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# **Constituting a Commonwealth for Europe and Beyond**

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## SUMMARY

This thesis argues that the European Union is a new kind of supranational polity governed by a constitution. This constitution was established by the European Court of Justice interpreting the founding treaties of the European Communities. The constitution has since been transformed by further treaties and now governs the European Union. Having sought to establish that the EU is governed by a constitution, the thesis subjects that constitution to a critique based on constitutional principles. It first establishes the principles that should govern a supranational constitution based on the constitutional values espoused in the Member States together with the necessary and desirable values for a supranational polity. It argues that the Union should be reconstituted as a Commonwealth.

In Chapter 2, it explores the basis for the EU in international law, Member State law and in the founding treaties of Paris and Rome. It concludes that the EU is based on all these legal systems but that in particular, the treaties established the basis for a new legal order superior to national law and more directly binding than international law.

In Chapter 3, it explores the political environment and institutional development which transformed the treaties into a constitution.

In Chapter 4, it explores the making of the Treaty on European Union which further transformed the constitution and the entities it constitutes. The treaty foreshadowed its own revision and the chapter explores that revision in the subsequent treaties of Amsterdam and Nice.

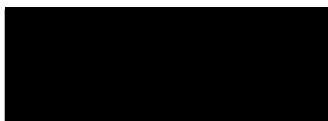
In Chapter 5, it explores the current moves towards creation of a "constitutional treaty" and argues that they will not produce a constitution in accordance with the principles espoused in Chapter 1. It therefore proposes a revision mechanism and tentative contents of a constitution which would accord with those principles while building on the achievements of the present constitution.

The law is as stated on 1 February, 2003, the date that the Treaty of Nice took effect.

## DECLARATION

This thesis contains no material which has been submitted for the award of any other degree or diploma in any university or other institution.

I affirm that to the best of my knowledge the thesis contains no material previously published or written by any other person, except where due reference is made in the text of the thesis.



Matthew Harvey

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## INTRODUCTION

In the era of globalization, the state faces increased difficulty in assisting its citizens to achieve their aspirations. A possible response is to collaborate with other states in order to harness globalization. This is a rational response, but it risks the constitutional democracy of the state hard won over centuries. The challenge is to achieve constitutional democracy in an entity large enough to harness globalization.

The European Union ("EU") is one such attempt to collaborate. This thesis argues that it should be based on constitutional values, but that it was not founded on such values and that they have only been imported in part and with difficulty. The thesis first seeks to establish why the EU should be reconstituted on the basis of values. It argues that there are values held in common by the citizens of the Member States which should be expressed through the constitution of a new kind of polity, the Commonwealth. Rather than seeking to constitute the Commonwealth from scratch, it should build on the existing EU even while reconstituting it. It is argued that the EU has made substantial progress towards the desired form of polity. It is necessary then to explore how the EU has developed from the Coal and Steel Community and the Economic and Atomic Energy Communities to see what further architecture is needed and what needs to be changed to express the desired constitutional values.

The thesis adopts Bruno de Witte's metaphor of the EU as a Gothic cathedral.<sup>1</sup> European integration was embraced by some key postwar European leaders as a kind of civic religion and the cathedral was laid out in the Treaty of Paris of 1951. Only a few years later in 1957, it was re-designed and expanded by the Treaties of Rome establishing two further Communities. This is the subject of Chapter 2: what sort of cathedral the makers thought they were building and the values on which it was based. Chapter 2 also explores the legal basis for the treaties and their subsequent development in international and Member State law.

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<sup>1</sup> See B De Witte "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?" in T Heukels, N Blokker and M Brus (eds) *The European Union After Amsterdam: A Legal Analysis* (The Hague, Kluwer 1997) pp51-68

As is often the case with building projects, the product varies significantly from the original design. Chapter 3 explores the building of the Communities through politics and institutional development, especially the role of the Court of Justice in converting the founding treaties into a "constitution". Chapter 4 explores the new, overarching creation of the European Union by the Treaty of Maastricht, its tortured path to fulfillment, and the subsequent developments of the Treaties of Amsterdam and Nice. This is described in cathedral terms as renovations, extensions and a new roof. It has enabled adherents to integration to practice both intergovernmental and supranational rites within the same building at the cost of great complexity, much smoke and many screens.

This brings us to the EU's present "constitutional moment" as a Convention discusses a possible European Constitution, as the Union prepares for the accession of ten new Member States, bringing its membership to twenty-five, and as the world both shrinks and divides in new ways. The EU constitution must respond to this triple challenge. In Chapter 5, I argue that it cannot effectively insert constitutional values into the present structure, that the structure will not work with twenty-five or more members, and that an entity limited to "Europe" is not desirable in any event. Drawing on the constitutional values espoused in Chapter 1, the existing structure of the EU, the constitutional experience of the new Member States, and the exigencies of a globalizing world, I propose a constitution for a new polity, the Commonwealth. It is part of my argument for bringing democracy back in that the people should have a central role in formulating this constitution. Chapter 5 therefore also considers how this might be done. In cathedral terms, I am calling for a new building on the same site, larger to accommodate new Member States, simpler and with clearer sight lines so that the people can see and are more involved, and with open doors so that other like-minded states can join the congregation, be they "European" or not. The building would also be underpinned by the direct popular legitimacy conferred by its citizens as well as the Member States. This does not require a new religion but rather a reformation, reunifying the constitutional values underpinning the Member States with those of integration. It remains to be seen whether this vision

will appeal to the people of the EU and whether they are given the opportunity to realise it.

There is freedom of religion in the EU. No one has to believe in integration but it has been implemented to an extent that seems irreversible. Nevertheless, the danger remains that public skepticism or indeed hostility could derail the project. The consequence of this would not be a return to a system of nation-states. It would be a journey into chaos. The Member States could probably rescue themselves but integration would be difficult to unscramble. It is preferable to obtain popular support and create a system that will receive continuing support.

I have been hampered by a knowledge of only English and French and have been fortunate that so much writing by writers of non-anglophone background is available in English. Language is one of the inescapable themes of European integration. I explore it especially in Chapter 1 in the course of arguing for a legalized *lingua franca*, but acknowledging that a valuable and vital feature of the EU has been the possibility of many cultures thriving within a single polity. These cultures must be nourished but there must also be dialogue between them.

This thesis comes from an Australian perspective. As an offshoot of European colonialism, the Commonwealth of Australia has a European social, cultural, political and legal heritage and retains close ties with Europe, but also has a home-grown federal constitution drafted by a series of democratically elected conventions and approved by referendum. Australia has progressed from a set of colonies to a self-governing dominion of the British Empire to an independent state. It thus offers some analogies and possible inspirations to the European integration experience, even though there are also many differences. An initially European Commonwealth could transcend Europe. Australia would be a possible future Member State.

The law is as stated on 1 February 2003.

## CHAPTER 1

### A CONSTITUTION FOR A COMMONWEALTH

#### *1.1 WHY A COMMONWEALTH?*

The creation of the European Communities and European Union demonstrates that the "Westphalia paradigm" of state sovereignty has shifted. They have established a source of law above the Member States and also distinct from international law. This "supranational" law is the start of a new paradigm, that of the post-state polity. The EU is so far the only example of such a polity, but there are good reasons why it should both inspire others and expand even further beyond its present boundaries. The Westphalia paradigm has not been destroyed, but it has been challenged by the new paradigm. Now there is a real alternative to a system of state sovereignty. Citizens of democratic states can now consider a new form of political organization better suited to the modern world than the nation state. Their choices are restrained by the survival of substantial parts of the Westphalian international system, by state constitutional law, which is often unable to envisage an entity greater than itself, and by conservative adherence to the familiar. It is very hard to imagine a system different from the one we live in. Even if we can imagine it, we may be cautious to seek to achieve it. We do not know what it will be like and it may be impossible to change back if we do not like it. The status quo is also backed by the theory that the constitution is the organic emanation of the society. While we must not ignore the power and legitimacy of an established constitution, the constitution is the result of human action. While it subsequently conditions human action, it must remain possible to change.

Constitutional change must not be undertaken lightly, and it is not readily concluded what super-majority should suffice to approve change. Some constitutions include the procedure for their own amendment. Some Member State constitutions have specifically authorized membership of the EU, but recognition that membership involves transcending the state paradigm is inherently beyond the ability of a state constitution. Yet it is precisely my argument that this paradigm has been transcended by the creation of a supranational entity under a constitution. I will show how this has been done and argue that it has been done largely without popular legitimacy. But rather than arguing that it should be reversed, I will argue that it should be improved. The ideal constitution would be approved by everyone. Short of that, as wide a consensus as possible is required. In a federal system, it is desirable that all the components should agree. I will argue for a particular constitution and a method for achieving it.

The process of globalization has given the issue of constitutional choice greater urgency. The global movement of goods, services, capital, people, information and ideas is proceeding faster than ever. It has brought many people a greater choice, but it has given more power than ever to the holders of transnational capital. It has increased the danger of global environmental damage. It has made violence by non-state actors easier. It has reduced the power of states to control their economies and societies. States are not powerless against it, but if they wish to partake in the prosperity it can bring, they are increasingly forced to abide by the wishes of global markets.

If those presently fortunate enough to live in prosperous democratic states are to continue to enjoy democracy and prosperity, democratic polities must be sufficiently powerful to set the terms on which they deal with global capital. This might suggest a world government.<sup>1</sup> Perhaps in the long run that will be the answer, but without embracing all of Samuel Huntington's "clash of civilizations"

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<sup>1</sup> See eg D Archibugi and D Held (eds) *Cosmopolitan Democracy* (Cambridge Ma, Polity, 1995).



thesis,<sup>2</sup> there are sufficient cultural and philosophical differences in the world to make global government not feasible at present. If something larger than most existing states is required, it is necessary to ask on what basis it could and should be constituted.

It is a sufficiently shared set of values among citizens that makes a polity feasible. It is my argument that the citizens of the European Union share certain values and that embodying these in a constitution would make for a good polity. Some of these values are already present in the founding treaties, some are presently expressed in other ways such as in the state or civil society. It may also be desirable to instill some new values necessary or desirable in a post-state polity. The EU and its constituent Communities were established by treaties, bargains of sovereign states under international law, rather than a constitutive act by citizens. The citizens have not had a direct opportunity to make the constitution embody their values better.

The EU is sufficiently large and prosperous to deal with transnational capital on its own terms. Its power could be increased by enlargement and more extensive powers, but without a legitimate and effective constitution, the project may collapse due to lack of internal support. Alternatively, a Union concerned only with its own enrichment and empowerment could face threats from other states and transnational terrorists. Embodying a set of values already shared by most of the citizens in a constitution would provide the legitimacy that the Union presently lacks. Openness to extension beyond Europe would make it more welcomed by other states and also enhance its legitimacy by not subjecting its values to arbitrary geographical limits.

This thesis is yet to be put to the empirical test. It relies on an analysis of current values held by the citizens of the EU, the values presently embodied in the constitution of the EU and in the constitutions of its constituent states, and desirable values for the proposed new supranational polity:

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<sup>2</sup> S Huntington "The Clash of Civilizations" (1993) 72(3) *Foreign Affairs*.

The EU is already an unprecedented supranational polity. There are, however, many difficult dilemmas about its future development. Indeed, it is an "essentially contested project".<sup>3</sup> Contests therefore cannot be avoided, but a good constitution of a supranational polity would enable a peaceful accommodation of differences and a flourishing of human potential. The main features of the constitution would be constitutionalism, democracy, rights protection, federalism and multiculturalism.

Visions of the future of the EU broadly divide into three categories: statal, status quo and post-statal. My vision transcends Europe but proposes to build on the present EU so it is necessary to engage with these theories.

Statal visions preserve the state as the ultimate source of sovereignty, usually underpinned by the sovereignty of the *nation*. They may also acknowledge a role for international law, but it is international law as the collective legislation of states. The EU therefore cannot go beyond being the creation of its Member States. If, as De Witte<sup>4</sup>, Schilling<sup>5</sup>, Hartley<sup>6</sup> and others argue, the EU is still only an international organisation based only on international law, then the Member States can still undo what they have created according to the international law of treaties. This would still seem to be the empirical reality, though it would be a very complicated exercise and one which looks unlikely at present. There are elements in the Treaties which suggest that the EU is indissoluble, a usual feature of a constitution.<sup>7</sup> If, as I have argued, the constitution presently lacks popular legitimacy, the Member States could also legitimately withdraw from it under the grand principle of self-determination. If the constitution had popular legitimacy, it would be impossible to dissolve without following its processes.

<sup>3</sup> Z Bankowski and E Christodoulidis "The European Union as an Essentially Contested Project" (1998) 4 *ELJ* 341.

<sup>4</sup> B De Witte "International Agreement or European Constitution" in J Winter et al (eds) *Reforming the Treaty on European Union* (The Hague, Kluwer, 1996), p3.

<sup>5</sup> T Schilling "The Autonomy of the Community Legal Order An Analysis of Possible Foundations" (1996) 37 *HarvIntLJ* 389.

<sup>6</sup> T Hartley *Constitutional Problems of the European Union* (Oxford, Hart 1999).

Status quo visions retain a central role for the Member States in constitutionmaking and in the decisionmaking processes of the EU, but also posit the creation of supranational authority. The issue then becomes what development is desirable within the current paradigm. Some argue that the EU constitution now has some core elements which cannot be amended.<sup>8</sup> The ECJ may indeed decide this, though it would not be desirable. Some adherents of the present model were dismayed by the Treaty on European Union, which seemed a step away from the supranationality of the EEC Treaty.<sup>9</sup> However, as explored in Chapter 4, many aspects of supranationality have been retained.

I explore the development of the constitution of the EU in Chapters 2, 3 and 4 as I argue that the new Commonwealth should be built on it. However I also criticize its constitutional shortcomings and conclude that a new Commonwealth is also desirable. This requires a post-statal vision.

Post-statal visions seek sources of legitimacy beyond the nation-state, both above it and below it. They can rely in part on international law concepts such as the right of self-determination but must also go beyond its emphasis on statehood. This is uncharted territory and hence the realm of theory. Post-statal theorists such as Archibugi and Held argue that supranational democracy is possible and indeed desirable.<sup>10</sup> Deirdre Curtin has also argued for this possibility in the particular context of the EU.<sup>11</sup> She proposes the term "postnational" and argues that "supranationalism" is the recreation of the nation-state on a larger scale.<sup>12</sup> It may seem that supranationalism presupposes the continuation of nationalism beneath itself in a way that postnationalism does not, but this cannot be so. Nationalism posits the nation-state as the highest repository of sovereignty, possibly supplemented by international law. Supranationalism posits a higher source of

<sup>7</sup> Under TEU Art 51(Q) the treaty is concluded for an unlimited period. Under ECT Art 118(109g) the value of the euro was irrevocably fixed at the third stage of EMU.

<sup>8</sup> This is suggested by *Opinion 1/91* [1991] ECR 6079.

<sup>9</sup> See eg D Curtin "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 *CMLRev* 17.

<sup>10</sup> D Archibugi and J D Held op cit.

<sup>11</sup> D Curtin *Postnational Democracy* (The Hague, Kluwer 1997).

<sup>12</sup> Ibid p52.

authority than the nation-state and therefore seeks to overturn the key principle of nationalism. However rather than seeking to recreate the nation at a higher level, it allows nations to continue to exist under it, but no longer as the sole or supreme sources of sovereignty. The major questions then become the source of legitimacy of the supranational authorities and the relationship between those authorities and national or sub-national authorities. I agree with Curtin that supranational authorities were to claim to be the sole repositories of sovereignty, that would be "super-nationalism",<sup>13</sup> but if they only lay claim to partial sovereignty, supranationalism is distinct from nationalism and the two major questions must be answered.

I seek to answer the first in this section and in the subsequent subsections on Constitutionalism and Democracy. I seek to answer the second in the subsection on Federalism. It should not be surprising that the search for legitimacy for supranationalism draws on some of the sources of legitimacy of the nation-state, but it cannot draw on them all. A strength of the federal approach is that it is possible to draw on the legitimacy of the nation-state for part of the legitimacy of the polity even while reducing the nation-state to a constituent of the greater polity. Supranationalism attenuates the connection between the citizen and the polity, increasing the legitimacy challenge, which is further increased by cultural diversity and geographical distance as in the EU. Supranational constitutionmaking brings the opportunity to address these challenges using the latest ideas and technology as befits a response to globalization. Only through new media could the more deliberative democracy proposed by Habermas be achieved in a large polity.<sup>14</sup>

Alan Milward has argued that the European Communities were a way for the Member States to "rescue" themselves from United States or Soviet Union hegemony.<sup>15</sup> According to his theory, the ECs/EU are not so much a threat to the statal paradigm as a different expression of it. The continuing power of the

<sup>13</sup> Id.

<sup>14</sup> J Habermas *Between Facts and Norms* (Cambridge, Polity 1996).

<sup>15</sup> A Milward *The European Rescue of the Nation State* (London, Routledge 1994).

Member States in the constitutional structure of the ECs/EU supports this thesis. However, in the course of rescuing themselves, the Member States have established supranational structures which have challenged the statal paradigm. The Commission, brainchild of Jean Monnet, was to be a supranational technocracy. The Court of Justice has devised and imposed a supranational Community law. The European Parliament, not part of Monnet's original plan, has obtained a democratic mandate and some legislative power. Together with the Member States, these institutions have formed a supranational polity.

As will be explored in Chapter 3, the European Court of Justice ("ECJ") has converted the founding treaties into a constitution with a hierarchy of laws, with Community law superior to Member State law. But given the Member States' continuing mastery of the constitutive treaties, it is possible to see the status quo not as a basis for hierarchy but for continuing negotiation.<sup>16</sup> This looks like a version of the old workers' catchcry "No home but the struggle!". Bankowski and Christodoulidis portray European integration not as a "journey to an unknown destination" but as a journey with no destination at all. While this is a plausible picture of European integration as practised today, it is not a satisfactory situation. It is both possible and desirable to build structures for co-operation as well as contest. It is hoped that these constitutional structures will make a better home than the chaos and carnage of the unregulated political battlefield. They are not intended to bring an end to politics. Rather, it is my argument that having become the plaything of politics, European integration has become distorted. It is necessary to imagine and implement a postnational constitutional paradigm in which politics can thrive.

The danger is that in seeking to transcend the nation-state and the nation-state system, we enter uncharted waters. But while our charts may no longer be of use, we had best not forget how to sail. At one level, anything seems possible and becomes thinkable, but we must also keep an eye on what is feasible and how to get there from here. The constitutional values presently embodied in the Member States and in the hearts and minds of their citizens can form the basis for the new

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<sup>16</sup> Bankowski and Christodoulidis op cit p342.

polity. In one way, this is conservative. It starts with some of the values on which present constitutions are based. It is also radical in that it is a leap to apply those values outside the nation-state. But once that leap is made, it is hoped that the values remain understood and embraced.

My approach thus partakes of all three paradigms. It appropriates some of the constitutional values of the Member States, hoping thus to transfer some of the legitimacy of the Member States to the new polity; it preserves those Member States as elements of the polity; it begins with the status quo of European integration, and it seeks to build a polity beyond both the Member States and the Union, a Commonwealth.

Neil MacCormick suggests the term 'commonwealth' <sup>17</sup> to describe a polity, drawing on David Hume's "The Idea of a Perfect Commonwealth". It implies a group of people with some consciousness of a "common weal" to be preserved and enhanced through a polity under a constitution. Thus for MacCormick, both the EU and the Member States are already commonwealths.<sup>18</sup> This should assist transformation to the proposed Commonwealth.

Robert Goodin uses commonwealth as a synonym for polity.<sup>19</sup> This implies that it could encompass statehood but need not. "Commonwealth" has particular resonance for an Australian. But as its application to the Commonwealth of Massachusetts, Puerto Rico, the Commonwealth of Australia, the Commonwealth of Independent States, and the Commonwealth of Nations <sup>20</sup> shows, it is rather imprecise. This may be a virtue. It reveals an openness to political possibility, an enclosure only by consent. 'Community' and 'Union' are also imprecise but also convey many possibilities. It would be sad to lose them, but a new entity would benefit from a new name. It would be desirable to have a name which is not

<sup>17</sup> N MacCormick *Questioning Sovereignty* (Oxford, OUP 1999) p137.

<sup>18</sup> *ibid* p143.

<sup>19</sup> R Goodin "Designing Constitutions: the Political Constitution of a Mixed Commonwealth" (1996) XLIV *Political Studies* 635.

<sup>20</sup> What its members are pleased to call "the Commonwealth of Nations" is known by many outside it as "the British Commonwealth".

geographically particular in keeping with the Commonwealth's universal potential.<sup>21</sup> 'Commonwealth' conveys a sense of shared prosperity and a political entity. I have therefore adopted 'Commonwealth' to distinguish the polity I propose from that which presently exists.

Peace and prosperity, two of the original rationales for European integration,<sup>22</sup> remain relevant to the EU today. That war between the Member States is now unthinkable is due in large part to integration, the steady lowering of barriers to trade and movement of people, the prosperity this has brought, the development of common institutions of government, and perhaps most important, a sense of shared destiny and values amidst diversity. This last may be more of a hope than a verifiable fact. The process of constituting a Commonwealth outlined in Chapter 5 will put it, and the whole thesis, to the test.

Some of the original reasons for integration have become less pressing or have disappeared completely. France and Germany have invested so much in their relationship that it seems secure. It remains at the heart of the European integration project. The Cold War, once a major rationale for integration by the states of western Europe as a bulwark against the USSR and its satellites, has ended. A group of newly liberated European states is now clamouring for admission to the EU instead of pointing missiles at it. The end of the Cold War has given the EU a new rationale: now it must seek to unite the whole of Europe. As the breakup of Yugoslavia has shown, peace and prosperity in the whole of Europe are far from secure. But in a globalised world, the EU must do more than unite Europe. It must reach out to the rest of the world so that some states may join it and others co-operate with it. The EU already has many association agreements with external or "third" states, but these may not be strong enough to ensure security and prosperity. The problems that a Commonwealth extending beyond Europe could address are global, even if a global response to them is not

<sup>21</sup> I am aware of the danger of insufficient identification for the reasons stated above but believe that a geographical name would count against the Commonwealth's global potential.

<sup>22</sup> See J Weiler *The Constitution of Europe* (Cambridge, CUP 1999) p252.

yet possible. A Commonwealth extending beyond Europe could be more effective than one limited to Europe.

The details of a global Commonwealth are beyond the scope of this thesis, but the Commonwealth I propose must by its nature not be limited to Europe. There is a danger that "Europe" could define itself not in terms of positive values but negatively in relation to a variety of "others". The original "other" was the Soviet Union. Now that it has collapsed and its former East European satellites are to be welcomed into the EU or "back into Europe", it is notable that with the exception of the Baltic states, which were independent before being incorporated into the Soviet Union, the countries of the former Soviet Union still remain outside the EU. Their unstable democracies and troubled economies still make them a possible "other". There is also a possible identity for "Europe" as a white, Christian/secular, rich "us" as opposed to a coloured, poor, non-Christian Asian and African "other". This might provide a rallying point for unity among some citizens, but it would also alienate many others and a large part of the rest of the world. It is particularly relevant to the possible admission of Turkey. Aspects of Turkey's democracy and human rights protection have been used to exclude it from membership, but it is possible to infer that many EU citizens regard Turkey as "non-European".

Another possible source of otherness is the United States. This long-discussed dichotomy has flared in recent days with the disagreement between the United States and some Member States over whether to go to war against Iraq. The debate has deeply split the EU itself, causing the US Secretary of Defence Donald Rumsfeld to talk of the "Old Europe" which opposes him, presumably compared to the "New Europe" which does not. This distinction seems unsubtle and self-serving, but it reminds us that there are deep divisions within the EU and makes more urgent the question of whether there are indeed any values which bind it together.

The comparison with the United States is rich and complex. The US is the leading example of a modern state built on a constitution. There has been postulation of a "United States of Europe" which the name suggests would be built on the

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American model.<sup>23</sup> But this serves to highlight the differences between the US and Europe. The states which united to form the United States of America were not fully sovereign. Like the Australian states before federation, they were only self-governing colonies of Britain. Only the United States claimed full statehood. The states of the United States are much more ethnically and culturally homogeneous than those of the EU. Basic ideas about constitutionalism are also different. While the US founders came from a European background, their thinking was also shaped by being in a new land. It was also shaped by fighting for independence from Britain. While the similarities between the United States constitution and the British constitution of the eighteenth century are striking, the United States constitution also expresses a fear of government largely absent from the constitutions of the EU Member States. This and the accompanying embrace of *laissez faire* capitalism have further differentiated the United States from most of the Member States. So while I argue that it should be possible to use a constitution to create an initially European polity, there are some important differences from the United States model.

Rather than differentiating itself from the "other", the Commonwealth must be based on values which unite but do not exclude. New members must embrace these values, but they must be potentially embraceable by all. The EU has transcended the nation-state. The Commonwealth must transcend Europe, but it should build on European foundations. There is a question as to how large such a Commonwealth could eventually become. The EU has had to confront the same question and has for the present answered that it can be a lot larger than it is now.<sup>24</sup> If the Commonwealth does come into being and expand as envisaged, it too will have to confront that challenge in due course. But I am here concerned with principle, and in principle, there should be no limit to expansion apart from ability to embrace the common values.

<sup>23</sup> Eg the Convention on the Future of Europe Draft Constitution discussed in Chapter 5 still includes this as a possible name.

<sup>24</sup> As discussed in Chapters 4 and 5, the EU is poised to grow from 15 to 25 members in 2004. There are three more active candidates: Bulgaria, Romania and Turkey. That would leave only Norway, Switzerland, Iceland, some other microstates and the former members of the USSR other than the Baltics inside "Europe" but outside the EU. Of course, if my proposal not to restrict the Commonwealth to "Europe" was adopted, there would be a very large potential pool of members.

people of the EU will democratically choose the former. It is to be hoped that they choose the latter, but they should be given the choice.<sup>25</sup>

From the political and constitutional traditions of the Member States of the EU, and of the EU itself, I seek to extrapolate a set of common values. Given that the Commonwealth would have significant differences from the Member States, it is necessary to add some values desirable for a polity of this type. It remains to be seen whether they will commend themselves to the people. If they do, the constitution itself can become a source of unity in the form of constitutional patriotism. Under such a unifying constitution, a government could then be confident of its legitimacy.

This approach is open to considerable criticism. As Neil Walker says, politicians and academics have a propensity to "fall back on law", and hence constitutionalism, as a mechanism of social engineering, the effort to foster the legitimacy of a new order.<sup>26</sup> I do not underestimate the other social forces both supporting and opposing the integration project, but believe, like Walker, that law has a role. If we "get the law right", perfection will not follow, but it will be a good foundation. It is certainly preferable to leaving the field to politics alone.

Jo Shaw advocates a different concept of constitutionalism and applies it to the EU.<sup>27</sup> Law is, after all, merely a social construct, a way to structure political power. Integration is a process which both shapes law and is shaped by it. If a particular outcome is assumed, say "ever closer union among the peoples of Europe", law can be used to pursue that goal. But Shaw argues that such an approach seeks to pre-empt and override politics. Instead, she calls for a critical perspective "when applying apparently well-established concepts such as 'constitution' or 'democracy' to unfamiliar circumstances such as the newly

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<sup>25</sup> There are, of course, many other possible choices!

<sup>26</sup> N Walker "European Constitutionalism and European Integration" (1996) *Public Law* 266 at 272.

<sup>27</sup> J Shaw "Postnational Constitutionalism in the European Union" (1999) 6 *Journal of European Public Policy* 579.

emerging 'postnational European polity'.<sup>28</sup> She draws attention to the "procedural turn" in studies of the EU and conceives constitutionalism as "a process of accommodation of diverse interests within society".<sup>29</sup> She draws on the work of James Tully to argue that constitutionalism in the EU should be a form of intercultural dialogue.<sup>30</sup> She argues that the postnational EU must be built by this dialogue on the diversity of the Member States.

My approach can survive Shaw's criticism. The accommodation of difference is part of all politics. The constitution should be an expression of those values that the members of the polity hold in common, including the vital value of resolving or accommodating differences peacefully. The values need not be as limited as those proposed by James Tully. Tully's values are suitable for very different groups which nevertheless seek to live in the same polity. They originate in Canada where attempts to reach a constitutional settlement between anglophones, francophones and aboriginals have proved very difficult. There are many more cultures to be accommodated in a European Commonwealth, and of course even more if it spreads beyond Europe as I propose, but there is also a greater basis for constitutional consensus than there is in Canada. In Canada, where the three groups were thrown together in a polity more or less unwillingly, the emphasis seems to be on how separate they can be while remaining within a single polity. In Europe by contrast, the emphasis has been on how integrated the Member States can be to the extent that it is feared by some that their identity is under threat. Economic and political integration has been attempted while preserving cultural integrity, but applying Tully's approach to the EU would give too much emphasis to the sanctity of national cultures. The federalism I propose would give national and sub-national cultures some protection but would also encourage participation in a greater polity.

There is a sense in which all politics is constitutionmaking. As I explore in Chapters 3 and 4, a constitution only comes to life when implemented.

<sup>28</sup> Shaw *ibid* p581.

<sup>29</sup> Shaw *ibid* p580.

<sup>30</sup> See especially J Tully *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, CUP 1995).

Interpretation, practice and convention develop it further. However, the text matters. Rather than the open-ended, open-textured, intercultural dialogue advocated by Shaw, I believe that a text which structures that dialogue and provides bargaining endowments for the participants will lead to better results.

It is all too possible for constitutionmaking to be the province of the élite, an opportunity to impose their values on the populace by inscribing them in law instead of leaving them to the play of politics. It is therefore vital that the people are involved in the creation of the constitution and also that they endorse it and take it to their hearts. The current process wherein a convention deliberates, receives public input, then drafts a proposal which can again be subjected to public comment, has much to recommend it. Tully's argument that "...the presupposition of shared, implicit norms is manifestly false...in...a culturally diverse society"<sup>31</sup> requires qualification. These norms must not be presupposed or implicit but discovered and expressed.

Will Kymlicka's approach to accommodating culturally diverse communities within a liberal constitution is preferable.<sup>32</sup> He argues that shared values are important but shared identity is decisive. Since I have rejected "European" identity, constitutional patriotism must suffice. People must see the Commonwealth as the way to put their values into action. This could in time lead to a sense of identity. A lot comes down to the quality of the constitution and its making. I devote the second part of this Chapter to the key values of a desirable constitution for the Commonwealth. I return to the issue of constitutionmaking in Chapter 5, but the critique of constitutionmaking methods used to date in Chapters 2, 3 and 4 will indicate that I do not think that the best method has yet been used.

A major challenge to my proposed constitutional project is the concept of flexibility now strongly entrenched in the EU constitution. "Flexibility" is currently used to refer to the possibility of different rates and degrees of

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<sup>31</sup> Tully *ibid* p131.

<sup>32</sup> See W Kymlicka *Multicultural Citizenship* (Oxford, Clarendon 1995).

integration across the EU.<sup>33</sup> It has been present from the earliest days of the ECSC but became more salient with the concessions granted to Britain and Denmark in the TEU and the possibility that EMU would not apply to all Member States. The Treaty of Amsterdam institutionalised the possibility of so-called "Closer Cooperation" which was further elaborated in the Treaty of Nice as "Enhanced Cooperation".<sup>34</sup> This kind of flexibility overcomes immediate political problems but in the long run, it undermines the unity and integrity of the polity. A different kind of flexibility is required. The EU is going to continue to expand. New members will need time to adjust to the full rigours of membership. After that though, Union/Commonwealth law should apply uniformly. Differentiation undermines solidarity and common values. The flexibility should be in the constitution itself. It must be able to accommodate expansion and further development. This will be easier if it is based on principle rather than continual patching and increasing complexity, of which differentiation is a leading cause.

## 1.2 THE CONSTITUTIONAL VALUES OF THE COMMONWEALTH

Having sought to establish the rationale for a European Commonwealth under a constitution, I now turn to the values that its constitution should incorporate in order to gain popular legitimacy, the values I claim that the people would incorporate in their constitution if given the opportunity. They are a combination of values gleaned from the constitutions of the Member States, the present constitution of the EU, and those necessary and desirable in a new, supranational, multi-ethnic, federal polity. The suggested values are constitutionalism, democracy, protection of fundamental rights, federalism and multiculturalism. They are inter-related and hence difficult to discuss in isolation. They are all susceptible to critique. I will justify the proposed values, explore some of the critique, and attempt to reconcile my particular conceptions with it.

<sup>33</sup> See G de Burca and J Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford, Hart, 2000).

<sup>34</sup> These developments are more fully discussed in Chapter 4.

### 1.2.1 Constitutionalism

In this subsection, I posit a particular constitutionalism as a core constitutional value. I then proceed to outline other particular constitutional values. I leave specific proposals for constitutional content to Chapter 5, building on existing content and the proposed values. Here, it is necessary to discuss the elements of constitutionalism which should guide the content. A constitution has the dual and potentially contradictory purposes of enabling effective government while also limiting government in the interest of individual and group rights.

First, the constitution must establish the basis of its authority. I have already argued that the Commonwealth should be established on the authority of both its citizens and of its constituent Member State. This double legitimacy should be powerful.

The constitution must state *what* it constitutes. This is difficult in the case of the Commonwealth, a new kind of legal and political entity. The Commonwealth would have legal personality but its exact nature would be subject to development.

The constitution should then state its organs of government. They should reflect a separation of powers. As we will see, the EU does not have a traditional separation of legislative, executive and judicial power.<sup>35</sup> In practice, no state does. As we will see, the division of powers in the EU has blurred lines of authority and accountability. These should be improved. The vertical separation of powers is required in a federal polity. This is discussed in 1.2.3. Federalism also suggests a two-chamber parliament, one to represent the people, the other the states.

It is not essential that a constitution be justiciable, but it is customary in federal polities and also the practice in many others. This usually requires a supreme court to decide constitutional disputes. A legislative body which purports to

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<sup>35</sup> K Lenaerts "Some Reflections on the Separation of Powers in the European Community" (1991) 28 *CMLRev* 21.

determine constitutional disputes would in effect be the constitution itself.<sup>36</sup> The EU and almost all Member States have judicial review of legislation for its constitutionality. Even those which do not have judicial review at the national level must now submit to the jurisdiction of the European Court of Justice to determine if national law can be enforced under Community law. All the federal Member States have national judicial review and as I propose a federal structure for the Commonwealth, judicial review will be essential.

A desirable feature of a constitution is clarity. This is often sought to be achieved by brevity, which is in itself a desirable feature, but brevity alone does not lead to clarity. Clarity will be assisted by statements of purpose. The EU has suffered from an overly prescriptive statement of objectives, but a statement of purposes would assist interpretation.

Potentially conflicting with clarity, a constitution should inspire loyalty and imagination. Although "an ever closer union among the peoples of Europe" is inspiring, the inspiration quickly fades in the detail.

Constitutions often contain a catalogue of rights. I deal with rights in 1.2.4. below. There is a strong argument to make the Commonwealth subject to the ECHR and thus part of a wider human rights regime.

Michelle Everson criticises the use of existing constitutions to craft a proposed constitution for the EU.<sup>37</sup> It is conceded that the EU does not resemble any existing state so borrowing from state constitutions is likely to require adaptation, but it is suggested that the constitutionalisation of the EU and by extension the Commonwealth is within a European *tradition* of constitutionalism. While noting the criticisms of this tradition by Tully and others,<sup>38</sup> and adding some of my own, I maintain that it is better to build on that tradition than to cast it aside. It is however desirable to depart from it in some ways.

<sup>36</sup> This is a possible description of the British constitution.

<sup>37</sup> M Everson "Beyond the *Bundesverfassungsgericht*: On the Necessary Cunning of Constitutional Reasoning" (1998) 4 *ELJ* 389 at 408.

<sup>38</sup> Tully *op cit passim*.

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As I will seek to show more fully in the following chapters, the present EU constitution is lacking in many important respects. That is because it is the product of fifty years of international negotiation and judicial interpretation rather than the systematic application of democratically sanctioned principles or genuine democratic dialogue. The ECJ has developed constitutional principles of its own in interpreting the constitution. In doing so, it has acted without democratic legitimacy however noble its aims.<sup>39</sup> Constitutionalism will be best upheld by a democratic process of constitutionmaking as advocated in Chapter 5.

### 1.2.2 Democracy

Democracy is another essentially contested concept. It means "rule by the people" in ancient Greek but that does not answer the questions of who are the people and how they should rule. Democracy has progressed in western thought from adoption in ancient Athens, through condemnation by Aristotle and a long period of hiatus to being taken for granted in modern western states. It has been a long struggle. Democracy is claimed as a "European value", but in its modern incarnation, it is often claimed to have originated in the United States. As in ancient Athens, it was there confined to free men of property for many years. Extension of suffrage and parliamentary power spread through Europe during the nineteenth century but even when full manhood suffrage was reached, it was always checked by other sources of power such as a second chamber with a more restricted franchise or an unaccountable executive. Universal suffrage with fully democratic government has only come in the twentieth century. To some parts of Europe, it has only come in the closing years of that century. It may therefore be as plausibly argued that fascism and communism are also 'European values'. Every Member State except Britain and Sweden suffered authoritarian rule at some time during the twentieth century, though for most this was imposed by foreigners. The EU was established partly as a defence against fascism and communism so its own democratic performance should not be allowed to falter. This however raises the very large question of whether democracy can or should be applied at the supranational level.

<sup>39</sup> See H Rasmussen *On Law and Policy in the European Court of Justice* (Dordrecht, Martinus Nijhoff 1986). Compare G Mancini and D Keeling "Democracy and the European Court of Justice" (1994) 57 *ModLR* 175.



representative, elite, popular, majoritarian, consensus, liberal, deliberative to name but a few. The EU is already using *élite* rather than popular democracy.<sup>42</sup> Some use of direct democracy such as referenda or in an electronic form would be possible, but representative democracy is also necessary given the size of the Commonwealth and the parliamentary traditions of its Member States. A parliament directly elected by the people passing laws executed by an executive accountable to the parliament or the people is required. Accountability, in the form of free media, accessible information, and open channels for consultation with civil society, is also required.<sup>43</sup>

Given that most Member States use proportional representation to elect their legislatures, that is how most of the European Parliament has been elected in most Member States. This is insufficient to say that the EU uses consensus democracy because the Parliament is only part of the legislature along with the Commission and Council. Consensus is the model for unanimity in the Council and even of qualified majority voting (ie it requires more than a bare majority), but it is not consensus *democracy*. Despite its widespread use in the Member States, proportional representation using party lists has some problems for the EU. A Parliament so remote from its voters is made even more remote by such a system. Territorial constituencies would be one way to close the gap. The Mixed Member Proportional system used in Germany and New Zealand has some appeal, combining territorial constituencies and proportional representation. This can also be achieved via multi-member territorial electorates. Alternatively, election from the regions of Member States would be a possible way to combine proportional representation with local representation.

The EU is quite liberal in its democracy at present: rights receive some protection and it springs from liberal cultures, but it needs more transparency and better

<sup>42</sup> Members of the Council of Ministers are either members of parliament or have been endorsed by an elected parliament but they make decisions in EU matters away from the public gaze. The European Parliament is popularly elected but has limited powers and even more limited publicity. It is therefore the views of *élites* which tend to receive attention at the EU level.

<sup>43</sup> Philippe Schmitter argues that accountability is indeed the essence of democracy: "Is it Possible to Democratize the Euro-Polity?" in A Føllesdal and P Koslowski (eds) *Democracy and the European Union* (Berlin, Springer 1998) pp13-36 at p15.

protection of fundamental rights to be truly liberal, as discussed further in subsection 1.2.4.

The process of consociationalism described by Arend Lijphart<sup>44</sup> has been suggested by Paul Taylor as a possible model for the EU<sup>45</sup>. A weakness of consociationalism which has also been a weakness of the development of the EU is that it depends on deference to élites with the élites then making the major decisions among themselves. While this model accurately describes the development of the EU to the present, it is too élitist for a democratic Commonwealth. When the élites lose legitimacy, so does the whole system.

I propose representative democracy with some elements of direct democracy. Both these methods are well represented in the Member States, but it is still a leap to transfer them. There has been much debate as to whether democracy is theoretically possible at the EU level. If democracy can only reside at nation-state level, clearly not. But the EU has transcended the nation-state and democracy must do so too if the EU is to be democratic. As I have argued, the nation is no longer sufficient as a basis for political solidarity and action in the face of globalisation.

A supranational norm of democracy has yet to be established. David Held has argued for a "cosmopolitan model of democracy".<sup>46</sup> While I draw on several aspects of this model in my proposals for the Commonwealth, I suggest that global democracy is presently too ambitious. It is central to my proposal of the Commonwealth that the people of the proposed entity hold certain values in common. These values are not universally held. I do not oppose efforts to foster democratic global governance, but believe that the Commonwealth can accomplish more at a regional level with an established set of values and the possibility of expansion rather than searching for a global lowest common denominator.

<sup>44</sup> A Lijphart *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (Berkeley, UCP, 1968).

<sup>45</sup> P Taylor *International Organisation in the Modern World* (London, Pinter 1993) pp 80-111.

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<sup>47</sup> *Brunner v German State* [1994] 1 CMLR 1119.

<sup>48</sup> J Weiler "Does Europe Need a Constitutional Court?" in *German Maastricht Decision* in P (London, Verso, 1997), p265.

<sup>49</sup> *Ibid* p270.

<sup>50</sup> See B Anderson *Imagined Communities*

If democracy cannot transcend the nation, there is a risk that the nation will be stifled by globalisation. But the German constitutional court in *Brunner*<sup>47</sup> upheld Germany's proposed ratification of the TEU partly on the basis that it did not infringe German democracy. In the course of this finding, the Court implied that democracy at the EU level is impossible because a *demos* can only consist of a *Volk*, a people sharing ethnic, cultural and linguistic homogeneity. On this basis, there is no European *demos*, nor is one likely in the foreseeable future.<sup>48</sup>

The Treaty of Rome itself acknowledges the lack of a single *Volk* by its use of the plural "*peoples of Europe*". The treaties do not purport to be democratic, though the inclusion of a directly elected Assembly looks like an attempt at democracy until the Assembly's powers are examined. Its lack of power suggests an attempt at a democratic smokescreen for technocracy. For the sake of popular legitimacy, the constitution must be democratic, but it must also to uphold the other constitutional values of the Member States as the treaties purport to do.

Weiler argues that the German court's view of *demos* contains both subjective and objective elements.<sup>49</sup> The subjective element is that of "imagined community"<sup>50</sup>. One could argue that even this has an objective dimension: people who *think* they are a community *are* a community. But beyond this, do *demos* have an objective existence separate from their subjective perception? The German court would appear to think so.

Along with Weiler, I would challenge this view. The experience of migration demonstrates that although people cannot change their genetic, linguistic and cultural heritage, they can adopt new languages and cultures. The EU has given every citizen of a Member State a new citizenship without having to leave home and without abandoning inherited identity, language and culture. All that must be

<sup>47</sup> *Brunner v German State* [1994] 1 CMLR 57. Hereafter "*Brunner*".

<sup>48</sup> J Weiler "Does Europe Need a Constitution? Reflections on *Demos*, *Telos* and *Ethos* in the German Maastricht Decision" in P Gowan and P Anderson (eds) *The Question of Europe* (London, Verso, 1997). p265.

<sup>49</sup> *Ibid* p270.

<sup>50</sup> See B Anderson *Imagined Communities* (London, Verso, 1983).

abandoned is the idea that these are the exclusive and immutable determinants of membership of a *demos*. It is possible to be both a German and an EU citizen, a member of both a German and a European *demos*. Moreover, it is possible for anyone to be an EU citizen albeit that this presently depends on being a citizen of a Member State. German nationality law has insisted until recently that a person must have some German ancestry to obtain German citizenship, but even in Germany, it is now possible to gain citizenship after a period of residence. Once legal membership rather than ancestry, place of birth, or culture determines citizenship, anyone can be a citizen. There is then room for much debate as to what qualities a person should have in order to be admitted to citizenship, but the basis for a civic *demos* has been established.

Since the German court's view is also essentially the one on which the principle of self-determination of nations is based, some major rethinking of the basis of *demos* is required if democracy at the EU level is to be possible.

The history of Europe shows that polity has almost always preceded the *demos*; Germany and Italy are examples.<sup>51</sup> The German court canvasses the possibility that a European *Volk* might evolve in time and hence form the basis of a European *demos*, but that development has yet to occur. Instead of appealing to a European *Volk*, the EU can appeal to the idea of "constitutional patriotism" suggested by Habermas.<sup>52</sup> This idea is based on the German concept of *Bundestreue* and can also be traced to the United States ethos of reverence for the constitution. Habermas argues that a process of communication can produce the necessary solidarity.<sup>53</sup> McCormick agrees.<sup>54</sup> His concept of a 'civic' *demos* is a rather less passionate version of constitutional patriotism. Weiler too argues for such a civic *demos*, specifically counterposed to nationality.<sup>55</sup>

<sup>51</sup> Weiler op cit p276.

<sup>52</sup> J Habermas "Citizenship and National Identity: Some Reflections on the Future of Europe" (1992) 12 *Praxis International* 1, 7.

<sup>53</sup> Habermas, J "Reply to Grimm" in Gowan and Anderson op cit p259.

<sup>54</sup> McCormick op cit p144.

<sup>55</sup> Weiler in Gowan and Anderson op cit p288.

If we are to argue for democracy once it becomes aware of its opportunity to participate in it, adopt it, and giving them a pr awareness that they are indeed will ensure legitimacy. Particip earned.<sup>57</sup>

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<sup>57</sup> See Habermas in *Praxis Internati*  
<sup>58</sup> There have been many attempts ECT should specify "European" judicially defined.

If we are to argue for democracy now, the *demos* must exist now.<sup>56</sup> It will exist once it becomes aware of its own existence. Giving the people of the EU the opportunity to participate in drafting a constitution, then voting on whether to adopt it, and giving them a prominent role in the new polity, could raise their awareness that they are indeed a *demos*. Beyond this, only political participation will ensure legitimacy. Participation can be enabled, but legitimacy must be earned.<sup>57</sup>

Democracy has been a fragile enough seed to plant in nation-states. Applying it in a dynamic, expanding, diverse, supranational polity is even more difficult. The experience of nationalism suggests that a sense of loyalty is a necessary element of a *demos*. The EU can claim loyalty through success. Such loyalty as the EU presently has is mainly due to its economic success to date. In the long run, prosperity is perhaps the best guarantee of loyalty, but it is precarious. Is there something to love? The idea of European unity has such appeal but only at a rather abstract level. When it comes down to standardising the meat content of sausages, it is no longer lovable.

Loyalty to the EU could have some of the features of loyalty to the nation-state. There is a territory and there are people. The territory and population are growing by enlargement. 'Europe' is a contested geographical entity.<sup>58</sup> It would be better to see Europe not as geographical or ethnic but ideological. The EU should not limit itself to geographical Europe but should embrace any state willing to adopt its constitutional values. At the same time, the EU is based on territory and caring for that territory can be a way to hold the Union together. But that territory can be and has been expanded. The whole globe needs care. A focus on territory could be beneficial to the environment, could foster identity, and could deflect attention from more dangerous sources of (dis)unity such as race and religion. This value of ecology could be embraced as part of an ideological commitment thus enabling

<sup>56</sup> MacCormick argues against full democracy now: *op cit* p156.

<sup>57</sup> See Habermas in *Praxis International* *op cit* p6.

<sup>58</sup> There have been many attempts to define Europe geographically. It is interesting that the ECT should specify "European" states as eligible for membership. 'Europe' has yet to be judicially defined.

territorial attachment to co-exist with more transcendent values even as territory increased.

Weiler is emphatic that the EU should not seek to emulate the nation state.<sup>59</sup> A European nation, he argues, would be no advance on the nations presently in existence. I agree, though I would not rule out something similar to national identity developing over time. While it is possible to legislate against acts of racism and xenophobia, it is not possible to legislate a sense of identity either into or out of existence. However once an entity exists, it will be easier for it to attract loyalty than it is for an abstract idea. The Commonwealth might not actively seek loyalty, but might nevertheless receive it. The loyalty I propose is inclusive, not exclusive like national loyalty. The Commonwealth would be capable of great expansion. At the same time, adopting some of the familiar forms of the state in the governance of the new polity should assist understanding and support for it.

By adopting a flag and an anthem, the EU has adopted symbols associated with the nation-state. The flag, shared with the Council of Europe, has been a great success as a recognisable symbol of the EU. The anthem, Beethoven's *Ode to Joy* without the words, has meaning outside its adopted status thus reducing its identification with the EU. Without words, it cannot be sung, unlike most national anthems. So the EU has made a half-hearted attempt at engendering national-type loyalty has only partly succeeded. An entity which is better understood and whose deeds can be more clearly seen will be more successful in gaining loyalty than these symbols.

What the EU overwhelmingly lacks when compared to a nation-state is a culture. There is a very well developed culture of "eurocracy" which has advanced integration, but this is the culture of a tiny élite and tends to provoke distrust, envy and scorn from those outside it. Language, literature, art and history are lacking.<sup>60</sup> There are some EU buildings but they do not inspire love. There has been an

<sup>59</sup> Weiler op cit p283.

<sup>60</sup> There is what Alan Milward has called "The Lives of the European Saints" but these have only gained a comparatively small following. See A Milward *The European Rescue of the Nation State* (London, Routledge, 1992) Ch6.

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<sup>62</sup> F Mount *The Theatre of Politics* (L  
<sup>63</sup> D Green, D "Does Europe need a

attempt, as with the adoption of the *Ode to Joy*, to appropriate a 'European' culture and it is true that many Europeans regard the great European painters, composers and writers as part of their cultural heritage, but this does not mean that common cultural heritage should lead to a common polity.

There is no common political culture at the popular level. What Ferdinand Mount calls "the theatre of politics" is almost completely lacking.<sup>61</sup> The nearest thing is the European Council press conference. The European Parliament has less theatre than most. A few charismatic figures have made the most of the theatrical opportunities in the institutions. The charismatic figure *par excellence* is a monarch. As discussed above, the EU does not have such a person to inspire loyalty. It is possible to imagine a forum in which the participants become popularly known and this might in time form the basis for political solidarity.

Democracy requires public political debate and the EU lacks this to a surprising degree. Language is the main barrier, accompanied by fragmentation of media into national segments. Even the European Parliament, where simultaneous translation is provided, has more the flavour of soliloquy than debate. What there is in abundance in the EU is national debate about the role of the Member State within the Union. This is only a small part of the politics of the Union itself, most of which takes place behind closed doors between officials and lobbyists. Grimm argues that this lack of political debate is sufficient reason to stop seeking a democratic European polity.<sup>62</sup>

It will be necessary to facilitate political debate so that a supranational democracy can flower. In order for this to happen, people must see the EU as a vehicle for their aspirations. Coexistence and participation in politics in a shared polity will cause the citizens to interact thus increasing their possibilities for solidarity, creating a civil society and political culture. Once created, this process will be

<sup>61</sup> F Mount *The Theatre of Politics* (London, Macmillan, 1972).

<sup>62</sup> D Grimm, D "Does Europe need a Constitution?" in Gowan and Anderson op cit p239.

self-sustaining.<sup>63</sup> This process is already happening: free movement of goods, services, capital and people has brought free movement of ideas and increased communication. Although there are linguistic and cultural barriers to be overcome, this can be done. The adoption of a common language would make it easier, though it would raise difficult issues of cultural hegemony – as is already occurring through practice rather than legislation. Habermas' proposal of English language and a German constitutional model has appeal but perhaps not to the sensibilities of citizens of all the other Member States.<sup>64</sup> The French may be able to draw some comfort from their role as initiators of the EU, to some extent in their own image, and that France will continue to provide a lot of its impetus. Speakers of all languages other than English should be able to take comfort from the continuing existence of their cultural communities and the usefulness of being able to speak a language other than the *lingua franca*. Some Britons might become less Eurosceptic.

Experience suggests that states will be extremely loath to surrender their national languages as official. It is more likely to happen unofficially as demonstrated by the adoption of "working languages". It is possible that the integration process will bring the political forum into being over time, perhaps via the internet, but democracy is sorely needed now. It is therefore worth establishing the institutions, giving the people the opportunity to shape them, and hoping that people will take their creation to their hearts.

National patriotism and identity need not be lost. A federal structure would enable nations to continue to have political expression through states. The difference would be that the nation-state would no longer be the sole source of loyalty, sovereignty and *demos*. The multiple *demos* of the Member States would co-exist with the Commonwealth *demos* as is always the case in federal systems. It is not the nation but rather nationalism as the highest source of legitimacy which must be overcome if the new polity is to succeed.

<sup>63</sup> G Teubner and others have sought to apply the concept of autopoiesis to law. See G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (New York, W de Gruyter 1988). The EU is arguably already autopoietic but could become even more so.

<sup>64</sup> Habermas in Gowan and Anderson op cit p264

The Commonwealth is also a vital part of which have divided Europe. While nationalism applied to the German, Austrian and Ottoman the First World War, it was only imperfectly had significant national minorities. Greek people, but this example was not followed. Nations tried to ensure that minorities would counteract nationalist ideology.

The borders of the new states were also punish the nations deemed guilty of starting and Turkey. Instead of recognising that it sought to extend their empires, the victors and dismembered them at the same time the result, many people were left in states with dominant nation, a permanent reminder of determination.

Czechoslovakia and Yugoslavia were new than one nation. By the end of the century, it would seem that nations must first exercise they can successfully combine in a state. Yugoslavia and the USSR are not good advanced politics, but they can all be described as experiment of a free multi-national union, the

The presence of Germans in Czechoslovakia Chancellor Hitler a pretext to invade the nation", sparking the Second World War. divided into a Federal Republic occupied by

<sup>65</sup> Czechoslovakia was divided into the Czech Republic and Slovakia in January 1993. Yugoslavia began to disintegrate followed by Croatia, Bosnia-Herzegovina and



The Commonwealth is also a vital part of overcoming the legacy of the wars which have divided Europe. While national self-determination was in theory to be applied to the German, Austrian and Ottoman Empires in the treaty process after the First World War, it was only imperfectly applied. The new 'nation-states' all had significant national minorities. Greece and Turkey held an exchange of people, but this example was not followed elsewhere. Instead, the League of Nations tried to ensure that minorities were treated civilly, but this did not counteract nationalist ideology.

The borders of the new states were also influenced by the perceived need to punish the *nations* deemed guilty of starting the war: Germany, Austria, Hungary and Turkey. Instead of recognising that it was undemocratic *regimes* which had sought to extend their empires, the victorious allies held the nations responsible and dismembered them at the same time that they dismantled their empires. As a result, many people were left in states where they did not identify with the dominant nation, a permanent reminder of the imperfections of national self-determination.

Czechoslovakia and Yugoslavia were new creations explicitly incorporating more than one nation. By the end of the century, neither of these states would exist.<sup>65</sup> It would seem that nations must first exercise their right to self-determination before they can successfully combine in a supranational polity. Czechoslovakia, Yugoslavia and the USSR are not good advertisements for multi-national federal polities, but they can all be described as forced rather than free unions. The experiment of a free multi-national union, the EU, is still in progress.

The presence of Germans in Czechoslovakia and Poland gave the German Chancellor Hitler a pretext to invade these countries to "reunite the German nation", sparking the Second World War. At the end of the war, Germany was divided into a Federal Republic occupied by the United States of America, Britain

<sup>65</sup> Czechoslovakia was divided into the Czech Republic and the Republic of Slovakia on 1 January 1993. Yugoslavia began to disintegrate in 1991 with the secession of Slovenia followed by Croatia, Bosnia-Herzegovina and Macedonia. At the time of writing there is a

and France, and a "Democratic Republic" occupied by the USSR. The end of communism has enabled the reunification of Germany, a triumph for nationalism. While Germany seems firmly anchored in the EU, Germans must be tempted to see their state as large enough to pursue an independent policy. One could read *Brunner*<sup>66</sup> as a confident assertion of the might of the German state.

Germany has championed the cause of the aspiring members of the EU in central and eastern Europe. Many of these states have significant national minorities. If the nation-state ceases to be the highest political authority, minorities will become re-enfranchised within a larger polity and ways can also be explored to bring them into community with their nations with neither population movement nor border changes. In a sense this would strengthen nationalism by bringing people back into community with their nations, but it would be within the overarching embrace of the Commonwealth. Arrangements for this are considered further in Subsection 1.2.5.

During the period in which the EU has been constructed, the number of states formed on the principle of national self-determination through decolonisation has proliferated. In many however, as in Europe, substantial minorities have been trapped in states where they do not identify with the dominant nation. It is appropriate that an alternative is now being explored in the continent where the nation-state (and colonialism) originated. This too may be of value to the rest of the world.

It is debatable whether the European Communities started out as an attempt to transcend the nation-state or to rescue it.<sup>67</sup> The EU purports to keep its Member States intact as states. The supranational High Authority of the European Coal and Steel Community only had jurisdiction over coal and steel markets. The European Economic Community had the potential to affect a larger part of national economies and societies but still had its limits. The European Union has the

rump Yugoslavia consisting of Serbia and Montenegro. Kosovo, a province of Serbia, is under United Nations interim administration. Its ultimate status is uncertain.

<sup>66</sup> [1994] 1 CMLR 57.

<sup>67</sup> Indeed Alan Milward argues that the EC was the rescue of the nation state rather than its transcendence: *op cit*.

potential to touch almost every aspect of life left intact by this integration, but they are not states. As Koen Lenaerts has argued, the EU is not their sovereignty from the EU.<sup>68</sup> It is only the unanimity among Member States for the federal constitution could safeguard sovereignty.

The federal element in democracy is already incorporated in the EU constitution. The individual to the supranational at which subsidiarity both require that decisions are easier said than done, but it demonstrates federalism.

The Member States take their democratic principles as an official test for democracy. There has been no the EU level compromises democracy. The continuing importance of state input into the democratically accountable. Most Member States to supervise their government's EU decisions follow the work of these committees. monitoring the huge quantity of EU legislation affects a government position on an issue voted in the Council.

To the extent that democracy at the EU level State governments to be overridden.

<sup>68</sup> K Lenaerts "Constitutionalism and the Member States"  
<sup>69</sup> See Art 5(3b) of the EC Treaty.  
<sup>70</sup> Art F(1) now Art 6 TEU.  
<sup>71</sup> See J Kokott "Federal States in Federal Europe: European Integration" in A Jyränki (ed) (Deventer, Kluwer 1999) pp175-204.

potential to touch almost every aspect of life. The Member States have not been left intact by this integration, but they have retained their status as sovereign states. As Koen Lenaerts has argued, there is no basis on which they can defend their sovereignty from the EU.<sup>68</sup> It is only protected by the process requirement of unanimity among Member States for key legislation and constitutional change. A federal constitution could safeguard some aspects of Member State sovereignty.

The federal element in democracy is captured by the concept of subsidiarity, already incorporated in the EU constitution.<sup>69</sup> There are several levels from the individual to the supranational at which decisions are best made. Democracy and subsidiarity both require that decisions are made at the best level. This is much easier said than done, but it demonstrates that democracy is consistent with federalism.

The Member States take their democracy for granted in the TEU.<sup>70</sup> There is no official test for democracy. There has been complaint that removal of powers to the EU level compromises democracy at both state and EU level.<sup>71</sup> Given the continuing importance of state input into EU decisions, it is vital that such input is democratically accountable. Most Member States have parliamentary committees to supervise their government's EU decisionmaking. Only the very diligent can follow the work of these committees. The committees have great difficulty in monitoring the huge quantity of EU legislation. Even if a committee successfully affects a government position on an EU proposal, the government may be outvoted in the Council.

To the extent that democracy at the EU level permits the wishes of some Member State governments to be overridden, democracy at the national level will

<sup>68</sup> K Lenaerts "Constitutionalism and the Many Faces of Federalism" (1990) 38 AJCL 205, 220.

<sup>69</sup> See Art 5(3b) of the EC Treaty.

<sup>70</sup> Art F(1) now Art 6 TEU.

<sup>71</sup> See J Kokott "Federal States in Federal Europe: the German *Länder* and Problems of European Integration" in A Jyränki (ed) *National Constitutions in the Era of Integration* (Deventer, Kluwer 1999) pp175-204.

inevitably suffer. A higher priority must therefore be placed on EU democracy, something the EU *demos* itself may not accept at present.

To be fully implemented, subsidiarity must also be applied at Member State level.<sup>72</sup> This may require constitutional reform. The whole constitutional history of the EU is the story of shifting powers to the supranational level, itself a constitutional reform of the Member States,<sup>73</sup> but giving full effect to subsidiarity entails further devolution or federalisation of the Member States. The mechanics of this are beyond the scope of this thesis but the need underscores the point that both the EU and the Member States are evolving.<sup>74</sup>

The issue of what rights should be protected in a democratic Commonwealth is contentious. Some rights are necessary for the existence of democracy. Others are bastions against the tyranny of the majority. The exception in the European Convention on Human Rights and Fundamental Freedoms allowing for derogations acceptable in a democratic society begs the question.<sup>75</sup> I discuss the issue of fundamental rights below in 1.2.4. Here I wish to consider the rights necessary for democracy. These are freedom of thought, speech and assembly, voting and candidacy. I would also add rights to basic support and education as necessary to create the conditions in which citizens can properly exercise their rights in a democracy. These rights are included in the Charter of Fundamental Rights proclaimed at Nice in 2000 and discussed in Chapter 4. However, the Charter is not presently legally binding.

The democracies of western Europe have attempted a more equitable distribution of wealth through high taxation and the provision of public services – the “welfare state”. These features are not attractive to global capital so the challenge of retaining them in an era of globalisation is considerable. The people of the EU enjoy a very high standard of living by global standards so increasing their

<sup>72</sup> The concept of subsidiarity is extensively discussed in Chapter 4.

<sup>73</sup> Indeed, many Member States have amended their constitutions to permit membership of the EU or to incorporate its increases in power.

<sup>74</sup> See Jyränki *op cit.* and Chapter 2.

<sup>75</sup> Art 12(b) ECHR.

welfare is not as important as increasing the world's people,<sup>76</sup> but if the EU can find a way to gradually be extended to the rest of the world, for example.

The principles of the welfare state – “solidarity” or “social rights” in social treaties.<sup>77</sup> Should solidarity therefore be a principle of the Commonwealth? Solidarity is an important value but it is a political value rather than a legal one within a constitution. An alternative way of thinking about rights of citizens or social provision in constitutions are divided on the inclusion or exclusion of provision for solidarity and social rights. The basis that democracy is likely to secure these rights. Prescribing a “free market economy” is necessary to prescribe uniform conditions for competition to seek to place limits on regulation of markets. Arguments are expanded in the following chapters and are examined.

### 1.2.3 Federalism

Federalism is not so much a contested concept as a set of expressions. Its essential feature is a division of power between a central authority and its constituent units. States which could be described as federalist. Federalism is a value held in common by many states as a value necessary for the success of a Commonwealth and, as argued above,

<sup>76</sup> I am talking in rough figures here, taking into account a few other prosperous western states as appropriate.  
<sup>77</sup> See eg Art 2 ECT.  
<sup>78</sup> Austria, Germany, Belgium and Spain

welfare is not as important as increasing that of the poorer ninety percent of the world's people,<sup>76</sup> but if the EU can find the formula to tame globalisation, it can gradually be extended to the rest of the world or the world can learn from its example.

The principles of the welfare state have found expression in the concept of "solidarity" or "social rights" in several Member State constitutions and in the treaties.<sup>77</sup> Should solidarity therefore be included as a constitutional principle of the Commonwealth? Solidarity is an essential value for the creation of a *demos*, but it is a political value rather than one which would be legally enforceable within a constitution. An alternative would be to include social rights among the rights of citizens or social provision as a duty of the state. The Member State constitutions are divided on the inclusion of such rights. I would suggest that provision for solidarity and social rights is best left to the play of politics on the basis that democracy is likely to secure it. The same principle applies to economic rights. Prescribing a "free market economy" is too politically restrictive. It is necessary to prescribe uniform conditions for the single market. It is not desirable to seek to place limits on regulation of the market at Commonwealth level. These arguments are expanded in the following chapters where the present arrangements are examined.

### 1.2.3 Federalism

Federalism is not so much a contested concept as one which can have a variety of expressions. Its essential feature is a legally enforceable separation of powers between a central authority and its constituent units. With only four Member States which could be described as federal,<sup>78</sup> it can hardly be claimed that federalism is a value held in common by the Member States. I therefore propose it as a value necessary for the successful constitutional development of the Commonwealth and, as argued above, a necessary element of democracy in a

<sup>76</sup> I am talking in rough figures here, taking the population of the EU, the United States and the few other prosperous western states as approximately ten percent of the world's population.

<sup>77</sup> See eg Art 2 ECT.

<sup>78</sup> Austria, Germany, Belgium and Spain

polity of this size. It would enable the Member States to continue to exist while enabling effective government at the Commonwealth level.

It would seem wise to draw on such federal traditions as there are in the EU for guidance. The type of federalism most used at present in the Member States of the EU is co-operative federalism.<sup>79</sup> In co-ordinate federalism, powers are rigidly separated between the two levels. In co-operative federalism, while there may be areas of exclusive responsibility, there are many areas of joint responsibility where the two levels co-operate to implement policy. There are some matters over which power to legislate should be exclusively granted to the Commonwealth. These are the minimum elements of a federal polity such as free movement, a common market, common entry requirements for foreigners, and common defence.<sup>80</sup> For the rest, the Member States and the Commission can negotiate matters considered appropriate for each level according to the principle of subsidiarity. The critical influencing factor would be financial resources. Each must be assured of financial resources, either through an allocation of different forms of taxation and/or a guaranteed share of revenue. This would give them a basis for negotiation of responsibilities. It has been the experience of many federations, including Australia, that the power of the purse is more significant than enumerated legal powers.

It would therefore not be a diminution of the power of the EU/Commonwealth to give it no specific jurisdiction other than the suggested powers and the mission to achieve the stated objectives using the constitutionally mandated procedures, together with a protected revenue base. It is better to use this system than to try to state both central powers and powers to be reserved to the Member States, which would raise the risk that there would be powers not within the scope of either level.<sup>81</sup> A single bill of rights could bind all levels of government.

<sup>79</sup> This is as distinct from co-ordinate federalism where each level is regarded as having an exclusive jurisdiction.

<sup>80</sup> Common migration policies and common defence are presently elusive goals for the EU and are jealously guarded by the Member States but they are almost always central powers in federations.

<sup>81</sup> This is not to rule out the possibility of three or more constitutionally guaranteed levels of government eg to protect the existing sub-national units of Member States.

*1.2.4 Fundamental Rights*  
It is inherent in the idea of liberal democracy that all people in the jurisdiction uphold these rights is to have them enshrined in law. It is desirable to spell them out in a constitution. The EU contains some rights though not in a bill of rights but rather in the prohibition of discrimination. Chapter 3 how the ECJ has developed this. There was potential was there in the treaties and the Member States, but the court has taken it further. In Chapter 4, I explore how the EU has actually adhering to the ECHR. I also consider possible Rights. In Chapter 5, I consider possible

There has been considerable debate in the EU as to whether the EU needs its own bill of rights. The ECJ has referred to the ECHR after an adverse opinion from the Member States. They presently have the power to do so. There is a hurdle by constitutional amendment and it would be a single system of human rights in the EU. It would prepare the EU/Commonwealth to integrate it into a larger human rights system. It would develop its own extensive set of constitutional rights for the Member States while working to extend them to all people within its jurisdiction.

<sup>82</sup> See eg A Clapham "A Human Rights Policy for the EU" 309; K Lenaers "Fundamental Rights in the EU" 367; G de Burca "The Language of Rights in the EU" 367; G More (eds) *New Legal Dynamics of the EU* (Cambridge, 1996) 153; A Toth "The EU and the ECHR" 491. *Opinion 2/94* [1996] ECR I-1759.

#### 1.2.4 Fundamental Rights

It is inherent in the idea of liberal democracy that citizens enjoy civil and political rights and that all people in the jurisdiction enjoy human rights. The best way to uphold these rights is to have them embedded in the culture, but to reinforce this, it is desirable to spell them out in a constitutional document. The founding treaties of the EU contain some rights though they are not expressed in the language of rights but rather in the prohibition of certain Member State actions. I explore in Chapter 3 how the ECJ has developed a significant jurisprudence of rights. The potential was there in the treaties and the constitutional traditions of the Member States, but the court has taken it further than could have been predicted. The adherence of all the Member States to the ECHR has assisted that development. In Chapter 4, I explore how the EU pledged to uphold fundamental rights without actually adhering to the ECHR. I also explore the new Charter of Fundamental Rights. In Chapter 5, I consider possible enhancement of rights protection.

There has been considerable debate in the legal and academic community of the EU as to whether the EU needs its own charter of rights.<sup>82</sup> The EU has not adhered to the ECHR after an adverse opinion from the ECJ on the grounds that it does not presently have the power to do so.<sup>83</sup> The Commonwealth should overcome this hurdle by constitutional amendment and adhere to the ECHR. There would then be a single system of human rights in an area extending beyond the EU. This would prepare the EU/Commonwealth for further expansion but would also integrate it into a larger human rights space. The Commonwealth should also develop its own extensive set of constitutional rights binding both itself and the Member States while working to extend the basic rights granted by the ECHR to all people within its jurisdiction.

<sup>82</sup> See eg A Clapham "A Human Rights Policy for the European Community" (1990) 10 *YBEL* 309; K Lenaerts "Fundamental Rights to be included in a Community Catalogue" (1991) 16 *ELRev* 367; G de Burca "The Language of Rights and European Integration" in J Shaw and G More (eds) *New Legal Dynamics of European Union* Oxford, Clarendon Press 1995 p29; R Bellamy *The Constitution of Europe: Rights or Democracy?* in R Bellamy and D Castiglione op cit p153; A Todt, "The EU and Human Rights: the Way Forward" (1997) 34 *CMLRev* 491.

<sup>83</sup> *Opinion 2/94* [1996] I ECR 1759.

### 1.2.5 Multiculturalism

A basic principle of the European Economic Community was the free movement of workers and business people, combined with the right not to be discriminated against on the ground of nationality. This was transformed in the TEU to citizenship of the Union for all Member State citizens. This includes the right of the citizen to reside in the Member State of their choice. Yet how exercisable is this right if there is no provision for one's culture in the state where one wishes to live? It is a corollary of the fact that most of the Member States regard themselves as *nation* states that they have not embraced multiculturalism. Multiculturalism is a highly contested concept.<sup>84</sup> As applied to a polity, I use it to mean that the polity is not constituted as a manifestation of a particular nation but rather provides infrastructure for many cultures.<sup>85</sup> This raises difficulties for the generation of political dialogue but these can be overcome by recognition that everyone must be multicultural. If the lingua franca does not reflect a dominant culture, it should be possible to use it for some purposes while retaining another culture. While English as a lingua franca would open the EU/Commonwealth even more to American cultural influence, it would also empower the Commonwealth to fight back.

But even if a constitution recognises the existence of more than one culture, it is not necessarily multicultural. For instance, the Belgian constitution recognises Dutch, French and German-speaking communities, but is substantially devoted to enabling each of those communities to be monocultural in its own region.<sup>86</sup> Multiculturalism presupposes that adherents to different cultures live side by side and are able to mix.

A possible approach to multiculturalism would be to enshrine a right to one's own culture in the constitution. This would be undesirable as it could be construed as a right to build cultural walls around a small community, creating a ghetto. It would

<sup>84</sup> See W Kymlicka *op cit* Chapter 2.

<sup>85</sup> This would mean, for example, that a particular language is specified as the language of the state.

<sup>86</sup> The Brussels-Capital Region is bilingual but only in the sense that both French and Dutch speakers are free to be monolingual there.

be preferable to require states to provide a Commonwealth. Alternatively, the Commonwealth model of Community government resembles the Belgian system of representation from representation of the inhabitants. There would be more disparity between linguistic groups. Whichever process were used, it would be a vital part of ensuring that Member States of the Commonwealth to have a true choice of

At an elite level in the EU, multiculturalism is integration at the elite level in the operation, and transnational business. But at a more limited extent. The doings of the MEPs of the same nationality. I have language differences create great difficulties in the EU/Commonwealth. I indicated my hope that the two may seem inconsistent with institutional arrangements can coexist. What I hope for is that even the Commonwealth but also function as a culture.

Canada is a large, federal, multilingual country. A majority francophone province, has been established. Within Canada, Quebec has its own Citizens of the Member States of the EU. In societies, but integration is also about not desirable to try to build walls around. Canada has tried to do this by attempting to

<sup>87</sup> This is not the expressed intention of the treaty.



be preferable to require states to provide cultural facilities for citizens of the Commonwealth. Alternatively, the Commonwealth could provide these or the model of Community government could be adopted. This would somewhat resemble the Belgian system of representation for linguistic communities distinct from representation of the inhabitants of regions, but unlike Belgium, there would be more disparity between linguistic community and geographical entity. Whichever process were used, it would be a difficult policy to implement, but it is a vital part of ensuring that Member States make it possible for citizens of the Commonwealth to have a true choice of residence.

At an élite level in the EU, multilingualism is common. This has enabled integration at the élite level in the institutions of the EU, governmental co-operation, and transnational business, but has only brought it to ordinary people to a more limited extent. The doings of the EU are conveyed through national media. The will of the people is conveyed to the institutions by national politicians and MEPs of the same nationality. I have argued above in the subsection 1.2.2 that language differences create great difficulty for the political process of the EU/Commonwealth. I indicated my hope that a *lingua franca* would emerge. This may seem inconsistent with institutionalised multiculturalism but in fact the two can coexist. What I hope for is that everyone can take their culture anywhere in the Commonwealth but also function within a Commonwealth language and culture.

Canada is a large, federal, multilingual state. A large minority in Quebec, the only majority francophone province, has sought secession ever since Canada was established. Within Canada, Quebec has sought the status of a "distinct society". Citizens of the Member States of the EU see themselves as members of distinct societies, but integration is also about the creation of a European society.<sup>87</sup> It is not desirable to try to build walls around societies in an integrated polity. The EU has tried to do this by attempting to leave national cultures intact despite

<sup>87</sup> This is not the expressed intention of the treaties but all societies are the result of integration.

integration.<sup>88</sup> This is impossible. National cultures remain, but they are affected by linguistic and cultural penetration. An integrated multinational polity is virtually impossible without a *lingua franca*. Either one will appear in time through market forces or propagation, or integration will reach its limits.

Switzerland provides another example of a successful multilingual state. The central powers of the confederation are quite weak. The cantons, which are mostly monolingual, have a great deal of independence. Based on the constitutions of their states and their acceptance of the EU, I would suggest that most EU citizens would wish for a more integrated polity than Switzerland.

India is an example of an ethnically extremely diverse group of people being brought together in a single state. Although some of its constituent units had a longstanding political identity, by the time of national independence, they had not had independent sovereignty for a very long time. A national élite had formed which was able to take over the administration after independence and even with democracy, has been able to retain its ascendancy. English and Hindi both have *lingua franca* status. Local language, identity and culture continue to thrive. This may provide some lessons for the EU.

Australia purports to be a multicultural state but the preponderance of a dominant anglophone culture makes this multiculturalism marginal compared to the scale which would be required in the Commonwealth. Government information is made available in community languages and there are state-sponsored multilingual media and services. The Commonwealth would need to make more thoroughgoing efforts to promote multiculturalism. This could be done through a right of access to cultural resources rather than a right to live entirely in one's own culture.

<sup>88</sup> See EC Art 151(128) stating that the Community will respect the national identities of the Member States while "bringing the common cultural heritage to the fore" and the further discussion of national identity below in Chapter 2.

## Conclusion

This Chapter has sought to show integration even though the original reason argued that such integration should be a European constitutional tradition. In the values that such a constitution should constitution should build on the constitution created. Chapters 2, 3 and 4 proceed to constitution, criticizing its deficiencies a new Commonwealth based on the preferable. Chapter 5 then explores current and how the proposed constitution might

### Conclusion

This Chapter has sought to show a continuing justification for European integration even though the original reasons have largely been superseded. It has argued that such integration should be on a constitutional basis in accordance with a European constitutional tradition. In the light of that tradition, it has outlined the values that such a constitution should embody and has also argued that the constitution should build on the constitution of the European Union already created. Chapters 2, 3 and 4 proceed to explore the development of the existing constitution, criticizing its deficiencies and demonstrating why the constitution of a new Commonwealth based on the values sketched in Chapter 1 would be preferable. Chapter 5 then explores current moves towards constitutional reform and how the proposed constitution might be achieved.

## CHAPTER 2

### LAYING THE FOUNDATIONS

#### *2.1 LEGAL FOUNDATIONS OF THE EUROPEAN COMMUNITIES*

It has been argued in Chapter 1 that a new legal and social basis is desirable for the new Commonwealth but also that it should build on the existing foundations. This Chapter examines the legal foundations of the European Communities and their suitability as foundations for the proposed Commonwealth. In this Chapter, those foundations are claimed to be international law (Section 2.1), Member State law (Section 2.2) and Community law (Sections 2.3 to 2.5). The further foundations laid by Community practice are discussed in Chapter 3, and those of the European Union in Chapter 4. It is a complex argument to structure because of the interaction between the three. It is impossible to discuss the basis in international law without examining the ways in which international law has been brought into Community law (and was already interacting with national law) and how the Communities have themselves become participants in international law. Similarly, it is impossible to discuss national law without considering the effect of Community and international law upon it. Only the initial treaties of Paris and Rome are considered in Sections 2.3 and 2.5, yet subsequent developments in EC/EU law have interacted with national and international law. The ongoing interaction between the three levels is analysed in Chapters 3, 4 and 5. International law and national law have not just been foundations. They have continued to develop along with the new Community/Union legal order as threads

in a tapestry,<sup>1</sup> plants in a garden, or chemicals in an experiment. Carole Lyons' analogy of a theatre of voices is also apt.<sup>2</sup>

The European Union was created by the Treaty on European Union and incorporated the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community (which the TEU renamed the European Community), each of these Communities having been created by a treaty. The Union and the Communities are thus creatures of international law. These treaties have also been ratified by the signatory states according to their constitutional requirements. In several cases, there were challenges before national courts to the constitutional capacity of the relevant authorities to ratify the treaty. By surviving these challenges, the ratifications were declared legal under national constitutional law by the Member States' constitutional courts. The Communities and the Union are thus based on both international and national law. They form part of an integrated system of law in which Member States participate along with Community/Union institutions in the creation of Community and Union law which is then either directly applicable to the institutions and in the Member States or requires further transposition into Member State law by the Member States. This transposition is then reviewable for compliance with Community law by a combination of Member State and Community courts. Community law has been held by the ECJ to constitute a "new legal order".<sup>3</sup> That claim will be subjected to closer scrutiny in Chapter 3 as it was made after the Communities had been created, but it has profound implications for both national and international law. It interposes a new system of law more comprehensively binding than international law and superior to national law. To ask how this can be possible is to enter an area of controversy with no easily derived solution. It is indeed to enter into what Jean Monnet called "the permanent dialogue between Community organs and national organs, which is the

<sup>1</sup> P Craig "Constitutions, Constitutionalism, and the European Union" (2001) 7 *ELJ* 125 at 146.

<sup>2</sup> C Lyons "Perspectives on Convergence Within the Theatre of European Integration" in P Beaumont, C Lyons and N Walker (eds) *Convergence and Divergence in European Public Law* (Oxford, Hart 2002) pp79-96

<sup>3</sup> *Van Gend & Loos* 26/62 [1963] ECR 1.

foundation of the Communities".<sup>4</sup> The hierarchy of norms and enter a realm of law is precisely the opposite of the ECJ's. The ECJ sought to create a new legal order. Community law, in its sphere, is superior to national law. Chapter 1 that this new creation should be seen in positivist legal terms, the "EU constitution" as the Commonwealth as a way to seek to reform the existing EU constitution. It is now necessary to look at the materials from which the new (C

International law, a key foundation of the EU legal area, depending as it does on the vagaries of the interpretation of treaties which are subject to interpretation. Fortunately, many aspects of the general agreement and others are agreed upon by the EU. Among those generally agreed is the principle of non-interference. Although the Vienna Convention on the withdrawal in certain circumstances, is not binding on the EC or EU. A major innovation of the EU is the procedures for legislation binding the Member States. The ECJ, definitively interpreting and applying international law for the new legal order and its institutions.

Some have claimed that the ECJ has the authority to overrule its decisions on implications it has created. This is not expressly stated.<sup>6</sup> This is arguable. The question the ECJ. It may be possible to

<sup>4</sup> J Monnet *L'Europe et l'Organisation de la Loi* 1964 p7 cited in A Giesen (ed) *The European Union and National Law: The Cases* (Cambridge University Press 2002) p100. See Art 26 of the Vienna Convention on the Law of the Sea. Eg H Rasmussen op cit, T Hartley op cit.

foundation of the Communities".<sup>4</sup> This is to leave the realm of a positivist hierarchy of norms and enter a realm of dispute, dialogue and uncertainty. Yet this is precisely the opposite of the ECJ's intention in declaring a new legal order. The ECJ sought to create a new *legal order* in which the law is certain and Community law, in its sphere, is superior to national law. I have argued in Chapter 1 that this new creation should be honoured but that while justified in positivist legal terms, the "EU constitution" lacks social legitimacy. I proposed the Commonwealth as a way to seek social legitimacy while building on the existing EU constitution. It is now necessary to examine the structural soundness of the materials from which the new Commonwealth could be built.

