975/ E.C.R. 1335.
69. Id. at 1363. Note however that unlike ERTA where there were no Treaty provisions at all for external competence in relation to transport, the OECD case fell within the commercial policy which has such provisions.
70. Joined cases 3, 4 and 6/76, Cornelis Kramer and Others /1976/ E.C.R. 1279.
71. Id. Recitals 35-39 of Judgment, p. 1310.
72. Treaty of Accession, Article 102.
73. Opinion 1/78 /1979/ E.C.R. 2871.
74. Recitals 57-60 of Judgment, pp. 2917-2918.
75. See note Gijlstra, note 64 supra.

76. Hanson, Methods of Interpretation--A Critical Assessment of Results, in Judicial and Academic Conference (Court of Justice of the European Communities, Luxemburg, 1976) II.
77. Id. at II 9; II 25 and II 26. Hanson's critique is not merely one of judicial policy and judicial role. In analyzing Van Gend en Loos he makes an acute distinction between categorical Treaty provisions which prescribe a particular consequence (e.g. Article 85(2)) and imperative provisions which only prescribe a legal obligation. He maintains that the doctrine of direct effect as expounded in Van Gend en Loos and its progeny renders--unjustifiably and illegitimately--all imperative provisions categorical.
78. Id. II 25.
79. Whereby, unlike the classical condominium in which there is joint national control over territory, here there is joint control over economic and other sectors of public policy.
80. Cf. Tenth Amendment to US Constitution.
81. On the doctrines of implied and additional powers, see, e.g., Gijlstra, note 64 supra at 1-9. See also, Schwartz, Article 235 and law-making powers in the European Community 27 I.C.L.Q. 614 (1978) and Mitchell, note 55 supra at 73. The discussion on implied or additional powers is crucial in fully fledged federations like Canada and the U.S.A. since two sets of independent power centres exist. The issue becomes much less acute in the Community since it is the governments of the Member States which control the legislative process of the Community. Expanding the Community jurisdiction will thus ipso facto be by the consent of at least a majority of Member States. Whether

- expansion can be done through elastic clauses such as Article 235 or necessitates actual Treaty amendment is less important except in as much as individuals may contest the expansion of Community jurisdiction undertaken by their government or in ERTA situations where the Member States prefer to proceed outside the Community framework.
82. See, e.g., Case 22/70 note 64 supra (external relations-transport policy); Opinion 1/78, note 71 supra (Common Commercial Policy); Case 91/79 Commission v. Italian Republic /1980/ E.C.R. 1099 (Environmental Policy). See also Gijlstra; Schwartz note 81 supra.
83. There is scope to examine the reasons for the totally different approach of, say, the Privy Council--for many years the "supreme court" of Canada--in relation to the Canadian Constitution. Was the restrictive Privy Council approach a result of a reasoned assessment of the different character of the Canadian federation, or perhaps the result of the British Law Lords' inability to adapt to the different spirit of federal jurisprudence?
84. Cf. Hay note 15 supra at 69 ff. Mitchell, note 57 supra at 73. Objections can of course be raised by national parliaments (see, e.g., Debate in British House of Lords, July 4, 1978; see also note 8 supra) and national pressure groups, although the former have, at least in theory, the ability to control their ministers' activity at the Community level. The "political estoppel" imposed on the Governments of the Member States in challenging jurisdictional expansion was recently illustrated in Case 91/79 note 82 supra. In that case Italy was defending its non-implementation of Directive 73/404/EEC which formed part of the Community's Environmental Programme.



Although serious doubts exist as regards the Community's competence to operate in this field--(cf. E. Grabitz & C. Sasse, Competence of the European Community for Environmental Policy (1977) at 24-31)--and therefore about the legality of the Directive in question, the Italian Government which partook in evolving the Policy (see, OJ C 12 20.12.1973) could not but state in that case that it did ". . . not intend to raise the question whether the directive is valid in the light of the fact that combating pollution is not one of the tasks entrusted to the Community by the Treaty" at 1103.

85. This is not to imply the Court's role is a-political. In fact the Court has shown a high degree of political acumen in, say, changing course on the question of human rights. It has also played an important role in demarcating the division of competences between different European Community Institutions. See, e.g., Case 22/70 Commission v. Council /1971/ E.C.R. 263 and joined cases 138/79; 139/79 note 5 supra.

86. This interplay is well illustrated in C. Sasse, E. Pouillet, D. Coombes, G. Deprez, Decision Making in the European Communities (N.Y. - London, Prager Publishers Inc., 1977) and H. Wallace, W. Wallace, C. Webb (eds.) note 34 supra.
87. See Wallace et al. note 34 supra, esp. Webb, Introduction: Variations on a Theoretical Theme, 1-31; and H. Wallace, National Bulls in the Community China Shop: The Role of National Governments in Community Policy Making, 33-68.
88. This inevitable feature of Community life is not only a sharp reminder that it is still a Europe of Nations but also places quality restraints on the body. "The need to cater for the differing interests of the Member States and to accept national quotas, however unofficial, . . . inhibits the development of an elite corps of policy-makers . . ." H. Wallace, id., at 53.
89. Article 10, Merger Treaty.
90. It should be noted that apart from a few limited fields such as competition, the actual practical execution of many Community policies is in the hands of the Member States acting as agents for the Community.
91. See Pescatore, note 32 supra at 7-10.
92. See Article 149, EEC.
93. There is here an apparent paradox. To the extent that, say, the governments of all ten Member States agree on a "desired" course of action, how can this be said to be contrary to the Community spirit? For do not the governments represent the Member States which together are the Community? True as this may be, the

originating Treaties still remain the main normative basis for Community evolution. To the extent that the governments consider disregarding the Treaty objectives (without formally amending it) they may legitimately be characterized as acting contrary to the Community spirit.

