The Transformation of Europe

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Introduction

In 1951, France, Germany, Italy, and the Benelux countries concluded the Treaty of Paris establishing the European Coal and Steel Community. Lofty in its aspirations, and innovative in some of its institutional arrangements, this polity was perceived, by the actors themselves – as well as by the developers of an impressive academic theoretical apparatus, who were quick to perceive events – as an *avant garde* international organization ushering forth a new model for transnational discourse. Very quickly, however, reality dissipated the dream, and again quickly following events, the academic apparatus was abandoned.[1]

Forty years and more later, the European Community is a transformed polity. It now comprises more than double its original Member States, has a population exceeding 350 million citizens, and constitutes the largest trading bloc in the world. But the notion of "transformation" surely comes from changes deeper than its geography and demography. That Europe has been transformed in a more radical fashion is difficult to doubt. Indeed, in the face of that remarkable (and often lucrative) growth industry, 1992 commentary, doubt may be construed as subversion.

The surface manifestations of this alleged transformation are legion, ranging (in the eyes of the beholder, of course) from the trivial and ridiculous[2] to the important and sublime. Consider the changes in the following:

[1] For a review of integration theory and its demise, see, e.g., Greilsammer, "Theorizing European Integration in its Four Periods," *Jerusalem Journal of International Relations* 2 (1976), 129; Krislov, Ehlermann, and Weiler, "The Political Organs and the Decision-Making Process in the United States and the European Community," in M. Cappelletti, M. Seccombe, and J. H. H. Weiler (eds.), *Integration through Law* (Walter de Gruyter: Berlin, New York, 1985), vol. II, book 1, 3 at 6–11.

[2] The winning song in the popular Eurovision Song Contest of 1990 was entitled "Altogether 1992," *The Times* (London) (May 7, 1990) at 6, col. 8.

1. The scope of Community action. Notice how naturally the Member States and their Western allies have turned to the Community to take the lead role in assisting the development and reconstruction of eastern Europe.[3] A mere decade or two ago, such an overt foreign policy posture for the Community would have been bitterly contested by its very own Member States.[4]
2. The mode of Community action. The European Commission now plays a central role in dictating the Community agenda and in shaping the content of its policy and norms. As recently as the late 1960s, the survival of supranationalism was a speculative matter,[5] while in the 1970s, the Commission, self-critical and demoralized, was perceived as an overblown and overpaid secretariat of the Community.[6]

[3] See "European Commission Defines a General Framework for Association Agreements ('European Agreements') between the EEC and the Countries of Eastern and Central Europe," *Europe*, Doc. No. 1,646/47 (September 7, 1990) at 1 (reprint of Commission communication to the Council and the Parliament). The evolution is limited, however. For example, the absence of a true Community apparatus for foreign policy rendered the political (not military) initiative in relation to the Iraqi crisis no more than hortatory. See, e.g., "Gulf Crisis: Positions Taken by the Twelve and the Western European Union," *Europe*, Doc. No. 1,644 (August 23, 1990) at 1 (statements of August 2, 10, and 21, 1990); "Gulf/EEC: The Foreign Ministers of the Twelve Confirm Their Position and Intend to Draft an 'Overall Concept' for their Relations with the Region's Countries," *Europe*, Doc. No. 5,413 (January 19, 1991) at 3–4. The Community has, however, taken a leading role in the Yugoslav crisis. On the evolving foreign policy posture of the Community in the wake of 1992, see generally R. Dehousse and J. Weiler, "EPC and the Single Act: From Soft Law to Hard Law" (European University Institute Working Papers of the European Policy Unit, No. 90/1).

[4] In 1973, the French Foreign Minister, M. Jobert, pressed the separateness (of the Framework for European Political co-operation which dealt with foreign policy) from the Community to a point of forcing the ministers to meet in EPC in Copenhagen in the morning, and to assemble the same afternoon in Brussels as a Community Council to deal with Community business: Stein, "Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution," in Cappelletti, Seccombe, and Weiler, *Integration through Law*, vol. I, book 3 at 63.

[5] See, e.g., Heathcote, "The Crisis of European Supranationality," *Journal of Common Market Studies* 5 (1966), 140.

