

PERSPECTIVES

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The Development of European Community Constitutional Law

The European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.

The Court of Justice of the European Community, 1986 European Court Reports p. 1365.

It will naturally take time for all of us to be initiated in the formidable principles of constitutionalism.

I DURGA DAS BASU, COMMENTARY ON THE CONSTITUTION OF INDIA p. XV (1961).

Decision upon the basis of natural law, right reason and constitutional content was the only true course. In taking the latter alternative, Marshall set forth, not precise rules of constitutional law, but rather the broad general outlines upon which future generations would evolve more explicit constitutional doctrines.

Herbert Johnson, *John Marshall*, in I LEON FRIEDMANN & FRED L. ISRAEL eds., THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, p. 298 (1969).

So massive was the struggle to found the Roman people.

Vergil *Aeniad* i. 33.

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Thirty-five years ago, a group of European statesmen set out to do something which nobody had ever done before. They wrote a treaty which in due course would convert itself into a constitution. My purpose today is to describe how far this change has gone, and what kind of constitution is emerging. You will see that some features of European Community law are still “international,” but that an increasing number are “constitutional.”

Anyone who tells you that it is easy to change the way large numbers of people do things is either a liar or a management consultant. The European Founding Fathers knew that what they wanted had to be done gradually. Jean Monnet wrote that economic integration and setting up a Community institution with binding legal powers over States would be “the first practical foundations of a European federation indispensable for the preservation of peace.” The European Founding Fathers were frank about what they were doing. They said they were “determined to lay the foundations of an ever closer union among the peoples of Europe.” They gave the Court of Justice the power of judicial review of Community acts. They visualized direct elections—though not at first—to the European Parliament that they were setting up. But they had no blueprint for the ultimate objective. If they had openly drafted a constitution, it would not have been adopted. They drafted only a foundation, a framework, a “*traité-cadre*.” Europe has no Federalist Papers. It is on a “journey to an unknown destination.”

A constitution would not have been adopted, in the 1950s, because six previously independent States have never in history set up a federation in one single step. All previous federations have either been set up progressively, or have been formed by a group of States not really independent of one another, or have been set up by force. So the European Community has good reasons for not being quite like any other federation. In fact, it is one of the only genuinely new political inventions in this century. Thirty years ago, when Max Rheinstein advised me to go into Community law, even he could not have found a more interesting field for a career. In law there is no greater scope for creativity than in helping to build a whole new legal system.

The European Community Treaty said that some rules of Community law would be “directly applicable,” without national implementing measures, in the laws of the Member States. The controversy about this at the time shows how strong the political limits were then, and why the Founding Fathers had to proceed slowly. Because they were writing a treaty, which would only become a constitution later, they did not even say that Community law would prevail over national laws in the courts of the Member States. That principle—essential in the constitutional law of any federation, but not a rule which is found in the text of treaties—was declared by the Court of Justice five years after the treaty came into force. Because they wanted their treaty to grow into a constitution, the draftsmen wrote no clause defining Community jurisdiction or State powers. But they knew what they were doing: Hallstein said, “We are not in business, we are

in politics.” One of my colleagues said suddenly to me one day, “We are making history.”

There is a risk that “If you don’t know where you want to go, you may end up somewhere else.” The fact that the European Community has avoided that risk is largely due to guidance from the Court. A treaty, even a brilliantly conceived treaty, does not grow into a constitution without a lot of effort. Advocate General Mancini has said that “the Court has sought to ‘constitution-ize’ the Treaty, that is, to fashion a constitutional framework for a federal-type structure in Europe.” The constitutional law principles of the Community are mostly found in the judgments of the Court, and not in the treaty. As a result of the Court’s case law, the Community is more integrated legally than it is politically. (The Court repeatedly uses the phrase “in the present state of Community law” to indicate that new legislation is needed.) So, like Molière’s Monsieur Jourdain, who was surprised to find that he had been talking prose all his life, European lawyers have suddenly seen something which the Court has always remembered: in John Marshall’s words, “it is a constitution that we are expounding.”