94. There is a certain terminological confusion regarding "secondary" legislation. Regulations and Directives are often referred to as secondary legislation. The better view, it is submitted, is to regard them as primary legislation. For if we view the Treaty as being the Constitution of the European Communities, the legislation thereunder, by analogy to national systems, would be primary. Perhaps the power of legislation entrusted to the Commission under enabling measures of the Council may be characterized as "secondary".
95. A recent study giving a realistic appreciation of the institutional balance is S. Henig, Power and Decision in Europe (Europotentials Press, London, 1980); see also Sasse, note 86 supra.
96. Term borrowed from Marquand note 4 supra.
97. The following remarks by a leading commentator are instructive in this context. ". . . /A/11 Member States have organised their policy-making in such a way as to promote their own national interests. . . These efforts to keep the formation and implementation of Community rules under national control are sustained by the fact that the organs of the European Communities still lack a democratic legitimation of their own. . . To date, the control of European policy through national parliaments is at any rate comparably weak and is at most exerted via a detour that is through the control of governments." Sasse, The Control of the National Parliaments of the Nine over European Affairs in A. Cassese (ed.) Parliamentary Control over Foreign

Policy (Sijthoff & Noordhoff, Alphen aan den Rijn, Germantown, 1980) at 147.

98. In fact a different type of democracy deficit emerged whereby the executive branch of the governments of the Member States able to pursue policies which, perhaps, would be more open to challenge if conducted "at home". See Rogers & Bolton, The True Cost of Sanctions, The New Statesman 9.1.81.
99. Cf. Case 1/58 Friedrich Stork & Co. v. High Authority of the European Coal and Steel Community /1959/ E.C.R. 17.
100. See Cappelletti, The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis, LIEI 1 (1979). On recent developments of human rights and the Community legal order see, Economides and Weiler, Accession of the Communities to the European Convention on Human Rights: Commission Memorandum 42 M.L.R. 683 (1979). See also, case 44/79 Liselotte Hauer v. Land Rheinland-Pfalz /1979/ ECR 3727.
101. See H. Wallace, note 87 supra, at 53.
102. See, e.g., Report on European Institutions presented by the Committee of Three to the European Council (Council of the European Communities, Luxembourg, 1980) hereinafter Three Wise Men Report pp. 49-53.
103. On this effect of COREPER the Three Wise Men commented that the Commission ". . . should not, as so often happens now, be drawn into negotiating with /national experts, etc./ to find a supposedly acceptable form of the /policy/ measure". They also commented that "/t/he Commission must frame its proposals in a more independent manner". Three Wise Men Report p. 54.

104. Three Wise Men Report at, e.g., 53 and passim.
105. For texts and brief commentary see conférence de presse du Président de Gaulle, September 9, 1965; Dichiarazione del Consiglio dei Ministri delle CEE, Bruxelles, Oct. 26, 1965; Communiqué de presse sur les accords de Luxembourg, 29 janvier 1966. All in R. Ducci, B. Olivi, l'Europa Incompiuta 411-422 (Padova, Cedam, 1970). See also P.J.G. Kapteyn, P. Verloren-van Themaat, Introduction to the Law of the European Communities (London, Sweet & Maxwell, 1973) at 143-146.
106. E.g. the procedure in the Agricultural Management Committees. See text to note 114 infra.
107. E.g. Article 126 EEC--"The Council, after receiving the opinion of the Commission . . . , may . . . unanimously determine what new tasks may be entrusted to the European Social Fund."
108. I.e. where the Treaty provides for a qualified majority in Council a small number of states can veto a decision.
109. See, O.J. 71, 4.11.1961; O.J. L 326, 29.12.1969. In relation to agreements based on article 238 EEC which does not provide for a consultative Committee, the Council set up a group of national observers who "constitute . . . more than token representation, although less than active intervention". Bot, Negotiating Community Agreements: Procedure and Practice, C.M.L. Rev. 286 at 294 (1970).
110. Among commentators there is no dispute about the decline in the Commission role although opinions differ about the appraisal of the phenomenon. Costanis, The Treaty-making power of the European Economic Community: The perspective of a Decade 5 C.M.L. Rev. 421 (1967-8), Alting von Geseau The external repre-

