# The European Economic Community — International Organisation or Federal State?

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The purpose of this article is to discuss whether the European Economic Community is more properly regarded as an international organisation or as an embryonic federal State. This matter may be of more than passing interest in Australian legal circles for several reasons. Firstly, the impact of the establishment and subsequent development of the EEC upon Australia through its effect upon traditional trading patterns has been dramatic. Secondly, Australians, as citizens of one of the leading democracies enjoying a federal system of government, may be particularly interested in the constitutional characteristics of the EEC, which seem to place it some way between an international organisation and a federal State. Finally, the fact that the origins of the vast majority of the Australian population are ultimately derived from the countries of the EEC establishes a major cultural link.

The preliminary part of this paper will outline the characteristics of, on the one hand, international organisations, and on the other, federal States. Since the matter is largely one of classification rather than precise definition, the remainder of the paper will examine the characteristics of the European Economic Community and attempt to reach a conclusion as to whether it is more properly regarded as an international organisation or as a federal State. In attempting to divine the essentials of a federal State frequent reference will be made to the United States, Swiss, Australian, Canadian, Indian and West German federations; these being the six leading federal systems which operate in a democratic environment as does the European Economic Community.

In this paper, unless the context otherwise requires, references to the Parliament, Commission and Council are to the Assembly, Commission and Council of Ministers of the European Communities, respectively, and references to the Court are to the European Court of Justice. References to the Treaty are to the Treaty establishing the European Economic Community as amended and related provisions. References to Articles are to Articles of the Treaty unless the context otherwise requires.

Although the establishment of the European Economic Community by the Treaty of Rome in 1957 with effect from the beginning of 1958 was preceded by the establishment of the ECSC in 1951, and accompanied by the creation of Euratom, the European Economic Community has such a broader degree of scope than the other two Communities that they may to a large extent be regarded as parasitic to it. Although each of the three Communities originally enjoyed its own Council and Commission (called the High Authority

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in the case of the ECSC) these were merged into one Council and Commission by the Merger Treaty of 8 April 1965. There was never any triplication of Parliamentary and Judicial organs by reason of a convention providing for one Assembly and Court of Justice for all three Communities being signed at the same time as the Treaty of Rome.

Accordingly, references to the European Economic Community in this paper may be taken generally to subsume the other two associated communities.

## General Characteristics of International Organisations

International Organisations are better classified than defined. This is so because of the plethora of such organisations in existence today.

One could attempt to define an international organisation as an independent entity set up by treaty and composed of member States. However, this attempt is inadequate in that international organisations need not be set up by treaty, although they generally rely on consent. Furthermore, international organisations are not always composed exclusively of States. Frequently, not only States but other international organisations are members.

Starke admits the difficulty of even establishing a satisfactory classification of international institutions[1]. This leads him to suggest a distinction between international institutions which are *supra-national* and those which are not. He regards bodies as supra-national if they have the power to take decisions directly binding upon individuals, institutions and enterprises, as well as upon the governments of the States in which they are situated, and which they must carry out notwithstanding the wishes of such governments. He cites the ECSC and European Economic Community as prime examples of such supra-national bodies. Certainly, the term supra-national is one very frequently applied to the European Economic Community in general usage and by many commentators.

## General Characteristics of Federal States

Jowitt's "Dictionary of English Law" defines a federation as "a composite State the constitution of which assigns certain functions to a central authority and others to member States, while offering guarantees to the latter against infringement of their status"[1a].

The previous entry in that work defines "federal government" as arising as a result of a federal union which stems from the mutual agreement by two sovereign or independent States not to exercise certain powers incident to their several sovereignties, but to delegate the exercise of those powers to some person or body chosen by them jointly; the federal government being that body. The definition continues with examples of federal systems including Switzerland,

1. Starke, Introduction to International Law (6th ed. 1967) p. 493.
1a. Second edition, 1977, p. 778.

the United States of America and Australia, and an indication of the matters on which a federal Parliament is permitted to legislate.[2]

It will be observed that while this definition is apposite to the formation of a federation by previously independent States, or States linked loosely in a confederation, as occurred in the case of the United States of America, it does not fit so well other examples of the formation of federations such as the establishment of federal systems in Canada and Australia within the British Empire by Imperial legislation. Nor does it fit the formation of the German Federal Republic in 1949 as a new State with a federal system under the influence of the victorious Western Powers. However, these quibbles are not directly relevant to the status of the European Economic Community since if it is indeed a federation it is one formed by the banding together of previously independent States.

