Juridical Pluralism and the Risk of Constitutional Conflict

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Abstract and Keywords

The interlocking of legal systems in various countries, with mutual recognition of each other's validity, but with different grounds for that recognition, has profound and potentially dangerous implications for the successful continuation of European integration. This chapter explores the problem of legal pluralism and solutions to the difficulties for practice implicit in the very idea of pluralism. The character and implications of the kind of legal pluralism that institutional theory admits are considered. The context is one in which ongoing challenges occur along the interface between the state-law systems of member states of the European Union (EU), and the EU legal order as interpreted by the European Court of Justice. The concepts of law, constitution, constitutionalism, and pluralism are discussed, along with EU jurisprudence on EU law, the dilemma of revolt or revolution against the constitution, state-law and the rule of law, and distinction between pluralism under international law and radical pluralism.

Keywords: legal pluralism, European Union, state-law, rule of law, radical pluralism, constitution, law, constitutionalism, revolt, revolution

Introduction

In the context of American federalism, it is remarkable how long it took for the Supreme Court to become a really significant organ of the Union. From the very beginning the President’s office was a working reality, and Congress also assumed effective legislative powers. The Court certainly laid down a marker in 1803 concerning the powers it was to exercise, with a significance later generations have come to appreciate well. But the decisive interventions of the Court in policing the constitution against encroachments either by states or by federal government were not part of the original making of the American union.
It has been otherwise with the forging of union (now ‘Union’) in Europe. Lawyers are well
warned not to over-state the role of the European Court of Justice in making the various
community treaties into a working reality. Yet it is true that the Court’s role was a decisive one.
For it took key decisions on the juridical character of the European Economic Community (now
known simply as the ‘European Community’) at a time at which there was severe tension among
member states between ‘supranational’ and ‘intergovernmental’ approaches. This tension even
for a time paralysed the Council of Ministers, and was more acknowledged than solved by the
Luxembourg compromise of 1965. In applying legal theory (and, in particular, the conception of
law as institutional normative order) to understanding the ‘new legal order’ that exists in
Europe, the decisions on the juridical character of Community and Union have particular
importance, though always with regard also to the political character of the whole, and the
significance of institutions other than the Court.

Certainly, the Court’s initiative was a decisive one when it interpreted the juridical character of
the entity brought to birth through the foundation treaties as being a distinct legal order. This
was an order of a new and hitherto unique kind, one whose norms were directly applicable and
directly effective both against and in favour of natural and juristic persons within the states as
well as against and in favour of the states themselves. It was the Court, moreover, that decided
these directly applicable and directly effective norms were to be accorded supremacy in each
state over national law. These decisions necessarily imply that the foundation treaties, as
subsequently amended by further treaties, each careful to conserve the cumulative (p.98)
acquis communautaire, amount effectively to the constitutional framework of a quite special
entity, this ‘European commonwealth’ as I later suggest calling it. What is more, the Court has
elaborated the doctrine that it is the Community constitution, the normative order that the
treaties establish by their own force and without the aid of international law, that confers the
interpretative as well as the decisional powers that the Court exercises.

This position has been established chiefly in cooperation with the courts of the member states. John
Weiler has pointed out that litigation involving companies and private individuals in
European law has almost invariably (and necessarily) started and finished in national courts, so
that any decision handed down has had the backing of these courts, with the weight of
legitimacy implied in that. At any rate in the developing years of the Community, citizens of
member states considered themselves unthreatened by a body of law that their own courts
handed down to them. This was so, even if the domestic courts relied for their decisions on
crucial interpretations provided by the European Court of Justice under the procedure for
reference under Article 177 of the Rome Treaty. Hence there was a lack of any perceived
imposition from without. If national courts were ready to go along with integrationist European
interpretations of the law of the Community, why should citizens balk at that?

A high-water mark of this loyal acceptance of the integrationist logic of Community law was, one
might suggest, the Factortame decision in the UK, discussed in the preceding chapter. Here, the
price of judicial loyalty to integrationist doctrine in Community law was a high one, but the
House of Lords was ready to bite the bullet. Norms that had hitherto been considered central to
the basic doctrine of UK constitutional law, the doctrine of parliamentary sovereignty, turned
out to be defeasible in favour of a weak reading of Parliament’s incapacity to be bound by its
own prior decisions. Injunctions ran against a Secretary of State to prevent his acting on a
contested Act of Parliament, and the Act itself was in due course disapplied. After twenty years of UK membership in the Communities, the chicken wrapped up in the European Communities Act 1972 came home finally to roost.

The move from ‘Community’ to ‘Union’, or, rather, the incorporation of Communities into Community within Union, was to give rise to a weightier reaction. The Maastricht Treaty on European Union, with its adoption both of the concept of subsidiarity and yet at the same time of the concept of ‘European citizenship’, though initially well received, did not take long to provoke a reaction. Where other states initially ratified without too much difficulty, making any necessary constitutional amendments, the Danes, against their Parliament’s advice, said (p.99) ‘No’ in a referendum. Following the Danish referendum, John Major’s Government in the UK found itself, even after a decisive election victory in April 1992, in deep trouble with the ‘Eurosceptics’ in the governing Conservative Party. The government had to drag its feet for a year before enabling legislation could be carried, and then only by a pretty narrow margin.

There was an Irish referendum that approved Maastricht by a reasonable majority. In France the Conseil Constitutionnel held that a constitutional amendment was required to ratify the Treaty on the ground that its provisions involved derogation from national sovereignty. The referendum required for the amendment was carried by only a narrow majority, and finally the Conseil Constitutionnel held that the decisions involved were a direct expression of the sovereignty of the French people and were not subject to further constitutional review. A similar decision was reached by the Constitutional Court in Spain on the necessity for a referendum to amend the constitution and to authorize a transfer of sovereign rights by the authority of the sovereign people.

Most telling of all, perhaps, was the judgment of the Federal Constitutional Court of the German Republic in response to a challenge mounted by Mr Manfred Brunner and several German members of the European Parliament to their country’s purported accession to the Maastricht Treaty by due process of constitutional amendment. The Constitutional Court, the supreme constitutional tribunal of Germany, rejected the argument that the German constitution contained no power to make legitimate an accession to a European Treaty that would violate the principles of democratic government. According to the argument, the German constitution requires the German federation to conduct itself as a soziale Rechtsstaat organized in accordance with federal and democratic principles. Since the European Union, and within it the Community, were not properly democratic, any transfer of powers to the Union involved a transfer from democratic to non-democratic authorities, and was accordingly ultra vires and of no effect in law. The Constitutional Court rejected this line of reasoning, but on the rather narrow ground that no fundamental state powers were in fact transferred under the Treaty.

