European University Institute
Robert Schuman Centre for Advanced Studies

EUI Working Papers

RSCAS 2008/34

European Union Law: A Unified Academic Discipline?

Bruno de Witte

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

European Union Law: A Unified Academic Discipline?

BRUNO DE WITTE

EUI Working Paper **RSCAS** 2008/34

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s).
Requests should be addressed directly to the author(s).
If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.
The author(s)/editor(s) should inform the Robert Schuman Centre for Advanced Studies at the EUI if the paper will be published elsewhere and also take responsibility for any consequential obligation(s).

ISSN 1028-3625

© 2008 Bruno de Witte

Printed in Italy in December 2008
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu/RSCAS/Publications/
http://cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies (RSCAS), directed by Stefano Bartolini since September 2006, is home to a large post-doctoral programme. Created in 1992, it aims to develop inter-disciplinary and comparative research and to promote work on the major issues facing the process of integration and European society.

The Centre hosts major research programmes and projects, and a range of working groups and ad hoc initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration and the expanding membership of the European Union.

Details of this and the other research of the Centre can be found on:
http://www.eui.eu/RSCAS/Research/

Research publications take the form of Working Papers, Policy Papers, Distinguished Lectures and books. Most of these are also available on the RSCAS website:
http://www.eui.eu/RSCAS/Publications/

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

Abstract

In this paper, presented to an interdisciplinary workshop on ‘The European Legal Field’, the author examines the way in which one sub-field, namely that of academic writing on European law, is structured. Some factors point to the existence of a relatively unified, cross-national community of scholars, but other, and perhaps more weighty, factors denote a rather more fragmented reality. This fragmentation is caused by legal education and training, which takes place overwhelmingly in a national context and is deeply embedded in national legal cultures. The fragmentation is also expressed in the ways in which legal scholarship is produced and distributed. These are marked by separation along linguistic and national lines, and along the established lines of legal sub-disciplines that, in many countries of Europe, tend to ‘absorb’ European law scholarship into existing academic frameworks.

Keywords

European law

1. Introduction

This paper[1] deal with one sub-field of European Union law, constituted by what in French one would call *la doctrine*, in German *die Rechtslehre*, and in English perhaps *legal writing*. Most of this legal writing is produced by professional academics (hence the reference in the title to European Union law as an academic discipline) who are mostly based at universities,[2] but some of it is produced by judges, civil servants or practitioners - in fact, EU law has been marked, especially in its early years, by the large proportion of legal writing produced by 'insiders', that is legally trained members of the EU institutions.

The main purpose of this paper is to explore the extent to which this group of European law academics can be said to constitute a true community. Is it a unified group or is it deeply fragmented along national or other lines? This paper does not aim at dealing with other, related, questions, such as that of the substantive characteristics of legal scholarship (What are its main themes? Which are the ideological currents?) and that of the influence of legal academics on the actual development of EU law.[3]

The first thing to note is that legal scholars display a surprising lack of interest in legal scholarship, or at least they tend not to make it an object of their writing. There is no apparent interest in "mapping the field" of the kind which one finds in political or sociological scholarship.[4] This general characteristic of legal academics is also true for European Union law. The scholars specializing in the field rarely, if ever, indulge in self-reflective inquiries. They write frequently about the nature of their object (what is European Union law?) but not about the nature and state of their own trade (what is European Union legal scholarship?). Among the few writings by EU law scholars that deal with the state of the academic discipline, some primarily deal with the content of scholarship,[5] and only very few deal also with the structure and organisation of EU law scholarship,[6] which is our concern in this paper. It remains to be seen whether the growing interest taken in EU legal scholarship by scholars from *other* disciplines, as exemplified by this workshop, will encourage greater self-reflection (or rather: the written expression of such self-reflection) by EU law academics.

---

1 This paper was presented at the Conference "The European Legal Field-Le champ juridique européen" organized by Bruno de Witte and Antoine Vauchez with the Robert Schuman Centre and the Academy of European Law (European University Institute, 25-26 September 2008).

2 Legal science is characterized by the fact that, compared to other social sciences, there is only a very limited number of research centres situated outside the universities.

3 For a comparative law essay about the influence of legal academics on the development of the law (but without specific reference to European law), see W. Twining, W. Farnsworth, S. Vogenauer and F. Tesón, "The Role of Academics in the Legal System", in P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 920-949. Specifically on the UK, see N. Duxbury, *Jurists and Judges: An Essay on Influence* (2001). And on Germany, see S. Vogenauer, "An Empire of Light? II: Learning and Lawmaking in Germany Today", *Oxford Journal of Legal Studies* (2006) 627-663.

4 But see the intriguing essay by W. Twining, "Mapping Law", *Northern Ireland Legal Quarterly* (1999) 12, reproduced in W. Twining, *Globalisation and Legal Theory* (2000), chapter 6.

5 See for example: J. Shaw, "European Union Legal Studies in Crisis? Towards a New Dynamic", *Oxford Journal of Legal Studies* (1996) 231-253; A. von Bogdandy, "A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective", *European Law Journal* (2000) 208-238; N. Walker, "Legal Theory and the European Union: A 25th Anniversary Essay", *Oxford Journal of Legal Studies* (2005) 581-601; D. Curtin, "European Legal Integration: Paradise Lost?", in Curtin, Klip, Smits and Mccahery (eds), *European Integration and Law* (2006).

6 H. Schepel and R. Wesseling, "The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe", *European Law Journal* (1997) 165-188; J. Shaw, "The European Union: Discipline Building Meets Polity Building", in P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 325-352; A. Arnull, "The Americanization of EU Law Scholarship", in A. Arnull, P. Eeckhout and T. Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (2008) 415-431.