In passing, it may be worth considering the concept of confederation. This is defined in Jowitt as alternatively as "a league or compact for mutual support, particularly of . . . States" or as "an association of States who agree to limit the exercise of their sovereignty in order to assist in the achievement of a common objective, but who do not permit any direct contact between the organs of the association and their citizens"[3]. Clearly the European Economic Community does not fall within the definition since there are many examples of direct contact between the organs of the European Economic Community and the citizens of the Member States. Citizens have direct contact with the Parliament through directly electing it, with the Commission and Council of Ministers through the ability of those organs to make decisions or regulations directly affecting them and with the Court through their capacity to appear as plaintiff or defendant in an action therein.

## Definitions of International Organisation and Federal State Compared

It may be observed that the above definitions do not offer a sufficiently clear dividing line between international organisations and federal States for one to be able immediately to assign the European Economic Community to one category or the other.

While the delegation of power to the federal government as a central authority is an essential characteristic of a federation such delegation of power may also occur where the members of an international organisation delegate powers to it.

Federations formed between previously independent States satisfy the requirement of being an independent entity set up by member States. Of course, once the federation is established, the constituent parts, usually still called States, as in Australia, the United States of America and India but not necessarily so, as in Canada where they are called Provinces, lose their status as members of the

2. Ibid. p. 777.
3. Ibid. p. 414.

international community, so they cease to be States in that sense[4]. However, this is not a means of distinguishing between an arrangement which has led to a federal union and one which, through falling short of that objective, has merely resulted in the creation of an international organisation, since the question whether a State has lost its international personality and status begs the question of whether a federal union has been formed.

Since formal definitions of international organisations and federal States appear unable to conclusively resolve the Status of the European Economic Community a much more detailed examination of the characteristics of international organisations and federal States is required. In particular, the characteristics of federal States must be examined and the European Economic Community measured up against them. This is likely to prove much more fruitful than the corresponding examination of the characteristics of international organisations since, firstly, the latter are so varied in character, and secondly, federal States through possessing international personality, tend to enjoy all their characteristics anyway. Finally, the finite number of federal States means there is less variation in nature amongst them than there is among international organisations.

In examining federal systems in more detail, distinctions will be drawn between them and international organisations.

## Federal Systems Examined in more Detail

Federal Systems, though numerous and varied, all enjoy a remarkable number of common features which distinguish them from international organisations.

### *1. A Central Governmental Authority*

The central authority derives from the surrender of functions by the constituent parts in the case of the federal State formed by merger of previously independent States or the allocation of functions in the case of the externally established federation. It is governmental in the sense that central institutions are established exercising the executive, legislative and judicial functions inherent in government of any nature. A major point of distinction from international organisations is that there is provision for effective enforcement of judicial decisions or other governmental action.

### *2. A Two Chamber Federal Parliament*

Almost invariably, a measure of protection for the constituent parts of the federation is provided through the composition of the bicameral legislature. This is reconciled with the claims of national unity through representation in the lower house normally being on

4. For ease of reference in the remainder of this paper, the term States will be used to refer to the constituent parts of a federation, and the term States rights will be employed to refer to the entitlements of States in a federation under the federal constitution.

the basis of population. Very frequently each State has equal representation in the upper house. This is true in the United States of America, Australia and Switzerland, and even where strict equality does not exist, as in W. Germany and Canada, there is a considerable degree of weightage in favour of the smaller States. For example, in W. Germany the ratio between the representation of the largest and smallest of the Lander in the Bundesrat is only 2:1, while the variation of population approaches 20:1.

Even in Canada, which most departs in practice from the principle of equality of representation in the upper house, there appears to be a recognition of this as a desirable goal.

Frequently, the position of the States is further protected by constitutional provisions enhancing the authority and prestige of the upper house relative to the lower, in marked contrast to the general trend in unitary democracies which possess bicameral legislatures. While the lower house generally enjoys the right to make or break governments, this does not exist in the United States where the executive is separately elected, and is elected through an electoral college system which increases the importance of the States, and in Australia is subject to the Senate's demonstrated ability to bring down a Government enjoying the confidence of the lower house by blocking supply. Lower houses also traditionally enjoy a monopoly over the origination of tax and supply measures. In the United States of America the Senate enjoys many privileges not accorded to the House of Representatives, such as the right to review many Presidential appointments, the sole right to ratify treaties and to try all impeachments.