International law, a key foundation of the EU, is itself a difficult and controversial area, depending as it does on the vagaries of state practice, expert opinion, and the interpretation of treaties which are seldom subjected to authoritative judicial interpretation. Fortunately, many aspects of international law are the subject of general agreement and others are agreed by at least all the Member States of the EU. Among those generally agreed is *pacta sunt servanda*: that treaties must be obeyed.<sup>5</sup> Although the Vienna Convention on the Law of Treaties allows withdrawal in certain circumstances, it is not clear that these provisions apply to the EC or EU. A major innovation of the Community treaties is that they provide procedures for legislation binding the Member States and decisions by a court, the ECJ, definitively interpreting and applying the treaties. Thus the ground is set in international law for the new legal order constructed by the ECJ and the other institutions.

Some have claimed that the ECJ has then exceeded its jurisdiction by basing some of its decisions on implications it has claimed to find in the treaties but which are not expressly stated.<sup>6</sup> This is arguable, but there is no basis in Community law to question the ECJ. It may be possible through amendment of the treaties to limit

<sup>4</sup> J Monnet *L'Europe et l'Organisation de la Paix* Centre de Recherches Européennes, Lausanne 1964 p7 cited in A Oppenheimer (ed) *The Relationship Between European Community Law and National Law: The Cases* (Cambridge, Cambridge UP 1994) p2.

<sup>5</sup> See Art 26 of the Vienna Convention on the Law of Treaties.

<sup>6</sup> Eg H Rasmussen op cit, T Hartley op cit.

the Court's jurisdiction. Indeed the TEU did so (see Chapter 4). There is still a question as to whether the Court can restrict treaty amendment (see *Opinion 1/91*<sup>7</sup> discussed in Chapter 4). I argue that it cannot but am confronted by the same problem as other critics of the Court: there is no mechanism within the Community legal system to question the Court's judgments. I expect nevertheless that the Court will accept almost all treaty amendments and would argue that it should accept all amendments. It has not actually prohibited an amendment but only indicated its disapproval of a provision in the European Economic Area Treaty, which was enough to have the proposal withdrawn.<sup>8</sup>

The question of whether the treaties constitute a "new legal order" will be more fully explored in Chapter 3. I accepted in Chapter 1 without argument that they do, indeed that they established a constitution and explored how that constitution could be further developed. It is appropriate here to deal with the argument that they do not form a new legal order. Sir Franklin Berman points out that the ECJ has always recognized the treaties *as treaties* and, even when declaring a new legal order, described it as a new legal order *of international law*.<sup>9</sup> Furthermore, the Member States have continued to use treaties to develop the Communities and to create the Union. Logically then, their interpretation should be according to the recognized rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties 1969. The question of the Communities' and Union's legal personality therefore also falls under international law. However this does not prevent the Communities from also becoming their own legal order. International law and national law created the makings of the new order, the ECJ declared it to have been made. While the Communities were created under international law, their founding treaties also constituted a new legal order. The Communities are still subject to international law in their external relations, but in their internal operations and their relations with Member States and citizens, they are governed by the new legal order as well as continuing to be governed by international law.

<sup>7</sup> [1991] ECR 6079

<sup>8</sup> *Opinion 1/91* (supra)

<sup>9</sup> Sir F Berman "Community Law and International Law: How far does Either Belong to the Other?" in B Markesinis (ed) *The Clifford Chance Lectures Vol 1* (Oxford, OUP 1996) pp241-277 at p243.

The ECJ is thus supreme in its domain of international law constituted by the treaties that law to be a new legal order. A proponent of an ECJ ruling. There is no mechanism so the national court's decision is likely to be under Community law, but what will be the time, all the Member States' supreme recognized the supremacy of Community law the monist theory that international law Dualist Member States have relied on pro implies that national courts also have the EC secondary legislation to be unconstitutional ECJ decision in *Simmenthal*<sup>10</sup> but it goes sovereignty has been retained by the Member States the *Brunner*<sup>11</sup> case that the German Constitutional Court has the right to declare treaty amendments unconstitutional with the ECJ. While this can be seen as a setback for the European integration project is based, it is

It is now nearly ten years since *Brunner* and the Treaties of Amsterdam and Nice, both of which challenge in Germany. The decision has the potential for trouble remains. The national constitutions provides a possible challenge to the supremacy of EC law in *Costa*<sup>12</sup> declared in *Brunner* that EC/EU supremacy would ultimately be fatal to the national constitutions. A decision in favour would consolidate Commonwealth and bolster national constitutional integrity underpinning constitutional legitimacy.

<sup>10</sup> 106/77 [1978] ECR 629

<sup>11</sup> [1994] 1 CMLR 57

<sup>12</sup> *Costa v ENEL* 6/64 [1964] ECR 585.

The ECJ is thus supreme in its domain as exclusive authoritative interpreter of the international law constituted by the treaties and has used that position to declare that law to be a new legal order. A problem arises if a national court refuses to accept an ECJ ruling. There is no mechanism for the ECJ to enforce its judgments so the national court's decision is likely to stand. Such action is clearly illegal under Community law, but what will happen in reality? Although it took some time, all the Member States' supreme or constitutional courts have now recognized the supremacy of Community law. Some have done so according to the monist theory that international law is automatically binding in national law. Dualist Member States have relied on provisions of national constitutions, but this implies that national courts also have the capacity to declare a treaty provision or EC secondary legislation to be unconstitutional. This is specifically contrary to the ECJ decision in *Simmenthal*<sup>10</sup> but it goes to the heart of the question as to what sovereignty has been retained by the Member States. It is a clear implication of the *Brunner*<sup>11</sup> case that the German Constitutional Court ("BvG") has retained the right to declare treaty amendments unconstitutional, creating a potential conflict with the ECJ. While this can be seen as part of the dialogue on which the European integration project is based, it is bad news for certainty in EC/EU law.

It is now nearly ten years since *Brunner*, the TEU has been followed by the Treaties of Amsterdam and Nice, both of which have come into force without challenge in Germany. The decision has thus not brought integration to a halt. But the potential for trouble remains. The supremacy of either EC/EU law or of national constitutions provides a possible solution. The ECJ has clearly opted for the supremacy of EC law in *Costa*<sup>12</sup> and *Simmenthal*, but the German BvG declared in *Brunner* that EC/EU supremacy has limits. National constitutional supremacy would ultimately be fatal to integration. The constitutional solution I favour would consolidate Commonwealth supremacy within its sphere but also bolster national constitutional integrity through both an overarching and an underpinning constitutional legitimacy. It might be claimed that the Member

<sup>10</sup> 106/77 [1978] ECR 629

<sup>11</sup> [1994] 1 CMLR 57

<sup>12</sup> *Costa v ENEL* 6/64 [1964] ECR 585.



States do not need enhanced legitimacy, but as argued in Chapter 1, globalisation is undermining their capacity for action and hence their legitimacy. The EU already plays a part in enhancing Member State capacities, but as also argued in Chapter 1, and to be further demonstrated in Chapters 3, 4 and 5, the EU has a legitimacy problem which the Commonwealth is intended to remedy.

Another way in which international law plays a vital part in EU constitutional law is in the international law of human rights. It has been frequently noted that the original treaties lacked a bill of rights and this situation has only been partially rectified by the adoption of a Charter of Fundamental Rights by the Nice European Council in December 2000, discussed in Chapter 4. However, as explored in Chapter 3, the ECJ has stepped into the breach to imply rights as found in the European Convention on Human Rights and Fundamental Freedoms ("ECHR") and in the constitutional traditions of the Member States. As all Member States are signatories of the ECHR, this can be justified, but it is an ingenious use of international law in the EC legal order. Some problems have arisen when the ECJ has subordinated ECHR rights to Community law and there is the significant problem that, as confirmed by the ECJ in *Opinion 2/94*,<sup>13</sup> the EC itself cannot become a signatory to the ECHR. The selective application by the ECJ of the ECHR in EU constitutional law seemed set to continue, but the adoption of the Charter has raised the possibility of a full EU bill of rights. As argued in Chapter 1, this could be a positive development, but becoming a signatory to the ECHR would be even better, making the Commonwealth a member of a human rights community even wider than itself.

## 2.2 BUILDING ON THE LEGITIMACY OF THE MEMBER STATES

The legitimacy of the Member States is another foundation of the Communities and the EU, and would also form a vital foundation for the Commonwealth. It is as subjects of international law that the Member States have entered into the founding treaties. International legal personality is one source of the Member

<sup>13</sup> *Opinion 2/94* [1996] ECR I-1759.

States' legitimacy, but they also enjoy  
embodiments of their peoples. This "nat  
weakness. It is a source of strength in th  
state and sense of identity for its citizen  
excludes minorities who do not identif  
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This is not to deny the deeply held senti  
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While citizenship of the EU is apparent  
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4 Here the main point is that it is dep  
based on that citizenship which in turn is

<sup>14</sup> See e.g. B. Anderson op cit; E. Hobsbawm  
(Cambridge, CUP 1993).  
<sup>15</sup> See e.g. O. Schmidtke "Obstacles and Pro  
Citizenship" in U. Hedetoft (ed) *Political*  
1998) pp44-64.

States' legitimacy, but they also enjoy both formal and social legitimacy as the embodiments of their peoples. This "nationhood" is a source of both strength and weakness. It is a source of strength in that it provides a strong legitimacy for the state and sense of identity for its citizens/nationals. It is a weakness in that it excludes minorities who do not identify with the dominant nation. It is also a weakness in that it identifies as the highest source of legitimacy the existence of a "nation" based on an illusory kinship and a common language and culture often of only recent origin despite claims to ancient heritage and continuous existence.<sup>14</sup> This is not to deny the deeply held sentiments of national majorities, but it makes nation-states flawed materials on which to build. As will be further explored below, the Communities and the EU have been built as supranational or postnational entities while attempting to keep the nationhood of the Member States intact. They have nevertheless been seen by some as a threat to national identity. As we will see, the treaties now have specific disclaimers of threat to national identity. These do not seem to have mollified nationalists. Such disclaimers also hamper the fostering of a supranational or postnational identity.<sup>15</sup> While citizenship of the EU is apparently intended to foster multiple identities, EU citizenship is still dependent on Member State citizenship or "nationality". The Commonwealth would seek to foster Commonwealth citizenship as a value in its own right and while at present proposing the Member States as constituent units and hence preserving Member State citizenship/nationality, I have also canvassed the possibility of decoupling nation and culture by introducing organization of cultural communities on voluntary instead of geographic lines. I will explore the implications and potential of EU citizenship more fully in Chapter 4. Here the main point is that it is dependent on national citizenship and hence based on that citizenship which in turn is backed by and based on nationality.

<sup>14</sup> See eg B Anderson op cit; E Hobsbawm and T Ranger *The Invention of Tradition* (Cambridge, CUP 1993).

<sup>15</sup> See eg O Schmidtke "Obstacles and Prospects for a European Collective Identity and Citizenship" in U Hedetoft (ed) *Political Symbols, Symbolic Politics* (Aldershot, Ashgate 1998) pp44-64.

Belgium, Spain, Italy, France and Britain all have significant minorities wishing either to secede or to join another state.<sup>16</sup> These states thus lack social legitimacy for those minorities. This problem will be significantly increased with enlargement to the east where past rearrangements of borders have left many people as citizens of states which do not embody the nation with which they identify.<sup>17</sup> It is hoped that membership of the EU will enhance their identity as "Europeans" at the expense of nationality and ethnicity, but the experience in existing Member States is not very encouraging. There has been a peace process in Northern Ireland and violence has decreased in the Basque country, but it is not clear that the EU can take credit for this. The Commonwealth would provide a new focus for identity going beyond the European to a community of values, but like the EU, this might not suffice to overcome more local passions.

The Member States enjoy social legitimacy in the eyes of their majorities, but their paths to this have varied. The formation of all the Member States either predates democracy or was effected by hostile powers which then imposed a democratic constitution. Nevertheless, all have achieved constitutional democracy. While there are significant differences in the form and content of their constitutions, it is necessary to treat them alike as constituents of a Commonwealth federation. It is prudent to consider particular national sensitivities, but it is also possible to draw inspiration from Member State experiences. Above all, it is necessary to see future constitutional development as the development of an overall constitutional system so while national constitutions are not to be superior to that of the Commonwealth, they are still a vital part of the overall system.

Some possible sources of sensitivity and inspiration are as follows. Belgium is deeply divided on linguistic lines between Flemish/Dutch speaking Flanders and Francophone Wallonia with the capital Brussels officially bilingual. There is also a small German-speaking population. While Catholicism, some historical

<sup>16</sup> See eg M Watson (ed) *Contemporary Minority Nationalism* (London, Routledge 1990).

<sup>17</sup> See eg H Seton-Watson *The "Sick Heart" of Modern Europe: the Problem of the Danubian Lands* (Seattle, University of Washington Press 1975).

developments, and the monarchy have held between Flemings and Walloons has led to the fact that there has been some support for separation from both sides, but a strong favour remains for retaining the Belgian state. However it is a strong building block for a European federation. It has staunch supporters of integration, but do not see their domestic division.

On the positive side, Belgium is an example of a federation, both features advocated for the Commonwealth. Wallonia might also be happy to divide if the Commonwealth functions presently served by the Belgian state.

Denmark is an old kingdom, fiercely independent of its neighbours, and amply demonstrated its skepticism in its initial rejection of the TEU in 1992 (see Chapter 2). Its proposal in 2000 to join the common currency (the Euro) seems to have a strong basis of support, but support is not universal. It is possible that positive guarantees of sovereignty might persuade Danish voters to join a federal Commonwealth.

On the positive side, Denmark is committed to its neighbours and has an active interest in global issues. It extends its standards of environmental and social policy to the Commonwealth as a whole. The structure of the Commonwealth keeps a close watch on the government's performance, as desired by most Member State parliaments. It encourages citizens to be involved in major decisions on international issues. Commonwealth.

Although the first united German state was not a federation, its strong national identity which is ancient. German integration may have been motivated by a desire for a Reich, but now that Germany has been reunified.

developments, and the monarchy have held the country together, antipathy between Flemings and Walloons has led to the creation of a federal state. There has been some support for separation from both sides, though the majority seem to favour retaining the Belgian state. However it is not clear that the present state is a strong building block for a European federation. Belgians have generally been staunch supporters of integration, but do not seem to see it as helping to resolve their domestic division.

On the positive side, Belgium is an example of a successful multilingual state and a federation, both features advocated for the Commonwealth. Flanders and Wallonia might also be happy to divide if the Commonwealth fulfilled enough of the functions presently served by the Belgian state.

Denmark is an old kingdom, fiercely independent from its German and Swedish neighbours, and amply demonstrated its skepticism about integration through its initial rejection of the TEU in 1992 (see Chapter 4). Danish voters also rejected a proposal in 2000 to join the common currency (see Chapter 5). The Danish state seems to have a strong basis of support, but support for integration seems limited. It is possible that positive guarantees of sovereignty would be necessary to persuade Danish voters to join a federal Commonwealth.

On the positive side, Denmark is committed to co-operating with its European neighbours and has an active interest in global free trade. It would be desirable to extend its standards of environmental and social protection across the EU or Commonwealth as a whole. The structure of the Danish parliament enables it to keep a close watch on the government's participation in the EU, something desired by most Member State parliaments. The use of referendums enables citizens to be involved in major decisions on integration, a desirable feature in the Commonwealth.

Although the first united German state was only achieved in 1871, there is a strong national identity which is ancient. German participation in European integration may have been motivated by a desire to atone for the acts of the Third Reich, but now that Germany has been reunified, it is in a position to assert itself

on the global stage and has an effective veto on integration. The German Basic Law seems to enjoy popular support and as interpreted by the BvG, may place some limits on integration.<sup>18</sup>

On the positive side, Germany has been very receptive to integration to date. Being a federation, it may more readily embrace a federal Commonwealth. Several features of the German constitution would suit a federal Commonwealth constitution, as explored in Chapter 5.

The admission of Greece to the European Communities showed that the Communities could embrace a poor, non-Western-Christian state. Having undergone foreign occupation, civil war and military dictatorship, the Greek state now seems secure. Greek sensitivity over Macedonia and longstanding differences with Turkey may make EU or Commonwealth expansion in the area problematic. Greece has been a large net recipient of EU funds but proved by qualifying for the single currency that its economy could improve. Greece has been a generally enthusiastic member of the Communities since its accession in 1981 but has had some reservations.

Spain underwent civil war and a long period of military dictatorship until 1976, but the restoration of democracy under a constitutional monarchy has provided the opportunity for constitutional renewal. The system of regional autonomy has enabled some regional desires for secession to be assuaged. The Basque region and Catalonia have taken the most advantage of these arrangements but this has not stopped a terrorist campaign for Basque independence.

Spain has been an enthusiastic member of the Communities since 1986, but enthusiasm may wane with the arrival of new, poorer Member States meaning less EU funding for Spain. The system of regional autonomy may have helped Spain to be willing to take part in a federal Commonwealth.

<sup>18</sup> See discussion of *Brunner* case in 2.1 and interaction of the BvG and ECJ in Chapter 3.

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France has a long identity as a kingdom followed by nearly two centuries of constitutional upheaval. The one constant seems to have been a French state based, since the revolution of 1789, on the *nation*. The nation can, it seems, be embodied in a monarch, an emperor, a republic or a president. The nation now has a very strong identity, as does the state, but while the Fifth Republic has now lasted for over forty years, much longer than many of its predecessor regimes, it is not clear that the people have taken it to heart. As a founder of the Communities, France was able to shape them along French lines, but in the expanded Communities, French influence has lessened. France has generally been an enthusiastic member of the Communities (the de Gaulle period, the major exception, is explored in Chapter 3). As it holds one of the permanent seats on the United Nations Security Council, France is able to exercise significant foreign policy power outside the EU framework. It is unlikely to place itself under a higher authority which it cannot control.

The Republic of Ireland emerged in 1937 from the long struggle of the Irish people for independence from Britain. Even after independence, Ireland has remained highly reliant on its economic links with Britain and did not consider membership of the Communities without Britain. However membership has reduced the reliance and Ireland has joined the single currency whereas Britain has not. Ireland has been a significant beneficiary of Community funds and while this made it a staunch supporter of the Community, the impending accession of poorer states, with their great need for funds, may sap Irish enthusiasm, as demonstrated by the initial veto of the Treaty of Nice in 2001. Although Ireland has since voted to accept the Treaty, future support for integration cannot be taken for granted. Support for elements of the Irish constitution may exceed support for elements of integration which counteract them. Ireland's neutrality would seem to prevent involvement in a defence identity for the EU or the Commonwealth.

Italy has a distinct geographic identity, but has only emerged as a nation since 1871. Prior to unification, a combination of interference by foreign powers and regional independence had made Italy very divided. The founding monarchy of 1871 was overthrown by the fascists in 1923. They were defeated during the Second World War and a democratic republic was subsequently founded. It is not

clear that either the Italian nation or the republic enjoy wholehearted support. There is some support for either secession by the north or a federal structure allowing the north to reduce its subsidy of the south. Italy was a founding member of the Communities and has been an enthusiastic member, albeit frequently accused of insufficient implementation of Community law.

Luxembourg is unique as the only Grand Duchy which is also a sovereign state. It was formerly a member of the Holy Roman Empire but retained its independence when the Empire collapsed. With a population of only 400,000, Luxembourg is a constant reminder that a small state can be viable. It was a founding member of the Communities and would have liked to be the seat of all the institutions. In monetary union with Belgium since 1921 and in customs union with Belgium and the Netherlands from before the advent of the Communities, Luxembourg has long been an enthusiastic supporter of integration. Its existence has made it difficult for the EU to counsel against the creation of small countries and its equal status in the EU will probably require the same status for Malta and Cyprus when they join.

The Netherlands has experience of a confederal structure (the United Provinces) in the past as well as more centralized government. It was a founding member of the Communities and has been supportive of integration. Its ability to combine a strong identity with a strong desire for integration should make it a willing member of a federal Commonwealth.

Portugal has undergone dictatorship followed by revolution and constitutional renewal. It may therefore be willing for constitutional reform at EU level and the creation of a Commonwealth. It has been an enthusiastic member of the Communities and Union since 1986 but may also lose some enthusiasm when the poorer new members come in.

Finland has had a long history of foreign occupation and has suffered from its proximity to Russia both before and during the Soviet era. The end of the Cold War enabled Finland to join the EU in 1995. A commitment to neutrality may make Finland reluctant to join a Commonwealth with a defence dimension.

Sweden has a long tradition of neutrality. It is a member of the EU since 1995 and has not joined the defence dimension. This combination may make it unwilling to join the Commonwealth for the Commonwealth.

The "United Kingdom" dates from the Union of England and Wales in the 13<sup>th</sup> century. The Parliament emerged in the 12<sup>th</sup> century and came from Magna Carta in 1215, though there have been then and the advent of full democracy in the 19<sup>th</sup> century but lost its major American possessions. It has possessions in Africa, Asia, the Pacific and Oceania. The creation of self-governing dominions in Canada and South Africa led some to propose an imperial federation. It accepted such a plan. India gained independence in 1947. The Communities were being formed in the 1950s. Britain sought membership in the 1960s, de Gaulle was against it. After the passing of de Gaulle, Britain was able to join. But a change of government to Labour the following year led to continuing membership. Although this passed, Britain was reluctant and skeptical. It negotiated opt-outs from the social chapter and although the return of a Conservative government improved relations with the EU, there is still a referendum on joining the single currency has yet to be held. Britain is therefore unlikely to embrace the Commonwealth.

Austria once had a huge European empire, but was defeated in the First World War and was forcibly converted to a republic. It was then annexed by Germany in 1938. After the Second World War, by all the Allied powers and forced to remain neutral. Its constitution which may make it more receptive to the Commonwealth. When the USSR collapsed, Austria was free to join the Commonwealth.

Sweden has a long tradition of neutrality. It has been a somewhat reluctant member of the EU since 1995 and has not joined the single currency. This combination may make it unwilling to join the Commonwealth. Sweden's environmental and social protection, like those of Denmark, would be desirable for the Commonwealth.

The "United Kingdom" dates from the Union of England and Scotland in 1707. England had annexed Wales in the 13<sup>th</sup> century and occupied Ireland. The Parliament emerged in the 12<sup>th</sup> century and constitutional monarchy can be dated from Magna Carta in 1215, though there have been many vicissitudes between then and the advent of full democracy in the 20<sup>th</sup> century. Britain won a huge empire but lost its major American possessions in 1776. It continued to acquire possessions in Africa, Asia, the Pacific and Oceania, some of which it retains. The creation of self-governing dominions in Canada, Australia, New Zealand and South Africa led some to propose an imperial federation, but Britain never accepted such a plan. India gained independence in 1947, but when the Communities were being formed in the 1950s, Britain still considered itself a global rather than merely a European power and declined to join. By the time it sought membership in the 1960s, de Gaulle was there to stop it. (See Chapter 3). After the passing of de Gaulle, Britain was able to join the Communities in 1973, but a change of government to Labour the following year saw a referendum on continuing membership. Although this passed, Britain has remained in many ways reluctant and skeptical. It negotiated opt-outs from the single currency and the social chapter and although the return of a Labour government in 1997 has improved relations with the EU, there is still a skeptical mood. A promised referendum on joining the single currency has yet to be held and seems likely to fail if held. Britain is therefore unlikely to embrace a federal Commonwealth.

Austria once had a huge European empire, but was one of the defeated powers in the First World War and was forcibly converted to a small republic. Austria was then annexed by Germany in 1938. After the Second World War, it was occupied by all the Allied powers and forced to remain neutral. It adopted a federal constitution which may make it more receptive to a Commonwealth federation. When the USSR collapsed, Austria was free to join the EU and did so in 1995.



Austria was the subject of an incident when Joerg Haider, leader of the far-right Freedom Party, was invited to join the government. This precipitated collective action by the other Member States, but there was no way to discipline Austria through EC or EU channels. Haider eventually left the government, but the incident demonstrated a weakness in the EU structure explored further in Chapter 4. Apart from this incident, Austria has been an enthusiastic member and has joined the single currency.

The above survey has sought to give a brief outline of the current Member States' constitutional histories with a view to establishing their sensitivities and aspects which might affect their appetite for further integration, particularly in the form of the proposed Commonwealth. Later in the Chapter, I specifically consider any national constitutional impediments to further integration.

There are threats to state legitimacy from a number of directions. As well as national minorities, there is the lure of Europeanisation and globalisation appearing to make nation-states obsolete. There is also the romantic nostalgia for the nation as the myth rather than the modern multi-ethnic, multicultural, Europeanising state that many of the Member States have become. European integration was a specific response to what the Nazis wrought with such a myth. The EU has sought to preserve the national identities of its Member States but if they lose their social legitimacy, this will also weaken the EU which is based on them. It would be more desirable for the EU and the Member States to bolster each other's legitimacy rather than undermine it. At present, the EU lacks a source of legitimacy separate from the Member States. By basing the Commonwealth on a direct link with both the people and the constituent Member States, it is hoped to harness maximum legitimacy from both sources.

The effect of membership of the EU on Member States' statehood is problematic. They are still full states in the eyes of international law, but they are also part of these supranational entities the Communities, which conduct some international relations on their behalf and whose laws are binding on them. They are also members of the Union, whose status is less clear (see Chapter 4). Further constitutional development is thus not starting with a clean slate as were the

founders in 1950. These partially integrated capacity, but they have subordinated some as long as they adhere to the treaties. This is already considerably integrated and accustomed however complicate the task of determining. This is even more the case when considering a Commonwealth, which involves adding a new government, yet retaining the Member State's supranational federation. This complexity of admission of new members, each of which is a sovereign state.<sup>19</sup> All were until recently subject to all the more cautious of a supranational federation.

Further integration in the EU or movement permissible under national constitutions if it many national constitutions have been membership of the EU. It is hard to imagine an openly supranational Commonwealth constitutional means. Those means will be in the Communities, the Commonwealth would be international law, but with the advent of conceivable. Among other things, this is hoped law and national law supremacy by clearly federal Commonwealth constitution, thus limiting

The existing treaties already have extensive constitutions.<sup>20</sup> In addition to their basis as

<sup>19</sup> This requires qualification in the case of the post-war states. Lithuania have only recently regained their independence. Hungary and Czechoslovakia were under heavy occupation. Slovakia only separated in 1993. Slovenia only became independent in 1991. Malta and Cyprus only became independent states in 1964 and 1960 respectively. They are thus fairly new to independence and yet are part of the organization.

<sup>20</sup> J. Wouters 'National Constitutions and the European Economic Integration' 25 at 34.

founders in 1950. These partially integrated states still have full international legal capacity, but they have subordinated some of that capacity to the Communities for as long as they adhere to the treaties. This is an advantage in that these states are already considerably integrated and accustomed to the integration process. It does however complicate the task of determining their role as foundations of the EU. This is even more the case when considering their role as foundations of the Commonwealth, which involves adding a new layer of popular sovereignty and government, yet retaining the Member States as sovereign components of a supranational federation. This complexity is even further increased by the admission of new members, each of which has been, before admission, a fully sovereign state.<sup>19</sup> All were until recently subject to foreign domination and may be all the more cautious of a supranational federation.

Further integration in the EU or movement to a Commonwealth must be permissible under national constitutions if it is to succeed. As we will see below, many national constitutions have been specifically amended to permit membership of the EU. It is hard to imagine amendment to permit membership of an openly supranational Commonwealth, but it should be pursued by constitutional means. Those means will be explored further in Chapter 5. Like the Communities, the Commonwealth would be an entity previously unknown to international law, but with the advent of Community and Union law, it is conceivable. Among other things, this is hoped to resolve the conflict between EU law and national law supremacy by clearly stating the supremacy of the new federal Commonwealth constitution, thus limiting power at both levels.

The existing treaties already have extensive interaction with Member State constitutions.<sup>20</sup> In addition to their basis as international law instruments of the

<sup>19</sup> This requires qualification in the case of the prospective Member States; Estonia, Latvia and Lithuania have only recently regained their independence from the USSR; Poland and Hungary and Czechoslovakia were under heavy Soviet influence; the Czech Republic and Slovakia only separated in 1993. Slovenia only seceded from the former Yugoslavia in 1991; Malta and Cyprus only became independent states comparatively recently. All these states are thus fairly new to independence and yet are coming into a well developed supranational organization.

<sup>20</sup> J Wouters "National Constitutions and the European Union" (2000) 27 *Legal Issues of Economic Integration* 25 at 34.

sovereign Member States, the treaties refer to enactment of provisions in accordance with national constitutional requirements. There is also the recognition of rights "as they result from the constitutional traditions common to the Member States as general principles of Community law" (TEU Art 6(2)). Thirdly, directives require implementation in national law and hence according to national constitutional requirements. Fourthly, the Member States are the main actors in the non-Community "pillars" of the EU. The Member States are thus a vital foundation of the EU and also woven through its fabric. A properly constituted Commonwealth would not have to be so reliant on national constitutions as it would have its own constitutional basis for authority, but for the sake of political feasibility and in the spirit of co-operative federalism, the new Commonwealth would probably still make a lot of its legislation through directives so national constitutions would still matter.

The issue of solubility would have to be addressed. The ECT and TEU seek to address it by providing no process for withdrawal and by being concluded for an indefinite period. As discussed above, this would seem to allow the Member States to withdraw based on the Vienna Convention on the Law of Treaties, but uncertainty about this renders solubility a "constitutional abeyance",<sup>21</sup> apparently too difficult and sensitive to state clearly. As the Commonwealth constitution would establish an overarching and underpinning law with both formal and social legitimacy, it could prohibit secession. But it could also set down a procedure for secession or, indeed, expulsion. This might seem to weaken the Commonwealth but would actually strengthen it by covering the abeyance. Member States could withdraw by following a constitutional procedure rather than a unilateral act of national sovereignty under international law as at present.

Art 6(3) of the TEU (as amended by the Treaty of Amsterdam) states that "The Union shall respect the national identities of its Member States". This echoes the Fifth Recital of the Preamble which seeks to respect the history, culture and traditions of the peoples while promoting their solidarity. This sentiment is also echoed in the assurance inserted in EC Art 17(1) that Union citizenship

<sup>21</sup> See M Foley *The Silence of Constitutions* (London, Routledge 1989)

complements rather than replaces "national identity".  
are seeking to protect is the elusive quality of  
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immutable should seem to need so many  
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well.<sup>22</sup> As national identity was not legally  
legislate for its protection. As argued  
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values rather than particularism. National  
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not be mourned as long as it is replaced by

Contrary to this optimistic picture, European  
globalisation seem to have provoked a  
States echoing the new nationalism of the  
eastern Europe now poised to enter the  
ignored, but they cannot be surrendered  
multiculturalism advocated in Chapter 1  
nationalists for cultural continuity within  
is also hoped that federalism will provide  
Member States.

<sup>22</sup> D Curtin *Postnational Democracy* (The Hague, 1998)  
<sup>23</sup> But see Hedetoft op cit on the various crises of  
<sup>24</sup> Ibid.

complements rather than replaces "national" citizenship. What these provisions are seeking to protect is the elusive quality of "nationality". This seems to adopt the view of the BvG in *Brunner*, what we might term "classic nationalism": that a state is based on a nation: a *Volk* or people who have the right to form a state. This view has been criticized above.

Rather than seeking to overcome nationalism and enter a period of postnationalism, to adopt Deirdre Curtin's term,<sup>22</sup> the treaties specifically seek to preserve "national identity". It is curious that something so supposedly strong and immutable should seem to need so much protection. To an outsider, national identities seem to be surviving over fifty years of European integration very well.<sup>23</sup> As national identity was not legislated into existence, it is also difficult to legislate for its protection. As argued in Chapter 1, the development of a Commonwealth rather than a European identity should be encouraged, based on values rather than particularism. National identity will survive in the EU or the Commonwealth if it still fulfils a need for people. If it does not, its passing should not be mourned as long as it is replaced by a positive civic identity.

Contrary to this optimistic picture, European integration and other aspects of globalisation seem to have provoked a nationalist backlash in many Member States echoing the new nationalism of the post-communist states of central and eastern Europe now poised to enter the EU.<sup>24</sup> These developments cannot be ignored, but they cannot be surrendered to either. My hope is that the multiculturalism advocated in Chapter 1 will satisfy the aspirations of these nationalists for cultural continuity within the new postnational Commonwealth. It is also hoped that federalism will provide some assurance of the survival of the Member States.

<sup>22</sup> D Curtin *Postnational Democracy* (The Hague, Kluwer 1997)

<sup>23</sup> But see Hedetoft *op cit* on the various crises of national and European identity.

<sup>24</sup> *Ibid.*

An alternative interpretation of EU Art 6(3) is that it is seeking to preserve the identity of the Member States *as states*.<sup>25</sup> To some commentators, it is a second attempt at restricting the Union's powers to accompany subsidiarity. If so, it may have more a political than a legal effect. As Koen Lenaerts has argued, there is no nucleus of sovereignty on which a Member State can rely to resist a Community measure.<sup>26</sup> If the measure is within the power of the Community, it will be valid. Wouters suggests that the provision covers the failure of the 1990-1992 IGC to establish a clear statement of powers for the EC/EU.<sup>27</sup> Such a statement is commonly found in federal constitutions and as the federalism of the EU is another apparent abeyance, it is not surprising that it is not included. I argued in Chapter 1 that federalism should be a fundamental feature of the Commonwealth constitution but that an exhaustive statement of powers would counteract the flexibility needed for good government. On the other hand, a vague statement about the respect for national identities is of little assistance. The Member States will be an essential component of the Commonwealth and will continue to have a substantial input into its legislation, so their identity is largely in their own hands, but it will continue to be affected by integration.

Diarmuid Phelan argues that the current doctrine of supremacy of Community law could require a national court to ignore national constitutional provisions so basic that the very rule of law in that Member State is called into question.<sup>28</sup> This would in turn undermine the Community because it is ultimately based on the Member States. I have argued that the new legal order of Community law has already transcended the Member States but it does require better legitimation, one aim of this thesis. The undermining of national legitimacy in the pursuit of Community law is clearly undesirable, but it is not clear that preserving aspects of national law from the scope of Community law is the answer. At one level, a vertical separation of powers is of the essence of federalism, but a hierarchy of norms is also desirable and this proposed partial winding back of Community supremacy

<sup>25</sup> See Wouters *op cit* p38.

<sup>26</sup> K Lenaerts "Constitutionalism and the Many Faces of Federalism" (1990) 38 *AJCL* 205.

<sup>27</sup> Wouters *loc cit*

<sup>28</sup> DR Phelan *Revolt or Revolution: the Constitutional Boundaries of the European Community* (Dublin, Round Hall 1997) p417.

would lead to the uneven application of Community law. There are many examples of such uneven application, particularly such a potentially open-ended exception for a Member State. I suggest that a better approach would be Commonwealth protection of fundamental rights, though I take Phelan's point that this may not be the best way of constitutional rights protection in the Member States, as long as they do not detract from Commonwealth objectives.

Paul Kirchhof, author of the *Brunner* proposal for an autonomous legal system, arguing that it would be a new national law.<sup>29</sup> Staying in the garden, it is also possible to see a new plant, a hybrid of international and national law, sheltering and enriching national law and becoming a new legal order. Kirchhof's argument for a system of co-operation between national and Community law goes squarely against the idea of certain national law. It certainly does require co-operation between national and Community law in ascertaining and applying Community law. The ultimate arbiters of validity risks chaos. Not only do conflicts between the ECJ and national courts exist, but arbitration reminds us that international law is also involved. But it would be a backward step for Community law. Disputes is the province of the ECJ.<sup>30</sup> The proposal of a Constitutional Council comprising the Chief Justices.<sup>31</sup> Such a body would lack the legitimacy to establish this situation in the Member States.

There will always be tensions in a federal system, but in every federal system, there is a hierarchy of norms and a court which can determine which norm prevails. It is attempted to establish this situation in the Member States.

<sup>29</sup> P Kirchhof "The Balance of Powers Between National and Community Law" *ELJ* 225.

<sup>30</sup> N MacCormick *Questioning Sovereignty* (Oxford, 1982).

<sup>31</sup> J Weiler *The Constitution of Europe* *op cit* p322.

would lead to the uneven application of Community law. While Phelan gives many examples of such uneven application, it is not desirable to add more, particularly such a potentially open-ended exception, to be determined by each Member State. I suggest that a better solution would be to enhance Commonwealth protection of fundamental rights, as proposed in Chapter 1, though I take Phelan's point that this may not give sufficient scope to the diversity of constitutional rights protection in the Member States. These may continue so long as they do not detract from Commonwealth fundamental rights.

Paul Kirchhof, author of the *Brunner* judgment, has argued against an autonomous legal system, arguing that it would cut the law off from its roots in national law.<sup>29</sup> Staying in the garden, it is also possible to see Community law as a new plant, a hybrid of international and national law, nourished by them and now sheltering and enriching national law and being sheltered by international law. Kirchhof's argument for a system of co-operation rather than hierarchy in this area goes squarely against the idea of certainty in law. The Community system certainly does require co-operation between national courts and the ECJ in ascertaining and applying Community law, but to make national courts the ultimate arbiters of validity risks chaos. Neil MacCormick's suggestion that conflicts between the ECJ and national courts could be resolved by international arbitration reminds us that international law is a foundation of Community law, but it would be a backward step for Community law in which resolving these disputes is the province of the ECJ.<sup>30</sup> The same applies to Joseph Weiler's proposal of a Constitutional Council comprising members of the ECJ and national Chief Justices.<sup>31</sup> Such a body would lack the legitimacy of a court or a parliament.

There will always be tensions in a federal system between uniformity and local diversity, but in every federal system, there is a both hierarchy and a delimitation of norms and a court which can determine which law is to apply. The ECJ has attempted to establish this situation in the EC. Some national courts have

<sup>29</sup> P Kirchhof "The Balance of Powers Between National and European Institutions" (1999) 5 *ELJ* 225

<sup>30</sup> N MacCormick *Questioning Sovereignty* (Oxford, OUP 1999) p121

<sup>31</sup> J Weiler *The Constitution of Europe* op cit p322

maintained their own right to be the final arbiter. I believe that TEU Art 46 clearly makes the ECJ the arbiter. While it has been observed in some state federal systems that the supreme court favours increase of central powers, and while this seems to have been the case in the EC, the ECJ is appointed by the Member States instead of by the central government, as in most federal states.

There is a problem for the future development of the EU if this is prohibited by national constitutions. In Chapter 1, I proposed a metaconstitutional act to overcome this problem but with or without it, there is another possibility: the amendment of the Member State constitutions to accommodate further constitutional development. The survey of the constitutions of Member States below will seek to determine any limits to such amendment.

For these purposes, the Member States can be divided into three categories: monist, constitutional, and dualist. In monist states such as Belgium, treaties will automatically have full effect in national law once ratified.<sup>32</sup> Luxembourg is also monist.<sup>33</sup> The Netherlands is monist but parliamentary approval of treaties is required.<sup>34</sup> Austria is monist<sup>35</sup> but its constitution also specifically provides for transfer of specific sovereign rights of the federation to intergovernmental institutions by treaty.<sup>36</sup> The Constitution of Portugal provides for direct effect of rules of international organizations of which Portugal is a member.<sup>37</sup> Nevertheless, there were several amendments to the Constitution to accommodate the TEU.<sup>38</sup> In Finland Section 94 of the Constitution requires treaties to obtain the approval of

<sup>32</sup> See *Minister for Economic Affairs v SA Fromagerie Franco-Suisse "Le Ski"* [1972] CMLR 330.

<sup>33</sup> Art 114 of the Constitution authorizes membership of international organizations. In *Chambre des Metiers v Pagani* (1954) cited in Oppenheimer op cit p671 the Superior Court, and in *Bellion v Ministry for the Civil Service* (Pas. Lux 1983-85 p175) cited in Oppenheimer op cit p668 the *Conseil d'etat* confirmed the supremacy of Community law over national law.

<sup>34</sup> Art 73 of the Netherlands Constitution provides for the Council of State to make recommendations on proposals for the approval of treaties by Parliament. Art 92 provides for conferral of powers on international institutions by treaty. Arts 93 and 94 provide for the direct effect and primacy of international law. Art 120 prohibits the courts from examining the constitutionality of treaties.

<sup>35</sup> Austrian Constitution Art 9(1).

<sup>36</sup> Austrian Constitution Art 9(2).

<sup>37</sup> Austrian Constitution Art 8(3).

<sup>38</sup> Oppenheimer op cit p689.

the legislature. It provides that: "An international democratic foundations of the Constitution" feter on monism.

In constitutional states, treaties will have constitution. These states have specifically membership of the EU.<sup>39</sup> They will sometimes deal with constitutional development of the requires a referendum.<sup>40</sup> The Swedish "Folketing" approval of international agreements decisionmaking to the Communities so long as freedoms corresponding to the protection of the European Convention on Human Rights

A particular difficulty arises in Germany under Basic Law under Arts 24 and 79(3). This before the BvG.<sup>41</sup> It appears possible from the treaty effecting further integration or a constitutional for such a treaty. Ireland has also provided There too there has been a court judgment the treaties authorized by the provision.

<sup>39</sup> For Denmark, see Art 20 of the Constitution.

<sup>40</sup> For Denmark, see Art 20 which requires a vote of referendum for new membership. Otherwise organizations is unlimited. The TEU also survives. Supreme Court held that it could determine whether sovereignty transferred by Denmark: *Carlson* judgment 6/4/98 I 361/1997 [1999] 3 CMLR 854.

<sup>41</sup> Chapter 10 Art 2.

Art 5.

<sup>42</sup> In *Solange I* [1974] 2 CMLR 540 the BvG held that an amend of the basic structure of the Basic Law democratic Parliament and a catalogue of fundamental long as the treaties remain in this state. In 1990 CMLR 225 that so long as the Communities are to the Basic Law, the BvG will not intervene: *7 EU* BvG held an amendment to Art 23 substantially 79(3). See also the *Banana* cases eg (1996) 7 EU Law 3<sup>rd</sup> ed (Oxford, OUP 2002) p295 n50.

<sup>43</sup> See Art 29.4.3 and *Crotty v An Taoiseach* [1987] 1

the legislature. It provides that: "An international obligation shall not endanger the democratic foundations of the Constitution" thus shading towards a constitutional fetter on monism.

In constitutional states, treaties will have effect according to the terms of the constitution. These states have specifically amended their constitutions to cover membership of the EU.<sup>39</sup> They will sometimes need to amend the constitution to deal with constitutional development of the EU. In Denmark and Ireland, this requires a referendum.<sup>40</sup> The Swedish "Instrument of Government" requires *Riksdag* approval of international agreements.<sup>41</sup> It authorises transfer of decisionmaking to the Communities so long as they have protection for the rights and freedoms corresponding to the protection provided in the Instrument and in the European Convention on Human Rights and Fundamental Freedoms.<sup>42</sup>

A particular difficulty arises in Germany due to the unamendable features of the Basic Law under Arts 24 and 79(3). This has given rise to several challenges before the BvG.<sup>43</sup> It appears possible from these that the BvG could veto either a treaty effecting further integration or a constitutional amendment seeking to allow for such a treaty. Ireland has also provided for membership in its constitution. There too there has been a court judgment indicating that there may be limits to the treaties authorized by the provision.<sup>44</sup> Italy has had similar experience.<sup>45</sup>

<sup>39</sup> For Denmark, see Art 20 of the Constitution.

<sup>40</sup> For Denmark, see Art 20 which requires a vote of the Folketing by a five-sixths majority or a referendum for new membership. Otherwise the nature of participation in international organizations is unlimited. The TEU also survived a constitutional challenge in which the Supreme Court held that it could determine whether a Community measure had exceeded the sovereignty transferred by Denmark: *Carlsen v Prime Minister* Danish Supreme Court judgment 6/4/98 I 361/1997 [1999] 3 CMLR 854.

<sup>41</sup> Chapter 10 Art 2.

<sup>42</sup> Art 5.

<sup>43</sup> In "*Solange I*" [1974] 2 CMLR 540 the BvG held that Art 24 does not permit a treaty to amend the basic structure of the Basic Law. With the Communities lacking both a democratic Parliament and a catalogue of fundamental rights, the Basic Law will prevail *so long as* the treaties remain in this state. In 1987, the BvG held in "*Solange II*" [1987] 3 CMLR 225 that *so long as* the Communities ensure protection of fundamental rights similar to the Basic Law, the BvG will not intervene to do so. In *Brunner* [1994] 1 CMLR 57 the BvG held an amendment to Art 23 substantially in terms of *Solange II* did not violate Art 79(3). See also the Banana cases eg (1996) 7 EuZW 126 cited in P Craig and G de Burca *EU Law* 3<sup>rd</sup> ed (Oxford, OUP 2002) p295 n50.

<sup>44</sup> See Art 29.4.3 and *Crotty v An Taoiseach* [1987] IR 713.



Greece also regulates its treaty participation under the constitution,<sup>46</sup> as does Spain.<sup>47</sup> France is a complicated combination of monism and constitutional provision.<sup>48</sup>

In dualist states, the treaty will have no effect in domestic law unless implemented by domestic law. Britain is dualist but has given a general application to Community law through the European Communities Act 1972. Several cases have been brought arguing that EC/EU treaties constitute illegal abrogations of parliamentary sovereignty, a basic tenet of the unwritten constitution. All have been unsuccessful. Barriers to increased integration therefore appear purely political, albeit formidable.

The above are the constitutional approaches of the Member States. It will be seen that most Member States would require constitutional amendment to participate in the Commonwealth while for some, this would seem constitutionally impossible at present. In Chapter 3, I will examine the ECJ's approach to the separation of Community and Member State power.

<sup>45</sup> Art 11 authorises limitations of sovereignty in favour of international organizations. *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372 the Constitutional Court held membership of the EEC to be valid but reserved the right to review the continuing compatibility of the treaty with the Constitution. See also *SpA Granital v Amministrazione delle Finanze* Dec 170 8 June, 1984 and *SpA Fraga v Amministrazione delle Finanze* Dec 232 21 April, 1989.

<sup>46</sup> See Art 28 and see Craig and de Burca op cit p301 n74 and E Maganaris "The Principle of Supremacy of Community Law in Greece: From Direct Challenge to Non-Application" (1999) 24 *ELRev* 426.

<sup>47</sup> Art 93 gives Community law supremacy over national law; Art 96 provides that international treaties form part of the national legal order, but not all of their provisions confer rights on individuals.

<sup>48</sup> Under Art 53, some treaties can only be ratified by parliament. Art 54 of the Constitution authorizes the *Conseil Constitutionnel* to declare a proposed treaty to be inconsistent with the Constitution and it cannot be ratified until the Constitution has been amended to authorize it. Art 55 of the Constitution enshrines the superiority of treaties over municipal statutes, but the *Conseil d'etat* held in *Sarran and Levacher* (30 October, 1998) that this does not extend to superiority over the Constitution. The *Conseil constitutionnel* decision 92-308 on the TEU and decision 97-394 on the Treaty of Amsterdam held that those treaties required constitutional amendment before they could be ratified as the Constitution prohibits transfer of 'conditions essentielles d'exercice de la souverainete nationale'.

## 2.3 CREATING THE EUROPEAN COMMUNITY

In this Section, I examine the drafting of the Treaty of Rome which was the great breakthrough to the creation of the European Community. The drafting method which it was done is instructive for future drafters. The drafting method also explains some of the difficulties of the Community. Although not drafted to be a constitution, the Treaty of Rome has many features but also lacks many features of a constitution.

The Treaty of Rome built on the Treaty of Paris, which differed significantly from the Treaty of Paris. I then examine the content of the European Community. I use the same framework of analysis in 2.3 and 2.5 of the EEC built on those of the ECSC.

One of the difficulties of creating new international organizations is that there is no one to speak for the new organization. This was the case for the European Communities. But Jean Monnet, a French banker and diplomat with extensive international experience including in the League of Nations, was the man to pursue an attempt to create a supra-national organization in France. It is not surprising that he sought to create an organization similar to those he had used to foster international cooperation. He believed in rule by experts, especially technocrats, to administer the European Coal and Steel Community. This vision substantially corresponded to his vision. He was the man for the moment, but without the political and economic force of the High Authority.

Monnet was the man for the moment, but without the political and economic force of the High Authority.

## 2.3 CREATING THE EUROPEAN COAL AND STEEL COMMUNITY

In this Section, I examine the drafting and adoption of the Treaty of Paris. This was the great breakthrough to the creation of a supranational entity so the way in which it was done is instructive for future constitutional development. The drafting method also explains some of the constitutional deficiencies of the treaty. Although not drafted to be a constitution, the treaty has many constitutional features but also lacks many features of a desirable constitution.

The Treaties of Rome built on the Treaty of Paris. In Section 2.4 I examine their drafting, which differed significantly from that of the Treaty of Paris. In 2.5, I then examine the content of the European Economic Community Treaty. I use the same framework of analysis in 2.3 and 2.5 to show how the constitutional features of the EEC built on those of the ECSC.

One of the difficulties of creating new entities with power over existing ones is that there is no one to speak for the new entity before it is created. This was not the case for the European Communities. Before they were created, their voice was Jean Monnet. A French banker and government official with extensive international experience including in the United States, Monnet was the perfect man to pursue an attempt to create a supranational organisation in the interests of France. It is not surprising that he sought to do so using methods and structures similar to those he had used to foster postwar reconstruction in France. He believed in rule by experts, especially himself. He succeeded in creating a supranational technocracy in the form of the High Authority which was to administer the European Coal and Steel Community. The Community also substantially corresponded to his vision. He then became the first President of the High Authority.

Monnet was the man for the moment, but the project could not have succeeded without the political and economic forces which were influencing European leaders at the time.

The Second World War reinforced the belief that international co-operation is preferable to international conflict. There had been previous efforts at co-operation and many schemes for European unification in a common polity<sup>49</sup> but a supranational organisation was not formed until the League of Nations in 1919, a response to the First World War. The League had little power. The United States and the USSR never joined it. Germany joined but withdrew when the Nazis came to power. The League could not prevent Germany's territorial aggression and the resulting war.

A fresh attempt was made after the Second World War with the establishment of the United Nations Organisation ("UN"). Unlike the League, the UN managed to secure almost universal membership of the world's states. It also has a Security Council which has sometimes been able to take effective action to secure peace. Although the UN has some economic objectives, it does not require economic co-operation. Although it has an International Court of Justice, submission to its jurisdiction is voluntary. The UN covers the world and hence a great diversity of countries with limited scope for co-operation on equal terms. Monnet was looking for a closer form of co-operation.

Among the non-communist countries, there was an attempt to reduce trade barriers through the General Agreement on Tariffs and Trade ("GATT") signed in Havana in 1947. GATT operated through negotiation and on the principle of reciprocity. While Monnet favoured free trade generally, he saw the need for more far-reaching free trade in Europe than provided by GATT.

The concept of "Western Europe" was created by the Second World War. What had been central Europe was now divided between the satellites of the USSR in the east and the western part of Germany occupied by the "Western Allies" the United States, Britain and France. Austria was left neutral, occupied by both sides. There was thus a community of interest between the countries of western Europe and the United States as a bulwark against communism. This was expressed in the establishment of the North Atlantic Treaty Organization ("NATO") in 1949 and

<sup>49</sup> See D Heater *The Idea of European Unity* (Leicester, Leicester UP 1992).

the Marshall Plan announced in 1947 by which the United States provided aid to European countries willing to accept it.<sup>50</sup>

It was a condition of Marshall aid that the recipients should co-operate in its distribution and the Organization for European Economic Co-operation ("OEEC") was formed for this purpose.<sup>51</sup> This organisation, which had seventeen member states, attempted to negotiate trade liberalisation but was hamstrung by the requirement of unanimity.<sup>52</sup>

Before the OEEC, even before the liberation, the governments-in-exile of the occupied low countries, Belgium, the Netherlands and Luxembourg, had agreed to form the Benelux customs union. This took effect in 1948 and made them a bloc for the purpose of further trade liberalisation.

There was an attempt to form an organisation with more political goals at the Hague Conference of 1948. This laid the groundwork for the Council of Europe which became a forum for political dialogue and conventions such as the European Convention on Human Rights and Fundamental Freedoms of 1950 which established a system of human rights protection through a Commission and a Court. It did not become the supranational legislator some had hoped for.

Thus at the time of the Schuman Declaration on 9 May, 1950, there had already been several attempts to secure peace, free trade and political co-operation on both a global and a European level. However most of these attempts had been hampered by the insistence of member states on the integrity of their sovereignty. Monnet and Schuman, along with European federalists, saw the need to transcend national sovereignty if progress in the interests of all Europeans was to be made. Unlike the federalists, Monnet and Schuman had the political position to achieve concrete results.

<sup>50</sup> R Lieshout *The Struggle for the Organization of Europe* (Cheltenham, Edward Elgar 1999) p60.

<sup>51</sup> D Spierenburg and R Poidevin *The History of the High Authority of the European Coal and Steel Community* (London, Weidenfeld & Nicolson 1994) p1.

It is also possible to see the ECSC as the pursuit of French policy by other means: bringing German industry under some international control, securing German supply to French markets. An occupied West Germany saw it as a means to *regain* some sovereignty. The Benelux and Italy could not afford to be left out of a Franco-German *rapprochement*. This is a more persuasive explanation than a collective conversion to supranationality among the leaders of the Six, but regardless of their motives, they created an organisation with supranational powers and federalising potential.

In the negotiation literature, a distinction is made between integrative and distributive negotiation.<sup>53</sup> Distributive negotiation entails a win-lose outcome. Integrative negotiation attempts to create a win-win. Negotiation of the European Union has been of both kinds: the predominant aim has been to produce an improvement for all participants, but there are occasions when there is a finite resource to be distributed such as a milk quota or a sum of money. The distinction is echoed in the debate over whether the EC has involved a transfer or a pooling of sovereignty. Is there a finite amount of power to be divided or can a group together do more than all of them individually?

The Schuman Declaration called for negotiations between interested countries to establish an organisation with specified goals in the field of coal and steel production and marketing. This was expressed to be just a first step towards a European federation. There had already been many proposals to combine French and German coal and steel production, but coming from Schuman, this proposal was assured maximum publicity and impact.<sup>54</sup>

Much of the detail had already been worked out by the French officials, especially Monnet, then Commissioner of the French *Commissariat du Plan*. He had designed the postwar industrial recovery plan for France and his ideas formed a

<sup>52</sup> France proposed some limited supranational powers but these were vetoed by Britain: see Lieshout op cit p63.

<sup>53</sup> Lewicki, R, J Litterer, J Minton and D Saunders *Negotiation* (2<sup>nd</sup> ed. Burr Ridge IL, Irwin 1994) p17.

<sup>54</sup> Lieshout op cit p93 There was already an international authority administering the Ruhr.

similar programme for Europe. Monnet's *Commissariat* was readily transferable to the model close to the French experience should the impression that this was France seeking to enhance its influence. This impression was enhanced by the fact that the *Commissariat* was a French creation.<sup>55</sup>

A revolutionary aspect of the proposed 'High Authority' to be composed of 'independent' members was that it was a genuinely supranational authority able to make decisions without reference to national governments. Poidevin and Spierenburg described it as 'the first step towards a European government'.<sup>56</sup>

The governments of West Germany, Belgium, France and Italy agreed to the proposed French plan for a supranational authority and therefore did not object to the proposal.

There was a flurry of diplomatic activity between the announcement of the Schuman Plan and the start of negotiations.<sup>57</sup> This revolved around Britain's reluctance to negotiate while France insisted that the plan was essential. However, in order to placate national governments, it was agreed that national governments would execute the plan. This avoided the need for an extensive network of liaison. In the period leading up to the conference, Monnet prepared a proposal. By June 12, 1950, his draft included the High Authority's decisions and a parliamentary assembly.<sup>58</sup>

<sup>55</sup> Monnet, J *Memoirs* tr R Mayne (London, Collins 1965) p10.  
<sup>56</sup> Spierenburg op cit p10.  
<sup>57</sup> Monnet op cit p311.  
<sup>58</sup> *Ibid* p321.

similar programme for Europe. Monnet noted that the apparatus of the *Commissariat* was readily transferable to the ECSC. It was not surprising that a model close to the French experience should be used, but it must have added to the impression that this was France seeking to remake Europe in its own image. This impression was enhanced by the fact that French lawyers worked on the text.<sup>55</sup>

A revolutionary aspect of the proposed Community was to be its control by a "High Authority" to be composed of "independent" members. This would be a genuinely supranational authority able to make binding decisions and to negotiate with governments. Poidevin and Spierenburg describe it as an "embryonic federal European government".<sup>56</sup>

The governments of West Germany, Belgium, the Netherlands, Luxembourg, France and Italy agreed to the proposed French principles. Britain did not agree to a supranational authority and therefore did not even join the negotiations.

There was a 'flurry' of diplomatic activity between France and Britain between the announcement of the Schuman Plan and the commencement of international negotiations.<sup>57</sup> This revolved around Britain's attempt to make all matters subject to negotiation while France insisted that the High Authority was not negotiable. However, in order to placate national governments, the Schuman proposal was that national governments would execute the decisions of the High Authority. This avoided the need for an extensive network of High Authority officials.

In the period leading up to the conference, Monnet and his team refined their proposal. By June 12, 1950, his draft included a court to deal with appeals from the High Authority's decisions and a parliamentary body able to dismiss the High Authority.<sup>58</sup>

<sup>55</sup> Monnet, *J Memoirs* tr R Mayne (London, Collins, 1978) p352.

<sup>56</sup> Spierenburg op cit p10.

<sup>57</sup> Monnet op cit p311.

<sup>58</sup> Ibid p321.

The Benelux countries, Italy and Germany were all concerned about the effect of the proposed body on their steel industries. As could be expected of a French proposal, there was clear benefit for the French steel industry, which was not as competitive as the German.<sup>59</sup>

Formal negotiations opened in Paris on 20 June, 1950. Schuman called for teamwork and a spirit of co-operation rather than the usual nationalistic bargaining.<sup>60</sup> Monnet chaired the negotiations. He was very much in control. One of his techniques was to deal with the heads of delegation, each with only a few advisers, rather than with armies of technocrats. The personal dimension in European integration has been very significant. This was the first of many examples where a personal rapport has enabled progress in negotiations. Although it has achieved some good results, principle and coherence have often been sacrificed in the search for agreement.

Negotiations were conducted in French, which all the *chefs de délégation* were able to speak. This enabled an active cut and thrust in discussion which is impossible when interpreters are required. Schuman and Monnet: "wanted to save the project from getting bogged down in drawn-out diplomatic manoeuvring. That is why they had to act quickly in adopting a negotiating method whereby the inviolable foundations of the pool could be established straight away."<sup>61</sup> Thus even at the very beginning, the Community was not to be negotiated from first principles but rather from a highly developed plan. This technique of negotiation, which might be called the art of the *fait accompli*, has been frequently and successfully used in the development of the EC and EU treaties, again at the cost of more principled or democratic approaches.

The Benelux countries formed a common front in the negotiations. They were concerned that the High Authority not have too much power.<sup>62</sup> They therefore proposed that the Authority consist of a member from each Member State, that

<sup>59</sup> Id.

<sup>60</sup> Ibid p14. He was calling for principled negotiation *avant la lettre*.

<sup>61</sup> Id.

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<sup>62</sup> Spierenburg op cit p12.

<sup>63</sup> Ibid p13. These bodies would make the ECSC  
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<sup>64</sup> Monnet's subsequent administration of the  
renewment. See Milward op cit p192 n97.

<sup>65</sup> Ibid p318.

there be a Council of Ministers to control the Authority's political decisions, and that there be a body to liaise with employers, workers and consumers.<sup>63</sup> Here can be seen the lineaments of some more of the future institutions of the Communities: a Commission consisting of Member State government appointees, a powerful Council of Ministers, and the Economic and Social Committee. The Benelux proposals, a reassertion of the role of national governments, were a serious baulk to Monnet and a compromise had to be reached.

Monnet and his team had prepared a draft treaty of 40 articles, but they did not circulate it. This would have encouraged pedantry. Instead, the draft provided a framework for negotiation led by Monnet. This may have been effective, but it also suggests the amount of control which Monnet was determined to take over the negotiations. He was a man convinced of his mission and it is a tribute to him and to the other negotiators that his approach was not resented more.<sup>64</sup> On the other hand, a less predetermined structure might have stimulated even greater creativity.

Private interest groups, especially the producers of coal and steel, were highly interested in proceedings, but were not allowed to participate directly, instead having to lobby their national governments.<sup>65</sup> This raises the vexed question of the role of civil society in constitutional negotiations. If industry had been offered seats at the table, unions and consumers, and indeed ordinary citizens, would also have had good claims to representation. With such clear objectives in mind, Monnet wanted to keep the process intimate and under his control. As we will see, subsequent negotiations have been more open to players other than states, and in Chapter 5 this opening is welcomed. It brings the danger of the debate being hijacked by the most vocal and well resourced rather than those with the best ideas, but that is often the fate of politics.

<sup>62</sup> Spierenburg *op cit* p12.

<sup>63</sup> *Ibid* p13. These bodies would make the ECSC resemble a state more closely, though with the Council of Ministers in a more legislative than executive role.

<sup>64</sup> Monnet's subsequent administration of the ECSC seems to have caused considerable resentment. See Milward *op cit* p192 n97.

<sup>65</sup> *Ibid* p318.



Chancellor Adenauer actually considered an industrialist as his chief negotiator, but in the end, he chose Walter Hallstein, a professor of law, later to become a President of the Commission.<sup>66</sup> That Hallstein and Monnet established a personal rapport is another example of the importance of the personal in the success of the project.

The other *chefs de délégation* were a mixture of diplomats, civil servants and politicians. Monnet noted that those accustomed to acting under government instruction would be hardest to win over to his bold new plan and pragmatic method. However, he needed to bear in mind that the negotiators would eventually have to persuade their governments.

It was of assistance to Monnet that the negotiations took place at his headquarters over a continuous period. It was possible to make close personal contacts and to concentrate on the work at hand. Frequent opportunities for delegates to consult with their governments would have impeded Monnet's work. However, there was a break between 25 June and 4 July, from which the Benelux delegates returned strengthened in their resolve to limit the power of the High Authority.<sup>67</sup>

A compromise was reached whereby some technical aspects were included in the treaty to guide the High Authority.<sup>68</sup> Was the High Authority to have its own sovereignty, or was it to be subject to the will of the Member States? The degree of control by the Member States remained in dispute and has remained an issue ever since in the Communities.

Between 5 and 12 July, this issue was worked on. Monnet and Schuman insisted that the High Authority be independent. Spierenburg and the Benelux representatives were equally insistent that on some matters the Council of Ministers must have ultimate control.<sup>69</sup> A compromise was agreed in which there was a balance of powers between the High Authority, the Council of Ministers,

<sup>66</sup> Ibid p320.

<sup>67</sup> Spierenburg op cit p16.

<sup>68</sup> Monnet op cit p325.

the Court of Justice and the Assembly.<sup>70</sup> The detail below. The extent of the shift by Monnet he had not initially envisaged an intergovernmental all.<sup>71</sup>

The question of an Assembly also caused difficulty important in his scheme. There was already a Council of Europe. An Assembly for the EC was this. However, the membership of the Council was identical and their functions were considerably justified. Germany proposed that it be a supranational support this.<sup>72</sup> It ended as a delegation of authority with the potential to become directly elected. Authority was to be supranational. Monnet's government scepticism about the Assembly elected, and hence supranational, until 1979.

The participants finally arrived at a text which governments. The text included the stipulation to withdraw with the consent of all the others. Monnet the ECSC was "laying the foundations of a European union from federations is impossible."<sup>73</sup> Monnet's ambitions for the organisation clear, but he was aware of the style restrictions on an organisation which was to be a

Monnet is clear that the surroundings assisted the observations of negotiation scholars.<sup>74</sup> Monnet the headquarters of the *Commissariat du Plan* was

<sup>69</sup> Spierenburg op cit p15.

<sup>70</sup> Ibid p18.

<sup>71</sup> Monnet op cit p326.

<sup>72</sup> Spierenburg op cit p18.

<sup>73</sup> Monnet loc cit.

<sup>74</sup> Fisher, Ury and Patton *Getting to Yes* (New York, Knopf, 1981).

the Court of Justice and the Assembly.<sup>70</sup> This balance will be explored in more detail below. The extent of the shift by Monnet is indicated by his admission that he had not initially envisaged an intergovernmental institution (ie the Council) at all.<sup>71</sup>

The question of an Assembly also caused difficulty. Monnet did not consider it important in his scheme. There was already the Consultative Assembly of the Council of Europe. An Assembly for the ECSC seemed a partial duplication of this. However, the membership of the Council of Europe and the ECSC was not identical and their functions were considerably different, so a new Assembly was justified. Germany proposed that it be a supranational institution, but France did not support this.<sup>72</sup> It ended as a delegation of Member State parliamentarians but with the potential to become directly elected. For Monnet, only the High Authority was to be supranational. Monnet's indifference combined with national government scepticism about the Assembly led to it not becoming directly elected, and hence supranational, until 1979.

The participants finally arrived at a text which they could take back to their governments. The text included the stipulation that a Member State could only withdraw with the consent of all the others. Monnet's rationale for this was that the ECSC was "laying the foundations of a European federation" and unilateral secession from federations is impossible.<sup>73</sup> Monnet had certainly made his greater ambitions for the organisation clear, but he was attempting to impose federation-style restrictions on an organisation which was far from yet being a federation.

Monnet is clear that the surroundings assisted the process. This too accords with the observations of negotiation scholars.<sup>74</sup> Monnet comments that the premises at the headquarters of the *Commissariat du Plan* were ideal as they had been set out

<sup>69</sup> Spierenburg op cit p15.

<sup>70</sup> Ibid p18.

<sup>71</sup> Monnet op cit p326.

<sup>72</sup> Spierenburg op cit p18.

<sup>73</sup> Monnet loc cit..

<sup>74</sup> Fisher, Ury and Patton *Getting to Yes* (New York, Random House 1981) p136.

for a process of continual consultation.<sup>75</sup> There were no facilities for interpreters. Discussions took place at close quarters in French in the dining room. Food was clearly important. Monnet notes that when people asked him how to get results from negotiations, he told them: "Above all, have a dining-room".<sup>76</sup> This efficacy is confirmed by Spaak, who recalls of his first meeting with Monnet: "I...remember the occasion very clearly for two reasons: first, because of what he said to me and second - dare I admit it? - because of the excellent dinner he offered me..."<sup>77</sup>

There was a clear political tension between the French espousal of *dirigisme* and the German preference at that time for liberal economics. Monnet was keen to stress that *dirigisme* is not inconsistent with capitalism.<sup>78</sup> The Community had to appeal to as broad a spectrum of political opinion as possible. This raises a fundamental question about the role of constitutions. Perhaps in reaction to the communist bloc, it was tempting to enshrine capitalism in the Communities and this is effectively what was done. But a mixed economy was so entrenched in the Member States at that time that government ownership of industry could not be prohibited. I argued in Chapter 1 that a constitution should not seek to determine the economic structure of a polity, which should be the province of politics under the constitution. Creating a single market required restricting national regulation of the market but also entailed providing for supranational regulation. Whether substantive as distinct from procedural limits should be placed on that supranational regulation is a political question. In the end, procedural limits in the form of oversight by the Council and the Court were preferred to a bill of rights or specific limits to regulation other than the restricted subject matter of the ECSC. We will revisit this tension in subsequent treaties.

Monnet was able to consolidate his gains by having points of agreement incorporated in a memorandum of understanding. This ensured that agreement

<sup>75</sup> Monnet op cit p329.

<sup>76</sup> Ibid p334. An earlier Frenchman, Napoleon, had noted that "An army fights on its stomach". A negotiator, apparently, settles on theirs!

<sup>77</sup> Spaak, P-H *The Continuing Battle* (London, Weidenfeld & Nicolson 1971) p213.

<sup>78</sup> Monnet op cit p330.

was a cumulative process rather than building  
eventual agreement might not be reached."

The negotiators were working to beat the sun  
A time constraint is often conducive to achieving  
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The negotiations had taken place in the context  
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1949. German involvement in military activities  
the Schuman Plan, but instead, Monnet saw  
Schuman Plan conference resumed in September  
sixty European divisions "of which ten million  
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Monnet saw the opportunity to broaden the plan  
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<sup>81</sup> As unfortunate as the circumstances were,

<sup>79</sup> Ibid p333.

<sup>80</sup> Ibid

<sup>81</sup> Spierenburg op cit p18.

<sup>82</sup> Monnet op cit p342.

<sup>83</sup> Ibid p343.

was a cumulative process rather than building a huge pile of proposals upon which eventual agreement might not be reached.<sup>79</sup>

The negotiators were working to beat the summer break and they were successful. A time constraint is often conducive to achieving an outcome, though it may not be a good outcome. A document of August 5 set out the institutional structure substantially as it exists today.<sup>80</sup> However Spierenburg comments that "differences remained", especially on key issue of the relationship between the High Authority and the Council of Ministers.<sup>81</sup>

The draft referred to a "merger" of sovereignty. The exact parameters of this could not be clear as it had not been tried before. Monnet held out against "delegation of sovereignty", presumably because a delegation can be revoked.

The negotiations had taken place in the context of the invasion by North Korea of South Korea on 25 June, 1950. One likely result of this invasion was an American demand for the rearmament of West Germany. This might have caused such protest in France that no further French-German *rapprochement* would be possible. A way to turn the crisis to the advantage of European integration would have been to establish a West European army. Adenauer had called for this in 1949. German involvement in military activity might have reduced its interest in the Schuman Plan, but instead, Monnet saw an opportunity. By the time the Schuman Plan conference resumed in September, the United States had demanded sixty European divisions "of which ten might be German" as a condition for further American reinforcements in Europe.<sup>82</sup> France flatly rejected this proposal. Monnet saw the opportunity to broaden the integration to include defence. He had not originally contemplated such a plan but was driven to it by the turn of events.

<sup>83</sup> As unfortunate as the circumstances were, he may have secretly welcomed the

<sup>79</sup> Ibid p333.

<sup>80</sup> Id.

<sup>81</sup> Spierenburg op cit p18.

<sup>82</sup> Monnet op cit p342.

<sup>83</sup> Ibid p343.

opportunity to press for political union which he saw must be the essential accompaniment of defence union.

Monnet and his team drafted a plan for: "a European army under the authority of the political institutions of a united Europe".<sup>84</sup> This was presented by the Prime Minister René Pleven to the French parliament on October 24, 1950 and became known as the Pleven Plan. It was not taken seriously by the United States, nor was it embraced by Germany. It was, however, the genesis of the European Defence Community.<sup>85</sup>

Meanwhile, the ECSC Treaty had still not been concluded. For Monnet and many others, including some of the Allied High Commission, a priority was to decartelise the German coal and steel industries.<sup>86</sup> The German industries and government were understandably unhappy with this plan, especially as it seemed to single Germany out. Monnet enlisted John McCloy, the United States representative on the High Commission, who threatened to take the competition issue directly to the Commission if Bonn did not agree to a solution. In the face of such a threat, Germany agreed to a compromise in mid-March, 1951.<sup>87</sup> Sometimes threats get results in a negotiation, but sometimes they are counterproductive. This incident reveals that apparently general principles can be intended to apply to a specific situation. Germany felt singled out, but there were still good reasons of principle to include decartelisation powers.

American diplomats played a significant role in the outcome of the treaty negotiations. The United States had favoured European co-operation in the distribution of Marshall Plan aid and now supported the Schuman Plan as long as it did not lead to a super cartel.<sup>88</sup> American diplomacy was also significant in moderating British opposition to the Plan. The United States could not make

<sup>84</sup> Ibid p347.

<sup>85</sup> The EDC is discussed further below.

<sup>86</sup> Lieshout op cit p105. Britain, in the process of nationalising its coal and steel industries, would have been happy to nationalise the cartels.

<sup>87</sup> Spierenburg op cit p23 and 28.

<sup>88</sup> Ibid p26.

Britain agree to join, but could persuade United States, Britain and France all had High Commission in Germany. and as the United States was not shy of using its power the American lawyers on various aspects: Commissariat.<sup>89</sup>

The treaty was initialled in Paris on 19 governmental agreement on the weighting of Common Assembly. Should it be based representation, as proposed by the Ben international organizations, volume of coal Germany, by far the largest producer, or democratic principle? The French government equality between France and Germany. The principles, none of which was a clear therefore a solution, but not a principled one.

A conference of the governments of the Six the five-member High Authority sought by Benelux obtained a nine member Authority Italy, Belgium, the Netherlands and Luxembourg, Germany, and the ninth elected by the other for six years with the following set of majority.<sup>90</sup>

On the issue of voting in the Council, a conference the Benelux and Italy together nor France each other.<sup>91</sup> Once again, pragmatism triumphed that pragmatism was the principle. A similar

<sup>89</sup> Ibid.  
<sup>90</sup> Ibid p24.  
<sup>91</sup> Ibid p25.

Britain agree to join, but could persuade it to lessen its spoiling tactics. The United States, Britain and France all had significant power as members of the High Commission in Germany, and as the action of McCloy demonstrates, the United States was not shy of using its power to persuade. Monnet also consulted the American lawyers on various aspects and even had one on his staff at the *Commissariat*.<sup>89</sup>

The treaty was initialled in Paris on 19 March, 1951, but it still required governmental agreement on the weighting of votes in the Council of Ministers and Common Assembly. Should it be based on equality of Member State representation, as proposed by the Benelux, the standard procedure in international organizations, volume of coal and steel production, as proposed by Germany, by far the largest producer, or population, as might be suggested by democratic principle? The French government resolved the impasse by proposing equality between France and Germany. This is an example of three possible principles, none of which was a clear winner. Pragmatic compromise was therefore a solution, but not a principled one.

A conference of the governments of the Six began in Paris on 12 April. In place of the five-member High Authority sought by France and Germany, Italy and the Benelux obtained a nine member Authority with one representative from each of Italy, Belgium, the Netherlands and Luxembourg, two each from France and Germany, and the ninth elected by the other eight. The initial appointments were for six years with the following set of appointments to be by five-sixths majority.<sup>90</sup>

On the issue of voting in the Council, a compromise was reached whereby neither the Benelux and Italy together nor France and Germany together could outvote each other.<sup>91</sup> Once again, pragmatism triumphed over principle. It could be said that pragmatism was the principle. A similar compromise was struck over the

<sup>89</sup> Id.

<sup>90</sup> Ibid p24.

<sup>91</sup> Ibid p25.

Assembly. France and Germany proposed the same representation as in the Council of Europe Assembly (eighteen for each of France, Germany and Italy, six each for Belgium and the Netherlands, three for Luxembourg). The Benelux wanted more and Schuman's proposal that they get 24 seats (ten each for the Netherlands and Belgium, four for Luxembourg) was accepted.<sup>92</sup>

The next battle was over the method of appointment to the Assembly. In June, 1950, France had proposed direct election by universal suffrage. Adenauer agreed, but the Benelux countries rejected the idea as "politically premature".<sup>93</sup> The compromise was that Member States could choose whether to have members popularly elected or appointed by the national parliament.

The judges of the Court were to be appointed by "common accord" of the Member States – the same procedure as for the High Authority and for a similar period of six years. The result in reality was for each Member State to appoint a judge and one to appoint a second by agreement.

The site of the institutions was not determined in the treaty. Every Member State vied for one or all. Luxembourg was chosen as their temporary seat at a ministerial meeting after a whole night of deadlocked negotiation "thanks to the general weariness".<sup>94</sup> The question of permanent seats has bedevilled the EU ever since. The debate demonstrated that national interest was still a far greater motivator than 'European spirit'.

A possible site for a "European Capital Territory", to adapt Australian phraseology, was the Saarland, with its capital Saarbrücken, which remained under French occupation, subject to an agreement to hold a plebiscite on its future. Located in the heart of the Lotharingian coalfields, it would have made an ideal symbolic capital. Instead, it returned to West Germany by the plebiscite and became a *Land* of the Federal Republic.

<sup>92</sup> Id.

<sup>93</sup> Id. It was not to be until 1979 that the Assembly (by then renamed the European Parliament) would be directly elected.

<sup>94</sup> Ibid pp34-39.

Another issue resolved at the Paris conference was the language. French was opposed as the sole language, what could have been a masterstroke, French, German, Dutch and Italian as an example of the inability to sacrifice national precedent whereby every new member languages added as an official language of the

The treaty was signed on 18 April, 1957, by the national parliaments.

Meanwhile, the conference on the proposed "EDC" had begun in Paris in February 1955. France was increasingly anxious to have a greater European role. Its neighbours were under pressure to agree to the ECSC before five international conferences before the ECSC came into effect in August 1953. I will deal with it further at the

There are several conclusions which can be drawn from the Treaty of Paris. Within the macro-political context, France and Germany to become entwined in a sovereign state, and for the United States to lead the leading west European states. Given the German *rapprochement*, it was the vision which saw the idea conceived, launched and the willingness of Robert Schuman to take the government, to support Monnet through the necessary, which greatly assisted the success of the willingness of the other leaders to take the agreement. The co-operation of the United

<sup>95</sup> Id p39.

<sup>96</sup> Monnet op cit p360.

Another issue resolved at the Paris conference was that of language. Germany opposed French as the sole language. A Benelux minister proposed English in what could have been a masterstroke, but the solution adopted was to have French, German, Dutch and Italian all as official languages.<sup>95</sup> This further example of the inability to sacrifice national pride for the greater good has set a precedent whereby every new member has had at least one of its official languages added as an official language of the Communities.

The treaty was signed on 18 April, 1951, but it still had to be ratified by the national parliaments.

Meanwhile, the conference on the proposed European Defence Community ("EDC") had begun in Paris in February 1951. With the United States increasingly anxious to have a greater European military contribution, France and its neighbours were under pressure to agree to the raising of German units. There were five international conferences before agreement was reached.<sup>96</sup> By the time the ECSC came into effect in August 1952, the potential EDC appeared more significant. I will deal with it further at the end of this chapter.

There are several conclusions which can be drawn from the negotiation of the Treaty of Paris. Within the macro-political context of the time, it was a way for France and Germany to become entwined, for Germany to regain the position of a sovereign state, and for the United States to assure itself of good relations between leading west European states. Given the propitiatory environment for Franco-German *rapprochement*, it was the vision and determination of Jean Monnet which saw the idea conceived, launched and carried through to reality. It was the willingness of Robert Schuman to take on the idea on behalf of the French government, to support Monnet throughout, and lend his own weight where necessary, which greatly assisted the success that was finally assured by the willingness of the other leaders to take up the new idea and see it through to agreement. The co-operation of the United States was also significant. While the

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<sup>95</sup> Id p39.

<sup>96</sup> Monnet op cit p360.



dispute over the seat of the institutions indicates the degree to which national feeling still triumphed over European spirit, the conclusion of the treaty indicates that a new spirit was infusing.

The negotiation of the ECSC involved both principled negotiation and positional bargaining. Monnet was willing to accept considerable modification of his plan, yet he managed to obtain the supranational High Authority which he saw as most important. American pressure was used at a key time to gain German agreement, so the agreement could not be described as entirely free. The Benelux countries felt pressured by the larger states but were still able to carry many of their points. Many issues were fudged or postponed. These have become standard Community ways to reach "agreement". This demonstrates a key feature of the Communities and the EU: they are and have been a work in progress. As with politics anywhere, few issues are 'solved' forever: they are a continuing source of struggle. The EU has provided new fora in which those struggles can be fought. True, there is a framework of law as there is in a state, but even the legal forum is a place of considerable negotiation.

While the EDC was taking shape, the ECSC treaty was slowly progressing through the Member States' parliaments. The Netherlands ratified in October, 1951. Only the Communists voted against. In Belgium, the Communists also voted against. The Socialists were split. Those who followed Paul-Henri Spaak voted in favour, but Socialist Senators abstained out of concern for miners' jobs.<sup>97</sup> The coal industry was also opposed, but Milward details some Machiavellian manoeuvring by the large Belgian holding companies which were more interested in restricting the High Authority's power over steel than what it might do to coal.<sup>98</sup> The holding companies had extensive interests in both industries. Belgium had been given special concessions for its coal industry which was the least competitive in Europe, an early example of flexibility in constitutional arrangements.<sup>99</sup> Belgium had sought the raising of miners' pay and conditions

<sup>97</sup> Id and Spierenburg op cit p32.

<sup>98</sup> Milward op cit p78.

<sup>99</sup> Milward op cit ch 3.

across the Community to the Belgian level. One market could work, but this was rejected.<sup>100</sup> A transitional period of five years before joining the

In Italy, the Right, Communists and Socialists. The industry had secured some concessions<sup>101</sup> but was dominated by the larger corporations of France.

In Germany, the Social Democrats were opposed. His own party to get the treaty through. The steel industry in his resistance to decartelisation. by of Allied control over production.<sup>102</sup> The unions

In Luxembourg, the steel industry was strong grounds of dirigisme, but Luxembourg was su for the Parliament to withstand this opposition. of the new Community in Luxembourg would a

In France, the steel industry was deeply opposed against the treaty.<sup>103</sup> The industry threw its weight in the 1951 French election. The unions also largely feared German domination. Some feared technocratic tendency and scepticism of democracy. Considering the opposition, ratification was a

<sup>100</sup> Ibid p69.

<sup>101</sup> Ibid p73.

<sup>102</sup> These concessions were in the form of guaranteed sources: see Spierenburg op cit p23.

<sup>103</sup> Spierenburg op cit p28.

<sup>104</sup> Ibid p30.

<sup>105</sup> Ibid p32.

<sup>106</sup> Id.

<sup>107</sup> Ibid p31.

<sup>108</sup> Ibid p33.

across the Community to the Belgian level, one possible vision of how a common market could work, but this was rejected.<sup>100</sup> Failing that, Belgium was given a transitional period of five years before joining the common market for coal.<sup>101</sup>

In Italy, the Right, Communists and Socialists all voted against. The Italian steel industry had secured some concessions<sup>102</sup> but was concerned that it would be dominated by the larger corporations of France and Germany.<sup>103</sup>

In Germany, the Social Democrats were opposed but Adenauer was able to rally his own party to get the treaty through. The steel industry had strongly supported Adenauer in his resistance to decartelisation, but at least the treaty meant the end of Allied control over production.<sup>104</sup> The unions supported the treaty.<sup>105</sup>

In Luxembourg, the steel industry was strongly opposed to the treaty on the grounds of *dirigisme*, but Luxembourg was sufficiently enmeshed in the process for the Parliament to withstand this opposition.<sup>106</sup> The location of the institutions of the new Community in Luxembourg would also have helped.