Treating the individuals who freely indulge in legal writing (in the case of judges or practitioners), or who are contractually obliged to produce legal writing (in the case of university academics), as potentially forming a community is itself an idea which makes more sense in some countries and in others. In a recent study of German legal academia, the author stated that "German lawyers take it for granted that there is a body of persons, writings and opinions that, in its entirety, constitutes 'the doctrine' (die Lehre), 'the legal doctrine' (die Rechtslehre), 'legal science' (die Rechtswissenschaft) or 'the literature' (das Schrifttum)."[7] Similarly, in France and in Italy, *la doctrine* has traditionally been conceived as an abstract entity beyond the collection of individuals that compose it.[8] This is not the case in other countries, such as the United Kingdom. So, already at the meta-level of whether it makes sense to conceive of legal academics as a body with collective views and opinions, there is a cultural fragmentation along national lines.

In the following pages, I will first (in section 2) present the 'unity hypothesis', that is, the factors that might lead us to conceive of EU legal scholarship as a relatively unified academic discipline, and then move to consider (in sections 3 and 4) the main elements that have caused, and continue to cause, fragmentation, with an emphasis on the existence of geographical and disciplinary boundaries.

2. The Unity Hypothesis

There are several reasons why one would expect EU legal scholarship to form a relatively close-knit and homogenous community. First of all, the academic 'branch' of European Community law was created quite some time ago and quickly assembled all the paraphernalia of a true legal sub-discipline. More precisely, one can date the emergence of the academic discipline of Community law to the early and mid-60s, and localize it, obviously, in the original six member states of the European Communities. [9] A number of Institutes of European Law were created in those years, in places such as Brussels, Leiden, Cologne, Paris, Liège and Padova, offering an infrastructure for teaching and research in the brand-new discipline. In some countries, particularly the Netherlands, special chairs for European Community law were established, whereas in other countries new courses in EC law were offered by academics belonging to an established discipline (this is an issue which we will address later in this paper). A number of specialized journals were started one after the other, including *Common Market Law Review,*[10] *Cahiers de droit européen, Revue trimestrielle de droit européen, Europarecht, Rivista di Diritto Europeo,* all still alive and thriving except for the last named. In each member state, associations of European Community lawyers were set up and together they formed a *Fédération Internationale de Droit Européen*, which still exists today and manifests its existence essentially by the organisation of large two-yearly conferences.

This early group of Community law scholars had a clear common purpose. Apart from commenting the concrete legal developments in EC legislation and case-law (which were very modest compared to what they are today), they devoted much of their intellectual energy to highlight the novel

7 S. Vogenauer, "An Empire of Light?", n. 3 above, at 631.

8 See in particular P. Jestaz and C. Jamin. *La doctrine* (2004); and P. Jestaz and C. Jamin, "The Entity of French Doctrine: Some Thoughts on the Community of French Legal Writers", *Legal Studies* (1998) 415-437. For Italy, see A. Braun, "Professors and Judges in Italy: It Takes Two to Tango", *Oxford Journal of Legal Studies* (2006) 665-681, at p. 680.

9 On this period of emergence of EC law, see A. Vauchez, "Integration-through-Law – Contribution to a Socio-History of EU Political Common Sense", *EUI Working Papers RSCAS 2008/10*, at pp. 21-22, and also, by the same author: "Une élite d'intermédiaires – Genèse d'un capital juridique européen (1950-1970)", *Actes de la recherche en sciences sociales*, no. 166-167, 54-65.

10 The *Common Market Law Review* was founded in 1963 at the University of Leiden in the Netherlands. The mission of the Review was defined, in its first editorial, as that of building a bridge between the continent and the UK, and providing interested readers in the UK with a view of legal developments in the Community of the Six. Its initial board of editors had 4 British and 4 Dutch members, and one each from Belgium, France, Germany and Italy. The vast majority of the contributors, in the years prior to UK accession, were based on the continent.

characteristics of the Community legal order. Based on an analysis of the judgments of the European Court of Justice in *Van Gend en Loos* (1963) and *Costa v ENEL* (1964), they propagated the need for the uniform application of EC law and its integration in the legal orders of the member states.[11] Thus, from the start, EC law aspired to become truly uniform law, in contrast with traditional public international law whose domestic application was (and still is) very uneven depending on the different constitutional rules and practices of each country. In fact, the uniform application of EC law has become a *leitmotiv* in the case law of the ECJ. Whereas most norms of Community law, whether contained in directives or in regulations, are implemented and applied by national authorities and courts, the European Court has insisted that this domestic transposition and application of European norms should not distort the content of the norm. It has often held that "the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community"[12] and that this requires, among other things, a consideration of all the language versions of a given Community law measure.[13] It is clearly utopian to think that national courts or authorities will be able to consult and compare all the (more than 20) language versions of an EU law norm,[14] but stating this as a rule of interpretation certainly expresses a strong invitation to look 'across the border' when interpreting and applying EU law. This aspiration to uniformity, a true hallmark of the EC legal order as it was developed from the 1960s, is thus a reason to expect the emergence of an academic community which is fairly homogeneous across national lines. Since EU law as applied in Germany must be the same as EU law as applied in Poland, one would expect EU legal writing to adopt a cross-national outlook in its comments and analysis.