That was all very well, and satisfactory to the Treaty’s supporters. They found more troubling, however, further holdings by the Court, of which two are of special importance to the present argument. First, it was held that any future transfer of sovereign powers to a Community lacking in adequately democratic institutions would breach the constitution and would hence be null and void judged against the German Basic Law. Secondly, it was held that Community organs necessarily had restricted competence assigned by them to the Treaties, and this competence could not include a competence in any Community organ to have the power to determine (p.100) the limits of its own competence. This second point, denying the existence of ‘competence-
competence’ goes to the root of the issue about sovereignty. In German theory, the critical issue of sovereignty concerns competence-competence. Whoever has the competence to determine the limits (if any) on their own competence is truly sovereign. All other competences are necessarily subordinate or derivative.8

Much of the controversy concerning the Constitutional Court’s judgment is directed at the second holding, and the implicit or indeed explicit assertion of a continuing sovereignty in the German people, with corresponding restriction of the powers of the organs of the European Community or Union. Particularly noteworthy was the denial by the Court that the European Court of Justice, or any other European organ, could legitimately be held to have competence over its own competence. This extended to denying that the Union as a whole could be said to have competence-competence corporately. It followed therefore that the competence to determine the competence of European organs must lie somewhere other than in these organs.

From a German point of view, the Court effectively held that it itself had this competence. The Court itself would have the final power of decision over any future question concerning the outer limit of European competence in respect of matters concerning Germany, or concerning any of the fundamental constitutional rights or powers of the German federation. It would be for the Court to uphold the fundamentals of German constitutional law, and reciprocally to determine the limits of competence over Germany of the European organs. It would not in such a setting consider itself bound to respect the opinion of the ECJ. Indeed, its own constitutional obligations would preclude it from acknowledging a competence of the ECJ so to interpret EC law that it trenched upon fundamentals of the German constitution reserved to the ultimate democratic control of the German people.

Although Mr Brunner’s particular challenge to the validity of Germany’s ratification of the Treaty failed, the Court thus left a marker, a line drawn in the sand, indicating that there might be future challenges that it would uphold if European organs should adopt an unduly expansionist view of their competences. There is an interesting contrast with the UK’s position as analysed by the House of Lords. The Lords’ holding appears to imply that, so long as the UK Parliament continues to uphold British membership of the Community, this implies upholding the supremacy of Community law and with it the interpretative competence of the European Court of Justice. This does not elide the power of the UK Parliament to decide upon a total repeal of the European Communities Act, with the effect of unilaterally seceding from the Community. An Act of Parliament to that effect would be valid in the perspective of UK law, whatever the Community organs might at that hypothetical future date think, say, or do. So, while there is a greater flexibility concerning the recognition of Community law and the extensive competence of Community organs (p.101) during the subsistence of British membership, there is again an assertion of last-resort supremacy of the United Kingdom constitution. From the Lords’ point of view as from that of the Federal Constitutional Court of Germany, the reason for the binding character of Community law is the provision of domestic constitutional law that made valid the acceptance of Community membership and Community law through accession to the relevant treaties.

The same goes for other member states. For example, in Ireland the question has arisen concerning the implications of Community law on the issue of rights to obtain information about the provision of abortion within the legal régimes of other member states. Freedom to provide
services might after all be presumed to carry with it freedom to provide anywhere in the Community information about services lawfully available in any member state. Freedom to provide services is, of course, one of the fundamental ‘four freedoms’ of Community law. On the other hand, Ireland has taken a different line about the lawfulness of abortion than that which has prevailed in the other member-states. By the eighth, twelfth, and thirteenth amendments to the Irish Constitution, Article 40.3.3 stipulates that the human right to life includes the right to life of the unborn foetus. Suppose that the validity of Community law in Ireland depends on its recognition under the Constitution, through specific amendments to the effect of adopting Community norms and competences. In that case, it is a question of Irish constitutional law whether the right of life of the foetus (or indeed other rights) would take priority over contrary provisions of Community law. The Irish Supreme Court has indicated its opinion both that this would be the correct interpretation of the Irish constitution, and that the Court’s recognition of the validity of Community law is, from its point of view, required by that very constitution, expressly amended for this purpose.9

This is the point at which it becomes blindingly clear why the issue characterized by the Germans as that of ‘competence-competence’ is of such vital importance. For the point of view of the European Court of Justice does not match that of the courts in the member states. The ECJ has been author of a long line of decisions that have effectively asserted the constituent (and thus constitutional) character of the foundation treaties for the ‘new legal order’ that they brought into being. The large and complex body of law and practice that at any given time comprises the *acquis communautaire* is (in the ECJ’s perspective, at least) valid primarily on account of the higher law of the Communities in its character as constitutional law. Hence the European Court is committed to a different conception of the basis of the ‘supremacy’ of Community law than that which the states’ courts acknowledge, to the extent that they do reciprocally acknowledge the ‘supremacy’ doctrine. For them, the ultimate validating ground is found in domestic constitutional law, whereas in the view of the ECJ, the Community has its own constitutional charter to whose validity in its own right the ECJ is necessarily committed according to its own longstanding doctrine.

This interlocking of legal systems, with mutual recognition of each other’s validity, but with different grounds for that recognition, poses a profound challenge to our understanding of law and legal system. The resources of theory need to be enhanced to help deal with a challenge full of profound and potentially dangerous implications for the successful continuation of European integration. We come to the frontier of the problem of legal pluralism, and have to reflect on solutions to the difficulties for practice implicit in the very idea of pluralism.


The remainder of this chapter will therefore consider the character and implications of the kind of legal pluralism that institutional theory admits. The context is one in which we see ongoing challenges along the interface between the state-law systems of member states of the European Community, and the Community legal order as interpreted by the European Court of Justice.

The starting point is one of embracing pluralism. By this, is meant the idea that there can coexist distinct but genuinely normative legal orders. Two such distinct legal orders can generate different answers to the same question, for example, the question whether Henry is
married to Mary and therefore not free to marry Anne, or divorced from Mary and therefore free to marry Anne. This, of course, diminishes the utility of law as a determinate guide to conduct at least in the area of conflict, for Henry must now decide whether to marry Anne or not, knowing that if he does he acts legally and validly in the perspective of one legal system, but wrongfully and without validity in the perspective of the other. Which shall he respect, which flout?

The supposition is that law in all its species belongs to the genus ‘institutional normative order’. This is widely prevalent among humans, by no means confined to the context of states and their agencies. Institutional normative order, or ‘law’, is certainly to be discerned in the European Union, both in respect of its member states and in respect of the ‘Community Pillar’ of the Union, arguably also of the Union as a whole. The ‘constitution’ of any such order can best be defined in terms of the establishment and empowerment of the agencies (‘institutions’ in one sense) that perform the roles of enunciating, executing, administering or judging about the norms whose institutional character is established by the very exercise of those powers. Such establishment or empowerment is itself achieved by institutional acts, that is acts guided by norms. To avoid an infinite regress, it is necessarily the case that some ultimately empowering norms be informal and customary or conventional in character. Of course, it may be that norms originally customary or conventional in character can be reduced to writing and formally enacted; but there is always a last-line question what authorizes any such enactment. That can only bring you back either to a conventional or customary normative basis, or to first-person assessment (p.103) of the rightness of upholding the order in question from the viewpoint of autonomous morality. A normative system as an element in an institutional normative order can be self-referential, and so it can happen that powers originally exercised through empowerment by custom and convention are subsequently confirmed and redefined through formal legislation, whether or not in the form of a comprehensive ‘written constitution’. In a similar way, those who are called upon to act as judges under conventional or written norms can by their authoritative interpretation of their own powers and of other constitutional norms transform the character of the original empowerments involved. The reading of the Rome and related Treaties that produced the conception of European Community law as a ‘new legal order’ is one remarkable illustration of this, but the process is by no means out of the ordinary.