Any human society in which some powers are exercised by the constituent bodies and some by the centre, on the basis of a basic legal framework, will have the essential characteristics of a federation. It is useful, especially for lawyers accustomed to a federal constitution, to analyze the Community accordingly. But the Community is not a federal State. Today, at least, it is not a State at all, it is *sui generis*. A federation is only a paradigm for the Community.

If you do not admit that you are writing a constitution, you fail to say certain things which you would otherwise certainly include. This means that the courts have to decide whether the things you have omitted are there or not. In the Community, the Court has filled many of the gaps left in the treaties. The Court has built up the constitutional law of the Community by defining the elements of the Community’s legal system. In doing so, it has had to reconcile two objectives: the need to make the Community effective, and the need to impose safeguards on the exercise of Community powers, to protect minority interests within the Community. The Court has done this *not* by protecting State powers, but by making effective safeguards directly available under Community law. As Justice Blackmun said in *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528, 552 (1985)): “State Sovereign interests . . . are . . . protected by procedural safeguards inherent in the structure of the federal system rather than by judicially created limitations on federal power.”

So the themes of this lecture are:

- the progressive creation of Community constitutional law by the caselaw of the Community Court;
- the gradual movement away from Member States’ powers towards an integrated Community legal system.

I. The Primacy of Community Law: The Basis for Fundamental Rights

One of the main foundations on which the Court has built extensively is the principle of the supremacy of Community law. The Court has used this principle, which it had itself established, to hold:

- First, rules of Community law that are directly applicable in national courts prevail over the national law of Member States. They prevail not only in the case of direct conflict, but also when the national law would interfere with the operation of Community law. “Every national judge is also a Community law judge.”
- Second, rules of Community law that are *not* directly applicable in national courts can nevertheless be relied on by private citizens and companies in litigation against national authorities.

To these basic safeguards for the effectiveness of the Community legal system, the Court has, in effect, added a bill of rights, by a remarkable series of judgments.

During the 1960s, German constitutional lawyers argued that the Community treaties contained no fundamental rights provisions, and that the Federal Republic of Germany could not confer powers on the Community which were not subject to review by the *German* courts for compatibility with the German Constitution. The Court rightly saw these arguments as threats to the primacy of Community law over national law. In answer, it held that principles of fundamental human rights were part of the law which the Court must apply when it exercises its powers of judicial review of Community acts. The Court said that these principles of fundamental rights were to be drawn from the European Convention on Human Rights, and from the constitutions of Member States of the Community. In effect, in this respect at least there is a common law of the Community.

Seldom in the history of law has so serious a difficulty been solved so as to benefit a legal system so profoundly. In Advocate General Mancini’s words, “reading an unwritten bill of rights into Community law is . . . the most striking contribution the Court has made to the development of a constitution for Europe.” You will see that this impressive piece of judicial legislation was not prompted by some flagrant violation of human rights, but by the need to uphold the principle of the primacy of Community law. But any set of fundamental rights, even if they are not clearly listed, is important when it is coupled with judicial review. In the Community, these judgments provide an additional moral element in Community law and create a link with the other European States which are parties to the European Convention on Fundamental Rights but which are not members of the Community. The driving force of the Community is no longer limited to avoiding another European war and setting up a single market: it now has a moral element.

The European Convention is interpreted by its own special court. But presumably any risk of conflicting judgments of the two courts will be avoided by judicial caution and by the fact that the Community Court can draw openly on national constitutional laws as well as on the European Convention.

Of course, it was always taken for granted that the Community was based on democracy, and it was always obvious that bills of rights are most needed in pluralist societies. They state the basic rules, they protect minorities, they reduce controversies, they produce judicial safety valves, and they provide common assumptions. In the European Community, they were certainly needed.