Another factor of unity, which was duly noted by Schepel and Wesseling in their pioneering empirical study of 1997,[15] is the active participation of lawyers working for the European institutions, and members of the Court of Justice and their legal secretaries, in scholarly writing, including the writing of textbooks[16] and the editing of legal journals. They showed, in their study, that there has been since the early years of the Communities a close connection between academics and practitioners, and frequent circulation of individual scholars from one sub-field to the other, with university professors becoming judges or members of the Commission or Council legal service and vice-versa, and many persons exercising both functions simultaneously. One typical figure of EU law is, in fact, that of the member of the Court of Justice who writes abundantly in scholarly journals, is an editor of a few of them, and teaches EU law in places such as the College of Europe. This close-knit interaction caused *la doctrine* to be, at least in the early decades, very supportive of the work of the EU institutions, and in particular of the Court.[17]

In a more recent publication dealing with another subject, one of the authors summed up and confirmed the views outlined in the 1997 article in the following terms:

---

11 See, on this propagation of the direct effect and supremacy doctrines in the 1960s through a network of practitioners and academics, the study by Vauchez, "Integration-Through-Law", cited in note 9 above.

12 ECJ, Case C-188/03, *Irmtraud Junk v Wolfgang Kühnel*, judgment of 27 January 2005, para. 29. Similar language can be found in many judgments of the Court.

13 Idem, para. 33.

14 Indeed, it is difficult enough for the European Court of Justice to deal with discrepancies between the language versions of a given text in its own interpretation of EU law; see, for example, G. Van Calster, "The EU's Tower of Babel – The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in More than One Official Language", *Yearbook of European Law* (1997) 374.

15 H. Schepel and R.Wesseling, n. 6 above.

16 For example, one prominent English-language textbook of EU law is co-authored by a current judge at the ECJ and by one of his *référendaires*: K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, 2nd ed (2005).

17 On this phenomenon, see Schepel and Wesseling, n. 6 above, and also J. Shaw, n. 6 above, at p.336 f.

> *"Les communautaristes forment un groupe très uni, qui circule tout naturellement entre l'université, les institutions politiques et le monde économique. Leur ethos est profondément pragmatique, ouvertement hostile aux idées grandioses, et sous-tendu par une conception clairement instrumentale du droit. Leur engagement collectif en faveur de l'intégration estompe leurs divergences politiques et leurs controverses techniques."*[18]

We find, in this passage, a nutshell definition of an academic discipline which is institutionally well-integrated and which possesses a common sense of purpose.

However, each of the three sentences contains highly disputable statements which may have been true at some earlier epoch, but may no longer be true today. The last sentence assumes that EU law scholars, taken as a whole, support the deepening of European integration. Yet, one increasingly finds legal writing that criticizes the general direction taken by the integration process (for example, through the drafting of a Constitutional Treaty), and of particular pieces of legislation and judgments of the European Court of Justice. Today, legal writing in the leading journals is as critical of EU law-making and judicial interpretation as comparable national legal scholarship, and *la doctrine*, taken as a whole, is no longer throwing its weight behind plans for 'more Europe'. The second sentence, referring to an ingrained pragmatism and instrumental view of the law, is probably less true than it used to be. As the number of academics specializing in EU law increases, there is more room for theoretically inclined and normative assessments of the evolution of EU law and its different branches. But the remainder of this paper will deal, in particular, with the plausibility of the statement in the first sentence: do EU legal writers really constitute *un groupe très uni*?

3. Fragmentation through Legal Education

A theoretical basis for scepticism about the existence of a single Europe-wide scholarly community is provided by the 'law-as-culture' school in comparative law.[19] Writers of this persuasion have expressed deep scepticism about the feasibility of comparative legal analysis and about transplants of norms and institutions between legal orders. They posit the "incapacity on the part of those immersed in one legal system to appreciate the deep context and meaning of other systems."[20] Their emphasis on the incommensurability of legal cultures and legal systems has become influential (though controversial) in the field of comparative law, but the views of these writers are clearly relevant also for the field of European Union law. In part, this is because EU law is only partly uniform and partly absorbed into 27 different national legal systems. But also where EU norms are formally speaking uniformly applicable throughout the territory of the Union (as in the case of the rare EC regulations that do not require national implementing measures), they will be understood and handled in a different way by lawyers depending on the legal culture to which they belong. The domestic interpretation and application of EU law does not involve the interpretation and application of a norm belonging to a *foreign* legal system (as is the case in comparative law scholarship and in the practice of legal transplants), but it still concerns a norm from *another* legal system than one's own – and this otherness is faced by academics as well as by judges and practitioners, since EU law is another legal system than the one in which they were trained and whose culture they have absorbed during that training process. The EU law that is studied in each country is therefore a 'legal hybrid', a European

18 H. Schepel, "*Professorenrecht?* Le champ du droit privé européen", *Critique internationale*, no. 26 (2005) 147-158, at 152.

19 Characteristic writings from this school include: P. Legrand, *Fragments on Law-as-Culture* (1999); P. Legrand, "The Same and the Different", in Legrand and Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 240-311. For discussion of this approach to comparative law, see R. Cotterell, "Comparative Law and Legal Culture", in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 709-737.

20 N. Walker, "Culture, Democracy and the Convergence of Public Law: Some Skepticism about Skepticism", in Beaumont, Lyons and Walker (eds), *Convergence and Divergence in European Public Law* (2002) 257-271, at 258 (the author of this description is not himself part of the school).

law which is contextualized and transformed by the national legal order in which it is articulated.[21] Professor Jolowicz put it in the following metaphorical terms, some 30 years ago: "It is not to be expected that the insertion into different legal systems of a single text will produce identical or even similar results in all those systems any more than it is to be expected that the addition of a litre of green paint to four litres of yellow will give us the same colour as the addition of the same quantity of the same paint to four litres of red."[22]

In fact, the validity of the 'law-as-culture' thesis appears to be crucially linked to the conditions of legal education. A child born in Birmingham is not a natural common lawyer, nor does the young Tuscan acquire a '*civiliste'* frame of mind already in secondary school. It is, rather, university and professional legal training that instil the deep understanding of law as expression of a particular legal culture. Now, to what extent can it be said that the understanding which legal academics have of EU law is determined by the particular legal system in which they received their early training?