Formal empowerment of institutionalized agencies like executive, courts, legislature, depends, then, on norms either conventional or institutionally articulated. An appropriately self-sufficient cluster of such norms of empowerment is a constitution, or at any rate is the central element in a constitution. A constitution in this empowering function always and necessarily imposes conditions on the powers it confers. For the constitution, however skeletal, is always ‘above’ the powers it confers. Constitutionalism as a minimal virtue involves duly respecting the conditional quality of powers conferred in this way and involves observing faithfully the (interpreted) conditions of the respective agencies’ empowerment. Since the example set by the first ten amendments to the US Constitution in 1789, so soon to be followed by the Déclaration des droits de l’homme et du citoyen, there has been a tendency to hold that constitutions do not merely (perhaps do not mainly) empower the main arms of a government, but also lay down or state the fundamental rights of those who stand before government. Sometimes, constitutionalism is taken to be specifically the virtue of respecting those rights. To my mind, this is too absolutist a view concerning the type of conditions a constitution sets upon the powers it confers. Constitutions may set genuine conditions of validity without including an entrenched charter of
rights. It remains a virtue to uphold these weaker validity conditions. Clearly, a charter of rights sets quite strong conditions (in my view, desirably strong ones) on the powers the constitution confers. But without conferment of those powers, nothing would be constituted nor could the rights condition any lawful governmental power, for there would be none. It is better, then, to say that the conditions of valid exercise of governmental power may be weaker or stronger, and hence constitutionalism can have weaker or stronger senses. Only in the stronger sense does it involve the strong conditions, embodying rights of human beings as well as other restrictions and restraints on the powers conferred by the constitution. For any speculation about constitutionalism in the European Union, this is the conceptual frame supplied by the institutional theory of law.

Constitutional pluralism is relevant here, given my earlier more general remarks about normative pluralism. There are obviously contexts in which the constitution of one body can be, or be represented as, a subordinate offshoot of a ‘higher’ constitutional order. For example, a public University might have a constitution wholly encapsulated in, or validated by reference to, an Act of the state Parliament. Then (assuming it agreed that the University has a ‘constitution’ at all) it is clear that the University has a dependent and delegated constitution, dependent on the state constitution. Much more questionable would be the issue of the constitution of, say, an international church operating within a given state. No doubt such a church would have reasons of prudence (at least) to ensure that its activities conform to the state’s laws, including any provisions in the state’s constitution about churches and religious observations in general, or about this church in particular. But it would be problematic to represent the church in its worldwide aspect as validated by a single state (any single state). Yet as a single international or universal church it must surely have a single constitution as ‘constitution’ has been defined here (not as many constitutions as there are states in which it operates), and surely also it must be acknowledged to have law, ‘canon law’, or ‘church law’. The church might well and might reasonably hold the validity of its constitution to be not conditional upon state approval in any particular state. The states in turn would be no less likely to consider themselves self-sufficient. All those within which such a church operates are most likely to consider the existence and legitimacy of their own constitution and lawfully constituted legal order to be independent of any conferment of power, or even acknowledgement or legitimation of power, by the church. That is not to say that there are not also states whose constitutional conception of their own legitimacy expressly depends on some form of ecclesiastical or religious confirmation.

So it would seem reasonable to say that here there are two sets of constitutions, each of which is acknowledged valid, yet neither of which does, or has any compelling reason to, acknowledge the other as a source of its validity. Where there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another. In this case, ‘constitutional pluralism’ prevails.

Applying the analysis
It must be obvious how the stated conceptual approach bears upon the contemporary European scene. At least on the face of it, constitutional pluralism obtains among the member states of the
European Union, and certainly between them and non-members. The validity of Germany’s constitution is not conditional on any grant of power by or under the Danish constitution, nor vice versa, and so on for the other member states. Certainly, in so far as each of the states is constitutionally committed to respect for international law, each at least implicitly acknowledges the legitimacy of every other, since all are legitimate and effective entities in international law. But it is open to question whether this implies a common constitutional (and thus power-conditioning) foundation for each state in international law. Here, a different view might be held from the viewpoint of the Netherlands, to the extent that the Dutch constitution grants overriding effect to all international obligations, including treaty obligations.

The European Court of Justice has declared the law it administers to be a new legal order, an order of a new kind, and has declared that this law enjoys ‘primacy’ or ‘supremacy’ over the state law of the member states (the ‘high contracting parties’ to the foundation treaties). In its guise as new legal order, European Community law seems at least potentially worthy to be noted as a further instance confirming the theory of constitutional pluralism. The idea of its being constitutionally dependent on the member states or any one of them is at the very least put in question by the claim of ‘primacy’ or ‘supremacy’. The converse possibility of the states now being constitutionally dependent on the Community is difficult to square with constitutional doctrine and constitutional jurisprudence in the states themselves such as was briefly reviewed above. At this stage, one should not prejudge the question whether in the end some form of pluralistic analysis is the correct one. Certainly, any approach that precluded this possibility a priori would seem unreasonable. There is an open question here, to be answered after further due and careful consideration.

Clearly enough, we can make little progress in understanding this legally polycentric, plurisystemic, multi-state legal order (or conglomerate of legal orders, perhaps) without some reasonably articulated theoretical framework. Yet just as the theorists have tended to neglect the problems and opportunities posed by the development of the European Union and within it European Community law, so on the other side the approach of doctrinal scholars in Community law has seemed somewhat defensive toward the need for theory.

Despite the challenge of a claim that here we have law in what is somehow a new form, maybe a new sense of the term ‘law’, not many scholars seem to have been stirred into deep consideration of the theoretical underpinnings of doctrinal study in European Community (hereinafter ‘EC’) law. Even outstandingly insightful and provocative work like that of Diarmuid Rossa Phelan seems sometimes almost aggressively anti-theoretical. The following passage from his *Revolt or Revolution* is (with respect) symptomatic:

> Wider perspectives are not considered, whether they be questions of justification in the sense of evaluation by, or soundness in respect of, any extra-order principles or values, comparative federalist perspectives, or legal theories. [The] ‘order approach’ [taken in *Revolt or Revolution*] is an extension in the context of relations between legal orders of the internal approach to law, and is humbler than considering the other approaches listed but has the advantage of trying to avoid the debates which surround the
perspectives of justification, the mutually disputed positions of federalism and states’
rightists, and legal theories.

Phelan on the whole chooses to ignore the extent to which his own position and approach belong
firmly within theory. His way of dealing with the situation is not really to abandon theory, but to
abstain from argument with theoretical positions other than his own. His own position is a
qualified positivism. He believes that there are legal systems, and that they can each be
understood from the inside, in their own terms (‘hermeneutically’, one might say, though he
does not). A doctrinal understanding of the rules and principles of a system so understood gives
a genuine though partial picture of a social reality.

