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THE CREATION OF THE EUROPEAN UNION AND ITS RELATION TO THE EEC TREATIES

by

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The European Policy Unit

The European Policy Unit, at the European University Institute, was created to further three main goals. First, to continue the development of the European University Institute as a forum for critical discussion of key items on the Community agenda. Second, to enhance the documentation available to scholars of European affairs. Third, to sponsor individual research projects on topics of current interest to the European Communities. Both as in-depth background studies and as policy analyses in their own right, these projects should prove valuable to Community policy-making.

In October 1984, the EPU, in collaboration with the University of Strasbourg and TEPSA, organised a conference to examine in detail the Draft Treaty Establishing the European Union. This Working Paper, presented at the conference and revised in light of the discussion, will appear in book form later in 1985 along with other studies of the Draft Treaty.

Further information about the work of the European Policy Unit can be obtained from the Director, at the European University Institute in Florence.

Article 82 of the Draft Treaty establishing the European Union provides:

> This Treaty shall be open for ratification by all the Member States of the European Communities.
>
> Once this Treaty has been ratified by a majority of the Member States of the Communities whose population represents two-thirds of the total population of the Communities, the governments of the Member States which have ratified shall meet at once to decide by common accord on the procedures by and the date on which this Treaty shall enter into force.(1)

By contrast, Article 236 of the Treaty of Rome provides that

> The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty.
>
> If the Council, after consulting in Assembly and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.
>
> The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.(2)

The Draft Treaty establishing the European Union is not, of course, the first international treaty which foresees the possibility of only partial ratification by Member States of the European Community.(3) The Draft Treaty establishing the European Union, however, departs dramatically from the past practice of the Member States; it is conceived, as presently

drafted, as a "successor" to the Treaties establishing the European Communities, not a subsidiary treaty existing within the framework of the Treaty of Rome. The High Contracting Parties are defined, in the Preamble, as the Member States of the European Communities, and it is difficult to envision the Union established by the Draft Treaty -- as presently formulated -- co-existing with the current EC.

The unique character of the Draft Treaty gives rise to a formal legal problem regarding the procedure established for its adoption. For if, as it seems at first blush, the Draft Treaty amounts to a massive amendment of the EC Treaties, the adoption and entry into force of the new may be incompatible with the revision provisions of the old. If, in the alternative, the Draft Treaty is not an amendment of the Community Treaties but a new treaty replacing them, we shall see that its adoption would still raise problems under public international law in the event that not all Member States adhere, and this interpretation entails other risks to the Community acquis.

In concrete terms, the question is whether the Member States of the Community may legally adopt the Draft Treaty otherwise than by the procedure laid out in Article 236(EEC).

Some subsidiary problems relating to Article 82(DT).

The terms of Article 82(DT) leave unresolved the final steps that will bring the Treaty into force. Article 82(DT) does not provide, as many treaties do, for automatic entry into force upon deposit of a preestablished number of ratifications. It provides, instead, that "the governments of the Member States... shall meet at once to decide by common accord on the procedures by ... which this Treaty shall enter into force." The need for a new common accord before entry into force leaves the parties some room to manouver as they seek to complete the transition from European Community to European Union.(4) Strictly speaking, from a legal point of view, the ratifying Member States would not be undertaking the obligations contained in the Draft Treaty itself, but the obligation to negotiate in good faith on the procedures by which and the time at which the Draft Treaty would enter into force.

This provision, clearly the result of a compromise, offers an important politico-legal advantage: it enables governments and parliaments to ratify the Draft Treaty, or a modified version thereof, without facing immediately the problem of the legality of non-unanimous adherence. Put more starkly, this mechanism allows proponents of the treaty to argue,

albeit legalistically, that Article 82(DT) violates neither Community nor international law because it does not, by itself, provide for the Draft Treaty's entry into force.

After ratification by the required majority, it is possible that non-adhering states would seek to negotiate an accord with the adhering states that would allow the Draft Treaty to be brought into force. One might even add that a Member State that ratified could refuse to bring the Draft Treaty into force, without violating the requirement of negotiating in good faith, if such an accord could not be reached.

This legal construction, however, only defers the real issue. In spite of its ambiguity, Article 82(DT) clearly foresees the Draft Treaty entering into force pursuant to a procedure which deviates from Article 236(EEC) and, in theory, even against the will of up to four Member States. Apparently, the very procedure of entry into force of the Draft Treaty could, especially if only some Member States take the plunge, be tainted with illegality under Community law.

The Relevance of the Issue

The issue of the legality of the adoption procedure will arise, under one guise or another, in any future restructuring of the Community. In this legal sense it

merits discussion regardless of the prospects of the Draft Treaty. Be that as it may, to many this issue might seem in some ways politically irrelevant: the type of legalism which gives lawyers a bad name. After all, should the required "political will" to adopt the Draft Treaty -- or an amended version thereof -- emerge, that kind of legalism will probably be brushed aside. Indeed, as we shall see below, even during the life of the EEC itself there have been Treaty amendments which did not respect the revision procedure ex Article 236(EEC). By contrast, in the absence of the necessary "political will," this issue might assume a certain theological air, like the question of how many angels can dance on the head of a pin.

And yet we believe that in the Community, this seemingly hairsplitting legalism partakes of an important political dimension -- greater perhaps than it could in other international-treaty-based entities. The so-called "primacy of politics" in the issues surrounding such a dramatic shift in the architecture of Europe may add such a political dimension even to purely legal issues; especially in light of the unique role that law (and, alas, lawyers) have come to play in the Community. We propose to digress briefly to examine the origins of law's key position in the process of European integration.

The Prominence of Law in the European Community Process

Many have noted the striking and even excessive importance which legal questions assume in the EEC.(5) This state of affairs is due to a number of factors. In particular one may mention the following five considerations:

1. At the risk of stating the obvious, the Community was and is a creature of law. When a nation-state adopts or changes a Constitution there is a more-or-less organic socio-political entity to which that Constitution applies. There would be a "France" with or without, say, the 1958 Constitution; there would be an Italy or a Germany with or without their Post-War constitutions.(6)

Even today, over thirty years since its inception, there would not be a European Community without the Treaties. Removal of a very few legal provisions would signal the end of the Community; it will be a long time yet before the Community assumes an organic social-economic-political identity apart from its legal framework.

