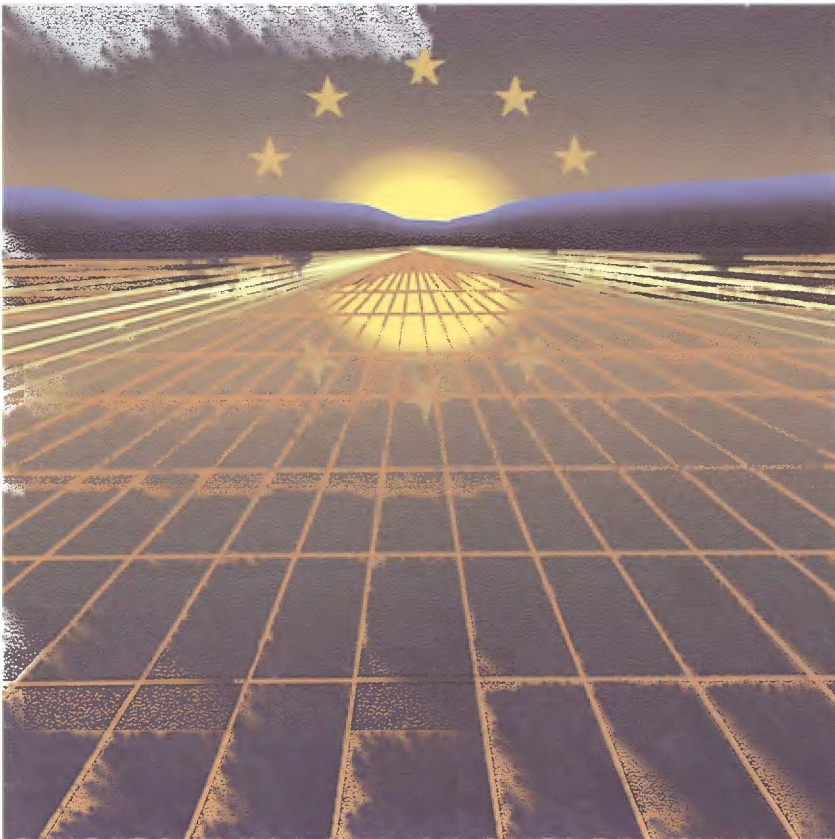


THE ABC OF COMMUNITY LAW



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THE ABC OF COMMUNITY LAW

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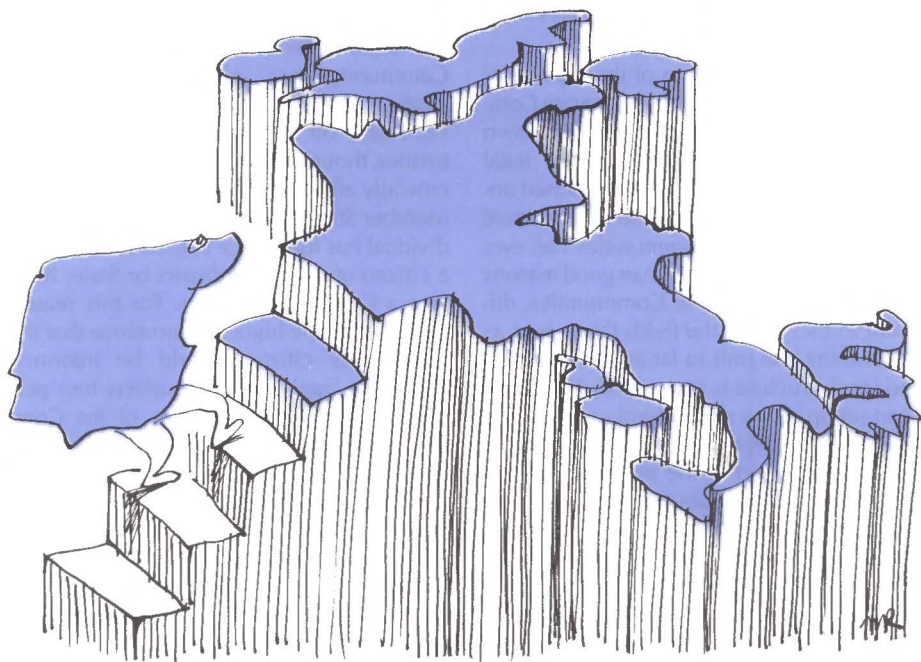
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INTRODUCTION



Until shortly after the end of the Second World War our concept of the State and our political life had developed almost entirely on the basis of national constitutions and laws. It was on this basis in our democratic States that the rules of conduct binding not only on citizens and parties but also on the State and its organs were created. It took the complete collapse of Europe to give a new impetus to the idea of a new European order, at least in Western Europe. The foundation stone of a European Community was laid by the then French Foreign Minister Robert Schuman in his declaration of 9 May 1950, in which he put forward the plan he had worked out with Jean Monnet to pool Europe's coal and steel industries. By this means, he declared, a historic initiative would be taken for an organized and vital Europe, which was indispensable for civilization and without which the peace of the world could not be

maintained. This plan became a reality with the conclusion of the founding Treaty of the European Coal and Steel Community (ECSC) on 18 April 1951 in Paris and its entry into force on 23 July 1952. A further development came some years later with the Treaties of Rome of 25 March 1957, which created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). The founding States of these Communities were Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands. On 1 January 1973 Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland acceded to the Community; the accession of Norway, which had been planned to take place at the same time, was rejected by a referendum in October 1972. In 1976 and 1977 Greece, Portugal and Spain submitted applications to join the Community. This

'southward extension' of the Community was completed with the accession of Spain and Portugal on 1 January 1986, Greece having already become a member on 1 January 1981. Twelve European States are now united in the Community.

Since the entry into force of the Treaties of Rome on 1 January 1958 three separate Communities have existed, each based on its own instruments of foundation. From a legal point of view this situation has remained unchanged to the present day, since no formal merger of the three Communities has ever taken place. There are however good reasons for regarding these three Communities, different as they are in the fields they cover, as constituting one unit so far as their political and legal structure is concerned. They have been set up by the same Member States and are based on the same fundamental objectives, as expressed in the preambles to the three Treaties: to create 'an organized and vital Europe', 'to lay the foundations of an ever closer union among the peoples of Europe', and to combine their efforts to 'contribute ... to the prosperity of their peoples'. This approach was also adopted in the resolution of the European Parliament of 16 February 1978, which proposed that the three Communities should be designated 'the European Community'. Common usage too, both in the media and in everyday life,

has long since come to regard the three Communities as one. For these reasons, and in order to simplify presentation, it is proposed here also to use the expression 'the European Community'.

The legal order created by the European Community has already become an established component of our political life. Each year, on the basis of the Community treaties, thousands of decisions are taken that crucially affect the lives of the Community's Member States and of their citizens. The individual has long since ceased to be merely a citizen of his town, district or State; he is also a Community citizen. For this reason alone it is of the highest importance that the Community citizen should be informed about the legal order that affects him personally. Yet the complexities of the Community and its legal order are not easy for the citizen to grasp. This is partly due to the wording of the treaties themselves, which is often somewhat obscure and the implications of which are not easy to discern. An additional factor is the unfamiliarity of many concepts with which the treaties sought to break new ground. The following pages are an attempt to clarify the structure of the Community and the supporting pillars of the European legal order, and thus help to lessen the incomprehension prevailing among Community citizens.

THE 'CONSTITUTION' OF THE EUROPEAN COMMUNITY

Every social organization has a constitution. By means of a constitution the structure of a political system is defined, that is to say the relationship of the various parts to each other and to the whole is specified, the common objectives are defined and the rules for making binding decisions are laid down. The constitution of the European Community, as an association of States to which quite specific tasks and functions have been allotted, must thus be able to answer the same questions as the constitution of a State.

This Community constitution is not, as in the case of most of the constitutions of its Member States, laid down in a comprehensive constitutional document, but arises from the totality of rules and fundamental values by which those in authority regard themselves as bound. These rules are to be found partly in the founding treaties or in the legal instruments produced by the Community institutions, but they also rest partly on custom.

In the Member States the body politic is shaped by two overriding principles: the rule of law and democracy. All the activities of the Community, if they are to be true to the fundamental requirements of law and democracy, must be both legally and democratically legitimated: foundation, construction, competence, operation, the position of the Member States and their institutions and the position of the citizen.

What answers, then, does the Community order afford to these questions concerning its structure, its fundamental values and its institutions?

■ STRUCTURE OF THE COMMUNITY

The tasks of the Community

In its structure the Community order resembles the constitutional order of a State.

This is immediately apparent from the list of tasks entrusted to the Community. These are not the narrowly circumscribed technical tasks commonly assumed by international organizations, but fields of competence which, taken as a whole, form essential attributes of statehood. Under the ECSC Treaty the Community is competent for the Community-wide administration of the coal and steel industries, which play a key role in the national economies. The European Atomic Energy Community has common tasks to perform in research for, and utilization of, atomic energy. Finally, the EEC does not aim, like the other two Communities, at the closer interlocking of specific sectors of the economy (so-called economic integration).

Rather, its task is, *by establishing a common market* that unites the national markets of the Member States and on which all goods and services can be offered and sold on the same conditions as on an internal market, and by the gradual approximation of the national economic policies in all sectors of the economy, to weld the Member States into a community. Specific matters covered are free movement of goods, free movement of workers, freedom of establishment, freedom to provide services and freedom of capital movements, agriculture, transport policy, social policy and competition. Only a few, albeit important, aspects of State sovereignty are withheld from the Community, such as defence, diplomacy, education and culture; but even in these spheres certain partial aspects are subject to Community competence.

The concept of establishing a common market has been revitalized by the programme aimed at completion of the internal market by 1992. This programme was born of the realization that, on the one hand, there remained a series of national obstacles to the full establishment of the freedoms on which the common market is based and that, on the other hand, important sectors of the economy such as telecommunications and public procurement were not included in the common market. In its White Paper on the completion of the internal market, the Commission of the European Communities presented the Heads of State or Government of the (then) 10 Member States in June 1985 with some 300 proposals for legal instruments, complete with a detailed timetable, designed to remove all intra-Community barriers by the end of 1992. At the Milan Summit in the same year, the Heads of State or Government entrusted the Commission with the political task of implementing the single market programme. However, to achieve in just seven years what fewer Member States had failed to achieve in nearly three decades, a mere declaration of political intent and the adoption of a programme was not enough: the substance of Project 1992 had to be incorporated into the Treaties of Rome. This was done by the Single European Act, which added to the EEC Treaty, among other new provisions, an Article 8a stipulating that the Community should take all the necessary measures to establish the internal market progressively by 31 December 1992. This provision entered into force along with the rest of the Single European Act on 1 July 1987.

The powers of the Community

The similarities between the Community order and that of a State become even more striking if we consider the extent of the powers with which the Community institutions are endowed for the performance of the tasks entrusted to the Community. Generally speaking the founding treaties do not confer on the Community and its institutions any general power to take all measures necessary

to achieve the objectives of the treaty, but lay down in each chapter the extent of the powers to act (principle of specific attribution of powers). This method has been chosen by the Member States in order to ensure that the renunciation of their own powers can be more easily monitored and controlled. The range of matters covered by the specific attributions of power varies according to the nature of the tasks allotted to the Community. It is very far-reaching, for instance, in the common transport policy, where any appropriate provisions may be enacted (Article 75(1)(c) EEC), in agricultural policy (Articles 43(2) and 40(3) EEC) and in the sphere of freedom of movement of workers (Article 48 EEC). On the other hand, in competition law (Article 85 *et seq.* EEC) the scope for discretion on the part of the Community and its institutions is limited by narrowly defined conditions. In addition to these special powers to act, the Community treaties also confer on the institutions a power to act when this proves necessary to attain one of the objectives of the treaty (see Articles 235 EEC, 203 Euratom, 95, first paragraph, ECSC — subsidiary power to act). These articles do not, however, confer on the institutions any general power enabling them to carry out tasks which lie outside the objectives laid down in the treaties. So they cannot be applied in matters of defence policy, foreign policy (apart from external trade) and most aspects of cultural policy. In practice, the possibilities afforded by this power have been used with increasing frequency. This is because the Community is nowadays confronted with tasks that were not foreseen at the time the founding treaties were concluded, and for which accordingly no appropriate powers were conferred in the treaties. Examples are the protection of the environment and of consumers, the establishment of a European Regional Fund as a means of closing the gap between the developed and underdeveloped regions of the Community and the numerous research programmes concluded since 1973 outside the European Atomic Energy Community. The Community was specifically given

jurisdiction in these fields by the Single European Act. Finally, there are further powers to take such measures as are indispensable for the effective and meaningful implementation of powers that have already been expressly conferred (implied powers). These powers have acquired a special significance in the conduct of external relations. They enable the Community to assume obligations towards non-member States or other international organizations in fields covered by the list of tasks entrusted to the Community. An outstanding example is provided by the *Kramer* case decided by the Court of Justice of the European Communities. This case concerned the Community's capacity to cooperate with international organizations in fixing fishing quotas and, where thought appropriate, to assume obligations on the matter under international law. The Court inferred the necessary external competence of the Community from its competence for fisheries under the common agricultural policy.

