Supranational Federations: The European Community as a Model[1]

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I INTRODUCTION

It was written in 1957 that 'one of the paradoxes of our time is the tendency of political organisation to run counter to the obvious need for a greater degree of global integration'.[2] This need has arguably never been stronger than in today's rapidly changing, interdependent world. Nevertheless, our century continues to be marked, not by unification, but by an increasing division and fragmentation of the political globe.[3]

Europe is the only contemporary example of a deliberate, uncoerced effort to modify the traditional model of the nation-state.[4] It is doing this by attempting to integrate twelve disparate nations within a single dynamic entity of quasi-federal character, with independent institutional structures and a distinct body of law, its own budget and resources and a set of policy-making and implementation mechanisms operating at a level above the nation-state.

The European Community, a *sui generis* structure, presents numerous challenges on several fronts. As a united single market of some 340 million people,[5] it constitutes a formidable competitor to its trade partners and raises the spectre of a 'Fortress Europe' to the outside world. Moreover, in the

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[1] The term 'European Community' refers to the three separate communities of the European Coal and Steel Community (ECSC), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC). It is the latter, as established by the Treaty of Rome 1957 and amended and supplemented by successive texts (the *Merger Treaty* (1965), the various *Accession Treaties*, the Single European Act, Regulations, Directives, Decisions etc) and case law, which forms the basis of this discussion. Note that art G(1) of the new *Treaty on European Union* omits the word 'economic' thus renaming the Community 'the European Community', a change which reflects its wider character; see infra fn 28.

[2] A J Zurcher, *The Struggle to Unite Europe 1940–1958* (Washington Square, New York University Press, 1958) Introduction, p xvii.

[3] The emergence of an ever-increasing number of new states, including the former republics of the Soviet Union and Yugoslavia, is clearly indicative of this trend.

[4] The incorporation of states into a single supranational entity is a rare historical phenomenon. If successful, Europe would be the first example of a federation entered into by sovereign nations with separate languages, cultures and ethnic identities, attempting to unite after centuries of independent development, antagonism and war (cf the Autralian and Canadian federations, also the product of voluntary agreement, whose participants were not, however, sovereign states with the same history of conflict).

[5] As a result of the absorption of East Germany into the Community the population of the Community has been raised to over 335 million in 1992.

post-Cold War era, a united, expanding Europe embracing East and West will clearly assume a central political and strategic role on the international stage.

There are internal challenges as well. As Europe advances further towards fulfilling its 'federal vocation',[6] questions as to the approach by which this may be achieved, and as to the ultimate result of the integrative process, persist amidst fears of loss of national sovereignty by some participants. In addition, there is the challenge of continuing to deepen unity while at the same time extending membership to other European nations.

These internal issues must be tackled before the Community can properly consider its place on the world stage. In the words of Jacques Delors, President of the European Commission, 'the Community will be required to give some thought to the future architecture of Europe and then see what contribution it can make'.[7] The Treaty on European Union (EUT) signed in Maastricht on 7 February 1992,[8] 'an intermediate stage in bringing into being a European Union capable of meeting the challenges of the present day' and 'the starting point for new and further endeavours',[9] constitutes precisely such an attempt.

However, the European experiment must not be regarded as an end in itself. The lessons to be learned from it are great and its successes and failures have important and far-reaching implications. As the inability of the nation-state to meet adequately the needs of its citizens for peace, security and economic prosperity becomes increasingly manifest, the European example of attempting to achieve these objectives through unity and solidarity will provide a valuable model for future global political organisation.

II THE LEGACY OF HISTORY: ORIGINS OF THE CONCEPT OF UNIFICATION AND FORMATION OF THE EEC

The vision of a united Europe has been a recurrent one finding political expression in different ways through the centuries.[10] However, calls for unity

[6] This term appeared in an earlier draft of the Treaty on European Union; see infra fns 128, 144.

[7] '1992: A Pivotal Year', address to the European Parliament published in *Bulletin of the European Communities* (Supplement 1/92), Strasbourg, 12 February 1992, p 9.

[8] The road to ratification of this document, which must occur in order for the EUT to become binding law, has been finally cleared after the handing down in October 1993 of a decision of the German constitutional court dismissing a challenge to such ratification. This occurs one year later than had been originally envisaged and after having experienced serious political difficulties, including the rejection and subsequent acceptance of the Treaty by Danish voters and its acceptance in France by the narrowest of margins, in popular referenda held in June and September 1992 respectively (discussed infra).

[9] Egon Klepsch, President of the EP, speaking at the EUT signing ceremony in Maastricht, 7 February 1992 (reported in *Agence Europe*, 7 February 1992).

[10] Eg the attempts by the Romans, Charlemagne, Napoleon and, more recently, Hitler, to impose unity by force (Zurcher, op cit, introductory chapter). The origins of the idea of voluntary unification can be traced to the French lawyer Pierre Dubois who allegedly drew up the first proposal in 1305–7. Since then some 182 of these have been documented (R H Foerster, *Die Idee Europa 1300–1946: Geschichte Einer Politischen Idee*,

amongst European nations were met with indifference, even hostility,[11] in the face of the nationalism and imperialism which dominated the early part of this century.[12]

It was the Second World War, instigated, like the First, by internal European conflicts and leaving the Continent economically and politically destroyed, which provided the political impetus for and rendered Europe receptive to the idea of unification.[13] As a disillusioned Europe, crushed and defeated and with a sharp realisation of its own weakness, commenced the painful process of reconstruction, it was evident that both the immediate aim of rebuilding the shattered national economies and the longer objective of securing peace and prosperity on the Continent, to which the Franco-German reconciliation was regarded as central,[14] would be much better served by a joint effort and a pooling of the available resources.[15]

However, even though the radical 'federal solution' had been regarded by many as the most effective, perhaps the only, means of achieving these aims,

1967), referred to in F Caportorti, H Meinhard, F G Jacobs, J-P Jacque, *The European Union Treaty: Commentary on the Draft Adopted by the European Parliament on 14 February 1984* (Oxford, Clarendon Press, 1986).

[11] Eg in 1923 Count Richard Coudenhove-Kalergi, in his *Pan Europa*, called for the formation of a pan-European federation, and in September 1929 in Geneva, the French Foreign Minister Aristide Briand presented a plan for the creation of a European Union within the League of Nations, stating that 'among the peoples like those of Europe which possess a certain geographical unity, there must also in the long run be some sort of political federation' (E Herriot, *The United States of Europe* trans R J Dingle (NY, Viking, 1930) p 49; R Coudenhove-Kalergi, *'An Idea Conquers the World* (London, Hutchinson, 1953) p 152).

[12] Eg in Britain concern lay with the Commonwealth and the maintenance of imperial unity; there was no real interest in forming federal links with the Continent. Moreover in Germany, with the death of Stresemann, who had endorsed unification declaring it a practical necessity, and with Hitler's looming shadow, 'the die was cast . . . for a nationalistic policy of revenge and aggrandizement', all in a backdrop of the severest, longest economic depression the Continent had ever undergone (Zurcher, op cit p 8).

[13] The Second World War also led to calls at the international level for the strengthening of the League of Nations, the creation of the United Nations and even a Federation of the World, as a means of combatting and eliminating the evils of nationalism and of ensuring that the atrocities experienced would never be repeated. After the War these aims were attenuated; a stronger United Nations was produced, but this was not even a confederation of states, let alone a World Government. It became quickly realized that such close cooperation as had been envisaged by the federalists was not possible except on a much smaller scale such as amongst the war-torn European nations, where a surrender of national sovereignty at that stage appeared more feasible than in other parts of the globe (U Kitzinger, *The European Common Market and Community* (London, Routledge & Kegan Paul, 1967) pp 1–2).

[14] With an independent Germany still regarded as a threat, it was thought that the only way to avert future aggression based on nationalism would be to bind Germany politically and economically within a supranational body to which large measures of sovereignty would be surrendered, thereby subjecting its policy to international controls (Kitzinger, op cit).

[15] Another factor making for unity of the politically agreeable nations of Western Europe was the rise of Soviet Communism which was gaining strength in Italy and France in the late 1940s and was reinforced by the 1948 coup in Prague and the beginning of the Berlin blockade. It was believed by many that only through political solidarity and a common defence and foreign policy would Europe be able to avert effectively this immediate common threat (Ibid).

the federal cause was met with serious impediments[16] and economic objectives ultimately superseded original aspirations for political unification. This began in 1951 with the placement under common administration of the war-torn coal and steel industries of France and Germany,[17] and culminated in the creation of the European Economic Communities by the Treaty of Rome in 1957. Significantly, these communities entailed a surrender of sovereignty by the member states to supranational quasi-federal institutions with independent powers which were, admittedly, under the very prominent influence of national actors.[18]

However, attempts to promote the supranational element in these early initiatives failed in the face of a resurgence of nationalism and the economic crises of the 1960s and 1970s.[19] In the 1980s the original vision of a united Europe began to surface once again, firstly with the Solemn Declaration on European Union of 1983, and then in the White Paper on the Completion of the Internal Market in June 1985 which called for the creation of a single internal market,[20] clearly the most decisive, concrete step towards European union since the process was initiated in the 1950s and regarded by many as the best means of emerging from the state of apathy that had afflicted the Community in the 1970s. Premised on the neo-functionalist idea that integration in the economic field would spill over in the political arena, something more likely to be acceptable to the member states than an immediate transfer of power to a supranational authority, the single market was not seen as a target in itself, but rather as initiating an irreversible process towards political union

[16] Eg in July 1944, the European Resistance Movement, in opposition to the Hitler regime, declared that, 'Federal Union alone can ensure the preservation of liberty and civilisation on the continent of Europe, bring about economic recovery and enable the German people to play a peaceful role in European affairs' (Id p 29). In Britain, the War did little to arouse enthusiasm for such schemes; she had escaped occupation and remained undefeated, 'coming through with greater self-confidence, greater pride in her national virtues and national institutions than she had known for years', while the Continent, on the other hand, had just been through the worst ordeal of its history (Id p 2).

[17] The European Coal and Steel Community, created by Jean Monnet and Robert Schuman in 1951, was the foundation stone of the political integration of Europe culminating in the emergence of a European Constitution. It sought to merge and coordinate French and German coal and steel production by placing it under the control of a common institution (the 'High Authority'), leaving membership open for any European nation wishing to join.

[18] P Murray, 'The European Community — Towards Political Union?' (1991) 20 *Melbourne Journal of Politics* 23, 24.

[19] Eg although the Commission had initially been envisaged as constituting the European Executive, it was the Council of Ministers, national representatives, who assumed the prominent role (K Neunreither, 'Transformation of a Political Role: Reconsidering the Case of the Commission of the European Communities' (1972) 10 *Journal of Common Studies* 233).

[20] The White Paper (Com (85) 310), approved by the Council at the Milan Summit of June 1985, contains the Community's legislative programme for working towards the target of 1992. It sets the deadline for completion of the internal market, analyses the obstacles to its operation and identifies the measures necessary to eliminate them, including a detailed timetable for the transposition of over 300 measures and proposals into the national laws of the member states.

by making the national economies more interdependent.[21] This process culminated in 1986 with the Single European Act (SEA) which gave legislative backing to, and introduced measures to ensure achievement of, the Internal Market Programme and laid down policies designed to strengthen further economic and social cohesion.