The Single European Act and other Community documents now contain explicit references to the European Convention on Fundamental Rights. Fundamental rights, as the Court sees them, include rights under a number of general legal principles which are in some ways closer to administrative law than to constitutional law. These include the principle of proportionality, which says that no official measure may impose cost or inconvenience on private citizens which is clearly unnecessary or out of proportion to the aim to be achieved — clearly an important safeguard even if not rigorously applied. Another principle is that of legal certainty — the principle that the law should at any time be ascertainable — which prohibits retroactive measures except in limited circumstances, invalidates excessively vague legislation, and creates an administrative law rule similar to estoppel. These general principles of law are substantive rules which, on occasion, invalidate Community measures, both legislative and executive, and also rules for the interpretation of Community legislation. Unlike the fundamental rights rules, there was no single European document anywhere setting out these principles: the Court imported them from the national laws of Member States to aid the exercise of its powers of judicial review.

It seems clear that both these general principles of Community law and the Community rules on fundamental rights apply not only to Community measures but also to measures adopted by Member States in the sphere of Community law. This is important, because Community law is decentralized: most of Community law is implemented and applied by Member State authorities. The Community institutions are far too small to carry out Community policies by themselves. They rely on national authorities to do so. The Community legal system is a symbiosis, not a structure parallel to national authorities, so both must be subject to all the same safeguards for private rights. In this respect also Community law principles prevail over national laws, even national laws implementing Community policies. Because Community fundamental rights rules are directly applicable, they prevail over national law even in the courts of Member States. So Community law has limited the powers of Member States over their own citizens.

You will see that the Community list of fundamental rights and of general principles of administrative law is open-ended: the Court may add to them if necessary. Community law has not passed the age of childbearing.

Another consequence of the supremacy of Community law is equally logical, but perhaps less obvious. Unlike most federations, the Community's fundamental law contains no list of exclusive Community or national powers. There is *no* residue of powers reserved to Member States. Reading the treaties one gets the impression that *all* the Community's powers are concurrent. The Court, on the basis of the EEC Treaty, has decided that the Community has exclusive powers over external trade and other aspects of "commercial policy," and over sea fisheries, mergers in the coal and steel industry, and certain nuclear matters, and where national powers are preempted by exhaustive Community legislation. Recently, the Community also has acquired exclusive powers over large corporate mergers. But (so far) that is all.

However, since Community legislation always prevails over national law, Community legislation, once adopted, can be amended only by the Community. So every piece of Community legislation creates pro tanto an area of exclusive Community legislative power. This is much more important than in any federation known to me, because the treaties give the Community such wide (non-exclusive) legislative powers. In effect, there is a moving boundary between Community and State powers, and the boundary moves only in one direction. Community constitutional law is dynamic, not static: it was never intended to be changeless. The original intent was for development. This means, among other things, that diplomats from non-Member States cannot be given a static list of the legislative powers of the Community and of its Member States: the boundary between them is continually moving.

I do not need to stress the essentially constitutional nature of all these principles. The primacy of federal law, its expanding scope, and its direct application to private citizens are normal in a federation, but unknown in international law.

SEPARATION OF POWERS, EUROPEAN COMMUNITY STYLE

In the original six Member States of the Community, the separation of legislative, executive, and judicial powers advocated by Montesquieu is well respected. In the Community it was cast aside: the Commission, in many respects the Community executive, is the only body with power to propose legislation. The power to adopt legislation is separated from the power to initiate it.

The legislature, the Council, is composed of representatives of the executives, not the legislatures, of Member States. The power to negotiate treaties is separated from the power to ratify them, and it is the Community legislature which ratifies them. The only directly elected body, the Parliament, has (with some very important exceptions) only advisory powers. In each case the explanation lies in the reluctance of Member States in 1956 to confer wide powers on the Community institutions.

THE COMMUNITY LEGISLATIVE PROCESS

Its legislative process was one of the Community's political inventions. It is a compromise between the intergovernmental agreements of classical international

organizations and a fully federal legislature. The primary Community lawmaking body is the Council, which is an intergovernmental body. But the Council can legislate only on the basis of a proposal from the Commission, and the Commission's independence is guaranteed by the treaty so that it can make neutral, objective proposals in the interests of the Community as a whole. This responsibility (and its duties as enforcer of the treaties) places great demands on the integrity, courage, and intelligence of the members of the Commission. The interests of Member States which are in a minority are protected by the rule that although the Commission's proposal can be adopted by a qualified majority, it can be amended only by a unanimous vote of the Council, or by the Commission itself. There is weighted voting for qualified majorities: Member States have *not* got equal votes, but the smaller States have votes out of proportion to their size.