2. The European Court of Justice and its astute use of Article 177(EEC) introduced the rule of law into Community life in a manner which has no precedent in other international entities. The fact the national courts render

final decisions based on transnational and uniform interpretation of the Treaties (and that governments can hardly disobey their own courts) has grafted onto the Member States a habit of obedience to European Law which is more usually associated with national law.

3. Soldiers are often told that "I can't" is the cousin of "I don't want to." In the Community this maxim often applies when the Member States complain: "I can't." Legal argument has a role here. Ilké, in his influential How Nations Negotiate explains: In negotiations a

> way of expressing firmness is to maintain that one's positions accord with legal or scientific principle... this is the principal function of legal ... argument; for you do not usually make your proposal more attractive to your opponent by telling him that what you are proposing is in accordance with ... international law. However, if you make your opponent believe that you think your proposal is grounded on such principles, you may have conveyed to him that your proposal is firm.(7)

We may add that in the Community the reverse is even more true: the legal argument is a wonderful excuse for the claim, "I want to but I can't."

4. The open-textured, almost constitutional nature of the Treaty makes legal interpretation central to the Community's development. Policy arguments masked as legal arguments abound much as in national constitutional governments.

5. Finally, the Community system displays a much higher level of constitutional-legal integration than institutional-political integration. Law often performs functions which in other polities may belong to the political sphere.(8)

These factors help to explain why any legal argument in the Community, especially over controversial issues, may assume a significance out of proportion to its apparent political importance. In the particular case of the Draft Treaty, we would single out two distinct considerations:

Assuming that the procedure for adoption of the Draft Treaty ex Article 82(DT) could be considered illegal, this legal fact would in our view have important political consequences. Although it is true that unanimous Member State political will would remove much of the urgency from the issue of procedural legality, it is more likely that, at least at first, only some of the Member States, if any, will favour the Draft Treaty enterprise. Others may display disinterest, even hostility. The legal argument will, I expect, become one of the tools which might be used by those governments opposed to the venture. Even more likely, a popular movement in favor of European integration along the lines of the Draft Treaty, combined with the European Parliament's relatively strong support, might embarass hostile governments, in at least some Member States, to the point that they would feel

unable to voice open opposition. It might be politically convenient for governments, or political parties, to make supportive noises while searching for excuses for avoiding decisive action. An argument based on the "need to respect the legal and constitutional requirement solemnised in the Treaty of Rome" as an obstructionist or delaying tactic is almost tailor made for this kind of ambivalent political situation.

The second political consideration inherent in the legal issue derives in a way from the first. Sensitive to the risk that the Draft Treaty's political opponents may hide behind legal objections to the proposed implementation procedure, the Treaty's promoters tend, understandably, to go to great analytical lengths to find legal justifications for departing from Article 236(EEC), especially in situations where not all the Member States adhere to the new order. As we shall see, much of this discussion relies on international law interpretations of the Treaty of Rome. It implicitly undermines some of the constitutional underpinnings which the European Court of Justice has attributed to the Community.(9) We do not think that the battle for the Draft Treaty establishing the European Union should be fought at the expense of the Community. The danger here (admittedly, the word "danger" betrays a value judgment) is that arguments in favor of the Draft Treaty will weaken the

existing structure of the EEC and damage certain hard-won principles concerning the political-legal nature of the Community.

The Entry into Force of the Draft Treaty: Two Basic Scenarios

In this analysis of the legal-political issue of treaty revision, we will distinguish two legally and politically distinct situations. In the first scenario, all Member States decide to adhere to the Draft Treaty establishing the European Union, or a modified version thereof. In the second, not all of the Member States decide to adhere. The second scenario presupposes a higher degree of political controversy and entails some additional grounds for legal opposition. We propose to examine several legal constructs through which the adoption procedure as currently embodied in Article 82 may be viewed. We will not attempt to "adjudicate" any of these constructs. They are presented merely as a basis for discussion.

The First Scenario -- All Member States Decide to Adhere

Let us assume, then, that all the Member States decide to adhere to the Draft Treaty establishing the European Union, or a modified version thereof. Under this scenario we assume that the Community will cease to exist when all Member States

join the Union. Thus, we will not discuss, at this point, the relational problems of the Union and the Community; our principal concern is actually the procedure itself.

Legal Construct No. 1: The Member States pursue the formal procedures provided in Article 236(EEC). Legally, of course, this would be the neatest avenue for obviating the juridical issues. The problem is political: Article 236(EEC) envisages a pathetic role for the European Parliament -- it is to be consulted only on the possibility of convening an intergovernmental conference. Parliament does not play a substantive role. Moreover, we have proof in the recent dismembering of the Genscher-Colombo Draft European Act that intergovernmental negotiations, at this point in time, are not conducive to radical change. The Genscher-Colombo proposal, unworthy of the name of European Union, was far less innovative than the present Draft Treaty, yet even that proposal was reduced to the anemic Solemn Declaration. The possible fate of the current Draft Treaty may be imagined.

It may, nevertheless, be possible to continue the current mobilization process and political negotiations of the Draft Treaty establishing the European Union and then, once accord is reached, have the Member States go through the motions of Article 236(EEC). Although this avenue is certainly open in

principle, it is not foreseen in Article 82(DT); we must confront the legality of that provision as it stands.

Legal Construct No. 2: The Member States reach accord and proceed to ratification without respect for Article 236(EEC). As already indicated, political accord would take the urgency out of the legal argument. Nonetheless, it is worthwhile for two reasons to discuss this construct as well: (a) an attack on the procedure favoured by Parliament could be based inter alia on legal arguments; and (b) brief analysis of the issues under this construct will shed light on other more complex ones.

On its face, the procedure of Article 82(DT) seems incompatible with Community law. One way of overcoming this difficulty is to invoke the international legal basis of the Community. In spite of its constitutional aspects, the Treaty of Rome arguably remains an international legal instrument subject, at least for some purposes, to the traditional rules of treaty interpretation. On this premise it is not difficult to find precedents in international practice for organizational revision which disregards the organic revision clauses.(10) If we adopt the view that the Draft Treaty amounts not to an amendment of the EEC Treaty but to a new treaty replacing it, we could argue that Article 236 does not apply (a contention we will discuss later) and the validity

of Article 82(DT) need be judged only under public international law. In this case, the problem could be neatly solved. Article 59 of the Vienna Convention, which to the extent that it represents a codification of customary law is binding even on non-parties, provides that

> A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty...