Phelan’s positivism does however exhibit a qualified character only. This becomes clear when, in
discussing the fundamental rights enshrined in the Irish constitution, he exhibits himself as
willing to ascribe these to a source in natural law that guarantees their validity despite the
presence or absence of confirming norms of enacted law. And it seems that he wishes not only
to say that agents within the system think they are upholding natural rights, but to give it as his
own opinion that they are in fact doing so.

The ‘institutional theory’ gives no ground for objection to this internal-to-the-order way of
approaching questions. One should, however, be careful to avoid begging the question of how
many distinct orders there are; and the issue of the ontological character of natural rights had
better be laid to one side at least for the moment. Subject to modest caveats of this kind, there is
no reason to doubt that Phelan’s theoretical approach can be thoroughly helpful for pursuit of
the inquiry on which we are at present embarked. But the theoretical issue will have to be
pursued more deeply than Phelan envisages. In particular, as has been said several times,
deeper thought needs to be given to the question how we are to understand systems and
linkages or interrelationships between them.

Community jurisprudence on Community law
From early in the history of the Community, previously ‘Communities’, and particularly in the
development of the European Economic Community, the European Court of Justice (‘ECJ’) took a
strong line in the development of the law through interpretation of the Rome Treaty and related
Treaties. Critical decisions in the formative period of the Community held that the Community
constituted a new legal order. First, this was characterized as a new legal order of international
law. But later the concept of ‘international law’ was dropped, and there was said to be simply a
new legal order, or an order sui generis.¹²

(p.107) The norms of this order include express treaty norms, norms made under powers
conferred by the Treaties, and norms explicated as tools to assist interpretation of the Treaties,
under the guise of fundamental legal principles applicable in EC law. These principles are
founded on an appreciation of the values implicit in the Treaties and on the values of legal order
inherent in the common juridical experience of the member states. All such norms have been
held directly applicable and directly effective (in appropriate cases) so as to confer rights and
obligations on citizens of the member states (now also ‘citizens of the Union’). This law of the
Community has been held to enjoy ‘supremacy’ over domestic law. Correlative with this
assertion of supremacy has been the doctrine that the member states in acceding to the
Community necessarily transferred to it a part of their ‘sovereign rights’.¹³
As often happens with developed bodies of law, the path that Community law has taken now seems to have a kind of retrospective inevitability. When we see what the makers have wrought, we are apt to think, ‘But how could they have done otherwise?’ It is difficult indeed to imagine things having developed differently. Yet it is worth trying to exercise the required feat of imagination. What if the ECJ had held from the outset that the Treaties merely constituted a body of regional international law with specialized organs established to secure observance of it?14 The obligations arising under this law would have been obligations of states to maintain their law in such a condition as to satisfy their international obligations. The resultant rights and obligations of individual legal persons would have been mediated through national law, adjusted by one means or another to achieve conformity with the said international obligations.

It is not inconceivable that this could have worked as a successful legal basis for achieving the economic and political aims envisaged by the states at the time of adopting the Treaties. The parallel case of the European Convention on Human Rights and Fundamental Freedoms helps make the point. That states are obligated to observe certain norms in favour of their citizens and others within their jurisdiction does not entail that these norms must have direct effect so as to be enforceable ipso jure in a domestic context by parties who hold their rights have been infringed. The UK’s Human Rights Act 1998 indicates that there even exist ways of domesticating obligations undertaken through an international convention that leave the ultimate constitutional authority of the state’s own legislative and judicial organs unimpaired thereby. For the Courts are charged with the task of so interpreting the domestic laws of the United Kingdom that they avoid, so far as possible, conflict with Convention rights (as British Courts interpret these in light of the jurisprudence of the European Court of Human Rights). In the case of any Act of the UK Parliament that the Courts find impossible to interpret as compatible with Convention rights, they are to issue a ‘declaration of incompatibility’. It will then be for Government and Parliament to decide how, if at all, to amend domestic law to eliminate the incompatibility, and a simplified legislative process is available to this end.

However that may be, the European theatre exhibits two different ways of achieving common legal standards among a diversity of states, the ‘Community way’, the ‘sui generis interpretation’ involving a ‘new legal order’, and the ‘Convention way’, the ‘internationalist interpretation’, where state legal orders interact with standards binding in public international law. There does not seem to be any evidence that levels of compliance with the Human Rights Convention have been spectacularly or at all lower than levels of compliance with Community law, so from that point of view one way might be considered quite as good as the other.

Would an ‘internationalist’ interpretation of Community law, had it prevailed, have been worse than the actually prevailing ‘sui generis’ view? As of 1958, say, was one or other clearly the better answer in strictly legal terms. Even now, could one say that the view taken by the ECJ in Costa, Van Gend, and the other cases of the famous series was, after all, the wrong or a mistaken view? Or was it always right, or has time made it so? These are puzzling questions.

Plainly, the issue is not a merely arbitrary one. There are solid and reasonable arguments either way. A persuasive case can be made for the view that the implicit needs of a ‘common market’, an ‘economic community’ include a need for the same law to be in force with direct effect throughout the community, and therefore to override any conflicting or competing local law.
Whoever signs up to a common market signs up to exactly such an enterprise, and the Court in determining in favour of the *sui generis* view simply draws out the implicit assumptions of the enterprise. But there is a persuasive counter-case that lays stress on the initial and continuing recourse to international treaties as the basis for the foundation and subsequent enlargement, modification, and reform of the Union. This counter-case argues that a more natural interpretation of the whole ensemble would be one rooted in international law, especially in the principle *pacta sunt servanda*.

Reasonable views reasonably statable come into conflict over an issue like this, and there will be more than two or even a few possible formulations of points in issue. That being so, we are perhaps inclined simply to say: ‘Well, somebody must settle the issue, choosing among reasonable alternatives.’ And this, we might further reflect, is just what happened. The ECJ did settle the matter. Starting with quite skeletal provisions in the foundation treaties, and working incrementally over time, the ECJ has built up a substantial jurisprudence in which is enshrined the *sui generis* view and a series of subordinate and satellite determinations which give body to the view. It is characteristic of such an incremental process to find that the scope for determination in later cases becomes steadily more constrained the larger the body of case-law and doctrine has grown. As the materials for interpretation expand, so the scope for acts of interpretation contracts. Question by question, the ‘right answer’ thesis gathers momentum, and the air of retrospective inevitability thickens.