The Court has ruled that this safeguard for minority interests is so important that the Commission's role must operate even in unorthodox situations, for example, where a Member State legislates as, in effect, an agent of necessity for the Community. The Court has also said that the Community cannot, even by a treaty, confer legislative power on an international body which would be exercisable without the Commission having its usual role.

The Commission's obligation to make its proposals in the interests of the whole Community is a political duty not directly enforceable by legal rules. But another series of legal principles provides protection for the interest of Member States, of companies, and of individuals. The Community legislature is not sovereign: there is judicial review of the compatibility of legislation with the treaty and with the rules of fundamental rights. Every Community measure must also be based on a specific legal power, which not only determines whether the measure can be adopted by a qualified majority or not, but also determines the nature of the reasons which must be given for the measure, in the preamble of the measure itself. If insufficient reasons are given, or if the reasons are inappropriate to the legal basis claimed, the measure can be annulled on that ground alone. The duty to state the reasons for each measure, in the measure itself, is a valuable assurance of open government, and the duty not to discriminate obliges the legislature to explain why one situation is not being treated in the same way as other, apparently similar, situations.

These rules apply to all legal measures adopted by the Community, to decisions in individual cases as well as to general legislative measures.

THE MEANS OF PROTECTION OF PRIVATE RIGHTS

Community law creates rights for individuals and companies. If a Community measure is a decision addressed to an individual or company (for example, an antitrust or antidumping decision), its validity can be challenged directly in the Community courts in Luxembourg. Rights under directly applicable rules can be relied on in national courts against anyone. Rights under rules which need implementation (directives) can be relied on against the authorities of a State

which should have implemented them, whether or not it has done so, though they can be relied on against private parties only to the extent that they have been implemented. The fact that so many rules of Community law can be relied on against State authorities in national courts makes Community law extremely effective—especially because of the rule that Community law prevails over inconsistent Member State law.

Curiously, the Court has not yet clearly decided in what circumstances an individual or company has a right under Community law to recover damages from a State for injury caused by breach of a directly applicable rule. I believe that there is a right to damages in all such cases. If I am proved right, Community law will be equipped with an enforcement weapon of great power: many protectionist or discriminatory State measures are prohibited by directly applicable rules, and it would be very salutary indeed if States had to pay damages for every infringement.

Individuals and companies may not sue national authorities in the Community Court, nor may they bring proceedings there against the Commission if they are in substance proceedings against a Member State. But they may achieve a similar result, if they are determined enough, by proceedings in national courts in which the relevant question of Community law can be referred by the national court to Luxembourg. Community law is fully enforceable in all courts—like constitutional law, and unlike public international law.

THE LEGAL DUTIES OF MEMBER STATES TO COOPERATE WITH COMMUNITY INSTITUTIONS

Another great foundation on which the Court has built Community constitutional law is article 5 of the EEC Treaty. This article is a general provision obliging Member States to ensure fulfillment of the obligations arising out of the treaty or resulting from action taken by the institutions of the Community, to facilitate the achievement of the Community's tasks, and to abstain from any measure which could jeopardize the attainment of the objectives of the treaty.

The Court knew that it was a constitution which it was interpreting and, as civil law lawyers do, deduced concrete precise results from general words. Indeed, it went further. It said that article 5 "is the expression of the more general rule imposing on Member States and the Community institutions *mutual* duties of genuine cooperation and assistance" (emphasis supplied). Once again, the Court has deduced a constitutional principle significantly broader than the words of the treaty themselves. This principle is essential in the Community, especially because there is no fixed frontier between Community and State powers.

The area of concurrent Community and State powers is so wide that strict duties of cooperation are essential (Physical Protection of Nuclear Materials Ruling, 1978). Because Community policies and legislation are implemented and applied largely by national authorities, and not through separate federal

agencies, the need for cooperation (and the scope for observation of Community policy) is much greater than it is in the U.S.A.