If, by contrast, we adopt the view that the Draft Treaty amounts to a massive amendment of the EC treaties, international law once again appears to raise no doubts about the Draft Treaty's validity, since all Member States, under this scenario, have agreed to the amendment.

What, however, of Community law?

There are well-known precedents in the history of the Community itself in which amendments to the Community Treaties were adopted without recourse to the relevant amendment procedures.(11) The force of these precedents depends on their status under Community law. It would appear that these precedents were more than anything else an early aberration rejected, in principle, by several

commentators(12) and, by implication, by the Court of Justice.

The Court of Justice, indeed, struck down a Community measure approved by the Commission and the Council, unanimously, for violation of a procedural requirement perhaps less important than Article 236(EEC).(13) It goes without saying that in Roquette Frères the rights of the European Parliament were violated, and that is not the case here. Other interests, however, are involved as well.(14) Article 236(EEC) foresees a positive role for the Council and the Commission. Though the Council's interests may be satisfied by unanimous agreement of the Member States, the Commission's interests seem still to be violated. Because Article 236 requires an opinion from the Commission only "where appropriate," there is some room to maintain that the Commission has no absolute rights to be violated under Article 82(DT). Furthermore, the "citizen of the Community" has rights that must be protected, apart from those of the Member States and the Community Institutions. Courts should, in principle, protect such "constitutional" rights from violation even by parliaments. Still, neither Article 236(EEC) nor Article 82(DT) requires a Community-wide referendum; thus, if all Member State parliaments ratify the Draft Treaty, the Community citizen's interests are protected as well under the Draft Treaty as under the Treaty of Rome.

In conclusion, within the framework of Community law, even unanimity might not suffice to legitimate a procedural deviation from Article 236(EEC). If this were not the case, each time the Member States jointly decided to violate the Treaty they could claim that the violation constituted a unanimous amendment of the Treaty. Plainly, international law should not be allowed to prevail here.

Legal Construct No. 3: A third approach to the problem of implementing the Draft Treaty would be for all the Member States to withdraw from the EEC and then adopt the Draft Treaty in accordance with the terms of Article 82(DT). The arguments used above to explain a unanimous disregard of Article 236(EEC) apply with even greater force to a unanimous decision to withdraw. The Draft Treaty's emphasis on continuity between the Community and the proposed European Union, however, suggests that its authors did not envision such a tactic.(15) Furthermore, it smacks of legal artificiality. Even a legal fiction may serve to disarm opponents of the Draft Treaty who might use legal objections as an excuse for their opposition, but it cannot fully supply the moral authority we seek from the law. This option, in any event, will be considered more fully below, in our discussion of the second scenario.

The Second Scenario - Only some of the Member States Adhere

Until now we have assumed that all the Member States of the Community decide to adhere to the Draft Treaty, or some modified form thereof. This hypothesis is politically unlikely, but has the virtue of simplifying the issues before us. If, as is probable, one or more Member States decline to join the European Union, the legal issues discussed above, neutralized by political agreement under the first scenario, will become weapons in the hands of the Draft Treaty's opponents. Moreover, partial adherence would raise new legal issues regarding the rights of non-adhering Member States under the EC treaties and the possible coexistence of the Union and the Community.

Let us deal first with the claim that the Draft Treaty constitutes not an amendment to the EC Treaties but a replacement of them, so that Article 236(EEC) does not apply. Although this interpretation is appealing at first sight it raises several problems and dangers.

In the first place it destroys the constitutionalization of the EC Treaties that the Court of Justice has achieved over the years in collaboration with national courts. It reconstrues the EC Treaties in purely international legal terms--a step that is legally dubious from the point of view of Community law and retrograde from the point of view of the goals of European integration.

Secondly, remembering that under the second scenario only a majority of the Member States want to create the European Union, it suggests that in the future a majority of the Member States might adopt another treaty abolishing the EEC or, should the Draft Treaty be adopted, the European Union, by claiming likewise that it "replaces" the Draft Treaty, as finally adopted. In other words, it opens the possibility of withdrawal by one or more Member States from the European Community, a possibility we discuss and reject in Legal Construct No. 4. Worse still, it provides the majority with a means to "kick out" the minority. In addition, it may become very difficult to draw the line between amendment and replacement. In this context, it is interesting to note that even the Draft Treaty requires unanimity for amendment (Art. 84).

Finally, and fatally, even if the requirements of Article 236(EEC) can be avoided under this construction, we must face the requirements of public international law. It is clear, for example, from Article 30 of the Vienna Convention, that a group of states party to a multilateral convention cannot avoid their obligations to other contracting parties simply by concluding a new treaty among themselves. Since the provisions of the Draft Treaty are clearly incompatable with the EC Treaties, this construction--that the Draft Treaty is

not an amendment to but a replacement of the EC Treaties--does not clearly resolve our legal difficulties but demonstrably damages the Community acquis.

Legal Construct No. 4: If it would be illegal, prima facie, for only some of the Member States to adhere to the Draft Treaty, it might be possible for those states to withdraw from the Community before concluding the European Union. This solution, which would have an air of artificiality when practised by all the Member States together, would have enormous practical and political consequences if only six or seven Member States withdrew. In that case, the legality of withdrawal would become much more than a legal quibble.

First there is the strict legal issue. Commentators differ sharply on the legality, under Community law, of unilateral withdrawal. The Treaty of Rome does not provide explicitly one way or the other, though Article 240 declares that"/t/his Treaty is concluded for an unlimited period."(16) Some writers maintain that this article necessarily precludes unilateral withdrawal(17); others note that the failed European Political Community treaty was defined as "indissoluble," a much stronger term than "unlimited period."(18) Under this reading, therefore, Article 240 might indicate only the Member States' intention to distinguish the Treaty of Rome and the Euratom Treaty from

the ECSC Treaty, which was limited to 50 years. Thus, the term "unlimited period" means merely "not limited to any specific duration," rather than "perpetual."(19) The Court of Justice has hinted that it favors the former view, though it has not, of course, confronted the question squarely. In the case of Commission v. France, France maintained that Chapter VI of the Euratom Treaty lapsed when the Council failed to confirm or amend them within the time specified in Article 76. Rejecting this interpretation, the Court stated:

> The Member States agreed to establish a Community of unlimited duration, having permanent institutions vested with real powers, stemming from a limitation of authority or a transfer of powers from the States to that Community.
> ...
> Powers thus conferred could not, therefore, be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone, except by virtue of an express provision of the Treaty.
> ...
> To admit that the whole of Chapter VI lapsed without any new provisions simultaneously coming into force would amount to accepting a break in continuity in a sphere where the Treaty, particularly by Article 2, has prescribed the pursuit of a common policy.(20)

In the absence of a clear provision regarding withdrawal in the Treaty of Rome, or a definitive reply by the Court of Justice, Article 56(1) of the Vienna Convention comes into play.(21) Article 56(1) returns to the fundamental principle of treaty interpretation, the intention of the parties.(22) Some writers take the position that state practice limits a right of withdrawal to cases where it is

provided for in the treaty in question unless the parties' intent is otherwise made very clear.(23) In essence, this view does not diverge from Article 56 of the Vienna Convention; it merely seeks to require a high degree of proof before right of withdrawal will be inferred. With respect to the Treaty of Rome, the different interpretations of Article 240(EEC) cited above illustrate how uncertain is the evidence concerning the intention of its framers.

In summary, it is not clear whether the Member States adhering to the new Treaty could legally withdraw from the Community. The majority of commentators appears to agree that no right of unilateral withdrawal exists. It is possible to suggest that withdrawal by a majority of Member States should be treated differently under Community law than unilateral withdrawal. Although tempting, this proposal is unsupported by the case law of the Court of Justice and would open the disastorous possibility mentioned above, of a majority of Member States expelling the minority from the Community. In a political sense, of course, these objections may be irrelevant, as the British referendum on withdrawal from the EEC demonstrates. We are concerned, however, with the legal legitimacy of the new enterprise, and it would be inauspicious to appeal at the outset to the irrelevance of law. Even if there is a right of withdrawal from the Community, moreover, it could be dangerous to encourage such

a tactic; the Community is a bird in the hand, the European Union is very much in the bush. Indeed, the main weakness of this argument is not legal; it is the risk of destroying the old with no assurance that it will be replaced by the new.

Legal Construct No. 5: To set the stage for our discussion of the fifth and sixth constructs, let us consider the possible consequences of a rigid application of Article 236 (EEC). Imagine that all the Member States, except Luxembourg, wish to adhere to the Draft Treaty.(24) Indeed, imagine that only a bare majority in the Luxembourg legislator opposes the move. Article 236 would, it appears, permit the representatives of no more than,say, 150000 persons to thwart, legally, the desires of all other Member States and their peoples. The result clearly offends common sense; but this intuition must be translated into a legal construct that permits the nonapplication of Article 236(EEC) in a situation, unlike the previous constructs, where some of the Member States insist on its application.

Some commentators seek to sidestep the legal problems of adopting a new treaty outside the amendment procedures established in the Treaty of Rome by characterizing the Draft Treaty as initiating a new legal order, instead of an amendment to the Treaty of Rome.(25) That approach is appealing because of its simplicity, but it does not

adequately resolve the underlying issues. If we construe the Draft Treaty as a new agreement between the Member States rather than an amendment to the Treaty of Rome, we run square into another problem: that a group of Member States has no power, under Community law, to enter into "private arrangements" in relation to subject matters which come within the jurisdiction of the Community.(26)

If this were not the case one would run the danger of a scenario no less disturbing than the "recalcitrant Luxembourg." Imagine six Member States regrouping to introduce a new vision for Europe which would, say, strengthen the role of national governments in the Community and detract from the acquis. (The Genscher-Colombo initiative was also termed a Draft European Act.) Could these six states, simply by calling their amendment a new legal order, which it might well amount to, be able to escape, legally, the binding effect of Article 236(EEC)? With no more, the idea of a new legal order seems plausible in a situation of unanimity (construct number two) but problematic in a divided Community.

The situations outlined above, in which a tiny minority wants to block the will of a majority or a majority wants to circumvent Article 236(EEC) to undermine the goals of the Community, are the two "hard cases" with which we must

contend. They illustrate the need for legal principles(27) to differentiate situations in which a majority should or should not be allowed to act outside the framework of the Treaty of Rome.

Legal Construct No. 6: The search for the principles alluded to in Construct No. 5 takes us into that delicate and profound zone where constitutional principle merges into social reality and political theory. In elaborating such principles, we must be careful clearly to define the situations in which a majority should be free of the minority veto embodied in Article 236(EEC). That veto is a safeguard designed to protect the Community structure from dismemberment by majorities.

Before trying to delineate the parameters of these rare situations in which the Member States might legitimately consider deviating from Article 236(EEC), let us see if the "laboratories of law," history and comparative analysis, offer us any insight. Our legal training instructs us to look for precedents; the trans-legal character of our argument forces us to look to political theory. The history of constitutional reform in a nation-state cannot, by definition, constitute a precedent for international law on the revision of international organisations. Nonetheless, in

light of the "quasi-federal" character of the Community, it is instructive to examine these precedents in some detail.

The first precedent, and the one that most closely fits the facts of recent years, is the transformation of the United States from a Confederation under the Articles of Confederation to a federal state under the Constitution. The Articles of Confederation were the fruit of a struggle between conservative elements who favored a strong central government and radicals who wanted to keep the central government as weak as possible.(28) In 1781, when the Articles were finally ratified by all the Colonies , the radicals had clearly carried the day. The Congress established by the Articles, not unlike the Council of Ministers, was composed of members appointed by the state legislatures,who acted on the states' instructions and could be recalled at will (Article 5). The Congress' jurisdiction was sharply limited, and it possessed no power to coerce states that disobeyed it. The Articles, like the Treaty of Rome, could be amended only by unanimous agreement of the states (Article 13).

During the six years between the ratification of the Articles of Confederation and the Constitutional Convention, the limitations of this decentralized system of government became amply clear.(29) The stage was set for a major

reorganisation when Virginia and Maryland entered into a commercial agreement, even though such agreements were forbidden by Article 6 of the Articles of Confederation.(30) They called a convention in Annapolis with the stated purpose of expanding this agreement, using it as a springboard for calling a Convention to thoroughly revise the Articles of Confederation, to take place in Philadelphia in 1787.(31)

Worried by these unilateral initiatives, Congress ratified the call for a convention in Philadelphia. Both the delegates to the Annapolis Convention and Congress called expressly for a convention to prepare amendments to the existing Articles of Confederation, to be submitted to Congress and then to the state legislatures in accordance with Article 13.(32)

When the Federal Convention of 1787 finally met, the delegates quickly convinced themselves that an entirely new Constitution, not merely amendments to the Articles of Confederation, was required. The Constitution they produced, unlike the Articles of Confederation, was to enter into effect when ratified by only a two-thirds majority of the states (Article 7). In fact, the Constitution did enter into effect without the states of North Carolina and Rhode Island, and the new Congress passed a statute imposing a tariff on goods from those states. The contrast between the relatively modest amendments within the framework of the Articles,

called for both by the Annapolis delegates and Congress, and the Constitution, which was ratified outside the terms of Article 13, inevitably evokes the nearly simultaneous development in the Community of the Genscher-Colombo and the Crocodile initiatives.