In France, the steel industry was deeply opposed and mounted a heavy campaign against the treaty.<sup>107</sup> The industry threw its weight against Schuman in the June 1951 French election. The unions also largely opposed the treaty. Nationalists feared German domination. Some feared technocracy.<sup>108</sup> Given Monnet's technocratic tendency and scepticism of democracy, this seems a legitimate fear. Considering the opposition, ratification was a great feat of persuasion. Schuman

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<sup>100</sup> Ibid p69.

<sup>101</sup> Ibid p73.

<sup>102</sup> These concessions were in the form of guaranteed supplies of ore from French and African sources: see Spierenburg op cit p23.

<sup>103</sup> Spierenburg op cit p28.

<sup>104</sup> Ibid p30.

<sup>105</sup> Ibid p32.

<sup>106</sup> Id.

<sup>107</sup> Ibid p31.

<sup>108</sup> Ibid p33.

succeeded by stressing the need to contain Germany. Eventually, only the Communists and Gaullists opposed the treaty in parliament.<sup>109</sup>

The treaty was thus ratified and the High Authority took office on 13 August 1952, with Monnet as its first President. It immediately set about the task of creating a single market for coal and steel, subject to the many exceptions in the treaty.

The treaty is a patchwork of compromises. It exemplifies both principle and pragmatism. Once the Community had come into existence, it could take on a life of its own. The Treaty of Paris is the constitutional foundation stone of what has become the EU cathedral. The preamble stated that the treaty was a step towards world peace. Coming only six years after a world war begun by disputes between some of the signatories, this seemed to be true. The preamble recognised that "Europe can be built only through practical achievements which will first of all create real solidarity". This also recognised the need for social as well as formal legitimacy. Economic growth was to be the main method of creating such legitimacy. The intention is expressed "to lay the foundations for institutions which will give direction to a destiny henceforward shared". The seed of constitutionalisation had been sown.

#### *Character*

Art 1 declared the establishment of the European Coal and Steel Community. "Community" is a very rich concept, evoking the closeness of a village, ties of kinship and solidarity. It is not the first name that would spring to mind for a common market in coal and steel. Using such a name strengthened the idea that the ECSC was about more than coal and steel, and just the first step towards European unity. It also indicated that the Community was a new kind of international organization, more closely knit than any before.

Art 6 provided that the Community had legal personality. A new kind of international legal person had been created. This has enabled the Communities to

<sup>109</sup> Ibid pp33-34.

take on lives of their own separate from the  
the Community enjoyed in the Member  
necessary to carry out its tasks.

Exactly what the Communities are has been  
clear that they are not states, but they are  
organizations. Further complexity has been  
Union, discussed in Chapter 4. We may c  
make clear what it is constituting, but the EC  
practice would reveal its full character.

Art 99 provided for ratification by the  
constitutional requirements. This is a nec  
effect but it also had the effect of incorpora  
law. Art 86 committed the Member States  
treaty. Unlike many treaties, this one requir  
more loyalty than an ordinary treaty. Art 87  
resolution of disputes outside the treaty pro  
ECJ can decide such disputes. The provisio  
is an unusual feature in international law and  
was intended to go further than previous  
provided for the High Authority to have rel  
further evidence of its special character.

#### *Objectives*

Art 2 set out the Community's objective  
growth in employment and standards of liv  
the Community will create the conditi  
safeguarding continuity of employment an  
economies of Member States. These inher  
the Community's dilemma: how can it ma  
the inefficient? The EU is still working on th  
and is the reason why the EU must have  
rather than a set of attempted technical sol

take on lives of their own separate from the Member States. Art 76 provided that the Community enjoyed in the Member States the privileges and immunities necessary to carry out its tasks.

Exactly what the Communities are has been the subject of much debate. It seems clear that they are not states, but they are also different from other international organizations. Further complexity has been added by the creation of the European Union, discussed in Chapter 4. We may criticise a constitution which does not make clear *what* it is constituting, but the ECSC was a new kind of entity and only practice would reveal its full character.

Art 99 provided for ratification by the Member States according to their constitutional requirements. This is a necessary step for a treaty to come into effect but it also had the effect of incorporating the treaty's provisions in national law. Art 86 committed the Member States to fulfil their obligations under the treaty. Unlike many treaties, this one required internal implementation and hence more loyalty than an ordinary treaty. Art 87 bound the Member States not to seek resolution of disputes outside the treaty processes, with Art 89 providing for the ECJ can decide such disputes. The provision of a special court to decide disputes is an unusual feature in international law and further evidence that the Community was intended to go further than previous international organizations. Arts 93 provided for the High Authority to have relations with the UN and OEEC. This is further evidence of its special character.

### *Objectives*

Art 2 set out the Community's objective as to expand the economy leading to growth in employment and standards of living. The second paragraph stated that the Community will create the conditions for rational production while safeguarding continuity of employment and not causing "disturbances" in the economies of Member States. These inherently contradictory aims demonstrate the Community's dilemma: how can it maximise efficiency and yet also protect the inefficient? The EU is still working on this puzzle. It is the dilemma of politics and is the reason why the EU must have a constitution which enables politics rather than a set of attempted technical solutions to political problems. That the

latter approach was taken demonstrates the gradualism, or stealth, by which political goals were being pursued. In one sense, it could be described as anti-constitutional as a constitution's role is to facilitate politics. These measures seek to lock in a particular political program.

### *Powers*

Arts 4 and 5 sought to set limits on both the Member States and the Community, a common constitutional feature. Art 4 prohibited government or private measures restricting trade. Art 5 specified that the Community shall carry out its tasks "with a minimum measure of intervention". This was a wonderful piece of Community drafting offering something to both a *dirigiste* and an economic liberal, urging restraint but not actually *requiring* it. Art 57 also sought to strike a balance between *dirigisme* and liberalism by requiring the High Authority to "give preference" to indirect ways of influencing production, but under Arts 58 and 59, it could also take direct measures such as the imposition of quotas. Arts 60, 63, 65 and 66 regulated anti-competitive practices by enterprises, Art 67 by states. Art 61 allowed the regulation of prices. Arts 64 and 66 allowed the imposition of penalties, giving the Authority the power to enforce its decisions. Art 68 had some very mild measures attempting to protect wages. Title III covered economic and social provisions. Art 49 allowed the Community to impose levies on coal and steel production, contract loans, or receive gifts. Thus it received a limited power of taxation.

It was envisaged that the ECSC would preside over major restructuring of the coal and steel industries, leading to extensive job losses. Art 56 therefore provided for the funding of programs to provide new work for such displaced workers. This is the sort of capacity to be expected for a sectoral authority, but it is also the sort of activity usually undertaken by a state. Thus the Community was given state-like power over a whole sector. Art 70 covered transport and demonstrated the possibility of 'spillover': regulation of the coal and steel sector required regulation of other sectors too.

Art 69 provided for elimination of nationality-based discrimination in employment in the sector. It was a very small step towards freedom of movement.

Rather than expressing this as a right, the government action. Art 83 provided that the ownership of the undertakings" to which Community's ability to restructure the industry across the political spectrum and property ownership to the Member States regulate the use of property as distinct from

### *Institutions*

Art 7 set out the institutions: a High Authority of Ministers and a Court of Justice. All four

Arts 8 to 19 dealt with the High Authority. They were appointed by the common accord of the governments. Under Art 12 they could be "independent". This goes to the heart of the experts. Members of the Authority were of the application of the High Authority or of the conditions required for the performance of the Authority could also be to the Assembly under Art 24, discussed below.

Under Art 14, the High Authority could make "recommendations" or deliver "opinions". These recommendations binding as to their aims. The High Authority had actual supranational power.

Chapter X on commercial policy did not create binding recommendations to counteract dumping but instead sought to harmonise tariffs. It was a sort of power not always given to an executive Authority to declare that Member States had failed to comply with the rules. A Member State could then challenge this decision in the Court. The separation of powers by giving the High Au

Rather than expressing this as a right, it was expressed as a restriction on government action. Art 83 provided that the treaty did not affect "the system of ownership of the undertakings" to which it applied. This diminished the Community's ability to restructure the industries. It again reflected the need to appeal across the political spectrum and to preserve the sensitive matter of property ownership to the Member States. The Community soon found ways to regulate the use of property as distinct from its ownership.

### *Institutions*

Art 7 set out the institutions: a High Authority, a Common Assembly, a Council of Ministers and a Court of Justice. All four institutions were innovations.

Arts 8 to 19 dealt with the High Authority. It initially had nine members. They were appointed by the common accord of the Member States and were to be "independent". This goes to the heart of Monnet's vision of government by experts. Members of the Authority were effectively appointed by Member State governments. Under Art 12 they could be "compulsorily retired" by the Court on the application of the High Authority or Council for "no longer fulfilling the conditions required for the performance of [their] duties" or for "serious misconduct". The Authority could also be forced to resign *en bloc* by a vote of the Assembly under Art 24, discussed below.

Under Art 14, the High Authority could take "decisions", make "recommendations" or deliver "opinions". Decisions were binding, recommendations binding as to their aims, and opinions not binding. Thus the High Authority had actual supranational powers.

Chapter X on commercial policy did not create a customs union in coal and steel but instead sought to harmonise tariffs. It gave the Authority power to make binding recommendations to counteract dumping or competition from imports, the sort of power not always given to an executive authority. Art 88 allowed the High Authority to declare that Member States had breached their treaty obligations. The state could then challenge this decision in the ECJ. It seems to violate the separation of powers by giving the High Authority a power of adjudication, albeit

subject to appeal to the court. Art 92 allowed the High Authority to enforce its penalties under national law. This embedding of Community law in national law has proved very effective.

Art 95 allowed for decisions or recommendations to be made to carry out the objectives of the Community where these were not otherwise provided for. This required unanimous approval of the Council. It provided a simple method to increase the power of the High Authority. The article also provided for a complex method of amendment of the rules for the High Authority's exercise of its powers. This involved supermajorities of the Council and Assembly and the opinion of the Court. By contrast, Art 96 allowed a more general procedure for amendment.

Art 18 provided for the establishment of a consultative committee to consist of equal numbers of producers, dealers, consumers and workers. This was in keeping with the corporatist ethos of the Member States at the time. The committee was required to be consulted before some measures are taken but its views were not binding. It reflects an early attempt, in the corporatist tradition, to institutionalise the involvement of civil society. We will see in subsequent Chapters other ways in which civil society has been able to become involved in Community and Union decisionmaking. The corporatist model of consultation has proved very durable in the history of integration. It is no substitute for democracy and it raises difficult issues as to who should have representation and how much. It may be preferable to organise interest group representation rather than leaving it unregulated, but the existence of these official channels of consultation does not seem to have diminished private lobbying.

Arts 20 to 25 covered the Common Assembly. It was to be either elected or appointed from national parliaments as each Member State chose, which was unlikely to give it much credibility compared to a fully elected assembly.<sup>110</sup> Under Art 22, it was to hold an annual session. This does not suggest that its role was intended to be important. Under Art 24, the Assembly could pass a motion of censure of the High Authority by a two-thirds majority consisting of an absolute

<sup>110</sup> Though as we will see, even full direct election may not be sufficient.

majority of members, which would require a semblance of accountability of the Authority. The legislature was established, yet neither had the High Authority had legislative and judicial powers. The institutional framework of the Community was very different.

Arts 26 to 30 covered the Council of Ministers. For votes by unanimity, qualified majority voting, the weighting of votes was calculated by each Member State's population. This was appropriate for a sector of undemocratic decisionmaking. For budgetary matters, roughly by population, a more democratic method was used.

Arts 31 to 45 covered the Court of Justice. To ensure that in the interpretation and application of the law, down for the implementation thereof, the Court had the scope to develop new law, a scope of which originally comprised seven judges. Followed by Advocates-General who deliver a reasoned opinion between an *amicus curiae* and a judge in the Court. Advocates-General were appointed for renewable terms. It would seem to militate against judicial independence. Advocates-General deliver a single judgment so it is difficult to deliver individual opinions. Advocates-General deliver individual opinions so they are less likely to face criticism.

Under Art 33, the ECJ could declare an act invalid. Under Art 38, it could do the same for administrative acts. These are usual powers of a constitutional court. The power to make preliminary rulings on the validity of laws.

<sup>111</sup> Arts 78, 78b and 78e.

majority of members, which would require the Authority to resign. Thus the semblance of accountability of the Authority as executive to the Assembly as legislature was established, yet neither body really had such a role in the system: the High Authority had legislative and judicial powers, the Assembly did not even have legislative power. The institutional structure resembled that of a state in some of its nomenclature and procedures, yet the actual substance of its operation was very different.

Arts 26 to 30 covered the Council of Ministers. Under Art 28, there was provision for votes by unanimity, qualified majority and majority. For qualified majority, weighting of votes was calculated by coal and steel production rather than population. This was appropriate for a sectoral institution but established a pattern of undemocratic decisionmaking. For budgetary matters,<sup>111</sup> votes were weighted roughly by population, a more democratic method.

Arts 31 to 45 covered the Court of Justice ("ECJ"). Art 31: "The Court shall ensure that in the interpretation and application of this Treaty, and of the rules laid down for the implementation thereof, the law is observed" gave the Court ample scope to develop new law, a scope of which it took full advantage. The Court originally comprised seven judges. Following the French system, it also had Advocates-General who deliver a reasoned opinion on the case – something between an *amicus curiae* and a judge in a common law system. Judges and Advocates-General were appointed for renewable periods of six years, which would seem to militate against judicial independence except that the Court delivers a single judgment so it is difficult to criticise individual judges. The Advocates-General deliver individual opinions, but as these do not bind the court, they are less likely to face criticism.

Under Art 33, the ECJ could declare an act of the High Authority to be void. Under Art 38, it could do the same for an act of the Assembly or the Council. These are usual powers of a constitutional court. Under Art 41, the Court had the power to make preliminary rulings on the validity of acts of the High Authority or

<sup>111</sup> Arts 78, 78b and 78c.



the Council. This too is a common attribute of constitutional courts, enabling a single authoritative source of decisions on constitutional questions.

#### *Geographical Application*

Art 79 applied the treaty to the Member States' external as well as home territories, subject to several exceptions. Thus even at this stage, a European Community transcended Europe. Art 98 provided for accession by "any European State". We will explore the meaning of this term, carried through to subsequent treaties, in later chapters. I argued in Chapter 1 that the Commonwealth should transcend Europe and it is interesting to reflect what was meant by this restriction, which was perhaps thought at the time to be more of an opening to other west European countries which had not yet joined.

#### *Temporal Application*

Art 97 provided that the treaty would apply for fifty years and the ECSC was finally liquidated in 2002. This was a contrast to the subsequent treaties which are expressed to be indefinite.

#### *Constitutional Character*

The ECSC was an innovation in international law. The supranational High Authority gained a considerable amount of power as did the Court. The power was in a single sector of the economy, but by breaking the Member States' monopoly on sovereignty, the Community paved the way for further experiments in supranationality. In some other respects, the treaty was cautious in trespassing on the sovereignty of the Member States.

The ECSC suffered from the declining importance of coal and steel in the economies of the Member States. Attention had already turned to the possibility of a Defence Community, a potentially more significant form of supranationalisation, before the ECSC had begun. However unlike the EDC, the ECSC succeeded. Although it may not have been of much practical significance, it was a very important step in the constitutional development towards the EU. Milward argues that the ECSC was not as significant to the future as it was to the past: that it

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consider those which did not succeed. A  
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<sup>91</sup> A Milward *The Reconstruction of West*  
p47.  
<sup>92</sup> Lieshout op cit p125.  
<sup>93</sup> Ibid p132.

brought France and Germany together in peace.<sup>112</sup> This was certainly a significant achievement, but I would maintain its significance as constitutional development, as will be seen by the many features carried forward into subsequent treaties.

Before proceeding to those treaties which came into force, it is necessary to consider those which did not succeed. As mentioned earlier in the chapter, the idea of a European Defence Community grew from the Pleven Plan of October 1950, a proposal designed by Monnet to create a European army. This had been a response to United States demands for a German contribution to European defence after the outbreak of the Korean War. The conference to discuss it began on 15 February, 1951, just before the ECSC Treaty was signed. The Six were the participants except for the Netherlands, which only sent an observer.<sup>113</sup> The United States took a strong interest. Lieshout describes its role as "arbitrator", and it seems to have resolved many disputes even though the other parties were not *bound* by its decisions.<sup>114</sup>

The conference initially made slow progress, but after the French elections of June 1951 and United States support for the proposed Community, momentum increased. At a meeting in mid-September, the three occupying powers of the Federal Republic agreed to end the Occupation Statute so that Germany could accede to the EDC as a sovereign state. Negotiations dragged on over technicalities. The treaty was finally signed in Paris on 27 May 1952. It bore a strong institutional resemblance to the ECSC. It was to share the Common Assembly and the Court.

Despite France having signed, there were many, including those in government, who had misgivings about it. The political climate in France was unfavourable and the government delayed seeking ratification for as long as possible. There were several changes of government between the signing of the treaty and its attempted ratification. It was introduced in the *Assemblée Nationale* in early 1953 by the Mayer

<sup>112</sup> A Milward *The Reconstruction of Western Europe 1945-195* (London, Methuen, 1984), p407.

<sup>113</sup> Lieshout op cit p125.

<sup>114</sup> Ibid p132.

government which was seeking additional protocols.<sup>115</sup> It therefore did not seek immediate ratification. Germany rejected the additional protocols and the Mayer government fell in May 1953. The Laniel government also sought changes and did not move to ratify pending them. It too fell in June 1954, only to be replaced by the Mendès-France government, which demanded changes so extreme as to suggest that the government really wanted the treaty to fail. When it failed to gain these, it did not support the treaty in the *Assemblée* and it was duly rejected.<sup>116</sup> With it died the European Political Community drafted by the Common Assembly, discussed further in Chapter 3 as part of an examination of the role of the Assembly.

One sequel to the failure of the EDC was the formation of the Western European Union ("WEU"), a defence union, from the basis of the Treaty of Brussels of 1948, by allowing Germany to join. The WEU was intergovernmental and included Britain, so it had a different character to the EDC. The WEU was overshadowed by NATO for many years, but has recently come to play a more prominent role in EU affairs, explored in Chapter 4.

## 2.4 NEGOTIATING THE TREATY OF ROME

The failure of the French parliament to ratify the EDC was a severe blow to the movement for European integration. Political union had been coupled with the highly emotive issue of defence, and both had been lost. Economics remained as a possible sphere for integration, continuing and extending the integration achieved in coal and steel. The Dutch foreign minister Beyen had already put forward the idea of a customs union in the EDC/EPC negotiations.<sup>117</sup> Economic union was less attractive to Monnet and Spaak than defence and high politics but gained in attraction once these had proved too hard. They immediately began to explore its possibilities.<sup>118</sup>

<sup>115</sup> Ibid p135.

<sup>116</sup> Ibid p139.

<sup>117</sup> Milward *Rescue* op cit p187.

<sup>118</sup> Lieshout op cit p150.

The fall of the Mendès-France government  
this process.<sup>119</sup> A more pro-integration gov-  
not only with the support of the anti-inte-  
developed a proposal to add transport and  
second community for nuclear energy. Spa-  
this proposal. Beyen responded by circular-  
Beyen and Spaak met on 23 and 24 April  
approach. The Benelux ministers subsequently  
to the conference together with a Belgian  
These proposals were distributed on 18 May

The conference of the foreign ministers on  
and 2 June. The meeting was very positive.  
level committee chaired by Spaak to work  
Monnet had resigned as President of the H  
the next conference.<sup>120</sup> He and Spaak  
negotiations to Monnet's negotiation techni-  
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As the Messina meeting did not decide be-  
proposals, it is not surprising that Spaak de-  
element of confusion.<sup>122</sup> Both the proposals

The idea of a customs union was not new  
unification of Germany in 1870. Belgium.

<sup>119</sup> Milward op cit p193.

<sup>120</sup> Monnet resigned to establish the Action Comm-  
high calibre lobby group.

<sup>121</sup> Milward op cit p194.

<sup>122</sup> Spaak op cit p228.

The fall of the Mendès-France government in France in February 1955 assisted this process.<sup>119</sup> A more pro-integration government under Edgar Faure took office but only with the support of the anti-integration Gaullists. Spaak and Monnet developed a proposal to add transport and energy to the ECSC and establish a second community for nuclear energy. Spaak called for a conference to discuss this proposal. Beyen responded by circulating his proposal for a customs union. Beyen and Spaak met on 23 and 24 April to try to agree a common Benelux approach. The Benelux ministers subsequently agreed to put both these proposals to the conference together with a Belgian proposal for a European free trade area. These proposals were distributed on 18 May.

The conference of the foreign ministers of the ECSC was held at Messina on 1 and 2 June. The meeting was very positive, leading to the establishment of a high level committee chaired by Spaak to work out the details of further integration. Monnet had resigned as President of the High Authority and could thus not chair the next conference.<sup>120</sup> He and Spaak attributed the success of the ECSC negotiations to Monnet's negotiation technique. Milward argues that the ECSC would not have been concluded if leaders in all the Member States had not perceived it to be in their national interests.<sup>121</sup> It seems likely, but it does seem fair to give Monnet some credit for the way the agreement was achieved.

As the Messina meeting did not decide between the Spaak/Monnet and Beyen proposals, it is not surprising that Spaak described its communiqué as having an element of confusion.<sup>122</sup> Both the proposals were to be considered.

The idea of a customs union was not new. A customs union had preceded the unification of Germany in 1870. Belgium, the Netherlands and Luxembourg had

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<sup>119</sup> Milward op cit p193.

<sup>120</sup> Monnet resigned to establish the Action Committee for the United States of Europe, a very high calibre lobby group.

<sup>121</sup> Milward op cit p194.

<sup>122</sup> Spaak op cit p228.

initiated their "Benelux" customs union in 1944. The United States had suggested a European customs union as part of the Marshall Plan.<sup>123</sup>

A customs union forces its members to charge the same external tariff on imports. This forces an alignment of trade policies which in theory feeds through to economic policy generally. The corollary is that movement of goods within the union must be free. This should enable the most efficient producers in the union to prosper at the expense of the less efficient.

The Spaak committee was to consist of senior government officials chaired by Spaak, a politician. This was a development of the Monnet method explored in Section 2.3. Spaak had the additional advantage of being a Member State minister. This would in theory promote a politically feasible outcome while still giving the opportunity to incorporate technical expertise in the treaties. Once again, Britain was invited to participate in the negotiations. It sent a representative to the Spaak committee who subsequently withdrew citing a lack of faith in the enterprise.<sup>124</sup>

Meetings began in Brussels on 9 July. Spaak claimed that his commitment was to integration and workable solutions rather than to a particular solution.<sup>125</sup> He suggests that the Brussels negotiations succeeded because the negotiators had a common goal.<sup>126</sup> Doubt is again cast by Milward who points out that at the start of the negotiations only the Netherlands favoured the customs union proposal wholeheartedly.<sup>127</sup>

Eight technical committees were established. They progressed slowly. At the end of November, Spaak wound them up and continued negotiations through the executive committee comprising the seven heads of delegation. He seems to have reached the conclusion which had been Monnet's starting point: that progress can be lost in a mire of technicalities and it is better to achieve agreement in broad

<sup>123</sup> Milward op cit p121.

<sup>124</sup> Spaak op cit p232.

<sup>125</sup> Ibid p229.

<sup>126</sup> Ibid p237.

<sup>127</sup> Milward op cit p196.

brush and work out the details later. The cabinet collapsed at the end of the year. The Faure cabinet collapsed at the end of the year. The elections in early 1958 led to the formation of a government.

The Spaak committee resumed on 15 January 1958. The Action Committee for the United States of Europe, with Monnet's views, it stressed the need for a common market called Euratom.<sup>128</sup> Mollet made it clear that France was not developing nuclear weapons, thus a *chasse gardée* for the Member States.<sup>129</sup>

The combination of a customs union and central institutions gradually came to appear. Germany saw the economic advantages of the political advantage of another supranational institution. Minister Erhard would have preferred to give attention to the political need for integration. France for a civil nuclear energy community accepted reluctantly as a companion measure. The situation also improved in the course of the year, mainly through the work of the Spaak committee.

A meeting of foreign ministers was held in Brussels in December 1958. In Euratom and Germany the customs union was accepted. By his legal experts reflecting what had been the "Spaak Report" covered the common market developments.

<sup>128</sup> Lieshout op cit p158.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid p159.

<sup>131</sup> Milward op cit pp197-223.

<sup>132</sup> Lieshout loc cit.

<sup>133</sup> Milward op cit p207.

<sup>134</sup> Lieshout op cit p160.

brush and work out the details later. The executive committee made good progress but the Faure cabinet collapsed at the end of November and early elections were called in France. After the elections in early January, the socialist Mollet managed to form a government.

The Spaak committee resumed on 15 January 1956. A few days later, Monnet's Action Committee for the United States of Europe held its first meeting.<sup>128</sup> In line with Monnet's views, it stressed the need for an atomic energy community, to be called Euratom.<sup>129</sup> Mollet made it clear that Euratom would not prevent France from developing nuclear weapons, thus emphasizing that defence policy was a *chasse gardée* for the Member States.<sup>130</sup>

The combination of a customs union and sectoral policies under the control of central institutions gradually came to appeal to the governments of the Six.<sup>131</sup> Germany saw the economic advantages of a single market of the Six together with the political advantage of another supranational organisation. Although finance minister Erhard would have preferred global free trade, Chancellor Adenauer drew attention to the political need for integration.<sup>132</sup> A majority was mustered in France for a civil nuclear energy community and the customs union was initially accepted reluctantly as a companion measure.<sup>133</sup> Economic conditions in France also improved in the course of the year, making France more inclined to join.

A meeting of foreign ministers was held in February. France continued to favour Euratom and Germany the customs union.<sup>134</sup> Spaak then presented a report drafted by his legal experts reflecting what had been agreed to date.<sup>135</sup> This document, the "Spaak Report" covered the common market, Euratom and other necessary developments.

<sup>128</sup> Lieshout op cit p158.

<sup>129</sup> Id.

<sup>130</sup> Ibid p159.

<sup>131</sup> Milward op cit pp197-223.

<sup>132</sup> Lieshout loc cit.

<sup>133</sup> Milward op cit p207.

<sup>134</sup> Lieshout op cit p160.

The Spaak Report was discussed by the ministers of the Six in Venice on 29 and 30 May 1956. It took less than two hours for them to adopt it as the basis for the negotiation of two new treaties, one for an economic community, the other for Euratom.<sup>136</sup>

The participating states were naturally interested in protecting their less efficient industries and encouraging low tariffs in areas where they were either efficient or did not produce. There were significant differences in economic structure across the Six, making this process and the companion task of determining levels of agricultural protection extremely difficult. The picture was further complicated by the combination of declining industries in some states which were becoming "infant industries" in others. The problem of tariffs was resolved by adopting a mathematical formula for their reduction over time. The Common External Tariff was also adopted by formula. While this method enabled favouritism of some sectors, it did at least have the appearance of objectivity.

Negotiations resumed in Brussels on 26 June. Spaak contrasts the negotiating styles of technicians and politicians. He suggests that technicians tend to stick to their views whereas politicians try for compromise. He nevertheless saw a role for technicians to have ideas and for politicians to create solutions. He also suggests that the expert opinions were tainted by national interest.<sup>137</sup> He recounts the difficulty agreeing to a tariff on bananas. He resolved that impasse through an act of brinkmanship: threatening a press conference to reveal it. This demonstrates again the effectiveness of a well placed threat.<sup>138</sup>

Monnet became involved in the negotiations informally, trying to separate the two communities.<sup>139</sup> One area of great difficulty was whether civil atomic energy technology could be used for military applications. In the end, this was resolved

<sup>135</sup> Spaak op cit p239.

<sup>136</sup> Ibid p240.

<sup>137</sup> Ibid p242.

<sup>138</sup> The subsequent difficulties of the Community over bananas suggests that the problem was not solved!

<sup>139</sup> Lieshout op cit p163.

by the ministers allowing substantial freedom for France, subject to certain restrictions. France once the treaty was in force.<sup>145</sup> This demonstrates also how a large state can flout it leaving

The French minister Maurice Faure proposed the conclusion of an agreement. These were similar working conditions to those in France and the other Member States. Spaak's response the following day. This allowed time for France to resume in a spirit of compromise.<sup>141</sup> France presented yet more demands. In the end sought harmonisation of standards, particularly in the Agreement was not reached but negotiations

Political events hastened agreement. The Soviet invasion of Hungary took place in 1956, reinforcing the need for west European solidarity. They resolved their remaining differences on 6 November

Three issues remained unresolved: the creation of a supranational Commission, Assembly and Council of Ministers, the relationship of the Community to the common market, and the treatment of agriculture

When negotiations resumed, there was agreement that the High Authority of the European Community should make some of its decisions by qualified majority. This would progressively increase with the stages of integration

<sup>140</sup> Spaak op cit p244.

<sup>141</sup> Ibid p246.

<sup>142</sup> Lieshout op cit p165.

<sup>143</sup> Milward op cit p215.

<sup>144</sup> Ibid p216.

by the ministers allowing substantial freedom to the only nuclear-armed power, France, subject to certain restrictions. France proceeded to ignore the restrictions once the treaty was in force.<sup>140</sup> This demonstrates how agreement can be reached but also how a large state can flout it leaving the other states little redress.

The French minister Maurice Faure presented France's conditions for the conclusion of an agreement. These were essentially that the other states adopt similar working conditions to those in France. Many of these were unacceptable to the other Member States. Spaak's response was to adjourn the meeting to the following day. This allowed time for reflection and for negotiations to be resumed in a spirit of compromise.<sup>141</sup> At the subsequent ministerial meeting, France presented yet more demands. In addition to removing trade barriers, it sought harmonisation of standards, particularly of wages and working conditions. Agreement was not reached but negotiations were allowed to continue.<sup>142</sup>

Political events hastened agreement. The Anglo-French invasion of Egypt and the Soviet invasion of Hungary took place in early November. Both events tended to reinforce the need for west European solidarity. Mollet and Adenauer swiftly resolved their remaining differences on 6 November.<sup>143</sup>

Three issues remained unresolved: the relative power of the proposed supranational Commission, Assembly and Court as against the intergovernmental Council of Ministers, the relationship of the Member States' overseas territories to the common market, and the treatment of agriculture.<sup>144</sup>

When negotiations resumed, there was agreement that the Commission not be as powerful as the High Authority of the ECSC. The Council of Ministers was to make some of its decisions by qualified majority instead of unanimity. This would progressively increase with the stages of tariff reduction. The calculation of the

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<sup>140</sup> Spaak op cit p244.

<sup>141</sup> Ibid p246.

<sup>142</sup> Lieshout op cit p165.

<sup>143</sup> Milward op cit p215.

<sup>144</sup> Ibid p216.



weighting of votes for a qualified majority caused difficulty then as it continues to do today given the variety of principles on which it could be based.<sup>145</sup> The Assembly received mostly consultative powers but also, as for the ECSC, the drastic power to dismiss the Commission.

The issue of the relationship of the Common Market to the Member States' overseas territories, of which France had by far the most, could only be resolved by a meeting of the Heads of Government in mid February 1957. By extending the preferential treatment received by the overseas territories to the whole common market and establishing an investment fund, the cost of the subsidy was spread. Eventually Germany, even though it had no colonies, agreed.<sup>146</sup>

The two Treaties of Rome, one establishing the European Economic Community ("EEC"), the other the European Atomic Energy Community ("EAEC"), were signed on 25 March, 1957 even though their texts had not been finalised.<sup>147</sup> As the European Atomic Energy Community has not been of great subsequent political or constitutional significance, I do not deal with it further.

The negotiations of the Treaties of Rome had been extremely difficult and were concluded more because, for political reasons, they could not be allowed to fail than because the parties wholeheartedly agreed to the final terms. It is therefore not surprising that the Communities have often been a forum for conflict. However, the fact of agreement being reached enabled that conflict to be part of the process of European construction rather than destruction.

The negotiations were a combination of conferences at official, ministerial and head of government level. This echoes subsequent decisionmaking in the Communities. It is quite an effective way to combine the making of major decisions with the working out of technical details. It is not so good for obtaining public input or winning over public opinion.

<sup>145</sup> Ibid p217.

<sup>146</sup> Spaak op cit p248.

<sup>147</sup> Lieshout op cit p170.

## 25 THE EUROPEAN ECONOMIC TREATY

The Treaty of Rome ("EECT") is not in the be construed as one. In the analysis below. features.<sup>148</sup> The first point to note is that the Paris. It built on the foundations of the "community", similar in many ways and, with Court and the Common Assembly of the ECSC.

### *Constitutional Character*

Like the Treaty of Paris, the Treaty of Rome of state who are enacting it. This emphasis governments of the Member States rather than in a constitution. However, the preamble is phrase is: "Determined to lay the foundations peoples of Europe". This emphasizes that foundation for the process of further constitution apparently to be neverending. Constitutions state of affairs which is intended to last 'constitution' instead inaugurates an entity in process of change. This is one respect in which been true to the original vision. My vision out is antithesis: a federal Commonwealth is not continuation of separate layers of government desirability of preserving separate 'peoples' in appearance, I believe that my vision is still federal Commonwealth can enable 'ever closer provides a structure under which this can be p advocate the maintenance of cultures but also political communication entailed by constitution

<sup>148</sup> I refer to the article numbers as originally enacted.

## 2.5 THE EUROPEAN ECONOMIC COMMUNITY TREATY

The Treaty of Rome ("EECT") is not in the form of a constitution yet it came to be construed as one. In the analysis below, I attempt to identify its constitutional features.<sup>148</sup> The first point to note is that the EECT drew much from the Treaty of Paris. It built on the foundations of that treaty by establishing a second "community", similar in many ways and, while a separate legal entity, sharing the Court and the Common Assembly of the ECSC.

### *Constitutional Character*

Like the Treaty of Paris, the Treaty of Rome is a treaty, so it first recites the heads of state who are enacting it. This emphasizes that it is an emanation of the governments of the Member States rather than their people, as one would expect in a constitution. However, the preamble is worthy of a constitution. Its key phrase is: "Determined to lay the foundations of an ever closer union among the peoples of Europe". This emphasizes that the treaty is intended to be the foundation for the process of further constitutional development. This process is apparently to be neverending. Constitutions usually *constitute*: they establish a state of affairs which is intended to last for an indefinite period. This 'constitution' instead inaugurates an entity but also sentences it to a perpetual process of change. This is one respect in which subsequent developments have been true to the original vision. My vision outlined in Chapter 1 may appear to be its antithesis: a federal Commonwealth is not 'ever closer', but seeks to ensure continuation of separate layers of government. I also doubted the possibility or desirability of preserving separate 'peoples' in an integrating society. Despite this appearance, I believe that my vision is still in keeping with the preamble. A federal Commonwealth can enable 'ever closer union' if that is people's will. It provides a structure under which this can be pursued or a stable union enjoyed. I advocate the maintenance of cultures but also openness to the possibility that the political communication entailed by constitutionalisation of the Commonwealth as

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<sup>148</sup> I refer to the article numbers as originally enacted.

a democratic polity, combined with integration, would sow the seeds of a common culture.

Inaugurating a process of change towards a goal is unusual in a constitution, but does not prevent the treaty being regarded as one. Like a constitution, the treaty established an entity with institutions, powers and limitations.

Art 1 established a European Economic Community. I discussed in section 2.3 the rich possibilities of 'Community'. They are even richer here in a Community with a much broader range of responsibilities. This does not answer the question of what a "community" is in this context, apart from "the entity created by this treaty". Under Art 210, the EEC, like the ECSC, was endowed with legal personality. It received specific treaty-making power under Art 228, the extent of which continues to cause difficulty.<sup>149</sup> Art 238 provided for agreements between the Community, a third state, a union of states, or an international organisation.<sup>150</sup> The Community has entered into a large number of association agreements including free trade agreements and agreements which substantially extend the operation of the Community to a third state without extending full membership, eg the European Economic Area. The ability to make international agreements is a significant aspect of the Community's state-like powers, but is also a feature of other international organizations with legal personality.

Pre-existing treaties between Member States and third countries continued to bind Member States, but they were exhorted to eliminate any incompatibility with Community obligations.<sup>151</sup> This shows that the Community was not a successor to the Member States and did not inherit their obligations. It also subordinates Community law to these pre-existing obligations but subsequent case law has indicated that it is a Community law obligation for Member States to renounce

<sup>149</sup> See Opinions 1/94 [1994] ECR I-5267, 2/94 [1996] ECR I-759 and 3/94 [1995] I-4577.

<sup>150</sup> Art 229 to 231 provide for relations with the United Nations and the General Agreement on Tariffs and Trade, the Council of Europe, and the Organisation for European Economic Co-operation. These substantially reproduce the provisions of the ECSC. It has observer status at the UN. It has not been able to join the Council of Europe (see Chapter 4).

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Art 211, the Community was given in ca  
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They set out specific objectives, created institutio  
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Member States" (2001) 26 ELRev 187.

inconsistent international law obligations where this is possible under international law,<sup>152</sup>

Under Art 211, the Community was given in each Member State the most extensive capacity accorded to legal persons, in particular the capacity to own property and enter contracts. These qualities were all compatible with being an international organization. It is in the institutions and powers that the EEC differed from any previous international organization except the ECSC.

Art 223 exempted matters of national security from the treaty. This gave Member States complete freedom in their manufacture and trade of arms.<sup>153</sup> This provision demonstrates how far the Community was from being a state. Progress towards a common defence has been very slow despite extensive co-operative defence arrangements. This area has been significantly transformed by the TEU (See Chapter 4) but without trammeling Member State freedom.

The treaty set out specific objectives, created institutions and provided procedures for them to attain the objectives. The objectives were extremely wide, giving the Community the potential to govern many areas of life. This was counteracted by the great power of the Member States in determining the content of Community legislation through role of the Council in the legislative procedures, especially those requiring unanimity. The Treaty created a new supranational organ with considerable power to shape integration, the Commission, and made use of the Court and the Assembly created by the ECSC. These institutions have subsequently worked for closer integration, while the Member States both within and outside the Council, while working on integration, have also expressed varying degrees of caution ranging at times to outright opposition.

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<sup>151</sup> Art 234. Under Art 233, the arrangements between Belgium and Luxembourg and the Benelux customs union were permitted to continue. This could be seen as an early example of variable geometry (see Chapter 4).

<sup>152</sup> See J Klabbers "Moribund on the 4<sup>th</sup> of July? The Court of Justice on the prior Agreements of the Member States" (2001) 26 *ELRev* 187.

Art 5 set out a fundamental requirement of a federal constitution: that the Member States shall abide by their obligations under the treaty.<sup>154</sup> This requirement is so obvious in most constitutions that it need not be stated, but in a treaty, it is necessary to emphasise its binding character. Art 5 actually goes further and attempts to engender a spirit of loyalty, but such a thing is difficult to legislate. This is not a feature of the ECSC and indicates a qualitative step towards a constitution.

Art 217 allowed the Council, acting unanimously, to decide the rules governing the languages of the institutions. Given that the Community was not attempting to impose a single culture, and that all the official languages of the Member States were already official languages of the ECSC, it is not surprising that all the official languages of the Member States have remained official languages of the Community. This presently means eleven languages, and the interpretation and translation facilities required are considerable. English and French are used as working languages, but all official documents must be fully translated. The Community would undoubtedly be more efficient if it used fewer languages, but it would also be less accessible and might well lose the support of those whose languages were not represented. Paradoxically, the diversity of languages actually impedes debate at the European level because of the need to translate for national audiences. Audiences usually do not have direct access to what is being said in other languages. The growth of a pan-European political culture may await a pan-European language, as discussed in Chapter 1. There is some sign that English may be that language, but pan-European status is a long way away. German reunification and eastward enlargement of the Community will increase the power of German language but also add even more official languages.

Any Member State or the Commission could submit proposals to amend the treaty and the Council, after consulting the European Parliament and the Commission

<sup>153</sup> Under Art 225, there is a special procedure to bring possible abuses of these articles before the ECJ *in camera*. The Member States of the EU include some of the world's leading arms suppliers, rather undermining its ability to conduct an ethical foreign policy.

<sup>154</sup> Art 220 3<sup>rd</sup> indent provided for recognition of judgments of other Member States, another common federal requirement.

could call a conference of representatives of the Member States in accordance with their obligations under the treaty. The amendments to the treaty to date. It is a procedure for constitutional amendment either through parliament, referendum, or a combination of these. The ECSC has a consultation in the amendment process and in the acceptance. As I argue in Chapter 5, a new amendment

The accession of new members originally required the Council.<sup>155</sup> Only a "European State" could apply for membership, as discussed below in relation to the treaty between the Member States and the Commission.

#### Objectives

Art 2 set out the tasks of the Community: to establish progressively approximating the economic policies, to promote prosperity and closer relations between the Member States in the methods set out in Art 3.

There was a heavy emphasis in the EEC Treaty on fostering economic growth. Although there was a reference to improving living standards, the policy emphasised harmonisation of Member States' policies to improve employment opportunities by assisting the provision of welfare by the Community. A European system of taxation and redistribution were missing except for the Social Fund.

<sup>155</sup> Art 236.

<sup>156</sup> Art 237.

could call a conference of representatives of the Member States to determine amendments.<sup>155</sup> As this is a treaty, the amendments must then be ratified by the Member States in accordance with their constitutional requirements. The operation of this article will be considered in subsequent chapters when I examine changes to the treaty to date. It is a procedure very much reflecting that the EECT is a treaty rather than a constitution in form. The Member States conduct their constitutional amendment either through parliament, a constitutional convention, a referendum, or a combination of these. The EC method allows for minimal public consultation in the amendment process and in only some cases an input into their acceptance. As I argue in Chapter 5, a new amendment process is needed.

The accession of new members originally required only a unanimous vote of the Council.<sup>156</sup> Only a "European State" could apply, raising the interesting issue of what is "European", as discussed below in relation to Art 227. Accession required a treaty between the Member States and the new member which also required ratification.

### *Objectives*

Art 2 set out the tasks of the Community: to establish a common market and by progressively approximating the economic policies of the Member States, to promote prosperity and closer relations between states. This was to be achieved by the methods set out in Art 3.

There was a heavy emphasis in the EECT on fostering good economic conditions. Although there was a reference to improving living standards, Title III on Social Policy emphasised harmonisation of Member State measures rather than separate provision of welfare by the Community. A European Social Fund was established to improve employment opportunities by assisting with training and transport.<sup>157</sup> This was a continuation of provisions under the ECSC. The basic functions of a state to tax and redistribute were missing except for agricultural levy and subsidy, and the Social Fund.

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<sup>155</sup> Art 236.

<sup>156</sup> Art 237.



### *Institutions*

The EEC presented as a puzzle in its constitutional structure. It had elements of both a state and an international organisation. Its Court of Justice and Common Assembly look like state institutions, even more so when the Common Assembly changed its name to the European Parliament. There was already a precedent for international courts: the International Court of Justice and the European Court of Human Rights. The ECJ had some points of similarity with them, but it was also to enforce a body of law extending well beyond the traditional international law jurisdiction. Unlike the European Court of Human Rights, the ECJ does not require domestic remedies to be exhausted before it can act. The EECT gives the possibility for the lowest court in the Member States to seek a "preliminary ruling" from the ECJ, thus firmly entrenching it within the national court systems and law of the Member States.

The Common Assembly was to be the one already serving the ECSC. The EECT provided for the possibility of direct election by universal suffrage according to a uniform procedure.<sup>157</sup> This was unprecedented for international parliamentary assemblies and very much what one would expect of a national parliament. That it took until 1979 for direct election to be implemented, and even then not according to a uniform procedure, demonstrates the extent to which the objectives of the Treaty could be frustrated by the acts of the Member States.

The Commission and the Council have clearer forerunners in international organisations. The supranational High Authority of the ECSC had been something new. The new Commission had less sweeping powers and more resemblance to the secretariat of an international organisation. However it still had significant resemblance to the High Authority, most notably in its monopoly on the initiation of legislation. Monnet's vision of a government of experts had been largely preserved. However as with the ECSC, there was to be a Council of Ministers, this time with ultimate control over what legislation was enacted. Although the Treaty provided for the gradual introduction of majority or weighted majority

<sup>157</sup> Art 123.

<sup>158</sup> EECT Art 138(3).

voting in the Council, many matters would respect, the Council would be little different where a state would only be bound if it chose would have a power of veto.

A Council of Ministers, at least in its name government. In the EEC, it was like the chief legislator, except that its deliberations were overseeing the implementation of legislation both a legislature and an executive.

The Court of Justice resembled a national appellate jurisdiction.<sup>159</sup> It also resembled an over disputes between Member States or between institutions,<sup>160</sup> but unlike the International Court of jurisdiction. The treaty provided for the enforcement against persons other than states through the States.<sup>161</sup> This was necessary to give practical it would also have been useful to enforce themselves before national courts. The ECJ had

from the point of view of a classical separation of Parliament without real legislative power, an adequate accountability or exclusive competence embodiment of the judicial function, and a democratically accountable and combined considerable executive power.<sup>162</sup> It may be

<sup>159</sup> "Appellate" does not sufficiently describe the problem discussed further in Chapter 3.

<sup>160</sup> Art 219 gave it a monopoly in deciding such disputes.

<sup>161</sup> Art 192.

<sup>162</sup> See *Francovich and Bonifazi v Italy* Cases 6 and 9/90.

<sup>163</sup> See further K Lenaerts "Some Reflections on the Community" (1991) 28 CMLRev 11.

voting in the Council, many matters would still require unanimity, and in this respect, the Council would be little different from an international organisation where a state would only be bound if it chose to be. Indeed in the EEC, every state would have a power of veto.

A Council of Ministers, at least in its name, sounds like a cabinet in a national government. In the EEC, it was like the chamber of a parliament in that it was a legislator, except that its deliberations were in private. It also had a role in overseeing the implementation of legislation, and in this it combined elements of both a legislature and an executive.

The Court of Justice resembled a national court, combining constitutional and appellate jurisdiction.<sup>159</sup> It also resembled an international court in its jurisdiction over disputes between Member States or between Member States and Community institutions,<sup>160</sup> but unlike the International Court of Justice, it had compulsory jurisdiction. The treaty provided for the enforceability of pecuniary obligations against persons other than states through the civil procedures of the Member States.<sup>161</sup> This was necessary to give practical efficacy to the Community, though it would also have been useful to enforce obligations of the Member States themselves before national courts. The ECJ has since created this possibility.<sup>162</sup>

From the point of view of a classical separation of powers the EEC presented a Parliament without real legislative power, an executive, the Commission, without adequate accountability or exclusive competence, a Court which seemed the pure embodiment of the judicial function, and a Council which was only indirectly democratically accountable and combined supreme legislative power with considerable executive power.<sup>163</sup> It may be observed that all Member States'

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<sup>159</sup> "Appellate" does not sufficiently describe the preliminary ruling procedure but this will be discussed further in Chapter 3.

<sup>160</sup> Art 219 gave it a monopoly in deciding such disputes.

<sup>161</sup> Art 192.

<sup>162</sup> See *Francovich and Bonifaci v Italy* Cases 6 and 9/90 [1991] ECR I-5357.

<sup>163</sup> See further K Lenaerts "Some Reflections on the Separation of Powers in the European Community" (1991) 28 *CMLRev* 11.

systems of government also depart from the schema, but few do so as radically as the Community.

An explanation for the lack of a clear separation of powers in the Treaty is that it is not in the form of a constitution. There is no mention of sovereignty: the Community and its institutions are given power to legislate in particular areas to achieve specified objectives. However, constitutional elements of the Treaty have made it possible for constitutional development to take place. The ECJ, either at the behest of an activist Commission, the Parliament, or private litigants, has been able to interpret Community competences expansively. The ECJ has also interpreted restrictions on Member State action expansively, creating what amount to rights to enjoy the Community freedoms. This kind of constitutional development through judicial interpretation has been observed in other federations such as the United States and Australia and is examined further in Chapter 3.

Under Art 214, members of institutions, committees and any other officials and servants of the EC are required not to disclose information "of the kind covered by the obligation of professional secrecy". This is a rather vague evocation of a widely understood concept. It did not establish a code of public access to information. This principle has been slowly established with many limitations in subsequent years.

The legislative procedures demonstrate the roles of the institutions.<sup>164</sup> Art 189 provided for regulations, directives, decisions and recommendations which could be made by the Council, the Commission or a combination thereof. These were a variant of the legislative procedures in the ECSC. A major difference was the greater role of the Council in legislation compared to the ECSC. Regulations had general application and were binding and directly applicable.<sup>165</sup> Directives were binding as to the result to be achieved but left to national authorities the method of implementation. Regulations are like ordinary statutes in a state system. The directive is an instrument of co-operative federalism. Its status when not

<sup>164</sup> Arts 189 to 192.

<sup>165</sup> That is, they apply without the need to be transposed into Member State law.

transposed either properly or at all into  
effect, further discussed in Chapter 3. Do  
addressed. Recommendations and opinions h

Under Art 190, regulations, directives and  
reasons on which they were based. This was  
Treaty basis determines the legislative pro  
participation of the Parliament and the voting  
look it upon itself to determine whether the  
for a measure, cementing its role as a consti  
Chapter 3.

An Economic and Social Committee ("Ecos  
Consultative Committee established for the EC  
It reflected a corporatist vision which se  
democracy, but perhaps provided a forum  
unable to provide. Members were appointed  
year terms. Despite their representative rol  
mandatory instructions. Some articles specific  
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The location of the seats of the institutions wa  
the seat of the institutions to be determined b  
not happened and only interim arrangements  
government almost always seems to be a bone  
are being created. In Australia and the United  
new capital cities. Although there are some  
government in a single place, if that place is  
there is a danger of senior officials being out  
country. It has been suggested that locating  
Duchy of Luxembourg has enabled it to pu

<sup>166</sup> Arts 193 to 198.

transposed either properly or at all into Member State law has caused much difficulty, further discussed in Chapter 3. Decisions bound those to whom they are addressed. Recommendations and opinions have no binding force.

Under Art 190, regulations, directives and decisions were required to state the reasons on which they were based. This was and remains highly significant as the treaty basis determines the legislative procedure required, in particular the participation of the Parliament and the voting procedure in the Council. The ECJ took it upon itself to determine whether the "correct" treaty basis had been chosen for a measure, cementing its role as a constitutional court as discussed further in Chapter 3.

An Economic and Social Committee ("Ecosoc") was established, similar to the Consultative Committee established for the ECSC.<sup>166</sup> It had purely advisory status. It reflected a corporatist vision which seems outdated in a parliamentary democracy, but perhaps provided a forum for dialogue which a parliament is unable to provide. Members were appointed by the Council for renewable four year terms. Despite their representative role, they were not to be bound by mandatory instructions. Some articles specifically required consultation of Ecosoc as part of the legislative process.

The location of the seats of the institutions was problematic. Art 216 provided for the seat of the institutions to be determined by common accord. To date this has not happened and only interim arrangements have been made. The seat of government almost always seems to be a bone of contention when federal systems are being created. In Australia and the United States, it resulted in the creation of new capital cities. Although there are some advantages in having the seat of government in a single place, if that place is remote and has no other industries, there is a danger of senior officials being out of touch with life in the rest of the country. It has been suggested that locating the ECJ in the "fairytale" Grand Duchy of Luxembourg has enabled it to pursue its constitutionalising agenda

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<sup>166</sup> Arts 193 to 198.

away from public gaze.<sup>167</sup> The concentration of the Commission and Council in Brussels had led to its recognition as the *de facto* capital of the Community. While reasonably central and well connected for the original Community, it was perhaps sufficiently little known by most of the EEC population as to become code for "a far off place where faceless bureaucrats meddle with our lives".<sup>168</sup> The Community in due course acquired impressive buildings in Brussels, but they are more practical than beautiful or inspiring and thus paradoxically enhance the impression of facelessness. The Assembly was forced to divide its time between Brussels, Luxembourg and Strasbourg, which has not assisted its deliberations or its credibility. The forthcoming eastward and southward expansion of the EU will make Brussels significantly north-western but the difficulty in allocating seats makes movement unlikely.

#### *Powers*

Rather than granting the Community enumerated powers as might be expected in a federal constitution, the treaty required the Community to enact policies in particular areas pursuant to its objectives. It then provided that if the Community lacked the necessary powers to pursue an objective, the Member States could vote unanimously to grant it such power.<sup>169</sup> This seemed to make the possibility for expanded power virtually unlimited except for the significant limitation of unanimity.

The treaty emphasized perfection of a single market for goods, services capital and labour. This was to be achieved through a combination of prohibitions on Member State action which might distort the market, harmonization of Member State laws on matters affecting markets, and Community legislation to establish common standards. This emphasis on the market has restricted and distorted the measures that the Community can take in the more general interest of society. A constitution with more general powers would have enabled a more direct addressing of such measures, but would have represented a more direct threat to the sovereignty of the Member States. In the event, the market emphasis has not

<sup>167</sup> E Stein "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 75 *AJIL* 1.

<sup>168</sup> Perhaps this is always the fate of a capital city!

prevented a large quantity of Community law  
have also been extended by amendments to  
measures in the area have already been attempted

The treaty required co-ordination of economic  
rather than having these set by the Community  
thus a procedure to establish a common  
established before a single currency became

It was a fundamental principle that ex-  
discrimination on the grounds of nationality  
for the Member States to agree on measures  
nationals in the protection of person and en-  
double taxation. Thus the Community did not  
inception. The article also made it possible for  
a new Member State. Corporations are better  
of the common market. Art 221 specifically  
nationality grounds in the treatment of invest-  
specified that the Treaty shall in no way  
property ownership. As will be seen in Chap  
ways to avoid this apparent limitation on the sc

Restrictions on constituent units are common  
usually accompanied by a grant to the federal  
by the constituents. The EECT did not do  
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As noted above, under Art 235, the Community  
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the common market, this was a substantial gain

<sup>169</sup> Art 235.

<sup>170</sup> Art 6. This article was subsequently removed  
provisions.

<sup>171</sup> Art 7.

prevented a large quantity of Community legislation. The Community's powers have also been extended by amendments to the treaty, but often only after policy measures in the area have already been attempted through existing means.

The treaty required co-ordination of economic policies by the Member States rather than having these set by the Community.<sup>170</sup> Co-ordination is clearly weaker than a procedure to establish a common policy and tighter rules had to be established before a single currency became possible.

It was a fundamental principle that except in very limited circumstances, discrimination on the grounds of nationality was prohibited.<sup>171</sup> Art 220 provided for the Member States to agree on measures to ensure equivalent treatment for nationals in the protection of person and enjoyment of rights and prevention of double taxation. Thus the Community did not create a common citizenship at its inception. The article also made it possible for corporations or firms to relocate to a new Member State. Corporations are better placed than people to take advantage of the common market. Art 221 specifically provided for non-discrimination on nationality grounds in the treatment of investors within three years, but Art 222 specified that the Treaty shall in no way prejudice Member States' laws of property ownership. As will be seen in Chapter 3, the ECJ has found ingenious ways to avoid this apparent limitation on the scope of Community law.

Restrictions on constituent units are common in federal constitutions. They are usually accompanied by a grant to the federal authority of the powers transferred by the constituents. The EECT did not do this so clearly, but did provide a mechanism for Community action to perfect the common market under Art 100. As noted above, under Art 235, the Community could take measures necessary to attain its objectives even where the treaty did not provide the necessary powers. Given the breadth of the objectives and the scope of measures justifiable to perfect the common market, this was a substantial grant of power to the Community.

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<sup>169</sup> Art 235.

<sup>170</sup> Art 6. This article was subsequently removed and replaced by much more detailed provisions.

<sup>171</sup> Art 7.

Unanimity in the Council was required for both Arts 100 and 235, thus preserving the Member States' power of veto, but a federal characteristic was created. The unanimity requirement held back many desirable measures and it was one of the major steps of the Single European Act<sup>172</sup> to introduce an easier procedure for harmonisation.

Art 36 allowed the Member States to impose restrictions on imports or exports on the grounds of public morality, public policy, public security, the protection of humans, animals, plants, national treasures of artistic, historic or archaeological value, and the protection of industrial or commercial property. These powers were subject to judicial review and were curtailed when the Community had legislated in the area, but seem designed to allow Member States some protection of their national interests and cultural identity.

Health protection would be gradually ensured through Community measures but until then was left to the Member States. It gave rise to "a royal abundance of case law".<sup>173</sup> Public policy and security are more difficult to define and have also been the subject of considerable litigation.<sup>174</sup> The ECJ has not accepted that a Member State's own judgement of public policy is sufficient. A broad reading of such a power could have made integration stall. In relation to industrial property, it was the intention of the treaty not to affect property rights, but the ECJ prohibited the exercise of property rights where this would violate free movement of goods.<sup>175</sup> This does not seem a valid distinction – of what value is a right that cannot be exercised? It is just one of many ways in which the court has subordinated the Member States' powers to those of the Community.

A Common Agricultural Policy ("CAP") was to be established.<sup>176</sup> This was one of the pillars of the Community, a centralisation of agricultural subsidy making

<sup>172</sup> See Chapter 3.

<sup>173</sup> Kapteyn *op cit* p393 and cases cited at n190.

<sup>174</sup> Eg *Commission v Italy* C95/81 [1982] ECR 2187; *Prantl* C16/83 [1984] ECR 1299. In relation to public security, there have been *Campus Oil* C72/83 [1984] ECR 2727 and *Centre Leclerc* 231/83 [1985] ECR 305.

<sup>175</sup> Eg *Centrapharm* 16/74 [1974] ECR 1147.

Community farmers among the new  
eliminating competition between them:  
Community expenditure. Its constitution  
Community to regulate a major area of  
created by the provisions and their inter  
a major source of Community litigation  
discontent for less protected agricultur  
hampered the Community's attempts to  
has been significantly reformed but seen

The treaty provided for free movement  
create a right of free movement.<sup>177</sup> E  
health, security or public policy,  
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recognised that facilitating free movement  
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central social security systems.

The treaty also regulated "social policy"  
improved working conditions and living  
to harmonise them. No power was grant  
the treaty did establish a European Social  
similar to that in the ECSC.<sup>178</sup> There was  
training policy. These provisions enhan  
directly assisting workers. A Europea

<sup>176</sup> Arts 38 to 47.

<sup>177</sup> Art 48.

<sup>178</sup> Arts 117 to 128.

<sup>179</sup> Arts 121 to 128.

Community farmers among the most protected in the world and largely eliminating competition between them. This has been by far the greatest area of Community expenditure. Its constitutional significance was in power it gave the Community to regulate a major area of the economy and in the rights of producers created by the provisions and their interpretation by the ECJ. These too have been a major source of Community litigation. The CAP has also been a major source of discontent for less protected agricultural producers around the world and has hampered the Community's attempts to open up global markets in other sectors. It has been significantly reformed but seems politically impossible to phase out.

The treaty provided for free movement of workers to be facilitated, but did not create a right of free movement.<sup>177</sup> Exceptions were permitted on grounds of health, security or public policy, including exclusion from government employment. Here is another reminder of the preservation of the states. It was recognised that facilitating free movement required the possibility of bringing the worker's family and having adequate social security, but it has been difficult to co-ordinate national social security systems based on contributions and much litigation has been required to ensure that workers and their families received equal treatment in a second state. It is notable that federal states tend to have central social security systems.

The treaty also regulated "social policy".<sup>178</sup> The Member States agreed to promote improved working conditions and living standards for workers while also working to harmonise them. No power was granted to the Community to achieve this, but the treaty did establish a European Social Fund to assist redeployment of workers similar to that in the ECSC.<sup>179</sup> There was also provision for a common vocational training policy. These provisions enhanced the Community's spending role in directly assisting workers. A European Investment Bank ("EIB") was also

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<sup>176</sup> Arts 38 to 47.

<sup>177</sup> Art 48.

<sup>178</sup> Arts 117 to 128.

<sup>179</sup> Arts 121 to 128.



established under the treaty.<sup>180</sup> Both the European Social Fund and the EIB involved fiscal transfer, but on a fairly small scale.

Under Art 119, each Member State had to ensure that men and women received equal pay for equal work, a progressive measure for the time. The giving of full weight to this provision in *Defrenne v SABENA*<sup>181</sup> in 1976 was so momentous that the ECJ decided to restrict it to prospective effect. Member States often seem not to have taken sexual equality in the workplace seriously, but a continuing flow of decisions from the ECJ has forced improvements in practice.

The treaty also provided for freedom of establishment of the self-employed or enterprises, achieved by requiring Member States to phase out restrictions.<sup>182</sup> This too was not in the form of a positive right and included the possibility of Member State restrictions similar to those in Art 36. The treaty facilitated progressive liberalisation of trade in services.<sup>183</sup> Again, no positive freedom was established. There was no timetable for the achievement of full liberalisation.

The treaty facilitated progressive liberalisation of capital movements.<sup>184</sup> Once again, no positive rights were created. Art 70 actually contemplated the possibility that liberalisation could be reversed. The drafters were proceeding cautiously in this sensitive area. Capital movements were not fully liberalised until 1990.

The treaty sought to establish a common transport policy.<sup>185</sup> This was always going to be difficult given the extent of state involvement in the sector. Progress towards a common policy depended very much on the Member States' will to legislate a common policy, which was lacking for many years.

<sup>180</sup> Arts 129 and 130.

<sup>181</sup> C43/75 [1976] ECR 455.

<sup>182</sup> Arts 52 to 58.

<sup>183</sup> Arts 59 to 66.

<sup>184</sup> Arts 67 to 73.

<sup>185</sup> Arts 74 to 84.

The treaty established the basis for an  
regulation.<sup>186</sup> This is one of the areas where  
action have had a direct impact on private  
jurisdiction over competition issues had been  
the heavily cartelised coal and steel industry  
EEC to address the many anticompetitive  
which would otherwise have restricted the competition.

The treaty sought to impose the competition  
"in so far as the application of such rules do  
their tasks."<sup>187</sup> In practice, this has allowed substantial  
interaction between the state and competition.  
There was no outright prohibition of such action.  
Commission to suggest measures in relation to  
them, and for the ECJ to prohibit them.  
solutions.

Another sensitive area covered was taxation  
the abolition of internal tariffs with provision  
not discriminatory. It was also necessary to ensure  
taxation did not distort the market. The tax  
EEC was more about the creation of a market  
of income. There was still enormous scope for  
investment decisions. Complete tax harmonisation  
and is not a feature of most federations. The  
the Community has limited its effectiveness as to  
citizens. Although direct taxation might be  
citizens to take a closer interest in their political  
financed by contributions from the Member States.

<sup>186</sup> Arts 85 to 94.

<sup>187</sup> Art 90.

<sup>188</sup> Arts 92 to 94.

<sup>189</sup> Arts 95 to 99.

<sup>190</sup> Art 200.

The treaty established the basis for an extensive regime of competition regulation.<sup>186</sup> This is one of the areas where Community legislation and executive action have had a direct impact on private parties, especially corporations. Jurisdiction over competition issues had been critical in the ECSC to restructure the heavily cartelised coal and steel industries. It was equally necessary in the EEC to address the many anticompetitive horizontal and vertical arrangements which would otherwise have restricted the creation of a free common market.

The treaty sought to impose the competition rules on public monopolies but only "in so far as the application of such rules does not obstruct the performance" of their tasks.<sup>187</sup> In practice, this has allowed such monopolies to continue. Another crucial interaction between the state and competition is state aids to industry.<sup>188</sup> There was no outright prohibition of such aids, but instead a procedure for the Commission to suggest measures in relation to aids, for the Council to authorise them, and for the ECJ to prohibit them, but the emphasis was on political solutions.

Another sensitive area covered was taxation.<sup>189</sup> It was necessary to complement the abolition of internal tariffs with provisions ensuring that national taxation was not discriminatory. It was also necessary to ensure that Member State indirect taxation did not distort the market. The taxation measures demonstrate that the EEC was more about the creation of a market than a system for the redistribution of income. There was still enormous scope for tax differences to affect trade and investment decisions. Complete tax harmonisation would be politically impossible and is not a feature of most federations. The lack of direct taxation of citizens by the Community has limited its effectiveness and attenuated its relationship with its citizens. Although direct taxation might be politically unpopular, it might lead citizens to take a closer interest in their polity. Instead, the Community was financed by contributions from the Member States based on size and wealth.<sup>190</sup>

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<sup>186</sup> Arts 85 to 94.

<sup>187</sup> Art 90.

<sup>188</sup> Arts 92 to 94.

<sup>189</sup> Arts 95 to 99.

<sup>190</sup> Art 200.

This system was supplemented by provision for financing from the EEC's "own resources" by Council decisions in 1970 and 1985.<sup>191</sup> These consist principally of duties collected under the Common External Tariff and a proportion of the Value Added Tax collected by each Member State. The EEC was required to have a balanced budget.<sup>192</sup> It was thus deprived of deficit budgeting, something of which all its Member States have taken advantage.

A special budgetary legislative procedure was laid down in Art 203. Until the advent of the co-decision procedure, it gave the European Parliament more power than any other procedure, including, under Art 203(8), the power to reject the budget. Under Art 204, if a new budget has not been approved, the EC is able to continue to operate on the same terms as the previous year, preventing the kind of government fiscal crisis which can occur in a bicameral system when one house of parliament refuses to pass the budget.

The treaty provided for the Council to make regulations on procedures for implementing the budget and preparing accounts.<sup>193</sup> Stricter constitutional requirements might have tightened the Community financial system. Requirements have since been tightened and enhanced by the creation of the Court of Auditors.

Art 101 allowed Community directives to require elimination of competitive distortion caused by legislation. Art 102 struck the despairing note that if a Member State did not take an action recommended by the Commission to remedy a distortion, other Member States did not need to take it either. This demonstrated the international law origins of the Community and the initial lack of central enforceability of Community law. These features are also apparent in the provisions for Member States suffering a balance of payments crisis.<sup>194</sup> Rather than being able to solve the problem, the treaty allowed the state concerned to

<sup>191</sup> OJ L94 28 April, 1970; OJ L128, 14 May, 1985.

<sup>192</sup> Art 199.

<sup>193</sup> Art 209.

<sup>194</sup> Arts 104 to 109.

derogate from its obligations. This sec  
subsequent progress towards monetary uni

A corollary of a customs union was a co  
policy on Community external trade.<sup>195</sup> O  
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GATT and WTO relations from the Membe

#### *Geographical Application*

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#### *Temporal Application*

Art 8 set out procedures for progressiv  
Constitutions often have transitional provisio

<sup>195</sup> Arts 110 to 113.

derogate from its obligations. This section has been extensively altered by subsequent progress towards monetary union.

A corollary of a customs union was a common commercial policy, a common policy on Community external trade.<sup>195</sup> Co-ordination was achieved during the transitional period, during which Community action was also possible, and after which the Community gained the power to set tariffs, enter tariff and trade agreements, set export policy and regulate subsidies and dumping. These were significant state-like powers. Art 116 provided for the Member States to act in common in international economic organisations (principally GATT) after the end of the transitional period. Indeed the Community has taken over many aspects of GATT and WTO relations from the Member States, but not all.

#### *Geographical Application*

Part 4, Arts 131 to 136 established "association" with the countries and territories set out in Annex IV: colonies and current dependencies of the Member States. Many of those mentioned have since become independent and have entered a different form of association. Basically, the other Member States extend preferential trade access to the associated states equivalent to those given by its former metropole.

In addition to the Member States, Art 227 applied the treaty selectively to the then-French territory of Algeria and the other French overseas departments with other parts possibly to be applied later. On the accession of Britain, only some British territories were included. The EECT thus spread to many corners of the world, intriguingly expanding the concept of what is "European". This forms a precedent for a Commonwealth spreading beyond Europe as proposed in Chapters 1 and 5.

#### *Temporal Application*

Art 8 set out procedures for progressive implementation of the Treaty. Constitutions often have transitional provisions and periods. The implementation

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<sup>195</sup> Arts 110 to 113.

period of twelve years is unusually long, reflecting the need to establish the common market and agricultural policy gradually.

Art 240 provided that the treaty was entered into for an unlimited period. By contrast, the ECSCT was only concluded for a period of fifty years. The unlimited period suggests a permanent arrangement with permanent effects, like a constitution.

### *Conclusion*

The EECT provided a good basis for constitutional development, but with some limitations and distortions. In the next chapter, I explore how the EECT was put into effect, the changes made to it up to the Treaty on European Union of 1992, and the other forms of constitutional development it underwent.

## CHAPTER

## BUILDING THE

In Chapter 2, I analysed the constitutional character of the EECT, with any constitutional system, only time and practice can reveal how it is interpreted and either put into practice or not. The development of the European Economic Community from 1957 to its major revision by the Treaty on European Union in 1992 was renamed the "European Community" and then the "European Union". This is a long period to cover, but it is the story of the development of the Community up to the moment of its transformation. It reveals the conduct of supranational institutions at the international level. It reveals how a constitutional system can evolve.

There was first a long transitional period of 1957-1967, the institutions of the several Communities. The tenure of Charles de Gaulle as President of France and his influence over the state over the supranational EEC. The enlargement to include Britain, Ireland and Denmark. The efforts at integration, especially monetary integration during the 1970s and early 1980s, and the development of "Eurosclerosis" which was broken by the President of the Commission and the thrust of the Single European Act. The Commission's role in the development of the Community.

## CHAPTER 3

### BUILDING THE CATHEDRAL

In Chapter 2, I analysed the constitutional character of the founding treaties, but as with any constitutional system, only time and practice can show how the words are interpreted and either put into practice or ignored. In this chapter, I explore the development of the European Economic Community from its creation in 1957 to its major revision by the Treaty on European Union ("TEU") in 1992, in which it was renamed the "European Community" and made part of the European Union. This is a long period to cover, but it is the coherent history of the constitutional development of the Community up to the major constitutional reform of the TEU. It reveals the conduct of supranational institutions and of national politicians at international level. It reveals how a constitution can evolve from a treaty.

There was first a long transitional period of implementation, including a merger of the institutions of the several Communities. This period largely coincided with the tenure of Charles de Gaulle as President of France, who reasserted the primacy of the state over the supranational EEC. The end of his tenure enabled a significant enlargement to include Britain, Ireland and Denmark. It also enabled renewed efforts at integration, especially monetary co-operation. Economic difficulties during the 1970s and early 1980s, and the digestion of the new members, led to a period of "Eurosclerosis" which was broken by the arrival of Jacques Delors as President of the Commission and the thrust to complete the single market through the Single European Act. The Community also undertook two further

enlargements: Greece in 1981 and Spain and Portugal in 1986. In the course of this period, the institutions of the Community developed, and in the case of the ECJ, transformed the treaty into a constitution. I consider first the implementation period, then the political developments which led to further development of the Community, then the constitutional development of each of the institutions. This is difficult in isolation as their interaction was a major part of their development, but it is possible to focus on the agency of each institution in constitutional development.

### 3.1 IMPLEMENTATION

The EEC Treaty ("EECT") had first to be ratified. In contrast to its slow killing of the EDC, France was the first to ratify the EECT. The Netherlands was the last to ratify, in December 1957, and the treaty took effect on 1 January 1958. It was to be implemented over a transitional period of twelve years in three stages. It was a framework for a process of integration rather than achieving that integration itself.<sup>1</sup> Implementation required extensive negotiation, especially of the new Common Agricultural Policy ("CAP") which was to replace the national systems of agricultural protection. In addition, the requirement of unanimity on most matters in the Council, especially during the transitional phase, would also entail considerable negotiation between the Member States. Finally, the relationships between the various institutions would have to be negotiated. There would also be negotiations within the institutions themselves as to how they would be run.

The removal of internal tariffs and creation of an external tariff was negotiated between 1958 and 1962.<sup>2</sup> There was a brief convergence of interest between France and Germany on a general lowering of tariffs, enabling agreement to be reached.<sup>3</sup>

<sup>1</sup> A Moravcsik *The Choice for Europe* (Ithaca, Cornell UP 1998) p157.

<sup>2</sup> Ibid p159.

<sup>3</sup> Britain had reached the same conclusion and applied for membership of the Community. See section 3.2 for discussion of the fate of the British application. See also Moravcsik *ibid* p161.

The CAP was to be negotiated directly by the institutions of the EEC.<sup>4</sup> This reflects the developed constitutionality of the Community held between 1960 and 1969. This reflected the Member States.<sup>5</sup> The settlement finally protection through price support.<sup>6</sup> While they have to take this form. It has, however, proved

Even though the Common External Tariff, the free internal movement of goods had a transitional period, the single market was of workers and capital continued to be gradual period, political events also had a significant development.

### 3.2 INTERNATIONAL AND DOMESTIC ECONOMIC FACTORS

The Communities were born in changing political circumstances. It had been the materials of the Second World War and a half. Even as the Coal and Steel Community was being created, it was clear that nuclear energy would be the future basis of the Community. It was not surprising then that a European Atomic Energy Community was created. Nuclear energy has not fulfilled its promise. It has been a disappointment for the Communities with a continuing dependence on oil and gas. There is concern about pollution and, more recently, the discovery of oil and gas in the region have still remains. Efforts to create a common energy market

<sup>4</sup> Ibid p156.

<sup>5</sup> Ibid p161.

<sup>6</sup> Ibid p162.

<sup>7</sup> At the time of writing, various proposals for a common energy market in western Europe are under consideration. These cover the EU.

The CAP was to be negotiated directly by the Member States rather than through the institutions of the EEC.<sup>4</sup> This reflects the sensitivity of the issue and the poorly developed constitutionality of the Community at that time. The negotiations were held between 1960 and 1969. This reflects deep differences of opinion between the Member States.<sup>5</sup> The settlement finally reached provided for a high degree of protection through price support.<sup>6</sup> While the CAP is part of the treaty, it did not have to take this form. It has, however, proved extremely difficult to change.

Even though the Common External Tariff, the Common Agricultural Policy and the free internal movement of goods had been established by the end of the transitional period, the single market was far from complete. The free movement of workers and capital continued to be gradually realised. During the transitional period, political events also had a significant impact on constitutional development.

### 3.2 *INTERNATIONAL AND DOMESTIC POLITICAL AND ECONOMIC FACTORS*

The Communities were born in changing political and economic times. Coal and steel had been the materials of the Second World War and the preceding century and a half. Even as the Coal and Steel Community was being created, it seemed that nuclear energy would be the future basis of both military and civil power. It is not surprising then that a European Atomic Energy Community was founded. But nuclear energy has not fulfilled its promise. Energy has remained a difficult issue for the Communities with a continuing dependence on oil imports and increasing concern about pollution and, more recently, global warming and ozone depletion. Discoveries of oil and gas in the region have temporarily eased the problem but it still remains.<sup>7</sup> Efforts to create a common energy policy have failed.

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<sup>4</sup> Ibid p156.

<sup>5</sup> Ibid p161.

<sup>6</sup> Ibid p162.

<sup>7</sup> At the time of writing, various proposals for pipelines from the former Soviet Union to western Europe are under consideration. These could bring the successor states closer to the EU.



Supranational control of the coal and steel industries has entailed overseeing many mine and plant closures. This was envisaged in the ECSC Treaty and has involved significant economic and social transformation. Workers have had to be retrained and in many cases have had to relocate or commute long distances to find new work. The Communities have not had the resources or political will to establish new industries in the areas worst affected. They have been able to provide some financial assistance to the affected people and regions, but perhaps their greatest contribution has been in assisting the growth of the European economy as a whole, enabling prosperity and employment growth in new industries.

The Communities benefited from the long postwar economic boom. The rise of new manufacturing and service industries ensured rising national and personal incomes and a restructuring of national economies through market forces. Increasing trade flows were a natural accompaniment, assisted by free trade within the EEC.

Within this development, agriculture was both in conformity and an exception. In line with industry generally, technology enabled agriculture to become more efficient: land yielded greater production with fewer workers. People left the land for the cities in huge numbers. But European agriculture was not competitive in global terms. Agricultural subsidy remained the main activity of the EEC. While making the EEC popular with Europe's farmers, this meant continued subsidy of agriculture by the rest of the economy. The Community became self-sufficient in food and indeed began to generate huge surpluses. These were frequently dumped on world markets, driving world prices down and angering unsubsidized producers. International hostility about EEC agricultural protection has inhibited lowering of trade barriers by other states.

The persistence of agricultural protection indicates the extent to which rural voters are able to influence national politics in the Member States.<sup>8</sup> Other factors in domestic politics have also influenced developments at the European level. West Germany had enjoyed remarkable political stability in its return to self-

<sup>8</sup> Milward op cit Ch 5 passim.

government under Allied occupation. A continuous thread of policy was pursued under the Christian Democrat Chancellors Adenauer and Erhard, and this stability continued when a Social Democrat-led government under Willy Brandt came to power in 1969. This policy included support for the EEC.

France, by contrast, suffered from extreme instability. The short life of governments under the Fourth Republic described in Chapter 2 made coherent development of policy over a long period very difficult, as seen in the difficulty of concluding the EECT. Barely had the treaty been concluded when the Fourth Republic collapsed, to be replaced by the Fifth Republic, created to the wishes of President Charles de Gaulle. De Gaulle's contribution to the constitutional development of the EEC is considered further below.

Italy also suffered from short-lived governments, but there was a much greater continuity of policy, certainly with regard to the EEC. Belgium too had a fairly short life for each government but a similar stability of pro-EEC policy. The Netherlands, though also having a proportional representation electoral system, enjoyed greater political stability during the period. Luxembourg likewise was fairly stable. Even where governments did not last long, there was continuity of politicians who served in several governments, and of career civil servants.

National politics had been significant in deciding whether the Treaties of Rome would be concluded. It continued to be important in determining the outcome of Community affairs given the power of the Council of Ministers.

The first major national political event after the conclusion of the Treaties was the fall of the French Fourth Republic in May 1958 and its replacement by the Fifth Republic designed and led by former General, and now President, Charles de Gaulle. De Gaulle had been critical of the ECSC and EDC and was expected to denounce the Treaties of Rome. Instead, he accepted them and worked within them until the "Empty Chair" crisis of 1966, provoked by the advent of the third transitional phase of the EECT in which majority voting in the Council was to expand. He also stamped his presence on the Community by vetoing British entry in 1963 and 1967 without consulting the other Member States.

Britain had withdrawn from participation in the negotiations leading to the Treaty of Rome. Then it had attempted to sabotage the Treaty by proposing a rival free trade area. When the Treaty had been concluded, the British response was to establish the European Free Trade Area ("EFTA") comprising Switzerland, Austria, Denmark, Sweden, Norway and Portugal, with the aim of forcing the EEC to enter a free trade agreement. But in 1960, the British government had a change of heart and applied to join the Community. Stephen George suggests that this was politically rather than economically motivated move.<sup>9</sup> It was not so much that Britain wanted to be in the Community as that it did not want to be left out. The United States favoured British membership.<sup>10</sup> Negotiations commenced.

In May 1960, de Gaulle called for "political co-operation" between the Member States. This was to be intergovernmental, not supranational. Purely intergovernmental co-operation was a strong challenge to the Community idea, though the Community structure still depended a good deal on intergovernmental co-operation in the Council. It seemed that de Gaulle was determined to mount a major challenge to the further development of the Community.

It is not correct to portray de Gaulle as anti-European. Rather, he sought a Europe adapted to his own ends. In keeping with Milward's argument that the Communities enabled the "rescue" of the nation state, de Gaulle saw the Communities as a vehicle for French assertion at the global level.<sup>11</sup> However a supranational Commission and majority voting in the Council, which was to be gradually expanded under the terms of the EECT, were both contrary to his vision.

In February 1961, the Six established a committee under Christian Fouchet to examine de Gaulle's proposal of "political union". This committee drafted the "Fouchet plan" for co-operation in defence, diplomacy, economics and culture.<sup>12</sup>

<sup>9</sup> George, S *An Awkward Partner: Britain in the European Community* (2<sup>nd</sup> ed, Oxford OUP 1994) p29. Moravcsik agrees, op cit p165, but also suggests that it could have been an economic motivation ahead of its time.

<sup>10</sup> George op cit p31.

<sup>11</sup> Ibid p170.

<sup>12</sup> Ibid p172.

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<sup>13</sup> Spaak op cit p442.

<sup>14</sup> Ibid p446.

<sup>15</sup> Bessis, S *The Republic of de Gaulle 1958 - 1969* u

This was, in effect, to be another Community, but without a powerful supranational body at its centre. Spaak describes how the French negotiators, presumably at the behest of de Gaulle, modified the proposal in this direction.<sup>13</sup> Spaak argued against the proposal unless Britain was allowed to join.<sup>14</sup> He was supported by Luns of the Netherlands, but in the absence of agreement, the proposal lapsed.

On 15 June 1962, de Gaulle declared that Europe was only conceivable as a Europe of states.<sup>15</sup> In particular, he drew attention to the language barrier. Later in the year, he won a referendum for direct election of the President and Gaullists won the legislative elections. De Gaulle thus had a very firm grip on power.

De Gaulle's next step towards his European vision was to veto British entry to the EEC in January 1963. Britain had applied in July 1961 and there had been sixteen months of negotiations before he acted. His justification was that Britain was too close to the United States, that allowing Britain in would allow the United States to dominate Europe, but it might also have been that Britain would have the strength to stand up to France.

A possibly more positive step was the Franco-German Treaty of 1963. It provided for regular meetings between the French President and German Chancellor, and between the two foreign ministers and ministers of defence, education and youth.<sup>16</sup> These developments are quite surprising given that the two countries' ministers already met regularly in the Community Council of Ministers. There was not yet a formal system for regular meetings of heads of state and government. The treaty certainly had symbolic value - the two old enemies now affirming their friendship - but it also symbolised a new Franco-German axis at the core of European integration. Such an axis had been at the centre of the initial attempts at integration by Schuman and Adenauer, but its reassertion now suggested a separate, more exclusive project than that pursued with the Six as a

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<sup>13</sup> Spaak op cit p442.