With the emphasis placed on economic cooperation, the political aspect of the Community, although never entirely overlooked, has tended to be marginalised. However, the initial reasons for unification at the end of the War, namely the prevention of military conflict and aggression, the preservation of peace and prosperity for all and the strengthening of economic, political and social cohesion, all of which are reflected in the three Treaties establishing the Community,[22] remain of the utmost relevance. The possibility of a large-scale war amongst member states today may be virtually unthinkable. However, the strong resurgence of nationalist feeling in the Balkans and elsewhere indicates that complacency is deadly and suggests that the EC has still some way to go before it can claim that its goals of peace, security and prosperity on the Continent have been achieved.

III FEDERAL CHARACTERISTICS OF THE EUROPEAN COMMUNITY[23]

1 The Supranational Character of the Community

The European system does not compare easily with existing political entities; its character is unique and distinct from both national and international structures.[24] Unlike international law, which merely creates mutual

[21] For a discussion of the advantages of a single market for European unification, see, eg *The Completion of the Internal Market 1992: Opportunity and Challenge* (Federal Ministry of Economic Affairs, Germany, 1990); P Cecchini, *1992: The European Challenge: The Benefits of a Single Market* (Vermont, Gower, 1988), on the 'cost of non-Europe' and the potential of the completion of the internal market.

[22] Eg the ECSC Treaty aims 'to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared'. The Treaty of Rome of 1957, by which time memories of the War had softened, speaks of 'preserv[ing] and strengthen[ing] peace and liberty'.

[23] Although one cannot speak of a 'typical' federal system, certain elements may be commonly found in such entities, including, (i) a division of powers between a central and regional government, (ii) a certain degree of independence between them, (iii) direct action by the central and regional governments, (iv) some means of preserving the constitutional division of powers (I Bernier, *International Legal Aspects of Federalism* (London, Longman Group Limited, 1973) p 5; J Crawford, *The Creation of States in International Law* (New York, Oxford University Press, 1979) p 291). Additional elements probably exist; moreover, not all will be found in all federations, and others may be present in differing degrees.

[24] As to the unique character of the Community in international law, see eg, J Groux et P Manin, *Les Communautés européennes dans l'ordre international* (Luxembourg, Office for Official Publications of European Communities, 1984); Schermers, H G, 'Community Law and International Law' (1975) 12 *Common Market Law Review* 77;

obligations amongst consenting states, Community law involves an actual limitation of the national sovereignty of its members and a transfer of it to common independent institutions endowed with sovereign rights; moreover, it binds directly the citizens as well as the participating states.[25] Community law is also distinguished from national law in that it creates a uniform legal system common to all members which stands independently of, and takes precedence over, the domestic legal orders of its constituents;[26] it operates, therefore, at a level above the nation-state.

The Community is thus clearly more than an ordinary international organisation providing for institutionalised intergovernmental cooperation; it is the product of a federalist approach albeit in modified and diluted form. However, notwithstanding its distinct supranational character and despite incorporating several federal characteristics, most notably in the judicial and legal fields, the European system is also characterised by significant federal shortcomings and cannot, at present, be termed a truly federal entity. At best, it is quasi-federal, a 'compromise' between the need for a fully federal structure and the member states' reluctance to abandon altogether the nation-state model.[27]

2 A Common Institutional Framework

The major institutions of the Community are the Council of Ministers, the Commission, the European Parliament and the Court of Justice. In July 1967 the Council and Commission of each Community were merged (the Parliament and the Court of Justice had been common to all three since 1958); however, hopes that this would lead to the setting up of a single Community

K M Meesen, 'The Application of Rules of Public International Law within Community Law' (1976) 13 *Common Market Law Review* 485; A Maes, 'La Communauté européenne, les organisations intergouvernementales et les accords multilatéraux' (1977) *Revue du marché commun* 395; J Groux, 'Le parallélisme des compétences internes et externes de la Communauté économique européenne' (1978) 14 *Cahiers de droit européen* 3.

[25] The separate and distinct legal order of the Community was established in *Van Gend en Loos* v *Nederlandse Administratie Der Belastingen* (Case 26/62 [1963] ECR 1, 12), where it was stated that, '[the EEC] Treaty is more than an agreement which merely creates mutual obligations between the contracting states. . . . The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'. In *Costa* v *Enel* (Case 6/64 [1964] ECR 585, 593) it was also held that, 'by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves' see fn 31 infra.

[26] See eg *Costa* v *Enel* (Case 6/64 [1964] ECR 585, 594; reiterated in *Commission of the European Communities* v *United Kingdom* ('Tachographs' Case, 128/78 [1979] ECR 419, 429), discussed infra.

[27] *European Unification: The Origins and Growth of the European Community* (3rd ed, Periodical 1/1990), p 25.

governed by a single Treaty did not materialise. The proposed EUT preserves the existence of the three communities.[28]

The institutional system of the Community is difficult to classify. The existence of common institutions based on a written Treaty subject to interpretation by a court of law, endowed with legislative, administrative and judicial sovereign rights and empowered to take decisions which bind the member states and their citizens, is clearly indicative of a strong federalist influence. However, as will be discussed, the institutional structures themselves display significant federal deficiencies.

3 Common Policies and Transfer of Power to the Centre

The administration of several key socio-economic issues at the Community level, implying a limitation of national sovereignty and a transfer of it to the centre, is also a strong federal feature. Common policies, many of which had been implemented on the basis of Community acts and formally introduced into the Treaty by the SEA, exist in an ever-increasing number of areas, including agriculture, transport, competition, the economic, monetary, commercial and social fields, culture, public health, consumer protection, industry, research and technological development, and the environment. The proposed EUT strengthens and extends many of these policies. Nevertheless, the fact that key areas of the highest politics (such as defence, security and foreign policy) do not form part of, or are peripheral to, the central supranational structure, significantly undermines the status of the centre.[29]

4 Divisional Supraposition of EC Law

The political basis of the Community requires the divisional supraposition of Community over national law. This implies firstly, that Community law be directly and uniformly applicable and directly effective in all member states, with a single judicial body to determine its validity and interpretation, and secondly, that Community law override national law in the event of conflict; both essential characteristics of a supranational system and indicative of a strong federal influence.

Community legislation is directly applicable[30] in that it penetrates directly into the domestic legal order of the member states and acquires legal effect without the need for further enactment or a specific act of implementation or ratification. It is also of direct effect in that it confers rights and obligations,

[28] Despite renaming the EEC Treaty the *Treaty Establishing the European Community*, or *EC Treaty* (art G(1)), the *ECSC Treaty* and Euratom are maintained under arts H and I of the EUT. Moreover, under art E the Court of Auditors is added as a fifth institution of the Union.

[29] These issues, as well as provisions of the EUT in relation to them, are considered infra.

[30] Art 189(2) of the *EC Treaty*.

enforceable in the national courts, upon the member states or their citizens without interference or intervention by national authorities.[31]

Further, despite not being expressly included in the Treaties, the general principle of the precedence of Community law over national legislation in case of conflict is well-established and accepted, both by the national jurisdictions,[32] and by the European Court.[33] This implies that any conflicting provisions of national law are automatically rendered inapplicable by the coming into force of Community laws;[34] moreover, member states are obliged to abolish all existing national legislative or other measures which are incompatible with Community provisions and are precluded from enacting any such measures in the future.[35]

The autonomy of its legal order, the fact of direct applicability and effect of its laws and its precedence over the legal orders of its members, distinguish the Community from existing national and international structures and prove beyond doubt the supranational character of the system established by the European Treaties.

5 The Supporting Role of the Judiciary: the European Court of Justice (ECJ)

The ECJ, akin to constitutional courts found in typical federations, is the guardian of the supranational element in the Community. Its principal functions of ensuring observance with Community law irrespective of political considerations, of ruling on the interpretation of the Treaties and determining the validity of acts and decisions of Community organs (thus keeping each level of government within its legal bounds), and of preventing unconstitutional interference with the rights of individuals, are of vital importance for the protection of the democratic element which in many respects is still weak within the Community.

The Court, which sits at Luxembourg, consists of 13 judges (one from each member state, with the thirteenth being selected from the larger states in rotation) appointed by unanimous agreement between the member states for

[31] In *Van Gend en Loos* (Case 26/62 [1963] ECR 1, 12) it was held that Community institutions are 'endowed with sovereign rights the exercise of which affects Member States and also their citizens', and that Community law is intended to confer rights on individuals 'which become part of their legal heritage'; see also *Costa* v *Enel* (Case 6/64 [1964] ECR 585, 593) and *Defrenne* v *Sabena* (Case 43/75 [1976] ECR 455, 474).

[32] Eg through extensive use by member states of art 177 of the *EC Treaty* to ask for preliminary rulings on questions concerning Community law.

[33] Eg in *Costa* v *Enel* (Case 6/64 [1964] ECR 585, 594, reiterated in *Commission* v *U.K.* ('Tachographs' case), Case 128/78 [1979] ECR 419, 429), the Court held that, 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overriden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

[34] In *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA* (Case 106/77 [1978] ECR 629, 643–41), it was held that a national court must set aside conflicting provisions of national law, whether prior or subsequent to the Community provisions, without requesting or awaiting their prior setting aside by the national legislature.

[35] Ibid; *Eridania* v *Minister of Agriculture and Forestry*, Case 230/78 [1979] ECR 2749; art 5 of the *EC Treaty*.

a term of six years. It is fashioned according to civil law models: its procedures are inquisitorial, written submissions are more important than oral argument, judgments tend to state general legal principle and no dissenting opinion is delivered. In 1986 a Court of First Instance (CFI) was established under the SEA to relieve the heavy workload of the ECJ (which, until the end of 1989, had heard some 4,265 cases).[36]

In its aim to increase the effectiveness of Community law and to establish its absolute supremacy over national law, the ECJ has, in a series of key decisions,[37] strengthened and reinforced the supranational element so that, 'as far as its legal system is concerned, the Community now possesses most of the characteristics of a federation'.[38] This attitude, coupled with the fact of the Court's increasing powers and jurisdiction,[39] has naturally operated in favour of the Community. The growth of judicial supranationalism has been made less objectionable by a decline in political supranationalism; however, the Court's role in expanding central power will undoubtedly be of greater concern as the influence of the Community's political organs increases.

Despite providing for the four original institutions to exercise their powers in relation to its provisions,[40] the new EUT generally leaves the range of the Court's jurisdiction unchanged.[41] Its powers and procedures, on the other hand, are considerably modified and extended, including the power to impose a fine on a member state which has not complied with a Court judgment

[36] *Working Together — The Institutions of the European Community* (European Documentation, Periodical 1991), pp 32–3. The CFI, which took up its duties in October 1989, has jurisdiction over *ECSC Treaty* matters, enforcement of competition law and disputes between Community institutions and their staff. Appeals against its decisions may be brought before the ECJ, in which case the latter may deliver a judgment only on points of law (P Fennell, 'The Court of First Instance' *European Access*, 1990:1 (February), p 11).