A longer term for members of the upper house than members of the lower is almost invariably the rule where they are elected. For example both United States of America and Australian Senators enjoy six year terms (subject to the double dissolution procedure in Australia[5]) in contrast to the two and three year terms respectively of their House of Representatives colleagues. Where they are not elected, they are often virtually delegates of the State Governments as in W. Germany (this method of selection buttresses States rights in another way). The terms of upper house members can only exceptionally be affected by the executive government, for example by calling elections early for the lower house.

While international organisations usually respect a principle of sovereign equality in their composition only rarely[6] do they pay any respect to the principle of according representation pro rata on the basis of population.

### *3. States Participation in Constitutional Changes*

It is invariably the case that the constituent parts of a federation have some input into the process of constitutional change, at least insofar as constitutional changes affecting the balance of power

5. See s.57 of the Australian Constitution.
6. The Council of Europe would be an exception. Perhaps it is significant that this began to some extent as a move towards federation which did not, or at least has not yet proceeded to fruition.

between the federal authorities and those of the States are concerned. Indeed it might be argued that without such influence there is no true federal system since a federal authority able to expand its power at the expense of the States without the need for their concurrence in any form would, in the nature of things, over a period of time become omnipotent.

The requirement for States assent to constitutional changes usually takes the form of the need for constitutional amendments to be ratified by the legislatures of a defined proportion of the States either generally, as in the United States of America where three-quarters must concur, and India where a majority must concur, or in relation to certain changes as in Canada. In Canada, generally seven out of ten encompassing a majority of the national population must approve, although there must be unanimity regarding certain matters regarded as especially important and each province can veto any loss of powers as far as it is concerned, while some matters not affecting the provinces may be handled without their involvement.

Alternatively, the amending process may require the approval of the voting population at a referendum, with protection for the States built in through requirements for the proposal to gain assent in a majority of States. Both Australia and Switzerland enjoy this provision. Exceptionally, West Germany possesses neither of these requirements, although the necessity for approval by a two thirds majority of the Bundesrat may be regarded as providing at least an equivalent degree of protection of States rights in view of the fact that body is composed of representatives appointed directly by the Governments of the Lander.[6a]

There is a strong case for saying that it is independent determination of the respective powers of the federal and State authorities which is the hallmark of a federation as opposed to a unitary State. A good example is furnished by the case of Northern Ireland which enjoyed a provincial legislature from 1922 to 1972, possessing defined powers. However, these powers originated only in a statute of the United Kingdom Parliament and so they could be revoked at any time without reference to either the Parliament or people of Northern Ireland, as indeed was done in 1972.

On the other hand if the central authority is so weakened that effectively it can be deprived of power at will by the States, then it may be argued that there is in reality no federation but rather a confederation or international organisation. Since the central authority is dependent for its continued existence upon the continuing desire of the States for it to continue as it can be wound up at will, it has in reality no independent control of its destiny. This is the hallmark of an international organisation rather than a federal State.

One might summarise this discussion by saying that a crucial aspect of any federal system is the existence of independent determinants of the respective powers of the federal and State

6a. Basic Law, Art. 79. The federal nature of the constitution and the basic position of the Lander are further protected by the restrictions on amendment contained in Art. 79(3) which render inadmissible amendments affecting the division into Lander of the federation and the participation of the Lander in legislation.

authorities such as do not exist in either a unitary State or an international organisation.

*4. Existence of an Independent Arbiter in Constitutional Disputes*

An essential part of a federal system is the existence of a court or similar body to which constitutional disputes affecting the respective powers of the federal and State authorities. For the reasons outlined above, this body must be independent of both the federal and State authorities. Thus the United States of America, India and Canada have the Supreme Court cast in this role. Australia has the High Court and West Germany the Bundesverfassungsgericht.