- sentation of plural interest, 5 Journal of Common Market Studies 426 (1967) and Leopold, External Relations power of the EEC in theory and practice I.C.L.Q. 54 esp. at 59-62 (1977) tend to be more critical of this development. Bot, id, offers a more balanced approach maintaining that the exigencies of international relations and their conduct make this development largely inevitable.
111. Costanis, id. p. 435.
112. Id., p. 434 (emphasis added). But see Bot, note 109 supra at 309-310. For an amusing account of the technical obstacles which this negotiating pattern produces, see W. Field, The European Community in World Affairs (Alfred Publishing, Washington, 1976) at 105.
113. See generally Weiler, The European Parliament and Foreign Affairs: External Relations of the EEC in Cassese note 97, supra, at 151.
114. See Council and Commission Committees, Supplement 2/80 Bull. E.C. (Commission of the European Communities, Luxemburg 1980) at 18-19.
115. Id. at 22.
116. The Court of Justice affirmed the legality of Management Committees and even seemed to approve their political role. In a case before the Court it was argued first that since execution of policies involved legislative functions it should have been left entirely in the hands of the Council. The Court first acknowledged the distinction: "according with the legal concepts recognized in all Member States, between . . . measures directly based on the Treaty itself and derived law intended to ensure

their implementation. It cannot [the Court concluded] therefore be a requirement that all the details of the regulation concerning the Common Agricultural Policy be drawn up by the Council. . . ." An alternative argument was that the ". . . Management Committee procedure . . . constituted an interference in the Commission's right of decision, to such an extent as to put in issue the independence of that institution. Further the interposition between the Council and the Commission of a body which is not provided for by the Treaty is alleged to have the effect of distorting the relationships between the institutions and the exercise of the right of decision." The Court's reply was that the Management Committee procedure was a legitimate exercise by the Council of its power under Article 155 to stipulate conditions under which it would delegate power. Thus per the Court: "Without distorting the Community structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary." Case 25/70 Einfuhr- und Vorratsstelle v. Köster [1970] II E.C.R. 1161 at 1170-1171; Recitals 3-10 of Judgment.

117. Accord - Doc 115, 1968-69 at 30.9.68 of European Parliament and Resolution of 3.10.68 O.J. C 108 p. 37.

118. See generally Proposals for Reform of the Commission of the European Communities and Its Services, Report made at the request of the Commission by an Independent Review Body Under the Chairmanship of Mr. Dirk Spierenburg (Commission of the European Communities, Brussels, 1979).

119. A recent event has been the intervention in January 1981 by the British Prime Minister with the President of the Commission as re-

regards the portfolio of one of the British Commissioners.

120. The so-called "mixed agreement". See Kapteyn & Verloren Van Themaat note 105 supra at 351 ff.

121. Shonfield note 11 supra.

122. Id. at 10.

123. Case 48/71 Commission v. Italian Republic [1972] E.C.R. 532; Case 48/69 Commission v. I.C.I. Ltd. [1972] E.C.R. 649.

124. Shonfield note 11 supra at p. 17.

125. See notes 7-8 supra.

126. Akehurst, Withdrawal from International Organizations, 32 Current Legal Problems 143 (1979).

127. The leading authority on withdrawal generally is Feinberg, 39 B.Y.B.I.L. 189 (1963) on whom Akehurst draws.

128. Akehurst id. at 151. A view shared even by ". . . international lawyers from Communist countries, which normally argue that there is an implied right of withdrawal from international organizations" Id. This accords of course with the European Court of Justice view. See, Case 128/78, Commission v. U.K. [1979] E.C.R. 419 esp. at 429.

129. Id.

130. Pryce, note 21 infra at 55. Since the Travaux of the Treaties of Paris and Rome have not been released it is difficult to see how Pryce can be so assertive in his submission.

131. Id.
132. "Alliance Politics" is the refinement of the "bag of sticky marbles" concept. See A. Shonfield, European Integration in the Second Phase: the Scope and Limitation of Alliance Politics (The University of Essex - Noel Buxton Lecture, 1974).
133. See Feinberg, and Akehurst, notes 127, 126 supra and examples therein. Indeed, in the few cases cited "withdrawal" was subsequently construed as "suspended membership".
134. And see generally, A.W. Green, Political Integration by Jurisprudence (Sijthoff, Leyden, 1969).
135. See, Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) /1980/ I.C.J. (19 I.L.M. 555 (1980)).
136. See M. Cappelletti, Judicial Review in the Contemporary World (Bobbs-Merrill, Indianapolis, 1971) esp. Ch. 4; and Cappelletti, Giustizia Costituzionale Soprannazionale, 23 Rivista di diritto processuale 1 (1978).
137. On the system of juridical review generally, see e.g. the erudite treatment by Schermers note 55 supra; L. Neville Brown & F.G. Jacobs, The Court of Justice of the European Communities (Sweet & Maxwell, London, 1977). G. Vandersanden & A. Barav, Contentieux Communautaire (Bruylant, Bruxelles, 1977). Naturally my treatment here will only sketch the bare limbs of the complex system.
138. See, Schermers id. § 53 - § 144 (pp. 31-80).
139. In this context one may record the words of Justice O.W. Holmes: "I do not think the US would come to an end if we lost our power