The duties of Member States which the Court has deduced from the general words of article 5 are already far-reaching and various. They include:

- the duty to give full effect to Community law, and to clarify the national position under Community law;
- the duty to enforce Community law, and not to encourage breaches of it;
- the duty to comply with fundamental rights rules and the “general principles of law” (proportionality, legal certainty, and the like);
- the duty to implement Community objectives;
- the duty not to interfere with the working of Community rules, or with the working of Community institutions;
- the duty to provide information to the Commission and to consult it; and
- the duty to act jointly with other Member States.

The Court is establishing another new Community contribution to federal theory: legal duties of cooperation in a sphere of concurrent powers, rather than theoretically fixed frontiers between Community and State powers.

THE FOREIGN RELATIONS LAW OF THE COMMUNITY

The division of powers between the Community and its Member States in the sphere of foreign relations also has a number of features which are quite different from those of normal federations:

- The Community has, so far, no legal powers in the spheres of foreign policy or defense.
- The powers of the Community over “commercial policy” (that is, trade policy and a wide but so far imprecisely defined area of other external economic relations) were declared to be exclusive by the Court, not by the treaty itself. The Court has always stressed the need for unity in the Community’s external relations.
- The Court has ruled that the Community has implied concurrent treaty-making power in all areas in which it has power to adopt Community measures, even when no internal measures have yet been adopted. As a result, the treaty-making procedure in many areas involves all the same steps as in the case of internal Community legislation (consultation with the Parliament and the Economic and Social Committee), which is lengthy and inconvenient.
- Treaties are negotiated by the Commission, acting in its basic role as the body responsible for the interests of the Community as a whole, but ratified by the Council.
- Treaties can be self-executing within the Community (“have direct effects”). If not drafted in this way, they can be implemented either by a Community measure (a regulation or a directive) or by the Member States.

Member States are bound by the treaty to give effect to any international agreement to which the Community is a party, even if the Community has not implemented it, and even if the State in question is not a party itself. Since breach of a treaty to which the Community is a party is a breach of Community law, the Court has compulsory jurisdiction over the State in such a case.

Perhaps the most unusual, and certainly the most inconvenient, feature of the Community's external relations law is that both the Community and the Member States have, and regularly exercise, treaty-making powers in the same spheres. I know of no other federation in which treaty-making powers are regularly exercised concurrently. All federations are diverse internally, but most are unified externally. This odd situation results from the wide range of concurrent powers of the Community and the States. This means that sometimes *both* the Community and its Member States are parties to the same treaty, as in the case of the Vienna Convention on the Protection of the Ozone Layer. This can necessitate special provisions dealing with the responsibility for implementing the treaty in question, and to negotiating difficulties, both for the Community side and for other States dealing with it. I have already said that the division of powers between the Community and its Member States is not fixed, but changing. The Court, always anxious to reinforce Community solidarity, has said (in its 1978 Physical Protection Ruling) that other parties to a treaty need not determine which obligations will be carried out by which party. "Mixed" agreements, with both the Community and its Member States as parties, are wholly new international law problems, caused because the Community's unique Constitution falls short of a traditional federation with unified treaty-making powers.

It has not, of course, escaped the attention of diplomats that one consequence of a "mixed" treaty is that the Community and its Member States can have multiple voting rights without necessarily having to concede them to conventional federations.

Under Community constitutional law there seems to be a traditional hierarchy of legal rules. The treaties establishing the Communities prevail over all other rules. Subject to the treaties, public international law, including treaties to which the Community is a party, prevails over Community legislation, and Community legislation prevails over State laws. Since a treaty entered into by the Community or one of its Member States might, in theory, be contrary to the Community constitution, diplomats negotiating with the Community need to know something of Community law. Under the Vienna Convention on the Law of Treaties, they would certainly be treated as being aware of, for example, the well-known rule that only the Community, and not its Member States, has power to enter treaties on visible trade and other commercial policy matters.

The Community does not have unlimited treaty-making powers: the Court in an Advisory Opinion has ruled that there are strict limits on the extent to which the Community could confer powers on an international body set up with non-

Member States, and there are still some areas in which the Member States have exclusive powers. However, the Advisory Opinions of the Court can ensure that in practice the Community never exceeds its powers.