Exceptionally, Switzerland through its wide employment of the procedure of initiative and referendum, does not rely heavily on the judicial process to strike a balance between the competing claims of the Federal Government and the Cantons. Perhaps, this is because the weakness of government at both levels relative to the powers reserved to the people through the referendum procedure tends to channel would be enhancers of federal powers, who are in any case scarce in a country with a very conservative record, in the direction of seeking to enlarge them through referendum rather than at the expense of the Cantons.

This kind of independent arbitration as to powers generally has no counterpart in international organisations where, although there may be tribunals to determine matters arising in the course of the activities of the organisation, matters touching its powers vis-a-vis States are almost invariably left to strictly diplomatic channels.

The procedure for judicial determination of federal-state disputes is crucial in any federal system. This procedure assumes particular importance where the amending procedure is such that amendments are difficult to achieve. Would be reformers, frustrated in their attempts to amend the constitution may regard judicial reinterpretation of the constitution as an acceptable substitute. It is submitted that this is inherently undesirable since it often leads to the selection of candidates for judicial appointment on the basis of their political and philosophical approach to issues of constitutional reform rather than strictly on the basis of their legal and judicial ability.

A frequent source of controversy in federal systems is the dispute between those who seek an enlargement of the powers of the federal authorities and those who wish to maintain the powers of the constituent parts of the federation. It is desirable, therefore, in order to preserve the balance that both federal and State authorities play a part in the appointment of the judiciary who determine constitutional disputes. Frequently, appointment is made by the federal executive so it is common to balance this by some involvement by the States. Accordingly, in the United States the Senate, in which all States are equally represented, must approve Supreme Court appointments. In West Germany the Lander participate equally in the appointment of judges of the Constitutional Court through the Bundesrat, which is comprised of

their representatives and makes half the appointments.[6b] Even in Australia and Canada, where constitutionally speaking the Federal Government has a free hand in appointments, a geographical balance is long established in practice, with a legislative requirement of minimum representation from Quebec. In Australia, there has been mounting concern at perceived 'centralist' leanings in the jurisprudence of the High Court. This has led the federal authorities to concede the States a right to be consulted with regard to High Court appointments, and to as yet unsatisfied demands for the States to enjoy a say in appointments.

In the EEC appointment of the judges of the Court is in the hands of the Member States, with appointment being made by common accord of the Governments.[6c] This means, in practice that each Member State nominates one.

### *5. Supremacy of Federal over State Law*

This appears to be an inevitable corollary of federation and is perhaps the crucial distinguishing feature of a federal State as opposed to an international organisation. However, this distinction is blurred to some extent by the respect paid by many countries legal and constitutional systems to international law.[6d]

Another significant feature is that the supremacy of federal law and the provisions of the federal constitution are normally justiciable issues, and the rights accruing therefrom are enforceable through the ordinary courts. This is virtually never the case in relation to international organisations.

### *6. Permanence of Union*

Federations are invariably intended to be permanent.[7] There is almost invariably no right of secession by a State except through the process of a constitutional amendment, and even the ability to secede by this process may be uncertain.[8]

In marked contrast, international organisations are not necessarily intended to be permanent, and States are usually free to leave. For example, NATO was originally established for a period of 20 years, and several countries have left during its life. Some international organisations are unlimited as to duration; the UN is an example of this, but they usually make provision for members to leave if they wish.

### *7. No Principle of Sovereign Equality*

This principle plays a very large part in international relationships where it is often equated to the principle that no State shall be bound without its consent. In international organisations it manifests itself

6b. Ibid. Art. 94.
6c. EEC Treaty, Art. 167.
6d. See infra, footnotes 23–26.
7. See, for example, the preamble to the Australian Constitution.
8. Note the use of the word "indissoluble" in the preamble to the Australian Constitution.

by the frequent requirement that all member States concur in any change in the constitutional arrangements, or in the alternative that only those concurring in the amendment are bound by it. Another method of accommodating this principle is to permit reservations by States in acceding to international agreements.

Generally, such concessions have no place in federal arrangements save for guarantees of territorial integrity and minimum parliamentary representation. These guarantees are found in the United States of America and Australian Constitution. These may be regarded as vestigial remains of the sovereignty previously enjoyed by the States prior to federation. The only other prominent example is the ability of Canadian Provinces to veto application of certain amendments to them. It is, perhaps, significant that this last provision resulted from the bargain struck between the Federal Government and nine Provinces in 1981 under the pressure of the need to present a united front to smooth the measure's passage in the United Kingdom Parliament.