- to declare an Act of Congress void. I do think the Union would be impeded if we could not make that declaration as to the laws of the several States." Collected Legal Papers 295-296 (N.Y., Peter Smith, Reprint 1952).
140. E.g. Articles 173, 175, 184, 215 EEC.
141. Cf. Stein & Vining, Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context, in F. Jacobs, European Law and the Individual (North-Holland, Amsterdam, 1976) 113.
142. E.g. Articles 169, 170 EEC.
143. Thus the Commission has apparently decided not to bring an action against France in the wake of the decision of the Conseil d'Etat in the Cohn-Bendit case, note 8 supra, although a clear violation had taken place (see, Isaac, L'affaire Cohn-Bendit 15 CDE 265, 1979). The Commission may fear that bringing an action under Article 169 EEC might give the impression of interfering with the independence of the French judiciary. This attitude, if it is the basis of the Commission's reluctance, is, it is submitted, unconvincing. The major part of the jurisprudence on the European Convention on Human Rights is dependent on the exhaustion of local remedies which implies, ipso facto, the subjection of judicial decisions to scrutiny by the organs of that Convention. The same would apply mutatis mutandis to "169 actions" based on wrong decisions taken by Member States' final appeal courts.
144. See Commission observations in Case 144/77 Commission v. Italian Republic /1978/ E.C.R. 1307 and see text to note 163 infra.
145. Id.

146. See note 8 supra.
147. Jacobs, When to Refer to the European Court, 90 L.O.R. 486 (1974) at p. 486.
148. See text to note 212 infra.

149. The substantive review grounds for legality under Art. 173 EEC and validity under 177 are largely similar although certain slight differences exist. See Schermers note 55 supra at § 371 (pp. 210-211).

The breadth of the remedy is also different. Under 177 which is, strictly speaking, an inter-court procedure the individual's right of arguing his case is more limited. In addition since the time limit for annulment under 173 will have passed it would be strange if ex tunc effect could be given to the 177 reference unless specifically indicated by the Court of Justice. Cf. Bebr, Remedies for Breach of Community Law, Community Report to 9th Congress of FIDE (FIDE & Sweet & Maxwell, London, 1980) at 10.5-10.6. See note 151 infra.

150. Case 61/79 Amministrazione delle Finanze dello Stato v. Denkavit Italiana Judgment of Court of 27.3.80 (not yet reported) Recital 12 of Judgment.
151. Rasmussen, Why is Article 173 Interpreted Against Private Plaintiffs? 5 E.L. Rev. 112 at 115 (1980).

Rasmussen's thesis, if correct, illustrates another subtle evolutionary trend in the very system of judicial Review. It is not proposed to discuss here all the various advantages and disadvantages that each limb of the system entails. It has e.g. been justifiably pointed out that the 177 procedure for judicial review of Member State actions does not allow the Member States

sufficient facilities (by comparison to 169-170 EEC procedures) to defend their position before the European Court. See, U.K. House of Lords Select Committee on the European Communities (1979-80 House of Lords 23 Report), HMSO). See generally, Rasmussen, id. and comprehensive bibliography cited in note 6 therein.

152. Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).
153. There are two elements in this cooperation between the European Court and national courts. First, the national courts must show a willingness to make references. The pattern is checkered. In 1979 the following references were made: Belgium: 6 from the Cour de Cassation, 7 from courts of first instance or of appeal; Denmark: 1 from a court of first instance; France: 2 from the Cour de Cassation, 2 from the Conseil d'Etat, 14 from courts of first instance or of appeal; Federal Republic of Germany: 2 from the Bundesgerichtshof, 1 from the Bundesverwaltungsgericht, 9 from the Bundesfinanzhof, 5 from the Bundessozialgericht, 16 from courts of first instance or of appeal; Ireland: 1 from the High Court, 1 from the Chuir Chuarda; Italy: 7 from the Corte di Cassazione, 12 from courts of first instance or of appeal; Luxembourg: 1 from a court of first instance; Netherlands: 1 from the Hoge Raad, 1 from the Centrale Raad van Beroep, 3 from the College van Beroep voor het Bedrijfsleven, 1 from the Tariefcommissie, 5 from courts of first instance or of appeal; United Kingdom: 1 from the House of Lords, 1 from the Court of Appeal, 6 from lower courts. For a useful attempt at analyzing the different pattern of references, see Mortelmans, Observations in the Cases Governed by Article 177 of the EEC Treaty: Procedure and Practice 16 C.M.L. Rev. 557 (1979).

Secondly, once the case is remitted back to the national court the latter must construe the case--where discretion is given--in

a manner consistent with and truthful to the European Court's ruling. The English Court of Appeal (on receipt of the European Court's judgment in Santillo note 147 infra, R. v. The Home Secretary, ex parte Santillo, The Times, 23 December 1980) "presided over with the pertinacious idiosyncrasy" of Lord Denning MR illustrated how, if it ". . . approves of a rule of English law, no amount of EEC law will deflect /it/ from giving the former priority". European Legal Movement Shows Signs of Strain Financial Times 22.12.1980 at p. 16.