<sup>14</sup> Ibid p446.

<sup>15</sup> Berstein, S *The Republic of de Gaulle 1958 - 1969* tr P Morris (Cambridge, CUP 1993), p70.

whole, pulling the other four in the direction dictated by France and Germany. Spaak's bitter opposition is understandable.<sup>17</sup>

De Gaulle was also taking a more independent line in the North Atlantic Alliance, attempting to carve out an independent position for France. This inhibited the formation of a European foreign policy or defence identity. France had acquired nuclear weapon capability in 1963. De Gaulle signed commercial treaties with the Soviet Union the same year and France withdrew from the integrated command structure of NATO.

The expiry of the Second Transitional Period of the EECT meant an extension of the areas in which majority voting was to apply in the Council from 1 January 1966. A particular range of agricultural proposals would have been approved by this method but were opposed by France. The French response was to boycott Council meetings (the so-called "Empty Chair Crisis") from July 1965 until the end of January 1966 when the "Luxembourg Accords" were reached. These were reached by diplomacy between the Member States, mediated by Spaak and not involving the Commission.<sup>18</sup> They are a glaring example of political pragmatism triumphing over the letter of the Treaties. Although an informal agreement between the Member States, they were documented in the EC Bulletin.<sup>19</sup> In effect, they gave Member States a right of veto, even in majority voting areas, if their "vital interests" were affected by the decision. As these were undefined, it was effectively a veto for any state on any issue. Thus de Gaulle achieved his goal of making the Community more intergovernmental. The Empty Chair Crisis covered the period leading up to the French Presidential elections in December 1965 and it was resolved shortly after de Gaulle's victory. This demonstrates how the Communities have often been a political football in national politics to the detriment of substantive debates on Community policies.

<sup>16</sup> Ibid p175.

<sup>17</sup> Spaak op cit p454.

<sup>18</sup> Ibid p486.

<sup>19</sup> Bull EC 3-66 p8.

Britain again applied for membership in 1961, but was vetoed by de Gaulle. This was done unilaterally even though the parliaments of the other four were in its favour.<sup>20</sup> Now it seemed that only France stood in the way of membership.

De Gaulle was heading for a leadership crisis. In May 1968 caused him to respond with a referendum giving the President a sweeping power of appointment and instead called parliamentary elections. He appointed Maurice Couvreur as Prime Minister and hence important actor in EEC affairs. This did not preclude any significant development in the Community. Instead, a referendum was held on regional power sharing and reform of the President's power.<sup>21</sup> This second proposal for a referendum was heavily defeated. He resigned.

The subsequent presidential election was won by Valéry Giscard d'Estaing, Prime Minister under de Gaulle, but a moderate. Pompidou had been de Gaulle's protégé and his policy towards the EEC. He favoured British entry into the CAP, and economic and monetary union. He was a strong advocate of Community development.

Another significant development was the election of Willy Brandt as Chancellor in Germany in October 1969. He had been in power since the restoration of democracy in 1949. His policy towards the Community was substantially similar to de Gaulle's. A major innovation was *Ostpolitik*, a move towards détente with the East.

<sup>20</sup> Monnet op cit p489.

<sup>21</sup> Berstein op cit p224.

<sup>22</sup> Ibid p232.

Britain again applied for membership in 1967. Once again de Gaulle vetoed it unilaterally even though the parliaments of the other five Member States all voted in its favour.<sup>20</sup> Now it seemed that only de Gaulle stood between Britain and membership.

De Gaulle was heading for a leadership crisis. The student and worker unrest of May 1968 caused him to respond with a proposed constitutional amendment giving the President a sweeping power of constitutional reform. He dropped this and instead called parliamentary elections which were won handsomely by his supporters.<sup>21</sup> He appointed Maurice Couve de Murville, long-time foreign minister and hence important actor in EEC affairs, as his new Prime Minister, but this did not presage any significant development in the French policy towards the Community. Instead, a referendum was held in April 1969 on proposals for regional power sharing and reform of the *Sénat* which would have drastically reduced its power.<sup>22</sup> This second proposal united opposition to de Gaulle and the referendum was heavily defeated. He resigned immediately.

The subsequent presidential election was won by Georges Pompidou, a former Prime Minister under de Gaulle, but a more modern and pragmatic politician. Pompidou had been de Gaulle's protégé but pursued a significantly different policy towards the EEC. He favoured British admission together with extension of the CAP, and economic and monetary union. The way was now open for a new era in Community development.

Another significant development was the election of the Social Democrat Willy Brandt as Chancellor in Germany in October 1969. The Christian Democrats had been in power since the restoration of civilian government. Brandt's policy towards the Community was substantially similar to that of his predecessors. His major innovation was *Ostpolitik*, a move towards better relations with the Eastern bloc.

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<sup>20</sup> Monnet op cit p489.

<sup>21</sup> Bernstein op cit p224.

<sup>22</sup> Ibid p232.

The Hague Summit of 1 and 2 December 1969 was the opportunity for the next *relance européenne*. Negotiations were to be opened with four aspiring members: Britain, Ireland, Denmark and Norway. Etienne Davignon, a Belgian diplomat, was commissioned to produce a report on "political integration". Its results were accepted at the Luxembourg Summit of 1970 and European Political Co-operation ("EPC") was born.<sup>23</sup> This was not an institution but rather a forum for negotiation of common positions in foreign policy.

The summit also agreed on a new method of financing the budget through the Community's "own resources" ie customs revenue on food and industrial goods and a guaranteed share of Value Added Tax rather than solely relying on contributions from Member States. This took the Community closer to statehood. The prospect of such independence had been one of the major sources of de Gaulle's opposition to the EEC as then constituted.<sup>24</sup>

The summit also agreed on a plan for economic and monetary union, starting with a European Reserve Fund.<sup>25</sup> Turbulence in currency markets in the late 1960s had raised the need to attempt exchange rate stability. The Bretton Woods Agreement had been supposed to do this, but it was starting to unravel.<sup>26</sup> Exchange rate stability could be achieved either through economic or monetary co-operation and the Member States were divided on how to proceed.<sup>27</sup> Pierre Werner, the Luxembourg Prime Minister, was commissioned to report and in 1971 suggested institutions to oversee monetary union. The Community opted instead for co-operation, to be implemented by 1974.<sup>28</sup> It was not until 1992 that a process for monetary union was agreed.

The negotiations with the four aspirant members began in 1970. In June 1970, the Wilson Labour government in Britain, which had reactivated the British

<sup>23</sup> D Urwin *The Community of Europe* (2<sup>nd</sup> ed, London, Longman, 1995) p148.

<sup>24</sup> Ibid p138.

<sup>25</sup> Monnet op cit p495.

<sup>26</sup> Urwin op cit p155.

<sup>27</sup> Id.

<sup>28</sup> Ibid p156.

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Heath continued the application.

Preparations for the entry of the new membe  
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colonies and for New Zealand dairy produ  
France was the Community's leading produce

On the related issue of agricultural subsid  
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government accepted the CAP as part of the  
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The new arrangements for "own resources"  
was a large importer of both food and indu  
efficient agriculture, it would benefit little fr

<sup>29</sup> George op cit p43.

<sup>30</sup> Urwin loc cit.

<sup>31</sup> George op cit p51.

<sup>32</sup> Id. It is interesting to note that the Community  
direction.

<sup>33</sup> Ibid p52.

application, lost power, but the new Conservative government under Edward Heath continued the application.

Preparations for the entry of the new members were made more difficult by the gathering crisis in international exchange rates. The United States was still on the gold standard but since 1968 had only been able to continue this with the co-operation of foreign central banks.<sup>29</sup> By 1971, even this was no longer sustainable and the United States abandoned the gold standard.<sup>30</sup> This forced other countries, including those of the Community and Britain, to move to floating currencies, albeit within agreed limits.

The (British) Commonwealth, which had been an original reason for Britain declining to join both the ECSC and the EEC, had become less important to the British economy during the 1960s. There was still a sentimental argument in favour of retaining connections, but economic arguments were no longer valid. Britain sought concessional entry for the cane sugar of its Caribbean former colonies and for New Zealand dairy products. This was a sensitive matter as France was the Community's leading producer of both sugar and dairy products.<sup>31</sup>

On the related issue of agricultural subsidy, Britain used income support for farmers rather than the price support used in the CAP.<sup>32</sup> However, the British government accepted the CAP as part of the price of entry and managed to obtain the concessions on the CAP and some Commonwealth products.<sup>33</sup>

The new arrangements for "own resources" financing disadvantaged Britain as it was a large importer of both food and industrial goods, yet with comparatively efficient agriculture, it would benefit little from CAP, by far the largest item of

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<sup>29</sup> George op cit p43.

<sup>30</sup> Urwin loc cit.

<sup>31</sup> George op cit p51.

<sup>32</sup> Id. It is interesting to note that the Community has subsequently reformed in the British direction.

<sup>33</sup> Ibid p52.



expenditure in the budget.<sup>34</sup> Negotiations reached an impasse. A special summit between Heath and Pompidou in May 1971 went well with the two establishing a relationship of trust.<sup>35</sup> This enabled speedy resolution of outstanding issues. There was a transitional period for Britain to phase out its tariffs and introduce the CAP, together with gradual assumption of its full budgetary obligations over seven years from 1973 to 1980.<sup>36</sup> The issue of what would happen if Britain's worst fears of a huge net budgetary contribution eventuated was left to the future. It was to be the cause of a great deal of trouble.

The accession of Denmark and Ireland caused little difficulty at the time. Both are very small in comparison to Britain and while both were substantial net beneficiaries of the CAP, this did not put the budget under strain. Norway also negotiated accession without difficulty. It would have been an even greater beneficiary of the CAP but its people rejected accession in a referendum, as they were to do again in 1994.<sup>37</sup>

The three new members formally acceded on 1 January 1973, but they were permitted to participate in the Paris summit of October 1972. The most prominent resolution of the summit was to establish economic and monetary union by 1980.<sup>38</sup> This ambitious goal was, of course, not to be achieved until 1999. The difficult trade-off of mutual currency support and co-ordination of economic policies had begun.

The summit highlighted differing priorities among the Member States. Britain sought reforms to make cross-border mergers easier and to remove remaining barriers to trade. Germany's Social Democrat-led government sought to extend worker participation in management decisions across the Community along with better industrial relations and social security. George points out that whereas the

<sup>34</sup> Ibid p53.

<sup>35</sup> Kitzinger, U *Diplomacy and Persuasion: How Britain Joined the Common Market* (London, Thames & Hudson 1973) p119.

<sup>36</sup> George op cit p56.

<sup>37</sup> Urwin op cit p144.

<sup>38</sup> Ibid p158.

He had been prepared to accept linkage between Britain's approach was to push the policies it wanted, these it did not.<sup>39</sup>

The Arab-Israeli war of 1973 precipitated the Arab oil-producing countries placed an embargo on oil. This supported Israel and a massive increase in prices. Britain's energy policy was impeded by Britain's need for oil.<sup>40</sup> Before a conclusion was reached, the Conservative government was succeeded by a Labour government in February 1974 and was succeeded by a Labour government. It was elected on a promise to renegotiate Britain's membership of the Community.

The Community was confronted with increased economic instability. However, the Member States were able to make the formulation of common policies difficult.

Pompidou died in office in April 1974 and was succeeded by Georges Pompidou, a moderate right winger. Brandt was succeeded by fellow Social Democrat Helmut Schmidt. Giscard d'Estaing was replaced by Valéry Giscard d'Estaing. Franco-German team since Schuman.

The first Wilson government in Britain was a minority government. It faced difficult economic conditions of rising inflation and unemployment. The Conservative Party was divided over the Community with the Conservatives being sceptical. The promise of renegotiation offered to the adherents, but it did not offer any benefits. When promised to put the renegotiated membership of the Community before the House of Commons, Foreign Secretary James Callaghan promised to renegotiate Britain's membership of the Community.

<sup>39</sup> George op cit p62.  
<sup>40</sup> Ibid p68.  
<sup>41</sup> Ibid p75.

Six had been prepared to accept linkage between issues and trade them off, Britain's approach was to push the policies it favoured while vigorously opposing those it did not.<sup>39</sup>

The Arab-Israeli war of 1973 precipitated the need for common action on oil. Arab oil-producing countries placed an embargo on supply to countries which had supported Israel and a massive increase in prices generally. Progress towards a common energy policy was impeded by Britain refusing a single internal market for oil.<sup>40</sup> Before a conclusion was reached, Heath lost office at the election of February 1974 and was succeeded by a Labour government under Harold Wilson, elected on a promise to renegotiate Britain's membership entirely.

The Community was confronted with increased oil prices, inflation and currency instability. However, the Member States were affected to different degrees. This made the formulation of common policies difficult.

Pompidou died in office in April 1974 and was succeeded by Valéry Giscard D'Estaing, a moderate right winger. Brandt was succeeded in May 1974 by his fellow Social Democrat Helmut Schmidt. Giscard and Schmidt formed the most pro-integration Franco-German team since Schuman and Adenauer.

The first Wilson government in Britain was a minority one. It faced particularly difficult economic conditions of rising inflation and unemployment.<sup>41</sup> The Labour Party was divided over the Community with the left strongly opposed and others also sceptical. The promise of renegotiation offered something to both the skeptics and the adherents, but it did not offer any benefit to the other Member States. Wilson promised to put the renegotiated membership to a referendum. The Foreign Secretary James Callaghan promised that the negotiations would not be

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<sup>39</sup> George op cit p62.

<sup>40</sup> Ibid p63.

<sup>41</sup> Ibid p75.

confrontation but rather an attempt to adapt and reshape.<sup>42</sup> The government's rhetoric was mainly for domestic consumption.

The renegotiation process was assisted by the changes at the helm in France and Germany. Giscard and Schmidt were keen to resolve the matter. The key British demands were: access of Commonwealth products, the right to give state aid to industry and the regions, reform of the CAP, and reduction of the British contribution to the budget.

Negotiations on the admission of Commonwealth products on a non-reciprocal basis eventually led to the conclusion of the Lomé Convention by which most of the independent former colonies of the Member States received these preferences together with aid.<sup>43</sup> This was the successor to the Yaoundé Conventions of the 1960s.

At the Paris summit of December 1974, it was decided to regularise such meetings of the heads of government as the "European Council".<sup>44</sup> This body initially had dubious constitutional status but enabled negotiation and agreement at the highest level. It reflected the turn the Community had taken towards intergovernmentalism since the Luxembourg Accords. It has raised the profile of Community issues because its meetings are highly publicised. The European Council has subsequently been explicitly recognized in the TEU. It thus sits uneasily both within and outside the Community system but exercising supreme power over it.<sup>45</sup> It is discussed further in Chapter 4.

At the Paris summit, a number of significant agreements were reached on CAP and regional policy. Leo Tindemans, the Belgian Prime Minister, was commissioned to report on European Union.

<sup>42</sup> Ibid p79.

<sup>43</sup> Ibid p82.

<sup>44</sup> All the members of the European Council are heads of government except the French President who is head of state. The President of the Commission is also a full member.

<sup>45</sup> See J-M Hoscheit and W Wessels (eds) *The European Council 1974-1986: Evaluation and Prospects* (Maastricht, EIPA 1988).

The most difficult issue during this period was the  
coordination. This was to plague relations between  
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At the first European Council meeting in Dublin in  
first elections to the European Parliament in 1979  
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able to present this to the British electorate and  
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lack of public engagement with the Community.  
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Grassi insisted that the Community implement the  
elections to the European Parliament. This was part  
was excluded by de Gaulle into a new centre-  
proposal required national legislation in order to be  
negotiation meant that legislation was not introduced  
proposal for proportional representation was defeated  
result, Britain had delayed the first direct elections to

<sup>46</sup> George op cit p83.

<sup>47</sup> Ibid p85.

<sup>48</sup> Ibid p111.

The most difficult issue during this period was the level of the British budgetary contribution. This was to plague relations between Britain and the rest of the Community for a further ten years.<sup>46</sup> The long budgetary disputes demonstrate the problem of not including financial principles in the constitution.

At the first European Council meeting in Dublin in March 1975, Wilson agreed to direct elections to the European Parliament in return for some concessions. The Commission proposed a complex formula allowing for a budget rebate. Wilson was able to present this to the British electorate as a victory in the lead up to the referendum on continued membership.

The British referendum was held on 5 June 1975. The campaign demonstrated the lack of public engagement with the Community.<sup>47</sup> As is perhaps inevitable with referenda, there was much simplification and emphasis on personalities. The result was an overwhelming vote to stay with in the Community. This did not however herald a new era of better relations between Britain and the Community.

Wilson resigned in March 1976 and was succeeded by Callaghan, previously Foreign Secretary and hence extensively involved in Community affairs. There were several summits between United States and European leaders which failed to agree on the co-ordination of economic policy.

Giscard insisted that the Community implement the Treaty's provision for direct elections to the European Parliament. This was part of his bid to draw the centrist parties excluded by de Gaulle into a new centre-right alliance. In Britain, the proposal required national legislation in order to be implemented. Labour party opposition meant that legislation was not introduced until June 1977. An initial proposal for proportional representation was defeated. By the time legislation was passed, Britain had delayed the first direct elections from 1978 to 1979.<sup>48</sup>

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<sup>46</sup> George op cit p83.

<sup>47</sup> Ibid p95.

<sup>48</sup> Ibid p121.

Britain held the presidency of the Council in the first half of 1977. The major issue was a common fisheries policy. With the advent of two hundred mile exclusive offshore economic zones, what were once high seas fishing grounds now had to be divided. It would have been within the spirit of the Community to give free access to all Member States, but the scarce resource also had to be controlled. There was no constitutional principle to draw on to decide how this should be done.

A purely European response to the new currency volatility since the demise of Bretton Woods was the European Monetary System (EMS), agreed at the Brussels European Council of 1978. An initiative of Schmidt and Giscard, strongly supported by Commission President Roy Jenkins, it provided for co-operation by national central banks to keep currencies within agreed bands of value and a partial pooling of gold and foreign currency reserves, and a new unit of account, the European Currency Unit (Ecu). Britain was initially sceptical, and did not join, but announced the intention to act as if it were a member.<sup>49</sup> Italy and Ireland were also initially sceptical but were persuaded by the promise of financial assistance and a broader band of fluctuation for their currencies. The EMS was a purely intergovernmental arrangement, but it was a step towards monetary union.

By mid 1978, it was clear that Britain was becoming a massive net contributor to the Community budget, second only to Germany and not nearly so prosperous.<sup>50</sup> The defeat of Labour in the 1979 British election brought the Conservatives under Margaret Thatcher to power. They inherited the problem of Britain's contribution to the Community budget and set about redressing it. Thus began a tectonic shift in British politics: the Conservatives, having brought Britain into the Community, now became increasingly opposed to it, while Labour, having opposed entry, became increasingly *communautaire*.

Direct elections for the European Parliament were held for the first time in June, 1979. The EP had finally acquired some democratic legitimacy, but it did not

<sup>49</sup> Ibid p130.

<sup>50</sup> Ibid p133. Indeed, Britain was only the seventh most prosperous per capita of the Nine.

immediately become the embodiment of the democratic Community. It is discussed further in Section 2.

In November 1979 and April 1980 European budget rebate. A meeting of Foreign Ministers in 1980-81.<sup>51</sup> At the same time, they asked the Commission for a solution.<sup>52</sup>

Internationally, the Islamic revolution in Iran and Afghanistan had a significant impact on the Community. The United States undertook punitive measures against Iran, which the Community was less enthusiastic about. A decision within the Community as Britain took policy,<sup>53</sup> but even Britain baulked at some of the actions between the United States and the Soviet Union over their loyalty to their NATO obligations with their eastern neighbours.

The United States took economic action to back its policies. The European response had to be to keep the Community out of recession.<sup>54</sup> This may tend to suggest that the Community should integrate to counteract globalisation is wrong. It suggests that if European monetary and fiscal policies were more integrated, a stronger response might have been possible.

In 1981, Greece joined the Community. It had first been a democracy. In October 1981, Andreas Papandreu was elected. It was not clear

<sup>51</sup> Ibid p140.

<sup>52</sup> Ibid EC 6-1981 1.2.1.

<sup>53</sup> George op cit p140.

<sup>54</sup> Ibid p142.

immediately become the embodiment of the democratic aspirations of the people of the Community. It is discussed further in Section 3.5.

At the November 1979 and April 1980 European Councils, Thatcher insisted on a British budget rebate. A meeting of Foreign Ministers in May agreed a formula for 1980-81.<sup>51</sup> At the same time, they asked the Commission to come up with a permanent solution.<sup>52</sup>

Internationally, the Islamic revolution in Iran and the Soviet invasion of Afghanistan had a significant impact on the Community. Oil prices rose again and the United States undertook punitive measures against the Soviet Union about which the Community was less enthusiastic. This provided another source of dissension within the Community as Britain tended to support the American policy,<sup>53</sup> but even Britain baulked at some of the American sanctions. As tensions between the United States and the Soviet Union escalated, the Member States were torn between their loyalty to their NATO partner and their need for good relations with their eastern neighbours.

The United States took economic action to back its foreign policy, driving up its interest rates. The European response had to be to raise interest rates too, leading Europe into recession.<sup>54</sup> This may tend to suggest that my argument that the EU should integrate to counteract globalisation is wrong. On the contrary, I would suggest that if European monetary and fiscal policy had been better co-ordinated at the time, a stronger response might have been possible.

In 1981, Greece joined the Community. It had first applied in 1975, the year after democracy had been restored. In October 1981, a Socialist government under Andreas Papandreou was elected. It was not nearly as pro-Community as its

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<sup>51</sup> Ibid p149.

<sup>52</sup> Bull EC 6-1981 1.2.1.

<sup>53</sup> George op cit p140.

<sup>54</sup> Ibid p142.

predecessor had been.<sup>55</sup> Despite its different political orientation and economic situation, Greece became a consistent ally with Britain and Denmark in opposing further integration. It was also an enthusiastic recipient of Community development funds.

The election of the Socialist François Mitterrand as President of France in May 1981 brought to power an administration determined to steer an independent path to prosperity. *Dirigisme* had been a feature of French policy since 1945. It had been a central element of the ECSC. While Mitterrand now spectacularly revived it in France, it seemed unlikely to obtain support in the Community as a whole, especially as Thatcher's policy was the exact opposite.

At the 1981 European Council meeting in London, the German Foreign Minister Hans-Dietrich Genscher and the Italian Foreign Minister Emilio Colombo put forward the Genscher-Colombo Plan for a new European Act to replace the Treaty of Rome.<sup>56</sup> Their proposal was to strengthen political union to enable more effective economic action. The Plan received little support from the Council and Commission but was trenchantly criticised by the Parliament for not going far enough.<sup>57</sup>

The Community was in serious financial difficulty. Reform and *relance* was needed. The CAP was increasingly costly but Britain refused to allow the percentage of VAT paid to the Community to be increased until a permanent solution to the problem of its budget contribution could be found.<sup>58</sup> Britain went further in the May 1982 Council meeting to set agricultural prices for the coming year by refusing to agree on the prices until the budget issue was resolved. This prompted the President to call for a majority vote (as specified in the Treaty).

<sup>55</sup> F Laursen and S Vanhoonacker (eds) *The Intergovernmental Conference on Political Union* (EIPA, Dordrecht, Nijhoff 1992) p79.

<sup>56</sup> Bull EC 11/81 p87.

<sup>57</sup> M Burgess *Federalism and European Union* (London, Routledge 1989) p130.

<sup>58</sup> George op cit p150.

Britain claimed its power of veto under the  
disregarded.<sup>59</sup> This was apparently the end of it.

In 1982, Argentina invaded the Falkland Islands  
400 kilometres off the Argentine coast. The British  
force to retake the islands. This victory increased  
enabling her to take a stronger line with  
Community reluctantly supported the British  
British forces in action against the predominant  
Argentines. Member States might not be at war  
could be.

The European Council in Stuttgart on 19  
Declaration on European Union" pledging a "new  
months to tackle the most pressing problems and  
development."<sup>60</sup> This was the fruit of the Genscher  
special negotiations by Foreign, Finance and  
issues were budgetary contributions, reform of  
Spain and Portugal. Unfortunately, agreement  
Council of December 1983. Reform of the  
impossible, especially for France.

Helmut Kohl, a Christian Democrat, was elected  
Thus Germany went to the right just as France  
continued his predecessor's pro-integration policy  
Mitterrand was initially hampered by their differences.  
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became more co-operative.

In February 1984, the European Parliament adopted  
Union ("DTEU"), principally written by the

<sup>59</sup> Ibid p150  
<sup>60</sup> Bull EC 6-1983.

Britain claimed its power of veto under the Luxembourg Compromise but was disregarded.<sup>59</sup> This was apparently the end of the Compromise.

In 1982, Argentina invaded the Falkland Islands or Malvinas, a British territory 400 kilometres off the Argentine coast. The British response was to send a naval force to retake the islands. This victory increased Thatcher's popularity at home, enabling her to take a stronger line with her Community counterparts. The Community reluctantly supported the British action. It was piquant to watch the British forces in action against the predominantly French weaponry of the Argentines. Member States might not be at war with each other but their weapons could be.

The European Council in Stuttgart on 19 June 1983 adopted a "Solemn Declaration on European Union" pledging a "major negotiation" over the next six months to tackle the most pressing problems and provide a solid basis for further development.<sup>60</sup> This was the fruit of the Genscher-Colombo proposals. There were special negotiations by Foreign, Finance and Agriculture ministers. The main items were budgetary contributions, reform of the CAP, and the accession of Spain and Portugal. Unfortunately, agreement was not reached at the Athens Council of December 1983. Reform of the CAP may have been politically impossible, especially for France.

Helmut Kohl, a Christian Democrat, was elected German Chancellor in 1981. Thus Germany went to the right just as France had gone to the left. Kohl continued his predecessor's pro-integration policies, but his co-operation with Mitterrand was initially hampered by their differences over economic policy. Once the French reflation experiment was discontinued, Kohl and Mitterrand became more co-operative.

In February 1984, the European Parliament adopted a Draft Treaty on European Union ("DTEU"), principally written by the veteran Italian federalist Altiero

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<sup>59</sup> Ibid p150

<sup>60</sup> Bull EC 6-1983.



Spinelli. It is further discussed in Section 3.5 below. The DTEU built on the *acquis communautaire*, retaining the same institutions and terminology, but proposed to change the balance of power of the institutions in favour of the Parliament and the Commission.

Having passed the Parliament, the DTEU had now to appeal to the leaders of the Member States. Instead of adopting the DTEU, the Fontainebleau European Council in June 1984 established two committees: the Adonnino Committee on a People's Europe and the Dooge Committee on institutional reform. Both could be seen as inspired by the DTEU: the Adonnino Committee could take the Community closer to nationhood, the Dooge Committee could take the Community closer to statehood.

The Adonnino Committee recommended a flag, anthem, common passport cover design and other indicia of statehood.<sup>61</sup> While the flag has become a well recognised symbol, the flag and anthem have not become as dear to people's hearts as their national counterparts. One reason may be that the anthem has no words.<sup>62</sup> While the passport cover has a meaning for the subsequently created Citizens of the Union, what lies beneath is still a national passport. The Committee also made proposals to make both cross-border movement and relocation easier for Member State citizens.

The Fontainebleau European Council also brought an end to the British budgetary dispute, so it was a good time to be looking forward. Mitterrand no doubt saw possible political advantage, but he also had a long history of support for the European movement.<sup>63</sup> The successful resolution of the dispute was the culmination of six months' feverish diplomacy by Mitterrand.<sup>64</sup>

<sup>61</sup> Bull EC Supp 7/85.

<sup>62</sup> The anthem is the *Ode to Joy* from Beethoven's Ninth Symphony. Both Latin and German lyrics are available but the anthem was officially adopted without words.

<sup>63</sup> Burgess op cit p186.

<sup>64</sup> George op cit p154.

Agreement on a new Commission President  
numerous negotiations each time the post  
have adopted an informal system to share it a  
his part of an overall attempt to balance app  
the exact weights of various offices are hard to  
for France and Germany had agreed that a  
Mitterrand nominated Claude Cheysson, for  
French Foreign Minister and Jacques Delors,  
subsequently chosen in July. I discuss his appo

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At the Dublin Council in December 1984  
negotiations with Spain and Portugal to proceed  
their admission had basically been reached.<sup>65</sup> C  
overcome by further financial assistance, the  
treaties of accession were signed in June 1985.

1986

The Dooge Report was handed down in March  
intergovernmental conference to prepare a European  
*acquis communautaire*, the Stuttgart Declaration  
acted of the [DTEU].<sup>66</sup> Thus the DTEU appe  
on the next step proposed. However, Dooge r  
more intergovernmental activity than the DTEU  
also recommended a security role for the Union  
DTEU

Gen C Delors (London, Nicholas Brealey, 1994) p55

14.

Burgess op cit p191.

Ad hoc Committee for Institutional Affairs Report to  
1986 Bull EC 3-1985.

15.

Burgess op cit p189.

16.

Agreement on a new Commission President for 1985 was not reached. To avoid acrimonious negotiations each time the position comes up, the Member States have adopted an informal system to share it around. This is an imprecise system. It is part of an overall attempt to balance appointments among the nationalities but the exact weights of various offices are hard to calculate. It was Germany's 'turn', but France and Germany had agreed that a Frenchman would be appointed.<sup>65</sup> Mitterrand nominated Claude Cheysson, former Commissioner who was then French Foreign Minister and Jacques Delors, the Finance Minister.<sup>66</sup> Delors was subsequently chosen in July. I discuss his appointment and contribution in Section 3.3.

At the Dublin Council in December 1984, Greece refused to allow the negotiations with Spain and Portugal to proceed, but agreement on the terms of their admission had basically been reached.<sup>67</sup> Once Greece's objections had been overcome by further financial assistance, the way was clear for admission and treaties of accession were signed in June 1985 providing for entry on 1 January 1986.

The Dooge Report was handed down in March 1985.<sup>68</sup> It recommended an intergovernmental conference to prepare a European Union treaty based on the *acquis communautaire*, the Stuttgart Declaration and "guided by the spirit and method of the [DTEU]".<sup>69</sup> Thus the DTEU appeared to have had some influence on the next step proposed. However, Dooge recommended retention of much more intergovernmental activity than the DTEU.<sup>70</sup> On the other hand, the report also recommended a security role for the Union, a subject not touched by the DTEU.<sup>71</sup>

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<sup>65</sup> Grant C *Delors* (London, Nicholas Brealey, 1994) p58.

<sup>66</sup> *Id.*

<sup>67</sup> Burgess *op cit* p191.

<sup>68</sup> Ad hoc Committee for Institutional Affairs *Report to the European Council* 29-30 March 1985. Bull EC 3-1985.

<sup>69</sup> *Ibid* p33.

<sup>70</sup> Burgess *op cit* p189.

<sup>71</sup> *Id.*

Britain had tabled its own vision for Europe at Fontainebleau.<sup>72</sup> It emphasised the completion of the internal market that the Community was supposed to be along with other measures to promote competitiveness. A key feature was the increased use of majority voting to pass market legislation. This was ironic given repeated British use of the veto. Some of the British proposals were later picked up and incorporated in the Single European Act.

Political problems, mostly over money, pushed the Dooge Report off the Community agenda. In particular, a rift in the Paris-Bonn axis made institutional reform unlikely. On the other hand, the Commission White Paper, *Completing the Internal Market*,<sup>73</sup> presented at the Milan European Council in June 1985, proposed a set of measures which would transform the roles of the Commission and Council and create momentum for further deepening. An Intergovernmental Conference (IGC) was convened to recommend treaty changes based on both the White Paper and the intergovernmental reports. Industrial groups had been lobbying for some time for improvements to the internal market.<sup>74</sup> The Commission had heeded these calls.<sup>75</sup> Several of the Member States' departments of industry had been working on the technical issues.<sup>76</sup>

The White Paper called for action to achieve a single market by the end of 1992. It proposed nearly three hundred specific measures needed to complete the internal market. While the EECT was supposed to have already created a common market, the White Paper had pointed out many aspects of Member State law impeding a single market. The White Paper mainly proposed substantive measures: it did not recommend much institutional change. It did, however, recommend a significant increase in majority voting in the Council. There was extensive provision for majority voting in the EECT, but it had been seldom used since the Luxembourg

<sup>72</sup> "Europe The Future" cited George op cit p174.

<sup>73</sup> COM (85) 310.

<sup>74</sup> K. Middlemass *Orchestrating Europe* (London, Fontana 1995) p102. See eg the report *Europe-1990* released by Wisse Dekker, Managing Director of the Philips group.

<sup>75</sup> Ibid p105.

<sup>76</sup> Ibid p106.

Commission. If now adopted as a regular practice, it will influence the whole of EEC decisionmaking dynamics.

The White Paper also marked a significant change in the Commission's approach to harmonisation, moving from the attempt to harmonise national laws which are sufficient to achieve the objectives of the Community to the legislative adoption of the approach taken in the Single European Act decision of 1979.<sup>77</sup>

The recommendations of the White Paper were incorporated into the Single European Act, signed at the Hague on 28 February 1992. The term "Act" was used, perhaps to give it a more authoritative status. Title III provided a legal basis for the Commission to recommend the existence of the European Court of First Instance ("TFI") to assist the Commission in overseeing Commission implementation of the internal market as "comitology".<sup>78</sup> A new Art 100a provided that the completion of the internal market to be decided in the Council, taking into account the needs of Member States with higher standards. This would not necessarily lead to complete harmony, but would lead to a lowest common denominator either.

A new "co-operation" procedure was introduced for the Council, giving a stronger role to the European Parliament in the legislative process, equal power with the Council. This is discussed in detail in the next chapter. The Act proposed fiscal harmonisation but preserved the principle that the internal market requires substantial harmonisation. It was unlikely to achieve them.

Case 120/78 Rewe [1979] ECR 649. See further below in S. 1. A new EEC Art 145. A new EEC Art 99.

Compromise. If now adopted as a regular practice, it would transform the Council and hence the whole of EEC decisionmaking dynamics.

The White Paper also marked a significant change of approach in Community lawmaking from the attempt to harmonise Member State laws to mutual recognition of national laws which are sufficient to meet Community standards. This was legislative adoption of the approach taken by the ECJ in the *Cassis de Dijon* decision of 1979.<sup>77</sup>

The recommendations of the White Paper were substantially adopted in the Single European Act, signed at the Hague on 28 February 1986. Although a treaty, the name "Act" was used, perhaps to give it a more regulatory than diplomatic appearance. Title III provided a legal basis for European Political Co-operation and recognised the existence of the European Council. It provided for a Court (or Tribunal) of First Instance ("TFI") to assist the ECJ. It formalised the system of committees overseeing Commission implementation of legislation, to become known as "comitology".<sup>78</sup> A new Art 100a provided for harmonisation measures to complete the internal market to be decided in the Council by QMV and allowed exemptions for Member States with higher standards. Thus even harmonisation would not necessarily lead to complete harmony, but it would not automatically lead to a lowest common denominator either.

A new "co-operation" procedure was introduced into EEC Art 149 for some legislation, giving a stronger role to the European Parliament, but still well short of equal power with the Council. This is discussed further in Section 3.5.

The Act proposed fiscal harmonisation but preserved the unanimity requirement.<sup>79</sup> A fair internal market requires substantial harmony of tax rates, but this measure seemed unlikely to achieve them.

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<sup>77</sup> Case 120/78 *Rewe* [1979] ECR 649. See further below in Section 3.6.

<sup>78</sup> A new EEC Art 145.

<sup>79</sup> New EEC Art 99.

The Act proposed steps to enable a further freeing of capital movement under EEC Art 70. While this had been foreshadowed in the EECT, the necessary measures to accomplish it had been left to the Council and had not been enacted. Freeing capital movement would have profound implications for national fiscal and monetary policy which the Act did not address. Like so many other Community instruments, it was foreshadowing further acts of integration without actually providing for them.

The SEA provided some new policy fields for the Community, notably occupational health and safety, economic and social cohesion, research and technological development, and environmental protection, providing a formal legal basis for existing Community forays into these areas.

The SEA did not give the Community much more to do than had been originally set out in the EECT, but provided better means to achieve those objectives. It enabled many of the things the EECT had been supposed to achieve in market integration. Perhaps most importantly, it pulled all the Member States together behind the integration process, enthusiastically backed by business, and giving the public something tangible in the promise of a fully integrated market by the end of 1992. The success of the SEA allowed the even greater ambition of a single currency and a "European Union" to be pursued, as explored in Chapter 4.

The political developments just outlined above were accompanied, as indicated, by institutional developments. However, there were also internal dynamics which caused the institutions to develop. In the following sections, I discuss institutional development in the period from start of the EECT to the preparatory stages of the Treaty of Maastricht. There is a section on each institution. One of the key features of institutional development has been interinstitutional dynamics so although the sections on each institution are discrete, each will contain considerable discussion of interinstitutional dynamics involving that institution.

### 3.3 THE COMMISSION

Instead of the High Authority, the EEC was guardian of the treaty and to initiate legislation. This is a major power given the accountability.

Under Art 155, the Commission was to ensure when this mission very seriously through both in unusual mission in constitutional systems. It was the duty of government and private parties to claim to be trying to uphold the constitution from taking action against the Commission for the Commission an apparently moral mission.

In addition to the powers conferred by the Treaty, the Commission has powers conferred by the Council to implement executive powers and the Council can confer on the Commission a large measure of executive power. This has given the Commission a system used to implement Community legislation. The separation of powers and lines of accountability.

The Commissioners, though appointed collectively, are not. They take an oath of independence. There are nine members, enabling the three largest Member States to have two Commissioners, and the smaller three one. They are elected for renewable periods of four years. Under Art 155, the Commission is elected by the ECJ on the application of either the Council or the Commission could be forced by a vote of the Council. Under Art 157 the only qualifications for Commissioners, Member States, have "general competence".

EEC Art 155 fourth indent.

### 3.3 THE COMMISSION

Instead of the High Authority, the EEC was given a Commission to be the guardian of the treaty and to initiate legislation. The Commission had less legislative power than the High Authority but retained a monopoly of the proposal of legislation. This is a major power given the Commission's tenuous democratic accountability.

Under Art 155, the Commission was to ensure that the Treaty was applied. It has taken this mission very seriously through both executive action and litigation. It is an unusual mission in constitutional systems. It is more common for various levels of government and private parties to engage in constitutional litigation all claiming to be trying to uphold the constitution. It has not prevented other parties from taking action against the Commission for breaching the Treaty, but it gave the Commission an apparently moral mission.

In addition to the powers conferred by the Treaty, the Commission could also have powers conferred by the Council to implement legislation.<sup>80</sup> Thus it has some executive powers and the Council can confer others, but the Council also retains a large measure of executive power. This has given rise to the complex committee system used to implement Community legislation which has further complicated the separation of powers and lines of accountability.

The Commissioners, though appointed collectively, are nominated by the Member States. They take an oath of independence. The Commission originally consisted of nine members, enabling the three largest Member States to appoint two Commissioners, and the smaller three one each. They were appointed for renewable periods of four years. Under Art 160, they could be compulsorily retired by the ECJ on the application of either the Council or the Commission and the entire Commission could be forced by a vote of the Common Assembly to resign. Under Art 157 the only qualifications were that they be nationals of the Member States, have "general competence", and that their independence be

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<sup>80</sup> EEC Art 155 fourth indent.

"beyond doubt". They were to be completely independent in the performance of their duties and take no instructions from their governments or anyone else. This reflects Monnet's vision of the supreme technocrat seized of a vision for Europe and the technical expertise to put it into effect. In reality, Commissioners are mere mortals and come to their positions with their national background and experience as both assets and baggage. Member States have jealously guarded their right, not stated in the Treaty, to appoint a Commissioner, or in the case of the large Member States, two. We will see in Chapter 4 how this provision has been amended in the face of imminent enlargement, but it seems that Member States expect "their" Commissioner to uphold that state's interests despite their oath of independence. This is an example of a supranational institution being "nationalized" at the very moment that it is meant to be most supranational. It must be said that the Commissioners generally appear to have taken their oaths seriously, but it is also to be expected that their closest connections will be with the government which "appointed" them. It is hard to see an alternative, but it would be interesting to see either a President seeking direct election with a multi-national team of their own choosing or a Commission being elected from the ranks of the Parliament.

The first President was the German Walter Hallstein, a former law professor, who had played a prominent role in the negotiation of both the ECSC and EEC. He was committed to integration and saw the Commission as an embryonic European government. Hallstein served two terms: 1958 – 1962 and 1962 – 1967. De Gaulle was contemptuous of Hallstein and claimed he was styling himself as a head of state. De Gaulle described the Commission as an "*aréopage apatride*".<sup>81</sup> To him, it was the epitome of the supranational Europe he opposed.

Hallstein described the role of the Commission as that of "motor of the Community, guardian of the Treaty, and ... 'honest broker'"<sup>82</sup> As motor, its role is to initiate policy, but how does it formulate its agenda? Keith Middlemass

<sup>81</sup> Translation cannot do this expression justice. The Areopagus was the highest court of ancient Athens. The pejorative quality of "apatride" is not fully captured by "stateless".

<sup>82</sup> W Hallstein *Europe in the Making* tr C Roetter (New York, Norton 1973) p58.

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will not be guided by a direct relationship with the

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other Commissioners demonstrate the difficulties  
position. Five of the initial eight had been government  
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experience rather than being composed of supposed

The Commission engages in a great deal of  
negotiation, agreement must first be reached with  
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<sup>83</sup> Middlemass op cit p213.

<sup>84</sup> Hallstein op cit p69.

<sup>85</sup> Ibid p60.

See eg? Lulow "The European Commission" in R K  
European Community (Boulder, Westview 1991) p91  
Cm, 16 The European Commission (Manchester, Manchester

describes the Commission as seeking the elements of a general will,<sup>83</sup> but it is a will not guided by a direct relationship with the people.

To a large extent, the agenda in the early years was laid down by the Treaty. The transitional period had distinct phases. The CAP had to be negotiated. After that, there may initially have appeared to pro-integrationists to be no limit to the possibilities of integration, but by the time the CAP was in place, a strong limit in the form of the Luxembourg Compromise had been imposed, albeit in an unconstitutional way as described above.

Hallstein stressed the collegiality of the Commission.<sup>84</sup> Preparation and execution in particular areas may belong to a particular Commissioner, but decisions are made by the Commission as a whole. This could be by simple majority, but it is more likely to be by consensus. Hallstein said that more forceful Commissioners did not seek to influence the Commission in their states' favour during his tenure.<sup>85</sup> There is no evidence to suggest this, but as the deliberations of the Commission are secret, it is difficult to tell. There is certainly evidence that it happened in subsequent Commissions.<sup>86</sup>

Hallstein was widely viewed as the personification of the Commission.<sup>87</sup> The other Commissioners demonstrate the different national approaches to the position. Five of the initial eight had been government ministers. The others had been senior civil servants. The Commission thus had a wealth of political experience rather than being composed of supposedly apolitical technocrats.

The Commission engages in a great deal of negotiation. Because it acts collegially, agreement must first be reached within it, at least by a majority. Much of the negotiation is carried out by members of the Commissioners'

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<sup>83</sup> Middlemass op cit p213.

<sup>84</sup> Hallstein op cit p59.

<sup>85</sup> Ibid p60.

<sup>86</sup> See eg P Ludlow "The European Commission" in R Keohane and S Hoffmann (eds) *The New European Community* (Boulder, Westview 1991) p91.

<sup>87</sup> Cini, M *The European Commission* (Manchester, Manchester UP 1996) p37.



*cabinets* – their small teams of personal staff. These have no constitutional status: they are the product of the dominance of a French bureaucratic culture in the original High Authority. As the Commission has become larger and more nationally diverse, Commissioners have felt an ever greater need for personal staff as opposed to the Directors-General who head the administrative units, who are not of their choosing.

Decisions are taken at formal Commission meetings. The Commission is then a participant in the deliberations of the Council, though not voting, and may also be invited to address the Parliament and answer questions. Negotiation begins with the initiation of policy. The Treaty establishes some broad policy goals and specific sectors in which these are to be pursued. The Commission could be proceeded against in the ECJ under Art 175 for failure to act.

One of the Commission's main aims has been to increase its own power. It has consistently favoured both enlargement of the Community and the extension of its powers, together with greater use of majority voting in the Council and greater powers for the European Parliament. It has also sought and gained involvement in Community institutions of which it is not a member and in areas where it has no legislative competence. For example, the President of the Commission is a member of the European Council, which was originally a summit of heads of government.

The Commission has achieved all the original treaty objectives to a greater or lesser degree, but it may have lost the "war" for supranationality. The Member States are still ultimately in control through the Council of Ministers and the European Council.

The Commission is the subject of extensive lobbying.<sup>88</sup> Jordan and Richardson describe a "logic of negotiation" in which Commission officials try to broker

<sup>88</sup> S Mazey, S and J Richardson "The Commission and the Lobby" in G Edwards and D Spence (eds) *The European Commission* (London, Cartermill, 1994), p170.

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bureaucratic culture, despite the influence o

G Jordan and J Richardson *Government and Press*  
Press 1987)  
Jordan and Richardson op cit p171.  
and p174. They give the example of DG V and its v

policy positions among disparate groups.<sup>89</sup> The Commission is inevitably close to the groups which it regulates directly, principally agricultural and industrial producers. It is equally inevitable that such groups are also able to exercise considerable influence within the Commission. The unregulated access of lobbyists to Commission officials is arguably as significant a "democratic deficit" as the lack of power of the European Parliament,<sup>90</sup> though the privileged position of organised lobbyists dogs all democracies. The active participation of lobbyists in the process of policy formation indicates the corporatist quality of the Community. This corporatism is constitutionally enshrined in the form of the Economic and Social Council ("Ecosoc"), which is purely consultative, but is also very much part of the practice of the Commission, which has considerable power.

Mazey and Richardson observe that some of the Commission's Directorates-General in areas where the Community has no legislative power have developed strong links with interested groups in the hope that their support will lead to the Community being given competence in these areas.<sup>91</sup> Looking at the Community's gradual increase in competences, this strategy seems to have been successful.

The Member State administrations, through the Council, have a major input into decisionmaking and can also affect Commission proposals through policy committees. It is in the Commission's interests to make proposals which will be approved by the Council. Member State input is therefore vital. Once the proposal has come from the Commission to the Council, considerable care has gone into its formulation, the Commission will be able to defend it, and the Council's concern may be more to reach a consensus than to satisfy national interests.

While nominally supranational, the Commission is also multi-national given the many nationalities of its Commissioners and staff. As a result, there is no single bureaucratic culture, despite the influence of French culture on the original

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<sup>89</sup> G Jordan and J Richardson *Government and Pressure Groups in Britain* (Oxford, Clarendon Press 1987)

<sup>90</sup> Mazey and Richardson *op cit* p171.

<sup>91</sup> *Ibid* p174. They give the example of DG V and its work on social policy.

structure. This is even more fragmented by the coexistence of many nationalities in the various working units of the Commission.

It took until mid-1960 to have a working organization in place.<sup>92</sup> The Member States adopted different methods to fill their quotas of Commission officials until a general examination was introduced in 1962. Cini suggests that the need for Commission staff to relocate to Brussels generated a strong *esprit de corps* and European spirit.<sup>93</sup>

The Commission had great freedom in choosing its working procedures. The High Authority was a possible model, but it was also possible to make a fresh start. A system of committees of three Commissioners was developed.<sup>94</sup>

The Commission immediately began to propose legislation. It made many proposals for cutting internal trade barriers. However, progress towards common transport and energy policies was slow. There was more of an emphasis on grand plans and visions than fine detail.<sup>95</sup> The Commission became active as early as 1961 in negotiating the possible accession of new members. This was peremptorily brought to an end by de Gaulle's veto of British entry discussed above.

The Commission took an active role in the negotiation of the Kennedy Round of GATT, which began in 1964. This gave the Commission considerable exposure at an international level. It also meant that the Community was playing a role in creating international trading conditions as well as in creating the internal market.

The Commission was able to assist progress towards both the customs union and the CAP, with both being implemented ahead of schedule. In the latter part of the 1960s, the Commission began trying to co-ordinate national economic policies.<sup>96</sup>

<sup>92</sup> Cini op cit p39.

<sup>93</sup> Ibid p40.

<sup>94</sup> Ibid p41.

<sup>95</sup> *The Economist* 21 February, 1959.

<sup>96</sup> Cini op cit p45.

This was always going to be difficult. With economic policy was necessary for the common market. It was a question of manipulation of the economy for the common market. Lacking formal powers in the area of economic policy.

In 1963, the imminent arrival of majority voting was a major issue of finance before the full operation of the common market. This "Empty Chair Crisis" has been discussed. It was a blow to the progress of the common market. The achievement of the Commission's objectives seemed to mark a significant step.

In April, 1965 the Six signed the Merger Treaty. The High Authority of the ECSC and the Commission of the European Communities were merged into a single Commission. There had already been some discussion of this and indeed there were already the shares of the common market. The treaty came into force on 1 July. The members of the High Authority were appointed by the Council of Ministers. The President of the High Authority was appointed by the Council of Ministers. The President of the High Authority was appointed by the Council of Ministers. The President of the High Authority was appointed by the Council of Ministers.

The first Presidency of the merged Commission was held by the Belgian Jean Rey, a lawyer, economist and politician. He faced the task of the merger. The new Commission was to be composed of some of the Euratom Commissioners.

The Commission supported Britain's second application for membership. It was again unable to overcome de Gaulle's veto.

<sup>97</sup> Schaberg and Poidevin op cit p643.  
<sup>98</sup> Ibid p64.  
<sup>99</sup> Cini op cit p50.

This was always going to be difficult. While a significant commonality of economic policy was necessary for the common market to function effectively, the temptation to manipulate the economy for short term national gain was almost irresistible. Lacking formal powers in the area, the Commission could only make suggestions.

In 1965, the imminent arrival of majority voting in the Council and the need to resolve issues of finance before the full operation of the CAP brought about a crisis. This "Empty Chair Crisis" has been discussed more fully in the previous section. It was a blow to the progress of the Commission. Majority voting would have made achievement of the Commission's program easier. The Luxembourg Compromise seemed to mark a significant clipping of the Commission's wings.

On 8 April, 1965 the Six signed the Merger Treaty to bring together the High Authority of the ECSC and the Commissions of the EEC and Euratom into a single Commission. There had already been some formation of joint services prior to this and indeed there were already the shared institutions: the Assembly and ECJ.<sup>97</sup> The treaty came into force on 1 July, 1967 after ratification. Only two members of the High Authority were appointed to the new Commission.<sup>98</sup> By only agreeing to Hallstein holding the merged Presidency for six months, de Gaulle in effect forced him to resign rather than accept such humiliating terms.<sup>99</sup>

The first Presidency of the merged Commission was expected to go to an Italian, but instead it went to the Belgian Jean Rey, a Commissioner since 1958 and a former lawyer, economist and politician. He faced the difficulty of overseeing the implementation of the merger. The new Commission had fourteen members to incorporate some of the Euratom Commissioners and High Authority members.

The Commission supported Britain's second application for membership in 1967, but was again unable to overcome de Gaulle's opposition. There was success of

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<sup>97</sup> Spierenburg and Poidevin *op cit* p643.

<sup>98</sup> *Ibid* p646.

<sup>99</sup> Cini *op cit* p50.

sorts in 1968 with the commencement of the CAP two years ahead of schedule. The arduous negotiations had been successfully completed and the necessary processes implemented. Agricultural support was the Commission's main activity at that time. The Commission now needed a new mission.

The resignation of de Gaulle brought the opportunity for a *relance*. This came in the form of the Hague Conference of December 1969 but it came too late for the Rey Presidency which, under the terms of the Merger Treaty, was to end in June 1970. The number of Commissioners was to return to nine. Once again, it was an opportunity for an Italian President and Franco Maria Malfatti was appointed.

Malfatti was expected to benefit from the *relance*, exemplified by the Werner Plan for economic and monetary union of October 1970.<sup>100</sup> Under the Plan, the Commission began to draft plans for such a union, but the monetary crisis of 1971 brought a premature end to it.<sup>101</sup> Malfatti indicated that he did not wish to hinder the accession of new members, especially Britain, by making bold policy initiatives, so the period can be seen as one of treading water until the accessions were achieved.<sup>102</sup> The Commission actively assisted the applications of Britain, Ireland, Denmark and Norway.

Malfatti announced his resignation after only fifteen months in order to contest the Italian election. This is an example of Community offices being a stepping stone in a political career rather than a pinnacle. Other Commissioners have tended to be in the twilight of their political careers. The Presidency was clearly the pinnacle for Hallstein. In retrospect, that is also the case for Jacques Delors.<sup>103</sup>

Sicco Mansholt, the long-time Agriculture Commissioner, took over the Presidency for the last nine months of Malfatti's term. In that time he oversaw the

<sup>100</sup> Ibid p54 and see previous section.

<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Jacques Delors was widely expected to run for the Presidency of France in 1995 but he decided not to. This would have been regarded as a higher post than the Presidency of the Commission. See further below.

...fication of the accession treaties which he  
...the rejection of membership by Norwegian  
...made significant public statements about  
...than outside Community competence and  
...Commission rather than uniting it.<sup>104</sup> His  
...was then within the Community's competences  
...is competence would later expand. As  
...visionary President who can gather Member  
...reform. Mansholt could not gather such support.

The members of the 1973 Commission had  
...apparently the turn of France to provide the  
...a former Finance Minister, who had been a  
...from 1958 to 1961, was appointed. He divided  
...two (development and trade) and gave one to  
...Deniau and the other to the British Commission  
...subsequently arranged a raid of files from Sicco  
...anchor within the Commission.<sup>106</sup> The split  
...apparently for no better reason than to appease  
...dissatisfaction among staff.<sup>107</sup>

Such problems were inevitable given the ex  
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<sup>104</sup> Cioop cit p55.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Ibid p56.

ratification of the accession treaties which had been signed in January 1972, and the rejection of membership by Norwegian voters at a referendum in October. He made significant public statements about ecology and development, two areas then outside Community competence and, according to Cini, divided the Commission rather than uniting it.<sup>104</sup> His vision was certainly broader than the areas then within the Community's competence and encompassed areas in which its competence would later expand. As we will see with Jacques Delors, a visionary President who can gather Member State support can lead constitutional reform. Mansholt could not gather such support.

The members of the 1973 Commission had been nominated in advance.<sup>105</sup> It was apparently the turn of France to provide the President and François-Xavier Ortoli, a former Finance Minister, who had been a Director-General in the Commission from 1958 to 1961, was appointed. He divided the external affairs portfolio into two (development and trade) and gave one to his fellow French Commissioner Deniau and the other to the British Commissioner Soames. Apparently Deniau subsequently arranged a raid of files from Soames' office, giving some idea of the rancour within the Commission.<sup>106</sup> The splitting of other Directorates-General, apparently for no better reason than to appease Commissioners, also caused dissatisfaction among staff.<sup>107</sup>

Some problems were inevitable given the enlargement and the need to find positions for additional Commissioners and staff. This highlights the role of the Commission in having to find jobs for both Commissioners and staff rather than being able to choose the staff it needs for its functions. English was introduced as an additional working language to French. Ortoli seemed to gain the respect of his fellow Commissioners but did not have a high public profile.<sup>108</sup> Instead, he concentrated on improving the internal cohesion of the Commission and of its relations with national administrations. He thus contributed to the process of

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<sup>104</sup> Cini op cit p55.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Ibid p56.

*engrenage* whereby national civil servants become involved in Commission practices and policies.

The President was only appointed for two years of the four year Commission term. The first Ortolí Presidency was during the period of the 1973 oil crisis and price shock and the breakdown of the Bretton Woods agreement on exchange rates. The Commission could do little about these events. The new European Council<sup>109</sup> detracted from the Commission's power of initiative without any amendment of the Treaties. The President of the Commission is a member of the European Council, but has little power within it. Another purely intergovernmental mechanism, EPC, at least gave the Commission the opportunity to give its opinion on the formulation of foreign policy.

The 1976 Tindemans Report recommended, as part of a process of greater democratization, that the President of the Commission be endorsed by the European Parliament. This would have made the Commission more like an executive in a system of responsible government. This proposal was subsequently adopted in the TEU (see Chapter 4).

The issue of renewal of Ortolí's Presidency arose at the end of 1974. There was the possibility that Soames might replace him, but Soames was a Conservative and, as described above, a Labour government had been elected earlier in the year. That government was committed to renegotiating its Treaty obligations and despite the Commissioners' oath of independence, it would have been politically difficult for a British President to negotiate with the British government. Ortolí had lost his primary political sponsor with the death of President Pompidou in 1974, but he was reappointed for a further two years.

It was Britain's turn to provide the President of the 1977 Commission. Soames was still one of the British Commissioners, but the Labour government not surprisingly sought one of its own. Roy Jenkins had to be persuaded to take the post. He had been that unusual thing a staunchly pro-EEC Labour member. He

<sup>109</sup> See above Section 3.2

was Home Secretary in the Wilson administration only after losing a party battle emphasizing the second-best quality of politicians.<sup>110</sup>

By publishing the diary of his Presidency, Jenkins reveals knowledge of the inner workings of the Commission including five Commissioners was Christopher Tugendhat, a member of those Member States with more of a spread of political outlook, emphasising the Member States as a means to pursue a point.

Jenkins recounts the domestic and international scene in some detail, but even more arresting is his account of the portfolios to the Commissioners. No doubt in an administration where the portfolios are in the hands of jockeying, wheedling and ill-feeling Commissioners' pride rather than efficiency was a factor.<sup>111</sup>

An early issue was the presence of the President since the Group of Seven, France, Germany and Italy, are also Members. Economic matters supposedly very much a Commission's absence would be incongruous. He pointed out, in an argument initially opposed. He pointed out, in an argument as a meeting of sovereign governments. Presidents of the Commission have been invited.

<sup>110</sup> Jenkins *European Diary* (London, Collins 1980) pp 661-668.  
<sup>111</sup> *Ibid* p 29. The group is now notionally Eight with formally a member but the President of the Commission.  
<sup>112</sup> Though Cini (op cit p 61) notes that Jenkins was a

was Home Secretary in the Wilson administration when appointed and took the position only after losing a party ballot to become Prime Minister, again emphasizing the second-best quality of the Presidency for Member State politicians.<sup>110</sup>

By publishing the diary of his Presidency, Jenkins has greatly contributed to our knowledge of the inner workings of the Commission. He headed a thirteen member Commission including five Vice-Presidents. The other British Commissioner was Christopher Tugendhat, a Conservative MP, it being the custom of those Member States with more than one Commissioner to appoint a spread of political outlook, emphasising that the Commission was not seen by Member States as a means to pursue a political agenda.

Jenkins recounts the domestic and international politics of his appointment in some detail, but even more arresting is his account of the process of awarding portfolios to the Commissioners. No doubt there is a similar process in any administration where the portfolios are in the gift of the chief, but the descriptions of jockeying, wheedling and ill-feeling, and the division of areas for Commissioners' pride rather than efficiency, does not make encouraging reading.<sup>111</sup>

An early issue was the presence of the President at an economic summit of what has since become the Group of Seven.<sup>112</sup> Four of the invited states, Britain, France, Germany and Italy, are also Member States, and the meetings discuss economic matters supposedly very much a concern of the Community, so the Commission's absence would be incongruous. However President Giscard was initially opposed. He pointed out, in an argument reminiscent of de Gaulle, that it was a meeting of sovereign governments. His objections were overcome and Presidents of the Commission have been invited to these summits ever since.<sup>113</sup>

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<sup>110</sup> R Jenkins *European Diary* (London, Collins 1989) p6.

<sup>111</sup> Ibid pp661-668.

<sup>112</sup> Ibid p20. The group is now notionally Eight with the inclusion of Russia. The EU is still not formally a member but the President of the Commission is always invited.

<sup>113</sup> Though Cini (op cit p61) notes that Jenkins was excluded from some sessions.



Jenkins looked to monetary union as a possible engine for integration.<sup>114</sup> He picked up the proposals which had been around since the Werner Report and developed the idea of a European Monetary System ("EMS"). A European version of Bretton Woods might bring back the happy days of currency certainty. The proposal was initially received with skepticism but Jenkins made it his personal crusade. Cini observes that by his many meetings with leaders, Jenkins eased the passage of the proposal.<sup>115</sup> "Shuttle diplomacy" is perhaps the nearest, but not quite adequate, term for such multiple bilateral negotiation, also reminiscent of Monnet.

EMS was never a formal Commission proposal. Rather, it was Jenkins' personal project. This emphasises the special position of the President. Although only *primus inter pares* in the Commission, the prestige and public profile of the Presidency, together with membership of the European Council, enable the President to pursue a personal agenda distinct from the Commission.

Jenkins used the Commission to try to build consensus among the Member States in other areas, but there were few other notable successes. Plans for Greek accession were already under way when he took office. He did not enthusiastically pursue it in the way that previous Commissions had pursued enlargement, but it was finalized during his term.

The most significant constitutional development during the Jenkins period was the direct election of the European Parliament, but the Commission cannot claim much credit for this either, apart from having been a consistent advocate of it.

At the Venice European Council of June 1980, Gaston Thorn, Prime Minister of Luxembourg, was chosen as the next President. It was the turn of a small country to provide the President. Some, including Giscard, were worried that Thorn was too "federalist", but he eventually prevailed. This was the first example of the European Council choosing one of their number as President of the Commission.

<sup>114</sup> Jenkins op cit p23.

<sup>115</sup> Cini op cit p63.

Although a Prime Minister, Thorn was not  
Further, he came to office at a time when the  
had been, the Schmidt-Giscard axis, was  
occupations for fourteen Commissioners  
Commissioner. He had to cope with the death  
only two weeks into the life of the new Com  
Agriculture was keenly sought. Thorn re  
Gaulle's Danish successor, thus encourag  
particular portfolios.

The initial period of Thorn's term was a  
Margaret Thatcher in the allocation of certa  
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The Thorn Commission was not in a very pow  
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community. Thorn can take some credit for the  
in 1984 and also for the end of the  
acceptance of a majority vote in the Council  
to see the conclusion of a common fisher  
and accession treaty, and the containment of  
the accession negotiations with Spain and Por  
towards the Single European Act.

The consensus among commentators is that th  
ed.<sup>116</sup> I would suggest that this is partly due to

<sup>116</sup> Ibid p64.

<sup>117</sup> Ibid p65.

<sup>118</sup> Ibid p66.

<sup>119</sup> Cf Cini id, G Ross Jacques Delors and European In  
Parker in R Keohane and S Hoffmann op cit p11.

Although a Prime Minister, Thorn was not going to have a very high profile. Further, he came to office at a time when the engine of the Community, such as it had been, the Schmidt-Giscard axis, was coming to an end. He had to find occupations for fourteen Commissioners with the addition of a Greek Commissioner. He had to cope with the death of the experienced Finn Gundelach only two weeks into the life of the new Commission. Gundelach's vital portfolio Agriculture was keenly sought. Thorn resolved the issue by giving it to Gundelach's Danish successor, thus encouraging the idea of national "ownership" of particular portfolios.

The initial period of Thorn's term was also marked by the interference of Margaret Thatcher in the allocation of certain portfolio interests to the British Commissioner Tugendhat. Such national interference in the internal affairs of the independent Commission was regarded as unacceptable by Commissioners and staff, but there was apparently nothing they could do about it.<sup>116</sup>

The Thorn Commission was not in a very powerful position. Davignon dominated through a combination of experience and force of personality.<sup>117</sup> He was also working on an area, industrial research, which had the support of the business community. Thorn can take some credit for the resolution of the British budgetary issue in 1984 and also for the end of the Luxembourg Compromise by the acceptance of a majority vote in the Council on agricultural prices.<sup>118</sup> His term also saw the conclusion of a common fisheries policy, a renegotiation of the Greek accession treaty, and the containment of a US-EC trade dispute. It also saw the accession negotiations with Spain and Portugal and the beginning of moves towards the Single European Act.

The consensus among commentators is that this was the Commission's lowest ebb.<sup>119</sup> I would suggest that this is partly due to the spectacular success of Thorn's

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<sup>116</sup> Ibid p64.

<sup>117</sup> Ibid p65.

<sup>118</sup> Ibid p66.

<sup>119</sup> Cf Cini id, G Ross *Jacques Delors and European Integration* (Cambridge, Polity, 1995) p28, P Ludlow in R Keohane and S Hoffmann op cit p91.

successor Jacques Delors, but also due to Thorn's low profile coming from a small country and to the unpromising conditions for action prevailing for most of his Presidency. Without the support of at least some of the larger Member States, the President can do little. Delors was about to show what a high profile President from a large country could do with the active support of several large Member States.

Jacques Delors was chosen as the next President. He had the credentials of being French Finance Minister and, briefly, an MEP (from 1979 to 1981). It was Germany's turn but there was no obvious German candidate. Surprisingly, the matter was not settled at the June 1984 Fontainebleau European Council. It was not even on the agenda but was discussed privately. Mitterrand put forward Claude Cheysson, a former Commissioner now French Foreign Minister, and Delors. Delors was known to some of the Heads of Government from his role as Finance Minister. Charles Grant reports that Chancellor Kohl preferred Delors because Cheysson was too close to his own Foreign Minister Genscher, apparently a disadvantage.<sup>120</sup> Thatcher indicated her preference for Delors because of his part in rolling back the initial socialist economic policies of Mitterrand.<sup>121</sup> Delors thus had a dream run: the Socialist nominee of Mitterrand also acceptable to anti-Socialists. He had the added dimension of being a committed Christian, thus making him a European for all seasons. Pierre Mauroy resigned as French Prime Minister on 16 July, 1984, and it was only once Mitterrand chose someone else as Prime Minister that Delors accepted the Presidency.<sup>122</sup>

While the Community appeared in some ways to be at its lowest ebb, things had started to improve on several fronts. Europe was coming out of recession. Mitterrand had abandoned his attempt at Socialism-in-one-country and was now looking for ways to further his agenda at the European level. He had developed a good working relationship with Kohl even though Kohl was a Christian Democrat. A new Franco-German axis had thus begun. The British budgetary

<sup>120</sup> Grant op cit p58. Genscher was from the Free Democrats rather than Kohl's own party the CDU.

<sup>121</sup> Thatcher, M *The Downing Street Years* (London, Harper Collins 1993).

<sup>122</sup> These were very similar circumstances to those under which Jenkins accepted the post.

dispute had been solved. A confident, Conservative British government could turn its attention to its own vision of the Community as a large, deregulated market. Right/Centre coalitions were also in power in the Netherlands, Belgium, Italy and Denmark. The business community was getting behind moves to perfect the internal market. The European Parliament, by adopting the Draft Treaty on European Union, had indicated its support for deepening. As we have seen, the Dooge Report, the Council's response, had also backed deepening. Spain and Portugal were about to join and were also likely to favour deepening. The time was propitious for the right person to seize the initiative and Jacques Delors was the person for the moment.

During the six months before he took office, Delors was able to tour the Member State capitals and canvas ideas for further integration. Max Kohnstamm, Monnet's long-time collaborator, brought together a group of industrialists and officials which advised Delors to proceed to the single market via an eight year plan.<sup>123</sup> Such an influential network was very useful to Delors.

The Commission he inherited was, as always, of diverse political outlook. Lord Cockfield, a Conservative, was Commissioner for the internal market. Peter Sutherland, a free marketeer, was Commissioner for competition. They were perfect partners for Delors in his push to complete the single market. While such concentration on the market may seem strange for a socialist, Delors, like Monnet, saw economic union as a means to a political end. The "single economic space" would be accompanied by a "single social space" consisting of the harmonisation and, he hoped, improvement of social conditions, as foreshadowed in the Treaty of Rome.<sup>124</sup>

In his first address to the European Parliament on 14 January, 1985, Delors declared his aim of a borderless Community by the end of 1992. He called for both observance of the existing provisions for majority voting and for a new treaty to promote further integration.

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<sup>123</sup> Grant op cit p66.

<sup>124</sup> Ibid p67.

"1992" became a powerful slogan: a distant date when all the dreams of the single market would come true. As the Kohnstamm Group had recommended, "1992" would span the term of two Commissions. Delors was already looking to his second term of office. The first term would be very busy laying the groundwork for the completion of the single market. Cockfield's White Paper, *Completing the Internal Market*, containing 297 proposals and a timetable for their implementation, was presented to the Milan European Council of June, 1985, as noted in Section 3.2. Delors was the enthusiastic public salesman of the White Paper. He also enlisted the support of business groups such as the European Round Table, which were happy to oblige.

There was debate as to whether treaty revision would be necessary to implement the White Paper. Delors insisted that it did, so that internal market measures could be passed by qualified majority instead of unanimity in the Council. The leaders of Italy, France and Germany used their ability under Art 236 to call an Intergovernmental Conference ("IGC") to consider treaty amendments, over the opposition of Britain, Greece and Denmark.<sup>125</sup>

Despite the Commission having no formal role in the IGC, Delors was allowed to attend its meetings. His drafts dominated the agenda.<sup>126</sup> In addition to majority voting on internal market matters, he took the opportunity to propose chapters on the environment, research and "cohesion" (assistance to poorer Member States).<sup>127</sup> He also proposed a new "co-operation" procedure for legislation, giving the European Parliament a greater role. He held back from proposing monetary union, judging that the time was not yet right.<sup>128</sup>

The IGC was conducted by foreign ministers and their officials. Delors did not hesitate to make representation to heads of government in order to get his way.<sup>129</sup> While his work was undoubtedly effective, it demonstrates his willingness to treat

<sup>125</sup> Ibid p72.

<sup>126</sup> Id.

<sup>127</sup> Ibid p73.

<sup>128</sup> Id.

<sup>129</sup> Id.

the Commission as a personal fief, an  
and was extraconstitutional.

Most significantly for the Commission,  
Council meant that it would get more of  
the engine of integration. It could now  
Delors was able to add to this power by  
arrangements in 1988. A year earlier, it  
categories five years in advance, giving  
a good idea to create certainty, the propo  
called for increased spending in several  
meeting in March 1988 to hammer out a  
role in negotiations.<sup>130</sup>

With the 1992 programme and the budget  
during his first term to justify reappointment  
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Council of June 1988, a committee headed  
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This ensured that Delors would be re  
Committee, as it came to be called, is  
appointed for a new term until the end of 19

I have analysed the Commission's role and  
influencing the conduct of the Member States  
special dynamics of the Commission-Council  
role of the President of the Commission as  
The relevant Commissioner also attends  
Ministers. The particular quality of the

<sup>130</sup> Ibid p79.

the Commission as a personal fief, an attitude which could be counterproductive and was extraconstitutional.

Most significantly for the Commission, qualified majority voting ("QMV") in the Council meant that it would get more of its program enacted, making it once again the engine of integration. It could now propose legislation in new areas too. Delors was able to add to this power by obtaining agreement to new budgetary arrangements in 1988. A year earlier, he had proposed setting major spending categories five years in advance, giving greater budgetary certainty. While clearly a good idea to create certainty, the proposals also generated controversy as they called for increased spending in several areas. It took a special European Council meeting in March 1988 to hammer out an agreement. Delors took a very active role in negotiations.<sup>130</sup>

With the 1992 programme and the budget bedded down, Delors had done ample during his first term to justify reappointment. He was the logical person to oversee the implementation of the measures that he had taken such a large part in proposing. There was also the next major task, monetary union. The SEA had finally secured liberalisation of capital movements, and this had the potential to destabilize exchange rates among the Member States. At the Hanover European Council of June 1988, a committee headed by Delors and consisting of central bank governors was established to examine possible progress to monetary union. This ensured that Delors would be reappointed. The work of the Delors Committee, as it came to be called, is considered in Chapter 4. Delors was appointed for a new term until the end of 1993.

I have analysed the Commission's role and the domestic and international factors influencing the conduct of the Member States, but it is necessary to consider the special dynamics of the Commission-Council relationship. I have considered the role of the President of the Commission as a member of the European Council. The relevant Commissioner also attends meetings of the relevant Council of Ministers. The particular quality of the relationship is in the Commission's

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<sup>130</sup> Ibid p79.

monopoly of proposal and the Council's power (subject to the participation of the European Parliament and the Commission) of enactment. The interaction continues through the process of "comitology",<sup>131</sup> the many committees through which the Council oversees Commission implementation.

A key issue is which article of the Treaty the proposed legislation is based on. This will determine whether unanimity or QMV in the Council is required. While initially a matter for the Commission, the Council can vote to change the legal basis. The legal basis is subject to judicial review and has led to many cases before the ECJ. Some of these are considered in section 3.6 on the ECJ. The battle for legal basis, familiar in federal systems in which one level of government has enumerated powers, is central to the Commission-Council relationship, but it is still a more co-operative than adversarial relationship.

The Commission has been able to blur the boundaries between itself and the Council by establishing policy committees consisting of both Commission and national officials. This leads to a spirit of *engrenage* conducive to agreement. This process is also at work in the implementation committees.

There is a vital working relationship between the Secretariats of the Commission and the Council. Peter Ludlow describes how Emile Noël, Secretary-General of the Commission from 1958 to 1987, played an active role in personally negotiating solutions.<sup>132</sup> His successors have continued this role.

Delors had taken the Commission from the sidelines to the centre of the action. As the driving force behind the Single European Act, the Commission had re-established itself as the engine room of integration. This assertion had had its price though. Delors' high public profile also invited a backlash. Nevertheless, the success of the SEA gave Delors the ideal platform to pursue the dream of monetary union, explored in the next chapter.

<sup>131</sup> On comitology, see eg Edwards and Spence op cit ch5.

<sup>132</sup> Ludlow in Keohane and Hoffmann *op cit* p95.

34 THE COUNCIL

The Council, also known as the "Council of the European Union") is the main decision-making body of the European Community. It also plays a significant role in the development of the Community, as defined in the previous Section. As it consists of representatives of the member states, it is an intergovernmental organization. The development of the Community from traditional diplomacy and the persistence of the treaties.

Under Art 145, the Council had the power to adopt certain acts. Articles gave it the power to adopt certain acts. Under Art 145, it could implement these acts. It is this power which is referred to in the context of implementing powers to itself, making it required the Council to legislate primary procedures on a proposal from the Commission. This area would be desirable to enhance a

Under Art 146, the Council consists of one representative of each Member State. Councils: depending on matter being minister of the Member State responsible. rotating presidency discussed further at meetings under Art 147. Under Art 148 treaties specified QMV, Member States to size and about 70% of the votes were decision must be made about the number. As we will see in Chapter 4, eastward e

ECT An 148(2).

### 3.4 THE COUNCIL

The Council, also known as the "Council of Ministers" (and subsequently "the Council of the European Union") is the most powerful legislative institution in the Community. It also plays a significant role in implementing legislation, as outlined in the previous Section. As it comprises representatives of Member State governments, it is an intergovernmental institution. The significant issues in its constitutional development have been its evolution of a *modus operandi* different from traditional diplomacy and the persistence of unanimity despite the provisions of the treaties.

Under Art 145, the Council had the power to make binding decisions. Other Articles gave it the power to adopt certain acts, mostly on the proposal of the Commission. Under Art 145, it could then confer power on the Commission to implement these acts. It is this power which enabled the Council to impose the complex of committees referred to above. The Council may reserve the implementing powers to itself, making it both legislator and executive. Art 145 required the Council to legislate principles and rules for its implementation procedures on a proposal from the Commission. Some constitutional regulation of this area would be desirable to enhance a separation of powers.

Under Art 146, the Council consisted at any given time of a ministerial representative of each Member State. The Council is really many different Councils: depending on matter being discussed, it will comprise the relevant minister of the Member State responsible for that subject. Art 146 also set out the rotating presidency discussed further below. The Presidency arranged Council meetings under Art 147. Under Art 148, it could vote by majority, but when the treaties specified QMV, Member States' votes were weighted roughly according to size and about 70% of the votes were required.<sup>133</sup> With each enlargement, a decision must be made about the number of votes to be given to the new member. As we will see in Chapter 4, eastward enlargement has caused much difficulty in

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<sup>133</sup> EECT Art 148(2).



the allocation of votes and the recalculation of the required number of votes for a qualified majority.

A committee of permanent representatives ("COREPER") was created to assist preparation for Council meetings. It was eventually enshrined in the treaty.<sup>134</sup> The Council can assign tasks to this committee and it has become a vital part of the legislative process as it is able to take time to consider proposals whereas the members of the Council have to combine that work with their other state ministerial duties. The Council has also established a Secretariat to assist its administration which has served an important co-ordinating role.

Under different sections of the EECT, matters were decided either by simple majority, QMV or unanimity. In the transitional phase, most decisionmaking was by unanimity, but in 1966, at the start of the third phase, more QMV was to begin. As discussed above, France withdrew from the Council for six months in protest at this, among other things, and the dispute was resolved by the so-called "Luxembourg Compromise" of 1966 which established that Member States could always exercise a veto where their "vital interests" were concerned, meaning that there was the potential for unanimity to be required on any question.

As Council deliberations have been entirely secret until recently, it has been difficult to analyse its procedures. It has produced large quantities of legislation. Thorough preparation and frequent meetings have enabled co-operation in many areas. The adoption of the Single European Act in 1987 significantly increased the use of QMV for measures to complete the single market.

If the Council were regarded as an adequate Community legislature, there would be no problem with it continuing to act as the legislature even with closer, perhaps federal, union. From a constitutional perspective, there would be no problem with such an arrangement. From a democratic perspective there are considerable problems. While members of the Council represent Member State governments, it is difficult for them to be fully accountable to their national parliaments for their

<sup>134</sup> EC Art 207(151).

actions in the Council, especially under QMV  
the veto to show "toughness" to the nation  
Council is being asked to serve contradictory  
by their Member State constituents to uphold  
states. They are then expected to act as  
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often conflicting. Most federal states have a  
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being a importance.

actions in the Council, especially under QMV. There is often the potential to use the veto to show "toughness" to the national audience. In theoretical terms, the Council is being asked to serve contradictory functions: its members are elected by their Member State constituents to uphold the individual interests of those states. They are then expected to act as the Community legislature, making decisions in the best interests of the Community as a whole. These interests are often conflicting. Most federal states have a nationally elected popular legislature whose members can deliberate on matters within the jurisdiction of the federation as a whole. The EP performs this function in the Community but lacks the power of the Council.

It is surprising in these times of advanced communications that Council matters cannot be dealt with by a permanent representative in Brussels. The domestic constituency must be assured that Community affairs are being attended to by senior members of the government in person. There may be fears that a permanent representative is somehow corrupted by being in Brussels. It is surprising how much European business is undertaken by ministers for "foreign affairs". It seems that a certain distance must be kept between the Council and "Brussels". Many Member States have specific ministers for European affairs, but European affairs now touch almost every portfolio.

A feature of the work of the Council is the six month Presidency rotated among the Member States, and formally held by the foreign minister of the relevant state. The presidency sets the agenda for the Council. The Presidency is for too short a period to accomplish useful work. It symbolizes the sharing of sovereignty in the EC: it is shared around equally and no one holds the reins for long. Lengthening the term would mean very long periods between presidencies. Restricting access to it, as has been proposed to deal with impending enlargement, would destroy the principle of equality between Member States. An elected presidency is an interesting concept, but might raise conflicting mandates between the President of the Commission and the Presidency of the Council. If the Council and European Parliament had full co-decision, the position of President of the Council would decline in importance.

The Presidency plays a crucial role in shaping the agenda.<sup>135</sup> Member States are able to address their particular priorities during their tenure. They seem reluctant to give it up. It would be preferable to make the Commission reflect the composition of the EP and give it full control of the legislative agenda, but it is hard to see the Member States being willing to do this.

An important development of the Council has been the advent of the European Council, discussed in Section 3.2.<sup>136</sup> Confusingly named and not to be confused with the Council of Ministers (now Council of the European Union), or the Council of Europe, the European Council is now held at least once in every Presidency of the Council of Ministers - ie every six months, and sometimes at other times as decided by the Presidency.

Crises in Community development had periodically been resolved by summit meetings of member state heads of state and government,<sup>137</sup> but at the Paris summit of December 1974, President Giscard D'Estaing announced their replacement by the European Council.<sup>138</sup> The European Council was both a meeting of the Council of Ministers and a meeting for EPC.<sup>139</sup> Thus the Council was both inside and outside the Community.

Meetings of the European Council have all the pomp and circumstance of summits. The leaders get together in a city of the incumbent Presidency and over a weekend of formal and informal meetings and meals, they often manage to reach agreement on intractable issues. Where all the bureaucrats and lesser ministers have failed, the European Council often succeeds, though the agreement may lack coherence and principle.

<sup>135</sup> G de Bassompierre, *Changing the Guard in Brussels: an insider's view of the EC presidency* (Washington, Centre for Strategic and International Studies 1988).

<sup>136</sup> The European Council is not an "institution" of the Community as set out in Art 4 EEC but is referred to in Art 4(D) of the TEU (see Ch4).

<sup>137</sup> Summits were held in Paris in 1961, Bonn 1961, Rome 1967, The Hague 1969, Copenhagen 1973 and Paris 1974.

<sup>138</sup> Hoscheit and Wessels op cit p109.

<sup>139</sup> Id.

It might befit what is clearly the Community's mysterious, but this does not contribute to the Council of Ministers under Art 2 of the M... not as much of a constitutional innovation... rules laid down for meetings of the Council.

In many cases, deliberations will cover the decision of the Council but will not cover the decision. However, as the ECJ held in *ERTA*,<sup>141</sup> the Council is acting as the Council of Ministers without using the recognized form... in some European Council resolutions, even while the Council is acting as the Council of Ministers.