The training of many EU law academics took indeed place within the confines of a national university system, in which the emphasis is clearly on learning about the national legal system first, and learning about European Union law (if at all) in the light of the categories and ways of argument of the national system. Thus, their perspective on European law was formed on the basis of a university curriculum which situated the national legal system at the centre of the legal universe. The fragmentation effect which this causes is visible both in terms of academic style and academic content.

As to academic content, the themes of EU law which academics explore are often determined by the importance given to them in the university canon of their own country. This question has never been properly studied, at least not for EU law,[23] but, to give just one example, it is surely no coincidence that much of the legal writing on the system of sources of EU law has been produced by French scholars, and that UK scholars fail to even to register this as a distinct topic of EU law scholarship.

The same is true for academic style. For example, the French rigid writing structure (with the *plan en deux parties*) applies to EU law as much as to any other legal discipline. Similarly, scholars of EU law who have been educated in a German law school will typically display a style of EU law scholarship which corresponds to the dominant style used by domestic law scholars. It is characterised, according to a description proposed by a German academic working in the UK, by a "struggle for rationality, systematic coherence, logical consistency, building on first principles, obsession with taxonomy, abstractness, precision and clarity of concepts." It is, to put it in a nutshell, "still very much under the spell of 19th-century 'legal science'". [24]

This form of fragmentation is of course self-perpetuating: to the extent that university teachers are themselves steeped in their national legal traditions, and use the EU law literature written in their own language, the legal education system will tend to perpetuate this nationally-coloured outlook on EU law for the next generation of students. On this point, one would need to have a closer look at textbooks, which are the privileged means through which EU law scholarship is passed on to students, but it is probably safe to assume that these textbooks, because of their synthetic approach, will be even more clearly focused on scholarship produced within the country or within the language community than other more specialized legal writings. If one takes, for example, the most widely used English language textbook of EU law, Craig and de Búrca's *EU Law – Text Cases and Materials* (4th ed,

21 N. Walker, "Legal Theory", n. 5 above, at 583.

22 J.A. Jolowicz, "New Perspectives of a Common Law of Europe: Some Practical Aspects and the Case for Applied Comparative Law", in M. Cappelletti (ed), *New Perspectives for a Common Law of Europe* (1978) 237-265, at 244.

23 But see the attempt to map the distinctiveness of German legal scholarship in the neighbouring field of public international law, in "Typisch deutsch…: Is there a German Approach to International Law?", special issue of the *German* Yearbook *of International Law* (2007) pp. 15-456.

24 S. Vogenauer, n. 3 above, at p. 657.

2008), each of the 28 chapters is followed by a list of further references comprising from a minimum of 5 to a maximum of about 30 items of legal writings; none of those is written in another language than English. The same is true, by and large, for the other English-language textbooks. This instils in young EU law scholars the feeling that it is possible and normal to write intelligently about EU law as if it were exclusively produced and commented upon in English. Textbooks in other main European languages similarly refer predominantly to writing in their own language, although this may be changing gradually. Examples of a new, more plurilingual approach, are a recently published *Introduction au droit européen*, written by two scholars of the younger generation, who refer extensively also to writing on EU law in English,[25] and Ulrich Haltern's *Europarecht*, which uses as much, if not more, English as German literature.[26]

It would seem, therefore, that national systems of legal education have a massive fragmenting effect on EU law scholarship. However, a number of factors weaken the 'nationalizing' impact of legal education on the formation of future EU law academics.

The *first of these factors* is that a large number of students (especially among the bright students who might become academics) actually study EU law in other countries than the one in which they receive their basic legal training. From the start, training in European law was not an exclusively national affair. In the early decades of European integration, when EC law was integrated in the national law curriculum to a very limited extent, knowledge of EC law was typically acquired in a specialized post-graduate programme, such as those of Nancy, Strasbourg and Saarbrücken. The most important of those programmes was the College of Europe in Bruges, a true breeding ground of EU law specialists who, for many of them, went on to work for the EU institutions.[27] At the more specific level of training future legal academics, the European University Institute in Florence has played a similar role of denationalization of legal scholarship, although the emphasis of its Law doctoral programme (unlike in Bruges) was never exclusively on EU law, and its unifying role is probably more implicit than deliberate.[28] More recently, this de-nationalization of the study of European law started to occur at undergraduate level as well. We can observe, today, that many Erasmus exchange students study EU law also, or even mainly, during their exchange period abroad rather than in their home university. This happens for a number of reasons, which include the perception that EU law is a more easily accessible subject in a foreign university context than courses in the law of the host university's country! As a result of these developments, a sizeable number of EU academics[29] have obtained their first or advanced training in EU law in another country than their own, so that their understanding of EU law becomes 'transnationalized' and partly divorced from their understanding of the domestic law of their country of origin.

A *second factor* is also linked to the operation of the Erasmus programme. The programme has, contrary to its stated ambition of strengthening cultural diversity in Europe, promoted the diffusion of English as EU law's *lingua franca*. Indeed, many universities in the smaller countries of Northern Europe have decided to offer English language courses in order to be sufficiently attractive to foreign students; in the case of law studies, the parts of the curriculum that were most easily Anglicized were

25 J.-S. Bergé et S. Robin-Olivier, *Introduction au droit européen* (2008).

26 U. Haltern, *Europarecht – Dogmatik im Kontext*, 2nd ed (2007).

27 For a sociological study of the role played by the College of Europe in general (that is, also in other fields than the law), see V. Schnabel, "Elites européennes en formation. Les étudiants du 'Collège d'Europe' et leurs études", *Politix* (1998) 33-52.