## Relevant Characteristics of the European Economic Community

Having considered relevant features of federal systems, key features of the European Economic Community are now examined in the same order.

### *1. A Central Governmental Authority*

The formation of the European Economic Community and subsequent accession of four other European States clearly involved the surrender of functions and powers by those States to the European Economic Community. The obligations undertaken not only bind the member States as subjects in public international law, but are in many cases directly applicable to all legal persons in the territory of all the member States. Also, many are self executing in that they create rights and obligations between legal persons merely through ratification of the relevant treaties by the member States without need for further enactment.

The European Economic Community's authority is governmental in nature in that it possesses organs exercising executive, legislative and judicial functions. The European Court of Justice clearly represents the judicial arm of government.[9] The other three main organs do not fit the normal classification of the remaining functions of government into executive and legislative, however, it will be argued in the remaining portion of this paper that it is appropriate to regard the Commission as the Executive and the Assembly and Council of Ministers as respectively the lower and upper houses of a parliament.

Although it is often the Council of Ministers which appears to make the major decisions, this clouds the fact that it is the

9. European Economic Community Treaty, Art. 164, and note its exclusive right to interpret the European Economic Community Treaty under Art. 219.

Commission which is in charge of the day to day running of the European Economic Community and that the Council of Ministers only acts in one of the recognised methods provided for in the Treaty, by taking a decision, making a regulation or issuing a directive, opinion or recommendation. This action, particularly where it is binding on the parties to which it is directed, can usually only be taken in response to a Commission proposal, and has more of the attributes of a legislative rather than an executive function. While the Assembly is curiously bereft of legislative power, it does enjoy an increasing degree of control over the European Economic Community budget and its frequent right to be consulted and to tender advice is not too different in quality from the effectively very limited powers of a number of upper houses of Parliament.

### *2. A Two Chamber Federal Parliament*

Despite its lack of legislative power, the Assembly is clearly envisaged as a parliamentary chamber, and it is submitted that it has many features in common with the lower house of Parliament in a federal State.

It has a power, albeit after a complicated procedure,[10] and subject to the European Economic Community's right to continue to spend at the same rate as the previous year, and to be authorised by the Council to spend more up to the amounts provided in the draft budget,[11] ultimately to refuse to pass the budget.

It is democratically elected directly by the people of the member States and the numbers elected from each State bear a relationship to population, although there is a considerable degree of weightage towards the smaller States. It possesses a limited degree of control over the European Economic Community executive, the Commission, through its power to dismiss them en bloc, by passing a censure motion by a two-thirds majority of the votes cast, amounting to a majority of the membership of the Assembly.[12] The Assembly has the right to question Commissioners, to be heard by the Council and to elect its officers and determine its rules of procedure.[13] It is obliged to meet annually or at the request of the Council or Commission, to publish its proceedings and to discuss in open session the annual report of the Commission.[14] It also generally conducts itself in the manner of a Parliament rather than as a meeting of delegations from independent States. There is, for example, a tremendous difference between the atmosphere at meetings of the European Economic Community Assembly and at meetings of the member States delegations to the Assembly of the Council of Europe.

Despite all this, it cannot be denied that the role of the Assembly is limited largely to an advisory role, and it is required to be consulted before the Council acts only in a minority of cases.[15]

10. Arts. 203-203a.
11. Art. 204, as amended.
12. Art. 144.
13. Art. 140, 142.
14. Art. 139, 142-143.
15. Arts. 7,43(2), 54(2), 56,57,63(2), 87, 127.

However, this apparent weakness did not prevent the United Kingdom Parliament being so concerned at possible loss of powers to the Assembly, that it insisted on the insertion of a provision requiring parliamentary approval before ratification of any increase in the powers of the Assembly into the legislation authorising direct elections.[15a]

Although, there is no express provision for a second house of Parliament, it is argued that the Council of Ministers should be seen in this role. Its function is, to a large extent legislative, its composition gives each member State an equal voice through being represented by the Government Minister most appropriate to the subject under discussion, save where a decision is taken by a qualified majority. Art. 148(1) provides that in the absence of special provision the Council shall act by a majority. Either this voting mechanism or the fairly frequent requirement of unanimity gives each Member State an equal voice. This is in accordance with the usual practice of federal States.