[37] These include establishment of the doctrine of direct effect, the supremacy of Community law over national law and the widening of Community jurisdiction, particularly in the international sphere; see R Kovar, 'La contribution de la Cour de Justice au développement de la condition internationale de la Communauté européenne', (1978) 14 *Cahiers de droit européen* 527; R Kovar, 'L'affaire de l'AETR devant la Cour de Justice des Communautés européennes et la compétence internationale de la CEE' (1971) *Annuaire français de droit international* 386.

[38] T C Hartley, *The Foundations of European Community Law* (2nd ed, New York, Oxford University Press, 1988) p 47.

[39] Eg the Court has claimed for itself exclusive jurisdiction to decide all questions of application of Community law in the national courts, to resolve conflicts between Community and national law and even to limit the scope of national law where there is no direct conflict, thus exceeding the boundaries set by the Treaties (eg by holding that directives are directly effective upon member states, even where this was clearly not intended by the authors of the Treaties: *Van Duyn* v *Home Office*, Case 41/74 [1974] ECR 1337).

[40] Art E of the EUT.

[41] In fact, its jurisdiction is probably narrower than is suggested in Art E, as this must be read in conjunction with Art L, which excludes from the Court's jurisdiction the Common Provisions (Art A-F), the provisions on a common foreign and security policy (Art J) and the provisions on cooperation in the fields of justice and home affairs (Art K), with the exception of the interpretation of conventions with non-member states in these fields (Art K(3)(2)(c)) (*The New Treaty on European Union Volume 2: Legal and Political Analyses* Belmont European Policy Centre, 26 February 1992, 44).

where it had failed to fulfil a Treaty obligation,[42] thereby reinforcing a recent Court judgment on this issue.[43]

IV FEDERAL DEFICIENCIES OF THE EUROPEAN COMMUNITY

1 The Problem of Lack of Supranationality[44]

Supranationality, a central and unique feature of the EC system, is probably also the area in which the federal deficit is most apparent. The principle has three dimensions:

(i) the *normative*, which implies firstly, direct applicability and effectiveness of Community law in national institutions, and secondly, the supremacy of Community law over national law, both vital, well-established elements of the European system, as has already been noted,

(ii) the *institutional*, which implies the independent composition of Community organs so that these represent the European people and not the national governments, and

(iii) the *decisional*, which implies the taking of decisions on a majority basis so that Community interests are pursued even where these are in opposition to perceived national interests. Both of these latter aspects are currently compromised.

(a) The Institutional Dimension

Firstly, although in theory Community organs are to be independently constituted, in practice this is not strictly the case. The European Commission, the body in which the supranational aspects of the Community are most apparent, although akin to a national executive in some respects,[45] is the result of direct designation and not of democratic parliamentary process; and,

[42] Art 171(2). Note that it is for the Commission to instigate a case against a member state which has failed to fulfil an obligation under the Treaty, and to specify the appropriate fine payable; however, the Court has, under Art 172, unlimited jurisdiction with regard to such penalties.

[43] In *Francovich* (Case 11/91), the Court recognised the right of the citizens of the Community to claim damages from the governments of member states where there has been failure to implement a directive, one of the main obstacles to completing the internal market (*The New Treaty on European Union*, op cit 44).

[44] Note that the term, which was included in the *ECSC Treaty* of 1951, is no longer used as such; rather, it has been replaced by the term 'Community' which, however, has the same connotations. It is also important to note at the outset that the concept of supranationality is unique to Europe as the only existing supranational community; consequently, in the absence of comparable cases, any analysis of the principle must be based exclusively on the EC system.

[45] Eg it is subject to supervision by Parliament, which also enjoys the right of its collective dismissal.

unlike elected politicians, Commissioners have security of tenure and cannot be removed, except by the ECJ on the grounds of incapacity or serious misconduct.[46] Similarly, although appointments to the ECJ are to be made without interference, in practice they are influenced by political, linguistic and other factors.[47]

However, it is in the Council of Ministers, the body where supranationalism meets nationalism and where ultimate political and legislative power resides, that the supranational element is most particularly thwarted.

Unlike the Commission, the Council does not purport to be an independent institution: its members represent, not the European people, but the governments of the member states and it is on their instructions, and by their authority, that they act.[48] However, it does not follow that the Council is entitled to protect purely the national interest at the expense of the interest of the Community as a whole,[49] although it is questionable whether this is always clearly perceived by participants at the Council meetings.[50] It has been suggested that in the Council, the Community interest is 'viewed through the spectacles of national interests'[51] and that, 'according to the subject-matter and the political climate in the Communities, the colour of these spectacles will be more or less dark'.[52] The confusion is possibly compounded further by the existence of the European Council, similarly composed of the Heads of State or Government of the member states but sitting purely as representatives of their governments and taking only political (as opposed to legal) decisions.

In the light of the political realities the Council must, in some sense at least, be regarded as an intergovernmental body. Given the fact that, at present, it occupies the position of ultimate Community legislator and decision-maker, this represents a major obstacle to the creation of a truly federal Community.

[46] Art 13 of the *Merger Treaty*.

[47] P Soldatos, 'Institutional and Political Trends in the EC of the '90s' paper delivered at the 19th Summer Sessions of the Institute of International Law & International Relations of Thessaloniki, Greece, on 'The European Communities and the International Community in View of the Challenge of 1992' August 27–September 13, 1991.

[48] Art 2(1) of the *Merger Treaty* provides that the Council 'shall consist of representatives of the member states. Each Government shall delegate to it one of its members'. The EUT replaces the first paragraph of Art 146, suggesting that a representative need no longer be a member of the government of a member state but merely a representative of the member state 'at ministerial level', thus possibly paving the way for the participation of regional ministers (*The New Treaty on European Union*, op cit, 75).

[49] In *Niederrheinische Bergwerks-A.G. et al.* v *High Authority of the European Coal and Steel Community* (Cases 2 & 3/60 [1961] ECR 133, 146–7), the ECJ held that a pure protection of national interests which encroaches upon the interests of the Community conflicts with the responsibility of the Council to protect Community interests.

[50] P J G Kapteyn, P Verloren Van Themaat, *Introduction to the Law of the European Communities after the coming into force of the Single European Act* (2nd ed, Deventer, Kluwer Law and Taxation Publishers, 1989), p 104.

[51] Ibid.

[52] Ibid.

(b) The Decisional Dimension

Secondly, although the taking of decisions at the supranational level is clearly indicative of a federal influence, this is also undermined by the need for unanimity in the decision-making process. The requirement of unanimity, which effectively grants member states a veto power to protect perceived national interests, is incompatible with the notion of federalism which requires that the general interest prevail over that of the regions. This is the case even though the system does admittedly grant to the smaller states greater voting power than that to which they would be entitled according to the criterion of population;[53] furthermore, as more than a two-thirds majority is required for a decision to be carried (54 out of a possible total of 76), the largest members (Germany, France, Italy and the UK) cannot impose their will on the smaller states; indeed, the small states can, acting together, block qualified majority decisions.[54]

The principle of majority voting was included in the Treaties but has never become established. This is due firstly to the fact that, despite requiring the Council to act by a majority of its members 'save as otherwise provided'[55] (which, at first sight would indicate the existence of a strong supranational element), the specific Treaty provisions do provide otherwise in almost every matter of importance;[56] thus the general rule is, in fact, the exception.

Moreover, even where majority voting was prescribed by the Treaties (including, most notably, the progressive replacement of unanimity by majority voting in a number of cases),[57] in practice political factors prevented this from occurring. The *Luxembourg Accord* of 1965, which gave rise to a convention requiring unanimity to be reached in relation to any issue considered by a member state to affect an essential national interest, marked a significant decline in the area of supranationality. The compromise ended arguably the most serious crisis which had ever confronted the Community and which arose when France, concerned that the arrangement for financing the common agricultural policy would affect adversely its own interests, refused to attend Council meetings ('the empty-chair policy'), demanding the suppression of qualified majority voting and blocking all decision-making in the Council for more than six months. With states systematically pleading 'very

[53] Under art 148(2), France, Germany, Italy and the U.K. each have 10 votes, Spain has 8, Belgium, Greece, the Netherlands and Portugal have 5, Denmark and Ireland have 3 and Luxembourg has 2.

[54] Hartley, op cit p 19.

[55] Art 148(1) of the *EC Treaty*. Note that this also includes qualified majority voting.

[56] Unanimity is required, eg, in arts 14(7), 45(3), 76, 93(2), 136, amendment of a Commission proposal (art 149), 188, 200(3), 223(3), 227(2), the admission of new members (art 237), 238. The matters to be decided by qualified majority appear of relatively minor significance, eg arts 128, 153, 213, of the *EC Treaty*.

[57] Eg in arts 28, 33, 42–4, 54, 56, 57, 145, 149(2)(d), (e), 168a(1), (4) of the *EC Treaty*, and SEA arts 130d, q and s, 145, 149(2)(d), (e), 168a(1), (4), unaminity was prescribed only for certain time periods, all of which have now elapsed, to be replaced thereafter by a system of majority voting.

important interests'[58] for a long time afterwards, and majority decisions being confined to administrative matters, the compromise meant the end of majority voting for all intents and purposes and had a profound effect on the subsequent development of the Community, leading, together with major disagreements over important issues in the 1970s, to its virtual paralysis.[59] It was not until the mid-1980s that a return to majority voting was effected by the enactment of the SEA, particularly in matters relating to the internal market. However, that Act does not eliminate the requirement of unanimity; indeed it does little more than acknowledge that majority voting should be used more frequently, apparently creating 'an understanding that more votes would take place'.[60]

The issue is now generally considered to be in 'the past'.[61] However, although the principle of unanimity has undoubtedly been weakened and its use considerably curtailed, the accord is by no means 'dead indeed'[62] nor does it follow that the veto no longer exists. Being a matter of convention, the scope of the accord will always be dependent on the consensus which exists between the member states; as such, it is not inconceivable that a crisis could reoccur. Moreover, the question of what is to occur in the case of failure to reach agreement, namely, whether the discussion must be continued until unanimity is reached (the French position) or whether, upon such failure, a decision is to be taken by qualified majority (the position of the remaining five) has never been resolved.

In many ways progress on the federal front depends upon the extent to which majority voting is accepted. If the Community is to move away from the rule of the 'lowest common denominator', there cannot exist mechanisms whereby regional interests may be pursued at the expense of the interest of the Community as a whole. This is not to say that the regional interest should be overruled; the ultimate object of an ever-closer union would not be feasible if one nation's vital interests were to be severely harmed by a decision seemingly in the interest of the whole. What must be sought is a finely balanced scheme whereby the concerns of the regional units can be adequately accommodated and promoted within a larger Community-focused framework.

The new EUT strengthens considerably the decision-making capacity of the Community by providing for an increased use of qualified majority voting in some areas.[63] However, in several others unanimity continues to be

[58] Note that, as no fixed criteria to determine this exist, states are in effect, given a right of veto in relation to any major Community decision by insisting that unanimity be reached.