II. Community—Member State Relations

Compared with a conventional federation, there are several curious features of the Community-State division of powers:

- The treaty contains no list of Community or State powers.
- Although States have great concurrent powers, there is no State action doctrine: States have no power to create exceptions to Community law.
- States' powers are not derived from the Community constitution: the treaty is the basis of the Community's constitutional law, but not that of the States' constitutions. There are thirteen grundnorms (foundations of legal systems) in the Community. But insofar as Community rules now form part of the States' constitutional laws, the States can alter them only by amending the treaty.

DECENTRALIZATION AND DELEGATION OF COMMUNITY POWER TO MEMBER STATE AUTHORITIES

Apart from the Member States' own powers, the Community's powers are exercised through State authorities in a variety of ways. In economic terms, the most important are the day-to-day administration of much of the Community's agricultural policy and its customs regime. All directives are implemented by measures at the State or regional level. Another example is the State legislation providing criminal penalties for breach of Community rules on, for example, fisheries: in some States it is not thought appropriate for the Community to exercise powers in the sphere of criminal law. In addition, even where the Community has exclusive powers (as in trade, fisheries, or where the Community has adopted comprehensive legislation), Member States may have powers delegated to them, and may even take measures as trustees on behalf of the Community in order to protect its interest. The Member States must then act only with the consent of the Commission: because the action is taken on behalf of the Community, the Commission's role in the legislative process must be maintained as far as possible.

One version of the principle of "subsidiarity" is that governmental action should as far as possible be taken at the lowest level (Community, national, regional, or local) at which it can be effective. Of course this is a justification both for decentralizing Community powers and for refraining from Community action in areas where national or regional action can be as satisfactory. The more the principle of subsidiarity is acted on, the more important it will be for national and regional authorities to comply with, and enforce, Community law. You will

see that the principle of subsidiarity, although vague, is a principle appropriate to a federation rather than an international organization.

NONPARTICIPATION BY SOME MEMBER STATES IN
COMMUNITY ARRANGEMENTS ASSOCIATED WITH
THE COMMUNITY — A “TWO-SPEED EUROPE”

Another odd feature of Community constitutional practice, which results from incomplete integration, is the fact that some Member States are not participants in some regimes associated with the Community, in which you would expect them all to participate. The best known example of this is the United Kingdom's long refusal to join the Exchange Rate Mechanism of the Community's monetary system. Another is the long delay in Denmark and Ireland becoming parties to the Community Patent Convention. The possibility that some Member States may not be parties is also allowed for by the Community Copyright Convention. This flexibility and pragmatism contrasts with the very clear statement in the Single European Act that acceptance of the foreign policy provisions of that act are a *sine qua non* for Community membership: Member States cannot join the Community for economic purposes and not for political purposes.

REGIONAL AUTHORITIES WITHIN MEMBER STATES

Several Member States of the Community either are themselves federations or have delegated extensive governmental powers to regional authorities. These situations give rise to various issues under Community constitutional law:

- Regional authorities are bound, within their powers, and by all the duties of cooperation resulting from article 5. However, if a regional authority fails to fulfil one of these obligations, it is the national government, not the regional authority, which is brought before the Court. This is important: the widespread failure to implement directives, especially environmental directives, is because regional authorities take their duties under Community law less seriously than do national governments.
- Regional authorities may have standing to challenge decisions of the Community institutions of special interest to them, such as a Commission decision prohibiting the granting of a subsidy.

**III. The Features of the Present
Constitution of the Community**

The Community constitution, viewed simply as a constitution, is still clearly incomplete, and has a number of striking features. Apart from those already mentioned, the most obvious is the great power of Member States:

- the budgets of the States are very large in comparison to the Community budget;

- State government representatives form the Community's principal legislative body;
- there are wide areas of State powers which are exclusive in practice;
- much Community law is enforced by the States' authorities.