On the basis of the powers thus conferred on them, the Community institutions can enact legal instruments as a Community legislature legally independent of the Member States. Some of these instruments take effect directly as Community law in the Member States, and thus do not require any transformation into national law in order to be binding, not only on the Member States and their organs, but also on the citizen.

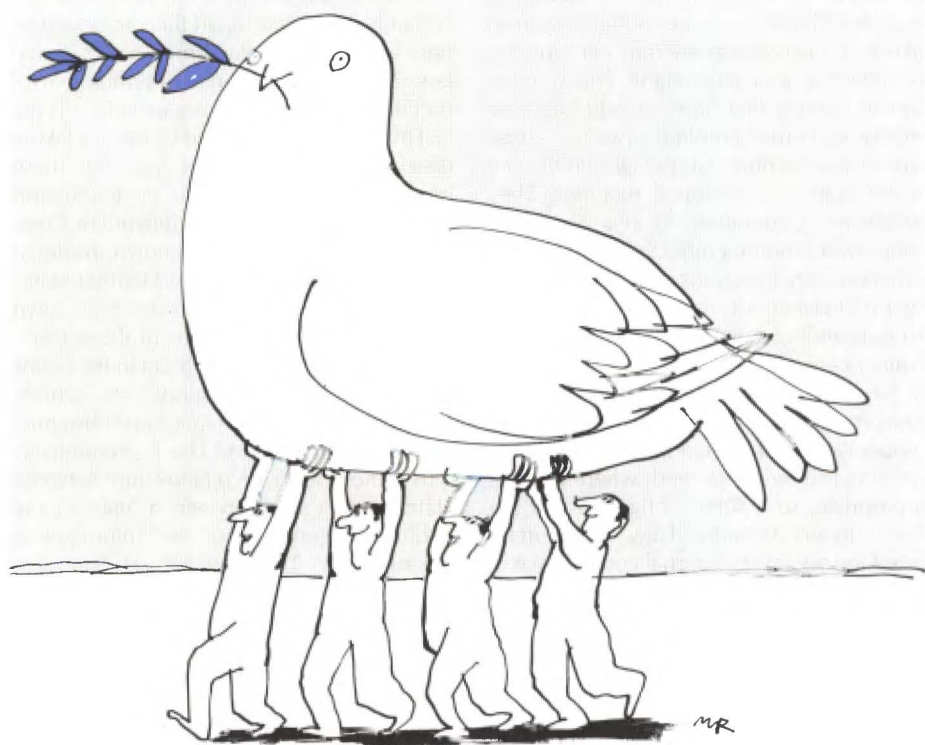
The Community is not a State

These points of resemblance between the Community order and the national order of a State do not, however, suffice to confer on the Community the legal character of a (federal) State. Sovereign powers have been conferred on the Community institutions only in the limited spheres mentioned above, and those institutions have not been given any power to increase their competence merely by their own decisions. Thus, the Community lacks both the universal jurisdiction characteristic of a State and the power to create new fields of competence.

Even if the Community is not yet a State, it is certainly more developed than an organization set up under traditional international law. Its only essential point of similarity with traditional international organizations is the fact that it, too, was created by treaties taking effect under international law. But these treaties are at the same time the foundation documents establishing independent Communities endowed with their own sovereign rights and competence. The Member States have pooled certain parts of their own legislative powers in favour of these Communities and have placed them in the hands of Community institutions in which, however, they are given in return substantial rights of participation. The Community is thus a new form of relationship between States, something between a State in the traditional sense and an international organization. The concept of 'supranationality' has become accepted among lawyers as a means of describing their legal nature. This is intended to indicate that the Community is an association endowed with independent authority, with its own sovereign rights and a legal order independent of the Member States to which both the Member States and their citizens are subject in matters for which the Community is competent. It would, however, be wrong to infer that the European Community has thus already achieved its final form; on the contrary it is still a developing system, the ultimate contours of which are not yet predictable. The development of the system lies primarily in the hands of the Member States. Above all, it depends on their will whether the Community develops further in the direction of a European federal State or of European union.

■ FUNDAMENTAL VALUES OF THE COMMUNITY

The foundations for constructing a united Europe were laid on fundamental ideas and values to which the Member States also



subscribe and which are translated into practical reality by the Community's operational institutions. These acknowledged fundamental values include the securing of a lasting peace, unity, equality, freedom, solidarity, and economic and social security.

The Community as guarantor of peace

There is no motive for European unification that is surpassed by the desire for peace. In Europe, this century, two world wars have been waged between countries that are now Member States of the European Community. Thus, a policy for Europe means at the same time a policy for peace, and the establishment of the Community simultaneously created the centre-piece for a framework for peace in Europe that renders a war between the Community's Member States impossible. More than 40 years of peace in Europe are proof of this.

Unity as the Community's leitmotiv

Unity is the Community's leitmotiv. Present-day problems can be mastered only if the European countries move forward along the path that leads them to unity. Many people take the view that without European integration, without the European Community, it would not be possible to secure peace both in Europe and in the world, democracy, law and justice, economic prosperity and social security and guarantee them for the future. Unemployment, inflation and inadequate growth have long ceased to be merely national problems; nor can they be resolved at national level. It is only in the context of the Community that a stable economic order can be established and only through joint European efforts that an international economic policy can be secured that improves the performance of the European economy and contributes to social justice.

Without internal cohesion, Europe cannot assert its political and economic independence from the rest of the world, win back its influence in the world and retrieve its role in world politics.

Equality must be the rule

Unity can endure only where equality is the rule. This means equality not only as between citizens of the Community but also as between the Member States. No citizen of the Community may be placed at a disadvantage or discriminated against because of his nationality. All Community citizens are equal before the law. As far as the Member States are concerned, the principle of equality means that no State has precedence over another and natural differences such as size, population and differing structures must be dealt with only in accordance with the principle of equality.

The fundamental freedoms

Freedom results directly from peace, unity and equality. Creating a larger entity by linking up 12 States immediately affords freedom of movement beyond national frontiers. This means, in particular, freedom of movement for workers, freedom of establishment, freedom to provide services, free movement of goods and freedom of capital movements. These fundamental freedoms under the founding treaties, as they are called, guarantee entrepreneurs freedom of decision-making, workers freedom to choose their place of work and consumers freedom of choice between the greatest possible variety of products. Freedom of competition permits entrepreneurs to offer their goods and services to an incomparably wider circle of potential customers. Workers can seek employment and change their place of employment according to their own ideas and interests throughout the entire territory of the Community. Consumers can select the cheapest and best products from the far greater wealth of goods on offer that results from increased competition.

The principle of solidarity

Solidarity is the necessary corrective to freedom, for ruthless exercise of freedom is always at the expense of others. For this reason, if a Community framework is to continue to endure, it must always recognize also the solidarity of its members as a fundamental principle, and share both the advantages, i.e. prosperity, and the burdens equally and justly among its members.

The need for security

Lastly, all these fundamental values are dependent upon security. In the most recent past, particularly, a period characterized by movement and change, and by the totally unknown, security has become a basic need which the Community must also endeavour to satisfy. Every action by Community institutions must pay heed to the need to render the future predictable for Community citizens and firms and to lend permanence to the circumstances upon which they are dependent. This is the case not only as regards job security but also as regards decisions taken by entrepreneurs in reliance on the continuance of existing general economic conditions and, lastly, the social security of citizens of the Community.

Fundamental rights in the Community

Once reference has been made to fundamental values and the concepts that underlie them, the question necessarily arises of the fundamental rights of individual citizens of the Community. This is particularly so, since the history of Europe has, for more than 200 years, been characterized by continuing efforts to strengthen the protection of fundamental rights. Starting with the declarations of human and civil rights in the eighteenth century, fundamental rights and civil liberties are firmly anchored in the constitutions of most civilized States. This is particularly so in the case of the Member States of the European Community, whose legal systems are constructed on the basis of observance of the law and respect for the dignity,

freedom and right to self-development of the individual. There are, moreover, numerous international conventions concerning the protection of human rights, among which the European Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950, is of very great significance.

A search through the Community treaties for express provisions concerning the fundamental rights of individual Community citizens is disappointing. In contrast to the legal systems of the Member States, the Community treaties contain neither a list of fundamental rights nor any generally binding commitment to respect and protect the fundamental rights and freedoms of Community citizens as, for example, was laid down in the European Defence Community Treaty of 27 May 1952. The Community treaties do not even mention the terms 'fundamental right' or 'human rights'.

Why are the treaties silent on this matter?

It would certainly be wrong to suppose that those who brought the Community into being had absolutely no regard to the fundamental rights and the fundamental freedoms of Community citizens. They, of course, took it as self-evident that the fundamental rights of Community citizens would remain unaffected by the establishment of the Community. They were, however, convinced that it would be relatively improbable that a Community, the activities of which are limited to economic and social fields, would encroach upon fundamental rights and freedoms. They therefore considered that the creation of a list of fundamental rights, specially tailored to the Community, could be dispensed with. This view, particularly in recent years, when there has been increasing discussion of the protection of human rights, no longer holds good. Superior national as well as European courts have handed down important judgments concerning the safeguarding of fundamental rights. In France the Court of Cassation has declared, in a leading judgment, that the European Convention on

Human Rights is applicable at national level. In the United Kingdom the enactment of a Bill of Rights is under discussion, and in Belgium and the Netherlands, also, consideration is being given to the improvement of the protection of fundamental rights against encroachments by the legislature. Lastly, at the Helsinki Conference on Security and Cooperation in Europe, the protection of human rights was the most important demand made by Western countries.

Against this background it is not surprising that the deficiencies in the protection of fundamental rights in the legal system of the European Community have become the subject of impassioned discussion, especially in Germany and Italy. Here, particular regard must be had to two viewpoints. On the one hand, the European Community is a Community established by States whose constitutions are characterized by respect for the rights and freedoms of their citizens. The Community itself, which can, through its institutions — even if only to a limited extent — enact legislation and make decisions the effects of which apply, in part, directly to the citizens of the Member States, affords, however, at first sight, no guarantee should an act of the Community institutions infringe one of their fundamental rights. On the other hand it is by no means the case that the manifold activities of the Community institutions, which affect the lives of Community citizens to an increasing extent, leave the fundamental rights of those citizens untouched. For example, the common agricultural market embodies prohibitions in relation to marketing and processing which encroach, in certain circumstances, on the rights of ownership and freedom to choose and practise a profession and upon the principle of equality. The officials and other staff of the Community are also, to a large extent, subject to rules that have a considerable influence on their fundamental rights. Convincing proof of this is afforded by the *Prais* case, which concerned freedom of religion of the individual. The plaintiff, Mrs Prais, brought an action in the Court of Justice because she considered that her fundamental right to

freedom of religion had been infringed because the date of a competition for recruitment into the Community's public service had been fixed on a day that was a holiday according to the religion she practised. Although this case concerns only the law governing employment with the Community, which constitutes only a limited area of Community activity, it is nevertheless characteristic of possible infringements of fundamental rights by the Community institutions, for a few years ago it appeared hardly conceivable that the Community could find itself in conflict with freedom of religion. These examples, many more of which could be adduced at will, show that the protection of fundamental rights constitutes a pressing problem in the legal order of the Community, which it was, and still is, essential to solve.

In the following paragraphs, therefore, a closer look is taken at the present situation regarding fundamental rights in the European Community as well as the prospects for further development of the protection of fundamental rights.

If one gives up looking for express guarantees of fundamental rights, one finds that there are provisions scattered throughout the treaty texts whose content is intended to protect Community citizens and which are very similar to certain of the Member States' guarantees of fundamental rights.

This is especially the case as far as the numerous prohibitions on discrimination are concerned which, in specific circumstances, express particular aspects of the general principle of equality. Examples are to be found in Article 7 of the EEC Treaty concerning the prohibition of any discrimination on grounds of nationality, Articles 48, 52 and 60 of the EEC Treaty on equal treatment of Community citizens in regard to the right to work, freedom of establishment and freedom to provide services, Article 85 *et seq.* of the EEC Treaty on freedom of competition, and Article 119 of the EEC Treaty concerning equal pay for men and women.

The Community rules that establish the four fundamental freedoms of the Community, which guarantee the fundamental freedoms of professional life, can be regarded as constituting a Community fundamental right to freedom of movement and freedom to choose and practise a profession. The rules in question are those relating to the freedom of movement of workers (Article 48 EEC), the right of establishment (Article 52 EEC) and freedom to provide services (Article 59 EEC) and freedom of movement of goods (Article 9 *et seq.* EEC).