[59] Eg in 1977, it was said of the Council that it 'provides evidence for the charge that the Community is no more than a diplomatic conference. Given the need for unanimity in the past, the attempts to achieve agreement have been tortuous. . . . The Council's agreements are in themselves compromises; they have no further room for compromise with other institutions' (P Crichton, *Prospects of Political Union in the European Community* (Canberra, The Australian National University Press, 1977) p 7).

[60] Hartley, op cit p 20.

[61] P S R F Mathijsen, *A Guide to European Community Law* (5th ed, London, Sweet & Maxwell, 1990) p 39.

[62] Ibid.

[63] Eg in the areas of transport (art 175) and trans-European networks (arts 129b–d), culture (art 128), public health (art 129), consumer protection (art 129a).

required,[64] or it is left for the Council to determine which decisions are to be taken by qualified majority.[65] Given the importance of the Treaty for the next stages of European integration, a further strengthening of qualified majority voting in the Council is clearly a priority issue that must be addressed in any prospective review of the Treaty.

2 The Federal Deficit in the Community's Institutional Structure

Despite the existence of common central institutions, in itself a federal characteristic, the structure, composition and functions of these organs themselves reflect significant federal deficiencies;[66] indeed, in some respects at least, they differ little from systems of 'institutionalised intergovernmental cooperation'.[67]

The extent to which the Community organs have succeeded in fulfilling the specific purpose of European economic, social and political integration for which they were designed is, at best, unclear. In the 1970s, the inability of the partly-intergovernmental, partly-supranational institutions to deal effectively with the series of crises confronting the Community gave rise to increased calls for radical institutional reform which did not, however, materialise. Moreover, despite enhancing significantly the powers of the centre by attributing to it a wide range of new policies in the economic, political and social fields, the EUT made only very modest progress in this area. This has led to charges that,

> as it stands, the institutional structure of the Union may well prove too weak to be able to manage the policies attributed to it.[68]

Already there are calls for a 'thorough and comprehensive review of existing management and organisation practices within the political institutions', for which the implications of the increased responsibilities devolved on the Community as a result of the EUT will be enormous.[69] The signatories themselves, acknowledging that the reforms introduced by the EUT could prove insufficient and that certain aspects of the Treaty will have to be reconsidered,

[64] Eg some of the decision-making procedures of the Community, of which there are now no less than six, require unanimity, others majority (eg the SEA cooperation procedure and the new co-decision procedure, by which the EP can prevent the adoption of legislation, with some exceptions), and some are subject to both, as provided in the relevant article (eg the original consultation procedure) (*The New Treaty on European Union*, op cit 27).

[65] Eg art 130s of the EUT in relation to the environment.

[66] The federal element is weakest in the Community's political institutions. It has been suggested that, although the EC itself appears to be an attempt at federation, in fact much of what goes on at the practical level has been in confederal form (P Soldatos, 'Institutional and Political Trends in the EC of the '90s', paper delivered at the 19th Summer Sessions of the Institute of International Law & International Relations of Thessaloniki, Greece, on *The European Communities and the International Community in View of the Challenge of 1992*, August 27–September 13, 1991).

[67] Hartley, op cit 6.

[68] European Parliament Session Documents, 'Report of the Committee on Institutional Affairs on the Results of the Intergovernmental Conferences' (A3-0123/92/Part I), March 26, 1992, p 13.

[69] *The New Treaty on European Union*, op cit 17.

have provided for an examination, to be undertaken in 1996, of 'those provisions of this Treaty for which revision is provided in accordance with the objectives set out in Articles A and B',[70] including the policies and forms of cooperation, the common foreign and security policies, the codecision voting procedure in the Council and the provisions relating to agreements with non-member states and international organisations.

The ability to establish an effective and democratic institutional system, capable of carrying out efficiently the new tasks entrusted to the centre while at the same time operating closely to, and retaining the confidence of, the European citizen, will be determinant of the viability and future directions of the Community. Moreover, the need for institutional reform will assume a far greater urgency with the prospect of an impending and, for many, inevitable enlargement in membership, something which undoubtedly 'will require institutional structures that are more advanced than those resulting from the Treaty signed in Maastricht'.[71]

3 Lack of a Central European Executive

In its classic form, a federal system is constituted of a central national government and of several regional governments, each independently constituted and superior in its own sphere, with a degree of autonomy in decision-making and a direct impact upon its citizens in its areas of competence.

Europe is confronted with a two-fold problem: firstly, it must determine which of the existing Community organs does in fact, or should in principle, occupy the role of central executive and what adaptations will be necessary to enable it to perform this role effectively. Secondly, it must deal with the problem of the enormous imbalance which presently exists in the budgetary capabilities of the central and national governments.

(a) Commission versus Council as European Executive

The Commission, the body in which the supranational element is most apparent,[72] was intended to represent the common interest and had originally been envisaged as constituting the executive organ of the Community. To date it has not fulfilled this objective. Despite its seeming impartiality, it does not function wholly independently of the national interest; more importantly, its role in the decision-making process has been progressively diminishing while the position of the Council has been increasingly enhanced at its expense.

[70] Art N(2) of the EUT.

[71] 'After Maastricht: Enlargement or Warped Architecture?' *Europe* (editorial), 13 February 1991, and 'A Halt to "Enlargement-mania"', *Europe* (editoral), April 1987.

[72] In fact, it was in connection with this body that the term 'supranational' was used in the *ECSC Treaty*, art 9 of which provides that, 'the members of the High Authority will refrain from any actions incompatible with the supranational character of their duties. Each Member State undertakes to respect this supranational character'.

The Commission is, at the very least, of quasi-political character. Its 17 members, nationals of the member states, (at least one, but no more than two, must be included from each),[73] owe their allegiance to the Community and are to be completely independent in acting in its general interest.[74] However, although in principle an independent body operating free of national considerations, it is perhaps paradoxical that its members are nominated by the very governments in relation to which their independence is so strongly asserted. Moreover, although appointments are to be made 'by common accord of the Governments of the Member States',[75] no mechanism exists by which these can in practice be checked or disapproved, and it is generally accepted that they may be validly influenced by internal political considerations (such as, for example, seeking to ensure a balanced representation of national political parties). Further, it is at least open for member states to exert political pressure on the Commission as a whole, although direct personal pressure is certainly illegal (which does not necessarily imply that it never occurs). Finally, given that in order to function effectively the Commission requires the cooperation of national governments, it must be concerned with national interests at least to some degree.[76]

Furthermore, the Commission's executive powers (including the enforcement of Community law, the issuing of opinions on Treaty interpretation, the negotiation of international agreements, the implementation of the Community budget), although wide in scope, are not comparable to the powers of a federal government. Although the Commission participates in the law-making process by exercising its right of initiative by submitting legislative proposals to the Council, it is the latter which enjoys the position of Community legislator. Moreover, its functions and powers are linked with those of the Council: decisions taken by the Commission do not operate on the same level as those of the Council and, more importantly, most are based on executive powers conferred on it by the Council, 'for the implementation of the rules laid down by the latter',[77] and may be subject to conditions. The

[73] Art 157(1) of the *EC Treaty*. There are presently two Commissioners from each of Germany, France, Spain, Italy and the U.K. and one from each of the other member states.

[74] Under arts 157(2) of the *EC Treaty* and 10(2) of the *Merger Treaty*, Commissioners undertake neither to seek nor to take instructions from any government or other body in the performance of their duties, and member states also undertake not to influence the Commissioners in their work.

[75] Art 11 of *Merger Treaty*.

[76] See generally Hartley, op cit.

[77] Art 155 of *EC Treaty*. In *Einfuhr-und Vorratsstele für Getreide und Futtermittel* v *Köster, Berodt & Co* (Case 25/70 [1970] ECR 1161, 1170–1), the ECJ confirmed the Council's right to delegate or not, and if so, to specify the conditions under which the delegated powers are to be exercised (laid down in the 'Comitology' decision of the Council (Dec 87/373, O.J. 1987, L.197/33)). The powers delegated to the Commission are specified and certain powers are typically reserved by the Council. Art 10 of the SEA adds a new art 145, parallel to art 155, which make the circumstances in which the Council may reserve the right to exercise specific implementing powers for itself the exception, not the rule, thus obliging it to delegate executive functions to the Commission save in exceptional circumstances. However, again this is dealt with under provisions concerning the competence of the Council, emphasising the Commission's lack of independence of the Council.

Commission is not, therefore, a wholly autonomous executive body which exists and operates independently of the Council.

Although unintended, over the years the Council has been confirmed as the major decision-making organ of the Community and the body exercising ultimate political power, something not altogether surprising given the rather general nature of the Treaties, which set out only the initial, basic policies and left the rest to the discretion of the institutions.[78] However, there are several reasons as to why the Council is ineffective as an executive body. Firstly, it is not an elected body which represents the European people but rather the national governments and as such, it severely undermines the supranational element in the Community. Further, it is a fragmented body with limited time and resources whose composition changes as national governments, and therefore Council Ministers, change.

In 1990 the Colombo Report on the Future of European Union reiterated the aspirations of the original architects of the Community by recommending that the Commission be designated as the governing organ of the Union,[79] elected by the European people to give expression to the Community interest, responsible to the Parliament and checked by the Council, where the interests of the member states would find expression.

The EUT does not take the Commission any closer to being a true executive body nor does it bring any significant change to its substantive powers,[80] although the synchronisation of the Commission's new five-year term (from 1 January 1995) with that of the European Parliament, as well as the latter's increased role in the appointment of the new Commission and its President, including the power to withhold approval of the next full Commission if it is not satisfied with its programme,[81] enhances considerably the status of the EP vis-à-vis the Commission.

[78] Hartley, op cit p 46.

[79] P Murray, 'The European Community — Towards Political Union?' op cit fn 18, 24. The Delors Commission itself has been asserting its importance on a regular basis, particularly in external relations, much like the Hallstein Commission before the crisis of 1965. It has been stated that, 'the Commission sees itself as becoming a government, with the President chosen indirectly by the Council, endowed with a rubber-stamp democratic legitimacy by the Parliament, and then able to choose one Commissioner from each state' (C Brewin, R McAllister, 'Annual Review of the Activities of the European Community in 1990' (1991) *Journal of Common Market Studies* 385, 386).

[80] This is with the exception of the additional power of the Commission to propose to the ECJ the fines to be imposed on member states for failure to fulfil a Treaty obligation, and its involvement in the European Central Bank, justice and home affairs and the common foreign and security policy.

[81] Under arts 156–163 of the EUT, the new Commission, to take office in January 1995, must be approved by the EP which must also be consulted by the member states before nomination of a Commission President. Note that although mere consultation is required, it is unlikely that a nominee who is unacceptable to the EP would be appointed as the EP can reject the nomination of the entire Commission. It is also likely that the EP will insist on obtaining an indication of the policy priorities of the new Commission before it proceeds to accord its approval (*The New Treaty on European Union*, op cit 7, 75).

(b) The Issue of Budgetary Imbalance

In order to gain a central government whose authority is real, the enormous disparity in fiscal means between the centre and the regions must be redressed. At present the centre is severely disadvantaged in its fiscal means in comparison with the national governments of the member states. The one percent of the combined resources of the member states presently enjoyed by the central government contrasts very vividly with the financial capabilities of constituents of typical federal systems. Such a fiscal disadvantage would make it almost impossible for any government to perform.