154. Article 189 EEC.

155. The Court has been consistent in its enumeration of the conditions for determining the direct effect of a measure: in general it must impose a precise obligation which does not necessitate an implementing measure and which leaves no discretionary power to the Member States. (As regards the direct effect of directives one must ascertain, in addition, ". . . whether the nature, general scheme and wording of the provision in question are capable of having direct effects". Case 41/74 note 44 supra at 1356 (per Mayras A.G.)).

There is a conflict in the Court as to whether these two tests are cumulative or mutually exclusive. Cf. Case 131/79 R. v. Home Secretary ex parte Santillo Judgment of 22.5.1980 (not yet reported); Case 148/78, note 44 supra; and Case 88/79 Ministère Public v. Grunert Judgment of 12.6.80 (not yet reported). See discussion in Usher, Direct effect of directives: dotting the i's . . ., 5 E.L. Rev. 470 (1980) at 472-473; and see also, Timmermans, Directives: Their Effect within the National Legal Systems, 16 C.M.L. Rev. 533 (1979).

156. See Case 148/78 id. Usher, id. Timmermans id.

157. E.g. Article 121 EEC.

158. E.g. Article 87 EEC.

159. E.g. Article 43 (2) EEC.

160. Article 100 EEC.

161. Article 155 EEC (emphasis supplied).

162. And see also, Schermers, note 55 supra at §§ 439-441 (pp. 252-254).

163. Pryce, note 21 supra, p.59.

164. Question 453/79--Debates of the European Parliament 10.3.80 at 24 (English version).

165. On this problem in general see Cappelletti, The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference--or no Difference at All?, in H. Bernstein, U. Drobniq, H. Kötz (eds.) Festschrift für Konrad Zweigert (J.C.B. Mohr, Tübingen, 1981) 381, esp. at 383-387 and references therein. Cf. Rasmussen, note 151 supra.

166. The Commission, it is submitted, qua prosecuting authority is entitled to use discretion when deciding on prosecutions provided it is based on consideration of the proper administration of justice and the interest of seeing that, per Article 155 EEC, the law is applied. There is, however, a danger that this discretion may be swayed by pure national or political expediency.

167. See e.g., Case 51/76 Federation of Dutch Undertakings v. Inspector of Customs and Excise /1977/ 1 E.C.R. 113 and see

Duffy, EEC Directives, Judicial Control of National Implementation, 41 M.L.R. 219 (1978).

168. Since not all legal systems provide for a "preemptive" declaratory challenge of legislation.
169. Even if the disputed provision is not penal, entering into any legal obligations on a basis of a law subsequently to be declared invalid may be economically harmful.
170. In Ireland, for example, Finbarr Murphy observes that "In a number of its Reports the Oireachtas Joint Committee has pointed to the existence of possible hindrances to access to remedies in connection with Community law. It has observed that Irish implementing measures frequently do not cite the Community basis for the measures in question". Finbarr Murphy, Remedies for Breach of Community Law, Irish Report to Ninth FIDE Congress. (FIDE--Sweet and Maxwell, London 1980) 5.12-5.13.
171. In Costa, Van Gend en Loos and their progeny the Court always relied on the uniformity requirement introduced by Article 177 as a ground in the decisions. See notes 42 and 45 supra.
172. Case 44/79 note 100 supra.
173. Recital 14 of Judgment p. 2744.
174. Case 14/68 note 48 supra, Recital 6 of Judgment.
175. Viz. "the purpose of that 177 jurisdiction is to ensure the uniform interpretation and application of Community law, and in particular the provisions which have direct effect, through the national courts." Joined Cases 66, 127 and 128/79 Amministrazione delle Finanze v. Meridionale Industria Salumi S.r.l.,

Judgment of 27.3.80 (not yet reported) (emphasis supplied).

176. "At an early stage in his legal education the student encounters the Latin maxim Ubi jus ibi remedium . . . /to/ which the realist replies: Ubi remedium ibi jus." F.H. Lawson, Remedies in English Law (Penguin, Harmondsworth, 1972) at 14. Cappelletti, note 136 supra, is equally emphatic: "All of this hearkens back to the old truth that a right without an adequate remedy is no right at all" at 78-79.
177. The Court on numerous occasions has indicated that "the general principle of equality . . . is one of the fundamental principles of Community law. The principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified." Joined Cases 103, 145/77 Royal Scholten-Honig v. Intervention Board for Agricultural Produce /1978/ E.C.R. 2037 Recitals 26-27 of Judgment. See also joined cases 117/76 and 16/77 Ruckdeschel v. Hauptzollamt Hamburg - St. Annen /1977/ E.C.R. 1753 at 1769. And see generally Schermers, note 55 supra, §§ 89-94 (pp. 52-54).
178. See generally, C.A. Wright, Handbook of the Law of Federal Courts (West Publishing, St. Paul, 1976) at e.g. 195-196.
179. Salumi, note 175 supra Recital 9 of Judgment (emphasis added). On the general question of the retroactive and prospective nature of judicial review, see M. Cappelletti & W. Cohen, Comparative Constitutional Law (Bobbs-Merrill, Indianapolis, 1979) at 98-112.
180. See Lagrange A.G. submissions in Joined Cases 28, 29 and 30/62, Da Costa v. Nederlandse Belastingadministratie /1963/ E.C.R. 31 at 41. See also for an oblique reference by the Court itself