Lastly, other spheres of fundamental rights are recognized in individual provisions of the Community treaties. Those of particular significance here are the right of association (Article 118(1) EEC and the first paragraph of Article 48 ECSC), the right to submit comments (second paragraph of Article 48 ECSC) and the protection of business and professional secrets (Article 214 EEC, Article 194 Euratom and the second and fourth paragraphs of Article 47 ECSC).

Although in the case law of the early years, the Court of Justice of the European Communities did not regard the application of fundamental rights within the Community as an issue with which it had to concern itself, since 1969 it has continually developed and added to these initial attempts at protecting the fundamental rights of Community citizens. The starting point in this case law was the *Stauder* judgment, in which the point at issue was the fact that a recipient of welfare benefits for war victims regarded the requirement that he give his name when registering for the purchase of butter at reduced prices at Christmas time as a violation of his human dignity and the principle of equality. Although the Court of Justice came to the conclusion, in interpreting the Community provision, that it was not necessary for recipients to give their name so that, in fact, consideration of the question of a violation of a fundamental right was superfluous, it declared finally that the general fundamental principles of the Community legal order, which the Court of Justice has to safeguard, include respect for fundamental rights. This

was the first time that the Court of Justice recognized the existence of a Community framework of fundamental rights of its own. In later judgments the Court of Justice then made clear the criteria according to which it intended to ensure protection of fundamental rights at Community level. These are, firstly, the concepts that are common to the constitutions of the Member States and, secondly, the international conventions concerning the protection of human rights to whose conclusion the Member States have been party or to which they have acceded. The Court of Justice has gradually recognized a number of fundamental rights on this basis and has incorporated them into the Community legal order. Examples are the right of ownership, the general right of privacy, freedom to engage in business and to choose and practise a profession, freedom of association, freedom of religion, privacy of correspondence, the general principle of equality and the right to a fair hearing.

With all due recognition of the achievements of the Court of Justice in the development of unwritten fundamental rights, this process of deriving 'European fundamental rights' has a serious disadvantage: the Court of Justice is confined to the particular case in point. The result of this can be that it is not able to develop fundamental rights from the general legal principles for all areas in which this appears necessary or desirable. Nor will it be able to elaborate the scope of and the limits to the protection of fundamental rights as generally and distinctively as is necessary. As a result, the Community institutions cannot assess sufficiently precisely whether they are in danger of violating a fundamental right or not. Nor can any Community citizen who is affected judge in every case whether one of his fundamental rights has been infringed. The Federal Constitutional Court of the Federal Republic of Germany has availed itself of the legal uncertainty inherent in this situation to declare in its ruling of 29 May 1974 that the protection of German fundamental rights from encroachments on the part of the European Community was a matter for the German courts for so long as the

Community itself lacked a system for the protection of fundamental rights that was equivalent to the Basic Law and had been decided upon by the European Parliament. In its Judgment No 183 of 18/27 December 1973, the Italian Constitutional Court expressed itself in similar terms on this question, albeit it in a much more guarded manner.

A cautious step towards making good this lack of protection of fundamental rights in the Community legal order was taken with the joint declaration by the European Parliament, the Council and the Commission of 5 April 1977. In this, the Community institutions emphasized the importance of fundamental rights to the Community and solemnly promised to respect fundamental rights in the exercise of their powers and in the pursuit of the objectives of the Community. In their declaration on democracy at the summit meeting in Copenhagen on 7 and 8 April 1978, the Heads of State or Government of the Member States endorsed this declaration on fundamental rights. Although these declarations do not establish any direct rights for the citizens of the Community, they nevertheless have considerable *political importance* because of the universal recognition of fundamental rights at Community level.

This was finally acknowledged by the Federal German Constitutional Court, which, impressed by the increasingly firm stance towards fundamental rights in the case law of the European Court of Justice, declared in a ruling given in October 1986 that the Community legal order now had a system for the protection of fundamental rights that was equivalent to the Basic Law and specifically renounced the right of scrutiny it had reserved for itself in the 1974 ruling.

The importance of the protection of fundamental rights was further stressed in the preamble to the Single European Act, which refers to the fundamental rights recognized in the constitutions and laws of the Member States, in the Human Rights Convention and in the European Social Charter.

■ THE INSTITUTIONS OF THE COMMUNITY

The third question arising in connection with the constitution of the European Community is that of its organization. What are the institutions of the Community? Since the Community exercises functions normally reserved for States, does it have a government, a parliament, administrative authorities and courts like those with which we are familiar in the Member States?

The institutions of the Community are the Commission, the Council, Parliament and the Court of Justice of the European Communities.

Of these institutions the Court of Justice and Parliament, or Assembly as it used to be called, were from the outset common to the three Communities. This was provided for in a Convention between the original six Member States that was signed in 1957 at the same time as the Rome Treaties. The process of creating common institutions was completed in July 1967 by the Treaty establishing a Single Council and a Single Commission of the European Communities (the 'Merger Treaty'). Since then all three Communities have had one and the same institutional structure.

The European Parliament

The European Parliament — to give it the name it adopted in 1958 despite its designation as 'Assembly' in the treaties — is elected by the citizens of the Member States by direct universal suffrage, as a result of a Council Decision of 20 September 1976, which entered into force on 1 July 1978.

The mere existence of a parliament cannot, however, satisfy the fundamental requirement of a democratic constitution that all public authority must emanate from the people. That calls not only for transparency of the decision-making process but also for representativeness in the decision-making institutions and the involvement of those concerned. In this respect the present

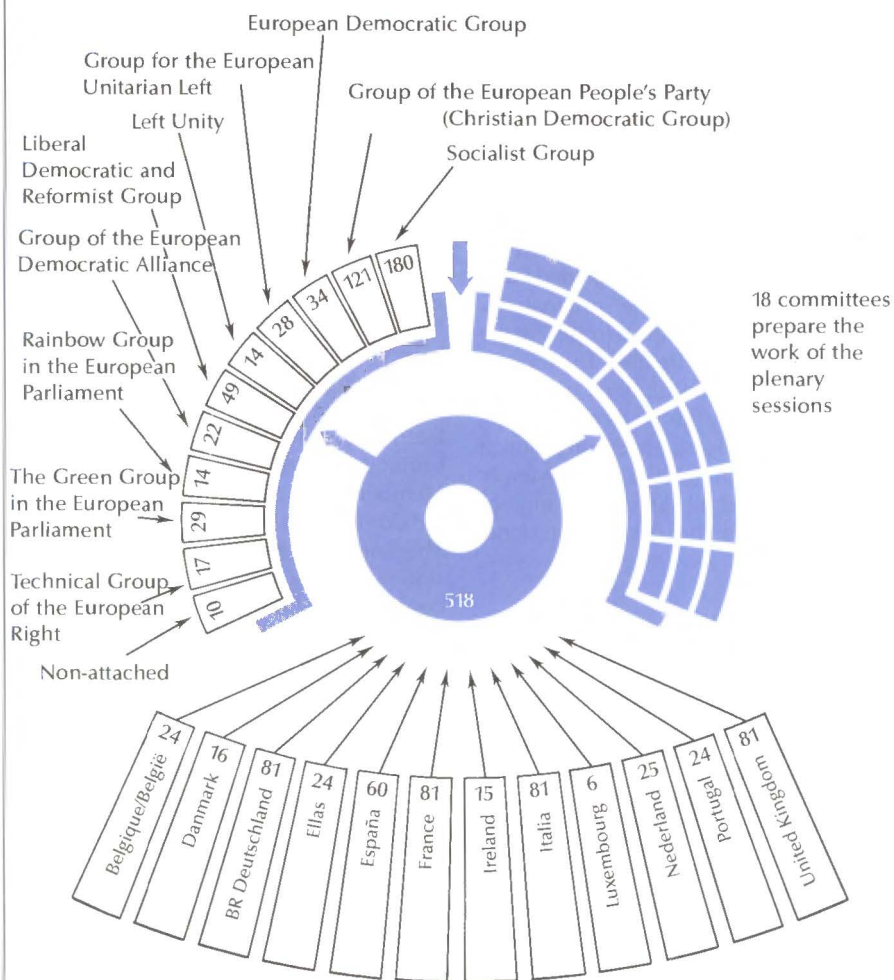
organization of the Community leaves something to be desired. It is therefore rightly described as a still 'underdeveloped democracy'. The European Parliament exercises only symbolically the functions of a true parliament such as exists in a parliamentary democracy. Firstly, the European Parliament does not elect a government. This is simply because no government in the normal sense exists at Community level. Instead, the functions analogous to government provided for in the treaties are performed by the Council and the Commission according to the division of work described above. Parliament has powers of supervision only over the Commission, and not over the Council. The Council is subject to parliamentary control only in so far as each of its members is, as a national minister, subject to the control of his national parliament. The Commission is supervised mainly by means of its accountability to Parliament and the need for it to report annually to the latter. Its conduct has to be defended in open session and it can be compelled to resign following a vote of no confidence. However, Parliament has no influence over the composition of the new Commission, so that the governments of the Member States could in theory reappoint the old Commission with the same membership. The European Parliament has direct decision-making powers in the legislative process only to a limited extent. It is consulted, however, by the legislative decision-making organ, i.e. the Council, on all important matters, even where the treaties do not so provide, but the outcome of the consultations is not binding on the Council. They often have an impact only if the Commission successfully advocates Parliament's views in the Council.

The situation of Parliament in the institutional structure is unsatisfactory in that it detracts from the Community's democratic credentials. The Single European Act was unable to bring about any decisive improvement in this situation. Parliament was granted a real say in decision-making only for decisions concerning the accession of new Member States to the Community and

THE EUROPEAN PARLIAMENT: 518 MEMBERS

Members meet
in political groups
regardless of
nationality

Parliament is presided over by
a President assisted by
12 Vice-Presidents



Political composition of the European Parliament (situation on 11 June 1990)

association with non-member countries. Otherwise, the last word in the Community's decision-making process still lies with the Council. Parliament's ability to influence the Community's decision-making process has been reinforced to some extent by the introduction of the cooperation procedure for all important decisions on the completion of the internal market. Essentially, this procedure, which is described in more detail in the section on the legislative process in the Community, introduces a second reading in the European Parliament for Community legislation.

Since 1975 Parliament can claim a certain special status in the field of budget law. It draws up the budget in conjunction with the Council under the cooperation procedure and, subject to certain conditions and in certain categories of expenditure, has the power to make amendments which even the Council may not oppose; in other words, Parliament has the last say.

This extension of its powers gives grounds for expecting that Parliament will acquire fur-

ther true decision-making powers in future. The history of the parliamentary system of government shows that in the nineteenth century parliaments were first vested with budgetary powers before becoming, sometimes after a hard struggle, the legislative organ.

The Council

The Council is made up of representatives of the governments of the Member States. All 12 Member States send one or more representatives — as a rule, though not necessarily, the departmental or junior minister responsible for the matters under consideration, such as the Minister for Foreign Affairs, Economic Affairs, Finance, Labour, Agriculture, Transport or Technology.

It is in the Council that the individual interests of the Member States and the Community interest are balanced and reconciled.

Although the Member States' interests are given precedence in the Council, the

'It was a stroke of genius on the part of the authors of the Treaty to have invented the Commission, not only because of its right of initiative but also because of this collective memory factor. Without it there can be no continuity.'

Jacques Delors, *A Tribute to Emile Noël*, p. 61

'We cannot simplify the questions about Europe.
But we must simplify the answers.'

Pierre Uri, *Libération*, 7 June 1989

'The Treaty strikes an overall balance:
the sum of the sacrifices made by any of the parties is offset by the sum of the advantages gained'.

Walter Hallstein, *Die Europäische Gemeinschaft* (Fifth edn.), p. 9

THE COUNCIL

**Representatives
of the governments
of the Member States**
12

**Permanent
Representatives
Committee
(Coreper)**



LEGISLATION

Weighting of votes

10	France
10	Germany
10	Italy
10	United Kingdom
8	Spain
5	Portugal

Weighting of votes

Greece	5
The Netherlands	5
Belgium	5
Denmark	3
Ireland	3
Luxembourg	2

Qualified majority:
54 votes out of 76

members of the Council are at the same time obliged to take into account the objectives and needs of the European Community as a whole. The Council is a Community institution and not an intergovernmental conference. Consequently it is not the lowest common denominator between the Member States that is sought in the Council's deliberations, but the highest between the Community and the Member States.