The history of the Swiss Constitution of 1848 provides a similar, though not quite parallel, precedent. The prior Constitution, the Federal Pact of 1815, established a very weak central government, limited in its competences and without power to enforce any of its decisions against recalcitrant cantons. The Federal Pact, however, unlike the Articles of Confederation, contained no clause regarding amendment. Nonetheless, a concerted effort to amend the Pact was made in 1832. In the 1840's, a series of religious conflicts led to the formation of the Sonderbund, a defensive league of seven predominantly Catholic cantons. Although the Sonderbund was arguably protected under the Federal Pact (Article 6), the Diet resolved to disband the league by force. The brief civil war that followed inflamed national feeling to the point that a renewed effort at Constitutional revision swept through the Diet and was adopted within a year, after ratification by a majority of the cantons.

The Federal Pact provided no mechanism for amendment, but this lacuna has been interpreted as reflecting simply a tacit understanding that the Swiss Constitution could be amended only by unanimous consent of the cantons.(33) This view is borne out by the repeated attempts at revision and even by the objections of Switzerland's neighbors. Metternich objected in 1848 that the Federal Pact could not be amended by only a majority of the cantons and warned that international recognition of Switzerland's neutrality was contingent upon the terms of the Federal Pact.(34) He did not claim, significantly, that the Pact could not be modified at all, even though it contained no provision for amendment. This interpretation seemed to follow inevitably from the sovereignty of the cantons, as guaranteed in the Federal Pact. Thus, some delegates to the commission that prepared the 1832 revision proposal maintained that "le Pacte de 1815, traité d'alliance entre vingt-deux cantons souverains, ne pouvait etre valablement revisé que par la volonté concordante de tous ses signataires."(35) Their objection, based on an international law construction of a national constitution, is strikingly pertinent today. Adoption of the 1848 Constitution by a majority of the cantons may be seen as a triumph of a constitutional over an international view of the Federal Pact.

The adoption of the American Constitution and the Swiss Constitution of 1848 furnish telling precedents for the current situation. To be sure, these precedents do not establish a rule of international law, such as would satisfy a lawyer treating the Treaty of Rome simply as an international legal instrument. But they do point us to a new perspective on the Draft Treaty, regarding it as an integrating step in constitutional history: a "heroic" revolutionary act.

Drawing on these historic exmples, we would like to suggest a few principles, some negative and some positive, that might serve to distinguish cases in which majoritarian treaty amendment may be permitted. We do not want to obscure the fact that this construct involves an illegality. A revolution, even if "heroic," remains a rupture of the legal order. What we are aiming at is a set of guidelines that, while acknowledging the illegality of a proposed action, would define conditions under which could be justified. While each one of these principles is necessarily somewhat ambiguous, cumulatively they may provide a framework for analyzing this and future initiatives.

1. The new legal order principle. The essence of this principle is not novelty, but a change so fundamental that it can be described as a "legal order." In many situations it

may be difficult to specify the elements of a "fundamental" change. It can hardly be denied, however, that a restructuring of the entire institutional structure of the Community is "fundamental." As we have suggested above, of course, it would be dangerous to allow anyone advocating a new legal order to neglect Article 236(EEC). The principles listed below are intended to avoid including such initiatives as the Genscher-Colombo proposal.

2. The proposed change must not detract from the acquis of the Community. This principle receives considerable support from the law of treaties, which must be interpreted in light of their aims and objectives. As one of the goals of the Treaty of Rome is to foster an "ever-closer union among the peoples of Europe"(Preamble), an amendment that furthers that ideal, even though it deviates from Article 236(EEC), constitutes less of a rupture to the Community legal order.(36)

3. The proposed change must not be forced on the minority. The Member States who opt out must have their rights under the old Community respected. This stipulation raises the issue of the relations between the Community and the Union, which is discussed in Construct No. 7.

4. The interests of democratic government must be preserved. In some ways, the Draft Treaty can lay claim to greater legitimacy than either the American Constitution or the Swiss Constitution. The commission that drafted the Swiss Constitution was appointed by cantonal representatives to the Diet; the Framers of the American Constitution by state legislatures. By contrast, the European Parliament that provided the impetus for the Draft Treaty was directly elected by the citizens of the Member States. The ratification procedure established in Article 82, moreover, would confer a democratic authority on the Treaty equal to that of the American and Swiss Constitutions. Both broke from the procedures established in the preceding constitutional orders, reducing the unanimity requirement to some degree of majority; all three derive their authority from ratification by overwhelming majorities in democratically elected legislatures.

Though comparisons of the procedure for ratification embodied in Article 82(DT) and the Swiss and American precedents are persuasive, the yardstick of legitimacy must ultimately be Article 236(EEC). By this standard, as well, majority ratification of the Draft Treaty satisfies the requirements of democratic legitimacy. As Madison pointed out in The Federalist (no. 40), the interests of democracy are not served when one state, representing 1/60 of the nation's

population, can block the will of the rest. The unanimity requirement in the Community confers a veto on one nation with a population smaller than that of Florence, a country representing 0.13% of the combined population of the Common Market. As one writer puts it, a "mutual veto...represents negative minority rule."(37) The example of Switzerland again bears directly on the issue; the Radical authors of the 1848 Constitution likewise "se persuadaient facilement qu'en brusquant la legalité formelle du droit positif, ils ne feraient que sevir la légitimité. Pour eux, le principe de la légitimité, c'était la souveraineté du peuple. Il était donc illégitime de mantenir une confédération d'Etats qui était à leurs yeux la négation même du peuple suisse et dont ce peuple, dans sa grande majorité, ne voulait plus"(38).