It is ironic that the body which clearly came into being should have been of such uncertain composition. The European Council clearly fills a need to have a meeting at the highest level: if they cannot be resolved at the highest level, the problem probably cannot be resolved. But how democratic is the Council? It is subjected to many of the criticisms made of the Council of Ministers: it is a body composed of members meeting in secret and therefore not fully democratic. In the case of the Council, the decision is taken only by the Head of Government. It is a strong assertion of the presence of the President of the Commission. It has also upset the traditional federalists. It has also to some extent taken the Commission's role away from the Commission's leverage gained from the Council. On a practical level, the existence of the Council is a strong assertion of the presence of the President of the Commission.

<sup>141</sup> *Id* p110. Also H Glaesner "The European Council" 22 *ELR* (1971) ECR 263.

<sup>142</sup> Hoscheit and Wessels op cit p118; Glaesner in *Carta*...

It might befit what is clearly the Community's most powerful body to be a little mysterious, but this does not contribute to clarity of constitutional structure. Jacqué and Simon argue that the Council could constitute a meeting of the Council of Ministers under Art 2 of the Merger Treaty.<sup>140</sup> Seen in this light, it is not as much of a constitutional innovation, but it does not observe the procedural rules laid down for meetings of the Council of Ministers.

In many cases, deliberations will cover the subject matter expected from a decision of the Council but will not comply with the formal requirements. However, as the ECJ held in *ERTA*,<sup>141</sup> the Council may adopt legally binding measures without using the recognized forms. The same should therefore be true for some European Council resolutions, even when these are not clearly taken while the Council is acting as the Council of Ministers.<sup>142</sup>

It is ironic that the body which clearly carries the most political power in the EC should have been of such uncertain constitutional and legal standing. The European Council clearly fills a need to have the most intractable matters decided at the highest level: if they cannot be resolved by the European Council, they probably cannot be resolved. But how democratic is the European Council? It can be subjected to many of the criticisms made about the power of the Council of Ministers: it is a body composed of members of Member State governments acting in secret and therefore not fully democratically accountable to the citizens of the EC. In the case of the Council, this is exacerbated by its loftiness, attendance only by the Head of Government and one other minister, and proceeding in haste. It is a strong assertion of intergovernmentalism, despite the presence of the President of the Commission, and thus a further setback for supranational federalists. It has also upset the institutional balance of the EC. It has to some extent taken the Commission's role of initiator. It also bypasses the Commission's leverage gained from the formal requirements of Council procedures. On a practical level, the existence of the European Council also

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<sup>140</sup> Ibid p110. Also H Glaesner "The European Council" in Curtin & Heukels op cit p105.

<sup>141</sup> 22/70 [1971] ECR 263.

<sup>142</sup> Hoscheit and Wessels op cit p118; Glaesner in Curtin & Heukels op cit p110.

inhibits the decisionmaking of the Council of Ministers: intractable problems can be passed on to the European Council.

Despite these objections, the European Council has revitalized Community decisionmaking and brought it into the public eye. These advantages should not be lost. The powers of the European Council were clarified and enhanced in the TEU and are discussed further in the next chapter.

### 3.5 THE EUROPEAN PARLIAMENT

Despite being something of an afterthought in the initial design of the Community, the European Parliament ("EP") has seized the chance to become the potential seat of democratic legitimacy in the Community. It has played a crucial role in the development of an EU constitution. Although still not possessing the powers usually found in a national parliament, its existence has been a beacon for the incremental development of a democratic Community. From modest beginnings, it has come to take a prominent role in Community legislation and public debate, and now receives the attention of many lobbyists, if not yet public opinion. This is all a long way from the European Parliament's origins as the Common Assembly of the European Coal and Steel Community.

The European Parliament is the world's first experiment in transnational democracy.<sup>143</sup> Before it became directly elected in 1979, however, it was a mere consultative and supervisory body composed of delegate members of the national parliaments of the Member States, with few powers and little legitimacy. It seems to have been a figleaf of democratic accountability for what Jean Monnet envisaged as a supranational, technocratic High Authority.<sup>144</sup> When originally established under Art 20 of the European Coal and Steel Community Treaty as the Common Assembly, it had only 78 members, and only supervisory powers. Under Art 21, it could either be composed of delegates of national parliaments, or directly elected, according to the choice of the Member States, but the latter option was not exercised. Its role was to discuss and adopt the High Authority's

<sup>143</sup> F Jacobs and R Corbett. *The European Parliament* (London, Longman 1990) pxvii.

<sup>144</sup> K Featherstone "Jean Monnet and the Democratic Deficit" (1994) 32 *JCMS* 149.

annual report or instead censure the High Authority. The members present, also comprising an absolute majority, which the Authority must resign. The Assembly was only required to hold one session per year.

An early indicator of the role the European Council was its commissioning by the Council of Ministers of an assembly to prepare a draft constitution for the Community. It went even further than this and produced a "Draft Constitution of the European Community" including a proposal for a Parliament of 87 for the Member States.<sup>145</sup> The "Draft Constitution of the European Community" was rejected by the Council of Ministers. Its ideas were carried forward by Paul-Henri Spaak, who, during this process, introduced the EEC and EA. The Assembly kept the impetus for integration going and was commissioned to oversee the work of drafting a constitution.

Never content to rest on its powers, the Assembly sought Monnet's successor as president of the High Authority. This was characteristic of its approach. Practices evolve and then are enshrined in law. Included in the President of the Commission's powers were consultation in advance, committees, written opinions, and seating of delegations. This also extended to the Assembly began acting like the Parliament in the constitutional conventions.<sup>150</sup>

<sup>145</sup> Jacobs and Corbett op cit p6.

<sup>146</sup> Robertson op cit p168.

<sup>147</sup> See Chapter 2.

<sup>148</sup> Robertson op cit p169; See also Chapter 2.

<sup>149</sup> Ibid p170.

<sup>150</sup> Ibid p171.

annual report or instead censure the High Authority by a two-thirds vote of members present, also comprising an absolute majority of all members, upon which the Authority must resign. The Assembly had no power over finances. It was only required to hold one session per year.

An early indicator of the role the European Parliament would later take to itself was its commissioning by the Council of Ministers in 1952 to act as the ad hoc assembly to prepare a draft constitution for the European Political Community.<sup>145</sup> It went even further than this and produced a draft treaty for a "European Community" including a proposal for a People's Chamber with 268 members and a Senate of 87 for the Member States.<sup>146</sup> This proposal lapsed when the European Defence Community was rejected by the French parliament in 1954,<sup>147</sup> but many of its ideas were carried forward by Paul-Henri Spaak, President of the Assembly during this process, into the EEC and EAEC treaties. The Assembly helped to keep the impetus for integration going at Messina, where Spaak was commissioned to oversee the work of drafting the new treaties.<sup>148</sup>

Never content to rest on its powers, the Assembly asked to be consulted about Monnet's successor as president of the High Authority in 1954 and was so consulted.<sup>149</sup> This was characteristic of its attempts to increase its powers over the years. Practices evolve and then are enshrined in law. Other such practices included the President of the Commission addressing the Assembly, some consultation in advance, committees, written questions, hearing of experts, and sending of delegations. This also extended to questioning the Council. In short, the Assembly began acting like the Parliament it wished to be and establishing constitutional conventions.<sup>150</sup>

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<sup>145</sup> Jacobs and Corbett op cit p6.

<sup>146</sup> Robertson op cit p168.

<sup>147</sup> See Chapter 2.

<sup>148</sup> Robertson op cit p169; See also Chapter 2.

<sup>149</sup> Ibid p170.

<sup>150</sup> Ibid p171.

The Assembly was the basis of the new Common Assembly of the EEC and EAEC. By Art 3 of the Convention Relating to Certain Institutions Common to the European Communities,<sup>151</sup> it was to consist of "representatives of the peoples of the States brought together in the Community [to] exercise the powers of deliberation and of control which are conferred upon it by this Treaty".<sup>152</sup> It thus retained the facilities, conventions and collective memory of the first Assembly. The new European Parliamentary Assembly, which renamed itself the "European Parliament" in 1962,<sup>153</sup> had slightly increased powers to be consulted on certain matters<sup>154</sup> and greatly increased numbers, 142.

Art 138(3) of the EECT required the EP to draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. This was its one power of initiative, which it proceeded fairly promptly to exercise in 1960,<sup>155</sup> based on the work of a Working Party. Its proposal was for a two-phase progress. First the term of the Parliament, voting age and eligibility, and admissibility of political parties would be agreed, with other matters left to Member States. The second phase would then be regulated by the European Parliament itself.<sup>156</sup> This proposal was not adopted by the Council.

It is remarkable that nineteen years passed between this first proposal and the first direct elections, and that a uniform procedure has still to be achieved. Direct election seems to have been feared by the Member States as a mark of the EP standing above the Member States as a new institution in its own right, perhaps a sovereign one. A uniform procedure would accentuate this by differing from those of the Member States. The maintenance by Member States of the use of their own electoral systems reflects their refusal to recognize the possibility of their eclipse

<sup>151</sup> Provided for in Art 137 of EEC and 107 of EAEC - not without a struggle, as recounted by Robertson *ibid* p194.

<sup>152</sup> Unless otherwise noted, I will henceforth refer to articles of the EEC Treaty.

<sup>153</sup> Finally enshrined in the EECT by the Single European Act Art 3

<sup>154</sup> Arts 21 ECSC, 138 EEC and 108 EAEC.

<sup>155</sup> Res. May 17 1960, (O.J. 834/60) (Dehousse Report: European Parliament session 1960-61, no.22) see Robertson *op cit* pp214-215. The proposal was for a tripling of numbers with only two thirds to be directly elected in the transitional period.

<sup>156</sup> Sasse et al (eds) *The European Parliament: Towards a Uniform Procedure for Direct Elections* (Florence, EUI 1981) p12.

as the sole foundation of democratic legitimacy. The design of the Parliament with seats allocated according to state reflects the perception that MEPs represent the people of their state rather than the Community as a whole. It is also testimony to deep national attachment to voting systems, although there have been some recent developments in this area, notably Italy's adoption of single-member electorates in national elections to the lower house. Britain's attachment to single member electorates has been the greatest impediment to a uniform procedure based on proportional representation. Even this too has finally changed, at least for the European Parliament, in the elections of 1999.

Although seats are allocated to each Member State, they are not strictly in proportion. The smaller states have always had an advantage. For many years the 'Big Four' had the same number of seats, but since 1995, Germany has had more to reflect its increased population since unification in 1990.

The Assembly asserted its parliamentary character immediately in 1958 by arranging seating according to political groups, not nationality.<sup>157</sup> When the Common Assembly comprised delegates from national parliaments, everyone had a dual mandate. With direct election, the question arose as to whether this should continue. Two major arguments against it are time and distance. The European Parliament's workload has increased enormously. A national parliamentarian's workload is not light either. The European Parliament's forced peregrinations are bad enough. Combined with national parliamentary duties they would be intolerable. On the other hand, dual mandates ensured a connection between the European Parliament and national parliaments, a relationship which has had to be re-invented since the coming of direct elections.<sup>158</sup>

Thwarted in its immediate attempts to gain direct election, the European Parliament nevertheless embarked on a programme to enhance its utility, prestige and legitimacy, in short to "constitutionalise" itself. Burgess notes:

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<sup>157</sup> Robertson *op cit* p195.

<sup>158</sup> The Assizes held between Member State MPs and MEPs created a relationship but achieved little of substance. I address the continued proposals for a greater role for national parliaments in EU decisionmaking in Chapter 5.



The Assembly was the basis of the new Common Assembly of the EEC and EAEC. By Art 3 of the Convention Relating to Certain Institutions Common to the European Communities,<sup>151</sup> it was to consist of "representatives of the peoples of the States brought together in the Community [to] exercise the powers of deliberation and of control which are conferred upon it by this Treaty".<sup>152</sup> It thus retained the facilities, conventions and collective memory of the first Assembly. The new European Parliamentary Assembly, which renamed itself the "European Parliament" in 1962,<sup>153</sup> had slightly increased powers to be consulted on certain matters<sup>154</sup> and greatly increased numbers, 142.

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... of substance. I address the continued proposa  
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"It has been important for the Parliament to act and behave as if it was already pivotal in the decision-making procedures of the Community...the Parliament's powers have not grown as fast as its influence but its overall institutional strength - its capacity to take initiatives, to invade new public policy spheres previously unoccupied and to interpret its own role ambitiously - is undeniable"<sup>159</sup>

MEPs are paid by the Member States at levels approximating those of national parliamentarians, leading to substantial disparities. The Parliament compensates for this with generous allowances. Parliament can establish its own rules of procedure and has adopted as much on the standard parliamentary model as possible making extensive use of committees, questions, and plenary debates. The need for simultaneous translation detracts from the cut and thrust of debate, and the amount of money and time spent on translation of texts takes up a major part of the organisation's resources, as does its peripatetic life.

The European Parliament repeated its proposal for direct elections in 1963. Various proposals were made for political union over the next two years, including that of the Italian Foreign Minister Saragat for the European Parliament to be directly elected and part of a European Political Union.<sup>160</sup>

The European Parliament once again brought forward its proposal for direct elections to the Hague Summit of 1969, together with a proposal for increased budgetary powers.<sup>161</sup> This was the first summit after the end of de Gaulle's presidency and hence there was some hope of *relance*. Burgess describes the "persistent disregard for the European Parliament's electoral proclivities"<sup>162</sup> demonstrated by the Summit's declaration that the proposal was "still being studied". The Summit brought further moves towards economic and monetary union, but otherwise neglected institutional development,<sup>163</sup> although the leaders did lay the groundwork for the First Budgetary Treaty, signed in 1970, in which

<sup>159</sup> Burgess op cit p100.

<sup>160</sup> Ibid p302.

<sup>161</sup> Jacobs and Corbett op cit p11.

<sup>162</sup> Burgess op cit p65.

<sup>163</sup> Ibid p66.

the EP gained important new powers  
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<sup>164</sup> Bull EC Supp 4/72.

<sup>165</sup> A. S. L. "The Vedel Report and the Refo  
Parliamentary Affairs 159.

<sup>166</sup> [Finance] The European Parliament (Lond

the EP gained important new powers over the budget. Budgetary powers were the motivation for the first censure motion proposed against the Commission, in 1972, which was defeated.

In 1971, the Commission established a working party under Professor Georges Vedel to: "examine the whole corpus of problems connected with the enlargement of the powers of the European Parliament."<sup>164</sup> The report was measured, suggesting gradual reform. It recognized the need to balance loss of parliamentary control at the local level with a corresponding increase at Community level. It called for co-decision in some areas, with a gradual move to full co-decision, and a role for the Parliament in nomination of the Commission. Its findings were the basis for the Commission's proposals to the 1972 Summit.<sup>165</sup> There was some isolated support among Member State governments for direct elections but still not the necessary unanimity.

In 1972, the Paris Summit defined new fields for Community action. The EP had been urging such an expansion for some time and has since taken a close interest in such new areas as the environment. The Summit expanded European Political Co-operation, in which the EP was only marginally involved, but it took no action on direct elections.<sup>166</sup> It adopted the concept of a 'European Union' to be achieved over time, a concept which proved an inspiration to the European Parliament.

The 1974 Paris Summit at least acknowledged the European Parliament's "association" with the process of EPC, as well as yet again calling for a proposal for direct elections (a call that the Parliament had been repeatedly making for fourteen years!).

With the enlargement of the Communities in 1973, the EP was enlarged to 198 Members. It commissioned a fresh proposal on direct elections, which it adopted

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<sup>164</sup> Bull EC Supp 4/72.

<sup>165</sup> A Shlaim "The Vedel Report and the Reform of the European Parliament" (1974) 27 *Parliamentary Affairs* 159.

<sup>166</sup> J Fitzmaurice *The European Parliament* (London, Saxon House 1978) p56.

in January, 1975.<sup>167</sup> This provided for the first elections to be held under entirely national systems, subject to a few common principles, such as that they be equal, free, universal, direct and secret.<sup>168</sup> The new European Parliament was then to adopt a uniform procedure by 1980.

Later in 1975, the Second Budgetary Treaty introduced the "Conciliation" process, which gave the Parliament more voice in legislation with financial consequences, the right to give a discharge of the budget, and the right to veto it. This was its most significant power thus far.

The EP submitted a report to Tindemans when he was preparing his Report on European Union in 1976. The EP's report stressed strengthening and extending Community powers with "a single decision-making centre...a real European government"<sup>169</sup> responsible to the European Parliament, and a European Court of Auditors. Not surprisingly, it called for an increase in its own powers.<sup>170</sup> Tindemans called for the European Parliament to be able to consider all matters within the competence of the Union, with eventually the right of initiative. He also called for direct elections.<sup>171</sup> Despite its moderate and well considered findings, the recommendations of the report, with the exception of direct election, were not adopted.

The Committee of Three's Report on European Institutions of October 1979 saw the Parliament as essentially a "sounding board"<sup>172</sup>. This did not bode well for an increase in its powers, despite the advent of direct elections.

The EP's proposal was substantially adopted as the Act concerning the election of the Members of the European Parliament of 8 October 1976.<sup>173</sup> The Member

<sup>167</sup> The European Parliament, *Forging Ahead* (Luxembourg, EEC 1988) p208.

<sup>168</sup> Sasse, op cit p14.

<sup>169</sup> Burgess op cit p86.

<sup>170</sup> Bull EC Suppt 9/75 9-13.

<sup>171</sup> Bull Supp 1/76.

<sup>172</sup> A Duff, "The Report of the Committee of Three" (1981) 19 *JCMS* 237 at 239.

<sup>173</sup> 76/787 O.J. 278.

States could choose their own procedures.  
Decisions were tentatively set for 1978.  
It was not complete the ratification  
The issue of direct elections raised considerable  
issues which had to be overcome.<sup>172</sup> Election

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<sup>172</sup> See also op cit p85 et seq.  
<sup>173</sup> Burgess, op cit p100.

Lapay and Verbeke van Themaat op cit p132.  
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Parliamentary Affairs 459 points out the way i  
European Parliament was a factor in the elections

States could choose their own procedures, which generally mirrored national ones. Elections were tentatively set for 1978, but had to be postponed for a year as Britain did not complete the ratification procedure in time, as described above. The issue of direct elections raised considerable constitutional problems in several states which had to be overcome.<sup>174</sup> Election was to be for a five year term.

The first direct elections of 1979 really put the European Parliament on the map. At last, the "democratic deficit" of the Community had begun to be addressed. Now, the EEC had a democratic parliament but without many of the powers normally associated with a parliament. However, armed with its new democratic legitimacy, the EP was better placed to make demands for greater power. Direct election focused attention on the whole institutional balance.<sup>175</sup> It was strongly arguable that the Parliament had too little power, but at whose expense should it be increased?

Laurence Gormley observes that the formula: "representatives of the peoples" used in Art 137 incorporated "the modern concept of representation as laid down in the constitutional law of the Member States".<sup>176</sup> If the European Parliament is the democratic voice of the peoples of the EC, it is logically difficult to deny it a full role in all EC legislation. The best arguments against this are the level of voter turnout in European Parliament elections compared to national elections,<sup>177</sup> and the affirmation that people understand, when they vote for the European Parliament, the nature of the limited powers of the institution they are voting for.<sup>178</sup> The formula "peoples", used several times in the Treaties, emphasizes that the people of the EC are plural rather than singular. The European Parliament is an important step towards creation of a single "people", as discussed in Chapter 1.

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<sup>174</sup> Sasse et al op cit p85 et seq.

<sup>175</sup> Burgess, op cit p100.

<sup>176</sup> Kapteyn and Verloren van Themaat op cit p132.

<sup>177</sup> J Lodge "The European Elections of 1979: a problem of turnout" (1979) 32 *Parliamentary Affairs* p448. With only 63% turnout compared to a national average of 85%, it seemed that the citizens of Europe had not fully taken their Parliament to heart. Turnout has since declined.

<sup>178</sup> J Crandall Hollick "The Elections of 1979 in France: a Masked Ball for 1981" (1979) 32 *Parliamentary Affairs* 459 points out the way in which fear of increased power for the European Parliament was a factor in the elections in France.

The elections were not, however, the fillip to European democracy which might have been hoped.

The European Parliament lacks that precious possession of most national parliaments, a permanent seat, or indeed the right to choose its seat. Being forced to shuttle between Strasbourg for plenary sessions, Brussels for committees, and home electorates while its secretariat remains in Luxembourg is a serious check on its efficiency. A move to Brussels would bring the European Parliament closer to the epicentre of Community decisionmaking. There is no good reason for leaving the secretariat in Luxembourg.<sup>179</sup> While Brussels now has the necessary facilities, France has insisted on maintaining Strasbourg, and indeed has built palatial new facilities there.

According to Art 137 before the TEU, the European Parliament had "advisory" and "supervisory" powers. This reflects its origin as something less than a legislature. Its supervisory power is most clearly seen under Art 144, where, as discussed, it holds the ultimate sanction of being able to dismiss the Commission en bloc, a power it has never exercised<sup>180</sup> and one which is a lot less useful than being able to censure particular Commissioners. Such a motion requires a two-thirds majority of votes cast, which must also constitute an absolute majority of members, after three days' notice, reflecting the founders' caution about entrusting such a power.

Since the TEU, the European Parliament has a say in the appointment of the Commission under Art 214{158}(2), and has used this right to examine prospective Commissioners in US style confirmation hearings. The real potential of this power is for the Parliament to try to influence the political makeup of the Commission to reflect its own, though so far, this has not been done. This would have implications for the Commission's independence, but it would be an

<sup>179</sup> Apart from the wishes of the Luxembourg government which has brought two cases against the European Parliament for attempts to remove parts of the secretariat. See [1983] ECR 255 and [1984] ECR 1945.

<sup>180</sup> It is almost certain that the EP would have passed a motion of censure against the Commission in 1999, but the Commission resigned before this could happen.

...acknowledgement that the Commission  
...of the Parliament's position ...

...EP's other supervisory powers come from ...  
...control practice, including the practice  
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...Commissioners have the power to attend European  
...as does the Council. The Commission is co  
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...Art 198(141), the European Parliament:  
...required by the Treaty, although under A  
...its own rules of procedure.<sup>141</sup> Under th  
...sive system of committees which enable it  
...These come in several varieties: standin  
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...and power of dissemination, Parliament ca  
...members under its legislative control.

...significant aspect of the European Parliament  
...budget. The budgetary procedure in Art 272(20)  
...EP has the power of veto over enough of it to  
...Power over spending is a central role  
...which are particularly dear to the EP. In the E  
...EP gained the right to adopt the budget and  
...budgetary expenditure" - but only as from 1975.  
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...also has the power to ensure the due functioning and  
...Luxembourg v EP [1983] ECR 255).  
...proposed for in rules of procedure and subsequently by Art

important acknowledgement that the Commission plays a highly political role and confirmation of the Parliament's position as the embodiment of European democracy.

The EP's other supervisory powers come from a combination of treaty provisions and evolved practice, including the practice of questioning Commissioners, analogous to the procedure in some national parliaments. Under Art 197{140}, Commissioners have the power to attend European Parliament sessions and to be heard, as does the Council. The Commission is compelled to answer questions put to it.

Under Art 198{141}, the European Parliament must act by absolute majority when required by the Treaty, although under Art 199{142} it may otherwise determine its own rules of procedure.<sup>181</sup> Under those rules, it has established an extensive system of committees which enable it better to fulfil its supervisory function. These come in several varieties: standing committees on the various areas of Community activity and Committees of Enquiry which, while they may be on matters over which the Parliament does not exercise a great deal of control, enable it to contribute to debate on these areas.<sup>182</sup> By exercising its forensic abilities and power of dissemination, Parliament can develop its claim eventually to have matters under its legislative control.

Another significant aspect of the European Parliament's power is its power over the budget. The budgetary procedure in Art 272{203} is exceedingly arcane, but the EP has the power of veto over enough of it to at least have its views taken seriously. Power over spending is a central role of national parliaments and therefore one particularly dear to the EP. In the First Budgetary Treaty of 1970, the EP gained the right to adopt the budget and have the final say on "non-obligatory expenditure" but only as from 1975. From the Second Budgetary Treaty of 1975, it gained the power to veto the budget, but this is not as dramatic

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<sup>181</sup> It also has the power to ensure the due functioning and conduct of its proceedings (see *Luxembourg v EP* [1983] ECR 255).

<sup>182</sup> Provided for in rules of procedure and subsequently by Art 193{138c}.

as it may sound: in the absence of a new budget, the Community proceeds with that of the previous year. Parliament also gained the power to give the Commission discharge of the implementation of the budget, recommendation of such discharge being first received from the Court of Auditors.<sup>183</sup>

The European Parliament's advisory role has developed into legislative powers. Initially, the treaties only provided for consultation. Subsequent amendments have introduced conciliation, co-operation, assent and co-decision, which constitute genuine legislative powers. In this regard, the legal basis chosen by the Commission and Council for enactment of legislation becomes highly significant. The basis chosen will affect Parliament's input. This is discussed below with regard to the Parliament's powers as a litigant.

A feature of the Parliament, noted above, is that it is an overtly political institution. Members do not sit in national, but in party groups. The Groups are loose and broad coalitions such as Christian Democrat (PPE), Socialist (PSE), Liberal, Communist, Green, Regionalist and Independents. The Groups control the allocation of committee chairs and rapporteurs, order of business, and indeed all aspects of parliamentary life. While some Groups have attempted to gain grass roots support, most are represented in the Member States by national parties. Candidates stand under the banner of a national party thus reinforcing the national prism through which European politics tends to be seen at Member State level.

The European Parliament must be kept informed of developments in Community external affairs and may ask questions and make recommendations. Some treaties under Art 300{228} must obtain its assent as must all Association Agreements under Art 310{238}. There are also well established procedures for consultation during the negotiation of agreements.<sup>184</sup>

<sup>183</sup> Art 276{206}.

<sup>184</sup> European Parliament *The Powers of the European Parliament* Research Paper No 15, 1989 pp35-36.

The Parliament, along with the Commission and the Court of Auditors, was established on 5th April, 1977, with the Joint Declaration on Fundamental Freedoms<sup>185</sup>. This basically adopted the conclusions of the Committee of Ministers of the Council and the Commission that the Community institutions should be established in the ECHR. This Joint Declaration was used by the Court in subsequent cases as evidence of the Community's commitment to fundamental rights and has led to further resolutions on fundamental rights.

The Parliament was not originally named as a co-legislator under Art 230{173} or whose failure to act could be challenged under Art 234{175}. The EP successfully challenged the Council's failure to adopt a common transport policy.

The EP has acted before the ECJ and has done so in many cases. The Council is required to consult the EP as required by Art 234{175}. This was very significant as the Council was then Art 173. It showed the Court's support for the Parliament in the Community process. In the case of Art 173 standing for the EP to challenge the Council's action.

The EP has been written into the treaty by the TEU. The EP has been written into the treaty by the TEU. The EP has been written into the treaty by the TEU.

In the *Titanium Dioxide* case,<sup>186</sup> the ECJ acted in a legislative process where there was a choice between the Council and the EP. The ECJ gave the EP a greater and a lesser input. This was a significant step for the Community.

<sup>185</sup> O.J. 1977 C 103/02.  
<sup>186</sup> Case 473 [1974] ECR 491 and Case 36/75 [1975] ECR 1039.  
<sup>187</sup> Res. 21 April 1979 (O.J. 1979 C 127/68-70).  
<sup>188</sup> Res. 16th May, 1989 O.J. 1989 C 120/51.  
<sup>189</sup> Case 15/83 EP v Council [1985] ECR 1513.  
<sup>190</sup> See Case 138/79 *Roquette* [1980] ECR 3333 and *Matteoli*.  
<sup>191</sup> Case 70/80 EP v Council [1990] ECR 2041.  
<sup>192</sup> See Art 230{173} third paragraph.  
<sup>193</sup> *Commission v Council* 300/89 [1993] 3 CMLR 359.



The Parliament, along with the Commission and Council, took another important step on 5th April, 1977, with the Joint Declaration on Human Rights and Fundamental Freedoms<sup>185</sup>. This basically adopted the decisions of the ECJ in *Nold No2* and *Rutili*<sup>186</sup> that the Community institutions must also uphold the principles enshrined in the ECHR. This Joint Declaration was in turn taken into account by the Court in subsequent cases as evidence of EC law. The European Parliament passed further resolutions on fundamental rights in 1979<sup>187</sup> and 1989.<sup>188</sup>

The Parliament was not originally named as an institution whose acts could be reviewed under Art 230{173} or whose failure to act could be declared under Art 232{175}. The EP successfully challenged the Council under Art 232{175} for failure to adopt a common transport policy.<sup>189</sup> It has the power to intervene in cases before the ECJ and has done so in many cases. In the *Isoglucose* cases,<sup>190</sup> failure by the Council to consult the EP as required by the Treaty led to a measure being annulled. This was very significant as the Parliament could not act directly under the then Art 173. It showed the Court's desire to safeguard the position of the Parliament in the Community process. In *EP v Council*<sup>191</sup>, the ECJ read into the then Art 173 standing for the EP to protect its prerogatives. This was subsequently written into the treaty by the TEU.<sup>192</sup>

In the *Titanium Dioxide* case,<sup>193</sup> the ECJ acted to maximize the EP's role in the legislative process where there was a choice between legal bases for legislation giving the EP a greater and a lesser input. This was a step forward for democracy in the Community.

<sup>185</sup> O.J. 1977 C 103/82.

<sup>186</sup> Case 4/73 [1974] ECR 491 and Case 36/75 [1975] ECR 1219.

<sup>187</sup> Res. 27 April 1979 (O.J. 1979 C 127/ 68-70).

<sup>188</sup> Res. 16th May, 1989 O.J. 1989 C 120/51).

<sup>189</sup> Case 13/83 *EP v Council* [1985] ECR 1513.

<sup>190</sup> See Case 138/79 *Roquette* [1980] ECR 3333 and *Maizena* 139/79 [1980] ECR 3393.

<sup>191</sup> Case 70/88 *EP v Council* [1990] ECR 2041.

<sup>192</sup> See Art 230{173} third paragraph.

<sup>193</sup> *Commission v Council* 300/89 [1993] 3 CMLR 359; see also 45/86 [1987] ECR 1493.

The EP can also be a defendant, both in staff cases and as in the cases brought by Luxembourg and France to prevent the Parliament from moving its seat.<sup>194</sup> and in the landmark case *Parti Ecologiste 'Les Verts' v EP*.<sup>195</sup> This reinforced the Parliament's identity as an institution. In *Council v EP*,<sup>196</sup> the ECJ declared the adoption of the 1986 budget by the President of the European Parliament illegal. While perhaps an undesirable result for the Parliament, this was further confirmation that its acts have legal significance.

The Solemn Declaration on European Union of the Stuttgart European Council of 1983 codified many procedures later to be officially incorporated in the treaties, some of which enhanced the position of the EP.

The European Parliament made a major contribution to constitutionalization with its Draft Treaty on European Union {"DTEU"} of 1984.<sup>197</sup> Following the first direct elections in 1979, the Parliament established an Institutional Affairs Committee chaired by the veteran Italian Commissioner turned MEP Altiero Spinelli. The Committee launched this initiative and carried it through to a complete draft treaty.<sup>198</sup>

The Commission, a potential beneficiary, supported the Parliament's endeavours with the Draft Treaty, but had to be cautious. There were unofficial meetings between Commission and Parliament lawyers on the preparation of the Treaty. There were other federalist initiatives in the European Parliament apart from that of Spinelli. Interestingly, some came from conservatives, especially the Christian Democrat PPE Group, including a different draft constitution in 1983, but they were sideshows compared to the DTEU.<sup>199</sup>

<sup>194</sup> [1983] ECR 255 and [1984] ECR 1945 (Lux) and 358/85 and 51/86 [1988] ECR (France).

<sup>195</sup> [1986] ECR 1339.

<sup>196</sup> [1986] ECR 155.

<sup>197</sup> European Parliament *Draft Treaty Establishing the European Union* (Luxembourg, EP 1984).

<sup>198</sup> Burgess op cit p162.

<sup>199</sup> Ibid p164.

Under EEC Art 236, the DTEU would have  
been to implement it. Subsidiarity was  
using inflammatory words, it was federal, with  
a bicameral legislature (Art 38). It co-  
ordinated the Commission and European Parliament, with  
invest the Commission. The DTEU would  
run for ten years.

The new Union was intended to replace the  
old. It established a hierarchy of norms and  
(all preoccupations of the Parliament). It  
protection of fundamental rights (Art 4). It  
had the judges of the ECJ and a role in  
Parliament and the Council gained power  
decision (Art 38). It created a distinction  
peers, with a procedure for transfer of  
relations (Art 54). There are some points of  
purpose in Chapter 5.

The DTEU was adopted by the European Parlia-  
ment on 11 Feb 1984 (237 to 31 with 43 abstentions).  
European Council of June 1984 by President M.  
European Council's response, as discussed in  
intergovernmental committees. Some of the 107  
recommendations and thence into the Single  
European Union had to await 1992 and would be  
features of the DTEU.

The Single European Act established the Co-  
operation, which for a limited range of areas gave  
a decision-making. The new procedure only  
a breakthrough in European Parliament's

Unlike EEC Art 236, the DTEU would have required only a majority of Member States to implement it. Subsidiarity was included (DTEU Art 12(2)). Without using inflammatory words, it was federal, with Council and European Parliament as bicameral legislature (Art 38). It established links between terms of Commission and European Parliament, with the Parliament having power to invest the Commission. The DTEU would have continued the Member States' veto for ten years.

The new Union was intended to replace the Communities, but also to build on them. It established a hierarchy of norms and a simplified legislative procedure (still preoccupations of the Parliament). It established citizenship (Art 3) and protection of fundamental rights (Art 4). It gave the Parliament power to appoint half the judges of the ECJ and a role in electing the Commission. Both the Parliament and the Council gained power of initiative (Art 37) and full co-decision (Art 38). It created a distinction between exclusive and concurrent powers, with a procedure for transfer of powers, especially in international relations (Art 54). There are some points of similarity with the constitution I propose in Chapter 5.

The DTEU was adopted by the European Parliament by an overwhelming margin on 14 Feb 1984 (237 to 31 with 43 abstentions). It was taken to the Fontainebleau European Council of June 1984 by President Mitterrand, but was not adopted. The European Council's response, as discussed in Section 3.2, was to form two intergovernmental committees. Some of the DTEU's ideas found their way into the recommendations and thence into the Single European Act ("SEA"). A European Union had to await 1992 and would have been a disappointment to the drafters of the DTEU.

The Single European Act established the Co-operation procedure under the then Art 149, which for a limited range of areas gave the European Parliament a greater say in decisionmaking. The new procedure only applied to ten articles, but was a major breakthrough in European Parliament's legislative power. The EP could

obtain a de facto veto through alliance with Commission.<sup>200</sup> The Assent procedure was also introduced to the then Art 237 EECT, giving the European Parliament a power of veto over any new accessions.<sup>201</sup> The new Article 100a for harmonization used the co-operation procedure, a desirable outcome for the Parliament. The SEA finally enshrined the European Parliament's name change from "Assembly". The extensive introduction of qualified majority voting highlighted the democratic deficit in the Community: matters could be approved by a mere majority in the Council and passed against the wishes of the Parliament.

The SEA required large amounts of legislation, substantially increasing the EP's workload. The Parliament also became more of a target for lobbyists.<sup>202</sup> Particularly through its committee work, the Parliament has been able to suggest many amendments which have been accepted.

Although kept busy by the SEA, the EP was still an enthusiastic supporter of further constitutional reform.<sup>203</sup> Its involvement will be explored further in Chapter 4. Having finally obtained direct election, with increased powers and with its efforts in constitutional reform influential, although not adopted, the Parliament was poised to take a greater role in future reforms.

### 3.6 THE EUROPEAN COURT OF JUSTICE

The ECJ, which was established under the ECSC, was established as the court of the EEC by Art 4 of the EECT. Under Art 220{164}, "The Court of Justice shall ensure that in the interpretation and application of this Treaty, the law is observed". The width of this article has enabled the ECJ to build an entirely new legal order. It has been, along with the Commission and Parliament, active in the construction of the Community, consistently expanding the scope of Community

<sup>200</sup> Ibid p210.

<sup>201</sup> SEA Art 8.

<sup>202</sup> S Mazey and J Richardson in J Lodge (ed) *The European Community and the Challenge of the Future* (2nd ed, London, Pinter, 1993) p41.

<sup>203</sup> For example, its Resolution on Guidelines for a Draft Constitution for the European Union OJ C231 17/9/1990 and the subsequent Martin Reports.

powers and its own jurisdiction. It has made  
legislative.

The Court has played a central role in the  
Community. The role of a court with political  
in a democracy. The role of a court in a  
Community is even more problematic. Many  
created the necessary conditions for democratic  
systematic.<sup>204</sup> This is true up to a point  
insufficiently democratic. It may be beyond  
efficiency, but given its bold and original  
perhaps more than it could have done.

The Court began with seven judges and  
enlargement to accommodate at least one judge  
through Art 223(167) specifies appointment from  
each Member State. Although there is nothing  
role of Member State nationality, the practice  
any Member State, with an extra judge be  
member on the bench. Appointment of the extra  
deliberate rotation among the larger Member States  
with fifteen members.

It has been a feature of the Australian system  
appointments to the highest court are made by  
highly significant in a federal system where the  
federal and state powers. Central governments are  
highly favour an increase in central power. In  
Community that the Member States would choose  
nearest, but this does not seem to have been the

It is possible to see the restriction of the Court's jurisdiction  
legitimacy in the eyes of the Member States. See further  
G. L. and D. Keeling op cit.

powers and its own jurisdiction. It has managed to do this without sacrificing its legitimacy.<sup>204</sup>

The Court has played a central role in the constitutional development of the Community. The role of a court with political power will always be problematic in a democracy. The role of a court in an emerging democracy such as the Community is even more problematic. Mancini and Keeling argue that the ECJ created the necessary conditions for democracy when the Community was undemocratic.<sup>205</sup> This is true up to a point, but the Community is still insufficiently democratic. It may be beyond the Court's power to cure this deficiency, but given its bold and original jurisprudence in other areas, there is perhaps more that it could have done.

The Court began with seven judges and has steadily expanded with each enlargement to accommodate at least one judge from every Member State, even though Art 223{167} specifies appointment by "common accord" rather than by each Member State. Although there is nothing in the Treaties requiring the judges to be of Member State nationality, the practice has been to appoint a judge from every Member State, with an extra judge being appointed to ensure an odd number on the bench. Appointment of the extra judge has been the subject of an elaborate rotation among the larger Member States, but is presently unnecessary with fifteen members.

It has been a feature of the Australian and United States systems that appointments to the highest court are made by the central government. This is highly significant in a federal system where the court umpires disputes between federal and state powers. Central governments are tempted to appoint judges who might favour an increase in central power. It might be expected that in the Community that the Member States would choose judges to uphold the 'national interest', but this does not seem to have been the case. It is possible that an openly

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<sup>204</sup> It is possible to see the restriction of the Court's jurisdiction in the TEU as a decline in legitimacy in the eyes of the Member States. See further Chapter 4.

<sup>205</sup> G Mancini and D Keeling *op cit*.

anti-integration judge would not be accepted by all Member States. Art 223 {167} also states that the Judges and Advocates-General "shall be chosen from persons whose independence is beyond doubt" which, while difficult to test, would also seem to count against those with firmly held views. Judges must also "possess the qualifications required for appointments to the highest judicial offices in their respective countries or [be] jurisconsults of recognized competence".<sup>206</sup> This gives access to a wide pool of potential judges, a combination of academic and practising lawyers enabling understanding of both theory and practice. The Court can give practical solutions to problems while also constructing a theoretical framework. It is, however, difficult to ascertain the activities of individual judges, as the Court gives only a single opinion and its deliberations are secret.

Unlike the United States, where Supreme Court judges are appointed for life, or Australia, where High Court judges are appointed until the age of 70, ECJ judges are only appointed for terms of six years. These are renewable, but given the collegiate nature of the Court, it would be difficult to decide whether or not a judge's term should be renewed. The judges of the ECJ thus enjoy a measure of anonymity and seem to have acted fearlessly and independently despite less security of tenure than their common law counterparts.

The court is assisted by a panel of Advocates-General, an office unknown in the common law system and based on the French system.<sup>207</sup> One Advocate-General sits on every case and delivers a reasoned submission to assist the Court. Although the Court need not follow the Advocate-General's opinion, it is very persuasive and often an eloquent statement of the problem and its solution, a more difficult achievement for a single consensual statement of up to fifteen judges or even a majority of them. Advocates-General can become judges and it is sometimes possible to detect their stamp on judgments from their previous opinions.

<sup>206</sup> "Jurisconsult" is not a concept known to English, Scottish or Irish law. Perhaps "lawyer" would have been a better translation.

<sup>207</sup> Art 222 {166}. The institution is apparently based on the office of the *commissaire du gouvernement* of the French *Conseil d'Etat*. See Kapteyn & VerLoren van Themaat op cit p145 n239.

The way in which cases can come before the Court has had a crucial effect. Under Art 226{169}, the Commission can bring a Member State before the Court for failing to fulfil its obligations under the Treaty. Thus the Commission has an efficient means to enforce Community law against the Member States and a way of enabling the Court to assist the integration project.

Art 227{170} allows a Member State to bring another Member State to Court for breach of treaty obligations, but must first submit its case to the Commission which tries to resolve the dispute. Unlike the Council of Europe's procedure where cases must pass through the Commission to get to the Court, a Member State can proceed to the Court of Justice regardless of the Commission's opinion, but it keeps the Commission, the supranational actor, in touch with proceedings and able to influence them.

Unlike the International Court of Justice, the ECJ's jurisdiction is compulsory. No reservation or withdrawal is possible.<sup>208</sup> This further distinguishes Community law from general international law.

Under Art 230{173}, a Member State, the Council or the Commission may ask the Court to review the legality of acts of the Council or the Commission. Any natural or legal person can also challenge a decision addressed to them or a regulation or decision addressed to someone else which is of "direct and individual concern" to them. If the Court upholds these claims, it can annul the act under Art 231{174}.

In contrast to the significant freedom and power enjoyed by the Commission to bring cases before the Court, the power of individuals is severely limited, both by the terms of Art 230{173} and its interpretation by the Court. This test of "direct and individual concern" has been strictly interpreted by the Court in cases such as *Plaumann*,<sup>209</sup> and in a long line of cases since then,<sup>210</sup> the ECJ has required not

<sup>208</sup> Dashwood, A. and White, R. "Enforcement Actions under Articles 169 and 170 EEC" (1989) 14 *ELRev* 388, 389.

<sup>209</sup> Case 25/62 [1963] ECR 95.

<sup>210</sup> eg *Deutz and Geldermann v Council* 26/86 [1987] ECR 941.

just that the individual be affected by the measure, but that it affects them more severely than others in their category. This is presumably in order to restrict the number of litigants, which is curious given the Court's generally open embrace of references under Art 234{177}. It would save the litigant the time, difficulty and expense of engineering a domestic case which could be referred to the ECJ under Art 234{177} if the litigant could go directly to the Court.<sup>211</sup> On the other hand, given the clear policy demonstrated under Arts 226{169} and 227{170} for the Commission to be the general guardian of the Treaties, it is an encouragement to individuals to first take their complaint to the Commission. Art 234{173} also requires that a measure be challenged within two months of the publication of the measure, or of when it came to the plaintiff's knowledge. This is a very strict time limit, more suitable for inter-institutional procedural disputes than for the public, for whom it may take some time with a measure in operation to decide whether it is worth challenging.

As discussed above, the ECJ has read Art 234{173} so as to enable the EP to be both a plaintiff and defendant under it to a limited extent.<sup>212</sup> These cases demonstrate the Court's creativity and willingness to expand its own jurisdiction as well as the powers of a fellow supranational institution.<sup>213</sup> The Court had previously stated that it would not create a right of action from its general power under Art 220{164}.<sup>214</sup>

In the *Les Verts* case, the Court expressed the opinion that the Community:

"...is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in accordance with the basic constitutional charter, the Treaty...the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions."<sup>215</sup>

<sup>211</sup> Mancini and Keeling op cit at 188-189.

<sup>212</sup> *Parliament v Council "Chernobyl"* [1990] 1 ECR 2041; *Parti Ecologiste 'Les Verts' v European Parliament* 294/83 [1986] ECR 1339.

<sup>213</sup> J Bengoetxea *The Legal Reasoning of the European Court of Justice* (Oxford, OUP 1993) p105 compares the string of cases on the EP to a "chain novel".

<sup>214</sup> *Germany v Commission* 44/81 [1982] ECR 1855 at para 7.

<sup>215</sup> "*Les Verts*" (supra) at paragraph 23.

This is one of many examples of court-led com-  
not just after the Single European Act  
in Parliament in Art 230(173). This has be-  
where the political institutions were unable to  
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decision-making on that of the politicians.

A measure may be challenged under Art 230  
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W. F. Burs and D. Kinley *Principles of European  
Law* (Company 1995) p156.

by H. Schermers and D. Waelbroeck *Justice  
in Europe* (5th ed Deventer, Kluwer, 1992).

*Parliament v Council* [1985] ECR 1513 where the  
Council's failure to implement a common transport p-  
Burs op cit p132.



This is one of many examples of court-led constitutionmaking. The *Les Verts* case took place just after the Single European Act amendments had failed to include the Parliament in Art 230{173}. This has been described as: "the court acting where the political institutions were unable to",<sup>216</sup> but it could also be seen as the Court acting where the political institutions deliberately had not, imposing its own constitutionmaking on that of the politicians.

A measure may be challenged under Art 230{173} on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application, or misuse of powers. These are wide grounds which have enabled the Court to develop its own administrative law.<sup>217</sup> Although the ECJ can be expected to uphold and further develop this law, it could also be usefully codified in the constitution.

Under Art 232{175}, if Council, or Commission failed to act, in infringement of the Treaty, the Member States and "other institutions" may bring an action before the Court to have the infringement established. The institution must first be called upon to act and given two months to "define its position". This article has been used to good effect,<sup>218</sup> but is of limited utility as an institution cannot be forced to act. Individuals may also use it, but only to claim that an institution has failed to address an act to them. A person may want an institution to address an act to *someone else*.<sup>219</sup> Art 233{176} requires institutions to comply with the Court's rulings against them but this has only subsequently been backed by the ability to impose penalties for non-compliance.

Art 234{177} provides for the ECJ to give preliminary rulings on interpretation of the treaty, acts of the institutions, and secondary Community legislation. Where such a question is raised before any court or tribunal of a Member State, it may

<sup>216</sup> S Bronitt, F Burns and D Kinley *Principles of European Community Law* (Sydney, Law Book Company 1995) p156.

<sup>217</sup> See generally H Schermers and D Waelbroeck *Judicial Protection in the European Communities* (5<sup>th</sup> ed Deventer, Kluwer, 1992).

<sup>218</sup> Eg in *Parliament v Council* [1985] ECR 1513 where the Parliament successfully challenged the Council's failure to implement a common transport policy.

<sup>219</sup> Bronitt et al op cit p152.

request the ECJ to make such a ruling. If it is raised before a court from which there is no appeal, it *must* be referred, although there is no recourse if that court fails to do so. The ECJ has also established exceptions to the rule: where the Community law issue is irrelevant, where it has been decided by a previous case, or where it is so clear as not to require further explanation (the doctrine of *acte clair*).<sup>220</sup> The second exception is similar to the common law doctrine of *stare decisis*.<sup>221</sup>

Art 234{177} establishes a single legal system for Community law, fused with national systems. It lessens the need for a separate network of Community courts and weaves community law into national law. It also makes national court judges collaborators in the Community law venture and brings Community law within the reach of every citizen. Citizen access was greatly strengthened by the case of *Van Gend & Loos*<sup>222</sup> where the Court held that individuals could invoke provisions of the Treaty against Member States, the doctrine of "direct effect". This was a major development in the constitutionalization of the treaty.

The ECJ has also been able to develop its position as a constitutional court through its power to pass an opinion on proposed treaties to be entered into by the Community under Art 300{228}. On this basis, in its *Opinion 1/91*, it declared the proposed European Economic Area Treaty to be contrary to the EECT.<sup>223</sup> It has also declared that the Community cannot accede to the ECHR.<sup>224</sup>

The ECJ has been able to assert itself as the supreme arbiter and creator of Community law. It has been assisted in this process by the Commission, which has brought many cases before it under Arts 226{169} and 230{173}, the many citizens who have raised issues of EC law in proceedings, and the courts, often inferior, which have referred these matters to the ECJ under Art 234{177} rather than abdicating that power to a superior court.

<sup>220</sup> *CILFIT V Ministry of Health* 283/81 [1982] ECR 3415.

<sup>221</sup> *Bronitt et al* op cit p159.

<sup>222</sup> *Case 26/62* [1963] ECR I.

<sup>223</sup> *Opinion 1/91* [1991] ECR I-6079.

<sup>224</sup> *Opinion 2/94* [1996] I-ECR 1759.

The ECJ delivers a single judgment principle, supported by detailed reasoning. The opinion is clear and more closely reasoned, is often more stable, and often does. It is difficult to say whether and whether an opinion was unanimous, and whether it will change next time. It is also almost impossible to obtain consensus, or at least to obtain it.

Although it is possible to conduct proceedings in any language, the Court works in French, so proceedings in other languages are less common. This gives a judge greater influence when negotiating, and being lost in translation is not to be feared. In every official language, the ECJ is to some extent a court of first instance. Different versions are compared in an attempt to reach a decision.

The size of the Court is imposing: fifteen judges.

The International Court of Justice, which is a permanent court, often sits in chambers of five judges, making agreement easier.

The ECJ is a remarkable achievement in that it has developed its own distinctive system. It has developed its own distinctive system of civil law composition at its inception. Its use of broad statements suggests a more flexible reasoning. However it has also given rise to a Supreme Court.

The Court can also be said to have taken a role in the construction of the Community. It has been instrumental in achieving the Treaty's objectives, and in making policy rather than merely interpreting it.

<sup>225</sup> *Brasserie du Nord* op cit p164; *Bengoetxea* op cit pp250-251.

The ECJ delivers a single judgment principally consisting of assertions, often not supported by detailed reasoning. The opinion of the Advocate-General, generally fuller and more closely reasoned, is often of assistance, but the Court is free to differ, and often does. It is difficult to ascertain the contribution of individual judges and whether an opinion was unanimous, or by a narrow margin which might change next time. It is also almost inevitable that the judgment will be a compromise to obtain consensus, or at least a majority.

Although it is possible to conduct proceedings before the Court in any official language, the Court works in French, so proficiency in that language presumably gives a judge greater influence when negotiating the decision. The possibility of nuances being lost in translation is not to be ignored. As legislation is authentic in every official language, the ECJ is to some extent a court of language where different versions are compared in an attempt to find meaning.

The sheer size of the Court is imposing: fifteen judges. It is now almost the size of the International Court of Justice, which does not require a single majority opinion. The ECJ often sits in chambers comprising less than the full bench, making agreement easier.

The ECJ is a remarkable achievement in that it seeks to combine several judicial traditions. It has developed its own distinctive style. Because the Court had an exclusively civil law composition at its inception, it strongly resembles a civil law court. Its use of broad statements suggests use of the civil law process of deductive reasoning. However it has also gained inspiration from the United States Supreme Court.

The Court can also be said to have taken a teleological approach: that it is involved in the construction of the Community and should interpret the Treaty and legislation to achieve the Treaty's objectives.<sup>225</sup> This has led to the court being accused of making policy rather than merely interpreting law<sup>226</sup>. All judges make

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<sup>225</sup> Bronitt et al op cit p164; Bengoetxea op cit pp250-253.

<sup>226</sup> Rasmussen op cit passim.

policy decisions, but this is particularly apparent in the ECJ. The Court's policy has clearly been to assist the creation of the common market. It has also demonstrated a commitment to due process, protection of fundamental rights,<sup>227</sup> uniform interpretation, and interpreting the treaties as a constitution. The Court has been successful in transforming the treaties into a constitution and in establishing the rule of law, but it may have also endangered the legitimacy of the integration project by appearing to be a government of judges.

Bengoetxea argues that the ECJ acts according to a body of underlying principle.<sup>228</sup> Although the judges apparently enjoy absolute freedom, he suggests that they are inhibited by the need to ensure legitimacy. Basically, they must act "like judges" to retain their legitimacy. Provided they do so, they can make profoundly political decisions.<sup>229</sup>

Under Art 288{215}: "The Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions...". This concept of general principles has been most beneficial to the Court in developing its jurisprudence. An attempt to distil the essence of Member States' law is one dimension of its project, but the Court also has considerable flexibility to develop its own principles.<sup>230</sup>

The Court has used the concept of general principles well beyond Art 288{215}. This can be justified by reference to Art 220{164}: the Court shall ensure that the "the law" is observed. "The law" is whatever the ECJ says it is. Wyatt and Dashwood note that "the law" refers to a body of existing law, the common heritage of the Community, which is thus equivalent to the statement in Art 288{215}.<sup>231</sup> Bronitt et al isolate four main principles: proportionality, equal

<sup>227</sup> But see further discussion of this below.

<sup>228</sup> Bengoetxea op cit p99.

<sup>229</sup> Ibid p103.

<sup>230</sup> J Temple Lang "The Constitutional Principles Governing Community Legislation" (1989) 40 *NILQ* 227.

<sup>231</sup> D Wyatt and A Dashwood *European Community Law* (3rd ed, London, Sweet & Maxwell 1993) p169.

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rules as demonstrated by Koster,<sup>237</sup> but the C  
  
<sup>236</sup> Bronitt et al op cit pp169-171.  
<sup>237</sup> Stemmer & D Waelbroeck op cit p28.  
<sup>238</sup> Ibid p21.  
<sup>239</sup> Ibid p21.  
<sup>240</sup> Ibid p21.  
<sup>241</sup> 1970(1970) ECR 1173; cited ibid p30.

application of laws, legal certainty and fundamental rights.<sup>232</sup> Schermers and Waelbroeck describe several types of general principle: compelling legal principles, regulatory rules common to the laws of the Member States, and general rules native to the Community legal order.<sup>233</sup> Compelling legal principles are described as "a form of natural law which should be obeyed irrespective of whether...part of the written legal order or not".<sup>234</sup> It must become increasingly difficult to isolate such principles as the Community enlarges. According to Schermers and Waelbroeck, they are usually enshrined in national constitutions, or in the case of the Community, in the Treaty. It would be desirable to enshrine them in the treaties as Community principles. Common regulatory rules are described as "all other rules which happen to be common to the legal orders of all Member States" but "unlike compelling legal principles, these rules do not necessarily contain an element of justice, fairness or equity".<sup>235</sup> They can also cease to be common on enlargement. The authors point out that the common heritage of Roman law has led to much commonality in legal rules. Indeed, it is the essential commonality of values in European society which makes integration possible. Their third category is that of rules generated within the Community legal order. These can be generated by any institution. They suggest that in theory, these "indigenous" principles could be compelling legal principles, but in practice they will not develop separately from those derived either from Member State systems or the Treaties.<sup>236</sup> Given the latitude of the Court in its interpretation of the Treaties and its distillation of general principles, this conclusion is open to doubt.

There are many principles to be derived from the Treaties and the laws of the Member States, but there is also much scope for creativity. Advocate-General Van Gerven has suggested that the Court actually prefers general principles to treaty articles as demonstrated by *Koster*,<sup>237</sup> but the Court has also shown a reluctance to

<sup>232</sup> Bronitt et al op cit pp169-171.

<sup>233</sup> Schermers & D Waelbroeck op cit p28.

<sup>234</sup> Ibid p27.

<sup>235</sup> Id.

<sup>236</sup> Ibid p28.

<sup>237</sup> 25/70 [1970] ECR 1173; cited ibid p30.

use general principles where there is no support from the Treaties or to override the specific words of legislation.<sup>238</sup>

Schermers and Waelbroeck suggest an ingenious formula whereby a constitutional principle of one Member State can be a general principle if not specifically denied in any other.<sup>239</sup> The Court has not always taken such a view, with cases such as *Ruhrkohlen (No2)* and *Stork*<sup>240</sup> specifically denying a claim for relief based on fundamental rights in the German constitution. However the ECJ's attitude to fundamental rights has developed significantly and is discussed further below. The Court can import a principle it likes provided it is not specifically denied in a Member State, but it can also decline to import a principle on the grounds that it is insufficiently general.

The principle of proportionality requires that the means used to accomplish the aim are proportionate and necessary to the aim.<sup>241</sup> This is of particular significance to a Treaty which specifies aims but provides a good deal of flexibility as to means. However, it also places a lot of power in the hands of the Court. It would place more power in the hands of the legislature and executive if any act within the specified aims and means was lawful. The Court has applied the principle both to Community acts and Member State acts affecting the application of Community law.<sup>242</sup> It has now been enshrined in the Treaty, at least for some Community acts, as part of Art 5{3b} introduced by the TEU.

Equality is an elusive concept. The Treaty outlaws discrimination on the grounds of nationality under Art 12{6} and requires equal pay for equal work by men and women under Art 141{119}. The Court has stated "the rule of equality of treatment...is one of the fundamental principles of Community law".<sup>243</sup>

<sup>238</sup> *Sgarlata* 40/64 [1965] ECR 227; *CFDT* 66/76 [1977] ECR 310.

<sup>239</sup> Schermers & Waelbroeck op cit p32.

<sup>240</sup> Cases 36-38 and 40/59 [1960] ECR 438 and 1/58 [1959] ECR 26.

<sup>241</sup> Schermers & Waelbroeck op cit p77.

<sup>242</sup> See for Member State acts *Sagulo* 8/77 [1977] ECR 1495; for the Community *Hauer* 44/79 [1979] ECR 3727.

<sup>243</sup> *Frilli v Belgium* 1/72 [1972] ECR 457.

Legal certainty is an aim of all legal systems. It has been endorsed by the ECJ in cases such as *Gondrand Frères*.<sup>244</sup> It includes the rule against retroactivity: *Decker*<sup>245</sup> and the rule of legitimate expectations: *Kolpinghaus Nijmegen BV*.<sup>246</sup> However, legitimate expectations can be overridden by other considerations.<sup>247</sup>

As previously discussed, the ECT has no bill of rights.<sup>248</sup> Like the Australian constitution, it contains few express rights. The separate regime of the European Convention on Human Rights and Fundamental Freedoms applies to all Member States. Once the Court had established the supremacy of Community law over national law, including national constitutional law, the lack of Community protection of fundamental rights became more of a cause for concern. The case of *Stork*,<sup>249</sup> decided before supremacy had been declared, demonstrated a lack of commitment to rights but a commitment to Community law ahead of national law. In *Stauder*<sup>250</sup> the Court first stated that fundamental rights were included among the general principles of law to be upheld. In *Internationale Handelsgesellschaft*<sup>251</sup> the Court stated that respect for fundamental rights was inspired by the constitutional traditions common to the Member States and "must be ensured within the framework of the structure and objectives of the Community." (para 4)(emphasis added). The Court thus still seemed as in *Stork* to be placing a higher priority on realising the Community's objectives than on fundamental rights.

In *Nold (No2)*<sup>252</sup> the Court stated that it "cannot uphold measures which are incompatible with fundamental rights recognised and protected by the laws of the Member States"(para 13) Did this mean that a right must be upheld by all Member States to qualify for protection? Apparently a right existing in one state and not

<sup>244</sup> Case 169/80 [1981] ECR 1942.

<sup>245</sup> Case 99/78 [1979] ECR 110.

<sup>246</sup> Case 80/86 [1987] ECR 3987.

<sup>247</sup> Schermers and Waelbroeck op cit p68.

<sup>248</sup> The recently proclaimed Charter of Fundamental Rights is discussed in Chapter 4.

<sup>249</sup> Case 1/58 [1959] ECR 17.

<sup>250</sup> Case 29/69 [1969] ECR 419.

<sup>251</sup> *Internationale Handelsgesellschaft* 11/70 [1970] ECR 1125.

<sup>252</sup> *Nold* 4/73 [1974] ECR 491.

being ruled out by others was sufficient.<sup>253</sup> This case was decided just eleven days after all Member States had acceded to the ECHR. It added international human rights treaties to constitutional traditions as a source of fundamental rights. The ECHR was such a treaty, and was thus brought into Community law. Other treaties may also give rise to rights. In *International Fruit Company (No3)*<sup>254</sup> the Court held that the GATT was binding on the Community, but that it did not have direct effect. The Court has also invoked the European Social Charter and Conventions of the International Labour Organisation.<sup>255</sup>

In *Rutili*<sup>256</sup> the Court specifically applied the ECHR in interpreting a 'Community regulation. In *Hauer*<sup>257</sup> the Court relied on "the constitutional rules and practices of the nine Member States" and also mentioned the ECHR in denying that a breach of rights had occurred. The Court has specifically protected many of the rights in the ECHR.<sup>258</sup>

The present technique raises a possible problem of consistency of interpretation between the ECJ and the European Court of Human Rights.<sup>259</sup> Lenaerts suggests a mechanism for the ECJ to obtain advisory opinions from the ECHR.<sup>260</sup> The Court

<sup>253</sup> As posited by Schermers and Waelbroeck op cit.

<sup>254</sup> 21-24/72 [1972] ECR 1225.

<sup>255</sup> *Defrenne (No 3)* 149/77 [1978 ECR] 1378.

<sup>256</sup> Case 36/75 [1975] ECR 1219.

<sup>257</sup> Case 44/79 [1979] ECR 3746.

<sup>258</sup> These include: freedom of religion: *Prais* 130/75 [1976] ECR 1598; inviolability of domicile: *Hoehst* 227/88 [1989] ECR 2859; freedom of expression: *Grogan* C-159/90; right to property *Hauer* (supra n264); the right to be heard (natural justice, also guaranteed in Art 36 ECSC): *Transocean Marine Paint* 17/74 [1974] ECR 1080; the rights of defence eg to cross-examine, to obtain adequate information to prepare a defence: *Demont (No2)* 115/80 [1981] ECR 3158, to be assisted by counsel: *Van Landewijck* 209-215, 218/78 [1980] ECR 3125; legal professional privilege: *AM&S* 155/79 [1982] ECR 1642; the privilege against self-incrimination, even for corporations, business secrecy: *Orkem* 374/87 [1989] ECR 3351; and the right against double jeopardy *Gutmann* 18 and 35/65 [1966] ECR 119.

<sup>259</sup> See R Lawson "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in R Lawson and M de Blois (eds) *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G Schermers Vol III* Dordrecht, Martinus Nijhoff 1994 p219, but contra F Jacobs "European Community Law and the European Convention on Human Rights" in Curtin & Heukels op cit p561.

<sup>260</sup> K Lenaerts. "A List of Rights to be included in a Community Catalogue" (1991) 16 *ELRev* 367; see also M Janis "Fashioning a Mechanism for Judicial Co-operation on European Human Rights Law among Europe's Regional Courts" in Lawson & de Blois op cit p211.

has ingeniously incorporated elements which would be preferable for the Community to apply it piecemeal, but the ECJ has declined the Community's present powers.<sup>261</sup> It is in a position and does not wish to submit it

The Court has steadily expanded the scope of its principles from acts of the institutions to implementing Community law. In *Wachauf* implementation of Community law must be interpreted in the light of the examined national measures imp compatibility with Community principles has specifically declined to enforce State actions without Community *Demirel*,<sup>262</sup> but in *ERT*<sup>263</sup> the Court a State measure which derogated from expands its activities, the *chasse gardée* although subsidiarity may counteract

Coppel and O'Neill have criticised rights jurisprudence, arguing that it the protection of fundamental rights the Court's jurisdiction.<sup>264</sup> Mendel recognised many fundamental rights

<sup>261</sup> *Opinion 2/94* [1996] ECR 1759, also

<sup>262</sup> A conclusion supported by *Opinion* EEA Treaty proposal for a court to w

<sup>263</sup> *Wachauf v Federal Republic of Germany*

<sup>264</sup> Case 77/81 [1982] ECR 695.

<sup>265</sup> Cases 60-61/84 [1985] 2627.

<sup>266</sup> Case 12/86 [1987] ECR 3719.

<sup>267</sup> C-260/89 [1991] I ECR I-2963.

<sup>268</sup> J Coppel and A O'Neill "The European Court of Justice" 29 *CMLRev* 669.



has ingeniously incorporated elements of the ECHR in Community law, but it would be preferable for the Community to accede to the ECHR than to continue to apply it piecemeal, but the ECJ has declared accession to be impossible with the Community's present powers.<sup>261</sup> It seems that the Court prefers the present situation and does not wish to submit itself to a higher court.<sup>262</sup>

The Court has steadily expanded the scope of application of its fundamental rights principles from acts of the institutions to acts of the Member States when implementing Community law. In *Wachauf*<sup>263</sup> the Court applied them to national implementation of Community law, once again stressing that fundamental rights must be interpreted in the light of the Community's objectives (para 18). It had examined national measures implementing Community rights for their compatibility with Community principles in *Zuckerfabrik Franken*.<sup>264</sup> The Court has specifically declined to enforce Community standards to invalidate Member State actions without Community links, for example in *Cinéthèque*<sup>265</sup> and *Demirel*,<sup>266</sup> but in *ERT*<sup>267</sup> the Court applied a Community rights test to a Member State measure which derogated from a Community freedom. As the Community expands its activities, the *chasse gardée* of the Member States will be ever smaller, although subsidiarity may counteract this, as will be discussed in Chapter 4.

Coppel and O'Neill have criticised the Court's development of its fundamental rights jurisprudence, arguing that it has not been motivated by a desire to further the protection of fundamental rights *per se*, but rather as a method of expanding the Court's jurisdiction.<sup>268</sup> Mendelson points out that although the Court has recognised many fundamental rights, it has usually not applied them to the case

<sup>261</sup> *Opinion 2/94* [1996] ECR 1759, also discussed in Ch1.

<sup>262</sup> A conclusion supported by *Opinion 1/91* [1991] ECR I-6079 in which the Court rejected the EEA Treaty proposal for a court to which the ECJ would be inferior.

<sup>263</sup> *Wachauf v Federal Republic of Germany* 5/88 [1988] ECR 2609.

<sup>264</sup> Case 77/81 [1982] ECR 695.

<sup>265</sup> Cases 60-61/84 [1985] 2627.

<sup>266</sup> Case 12/86 [1987] ECR 3719.

<sup>267</sup> C-260/89 [1991] I ECR I-2963.

<sup>268</sup> J Coppel and A O'Neill "The European Court of Justice: Taking Rights Seriously?" (1992) 29 CMLRev 669.

before it.<sup>269</sup> Rasmussen notes that it took fifteen years for the Court to create fully fledged fundamental rights protection for individuals and companies under Community law.<sup>270</sup> He too argues persuasively that the Court put integration ahead of fundamental rights protection. Weiler and Lockhart argue that there need not be a dichotomy between human rights and integration,<sup>271</sup> but as Coppel and O'Neill argue, human rights should not be used selectively to further integration, they are of a higher value.<sup>272</sup> Only their incorporation in the constitution or accession to the ECHR would ensure this.

What is one to conclude from the failure of the founders and those who have followed them to include or accede to a bill of rights in the treaty? They may have concluded (apparently like the Australian founding fathers) that rights would be adequately protected by legislation and judge-made law. Perhaps national protection was considered adequate. The Art 288{215} formulation suggests national systems as a source of inspiration, but it is not sufficient by itself. Did the drafters consider the risk of violations by the institutions insufficient to require special protection?<sup>273</sup> Be that as it may, the Treaties were silent until the SEA,<sup>274</sup> but the Court has acted extensively.

The Court's motivations for its fundamental rights jurisprudence are also unclear. The German constitutional court in *Internationale Handelsgesellschaft*<sup>275</sup> ("Solange NoI") in 1974 reserved its power to determine the validity of legislation based on its compatibility with national fundamental rights *so long as* (*solange*) such rights were inadequately protected at Community level. In *Frontini*,<sup>276</sup> the Italian constitutional court made a similar decision. This was a

<sup>269</sup> M Mendelson "The European Court of Justice and Human Rights" (1981) 1 YEL 125.

<sup>270</sup> Rasmussen op cit p389.

<sup>271</sup> Indeed, Frowein, Schulhofer and Shapiro explore the use of fundamental rights as a vehicle for integration in Cappelletti, M., Seccombe, M. and Weiler, J. (eds) *Integration through law* Vol 1 Bk 3 (Florence, EUI, 1984) p231.

<sup>272</sup> Coppel & O'Neill op cit passim.

<sup>273</sup> Rasmussen op cit p390.

<sup>274</sup> The SEA included a reference to the protection of fundamental rights and so did the TEU, to be discussed in Chapter 4. The recent Charter of Rights is also discussed in Chapter 4.

<sup>275</sup> [1974] 2 CMLR 540.

<sup>276</sup> [1974] 2 CMLR 386.

major blow to the doctrine of supreme rights jurisprudence, starting with cases. In *Wuensche* ("Solange") development of this jurisprudence Community law continued to protect Community legislation. The in *BECS SpA*.<sup>277</sup> But in *Brunner*<sup>278</sup> the of such review. Having developed the ECJ's jurisprudence of fundamental constitutionalization process by devis

Another way in which the Court development has been its arrogation of basis for measures taken under the treaty profound political consequences given depending on which basis is chosen Council, some qualified majority, at European Parliament.<sup>281</sup> The Court Commission and found that any justification that there is only ever one true basis for noble aim, but it is an undue trespass on

In *Van Gend en Loos*, the Court held provisions of the Treaty against government 'direct effect' has been one of the constitutionmaking. It took a treaty, the organizations, and began to make it. Admittedly the Court always placed regard give rise to direct effect, but the dyke

<sup>277</sup> *supra*. The ECJ had begun to talk of rights  
<sup>278</sup> [1967] 3 CMLR 225.  
<sup>279</sup> Corte Costituzionale 23 April, 1985.  
<sup>280</sup> [1994] 1 CMLR 57.  
<sup>281</sup> See *Titanium Dioxide* (*supra*).

major blow to the doctrine of supremacy. The development of the ECJ's human rights jurisprudence, starting with *Nold*<sup>277</sup> may be seen as a response to these cases. In *Wuensche* ("Solange No 2")<sup>278</sup> the German court reviewed the development of this jurisprudence and held that *so long as* the ECJ and Community law continued to protect fundamental rights, it would not seek to impugn Community legislation. The Italian court had reached a similar conclusion in *BECS SpA*.<sup>279</sup> But in *Brunner*<sup>280</sup> the German court again reopened the possibility of such review. Having developed the doctrines of direct effect and supremacy, the ECJ's jurisprudence of fundamental rights protection continued the constitutionalization process by devising a bill of rights.

Another way in which the Court has been able to guide constitutional development has been its arrogation of a jurisdiction to decide the "correct" legal basis for measures taken under the treaties. The choice of basis will often have profound political consequences given the diversity of legislative procedures depending on which basis is chosen, with some requiring unanimity in the Council, some qualified majority, and varying forms of participation by the European Parliament.<sup>281</sup> The Court could have left the matter in the hands of the Commission and found that any justifiable legal basis was sufficient. Its insistence that there is only ever one true basis seems unduly restrictive. It may have had a noble aim, but it is an undue trespass on the legislative process.

In *Van Gend en Loos*, the Court held that a citizen may directly invoke some provisions of the Treaty against government instrumentalities. This doctrine of 'direct effect' has been one of the Court's most significant pieces of constitutionmaking. It took a treaty, the affair of governments and international organizations, and began to make it into a constitution, the affair of people. Admittedly the Court always placed restrictions on which treaty provisions could give rise to direct effect, but the dyke between international law and individuals

<sup>277</sup> *supra*. The ECJ had begun to talk of rights five years earlier in *Stauder* (*supra*).

<sup>278</sup> [1987] 3 CMLR 225.

<sup>279</sup> Corte Costituzionale 23 April, 1985.

<sup>280</sup> [1994] 1 CMLR 57.

<sup>281</sup> See *Titanium Dioxide* (*supra*).

was breached, and the doctrine soon spread. Direct effect was not entirely surprising. Regulations and decisions had always had direct application to both governments and individuals. Art 230 {173}, so narrowly interpreted by the Court, was specifically designed to limit direct effect in relation to Community legislation. Yet in *Van Gend & Loos*, the Court opened huge new possibilities for the challenging not only of Member State, but also of Community legislation. By characterizing Community law as a "new legal order" between international law and domestic law, the Court laid the groundwork for establishing its supremacy over national law and licensed its own power to create an entirely new system. A feature of that system was that individuals as well as states and Community institutions were subjects in it. The Court's logic was compelling: the Treaties impose obligations on individuals; individuals must also receive rights. Coming so early in the life of the EEC, the case transformed the Community.

The limitations placed on direct effect show that the Court was still cautious about its potential.<sup>282</sup> In *SABAM*<sup>283</sup> the Court took the next logical step and applied direct effect to treaty provisions regulating conduct between individuals: 'horizontal' direct effect. The upholding of this principle in *Defrenne*<sup>284</sup> on the requirement of equal pay for men and women under Art 141 {119}, had the potential to cause chaos in the many laggard states which had failed to implement this principle even by the 1970s.<sup>285</sup> The Court revealed its sensitivity to practical difficulties by making its decision prospective only.

As mentioned above, there has been little doubt that regulations can have direct effect. Directives have caused much more difficulty. Art 249 {189} states that they are only binding as to the result to be achieved, making them unable to satisfy the criterion of completeness. The end of the transitional period with many directives unimplemented gave the Court the opportunity to rule on the issue. In *Grad*<sup>286</sup> the

<sup>282</sup> See *Reyners* 2/74 [1974] ECR 631.

<sup>283</sup> 127/73 [1974] ECR 51.

<sup>284</sup> 43/75 [1976] ECR 455.

<sup>285</sup> As nearly twenty years later they had still failed to apply it for occupational pensions of *Barber* C262/88 [1990] ECR I-1889.

<sup>286</sup> Case 9/70 [1970] ECR 825.

Court held that an unimplemented directive, once implemented, must be treated as if it has not been implemented. Member State courts must read it in conformity with the directives they are implementing. The Court has so far only extended this principle to horizontal direct effect in *Dori*<sup>281</sup> but the Court has developed a remedy against Member States to provide relief for those who have failed to implement a directive.

Supremacy is such a fundamental principle that it was not included in the Treaty. It was not until the ECJ definitively stated the principle in *Van Gend & Loos* that it became a reality. However, several Member States have expressed difficulty accepting supremacy, but on the basis of valid national law. *Smuntz*<sup>284</sup> was adamant that supremacy is a constitutional law. The German Constitutional Court has questioned the possibility of Community legislation. The Law, has again questioned the supremacy really has no option but to accept it.

<sup>281</sup> Case 41/74 [1974] ECR 1337.

<sup>282</sup> 36/75 [1975] ECR 1219.

<sup>283</sup> 14/83 [1984] ECR 1891.

<sup>284</sup> *Foster v British Gas* 188/89 [1990] ECR I-4135.

<sup>285</sup> Case 91/92 [1993] I CMLR 665.

<sup>286</sup> Cases 6 & 9/90 [1991] ECR I-5357.

<sup>287</sup> Case 6/64 [1964] ECR 593.

<sup>288</sup> Case 106/77 [1978] ECR 629.

<sup>289</sup> [1994] I CMLR 57.

Court held that an unimplemented directive *could* have direct effect after the deadline for its implementation. *Van Duyn*<sup>287</sup> and *Rutili*<sup>288</sup> reinforced this. A directive, once implemented, may have direct effect enabling an individual to plead that it has not been implemented correctly. *Von Colson*<sup>289</sup> is authority that Member State courts must read their states' implementing measures so as to give effect to the directives they are implementing: so called "indirect effect". The Court has so far only extended the direct effect of directives to the states and their arms.<sup>290</sup> Horizontal direct effect is yet to come. A-G Lenz recommended its extension in *Dori*<sup>291</sup> but the Court disagreed. It has, however, in *Francovich*<sup>292</sup> developed a remedy against Member States for non-implementation which will provide relief for those who have suffered loss from a government's failure to implement a directive.

Supremacy is such a fundamental necessity of Community law that it is surprising it was not included in the Treaties. Perhaps it was implied, but not until *Costa*<sup>293</sup> did the ECJ definitively state the principle. Some Member States' courts have had difficulty accepting supremacy, but all have now done so, as discussed in Chapter 2. However, several Member States' supreme constitutional courts have only done so on the basis of valid national delegation of power to the EC. The ECJ in *Simmenthal*<sup>294</sup> was adamant that Community law overrides even national constitutional law. The German Constitutional Court in *Brunner*,<sup>295</sup> by raising the possibility of Community legislation being incompatible with the German Basic Law, has again questioned the concept of supremacy. A state which rejects supremacy really has no option but to leave the Community. This ultimately

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<sup>287</sup> Case 41/74 [1974] ECR 1337.

<sup>288</sup> 36/75 [1975] ECR 1219.

<sup>289</sup> 14/83 [1984] ECR 1891.

<sup>290</sup> *Foster v. British Gas* 188/89 [1990] ECR 3313 ruling that a privatised utility was still an arm of the state.

<sup>291</sup> Case 91/92 [1995] 1 CMLR 665.

<sup>292</sup> Cases 6 & 9/90 [1991] ECR I-5357.

<sup>293</sup> Case 6/64 [1964] ECR 593.

<sup>294</sup> Case 106/77 [1978] ECR 629.

<sup>295</sup> [1994] 1 CMLR 57.

means that the Member States can retain their sovereignty, but only if they leave the Community. No state has yet tried to do so.

The ECJ has elaborated the meaning of the treaties in many other areas. There was much judicial interpretation needed of the provisions relating to freedom of movement in the creation of the common market, just as Section 92 on free movement has proved the most litigated section of the Australian constitution.<sup>296</sup> Art 28{30} is very wide, and the ingenuity or thoughtlessness of Member States is has devised many measures which have the effect of reducing imports.<sup>297</sup> Art 33{36} might be thought to provide Member States with ample opportunity for restriction, but the ECJ has subjected its use to thorough review. In *Rewe*<sup>298</sup> (the "Cassis de Dijon" case) the Court described the rules on free movement as "fundamental rules of the Community" and developed additional bases for both free movement and restriction not found in the treaties. The hierarchy between free movement and fundamental rights is still unclear. As discussed above, Coppel and O'Neill suggest that the rules on free movement have been placed ahead of fundamental human rights.<sup>299</sup> There is some evidence for this but also evidence of a genuine commitment to human rights protection by the Court, as discussed above.

In *Rewe*, the Court adopted a "rule of reason" approach, allowing certain criteria in derogation of Art 28{30} other than Art 33{36}. This has given the Court a great deal of flexibility in interpreting Art 28{30}. Given the existence of Art 33{36}, this is questionable judicial lawmaking, although it has enabled significant extension of the scope of Community law for example to include environmental considerations, the workplace, and culture. These have since been included in the treaties as legitimate areas of Community concern.

<sup>296</sup> This states that "...trade, commerce and intercourse between the States shall be absolutely free".

<sup>297</sup> The line of cases beginning with *Dassonville* [1974] ECR 837 has applied a stringent test to restrictions.

<sup>298</sup> eg *Rewe-Zentral AG* 120/78 [1979] ECR 649.

<sup>299</sup> Coppel & O'Neill op cit passim.

Free movement of workers and professional people have also development.<sup>300</sup> The original movement, but the realisation of with a local unless accompanied rights of locals led to the widening been seen by some as "an inc indeed ripened into such citizens

Given the vast disparities in living people has the potential to cause relocation, only a tiny minority exceptions. There has been no de area, but the exceptions have ECHR was used as a basis to While deportation is permitted, safeguards imposed.<sup>301</sup> Social caused difficulty and will do so system.<sup>302</sup> The Court has not but has improved access to nation

Free movement of services has services.<sup>303</sup> This opened the way characteristic of citizenship desc

<sup>300</sup> See generally E Meacham *Citizenship*

<sup>301</sup> Eg *Incirillo* 63/76 [1976] ECR 275

<sup>302</sup> Levi Sandri, Commissioner for social

<sup>303</sup> The creation of an official citizenship

<sup>304</sup> Eg *Van Duyn* 41/74 [1974] ECR I

<sup>305</sup> *Sanfilippo* 131/79 [1980] ECR 1545

<sup>306</sup> Art 42(51) requires co-ordination

<sup>307</sup> many cases have still arisen. See K

<sup>308</sup> *Cowan* 186/87 [1989] ECR 195

Free movement of workers and the right of establishment for business and professional people have also been a significant opportunities for constitutional development.<sup>300</sup> The original treaty fell short of providing complete freedom of movement, but the realisation that a migrant worker could not be treated equally with a local unless accompanied by their family who in turn must share all the rights of locals led to the widening of the scope of this provision.<sup>301</sup> It has always been seen by some as "an incipient form of European citizenship"<sup>302</sup> and has indeed ripened into such citizenship through constitutional development.

Given the vast disparities in living standards within the EC, free movement of people has the potential to cause chaos, but due to difficulties of language and relocation, only a tiny minority of workers have relocated. Art 39{48} gives exceptions. There has been no development by the Court of a rule of reason in this area, but the exceptions have been strictly construed.<sup>303</sup> In *Rutili* (supra), the ECHR was used as a basis to expand the rights enjoyed by a foreign worker. While deportation is permitted, strict limits have been placed on it and procedural safeguards imposed.<sup>304</sup> Social security rights spread across several states have caused difficulty and will do so until there is a single European social security system.<sup>305</sup> The Court has not been able to speed the development of such a system but has improved access to national systems.

Free movement of services has been extended to free movement to receive services.<sup>306</sup> This opened the way for free movement without an economic nexus, a characteristic of citizenship described in Chapter 4. The Court has also extended

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<sup>300</sup> See generally E Meehan *Citizenship and the European Community* (London, Sage 1993).

<sup>301</sup> Eg *Inzirillo* 63/76 [1976] ECR 2057.