At present the EC system has no real, authoritative central government. It is not sufficient to expand the jurisdiction and functions of the centre, nor can there be any real balancing of power, unless there is also change in the proportional budgetary balance.

Originally the *EC Treaty* specified the proportions payable to the Community by each of the six member states.[82] The Community now has its own resources; however, these are subject to political agreement. The EUT introduces a new article 201a into the *EC Treaty*, requiring the Commission to put forward proposals only on the basis that sufficient funds exist to pay for them; moreover it requires that the Union provide itself with the necessary means to attain its objectives and to carry through its policies.[83] However, again these are a statement of political objective rather than of legal principle. Ultimately, despite extending substantially the responsibilities of the centre, the Treaty makes no provision for securing the resources necessary to pay for them; therefore, the problem of contribution to the Union's funds remains unresolved.

4 Lack of Jurisdiction of Centre

In classic federal systems, a division and distribution of legislative power between the constituents is provided for in the constitutional instrument,[84] which also typically includes a special amendment procedure designed to prevent intergovernmental interference.

In the European framework some such division also occurs; several key socio-economic issues (such as trade, transport and some social issues) are transferred to, and administered by, the Community while others are left to be dealt with unilaterally by the member states. However, despite the acceptance of a paramountcy rule, providing for the supremacy of Community over national law in case of conflict, such as is typically found in federal constitutional instruments,[85] the absence of a single constitutional instrument

[82] In art 200, which the EUT proposes to repeal.
[83] Art F(3) of the EUT.
[84] Eg in Australia, ss 51 and 52 of the Commonwealth Constitution enumerate the powers nominated to the Commonwealth, leaving the residual powers to the States.
[85] Eg s 109 of the Australian Constitution.

providing for a clear division of powers between the constituents,[86] coupled with the fact that the spheres of competence of the centre are presently extremely limited, mean that, in reality, the member states are able to deal unilaterally with any area provided that there is no direct interference with Community law.

The problem of lack of jurisdiction at the centre is significant. Despite the fact that central competences are increasing, several key areas of the highest political significance (such as defence, foreign affairs and fiscal and monetary matters), to date remain outside the Community framework and are left to be dealt with by the sub-system of the member states.

The EUT does extend and strengthen the Community's competence in several fields, including economic and social cohesion, transport and telecommunications, environment, consumer protection, culture, education and vocational training, public health, industrial policy and development co-operation; moreover, and more importantly, some provision is made for the implementation of a common foreign and security policy and the eventual framing of a common defence policy (article J), as well as for justice and home affairs cooperation (article K). However, these intergovernmental 'pillars' remain outside the ambit of the *EC Treaty* and in reality do little more than indicate an increased political commitment to cooperation in these areas.

It is clear that there is a long way to go with regard to increasing the sphere of competence of the centre. Ultimately any greater transfer of sovereignty is unlikely to precede institutional reform aimed at creating fully democratic central institutions which will succeed in gaining the confidence of both the member states and their citizens.

5 Lack of a Federal Legislative Body: the European Parliament (EP)[87]

The EC lacks a genuine independent legislative body to legislate for the system at the level of the elected people. The EP clearly does not have this role. Its change of name in 1962, endorsed by the SEA, from 'Assembly' to 'Parliament' 'to avoid confusion in terminology' in the different Community languages,[88] was probably ill-advised given the absence of any powers characteristic of democratic parliaments,[89] and even more so as it has created the illusion that democratic control already exists within the Community. In fact, despite the significant widening of its competence resulting from the SEA, caselaw and as a matter of practice to include broad checking powers,

[86] The Treaties, concerned primarily with defining jurisdiction, do not purport to be federal constitutions, although they do operate as such in some respects. The lack of a constitutionally enacted, formal régime for the division of power means that the precise nature and limits of the competences of each level of government are unclear.

[87] At present the EP, sitting in Strasbourg, consists of 518 members, elected every five years: 81 from each of Germany, France, UK and Italy, 60 from Spain, 25 from the Netherlands, 24 from Belgium, Greece and Portugal, 16 from Denmark, 15 from Ireland and 6 from Luxembourg. The deputies take their parliamentary seats on the basis of political groups rather than nationality.

[88] 'One Parliament for Twelve: The European Parliament', EC documentation (10th ed), 10.

[89] It has been suggested that the word 'Parliament' is a misnomer for this body because it has not had any real legislative powers (Crichton, op cit 7).

budgetary powers and the right to attack European institutions for non-fulfilment of obligations,[90] there continues to be no question of legislative power for this body. Given that any advance on the federal path is dependent largely upon the progress made in this institution, the criticisms directed at it must be seriously addressed and rectified.

The EP was intended to represent the peoples of the Community.[91] However, until 1979 its members were selected by the national legislatures of the member states. The move to membership by direct elections by the electorates of each member state, as well as the formation of European political party-groups, undoubtedly increased and strengthened the Parliament's authority, making it a much more democratic institution.[92] Nevertheless, the EP does not, to date, enjoy normal parliamentary prerogatives: its participation in the legislative process extends little beyond issuing opinions and proposing amendments and its functions and activities, generally consultative rather than legislative in nature,[93] do not correspond to those of national legislatures. Closest to a legislative function is the EP's right to participate in the formulation of directives, regulations and Community decisions, by giving its opinion and proposing amendments through the cooperation and consultation procedures. However, although direct parliamentary approval is required in some cases, (such as in relation to the budget, the admission of new members to the Community or the conclusion of association agreements with third countries),[94] its opinions are neither binding nor authoritative.[95]

The past two years have seen considerable activity in the EP which, since its direct election, has become a much more cohesive, better organised and dynamic body, with the production of at least four reports expressing its views on European Union[96] and its concern to redress what it perceives as the

[90] Art 175 of the SEA. Importantly, in *Parliament* v *Council* (Case 70/88 [1990] ECR), the ECJ accepted the EP's right to seek the annulment of Community legislation by the Council and the Commission in order to safeguard its prerogatives and if it has no other means of defence, extending further the EP's powers by agreeing to the principles of 'respect for Parliamentary prerogatives' and 'institutional balance' (*European Report*, 23 May 1990).

[91] Art 137 of the *EC Treaty* provides that the EP is to consist of 'representatives of the peoples of the States brought together in the Community'.

[92] The process of direct election of the EP is established under art 138 of the *EC Treaty* and Council Decision 76/787, annexed Act concerning the election of the representatives of the Assembly by direct suffrage (OJ 1976, L 278/1). Note that, at present, it is for each member state to decide as to the electoral system to be used. A proposal in 1982 by the EP to adopt a form of proportional representation on a regional basis, which would ensure a greater degree of representation of all significant political parties in the Community, was not accepted.

[93] Art 137 of the *EC Treaty*. Note that this Article is significantly amended by the EUT by entitling the EP to exercise 'the power conferred upon it by this Treaty' and not merely 'the advisory and supervisory powers' previously conferred.

[94] Arts 237–238 of the *EC Treaty*.

[95] P Kangis, 'How Democratic is the European Community?' [1989] 6 (December) *European Access*, 10, 10–11.

[96] These were the *Colombo Report*, a 70-point blueprint for European union adopted in its entirety by a vast majority of the EP in December 1990, the *Martin Report* which expressed the EP's hopes from the 1990 intergovernmental conference including calls for greater co-decision powers with the Council, the *D'Estaing Report* on subsidiarity and the *Duverger Report* which called for greater involvement of national parliaments with the EP, including proposed assises with the national parliaments to prepare a

lack of legitimacy at the EC level of decision-making by demanding greater democratic control over the Council and Commission.

The EUT increases considerably the EP's political influence by the introduction of a new 'codecision' procedure,[97] under which the EP for the first time can prevent legislation from being adopted. Thus, in effect, the EP is given a veto power, albeit of limited operation, in the specified areas which include the internal market, education, culture, public health, consumer protection, research and the environment. The EP is also given an increased role in the appointment of the Commission and its President, the power to set up Committees of Enquiry, to be petitioned by Community citizens and the right to call upon the Commission to make a legislative proposal (which, however, falls far short of according a *direct* right to initiate legislation).[98] However, these reforms are rather ill-defined and no mechanisms by which they may be enforced are provided for in the Treaty; indeed, the very fact that the assent of the EP is not required in order for the EUT itself to become binding law indicates the extent of the democratic deficit which continues to exist within the Community.[99] Quite apart from these considerations the EP continues to be plagued by several practical problems, not the least of which is its continuous, unnecessary movement to and from its various 'sites' (in Strasbourg, Luxembourg and Brussels) as well as the increasingly complex, lengthy and costly process of considering the increasing volume of EC legislation.

It has been suggested that the EP act to increase its own powers by making use of article 237 of the *EC Treaty* and article O of the EUT, which require parliamentary assent for Community enlargement by absolute majority of its members, or by use of its advisory and budgetary powers to influence Community decisions: 'What Parliament lacks in formal powers it must make up for in skill'.[100] The EP itself, having voted to accept the Maastricht treaties, declared that it would exercise its right to block accessions to the Community unless it were given more powers in relation to other EC institutions to reduce the 'democratic deficit'.[101] This is a hopelessly inadequate substitute for the genuine political reforms which are needed. The Community cannot truly unite unless its Parliament ceases to be a pseudo-legislature and achieves the status and confidence enjoyed by the national parliaments. It has been said,

> Constituent Assembly 'in the French revolutionary tradition', a point taken up by the EUT (Declarations 13 and 14, which provides for the institutionalisation of meetings between the EP and national parliaments in a 'Conference of the Parliaments' or 'Assises';
> such meeting has already occurred during the 1991 Intergovernmental Conference) (C Brewin and R McAllister, 'Review of the Activities of the EC in 1990', [1991] *Journal of Common Market Studies*, 385).

97 Art 189b of the EUT.

98 Arts 137–144 of the EUT.

99 The EP has no power as to ratification of the EUT as only national bodies have this competence; it merely held a debate on the text.

100 E J Kirchner, *The European Parliament: Performance and Prospects* (England, Gower Publishing Company Limited, 1984), introductory chapter; 'The Treaty on Union before the European Parliament', *Europe (editorial)*, 1/2 April 1992).

101 'President Delors on EC enlargement' *EC News*, Vol 10, No 3, April 1992.

> It is ironic that the only EC institution that can credibly claim to have a directly legitimated representative function should be excluded from playing as of right a role in . . . legislation directly affecting its constituents.[102]

Clearly the supranational element in the Community, limited though real, is unlikely to grow stronger unless the democratic element is significantly enhanced. Specifically, there can be no realistic prospect of a European federation unless the democratic deficit is redressed by increasing substantially the powers of the EP, including the granting of full legislative power within the areas of Community competence, full budgetary powers and the power to control the executive.[103]

6 Regional Representation

A federal system comprises strong, independent central institutions in which the regional units are represented.[104] In the European system it was the Council, now the primary legislative body of the Community, which was originally envisaged as being the body in which the national interest would be expressed, akin to the institution of the Senate in federal systems.[105] However, political realities have led to the Council's assumption of the dominant position in the Community's legislative process.