To be sure, majoritarianism does not represent the sole democratic value. Constitutions protect minorities on certain issues from the will of the majority. Likewise, divisions of competence in a federal or confederal system protect the minority that inhabits a given territorial division from the will of the federal or confederal majority as regards certain issues,(39) either because they are believed to be particularly local in character or because they are most efficiently managed at that level. The principle of minority protection, however, must be balanced against that of majoritarianism. Occasionally, as in the

case of freedom of speech, a minority of one must be permitted to assert his right against the rest of society. We believe that the kind of right protected by Article 236(EEC), however, should not be guaranteed to that extent.

Article 236(EEC) gives a minority of one Member State a right to the maintenance of the particular institutional division established in the Treaty of Rome. The ideal division of competences in a federal or confederal system, however, is not subject to a theoretical analysis. Instead, it reflects an empirical judgment in light of values that shift over time.(40) The relativism of each division of competences suggests that a given institutional structure should not be fixed immutably. This is especially true in the Community, where the"democratic unit"(41), the Member State, is an historical accident, not a rational division designed to maximize democratic values and efficiency. Since no reordering of national boundaries in Europe is in the offing, the Draft Treaty has tried to accommodate the conflicting demands of a democracy of nations and a democracy of peoples. From this vantage point, the unfairness of Article 236's unanimity requirement emerges. Although it may be "undemocratic" to proceed from one stage of integration to another without the consent of all parties to the original agreement, to provide otherwise prevents the majority from reaching its own judgment on the ideal--for that group in

that moment of time-- division of competences within the federal or confederal system. The right to make such a choice is fundamental to democratic values, and should not be subject to "negative minority rule."

The principles we have tried to elaborate may bear practical fruit. The authors of the Draft Treaty provide for unanimous amendment (Art. 84). Our construction of the European Union as a further move away from an outmoded view of the Community as a simple international organization towards a European federation suggests tht we look again at the historical examples of the United States and Switzerland. Both the 1787 and the 1848 Constitutions, adopted against the prevailing legal requirements, established the possibility of majoritarian amendment.(42) If the illegality of the Article 82(DT) procedure is to be justified on the basis of fundamental democratic values applicable to nation-states, those values should likewise be incorporated in the Draft Treaty's amendment procedure. It would be more consistent, in this regard, to redraft Article 84(DT) to permit majority amendments, but this solution would clash with the requirements that certain measures be taken unanimously.(43) It would be anomalous to permit a majority to make amendments that would be more important than legislation requiring unanimity. The anomaly would be mitigated by incorporating the four principles outlined above as requirements to be

satisfied in addition to two-thirds (or some other fraction) approval. These principles, however, are not readily justiciable, and they might prove vulnerable to manipulation. It seems more realistic to preserve the unanimity requirement, recognizing that pressure may someday build towards another illegal but "revolutionary" step in European integration.

Legal Construct No. 7: Whatever the legal and political justifications for a transition from European Community to European Union under the Draft Treaty, we may have to confront, in Europe, the possibility of two institutions existing side-by-side. Such a Europe "à deux vitesses" constitutes the most likely solution to the practical problem of guaranteeing the rights of Member States that do not feel ready to take the next step in European integration.(44) It should be emphasized, however, that this practical political solution does not resolve the legal issue posed by a treaty that deals with fields in which the Member States have transferred their sovereignty to the European Community and adopted outside the amendment mechanisms of the Treaty of Rome.

Europe has experimented before with parallel institutions. The practical inefficiency of this solution was recognized in the Merger Treaty of 1965, which abolished the redundant

institutional structure of the three European Communities. A similar redundancy endures, however, in the separation between the European Political Cooperation and the European Council. While that system has led to such absurdities as dividing meetings between Copenhagen and Brussels, it has nevertheless survived. This fact suggests that, for all its inefficiency, a coexisting Community and Union may prove a viable transitional solution.(45) Of course, we realise that the difficulties in coordinating the Union and the Community would be far greater than those encountered so far in the Community's experiments with parallel institutions. Substantial revision of the Draft Treaty would be required, and even then it is difficult to imagine what mechanisms might be required. Ehlermann(46) suggests that the Treaty of Rome is flexible enough by itself to accomodate two speeds, and that incorporation of the "deux vitesses" idea in a separate treaty is therefore unnecessary. He may be right; but the Treaty provisions he points to may also be taken as proof that drafting the technical provisions for coordinating two institutions is feasible.

The other solution that has been suggested,(47) to negotiate some form of association between the Union and the diminished Community, offers both advantages and disadvantages. It is appealing because it would eliminate a great deal of duplication of effort and obviate the danger that nations who

were members of both the Community and the Union might someday be subject to conflicting obligations. The association solution is risky, however, even as a theoretical proposal, because it presupposes that the Union members could withdraw from the still-extant Community. As noted above, we must avoid at all costs arguments that put at risk the already consolidated gains of the Community.

Conclusion

Throughout this discussion we have tried to be sensitive to the distinction between the legal and the political issues surrounding the implementation procedure envisaged by the Draft Treaty establishing the European Union. We realize fully that the legal issues we have examined are liable to be subsumed in a political accord or lost in the shuffle of political controversy; still, analysis of legal arguments at this stage of the game may prevent them from becoming political weapons. Ironically, however, perhaps the most fruitful legal construct for interpreting and justifying the Draft Treaty's departure from the terms of Article 236 EEC has proved to be precisely the one that draws most heavily from political theory. This is true for two reasons. The other possible constructs we have discussed, especially those that apply to the probable scenario of partial ratification, entail serious risks to the Community should they be accepted

in principle. Second, a political analysis is intuitively more appropriate to the revolutionary nature of the enterprise at hand. It is fitting, when considering an effort as great as that of proceeding from a "European Confederation" to a "European Union," to recall the basic values underlying federalism and democracy.

Footnotes

1. The following combinations would meet the requirements of Article 82: Any combination of six states including all of the Big Four; Any combination including three of the Big Four and Denmark; Any combination including Italy, France, and Germany or the United Kingdom, Italy, and Germany; Any combination including the United Kingdom, France, Germany and Greece or Belgium. If the United Kingdom, France, and Italy adhere, but not Germany, any combination must include the Netherlands or any of the following pairs: Greece and Denmark, Greece and Belgium, Denmark and Belgium. It is impossible for any combination of six Member States to satisfy the requirements of Article 82 unless it includes three of the Big Four. Source for population figures: Countries of the World and their Leaders: Yearbook 1984 (Detroit 1984).