[6] See, e.g., B. Biesheuvel, E. Dell, and R. Marjolin, "Report on European Institutions" (1980), 10–12, 49–56 (report of the Committee of Three to the European Council, October 1979) (hereinafter "Report on European Institutions"); see also "Proposal for Reform of the Commission of the European Communities and its Services" (1979) (report made at the request of the Commission by an independent review body under the Chairmanship of Mr. Dirk Spierenburg) (report requested in part because of sense of malaise in Commission) (hereinafter "Spierenburg Report"). For a self-mocking but penetrating picture, see M. von Donat, *Europe: Qui Tire les Ficelles?* (Presses d Europe: Paris, 1979).

3. The image and perception of the European Community. Changes in these are usually more telling signs than the reality they represent. In public discourse, "Europe" increasingly means the European Community in much the same way that "America" means the United States

But these surface manifestations are just that – the seismographer's telltale line reflecting deeper, below-the-surface movement in need of interpretation. Arguably, the most significant change in Europe, justifying appellations such as "transformation" and "metamorphosis," concerns the evolving relationship between the Community and its Member States.[7]

How can this transformation in the relationship between the Member States and the Community be conceptualized? In a recent case, the European Court spoke matter-of-factly of the EC Treaty[8] as "the basic constitutional charter" of the Community.[9] On this reading, the Treaties have been "constitutionalized" and the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet non-unitary polity, principally the federal state. Put differently, the Community's "operating system" is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles.

This judicial characterization, endlessly repeated in the literature,[10] underscores the fact that not simply the content of Community-Member

[7] The juxtaposition of Community and Member States is problematic. The concept of the Community, analogous to the concept of the Trinity, is simultaneously both one and many. In some senses, the Community is its individual Member States: in other senses, it is distinct from them. This inevitable dilemma exists in all federal arrangements. Moreover, the notion of an individual state itself is not monolithic. When one talks of a Member State's interests, one usually sacrifices many nuances in understanding the specific position of that state: "[D]ifferent, conflicting and often contradictory interests, either objective or subjective, are frequently expressed as unified, subjective "national" interests. Behind these articulated, subjective national interests, however, lie a variety of sets of social, economic and political relations, as well as different relationships between private and public economic organisations and the state.": F. Snyder, *New Directions in European Community Law* (Wiedenfeld and Nicolson: London, 1990) at 90 (footnote omitted); see also *ibid*. at 32, 37. While the danger of sacrificing these many voices within a state cannot be avoided, I shall try to minimize it by referring to the interest of the Member States in preserving their prerogatives as such in the Community polity.

[8] EEC Treaty, as amended by the Single European Act (SEA).

[9] Case 294/83, *Parti Ecologiste, ""Les Verts"" v. European Parliament* [1986] ECR 1,339, 1,365 (hereinafter "*Les Verts*").

[10] For fine recent analyses, see Lenaerts, "Constitutionalism and the Many Faces of Federalism," *American Journal of Comparative Law* 38 (1990), 205; Mancini, "The Making

State discourse has changed. The very architecture of the relationship, the group of structural rules that define the mode of discourse, has mutated. Also, the characterization gives us, as analytical tools, the main concepts developed in evaluating non-unitary (principally federal) polities. We can compare the Community to known entities within meaningful paradigms.

This characterization might, however, lead to flawed analysis. It might be read (and has been read[11]) as suggesting that the cardinal material *locus* of change has been the realm of law and that the principal actor has been the European Court. But this would be deceptive. Legal and constitutional structural change have been crucial, but only in their interaction with the Community political process.

The characterization might also suggest a principal temporal *locus* of change, a kind of "Big Bang" theory. It would almost be natural, and in any event very tempting, to locate such a temporal point in that well-known series of events that have shaken the Community since the middle of the 1980s and that are encapsulated in that larger-than-life date, 1992.[12] There is, after all, a plethora of literature which hails 1992 as the key seismic event in the Community geology.[13] But, one should resist that

of a Constitution for Europe," *Common Market Law Review* 26 (1989), 595; and literature cited in both. The importance of the legal paradigm as a characterizing feature of the Community is recognized also in the non-legal literature. See, e.g., Keohane and Hoffmann, "Conclusions: Community Politics and Institutional Change," in W. Wallace (ed.), *The Dynamics of European Integration* (Pinter: London, New York, 1990), 276, 278–82.