Apart from the member states themselves, the Community also comprises several regions (for example the German Länder and the Flemish, Scottish and Catalan communities), for which the question of regional representation and participation, (as well as the concept of subsidiarity discussed below), assumes particular importance. Some of these regions enjoy autonomous rights, so that a series of competences concerning legislation and administration lie not with the central state, but with the regions themselves; therefore, they are also affected by the loss of the competences ceded to the Community, a loss 'perceived as affecting the substance of the constituent state or the autonomous region'.[106] This requires that they be given a greater

[102] J Lodge 'A Parliament for the People's Europe of the 1990s?' [1990] 1 (February) *European Access*.

[103] The EP itself has sought 'equal rights and equal weight in the legislative process', including the right of initiative and of co-decision with the Council on Community legislation, the right to ratify all constitutional decisions requiring the ratification of the member states and the right to elect the president of the Commission ('Resolution of the EP on the Intergovernmental Conferences in the context of Parliament's structure for European Union' (Martin II), OJC 231, 17 September 1990, 97).

[104] Eg in the Australian federal system, the Senate is the House of the regional unit of the State, where each State is entitled to equal numbers of representatives, regardless of population.

[105] Indeed, no mention was made of the Council in the original draft of the *ECSC Treaty*; it was ultimately included to alleviate the fears of the smaller states that the Commission, intended to be the central authority, would be dominated by the larger members (Hartley, op cit 46).

[106] W Rudolf, 'Regional Autonomy in the EC', paper delivered at the 19th Summer Sessions of the Institute of International Law & International Relations of Thessaloniki, Greece, on 'The European Communities and the International Community in View of the Challenge of 1992', 27 August–13 September, 1991.

voice in Community decision-making, particularly in relation to matters which affect their competences and interests.

The EUT expands the Community's regional policy by providing for the creation of a new Committee of Regions, consisting of representatives of the regional authorities of the member states, to be consulted in matters affecting the regions.[107] Although at present this body merely has advisory status, its creation is a significant development which should increase the influence of the regions in the decision-making process of the Community and possibly lay the ground for the creation, in due course, of an upper house in Parliament concerned with the protection of the regional interest. This is also in line with the emphasis placed on the notion of subsidiarity, concerned with the distribution of political power at the Community, national or regional levels.

7 Functional Nature of the EC

Although membership of the Community is on a regional basis, which would render easier the consolidation of its members into a single political unit,[108] at present there is no direct territorial link.[109] Rather, in the EC system divisibility of sovereignty, a typical federalist feature, is merely functional and consequently based upon the willingness of the participants to cooperate; the approach is functional and not territorial. The elimination of intra-Community controls, as well as the proposed establishment of a citizenship of the Union where 'every person holding the nationality of a Member State shall be a citizen of the Union' with specified rights,[110] will help to give a territorial dimension to the system and to create and promote a true 'European identity'.[111]

[107] Arts 198a–198c of the EUT.

[108] Art 237 of the *EC Treaty* requires firstly that members be part of the region of Europe, as well as other factors such as economic development, cultural content and political system; thus what is sought is the creation of a regional block with greater solidarity and interdependence.

[109] Eg in the form of an actual European territory or citizen; Y Otani, 'Le Territoire Communautaire et le Droit International Public, le statut juridique international de la CEE après la réalisation du marché', paper delivered at the 19th Summer Sessions of the Institute of International Law & International Relations of Thessaloniki, Greece, on 'The European Communities and the International Community in View of the Challenge of 1992', 27 August–13 September, 1991.

[110] Arts 8 to 8d of the EUT provide for the establishment of citizenship of the Union with every person holding the nationality of a member state being a citizen enjoying the rights conferred, and subject to the duties imposed, by 'this Treaty' (art 8), with the right to move and reside freely within the territory of the member states with certain exceptions (art 8a), the right to vote and stand as a candidate in municipal elections and elections to the EP in the member state in which s/he resides (art 8c), and the right to petition the EP and apply to the Parliamentary Ombudsman (art 8d).

[111] See, eg, P Sandler, 'Who are we Building Europe For?' [1991] 1 (February) *European Access* 8; A Durand, 'European Citizenship' (1979) 4 *European Law Review* 3; M P Solbes, 'La citoyenneté européenne' SB [1991] *Revue du marché commun 168*; C A Stephanou, 'Identité et citoyenneté européennes' [1991] *Revue du marché commun 30*.

V INTERNAL ARCHITECTURES: ON CREATING A FEDERAL EUROPE

Drastic changes in the political and international context since the first four decades of the Community's existence have led to a resurgence of the vision of a federal Europe with many of the ill-fated ideas of the early 1950s being re-enacted and tested in the new circumstances. Today it is clearer than ever before that Europe cannot hope to survive as a coherent economic and political entity capable of responding to the continental and global challenges which confront it unless it moves further in the direction of a federal political union.[112] With the single market already a point of reference, in 1992 Europe is standing at the crossroads: 'either it will go forward to become a federation or it will regress and eventually break up'.[113] The determining factor, and the greatest challenge, will be the ability of the Community to take the European people along on its federal path, to 'renew a sense of popular approbation from a European public which can all too easily feel that developments in the Community are remote, esoteric and beyond its control',[114] as was indicated in the recent Danish and French referenda on the EUT.[115] This, in turn, will largely depend on the ability of the Community to achieve unity while at the same time enhancing the democratic element and ensuring the protection of the regional interest.

1 The Need for Federal Union

Today the Community faces a series of daunting challenges both from within and without. Internally, it must prove the practicability of its commitments to economic and monetary union (EMU) (which envisages economic and monetary convergence, including a single currency, upon meeting the speci-

[112] See eg 'In Favour of a Federal Constitution for the European Union', document adopted by the eighth Congress of the European Peoples Party, Dublin, 14–16 November 1990, published in 'Europe Documents' *Europe*, No 1665, 5 December 1990; D Sidjanski 'Actualité et dynamique du fédéralisme européen' (1990) *Revue du marché commun* 655; D Sidjanski 'Objectif 1993: Une communauté fédérale européenne' (1990) *Revue du marché commun* 687.

[113] Hartley, op cit 6.

[114] *The New Treaty on European Union*, op cit 41, 3.

[115] The Danes rejected the EUT in the referendum of 2 June 1992 (50.7% to 49.3%; 'European Union: Member States close ranks in response to the Danish "No" vote' *European Report*, N.1774, 6 June 1992, 1). In France the EUT was ratified in the referendum of 20 September 1992 (51.05% to 48.95%; 'Un "oui" difficile á exploiter' *Le Figaro*, 22 Septembre 1992, 4). However, despite the fact that 'le "premier de cordée" des Douze n'avait pas coupé la corde' ('Europe: Demandez le programme!' *L'Express*, 2 Octobre 1992, 18), it has also been said that, 'le scrutin a confirmé le fossé entre la classe politique et une France qui "ne suit plus"' ('Les Conséquences d'un Oui à l'Arraché', *L'Express*, 2 Octobre 1992, 10): 'le résultat du référendum offre un visage nouveau et détaillé de la France politique, de ses aspirations, de ses craintes, dont il faudra tenir compte' (Jacques Delors, reported in 'Au lendemain du Scrutin de Maastricht' *Le Courrier Australien*, Octobre 1992, 2).

fied criteria by 1999 at the latest),[116] and continue on the path to achieving greater economic, social and political cohesion while at the same time dealing with increasing pressure to extend membership to other European nations. Moreover, it must confront the deepening economic crisis and uncertainty occurring east of its frontiers as the post-Communist world attempts to establish a democratic free market system: 'Europe pacified by the West will not remain pacified if it does not address the issue of the explosive Eastern Europe'.[117] To its south, Europe is faced with the wholly different but equally grave problems of appeasing aroused ethnic rivalries and preventing full scale civil war. Only by achieving greater progress from within, by creating a genuine federal European Union, will the Community be able to respond to the dramatic changes within its borders and beyond and meet the challenges posed by the modern world.

2 Federalism, Nationalism and the Nation-State[118]

Despite the importance of the institution of the nation-state and the great deal of loyalty that this continues to command in Europe, the mere fact of the Community's existence, as well as the cumulative commitment to greater integration, are evidence that the majority of people within its borders no longer regard the nation-state as capable of meeting adequately the needs of its citizens for peace, security and economic prosperity. Notwithstanding this fact, the sceptical attitude of public opinion regarding further integration arguably constitutes the greatest obstacle to its achievement.[119]

The tension which was to mark the entire post-war European history, resulting from the reluctance to abandon the nation-state structure or to compromise national sovereignty just regained after the war, continues to cast

[116] Arts 102a–109m, and several of the Protocols, of the EUT. This is particularly so in light of the recent turbulance on European financial markets which saw the devaluation of several of the European currencies and the withdrawal of the UK from the fixed Exchange Rate Mechanism (ERM), seen by some as threatening the entire basis of European economic and political union and giving rise to fears of the creation of a 'two-track Europe'.

[117] Address by Jacques Delors, President of the European Commission, at a symposium of 'Tribes or Europe' (*Political Day*, 2 March 1992, cited in the editorial of *Agence Europe*, No 5685, 9/10 March 1992).

[118] See B Burrows, G Denton, G Edwards (editors), *Federal Solutions to European Issues* (London, Macmillan, 1978) introductory chapter; L Holmes, 'Sovereignty, Nationalism and Statehood in the Future Europe', paper delivered at the 17th National Conference of the Australian Institute of International Affairs, on the theme of 'The New Europe: East and West', Melbourne, March 1992.

[119] The fears of loss of identity, although unnecessary, are understandable and, as indicated by the recent failure by the Danish people to ratify the Maastricht Treaty, very real. It has been suggested that the rejection of the Maastricht Treaty indicates Danish concerns over the preservation of their national and cultural identity in the face of an ever-closer Europe: 'Many of Denmark's four million voters were worried that closer union would see their individuality and high standard of living swallowed up by a newly reunified Germany and other forces in the new Europe' ('EC to press ahead with treaty despite Danish vote' The *Age* (Melbourne), 3 June 1992). Similar sentiments were being voiced in the lead-up to the French referendum: 'Français nous sommes, Français nous voulons rester' ('Le retour de la Politique' *L'Express*, 2 Octobre 1992, 23).

doubts over the prospect of further progression on the federal path. Today it takes the form of fear of loss of national, cultural and linguistic identity within a larger European whole, of the consequences of assuming the identity of the elusive 'European'. In reality, the notions of regional autonomy and federation are not necessarily mutually exclusive, nor does federation, the quintessence of which is a distribution of power to the appropriate level of government, imply the eradication of the regional unit.

Popular fears can be alleviated, through explanation and education, by ensuring that the citizen remains informed and understands fully the process towards unity[120] and, more importantly, by stimulating confidence and faith in the federal cause by working towards providing a finely balanced, efficient system based on democracy and representation.

The larger the unit, the more bureaucracy, the less control, and the less relevance to the citizen; therefore, the real challenge remains. Firstly, it is imperative that the functions and responsibilities of government be identified and clearly defined. Secondly, it must be determined how, and at which level, these tasks can best be performed. Thirdly, power must be disseminated sufficiently widely amongst the various levels of government so as to encourage regional representation and participation, but at the same time the creation of a complex, costly and widely interfering bureaucracy at the centre must be avoided. Finally, the various levels must be related in some way to form a coherent, democratic system that works efficiently but remains of relevance to the citizen.