2. For the sake of simplicity we shall deal only with the EEC; most issues are similar in the ECSC and Euratom. Cf. Article 96 ECSC and Article 204 Euratom.

3. One example of such a treaty is the recently concluded Law of the Sea Convention. For a discussion of the roles of the Community and the Member States in that treaty, see, Gaja, The European Community's Participation in the Law of the Sea Convention: Some Incoherencies in a Compromise Solution, in 5 Italian Yearbook of Int'l. L. 110 (1980-81). The issues raised by partial ratification of the Draft Treaty have been discussed by Nickel, Le projet de traité instituant l'Union européenne élaboré par le Parlement européen, forthcoming in Cahiers de Droit Européen; Lodge, Freestone and Davidson, Some Problems of the Draft Treaty on European Union, 9 Eur. L. Rev. 387 (1984); Groupe d'études politiques européennes, L'Union européenne: le projet du Parlement européen aprés Fontainebleau (1984); de Saint-Mihiel, Le projet de traité instituant l'Union européenne, R.M.C. No. 276, 149 (1984); Catalano, The European Union Treaty: Legal and Institutional Legitimacy, Crocodile, No. 11, 6 (June 1983); Jacqué, The European Union Treaty and the Community Treaties, Crocodile, No. 11, 1 (June 1983).

4. The juxtaposition of an imperative "shall meet at once" and the facultative "by common accord" is a classical way of reconciling incompatible interests. For a similar formulation cf. Art. 169(EEC).

5. Ehlermann, Die Rolle der Juristen im Rechtsetzungsprozess der EG (1983) from which we have drawn and to which we are indebted.

6. Though in both these cases constitutional changes altered the complexion of the nation, unifying Italy and partitioning Germany.

7. Ilké, How Nations Negotiate 202 (1964).

8. Weiler, The Community System: The Dual Character of Supranationalism, 1 Yearbook of European Law 267 (1981).

9. Whether the Community is an international organiation subject to international law or a hybrid form of quasi-federal state, subject only to its own, internal constitutional law is an issue that has excited endless debate. See, e.g., Dagtoglou, La nature juridique de la Communauté européenne, in Trente Ans de Droit Communautaire 35 (1982). This is not the place for a full discussion of that issue. Suffice it to say that legal constructs to justify the implementation of the Draft Treaty should not carry the Community backward by stressing its foundations in international law.

10. For example, the OECD supplanted the OEEC without following the organic amendment procedures contained in the OEEC. See, Jacqué, supra, at 7; Pescatore, L'Ordre juridique des Communautés européennes 62-63 (2d ed. 1973).

11. The Convention on Common Institutions was signed with the Treaties of Rome. Although it modified portions of the ECSC Treaty, no-one objected that Art. 96 ECSC had been breached. Catalano, supra, at 2. The "acceleration decisions" of the 1960's furnish another parallel. In Commission v. Italian Republic, Case 38/69 (1970) E.C.R. 47, Italy claimed that an acceleration decision modifying the terms of the Treaty of Rome had the status of an international agreement such as those foreseen by Articles 20 and 220(EEC). The Court of Justice disagreed, rejecting Italy's claim that her declarations at the time of the decisions operated as a reservation to an international instrument. See, Pescatore, The Law of Integration 67 (Leiden 1974).

12. See, e.g., Schwarze, Ungeschriebene Geschaftsfuhrungsbefugisse fur die Kommissien bei Untatigkeit des Rates? Zum Fischerei-Urteil des EuGH v.5.5.1981., 17 Europarecht 133 (1982); Bernhardt, Les sources du droit communautaire: la "constitution" de la Communauté, in Trente Ans de Droit Communautaire 73, 80-81 (1982). But cf., Lodge, Freestone, and Davidson, supra, at 393-95.

13. Roquette Frères v. Council, Case 138/79 (1980) E.C.R. 3360.

14. In this discussion we deal only with Article 236(EEC). Another actor is involved in the Coal and Steel Community; Article 96(ECSC) requires an opinion on proposed amendments from the Court of Justice.

15. The Draft Treaty's concern for continuity manifests itself especially in Article 7, entitled "The Community Patrimony."

16. Cf. Article 208 of the Euratom Treaty. Article 97 of the ECSC treaty limits that treaty to a term of 50 years.

17. See, e.g., Akehurst, Withdrawal from International Organisations, in Current Legal Problems 1979 143, 151 (London 1979). Accord, Note, Hill, The European Economic Community: The Right of Member State Withdrawal, 12 Ga. J. Int'l. & Comp. L. 335 (1982).

18. Dagtoglou, How Indissoluble is the Community?, in Basic Problems of the European Community 258 (Oxford 1975). See also, Dagtoglou, La nature juridique de la Communauté européenne, supra, note 8a, at 42 (1982); Lasok and Bridges, Introduction to the Law and Institutions of the European Communities 25 (2d ed. 1976), who agree that a Member State may withdraw "as long as the political integration of the economic community into a more homogeneous body politic has not materialised." Bernhardt, supra, note 11, at 85 (1982) assumes that withdrawal would be legal when he remarks that withdrawal of a Member State that has failed to maintain a democracy would be "desirable."

19. Id. at 259-260.

20. Case 7/71 (1971) E.C.R. 1003, 1018. Cf., Hill, supra.

21. Article 56(1) reads:

> A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

By its terms, the Vienna Convention applies only to treaties entering into force after the Convention itself. As the Convention was conceived as largely a codification of existing international law, its provisions may still guide our discussion.

22. Article 56(1)(b) does not state an entirely different principle from Article 56(1)(a); it merely expresses in

concrete form the concept that the nature of some treaties may give rise to a presumption that the Contracting Parties intended to include a right of withdrawal.

23. E.g. Akehurst, supra.

24. This situation is, of course, purely hypothetical. It is as unlikely that only one Member State would oppose the Draft Treaty as it is that Luxembourg would be the one to do so.

25. Nickel, Le projet de traité instituant l'Union européenne élaboré par le Parlement européen forthcoming in Cahiers de Droit Européen (1984); Catalano, supra, at 2; Jacqué, supra, at 7.