28 See F. Snyder, "The EUI Law Department and the Europeanisation of Law: An Introduction", in F. Snyder (ed), *The* Europeanisation *of Law – the Legal Effects of European Integration* (2000) 1-11; see also the Autumn 2005 issue of the *EUI Review* (available online).

29 Although it is true that less than 4% of university students take part in an Erasmus exchange during their studies, the percentage is probably much higher (although once again, I have no figures…) among EU law academics – that is, of course, among those who obtained their law degree during the last 20 years.

EU law and international law, rather than the courses dealing with the various branches of national law. The Erasmus-induced student mobility has thus led to the large-scale use of English and English-language literature for teaching EU law outside the UK and Ireland. Examine, for example, the webpage of the University of Edinburgh's School of Law dedicated to its Erasmus exchanges.[30] It lists the participating institutions and mentions the languages they use: there are five French universities where courses are taught in French, three German universities where courses are taught in German, three Spanish universities where they are taught in Spanish, whereas for all other European destinations, namely Belgium, Denmark, the Netherlands, Norway and Sweden, the webpage reassuringly indicates that the courses will be taught in English (which presupposes that the Edinburgh students will not venture to take courses in Belgian, Dutch etc. law, but will stay with the selected English language offering of their host institutions, which invariably includes one or more courses of EU law). Obviously, the switch to English and to English language literature also applies to the 'home' students of those law schools, since the schools often cannot afford the luxury of offering parallel courses of EU law in the national language and in English. It is difficult to argue that, say, a Dutch student who studied European law at the University of Maastricht based on the *EU Law* textbook by Craig and de Búrca has imbibed a vision of EU law that reflects Dutch legal culture.

This 'blurring' of legal cultures also happens at later stages of the academic career. Indeed, the *third factor* that counteracts national fragmentation in university education is that fact that, in a number of countries, university positions in the field of EU law are wide open to foreign nationals. In theory, all university positions are now open to all EU citizens, on the basis of the rules on the free movement of persons of the EC Treaty. In practice, though, the mobility of university professors and lecturers is rather limited, particularly in the field of legal studies. The rules on academic recognition and the recruitment practices of universities, particularly in the large continental countries France, German, Italy and Spain, are organized in such a way that it is very difficult for foreign-trained scholars to be appointed.[31] In contrast with them, countries such as the United Kingdom and the Netherlands are easily accessible to foreign-trained scholars and both these countries might, today, have a majority of EU law academics who obtained their initial legal training in other countries than the UK or the Netherlands. For academics who are based, and teach, in another European state than the one in which they received their basic legal education, the national legal system of reference may become, with time, that of the country in which they live or else (and perhaps more frequently) they may form islands of truly a-national research on EU law.

The *fourth factor* is that a rather small, but increasing, number of students opt for complete *undergraduate* legal studies offered by a foreign institution, which may involve either student mobility or the cross-border provision of legal education. Both these modalities of transnational education are permitted by the application of EC Treaty rules on freedom of establishment, freedom to provide services and Union citizenship. It is not uncommon, now, for a Greek student to obtain her legal education in France (or from an English university through distance learning), or for a German student to obtain a Dutch law degree. Luxemburgers necessarily had to study law abroad in the absence, until very recently, of a university at home, and this allowed for the emergence of some typically 'cosmopolitan' jurists such as former ECJ judge Pierre Pescatore, who had both studied and worked in several European countries other than his own.[32]

The *fifth factor* relates to the non-academic segment of EU law scholarship. Many of the legal specialists working for the EU institutions have made most or all of their career inside these institutions, and have become thoroughly socialized into the frame of mind of the 'supranational' EU

30 www.law.ed.ac.uk/erasmus/institutions

31 On the legal academic recruitment patterns in a selected group of countries, see the symposium papers edited by U. Mattei and P.G. Monateri, "Selecting Minds", *American Journal of Comparative Law* (1993) 351 ff. Little has changed since 1993…

32 A. Vauchez, « Une élite », n. 9 above, at 61.

lawyer. This is reflected in their writings which, after some years, feel more like 'Brussels' than like Dublin, Heidelberg or Salamanca.

To conclude on this point, we find that the legal culture of many European law academics is a disaggregated and recomposed legal culture. The field is composed of two rather different groups of scholars: those who have been trained inside the traditions of a national legal system, and have encountered EU law within that context; and those (a growing number) who have a transnational perspective of the discipline, either because they lack a specifically national vantage point altogether or because they have become thoroughly socialized in a transnational professional context.

4. Fragmentation in the Production of Legal Scholarship

After our summary examination, in the previous section, of the degree to which legal education structures promote fragmentation in EU law scholarship, we will now turn to another (not unrelated) dimension of the unity v fragmentation debate, namely the way in which the diffusion of EU law scholarship is organized. Here as well, the first impression is not that of a closely-knit community of scholars continuously speaking to each other (as the Schepel/Wesseling study of 1997 suggested), but rather that of a deeply segmented field with groups of scholars organised along national/linguistic and disciplinary lines.

a) National/Linguistic Fragmentation

We will start with the most obvious source of fragmentation in the diffusion of EU law scholarship: the fact that it takes place in different languages and through separate publication channels without much interaction between them. As one indicator of this degree of territorial fragmentation, we propose some data (presented in Tables at the end of this paper)[33] relating to the geographical origin of the contributors to some of the leading European law journals. With geographical origin, we mean here the country of the author's principal professional affiliation rather than her nationality. We made separate categories for each of the 15 "old" member states, and lumped the twelve member states that joined after 2004 together in one category "New Member States". In addition, we added a category "EU" for the authors who work for one of the European Union institutions (or for the European University Institute in Florence), and therefore cannot be assigned, professionally speaking, to one particular country. The data relate to the years 2005 and 2006, and also to the years 1995 and 1996 in order to signal any major changes that may have occurred over the last decade. They indicate a very clear divide between on the one hand the German, Italian and Spanish journals which are overwhelmingly written by authors from the country in which the journal is based and on the other hand the English language journals which present a very diverse picture in this respect. The French language journals are situated in between. This pattern has not changed much during the last decade.