The provision for a qualified majority requires some explanation. Many of the substantive provisions of the European Economic Community Treaty require the Council to act following a proposal of the Commission.[16] This contrasts with the comparatively small number of instances where the Council can act independently.[17] Art. 148 of the Treaty provides that the Council is to act by a majority of its members except that where it is required to act by a qualified majority, the votes of members are weighted, and out of the total weighted vote of 61 following the accession of Greece, 45 affirmative votes are required where the Council is acting on a Commission proposal. Otherwise, there must, in addition, be at least six States in favour. Since each of the 'big four' (France, Germany, Italy and the United Kingdom) has 10 votes, this means no proposal can pass by a qualified majority without the support of at least three of these States. On the other hand, the 'big four' cannot alone pass a proposal by a qualified majority without the support of at least one of the smaller States.

In practice, the Council has shown a great reluctance to use the qualified majority provision, preferring to adhere, with one exception, to the Luxembourg Accord of 1966, which according to the French interpretation conferred upon each member State a right of veto where "its vital interests are concerned". The accord was the culmination of a major disagreement between France and the five other member States of that epoch over the introduction of the Common Agricultural Policy, which had led to a boycott of European Economic Community business by France, then led by De Gaulle.

The accord, or at least its negotiation, is apparently in violation of Art. 219, by which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for therein.

15a. European Assembly Elections Act 1978, s.6.

16. Arts. 7,21,28,33,38, 43(2), 44(4), 54(2), 55,56,57, 63(2), 69,70,79,87,94,98,101, 103(3),108,109,111,112,116,127.

17. Art. 43(3), 73, 113, 114.

It may be seen as a form of re-emergence of the principle of sovereign equality and thus a telling argument against the European Economic Community being regarded as a federal State. In this respect the comparatively recent (1983) overruling of the United Kingdom by a qualified majority may be a particularly significant milestone in the development of the European Economic Community towards a federal State.

The Council also has in effect the power to appoint the European Economic Community's Government, that is the Commission, since, under Art. 11 of the Merger Treaty, the Commissioners are appointed by common accord of the Governments of the Member States who, in effect, comprise the Council. This is similar to the way in which the Swiss Parliament appoints the Swiss Federal Executive for the fixed term of four years.

Clearly, the functions of the three main European Economic Community organs apart from the Court do not exactly parallel the division of governmental functions into executive and legislative. In particular, it may be argued that through its frequent monopoly over initiation of legislative action, the Commission has a legislative role. However, it is more appropriate to regard the Commission as the executive, as no other body has executive functions and it alone possesses many of the executive functions.[18] Furthermore, it has a much greater freedom to initiate independent action than any other organ. In any case, the executive government of any country nowadays possesses wide powers to legislate by way of regulations in specified matters.

In support of the contention that the European Economic Community is a federal State, it may be observed that while its structure does not exactly fit the pattern, the same would be true in some respects of every federal State. It must always be borne in mind that the European Economic Community is a very legalistic regime in the sense that its powers and activities are defined much more precisely than those of any federal government or international organisation. The regime is replete with the checks and balances generally thought essential to the proper functioning of a federal State, but not regarded as so important in an international organisation.

### *3. Member States Participation in Constitutional Changes*

The procedure for amendment is stipulated by Art. 236 of the Treaty and is initiated by the Commission or the Government of any Member State proposing an amendment. The Council is obliged to consult the Assembly and, where the proposal emanates from a Member State, the Commission, before delivering an opinion in favour of calling a conference of representatives of Governments of the Member States to be convened by its President for the purpose of determining by common accord the amendments to be made to the Treaty. Amendments enter into force when ratified by all

18. Contrast Arts. 145 and 155, defining the functions of the Council and Commission respectively. Note particularly the way in which the language of Art. 155 equates the role of the Council and Assembly in legislating measures.

Member States in accordance with their respective constitutional requirements.

While this procedure certainly has the level of Member State involvement expected in federal States it places so much emphasis on the Member States' consent that it could be argued to demonstrate similarities to the constitutional arrangements governing international organisations. In effect the Member States may use this procedure to wind up the European Economic Community, but this is sometimes possible in a federal State. For example, the United States of America could use the amending procedure to dissolve the federal union.