Yet how can it be said that the ECJ has settled the matter? To say its decisions ought to be accepted as settling the question is to impute to it a normative authority to decide this and like matters. But to justify such an imputation would be to reenter the discussion of the proper interpretation of the Treaty-constituted order, and thus to reopen a version of the question that the ECJ is being said to have authoritatively closed. There is an obviously paradoxical quality in the answer that the ECJ necessarily has this authority because it has interpreted its own authority in just this way, an obviously question-begging argument whose conclusion is already assumed in its premises. Such paradox, such question-begging, such circularity of reasoning, is perhaps built into our very understanding of system. The highest authority in any normative order can appeal to no higher positive confirmation of its own authority than that enshrined in its own jurisprudence.\(^{15}\)

But the very situation we study is one in which the issue of highest or ultimate authority is itself at stake. The ECJ is not the sole actor here with pretensions to ultimate authority. The highest tribunals of the member states also belong within normative orders in which they claim ultimate authority to adjudicate, and are accustomed to approval, or at least acquiescence, in their doing so. What if they characterize the legal order of Community law in terms different from those used by the ECJ? Could they take the line that the ECJ (and other organs of the Union and Community) exercise powers delegated by the states through the Treaties, and are therefore not ultimate authorities after all, but mere delegates? Certainly, the delegation is complicated by the fact that each member state is under an obligation of international law to every other to respect the same terms the decisions of the delegated authorities. These obligations, however, cannot logically be interpreted as including an obligation to accept as binding a decision taken under delegated authority that goes clearly beyond the proper range of the delegated power.
In *Revolt or Revolution*, Phelan poises the problem of European politico-legal development on just this deliberative fulcrum. He critically scrutinizes the jurisprudence of the ECJ in relation to the doctrines of *sui generis* legal system, supremacy, direct effect, transfer of sovereign rights, and the rest of it. He sees these as highly contentious, tendentious even; he considers them to be doctrines determined by the will of the court not by the will of the high contracting parties to the Treaties (for the Treaty texts are silent on many of the key points). He roundly rejects any notion of retrospective inevitability. The argument above concerning the tenability of the ‘internationalist’ conception of Community law is indeed little more than a pallid summary of an argument developed colourfully, trenchantly, and at some length by Phelan. The ECJ, he contends, could have taken a less federalist line, one less corrosive of the sovereignty of the member states, less tending towards an assertion of sovereignty for the Community, that is, of the competence of its organs to determine their own competence.

The conclusion to which the argument drives is that Europe has reached, or is teetering on the brink of, a crisis. The problem is that of a conflict of obligations. Constitutional courts, or regular supreme courts in some cases, exercise a vital (p.110) responsibility to uphold constitutional norms and in particular constitutional rights, human rights as guaranteed in constitutions. Constitutions (where not the product of custom and statute in mosaic) represent the ultimate exercise of popular sovereignty, the self-constitution of a territory’s inhabitants into an organized state whose organs act under the restrictions agreed by the people, most significantly restrictions in favour of individual rights. Where a state has acceded to the Community and Union, making appropriate constitutional amendments to that end, the constitutional tribunal must undertake its task in the light of the constitutional empowerment of Community law. This will include a duty to have regard to authoritative interpretations of Community law supplied by the ECJ.

Can it, however, include a duty to accept without question the ECJ’s conception of the constitutional responsibilities of the national court under the national constitution? One quite natural interpretation of the doctrine of legal order *sui generis* yields the implication that the ECJ may and must do this very thing. For the ECJ considers the obligation of the state court to be one arising directly under Community law. Yet, setting aside the case of the Netherlands, and the special place the Dutch constitution gives to treaty obligations, including the Community treaties, state constitutional or supreme courts, by an equally natural interpretation of the domestic constitution, reach a different conclusion. They hold, as we have pointed out, that their obligations derive from the national constitution, including such amendments validly made as have rendered domestically effective and applicable the norms of the Community legal order, including the norm that authorizes Article 177 references to the ECJ.

The dilemma: revolt or revolution?
National courts which implement Community law thus find themselves doing so on a ground different from that which the ECJ regards as mandating their doing so. The ECJ considers the implementation of Community law by national courts to be directly required by an EC constitution, and considers the doctrine of primacy or supremacy as applying (above all) to that constitution. The national Courts consider Community law, constitution included, as applicable only in virtue of national constitutional law. Herein lies Phelan’s dilemma of ‘Revolt or Revolution’. He warns that the present legal situation cannot last forever. Key test cases are
bound to arise, if, indeed, they have not already arisen. The highest court in some state (or in more than one) will be driven, he suggests, to the point where one or other of two paths must be taken. Either loyalty to Community law will force them to sanction a revolution in their own state, a constitutionally unauthorized change of the constitution that will effectively transfer the people’s sovereignty to organs of the Union. (According to Sir William Wade, this has already happened in the United Kingdom.) Or loyalty to the constitution as expression of the people’s sovereign mastery of their state will sanction a revolt against the constitution of the Community, and the decisions of the ECJ that have created it.

Phelan’s case for his thesis is laid out in three phases. First there is a lucid account of the evolution of the Community legal order. The author sees this as attributable mainly to acts of will of the ECJ, which have developed norms well beyond the scope of the foundational Treaties. Secondly, there is an account of French constitutional law and of the jurisprudence of the Conseil Constitutionnel, together with a shorter account of the posture of the Conseil d’Etat and the Cour de Cassation towards Community law as developed by the ECJ. Throughout, there is a contrast between questions of ultimate competence posed in the French constitutional perspective and similar questions viewed in the perspective of the ECJ. Direct conflict has so far been avoided, but the rationale whereby the French courts treat it as constitutional to implement Community rights and obligations is in clear contrast with the ECJ’s rationale for this. There is therefore serious potential for a conflict where the difference of rationale yields contrariety of practical decision.

Thirdly, Phelan gives an extensive treatment of Irish constitutional law, and particularly the Irish constitutional jurisprudence of fundamental rights, which in turn includes the theory that these are pre-constitutional natural rights transcribed into the constitution rather than invented by its drafters. The abortion decisions have already been mentioned. Through a sequence of highly newsworthy and controversial decisions, the Irish Court and the ECJ succeeded in avoiding a direct conflict. It remains the case, however, that the Irish constitution recognizes as a human right the right to life of the human foetus, and requires its judges to uphold this. By contrast, most of the other systems within the European Union reject this, taking the more restrictive view that rights commence at birth, not at conception, and permitting abortion in various legally determined circumstances. In some states at least, there are grounds in turn for considering the legal regime in question to be one that embraces respect for a woman’s right to privacy and control of her own fertility. Believers in (rival versions of) fundamental rights can find themselves here in a deep conflict over the proper interpretation of conflicting rights. If the condition of European law is not such as to leave different state-societies, different sovereign peoples, to reach their own conclusions on such issues, intolerable pressures will build up. Yet the hitherto evident ambition of the ECJ to forge a judge-made constitution for Europe points inevitably, according to Phelan, in the very direction of settling a Community-wide resolution of this and other similar issues one way or another.

Is there then a remedy? The author believes so, and puts forward a proposal in the following terms:
[A] European Community law constitutional rule [ought to be] adopted to the effect that the integration of European Community law into national law is limited to the extent necessary to avoid a legal revolution in national law. The extent to which such limitation is necessary is (p.112) to be finally determined by national constitutional authorities (such as the Supreme Court [of Ireland] or the Conseil Constitutionnel) in accordance with the essential commitments of the national legal order, not by the Court of Justice.

He argues that already within EC law and jurisprudence there exist adequate warrants for a development of this kind. Clearly, there may be differences of ‘essential commitments’ in different national systems, and these cannot but generate some lack of uniformity in the law across the community as a whole. However, this would be rendered tolerable from a Community point of view if the decisive step were taken by a ruling of the ECJ aimed at establishing a rule of EC law that protects fundamental commitments even when these are in opposed senses in different states.