In the case of the two more recent Communities, the Council is the supreme legislative body. It takes the most important political decisions of the Community. With regard to the ECSC, on the other hand, it is an endorsing body that has to deal only with a few, especially important decisions. Under

the Community treaties, majority voting in the Council is the rule. The EEC Treaty provides for unanimity only in areas of political sensitivity for the Member States such as the social security of workers or taxation and in the implementation of the special 'stop-gap' powers under Article 235. Where no express provision is made to the contrary, a simple majority suffices, and each State has one vote. Normally, however, a 'qualified' majority is required, where votes are weighted so that the larger States exert a greater influence. Thus, France, the Federal Republic of Germany, Italy and the United Kingdom each have 10 votes, Spain eight votes, the Netherlands, Belgium, Greece and Portugal five votes, Denmark and Ireland three votes

and Luxembourg two votes. The importance of majority voting lies not so much in the fact that it prevents small States from blocking important decisions, as such members could as a rule be brought into line by political pressure. What the majority principle does is make it possible to outvote large Member States that would withstand political pressure. This principle thus contributes to the equality of Member States and must therefore be regarded as a cornerstone of the Community constitution. Despite this original and intrinsically well-balanced approach, the importance of the majority principle has in practice remained small. The reason for this dates back to 1965 when France, afraid that its vital interests in the financing of the common agricultural policy were threatened, blocked decision-making in the Council for more than six months by a 'policy of the empty chair'.

It was not until 29 January 1966 that this dispute was resolved by the 'Luxembourg Agreement', which states that in the case of decisions where very important interests of one or more countries are at stake, the Council will endeavour, within a reasonable time, to reach solutions that can be adopted by all the members of the Council while respecting their mutual interests and those of the Community. The French delegation emphasized that it considered that in these cases the discussion must be continued until 'unanimous agreement' was reached. The Luxembourg Agreement provides no solution for cases where reaching unanimity proves impossible, but confines itself to stating that a divergence of views on this point still exists among the Member States. This Agreement did succeed in putting an end to the deadlock in the Council, but it also in practice spelt an end to the majority principle. It provides no criteria for determining within the Council whether very important interests are in fact at stake. It is left purely to the Member State concerned to decide this, so that in effect any Member State can demand unanimity for any major decision in the Council. Thus, each Member State has in practice a right of veto. This situation, which

detracted from the decision-making ability of the Council, has been considerably improved by the Single European Act. Although it was not possible to abolish the unanimity rule altogether, it was agreed to give greater emphasis to majority voting — for example, on measures to harmonize legislative and administrative provisions concerning the establishment and functioning of the internal market, economic and social cohesion, research and technological development and the environment. However, exceptions to the majority voting rule were made in the case of taxation, the free movement of labour and the rights and interests of workers, areas where unanimity is still required.

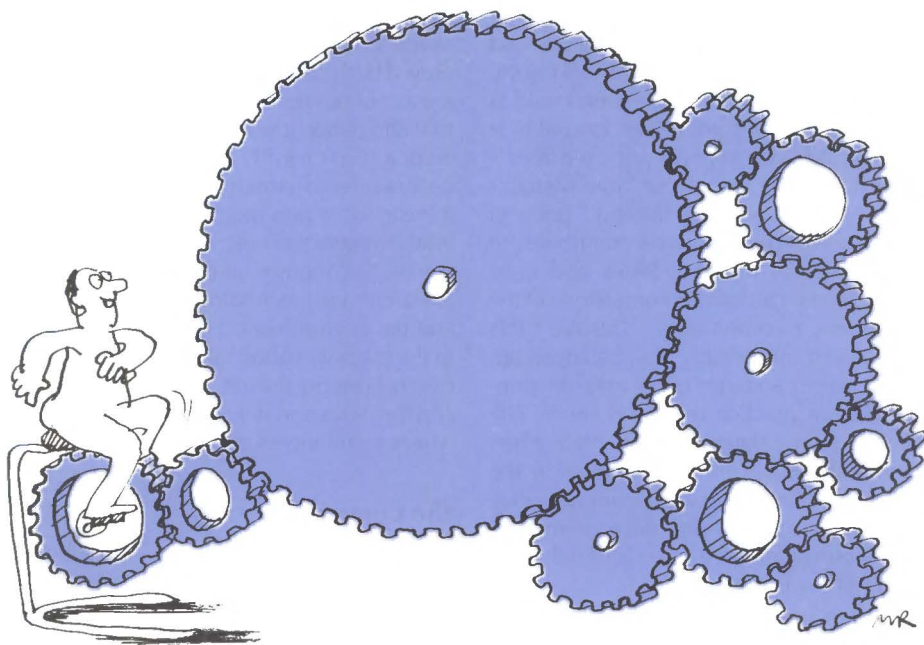
The Commission

Since the accession of Greece, Portugal and Spain, the Commission has consisted of 17 members (two members each from France, the Federal Republic of Germany, Italy, Spain and the United Kingdom, and one from each of the other Member States) appointed by 'common accord' of the governments of the Member States for a term of four years.

The Commission's functions may be broken down as follows:

(i) The Commission is first of all the motive power behind Community policy. It is the starting point for every Community action, as it is the Commission that has to present proposals and drafts for Community legislation to the Council (this is termed the Commission's right of initiative). The Commission is not free to choose its own activities. It is obliged to act if the Community interest so requires. The Council may also ask the Commission to draw up a proposal. Under the ECSC Treaty, however, the Commission also has law-making powers. In certain circumstances these are subject to the assent of the Council, which enables it to overrule Commission measures.

(ii) The Commission is also the guardian of the Community treaties. It sees to it that the treaty provisions and the measures adopted by the Community institutions are properly implemented. Whenever they are infringed



the Commission must intervene as an impartial body and, if necessary, refer the matter to the Court of Justice. The Commission has so far performed this role very effectively.

(iii) Closely connected with the role of guardian is the task of defending the Community's interests. As a matter of principle, the Commission may serve no interests other than those of the Community. It must constantly endeavour, in what often prove to be difficult negotiations within the Council, to make the Community interest prevail and seek compromise solutions that take account of that interest. In so doing, it also plays the role of mediator between the Member States, a role for which, by virtue of its neutrality, it is particularly suited and qualified.

(iv) Lastly, the Commission is — albeit to a limited extent — an executive body. Classic examples of this are the implementation of the Community budget, competition law and the administration of the protective clauses contained in the treaties and secondary legislation. Much more extensive than these 'primary' executive powers are the

'derived' powers devolved on the Commission by the Council. These essentially involve adopting the requisite detailed rules for implementing Council decisions. As a rule, however, it is the Member States themselves that have to ensure that Community rules are applied in individual cases. This solution chosen by the treaties has the advantage that citizens are brought closer to what is still to them the 'foreign' reality of the European system through the workings and in the familiar form of the national system.

The Court of Justice

A system will endure only if its rules are supervised by an independent authority. What is more, in a community of States the common rules — if they are subject to control by the national courts — are interpreted and applied differently from one State to another. The uniform application of Community law in all Member States would thus be jeopardized. These considerations led to the establishment of a Community Court of Justice as soon as the ECSC was created.

THE COMMISSION OF THE EUROPEAN COMMUNITIES



PRESIDENT

1

VICE-PRESIDENTS

6

MEMBERS

10

17 Members appointed
by common accord of
the governments of the
Member States for a
term of four years

Members

1	Belgium
1	Denmark
2	France
2	Germany
1	Greece
1	Ireland

Members

Italy	2
Luxembourg	1
The Netherlands	1
Portugal	1
Spain	2
United Kingdom	2

Responsibilities

Proposing
measures for
the further
development
of Community
policy

Monitoring
observance
and proper
application of
Community
law

Administering
and
implementing
Community
legislation

Representing
the Community
in
international
organizations

Since Greece, Portugal and Spain became members of the Communities, the Court of Justice has consisted of 13 judges, appointed by common accord of the governments of the Member States for a term of six years. The Court is assisted by six Advocates General whose term of office corresponds to that of the judges.

The task of the Court of Justice is to ensure that the law is observed in the interpretation and application of the Treaties establishing the Communities and the legal instruments adopted by the Council and the Commission. Since it was set up, the Court has seen this task as involving not only the administration of justice but above all the shaping of

Community law. It is credited with having defined the principles on which the Community legal order rests, thereby providing the process of European integration with a firm foundation. For this reason, the Court of Justice has been quite accurately described as 'an integrating factor of the highest order'.

Under the Single European Act, the Council was empowered to set up, by a unanimous decision, a Court of First Instance to be responsible for dealing with certain classes of action. On 24 October 1988 the Council availed itself of this possibility and adopted a decision setting up such a Court. It consists of 12 members who, in accordance with the rules of procedure, may also be called on to

THE EUROPEAN COURT OF JUSTICE

Governments of the
Member States appoint
the 13 judges
and six Advocates-General
by common accord for
a term of six years



COURT OF JUSTICE

Full court of 13 judges

2 chambers with 5 judges

4 chambers with 3 judges

TYPES OF PROCEEDING

Actions for failure
to fulfil obligations
under the Treaties
(Commission v
Member State)

Actions by one
Member State
against another

Actions on grounds
of failure to act
(against Council
or Commission)

References from
national courts for
preliminary rulings
to clarify the
meaning and scope
of Community law

Claims for
damages against
the Community

COURT OF FIRST INSTANCE

12 judges

Staff cases
Actions in the field of competition law
Actions under anti-dumping law
Actions under the ECSC Treaty

perform the task of an Advocate-General. The Court has jurisdiction in actions relating to the Staff Regulations of the Communities, competition law, anti-dumping law and matters covered by the ECSC Treaty.

The various types of proceeding and the responsibilities of the Court of Justice are described in more detail in the section on the Community system of legal protection.

Community law lives only in the judgments of the Court. Its judgments convey a feeling of the justness of European law and hence give it the necessary authority *vis-à-vis* governments, authorities, parliaments and citizens.

Ancillary institutions

In addition to the abovementioned institutions proper there are a number of ancillary bodies. The most important of these, because it is vested with general powers, is the *Economic and Social Committee*. The Economic and Social Committee advises the Council and Commission on economic matters. It is a forum for such economic and social categories as manufacturers, farmers, carriers, employees, businessmen, small tradesmen and the professions. As a result of its composition and its political and technical terms of reference, it exerts a strong influence on the Community's decision-making process. Through its opinions, not only does it provide valuable assistance to

those responsible for formulating Community policies, but it also forms a link between the various occupational groups, which ultimately feel directly the practical effects of Community measures, and the European reality.

As financing agency for a 'balanced and steady development' of the common market, the Community has at its disposal the *European Investment Bank*. This provides loans and guarantees in all economic sectors to promote the development of less-developed regions, to modernize or convert undertakings or create new jobs and to assist projects of common interest to several Member States.

Lastly, mention must be made of the *European Court of Auditors*, which was set up by the Treaty of 22 July 1975 and started work in Luxembourg in October 1977. It consists — in line with the present number of Member States — of 12 members appointed for six years by the Council following consultations with the European Parliament. The Court of Auditors performs the task of examining whether all revenue has been received and all expenditure incurred in a lawful and regular manner, and whether the financial management has been sound. The results of its activity are summarized after the close of each financial year in an annual report published in the *Official Journal of the European Communities*.

THE COMMUNITY AS A LEGAL REALITY



The constitution of the European Community described above, and particularly the fundamental values it establishes, can be brought to life and given substance only through Community law. This makes the Community a legal reality in three different senses: it is created by law, it is a source of law, and it forms legal order.

■ THE COMMUNITY IS CREATED BY LAW

This is what is entirely new about the Community, what distinguishes it from earlier efforts to unite Europe. It works not by means of force or domination but simply by means of law. Law is to do what 'blood and iron' have for centuries failed to do. For only unity

based on a freely made decision can be expected to last: unity founded on the fundamental values such as freedom and equality, and protected and translated into reality by law. That is the insight underlying the treaties that created the Community.

■ THE COMMUNITY IS A SOURCE OF LAW

When we speak of a 'source of law' we may mean one of two things. In its fundamental sense the term means the original cause of the law, the grounds on which the law is created. In this sense the source of Community law would be international solidarity, and the desire to preserve peace and to build a better Europe through economic in-

tegration: these are the two motive forces to which the Community owes its existence. However, the expression 'source of law' more commonly refers to where the law comes from, the formal foundation it rests on.

The founding treaties as primary source of Community law

The first source of Community law in this sense is provided by the three treaties, with the various annexes and protocols attached to them, and their later additions and amendments: these are the founding acts which we already looked at when we discussed the Community's constitution. Because the law contained in the treaties was created directly by the Member States themselves, it is known as primary Community legislation. This founding charter is mainly confined to setting out the objectives of the Community, establishing its mechanisms, and laying down a timetable within which the objectives are to be achieved. It sets up institutions with the task of filling out the constitutional skeleton, in the interest of the Community as a whole, and confers on them legislative and administrative powers to do so.