More specifically, we found for the Italian journal *Il Diritto dell'Unione Europea* that 33 of the 38 authors for the year 2005, and 31 out of 36 authors for 2006 were based in Italy, and the remainder (with one exception) was affiliated with the EU institutions. In *Europarecht*, 38 out of 39 authors in the year 2005 were based in Germany, and 40 out of 41 in 2006. Among the French-language journals of our sample, there is a clear difference between the *Revue trimestrielle de droit européen*, based in France, whose contributors are predominantly located in France (though with a large number of EU-based contributors in the year 2005) and the Belgium-based *Cahiers de droit européen* which has a more varied pattern, but with Belgian authors forming the largest group in most years. One finds a similar distinction between the two English-language journals included in the sample. Whereas the *European Law Review*, based in the UK, recruits about half of its contributors from the UK, the *Common Market Law Review*, based in the Netherlands, has a much wider spread. In fact, this journal

33 The data were collected by Gracia Marín Durán, research assistant of the Academy of European Law of the EUI.

has traditionally had a very diverse range of authors including, along those based in Britain, also an important number of Dutch, Belgian, German and EU-based authors.[34] The *Revue du Droit de l'Union Européenne* is different from all others. This journal was founded by jurists working for the European Commission, and its contributors are still overwhelmingly affiliated with one of the EU institutions; although their articles are all published in French, the nationalities of the authors are quite diverse.

This compartmentalization of the non-English journals is largely due to language barriers. For example, very few non-Italian scholars are able to write in Italian and Italian journals do not have the means to make more than the occasional translation of a foreign text. This language-induced fragmentation may be compared with the neighbouring field of public international law. There, one can observe that in Germany, Spain and Italy, alongside journals in the national languages, there are also periodical publications that have adopted English: the *German Yearbook of International Law*, the *Italian Yearbook of International Law* and the *Spanish Yearbook of International Law*. The former of these switched to English long ago (in 1976) and publishes the work of numerous authors who are not based in Germany, as well as contributing to the diffusion of German scholarship abroad. This cosmopolitan character contrasts quite sharply with the Germany-centred composition of the journal *Europarecht*, whose valuable articles are rarely perceived abroad, due to the language factor.

This summary view, based on the examination of a limited number of mainstream EU law journals over a limited number of years, provides only a rough indication of the degree of 'output' fragmentation of EU law scholarship. It would need to be complemented and qualified by consideration of other, less mainstream journals, which offer a very different perspective. For example, the *Revista de Derecho Constitucional Europeo*, an online-journal edited by the University of Granada,[35] contains very many (often translated) contributions by authors from outside Spain. One should also mention here the *European Law Journal* which has moved its editorial seat from Italy to France and then to the UK and has a cosmopolitan authorship to an even greater extent than the other two English-language journals mentioned above. It also has a special feature, namely the annual publication of a set of papers written by young European law authors based in institutions spread all over Europe and beyond, selected from among those presented at an annual International Workshop of Young Scholars.[36]

A more refined indicator of geographical closure (or, conversely, cross-national fertilisation of ideas) would be the practice of referring to publications in other languages than the one in which one writes. There, the picture is quite different from the one sketched above. Although I cannot offer concrete data here, there are some noticeable differences between countries on this point as well. Generally speaking, scholars writing in Italian and Spanish, despite the existence of a rich literature in their own language, tend to make frequent reference to the foreign-language literature, and not only in English. The same is true, of course, for those writing in the smaller European languages. In contrast, most authors writing in German and French hardly use any literature in other languages than their own, although there is a growing minority of mainly young authors who examine also the scholarly production in other languages (in fact, mostly English, in both cases).[37] Among those writing in English, there is also a majority/minority cleavage, but of a different nature: here the smaller group of

34 Three other English-language journals based in the Netherlands that deal, to a large extent, with EU law, namely the *Legal* Issues *of Economic Integration*, the *European Constitutional Law Review* and the *Maastricht Journal of European and Comparative Law*, show the same pattern of multinational authorship.

35 www.ugr.es/~redce

36 There have been five such special issues of the *European Law Journal* so far, the last of which were the September 2006 and November 2007 issue.

37 A good example of the new trend is the sample of EU law scholarship from Germany and Italy published in English in the series of *Jean Monnet Working Papers* of New York University: A. von Bogdandy and J.H.H. Weiler (eds.), "Symposium: European Integration – The New German Scholarship", *Jean Monnet Working Papers* 9/2003; R. Toniatti and J.H.H. Weiler (eds.), "Symposium: European Legal Integration – The New Italian Scholarship", *Jean Monnet Working Papers* 06-07 to 12-07.

those who make frequent use of foreign language literature is mainly composed of those authors who are not based in Britain or Ireland. For example, a Dutch academic writing for an English-language law journal will quite naturally include Dutch, German and perhaps French writers among her references to the literature. Interestingly, though, the many EU law scholars of foreign origin who are employed by British universities tend to adopt the habit of their British-born colleagues of using exclusively English-language sources. It is a sure sign of the growing hegemony of English that these authors, who have easy mother-tongue access to other European languages, do not bother using the legal literature produced in those other languages.