- Case 29/68 Milchkontor v. Hauptzollamt Saarbrücken /1969/ E.C.R. 165, Recital 2 of Judgment. For a general discussion on the issue of Inter partes v. Erga omnes decisions, see Cappelletti & Cohen, id. at 96-98.
181. French Raffaele Case, Court of Appeals, Paris decision of 13.11.70, Gazette du Palais, 1971, J. p. 206. Cited and translated in Schermers, note 55 supra, § 618 (p. 354); and see also Schermers, id. § 619 for a survey of attitudes of other Courts.
182. Case 51/74, Hulst v. Produktschap Voor Siergewassen /1975/ E.C.R. 79.
183. Schermers note 55 supra, note 155 p. 355.
184. Case 43/75, Gabrielle Defrenne v. Sabena /1976/ E.C.R. 455.
185. Salumi, note 175 supra Recital 10 of Judgment Denkavit, note 150 supra Recital 18 of Judgment. In Defrenne the Court was obviously swayed by the enormous economic impact a fully fledged extunc, erga omnes decision would have brought about.
186. Id. and cf. Bebr note 149 supra.
187. Case 33/76 Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland /1976/ E.C.R. 1980, hereinafter Rewe. Case 45/76 Comet v. Produktschap voor Sleugewassen /1976/ E.C.R. 2043. For a sharp analysis see Bebr id.
188. Denkavit, Salumi, notes 150, 175 supra; and Case 68/79 Hans Just v. Danish Ministry for Fiscal Affairs /1980/ E.C.R. 501; in a slightly different context see Case 130/79 Express Dairy Food v. Intervention Board for Agricultural Produce. And see Hartley, The Effects in National Law of the European Court 5 E.L. Rev.

- 366 (1980). See also, Case 826/79 Amministrazione delle Finanze dello Stato v. Mediterranea Importazione, decision of July 10, 1980 (not yet reported) and Case 265/78 Ferwerda v. Produktschap Voor Vee en Vlees /1980/ E.C.R. 617.
189. Case 39/73 Rewe-Zentralfinanz v. Landwirtschaftskammer Westfalen-Lippe /1973/ E.C.R. 1039.
190. Article 13(1) EEC. Regulation 159/66 EEC, J O 192 (25.10.1966).
191. See Article 58 Verwaltungsgerichtsordnung.
192. Recital 3 of Judgment, Rewe, note 187 supra.
193. The Court at that time, it is submitted, was hardly cognizant of the profound nature of the problem. In subsequent cases the lacunism was substituted by more detailed analysis and a greater appreciation of the policy conundrums. The Court even came to express its regret at the situation. See note 210 infra.
194. Recital 5 of Judgment.
195. An expression extending to all "the conditions under which /claims/ may arise, the requirements for lodging an action, periods of prescription and awards of interest" Bebr, note 149 supra at 104.
196. Commission submissions at 1994.
197. See Schermers note 55 supra at §§ 67-88 (pp. 39-51).
198. Recital 5 of Judgment.
199. Note 50 supra.
200. Rewe Recital 5 of judgment.
201. However the Court has been quite adept in creatively casting rules of procedure in relation to its direct jurisdiction. Cf.

Oliver, Limitation of Actions Before the European Court 3 E.L. Rev. 3 (1978). Further, the Court in its Human Rights cases has indicated its willingness to draw on the different constitutions of the Member States in construing a Community standard. Are procedural rules--or at least time limits--so much more difficult?

Recently, in its interlocutory decision in case 149/79, note 55 supra, the Court stated that reference to substantive provisions of domestic level systems as a means to restrict the scope of the provisions of Community law, which has the effect of damaging the unity and impairing the efficacy of that law, cannot be accepted (Proceedings of the Court of Justice no. 28/80, 15-19.12.80). Diverse domestic procedural provisions may have the same damaging effect on the unity and efficacy of Community law. Yet whereas in Case 149/79 the Court indicated in principle a preparedness to overrule Belgian Constitutional law in order to protect the unity of Community law in the cases discussed here national procedural law was sufficient obstacle for the Court to concede disunity and lack of efficacy.

202. In Rewe the Commission correctly asks ". . . whether each Member-State can, insofar as it is concerned, decide which is the right laid down by national law to which for the purpose of applying the time limits a Community right must be assimilated" Rewe, p. 1994.
203. First steps have been taken in this direction in relation to Community charges. See e.g. Council Regulations 1430/79 OJ L 175/1 12.7.79; 1697/79 OJ L 197/1 3.8.79. But note that even here the Regulations are not aimed specifically at reimbursement in cases of annulment or declaration of invalidity by the European Court.
204. See note 178 supra. The author is now engaged in a fully

fledged comparative analysis of this problem.