The Community legal acts as secondary source of Community law

Law made by the Community institutions in the exercise of the powers conferred on them by the treaties is referred to as secondary legislation, the second great source of Community law. It covers a range of types of legislative act that had to be devised afresh when the Community was set up. It had to be decided first and foremost what forms Community legislation should take and what effects these forms should have. The institutions had to be able to align the disparate economic, social and not least environmental conditions in the various Member States, and do so effectively, thus without depending on the goodwill of the Member States, so that the best possible living conditions could be created for all the citizens of the Community; but on the other hand they were not

to interfere in the domestic systems of law any more than necessary. The Community legislative system is therefore based on the principle that where the same arrangement, even on points of detail, must apply in all Member States, national arrangements must be replaced by Community legislation; but where this is not necessary, due account must be taken of the existing legal orders in the Member States.

The Community's range of tools

Against this background a range of tools was developed that allowed the Community institutions to work on the national legal systems in varying measures. The most drastic action is the replacement of national rules by Community rules. Then there are Community rules by which the Community institutions act on the Member States' legal systems only indirectly. Thirdly, measures may be taken that affect only a defined or identifiable addressee, in order to deal with a particular case. Lastly, provision was also made for legal acts that have no binding force, either on the Member States or on the citizens of the Community. These basic categories of legal act are to be found in all three Community treaties. There are differences in the actual form they take, and in their titles, between the ECSC Treaty on the one hand and the EEC and the Euratom Treaties on the other. The ECSC Treaty makes provision for only three types of legal act — decisions, recommendations and opinions (Article 14 ECSC); the EEC and Euratom Treaties provide for five forms — regulations, directives, decisions, recommendations and opinions (Article 189 EEC and Article 161 Euratom). The changes in the pattern arose because it was recognized that the forms developed for the ECSC would not adequately meet the needs of the EEC and Euratom. The new titles were intended to avoid the conceptual shortcomings in the legal acts provided for in the earlier treaty. It was felt that the distinctions between the two sets of concepts would simply have to be tolerated until the merger of the three Communities,

which it was intended should take place at a later date.

But if we look at the range of Community legal instruments in terms of the person to whom they are addressed and their practical effects in the Member States, we can break them down as follows:

The purpose and effects of a regulation, or a general ECSC decision, can be illustrated by means of two examples. For the regulation we can take the field which has from the beginning been dealt with mainly by means of regulations, namely agriculture. The common market extends to agriculture and trade

ECSC (Article 14)	EEC (Article 189)	Euratom (Article 161)
● Decisions (general)	● Regulations	● Regulations
● Recommendations	● Directives	● Directives
● Decisions (individual)	● Decisions	● Decisions
—	● Recommendations	● Recommendations
● Opinions	● Opinions	● Opinions

Community 'laws'

The legal acts that enable the Community institutions to encroach furthest on the domestic legal systems are regulations in the EEC and Euratom Treaties, and general decisions in the ECSC Treaty. This makes them by far the most important legal acts in the Community. Two features very unusual in international law mark them out: their Community character, which means that they lay down the same law throughout the Community, regardless of State borders, and apply in full in all Member States; and their direct applicability, which means that they do not have to be transformed into domestic law, but confer rights or impose duties directly on the citizens of the Community in the same way as domestic law; the Member States and their governing institutions and courts are bound directly by Community law and have to comply with it as they have to comply with domestic law. But in spite of all their similarities with the statute law passed in individual Member States they cannot, strictly speaking, be described as the equivalent at European level, as they are not enacted by the European Parliament and thus, from a formal point of view at least, they lack the essential characteristics of legislation of this kind.

in agricultural products (Article 38(1) EEC), as we have already seen. In the common agricultural market, goods have to be traded not just inside one country in which the same rules apply, but between buyers and sellers in different countries, so that the market can operate smoothly only if common rules are in force throughout the territory of the Community. This requires joint management centrally for the Community as a whole, and the measures needed for the operation of the market have to have direct force in all Member States. Only a regulation has these effects. The purpose and effect of the general ECSC decision is clearly illustrated in the way in which the Commission intervenes in the Community steel market. The crisis that had been smouldering in the European iron and steel industry since 1975 grew in 1980 into the worst crisis since the war. There was a collapse in demand for steel on the Community market and the world market, which led to a substantial fall in prices in the Community even though production costs were rising. European steel producers' financial position worsened so far that it was feared there would be lasting damage to the steel industry. This would have been a major blow to the attainment of

the objectives of the ECSC Treaty, set out in Article 3, particularly the improvement of workers' living and working conditions and the achievement of an orderly Community market. This dangerous situation required direct adjustment of steel output, binding on all steel firms, in order to restore the balance between supply and demand on the steel market. The only suitable instrument is the general ECSC decision, as it is the only instrument which ensures that the necessary measures are binding and actually applied in all Member States and by all steel firms alike.

Directives and ECSC recommendations

The second form of binding Community legislation is the directive, which appears in the ECSC Treaty as the recommendation. Directives are addressed to Member States, sometimes to all Member States and sometimes only to specified ones; ECSC recommendations may also be addressed to firms in the Community. Unlike the regulation or general ECSC decision, this form does not create new uniform Community law binding throughout the whole Community: it requires the addressees to take such measures as may be necessary in order to achieve an aim desired by the Community. The directive or ECSC recommendation states an objective which the addressee must realize within a stated period. How this is to be done is a matter for the addressee. The reasoning behind this form of legislation is that it allows intervention in domestic legal and economic structures to take a milder form, and in particular enables Member States implementing the Community rules to take account of special domestic circumstances. The draftsmen of the treaties here proceeded on the assumption, surely correct, that the far-reaching changes in national arrangements needed to implement the treaties often made it advisable to leave it to each State, which is naturally in the best position to know its own circumstances, to judge how its own requirements could best be reconciled with the needs of the Community.

A second guiding principle is also reflected here, namely the desire to achieve the necessary measure of unity while preserving the multiplicity of national characteristics.

When they implement a directive or an ECSC recommendation the Member States have to introduce new domestic law, or recast or repeal their existing domestic statutory and administrative rules so as to bring them into line with the objectives set in the directive or recommendation. This form of Community legislation therefore provides the chief method used for the 'harmonization' process ('approximation of laws': see Article 100 EEC), in which inconsistencies between the various national legal or administrative rules are removed or differences gradually ironed out, and for aligning the economic policy of the Member States. Apart from cases in which an ECSC recommendation is addressed directly to a Community firm, directives and ECSC recommendations do not confer direct rights and duties on Community citizens, as they are addressed solely to the Member States. Citizens acquire the relevant rights and duties only when the directive or recommendation is incorporated into domestic law by the responsible authorities in the Member State. This point is of no importance to the citizens as long as the Member States comply with their obligations. But there would be disadvantages for the citizen where a Member State does not take the necessary implementing measures to achieve an objective set in a directive or ECSC recommendation that would benefit him, or where the measures taken are inadequate. The Court of Justice has refused to accept these disadvantages, and has ruled that in such cases Community citizens can invoke the directive or recommendation directly. This is true only after the time the directive allows for incorporation into national law has expired, and provided the relevant provision is worded clearly enough to leave the Member States no discretion to determine the effect of the measures to be taken. These tests would be satisfied for example where a directive required a Member State to abolish a particular tax, and the

reaches a decision there are various stages to be completed in which, depending on the subject of the measure, it may also come before the European Parliament and the Economic and Social Committee. The machinery is set in motion by the Commission, which must take the initiative by drawing up a proposal for the Community measure in question (we therefore speak of the Commission's right of initiative). A proposal is prepared on the responsibility of a Member of the Commission by the Commission department dealing with the particular field; frequently the department will also consult national experts at this stage. The draft drawn up here, which is a complete text, setting out the content and form of the measure to the last detail, goes before the

Binding legal instruments of the Community institutions (regulations and directives) are enacted at the end of a legislative process that begins with a proposal. This process rests on a division of labour between the Commission and the Council. Put very briefly, the Commission proposes and the Council disposes. But before the Council actually



Commission as a whole when a simple majority is enough to have it adopted. It is now a 'Commission proposal', and is sent to the Council with a detailed explanation of the grounds for it. The Council first checks whether it must consult other Community bodies before deciding on the proposal. The treaties give the European Parliament the right to be consulted on all politically important measures ('compulsory consultation'). Parliament here speaks on behalf of all the citizens of the Community; its function is to look after their interest in the development of the Community. Failure to consult Parliament in such cases is a serious irregularity and an infringement of the treaties. Apart from compulsory consultation of this kind, Parliament is in practice also consulted on all other draft legislation ('optional consultation'). Parliament's part in the process ends with the adoption of a formal written opinion, which the President of Parliament transmits to the Council and the Commission, and which may recommend amendments to the proposal. But the Council is not legally obliged to take account of the opinions or amendments emanating from Parliament. The final decision is the Council's alone.

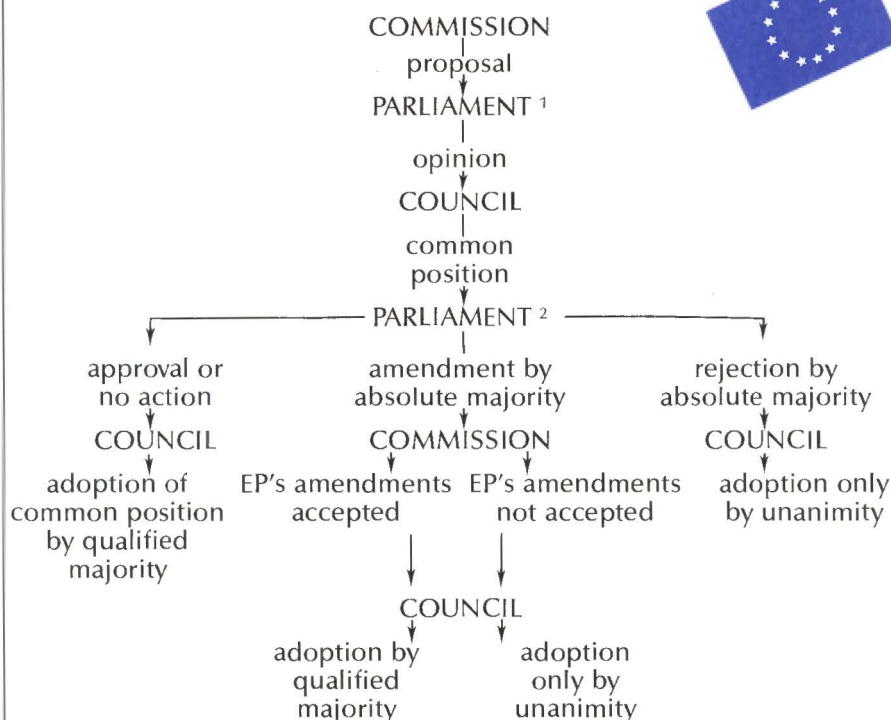
As well as the European Parliament the treaties in some cases also oblige the Council to consult the Economic and Social Committee. Consultation of the Committee is explicitly required, for example, for Council measures relating to the freedom of establishment (see Article 54(2) EEC). But the Council is free to consult the Committee in other cases too. This is done very frequently, although it is not the general rule as it is with Parliament. As in the case of Parliament, the Economic and Social Committee's opinion on the proposal is sent to the Council and the Commission, and this ends its part in the process. After Parliament and the Committee have been consulted, the Commission proposal is once more put before the Council, perhaps amended by the Commission in the light of the opinions of Parliament and the Economic and Social Committee (see Article 149(2) EEC). It will first be discussed by

specialized working parties and then by the Permanent Representatives Committee (known as 'Coreper', from its French title *Comité des Représentants Permanents*). The importance of this Committee in the workings of the Community can hardly be exaggerated. It is in permanent session, and coordinates the preparatory work for Council meetings, determining the priorities and urgency of the items on the Ministers' agenda when they meet in the Council. It can also reach agreement on technical points, with the Ministers merely rubber-stamping measures adopted unanimously by the Permanent Representatives. Adoption of the proposal by the Council is the final stage in the legislative process. The final text, in all nine official languages of the Community (Danish, Dutch, English, French, German, Greek, Italian, Portuguese and Spanish), is adopted by the Council, signed by the President of the Council, and published in the *Official Journal of the European Communities* or notified to the person to whom it is addressed.

As has already been mentioned, another procedure for the adoption of Community legal instruments — in addition to the one we have just described — was introduced by the Single European Act: the institutional cooperation procedure. This differs from the procedure originally laid down in the treaties in that it gives Parliament the opportunity to consider a proposed measure a second time and to deliver a second opinion. As with the original procedure, the process begins with a Commission proposal. However, this proposal is transmitted not only to the Council but also to Parliament, which gives it a first reading and transmits its opinion to the Council. The Council adopts a common position on the basis of the Commission proposal, Parliament's opinion and its own deliberations, and this common position is then the subject of a second reading in Parliament. Parliament now has four possible courses of action open to it within a period of three months.