Another obvious feature is the great power of the Council when it acts unanimously: it acts in many respects as both legislature and executive. Apart from the legal constraints already outlined, its powers are reduced in practice by the reluctance of States to act jointly unless necessary, and by their difficulty in agreeing. You will see that the Community's constitution is unlikely to produce strong leadership.

The third striking feature is the limited powers—essentially advisory, except in budgetary matters—of the directly elected Parliament, the “democratic deficit.” The Parliament has no power to initiate legislation. These limited powers are constantly exercised, with a view to maximizing them, and they were substantially increased by the Single European Act, which itself was the result of an initiative of the Parliament.

A fourth unusual feature is that some rules of purely economic law, for example, antitrust rules, have constitutional status, and cannot be changed.

Napoleon said that a constitution should be “short and obscure”—presumably because that made it flexible. The treaties, the Community constitution, are certainly not short, but because they are framework treaties rather than normative treaties they are surprisingly flexible. So the constitution of the Community is taxonomically an odd animal indeed.

The Community, unlike the U.S.A. in 1787, so far shows no signs of giving itself a whole, new, coherent, codified, constitution, on conventional federal lines. It is planning another round of specific amendments to the basic treaties. The key to changing the Community into a normal federation, making the Council into a Senate representing States instead of a body representing State governments, has not yet been mentioned. The journey's ultimate destination is still unknown. But unfortunately an operation which can only be accomplished by many small steps runs the risk of being frustrated by many small minds. As J.M. Keynes said, “the difficulty is not to get acquainted with new ideas, it is to get rid of the old ones.” Much of the controversy in EC about EC and State power has been conducted unintelligently, either in terms of “sovereignty,” (never defined and so never understood as a *divisible* bundle of powers), or on the basis of suspicions that the Community is either a “Socialist” or a “Capitalist” ogre, or otherwise in shrill caricature. The EC is seen as a threat to States' powers, not yet as a debate about the allocation of limited powers of government.

CONSTITUTIONAL REFORM

During 1990, a consensus has emerged, although the United Kingdom has shown signs of dissent: England has been isolationist at least since the Refor-

mation. The consensus, as expressed by the conclusions of the European Council in December, was that the stages should be defined for "the process of transforming the Community into a Political Union." Accordingly, the Intergovernmental Conferences in 1991 are to give particular attention to:

- strengthening the role of the European Parliament in various ways, and increasing its legislative powers;
- an institutional framework for common foreign and security policy, the Commission having a reinforced role and a (nonexclusive) right of initiative, and with general guidelines adopted by consensus and qualified majority voting on measures to implement agreed policies; the gradual extension of the union's role in common security should be considered, and the prospect of a role for the union in defense matters;
- common European citizenship;
- extending or redefining the Community's powers in various spheres such as social matters, health, research, energy, culture, and education;
- improved decision making, including increased majority voting in the Council, strengthening the Commission's powers;
- moves towards a single currency and a Community Central Bank.

It is still too early to say what the results of the Intergovernmental Conferences in 1991 are likely to be. Yet, the *Economist* magazine said in December that there lurk "two possibly historic congresses. Twelve governments will decide whether to surrender powers that European States have guarded jealously since the end of the Roman Empire—the issuing of their own monies and the making of their own foreign and defence policies . . . two conflicting pressures have to be reconciled in the rich parts of today's world. One is the unduckable need for a degree of supranational government. The other is a strong desire to cling to national and regional identity. In Europe, the best way to reconcile the two is a democratic confederation. That is not a construction to be equated with anything else. It has not been tried before."

More and more, as this whole process is described, the word "constitution" is being used.

These aims are not easily reconciled with one another. More democratic control, whether by the European Parliament or by national parliaments, and whether exercised primarily over the Council or the Commission, would tend to slow down and complicate Community decision making, not speed it up. A wider area for majority voting in the Council would, under present constitutional principles, also involve a widening of the scope for Parliament's involvement in the legislative process.