205. Notes 150, 188 supra.
206. Just Recital 25 of Judgment.
207. This, of course, should be balanced against the possible drop in turnover which the imposition of the illegal charge may have had on the importer's business. The Danish legal system in which the Just case took place acknowledges this factor. One may wonder why the Court--within the system of direct effect--did not insist on a Community concept of unjust enrichment the recipients of which would be the Member States themselves rather than the trader. To do so would have been more in accord with the fundamental nature of the Customs Union within the legal order of the Community.
208. Note 188 supra.
209. Express Dairy gives an oblique positive indication as to the question of the erga omnes effect of decisions of invalidity based on 177. The claim was brought on the basis of a similar decision in an earlier case: Case 131/77 1978 E.C.R. 1041. But see Joined Cases 4/79, 109/79 and 145/79 Providence Agricole de Champagne (not yet reported) where the Court appears to reject automatic ex tunc effect of declarations of invalidity.
210. Express Dairy, Recital 12 of Judgment. Here the Court was moved to indicate its view by actually acknowledging the regrettable absence of Community provisions, id.
211. See note 149 supra.
212. Note 178 supra. And see also Case 118/78 C.J. Meijer B.V. v. Department of Trade and Others 1979 E.C.R. 1387.
213. See generally Harding, The Choice of Court Problem in Cases of Non-Contractual Liability under EEC Law, 16 C.M.L. Rev. 389 (1979); and see Case 26/74 Roquette v. Commission 1976 E.C.R. 677 viz. "On the question of interest . . . i/n the absence of

provisions of Community law on this point, it is currently for the national authorities, in the case of reimbursement of dues improperly collected, to settle all ancillary questions relating to such reimbursement, such as payment of interest". Recital 12 of Judgment. Determination of quantum of damages falls within the difficult category of issues in which arguably there exist objective societal reasons to pay a different measure of damages to plaintiffs in different Member States suffering from a similar type of non-contractual violation, since the quantum of damages should probably be in line with the general expectation based on normal awards. In other words differing expectations would create an "unlike situation" calling for "unlike treatment".

214. See generally, M. Cappelletti and B. Garth (eds.), Access to Justice: A World Survey (Alphen aan den rijn/Milan, Sijthoff/Giuffrè, 1978); M. Cappelletti and J. Weisner, (eds.), Access to Justice: Promising Institutions (Alphen aan den rijn/Milan, Sijthoff/Oceana, 1979); M. Cappelletti and B. Garth (eds.), Access to Justice: Emerging Issues and Perspectives (Alphen aan den rijn/Milan, Sijthoff/Oceana, 1979); K. Koch, Access to Justice: The Anthropological Perspective (Alphen aan den rijn/Milan, Sijthoff/Oceana, 1979).
215. See e.g. Provisional Commission Document, L'Accès des Consommateurs à la Justice, ENV/266/80/orig. The European University Institute and the Ford Foundation are sponsoring a research project entitled "Methods, Tools and Potential for European Legal Integration in the Light of the American Federal Experience" directed by M. Cappelletti one major part of which will be dedicated to access to justice problems at the Community level.
216. M. Cappelletti and D. Tallon, Fundamental Guarantees of the Parties in Civil Litigation (Milan/Dobbs Ferry, N.Y., Giuffrè/Oceana, 1973).

Oceana, 1973).

217. Thus, e.g., the question is not treated in the otherwise excellent Community Report on Remedies for Breach of Community Law submitted to the Ninth FIDE Congress. Bebr, note 149 supra.
218. And this despite the very different substantive rights. To create such a distinction might produce an even more offensive type of inequality. The constitutional weakness of the non-Community migrant calls perhaps for even stronger meta-legal protection.
219. Thus, for example, one of the objectives of the Community competition policy is to improve the quality and the prices of goods for the benefit of consumers. The prohibition on monopolistic agreements and practices when translated into a duty imposed on undertakings to refrain from certain activities, bestows a diffuse and indirect right on consumers to be protected from abuse. This immediately poses one of the main access problems, that of safeguarding rights not directly granted, and formed in terms of a duty on potential violators. Under the relevant regulation (Regulation 17, OJ 1959-62, 87) the Commission has the direct task of enforcing the competition policy--acting thus as a "supranational public agency". In addition Regulation 17 provides that individuals, even if not parties to an alleged violative agreement, may lodge a complaint against it with the Commission provided they have a "legitimate interest". This term is yet to be clearly defined by the European Court. Should consumer groups--national or transnational--be bestowed with automatic legitimate interest which the Member States already enjoy? The advantages would be obvious since they would have then all the legal and political resources of the Commission with them. In Joined Cases 41/73, 43-48/73, 50/73, 111/73, 113/73, 114/73 Gé-

nérale Sucrière v. Commission /1973/ E.C.R. 1465 the Court allowed the intervention in the proceedings by the Italian Unione Nazionale Consumatori in accordance with Article 37 of the protocol of the Court's statute. It said:

Since it is the particular objective of the Union to represent and protect consumers, it can show an interest in the correct application of Community provisions in the field of competition, which not only ensure that the common market operates normally but which also tend to favour consumers.