<sup>302</sup> Levi Sandri, Commissioner for social policy Bull EC 11, 1968 cited in Kapteyn op cit p411. The creation of an official citizenship is discussed in Chapter 4.

<sup>303</sup> Eg *Van Duyn* 41/74 [1974] ECR 1337.

<sup>304</sup> *Santillo* 131/79 [1980] ECR 1585.

<sup>305</sup> Art 42{51} requires co-ordination of social security and although this has been attempted, many cases have still arisen. See Kapteyn op cit p423.

<sup>306</sup> *Cowan* 186/87 [1989] ECR 195.

free movement to a right to advertise services available in another Member State.<sup>307</sup>

The ECJ has effectively constitutionalized the treaties by its development of the doctrines of a new legal order, direct effect and supremacy, its elaboration of a set of both procedural and fundamental rights, and its ability to incorporate the new legal order within the law of the Member States. The court has been the most successful of the supranational institutions. It has established the rule of law in the Communities, and a constitution, but has been unable to establish democracy. Despite occasionally incurring the wrath of the Member States, it continues to wield significant power. Changes made to its jurisdiction by the Treaty on European Union and subsequent treaties are explored in Chapter 4.

### 3.7 THE EUROPEAN COURT OF AUDITORS

An essential part of democratic government is accountability for public spending. Although only an embryonic government, and insufficiently democratic, the Community also needs such accountability. The situation in the EC is more complicated than in most states because of its institutional structure. It relies on Member States' contributions and collections for most of its revenue<sup>308</sup> and also delegates to them a large proportion of its expenditure.

The EC is required to run a balanced budget. The budget is 4-5% of the combined budgets of the Member States.<sup>309</sup> Given that the chain of accountability in the EC is different from a state, it is not surprising that the auditing mechanisms also developed differently. Although the ECSC began in 1952 and the other Communities in 1957, it was not until the mid 1960s that the Commission proposed a greater role for the European Parliament in budgetary control. This was connected to the development of the EC's "own resources" in addition to contributions from Member States, and can be seen as part of the agenda to

<sup>307</sup> Grogan C-159/90 [1991] ECR I-4685.

<sup>308</sup> 18% customs duties, 51% VAT receipts, 27% Member State contributions

<sup>309</sup> The European Court of Auditors, *Auditing the Community's Finances* (Luxembourg, ECA 1994) p12.

constitutionalize the Community Member States.

Before the advent of Own Resources Board for the EEC and an Audit Parliament obtained limited rights 1970. The Second Budgetary Treaty Resources and the power of the Parliament to adopt it, and accept discharge, is only fully independent act of law going to be needed to assist the creation of a European Court of Auditors. However, it was not proposed for the Communities, merely a subordinate Budgetary Treaty<sup>312</sup> and govern 1977.<sup>313</sup>

The ECA has a member for each Member State renewable six year terms.<sup>314</sup> This is a single responsible official but Appointment is made by the Council. O'Keefe notes that this is different from the President of the Commission, observes, this is an anomaly given that the Council are generally uncontroversial, a proposal was rejected by the European Parliament.

<sup>310</sup> Ibid p4.

<sup>311</sup> C Kok, "The Court of Auditors of the European Community" (1989) 26 CMLRev. 1.

<sup>312</sup> OJ 1977 L359/1.

<sup>313</sup> OJ 1991 C80.

<sup>314</sup> Now Art 247(188b). Formerly Art 247(188b).

<sup>315</sup> Kok op cit p347.

<sup>316</sup> D O'Keefe "The Court of Auditors of the European Community"

<sup>317</sup> Kok ibid p367. One withdrew, the



constitutionalize the Community by introducing a system more similar to those of Member States.

Before the advent of Own Resources, the Communities had only a part-time Audit Board for the EEC and an Auditor General for the ECSC.<sup>310</sup> The European Parliament obtained limited rights over the budget in the First Budgetary Treaty of 1970. The Second Budgetary Treaty of 1975 coincided with the advent of Own Resources and the power of the Parliament to amend part of the budget, reject or adopt it, and accept discharge, ie approval of its regularity. Discharge was the only fully independent act of law by the Parliament.<sup>311</sup> A stronger institution was going to be needed to assist the Parliament with its new responsibilities, and the creation of a European Court of Auditors ("ECA") was included in the proposal. However, it was not proposed that the new court become an institution of the Communities, merely a subordinate organ. It was established by the Second Budgetary Treaty<sup>312</sup> and governed by the Financial Regulation of December 1977.<sup>313</sup>

The ECA has a member for each Member State nominated by the Council for renewable six year terms.<sup>314</sup> This structure avoids the difficulty of choosing a single responsible official but makes the organization more unwieldy.<sup>315</sup> Appointment is made by the Council after consulting the European Parliament. O'Keefe notes that this is different from the appointment process for the ECJ and the President of the Commission, both of which are by common accord.<sup>316</sup> As he observes, this is an anomaly given the ECA's institutional status. Appointments are generally uncontroversial, although two of six proposed candidates were rejected by the European Parliament in 1989.<sup>317</sup> Qualifications in terms of

<sup>310</sup> Ibid p4.

<sup>311</sup> C Kok, "The Court of Auditors of the European Communities: the other European court in Luxembourg" (1989) 26 *CMLRev* 345, 346.

<sup>312</sup> OJ 1977 L359/1.

<sup>313</sup> OJ 1991 C80.

<sup>314</sup> Now Art 247 (188b). Formerly Art 206 before renumbered in TEU.

<sup>315</sup> Kok op cit p347.

<sup>316</sup> D O'Keefe "The Court of Auditors" in Curtin & Heukels op cit p177 at 179.

<sup>317</sup> Kok ibid p367. One withdrew, the other was subsequently appointed.

independence, competence and integrity are similar to those for members of the Court of Justice.<sup>318</sup> Reflecting the difference in national systems of supreme audit, some are lawyers, others accountants, civil servants or former politicians.

The ECA acts collegially with several members forming an Audit Group taking responsibility for a particular area then combining to produce their Report.<sup>319</sup> The Court then chooses by majority whether to accept the report and, if accepted, takes full responsibility for it.

As well as its annual report, the ECA must be consulted regarding financial legislation.<sup>320</sup> Its prime task is to examine all revenue and expenditure of the EC, in all Member States and in third countries receiving community funds for legality, regularity and sound financial management. This last criterion does not apply to all national audit institutions.<sup>321</sup> It may also submit special reports on particular areas on its own initiative.<sup>322</sup>

The Court is located in Luxembourg. While 200 kilometres from Commission headquarters in Brussels, given the need for mobility around the whole EC, this is not really a disadvantage. As with the Court of Justice, it probably keeps the ECA further from the public eye, a mixed blessing.

The ECA has no power to impose sanctions. Its weapons are Parliament's power to reject discharge of the budget and the power of publicity. It is thus not like the common law idea of a court of law, but has counterparts in several Member State jurisdictions. The European Parliament did indeed refuse discharge of the 1982 budget, but the Commission did not resign.<sup>323</sup> As discharge does not come up for vote until April of the year following the year following the budget year under

<sup>318</sup> *Mutatis mutandis* for auditing rather than law.

<sup>319</sup> ECA op cit p6.

<sup>320</sup> Art 279 (209)

<sup>321</sup> ECA op cit p4.

<sup>322</sup> Ibid p9.

<sup>323</sup> Kok op cit p351.

review, it was all a long time ago. Kok suggests<sup>324</sup> that denial of discharge could be used as a weapon to try to induce the resignation of an individual commissioner (the Parliament can only require the resignation of the entire Commission), but the collective solidarity and responsibility of the Commission have been jealously guarded to date.<sup>325</sup>

It can be imagined that the difficulties of getting fifteen auditors from very different auditing cultures to work together would be considerable. France, Germany, Italy, Belgium, the Netherlands and Austria all have courts as their supreme audit institutions. Britain, Ireland and Denmark have non-judicial officials. Most Western European countries base their public accounting on statute law. Accountability is to parliament rather than the people. In 1973, Britain and Ireland had joined the Community, bringing a new legal, accounting and auditing culture, among other things. Instead of a Court, Britain has a Comptroller and Auditor General, who operates for both the executive and the legislature.<sup>326</sup>

Luder suggests that that Courts of Audit have traditionally taken more interest in legality and regularity than in systems<sup>327</sup> The ECA had the opportunity to create an entirely new culture. With limited resources, it could not examine all transactions, and after considerable study, has adopted a systems-based approach - an emphasis on the adequacy of systems in place to achieve desired results. The ECA has three objective functions: to determine legality, regularity and reliability, and one subjective: "sound financial management"<sup>328</sup>. The Court has also adopted a systems-based approach to this last requirement.<sup>329</sup> A problem with the systems-based approach is that it does not actually account for the money spent, which

<sup>324</sup> Ibid p352.

<sup>325</sup> To the extent of the resignation of the entire Commission in 1999 due to the misconduct of only some: see Chapter 4.

<sup>326</sup> R Jones, M Pendlebury in J Chan. and R Jones. (eds) *Governmental Accounting and Auditing: International Comparisons* (London, Routledge 1988) p52 at 58.

<sup>327</sup> K Luder "Governmental Accounting in West European Countries: with special reference to the Federal Republic of Germany" in Chan and Jones *ibid* p82 at 96.

<sup>328</sup> Art 248 {188c}.

<sup>329</sup> ECA *op cit* p15.

appears to be one of ECA's duties. Defenders of the Court respond that addressing the system will eliminate the problem.<sup>330</sup>

Auditing can take place throughout the audit period and is not restricted to that period. Recommendations may require legislative action, partly the responsibility of the Council, a body largely beyond the ECA's scrutiny. The ECA has not shrunk from recommendations with highly political consequences, especially in the area of agriculture.

In a 1983 report, the ECA pointed out one of its greatest difficulties: that although under Art 274{205}, the Commission is responsible for administering the budget, much administration is in fact done at national level.<sup>331</sup> Indeed, 90% of expenditure is at national level.<sup>332</sup> The principle of subsidiarity will dictate that this practice continues and probably expands. While the ECA is empowered to examine national administration of EC funds, it is inevitably more difficult to penetrate national administrations, jealous of their national sovereignty. The Treaty provides for liaison between the ECA and national audit institutions ("NAIs") or other national authorities. NAIs collectively employ more than twenty times the staff of the ECA<sup>333</sup> (roughly proportional to budgetary share). Luder points to the importance of co-ordinating the national accounting and auditing practices of Member States, not least because of the need for uniform treatment of EC grants in national accounting but also for the sake of more meaningful Community accounting.<sup>334</sup>

In 1988, the Commission proposed to the ECA that it obtain institutions' agreement to publication of its reports, and that it provide for their reply.<sup>335</sup> The Court does not seek permission, but does provide the opportunity to reply (and often replies to the reply). Rather than the form of negotiation in which only the

<sup>330</sup> Luder in Chan and Jones op cit p119 and Kok op cit p364.

<sup>331</sup> OJ 1983, C 287.

<sup>332</sup> ECA op cit p17.

<sup>333</sup> ibid p18.

<sup>334</sup> Luder, in Chan and Jones op cit p97.

<sup>335</sup> OJ 1989 C115.

ultimate outcome is known, this technique of reporting exposes the whole negotiation, or at least that part of it which the parties choose to make public.

'Euro-fraud' has been well documented, especially in conjunction with the Common Agricultural Policy.<sup>336</sup> In its very first report, the ECA noted that auditing, while of assistance in detecting fraud, cannot detect all fraud.<sup>337</sup> In 1983, it recommended greater action by the Commission in this area.<sup>338</sup> In 1987, it noted that primary responsibility must lie with the Member States when administering Community funds.<sup>339</sup> Some Community bodies not directly stated to be subject to its scrutiny, such as the European Investment Bank, nevertheless disburse Community funds, and have not always provided necessary information.<sup>340</sup>

The Commission may have a vested interest in not pursuing enquiries about mismanagement within its jurisdiction. Also, there is no EC police force. The House of Lords recommended in 1989 that the ECA delegate national audit offices to act on its behalf.<sup>341</sup> Apart from having no basis in law, such a proposal would pose considerable practical difficulties. Joint audits do, however, take place. There is an organization, EUROSAI, European equivalent of INTOSAI, the International Organization of Supreme Audit Institutions, to improve co-ordination of national audit efforts and to examine better collaboration with Community institutions. Given the overlapping roles of the Community and Member States in this area, such co-operation is critical.

A leading cause of problems in EC finances is the sheer complexity of the EC constitution and EC legislation, which has so many varieties, with many different processes for implementation, and the extensive involvement of Member States.

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<sup>336</sup> See F Calvi *L'Europe des Parrains* (Paris, Grasset 1993).

<sup>337</sup> OJ 1978 C313/8.

<sup>338</sup> OJ1984 C348.

<sup>339</sup> Annual Report for 1986 Financial Year.

<sup>340</sup> Kok, *op cit* p362. O'Keeffe *op cit* p185.

<sup>341</sup> House of Lords Select Committee on the European Communities, *Fraud Against the Community*, Session 1988-89, 5th Report, HL Paper 27.cited Kok p364.

The Court has been the subject of surprisingly little attention from scholars. As Kok observes, even writers on the Community budget process sometimes neglect its role.<sup>342</sup> O'Keeffe draws attention to the Court's importance and potential.<sup>343</sup>

The House of Lords reported on the Court in 1987. It found that many of the Court's recommendations had not been acted on by either the Community or the Member States, raising the idea that the ECA should be armed with sanctions. In the TEU, it gained standing to bring a case against another institution for failure to act.

How has the ECA performed in the key areas of agriculture, the institutions and international aid? Farm subsidies are an area almost inviting abuse. 40% of these are for export subsidy. Those who can export, import secretly, then re-export can make a large profit. The ECA has been aware of the problem, but not able to do much about it. Member States have different concepts of fraud. Perhaps there is also a lack of incentive for governments closely to monitor how they spend EC money. Agricultural subsidy is an entrenched part of EC practice, so it is unlikely that an ECA proposal will alter it, and abuses are hard to combat. The ECA can continue to draw attention to the problem until action is taken.

The EC's international aid and development budget is administered by the Commission, but is not all included in the Community budget. Some is from a special European Development Fund. Nevertheless, it is monitored by the Court. Members of the Court sometimes visit Third World receiving countries. Their reports have found significant waste of EC money.<sup>344</sup> The tendering processes are intended to favour EC or recipient tenderers. Quantifying the value of development projects, as distinct from the cost, can be difficult.

Financial accountability is a critical part of good government and if the Community is to increase its powers and budget, the powers of the ECA must also

<sup>342</sup> Kok op cit p345.

<sup>343</sup> O'Keeffe op cit p193.

<sup>344</sup> *ibid* p228.

## CONCLUSION

In this paper, I have explored the constitution of the Community from the signing of the Treaty of Rome to the present. I have seen the progress of the Community from the Commission, the Parliament, the Council and the Court. I have seen the ways in which the Community has increased their powers and the ways in which the Community has changed its institutional structure. I have seen the democratic dimension of the Community and the way in which it has been achieved through the achievement of the Community. I have seen the Community was still far from the completion of the single market and what a European Union do to

be increased. It must become a genuine court with powers of investigation and sanction wherever Community money is spent.

### 3.8 CONCLUSION

In this chapter, I have explored the constitutional development of the European Economic Community from the signing of the Treaty of Rome to the preparations for the Treaty on European Union. I have suggested that several political figures dominated the progress of the Community, but that each of the supranational institutions, the Commission, the Parliament, the Court of Justice and the Court of Auditors, found ways to increase their power. There were also setbacks in this process with reassertions of national sovereignty and changes in economic conditions. The Community doubled its membership during the period yet did not significantly change its institutional structure. The TEU was therefore an opportunity to reform the structure and increase the Community's powers. Although the democratic dimension of the constitution improved during the period, principally through the achievement of direct election for the European Parliament, the Community was still far from democratic. The Single European Act furthered completion of the single market, but monetary union had not been achieved. What could a European Union do to make a more democratic, effective constitution?

## CHAPTER 4

### RENOVATIONS, EXTENSIONS AND A NEW ROOF:

#### EUROPEAN UNION

In this chapter, I consider the constitutional development achieved by the Treaty on European Union ("TEU") signed at Maastricht on 7 February 1992 and the subsequent amendments to that treaty and the other treaties effected up to 1 February 2003 when the Treaty of Nice came into effect. For each treaty, I examine the negotiation process, the ratification process, and what the treaty achieved. These developments constitute the construction of the cathedral to date, the current basis for further construction or the reformation I seek in Chapter 5.

#### *4.1 THE POLITICAL AND ECONOMIC CONTEXT*

With the 1992 programme well under way in the late 1980s, attention turned to the next logical step to complete the single market: monetary union. EMU<sup>1</sup> had first been proposed at the Hague Summit of 1969, but the collapse of the international exchange rate regime, discussed in Chapter 3, had pushed it from the agenda. There had been monetary co-operation through the European Monetary System, and the SEA had achieved a timetable for the free movement of capital provided for in the EECT, so from a constitutional perspective, the time was ripe for monetary union. A report by the Italian banker Tommaso Padoa-Schioppa in

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<sup>1</sup> The acronym can stand for European or Economic [and] Monetary Union.



April 1987, requested by the Commission, warned that the liberalisation of capital movement provided for in the SEA would put pressure on the Exchange Rate Mechanism ("ERM").<sup>2</sup> It recommended monetary union as the solution to this problem. This report and the stock market crash of October 1987 fortified opinion in the business community and among many political leaders that monetary union was necessary to give currency stability and to complete the single market.<sup>3</sup> The conclusion of the "Delors Package" of Community budgetary measures in February 1988 cleared the decks for an assault on monetary union.

The Hanover European Council of June 1988 commissioned a committee headed by Delors and comprising the Member States' central bank governors, some additional economists and bankers, and Commissioner Frans Andriessen to report on the matter.<sup>4</sup> It was to report on *how* EMU should be achieved rather than *whether* it should be pursued. Delors and the central bankers seem to have persuaded the politicians that monetary union *should* be pursued and that it should be done their way.

The Committee proposed a path to monetary union via a three stage process including constitutional changes to establish an independent European central bank and "convergence criteria" which Member States had to meet in order to qualify for participation in the single currency. The Madrid European Council of June 1989 accepted the report.

The first stage, closer alignment in the EMS, was to begin in July 1990, with the second and third stages to await constitutional amendment and the necessary economic convergence. These details were to be finalised in an IGC to be convened at the end of 1990. The Hanover European Council had also endorsed a second four year term for Delors which would enable him to see the proposal through.

<sup>2</sup> T Padoa-Schioppa (ed) *Efficiency, Stability, Equity: A Strategy for the Evolution of the Economic System of the European Communities* (Luxembourg, Commission of the European Communities 1987).

<sup>3</sup> A Moravcsik *Choice* op cit p381.

<sup>4</sup> Grant op cit p118. It was thus a predominantly technocratic committee.

The Delors Committee report was submitted to the Berlin Wall in November 1989. Communism in all of central and eastern Europe brought a dramatic change to the European Community. As the other central and eastern communist rulers, they now also belong to the Community. This should perhaps have been kept apart from German reunification. It is not the newly ex-communist states, and the "Common European Home" from the Atlantic.

West Germany was not the prime mover in the push for it.<sup>5</sup> EMU was the Deutschmark was by far the Community's independent Bundesbank with its low inflation and politics. Germany would not be a European Central Bank with as many objectives as its own. This is a provision for the European Central Bank.

It is widely appreciated that the Bundesbank and German government policy powers and the bank must accommodate Chancellor Kohl's offer to East German states. This decision horrified the Bundesbank.

This demonstrates that in German eyes monetary policy is governmental control of

<sup>5</sup> Moravcsik op cit p387.

<sup>6</sup> Ibid p104.

<sup>7</sup> T Padoa-Schioppa (ed) *The New Europe* (Oxford, Blackwell 1990).

The Delors Committee report was submitted and accepted just before the fall of the Berlin Wall in November 1989. This, and the subsequent collapse of communism in all of central and eastern Europe had not been foreseen and brought a dramatic change to the European scene. Chancellor Kohl immediately began working for the incorporation of the German Democratic Republic into the Federal Republic. As the other central and east European countries also ejected their communist rulers, they now also saw their future in the European Community. This should perhaps have brought a change in Community priorities, but apart from German reunification, immediate moves for closer relationships with the newly ex-communist states, and some grand but vague calls for a "Common European Home" from the Atlantic to the Urals, it did not.

While Germany was not the prime mover for EMU, it nevertheless exercised hegemony over the push for it.<sup>5</sup> EMU was impossible without German support. The deutschmark was by far the Community's strongest currency and the independent *Bundesbank* with its low inflation goal was a pillar of German economics and politics. Germany would not accept EMU unless it was controlled by a European Central Bank with as much independence and stringent anti-inflation objectives as its own. This largely explains the similarity of the provisions for the European Central Bank to those of the *Bundesbank*.<sup>6</sup>

Less widely appreciated than the *Bundesbank's* discipline was the interaction between it and German government policy. The German government retains fiscal powers and the bank must accommodate these. This was demonstrated by Chancellor Kohl's offer to East Germans of one deutschmark for each of their ostmarks. This decision horrified the *Bundesbank* but had to be accepted.<sup>7</sup>

This demonstrates that in German eyes, the corollary of strict independent monetary policy is governmental control of other aspects of policy. It follows that

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<sup>5</sup> Moravcsik op cit p387.

<sup>6</sup> Ibid p404.

<sup>7</sup> J Story (ed) *The New Europe* (Oxford, Blackwell 1993) p181.

monetary union should be accompanied by political union. In addition, German federalists supported political union *per se*.

Germany became heavily preoccupied with its own reunification which took place formally on 3 October 1990. Roy Pryce states that political union was only added to the agenda as a result of German reunification.<sup>8</sup> The timing of its addition to the agenda supports this but it was already an idea Kohl favoured for the reasons stated.

Mitterrand also favoured political union, though perhaps as much to contain the new Germany as for any other reason. In April 1990, Kohl and Mitterrand wrote a joint letter to the Irish Presidency proposing a separate IGC on political union.<sup>9</sup> Belgium, Italy and the European Parliament had also expressed support for the idea.

At the special Dublin European Council of 28 April 1990, Britain and Portugal opposed the convening of a second IGC on political union.<sup>10</sup> Although Britain had been initially enthusiastic about the single market program, Thatcher opposed moves to add a "social dimension" and to give additional powers to the Community. However between the April and June European Council meetings, the British attitude softened. Greece put forward a detailed proposal for political union and an informal weekend meeting of foreign ministers at Parknasilla in Ireland on 19-20 May seems to have encouraged a convergence of support for the separate IGC.<sup>11</sup> The European Council of June 1990 agreed to the second IGC on political union concurrent with that on monetary union. The decision to have separate conferences reflected the view that it is possible to separate economic and monetary affairs from political affairs. Indeed, an "independent" central bank is intended to achieve this objective. On the contrary, this is a decision with profound constitutional and political implications, explored in Section 4.3.

<sup>8</sup> R Pryce "The Treaty Negotiations" in A Duff, J Pinder and R Pryce (eds) *Maastricht and Beyond* (London, Routledge 1994) p38.

<sup>9</sup> *Agence Europe* 20 April 1990.

<sup>10</sup> *Agence Europe* 30 April-1 May 1990.

<sup>11</sup> *Agence Europe* 22 May 1990.

Chapter 4  
The fall of Thatcher in November 1990  
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It has been argued that constitutions are  
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<sup>12</sup> B. Achmann "The Scots Lectures: Discovering

The fall of Thatcher in November 1990 and her replacement by John Major made it possible to convene the IGCs. Although also a Conservative, Major was less strident in his rhetoric than Thatcher and while he still opposed both monetary and political union, he allowed agreement to be reached. The IGCs began in December.

As before in the history of the Community, constitutional development was effected by an international treaty, negotiated by government officials behind closed doors. There was little attempt to engage citizens in the process. Monetary union was regarded as an economic technicality, but the economic reforms to enable the convergence seen as necessary for it would have a major effect on citizens. Attention to how public opinion would perceive those reforms might have eased their path. Political union too, though it had a democratic dimension, was largely about co-ordination of policy at the governmental and diplomatic level. This too was apparently not regarded as a suitable subject on which to engage the public. Similarly with co-operation in justice and home affairs, which seems to have been regarded as a matter solely for governments.

It has been argued that constitutions are usually created or changed at times of upheaval.<sup>12</sup> In contrast, the Community's constitutional reform proceeded despite the upheaval going on around it. The collapse of communism in central and eastern Europe between 1989 and 1991 could have been the kind of upheaval from which constitutions are often transformed. It was argued in Chapter 2 that one of the sources of the Community's strength was as a rallying point against communism. In 1989, communism in Eastern Europe began to unravel with the fall of the Berlin Wall and the "Velvet Revolution" in Czechoslovakia, followed by German reunification in 1990. August 1991 saw the abortive coup in Moscow which hastened the dismantling of the Soviet Union at the end of that year. The communist bloc in Eastern Europe had disappeared, to be replaced by a collection

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<sup>12</sup> B Ackerman "The Storrs Lectures: Discovering the Constitution" (1984) 93 *Yale LJ* 1013.

of economically backward states now more or less committed to democracy and market economies, and most hoping for Community membership.<sup>13</sup>

It is hard to see exactly how the EC should have responded to this challenge/opportunity. Perhaps the best way would have been to establish a definite timetable for admission of the central and east European states ("CEES") to the EC and program of assistance to make this possible. Instead, the EC entered into "Europe Agreements" with the former communist states and the PHARE program of financial assistance. These involved financial support, some access to Community markets and provision for the former communist states to amend their economic law to converge with Community law – in effect a waiting-room for membership but without a definite promise of membership.<sup>14</sup> There have since been negotiations for full membership which only began in 1998. Ten states, eight of them CEES (including the three Baltics), will be admitted in 2004. Some of the issues of enlargement and its constitutional effect are dealt with further in Section 4.7 and in Chapter 5.

Thus the end of communism had no immediate effect on Community constitutional development. Even the effect of German reunification has been fairly small in constitutional terms. There was initially no change in German representation in the European Parliament,<sup>15</sup> Commission or Court, and vote weighting in the Council did not change. The effect of reunification on Community politics has been much more significant. Germany has become more confident and assertive and has started to look east as much as, if not more than, west. The change of the capital from Bonn to Berlin symbolized this new

<sup>13</sup> It is necessary to distinguish between the Central and East European states and the former members of the USSR. Most of the latter, eg Ukraine, Belarus and Moldova, seemed content to stay within the Russian orbit. The exceptions were the Baltic states: Latvia, Lithuania and Estonia, which saw themselves as part of the CEES or the "Baltic family" with Scandinavia and sought to escape the Russian orbit.

<sup>14</sup> D Kennedy and D Webb "The Limits of Integration: Eastern Europe and the European Communities (1993) 30 *CMLRev* 1095.

<sup>15</sup> Art 136 was subsequently amended to provide for 99 MEPs for Germany instead of 87. While this is smaller than Germany's proportionate increase in size due to reunification, it is a belated acknowledgement of that increase.

orientation and perhaps also a return to German imperialism, economic if not political. The German approach to EMU was also a move in this direction.

Another factor which might have encouraged more movement towards a common foreign and security policy was the Gulf War of 1990/91 between Iraq and a United Nations force led by the United States but also comprising representatives from Britain, France and other Member States. Although the EC did not take on a defence identity, collective diplomatic protests were issued, economic sanctions were taken against Iraq, and there was support for nearby states adversely affected by the war.<sup>16</sup> The EC was thus able to take significant collective action but not at a military level.

The developing debacle in Yugoslavia might also have provided some stimulus to a common foreign and security policy. Fighting broke out in Yugoslavia around the time of the Luxembourg European Council of June 1991. The EC had an Association Agreement with Yugoslavia and first tried to keep the country together, but it was unwilling to provide the sort of development assistance that this would have required and political developments probably would have made it impossible anyway. The EC then sent observers to observe early truces and to attempt mediation, but they were unable to prevent the escalating conflict. The EC convened a peace conference in the Hague in early November. When this failed to produce agreement, there was a proposal for an EC peacekeeping force, but this did not proceed.<sup>17</sup> The EC then adopted rather limited economic sanctions including cancellation of economic aid under the PHARE program.<sup>18</sup> It initially organised humanitarian aid for all sides in the conflict then decided that the republics apart from Serbia and Montenegro should not be punished. However, the Community was divided on whether to recognise the would-be breakaway republics.<sup>19</sup> When fighting broke out in Slovenia in June, the Community sought to mediate and was instrumental in the conclusion of the Brioni Pact, enabling a

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<sup>16</sup> Holland, M *European Integration: From Community to Union* (London, Pinter 1994) p134.

<sup>17</sup> Ibid p136.

<sup>18</sup> *Agence Europe* 12/13 November 1991 p5.

<sup>19</sup> E Remacle *La politique étrangère européenne: de Maastricht à la Yougoslavie* (Brussels, GRIP 1992), p33.

cease-fire in early July. When fighting then broke out in Croatia, it became clear that Yugoslavia would not survive. The Community and the United States imposed an arms embargo. The Community established a committee of jurists to establish criteria for the recognition of new republics.<sup>20</sup> This was an example of the Community seeking to act like a regional UN, a role better fulfilled by the UN itself.

Germany sought to recognise Croatia and Slovenia regardless of their satisfaction of the criteria, on 23 December 1991. The rest of the Community felt compelled to do likewise on 15 January 1992. Greece refused to recognise Macedonia unless it changed its name to the "Former Yugoslav Republic of Macedonia" and removed a particular symbol, claimed to be Greek, from its flag. The rest of the Community acquiesced in this demand.

The EC subsequently sent an envoy, Dr David Owen, to the area to try to negotiate the peaceful cantonisation of Bosnia-Herzegovina. His efforts were ultimately unsuccessful. Various Member States contributed forces to United Nations peacekeeping forces, but the overwhelming impression in the early stages of the conflict was that the Community, economic powerhouse that it might be, could do nothing about a conflict in countries bordered on several sides by Member States. If anything should have galvanised the creation of effective machinery for a common foreign and security policy, it was this.

Instead, at a time of major international upheaval, the Community was pursuing principally internal reform. While a common foreign and security policy was a major priority of that reform, negotiation of machinery for it looked like fiddling while the Balkans burned. Rather than rising to the challenges and opportunities of the new global political landscape, the Member States seemed intent on preserving their prerogatives within the framework of further integration. But if these events did not influence the content of the Treaty on European Union ("TEU"), it is necessary to consider what factors *did* affect that content.

<sup>20</sup> The Badinter Commission was appointed to rule on the satisfaction of the criteria for recognition.

THE INTERGOVERNMENTAL  
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The EC on EMU  
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## 4.2 THE INTERGOVERNMENTAL CONFERENCES

The intergovernmental conferences were held in closed session and were characterised by the circulation of drafts by various Member States. While these drafts were the subject of a certain amount of public comment, it could not be said that the conferences conducted their deliberations under intense public scrutiny. Public submissions were not called for. The Member States and the institutions submitted proposals, explored below. Many matters remained to be decided at the final European Council meeting in Maastricht in December 1991. This was not conducive to good constitutionmaking.

### 4.2.1 The IGC on EMU

At the conference on EMU, the Delors Report formed a detailed basis for agreement and had indeed already begun to be implemented: Stage One had started on 1 July 1990. German reunification had been achieved in October 1990, but the full cost to the German treasury was not yet clear. At a special European Council in Rome in October 1990, it was agreed that Stage Two of EMU would begin on 1 January 1994. Britain had proposed a "hard ecu" as a parallel currency as an alternative to monetary union. This idea received little support and demonstrated Thatcher's determination to thwart consensus. This and other acts of recalcitrance caused her to lose the support of her party and she was forced to resign on 22 November 1990, leaving the field more open for agreement.

While there was now substantial consensus among states other than Britain, many details had still to be concluded. Disagreement on when to establish the European Central Bank ("ECB") led to a compromise transitional institution, the European Monetary Institute ("EMI"), to be established in Stage Two.

At the Luxembourg European Council of June 1991, Britain, under its new Prime Minister John Major, finally dropped the idea of the hard ecu. When the IGC negotiations resumed in September, discussion centred on the "convergence criteria" for progress to Stage Three (monetary union) and arrangements enabling Britain to "opt out" of EMU. The convergence criteria involved a critical political judgement to impose a particular economic model on the Member States. That



model resembled the German economic fundamentals before Germany started having to fund reunification. The Community was conducting integration by conformity to a theoretical ideal rather than establishing the capacity to make central economic decisions democratically.

At the Maastricht summit in December 1991, EMU was discussed first. It had been agreed that the results of the two IGCs would be grouped together in a single treaty. A starting date for Stage Three was set at either the start of 1997 or 1999. The British opt-out was confirmed. Denmark also obtained an opt-out. Strict convergence criteria were set. EMU remained a potentially great achievement, dependent on events a long way in the future. If the Member States were prepared to wear the economic strait-jacket, they would be able to enter the promised land of monetary union. The Member States thus became locked into a period of financial austerity at a time when some expansionary policy might have been desirable. The convergence criteria could also be used by governments to disown responsibility for economic problems.

#### *4.2.2 The IGC on Political Union*

Political union had many possible dimensions and the Member States had many corresponding divisions over them. An early source of division was whether to include the new provisions within a single structure (the so-called "tree") or whether to have a union of "pillars" with the Communities as one pillar and the new areas as separate pillars with distinct, more intergovernmental decisionmaking processes (the so-called "temple"). The Communities already incorporated a considerable diversity of decisionmaking processes but the Commission's monopoly on initiation and the oversight of the ECJ were felt by some Member States to be inappropriate for the new areas which affected sensitive matters of national sovereignty.<sup>21</sup> The European Council provided a possible forum to decide on such matters collectively. Another complex division was between those seeking a European security and defence identity (Belgium, Luxembourg, Italy, Spain, Greece, Germany and France), those content to operate

<sup>21</sup> F Laursen and S Vanhoonacker (eds) *The Intergovernmental Conference on Political Union* (EIPA/Nijhoff, Dordrecht 1992). Factual information on the IGC on Political Union is taken from this book. Statements of opinion from it are footnoted.

within NATO (the Netherlands, Portugal, Denmark, Britain), and neutrals who did not wish to participate in a defence dimension at all (Ireland). Another fissure was between the poorer states, Greece, Spain, Portugal and Ireland, and the more prosperous over funding. The poorer states proposed the inclusion of "solidarity" as a fundamental principle of the Community, able to be put into action through increases to "cohesion" funds.

The agenda was not restricted to the new areas. There was also the need to address the "democratic deficit" though proposals seemed more addressed to reducing the deficit than actually making the Union democratic. The main proposed methods were increasing the power of the EP and increasing the transparency of the institutions. The extension of QMV in the Council was also proposed. France proposed a second EP chamber to comprise members of national parliaments. Italy also proposed a bicameral structure but with the Council as the second chamber to the existing EP. Greater transparency would be achieved through the Council conducting more of its proceedings in public and a general right of access to information. It was felt by some that the Community should make a commitment to human rights, formalising the jurisprudence of the ECJ and perhaps acceding to the ECHR. Spain led proposals for Union citizenship giving rights of residence and the right to vote in local and EP elections, the former a right already in Denmark. Denmark also proposed the establishment of an office of Ombudsman for the Community. There was a proposal for a committee of regions to give regions direct representation at Community level, if only in an advisory capacity. There were proposals for a co-ordinated approach to migration and asylum seekers, a particular concern of Germany as it bore the brunt of the flood of refugees from Yugoslavia. There was a proposal to make the principle of subsidiarity, applied to environmental matters by the SEA in EEC Art 130r, a general principle of Community action. Despite this desire to limit Community action, there were also proposals to extend Community competence to areas such as environment, energy, consumer protection, public health, research, education and culture. A "social dimension" was proposed, providing for regulation of working conditions.

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Luxembourg held the Presidency in the first half of 1991, a critical period leading up to Maastricht, and played an active role in negotiations during its Presidency. Its first draft proposal appeared on 17 January during the height of the Gulf Crisis and proposed a defence role for the Union. A more detailed draft treaty, the "Luxembourg Non-Paper" appeared in April. It attempted to "conciliate totally diverging views"<sup>22</sup> - a difficult task! This draft used the three-pillared "temple" structure, separating the Communities, CFSP and Co-operation on Justice and Home Affairs, the form eventually adopted in the treaty.

As with the subsequent treaty, everyone found something to dislike. The Netherlands, Belgium and the Commission objected to the temple structure, Italy and Germany to the inadequate extension of the powers of the EP, and the Britain and France to the structure of the CFSP. The second draft of June 1991 retained the temple. It also made reference to a "federal goal" for the EU causing a strong protest from Britain. The draft became the basis for the Maastricht treaty, which indeed closely resembled it.<sup>23</sup>

During its Presidency, Luxembourg was also involved in the deepening crisis in Yugoslavia. It was a difficult moment for the EC when Foreign Minister Poos went to tell the leaders of Slovenia and Croatia, each with a population several times that of Luxembourg, that they were too small to be viable as independent states!<sup>24</sup>

The Netherlands had a particular opportunity to shape the Maastricht treaty by holding the Presidency in the period leading up to the Maastricht meeting. Issues such as the role of the EP, Common Foreign and Security Policy ("CFSP"), cohesion and the social chapter were still up for negotiation when the Presidency began. The Netherlands surprised everyone by submitting a new draft treaty in

<sup>22</sup> Ibid p159.

<sup>23</sup> Ibid p161.

<sup>24</sup> Luxembourg is certainly a thorn in the side of the EU in this respect. Having it as a full member, the EU will also have to grant full membership privileges to Cyprus (758,000) and Malta (391,000) (est at July, 2000). (Yahoo World Fact Book: [education.yahoo.com/reference/factbook/cy/popula.htm](http://education.yahoo.com/reference/factbook/cy/popula.htm) visited 30 March, 2003) Figure for Cyprus combines Republic of Cyprus 78% and Turkish Republic of North Cyprus 22%.

September 1991, based on a unified structure (the "tree" model), with veto power for the European Parliament on legislation approved by the Council, and an emphasis on the continuing role of NATO in European security.<sup>25</sup> It could count on support from some Member States for each of the above elements but presumably each saw more negatives overall because on 30 September, only Belgium and the Commission approved the draft and it had to be dropped.<sup>26</sup> This was a major embarrassment for Dutch diplomacy. Negotiations reverted to the Luxembourg Draft discussed above. It seems that the Dutch Draft was too federalist for some and too unrealistic for others. It would have resulted in a much more coherent Union.

At the summit, the reference to a "federal goal", particularly dear to the Dutch, was dropped. It is ironic that the British representatives were so vehemently opposed to the "F word" when subsidiarity, a word to which they became strongly attached, is a basic principle of federalism. It has been claimed that many in Britain see "federalism" as code for centralism.<sup>27</sup> This makes intelligent debate difficult. It is possible that recent devolution of some power to Scotland and Wales has since made the British people more familiar with multi-level governance.

Robert Wester suggests that the negotiating skills of the Dutch Prime Minister Ruud Lubbers were instrumental in bringing the negotiations to the successful conclusion of an agreement all participants could hail to their constituents back home as a "victory".<sup>28</sup> There was something for everyone. The Dutch thus went from humiliation to triumph, with "Maastricht" a continual reminder that the treaty was concluded in the Netherlands.

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<sup>25</sup> Laursen op cit p173.

<sup>26</sup> id.

<sup>27</sup> W Cash *Against a Federal Europe* (London, Duckworth 1991). Ironically, many former British colonies, including the United States, Canada, Australia and India, are federations despite retaining many features of the British system of government.

<sup>28</sup> Laursen loc cit.

Denmark obtained an opt-out from the single currency and a special right to prevent foreigners from acquiring second homes in Denmark. Britain also obtained an opt-out from the single currency. It managed to prevent the inclusion of the Social Chapter, relegating it to a protocol by which the eleven willing Member States could use Community procedures to implement an agreement on working conditions. Ireland obtained a special protocol safeguarding its constitutional prohibition of abortion.

The Commission and the EP were disappointed with the TEU. The EP nevertheless urged national parliaments to ratify it.<sup>29</sup> The EP could take some comfort from the provision for revision in TEU Art N(2).

### 4.3 THE TREATY ON EUROPEAN UNION

The TEU between the twelve Member States of the European Communities created a "European Union" based on the EEC, ECSC and EAEC treaties, which it amended, and on two new "pillars": special procedures for a Common Foreign and Security Policy ("CFSP") and Co-operation in Justice and Home Affairs ("CJHA").

The TEU consisted of seven Titles to which are annexed seventeen Protocols and thirty-three Declarations. It contained neither index nor table of contents. A table of contents was helpfully included as a separate insert in the official edition, annotated: "not part of the Treaty". This was not a promising start for a Treaty which according to its first article, Art A, created a Union "in which decisions are taken as closely as possible to the citizen". Citizens found the Treaty very hard to read, especially as apart from the provisions establishing the Union, the amendments to the Community treaties only made sense when read with those treaties.

Title I, Arts A to F were the common provisions for the Union as a whole. They are analysed below under the headings of *Character, Objectives, Institutions*.

<sup>29</sup> Resolution A3-0123/92 reproduced in: European Parliament, *Maastricht The Treaty on European Union The Position of the European Parliament* (Luxembourg, EC 1992).

*Powers, and Constitutional Character* used in Chapter 2. Title II comprised all the amendments to the EEC Treaty. The most important ones are discussed. Many amendments to the EECT are expressed in terms of the Union. EMU is discussed at 4.3.2.

Title III of the TEU amended the ECSC Treaty. Title IV amended the Euratom Treaty. These amendments are not of great constitutional significance except to note that yet another excellent opportunity to merge the three treaties was not taken. The amendments were necessary to maintain the identical wording of the provisions governing the merged institutions operating under the three Community treaties.

Title V established the machinery for the Common Foreign and Security Policy and is discussed at 4.3.3. Title VI established the machinery for Co-operation in Justice and Home Affairs and is discussed at 4.3.4.

Title VII contained the final provisions, which are discussed under the headings below.

#### *Character*

Article A establishes a "European Union". This is said to mark "a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen". Thus the Union is only a stage in the creation of ever closer union, it is not itself that union. But what exactly is the Union? Art A continues: "The Union shall be founded on the European Communities, supplemented by the policies and forms of co-operation established by this Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples." Thus the Union is constituted by the three "pillars" of the treaty: the Communities, CFSP and CJHA, but there is still no guidance as to its legal nature. It had its mission, spelt out in Arts A, B and C. Art C stated that it would be served by a single institutional framework of which the institutions are those specified in Art E (the EP, the Council, the Commission and the ECJ). So it is built on the foundations of the Communities but also uses their institutions and



makes them its own. Art D stated that the European Council "shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof", but did not make the European Council an institution of the Union or specify that its decisions had any legal effect.

The Art B objective of "[Assertion] of its identity on the international scene, in particular through the implementation of a common foreign and security policy..." was made difficult by the lack of provision for legal personality of the Union. On the other hand, it seems that the Union might have legal personality inferable from subsequent actions. The fact that this is still the subject of academic dispute demonstrates the difficulty of identifying the character of the Union, let alone asserting it on the international scene, as discussed further below. According to Art B, the provisions of the treaty were to be carried out 'while respecting the principle of subsidiarity' as defined in Art 3b of the Treaty establishing the European Community, which is somewhat strange as the Art 3b definition referred specifically to the Community.

The stress in Art C on the single institutional framework of the Union "which shall ensure the consistency and continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*" looks like a smokescreen hiding the damage done to the *acquis* by the development of a multi-pillared structure and the advent of variable geometry in the application of Community law.<sup>30</sup> On the other hand, by incorporating the Community institutions in the Union, the TEU helped the possibility of a unified structure despite the pillars.

With the Union thus shakily and shadily established, Art F proceeded to impose limits on it. Under Art F(1): "The Union shall respect the national identities if its Member States, whose systems of government are founded on the principles of democracy." This was apparently a reassurance that the Union was not attempting

<sup>30</sup> De Burca demonstrates that variable geometry has always been a feature of Community law but the TEU was the first time major variable geometry was enshrined in a founding treaty. See G de Burca "Differentiation Within the 'Core'? The Case of the Internal Market" in G de Burca and J Scott (eds) *Constitutional Change in the EU* (Oxford, Hart 2000), p133.

to subsume the Member States' statehood, as discussed in Chapter 2. It raised the fascinating question of how national identity could receive legal protection but Art L excluded Arts A to F from ECJ jurisdiction, so this was a purely political statement. It was also a rather curious statement about the Member States: it ought to go without saying that the Member States are democratic.<sup>31</sup> It sent a message to aspiring member states that a Member State must be democratic, but it appeared to impose no such requirement on the existing Member States. It did not require the Communities or the Union to be democratic either.

Under Art F(2): "The Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." This was an attempt to resolve the problem that the Communities could not accede to the ECHR, incorporating the ECHR by reference but not in a judicially enforceable way. It also incorporated the ECJ's human rights jurisprudence discussed in Chapter 3. The concept of "constitutional traditions common to the Member States" is difficult to render meaningful. Some Member States had only recently returned to democracy. It evoked the myth of an underlying unified constitutional tradition which is present more in the Community process than in pre-Community history. Nevertheless, as argued in Chapter 1, there are constitutional features shared by the Member States and these are a possible source of rights. However, here, they were purely aspirational. A constitutionally entrenched, enforceable charter of rights or accession to the ECHR would have been preferable.

The nature of the Union might be better gauged from its tasks. Art B specified its objectives in five indents. The first was substantially the objectives of the EEC as amended by the TEU: an economic union including monetary union and cohesion. The second was to assert its identity on the international scene, *inter alia* through the implementation of a common foreign and security policy. This was to include

<sup>31</sup> It used to be that only undemocratic regimes put "democratic" in the name of their states. It has been pointed out that if the EC was a state and tried to join the Union, it would be turned down because it is not a democracy.

the "eventual" framing of a common defence policy which "might in time lead" to a common defence. This was just one of many provisions which threw forward to an indefinite future. CFSP is explored in detail in 4.3.3. It sets out procedures through which common positions might be arrived at and common actions taken, rather than establishing institutions which might take those decisions.

The third referred to establishment of citizenship of the Union which was accomplished through the insertion of a new Part into the EECT. This is discussed in 4.3.5.

The fourth referred to the development of co-operation in justice and home affairs, but as with CFSP, established no institutions to foster this. It also proffered no reason for such co-operation.

The fifth referred to maintenance in full of the *acquis communautaire* while recognising that it might have been affected by the new pillar structure. Art N(2) provided for an IGC in 1996 to review this, revealing a treaty whose parties were so divided over its quality that they already anticipated the need for revision.

Apart from the tasks already provided for within the Communities, the main tasks of the Union would be in CFSP and CJHA. Art C provided for the Union to "ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies". The work of the Community and CFSP pillars was to be co-ordinated by the Council and Commission. This suggests a unity of purpose for the Union as a whole, but it was only the Member States acting through the Council which could ensure that their actions in the CFSP pillar co-ordinated with those in the Community pillar. Marise Cremona has shown how this co-ordination has worked to create a coherent external policy.<sup>32</sup> This has involved the appearance of an international identity for the EU as sought by Art B.

<sup>32</sup> M Cremona "External Relations and External Competence: the Emergence of an Integrated Policy" in Craig and de Burca *Evolution* op cit Ch4 pp137-177.

Chapter 4: *Amsterdam*

There was no provision in the TEU for the provisions for the EEC in EEC Art 101 argued that the EU has no institutional identity. It is argued that the TEU is purely a treaty of co-operation and that personality can be inferred from the "identity" seems carefully chosen in the TEU and the granting of personality was agreed in the IGC, introduced by the Treaty of Amsterdam. It is concluded "by the Council acting in the Presidency". Technically, it is still a treaty of co-operation. Jaap de Zwaan describes the EU as an agreement without legal personality.<sup>33</sup> This seems to make sense in a political context but it is not the EU, but that is not the same as legal personality.

Some guidance as to whether the EU has legal personality is whether it has an essential function. Von Bogdandy and Nettesheim argue that the EU has now been merged in a single system. The EU as a "layered international organization" establishing international organizations and their legal status.<sup>34</sup> That status is prescriptive.

<sup>33</sup> C Koenig and M Pechstein *Die Europäische Union* p93.

<sup>34</sup> Cremona *ibid* p167.

<sup>35</sup> J de Zwaan "Community Dimensions of the EU" in *The European Union After 1992* Chapter 9 pp179-193 at 182.

<sup>36</sup> Or indeed, as Curtin and Dekker conclude "The EU as a 'Layered' International Organization" and G de Burca *Evolution* op cit Ch3 p105.

<sup>37</sup> A Von Bogdandy and M Nettesheim "The EU as a Layered International Organization" in *The European Union* p105.

<sup>38</sup> Curtin and Dekker op cit p97.

<sup>39</sup> Curtin and Dekker op cit p105.

<sup>40</sup> See J Klabbers "Presumptive Personality" in Koskenniemi (ed) *International Law* (1998) p249.

There was no provision in the TEU for the EU to have legal personality, unlike the provisions for the EEC in EEC Art 210 (now 281). Koenig and Pechstein have argued that the EU has no institutional legal status under international law.<sup>33</sup> They argue that the TEU is purely a treaty binding the Member States. However others argue that personality can be inferred from practice. As Cremona points out, "identity" seems carefully chosen in the treaty to be distinct from "personality"<sup>34</sup> and the granting of personality was again rejected at the 1996 IGC. However Art J.14, introduced by the Treaty of Amsterdam, allowed international agreements to be concluded "by the Council acting unanimously on a recommendation from the Presidency". Technically, it is still the Member States which enter into the agreement. Jaap de Zwaan describes this as granting the EU legal capacity without legal personality.<sup>35</sup> This seems to me, with respect, to be a legal nonsense. It makes sense in a political context to describe the agreement as "concluded by the EU", but that is not the same as legal reality.

Some guidance as to whether the EU has acquired a legal personality through practice is whether it has an essential unity or whether it is still "bits and pieces".<sup>36</sup> Von Bogdandy and Nettesheim argue that all the Communities and pillars have now been merged in a single system.<sup>37</sup> Deirdre Curtin and Ige Dekker describe the EU as a "layered international organization".<sup>38</sup> They point out that treaties establishing international organizations do not usually specifically provide for their legal status.<sup>39</sup> That status is presumed, but the presumption can be rebutted.<sup>40</sup>

<sup>33</sup> C Koenig and M Pechstein *Die Europäische Union* (Mohr 1995) cited in Curtin and Dekker *ibid* p93.

<sup>34</sup> Cremona *ibid* p167.

<sup>35</sup> J de Zwaan "Community Dimensions of the Second Pillar" in T Heukels, N Blokker and M Brus (eds) *The European Union After Amsterdam: A Legal Analysis* (The Hague, Kluwer 1998) Chapter 9 pp179-193 at 182.

<sup>36</sup> Or indeed, as Curtin and Dekker conclude, a unity of bits and pieces: D Curtin and I Dekker "The EU as a 'Layered' International Organization: Institutional Unity in Disguise" in Craig and G de Burca *Evolution* op cit Ch3 pp81-136 at p132.

<sup>37</sup> A Von Bogdandy and M Nettesheim "Ex Pluribus Unum: Fusion of the European Communities into the European Union" (1996) 2 *ELJ* 267.

<sup>38</sup> Curtin and Dekker op cit p97.

<sup>39</sup> Curtin and Dekker op cit p105.

<sup>40</sup> See J Klabbbers "Presumptive Personality: The European Union in International Law" in M Koskenniemi (ed) *International Law Aspects of the European Union* (The Hague, Kluwer 1998) p249.

Drawing on the law of international organizations, they argue that an international organization is an entity established under international law by the agreement of two or more states, endowed with certain objectives and tasks, and capable of acting both internally and externally through at least one permanent organ.<sup>41</sup> Drawing on the institutional theory of law, they argue that the EU has achieved this status by being a legal institution which can itself create law and indeed can create further legal institutions and a legal system. The collective of these institutions can be described as a "layered" institution. To qualify as a layered institution, they argue that the legal system must be "coherent", consistent and connected.<sup>42</sup> Consistency and connection are absolute. Coherence is a matter of degree. Legal institutions do not produce only legal norms, they also produce social institutions which enable the legal institution to achieve social reality. Curtin and Dekker argue that the EU has achieved this social reality through its "legal practices", the forms of legal action employed to make a legal institution operative.<sup>43</sup> They point to Art C's prescription of a "single institutional framework" for the EU, including the supranational Commission, EP and ECJ as well as the intergovernmental Council and European Council.<sup>44</sup> Sharing these institutions with the EC makes the EU and EC part of a unified structure. They point out that CFSP specifies tasks for both the Union and the Member States, thus distinguishing between the two.<sup>45</sup> They thus conclude that the EU has evolved into a layered international organization with legal personality.

Bruno de Witte has come to a similar conclusion. He has evocatively characterised the EU as a Gothic cathedral rather than the commonly described "temple".<sup>46</sup> This analogy is very apt for what is essentially a theological

<sup>41</sup> Ibid p96

<sup>42</sup> Ibid p89.

<sup>43</sup> Curtin and Dekker ibid p91

<sup>44</sup> Curtin and Dekker op cit p94

<sup>45</sup> id.

<sup>46</sup> B De Witte "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral" in T Heukels, N Blokker and M Brus (eds) *The European Union After Amsterdam: A Legal Analysis* (The Hague, Kluwer 1998) Ch3 pp51-68.

argument. As he argues, the "pillars" they have only ever been Platonic. He EP all deal with matters in all three pillars and legal outcomes, it can be compared of games is played.<sup>47</sup> There were, after a legal instruments in the EC. It would be CFSP within the EC but this was common and final provisions of the Treaty common rules for amendment and access explaining the EC procedures in these areas.

It is also possible to see the EU as parasitic and perverting them to its own use. On the Witte and others have shown, the provisions Union have enabled the Community method to an overall impression of unity whether of

The effect of conceding existence to the EC to the status of "sub-organization", supranational institutions at the highest point ECJ. By putting the European Council in production of the ECJ in key areas, the EC on top. It also introduced an added level of integration further away from the people. Graine de Burea concludes that the gap between for concern. She concludes: "there should comprehensive constitutional norms...."

<sup>47</sup> Further on the theological theme, Joseph Weinst "Neither Unity nor Three Pillars - the Trinity of Mon, W Ungerer and W Wessels *The Mission of European Interuniversity Press* 1993 pp49-62. De Witte op cit p53. This can be contrasted to multiple games of chess but all of them chess. De Witte ibid p39. De Witte ibid p62.

argument.<sup>47</sup> As he argues, the “pillars” are never described as such in the TEU. They have only ever been Platonic. He argues that the Commission, Council and EP all deal with matters in all three pillars and while there are different procedures and legal outcomes, it can be compared to one big playground in which a variety of games is played.<sup>48</sup> There were, after all, already many different procedures and legal instruments in the EC. It would have been possible to include CJHA and CFSP within the EC but this was consciously not done. However, there are common and final provisions of the TEU, common institutions, common values, common rules for amendment and accession now shared with the EC, or rather supplanting the EC procedures in these areas.<sup>49</sup>

It is also possible to see the EU as parasitic on the EC, grabbing the parts that suit it and perverting them to its own use. On the other hand, as Curtin and Dekker, De Witte and others have shown, the proximity and isometry of Community and Union have enabled the Community method to influence Union methods leading to an overall impression of unity whether or not legally “real”.

One effect of conceding existence to the EU is the apparent subordination of the EC to the status of “sub-organization”.<sup>50</sup> With all its faults, the EC had supranational institutions at the highest points: the Commission, the EP and the ECJ. By putting the European Council clearly at the top and ousting the jurisdiction of the ECJ in key areas, the TEU put the Member States firmly back on top. It also introduced an added level of complexity which took the institutions of integration further away from the people.

Grainne de Burca concludes that the gap between treaty text and reality is cause for concern. She concludes: “there should be a number of entrenched and comprehensive constitutional norms...accountability, coherence, openness,

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<sup>47</sup> Further on the theological theme, Joseph Weiler has described the EU as a “trinity”: J Weiler “Neither Unity nor Three Pillars – the Trinity Structure of the Treaty on European Union in J Monar, W Ungerer and W Wessels *The Maastricht Treaty on European Union* (Brussels, European Interuniversity Press 1993 pp49-62.

<sup>48</sup> De Witte op cit p53. This can be contrasted to Curtin and Dekker op cit p132 who suggest multiple games of chess but ail of them chess.

<sup>49</sup> De Witte ibid p59.

<sup>50</sup> De Witte ibid p62.

fairness, and amenability to political or judicial control...".<sup>51</sup> Some of these norms are more appropriate for political than judicial enforcement. Others are more administrative than constitutional. They certainly fit within the value of "constitutionalism" espoused in Chapter 1.

It would be in keeping with my argument that a constitution was created from treaties that a unity has been created from treaties the drafters of which consciously chose diversity. However, unlike the case of the constitution, we do not have the authority of the ECJ. What we do have is nine years of practice. In practice, the acts of the Union are more than the acts of the Member States collectively. Not only can all acts of the Communities now also be described as within the EU, acts in the other pillars are also more than just Member State interactions. The institutions are involved, albeit not in the same way as in the Community pillar. Also, actions can involve multiple pillars. Despite the developments through practice, it would still be desirable to spell out the Union's legal personality, as further discussed in Chapter 5. This is also the conclusion of the Working Party on Legal Personality of the Convention on the Future of Europe.<sup>52</sup>

### *Institutions*

The Community institutions have been adopted by the Union rather than "borrowed".<sup>53</sup> Art C specified a "single institutional framework" for the Union. This would comprise the EP, the Council, the Commission and the ECJ under Art E. The Court of Auditors was made an institution of the EC under ArtG(6) so it should have been included in Art E. Art D incorporated the European Council in the work of the Union and specified how it was to be constituted, yet did not make it an institution of the Union.

<sup>51</sup> G de Burca "The Institutional Development of the EU: A Constitutional Analysis" in P Craig and G d Burca *Evolution* op cit Ch2 pp55-81 at 80.

<sup>52</sup> See the Group's report CONV 305/02.

<sup>53</sup> Contra U Everling "Reflections on the Structure of the European Union" (1992) 29 *CMLRev* 1053 at 1061.

Chapter 4: Review  
Article L provided that the ECJ would  
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### *Powers*

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Article L provided that the ECJ would only have jurisdiction over the original three treaties as amended, the prospective conventions referred to under K.3, and Articles L to S. The ECJ thus did not gain jurisdiction over the Common Provisions, Articles A to F, nor over the CFSP, and only potentially gained jurisdiction over part of CJHA. This meant that the aims of the Union set out in Article B, the consistency of external activities under Article C, the role of the European Council under Article D, and, most importantly, the provisions of Article F were not justiciable before the ECJ. In particular, Article F(2) which provided that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and "as they result from the constitutional traditions common to the Member States" was not justiciable. As discussed in Chapter 3, the ECJ was already applying the Convention as part of the "common law of the Community". It was therefore bizarre to attempt to exclude this area from ECJ jurisdiction for the activities of the Union. Matters not justiciable before the ECJ would be governed solely by international law, which would limit their legal effects.

#### *Powers*

Article C specified that the Union shall "ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers". Given the plethora of mechanisms for conducting different kinds of external relations with various parts of the world through different combinations of institutions, consistency would seem to be a major challenge, indicated by the detailing of *two* institutions to try to ensure it.

Under Art F(3): "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies." This resembled EECT Art 235. It allowed the EU to use flexibility and imagination in the lawmaking process in order to achieve the stated objectives. It did not require the EU to have legal personality, though it could be argued that the Member States should be able to endow the Union with legal personality as a means to obtain its objectives under this Article. I will deal with the relevant practice in relation to CFSP in 4.3.3.



### Amendments to EECT

Art G of the TEU set out amendments to the EECT. Art G(1) changed the name of the EEC to the European Community *tout court* so the treaty establishing it is referred to henceforth as the "ECT". Some minor changes were made to the Community's objectives. They now combined a mixture of the economic tempered with the social. Sustainable growth respecting the environment, high employment, and raising quality of life, not just the standard of living were the major changes, reflecting a Community aware of more than just economic factors.

EC Art 3 was amended to include some new policy areas. A new Art 3a stated that Member States would co-ordinate their economic policies in line with the internal market and common objectives and conduct them "in accordance with the principle of an open market economy with free competition". Here is a very clear enshrining of free market capitalism in the EC constitution. As noted in relation to Art F above, this was perhaps to establish admission criteria for former Eastern bloc countries then in the process of dismantling their communist systems. Given the social democratic policies embedded in many Member States, it is a curious step. Perhaps even socialists found the formulation acceptable as "open market economy" and "free competition" are not terms susceptible to precise legal interpretation and the treaties still include the possibility of regulation. Pure goals can be expressed but can be softened in practice.

Para 2 of Art 3a specified that pursuit of the said policies would lead to the introduction of a single currency, accompanied by a single monetary policy and exchange-rate policy "the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community, in accordance with the principle of an open market economy with free competition." This revealed a circularity in the provisions: under Para 3, Member States and the Community were to pursue economic policies consistent with price stability. The central monetary policy was to uphold price stability but also to "support the general economic policies in the Community". The provision reflected the position of the *Bundesbank* under German law wherein the bank was "independent" but subject to the general

economic policy of the state. The arrangements for monetary union are discussed in more detail in Subsection 4.3.2 below.

The principle of subsidiarity was incorporated in a new Art 3b. This was intended to be a curb on Community power but could also enhance that power. Subsidiarity is discussed in more detail below in Subsection 4.3.6.

The old Part Two became part of a new Part Three on Community Policies. Minor amendments to provisions on free movement of workers were made. Articles 73a to 73h were added providing for free movement of capital, replacing Arts 67 to 73 as from 1994 to accommodate Stage 2 of EMU. The old Title II became partly Title VI on economic and monetary policy and was extensively amended for monetary union. (see further below Subsection 4.3.2).

A new Chapter 3 on Education, Vocational Training and Youth replaced the old Arts 126 and 127. This dovetailed with the new Title IX on culture which stated that the Community: "shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the cultural heritage to the fore." This would be achieved by fostering: education about the "culture and history of the European peoples", conservation of "cultural heritage of European significance", cultural exchanges, and "artistic and literary creation, including in the audiovisual sector." Here are the seeds of the creation of a 'European' culture yet also an attempt to perpetuate the separate cultures. Under the new Art 128(4), "the Community shall take cultural aspects into account in its actions under the other provisions of the Treaty." While this is a "soft" provision, not susceptible to legal enforcement, it would have an interesting interaction with measures to create a single market.

The new Title X on Public Health mainly involved co-ordination of Member State laws, promotion of research and information. Legislation on incentives, but not harmonisation, was permitted. The new Title XI on Consumer Protection allowed market completion measures under Art 100a and additional measures in the field. Member States could also take more stringent measures. This was just a more explicit formulation of what was already possible.

There was a new Title XII on trans-European networks in the areas of transport, telecommunications and energy. Article 129b(2) provided: "Within a framework of open and competitive markets, action by the Community shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks". Here can be seen two contrasting visions of integration. There is recognition that existing networks are predominantly in the hands of Member State governments. In one vision, these networks are merged into European networks. In another, there is privatisation and competition within such networks. The Community is empowered to contribute to the development of infrastructure through the Cohesion Fund.

A new Title XIII on industry also reflected the tension between *dirigisme* and the free market. The Community and the Member States could continue to assist industry in various ways while the treaty expressed the goal of open and competitive markets. The title ended with the proviso that it "shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition."

Title XIV substantially reproduced the old Title V on economic and social cohesion. The aim of "reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions, including rural areas" might conflict with preserving the cultures of these areas. The new Committee of the Regions must now be consulted. The Article referred only to "reducing" the disparities rather than eliminating them, which raised the interesting question of how much they are to be reduced. Cohesion is a significant counterweight to the market-centred provisions for economic convergence, but whether it is sufficient to prevent disadvantage is doubtful.

Art 130r(2) on the environment was amended to include the "precautionary principle". It provided significant scope for Community action, but also for differential application. It provided reassurance to the more environmentally friendly Member States that they could maintain more stringent standards than those of the Community.

Law 146 XVII on Development Co-operation of overseas countries and territories, the role of law and regional development. The Community economic shortcomings.

Law Art 228a provided for the imposition of a qualified majority of the Council provided prior has been reached through CFSP (see section 4.3.7).

Constitutional Reform in the ECT

Law Art 4 ECT stated that the new Committee of the Regions in an advisory capacity. This new section 4.3.7.

Law Art 4a announced the establishment of the ESCB and European Central Bank.

Law Article 137 removed "advisory and consultative" role of the European Parliament. With co-decision.

Law Under the new Art 138(3) the assent required for any law for a uniform election to be forthcoming?

Law Art 138a set out a role for political parties to be legislated such parties into existing national groups in the European Parliament. Despite the moderate increase in the number of parties seem unlikely to materialize in the future. Parliament becomes a locus for much more development to the extent that European level political proposals for legislation. There was a...

A new Title XVII on Development Co-operation replaced the old Part 4 on association of overseas countries and territories. It now stressed the development of democracy, the rule of law and respect for human rights in addition to economic development. The Community also needed to address its own democratic shortcomings.

A new Art 228a provided for the imposition of sanctions against third countries by qualified majority of the Council provided that a common position on the question has been reached through CFSP (see Subsection 4.3.3).

#### *Institutional Reform in the ECT*

A new Art 4 ECT stated that the new Committee of the Regions would assist the institutions in an advisory capacity. This new development is discussed below in Subsection 4.3.7.

A new Art 4a announced the establishment of a European System of Central Banks ("ESCB") and European Central Bank ("ECB"). See 4.3.2.

A new Article 137 removed "advisory and supervisory" as a prefix to "powers" of the European Parliament. With co-decision, the European Parliament gained real power. Under the new Art 138(3) the assent of the European Parliament was required for any law for a uniform electoral procedure. Would such a proposal ever be forthcoming?

A new Art 138a set out a role for political parties at European level. The treaty could not legislate such parties into existence. While there are now significant transnational groups in the European Parliament, truly European parties do not yet exist. Despite the moderate increase in the Parliament's powers, Europe-wide parties seem unlikely to materialize in the near future. Only when the European Parliament becomes a locus for much more power will a European politics develop to the extent that European level parties will appear.

Article 138b gave the European Parliament the right to request the Commission to make proposals for legislation. There was nothing to prevent this before, but it

edged the European Parliament closer to a right of initiative. Art 138c permitted the European Parliament to establish Committees of Inquiry, a further step in its development as a parliament with a more national shape. Art 138d gave any citizen of the Union or resident the right to petition the European Parliament on matters within Community competence which affect them directly. This is one of the few rights unequivocally granted to citizens by the treaty.

Art 138e required the European Parliament to appoint an Ombudsman to investigate complaints against all Community institutions except the ECJ and the Court of First Instance acting in their judicial role. This helped to bring the institutions closer to the people but the Ombudsman lacks teeth.<sup>54</sup>

A new Art 146 set out a new rotation of the Presidency of the Council, ensuring that the half of the year in which the Presidency is held is not always the same. Because of the summer holidays, the Presidency in the second half of the year is shorter than that in the first. Simplicity was sacrificed to national pride. This development was only temporary as the advent of enlargement required rescheduling and an odd number of Member States solves the problem provided that the system of six month presidencies is retained.

A new Art 151 formalized the General Secretariat of the Council, a body which already existed and which carries out a valuable co-ordinating role. It gives the Council more of a human face.

Under a new Art 158, the Commission was appointed for five years rather than four to bring it in step with the EP and to enable the EP to have a role in selecting it. This was a pro-democratic measure. The Member States nominate the President of the Commission by "common accord" then nominate their Commissioner or Commissioners in consultation with the Presidential nominee. The nominated body is then submitted to a vote of the European Parliament and is then appointed as the Commission for five years unless earlier dismissed by vote of the European

<sup>54</sup> This could be said of parliamentary ombudsmen generally, but their power also depends on the power of the parliament to which they report.

Chapter 1  
Reform under Art 144. The Committee  
and January 1995 as a transitional measure.

Article 171 now allowed the ECJ to rule  
on the motion of the Commission  
powers of enforcement. The EP and ECB  
their prerogatives under Art 173, in the  
enshrined in the Treaty the decision of the  
jurisdiction over the new banking inst.

The Court of Auditors was enshrined as  
Articles 188a to 188c. This gave it sta-  
tus of its significance. However as  
it holds the power to ensure satisfaction  
pending.<sup>55</sup>

One of the most important pieces of constitu-  
tional law without fanfare in the new agree-  
ment was inserted in Art 189 as a body  
in 189c were inserted setting out the pro-  
cedure, known generally as "co-deci-  
sion" under Art 189b, gave the  
procedures to seek agreement with the Council  
procedures, there were now no less than six pro-  
cedures additional subsidiary variations. For con-  
venience dubbed "Co-decision", "Co-operat-  
ion", and "Budget".<sup>56</sup>

<sup>55</sup> Article 188.3 indent 2.

<sup>56</sup> EP's Council C-70/88 [1990] ECR I-2041.  
para 177, 180 and 184.

<sup>57</sup> O'Keefe "The Court of Auditors" in D. Curtin and  
J. van der Bruggen (eds) *European Integration* (Dordrecht, Martinus Nijhoff,  
1990) Centre Guide to Maastricht (Brussels, Belgium).

Parliament under Art 144. The Commission appointed in January 1993 served until January 1995 as a transitional measure.<sup>55</sup>

Article 171 now allowed the ECJ to impose a pecuniary penalty on a Member State on the motion of the Commission. For the first time, the ECJ obtained real powers of enforcement. The EP and ECB gained the right to take action to protect their prerogatives under Art 173, in the case of the European Parliament, this enshrined in the Treaty the decision of the ECJ in "*Chernobyl*".<sup>56</sup> The ECJ was given jurisdiction over the new banking institutions.<sup>57</sup>

The Court of Auditors was enshrined as an institution of the Community in Articles 188a to 188c. This gave it standing before the ECJ and greater recognition of its significance. However as David O'Keeffe points out, the Court still lacks the power to ensure satisfactory accountability for Community spending.<sup>58</sup>

One of the most important pieces of constitutional development in the treaty was tucked away without fanfare in the new articles following Art 189. The European Parliament was inserted in Art 189 as a body which makes legislation. New Arts 189a to 189c were inserted setting out the procedures for enacting legislation. The new procedure, known generally as "co-decision" but to the Treaty drafters as "the procedure under Art 189b", gave the EP a power of veto after elaborate procedures to seek agreement with the Council. Together with previously existing procedures, there were now no less than six procedures for Community measures, with additional subsidiary variations. For convenience, the six main types have been dubbed "Co-decision", "Co-operation", "Consultation", "Assent", "Information", and "Budget".<sup>59</sup>

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<sup>55</sup> Article 158.3 indent 2.

<sup>56</sup> *EP v Council C-70/88* [1990] ECR I-2041.

<sup>57</sup> Arts 177, 180 and 184.

<sup>58</sup> D O'Keeffe "The Court of Auditors" in D Curtin and T Heukels (eds) *Institutional Dynamics of European Integration* (Dordrecht, Martinus Nijhoff, 1994), p185.

<sup>59</sup> Belmont Centre *Guide to Maastricht* (Brussels, Belmont Centre 1992).

The new "co-decision" procedure applied to some proposals on free movement of workers, freedom of establishment, self-employed persons, internal market, education, culture, public health, consumer protection, trans-European networks, research and the environment.<sup>60</sup>

The "assent" procedure applied to some proposals on citizenship, the Structural Funds, the Cohesion Fund, election procedure, association agreements, ECB supervision tasks, and amendments to the ESCB Protocol.<sup>61</sup> It also applied to the admission of new Member States under Art O of the TEU. These are the more politically sensitive matters. The "information" procedure applied to measures regarding third countries, decisions on broad economic guidelines, reports on multilateral surveillance, decisions on financial assistance to Member States, sanctions for excessive deficits, fixing of the central rate of the ECU, the ECB annual report, composition of the Economic and Financial Committee, CFSP and CJHA activities.<sup>62</sup> These matters were regarded as too sensitive to give the EP any role.

The plethora of procedures made for neither simplicity nor clarity. The EP's new power was granted sparingly. Art 130s alone had three different legislative procedures.

Art 228 on the conclusion of treaties by the Community was amended so as to incorporate the Council acting by a qualified majority in most circumstances, and consultation with the European Parliament.

### *Geographical Application*

There was no specific provision for the geographical application of the TEU but there were several country-specific protocols. EMU, effected by the TEU but

<sup>60</sup> Ibid p33. Articles are: 49, 54(2), 56(2) second sentence, 57(1), 57(2) third sentence, 100a, 100b, 126, 128, 129a, 129d first paragraph, 130i(1) and 130s(3) first paragraph.

<sup>61</sup> Ibid p33. Articles: 8a, 130d, 138(3), 228(3) second paragraph, 105(6) and 106(5).

<sup>62</sup> Ibid pp33-34. Articles: 73g(2), 103(2), 103(4), 103a(2), 104c(11), 109(1) third sentence, 109b(3), 109c(3), J(7) second sentence, K(6) first sentence.

inserted in the ECT, would only apply to the Member States which qualified and wished to take part.

#### *Temporal Application*

Under Art R, the TEU was to come into effect on 1 January, 1993 or at the beginning of the calendar month following the last ratification. Art Q specified that it was to be of unlimited duration, however Art N(2) specified the convening of an IGC in 1996 to revise some provisions. This did not suggest great faith in the quality of the treaty and was likely to lead to public perception of a flawed, temporary treaty requiring further work. The treaty had established an elaborate, albeit flexible, timetable for monetary union, yet it also provided for revision before that union had been achieved. As it turned out, with the TEU not taking effect until November 1993, the 1996 IGC came around quickly and a treaty barely ratified was extensively amended.

#### *Constitutional Character*

From a constitutional perspective, the TEU took the existing constitution and placed it within a larger, more complex structure of a new polity. Some aspects of the original constitution were amended or extended, but the overarching Union subsumed the Communities within a much more intergovernmental structure with an unclear character, as discussed above under *Character*.

From a transparency perspective, the treaty was a disaster. The common provisions stood alone but made little sense without the context of the Community treaties which remained as separate texts. Arts G, H and I amended the Community treaties but made no sense without reference to those treaties. Diligent circulation of the TEU text as done in Denmark in the leadup to the first referendum was more likely to add to confusion and suspicion than to enlighten. Re-enactment of the founding treaties within a single union framework would have overcome this problem, but that idea had been rejected. Three Communities in one of three pillars made for a complex constitution indeed before one had even started on the substantive provisions. Changing the name of the European Economic Community to the European Community did not help either. It



reflected that the Community was about much more than economics but it just added to the confusion.

The founding treaties had looked forward and set transitional periods for their implementation. Accession treaties likewise set transitional periods. The TEU was therefore typical in setting a timetable for monetary union. However it broke new ground in setting a timetable for its own amendment in Art N. This set the scene for the ongoing program of constitutional amendment which has been in process ever since. I argued in Chapter 1 for a constitution to facilitate politics rather than a process of politics through constitutional amendment. The EU has hitherto followed the latter path and this seems set to continue. Nevertheless, every occasion of amendment is also an opportunity to establish something more lasting.

I now turn to some distinct areas of constitutional development.

#### *4.3.2 EMU*

EMU is the TEU development with the greatest economic significance. A single currency would complete the single market except for the harmonisation of taxation. The institutions and methods used to enable movement to a single currency and to administer that currency are of great constitutional significance. The issuing of currency is generally a prerogative of sovereign states so the EC and by extension the EU moved closer to statehood by acquiring this power. The TEU first established a European Monetary Institute to oversee progress towards the single currency. The single currency itself would be administered by a combination of a European Central Bank ("ECB") and a European System of Central Banks ("ESCB"), comprising the Member State central banks. Under EC Art 105, the ESCB would define and implement monetary policy, conduct foreign exchange operations, hold Member States' foreign reserves, and promote the smooth operation of payments systems. The two were to be governed by a joint statute attached as Protocol 3 to the EC Treaty. The ECB was to be consulted on proposed acts within its competence at either Community or national level. It was to collect statistics, decide on the representation of the ESCB in international forums. Under Art 106, the ECB obtained legal personality. It has both an executive board and a governing council. The Governing Council comprises the

Chapter 1  
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This complex legal structure creates a  
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the ECB in the literature.<sup>41</sup> Their  
"independent both of the Member State  
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Treaty.<sup>43</sup> However this does not end  
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right. However unlike the Communities

<sup>41</sup> C Zilli and M Selmayr *The Law of the Euro*  
<sup>42</sup> Ibid p9  
<sup>43</sup> Ibid p10.  
<sup>44</sup> Ibid p29.

board and the governors of the national central banks. Art 107 stressed the independence of the ECB and the national central banks. This is assisted by eight year non-renewable terms for the board. The ECB is given the power to make regulations and take decisions. It can impose penalties for failure to comply with these. It thus has many of the characteristics of an institution. It is itself part of the ESCB. There was also to be an Economic and Financial Committee consisting of representatives of Member States, the Commission and the ECB.

This complex legal structure creates an independent central bank but also retains a role for Member State central banks. It also creates considerable uncertainty about the status and role of the ECB in the EU. I have already referred to the confusion caused by the creation of the EU generally and the elision between the EC and the EU not only in common parlance but in the names of the institutions and the siting of EU matters in the EC treaty and vice versa. The institutional structure of monetary union not only creates confusion between the ECB and ESCB but also as to the status of the ECB within the EU legal order. Chiara Zilioli and Martin Selmayr identify no less than six different descriptions of the institutional status of the ECB in the literature.<sup>63</sup> Their careful conclusion is that the ECB is "independent both of the Member States and the Community [sic] institutions and bodies".<sup>64</sup> There was apparently some thought of making monetary union a "fourth pillar" of the EU, but the ECB was in the end brought within the EC Treaty.<sup>65</sup> However this does not end the matter. Zilioli and Selmayr go on to observe that EC Art 107(2) gives the ECB legal personality just as Art 266(1) gives the EIB legal personality. Yet it is not named as an institution of the EC. Zilioli and Selmayr's characterisation of the ECB as "an independent specialised organisation of Community law"<sup>66</sup> looks like the common characterisation of the EC as "sui generis". They suggest that it has aspects of a Community in its own right. However unlike the Communities, the Member States have no role in its

<sup>63</sup> C Zilioli and M Selmayr *The Law of the European Central Bank* (Oxford, Hart 2001) p7.

<sup>64</sup> Ibid p9

<sup>65</sup> Ibid p10.

<sup>66</sup> Ibid p29.

decisionmaking except through their (independent) central banks. As Zilioli and Selmayr point out, the ECB is even more independent than the *Bundesbank*.<sup>67</sup>

Independent as it is, the ECB has a constitutionally prescribed mission: price stability. It is also supposed to take the Art 2 Community objectives into account, but they are secondary to price stability. Zilioli and Selmayr suggest that price stability is thus the *Grundnorm* of the ECB.<sup>68</sup>

In addition to the democratic deficits of the Community and Union, there is a specific democratic deficit in the case of the ECB. Independence from democratic accountability is held to be a specific virtue which enables the pursuit of price stability. Zilioli and Selmayr offer a number of defences. Firstly, the ECB was legislated by the Member States. Secondly, price stability is necessary for all successful policy. Thirdly, although not democratically accountable, the ECB is accountable to the rule of law. It also strives to be transparent and has submitted voluntarily to the jurisdiction of the Ombudsman. It thus does not suffer from a constitutional deficit and the solution to the democratic deficit may lie in the (democratised) centralization of fiscal policy. Nevertheless, the principle that the technocrats know best is profoundly undemocratic. It is claimed by some that this piecemeal building of a polity will achieve more than utopian schemes. That may be true, but there is also a danger of either loss of public support or government of the elites for the elites.

The decision to impose "convergence criteria" for Member States which wished to join the single currency was also significant. As Francis Snyder points out, EMU could be the culmination of the integration project, but it could also drag the Union down by tying it so strongly to global economic developments.<sup>69</sup>

<sup>67</sup> *ibid* p33.

<sup>68</sup> *ibid* p36.

<sup>69</sup> F Snyder "EMU Revisited: Are We Making a Constitution? What Constitution Are We Making?" in P Craig and G de Burca (eds) *The Evolution of EU Law* (Oxford, OUP 1999) pp417-479 at 418.

As Mary Eichengreen and John Frieden  
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<sup>70</sup> B Eichengreen and J Frieden *The Political  
Economy of the Euro* (Oxford, Westview Press 1995) p89.

As Barry Eichengreen and John Frieden argue, EMU was created for political rather than economic purposes.<sup>70</sup> Although intended to have beneficial economic effects, it was not based on an optimal currency area but rather on the idea that harmonised economic policies would enable a single currency, bringing political and economic benefits. There was a fundamental argument between economists and monetarists as to whether to establish the conditions for a single currency first (the economists) or to impose the single currency and let it drag economic policies into line (the monetarists). The first view won. "Convergence criteria" were set with a timetable for those who qualified to join the single currency. Despite the political goal, debate was taken over by economists. EMU was intended by some to be part of a political union also involving greater fiscal redistribution and closer co-ordination of economic and general policy, ie a step towards federalism. But in the course of negotiation, these other features were largely lost, leaving a rather narrow prescription of fiscal rectitude and an independent central bank with price stability as its highest goal.

An independent central bank on German lines was a condition of German acceptance of the TEU. Germany's particular history of hyper-inflation has made the German people particularly accepting of an independent central bank with a prime objective of price stability, but it is less clear why other states would accept that there are matters too important to be left to politicians, and indeed that politicians should be excluded from them. They have accepted the German conditions, often bringing considerable hardship for their citizens, in the hope that monetary union will bring the promised economic benefits. Yet even the *Bundesbank* is not as independent as the ECB and must work with economic conditions set by the German government. Germany had initially insisted on monetary union only if accompanied by greater political union but eventually surrendered this condition.