The first two options are straightforward: Parliament either accepts the Council's com-

THE INSTITUTIONAL COOPERATION PROCEDURE



¹ First reading.

² Second reading.

mon position or allows the time-limit to expire without taking any action. In both cases the Council adopts the measure in accordance with the common position.

However, Parliament may also reject the common position or propose amendments to it. In both of these eventualities the Council can still have its own way, though it has different means of achieving this in each case. If its common position has been rejected by Parliament, the Council can adopt it on a second reading by a unanimous decision or take no decision at all. The unanimity

requirement puts considerable strain on the Council's decision-making process, so this would lead to deadlock. For this reason, Parliament uses its power of rejection only on rare occasions, preferring, as a rule, to propose amendments. The success of these amendments depends on whether or not they are endorsed by the Commission. If they are, the Council takes a decision on the re-examined Commission proposal according to the normal procedure, i.e. by a qualified majority for adoption or, if it wants to depart from the proposal, unanimously. However, if

the Commission does not endorse the amendments, unanimity in the Council is required for them to be adopted.

It is difficult, then, for Parliament on its own to bring its opinion to bear in the face of the Council. For Parliament's views to prevail they must have the Commission's support. In any case, the Council may still exercise a veto by not taking any decision on the amendments proposed by Parliament or on the amended Commission proposal, thereby blocking the legislation in question. However, on the whole, the cooperation pro-

cedure is a considerable step forward in the Community's decision-making process.

The procedure is different in the case of the binding legal instruments of the ECSC, the general decision and the ECSC recommendation. The main difference from the scheme laid down in the Rome Treaties lies in the role of the Commission and the Council. The ECSC Treaty gives the power to adopt these instruments not to the Council but to the Commission. In certain specified cases they require the Council's assent, and of course this does then enable the Council to block

SOURCES OF COMMUNITY LAW

Treaty law

Primary legislation
(Treaties
establishing the Communities,
Annexes and Protocols,
amendments to the Treaties,
Treaties of Accession)



General principles of law, customary law

International agreements

Secondary legislation

Regulations and implementing
regulations
Directives/ECSC Recommendations
General and individual Decisions

Conventions between the Member States

Decisions of the representatives of the Member States
meeting within the Council
Conventions creating uniform Community law

Commission measures. Before the Commission finally adopts a text it must, in certain cases laid down by the Treaty, consult Parliament and the ECSC Consultative Committee.

The Community's 'administrative measures'

A third category of Community legal acts consists of EEC or Euratom decisions and individual ECSC decisions. In some cases the Community institutions may themselves be responsible for implementing the treaties, or regulations and general ECSC decisions, and this will be possible only if they are in a position to take measures binding on particular individuals, firms or Member States. The situation in the Member States' own systems is the same. An Act of the United Kingdom Parliament, for example, will be applied by the authorities in an individual case by means of a statutory instrument. In the Community legal order this function is fulfilled by the individual decision. The individual decision is the means normally available to the Community institutions to order something to be done in an individual case. The Community institutions can thus require a Member State or an individual to perform or to refrain from some action, or can confer rights or impose duties on them.

Non-binding measures of the Community institutions

Lastly there are opinions and EEC and Euratom recommendations. This category of legal measures is the last one explicitly provided for in the treaties; it enables the Community institutions to express a view to Member States, and in some cases to individual citizens, which is not binding and does not place any legal obligations on the addressees. In the EEC and Euratom Treaties these non-binding legal measures are called recommendations or opinions, but under the ECSC Treaty only the term opinions is used. Unhappily, in the ECSC system a 'recommendation' is a binding legal act, correspon-

ding to the directive in the EEC and Euratom Treaties. In any event, while EEC and Euratom recommendations urge the addressees to adopt a particular form of behaviour, opinions are used where the Community institutions are called upon to state a view on a current situation or particular event in the Community or the Member States.

The real significance of these recommendations and opinions is political and moral. In providing for legal acts of this kind the draftsmen of the treaties proceeded on the expectation that, given the prestige of the Community institutions, and their broader view and wide knowledge of conditions beyond the narrower national framework, those concerned would voluntarily comply with recommendations made to them and would draw the appropriate consequences from the Community institutions' assessment of a particular situation.

These non-binding legal acts are not adopted by the legislative procedure described above, but are simply issued by a single Community institution.

The Community's international agreements

A third source of Community law has to do with its role at international level. As one of the focal points of the world, Europe cannot confine itself to managing its own internal affairs: it has to concern itself with the economic, social and political relations with the world outside. The Community therefore concludes agreements in international law, with non-member countries and with other international organizations; these range from treaties providing for extensive cooperation in trade or in the industrial, technical and social fields to agreements on trade in particular products. With the Community's economic significance growing, and its trading activities expanding, the number of agreements it has concluded with non-member countries has increased substantially in the last few years.

Two kinds of agreement between the Community and non-member countries are particularly worth mentioning.

Association agreements

Association is a special kind of relationship between the Community and a non-member country that goes beyond the mere regulation of trade and involves close economic cooperation and financial assistance. A distinction may be drawn between two different types of association agreement:

(i) Agreements that maintain special links between certain Member States and non-member countries.

One particular reason for the creation of the association agreement was the existence of overseas countries and territories with which Belgium, France, Italy and The Netherlands maintained particularly close ties as a legacy of their colonial empires. The introduction of a common external tariff in the Community would have seriously disrupted trade with these countries, so special arrangements needed to be made so that the system of unrestricted Community trade could be extended to them. At the same time tariffs on goods originating in these countries were progressively dismantled. Financial and technical assistance from the Community was channelled through the European Development Fund.

(ii) Agreements as preparation for accession to the Community or for the establishment of a customs union.

Association also has a role to play in the preparation of countries for possible membership of the Community. It serves as a preliminary stage towards accession during which the applicant country can work on converging its economy with that of the Community. This proved successful in the case of Greece, which was associated with the Community from 1962. Another association agreement with a view to future accession to the Community was concluded with Turkey in 1964.

Two other association agreements, whose eventual purpose is not membership of the

Community but the establishment of a customs union, were concluded with Malta in 1971 and Cyprus in 1973.

Cooperation agreements

Cooperation agreements are not as far-reaching as association agreements, being aimed solely at intensive economic cooperation. The Community has such agreements with the Maghreb States (Morocco, Algeria and Tunisia), the Mashreq States (Egypt, Jordan, Lebanon and Syria), and Israel, for instance.

General principles of law

The sources of Community law described so far share a common feature in that they all produce written law. Like all systems of law, however, the Community legal order cannot consist entirely of written rules: there will always be gaps which have to be filled by unwritten law. The sources of unwritten Community law are provided by the general principles of law. These are rules reflecting the elementary concepts of law and justice that must be respected by any system of law. Written Community law for the most part deals only with economic and social matters, and is only to a limited extent capable of laying down rules of this kind, so that the general principles of law form one of the most important sources of law in the Community. They allow gaps to be filled and questions of the interpretation of existing law to be settled in the fairest way. These principles are given effect when the law is applied, particularly in the judgments of the Court of Justice: under Article 164 EEC, Article 136 Euratom and Article 31 ECSC 'the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed'. The main points of reference for determining the general principles of law are the principles common to the legal orders of the Member States. They provide the background against which the rule needed to resolve a problem at Community level can be developed. So far the following principles have been formulated by the Court in this way, and thus

recognized as unwritten sources of law in the Community legal order:

- (i) aspects of the Community's liability for damage sustained as a result of action by its institutions or staff;
- (ii) the principle of legality in administration;
- (iii) the principle of proportionality (that action must be in proportion to the end it pursues);
- (iv) the principle of legal certainty;
- (v) the principle that legitimate expectations must be protected;
- (vi) the principle of non-discrimination and the principle of equality of treatment;
- (vii) the principle of entitlement to a legal hearing;
- (viii) the fundamental human rights.

Agreements between the Member States

The final source of Community law is provided by agreements between the Member States. Agreements of this kind may be concluded when questions have to be settled that are closely linked to the Community's activities, but no powers have been transferred to the Community institutions; there are also full-scale international agreements (treaties and conventions) between the Member States aimed especially at overcoming the drawbacks of territorially limited arrangements and creating law that applies uniformly throughout the Community (see Article 220 EEC). This is important primarily in the field of private international law; thus agreements have been concluded on the reciprocal recognition and enforcement of judgments in civil and commercial matters (1968) and on the mutual recognition of companies and legal persons (1968).

■ THE COMMUNITY IS A LEGAL ORDER

Finally, the Community is a legal order, since it is not merely a creation of law but also pursues its objectives purely by means of law. To put it briefly, it is a Community based on law.

The common economic and social life of the peoples of the Member States is governed not by the threat of force but by the law of the Community. We have already in previous chapters made the acquaintance of this Community law, which in all its ramifications shapes the legal order.

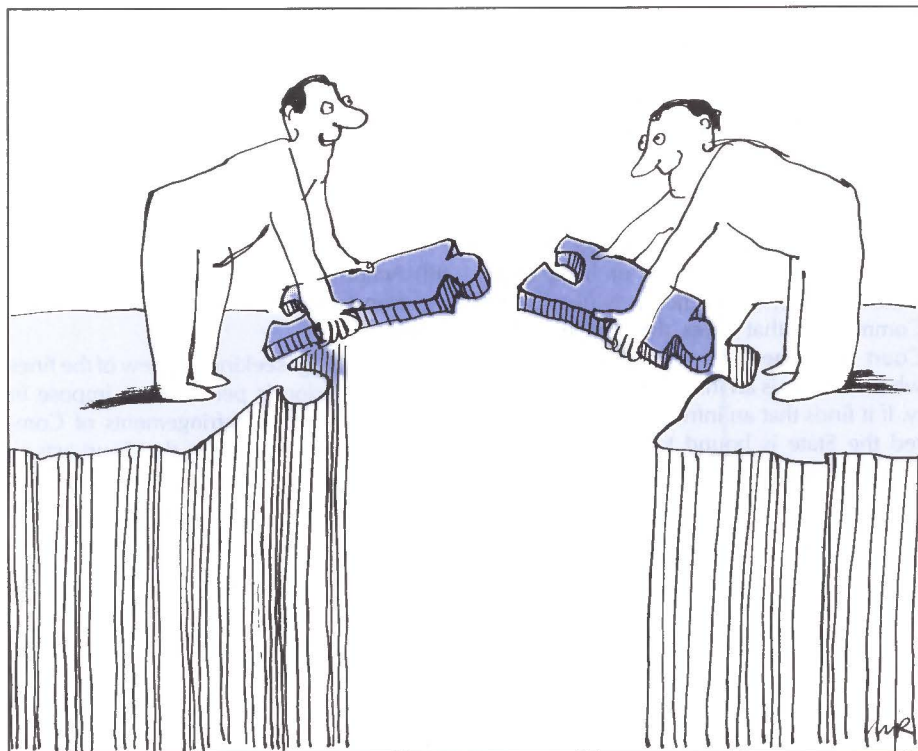
It is the basis of the institutional system. Community law lays down the procedure for decision-making by the Community institutions and regulates their relationship to each other. It provides the institutions with the means — in the shape of regulations, general ECSC decisions, directives, ECSC recommendations and individual decisions — of enacting legal instruments binding on the Member States and their citizens.

Thus the individual himself becomes a main focus of the Community. Its legal order directly affects his daily life to an ever-increasing extent. It accords him rights and imposes on him duties, so that as a citizen both of his State and of the Community he is governed by a hierarchy of legal orders — a phenomenon familiar from federal constitutions. Community law also defines the relationship between the Community and the Member States. The Member States must take all appropriate measures to ensure fulfilment of the obligations arising out of the treaties or resulting from action taken by the institutions of the Community. They must facilitate the achievement of the Community's tasks and abstain from any measure that could jeopardize the attainment of the objectives of the treaties (see the similar wording on these points of Article 5 EEC, Article 192 Euratom and Article 86 ECSC).

Apart from this, two fundamental principles govern the Community legal order: the legality of the acts of the Community organs and the legal protection of those subject to Community rules.

Legality of the acts of the Community institutions

The Community treaties attach great importance to the principle that the acts of the institutions must be in accordance with the



provisions of the treaties. This principle is expressed in many of their provisions: for example, all three treaties, in connection with the tasks of the Community and its institutions, use the expressions 'in accordance with the provisions of this Treaty', 'as provided in this Treaty' and 'pursuant to this Treaty'. Just as the Community institutions are bound by the law laid down in the treaties when exercising their legislative and executive authority, so they must observe Community secondary law when enacting implementing provisions and dealing with particular cases by means of individual decisions. The comprehensive rules of Community law, sometimes quite specific even on points of detail, would have little point if the Community institutions were not bound to observe them scrupulously.