The changes envisaged by the EUT, despite being 'presented in some quarters as a choice between preserving national sovereignty or proceeding towards a centralised superstate',[121] in fact aim towards decentralisation and a wider, more democratic distribution of political power within the Community, as they seek to interrelate the various components of the system in a union of federal form.[122]

[120] The Community must be brought closer to the people as well as to governments: '[it] must not be seen as a business club. It is, and must continue to be, actively concerned with the people for whom it is building its Single Market. Unless it can carry them along, not only will "1992" lose credibility but it will lack its fundamental justification' (P Sandler, 'Who are we Building Europe For?' [1991] 1 (February) *European Access* 8, 10); see also C Flesch, 'The Duty to Inform about the Community' *Target 92*, No 3, March 1992; J Delors, 'A Europe Closer to its Citizens' *Target 92*, No 7, July/August 1992.

[121] Address by Ove Juul Jorgensen, former Head of the EC Delegation to Australia and New Zealand, to the National Summit of the Committee for Economic Development of Australia, Melbourne, 4 August 1992 (*EC News*, Vol 10, No 6, July 1992).

[122] Consider, for example, the view that 'Maastricht in fact provid[es] the framework necessary to achieve the aim of integration and common action where necessary, and introduc[es] new, legally binding restrictions on the scope of Community action where such action would be intrusive and unnecessary . . . [is] both integrationalist and limitative in nature, a major step in establishing a sound basis for delimiting the rights and powers exercised at Community and national levels' (Sir Leon Brittan, Commission Vice-President, in an address to the European University Institute, Florence, Italy, 11 June 1992; Press Release IP (92) 477, Brussels, 11 June 1992).

3 Safeguarding Regional Interest: The Subsidiarity Principle

It is precisely the essence of a federal method which is described by the principle of subsidiarity,[123] although by referring to 'the process of creating an ever closer union amongst the peoples of Europe in which decisions are taken as closely as possible to the citizen', the text refrains from pronouncing 'the dirty word':[124]

> Federalism for the EC in the 1990s involves the application of the existing principles of subsidiarity: 'government as close as possible to the people' — whether at EC, national, regional or local level.[125]

The principle, which is expressed in legal form for the first time in the EUT, is used as a criterion to demarcate Community and national action and operates to control the degree of Community interference in national affairs. It does this firstly, by confining the Community to its exclusively assigned powers and secondly, in areas where concurrent legislative competence is conferred, by limiting it to tasks which, by virtue of their magnitude or effects, cannot be undertaken efficiently by individual member states acting separately. Article 3b of the EUT provides that the Community, in all areas which do not fall within its exclusive competence, shall take action,

> 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.[126]

The notions of federal unity and subsidiarity, although at first glance contradictory, are not nevertheless irreconcilable. Subsidiarity does not aim to restrict central powers, leaving maximum scope for regulatory action to the states. Rather, it is concerned with the allocation of Community competences generally, requiring the *designation of powers and responsibilities to appropriate political levels and institutions*, either at the Community, the national or the regional levels.[127] As such, not only is it not contrary to the notion of

[123] In an address at the ceremony for the signing of the EUT in Maastricht on 7 February 1992, Jacques Delors stated that: '... the federal framework remains the only one to enable the debate to be clearly ordered on the distribution of tasks and the transfer of sovereignty or, if we prefer, on the modalities for sharing sovereignty. Moreover, the federal approach and subsidiarity are two coherent and complementary things' (*Europe*, No 5665, 10/11 February 1992).

[124] *Europe* (editorial), 7 February 1992.

[125] *The New Treaty on European Union*, op cit 15.

[126] Note the marked similarity of this to art 12(2) of Spinelli's Draft Treaty on European Union which provided that, 'where this Treaty confers *concurrent* competence on the Union, the Member States shall continue to act so long as the Union has not legislated. *The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the MS acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers*' (emphasis added): 'The Subsidiarity Principle', Editorial Comments, (1990) 27 *Common Market Law Review* 181–184.

[127] In fact, the concept is broader still, involving an examination, not only of the appropriate level of government to undertake action (ie at the local, regional or central government level), but also of whether regulatory action is necessary at all, something which, in Brussels and in the capitals of the 'Twelve', invariably appears to be implicitly

federalism, but it constitutes its essence;[128] by requiring that the prescribed limits of competence both of the Community and the Member States be respected (neither over-regulate at the Community level, thereby extending central power at the expense of the States, nor invoke subsidiarity to avoid national implementation of Community decisions),[129] it represents one of the main guarantees of a balanced distribution of power.[130]

Regardless of the soundness of its theoretical underpinnings, in practice the principle, advocating, as it does, regulation at the lowest possible level of government,[131] does represent a potentially significant threat to the federal objective and has been described as 'the compromise masking the mental reservation' behind the Maastricht treaties.[132] The issue of whether a matter should be governed by Community or national legislation is presently decided by each member state in accordance with national law and influenced by domestic political considerations, making the possibility of its abuse (ie seeking to restrict the scope of Community power, thus undermining the supranational element) very real. It is vital that such determination be made at the supranational level so that subsidiarity is used not to undermine, but to further, the general Community objective.

4 A Greater Europe

The Community in the 1990s is confronted by a crucial dual challenge. On the one hand, it must continue the ongoing process of strengthening its internal structures and deepening its cohesion and unity so as to be able to deal effectively and democratically with the numerous challenges facing it. On the other hand, aiming as it does to create a pan-European community and to constitute a blueprint for regional cooperative endeavours, it must keep its doors open to

assumed although this clearly is not always the case (eg a matter may more appropriately be left to the private sphere, the individual, the family, companies, trade unions, associations; see generally 'The Subsidiarity Principle', Editorial Comments, (1990) 27 *Common Market Law Review* 181, 182–83).

128 It is precisely this concept, namely the determination of policy and decision-making at the appropriate level (central, regional or local), which is reflected in the term 'federal vocation', a term which appeared in an earlier draft but was ultimately dropped from the Treaty. Federalism, with its focus on the distribution of powers and duties to the appropriate political level, implies not only centralisation, but also decentralisation.

129 'Subsidiarity: a principle which is more timely than ever', *Target 92*, No 6, June 1992, 1.

130 The *D'Estaing Report* defined subsidiarity by stating that, 'everything related to citizen's daily lives, their social and civil status, their cultural and linguistic identity, with the exception of European citizenship, would be within national competence, but in which everything related to international action, defence posture and also the European dimension of the environment and technology, would be federal' (C Brewin and R McAllister, 'Review of the Activities of the EC in 1990', op cit 391).

131 Eg consider the statement by Commission Vice-President Henning Christophersen that, 'formulated in a most general fashion, the subsidiarity principle stipulates that a higher level of government should only assume responsibilities that cannot be effectively taken care of by a lower level of government' ('Subsidiarity and Economic and Monetary Union', Press Release IP (91) 248, Brussels, 21 March 1991).

132 'The Twelve in Maastricht: "Resolved" and Free of Mental Reservations?' *Europe* (editorial), 7 February 1992.

other European nations who aspire to membership.[133] The tension between 'deepening' and 'widening' remains unresolved.

With several countries having already sought membership, and others expected to follow suit,[134] the question of enlargement, a 'moral and political imperative',[135] can no longer be postponed. Moreover, the theme of enlargement has changed since the collapse of communism in the east,[136] for which the Community 'has not only been the example and the catalyst but also the "power magnet" which has led [these] countries to choose democracy and Europe'.[137] With several of the new eastern democracies, including Poland, Hungary, the Czech and Slovac republics as well as some of the former Soviet Republics, having indicated their aspirations for membership, a Community of up to 35 members is now not inconceivable. The implications for the Community of an enlargement of this scale at a rapid pace would be enormous, both in terms of the financial and other burdens as well as in terms of

133 'The Community must accept those European states which wish to join and which are ready and able to do so. We have no right to regard ourselves as an exclusive and cosy club, ready to pull up the drawbridge whenever we feel that admitting more members would make life less comfortable for those snugly inside. That is not the vision of Europe enshrined in the founding Treaty' (Commission Vice-President Sir Leon Brittan in an address to St Anne's School, Windermere, 6 March 1992: 'Enlargement of the European Community' *EC News*, Vol 10, No 2, March 1992).

134 Eight countries have already formally applied for membership: Turkey (1987), Cyprus (1990) and Malta (1990), and five EFTA countries, namely Austria (1989), Sweden (1991), Finland (1992), Switzerland (1992) and Norway (1992). Several other countries have announced their intention of applying for membership in the future or are discussing the possibility, including the remaining EFTA countries, Iceland and Liechtenstein, countries of Central and Eastern Europe including the Czech and Slovak Republics, Poland and Hungary, the Baltic States of Estonia, Latvia and Lithuania, Bulgaria, Rumania and even Albania. EC leaders at the Lisbon Summit announced that negotiations with the EFTA applicants (Austria, Finland, Sweden and Switzerland) would commence as soon as the EUT was ratified and negotiations on the Community's financial resources (the 'Delors II package') had been terminated. As for the remaining applicants (Cyprus, Malta and Turkey), it was decided to strengthen relations and cooperation, and to establish dialogue with Eastern Europe (*EC News*, Vol 10, No 5, June 1992). Negotiations with Austria, Sweden and Finland are under way as of February 1993, and negotiations with Norway were opened on the same basis after the delivery of the Commission's Opinion in March 1993. It has been agreed that, where possible, negotiations for all four countries would be conducted in parallel ('The Enlargement of the Community: Background Report' *EC Background*, publication of the Delegation of the Commission of the European Communities to Australia and New Zealand, June 1993).

135 Ove Juul Jorgensen, former Head of the EC Delegation to Australia and New Zealand, in an address to the National Summit of the Committee for Economic Development of Australia, Melbourne, 4 August 1992 (reported in *EC News*, Vol 10, No 6, July 1992).

136 It has been suggested that, as Eastern European countries must ultimately be seen as part of Europe even though at present their economies are too fragile to accept the obligations of membership, the Community must drive them on the path to accession by continuing to forge closer relationships, to assist in the consolidation of democratic structures and to accelerate the development of full market economies (K Lankosz, 'New Post-Communist Democracies of Central Europe Towards the Economic Integration of the Twelve: Political, Economic, Legal and Social Aspects of the Challenge of 1992', paper delivered at the 19th Summer Sessions of the Institute of International Law & International Relations of Thessaloniki, Greece, on 'The European Communities and the International Community in View of the Challenge of 1992' 27 August–13 September 1991).

137 *Europe* (editorial), 13 February 1992.

the Community's very identity, aims and future directions.[138] If the question of enlargement can no longer be postponed, as is arguably the case, then at the same time it is also vital that the Community's coherence and effectiveness not be compromised; in other words, the Community must seek to deepen its unity even as it widens its membership.