Accordingly the Union has an interest in the solution of the Cases at issue, to the extent that the latter concern the finding that the applicants in the main actions indulged in a concerted practice with the object and effect of protecting the Italian market.

(Recitals 7-8 of Judgment.) We can see here evidence of the type of argumentation surrounding the issue of class action, private-public prosecutors, etc.

See generally, Temple-Lang, The Position of Third Parties in the EEC Competition Cases, 3 E.L. Rev. 177 (1978).

220. Economides and Weiler, note 100 supra at p. 604.

221. Id.

222. Shonfield, note 11 supra, at 11.

223. The literature on the European Parliament, its functions and powers is very large. See K. Kujath, Bibliography of European Integration (Europa Union Verlag, Bonn, 1977) § 5.2. See also note 5 supra. The European Parliament--like most national parliaments--has many functions which are not directly concerned with decision making and policy shaping. These, and the effect of direct elections on them, will not be discussed here. As regards decision making, the lack of legislative power and the limited control by Parliament over the political organs have been the two most important factors which have rendered the Parliament extremely

weak--perhaps even irrelevant in the process.

224. Case 26/62 note 42 supra at p. 12. See also note 45 supra.

225. The Parliamentary involvement in the decision making process--especially in the control of the Community budget--has substantially increased since 1963. See, e.g. Verges, Les Pouvoirs Financiers du Parlement Européen, C.D.E. 3 (1972). Wooldridge & Sassella, Some Recent Legal Provisions Increasing the Budgetary Powers of the European Parliament and establishing a European Court of Auditors, LIEI 13 (1976).

226. Under the system of the dual mandate it was suggested ". . . that the aspiration of most members of /national/ parliaments interested in European affairs is to serve not in the European Parliament, but in national government. In other words, the /European/ Parliament is also limited by its composition, in that its members tend to be essentially backbenchers of the national parliaments" Coombes, The Role of the European Parliament, in Sasse note 86 supra, at 289.

227. The overall turnout was 62 per cent. In the U.K. it was 31 per cent. In Italy it was substantially higher but that is a Member State with a general system of compulsory voting albeit without real sanctions against non-voters. See generally, Editorial, The European Parliamentary Election, 4 E.L. Rev. 145 (1979).

228. A recent poll in the U.K. showed that despite direct elections only recently held the connection between electors and their Members was extremely tenuous. See, Britain and the EEC Which? 101 (1980) esp. at 104.

229. See note 5 supra.

230. It is true of course that Parliament has criticized aspects of the wasteful Common Agricultural Policy. The 1980/81 budgetary crisis may however place Parliament in the public eye as a Community spender opposed to national thrift.
231. For a lucid discussion of the history of these strands in the European Federal movement, see Greilsammer, Some Observations on European Federalism, in Elazar note supra, 114 at pp. 112-119.
232. The signs of strain are apparent for example in the Commission's delicate rejection of Parliament's request to get a more meaningful say in the international agreement making process. See, e.g., Reply of President Jenkins to the European Parliament, Debates of the European Parliament of 16.4.1980 at 136 (English version).
233. One of the sponsors of the Debré-Foyer Bill, note 7 supra, is a prominent member of the European Parliament. In general certain factions among the British and Danish Labour Members and French G Gaullists and Communists are European minimalists.
234. See, e.g., Debates of European Parliament of 12.12.1978 at 163 (English version).
235. On the rule of proportionality and its effect on the operation of Parliament, see J. Weiler & F. Petry, The Foreign Affairs Committees of the European Parliament (forthcoming).
236. See e.g. remarks of Sir Fred Catherwood MEP--Debates of the European Parliament, 15.2.1980 at 325 (English version).

237. I am indebted to Professor Soberman of Kingston Law School, Canada, discussion with whom was of great help in preparation of this section. In general, see Soberman and Pentland, Forms of Economic Association, to be published by the Institute of Intergovernmental Relations, Queen's University (Canada) in its series of Discussion Papers on the "Future of the Canadian Communities".
238. Soberman and Pentland, id. tend to emphasize the negative aspects. The discussion is somewhat theoretical given the relative paucity of two member associations.
239. Puchala's model, note 26 supra, illustrates the variety of interests which have to be squared in reaching concordance among just two states. The larger the Community the more factors, rising geometrically, which will have to be squared in order to reach concordance.
240. The U.K. has found itself isolated on issues such as its own budgetary contribution, the annual increase in the agricultural prices and the conclusion of a fisheries policy.
241. See Stein et al., note 21 supra, at pp. 35-36.
242. In an enlarged Community it may be that each Member State will have only one Commissioner regardless of its size. Naturally the weighting of Council votes will also change.
243. See Marguand, note 4 supra at pp. 30-33.

244. See Dahrendorf note 21 supra at 14.
245. On the "two speed" Europe, see the Tindemands Report (European Communities, Luxembourg, 1976).
246. See Jenkins, Europe à la Carte, 1/2 Europe 81 (1981).