So, it may be tempting to divide EU law scholarship in two groups: English-language scholarship and the rest. The former group is multinational in its composition, and is rather widely read and cited by their colleagues operating through other languages; the latter group operate *en vase clos*, in the sense that they may form a thriving and lively scholarly community within their language area, but are largely ignored by the rest of the world unless they make the effort to occasionally publish in English. There is, thus, a tendency for the English-language cluster, composed of many British and Irish scholars, a smaller group of Americans, and a growing group of scholars from Northern and Central Europe, to dominate the field, but this dominance is not absolute and uncontested.

More particularly, it is difficult to argue that English-language scholarship is more influential than the rest when it comes to the actual evolution of EU law. It is, of course, difficult to measure influence, but one small indicator is the extent to which legal writing is transmitted to the European Court of Justice through the opinions of the Advocates-General. Indeed, it is rather common for such opinions to refer to the scholarly literature dealing with the legal issue that is at stake in the case at hand.[38]A.-G. Poiares Maduro, for example, cited ten pieces of legal literature in his opinion of 21 May 2008 in the case *Arcelor* (dealing with the interpretation of the principle of equality and the relationship between the European Court and national courts),[39] A.G. Bot cited thirteen pieces of legal writing in an opinion of 8 July 2008 in a dispute between the Commission and Italy dealing with the regulation of motorcycle trailers;[40] and A.G. Trstenjak, in her opinion of 3 July 2008 in *SELEX Sistemi Integrati* (a competition case) cited fifteen different academic writings.[41] It would seem that the national origin of the A.G is an important factor in the choice of the literature: whereas all AGs tend to use French and English literature, the use of writings in other languages is more sporadic and depends on the language skills of the AG and his/her collaborators. Some Advocates-Generals tend not to mention the *doctrine* at all; for example, in an opinion of AG Mazak of 10 July 2008 in the *Förster* case, which deals with a controversial problem of Union citizenship on which there is abundant legal writing, one finds references to literally dozens of earlier ECJ judgments but not a single reference to the literature. It seems that the influence of legal scholarship on lawmaking and judicial decisions is limited by its fragmentation. The existence of national sub-communities means that it is much more difficult for something like a "European prevailing opinion" to emerge, which could play a similar role as the *herrschende Lehre* in the German legal culture. In Germany, the prevailing doctrine is a well-known concept which plays a practical role, in the sense that even judges and lawmakers feel under an obligation to give good arguments when they wish to depart from the prevailing doctrine.[42] There is no such thing in EU law.

38 See M. Lasser, Judicial Deliberations – A Comparative Analysis of Judicial Transparency and Legitimacy (2004) at 122 ff.

39 Of which 5 in French, 4 in English and 1 in Italian.

40 Of which 9 in English and 4 in French.

41 Of which 9 in German, 5 in French and 2 in English.

42 Vogenauer, n. 3 above, at p. 631 and p. 652. And, more generally, on the role of "prevailing opinion": T. Drosdeck, *Die* herrschende *Meinung: Autorität als Rechtsquelle* (1989).

b) Disciplinary Fragmentation

In 1989, the European Commission started its Jean Monnet Action Programme, a funding scheme which sought to promote university teaching on questions of European integration. Much of the funding since then went to the creation of new chairs or course modules of EU law. The Commission considered, indeed, that such a financial incentive was needed in order to convince the conservatively minded national education authorities and universities to give EU law its rightful place within the curriculum. It is true that prior to the Jean Monnet Programme only a few countries, such as Belgium and the Netherlands, had created specialized chairs in EU law. In most countries, EU law was incorporated into existing legal disciplines. In the early decades, this was often public international law, a logical choice since the European Communities had been created as advanced international organizations. In France, the main cleavage in legal studies between private law and public law ran right through EC law, so that EC law scholarship was fragmented, from the early days, between the *publicistes* and the *privatistes*, with separate courses and textbooks that deal either with the *droit institutionnel de l'Union européenne* or with the *droit communautaire des affaires.* When Spain joined the EC, it was decided not to create separate chairs or departments, but rather to allow the new field to be 'carved up' between the existing departments of international law, administrative law or constitutional law, according to the dynamics and *rapport de force* in each university. Each member state thus offers its own micro-story of the way in which the new legal reality of EU law was absorbed into generally very conservative university structures and academic circles.

More generally, with the expansion of EU law into ever new areas such as environmental law, contract law, administrative law, health law or criminal law, the legal doctrinal analysis of EU law has also to a growing extent been 'redomiciled'[43] in the various substantive disciplines of national law. EU legal scholarship is now incomparably more voluminous, richer and interesting than twenty years ago, but it is, unavoidably, also more fragmented. If a French EU law scholar wants to follow the periodical literature in his field, he can no longer limit himself to read the specialized European law journals (the three journals mentioned above and the monthly *Jurisclasseur Europe)*; he now also needs to browse through the *Revue trimestrielle de droit civil*, the *Revue française de droit administratif*, *Droit social*, the *Revue critique de droit international privé*, the *Revue du droit public*, and several others, because all of them may contain important pieces of scholarship dealing with one corner of EU law. Faced with this abundance of domestic legal scholarship, he may well decide that there is no time left to read also the English-language or Italian journals of EU law. In this way, disciplinary fragmentation strengthens national/linguistic fragmentation.