Monetary policy alone is a blunt instrument of economic management. It is more effective to use a combination of fiscal and monetary methods. Yet only monetary

<sup>70</sup> B Eichengreen and J Frieden *The Political Economy of European Monetary Unification* (Boulder, Westview Press 1995) p89.

policy has been placed in the independent hands of the ECB. Fiscal harmonisation was attempted through the convergence criteria. These were set out in Art 121{109j} and Protocol 6. Essentially they required low inflation, a low budget deficit, limited government debt, exchange rate and interest rate stability. They thus provided a strait-jacket for fiscal policy rather than allowing it to be used for economic management. There were no criteria for growth or employment. The convergence criteria are too prescriptive for a constitution, seeking to dictate vital political decisions. Some fiscal limits are required but they should be decided by central democratic institutions. The present structure locks out democracy at both national and Community level.<sup>71</sup> Fiscal balance is a crucial element of the federalism advocated in Chapters 1 and 5.

The Member States soon began their attempt to match the convergence criteria. At the beginning, only Luxembourg matched all the criteria. By 1996, it was clear that 1997 would not be a realistic date for monetary union. By 1998, by a combination of austerity and creative accounting, eleven of the twelve Member States which wished to join the single currency had been deemed to qualify.<sup>72</sup> The new currency's name had been changed from the ecu to the euro, which sounds less French. Monetary union came into effect on 1 January 1999 although the circulation of euro notes and coins only began in 2002.

The spirit of the convergence criteria was continued by the Stability and Growth Pact adopted by the European Council at Amsterdam in June 1997. There are also procedures in the EC Treaty to punish members of the euro-zone which run "excessive" deficits.<sup>73</sup> The Member States have formulated "stability programmes" to show how they will continue to comply with the convergence

<sup>71</sup> L Gormley and J de Haan "The Democratic Deficit of the European Central Bank" (1996):21 *ELRev* 95.

<sup>72</sup> France, Germany, Ireland, Italy, Belgium, Netherlands, Luxembourg, Spain, Portugal, Austria and Finland. Greece had failed to qualify but has since done so and joined in 2001. Denmark voted by referendum in September 2000 not to join. Britain may hold a referendum on participation in the next few years but public support still seems lacking. Sweden has elected not to participate at present. On the other hand, it is likely that all the new Member States in 2004 will wish to join as soon as possible.

<sup>73</sup> EC Art 104{104c}.

criteria after monetary union. These are inspected by the Council under Art 103 (now 99(3)).

In the four years since its inception, monetary union has not been the panacea that the years of work to bring it about might have suggested, but neither has it been the disaster some had feared. The quest for it has brought fiscal and economic, convergence, savings in transaction costs, and some sense of solidarity. The falling euro was good for exports. Growth has increased modestly.<sup>74</sup> The successful transition to the euro emphasises that political and economic co-operation are possible, but that political union has not been achieved. Snyder argues that by its very attempt to depoliticize money, EMU has stimulated politicisation of EU policies and law.<sup>75</sup> It was seen as a threat to national sovereignty but also stimulated debate about the relationship of the state or EC and the market. The eventual result, he argues, has been to strengthen the European Council at the expense of the supranational EC institutions. While this enables an interpenetration of Member State and EU politics, it does not assist democratization of the Community or Union. However another possible result is to stimulate new lines of solidarity across Member State borders as a common monetary policy and harmonized fiscal policies have similar effects on particular classes. On the other hand, a common monetary policy when economic conditions differ may simply highlight national differences and increase antagonism towards other states, the ECB, Community and Union.

Constitutionally, EMU has been a comeback for Monnet's technocratic vision. An independent central bank now rules over monetary policy for twelve of the fifteen Member States and while economic policy largely remains in Member State hands, it is guided by the EC Treaty and the stability pact. EC Art 4(2){3a} specifies that the primary object of the ECB's policy will be price stability. It may also support the general economic policies of the Community "in accordance with the principle of an open market economy with free competition", but only subject to the objective of price stability.

<sup>74</sup> *The Economist* 29 April 2000 p51.

<sup>75</sup> Snyder in Craig and de Burca *Evolution* op cit p470.

Another ground of objection to EMU is its provision for variable geometry. Britain and Denmark (and subsequently Sweden) were allowed to opt out of participation. Member States willing to participate had to qualify. It is thus possible to have three categories of states in relation to the single currency. This institutionalizing of variable geometry began with the TEU and has since been expanded. It is defensible as a way to promote integration, but it could also make integration more difficult eg by making non-qualifiers drop further behind. As it happened, Greece, the only initial would-be participant which failed to qualify for EMU has since qualified. The fate of the new entrants in 2004 has yet to be seen. They will be required to try to qualify and may undergo severe hardship to do so.

Democratization of economic and monetary policy would be difficult. It would either involve large scale transfer of economic decisionmaking to the central democratic authorities or more room to move for the Member States. The first would meet political difficulties. The second could make monetary union unworkable. It is suggested that the first is therefore preferable, but it must be presented as a constitutional choice rather than the dictation of a single correct policy.

#### 4.3.3 CFSP

The new machinery for a Common Foreign and Security Policy ("CFSP") built on the existing procedures for European Political Co-operation. A CFSP was to be defined and implemented in accordance with stated objectives, if the Member States so decided. Under Art J.2, the Council could define a "common position". Member States were supposed to uphold these positions in their actions but this pillar is non-justiciable.

Art J.3 provided for "joint actions". The Council could determine unanimously that aspects of these could be decided by QMV. The provision for QMV after unanimity had potential to transform CFSP into a more effective instrument but did not take things very far by itself. Under Art J.3(4), Member States were committed to the joint actions adopted.

Art J.4 provided that the CFSP covers all security matters including "the eventual framing of a common defence policy which might in time lead to a common defence". This was not so much legislation as aspiration. Art J.4(2) requested the WEU to "elaborate and implement" EU decisions with defence implications. This was quite significant variable geometry as not all Member States are also members of the WEU.<sup>76</sup> Art J.4(4) recognised this and stated that the CFSP shall not prejudice the defence policies of non-members of the WEU.

The EU has a dilemma with defence policy. It is one of the quintessential aspects of national sovereignty and yet something on which a union of contiguous states should logically collaborate. Indeed, most of those states have done so within the wider context of NATO, which also includes the United States, Canada and European states outside the EU including Norway and Turkey. The formation of a distinct EU defence identity would appear to be in conflict with NATO despite attempts to find a way in which they might coexist. The differences of opinion within both the EU and NATO at the time of writing over policy towards Iraq illustrate the difficulties of both organizations.

The possibility of an EU defence identity was elaborated in the Petersberg Declaration of the WEU on 19 June 1992. This set out the "Petersberg Tasks" of humanitarian relief, peacekeeping and peace making which could distinguish a European identity from NATO, which has the character of a full scale military force backed by nuclear weapons.

Art J.7 specified that the Presidency shall consult the European Parliament on "the main aspects and basic choices" of CFSP. This is analogous to the position of most national parliaments in foreign affairs with the exception that they can bring down the executive if they do not approve. The European Parliament thus has little direct effect on foreign policy but has been very active in taking positions on foreign policy issues and these can at least exercise moral persuasion.

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<sup>76</sup> Denmark, Ireland and the more recent Member States Austria, Sweden and Finland are observers.



Arts J.3 and J.8 enshrined the European Council at the head of CFSP, setting out general principles and guidelines. Under Art J.8(2), the Council of Ministers (now of the EU) then takes the more detailed decisions. Under Art J.8(3), both the Member States and the Commission may make proposals, thus clearly differentiating CFSP from the Community method. Under Art J.9, the Commission was to be "fully associated" with the work, but would have no decisionmaking power.

Art J.11 provided that operational expenditure could either be paid through the Community budget or levies on individual states. There was thus the potential to bring foreign policy more closely under Community procedures.

In practice, CFSP has not been a great success. As noted, it was formulated as the Yugoslav crisis was beginning to unfold in 1991 and by the time the TEU came into effect, that crisis was well advanced into war. The EU was able to send envoys to seek peace but was not able to take military action to bring peace. Eventually it was NATO which took military action to secure peace. The EU has declared many common positions and some joint actions. It administered the Bosnian city of Mostar from 1994 to 1996. It has entered some international agreements. It has undertaken international obligations. But the Member States again declined at Amsterdam to specify legal personality for the EU. The Presidency was initially the face of the Union. It was supplemented in TA with provision for a High Representative for CFSP.

There has also been a considerable amount of "cross-pillar" activity since effective action will often involve a combination of Community and Union competences. Indeed the General Affairs Council for the EC is also the Council for CFSP but other configurations of the Council have also enacted CFSP matters.<sup>77</sup> The Council secretariat has become the repository of expertise in CFSP, supplemented since TA by a Policy Planning and Early Warning Unit and the High Representative. The Commission has also sought to maximise its role in foreign policy and its mission to ensure consistency under TEU Art C. The EP has

<sup>77</sup> See Curtin and Dekker *op cit* p114.

sought to increase its input into CFSP but can only do so at the margins. National parliaments have also tried to increase their influence in this area, but their ability to do so depends on the sway they hold over the executive in each case.

Foreign policy is still very much a matter for the Member States. The CFSP provisions do little more than make it possible for the Member States to co-operate, something they were already free to do. They were exhorted to co-operate and means were provided by which they could, but ultimately it is a matter of political will as there are no sanctions if they do not. CFSP has been amended by both the Treaty of Amsterdam (see Section 4.5) and the Treaty of Nice (see Section 4.7).

#### 4.3.4 CJHA

Like CFSP, CJHA provided mechanisms for intergovernmental co-operation with potential for legal effects. Art K.1 specified areas of common interest notably asylum and immigration, combating crime and drugs, and judicial and customs co-operation. It provided for the establishment of the European Police Information System ("Europol").

In acting on the matters in K.1, the Member States were required to have regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Convention relating to the Status of Refugees, to which all are parties.<sup>78</sup> It is comforting that the treaty did not derogate from those commitments, but given that the Member States were already bound by them, one begins to wonder if they were protesting too much.

The Commission was given a peripheral role in some matters, but was excluded from others.<sup>79</sup> The Council could adopt joint positions, joint action, co-operation or conventions. These conventions might only require a two-thirds majority in the Council for implementing measures and might also provide that they be

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<sup>78</sup> Art K.2.

<sup>79</sup> K.1(1) to (6); excluded from (7) to (9).

justiciable before the ECJ, but not necessarily.<sup>80</sup> This kind of prospective, contingent constitutionmaking was a feature of the TEU.

K.4 provided for a Co-ordinating Committee to assist the Council with the "full association" of the Commission. K.6 provided for the European Parliament to be informed and consulted, rather less input than the Parliament had wished. K.8 applied many EC procedural articles to the pillar. It seemed at least to be leaning against the Community pillar and indeed much of it was subsequently transferred into the Community pillar by the Treaty of Amsterdam.

K.7 provided for "closer co-operation" between two or more Member States, a harbinger of more extensive provisions for such co-operation in subsequent treaties.

Although falling short of the incorporation of the administration of justice and home affairs under Community law, the structuring of co-operation in this area was highly significant. Justice and home affairs are quintessentially internal to a state. The integration of Community law into national legal systems has ensured Community permeation of the justice system. The possibility of co-operation in home affairs left very little which could not be touched by common action. The concern about this pillar was that it would enable measures with far-reaching effects on people's rights to be taken secretly by the Member States. The provisions had a significant potential effect on the new "citizens of the Union" yet they were in a separate intergovernmental pillar.

CJHA does not seem to have worked very well. As we will see, it was extensively amended by the Treaty of Amsterdam, divided into matters which could be taken into the Community pillar and those which were still as having to remain intergovernmental. It initially proved cumbersome to be bound by unanimity.

<sup>80</sup> Art K.3(2)(c).

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#### 4.1 Citizenship

The citizenship provisions of the TEU were  
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Citizenship should have been of enormous  
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<sup>81</sup> See J de Zwaan and M Vroemen "The Treaty of  
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Schengen in the small town in Luxembourg  
agreements were the then nine Member States

Some conventions were concluded but as they also had to be ratified, they took a long time to come into force.<sup>81</sup>

Progress on establishing common conditions for entry by third country nationals was slow so a group of Member States willing to proceed more quickly signed the Schengen Accords in 1985.<sup>82</sup> Schengen was an early example of variable geometry. The difference with later variable geometry was that Schengen was done entirely outside the Community framework on a completely intergovernmental basis.

#### 4.3.5 Citizenship

The citizenship provisions of the TEU were both sweeping and disappointing. An entire new Part 2 of the ECT was created for them, but it may be asked why these provisions were in the ECT and not part of the wider EU. Art 8(1) established "Citizenship of the Union". Every person holding the nationality of a Member State became *ipso facto* a citizen of the Union. This in itself is disappointing as it makes Union citizenship dependent on national citizenship. It is hard to imagine someone being a Union citizen without being also a citizen of a Member State, but Union citizenship should not have been subordinate to national citizenship, just as Union law is not subordinate to national law.

Citizenship should have been of enormous significance since it is the key component of membership of a polity. The polity had been created a long time before. Community law rights for citizens of Member States had been developed by the ECJ. Even direct election to the EP had finally come, and yet citizenship of the Communities had never been formally created. Now that citizenship of the Union had been created, it had great potential, but its initial content was disappointing.

<sup>81</sup> See J de Zwaan and M Vrouenraets "The Future of the Third Pillar: An Evaluation of the Treaty of Amsterdam" in Heukels, Blokker and Brus op cit Ch11 pp203-214 at p206.

<sup>82</sup> Schengen is the small town in Luxembourg where the Accords were signed. The initial signatories were the then nine Member States except Britain and Ireland.

A logical corollary of Union citizenship would be freedom of movement for all citizens within the Union. This appeared to be achieved by Art 8a, but there was the possibility of "limitations and conditions laid down in this Treaty and by the measures adopted to give it effect". In Art 8a(2), the Council could adopt provisions with a view to facilitating the exercise of citizenship rights, but must do so unanimously. Rights with such a high threshold for facilitation ran the danger of not being created. Indeed, with such possibility of curtailment, they were not really "rights" at all.

In relation to free movement, at least there was now a presumption of a right of movement and residence. It could be restricted but did not first need to be established. The previous rights of movement had had to have some economic connection. By the time this included "the right to receive services",<sup>83</sup> it seemed virtually unrestricted, but Member States still maintained border controls. As discussed above, CJHA had been an attempt to regulate this area.

A major citizenship right almost completely lacking between the Union and its citizens is that of welfare provision. Except in the agricultural and a few industrial sectors, citizens have no direct fiscal relationship with the Union. Citizens are unlikely to look kindly on a Union which cannot help them in their hour of need.

The most fundamental right of the citizen, as argued in Chapter 1, is the right to constitute the polity. Union citizens are members of their national polities and those polities constitute the EU, but the EU is more than the sum of the Member States. It has supranational political institutions. If these are not accountable to the citizens, it is a poor citizenship indeed. The European Parliament had been elected by universal suffrage since 1979. Seats are allocated to Member States and are only approximately in proportion to population size. Although the Commission is invested by the European Parliament, and can be removed by it, it is not chosen by the Parliament and lacks democratic legitimacy to that extent.

<sup>83</sup> *Cowan v Tresor Publique* 186/87 [1989] ECR 216.

The TEU gave EU citizens the right to vote and stand for the European Parliament in the state where they reside, regardless of their nationality. (Art 8b(2)) This was subject to detailed arrangements to be adopted unanimously by the Council which: "may provide for derogation where warranted by problems specific to a Member State". So even voting for the supranational body could be curtailed in the 'national' interest.

Art 8b(1) made the same provision for standing and voting in municipal elections. Some Member States already permitted this privilege to non-nationals. It is an interesting denationalisation of the local. However like most of the rights granted by the treaties, it was subject to derogation and Luxembourg has obtained such a derogation as it has so many foreign residents.

The great unspoken and forbidden right is that to stand and vote in national elections. This was left to the discretion of the Member States. The Community, which has worked so hard to abolish national frontiers, continues to observe political integrity at national level. Despite this, it is repeatedly charged with attempting to supplant national identity. Protection of 'national identity' is discussed in Chapter 2.

There has been much talk of bringing the Community/Union closer to its citizens, but the actions which would permit this were balked at. Democracy, transparency and subsidiarity would all help to achieve this, but they have to be more than words. I discussed the necessary features of citizenship in a democracy in Chapter 1. In Chapter 5, I consider the desirable features of citizenship in the Commonwealth.

#### 4.3.6 Subsidiarity

A new Article 3b stated that: "the Community shall act within the limits of the powers conferred on it by this Treaty and of the objectives assigned to it therein." It appears that it could only act on the objectives when the powers have been provided already, contrary to the wording of Art 235. The Article continued:

"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and

can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

"Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

Thus was the notorious principle of subsidiarity introduced into the treaty as a central guiding principle after its marginal appearance in the SEA.<sup>84</sup>

Seldom has a single word leapt so quickly into public discourse. "Subsidiarity" had been used in the papal encyclical *Quadragesimo Anno* of 1931 to guide officials of the Catholic Church as to at which level decisions should be taken, whether individual, family, priest, bishop etc. with analogies to temporal life. It had therefore become part of Catholic thought on civil government. It was incorporated in the German constitution and was mentioned in the Commission's Report on European Union in 1975.<sup>85</sup> It was used in paragraph 9 of the Preamble to the DTEU in a substantially similar form to its eventual adoption in the TEU.

EEC Art 130r.4, inserted by the SEA, provided that the Community shall take action relating to the environment "to the extent to which [the objectives] can be attained better at Community level than at the level of the individual Member States". It is interesting that the word itself was not used. Jacques Delors suggested that subsidiarity already existed in Community law through the medium of the directive, but that it could be taken further.<sup>86</sup>

Subsidiarity exists in the very act of dividing powers. It is therefore the essence of federalism. By definition, any division of power is a decision that one power is better exercised at one level than another. Thus subsidiarity is more a restatement of the problem that different functions are best exercised at different levels rather than the solution to it.

<sup>84</sup> Art 130r.4 of the EECT as amended by the SEA.

<sup>85</sup> Bull EC Supp 5/75.

<sup>86</sup> J Delors "The Principle of Subsidiarity: Contribution to the Debate" in *Subsidiarity: the Challenge of Change* Proceedings of the Jacques Delors Colloquium 1991 (Maastricht, EIPA 1991) p8.

But subsidiarity was a solution for the Commission. It enabled the Commission to portray itself as a measured seeker after only the minimum of power necessary, with all else left to the Member States. Subsidiarity was the word for all seasons. Nationalists could rally to it as the way to keep power from Brussels, but integrationists could also invoke it to argue that a matter could be more effectively addressed at Community level. Little wonder then that Lord Mackenzie-Stuart, a former judge of the ECJ, described subsidiarity as "a busted flush".<sup>87</sup>

Although Mackenzie-Stuart's particular criticism was of the way in which subsidiarity has been incorporated in the ECT, his phrase is apt for the concept as a whole. It promises much but delivers little. If it was indeed "the word that saved Maastricht",<sup>88</sup> in that it enabled agreement, that may be all it achieved. As Deborah Cass points out, subsidiarity is a fundamental feature of a federation,<sup>89</sup> yet British Prime Minister John Major exulted in the removal of an explicit federal goal from the TEU while enthusiastically embracing subsidiarity. If subsidiarity embedded federalism in the treaty, it would further one of the values espoused in Chapter 1. The treaty is federal because it is an agreement by states to divide some of their power and exercise some of it centrally. It is desirable that the text reflects this. This may be surprising to anti-federalists, but the debate should be not whether the treaty is federal but rather how powers should be distributed and exercised within the federation whether it goes by that name or not. That is the question neither "federalism" nor "subsidiarity" can answer, but the one the EU must grapple with every day.

As an everyday criterion for action at a particular level, subsidiarity is of little use, but as a justification for either acting or failing to act, it is very useful. It is almost impossible to argue that the principle has not been followed, however this does not advance good government. The incorporation of subsidiarity in the ECT

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<sup>87</sup> Lord Mackenzie-Stuart "Subsidiarity - A Busted Flush?" in D Curtin and D O'Keefe (eds) *Constitutional Adjudication in European and National Law* (Dublin, Butterworths 1992) p19. For the uninitiated, a busted flush in poker is an initially promising hand which turns out to be worthless.

<sup>88</sup> D Cass "The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community" (1992) 29 *CMLRev* 1107.

<sup>89</sup> *Ibid* p1109.



meant that it became justiciable. This could require the ECJ to make judgments about matters of political principle. In practice, the ECJ has never used it to strike down EC legislation.

The TEU had hardly been signed when the Danish referendum in June forced the need to "re-present" it. It was thought that some further and better explanation of subsidiarity was necessary to try to reassure Denmark and other sceptical Member States that the Commission would be less ambitious in its legislative agenda. At the Edinburgh European Council on 11-12 December 1992, an "annex" to the TEU was agreed clarifying the way in which subsidiarity would be used in deciding whether the Community would legislate. It was a pragmatic political response to public concern about the TEU. It did not amend the TEU but rather "clarified" it.

The Treaty of Amsterdam included a Protocol on the Application of the Principle of Subsidiarity which required the Commission to justify its proposals in terms of the principle. The Council and EP must also justify any amendment proposing more extensive Community action. It is not clear that these provisions have inhibited Community lawmaking. At least they provide a means for clearer justification of legislation.

#### *4.3.7 The Committee of the Regions*

A new Chapter 4 of Part 5 Title I comprising Arts 198a to 198c established a Committee of the Regions which was required by other provisions of the treaty to be consulted on certain matters.

The establishment of this committee held out the exciting possibility of an extra tier of government. Rather than power being divided simply between the Community and Member States, regions could now also be included. The Committee of the Regions was a timely recognition of the federal or devolved structure of some of the Member States. But it was something of a misnomer. The members were to be nominated by the Member States and formally appointed by the Council but there was no specific representation for particular regions. The Member States were allocated a number of places based roughly on size rather

than their number of places among its regions. Article 198a provided that the Committee shall be independent of the Community. This body, like the Economic and Social Council, is to meet on its own initiative and to be consulted. The Council and if these are elected

The Committee has completed achieving its objectives. If regionalism is to eventually get some

#### *4.3.8 The TEU*

In terms of constitutional law, the Community has been operating unsupervised in its activity under the TEU making it necessary to resort to large provisions.<sup>91</sup>

Ulrich Everling has argued that the obsolete provisions of the TEU, however that the

The secrecy of the Community is incomprehensible

<sup>90</sup> Art 264 {198b

<sup>91</sup> Curtin, D. "The 30 CMLR p17

<sup>92</sup> Ibid p1072.

than their number of regions. True, the Member State was free to allocate the places among its regions as it saw fit, but there was no obligation to do so. Art 198a provided that members shall not be bound by mandatory instructions and shall be independent, performing their duties in the general interests of the Community. This further emphasises that the Committee is not a representative body. Like the Economic and Social Committee, it is purely advisory, but it is free to meet on its own initiative.<sup>90</sup> Some provisions of the ECT require the Committee to be consulted. The Council or Commission may place time limits for a response and if these are exceeded, may act regardless.

The Committee of the Regions is more significant as a first step than as a completed achievement. Its composition has since been altered as covered below. If regionalism continues to rise, a Committee or Council of Regions may eventually get some real power. I canvass this possibility further in Chapter 5.

#### 4.3.8 *The TEU as Constitutional Development*

In terms of constitutionalism, the TEU was in some respects a backward step from the Community treaties. In addition to its sheer complexity, it increased unsupervised intergovernmental activity rather than increasing and improving activity under the Community method. I have already referred to the form of the TEU making it meaningless without copies of the Community treaties. It also resorted to large numbers of protocols modifying the effects of substantive provisions.<sup>91</sup>

Ulrich Everling criticised the failure to tidy up the treaty given the number of obsolete provisions. He also criticised the quality of the drafting. He concluded however that the TEU had strengthened the constitutional order.<sup>92</sup>

The secrecy of the negotiations and their intergovernmental character delivered an incomprehensible *fait accompli*. The TEU made future constitutional development

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<sup>90</sup> Art 264 {198b}.

<sup>91</sup> Curtin, D. "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 CMLR p17.

<sup>92</sup> Ibid p1072.

more difficult because there was now a Union to reform as well as the Communities. While many thought that the IGC process had shown its inadequacy, the TEU specified that such a process be used again for its own reform.

By its embrace of variable geometry, the TEU set the stage for future fragmentation which has only continued.

Deirdre Curtin raised the extremely difficult and controversial idea that the ECJ may be able to rule some of the Maastricht amendments to the EC unconstitutional on the grounds that they breach fundamental human rights or constitutional principles.<sup>93</sup> She suggested that the ECJ's first opinion on the EEA raises this possibility.<sup>94</sup> There are other jurisdictions, notable Germany where either courts or constitutions themselves have placed limits on amendment. In the event, there was no challenge before the ECJ to the "constitutionality" of the TEU, but there were several challenges to national ratification before national courts, examined in the next section.

It is difficult to support a judicial veto on constitutionmaking. It is easier when the constitutionmaking process was undemocratic, but two wrongs do not make a right. As argued in Chapter 1 and to be further argued in Chapter 5, democratic constitutionmaking is the answer. Until this is achieved, I would argue that the Member States remain *Herren der Verträge*, subject to the terms of the TEU itself.<sup>95</sup>

In terms of democracy, the TEU involved both progress and regress. Its introduction of co-decision increased the role of the EP. Its provisions on citizenship modestly increased democratic rights. However its complexity and moves towards unaccountable intergovernmentalism were anti-democratic.

<sup>93</sup> Ibid p63.

<sup>94</sup> *Opinion 1/91* [1991] ECR I-6079.

<sup>95</sup> See eg B De Witte "International Agreement or European Constitution" in J Winter, D Curtin, A Kellermann and B De Witte (eds) *Reforming the Treaty on European Union: The*

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In terms of fundamental rights, it claimed to bind the Union to them but then purported to make this not subject to judicial review.

In terms of federalism, although a "federal goal" was specifically excluded from the text, subsidiarity, a basic federal principle, was introduced. Some more powers were granted to the Community and more matters were to be determined by intergovernmental methods, some involving the supranational institutions. Even the opt-outs could be regarded as advancing federalism by at least making the division of powers clearer.

In terms of multiculturalism, the new EC provisions on culture did not advance it at all, instead encouraging both Member State cultures and common cultural heritage.

The TEU achieved the important objective of facilitating monetary union. It also modestly extended the power of the EP. It facilitated closer integration in new areas and while this was done inelegantly and inadequately, it enabled further steps to be taken subsequently. It was necessary both to ratify the treaty and to move on to the review set for 1996. While this meant that constitutional reform would be an ongoing process, each new opportunity would also be an opportunity for finality.

#### 4.4 THE RATIFICATION PROCESS

The TEU having been signed on 7 February, 1992, an unexpectedly difficult process of ratification commenced. The ratification debates in each of the Member States are interesting and important for the light they shed on the democratic legitimacy of the EU and the problems of the current system of constitutional development. Three Member States, Denmark, France and Ireland, held referenda on ratification, the British government nearly fell in its efforts at parliamentary ratification, as well as facing a legal challenge, and the German ratification was

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*Legal Debate* (The Hague, Kluwer 1996) pp3-18 and U Everling's comment *ibid* pp19-25 at 22.

also the subject of a constitutional challenge.<sup>96</sup> The problematic five will be explored in detail.

A consolidated version of the treaties as amended by the TEU was not initially produced. Instead, the TEU was printed as a stand-alone document and while some of its provisions were new and entire in themselves, many of the amending provisions made little sense outside their context and it seems unlikely that many non-specialists could be bothered to read them along with the previous text.

The Danish constitution required a referendum before ratification as the necessary majority in the *Folketing* could not be raised. The ratification referendum was held on 2 June, 1992. It was thus the first of the three referenda. In retrospect, it was unwise for a traditionally sceptical Member State to be the first candidate for ratification. The government conscientiously distributed the text of the TEU, but as discussed above, it made little sense to citizens. Although almost all the major political parties advocated a "Yes" vote, there were substantial levels of dissent in these parties.<sup>97</sup> There was also a very prominent and well organised "No" campaign and the contest was desperately close.

The "No" verdict, albeit by a very small margin,<sup>98</sup> sent shock waves through the Community. Could little Denmark derail the integration process? The TEU in its terms required ratification by all the Member States to enter into force. If the remainder were to proceed with integration, they would need to negotiate a new treaty. This horrifying reality did not seem to have sunk in with Delors and French and German leaders, all of whom indicated that Denmark could be expelled from the Community.<sup>99</sup> There was in fact no legal mechanism for this.

But rather than uniting the rest of the Community against Denmark, the Danish vote instead gave great comfort to the opponents of the TEU across the Community. On 18 June, Ireland voted in a referendum to ratify by a comfortable

<sup>96</sup> There was also a constitutional challenge to the treaty in Denmark but it did not prevent ratification and was unsuccessful.

<sup>97</sup> L Lyck (ed) *Denmark and EC Membership Evaluated* (London, Pinter 1992) p237.

<sup>98</sup> Grant op cit p211. The margin was 45,000 votes.

<sup>99</sup> Grant ibid p216.

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<sup>100</sup> George op cit p24

<sup>101</sup> A Duff "Ratifica (London, Routled

margin. There was opposition from groups unhappy about EC law giving Irish women access to information about abortion, but Ireland had secured a protocol stressing that nothing in the treaties could affect the operation of the abortion prohibition in the constitution in Ireland. Ireland's massive fiscal benefit from Community membership assisted a positive result.

The Danish result sent politicians across the Community a message they had not wanted to hear: they were out of step with many of their constituents on the issue of integration. Rather than the "democratic deficit" needing to be addressed by greater powers for the Community, the integration engaged in by the Member States so far had itself had only a very shaky democratic sanction. It had been the elite politics of diplomacy rather than the expressed wish of the people. The ratification stage was rather too late to be finding this out. The leaders of many Member States were fortunate that they did not have to put the question to a referendum, as it would probably have failed. President Mitterrand's decision to hold a referendum looked unnecessarily risky, but only to those who did not wish to hear the people.

The Danish result gave great heart to Eurosceptics in Britain. Sixty-eight conservative backbenchers called on the government to "make a new start on the development of the EC".<sup>100</sup> There were calls for a referendum but the government declined to hold one. The Conservative government was returned at the election of April 1992 and was thus able to claim a continuing mandate for its sceptical engagement. The ratification bill had its second reading in the House of Commons on 21 May but further debate was suspended after the Danish vote.<sup>101</sup>

At the Lisbon European Council in June, the Member States decided to emphasise subsidiarity and arranged a special meeting in Edinburgh in November at which a declaration on subsidiarity and transparency would be made and an attempt made to massage the treaty so that it might appear acceptable to Danish voters.

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<sup>100</sup> George op cit p245.

<sup>101</sup> A Duff "Ratification" in A Duff, J Pinder and R Pryce (eds) *Maastricht and Beyond* (London, Routledge 1994), p55.

Luxembourg ratified on 2 July by a vote of its parliament. Greece ratified on 31 July, also by a parliamentary vote.

In the leadup to the French referendum on 16 September, there began to be speculation against some Member State currencies. First the lira and then the pound came under pressure, with the pound withdrawn from the ERM on 16 September. The movement towards a single currency seemed to be unravelling before the treaty had even come into force.

President Mitterrand had turned the referendum in France into one on his own popularity. The two houses of parliament adopted the treaty on 23 June, but Mitterrand still wanted the referendum. It was held on 16 September. The result was far from what he would have wanted: a "yes" vote of only 51.05%. This demonstrated that the Danes were not alone in being profoundly ambivalent about the treaty.

Italy ratified by parliamentary vote on 29 October 1992. Although Italian politics was in crisis with the exposure of vast corruption, the deputies were strongly united in their support for the EU. The Belgian Chamber of Deputies approved the TEU in June, 1992, the Senate in November. The Spanish Cortès voted for ratification in October (Chamber of Deputies) and November 1992 (Senate) by overwhelming margins. Spain, like Ireland, would be a major beneficiary of the new "cohesion" funds. The Portuguese Parliament ratified on 11 December. Portugal too would be a substantial recipient of cohesion funds. The Dutch Second Chamber ratified on 12 November and the First Chamber on 15 December 1992. That left only Denmark, Britain and Germany to ratify.

German ratification required constitutional amendment to give effect to EU citizenship and monetary union, and to safeguard the position of the *Länder*. The Bundestag voted for ratification on 2 December and the Bundesrat on 18 December, but the Bundestag reserved the right to vote whether to proceed to the third stage of monetary union.

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<sup>102</sup> See Bull EC 12-1

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However Germany was unable to ratify pending the outcome of a legal challenge brought by a group led by Manfred Brunner, former *chef de cabinet* of Commissioner Martin Bangemann. They claimed that ratification would violate the German constitution. The new Art 23, which had been specifically amended to accommodate the TEU, stated that Germany could participate in the EU "which is committed to principles of democracy and the rule of law, social and federal principles and the principle of subsidiarity and guarantees a protection of basic rights substantially comparable with this Basic Law". The case was not decided until October 1993 so I will deal with the events in the interim as the resolution of the case removed the last impediment to the TEU coming into effect.

As discussed above at 4.3.6, the Edinburgh European Council made a "clarification" of subsidiarity through an "annex" to the TEU. It sought to change the political landscape to make Community action less likely.<sup>102</sup> One of the major goals of the annex was to provide something which Danish leaders could take back to their constituents and say: "Here is how the TEU has been changed for you". Ironically, Britain held the Presidency in the second half of 1992 and Denmark in the first half of 1993. The British Presidency was willing to try to accommodate Danish wishes as far as possible. The Decision of the European Council made some "interpretations" which addressed Danish concerns, and acknowledged some *de facto* "opt outs" on the single currency and defence on matters which were already present in the treaty<sup>103</sup>

The Danish government fell in early January 1993 but the new Social Democrat-led government was just as committed to ratification. A second referendum on 18 May resulted in a "Yes" vote of 56.8%.<sup>104</sup>

Britain now had no further excuse for delay, but the ruling Conservative Party threatened to split on the issue. Some called for a referendum. The bill remained

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<sup>102</sup> See Bull EC 12-1992, point I.15.

<sup>103</sup> See D Howarth "The Compromise on Denmark and the TEU: A Legal and Political Analysis" (1994) 31 *CMLRev* 765.

<sup>104</sup> A constitutional challenge to ratification *Carlsen* was decided on 6 April 1998 I361/1997. It upheld Danish ratification.



before the Parliament until the result of the second Danish referendum and several votes were desperately close. A separate vote on the Social Protocol was forced. The bill was passed. The vote on the Social Protocol was lost, but a consequent motion of no confidence in the government also failed. The House of Lords passed the bill on 20 July. There was then a legal challenge by Lord Rees-Mogg on the grounds that ratification would exceed the Crown's prerogative by alienating some sovereign powers and acting without parliamentary approval on others.<sup>105</sup> This case was dismissed and Britain finally submitted its ratification on 2 August 1993.

That left only the German *Bundesverfassungsgericht* between the treaty and its entry into force. On 12 October, it handed down its decision which held that the treaty was indeed compatible with the Basic Law and could thus be ratified.<sup>106</sup> However the court made some observations on the nature of the EU which are very interesting and were discussed in Chapter 2. They are to the effect that the EU is a union of states, not a state itself and that ultimate democratic legitimacy resides in the Member States. Of most concern was that the court also indicated that if future changes to the EU violated the Basic Law, the court would have the power to declare them invalid in Germany. Ten years later, this threat still hangs over EU constitutional development, but two subsequent treaties have been ratified with much less difficulty. On the other hand, they were not as momentous as the TEU.

## 4.5 FROM MAASTRICHT TO AMSTERDAM

### 4.5.1 *The National Positions*

With this combination of a messy treaty and messy ratification process, the TEU came into force on 1 November 1993. Already built into it was a review in 1996, now not very far away. The main achievement of the TEU, provision for monetary union, looked unlikely to be realised, and the treaty had been portrayed

<sup>105</sup> *Guardian Weekly* July 25, 1993 p9.

<sup>106</sup> *Brunner v The European Union Treaty* Cases 2 BvR 2134/92 and 2159/92 [1994] 1 CMLR 57.

in the media as far more times for further integration. Better things to come too far, the public in monetary union was respond to the continuing

The European Parliament even while voting in much more to do. The negotiations for the Institutional Affairs Committee in February 1993 it was a reminder that the process. The recommendations were much more moderate

Further developments for monetary union. It would not proceed on January 1999.<sup>107</sup> This States as many of the be unpopular. It would to soften these measures fiscal powers to the E

The German Christian a "hard core" which

<sup>107</sup> The EP voted in favour many criticisms. See

<sup>108</sup> OJ C61/155 10 February

<sup>109</sup> EP Resolution 19 March

<sup>110</sup> Bull EU 1995/6.

<sup>111</sup> S Aaronsvitch and

in the media as far more sweeping than it really it was. These were not propitious times for further integration, but there was a treaty to implement and the hope of better things to come from the review. For the Eurosceptic, the TEU was a bridge too far, the public response demonstrated the legitimacy of their cause, and monetary union was looking impossible. Also, CFSP was not helping the EU to respond to the continuing crisis in Yugoslavia.

The European Parliament had already indicated its dissatisfaction with the TEU even while voting in its favour.<sup>107</sup> Many members clearly thought that there was much more to do. The 1996 revision gave them something to aim for, as did the negotiations for the accession of Austria, Norway, Finland and Sweden. The Institutional Affairs Committee of the EP adopted a Constitution of the European Union in February 1994,<sup>108</sup> and although it was not adopted by the full Parliament, it was a reminder that the Parliament could still provide leadership in the reform process. The recommendations for the revision actually adopted by the Parliament were much more modest and did not even refer to a "constitution".<sup>109</sup>

Further developments in the course of 1994 and 1995 did not look encouraging for monetary union. The Cannes European Council of June 1995 decided that it would not proceed on the first possible date of 1 January 1997, but therefore on 1 January 1999.<sup>110</sup> This required considerable political courage by the Member States as many of the necessary measures to satisfy the convergence criteria were be unpopular. It would have been logical for the Member States to seek some way to soften these measures either by modifying the criteria or by granting larger fiscal powers to the EU, but instead they kept monetary issues off the agenda.<sup>111</sup>

The German Christian Democrat foreign affairs spokesman Karl Lamers proposed a "hard core" which would proceed at speed to further integration to ensure that

<sup>107</sup> The EP voted in favour of ratification on 7 April, 1992. Its resolution was long and contained many criticisms. See OJ C 125 18 May, 1992.

<sup>108</sup> OJ C 61/155 10 February 1994.

<sup>109</sup> EP Resolution 19 May, 1995.

<sup>110</sup> Bull EU 1995/6.

<sup>111</sup> S Aaronovitch and J Grahl "Building on Maastricht" in Gowan and Anderson op cit p181.

both widening and deepening continued.<sup>112</sup> This received wide publicity and was met with concern by people in some of the Member States unlikely to be in the hard core but not wishing to be left behind. Lamers also stressed the German argument that economic union must be accompanied by political union.<sup>113</sup> The TEU had spoken of such union but had not achieved it in practice.

Negotiations for the accession of Austria, Norway, Finland and Sweden were concluded in early 1994. Each then held a referendum on membership. All succeeded except in Norway and the new members joined on 1 January 1995.

The accession of the three new members did not seem to have an immediate impact on EU politics. Austria and Sweden each gained four Council votes and Finland three. The Corfu European Council of June 1994 confirmed the "Ioannina Compromise" whereby if the holders of 23 to 25 votes in the Council sought to block a QMV measure, a decision would be delayed in an attempt to garner greater support. This was not as damaging to QMV as its Luxembourg counterpart, but was still a distortion of what had been agreed in the treaty.

A new Commission took office at the same time including Commissioners from the new members. Britain vetoed the Belgian Prime Minister Jean-Luc Dehaene as President but agreed to the Luxembourg Prime Minister Jacques Santer, who was no less federalist. New MEPs took their seats and new judges were added to the ECJ and TFI.

The EU continued to co-operate with the central and east European countries, but still without giving them a definite timetable for membership. They were encouraged via "Europe Agreements" to adopt EU laws but were not given free market access in their most competitive sectors.

In May 1995 French Presidential elections were held, won by the Gaullist Jacques Chirac. It had been thought that Jacques Delors might run, but he decided not to.

<sup>112</sup> K Lamers "Strengthening the Hard Core" in Gowan and Anderson op cit p109.

<sup>113</sup> Ibid p110.

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<sup>116</sup> European Parlian  
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It would have transformed the European political landscape if he had done so, as the Commission has more often been a stepping stone from national politics than to it. A President of France with such experience of the Community might have been very productive in Union constitutional terms.

The Corfu European Council of June 1994 decided to establish a "Reflection Group" to make recommendations for the 1996 revision. It comprised representatives of the foreign affairs ministries of each Member State, a representative of the President of the Commission, and two members of the European Parliament. The Reflection Group's Report is considered below.<sup>114</sup>

The December 1994 European Council at Essen decided that there would be no enlargement until the institutional reforms proposed by the IGC had come into effect.<sup>115</sup> This demonstrates that the 1996 revision was supposed to produce the changes to make eastward enlargement possible. As we will see, this did not happen.

In the leadup to the IGC, there was significant diversity in what Member States sought to achieve.<sup>116</sup> Some saw the possibility of significantly improving the EU instead of merely making minor technical changes. Most saw the need for more open and efficient decisionmaking before enlargement but the small Member States insisted on still being able to appoint a Commissioner. Some suggested downgrading or abolishing the Commission in favour of a purely executive body, with the Presidency of the Council taking responsibility for initiative. Some saw the need for a hierarchy of Union and Community laws. Some saw the need for further deepening, especially by bringing parts of CJHA and the Social Protocol into the Community pillar. A continuing problem with asylum seekers and illegal migrants kept the issue of a Community response on the agenda. Some proposed incorporation of the Schengen Agreement into the Community as one way to address this. Many wanted Community action on unemployment. Some wanted a

<sup>114</sup> Reflection Group's Report SN 520/95 pI.

<sup>115</sup> Research Paper, European Parliament IV/WIP/94/11/006 p4.

<sup>116</sup> European Parliament *White Paper on the 1996 IGC* Vol II (via internet [europa.eu.int/en/agenda/igc-home/eu-doc/parment/peen2.htm](http://europa.eu.int/en/agenda/igc-home/eu-doc/parment/peen2.htm) visited 14/01/97).

clearer demarcation of Community, Union and Member State powers. Some wanted a greater involvement for national parliaments. Some wanted a greater role for the Commission in foreign policy. Belgium proposed social convergence similar to the standards of economic convergence required for participation in monetary union. Some sought to enhance the provision for variable geometry for which the TEU was a precedent. Some sought this so they could integrate faster, others to opt out of integration.

Some were keen to facilitate eastward enlargement. Poorer states were concerned that this would reduce their assistance from the Community. The Greek government opposed enlargement with the exception of Cyprus.

As Spain held the Presidency in the second half of 1995, the Reflection Group was headed by a Spaniard, Secretary of State for the EU Carlos Westendorp. A Spanish document issued ahead of the Reflection group canvassed the possibility of a constitution but with the realisation that this was politically unlikely.

France assumed the Presidency at the beginning of 1995 and thus held it during its own presidential election. Centre-right Prime Minister Balladur, a presidential candidate, put forward the idea of three concentric circles: the present members of the EU, those waiting for admission, and those EU Member States prepared to go further in particular areas such as monetary union or defence. Jacques Chirac, the winner of the election, stressed the need for enlargement accompanied by strengthened institutions. In a joint letter, he and Chancellor Kohl suggested enlargement, a single area of free movement, enhanced foreign policy, and enhanced democracy via enhancement of both the EP and national parliaments.

The new Member States, Austria, Sweden and Finland, were all neutral and therefore sought to avoid compulsory involvement in EU defence activities.

In a White Paper of 12 March 1996, the British Conservative government set out a conservative position on the IGC. It stressed British national interests, especially that the EU be primarily a free trade area, favoured enlargement, rejected the idea of the hard core but advocated "flexibility and diversity": multi-speed was

acceptable with the Social Charter 1997 and it was the final terms of the Protocol.

It may be seen that the Member States

#### 4.5.2 *The Reflection Group*

The Reflection Group was a constitutional reflection group as while individual Member States The Report began with globalisation, the transition to a new arrangement for east and south

The Report spoke of Europe,<sup>117</sup> but the concept of "regional states are coming into a bloc whereas 'the east' to the eastern states mention Romania may have turned return for some

A priority for the EU to improve the

<sup>117</sup> Reflection Group

<sup>118</sup> Ibid p11..

acceptable when sought by Britain such as opting out of the single currency and Social Charter. In the event, the Conservatives lost a general election in March 1997 and it was the new Labour government under Tony Blair which negotiated the final terms of the Treaty of Amsterdam. It accepted incorporation of the Social Protocol.

It may be seen from the above that there were significant differences between the Member States. These were also visible in the Reflection Group.

#### 4.5.2 *The Reflection Group's Report*

The Reflection Group's report is of interest as a considered approach to constitutional development.<sup>117</sup> It has something of the character of a *roman à clef* as while individual positions were mentioned, it does not state who held them. The Report began by asserting the need for European integration as a response to globalisation, as argued in Chapter 1.<sup>118</sup> The European Council had suggested that the transition to the single currency, the negotiation of a new financial arrangement for the Union, transformation of the WEU, and enlargement to the east and south were the most important issues for the Group to consider.

The Report spoke of enlargement as the opportunity for a "political reunification" of Europe,<sup>119</sup> but this is a fallacy: Europe has never been politically unified. The conceit of "reunification" reinforced the idea that the central and east European states are coming "home" to western Europe from some sort of exile in the eastern bloc whereas "western Europe", including the EU, was itself a specific response to the eastern bloc. Poland, the Czech Republic, Slovakia and Hungary, not to mention Romania, Bulgaria, the Baltic states, and the "former Yugoslav" states may have turned from east to west, but this is more of a new beginning than a return for some.

A priority for the 1996 IGC set by the European Council was institutional reform to improve the efficiency, democracy and transparency of the Union and make it

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<sup>117</sup> Reflection Group's Report op cit.

<sup>118</sup> Ibid pII..

ready for enlargement. These matters should have been addressed in the TEU, but it would seem that monetary union was then the main priority and that most of the other changes were more aspirational and symbolic than substantial. To address each of the three priorities briefly as affected by the TEU: efficiency was not enhanced by the addition of a complicated new legislative procedure. Transparency was not enhanced by the three pillar structure with new areas of co-operation being undertaken *outside* the Community process. Democracy was only slightly enhanced by the new citizenship of the Union and the small new powers for the Parliament.

The Reflection Group set three main goals for institutional reform: "making Europe more relevant to its citizens; enabling the Union to work better and preparing it for enlargement; [and] giving the Union greater capacity for external action."<sup>120</sup> Of the first of these, Joseph Weiler has noted that it seems more like treating the Union as a brand to be sold rather than making citizenship a means of empowerment.<sup>121</sup> The second was laudable and vital but an enormous challenge. The third was not so much a matter of institutional reform: the Common Foreign and Security Policy process already existed. External action now depended more on political will than institutional structure.

On citizenship, the Report stated: "The Union is not and does not want to be a super-state". How had this wish been determined? It would seem a reasonable statement of the wishes of the majority of citizens as gleaned from opinion polls, but no one could speak for "the Union" as a whole on this matter.

The Report stated that the Union is based on common values: democracy and respect for human rights. If this is so, as argued in Chapter 1, it was ironic that the Union had a democratic deficit and no justiciable guarantee that it would uphold human rights. It is not surprising that some members of the Group thought that such rights should be more clearly guaranteed but "some" took the view that

<sup>119</sup> Id.

<sup>120</sup> Ibid pIII.

<sup>121</sup> J Weiler *The Constitution of Europe* (Cambridge, Cambridge UP 1999) p335.

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<sup>122</sup> Reflection Group's

<sup>123</sup> Opinion 2/94 [1996]

national governments already provide adequate safeguards for these rights".<sup>122</sup> This is a surprising view: national laws cannot guarantee that the Union will uphold fundamental rights as they have no jurisdiction over it; all Member States are also signatories of the ECHR and therefore do not believe that human rights are adequately protected by national laws alone. Some of the Group thought that the Union should accede to the ECHR but the ECJ subsequently ruled that this was impossible.<sup>123</sup> It was still possible for the Union to adhere to the principles of the ECHR and permit the ECJ to enforce this.

Some of the Group thought that such "European values" as equality between men and women, non-discrimination on grounds of race, religion, sexual orientation, age or disability should also be enshrined in the treaty. This would go further in some respects than the ECHR. These principles are wider than merely "European" and indeed are protected in many other parts of the world. It is certainly desirable that they receive protection, but it might be better to include them in the ECHR and simply apply that.

Some of the Group also recommended that the treaty recognise a right of access to public service utilities. In an era of corporatisation and privatisation, this would be a significant right. It would cut against the market thrust of so much of the ECT.

The Report noted that "many of us" thought that the Community should have competence over all third country nationals. This would certainly make border control easier and could potentially increase such nationals' internal freedom of movement, but it is unlikely that this is what the proponents had in mind. Asylum seekers are discriminating between Member States and those in high demand, principally Germany, wanted to share the burden. This issue was addressed in the Treaty of Amsterdam.

The Group's equation of an "open society" with the free market system is notable, though it also sees a role for government initiatives. The Group was unanimous

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<sup>122</sup> Reflection Group's Report op cit pIV.

<sup>123</sup> *Opinion 2/94* [1996] ECR I-1759.



that "the main responsibility of ensuring the economic and social wellbeing of citizens lies within the Member States"<sup>124</sup> which is surprising in the leadup to monetary union. The Group was divided on whether to write a specific employment goal into the treaty. Even those in favour recognised that this would not of itself create jobs. No one seems to have considered making a right to employment part of a charter of Community rights.

The Group described the European Council as "the highest expression of the Union's political will".<sup>125</sup> While the European Council remains pre-eminent, the Union will have more of an intergovernmental than a supranational base.

Some of the Group proposed more qualified majority voting in the Council, some only if votes were re-weighted to more accurately reflect population.<sup>126</sup> It sounds more democratic to re-weight the votes until one reflects that a government does not really speak for all its citizens. It would be more democratic if actual opinion on various policies were more accurately reflected in the Union's decisionmaking procedures.

The Group expressed doubt that the existing system of the six-monthly rotating Presidency would be workable in a larger Union. This is especially true if equality between Member States is maintained. I would argue that the tasks of the Presidency should pass to the Commission but it seems unlikely that the Member States would accept this even though their presidencies are decreasingly frequent.

The Group identified two possible approaches to reforming the Commission for enlargement: continuing the arrangement of at least one Commissioner per Member State or deciding the optimum number of Commissioners then having them chosen by the President from a list provided by the Member States. The second option is preferable as it fits the organisation for its tasks rather than distorting it to satisfy national pride.

<sup>124</sup> Reflection Group's Report op cit pV.

<sup>125</sup> Id.

<sup>126</sup> Ibid pVII

The Group did not think a catalogue would make sense. It might also restrict voting in policy areas and a number thought that an effective separation of powers

Declaration 16 attached should be a hierarchy of those proposing such acts and those opposing and the Commission. The opponents argued that directives, decisions have direct effect, therefore the matter is within the Community institutions.

The issue of the meeting of the IGC. This "committee" name. It would be a weak power, but while the Commission must remain. The Group found a compromise.<sup>127</sup> in the Treaties and

On the issue of co-operation Auditors and European Court that much of the framework

<sup>127</sup> Ibid p35.

<sup>128</sup> Id.

The Group did not favour cataloguing the Union's powers in the treaty.<sup>127</sup> A catalogue would make the treaty resemble a national constitution more closely but might also restrict what the Community could do in a way that the combination of policy areas and a power like the then Art 235 does not. The Group may have thought that an elaboration of subsidiarity would suffice to fix the vertical separation of powers.

Declaration 16 attached to the TEU had postponed consideration of whether there should be a hierarchy of acts to the 1996 IGC. The Group was divided between those proposing such a hierarchy of constitutional, legislative and implementing acts and those opposing it as making the Council a second parliamentary chamber and the Commission an executive. Of course to some, this is a recommendation. The opponents argued for retention of the existing system of regulations, directives, decisions and recommendations. Given the development of the law on direct effect, there is an argument for more directly applicable legislation. If a matter is within Community competence, it should be legislated by the Community institutions for the Community as a whole.

The issue of the method of implementation of legislation had also been referred to the IGC. This "comitology" is one of the labyrinths which gives the EU a bad name. It would be logical to abolish it and give the Commission full executive power, but while the Council retains some executive power, something like it must remain. The Group was divided three ways between abolition, the status quo and a compromise.<sup>128</sup> As the Group pointed out, the procedure was not enshrined in the Treaties and could therefore be addressed immediately.

On the issue of combating fraud, the Group suggested only that the Court of Auditors and European Parliament make full use of their powers and pointed out that much of the fraud for which the EU is blamed takes place at Member State

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<sup>127</sup> Ibid p35.

<sup>128</sup> Id.

level and below.<sup>129</sup> An EU financial inspectorate with full power to inspect expenditure of EU money at all levels would be a radical extension of Community power apparently not yet able to be contemplated.

On the matter of policies, "the general feeling within the Group is that the Community should try to do not more but better".<sup>130</sup> This epitomised the conservatism of the Group and the times.

On the question of external action, many members saw the problem of a division between economic action under the EC and political action under CFSP. A majority favoured international legal personality for the Union. As discussed above, the Union may have obtained that personality through practice.

The Group canvassed options other than unanimity for CFSP decisions but was unable to reach agreement.<sup>131</sup> This is a very difficult area. An EU acting by less than unanimity in international politics would be well on the way to statehood. Yet any combinations of Member States short of full participation would deprive the action of the weight of the EU.

#### *4.5.3 The 1996 IGC*

The 1996 IGC began its work in March 1996 under the Italian Presidency. It proceeded through the Irish Presidency in the second half of 1996 by the end of which a draft treaty had been prepared. Substantial agreement had been reached in areas such as internal security and the promotion of employment, but differences remained. The major aspects of institutional reform necessary to enable enlargement were not agreed. This removed much of the utility of the IGC. The election of a Labour government in Britain in early 1997 enabled Britain to accede to the Social Protocol and for it to be incorporated in the EC treaty.

<sup>129</sup> Ibid p36.

<sup>130</sup> Ibid p38.

<sup>131</sup> Ibid p42.

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#### *4.6 THE TR*

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#### *Character*

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Once again, the Dutch Presidency oversaw the completion of a treaty. The final touches were made at the Amsterdam European Council of 16 and 17 June 1997, then the treaty was "legally edited" over the summer and signed on 2 October.

#### 4.6 THE TREATY OF AMSTERDAM

The Treaty of Amsterdam ("TA") amended the TEU, the Community treaties and some related acts. It was divided into three Parts. Part One made substantive amendments. Part Two repealed obsolete provisions and made consequential amendments. Part Three contained general and final provisions including a renumbering of both the ECT and the TEU.<sup>132</sup>

The Treaty received little publicity. It was overtaken by the leadup to the introduction of the single currency. Its major achievement was the incorporation of the Social Protocol and aspects of CJHA and Schengen into the Community but it also made some incremental changes which improve democracy and transparency. Its major failure was not making the institutional changes necessary to support enlargement, necessitating a further IGC and the Treaty of Nice discussed in Section 4.7. I now consider the constitutional development achieved by the TA in detail.

##### *Character*

The character of the Union was retained. It was not explicitly given legal personality. The structure of common provisions followed by amendments to each of the three pillars was retained. Some aspects of CJHA were transferred to the EC. CJHA was renamed "Police and Judicial Co-operation in Criminal Matters" ("PJCCM").

Art 6(1){F(1)} now states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. This reflects some of the values espoused in Chapter 1.

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<sup>132</sup> In the discussion below, the new numbering is adopted with the old in curly brackets.

Part of the old Art F(1) that the Union shall respect the national identities of its Member States, now becomes Art 6(3). The EU is often accused of posing a threat to national identity, so this profession is reassuring, but what does it actually mean? It is non-justiciable, but an ECJ interpretation would be interesting. Does it mean that the EU cannot become a state? Does it mean that the EU cannot become a nation (a subjective idea anyway)? This has been discussed in Chapter 2.

### *Objectives*

Sustainable development was included as an aim in the seventh recital of the TEU. A new tenth recital resolved to establish "an area of freedom, security and justice". This was the beginning of the concept of the EU as a space in its own right.

Art 2{B} was amended to include "a high level of employment" as an objective, something which is already amply included in the idea of economic and social progress but addressed a rhetorical need to be seen to be doing something about unemployment.

The bald paragraph "to develop co-operation in justice and home affairs" was amended to: "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". It was now clearer the pillar was intended to achieve. Machinery was converted to a substantive policy.

### *Institutions*

Art 1{A} was amended to say that decisions will be made "as openly as possible", a gesture in the direction of transparency, but leaving very open the question of what is "possible".

Art 3{C} was amended to state that the Council and Commission "shall co-operate" to ensure the consistency of external activities, a matter which cannot be legislated.

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Art 5{E} included the Court of Auditors among the institutions of the EU as should have been done in the original TEU.

Art 46{L} was amended to expand the jurisdiction of the ECJ. Art 35{K.7} allowed the ECJ to give preliminary rulings on the new quasi-Community legislation produced under Title VI, discussed below. The ECJ also received jurisdiction over the processes of co-operation provided for in Title VII {VIa} on closer co-operation. The ECJ was given jurisdiction over the compliance of the Union institutions with Art 6(2){F(2)} that they must respect fundamental rights. This had been a glaring omission in the TEU which had looked like a deliberate snub to the ECJ.

#### *Powers*

A new Art 7 was inserted allowing the European Council on the motion of a third of the Member States or the Commission with the assent of the Parliament to determine by unanimity the existence of a serious breach of Art 6(1). Once it made this finding, it could decide by qualified majority to suspend "certain of the rights" of that Member State under the treaties, including its right to vote in the Council. This decision could later be varied or revoked. This was the first sanction of its kind to be written into the treaties. It is possible to see it as preparation for the accession of states with fragile new democracies. It fell short of expulsion.

This Article might have been used in early 2000 when the far right Austrian Freedom Party joined the governing coalition.<sup>133</sup> However, although the other fourteen states imposed sanctions on Austria, they did not invoke Art 7. Instead, they asked the President of the European Court of Human Rights to appoint a Commission to enquire into Austria's commitment to "common European values." This three-man Commission reported on 8 September 2000, going into detail about Austria's rights protection regime and recommending the lifting of sanctions. The fourteen then did so. This suggests that Art 7 was not yet as adapted as it might need to be to deal with possible violations. It was indeed subsequently amended by the Treaty of Nice (see below).

*CFSP*

Title V on the CFSP was amended in some subtle ways. Art 11{J.1} now states only that the Union shall define and implement a CFSP, instead of the Union and the Member States. This suggests a personality for the Union separate from the Member States even though this was still not spelt out in the treaty. The structure was improved, more logically setting out objectives, means of pursuing them, the role of the European Council, the Council, the WEU and the Commission. There is a new instrument, the common strategy, and clarification of common positions and joint actions. Art 14{J.4} allows the Council to invite the assistance of the Commission in the implementation of a joint action. It is hard to read much into this as the Commission was already "fully associated" with CFSP.

A new Art 17{J.7} described relations with the WEU in more detail while still recognizing that not all Member States are members of it. The possibility of integrating the WEU into the EU was canvassed. The "Petersberg tasks"<sup>134</sup> were enumerated in Art 17(2): humanitarian and rescue tasks, peacekeeping, and "tasks of combat forces in crisis management, including peacemaking", the last of which sounds pretty close to war. In Art 17(3), the EU could involve the WEU in the implementation of its joint positions and actions, but if the WEU was involved in "Petersberg tasks", other Member States may also choose to be involved. This looked very messy, though in practice it would presumably be no more complicated than assembling a UN force. A protocol provided for arrangements to be made within a year of the Treaty entering into force. In the event, agreement was not reached. Art 17 was again amended at Nice, where yet again it was specified that it would be subsequently reviewed.

Art 18{J.8} institutes the office of High Representative for the CFSP. This is an extra office for the Secretary-General of the Council. There is also provision for the appointment of a special representative for a particular issue. The Presidency of the Council is otherwise retained as the agent of the CFSP. There had been

<sup>133</sup> See A Duxbury "Austria and the European Union: The Report of the 'Three Wise Men'" (2000) 1 *Melbourne Journal of International Law* 169.

<sup>134</sup> See above.

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much talk of the need to appoint a person as the public face of CFSP and this has been achieved, but the continuing role of the Presidency lowers the High Representative's profile. In cases where the Member States are divided, as in the recent controversy over action against Iraq, the Heads of Government retain their prominence at the expense of both the Presidency and the High Representative, who can only speak when the Union is united.

The process of abstention in CFSP is introduced in Art 23 {J.13}. Some decisions on CFSP are still taken unanimously, but any abstentions do not prevent a decision being taken unless they constitute a third of the weighted votes in the Council. Abstainers need not apply the decision but it still will be a decision of "the Union". Adoption of joint actions and common positions and their implementation is now to be by qualified majority but a Member State can object to such a decision being taken, in which case it will be referred to the European Council which still acts by unanimity. So what looks like a step towards supranational decision of foreign policy has a built-in shackle.

While there are still two Member States which are permanent members of the UN Security Council but no EU seat, foreign policy remains a predominantly national affair. It will continue to be the site of much negotiation structured through CFSP but ultimately a matter for national decision. This was also demonstrated by Art 24 {J.14} concerning agreement with other states or international organisations. "The Council acting unanimously" was to conclude such agreements, but it was not clear whether they were to be concluded in the name of the Union or the Member States. Member States could notify the Council that an agreement would not bind them, which seemed to leave a very confused situation. Art 24 was amended at Nice (see below).

#### *PJCCM*

Title VI, the "third pillar" covering co-operation in justice and home affairs ("CJHA") was also replaced, retaining some of the previous provisions but renumbering them and adding new ones, but with many having been transferred to the Community pillar. The Title was given a new title, "Provisions on police and judicial co-operation in criminal matters", which is more explicit. The new Title



VI is also more rhetorical, stating particular objectives: safety for citizens through prevention and combat of crime, racism and xenophobia, rather than, as previously, that the Title is simply intended to further the objectives of the Union. This can be seen as an effort to engage with the public, but it is necessary to examine whether the substance matches the rhetoric.

Where the old Title stated those matters which were of "common interest", the new Title presents a more coherent set of objectives and actions designed to achieve them. Particular crimes are mentioned: terrorism, trafficking in persons, drugs or arms, offences against children, corruption and fraud.

Trafficking in persons is increasing and has been highlighted by recent tragic cases of people found suffocated in ship containers. Here is a crime that must be combated, but it is also a symptom of the desirability of the Union as a migration destination. Fighting the symptom will not counteract the cause, and there has been less emphasis in recent times on aid to source countries. Illegal migration is of concern to EU citizens and this attempt to address it only deals with part of the problem. The Union also announces its intention to fight racism and xenophobia, yet it portrays immigration as an issue of crime to be combated rather than as a humanitarian issue to be addressed. There is thus a subliminal xenophobic message reinforcing some citizens' prejudices.

Increasing trade in illicit drugs has been a predictable accompaniment to free movement of other goods. There remain significant differences in the tolerances of Member States for drug use. Such laws seem unlikely to be harmonised. The battle against illicit drugs seems to be being lost in most parts of the world but innovative solutions are unlikely to be sought at the EU level. More likely is that an anti-drug rhetoric will be espoused at EU level while individual Member States continue to pursue their different policies. It seems worth impeding the war on drugs for the sake of free movement more generally while addressing sources of addiction.

Corruption and financial institutions.<sup>135</sup> The systemic fraud and resignation has emerged but the systemic approach to combating the amounts of money susceptible to financial prevalent, are inherent

The Title addresses and customs co-operation is, there is not a been retained at the

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Art 34 {K.6}(1) p relevant government collaboration would seems unlikely to 34 {K.6}(2) prov

<sup>135</sup> See eg Tutt op

<sup>136</sup> See Curtin and

Corruption and fraud have been crimes alleged to be rife within the Community institutions.<sup>135</sup> The resignation of the Commission in March 1999 over issues of systemic fraud and personal corruption illustrated this. It is to be expected that the resignation has encouraged Commissioners to take a closer interest in these issues, but the systemic elements are hard to address. TA did not substantially contribute to combating them. The CAP, which essentially involves distributing large amounts of money for agricultural activity which is hard to verify, is inherently susceptible to fraud. The Community institutions, in which patronage is so prevalent, are inherently susceptible to corruption.

The Title addresses the objectives by the same methods as before: judicial, police and customs co-operation. It is unclear why, in a customs union such as the Union is, there is not a single customs service. An indicium of national sovereignty has been retained at the expense of the rational operation of a Community function.

There has been extensive judicial integration through the ECJ, but not in the criminal sphere. The Title is more about co-operation in the administration of justice than the integration of courts. It included (Art 31(e){K.3(e)}) possible harmonisation of some criminal laws.

The formation of a Union police force would be a rational and radical way to tackle cross-border crime. That approach was not adopted. Instead, some steps were taken in that direction in Art 30{K.2} to give Europol more power to facilitate, co-ordinate and assist in investigations. This raises the issue of the extent to which Europol is subject to the rule of law.<sup>136</sup>

Art 34{K.6}(1) provides for collaboration between Member States, including the relevant government departments. It is through central institutions that such collaboration would be consistent and co-ordinated. On such an ad hoc basis it seems unlikely to be effective, but would be a small step towards integration. Art 34 {K.6}(2) provides for the adoption of "framework decisions" which look very

<sup>135</sup> See eg Tutt op cit. and Calvi op cit.

<sup>136</sup> See Curtin and Dekker in Craig and de Burca *Evolution* op cit p129.

like directives by another name. The article stresses that they "shall not entail direct effect". This entails the creation of a shadow Community which is not conducive to a coherent legal order. Art 35{K.7} giving Member States given the option of whether to submit themselves to the jurisdiction of the ECJ to give preliminary rulings on the validity and interpretation of framework decisions and conventions made under the Title invites fragmentation of the rule of law. Art 36 {K.8} provides for a similar Co-ordinating Committee to that for CFSP. The Commission is fully associated with the activities covered by the Title and under Art 39{K.11} the European Parliament must be consulted. This brings the measures closer to being Community law but they are still not Community law. The closeness only increases the confusion.

Art 40{K.12} allows the Council to authorise the use of the institutions, procedures and mechanisms of the Community for closer co-operation by Member States. As with CFSP, a single Member State can object and have the matter sent to the European Council.

Under Art {K.14}, the Council can vote unanimously to bring PJCCM matters within Community competence (the old Art K.9), the so-called *passerelle* or one-way bridge from co-operation to Community.

#### *Closer Co-operation*

A new Title VII{VIa} is inserted to cover "closer co-operation" in general. This mirrors the procedures set out in Art 40{K.12} for closer co-operation in criminal justice but adds some requirements: more than half the Member States must be involved, the rights of non-participants must not be affected, and any Member State must be free to join. Art 44{K.16} specifies that when the Council is used to adopt acts and make decisions, all Member States may participate in deliberations but only the participants in the co-operation may vote. This seems to bring the procedure as close to Community procedure as possible and gives non-co-operating states the opportunity for both information and input. If there is to be this degree of flexibility, it is best that it be as close to the Community process as possible. The Community process itself has already had to tolerate a certain amount of variable geometry, and it may have been possible to include these

flexible arrangements inside the Community conditions to enable *acquis communautaire*

The special arrangements are able to be dispersed the possibility of such flexibility a permanent the constitutional

#### *Geographical Application*

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#### *Temporal Application*

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#### *Constitutional Changes*

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TEU Art N(2) which method of amendment requirement for a constitutionmaking

#### *Amendments to the*

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flexible arrangements in the Community process. Now there is flexibility both inside the Community and outside it. A new Art 11{5a} of the ECT provides conditions to enable the new forms of "closer co-operation" while preserving the *acquis communautaire*.

The special arrangements adopted in the Social Policy Protocol of the TEU were able to be dispensed with when Britain agreed to full participation, but the possibility of such arrangements has now been made a permanent feature. Making flexibility a permanent feature of the EU constitution contradicts a key feature of the constitutionalism espoused in Chapter 1.

#### *Geographical Application*

The creation of "an area of freedom, justice and security" has a geographical dimension though it seems more a state of mind. Control of borders and territory is a state-like characteristic.

#### *Temporal Application*

TA did not amend the provision that the TEU was concluded for an unlimited period, but it did foreshadow further amendment as discussed below.

#### *Constitutional Character*

The Treaty of Amsterdam has no continuing existence apart from its amendments to the TEU and Community treaties. Its constitutional effects have been described.

TEU Art N(2) which had prescribed the 1996 IGC was deleted but otherwise the method of amending the treaties by IGC was retained. A Protocol set out the requirement for another IGC to deal with institutional reform. The rolling constitutionmaking exercise rolled on to its next port, Nice.

#### *Amendments to the European Community Treaty*

Most of the amendments to the ECT concerned transfer of some CJHA provisions and incorporation of the Schengen *acquis*. The amendments to the ECT were effected by TA Art 2. A new recital added education and life-long learning to the preamble. EC Art 2 was amended to add as objectives sustainable development, equality between men and women, a high degree of competitiveness in economic

performance, and protection and improvement of the environment. These changes indicate a broader, more socially minded Community. The new Art 6{3c} adds to this by requiring the integration of environmental protection in all Art 3 policy proposals. Art 3(2) goes some way towards enacting the commitment to gender equality, though in a non-enforceable way. The insertion of "competitiveness" as well as convergence in economic performance suggests that some felt the need to reassert a neoliberal agenda. Competitiveness and convergence are somewhat antithetical but it is possible to satisfy both. There was also to be a new coordinated strategy for employment.<sup>137</sup>

Many articles were amended to specify co-decision under Art 251{189b} instead of co-operation under Art 253{Art 189c}, a modest step forward for parliamentary democracy.

A new Art 13{6a} gives the Council the power, acting unanimously on a proposal from the Commission and after consulting the European Parliament, to take action against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This looks like the basis for a bill of rights without actually requiring one. The requirement of Council unanimity and mere consultation of the Parliament, together with the stipulation that the action be within the limits of existing powers, makes for only a modest advance in rights protection.

A new Art 16{7d} is inserted making cryptic reference to "services of general economic interest" and requiring the Community and Member States to "take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions". This is expressed to be without prejudice to Arts 73{77}, 86{90} and 87{92} which regulate government assistance to monopolies. It reflects the difficulty of trying to apply market principles to a mixed economy. It seems to affirm a belief in the provision of public services by governments but does not transfer any to the Community. They are to continue to be subjected to

<sup>137</sup> New para 3(1)(i).

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<sup>138</sup> See L Ha  
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<sup>139</sup> Arts 61 {7

scrutiny for compliance with competition policy.<sup>138</sup> Art 16 is buttressed by a Declaration acknowledging the jurisprudence of the ECJ in the area.

Art 17{8}(1) is amended to add that citizenship of the Union will complement and not replace national citizenship. It is not possible for a citizenship based entirely on national citizenship to replace national citizenship. Nevertheless, it seems that the public were thought to require some reassurance. The adoption of "citizenship of the Union" and a common cover for Member State passports has apparently led to some confusion. Examination of the contents of the passport should have dispelled this error. It is unfortunate that the new citizenship seems to have been more a source of anxiety than pleasure.

There is a small addition to citizens' rights in a new paragraph in Art 21{8d} giving citizens the right to write to the institutions and be answered in their own language, provided that it is an official language. It seems unlikely that this was not already done in practice. It affirms citizens' right to communicate in their own language and thus does not advance the cause of a *lingua franca*. It could be seen as positive for multiculturalism however.

A new Title IV{IIIa} is inserted in Part 3, entitled "Visas, asylum, immigration and other policies related to the free movement of persons". This enables Council to legislate provisions for free internal movement of people and common conditions for entry to the Union together with measures in police and judicial co-operation.<sup>139</sup> This has been a prominent political issue with the recent significant flows of asylum seekers and illegal immigrants into the EU. If there is to be freedom of internal movement, there must be agreement on conditions of entry from outside. The Schengen Treaties had achieved co-operation on this outside the Union structure. Title IV{IIIa} brings the Schengen approach within the Community. Common rules are to be enacted for entry conditions, checking procedures, visas, including a common list of which third country nationals

<sup>138</sup> See L Hancher "Community, State and Market" in Craig and de Burca *Evolution* op cit Chapter 20 pp721-743.

<sup>139</sup> Arts 61{73i} and 62{73j}.

require them and eventually a uniform visa. It is not clear whether this would be a Union visa or one issued by each Member State. Under Art 63{73k}, the Council is within five years of TA coming into force to legislate criteria to decide which Member State is responsible for determining an application for asylum. This reflects the sensitivity of the area. It will be an internal EU conflict of laws regime rather than a single regime to decide the claims of asylum seekers. The Council is to establish minimum standards for various procedures relating to asylum seekers and is to "promote a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons". Here we see the underlying rationale for the Title but not what can be done to achieve it. Some Member States are more attractive destinations for asylum seekers than others. A uniform claims procedure would reduce the temptation of forum shopping, but asylum seekers can still try to choose in which country they will live. One way to share the burden would be a single system of asylum seeker benefits paid from EU resources. This might be a forerunner of an EU social security system.

Measures dealing with immigration are closely allied to those regarding asylum seekers, but there are important differences. States do not seek asylum seekers but they do sometimes seek immigrants. The Council is also to adopt measures on conditions of entry and residence, including for third country nationals living in one Member State for living in others.<sup>140</sup> These measures are necessary if internal freedom of movement is to be secured.

Art 65{73m} provides for measures to promote judicial co-operation in civil matters with cross-border dimensions. This seems potentially a significant step for upholding legal rights in the single market.

A protocol spells out the method for integrating the "Schengen *acquis*" into the framework of the EU. Special arrangements are made for Denmark and different special arrangements for Britain and Ireland, which never signed the Schengen treaties. Bringing the Schengen *acquis* into EU law enables use of Community procedures but has entailed another exercise in variable geometry. To complicate

<sup>140</sup> Art 63{73k}(3) and (4).

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A new Title X provides for international criminal in an area where

Title XI{VIII} which was left cautious. Sensitivity employment, and of pay, rights of

<sup>141</sup> *Opinion 1/94* [

<sup>142</sup> This despite women.

matters further, Norway and Iceland, which together with the EU constitute the European Economic Area, have also agreed to participate in the free movement regime.

A new Title VII{VIa} on employment is inserted. It requires co-ordination of employment policies by Member States and allows the Community to set guidelines but does not enable major Community initiatives. It is thus another example of being seen to be doing something about an intractable problem without actually giving the Community the power to do very much.

A new paragraph is added to Art 133{113} to allow the Commission to negotiate international agreements on services and intellectual property. This had been the subject of a case before the ECJ on whether the Member States as well as the Community had to accede to the GATT agreements on services and intellectual property.<sup>141</sup> The ECJ held that some aspects were still within the powers of the Member States. They could now decide unanimously to grant them to the Community.

A new Title X{VIIa} on customs cooperation is inserted. A new Art 135{116} provides for measures to strengthen customs cooperation but not affecting national criminal law or the administration of justice. This seems a weak measure in an area where the Community should be strong.

Title XI{VIII} is significantly strengthened by the insertion of the Social Chapter which was left as a messy protocol in the TEU. It has very laudable aims but is cautious. Sensitive matters such as social security, provisions on termination of employment, and industrial representation, must be decided unanimously. Matters of pay, rights of association, strike and lockout may not be dealt with at all.<sup>142</sup>

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<sup>141</sup> *Opinion 1/94* [1994] ECR I-5267

<sup>142</sup> This despite the longstanding Art 141{119} provision ensuring equal pay for men and women.



Art 280{209a} is amended to give the Community power to legislate against fraud rather than simply coordinating Member State efforts.

### *Institutions*

Art 189{137} was amended to provide that the number of members of the European Parliament could not exceed 700. This was one of the few preparations for enlargement, in the form of a pre-emptive limitation. While it is true that even 700 is a very large number and larger than almost all democratic parliaments, the population after enlargement could be over 400 million, a number for which 700 seems a rather small representation. This number was further amended in the Treaty of Nice so the issue will be discussed further in 4.7.

Art 207{151}(3) provides for publication of documents, votes and explanations of votes of the Council when it deems itself to be acting in a legislative capacity. This is a step forward for transparency but it still seems grudging and cautious. It is complemented by the new Art 255{191a} which provides access to official documents subject to conditions to be laid down by the Community. It is on those conditions that the effectiveness of the measure will depend.

There is a slight change to the procedure for appointing the Commission. The Member States now appoint the Commissioners *by common accord* with their nominee for President instead of simply *in consultation* with that person.<sup>143</sup> This should give the nominee greater influence over the composition of the Commission which may give it greater political coherence, but the interests of the Member States, which are still likely to have a diversity of political views, will still have to be accommodated.

An addition to Art 219{163} reinforces the idea of a more political Commission by stating that it "shall work under the political guidance of its President". This seems a bizarre interference with the independence of the Commission and seems unlikely to have any effect in practice. The President is first among equals and while able, as discussed in Chapter 3 in relation to Jacques Delors, to use

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<sup>143</sup> Art 214{158}(2)

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The Court of Auditors is given the right to protect its prerogatives under Art 230{173}, a further step towards equality with the other institutions. Its powers are also slightly increased in Art 248{188c}.

The co-decision procedure under Art 251{189b}, to which several procedures are converted by TA, as mentioned above, is itself amended. It is simplified by the Council obtaining the Parliament's opinion before making its first decision. It is further simplified in paragraph 6 by providing that if the Conciliation Committee cannot agree on a text, the proposal will fail. This simplification and shortening seems another positive step for parliamentary democracy.

A new Art 309{236} is inserted to apply to the Community the measures which can be taken to suspend the rights of a delinquent Member State under TEU Art 6{F.1}(1) discussed above. TA Arts 3 and 4 make the necessary consequential amendments to the ECSC and EAEC.

TA Art 5 amends the Act concerning the direct election of members of the European Parliament of 20 September 1976. It provides that "appropriate representation" of the peoples of the Member States be ensured. Whether this could be ensured with a cap of 700 is debatable.

Part Two of TA is entitled "Simplification". Arts 6 to 8 deleted lapsed provisions of the three Community treaties and made consequential amendments. Art 9 repealed the essential features of the Convention on Common Institutions and the Merger Treaty while leaving their effect intact. Quite large swathes of articles concerning the transitional provisions establishing the common market were repealed. This opened the way for a renumbering effected by Art 12 which does not seem worth the trouble it has caused. One effect was to renumber provisions just introduced by the TA itself.

There are several protocols. Some have been referred to above, especially the protocol incorporating the Schengen *acquis*. A protocol incorporated the Birmingham and Edinburgh Declarations and Interinstitutional Agreement on Subsidiarity to assist in its interpretation. I would suggest that the difficulty with subsidiarity still lies with its application rather than its interpretation. A protocol determined that a further IGC would be held on institutional matters at least a year before membership reached twenty. In the event, it was held earlier.

#### *Ratification*

The Treaty of Amsterdam was ratified with little fanfare over the course of 1998 and early 1999 and entered into force on 1 May 1999. During that time, much more attention was paid to the preparations for monetary union which commenced on 1 January 1999 for the eleven Member States involved.

#### *The Treaty of Amsterdam as Constitutional Development*

TA was a mixed bag for constitutional development. It was an improvement to bring much of CJHA and the Schengen *acquis* within the Community pillar. There were some small improvements to CFSP and creation of the PJCCM pillar which was both the remains of CJHA and an intensification in key areas. The provisions for flexibility were a potentially backward step. There were some small improvements in parliamentary democracy. There was some improvement in rights protection with expansion of ECJ jurisdiction. There was some improvement in federalism with the ability of Member States to engage in closer co-operation, but it would be an unstable federalism. Multiculturalism was not advanced except to the extent that cultural differences were preserved.

The great failure of TA was lack of institutional reform to enable enlargement, which necessitated an IGC only the year after it had come into force.

### **4.7 THE 2000 IGC**

As noted, TA had been expected to prepare the EU for the next enlargement but had failed to do so, postponing the difficult institutional reforms to an IGC to be

held in the year of the  
"first wave" of enlargement  
being ratified, pre-empting  
admission of new members  
for a new IGC to be held.

At the Helsinki IGC was established  
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measures needed for enlargement.

The IGC began its work  
concluded at Nice  
to be pursued, but the IGC was not held.

It was unfortunate that the IGC was not held.  
While it was delayed, the IGC was not held.  
constitutional reforms and the success of the IGC in 2004.

One of the most significant failures of the IGC was the resignation of the IGC in response to a report of the Commission, the IGC was corrupt.<sup>146</sup> Some of the IGC's work was the Parliament was not held.

<sup>144</sup> Protocol on the IGC  
<sup>145</sup> Conclusions of the IGC  
<sup>146</sup> Committee of the IGC on Allegations Regarding the IGC, March, 1999.

held in the year before membership of the EU reached 20.<sup>144</sup> Negotiations with a "first wave" of applicants started in March 1998. During the year, as TA was being ratified, pressure built to finalise the institutional arrangements enabling the admission of new members. The Cologne European Council of June 1999 called for a new IGC to resolve the institutional questions of enlargement.

At the Helsinki European Council in December 1999, the agenda for the 2000 IGC was established. It was to determine the makeup of the Commission, weighting of votes in the Council, any extension in QMV, and any consequential measures needed to implement the Treaty of Amsterdam.<sup>145</sup>

The IGC began its work in February 2000 with the aim of drafting a treaty to be concluded at Nice in December. A Charter of Human Rights for the EU was also to be pursued, but outside the IGC in a Convention.