26. Insofar as the envisaged jurisdiction of the Union comprises subject matters that fall within the exclusive competence of the Community, the principle of preemption precludes the Member States from entering into agreements in those areas. To the extent that the new Treaty deals with matters over which the Member States have concurrent competence, the agreement would risk violating the principle of supremacy. We have warned all along that certain rationales for justifying Art. 82(DT) may risk doing grave harm to the Community acquis; this legal construct, which suggests that the transfer of sovereign powers from the Member States to the Community may be revoked at any time, could wreak havoc on the existing Community structure.

27. The sort of principle that we are referring to clearly straddles the domains of law, philosophy and political science. Such principles are nonetheless "legal" principles; indeed, they are essential elements of the legal edifice. The law must turn to fundamental principles when confronted by the "hard" cases that cannot be resolved by the usual legal methods. See, Dworkin, Taking Rights Seriously (London rev'd ed. 1978).

28. The controversies leading to the final version of the Articles is recounted in detail by Jensen, The Articles of Confederation (Madison 1948).

29. The classic picture of a nation paralyzed by the weakness of its central government, painted by Fiske, The Critical Period of American History 1783-1789 (Boston and New York 1888), has been much disputed in recent years. See, e.g. Jensen, The New Nation: A History of the United States During the Confederation 1781-1789 (New York 1950); Morgan, The Birth of the Republic 1763-1789 (Chicago rev'd ed. 1977). Still, the consensus survives that the Confederation was hamstrung in certain areas, especially in foreign relations

and commercial policy, and by its lack of power to collect taxes.

30. The two states were, apparently, well aware that their agreement was illegal. Farrand, The Fathers of the Constitution 100-101 (New Haven 1921).

31. Only five states were represented at the Annapolis Convention. The failure of this Convention, it has been suggested, was deliberate; it highlighted the need for radical, rather than incremental, change and provided an excuse to call the Constitutional convention. Id. at 101-103.

32. Congress' resolution read, in part:

> Whereas, there is provision in the Articles of Confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several States ...
>
> Resolved, - /That a convention be assembled/ ... for the sole and express purpose of revising the articles of the Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the States, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.

The Annapolis call was similar, calling for a convention

> to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same.

Quoted by Madison in The Federalist, No. 40.

33. Gilliard, A History of Switzerland 91 (Westport Conn. 1978).

34. Calgari and Agliati, 2 Storia della Svizzera 216-18 (Bellinzona 1969).

35. Rappard, La Constitution Fedérale de la Suisse: 1848-1948 80 (1948).

36. Cf. Bernhardt, Les sources du droit communautaire: la "constitution" de la Communauté, in Trente Ans de Droit Communautaire 73, 81 (1982).

37. Lijphart, Democracy in Plural Societies 36 (New Haven 1977).

38. Bridel, Précis de Droit Constitutionnel Suisse 46-47 (1965).

39. See, Cappelletti, Seccombe, and Weiler, Introduction, Integration Through Law: Europe and the American Federal Experience, vol. 1, book 1. (Forthcoming).

40. Dahl, Federalism and the Democratic Process, in Liberal Democracy, NOMOS XXV 95 (Pennock and Chapman eds. 1983).

41. Id.

42. Art. V, U.S. Constitution; Arts. 104-107, 1848 Swiss Constitution. The failed 1832 amendment to the Federal Pact also permitted amendment by a majority of the cantons.

43. See, for example, Article 68.2(DT), under which the Council of the Union, by unanimous vote, can authorize a Member State to derogate from measures taken by common action.

44. This assessment does not mean that we neglect the complexities of the "two-speed" concept, elaborated by Ehlerman, How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds", 82 Mich. L. Rev. 1274 (1984). See also, Langeheine, Abgestufte Integration, 18 Eur. R. 227 (1983); Grabitz and Langeheine, Legal Problems Related to a Proposed "Two-Tier System" of Integration Within the European Community, 18 Common Mkt. L. Rev. 33 (1981). If, as Ehlermann suggests, a "two-speed Europe" would only be workable under an amended Treaty of Rome, we would be back once more to Article 236(EEC). The political forces surrounding the technical amendments necessary to implement a two-speed Europe would be different than those that might prohibit implementation of the Draft Treaty via Art. 236(EEC). The most obvious reason is that unanimous approval of the Draft Treaty, in its present form, would leave no options for Member States that wish to "stay behind," while such technical amendments would be designed precisely to provide those options. Moreover, the political objections raised above to implementation--albeit unanimously--by Art. 236(EEC) would not apply to such amendments.

45. In any case, these precedents show that coexistence cannot be dismissed as "inconceivable." See, Nickel, supra, at 30.

46. Supra.

47. Jacqué, supra, at 8; Groupe d'études politiques européennes, supra, at 17-22.

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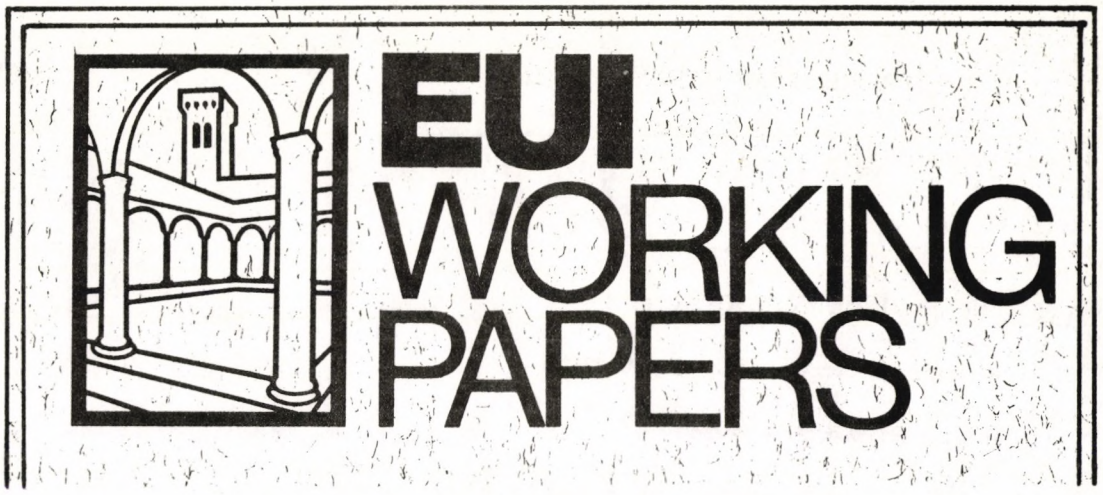

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