Apart from this fragmentation which follows the lines of the traditional legal disciplines, one can see the appearance of another cleavage line in EU law scholarship which is based on different general understandings of 'how to study law'. In particular English-language EU law scholarship has been subject, in the last two decades, to a radical transformation which is much less visible in the scholarship in other languages. This transformation thesis was recently expounded by Tony Arnull.[44] According to this author, the Community law literature was marked until the end of the 1980s by "two essential characteristics: first, it was essentially sympathetic to the integration project; second, it was traditional in character, 'based on the exposition of legal doctrine and the analysis of judicial decisions'."[45] After that, there occurred a 'theoretical turn' whereby a number of younger EU law scholars started to follow the model of American legal academia, where traditional doctrinal studies are neglected in favour of theoretically inspired and interdisciplinary research. However, as Arnull continues to argue, the American influence has had only a limited impact on English-language EU law scholarship: "to the established tradition of sophisticated doctrinal analysis have been added the

43 N. Walker, n. 5 above, at 582.

44 A. Arnull, "The Americanization of EU Law Scholarship", in Arnull, Eeckhout and Tridimas (eds), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (2008) 415-431.

45 Arnull, at 416. The internal quotation is from F. Snyder, *New Directions of European Community Law.*

insights afforded by theoretical, contextual and interdisciplinary work,"[46] but this is an addition rather than a displacement. In fact, English-language EU scholarship seems to be marked by the coexistence of several approaches, ranging from the very doctrinal to the very theoretical, but without any animosity between different schools.[47] This "rude health"[48] is probably due, in part, to the variety in national origin and academic background of the scholars. One could say that the capacity of English-language scholarship to overcome traditional national fragmentation, and its relative insensitivity to the well-established pattern of legal disciplines, allows it to be more open to new ways of studying the law.

Bruno de Witte
Professor of European Law
European University Institute
Bruno.DeWitte@eui.eu

46 Arnull, at 431.

47 For a similar view by a German scholar, see U. Haltern, *Europarecht und das Politische* (2005), at 33.

48 Arnull again, at 431.

ANNEX:

Country of professional affiliation of the authors of some leading European law journals

Journals included in the sample: *Cahiers de droit européen* (CDE), *Common Market Law Review* (CMLR), *Diritto dell'Unione Europea* (DUE), *European Law Review* (ELR), *Europarecht* (EPR), *Revue du Droit de l'Union Européenne* (RDUE), *Revista Española de Derecho Europeo* (REDE), *Revue trimestrielle de droit européen* (RTDE)

TABLE 1: 2005

Journal	***Place of Authors' Professional Affiliation (principal)***																		***Total Number of Authors***
	Old EU Member States															*New EU Member States*	*EU*	*Non-EU*	
	AT	BE	DE	EL	FI	FR	GE	IR	IT	LX	NL	PT	SP	SW	UK				
CDE (BE-based)		8	1	3		4							1				4		21
CMLR (NL-based)	1	9		1	1		10	1	8		8			1	10		7	2	59
DUE (IT-based)									33								5		38
ELR (UK-based)		4	1	3		2	4	1			2		1	1	21	1	5	4	49
EPR (DE-based)							38										1		39
RDEU (FR-based)				1		4			1		1		2				27	1	37
REDE (SP-based)							1						15			1	5		22
RTDE (FR-based)		3				22									1		7		33

TABLE 2: 2006

Journal	***Place of Authors' Professional Affiliation (principal)***																		***Total Number of Authors***
	Old EU Member States															*New EU Member States*	*EU*	*Non-EU*	
	AT	BE	DE	EL	FI	FR	GE	IR	IT	LX	NL	PT	SP	SW	UK				
CDE (BE-based)		4		3		6			1								4		18
CMLR (NL-based)	1	8	2	1	2	1	8		1	1	9		1		19		9	3	69
DUE (IT-based)									31						1		4		36
ELR (UK-based)		2		1		1	2	2		2	6				25	3	8	2	54
EPR (DE-based)							40				1								41
RDEU (FR-based)	1	2				3			3								30	2	41
REDE (SP-based)	1								1				19				2	2	25
RTDE (FR-based)		2				20			2		1				1		1		27

TABLE 3: 1995

Journal	***Place of Authors' Professional Affiliation (principal)***																		***Total Number of Authors***
	Old EU Member States															*New EU Member States*	*EU*	*Non-EU*	
	AT	BE	DE	EL	FI	FR	GE	IR	IT	LX	NL	PT	SP	SW	UK				
CDE (BE-based)		11		1		4	1		2		1		1		1		3		25
CMLR (NL-based)	2	8	1				3		1		11		2		13		16	4	61
DUE[49] (IT-based)																			0
ELR (UK-based)		2	2		1		1	2			4				19	1	7	2	41
EPR (DE-based)	2						17										4		23
RDEU[50] (FR-based)		4		1		3			4		2						26		40
REDE[51] (SP-based)																			0
RTDE (FR-based)		1		1		18	1						1				3	1	26

49 First published in 1996.

50 Then "Revue du Marché Unique Européen".

51 First published in 2002.

TABLE 4: 1996

Journal	***Place of Authors' Professional Affiliation (principal)***																		***Total Number of Authors***
	Old EU Member States															*New EU Member States*	*EU*	*Non-EU*	
	AT	BE	DE	EL	FI	FR	GE	IR	IT	LX	NL	PT	SP	SW	UK				
CDE (BE-based)		10				2											6	1	19
CMLR (NL-based)	1	8				1	6	1	1		7				17		11	2	55
DUE (IT-based)									31								7		38
ELR (UK-based)		2					1	1			7			1	25		1	1	39
EPR (DE-based)	1						18			1							3		23
RDEU (FR-based)		13				2							3		2		20	2	42
REDE (SP-based)																			0
RTDE (FR-based)		2				16					1				1		2		23