[11] "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe.": Stein, "Lawyers, Judges and the Making of a Transnational Constitution," *American Journal of International Law* 75 (1981), 1; see also A. W. Green, *Political Integration by Jurisprudence* (Sijthoff: Leyden, 1969).

[12] 1992 actually encapsulates, in a game which resembles some new Cabala of Community life, a temporal move to an ever-increasing higher celestial sphere. The key dates in this game of numbers are: the 1984 European Parliament Draft Treaty on European Union and the 1985 Commission White Paper ("Completion of the Internal Market"), endorsed by the 1986 Single European Act (which entered into force in July 1987), and to which was added the April 1988 Commission (Delors) Plan of Economic and Monetary Union, endorsed in the 1989 Madrid Summit and strengthened by the Dublin 1990 decision to hold two Intergovernmental Conferences leading to the Maastricht Treaty, which came into force on 1 January 1993.

[13] "The Single European Act … represents the most comprehensive and most important amendment to the EEC Treaty to date.": Ehlermann, "The '1992 Project': Stages, Structures, Results and Prospects," *Michigan Journal of International Law* 11 (1990), 1,097, 1,103 (hereinafter "1991 Project"). Although I agree with Ehlermann that the SEA is the

temptation too. This is not to deny the importance of 1992 and the changes introduced in the late 1980s to the structure and process of Community life and to the relationship between Community and Member States. But even if 1992 is a seismic mutation, explosive and visible, it is none the less in the nature of an eruption.

My claim is that the 1992 eruption was preceded by two deeper, and hence far less visible, profound mutations of the very foundational strata of the Community, each taking place in a rather distinct period in the Community's evolution. The importance of these earlier subterranean mutations is both empirical and cognitive. Empirically, the 1992 capsule was both shaped by, and is significant because of, the earlier Community mutations. Cognitively, we cannot understand the 1992 eruption and the potential of its shockwaves without a prior understanding of the deeper mutations that conditioned it.

Thus, although I accept that the Community has been transformed profoundly, I believe this transformation occurred in three distinct phases. In each of the phases a fundamental feature in the relationship of the Community to its Member States mutated; only the combination of all three can be said to have transformed the Community's "operating system" as a non-unitary polity.

These perceptions condition the methodological features of this chapter. One feature is a focus on evolution. I shall chart the principal characteristics of the new "operating system" in an historical framework. In other words, I shall tell a story of evolution over time. This approach will enable me not only to describe but also to analyze and explain. Each evolving facet of the new system will be presented as a "development" that needs systemic and historical analysis.

Second, in this analysis I shall focus on what I consider to be the two key *structural* dimensions of constitutionalism in a non-unitary polity: (1) the relationships between political power in the center and the periphery and between legal norms and policies of the center and the periphery; and (2) the principle governing the division of material competences between Community and Member States, usually alluded to as the doctrine of enumerated powers. The structure and process of the Community will thus occupy pride of place rather than substantive policy and content.

most important formal amendment, I contend that earlier developments without formal amendment should be considered even more important. For a recent comprehensive bibliography of 1992 literature, see *Michigan Journal of International Law* 11 (1990), 571.

The final feature of my methodological approach relates to the position of law in the evolution of the Community. In a sharp critique of a classic study of the European Community legal order, Martin Shapiro made the following comments, which could be leveled against much of the legal literature on the Community:

> [The study] is a careful and systematic exposition of the judicial review provisions of the "constitution" of the European Economic Community, an exposition that is helpful for a newcomer to these materials. But … [i]t is constitutional law without politics … [I]t presents the Community as a juristic idea; the written constitution as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court as the disembodied voice of right reason and constitutional theology … such an approach has proved fundamentally arid in the study of [national] constitutions … it must reduce constitutional scholarship to something like that early stage of archeology that resembled the collection of antiquities … oblivious to their context or living matrix.[14]

The plea for a "law and …" approach is of course *de rigueur*, be it law and economics, law and culture, law and society, that is, in general, law in context. At one level, a goal of this chapter will be precisely to meet aspects of this critique of, and challenge to, European legal literature. I shall try to analyze the Community constitutional order with particular regard to its living political matrix; the interactions between norms and norm-making, constitution and institutions, principles and practice, and the Court of Justice and the political organs will lie at the core of this chapter.