Community system of legal protection

Like every true legal order, the Community legal order provides a self-contained system of legal protection to deal with disputes concerning Community law and to ensure its implementation. The focal point of this system is the Court of Justice of the European Communities and the associated Court of First Instance. It is the supreme and, at the same time, the only judicial authority empowered to determine all questions of Community law. Its general task is described in the founding treaties as being to 'ensure that in the interpretation and application of this Treaty the law is observed'. (See Article 164 EEC, Article 136 Euratom, Article 31 ECSC.) The Court's duties are extremely wide-ranging. First, it acts in an advisory capacity: it can deliver opinions on conventions the Community in-

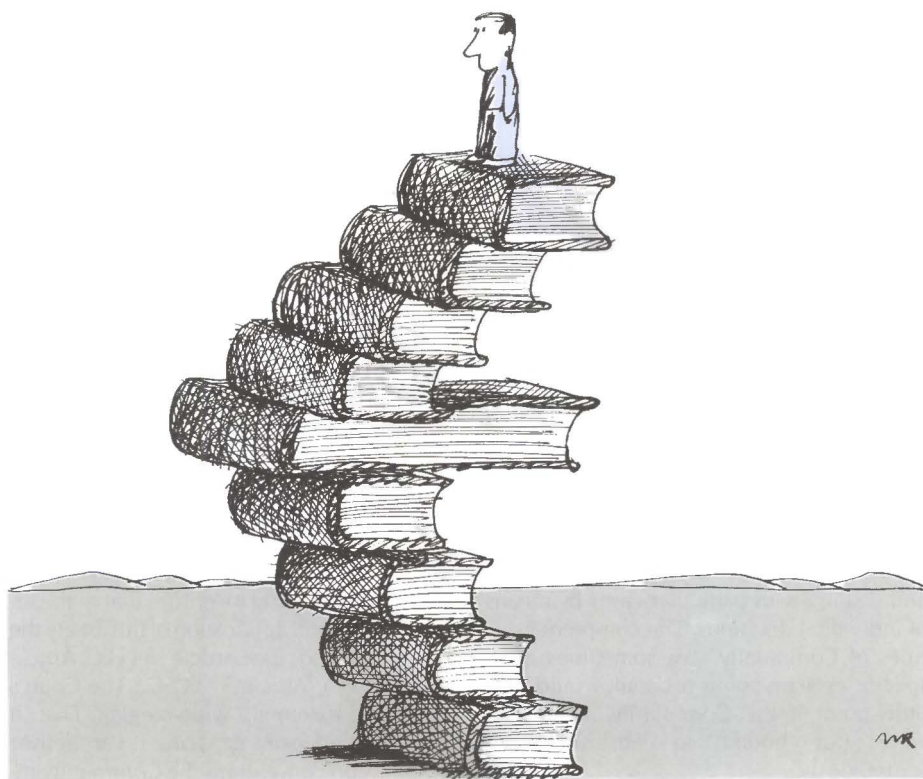
tends to conclude with States or international organizations. These opinions are legally binding. Of much greater importance, however, are its functions as a judicial body. They embrace the following types of proceedings:

- (i) Actions against States that fail to fulfil their obligations under the treaties or under Community law. Such actions may be initiated either by the Commission or by another Member State; in practice it is usually the Commission that takes the initiative. The Court examines the case and decides whether there is an infringement of the treaty. If it finds that an infringement has occurred the State is bound to take immediate steps to comply with the Court's judgment.
- (ii) In the context of the Court's jurisdiction to examine the validity of the acts of the Com-

munity institutions, an action may be brought on the ground of failure to act or for the annulment of action taken by an institution. Actions on the ground of failure to act may be brought against the Council or the Commission if either institution fails to take a decision that is mandatory under the treaty or under a legal instrument based on the treaty.

- (iii) Actions concerning disputes involving the non-contractual liability of the Community.

- (iv) Proceedings seeking a review of the fines the Commission is permitted to impose in the case of certain infringements of Community law. In these cases the Court acts as a court of appeal which has the right either to annul the fines or to increase or reduce them.



(v) Actions concerning disputes between the Community and its officials or their successors in title.

(vi) Finally, the Court acts in some cases as a court of arbitration when this jurisdiction is expressly conferred on it by the particular contract concerned.

The Court has, however, a further very important field of jurisdiction. Since its duty is to ensure the uniform interpretation of Community law, national courts, in cases where any question of Community law arises, can request the Court to clarify any such points by means of a preliminary ruling. By these preliminary rulings the supreme European Court exercises a form of advisory function that is legally binding. The following are examples of matters on which preliminary rulings may be given:

(i) clarification of the meaning and scope of the provisions of the treaties or of Council or Commission regulations;

(ii) identification of the national law referred to in any particular provision of Community law;

(iii) determination of the period of validity of a Community rule;

(iv) decisions on the legal acts or legal measures falling respectively under Community law or under national law;

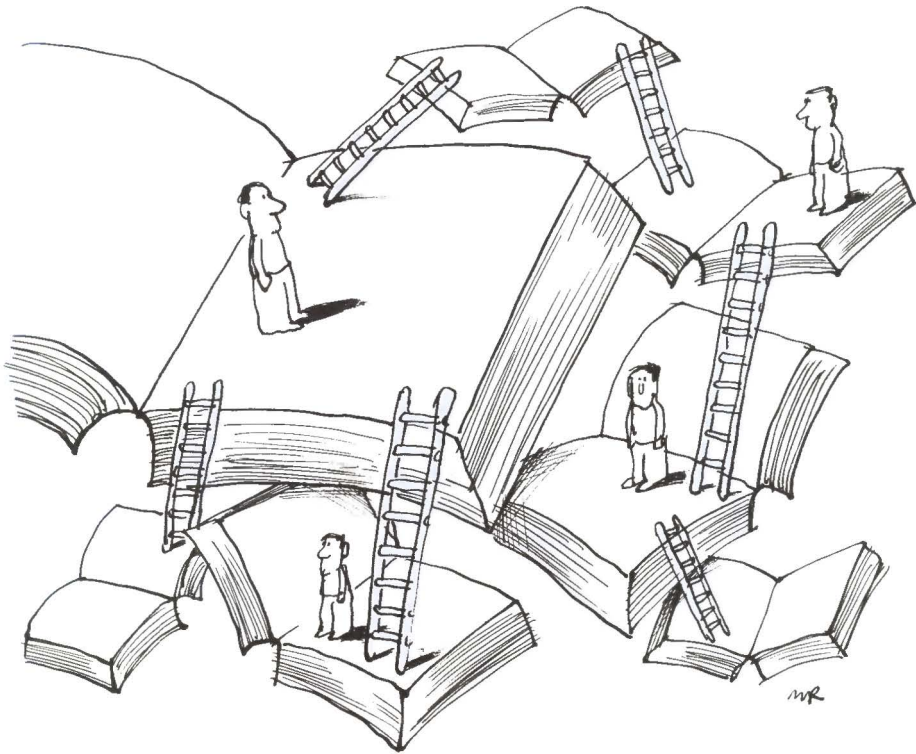
(v) determination of the question whether Community rules are self-sufficient or re-

quire to be clarified or supplemented by provisions of national law;

(vi) examination of the validity of Community legal acts.

The range of duties imposed on the Court shows that it performs functions which in the legal orders of the Member States are divided among different types of court — constitutional courts, administrative courts, civil courts and labour courts. The Court may be regarded as a constitutional court in cases where it has to decide on actions brought by the Council or the Commission, or by one Member State against another Member State (on account of breaches of obligations under the Community treaties), or when it decides on the interpretation of the Community treaties, particularly in the case of questions on interpretation of Community law referred by national courts. The Court exercises the functions of an administrative court when it examines the validity of decisions taken in individual cases by the Community institutions. Finally, in actions for damages and actions by officials arising from their service relationship the Court exhibits features of a civil court or a labour court. The Court cannot, however, exercise any of the functions of a criminal court in the traditional sense, although it does have the power to review the fines imposed by the Commission and to reduce them where it thinks fit.

THE POSITION OF COMMUNITY LAW IN RELATION TO THE LEGAL ORDER AS A WHOLE



After all that we have learnt about the structure of the Community and its legal order, it is not easy to assign Community law its rightful place in the legal order as a whole and to define the boundaries between it and other legal orders. Two possible approaches to classifying it must be rejected from the outset. Community law must not be conceived of as a mere collection of international agreements, nor can it be viewed as a part or an appendage of national legal systems. On the contrary, through the establishment of the Community, the Member States have limited their legislative sovereignty and in so

doing have created a self-sufficient body of law that is binding on them and on their subjects.

How then, should the relationship between Community law and national law be described?

Even if Community law constitutes a legal order that is self-sufficient in relation to the legal orders of the Member States, this situation must not be regarded as one in which the Community legal order and the legal orders of the Member States are superimposed on one another like layers of

bedrock. The fact that they are applicable to the same people, who thus become citizens of a national State and citizens of the Community in one person, negates such a rigid demarcation of these legal orders. Secondly, such an approach disregards the fact that Community law can become operational only if it becomes part of the legal orders of the Member States. The truth is that the Community legal order and the national legal orders are interlocked and mutually dependent on one another.

■ COOPERATION BETWEEN COMMUNITY LAW AND NATIONAL LAW

In the first place, the relationship between these legal orders is characterized by the fact that Community law and national law work in concert with one another, assist one another and supplement each other. On its own, the Community legal order is not able to fully achieve the objectives pursued by the establishment of the European Communities. For this, it requires the assistance and the substructure of national law. Thus, the Community treaties and the legal provisions adopted by the Community institutions for their implementation must not only be observed by the Member States' institutions — the legislature, the government (including government departments) and the judiciary — but must also be put into effect and rendered operational. The Community legal order must not confront them as if it were something 'external' or 'foreign'; the Member States and the Community institutions are, on the contrary, called upon jointly to make their contribution to achieving the common objectives. The close link and the supplementing interrelationship between the Community legal order and the national legal orders show up most clearly in the way in which directives operate, for in order to attain the objective laid down in a directive the latter is dependent upon national law. The interdependence of the Community legal

order and the national legal orders is also illustrated by the fact that in order to remedy its own deficiencies, Community law frequently has recourse to the national legal orders. A final example is the enforcement of pecuniary claims of the European Communities against Community citizens or firms. Although, here, the procedure is governed by the law of the Member State in whose territory enforcement is effected, the basis for the claim and the scope for contesting it are governed solely by Community law.

■ CONFLICT BETWEEN COMMUNITY LAW AND NATIONAL LAW

However, the relationship between Community law and national law is also characterized by an occasional 'hostility' between the Community legal order and the national legal orders. Here one speaks of a conflict between Community law and national law. Such a situation always arises when a provision of Community law confers rights and imposes obligations directly upon Community citizens while its content conflicts with a rule of national law. Concealed behind this apparently simple problem area are two fundamental questions underlying the construction of the Community, the answers to which were destined to become the acid test for the existence of the Community legal order, namely:

- (i) the direct applicability of Community law, and
- (ii) the primacy of Community law over conflicting national law.

■ DIRECT APPLICABILITY OF COMMUNITY LAW

Firstly, the direct applicability of Community law simply means that the latter confers rights and imposes obligations directly not

only on the Community institutions and the Member States but also on the Community's citizens. That bald statement does not, however, get us very far since the question remains which provisions of Community law have that effect. The Community treaties enlighten us in this regard only by reference to what is referred to as secondary legislation (enacted by the institutions). For example, Article 189(2) EEC states that a Regulation is 'directly applicable in all Member States'.

One of the outstanding achievements of the Court of Justice of the European Communities is that it has enforced the direct applicability of the provisions of Community law despite the initial resistance of certain Member States and has thus guaranteed the existence of the Community legal order. Its case law on this point started with a perfectly run-of-the-mill case which, however, was destined to go down in the annals of the Court. In this case, a Dutch transport firm, *Van Gend & Loos*, brought an action in a Dutch court against the Dutch customs authorities, who had charged increased customs duties on a chemical product imported from the Federal Republic of Germany. The firm regarded this practice as an infringement of Article 12 EEC, which prohibited the Member States from introducing new customs duties or increasing those that they already applied in the common market. In the final analysis, the outcome of these proceedings depended on the question whether individuals, also, can rely on Article 12 against customs duties levied in breach of the Treaty. As the answer to this question necessitated an interpretation of the EEC Treaty, the Dutch court suspended the proceedings and referred the matter to the Court of Justice of the European Communities. Despite the advice of numerous governments and its Advocate-General, the Court decided that all the rules of the founding treaties, which are worded unconditionally, are self-sufficient and legally complete so that their implementation or validity do not require any further intervention by the Member States or the Commission, can apply directly to individuals. This was stated to

be the case with Article 12, so that the *Van Gend & Loos* company could also derive rights from that provision which the Dutch court had to protect. The logical consequence was that the customs duties levied in breach of the Treaty were declared void. In the grounds for its judgment, the Court stated that 'the Community constitutes a new legal order... the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community'.