It was unfortunate that the IGC was given a tight timetable and a restricted brief. While it was desirable to bring new members in soon, a more thorough constitutional revision was needed, as demonstrated by the pursuit of the other reforms and the subsequent provision in the Treaty of Nice for yet another IGC in 2004.

One of the most notable political developments since the signing of TA was the resignation of the Commission in March 1999. The Commissioners resigned in response to a report which found incompetence, corruption and nepotism within the Commission, though it did not find any individual Commissioner to be corrupt.<sup>146</sup> Some saw the resignation as an overreaction, but it seemed likely that the Parliament would have voted to censure the Commission, forcing it to resign.

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<sup>144</sup> Protocol on the Institutions with the Prospect of Enlargement of the EU.

<sup>145</sup> Conclusions of the Helsinki European Council.

<sup>146</sup> Committee of Independent Experts (Report to European Parliament) First Report on Allegations Regarding Corruption, Mismanagement and Nepotism in the Commission 15 March, 1999.

It had been widely thought before these events that Parliament's power to censure the Commission was too drastic to be used.<sup>147</sup> Now it is clear that the Parliament will use that power if sufficiently provoked. It thus appears that the accountability mechanism for the Commission does work, albeit in an extreme situation. The event also revived the debate about whether Commissioners should be individually accountable or whether the ethos of collegiality should continue to prevent this. The resignation damaged the prestige of the Commission and made it a less significant actor in the reform process.

In the pursuit of enlargement, there is the risk that inherent flaws in the present system will unravel the whole project. The low turnout at the 1999 European Parliament elections<sup>148</sup> indicated a combination of disenchantment and indifference in the electorate which the EU could not ignore. There was an urgent need for institutional reform to make the EU more visible, comprehensible, transparent, effective and accountable. Only then would it be ready for enlargement.

The 2000 IGC was a potential "constitutional moment".<sup>149</sup> The imminent accession of a large number of comparatively poor states required constitutional reform. The enlargement will transform the Union. Constitutional architecture will have a crucial effect on how that transformation works. It was time for a new architecture and a new method of building, but the institutions and Member States seemed determined to follow the paradigm of constant reform of the existing structure.

The structure has been significantly developed in the course of the EU's development, but the method of pursuing change has not. The Treaty of Nice ("TN"), like all its predecessors, was a treaty between sovereign states, negotiated behind closed doors. The European Parliament has been more involved in the negotiations since the TEU. In the 2000 IGC there was a concerted attempt to

<sup>147</sup> Including by the author.

<sup>148</sup> Turnout was the lowest since direct election began.

<sup>149</sup> See B Ackerman *op cit*.

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consult the public,<sup>150</sup> but the process was still basically interstate bargaining. Indeed, the political arm-twisting at the Nice summit demonstrated that state power politics is as alive in the EU now as it ever has been.

It seems unfair and undesirable that the applicant states were not permitted to participate in the IGC. The Union was being shaped for them and yet they were very peripheral participants.<sup>151</sup> I consider below what constitutional values they might bring to the EU in Chapter 5. They will now have to await enlargement to shape the constitution.

The euro made its debut on 1 January 1999 and while it initially declined spectacularly in value, it has since recovered. The ECB was able to maintain price stability but economic growth and unemployment remained problematic.

On 28 September 2000, Denmark voted not to join the euro bloc. Once again, Denmark had dealt a blow to integration. It was apparently too soon before the Nice European Council meeting for this to lead to a major reappraisal of how to increase public support for integration. On the positive side, Greece satisfied the convergence criteria and joined the euro zone on 1 January 2001.

The EU approached Nice in an atmosphere of scepticism tempered by hope. The conditions for enlargement had to be achieved to avoid a huge failure, but there seemed little appetite for more ambitious reform.

The IGC was assisted in its deliberations by an expert report prepared at the request of the European Council by the former Belgian Prime Minister Jean-Luc Dehaene, the former German President Richard von Weizsäcker and the former British minister Lord Simon.<sup>152</sup> They were asked to explore the issues on the

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<sup>150</sup> This was a process conducted through public fora and internet discussion.

<sup>151</sup> The Cologne European Council called for "an appropriate exchange of views...within existing fora". The applicants were kept informed of the progress of the IGC and their leaders were at Nice, but they were not participants in the European Council meeting or the conclusion of the treaty.

<sup>152</sup> J Dehaene, R von Weizsäcker and D Simon *The Institutional Implications of Enlargement*, Report to the Commission 18 October 1999.

agenda rather than recommend specific solutions. They suggested restructuring the treaties to make them easier to understand and not requiring so much amendment.<sup>153</sup>

The report identified problems in the existing workings of the Council, Commission and Parliament. It took for granted that the Commission must have representation from all Member States and considered the solution for this unwieldiness to be greater power for the President and individual accountability of Commissioners.<sup>154</sup> It considered that the treaties should enshrine the right of the President to ask a Commissioner to resign, an arrangement already achieved informally by the new Commission President Romano Prodi.<sup>155</sup>

On Parliament, the Group recommended establishing a basis for the allocation of seats.<sup>156</sup> This issue, and that of vote weighting in the Council, raise the basic issue of how democratic the Union is to be. Unfortunately, the Group provided no answer. Rather than seek to enshrine a principle, they left the decision to political pragmatism.

The Group pointed out the difficulty that enlargement will cause to the ECJ and the Court of Auditors. If every institution is to have representatives from all Member States, representation is being given a higher priority than functionality. The supranational institutions should be the right size for their function and staffed by the best people available, regardless of nationality.

The Group had doubts about the system of "closer co-operation" set out in TA. They considered it a desirable goal which might need different provisions to facilitate it. The European Council at Feira in June 2000 added "closer co-operation" to the IGC's agenda.

The Group observed that all the matters before this IGC were also before the 1996 IGC, so there was a wealth of material to work with and a quick conclusion

<sup>153</sup> Ibid p5.

<sup>154</sup> Ibid p7.

<sup>155</sup> Id.

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<sup>156</sup> Ibid p9.

<sup>157</sup> See Finland's 15/12/02).

<sup>158</sup> Confer 4748/00

should have been possible. They suggested that the Commission prepare a draft treaty as a means to swift conclusion of the IGC. This is a well tried, successful negotiation tactic, extensively used by Monnet, as seen in Chapter 2.

They also observed that there are many institutional procedures which do not require treaty amendment but which need to be reformed before enlargement. These procedures are as important as the treaty provisions for successful working of the system.

The IGC proceeded in comparative openness with discussion papers used in meetings also published on the official web site. Private individuals and groups were welcome to make submissions, but there was no guarantee that these would be heeded.

The European Parliament in its resolution of 13 April 2000 proposed a double majority in the Council: of both Member States and population. It advocated extension of use of the co-decision procedure, further simplification and bifurcation of the treaties into a basic treaty of objectives, rights and processes, and a second treaty setting out policies in detail, an idea also supported by the Dehaene Group.

In the IGC proceedings, there were clear differences of opinion. The Member States put forward their views in discussion papers. Finland had drafted the agenda on which the Helsinki European Council decision was based. It favoured extension of QMV, one Commissioner per Member State, and a re-weighting of votes.<sup>157</sup>

Austria, which had been subjected to sanctions by the other Member States when the right wing Freedom Party joined the national government early in 2000, proposed amendments to the Art 7 TEU procedure for suspension of a member.<sup>158</sup>

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<sup>156</sup> Ibid p9.

<sup>157</sup> See Finland's submission to the IGC (via internet [europa.eu.int/archives/igc2000](http://europa.eu.int/archives/igc2000) visited 15/12/02).

<sup>158</sup> Confer 4748/00.



In its general position submitted in February,<sup>159</sup> it called for every Member State to have a Commissioner and for Commissioners to remain of equal status. It observed that collegiality and efficiency depend more on management than size.<sup>160</sup> Austria was willing to consider an adjustment in the weighting of votes to compensate the larger states for their loss of a second Commissioner. It suggested a majority of the population should be required for a qualified majority but opposed any increase in the required percentage of weighted votes from 71%.<sup>161</sup> Austria favoured an extension of QMV, not least to discourage "inappropriate linkages", a reference to the deals done to secure unanimity.<sup>162</sup> It proposed some additional items for the agenda: the individual responsibility of Commissioners, co-decision for the European Parliament in all matters decided by QMV, reform of the ECJ to cope with enlargement, allocation of seats in the European Parliament, and changes to CFSP and the Charter of Rights.

The Benelux countries made a joint submission.<sup>163</sup> They proposed more power for the President of the Commission to deal with a larger Commission still comprising a Commissioner for every Member State, bifurcation of the treaty, and a strengthened CFSP. They also proposed conditions for closer co-operation because the conditions imposed in TA were too restrictive.<sup>164</sup>

They canvassed the possibility of dissolution of the European Parliament before the end of its term but did not say who might do this.<sup>165</sup> It is traditionally a power of a strong executive. Where, as in the EU, the government does not depend on a majority in the Parliament, it is hard to justify a power of dissolution. But even if the Commission were to become more accountable to the EP, this would not be an argument for a power of dissolution.

<sup>159</sup> Confer 4712/00.

<sup>160</sup> Ibid p5.

<sup>161</sup> Ibid p6.

<sup>162</sup> Ibid p7.

<sup>163</sup> Confer 4721/00.

<sup>164</sup> Ibid p3.

<sup>165</sup> Id.

The Danish position maintaining the qualified majority to represent a majority of QMV on some matters providing some mechanism for the Charter of Rights should be maintained.

The Commission proposed to provide lists. This mechanism is supranational by all means (although it would be based on nationality). A parallelism between MEPs even more difficult voting.

Like the European Parliament and Council. This can be seen as a democracy and Member States. In 2000, statistics were provided by states representing 51% with 28 states in the two types of qualified majority of states in a Commission proposal 205(148). The percentage 71%. The paper recorded 'objective' or 'purely

<sup>166</sup> Confer 4722/00.

<sup>167</sup> Ibid p3.

<sup>168</sup> Ibid p4.

<sup>169</sup> Ibid p5.

<sup>170</sup> Confer 4728/00.

The Danish position<sup>166</sup> was based on its submission to the 1996 IGC. It suggested maintaining the qualified majority vote at around 70% but requiring that this also represent a majority of the population. Denmark was sympathetic to an extension of QMV on some matters.<sup>167</sup> It favoured every state retaining a Commissioner but providing some means for individual accountability.<sup>168</sup> It considered that the Charter of Rights should be 'political' rather than legally binding.<sup>169</sup>

The Commission proposed that part of the Parliament be elected from Europe-wide lists. This might achieve the objective of making the EP genuinely supranational by allowing people to vote for someone of a different nationality (although it would be possible to field a 'Europe-wide' list of people of the same nationality). A paradoxical problem with Europe-wide lists is that they make MEPs even more distant from the voters even as they come closer through direct voting.

Like the European Parliament, the Commission proposed a double majority in the Council. This can be described as the 'federal' option as it combines majoritarian democracy and Member State representation. In a Presidency paper of March 2000, statistics were provided to show that a qualified majority could be reached by states representing 58% of the Union's population, but that this would drop to 51% with 28 states if the present proportion were retained.<sup>170</sup> There are presently two types of qualified majority: a vote on a Commission proposal only requires a majority of states in addition to the required number of votes. A vote other than on a Commission proposal also requires a two-thirds majority of states under Art 205{148}. The percentage of votes required for a qualified majority is presently 71%. The paper recognised that the possible approaches to this issue are either 'objective' or 'purely political'.

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<sup>166</sup> Confer 4722/00.

<sup>167</sup> Ibid p3.

<sup>168</sup> Ibid p4.

<sup>169</sup> Ibid p5.

<sup>170</sup> Confer 4728/00.

The European Council had linked reweighting to the need to compensate the larger Member States for no longer being able to nominate a second Commissioner.<sup>171</sup> This is rather dubious logic when the IGC is considering whether some states could be deprived of the right to nominate a Commissioner at all. It is also doubtful that additional votes in the Council really compensate for the loss of a Commissioner, but then having a Commissioner is not supposed to be a national advantage.

The French Presidency began in July and put aside the question of numbers in the Commission to concentrate on its internal organisation. After the summer break, the IGC returned to the difficult issue of the extension of QMV.

On 20 September, the Presidency noted that neither a linear extrapolation of the present distribution of seats in the European Parliament nor the European Parliament's proposal of strict proportionality to population but with a minimum of four seats per state had achieved a consensus.<sup>172</sup> An unprincipled compromise would therefore be necessary. The paper also considered the extension of co-decision and whether to create a hierarchy of acts.

On 13 and 14 October, the Biarritz European Council was held. This was an informal meeting so no written conclusions were issued. An online report indicates that institutional reform was discussed, that it had already been agreed to transfer many measures to QMV, and the principles for "reinforced" or "enhanced" co-operation.<sup>173</sup> The size of the Commission and reweighting of votes were clearly proving extremely intractable.

The meeting approved the content of the Charter of Fundamental Rights which would be formally proclaimed at Nice. The Charter is considered below in 4.7.3

<sup>171</sup> See Protocol to Treaty of Amsterdam.

<sup>172</sup> Confer 4771/00.

<sup>173</sup> See [europa.eu.int/igc](http://europa.eu.int/igc). This was the new name for "closer co-operation"

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While the IGC was running, national leaders continued to articulate their own visions for the EU. The German Foreign Minister, Joschka Fischer, a Green, speaking "in a personal capacity" in May 2000, outlined a federal vision combined with the possibility of a hard core of more rapid integrators.<sup>174</sup> This controversial statement was condemned by the French minister Jean-Pierre Chevènement<sup>175</sup> and did not gain much support elsewhere. It highlighted the lack of vision displayed by other European leaders. Heading into a reform and enlargement which was hoped to transform the EU, the leaders seemed incapable of developing a new paradigm.

## 4.8 THE TREATY OF NICE

### 4.8.1 The Treaty Provisions

The Nice European Council was scheduled for 7 to 9 December 2000. It was announced at 4.45 on the morning of 11 December that the terms of the Treaty of Nice had been agreed. This was in keeping with the marathon negotiating sessions at other IGCs. It demonstrated the EU at the mercy of the self-interest of the Member States. The Treaty was subsequently signed on 26 February 2001 but did not enter into force until 1 February 2003 after Irish voters initially rejected it.

The greatest achievement of TN was agreement on a formula for reweighting of votes in the Council and other institutional arrangements which will allow new Member States to accede.<sup>176</sup> The outcome was very much a pragmatic compromise but it also contained some principle. The larger Member States had insisted on enhanced power in the Council to reflect their greater population and loss of a second Commissioner. This was gained but Germany was willing to allow the other three largest Member States to have the same number of votes as itself despite its significantly greater population. The question was then to what extent parity should be retained among medium and small states. Belgium held

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<sup>174</sup> J Fischer *From Confederation to Federation: Thoughts on the Finality of European Integration* (London, Federal Trust, European Essay No 8, 2000).

<sup>175</sup> Chevènement accused Fischer and Germans more generally of seeking a return to the Holy Roman Empire and of not having come to terms with Nazism. *The Economist* 3 June 2000 p54

out for the same number of votes as the Netherlands but eventually settled for one less.

Another preparation for enlargement was amendment of Art 7 of the TEU to provide for the a third of the Member States, the Commission or Parliament to take pre-emptive action where there is a risk of a violation of Art 6 instead of only after the violation has occurred. The Council may vote by four-fifths to make such a declaration and recommend appropriate action. It would have been interesting to see whether such a provision would have been applied to Austria in the crisis discussed above.

A significantly amended TEU Art 17 stresses the restrictions on the Common Foreign and Security Policy. Para 4 allows for closer co-operation in the area. Such closer co-operation is more elaborately regulated by the principles in the new Arts 27a to e.

Art 24 now allows for some international agreements to be concluded by QMV. This is significant given previous emphasis on unanimity in matters involving sovereignty, but only if it is actually used.

An amended Art 29 gives a treaty basis for the European Judicial Co-operation Unit "Eurojust" which had been proposed at the Tampere European Council.<sup>176</sup> This will provide a framework for investigative, prosecutorial judicial administrative assistance in the fighting of cross-border crime. There are consequent amendments to set out its tasks in Art 31. Provisions on enhanced co-operation are also inserted into this Title in Arts 40 to 40b.

Titles VII is amended to replace the "Closer Co-operation" of Amsterdam with the "Enhanced Co-operation" of Nice. An act of enhanced co-operation must involve at least eight Member States and may affect neither the *acquis*

<sup>176</sup> Treaty of Nice (2001) OJ C 80/1.

<sup>177</sup> COM(2000) 746.

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<sup>178</sup> Art 43(i).

*communautaire* nor the "Schengen *acquis*".<sup>178</sup> Enhanced Co-operation is inserted into the ECT by the amendment of Art 11 and insertion of a new Art 11a.

Enhanced Co-operation institutionalises variable geometry in the EU. While it means that integration need not proceed at the speed of the slowest, it also sacrifices a unified *acquis*. The *acquis* has already been fragmented, but it does not seem a good idea to do so further. As this is, however, the trend, it seems likely to lead to divisions based on wealth. New members may be admitted, but they may be unable to qualify for many of the advantages of closer integration.

ECT Art 18 on free movement is amended to allow for some measures by co-decision but excludes regulation of the matters most conducive to free movement. These are addressed further in Art 67, already subjected to transitional provisions in the Treaty of Amsterdam. Once again, the emphasis is on the exclusion of sensitive matters from Community regulation. Some matters are postponed to an IGC in 2004.

EC Art 100 is amended to allow assistance for Member States suffering natural disasters. This is a good example of solidarity in action. The article emphasises that it is not to allow financial bail out, reinforcing the intended rigour of financial management. It is a pity that a provision on solidarity is so harshly hedged.

Art 133 on the Common Commercial Policy is slightly amended to emphasise that international agreements must be compatible with the Community's internal law. The Community can negotiate agreements on areas within the Member States' competence, but these must be concluded by unanimity. Agreements on trade in cultural, audiovisual educational, social and health services must still be concluded as mixed agreements. France particularly insisted on this provision to protect its culture.

Art 137 on social protection is slightly amended, with both some appearance of extension and some explicit exclusion. There is to be no movement towards a

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<sup>178</sup> Art 43(i).

common basis for social security. An important basis for citizenship and solidarity is thus to remain fragmented. Industrial policy under Art 157 is to have no effect on the rights of workers, another blow to common social protection.

A new Art 144 establishes a consultative committee on social protection comprising representatives of Member States and the Commission. Given the caution on social security harmonisation, this committee does not seem a significant development, but its work may lead to harmonisation in due course.

Art 161 on structural and cohesion funds is slightly amended to allow for QMV in 2007 if funding arrangements to 2013 have been concluded. This was insisted on by Spain, keen to ensure the continuation of its cohesion funding. It does not bode well for new members.

#### *Institutions*

The maximum number of MEPs is increased under Art 189 to 732 in accordance with the Protocol on Enlargement. I argued in Section 4.5 that 700 was too restrictive. The new figure is an insufficient increase. Art 191 allows the Council to regulate EU-level parties by co-decision, including funding them. This may enable Europe-wide parties to become a reality but it is more likely that a change in the electoral system to Europe-wide lists or candidacy would be the necessary motivation.

Art 230 is amended to give the EP a full right to bring actions for annulment. Art 300(6) now also allows the EP to request the opinion of the ECJ on a proposed international agreement. The EP at last obtains standing befitting its institutional status.

Art 207 provides for the appointment of the Secretary-General of the Council by QMV. This figure has added importance as the High Representative of CFSP. More importantly, QMV is also applied to the nomination of the Commission by the Council meeting as the Heads of State and Government. These measures appear to be an assertion of power by the large Member States.

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The President is given enhanced powers under Art 217 to determine the internal structure of the Commission and the distribution of portfolios, and to remove a Commissioner with the approval of the rest of the Commission. This last power seems to render redundant Art 216, with its more complex procedure to compulsorily retire an incompetent Commissioner. It makes individual Commissioners more accountable to the Commission itself.

Arts 220 to 230 and Art 245 on the ECJ and TFI are amended. The ECJ is to have a judge for every Member State, the TFI at least one from each. The ECJ will grow yet more unwieldy. The TFI is more suitable for expansion. Another significant amendment is the possible addition of "judicial tribunals" to the TFI. These are specialised tribunals to decide disputes in particular areas. They could considerably reduce the workload of the courts. There would be appeal to the TFI. A protocol enacts an amended Statute for the ECJ and TFI.

The Court of Auditors acquires the right to defend its prerogatives under Art 230. Under Art 247, it is to comprise one national of each Member State, appointed by QMV. Declaration 18 calls on the Court and national audit bodies to improve their co-operation, but no new powers are granted.

Art 257 on the Economic and Social Committee is amended to incorporate the fairly new term which describes what the Committee has been all along: "The representatives of organised civil society". Consumers are also specifically mentioned. Organised civil society has been reasonably successful in its involvement with the EU policymaking process. It is the citizens at large to whom the Union must reach out.

Art 263 on the Committee of the Regions is amended to provide that its members must hold an electoral mandate at some regional or local level. This is a step towards making the Committee a genuinely accountable body which could then demand more power, but it is only a small step.

A protocol quietly disposes of the remaining assets of the ECSC, which came to an end in 2002.



#### *4.8.2 The Protocol on Enlargement*

The proposed arrangements to carry out the institutional reforms necessary to enable enlargement are contained in a Protocol annexed to both the Union and Community treaties. From the 2004 elections, representation in the EP will change. Germany will remain with 99 but France, Italy and Britain will reduce to 72 and the smaller states except the Netherlands and Luxembourg all reduce slightly, except that depending on the number of new Member States, numbers may be adjusted to bring the total as close as possible to 732. If new members join after these numbers have been determined, the number shall be temporarily allowed to exceed 732. These changes were uncontroversial. It is unfortunate that representation in some Member States has to be reduced to accommodate the new members within an unnecessarily restricted number.

The reweighting of votes in the Council was much more controversial. This time the large Member States agreed to retain their parity, but at 29 votes each instead of 10. The large states now have nearly three times as many votes as the medium sized instead of twice as many before TN. Spain received 27 instead of 8, a significantly better deal. There is presently parity between the medium-sized Member States, but this was broken with the Netherlands receiving 13 votes and Belgium, Greece and Portugal only 12. Austria and Sweden each receive 10, Denmark, Ireland and Finland 7, and Luxembourg 4. One way to gauge the democratic quality of this compromise is to look at the number of people per Council vote in each Member State. There is a spectacular range with Luxembourg on 100,000 and Germany on 2.83 million. These are extremes. Britain, France and Italy are all around 2 million. Most of the rest are under a million. The Council is a compromise between federalism and democracy which will always be difficult to draw.

169 votes are now required for a qualified majority, continuing also to require a majority of Member States on a Commission proposal or two thirds otherwise.

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The decision must also be carried by countries comprising at least 62% of the Union's population.<sup>179</sup> Thus there are triple hurdles to a qualified majority.

The issue of the Commission has not been solved. The larger Member States give up their second Commissioner from 2005 but the new Member States will each get one. When the number reaches 27, a system of rotation, yet to be devised, will be used. It is a major step that even the large states are prepared to give up the right to a Commissioner but even rotation puts national pride ahead of the quality of Commissioners. Rotation is to be strictly equal but must also reflect the demographic and geographic character of the Union. It will be difficult to achieve and will enshrine an unsatisfactory principle.

The Protocol is complemented by Declaration 20 covering representation of new members in the Parliament, Council, Ecosoc and the Committee of the Regions. Reweighting was, after all, carried out for the specific purpose of enabling enlargement. Poland received the same number of MEPs and votes in the Council as Spain. Romania would form a new category with 33 MEPs and 14 Council votes. The Czech Republic and Hungary get only 20 MEPs when their size would suggest 22, but 12 Council votes like their western counterparts of a similar size. Bulgaria would join Sweden and Austria on 10 Council votes but Sweden will have 18 MEPs to the others' 17. Slovakia joins Denmark and Finland on 13 MEPs and 7 Council votes. Ireland and Lithuania also have 7 Council votes but only 12 MEPs. Latvia, Slovenia, Estonia and Cyprus join Luxembourg on 4 Council votes but Latvia will have 8 MEPs, Slovenia 7 and the others only 6. Malta, with a population only slightly smaller than Luxembourg, gets one less Council vote and one less MEP.

There are many more issues to be decided before enlargement can take place, some discussed in Chapter 5, but these calculations are a vital piece of architecture. Their importance is revealed in Declaration 21 on adjustment of the qualified majority. It can rise to 73.4% but when all the proposed members have

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<sup>179</sup> This threshold can be requested by any Member State: Protocol Art 3.

joined, it will decrease slightly. In practice, ten new Member States will join at once in 2004.

Declaration 22 provides that from 2002 half of the European Council meetings will take place in Brussels and after membership reaches 18, all will do so. While this strengthens Brussels' position as capital of the EU, it is a blow for decentralisation. The use of geographical titles for treaties is also a reminder of European diversity and the peripatetic European Council shows that the EU is much more than "Brussels".

Declaration 23 on the Future of the Union is discussed in Chapter 5.

#### *4.8.3 The Charter of Fundamental Rights*

The Charter of Fundamental Rights of the EU was formally proclaimed at Nice, but it has no legal status. One of the proposed items for the next IGC is to decide whether to give it legal status. It is pertinent to ask the point of such a Charter. I have argued that the EU should accede to the ECHR, though it presently lacks the power. The ECJ has developed a significant case law of human rights protection and they are a vital element of a modern constitution, but the Charter does not add to them. It reaffirms rights as they result from the constitutional traditions and international obligations of the Member States, the TEU, the Community treaties, the ECHR, the Social Charters, the case law of the ECJ and European Court of Human Rights.

A threshold problem even if the Charter was to be legally binding is that many matters most closely affecting human rights are within the jurisdiction of the Member States. It is therefore important that the Member States have all acceded to the ECHR but it again raises doubt as to the necessity of an EU document as distinct from one binding both the Member States and the institutions of the EU. A document binding only the institutions could be more tightly drawn than the Charter given their limited powers. I briefly consider some of the provisions:

Art 1 requires respect and protection for "human dignity". If this means, among other things, a right to a basic income, it has the potential to be significant.

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Art 2(1) declares that everyone has the right to life. Art 2(2) outlaws the death penalty, but it is not clear how Art 2(1) is meant to affect the unborn child.

Art 3 declares some laudable principles for medical treatment and biology. Arts 4 and 5 outlaw torture, cruel punishment and slavery, unlikely to be problems for the EU. Art 5(3) "trafficking in human beings" is a huge problem for the EU and needs to be addressed more vigorously than by this provision.

Art 8 gives a right to the protection of personal data. This is an especially necessary right in the information age, but how is it to be enforced?

Art 11 giving freedom of expression "regardless of frontiers" has the potential to be a significant right. Does it mean the "right" to own a Europe-wide television station for example?

Art 17 gives the right to property including compensation for deprivation.

Art 18 gives a right of asylum to refugees. Art 19 protects them against various forms of removal. These protections will be of some comfort if the Union gains responsibility in this area.

Art 20 declares equality before the law and Art 21 prohibits discrimination on various grounds. These are vital but must be acted on. Art 22 states that the Union shall "respect" cultural, religious and linguistic diversity which is less than granting enforceable rights to their exercise. Art 23 requires that equality between the sexes be ensured but gives no guidance as to how.

Chapter IV then moves to various rights for workers. The more significant of these are very cautiously worded to be subject to national laws.

Art 33 affords "the family" legal, economic and social protection. Part of such protection is against discrimination in employment due to parenthood. There are no more detailed family welfare provisions. Art 34 covers social security and again retreats behind national laws. Arts 35 and 36 on access to health and other

essential services also defer to national laws. Arts 37 and 38 on environmental and consumer protection reproduce existing Community protections.

Chapter V on citizens' rights reproduces the EP and municipal voting rights introduced by the TEU. Art 41 introduces the interesting "right to good administration", including natural justice, access to personal data, the right to reasons for decisions, compensation for damage caused by the Community, and correspondence in one's own Member State language. Art 42 gives a very broad right of access to the documents of Community institutions. This is not set about with exceptions and implementation. Will it ever become law?

Arts 43 and 44 reproduce the rights to complain to the Ombudsman or petition the EP. No additional powers are granted to the Ombudsman.

Art 45(1) reproduces the right of free movement and residence for citizens but without the limitations set out in Art 18(1) ECT. This would indeed be a right befitting a citizen of the Union.

Chapter VI covers justice. It grants in relation to the judicial system similar rights to those for good administration in Art 41. They are similar to the procedural rights in the ECHR and as declared by the ECJ.

Art 51 declares that the Charter is addressed to the institutions of the Union and only applies to the Member States when they are implementing Union law. Application to the Member States would thus be fraught with difficulty. It does not establish any new power or task for the Community or Union, though it does appear to establish some new rights for citizens if it ever gains the force of law.

Art 52 allows for limitation of the rights and freedoms by law, subject to the principle of proportionality in the "general interest" or to protect the rights of others. This seems to leave considerable leeway for limitation. Art 53 declares that the Charter does not adversely affect any other rights.

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#### *4.8.4 Ratification*

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The Charter seems to be primarily an exercise in public relations. As indicated above, it has been for the most part narrowly drawn and with provision for limitations. The Member States should not have been worried to enact it as law except for its confusing overlap with existing schemes of rights protection. As its legal status is one of the items for the next IGC, I will consider it further in Chapter 5.

#### 4.8.4 *Ratification of the Treaty of Nice*

TN was signed on 26 February 2001. One of the first Member States to attempt ratification was Ireland, which required a referendum in order to make constitutional changes to accommodate it. Ireland was the only country which held a referendum on TN. The referendum was held on 7 June and was defeated. There was only a 34% turnout, of whom 54% rejected the treaty. It was almost a replay of the Danish rejection of the TEU in 1992 with some commentators in some larger states immediately bemoaning how one small state could hold back fifteen. Indeed it was potentially more as enlargement had appeared to depend on TN. In fact, enlargement could proceed without TN by including necessary provisions in the Accession Treaty. That was legally feasible but not politically acceptable.

It was quite difficult to find a way to re-present TN to the Irish people. The "No" vote seems to have been based on several objections. The most significant is thought to have been a supposed threat to Ireland's neutrality by the possibility of an EU "Rapid Reaction Force". This was countered by assurances that neutrality was not threatened. There was a perception in the rest of the EU of Irish ingratitude after being such a heavy net recipient of subsidies. Irish voters might indeed have seen the accession of ten poor states as leading to an end to its subsidies. There could be no answer to this but to appeal to solidarity with the new members. The Irish government concentrated on wooing voters who had not turned out the first time and this strategy seems to have worked. On 19 October 2002, in a second referendum, Irish voters approved the treaty, enabling it to enter into force on 1 February 2003.

#### 4.9 THE STATE OF THE UNION

With the Treaty of Nice having only just come into effect on 1 February 2003, with a massive enlargement set for 2004, to be followed by an IGC on further constitutional development, 2003 is a good year to take stock of the state of the Union. As it approaches ten years of operation, what has it become? Discussion of its legal nature above indicates that this is still a matter of dispute and uncertainty. Although provision had been made for enlargement, major issues of distribution of powers, rights protection, institutional involvement, and comprehensibility remain. These were only the issues mentioned in the Declaration on the Future of the Union attached to TN. They are constitutional issues and there are others to be outlined in Chapter 5. In short, the EU is still searching for a better constitution.

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## CHAPTER 5

### REFORMATION

At the dawn of a new millennium, the EU faces fascinating possibilities. It has achieved the long-awaited goal of monetary union, at least for twelve of its fifteen members. It has become a supranational polity. It is about to accept ten new members with more to come. It has embarked on another round of constitutional reform to follow enlargement. There is now yet another opportunity to formulate a good constitution for the Union, or indeed to reconstitute it as the Commonwealth proposed in Chapter 1. In terms of the cathedral metaphor, this would amount to a reformation, still retaining the cathedral but with some architectural changes, new underpinnings, and different forms of worship.<sup>1</sup>

The first major challenge is enlargement. Negotiations with the ten prospective members have now concluded, with the Treaty of Accession due to be signed in April 2003, providing for admission on 1 May 2004. Although the institutional arrangements are now agreed,<sup>2</sup> it will still be a major challenge for the new and existing Member States and the institutions. One may wonder if this is the appropriate time to be embarking on constitutional reform, but as the Member States have recognized, the constitutional issues are pressing. Also, the new members, having been required to accept the *acquis communautaire* and *acquis de*

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<sup>1</sup> This metaphor is inspired by Joseph Weiler "The Reformation of European Constitutionalism" in his *The Constitution of Europe* op cit pp221-237.

<sup>2</sup> See [www.europa.eu.int/comm/enlargement/docs](http://www.europa.eu.int/comm/enlargement/docs) visited 24/3/03.



*l'union as a fait accompli*, deserve the opportunity for constitutional input as soon as possible.<sup>3</sup>

Section 5.1 explores some of the constitutional implications of enlargement. Section 5.2 looks to the preparations for the 2004 IGC in the Convention on the Future of Europe and at an alternative model. Section 5.3, working from the draft constitution released by the Convention in October 2002, proposes the elements of a constitution for a Commonwealth as proposed in Chapter 1. Finally, Section 5.4 looks to how the Commonwealth might be extended beyond the present (and soon to be enlarged) EU.

### 5.1 ENLARGEMENT

The EU and the ten prospective members are to conclude an Accession Treaty in April 2003. Admission has been dependent on the outcome of individual negotiations with each applicant. This has prevented the applicants from engaging in collective bargaining. They have been required to adopt the *acquis communautaire* in its entirety. Various sectors will be subject to transition arrangements of varying duration for particular incoming states. There has been a backlash against enlargement in the Member States, most graphically illustrated by the initial Irish rejection of the Treaty of Nice discussed in Chapter 4. At the last moment, there is the war between the United States and its allies and Iraq. The war has bitterly divided the EU with Britain joining the "Coalition of the Willing" fighting Iraq and Denmark, Spain, Portugal and Italy expressing their support, while France threatened to use its Security Council veto against military action and Germany, the then Chair of the Security Council, also strongly opposed such action. The candidate states have generally expressed their support for the Coalition which may yet lead to delays in the signing of the Accession Treaty.<sup>4</sup>

The EU had various options for enlargement. It could have admitted the central and east European states much sooner, helping them to adjust to the rigours of

<sup>3</sup> Their representatives are participating in the Convention on the Future of Europe discussed in 5.2.

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membership with generous assistance. Instead, it has kept them outside, requiring them to enact the entire *acquis communautaire* before admission. The transitional arrangements negotiated on a state-by-state and sector-by-sector basis, seem more for the benefit of the existing Member States than for the candidates. The EU has provided financial assistance to the candidates, but on a fairly modest scale.

The impact of ten new members is hard to gauge, but it is absolutely and proportionately the largest enlargement yet and can be expected to have a very large impact on the Union, the new members and the existing members. It will affect both the content of the constitution and the path to its creation.

The content of the post-enlargement constitution has been partly addressed by the Declaration on Enlargement discussed in Chapter 4. I will discuss it further in 5.2. First it is necessary to consider the possible contribution of the new members to the new constitution.

It is proposed that the principle of language equality will be retained. The number of official languages could more than double. This is an essential element of equality but a major inefficiency.

The central and east European candidates have all experienced the transition from communism to capitalism and democracy, but they have responded in different ways. Rather than slavishly adopting a western model, each has adapted in its own way.<sup>5</sup> The experience of devising new democratic constitutions to serve societies and economies undergoing radical change has put them in a good position to advise on desirable changes to the EU which is also seeking to respond to a changing world and establish democratic constitutionalism.<sup>6</sup>

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<sup>4</sup> President Chirac made an intemperate outburst against such support including a veiled threat against accession which seems unlikely to be acted on. *The Observer* 16/3/03.

<sup>5</sup> An arguable exception is the former German Democratic Republic which was incorporated into the Federal Republic. Its citizens have thus already had the opportunity to participate in EU affairs.

<sup>6</sup> W Sadurski "Charter and Enlargement" (2002) 8 *ELJ* 340.

Poland is a shining example of the power of civil society to transform the political system. Its progress from martial law to a constitutional state through the action of trade unions, the Catholic Church and other actors in civil society is a reminder that these forces are a vital part of a democracy.

Hungary is an example of how gradual change can work. It was the first of the East European countries to embrace market reforms while still under communism, but it has not abandoned a role for the state in the post-communist era.

Czechoslovakia chose the remarkable dissident playwright Vaclav Havel as its President, demonstrating the possibility of a new kind of politics. The "velvet divorce" between the Czech Republic and Slovakia is a happy example of the peaceful breakup of a state by mutual consent. It may not seem to bode well for a supranational, federal future, but it was better to dissolve a state unwanted by the majority of its citizens. Now the Czech Republic and Slovakia can freely seek new associations.

Slovakia has paid a high price for the divorce. It is less developed than the Czech Republic and has been swayed by populist politics. People have been tempted to return to authoritarian rule, but these temptations have been overcome. Despite its difficulties, Slovakia has managed to remain in the front line for admission.

The Baltic states Estonia, Latvia and Lithuania may be economically underdeveloped, but they are small enough for the EU to absorb without difficulty. Rather than treat them as a unit, the EU began negotiations with Estonia first. It subsequently began negotiations with Latvia and Lithuania and all are now concluded. Estonia benefits from its ethnic and geographic closeness to Finland. The other two do not have such close connections but the three are seen by the Scandinavian countries as part of the "Baltic family". The accession of the Baltics would bring quite a large number of ethnic Russians into citizenship of the EU which may have interesting implications for EU-Russia relations. It would also bring the Russian Kaliningrad enclave to be surrounded by EU territory, raising additional problems.

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Bulgaria and Romania have been accepted as part of the "second wave". Negotiations will resume for possible accession in 2007. They have had some difficulty in making political and economic adjustments. They are also large and poor enough to require a major allocation of resources if they accede.

The countries of the former Yugoslavia have been very differentially treated. Slovenia has been accepted as part of the "first wave". It is significantly more prosperous than the other former Yugoslav states and has a close relationship with Austria which should ease its accession. Croatia applied for EU membership in February 2003. Bosnia-Herzegovina has yet to apply. Croatia has had some difficulty adjusting to democracy and minority rights. Its bid for independence was quite strongly supported by Germany and it may receive similar support for EU membership. Part of Bosnia-Herzegovina has actually been administered by the EU in the aftermath of the war. Sympathy for its suffering in the recent war might also make it a special case for early inclusion. Unfortunately, its division into two *de facto* separate states makes its further development as a state extremely difficult.

The "Former Yugoslav Republic of Macedonia", so named at the insistence of Greece, which has been able to transfer this insistence to the EU as a whole, was briefly subject to sanctions by Greece and has not applied to join the EU. It is in extreme economic difficulty due to the conflicts which have surrounded it. It also has a substantial Albanian minority which may wish to secede. It thus does not enjoy the stability which might make accession possible, but leaving it on a limb will not assist regional stability either. The EU has been active in assisting stability but membership seems distant.

The new entity Serbia and Montenegro, created in 2002 from the rump Federal Republic of Yugoslavia, is still in political turmoil and some way from being in a position to apply for membership, though membership would probably be very beneficial to its recovery. The former Serbian province of Kosovo remains in limbo under NATO occupation, seemingly unable to be returned to Serbia, given its independence, or transferred to Albania.

Albania has had too many political and economic difficulties to consider applying for membership. Although it has cast off its years of communist isolation, it still appears isolated by economic and political difficulties. Albanian accession could assist the creation of governments of cultural communities separate from territorial borders, which might address some of the current problems with the Albanian diaspora in Kosovo and Macedonia.

Cyprus has had the difficulty of being divided between the Republic and the Turkish Republic of Northern Cyprus. While reunification is not a prerequisite to admission, it would certainly have made admission easier. If Cyprus could reunify, it would be a wonderful example of the triumph of unity over ethnic diversity which could inspire the whole EU. It might also ease the admission of Turkey in due course. Most recent developments suggest that reunification will not be possible in the immediate future but accession is set to proceed regardless.

Malta could prove that a microstate can hold its own in the EU. Luxembourg has already shown that this is possible but is a special case being at the geographical heart of Western Europe and a founding member of the EU. Malta is right on the edge, a further step towards the Maghreb. With a culture which has absorbed many influences, Malta will add to the EU's diversity while sitting comfortably within the polity.

Turkey remains the longest standing applicant with the least prospect of accession. Its accession could be the beginning of the transcendence of Europe discussed in Chapter 1 and further below. Negotiations for its admission are supposedly to begin in 2004 but there remains entrenched opposition in some quarters of the EU. Turkey's possible involvement in the war in Iraq may yet further complicate its prospects for admission. Turkish admission would give the EU a border with Iraq which might be regarded as too close to a deeply troubled area. Turkey may be destined to remain a buffer state for the EU.

Accession was originally being negotiated in two "waves". The "first wave" consisted of Poland, Hungary, the Czech Republic, Estonia, Slovenia and Cyprus. Negotiations with these states began in March 1998, with a view to admission in

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2003. Negotiations with the "second wave" began in February 2000. Now, negotiations have been concluded with Estonia, Latvia, Lithuania, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Cyprus and Malta. Barring last minute problems, the Accession Treaty will be signed on 16 April 2003.

The former communist candidates had first to address the "Copenhagen criteria"<sup>7</sup> for accession: democracy, rights protection, a market economy, and acceptance of the *acquis communautaire*. Acceptance of the *acquis* has been an onerous task, though it is also of some assistance to new free market democracies to have a ready-made set of legislation to adopt. It does not seem to leave them much scope for local input. The EU appears to be insisting on more privatised economies than many of its Member States have. Once admitted, the new members will have the chance to persuade the EU to help to fulfil their aspirations. Wojciech Sadurski argues that the former communist states can bring the insights of experience to the constitutionmaking process.<sup>8</sup>

## 5.2 CONSTITUTIONAL REFORM AFTER ENLARGEMENT

As always, constitutional development is proceeding in the context of political and economic developments. These always make it harder to concentrate on the bigger picture. In the circumstances, it seems ambitious to contemplate major constitutional reform when the new Member States will have only just acceded. It would make more sense to set out a program for constitutional reform with a target of, say, 2010 to give time for the new Member States to settle in and for their citizens and the citizens of the Union as a whole to become involved.

It may seem surprising to suggest such a long lead time when it has been claimed that reform is so urgent but this thesis has also argued that the rolling reform program starting with the SEA has yielded a combination of incomplete reforms and postponements instead of a coherent constitution. Some have embraced this as

<sup>7</sup> See Conclusions of the Copenhagen European Council June 1993.

<sup>8</sup> W Sadurski op cit.

the glorious chaos of postmodernism. I have portrayed the EU as a modernist project and proposed a modernist reconstitution as a Commonwealth. This would be only the beginning of a new era of politics in Europe and beyond. It is no "final solution". It seeks to marry the dynamics of European integration with the more enduring constitutional values of the Member States. Integration will continue to roll and wobble as ten new members settle in and are perhaps joined by others. The challenge is to facilitate debate leading to a constitutional text which will unite a diverse polity of four to five hundred million people around some values and processes which will enable that polity to work for the good of its people and the world.

Bruno de Witte has examined what some have called the "constitutional conversations" presently taking place in the EU.<sup>9</sup> The term derives from deliberative democracy theory inspired by Habermas' discourse theory. It is more a wish than a necessarily accurate description of the interactions between constitutional actors which sometimes resemble a dialogue of the deaf. There have been distinct "conversations" between European and national court judges – what Neil Walker has called "judicial conversations" and between European institutional officials and Member State politicians – what Walker calls "political conversations".<sup>10</sup> It is the judicial conversations, explored particularly in Chapters 2 and 3, which have yielded and elaborated a constitution from the political conversation that had yielded the Treaty of Rome. That constitution has been further elaborated by politicians as outlined in Chapters 2 to 4 while national constitutional courts, especially the German BvG, have continued the judicial conversation with the ECJ. As de Witte points out, the judicial conversation is somewhat attenuated given the infrequency of references from national constitutional courts to the ECJ. The courts listen carefully to each other but the conversation moves very slowly as it may take years for a suitable opportunity to respond. Even when a response comes, it may take some years for its implications

<sup>9</sup> B De Witte "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process" in P Beaumont, C Lyons and N Walker (eds) *Convergence and Divergence in European Public Law* (Oxford, Hart 2002) pp39-57.

<sup>10</sup> See N Walker "Flexibility within a meta-constitutional frame: Reflections on the Future of Legal Authority in Europe" in G de Burca and J Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility?* (Oxford, Hart 2000) pp9-30 at 21.

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<sup>13</sup> Ibid

<sup>14</sup> Ibid p46

to emerge. Who is to say what the BvG's response will be if faced with the circumstances it warned about in *Brunner* in 1993? Joseph Weiler has suggested a Constitutional Council<sup>11</sup> consisting of the ECJ and Member State constitutional court chief justices as a way to intensify the conversation.<sup>11</sup> This would be likely to have that effect, but at the expense of narrowing the conversation excessively in both content and participation.

The political conversation moves faster though it too seldom takes place face to face. There is an abundance of face to face interaction by key players, but it is in the context of day to day decisionmaking rather than constitutionmaking. Nevertheless, the "semi-permanent" constitutional revision process of the EU has provided numerous opportunities for political conversation at both EU and national level. As de Witte points out, the conversations have been linked by IGCs and treaties throwing forward to the next IGC.<sup>12</sup> The "package deals" cobbled together in the small hours of European Council meetings account for much of the incoherence in the treaties. They are also the typical outcome of face to face conversations.

Once the treaty has been signed, the national conversations about ratification are often very different, focused almost completely on national interest and often having little reference to one another. An exception was the initial Danish rejection of the TEU which, as explored in Chapter 4, affected debate across the Community as a whole, but particularly in Britain. National conversations are crucial to European constitutional development, but they seem even harder to influence than those at the European level.

As de Witte points out, the IGCs themselves involve triple layers of negotiation: officials, foreign ministers and heads of government.<sup>13</sup> Some of the most crucial compromises have been struck by heads of government over dinner,<sup>14</sup> reminding

<sup>11</sup> See J Weiler "The Autonomy of the Community Legal Order: through the looking glass" in J Weiler *The Constitution of Europe* op cit p322.

<sup>12</sup> De Witte op cit p43.

<sup>13</sup> Ibid

<sup>14</sup> Ibid p46



us of Monnet's exaltation of the dining room.<sup>15</sup> The Commission and EP are involved to varying degrees but do not participate in the actual decisions. De Witte also talks about the "ghosts" at the table: opposition parties, sub-national governments (especially in federal systems where they may be able to veto ratification), public opinion (especially in Member States which require a referendum for ratification), national courts and the ECJ.<sup>16</sup> After all, almost every treaty revision will have implications for the national constitutional orders. Some of these ghosts then become flesh as the national conversations begin. They may be as resentful at being excluded from the table as with any particular proposal, but proposals are presented as a *fait accompli*. The Danish rejection of the TEU and the Irish rejection of TN force a slight qualification of this last point. Although the treaties were not renegotiated as a result of these rejections, they had to be "repackaged" to make it appear that concessions had been made.

There has been widespread recognition of the inadequacy of the IGC form for constitutionmaking but as yet no move to change it.<sup>17</sup> There has been some movement towards other forms of dialogue to assist it. The Reflection Group that assisted preparations for the 1996 IGC enabled a focused exploration of some large constitutional issues. The body appointed to draft the Charter of Fundamental Rights, which styled itself a "Convention", is another possible approach. Deirdre Curtin had proposed a forum drawn from "civil society" as part of the treaty revision process.<sup>18</sup> The Charter "Convention" was an improvement on the IGC process,<sup>19</sup> but it has the flavour of "guided democracy": "stakeholders" were chosen. Only election would be democratic. The heads of government of the Member States seem to have had an ancient representative model in mind when they appointed the Convention: MEPs, national parliamentarians, representatives of the Commission and Member State governments. This looks something like the

<sup>15</sup> See Chapter 2.

<sup>16</sup> De Witte op cit pp48-9.

<sup>17</sup> See eg N Walker "European Constitutionalism and European Integration" [1996] Public Law 266 at 281.

<sup>18</sup> D Curtin "Civil Society and the European Union: Opening Spaces for Deliberative Democracy?" (1999) *Collected Courses of the Academy of European Law* Vol VII Bk1 p185 at p277 cited in De Witte op cit n58.

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<sup>20</sup> De Witte ibid

<sup>21</sup> [2000] OJ C 3

Estates General summoned by Louis XVI. It decided to call itself a "convention" (though, as de Witte emphasizes, not a *constitutional* convention),<sup>20</sup> and it did not claim to proclaim the Charter. That was done by the EP, Council and Commission.<sup>21</sup> A similar technique has been used to appoint the Convention on the Future of Europe now assisting preparation for the 2004 IGC and discussed further below.

The Declaration on the Future of the European Union appended to TN declared the need for "deeper and wider debate about the future of the [EU]". This was to be encouraged by the Presidencies during 2001. The Declaration suggested *inter alia* the following questions for debate: delimitation of competences between the Union and the Member States; the status of the Charter of Fundamental Rights; simplification of the treaties; the role of national parliaments. An IGC will then be held in 2004 to consider these matters. The 2004 IGC, unlike that of 1996, will not constitute a delay to enlargement. Indeed, the new members will be able to participate.

The Declaration recognized the need to improve and ensure democratic legitimacy and transparency to bring it closer to its citizens (notably "citizens of the Member States" rather than "citizens of the Union"). This now-familiar mantra has come closer to being put into action.

The Declaration was put into action by the inauguration of a Debate on the Future of Europe early in 2001. The Laeken Declaration of December 2001 fleshed out the Nice Declaration. After restating the constitutional dilemmas confronting the Union, it announced the establishment of a Convention on the Future of Europe. Valéry Giscard D'Estaing, the former French President, is the President, Giuliano Amato and Jean-Luc Dehaene Vice-Presidents. They are former heads of state (Giscard) and government (Amato and Dehaene) and still highly respected, but now lack the power they once wielded. The remaining composition is 15

<sup>19</sup> Grainne de Burca has commented favourably on the drafting process: see her "The Drafting of the EU Charter of Fundamental Rights" (2001) 26 ELRev 126.

<sup>20</sup> De Witte *ibid* p56

<sup>21</sup> [2000] OJ C 364/1

representatives of Heads of State or Government, 30 members of national parliaments, 16 MEPs and two Commissioners. The prospective member states are also represented but are not allowed to prevent consensus, should it be forthcoming. ECOSOC and the "social partners" were also given observer status. The Convention's brief is to consider the key issues and identify possible responses. It has operated in public in Brussels. Simultaneously, a structured forum is taking place involving elements of civil society, with its input enriching the Convention.

The Convention opened on 28 February 2002. It was supposed to report within a year with either recommendations which had received consensus or options, noting their degree of support. The Convention will not report by the due date. It has given itself an extension until June 2003. It has made significant progress. I consider the Draft below.

The Convention has many desirable features. It has a wide spread of representation. It is receiving input from a diversity of sources. It has been given time to deliberate. However, it is open to criticism. It is a gathering of people with a stake in the present system. While national parliamentarians could be said to be outside the system, they have a stake in seeking to increase national parliamentary involvement. The Convention's recommendations are not binding. It has been given a wide brief, but as Lars Hoffmann points out, there are some 'safety features'.<sup>22</sup> Giscard D'Estaing has been on the scene for a very long time and his views are well known. He is likely to advocate essentially a continuation of the present system. The Laeken Declaration confidently stated that the people of Europe do not want a superstate, but the people were not actually consulted on this.

Although it is impossible to be sure what the final report and draft constitution will contain, it looks likely to be essentially the substance of the present treaties but in a single document. It will be able to lie on the table for a year before the 2004 IGC so it will have time to gain public support. It is not yet clear how

<sup>22</sup> L Hoffmann "The Convention on the Future of Europe - Thoughts on the Convention Model" Jean Monnet Working Paper 11/02 p8

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<sup>23</sup> Hoffmann *ibid* p

<sup>24</sup> Hoffmann *ibid* p

<sup>25</sup> De Witte *op cit*

conversation about it will be promoted. If it attracts little interest, it could just slip away. On the other hand, a groundswell of public support could pressure the IGC into accepting a text more radical than they would have produced themselves.<sup>23</sup> As Hoffmann points out, this draft will have the potential to be the first European constitution named as such. He also draws attention to the obstacles but considers a positive result likely.<sup>24</sup> If he is right, I suspect that the IGC will weaken the proposals. I consider it more likely that the Convention will propose an open document which will leave many hard decisions to the IGC. This would be unfortunate as the last two IGCs have been unable to make some hard decisions. It would be excellent if the Convention arrived at a draft similar to my proposal outlined in Chapter 1 and elaborated below, and if this commended itself to the IGC. If my proposal is too radical, it can wait for the attempt that I propose should start in 2004 rather than finishing with the 2004 IGC.

De Witte describes what he calls the "Philadelphian dream" of a constitutive convention.<sup>25</sup> A variant of this was Altiero Spinelli's proposal that the EP have constitutive power, a power it attempted to exercise with the DTEU, a proposal endorsed by Italian voters in 1989, and again exercised by the EP resolution of 12 December 1990 on the constitutional basis of the European Union. But as outlined in Chapter 4, the Member States proceeded with their IGC in 1990 despite the EP's resolution. The most recent attempt by the EP to formulate a constitution, the Herman proposal of 1994, only passed the Institutional Affairs Committee and was not adopted by the EP as a whole. Since then, the EP appears to have relinquished its claims to be a constituent assembly.

De Witte describes the constitutional convention idea as a "utopian scheme which is still occasionally proposed by academics of the federalist persuasion..."<sup>26</sup> As just such an academic, I must defend this position. Like my proposed constitutional model, it is only utopian until it happens! I return to my argument in Chapter 1 that the constitution must enjoy popular legitimacy and that this is a

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<sup>23</sup> Hoffmann *ibid* p11.

<sup>24</sup> Hoffmann *ibid* p15.

<sup>25</sup> De Witte *op cit* p55.

problem for the present constitution. Not only must the constitution be legitimate, a path to legitimacy is the legitimacy of its formulation.

Here is where Australia has something else to offer the EU. The Australian Constitution was drafted in a series of conventions between 1891 and 1899. The first comprised delegates from the governments of the six Australian colonies and New Zealand. It produced a draft, but this was allowed to languish through a lack of political will. Only with the revival of the federal movement through civil society did the politicians once again take up the cause and this time, the 1897 Convention comprised delegates popularly elected in each colony. This convention was able to approve a draft which was in turn approved by referendum in each colony. With the proviso that there was not universal suffrage in every colony, it would be difficult to envisage a more democratic drafting and ratification process. This legitimacy was purely political as for formal validity, the Constitution had to be an act of the British Parliament. The British government still felt entitled to make changes, but the Constitution was enacted almost entirely as drafted by the Australians.

There are clearly differences between the Australian situation at the turn of the twentieth century and the EU at the turn of the twenty-first century. One is that there is already a federal polity in existence in the EU. Another is that the Member States are sovereign states and not colonies. However, the Commonwealth requires a clear legitimacy in its own right, not derivative from the Member States. That is why it is necessary to obtain that legitimacy from the people (or peoples) directly. Many Member State politicians would no doubt be hostile to such a procedure, as were many of their colonial counterparts in Australia, but letting the people speak is the best way to get their involvement and support.

It is notable that Australia's most recent constitutional convention in 1998 was half elected and half selected by the federal government. Its proposals were not adopted. On a matter as basic as this, the people must be trusted and allowed to select their convention in its entirety.

<sup>26</sup> De Witte op cit p55.

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<sup>28</sup> See R. Good Commonwea European and

### 5.3 CONSTITUTING A COMMONWEALTH

In Chapter 1, I set out the rationale for a Commonwealth under a constitution. I also set out the values that I argued should underpin such a constitution. I proposed to build on the existing cathedral of European integration subject to the criticisms set out in Chapters 2, 3 and 4. Having argued in this Chapter that enlargement should first be effected and a new constitutional convention organised, I now turn to the desirable shape of the resulting constitution. I feel able to avoid excessive detail by arguing the need for almost all matters to be decided by the convention, but having criticised previous preparatory efforts for leaving too much to the following IGCs, I provide some detail.

I start with the Draft prepared by the current Convention.<sup>27</sup> Where it has recommended an article, I comment on that article then indicate how I propose the Commonwealth should address the subject.

The Draft is still in the form of a treaty, but "a Treaty establishing a Constitution for Europe". While I welcome the distillation of the constitution into a single document, it should be promulgated by the people of the EU (or Commonwealth) to enhance its legitimacy and establish a direct link with the people.<sup>28</sup> It should also be promulgated by the Member States as it is a federal compact.

The proposed structure of the constitution is good. Part One covers the nature of the Union, citizenship and fundamental rights, types of Union competences, institutions, legislative procedures, democratic principles, finances and membership. Part Two covers the legal bases for Union policies, essentially a restatement of the vertical separation of powers between the Community and the Member States as it presently exists. Part Three covers the transition from the

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<sup>27</sup> Presented by the President of the Convention on 28 October 2002: CONV 369/02. The draft has since been fleshed out with the reports of various working groups but at the time of writing, not all had reported.

<sup>28</sup> See R Goodin "Designing Constitutions: the Political Constitution of a Mixed Commonwealth" in R Bellamy and D Castiglione (eds) *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford, Blackwell 1996) p223 at 224.

status quo to the new constitution. I believe that this single document is preferable to two documents, one with principles, the other with detail.

The preamble, yet to be drafted, is an opportunity for some inspirational language setting the tone for the whole constitution. There is ample material from which it could be drawn. The preamble for a Commonwealth constitution would need to justify the constitution of a new entity. The need for a federal balance would also need to be expressed so as to instil confidence in the new entity while stressing that development is still possible but not predetermined.

Title 1 on the definition and objectives of the Union begins quite radically by canvassing a number of possible names for the proposed united body including "European Community", "European Union", "United States of Europe" and "United Europe". I would, of course, add "Commonwealth". The constitution should explain what the Commonwealth is: a supranational federal polity comprising its citizens and its Member States and based on their consent.

Art 4 specifies that whatever its name, the entity shall have legal personality. Given the present uncertainty about the EU as explored in Chapter 4, this proposal is most welcome. Art 1 continues in radical vein to talk of a "federal basis" for the organization – stronger than the "federal goal" not included at Maastricht. It is to be open to "all European States which share the same values". It goes on to suggest those values in Art 2, but retention of the "European" requirement begs the question as to what values are inherent in that appellation. The suggested values are: human dignity, fundamental rights, democracy, the rule of law, tolerance, respect for obligations and for international law. Few would oppose any of these. As with the similar values espoused in Chapter 1, they may be held by all participating states, but they are by no means exclusively European values. This again raises the question of why the Union should be restricted to "Europeans", leaving the suspicion of some unspoken qualities of "Europeanness" that are taken for granted. It also raises the danger that Europeans will not see enough in these values to unify around them. In Chapter 1, I balked at including values such as solidarity in the constitution. These are not values for which it is possible to

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legislate, but without them, the polity will not survive. However, it is in enabling those values to be put into action that a constitution proves its worth.

The Art 3 statement of objectives encapsulates the similar statements in the existing treaties. I would add to the use of foreign, security and defence policies to promote the Union's values in the wider world that the Commonwealth would aim to recruit like-minded states from anywhere in the world which shared its values and were able to implement its policies.

Art 5 of Title II on Union Citizenship and Fundamental Rights establishes Union citizenship and declares that every such citizen is a dual citizen of the Union and their Member State. Union citizenship is left as defined in the TEU.<sup>29</sup> The Commonwealth provision would need to emphasise the citizen's direct relationship with the Commonwealth in greater detail.

Art 6 leaves space for the relationship with the Charter of Fundamental Rights, which has yet to be determined. As I have argued, this should be replaced by adhesion to the ECHR. After enlargement, there may be scope to merge the ECHR into the EU structure as suggested by Toth<sup>30</sup> but there would still be many ECHR members outside the Union/Commonwealth and it would be better to stay in a human rights project with them than to withdraw behind walls of virtue.

Title III on Union Competence and Actions simplifies the current complexity of bases for Community and Union action. Art 7 essentially specifies the federal principles of subsidiarity and proportionality. I would add the principle of co-operation, though this is even less justiciable than the other two. Political exhortation is still permissible in a constitution.

Art 8 specifies the frequently found federal principle that all competences not conferred on the centre rest with the Member States. This begs the question of the scope of the competences granted to the centre but is essential to establish that

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<sup>29</sup> As inserted into the ECT.

<sup>30</sup> See A Toth "The EU and Human Rights: the Way Forward" (1997) 34 CMLRev 491, 512.



there is a division of competences. Although I recognise the need for a division of competences in a federal system, the emphasis should be on co-operation rather than separation. Both levels need to have their existence assured and money and power with which to bargain, but beyond this, co-operation is essential. Art 8 establishes the primacy of central law within its competences, a desirable constitutionalisation of the judicially created supremacy principle. It also incorporates provision for the transfer of powers (currently EC Art 308), another desirable feature of a federal system. This principle should be extended to the Commonwealth as well as the Member States.

Art 9 would establish categories of Union competence, presumably exclusive or shared, a glaring omission from the existing treaties which assume such a distinction without delineating it. Arts 10 and 11 would then specify which competences fall into each category. Art 12 would specify areas in which the Union may support or co-ordinate the actions of the Member States but has no competence to legislate. I do not think that this needs to be specified in the constitution as there should be no limits to the central authority's efforts in this area. Nor can I see the point of Art 13 which provides for Member States to pursue common policies "within the Union framework" without these being Union policies.

Title IV on the institutions facilitates politics through a single institutional structure. An injunction to "open, effective and unostentatious administration" is intriguing. It is perhaps meant to urge minimal government, but that should be a political decision. The Title leaves the "institutional balance" of the EU intact. While this "institutional balance" now has quite a long history, Grainne de Burca has shown that it has varied over time and is unsatisfactory from a constitutional perspective.<sup>31</sup> There should be a clear horizontal separation of powers in government between the legislative, executive and judicial branches.<sup>32</sup> While no polity has a complete separation, it is still a sound principle. The United States

<sup>31</sup> G de Burca "The Institutional Development of the EU: A Constitutional Analysis in Craig and de Burca (eds) *Evolution* op cit pp55-81

<sup>32</sup> C de Montesquieu *L'Esprit des Loix* tr T Nugent (New York, Hafner 1949).

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<sup>33</sup> ECJ Opinion on  
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constitution structures the government on these lines such that each checks and balances the others. Other states, including most of the Member States, have less clear separation, such as an executive drawn from the legislature or responsible to it. As part of the constitutionalisation and democratization process, the horizontal balance of powers in the Union/Commonwealth should be altered. The EP and the Council should be the legislature, the Commission should be the executive, the Court of Justice and TFI should continue as the judicial branch. The checks and balances could be: the Second Chamber or Commonwealth Council as a check on the First Chamber or Commonwealth Parliament, and the Commission being appointed and able to be dismissed by the Commonwealth Parliament. The Court of Justice should continue to be immune from dismissal by the Parliament but it should not have the right to veto constitutional change.<sup>33</sup> The Ombudsman, not mentioned in the Draft, should continue as a promoter of transparency and good government, enshrined in the constitution.

Art 16 covers the EP, which would be renamed the Commonwealth Parliament. The legislature in a representative democracy expresses the will of the people, though this can also be expressed directly through referendum and civic action. All the Member States have parliaments with at least one popularly elected chamber. All but Luxembourg, Denmark, Sweden and Finland are bicameral. All but France and Finland have non-executive heads of state. All have an executive responsible at least to some extent to the legislature. Most have judicial review of legislative action. Thus we may tentatively suggest that the Commonwealth should have a bicameral parliament with at least one chamber directly popularly elected and one to specifically represent the constituent states of the federation, and an executive responsible to parliament or at least to its directly elected chamber.

A cap of 732 members has been placed on the European Parliament by the Treaty of Nice. This will mean less than two MEPs per million citizens, the lowest ratio of any democracy. I would suggest allowing the Parliament to have greater

<sup>33</sup> ECJ Opinion 1/91 [1991] ECR I-6079 appears to give the ECJ scope to reject constitutional amendments.

numbers on the basis that 732 is already too large for the type of parliament operating in most Member States. A parliament of over one thousand would have to make even more use of committees and parties than the present European Parliament, but could at least prevent representation from becoming impossibly remote from citizens.

The power of the Second Chamber or Commonwealth Council would reflect the extent of federalism in the Commonwealth. Second chambers in the Member States are of very varied membership structure. As mentioned, only four Member States are unicameral. Thus even most of the unitary states are bicameral. All the federal states are bicameral and the Commonwealth would be federal so it should also be bicameral. Second chambers of federations in the EU and around the world vary between providing equal representation to constituent units and weighted representation to reflect population difference. In the EU, given the great differences in size between Member States, I suggest weighted representation for Member State governments on the lines of the German *Bundesrat*. This would preserve much of the character of the Council of Ministers but in a new parliamentary setting. As to weighting, I would suggest that it be the same as that of representation in the European Parliament but with the difference that the Member State government casts all the votes of its state. A simple majority of votes could then be used on most matters.

There is a risk of deadlock between the two chambers. This would only increase the need for consensus politics. It should not be possible for the Council to block the supply of money to the administration as is possible in Australia. The existing EC procedure should be used whereby the previous year's budget is repeated until a new one has been passed. The CP should have a fixed term of five years as the EP has at present. The Second Chamber's composition would vary with national elections so it would not need to have a term.

Arts 15 and 15bis cover the thorny issue of the European Council and its Presidency while Arts 17 and 17bis treat the Presidency of the Council separately. There seems a danger of too many Presidencies when at present there are too few. The present concurrent Presidency of the Council and European Council for six

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months seems designed to prevent useful work being done. On the other hand, presidency of either of these bodies based on something other than a rotation of Member States makes little sense since they express the will of the Member States. I would propose the President of the Commission, elected by the EP and agreed by the Council for a five year term, as the setter of the central legislative agenda. The Presidencies of Council and European Council would then be of less importance, indeed I would abolish the European Council but have the Council to meet as Heads of State and Government when necessary.

The issue of a head of "state" should be addressed. This issue has caused much concern in Australia in the debate over transformation from a monarchy to a republic. Since most proponents of a republic favour preserving all the elements of the present constitutional system except the monarchy, they are forced to advocate a president who is as much like a constitutional monarch as possible. This makes selection and dismissal, two procedures not usually required in a monarchy, very vexed.<sup>34</sup> In the EU, it is not so clear that a head of state is needed, given that it is not a state. The combination of a President of the Commission, a rotating Presidency of the Council, and a Presidency of the Parliament befits such a large body. However a recurring theme in the EU is its facelessness. A single President would provide a face for the EU or Commonwealth. A directly elected but non-executive President could be the ultimate guardian of the constitution, a dignified figure commanding respect and trust who would be primarily engaged in ceremonial duties but able to refer matters to the ECJ for a ruling if a constitutional crisis occurred. This is closer to a model of presidency not used in many Member States (only Austria, Ireland and Portugal) but is also an attempt to apply in a republican system aspects of the seven Member States which are constitutional monarchies.<sup>35</sup> As mentioned above, non-executive presidents are found in six of the eight current Member State republics. They are also the norm in the candidate states.

<sup>34</sup> Of course, a mechanism for initial selection of the monarch is necessary, but after that, it is usually a hereditary position. Removal is usually not covered in the constitution.

<sup>35</sup> Belgium, Britain, Denmark, Luxembourg, the Netherlands, Spain, and Sweden.

The EU is a fascinating amalgam of monarchies and republics. It has always had a certain balance between them. Of the original six, there were three large republics and three small monarchies. The 1973 enlargement brought two monarchies and a republic. Greece, a republic, brought the numbers back to equality in 1981. Spain and Portugal added one of each in 1986. Austria, Sweden and Finland added two republics and a monarchy in 1995. If Norway had joined, it would have been two of each. Now Norway remains the only European monarchy outside the EU.<sup>36</sup> All the applicant states are republics though some are former monarchies. The EU is therefore poised to take a turn for the republican but it will still contain many monarchies. To be both monarchical and republican seems theoretically impossible, the theoretical locus of sovereignty is so different between the two. The present situation is thus a triumph of practice over theory. There is surprisingly little constitutional difference between the parliamentary democracies of the EU whether monarchical or republican, but the presence of both monarchies and republics complicates the task of creating a theoretically coherent constitutional system. I thus propose a republican constitution for the Commonwealth which could accommodate existing monarchical states.<sup>37</sup> This seems both more feasible and more desirable than an overarching monarchy. A monarchy might have advantages in terms of neutrality and charisma but it is wholly incompatible with constituent republics.

The lack of "responsible government" in the EU relieves the putative head of state of the need to invite someone to try to form a government.<sup>38</sup> I would continue to relieve the president from this role by requiring a positive vote of no confidence appointing a new Commission before the old Commission was removed. The Commission has been given the role of guardian of the treaties often given to the head of state. The President should take on this role at the highest level with a right to refer matters to the ECJ for a ruling.

<sup>36</sup> I exclude the microstate monarchies Andorra, Liechtenstein and Monaco.

<sup>37</sup> G Winterton *Monarchy to Republic* (Melbourne, OUP, 1986), p103 argues that it is possible to have monarchical constituent units in a republic. The rationale would be that the EU is a separate political entity from its constituent units.

<sup>38</sup> The EU *does* have a form of responsible government in that the Parliament can force the Commission to resign, but there is no need for presidential intervention in the formation of the Commission, even though the President of the Commission has been given such a role.

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Art 18 of the Draft covers the Commission but leaves open the question of its size. I would leave this to the President of the Commission rather than enshrining it in the constitution. The thorny issue of Member State "representation" on a body which should be supranational should be resolved through the political judgment of the President of the Commission. If a smaller group than the full body of Commissioners is desired for planning purposes, this too should be in the President's power, but decisions on legislative proposals should still be by the Commission as a whole.

Art 19 proposes a Congress of the Peoples of Europe. This appears to be code for a chamber of representatives of national parliaments. I do not believe that such a body is desirable. The EP would be the voice of the people as a whole and national perspectives could be heard through the Council. National parliaments would have a demanding role scrutinising and guiding the actions of their representatives in the Council. If there is a role for a congress of the peoples of Europe, it should be combined with that of the Committee of the Regions.

It is possible to distinguish between geographical dispersed cultural communities and geographically defined regions. If the EU is genuinely to embrace multiculturalism, an option is to create self-governing cultural communities distinct from territorial borders. This has been tried to some extent in Belgium, but there is substantial congruence of cultural and regional borders with the exception of linguistically mixed Brussels. A more radical approach would be cultural government across a whole diaspora. This would give people the choice whether to assimilate to the culture of their state of residence, or to retain links with their original culture. It carries the risk of ghettoisation but would provide cultural support for people living away from their homeland and hence encourage the integration of people through migration. The EU has consistently claimed to be promoting economic rather than cultural integration, implying that this is possible. Migration within the Union has generally not been accompanied by provisions to assist either preservation of original culture or adjustment to the culture of the new country of residence. Many people seem to fear destruction of their culture at the hands of integration, but there has been more penetration by American culture than 'Euroblandness'. As indicated in Chapter 1, I am inclined

to hope for some cultural integration, if only to foster a democratic Commonwealth political culture. This is not inconsistent with multiculturalism. It simply recognizes that cultures can develop. Supranational politics must be attempted if supranational democracy is to be achieved.

Art 23 covers the Committee of the Regions and the Economic and Social Committee ("Ecosoc"). I have discussed the possible role for the Committee of the Regions above. I have some misgivings about the role of Ecosoc. It raises the question of whether particular sectors of civil society should have privileged access to policymaking. Elements of the interests represented in the Committee should be able to get elected to the EP and others can express their opinions to the various institutions.

Art 20 covers the Court of Justice. I believe that the Commonwealth Court of Justice ("CCJ") would become too large if every Member State continued to have a representative. Depriving any Member State of "representation" would be politically difficult, but it is desirable in the interests of a workable court. The Tribunal of First Instance could be large enough to include at least one nominee from every Member State and could be expanded to form a network across the Commonwealth to hear cases involving Commonwealth law. Member State courts would be free to apply Commonwealth law or to request a preliminary ruling from the TFI. The CCJ would be the court of final appeal in Commonwealth law matters. It would still have original jurisdiction in constitutional matters.

It is a good idea to establish the Court of Justice, the Court of Auditors and the Central Bank in the same Title as is proposed by the Draft. They are all central institutions. As argued in Chapter 4, the Central Bank should have a broader mandate than just price stability so that the Union/Commonwealth can take more effective economic action. The Court of Auditors would also need more power and resources to deal with larger amounts of money being spent centrally.

Title V provides for various legislative instruments and the procedures for enacting them. I suggest that the types of instruments and procedures should be reduced to a minimum for the sake of clarity. The Commission should receive

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extensive powers of implementation subject to the scrutiny of both the Council and the EP(CP). Arts 29 to 31 envisage separate procedures in the areas of foreign policy, defence policy and police matters, preserving the present distinctions in CFSP and PJCCM. While special procedures for entering and implementing treaties are justified, endogenous legislation in these areas should be part of the general legislative framework, which could still require Council unanimity for some matters. The Commonwealth should have a criminal jurisdiction for international or cross-border crime and the necessary policing and prosecutorial powers and resources.

Art 30 covers the Common Defence Policy that the EU does not yet have. The Commonwealth should certainly have a common defence policy, but it should be confined to the humanitarian and peacekeeping tasks and self-defence and forbid action not specifically authorised under the UN Charter. The present split in the EU over whether to attack Iraq should not be allowed to hamper the development of a Commonwealth defence policy. Diplomatic language is notoriously ambiguous but all Member States should be obliged to assist a fellow member which is actually attacked while military action in the name of the Commonwealth should be possible only if unanimously authorised. While defence is almost always the responsibility of central authorities in federations, there are historical and pragmatic reasons to retain national forces in the Commonwealth but to subject their use to Commonwealth law.

Art 32 provides for a framework for enhanced co-operation, about which I have expressed misgivings in previous chapters.

Title VI is headed "The Democratic Life of the Union". Art 33 establishes the principle that "all Union citizens are equal vis-à-vis its institutions". It is not clear what this means. It seems unlikely to mean, for example, that all votes for the EP are of equal value. It is a laudable principle but difficult to give real meaning. Art 34 sets out the principle of participatory democracy but mentions "citizens' organizations" rather than just citizens themselves. Rather than leaving it to the institutions to "ensure a high level of openness", the constitution should require such openness. Art 35 provides for a uniform procedure for elections to the EP in



all Member States, which really would be a breakthrough for democracy, especially if seats were distributed according to population. The provision should go even further and provide for Commonwealth-wide voting though the exact balance between local and proportional representation is hard to strike. Given that the Commonwealth would be very large and a workable parliament unlikely to allow for less than about 500,000 constituents per member, it may be more practical to emphasise party rather than local affiliation, but the possibility to vote for an individual or a list should be given. Democracy and transparency would also be enhanced by Art 36 specifying that EP debates and the Council acting legislatively shall be public.

Art 37 would cover voting procedures in the institutions. I have sought to address this above with regard to the Council by making it a legislature with weighted votes, able to work by simple majority most of the time.

Title VII covers finance. Art 38 provides for the Union to be financed entirely by own resources. I would enhance this by giving the Commonwealth a power of taxation. This would have to be restricted as to subject matter or share of overall revenue to ensure that both the Commonwealth and the Member States had access to sufficient revenue. The way in which the central authorities have gained access to the lion's share of revenue in Australia, forcing the States to rely on regressive taxes, is cautionary. While taxation in the EU is presently overwhelmingly at Member State level, fiscal balance is crucial to a successful federation.

Art 39 requires a balanced budget thus limiting Union spending power. I would allow the Commonwealth to engage in deficit budgeting but enact a budgetary procedure to ensure that this was done responsibly. I would propose to retain the current EC procedure whereby failure to pass a new budget leads to continuation of the existing budget rather than the denial of supply. This should prevent parliamentary brinkmanship and government crisis.

Title VIII covers external relations and would need to be co-ordinated with Arts 29 and 30. I would suggest concentrating this responsibility in the Commission for matters within Union/Commonwealth jurisdiction, subject to scrutiny by the

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EP and Council. It would still be possible to have Member State involvement in treaty-making unlike in many federations.

Title IX preserves the possibility of association agreements but couched in the new language of "privileged relationship[s] between the Union and its neighbouring States". It is hard to see why association agreements should be limited in this way though perhaps "neighbouring" could be read very broadly. It is apparently inevitable that the Member States through the Union or Commonwealth would wish to pursue special relationships with some states. It would be preferable to pursue these relationships through the UN and WTO for the sake of global consistency but as I propose that the Commonwealth should expand beyond Europe, provision for association as a prelude to full membership seems prudent.

The reference in Title IX to "environment" raises an important constitutional dimension not given sufficient prominence in the draft, that of the physical environment. Care for the environment is a vital plank of policy. It must be addressed at Commonwealth, Member State and local level but is only ultimately assured by action at global level in which the Commonwealth should play a leading part.

Title X covers membership. I have already extensively argued why the Commonwealth should not be restricted to Europe, a restriction repeated in Art 43. Values are more important than geography and culture as a source of unity. If there is thought to be a limit to viable size, it should be remembered that the EU is neither the largest nor the most populous political entity in the world. The size of the Commonwealth should be limited only by the desire and ability of the Member States to adhere to its values.

Art 45 providing for suspension of a Member State is an important part of enabling the entity to uphold its standards. It is notable that there is no provision for expulsion. Art 46 establishing a procedure for voluntary withdrawal from the Union is also a desirable provision, as argued in Chapter 1.

Part Two would set out the legal bases for the Union's legislation. This would essentially reproduce the substantive provisions of the EC and EU treaties, allocating them a Title III competence and a Title V act and procedure. This would clarify and simplify the operation of the existing powers of the Community and Union. I have argued for the maintenance of the *acquis communautaire* but with an emphasis on co-operation rather than a rigid separation of powers.

Part Three would repeal the existing treaties but provide for the continuity of their legal effect. A major difference would be the effective merger of the Community and the Union. It would be appropriate for this new entity to have a new name such as the Commonwealth to differentiate it from the Communities and Union from which it is derived. The Draft does not give detail of the procedures for adoption, ratification, entry into force or revision of the treaty. It does provide that the treaty would be of unlimited duration, as appropriate for a constitution. The language article will presumably provide for the treaty to be authentic in all the official languages. While I have expressed misgivings about an organisation's ability to work in so many languages, if one is not feasible, it is better that all should be represented than that a selection of a few is made.

The procedures for adoption and revision are crucial to the legitimacy of the new constitution. As it is still to be a treaty, it will presumably have to be ratified and implemented according to Member State constitutional requirements. It would be possible to constitutionalise it further by requiring a referendum to be passed by an overall majority and in all Member States. This would be a difficult hurdle, but if crossed, a powerful source of legitimacy. Amendment could then be less onerous, but exactly how onerous is a very difficult question. The Australian requirement of an overall majority in a referendum and a majority in a majority of States has led to a success rate of less than 20%. It is possibly too onerous but it would be hard to justify a less onerous provision. A possible additional safeguard would be that if the proposal received less than 40% support in any Member State, it could not be adopted. There is a danger of smaller or poorer Member States holding the entity to ransom which might be addressed through fiscal provisions in the constitution. It might seem more within the political cultures of most of the current Member States to require only parliamentary approval. My proposal of

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referenda is to take the decision directly to the people. It is risky in the absence of better public education about the system but that has always been the excuse for elite rule.

#### 5.4 TRANSCENDING EUROPE

I have canvassed above what I believe to be a feasible way to transform the EU into a Commonwealth. Finally, I wish to explore the scope to extend the Commonwealth beyond Europe. I have stressed that the underlying constitutional values, while shared by the Member States of the EU, are not exclusive to them. The EU should be willing to accept any state which espouses those values and can implement the policies.

The EU has a strongly Western Christian heritage. Although it is ostensibly a secular institution, its expansion into the Orthodox Christian world has been slight, and will only be modestly increased by the admission of Cyprus.<sup>39</sup> The EU is poised to enter the Slavic world, but will have its path eased by the Roman Catholicism of Poland, the Czech Republic, Slovakia and Slovenia (and eventually Croatia). Hungary is also predominantly Catholic. The Baltics are predominantly Lutheran (Estonia and Latvia) and Catholic (Lithuania).<sup>40</sup> Malta is Catholic.

Turkey looms as the great test of whether the EU can expand beyond the Christian world.<sup>41</sup> The EU has agreed to start negotiations with Turkey in 2004. If Russia, acknowledged by all to be "European" is too hard to accommodate in the EU, there are many other parts of the world which would be much harder. On the other hand, there are countries beyond Europe which could fit in quite well.

<sup>39</sup> Greece is presently the only Orthodox Member State. It is notable that Orthodox states such as Bulgaria and Romania are not in the front rank of applicants.

<sup>40</sup> All these states were nominally atheist under communism but the former religions have made a strong comeback since its end. There are still many atheists and some adherents to new religions. The point is really cultural affinity rather than religious observance.

<sup>41</sup> Turkey is a secular republic but Islam is the predominant religion. If marine borders are considered, the EU also border the countries of the Maghreb. It has so far been unwilling to accept their accession.

Australia and New Zealand, North America and some of Central and South America could join, even South Africa and parts of North Africa such as Morocco. If a certain level of prosperity is also required, opportunities would be restricted, but the EU already has significant disparities in prosperity. It is hard to imagine the USA wishing to join given its power and independence but possible to imagine an independent Quebec seeking admission. There is little likelihood of a single "Western" government, but expansion beyond Europe is both possible and desirable.

Of course, there is a precedent for European global expansion in the form of imperialism. I am certainly not proposing a repeat of this, but the past provides a possible link to the future. The EU has a special relationship with many of the Member States' former colonies embodied in the Lomé Conventions and their successors. While this can be seen as a form of neocolonialism, it is certainly more benign than the old variety. Gradually bringing these countries into full membership of the Commonwealth would benefit large parts of the world.

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