And yet, even though I shall look at relationships of legal structure and political process, at law and power, my approach is hardly one of law in context – it is far more modest. In my story, de Gaulle and Thatcher, the economic expansion of the 1960s, the oil crisis of the 1970s, socialists and Christian Democrats, and all like elements of the political history of the epoch play pithy parts. It is perhaps ironic, but my synthesis and analysis are truly in the tradition of the "pure theory of law" with the riders

[14] Shapiro, "Comparative Law and Comparative Politics," *Southern California Law Review* 53 (1980), 537, 538. In his comment Shapiro alludes to what in its own terms is a model analysis: Barav, "The Judicial Power of the European Economic Community," *Southern California Law Review* 53 (1980), 461. And, of course, not all constitutional scholarship of the Community falls into this trap. See, e.g., Snyder, *New Directions*; Lenaerts, "Constitutionalism"; Mancini, "The Making of a Constitution."

that "law" encompasses a discourse that is much wider than doctrine and norms and that the very dichotomy of law and politics is questionable.

The shortcomings of this "purism" (not total to be sure) are self-evident: my contribution cannot be but a part of a more totalistic and comprehensive history. But, if successful, the "pure" approach has some virtues, as its ultimate claim is that much that has happened in the systemic evolution of Europe is self-referential and results from the internal dynamics of the system itself, almost as if it were insulated from those "external" aspects.[15]

1958 to the Middle of the 1970s: the Foundational Period: Towards a Theory of Equilibrium

The importance of developments in this early period cannot be overstated.[16] They transcend anything that has happened since. It is in this period that the Community assumed, in stark change from the original conception of the Treaty, its basic legal and political characteristics. But understanding the dynamics of the foundational period is of more than historical interest; the patterns of Community-Member State interaction that crystallized in this period conditioned all subsequent developments in Europe.

In order to explain the essentials of the foundational period, I would like to make recourse to an apparent paradox, the solution to which will be my device for describing and analyzing the European Community system.

[15] The "insulation" cannot be total. External events are mediated through the prism of the system and do not have a reality of their own. *Cf.* Teubner, "Introduction to Autopoietic Law," in F. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (Walter de Gruyter: Berlin, New York, 1988) (the autopoietic approach to law, pioneered by Niklas Luhmann and elaborated by Gunther Teubner, acknowledges a much greater role to internal discourse of law in explaining its evolutionary dynamics; autopoiesis also gives a more careful explanation of the impact of external reality on legal system, a reality which will always be mediated by its legal perception).

[16] The intellectual genesis of this chapter is rooted in my earlier work on the Community. See Weiler, "The Community System: The Dual Character of Supranationalism," *Yearbook of European Law* (Clarendon Press: Oxford; Oxford University Press: New York, 1981), vol. I, 267. It was later developed in J. Weiler, *Il sistema comunitario europeo* (Il Mulino: Bologna, 1985) (an attempt to construct a general theory explaining the supranational features of the European Community). In the present work I have tried, first, to locate my construct, revised in the light of time, within a broader context of systemic understanding; and, second, to use it as a tool to illuminate the more recent phenomenon of 1992.

A paradox and its solution: Exit and Voice

If we were to ask a lawyer during the foundational period to compare the evolution of the European Community with the American experience, the lawyer would say that the Community was becoming "more and more like a federal (or at least pre-federal) state." By contrast, if we were to ask a political scientist at the same point in time to compare the European system with, say, the American system, the political scientist would give a diametrically opposite answer: "They are growing less and less alike."

The paradox can be phrased in non-comparative terms: from a legal-normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. European legal integration moved powerfully ahead. From a political-decisional-procedural point of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration. It is not surprising, therefore, that lawyers were characterizing the Community of that epoch as a "constitutional framework for a federal-type structure," [17] whereas political scientists were speculating about the "survival of supranationalism." [18]

Identifying the factual and conceptual contours of this paradox of the Community and explaining the reasons for it will be the key to explaining the significance of the foundational period in the evolution of the Community. What then are the contours of this legal-political puzzle? How can it be explained? What is its significance?