It has been suggested that 'the deepening and the enlarging can go hand in hand, that there is no contradiction; on the contrary, they are complementary and can together increase the dynamism of the Community'.[139] It is difficult to see how, at this delicate, crucial stage of the Community's development, the goals of deepening and widening can be so readily reconciled.[140] If the Community is to maintain its dynamism, the accession of more member states cannot be contemplated without firstly consolidated integration and undertaking radical institutional reform to accommodate such enlargement, for which the *Maastricht Treaty*, being only 'an intermediate stage', 'does not create the [necessary] framework'.[141]

Given that the prospect of an increase in membership, at least by a small number of states, even as early as 1995, is very possible indeed,[142] it is imperative that the Community consider urgently the question of enlargement and its implications for the next stages of European Union.

5 A European Federal Format

The aspiration of many of the architects of the Community that it constitute a first step towards the formation of a federal Europe arguably did not materialise. At best, the Community is of a hybrid nature, standing somewhere between an intergovernmental organisation and a fully fledged federation. However, as a 'fluid polity' still in the process of acquiring political structure and consolidation,[143] its present form is unstable and transient.

[138] 'The Community's ability to absorb new members is not unlimited. ... If the community's membership were to double once again, changes would be necessary not only as regards the Community's structure but also its aim. ... It is naive to assume or to hope that the contradictions of European history can be eliminated through a merger of states, on a continental scale, within the Community framework' (P Schmidhuber, 'The enlargement of the European Community and the nationality question' *Target 92*, No 2, February 1992).

[139] Statement made by Commission Vice-President Henning Christophersen in an address to a meeting of economists in Copenhagen, March 1992 (reported in *Agence Europe*, 5 March 1992).

[140] Eg addressing the EP on 7 April 1992, Commission President Delors spoke of the 'fundamental contradiction' that existed between the objective of strengthening European union and future enlargement of the Community, pointing out that political events had made a wider Community of up to 35 states 'highly probable', a fact 'which not all Member States had grasped'. He stressed that, to ensure that widening would not be at the expense of what has been achieved, it is imperative to reflect seriously upon Community structures ('President Delors on EC enlargement' *EC News*, Vol 10, No 3, April 1992).

[141] Egon Klepsch, President of the EP, *Agence Europe*, 7 February 1992.

[142] This is particularly the case with the EFTA applicants (Austria, Finland, Sweden and Switzerland), who are seen as clearly capable of meeting the relevant criteria and whose economies can sustain membership; see fn 134.

[143] P Murray, 'The European Community — Towards Political Union?' (1991) 20 *Melbourne Journal of Politics* 23.

The next stage of European Union — its future course and direction, the ultimate shape it may take — remains unclear. There is no single guiding goal other than the idea of a transcendence from the unit of the nation-state towards a union of some kind, following a decisive path which fulfils Europe's 'federal vocation'.[144]

In considering the nature and character of a European federal model, the influence of existing systems will be important. However, 'the Community is after all without parallel; it is and doubtless will remain a political system *sui generis*, a new political animal'.[145] As the conditions in which new political structures will emerge in Europe will be radically different from those in which most earlier federal systems were created,[146] a simple adoption of existing models would be both undesirable and unrealistic. Specifically, unlike other federal systems, a European federation will involve not only the relation of geographical units to each other and to a federal centre, but also their interrelationship at a functional level: thus, it must combine geographical and functional federalism.

However, it must not be assumed that the concept of federation is fixed and absolute, or that the only 'proper' federation is one where the local units are indistinguishably part of the large unit. Unitarian states, as well as federations, accommodate existing differences, often in the framework of restrained territorial units, without prejudicing the consensual unity of the entity. A flexible system of federal government which combines unity with autonomy and ensures closeness to the citizen will not only not cause a dismantling of the European culture and identity, but will encompass, preserve and enhance national diversity through the promotion of greater local autonomy:[147] 'An entity like the European Community, with limited powers at the centre, may be a better safeguard for diversity than the nation state'.[148] Moreover,

> a European identity and allegiance is quite feasible if the European Union is organised on federal lines, which gives due weight and also commands loyalty to national, regional and local interests. By analogy an allegiance to

[144] See fn 6 and fn 128 supra.

[145] *Federal Solutions to European Issues*, op cit 14.

[146] For example, in Australia federalism was chosen as it was impossible to form a single centralised government due to strong colonial feelings. The size of Australia as well as its geographic and climatic differences favoured such system, as did the tradition of the notion of 'responsible government' where one component is answerable to another. Moreover, there was a heavy influence from the United States federal model.

[147] The Commission defined its 'federal perspective' as, 'unity . . . which would guarantee the effectiveness of the Community, its democratisation and clear distinction between the powers enjoyed by the Community, its member states and their regions, in full respect of the principles of subsidiarity and diversity' (Declaration of the Commission on the two Intergovernmental Conferences on Political Union and on Economic and Monetary Union', 27 November 1991, Press release IP (91) 1063, 1).

[148] *Federal Solutions to European Issues*, op cit 3. According to the Commission, subsidiarity also implies respecting the diversity of Europe and recognising that there are areas for which national authorities alone have competence, such as internal security, justice, national and regional development, education, culture, health and related ethical issues (J Delors, 'A Europe closer to its citizens' *Target 92*, No 7, July/August 1992).

such a federal Europe will not militate against a wider loyalty to the whole world and the rest of humanity.[149]

VI ON CREATING A NEW WORLD ORDER: THE EC AS GLOBAL MODEL

Changes may not necessarily be for the worse if they weaken the nation-state and its political institutions. The mere fact that national governments have already accepted significant limitations on their powers in the areas of security, economy, the environment and foreign trade (to mention only a few), is an indication that the unit of the nation-state, a comparatively short-lived phenomenon in world history,[150] is being found increasingly inadequate, and

> There need be no surprise if the nation-state is found of less value in an age when it can no longer meet the needs of its people for security, which was the main reason for its creation.[151]

The value of the nation-states must indeed be questioned at an age when the nations of the world are realising the need for multilateralism and are increasingly looking to the United Nations to provide solutions to problems of truly global dimensions. However, it must be questioned whether it is possible for such organisation, merely a weak association of sovereign nations, to be an effective, influential institution capable of meeting these expanding responsibilities (now extending beyond the maintenance of peace and security to encompass issues of human rights, the environment, world health and economic management). It is unlikely, for example, that the problem of environmental degradation, a truly universal issue, can be resolved without the surrendering of at least some degree of national sovereignty by individual states which are incapable, on their own, of dealing with this crisis of truly global dimensions.

Victor Hugo saw a 'United States of Europe' as leading to the creation of a 'United States of the World'.[152] Although the prospect of states surrendering sovereignty to some kind of supranational world government presently appears remote, the emerging European model is not, and must not be regarded as, an end in itself, but rather as some kind of a stepping stone:

> Hopefully, the creation of a United States of Europe will exhibit the declining value of nationhood and the increasing benefits of combination, and encourage the development of similar federations elsewhere. Certainly it

[149] *Federal Solutions to European Issues*, op cit 70.
[150] Eg in comparison with empires.
[151] *Federal Solutions to European Issues*, op cit 1.
[152] 'I represent a party which does not yet exist: Civilization. This party will make the Twentieth Century. There will issue from it, first the United States of Europe, and then the United States of the World' (quoted in U Kitzinger, *The European Common Market and Community*, op cit 1.

> would be easier, ultimately, for a dozen political units . . . to negotiate a world order.[153]

At a time when the need for closer cooperation in dealing with truly global challenges has never been greater, a federal Europe will provide a valuable model of regional political organisation ultimately possibly leading to the creation of some form of 'world government'.[154]

VII FUTURE DIRECTIONS

The EC was formed with high aspirations and hopes for the future: it was envisaged as becoming truly a single political entity, not merely an amalgamation of sovereign states, where the central and national interests would be balanced within the institutions of a Commission and Council under the control of a democratic European Parliament.

The vision of a federal Europe has not to date been realised. The process of integration, dependent as it is upon compromise and political goodwill, has been arduous and slow, with periods of defeat, modest steps forward and long periods of stagnation, although it must be acknowledged that the progression from independent nationhood to a Union of twelve disparate states bound together by common policies and a distinct institutional framework continually strengthening and expanding, only fifty years after fighting each other in a bloody war, has been no small achievement.[155]

However, today it is clearer than ever before that the only way that Europe can hope to be able to respond effectively to the numerous challenges presented internally and externally by an increasingly changing, uncertain world, is by progressing in the direction of a federal political union.

Maastricht has not lived up to hopes that it would lay the foundations of an ever-closer union, perhaps creating a 'United States of Europe'. Instead, it revealed the inevitable deep divergence of views about EC goals and directions. Despite transforming the Community to a 'Union', a term which reflects the wider dimensions of the Treaty,[156] its achievements are a far cry

[153] *Federal Solutions to European Issues*, op cit 19. The fact that numerous countries are seeking entry into the Community is itself testimony of this.

[154] Note that, in Europe, the unifying process has been aided and accommodated by the presence of numerous distinguishable European characteristics (political ideology, living standards, human rights) which are prevalent despite the existence of several ethnic groups with centuries of diverse historical and cultural development and over thirty distinct languages and dialects. These common links bind European nations and afford a European identity at least at a broad level.

[155] These difficulties are neither unusual nor unprecedented. In the United States, a period of thirteen years elapsed from the time of declaration of independence until the time of federation, even though it involved three million people with common race, culture and language and the same institutional heritage who had just fought a civil war on the same side.

[156] Note that, as already pointed out (fn 6, 128 and 144 supra), the reference to the federal destiny of the Community was, in the end, not incorporated into the Treaty, despite the fact that it does introduce and improve upon existing federalist elements. However, it may also be pointed out that the US Constitution does not contain the word 'federal' either.

from creating the 'European Union of federal type' called for by the EP.[157] It has been said of the Summit that,

> No one can be fully satisfied with the results of the Maastricht Summit. Any negotiation involving a compromise with at least one Government that was philosophically opposed to the whole exercise was unlikely to go far beyond the lowest common denominator. That it did so in some respects is thanks to the pressure brought to bear by the supporters of a federal Union, both within the Community institutions (notably the EP) and outside.[158]

The link between achieving greater unity and extending political and democratic control is obvious. Public opinion is unlikely to accept the granting of greater powers to what is perceived by some to be a 'Brussels bureaucracy'. What is needed is an urgent rethinking and restructuring of Community organs and a new approach to decision-making; specifically, the EP must be accorded greater democratic control over both the Council and the Commission, so that the original intention of the founders (that the Commission be progressively transformed to a European executive responsible to the EP, with the Council acting as a Senate representing the national interest) may be realised.

Ultimately, 'it is necessary to explain more effectively to the people just what is at stake: extending the peace which we already enjoy to the continent as a whole; refusing the decline of Europe; strengthening our economic potential, a prerequisite to social progress and, finally, the Community's role as a driving force, particularly as regards the environment and North-South relations'.[159]

[157] *Second Martin Report*, op cit para 4.
[158] *European Parliament Session Documents*, 'Report of the Committee on Institutional Affairs on the results of the intergovernmental conferences', 26 March 1992, 13.
[159] J Delors, 'A Europe Closer to its Citizens', *Target 92*, No 7, July/August 1992, 1.