This is an interesting and suggestive possibility. There is, however, one potential weakness internal to Phelan’s argument, whether or not other objections can be mounted from outside of it. The author’s critique of the ECJ’s development of the sui generis view with the associated doctrines of supremacy, direct applicability, and direct effect, is firmly premised on an absence of explicit member-state consent to any such doctrines. For states such as the United Kingdom and Ireland, which acceded to the communities only some time subsequently to such decisions as Costa and Van Gend, this is not at all convincing. For these states signed up to the law of the Community as it was understood at the time of their joining. Even for original founder members, there have been several occasions of Treaty-revision which have provided the opportunity, had anyone taken it, to set out the terms of a new view that would partially repeal the jurisprudence of the ECJ and radically cut back the acquis communautaire. This has not been done. So one part of the case against the legitimacy of the sui generis view seems to be seriously flawed.

Certainly, the difficulty of defining a reduced acquis communautaire would be formidable, so it is not to be wondered that no Intergovernmental Conference appears seriously to have attempted such a task. In effect, the Community and its law have evolved as they have evolved. There have been controversial landmark decisions, such that at particular points in history a different (and perhaps more cautious) trajectory of development could have been traced for the Community. But these are not matters of a kind that permit the turning back of a clock to an earlier moment of decision and deeming a different trajectory then to have been traced. In some measure, the choice at any moment is thus an all-or-nothing one—to keep with the evolved system you have, or to abandon it forthwith. No state has yet raised the latter course as a serious possibility. The former is not incompatible with trying to develop new norms that set a more cautious course for the future, and a pointer in that direction may indeed be found in the provisions about subsidiarity in the Maastricht Treaty.

However that may be, it seems better to consider the character of EC law as being now settled in the general direction of the ‘new legal order sui generis’, rather than to raise the possibility of some such radically different approach as would be involved, say, in trying to restart conceptually on the basis of a purely public-internationalist reading of the treaties and sub-treaty decisions, regulations and directives. The only (p.113) real question posed by Phelan’s proposal is whether it could itself be reasonably accepted as a new principle developing current
EC law so as to settle in a fresh way the boundary between EC law and national law. The question is one about how to settle boundaries between interacting systems on the assumption of non-hierarchical ranking between them. In the spirit of the theoretical position stated in the second section of this Chapter, I shall now to take up this issue.

Constitutional pluralism or constitutional monism?

Legal systems are not solid and sensible entities. They are thought-objects, products of particular discourses rather than presuppositions of them. Certainly, their existence has effects in the ordinary world. For much that people do, especially when acting in governmental roles, is guided by law or at least by beliefs about law. These beliefs include belief in the idea of law as a systemic enterprise, focused on an ordered, self-consistent, and coherent body of norms. To postulate the existence of the ‘legal system’ as a kind of ‘regulative ideal’ is a way of making this intelligible. A closely connected idea is that of ‘legal order’, which is the kind of, or aspect of, social order that we consider imputable to the fact that people, especially when acting in official roles, orient their conduct to satisfying norms of the legal system.

The idea that there are ‘governmental roles’ supposes some structure of government. For this, we have to imagine that there is some kind of systematic normative conferment of competences of the kind that was earlier characterized as ‘constitutional’. Hence it is a truism that those holding governmental roles must, at least in part, orient their conduct towards norms that they impute to a legal system which they represent to themselves and others as binding, that is, as one they are duty-bound to accept and implement. Legal system and government within a modern territorial state have certain distinctive features. Such a state is a coercive association, its legal order making provision for physically coercive enforcement of its norms, through forcible implementation of punishments and civil remedies for breaches of primary norms. Organized defence forces are maintained to protect against external violations of the internal order, and these may contribute also to repression of internal disorder.

But state-law is not the only kind of law that there is. There is also law between states, international law, and law of organized associations of states such as the EC/EU, law of churches and other religious unions or communities, laws of games, and laws of national and international sporting associations. Non-state law has also the character of being institutional normative order, but not that of being physically coercive (except for rare cases of sanctions taken under the auspices of the United Nations). In general, they are not directly so, though they may become so indirectly, through the action of organs of a state-system.

The coercive and non-voluntary character of the state as an association adds urgency to the demand that it be governed according to the rule of law, and that the exercise of governmental power in the state be restrained by respect for fundamental rights. Constitutionalism is a condition of legitimacy. Among its implications are that a constitution contain both a clear allocation of powers, and a reasonable separation of them. The state has to have both legislative and judicial organs constitutionally empowered. The existence of institutions with powers of law-making, of adjudication, or of law-enforcement depends on constitutional and sub-constitutional norms of competence. These norms are themselves properly regarded as elements of the system. Yet the functions of the institutions that these norms empower include those of legislatively determining, and those of adjudicating upon and interpreting, the very norms that constitute the
system, including its empowering norms. So it is both true that the laws make the institutions, and yet also true that the institutions make the laws, or make them determinate in the process of applying them. Again, we note how legal systems in modern states, but also in the sui generis system of European community within European union, exhibit the apparently paradoxical character of being self-referential.

Yet this is not too paradoxical, for their institutional existence is only ‘in part’ dependent on their own norms; it is also dependent upon at least some measure of efficacy. They do not exist just because laws say who are judges and judges say what laws mean and how they are to be implemented. They exist because, and to the extent that, legal propositions are widely treated, for a bewilderingly wide range of reasons, as proper and even compulsory grounds for action and inaction, and are openly acknowledged as such, and invoked in myriad ways in all the business of life. Efficacy in this sense depends both on legitimacy in the eyes of those whom the putative norms of the system regulate; and on state organs’ power or influence over the conduct of the human beings to whom the norms are addressed. The sources and forms of legitimacy, power and influence are, of course, characteristically different as between different forms of legal order. In the case of the state, with its pretension to physical coercion, coercive civil power and military power are important in securing state-institutions and obedience to norms constituting or constituted by those institutions.

The ‘rule of law’ element in legitimacy requires at least that laws be reasonably clear and that they be reasonably identifiable. The rule of law is not khadi-justice, however enlightened might be the principles on which the khadi acts in coming to particular decisions. There must be interpersonally acknowledged and reasonably determinate criteria for testing what counts as a norm (rule or principle or individual norm) of the system in question. Where there is a constitution in a formal sense, the constitution itself will contain norms that belong to law and are justiciable by the courts established in or under the constitution. Constitutional power to legislate, and to grant delegated powers of legislation, entails the validity of norms enacted by way of primary or secondary legislation, within whatever limits there are on the power of legislating. Constitutional or sub-constitutional validity is a criterion of recognition of norms as binding norms, ‘laws’, within a given legal system. Systems of precedent can also, but do not necessarily, generate criteria of recognition of case-law rules as norms of law within a system. Where there is a multiplicity of criteria of recognition, they have to be ranked in some order of priority. H. L. A. Hart’s celebrated idea about the ‘rule of recognition’ is nothing other than that of a judicial practice of acknowledging a common rank order of criteria of recognition, and treating as obligatory the judicial implementation of norms that are binding according to the criteria in question.