In *Exit, Voice and Loyalty*,[19] Hirschman identified the categories of Exit and Voice with the respective disciplines of economics and politics. Exit corresponded to the simplified world of the economist, whereas Voice corresponded to the messy (and supposedly more complex) world of the political scientist. Hirschman stated:

> Exit and Voice, that is, market and non-market forces, that is, economic and political mechanisms, have been introduced as two principal actors of strictly equal rank and importance. In developing my play on that basis I hope to demonstrate to political scientists the usefulness of economic concepts *and to economists the usefulness of political concepts*. This reciprocity has been lacking in recent interdisciplinary work.[20]

[17] Stein, "Towards a European Foreign Policy?" at 1.
[18] Heathcote, "The Crisis of European Supranationality."
[19] A. Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations and States* (Harvard University Press: Cambridge, MA, 1970).
[20] *Ibid*. at 19 (emphasis in original).

The same can be said about the interplay between legal and political analysis. The interdisciplinary gap there is just as wide.

The interplay of Exit and Voice is fairly clear and needs only a brief adjustment for the Community circumstance. Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intra-organizational correction and recuperation. Apart from identifying these two basic types of reaction to malperformance, Hirschman's basic insight is to identify a kind of zero-sum game between the two. Crudely put, a stronger "outlet" for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction. By contrast, the closure of Exit leads to demands for enhanced Voice. And although Hirschman developed his concepts to deal with the behavior of the marketplace, he explicitly suggested that the notions of Exit and Voice may be applicable to membership behavior in any organizational setting.

Naturally I shall have to give specific characterizations to Exit and Voice in the Community context. l propose first to discuss in legal categories the Exit option in the European Community. I shall then introduce Voice in political categories.

Exit in the European Community: formal and selective

Formal (or total) Exit is of course an easy notion, signifying the withdrawal of a Member State from the European Community. Lawyers have written reams about the legality of unilateral Member State withdrawal.[21] The juridical conclusion is that unilateral withdrawal is illegal. Exit is foreclosed. But this is precisely the type of legal analysis that gives lawyers a bad name in other disciplines. It takes no particular insight to suggest that should a Member State consider withdrawing from the Community, the legal argument will not be the critical or determining consideration. If Total Exit is foreclosed, it is because of the high enmeshment of the Member States and the potential, real or perceived, for political and economic losses to the withdrawing state.

Whereas the notion of Total Exit is thus not particularly helpful, or at least it does not profit from *legal* analysis, I would introduce a different notion, that of Selective Exit: the practice of the Member States of

[21] For further discussion, see Weiler, "Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community," *Israel Law Review* 20 (1985), 282, 284–8.

retaining membership but seeking to avoid their obligations under the Treaty, be it by omission or commission. In the life of many international organizations, including the Community, Selective Exit is a much more common temptation than Total Exit.

A principal feature of the foundational period has been the closure, albeit incomplete, of Selective Exit with obvious consequences for the decisional behavior of the Member States

The closure of Selective Exit

The "closure of Selective Exit" signifies the process curtailing the ability of the Member States to practice a selective application of the *acquis communautaire*, the erection of restraints on their ability to violate or disregard their binding obligations under the Treaties and the laws adopted by Community institutions. In order to explain this process of "closure" I must recapitulate two dimensions of EC development: (1) the "constitutionalization" of the Community legal structure; and (2) the system of legal/judicial guarantees.

The foundational period: the "constitutionalization" of the Community legal structure

Starting in 1963 and continuing into the early 1970s and beyond,[22] the European Court in a series of landmark decisions established four doctrines that fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states.

The doctrine of direct effect The judicial doctrine of direct effect, introduced in 1963 and developed subsequently,[23] provides the following presumption: Community legal norms that are clear, precise, and self-sufficient (not requiring further legislative measures by the authorities of the Community or the Member States) must be regarded as the law of the land in the sphere of application of Community law. Direct effect

[22] The process of constitutionalization is an ongoing one. I suggest the 1970s as a point of closure since, as shall be seen, by the early 1970s all major constitutional doctrines were already in place. What followed were refinements.

[23] On the doctrine of direct effect and its evolution, see T. Hartley, *The Foundations of European Community Law* (Clarendon Press: Oxford; Oxford University Press: New York, 2nd edn., 1988), 183–218.