Nor could these aims, however desirable in themselves, necessarily be achieved without weakening some of the principles on which the Community is now based. Making the *Commission* more subject to democratic control would *reduce* its independence and its ability to act as an arbiter protecting the interests of smaller Member States. This would be important for smaller Member States

if the powers of the Parliament were simultaneously increased in relation to those of the Council: the smaller Member States have a greater influence in the Council than in the Parliament. Giving the Parliament power to initiate legislation would have a similar effect. Making the Commission subject to democratic control would also make it *less* suitable as a body for quasi-judicial decisions applying legal rules in particular cases (for example, concerning antitrust or State subsidies). And it might weaken the resolve of some people within the Commission to apply the law correctly and without compromise. This is not to argue against reform, but merely to say that any reform must be carefully and intelligently planned.

Each of these reforms is intended to meet a specified need. Unlike the Parliament's efforts to rewrite the treaties comprehensively, which led to the Single European Act, these reforms cannot complete the conversion of the treaties into a constitution: the Community is entering the chrysalis stage, it is not yet ready to emerge as a complete butterfly. Jacques Delors has already said that another constitutional conference may be needed in the 1990s.

THE INCREASES IN THE POWERS OF THE PARLIAMENT

The powers of the Parliament have already been increased, primarily by the Single European Act, and by several judgments of the Court recognizing its powers to intervene in cases before the Court. In an important judgment in May 1990, the Court recognized the Parliaments' right to bring proceedings before the Court to defend its own powers under the "institutional balance" set out in the treaties.

The Future

Soia Mentschikoff, in *Federalism and the New Nations of Africa*, said that in a federation the central government should control "foreign affairs, matters of currency, communications, transport, banking, international and interstate trade, and bankruptcy." We are not there yet, but we are getting there. Community law already covers some of these areas: there are, or soon will be, proposals dealing at least partly with all the others. There is still no general power to tax and no power to raise armed forces.

But while recognizing that the Community constitution is still incomplete, we should recognize what it has already achieved. War between the Member States of the Community is not now merely impossible. It is inconceivable. That is a gigantic achievement. Struggles over power that used to call out troops now call out lawyers. They are *almost* as expensive, but not so destructive.

The European Community has a constitution a little like that of the U.S. before 1787, and Europe as a whole is creating new constitutions from scratch, rather as it was in 1815. But now governments can be legitimate only if they are based on democracy. Democracy, if it is to last, must be based on prosperity. Prosperity

must, in European circumstances, be based on economic integration of national free markets. The challenge is to reconcile economic integration with legitimate nationalism. The main problems for Europe today are to restore and consolidate democracy and prosperity in Eastern Europe and to restore the identities of suppressed minorities (President Wilson's problem). The EC can show how to solve both problems. Both the "deepening" and "widening" of the European Community are possible and necessary. The Court, within its judicial role, has both "deepened" the constitution of the Community by strengthening and adding to the obligations expressly listed in the treaties and "widened" it by importing the European Convention on Human Rights which is shared by a wider Europe than the Community.

Americans are impatient people, and frequently ask why the Community cannot become, in one step, a United States of Europe. Be patient. Jacques Delors has said, "History is speeding up." Remember, the homogeneity of the U.S. in 1787 was apparent, and not real. The U.S. Constitution would have been much harder to agree on if slaves and native Americans had been adequately represented in the discussions. We, in Europe, are trying to do something similar entirely democratically, and we are not trying to do it when everyone knows that new ideas are needed. In times of great change, people are willing to change greatly: it is much harder to persuade them to change on their own initiative.

Any strategy begins with a vision. I have described how Europe has gotten this far because of two brilliant legal insights which followed Monnet's perception that economic integration would progressively lead to political integration. The two legal insights were that fundamental rights could be ruled judicially to be part of Community law, and that unity in external relations would progressively lead to internal integration as well. Both these legal insights seem to be due largely to one great lawyer, Pierre Pescatore, the European John Marshall. He probably contributed more than any other single person to the fact that the Court has always had a strategic vision which was both dynamic and statesmanlike, and has made such good use of the available materials and the opportunities which presented themselves. The Court has provided an entirely new Community legal system with the foundations it needed in the Member States' laws. It now has continuity, sources of new ideas, integration, and acceptability. In other words, the European Community has already a constitution.