Clearly, the constitutionally given power to legislate, to change law, is a mirror-image of the relevant criterion of recognition. A practice would not be one of legislation, of law-making within a system, if it did not yield norms that were acknowledged to be applicable as binding norms by the judges of that system. Validity as an enacted law is the defining consequence of a valid exercise of a power of legislation. It is a necessary condition of the binding character of an enacted norm for a judge or court.
Classically, state-law was home-made. Even when norms had an extraneous history through a reception or an inheritance from colonial rule, the mark of sovereign independent statehood was that the power to change received or inherited law was fully autochthonous, exercisable within state territory by organs established for that very state by its own constitution. The development of European Community law has wrought a profound change in this for the Member States. The Treaties, and norms validly made under the Treaties, and interpretative principles acknowledged by the ECJ, are all now recognized as part of the law of each of the member-states. Each state has amended its criteria of recognition to include validity-in-EC-law as a criterion of validity domestically. Moreover, the concept of the ‘supremacy’ of EC law has entailed its being a high-ranking criterion, ranking above legislation and all subordinate forms of law locally. Without such recognition, it does indeed seem doubtful whether the process of creating a common market could really have come successfully to fruition.

What is much more contestable is whether validity in EC law could be made a criterion superior to a state’s constitution itself. The norms of a constitution that facilitate its own amendment can properly be held to allow of amendment up to the point of subordinating even constitutional provisions to EC law in a hierarchy of criteria (of ‘sources of law’), to the extent that a constitutional amendment expressly provides for this. But it would indeed make no sense in the perspective of a member state’s legal order to hold that accession to the Community or Union necessarily entails subordinating the state’s constitution as a whole package to Community law. For that would amount to holding that the criterion of EC-validity outranked the whole constitution among the criteria of validity. This would be a manifestly absurd and unacceptable interpretation of the processes of unification of Europe under the Treaties.

If the Community is to be a community of states interacting on equal terms, whatever answer is given to the question of the validity-ranking of EC law for one state system, the same will indeed have to hold good for every other. Moreover, one main purpose of the EC-system is to establish a single market on common terms among all member-states. It is therefore necessary that the common EC-norms override all rival local norms within the relevant ‘material sphere of validity’; namely that of market-regulation. Once we have established this doctrine of the supremacy of Community law, however, the question inevitably to be posed is whether there is any need at all for an elaborate theory about interaction of distinct systems. If system X enjoys supremacy over system Y, why trouble to have a theory about separate systems, rather than a theory which acknowledges the fact that Y belongs to X as a sub-system of it? Applied stringently, this leads to the view that in the Europe of the European Union there is but a single legal system, with as many sub-systems as there are member states. This has echoes of Kelsen’s theory of legal monism, one reading of which holds that there is essentially one legal order in the World, that of international law together with the totality of national systems that are, in effect, subsystems of the international system. For contemporary Europe, this could hold good only with the added complexity that the Community legal order alone is a subsystem of international law, validated by the international law norm pacta sunt servanda, while the state systems, validated by Community law, would constitute sub-sub-systems. Other readings could suggest, for example, that international law continues to be the ground of validity of member-state law, while these systems jointly validate community law, which is then the sub-sub-system. Perhaps most credibly of all, it might be held that in a coordinate way, international law functions as a common ground of validity both of member-state systems and of Community law.
law, neither being therefore a sub-system of the other, but both cohering within a common legal universe governed by the norms of international law. Since this position involves pluralistic relationships between the law of the Community and the member-states (and among the states inter se), albeit within a ‘monistic’ framework of international law, I shall in subsequent discussion refer to this position as that of ‘pluralism under international law’.

What is not convincing in relation to the EC is the picture that holds the legal orders of the member-states to retain validity only through the mediation of EC law. This does not square well with the fact that the effective legislature for the Community is the Council of Ministers, whose members are identifiable only by reference to the place they hold according to state-systems of law. So Community powers of legal change and criteria of validity presuppose the validity of competences that are conferred by state-systems but not otherwise validated by EC law. Nor does it square with the fact that the process of constitutional amendment for both Union and Community remains a process of treaty-making among member-states. Yet more generally, the institutional theory of law insists on a degree of sociological realism, hence is not in the Kelsenian sense a pure theory. From this point of view it is clear that institutions of state law look to the state legal order for confirmation of their competences. They do not treat this as contingent upon ulterior validation or legitimation by the Community. And in turn Community institutions look to the foundation treaties as sufficient for their validation, without further reference to member-state constitutions.

A pluralistic analysis is in this instance, and on these grounds, clearly preferable to the monistic one that envisages a hierarchical relationship in the rank-order International law—Community law—Member-state law. Accordingly, the doctrine of supremacy of Community law should by no means be confused with any kind of all-purpose subordination of member-state-law to Community law. Rather, the case is that these are interacting systems, one of which constitutes in its own context and over the relevant range of topics a source of valid law superior to other sources recognized in each of the member-state-systems. Moreover, the power that the ECJ exercises of interpreting Community law as binding in member states entails in its exercise a competence to interpret the norms conferring this interpretative competence, and thus an interpretative, as distinct from a norm-creating, competence-competence.

There seem to be only two reasonably arguable analyses of the situation that obtains among the states and the Community and Union. I shall call these respectively ‘pluralism under international law’, and ‘radical pluralism’. Both are pluralistic in the sense that they deny the constitutional dependency of states on each other or of states on the Community. No state’s constitution is as such validated by that of any other, nor is it validated by Community law. For each state, the internal validity of Community law in the sense mandated by the ‘supremacy’ doctrine results from the state’s amendment of constitutional and sub-constitutional law to the extent required to give direct effect and applicability to Community law. On the other hand, the Community’s legal order is neither conditional upon the validity of any particular state’s constitution, nor upon the sum of the conditions that the states might impose, for that would be no Community at all. It would amount to no more than a bundle of overlapping laws to the extent that each state chose to acknowledge ‘Community’ laws and obligations. So relations between states inter se and between states and Community are interactive rather than hierarchical. The legal systems of member-states and their common legal system of EC law are
distinct but interacting systems of law, and hierarchical relationships of validity within criteria of validity proper to distinct systems do not add up to any sort of all-purpose superiority of one system over another. It follows also that the interpretative power of the highest decision-making authorities of the different systems must be, as to each system, ultimate. It is for the ECJ to interpret in the last resort and in a finally authoritative way the norms of Community law. But equally, it must be for the highest constitutional tribunal of each member-state to interpret its constitutional and other norms, and hence to interpret the interaction of the validity of EC law with higher level norms of validity in the given state system.

Where then lies the difference between pluralism under international law and radical pluralism? The answer depends on the relationship between the Community systems and international law. Granted that the relationships between the states and the Community are ‘interactive rather than hierarchical’, does the same obtain as between states and Community on the one hand and international law on the other? According to pluralism under international law, the obligations of international law set conditions upon the validity of state and of Community constitutions and interpretations thereof, and hence impose a framework on the interactive but not hierarchical relations between systems. According to radical pluralism, these obligations simply give a third perspective on the relationships in question, a further non-hierarchical interacting system. Which view is preferable?