Subsequently, the Court continued to apply this case law in regard to provisions of the EEC Treaty that are of far greater importance to citizens of the Community than Article 12. Three judgments are noteworthy here covering the direct application of Article 48 (freedom of movement), Article 52 (freedom of establishment) and Article 59 (freedom to provide services).

Freedom of movement (Article 48 EEC)

Freedom of movement means the right of all workers in the Member States of the Community to take up employment in any other Member State under the same conditions as national workers (Article 48(2) EEC). Express mention is made of the right to accept offers of employment and to stay and move freely in the host country (Article 48(3)). The details of these rights were elaborated in Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, which hence confers on Community citizens rights on which they may rely before national courts. With regard to the guarantees afforded by Article 48, the Court of Justice delivered a judgment to this effect in the *Van Duyn* case. The facts of this case were as follows: a Miss van Duyn, a Dutch

national, was, in May 1973, refused leave to enter the United Kingdom in order to take up employment as a secretary with the 'Church of Scientology', an organization considered by the Home Office to be 'socially harmful'. Relying on the Community rules on freedom of movement for workers, in particular Article 48 EEC, Miss van Duyn brought an action before the High Court. She sought a declaration from the High Court that she was entitled to stay in the United Kingdom for the purpose of employment and to be given leave to enter the United Kingdom. In answer to a question referred by the High Court, the Court of Justice held that Article 48 has direct effect and hence confers on individuals rights that are enforceable before the courts of a Member State.

Freedom of establishment (Article 52 EEC)

Freedom of establishment comprises the right to take up and pursue activities as self-employed persons in another Member State and to set up and manage undertakings, in particular companies or firms (second paragraph of Article 52 EEC). All existing restrictions on freedom of establishment based on nationality were to be lifted during the transitional period, which expired on 31 December 1969 (see Article 8(7)) and foreigners were to be granted the right of establishment under the same conditions as nationals.

The Court of Justice was asked by the Belgian Conseil d'Etat to give a ruling on the direct effect of Article 52. The Conseil d'Etat had to decide an action brought by a Dutch lawyer, J. Reyners, who wished to assert his rights arising out of Article 52. Mr Reyners felt obliged to bring the action after he had been denied admission to the profession of lawyer in Belgium because of his foreign nationality, despite the fact that he had passed the necessary Belgian examinations. In its judgment of 21 July 1974, the Court held that unequal treatment of nationals and foreigners as regards establishment could no longer be maintained, as Article 52 was directly ap-

plicable since the end of the transitional period and hence entitled Community citizens to take up and pursue gainful employment in another Member State in the same way as a national. As a result of this judgment Mr Reyners had to be admitted to the legal profession in Belgium.

Despite this 'citizen-friendly' judgment, a Community citizen who wishes to set up in business still frequently encounters obstacles which he has difficulty in surmounting. This is because a foreigner is still allowed to establish himself in another Member State only if he fulfils the same conditions as are required of nationals of the host country. For example, he must have received the required domestic professional training or have passed the necessary examinations and obtained certificates or diplomas issued by the host country, which as a rule is not the case. With a view to removing these obstacles, the EEC Treaty provides for the adoption of measures to coordinate Member States' rules on the taking up and pursuit of activities as self-employed persons (Article 57(2)) and on the mutual recognition of diplomas, certificates and other evidence of formal qualifications (Article 57(1)).

Freedom to provide services (Article 59 EEC)

Freedom to provide services encompasses the self-employed activities for which only a temporary stay in another Member State is necessary. The right of establishment is therefore not involved. Examples are the activities of doctors, lawyers, architects and engineers, as well as those of banks and insurance companies or of brokers, intermediaries and advertising agencies and technical, craft and artistic activities. As in the case of freedom of establishment, all restrictions on freedom to provide services should have been abolished by the end of the transitional period, i.e. 31 December 1969, and foreigners should have been granted the right to provide services under the same conditions as nationals.

The Court of Justice was given an opportunity in the *Van Binsbergen* case to establish expressly the direct effect of Article 59 EEC. These proceedings involved *inter alia* the question whether a Dutch legal provision to the effect that only persons habitually resident in the Netherlands could act as legal representatives before an appeal court is compatible with the Community rules on freedom to provide services. The Court answered this question in the negative on the ground that all restrictions to which Community citizens might be subject by reason of their nationality or place of residence infringe Article 59 and are therefore void.

Of the many other treaty provisions whose direct effect within a Member State the Court has confirmed, the following may be singled out: Article 30 EEC, which guarantees freedom of movement for goods, and Article 119 EEC, which guarantees equal pay for men and women.

Since 1970 the Court has extended its principles concerning direct effect to provisions in directives and in decisions addressed to States. This seems logical if even treaty law can apply directly to Community citizens despite the fact that it is addressed to the Member States.

The practical importance of the direct effect of Community law in the form in which it has been developed and brought to fruition by the Court of Justice can scarcely be over-emphasized. It improves the position of the individual by turning the freedoms of the common market into rights that may be enforced in a court of law. The direct effect of Community law is therefore one of the pillars, as it were, of the Community legal order.

■ PRIMACY OF COMMUNITY LAW

The direct effect of a provision of Community law leads to a second, equally fundamental question: what happens if a provision of Community law gives rise to direct rights and obligations for the Community citizen and

conflicts in substance with a rule of national law?

Such a conflict between Community law and national law can be settled only if one gives way to the other. Community legislation contains no express provision on the question. None of the Community treaties contains a provision stating, for example, that Community law overrides national law or that it is inferior to national law. Nevertheless, the only way of settling conflicts between Community law and national law is to grant Community law primacy over national law and allow it to supersede all national provisions that diverge from a Community rule and take their place in the national legal orders. After all, what would remain of the Community legal order if Community law were to be subordinated to national law? Hardly anything! Community rules could be set aside by any national law. There would no longer be any question of a uniform and equal application of Community law in all Member States. Nor would the Community be able to perform the tasks entrusted to it by the Member States. The ability of the Community to function would be jeopardized, and the construction of a united Europe on which so many hopes rest would never be achieved.

Once again it fell to the Court of Justice of the Community, in view of these consequences, to establish — despite opposition from several Member States — the principle of the primacy of Community law that is essential to the existence of the Community legal order. In so doing, it erected the second pillar of the Community legal order after direct effect, which was to turn that legal order at last into a sound edifice. Barely two years after the *Van Gend & Loos* judgment, questions on the interpretation of the EEC Treaty were referred to the Court of Justice by a Milan justice of the peace which enabled it to clarify the principles underlying the conflict of laws question. In 1962 Italy had nationalized the production and supply of electricity and transferred its administration to the ENEL. A shareholder of Edison Volta felt

that his interests were adversely affected by this nationalization and refused to pay an electricity bill of a few hundred lire. He justified his conduct before the Milan justice of the peace *inter alia* by claiming that the law nationalizing the electricity industry infringed the EEC Treaty. Since the outcome of this action depended on the interpretation of several articles of the EEC Treaty, the justice of the peace turned to the Court of Justice. In its judgment, the Court made two important observations regarding the relationship between Community law and national law:

Firstly: the Member States have definitively transferred sovereign rights to a Community created by them. They cannot reverse this process by means of subsequent unilateral measures inconsistent with the Community concept.

Secondly: it is a principle of the Treaty that no Member State may call into question the status of Community law as a system uniformly and generally applicable throughout the Community.

It follows from this that Community law, which was enacted in accordance with the powers laid down in the Treaties, has priority over any conflicting law of the Member States. Not only is it stronger than earlier national law, but it also has a limiting effect on laws adopted subsequently.

Ultimately, the Court did not in its judgment call in question the nationalization of the

Italian electricity industry, but it quite emphatically established the primacy of Community law over national law.

The Court has since adhered to this finding in case after case. It has, in fact, developed it further in one respect. Whereas in the judgment just mentioned it was concerned only with the question of the primacy of Community law over ordinary national laws, it confirmed the principle of primacy with regard also to the relationship between Community law and national constitutional law. After initial hesitation, national courts in principle accepted the interpretation of the Court of Justice. In The Netherlands no difficulties could arise in any case as the primacy of treaty law over national statute law is expressly laid down in the constitution (Articles 65 to 67). In the other Member States the principle of the primacy of Community law over national law has likewise been recognized by national courts. However, the constitutional courts of the Federal Republic of Germany and Italy initially refused to accept the primacy of Community law over national constitutional law, in particular regarding the guaranteed protection of fundamental rights. They abandoned their objections only after the protection of fundamental rights in the Community legal order had reached a standard that corresponded in essence to that of their national constitutions. Since then the primacy of Community law even over national constitutional law has been generally recognized.

CONCLUSIONS

What overall picture emerges of the construction of the European Community and its legal order?

The European Communities have a relatively uniform system of rules — their constitution. Crucial factors in its creation were the comparable state of economic development of the original Member States and their broad consensus on the means and objectives of the unification of Europe. The similarity of Member States' values and the existence of a model were decisive when it came to choosing a constitutional system.

The legal order is the true foundation of the Community, giving it a common system of law on which to operate. Only by creating new law and upholding it can the objectives pursued by setting up the Community be achieved. The Community legal order has already accomplished a great deal in this respect. It is thanks not least to this new legal order that the, by and large, open frontiers, the substantial trade in goods and services, the migration of workers and the large number of transnational links between companies have already made the common market part of everyday life for approximately 320 million people. Another feature of the

Community legal order that has already attained historic importance is its peacemaking role. With its objective of maintaining peace and liberty, it replaces force as a means of settling conflicts by rules of law that bind both individuals and the Member States into a single Community. As a result the Community legal order is an important instrument for the preservation and creation of peace.

The Community legal order and the Community that is based on it can survive only if observance and protection of the legal order are guaranteed. This is ensured by the two cornerstones of the Community legal order: the direct effect of Community law and the primacy of Community law over national law. These two principles, the existence and maintenance of which are defended with great determination by the Court of Justice, guarantee the uniform and priority application of Community law in all Member States.

For all its imperfections, the contribution the Community legal order makes towards solving the political, economic and social problems of the Member States of the Community is of inestimable value.

TABLE OF CASES

■ NATURE AND PRIMACY OF COMMUNITY LAW

Case 26/62 *Van Gend & Loos* [1963] ECR 1 (Nature of Community law; rights and obligations of individuals).

Case 6/64 *Costa v ENEL* [1964] ECR 585 (Nature of Community law; direct applicability; primary of Community law).

Case 14/68 *Walt Wilhelm and Others* [1969] ECR 1 (Nature of Community law; primacy of Community law).

Case 106/77 *Simmenthal* [1978] ECR 269 (Community law; direct applicability; primacy).

Case 83/78 *Pigs Marketing Board* [1978] ECR 2347 (Primacy of Community law).

Case 826/79 *Mireco* [1980] ECR 2559 (Primacy of Community law).

Case 157/86 *Murphy* [1988] ECR 686 (Nature of Community law; direct applicability).

Case 104/86 *Commission v Italy* [1988] ECR 1813 (Nature of Community law; direct applicability).

■ POWERS OF THE COMMUNITY

Case 8/55 *Fédéchar* [1954-56] ECR 245 (Implied powers; official fixing of prices).

Case 22/70 *AETR* [1971] ECR 263 (Legal personality and treaty-making powers of the Community).

Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279 (External relations; international commitments; authority of the Community).

Opinion 1/76 [1977] ECR 741 (External relations; international commitments; authority of the Community).

Opinion 1/78 [1979] ECR 2871 (Division of powers between the Community and the Member States).

■ EFFECTS OF LEGAL ACTS

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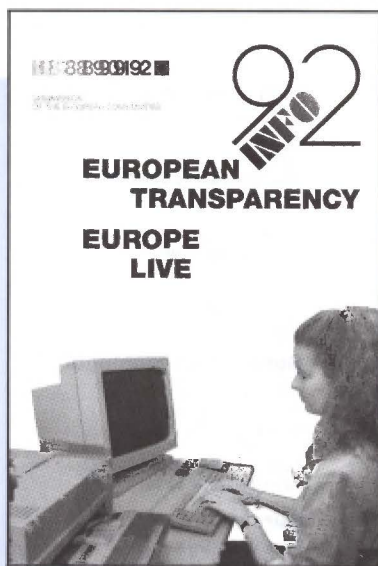
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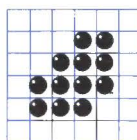
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