Whatever answer is given to this question, it has to be sensitive to the weight attached to the sui generis interpretation of Community law in the jurisprudence of the ECJ. Community law is self-interpreted as being something other than a mere regional subset of norms of international law, and unless this were to be shown untenable or absurd, a theoretical account of the totality of juridical relationships in Europe should seek to accommodate it. We should therefore presume a distinctness of legal systems between international law and Community law. The constitution of the Community commenced as an international treaty, but became internalized into a self-referential legal system. There are precedents for this, for example, the United Kingdom, which was founded by a treaty between the Kingdoms of England and of Scotland, but which became through this process a single state, not an international community. The Community is of course a polity or commonwealth different in kind from a state, so the analogy is imperfect. But it is not on that account irrelevant.

The imperfection of the analogy lies, of course, in the fact that within the Community (by contrast with internal relations in the UK) the ‘High Contracting (p.119) Parties’ remain distinct parties in international law, and that is part of the difficulty with which we are wrestling. It does follow, though, that they are subject to obligations of international law among themselves in respect of the treaties they have agreed. The treaties in question have had the effect of constituting a new legal order sui generis that could not now be lawfully repudiated by any of the members, though it could be dissolved or radically changed in character by treaty amendment. The good reasons that we have for conceptualizing the relevant relationships in favour of a coordinate rather than a hierarchical interaction between EC legal order and member-state legal order are not reasons for denying that this coordinate relationship is itself subject to norms of international law. Hence the validity and partial mutual independence of EC law and member-state law is authorized by (public) international law. If international law were assumed as conditioning the validity of the legal orders respectively of member states and of
Community, the same thesis as to the coordination without subordination of legal orders would be available within pluralism under international law as under radical pluralism. (Here, one should note again that ‘pluralism under international law’ would be an instance of ‘monism’ in Kelsen’s sense, though he was never able himself to contemplate the kind of tertium quid between international and municipal law that the Community constitutes according to the ‘sui generis’ interpretation here endorsed.)

A pluralistic analysis in either of these senses shows the systems of law operative on the European level to be distinct and partially independent of each other, though also partially overlapping and interacting. It must then follow that the constitutional court of a member-state is committed to denying that its competence to interpret the constitution by which it was established can be restricted by decisions of a tribunal external to the system. This applies even to a tribunal whose interpretative advice on points of EC law the constitutional court is obligated to accept under Article 177. Conversely, the ECJ is by the same logic committed to denying that its competence to interpret its own constitutive treaties can be restricted by decisions of member-state tribunals.

Under radical pluralism, that is all that is to be said as a matter of law. Acceptance of a radically pluralistic conception of legal systems entails acknowledging that not every legal problem can be solved legally. The problem in principle is not that of an absence of legal answers to given problems, but of a superfluity of legal answers. For it is possible that the European Court interprets Community law so as to assert some right or obligation as binding in favour of a person within the jurisdiction of the highest court of a member state, while that court in turn denies that such a right or obligation is valid in terms of the national constitution. The problem is not logically embarrassing, because strictly the answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not have a certain right. How shall they act? To which system are they to give their fidelity in action?

Resolving such problems, or, more wisely still, avoiding their occurrence in the first place, is a matter for circumspection and for political as much as legal judgment. The ECJ ought not to reach its interpretative judgments without regard to their potential impact on national constitutions. National courts ought not to interpret laws or constitutions without regard to the resolution of their compatriots to take full part in European Union and European Community. If conflicts despite this come into being through judicial decision-making and interpretation, there will necessarily have to be some political action to produce a solution.

In this light, there seems much to be said for Phelan’s proposal about the future development of European law at the junction point between Community law and member-state law. The radical pluralist thesis suggests that neither can or should claim all-purpose supremacy over the other. It would therefore be of value for all participants to make this explicit in some way. Something along the lines suggested in Revolt or Revolution might do the trick admirably.

But pluralism under international law suggests that we need not run out of law (and into politics) quite as fast as suggested by radical pluralism. The potential conflicts and collisions of systems that can in principle occur as between Community and member-states do not occur in a
legal vacuum, but in a space to which international law is also relevant. Indeed, it is decisively relevant, given the origin of the Community in Treaties and the continuing normative significance of pacta sunt servanda, to say nothing of the fact that in respect of their Community membership and otherwise the states owe each other obligations under international law. A part of the legal considerations that ought to bear upon the deliberations of both state courts and the ECJ is regard for these mutual obligations. To take account of this would lead one to qualify in an important way any proposition along the line suggested by Phelan. Simply to remit to state courts an unreviewable power to determine the range of domestic constitutional absolutes that set limits upon the domestic applicability of Community law would seem likely to invite a slow fragmentation of Community law. Yet it is a clear mutual international obligation of states not to fragment the Community by unilateral decisions either judicial or legislative (or, for that matter, executive).

Phelan’s proposal if adopted raw would give an unsatisfactorily unbounded discretion to state courts in permitting, for the sake of the domestic constitution, limitation of the local effectiveness of Community law. The terms in which he suggests this are:

The extent to which such limitation is necessary is to be finally determined by national constitutional authorities (such as the Supreme Court [of Ireland] or the Conseil Constitutionnel) in accordance with the essential commitments of the national legal order, not by the Court of Justice.

Surely this is much too strong, and ought at least to carry the qualification ‘in accordance with international obligations to other member states and in accordance with essential commitments of the national legal order including the commitment to good faith observance of international obligations’. What that signals in the first instance is that state Courts have no right to assume an absolute (p.121) superiority of state constitution over international good order, including the European dimension of that good order. This is not the same as saying that they must simply defer to whatever the ECJ considers to be mandated by the European constitution. For its reading of that constitution and the state Court’s reading of its own constitution ought both to have regard to the international obligations which still subsist notwithstanding, or indeed because of, the fact that Community law is a ‘new legal order sui generis’. Such an approach would help to diminish the risk of normative collisions. But in the event of an apparently irresoluble conflict arising between one or more national courts and the ECJ, there would always on this thesis be a possibility of recourse to international arbitration or adjudication to resolve the matter.

At one time, I was on the whole persuaded by the position that I have here called ‘radical pluralism’. For the reasons here indicated, it now seems that the thesis of ‘pluralism under international law’ is contextually more persuasive and appropriate. Although this is a kind of ‘monism’ in Kelsen’s sense, I remain of the opinion that the correct understanding of the interaction between different normative systems is a contingent matter, not one that flows from the very concept of normative order. This chapter has considered whether, in conditions of pluralism, collisions are inevitable. The answer is that they are possible, but not inevitable. How likely they are depends on the wisdom with which interested parties approach problemsituations, and the theoretical resources available to them in approaching them. Under the approach suggested, they are not incurable in the event that they do occur, and there are ways
of actively avoiding them by advance precautions that fall well short of forcing an amalgamation of plurality into flat unity. (p.122)

Notes:
(1) See *Marbury v Madison* (1803) 1 Cranch 137.


(7) Case Nos. 2 BvR 2134 and 2159/92; Oppenheimer, *Relationship*, 527–76.


(11) Phelan, *Revolt or Revolution*, 3–4. I have omitted the author’s footnote citations in the quoted passage.


(14) See the writers and writings cited by Rossa Phelan at Revolt, 23, and the discussion pp. 26-7.


(16) See the discussion in Ch. 6 above.

(17) Revolt, 417; for supporting argument, see pp. 417-28.


(21) Cf. n. 15 above.