*4. Existence of an Independent Arbiter in Constitutional Disputes*

The standard federal device of investing a court with the jurisdiction to resolve constitutional disputes is employed. The European Court of Justice has jurisdiction to review the legality of the Acts of the Council and Commission which are binding.[19] It also has a jurisdiction to give preliminary rulings interpreting the Treaty and determining the validity and interpretation of acts of European Economic Community organs.[20]

The judges are appointed by common accord of the Governments of the Member States for a term of six years. This is in practice similar to appointment by the Council. While the limited term may seem strange to those imbued with Anglo-American concepts of judicial independence, it should be borne in mind that fixed term appointment is not unknown on the continent of Europe. For example, the Swiss Federal judicial appointments are made in this way.

In practice there is one judge from each Member State.

*5. Supremacy of Federal over State Law*

Perhaps, one of the strongest pointers to the development of the European Economic Community along federal lines is the manner in which the Court has ruled that European Economic Community law prevails over the domestic laws of each of the Member States. The Treaty was silent on this point but the Court has been unequivocally in favour of the precedence of European Economic Community law.[21]

Since there is provision for matters of interpretation of European Economic Community law to be referred to the Court under Art. 177 by domestic courts, and there is an obligation on courts of last resort to do so in the case of contentious questions, there is the machinery in existence for the Court's view to prevail. Some courts, notably in France, have shown a degree of reluctance in referring matters to the European Court through the evolution and

19. Art. 173, this jurisdiction does not extend to non-binding acts, that is recommendations and opinions.
20. Art. 177.
21. See ENEL case, Official Record of European Economic Community 1964, at 1159; *Internationale Handelsqesellschaft* v. *Einfur-und Vorratsstelle Getreide*, Ibid. 1970, at 1135.

application of the "acte claire" doctrine, whereby matters need not be referred if the answer under European Economic Community law is clear. However, even the French courts appear eventually to have been prepared to recognise the supremacy of European Economic Community law even over subsequently enacted domestic laws.[22]

In some Member States the national constitution provides in a more or less certain manner for the supremacy of European Economic Community law. The most explicit, the Dutch places the general binding rules of treaties above ordinary laws,[23] and the German,[24] French[25] and Italian[26] Constitutions each make a less definite commitment in this regard.

There is a possible problem in the case of the United Kingdom because of the long standing principle of the sovereignty of Parliament which many commentators claim enables the United Kingdom's European Economic Community obligations to be cast off by an express[27] repeal of the European Communities Act 1972, which gave effect to the United Kingdom's accession in domestic law. Others argue that the combined effect of ss. 2(1), 2(4) and particularly 3(1) and 3(2) of that Act render European Economic Community law supreme even against this principle. This is because of the requirement in s.3(1) that any question as to the effect of the Treaty is to be determined in accordance with the principles laid down by the European Court, coupled with the fact that any United Kingdom court has judicial notice of any decision of, or expression of opinion by, the European Court.

This problem is really only the peculiarly British manifestation of the general problem that national constitutional provisions according supremacy to European Economic Community law would still place that supremacy at the mercy of a constitutional amendment. For enduring supremacy, one must look to the force of European Economic Community law itself, and this is the import of the decisions of the European Court.[28]

Whereas the courts of all Member States have accepted the supremacy of European Economic Community law over ordinary domestic law, the question of conflict with national constitutional provisions has not yet really been faced squarely. It is significant that the German Courts, who were so ready to accord supremacy to European Economic Community law over ordinary German law baulked at allowing it precedence over the provisions of the German Constitution.[29] This view has much to commend it in domestic German law since the German Constitution was not amended at the time of Accession so as to conform to the European Economic

22. *Directeur general des Douanes* v. *Jacques Vabre et al.* (1973) Gazette du Palais 19-20 Sept. 1973, 28.
23. Arts. 66, 67.
24. Arts. 24(1), 25.
25. Art. 55.
26. Art. 10(1)
27. So as to overcome the European Communities Act 1972, s.2(4).
28. *Internationale Handelsgesellschaft* v. *Einfuhr-und Vorratsstelle Getreide*, Ibid. 1970, at 1135.
29. Neue Juristische Wochenschrift, 1974, 1697.

Community Treaty.[30] However, it could be argued to the contrary that the relevant constitutional provisions are capable of being construed so as to yield the result determined by the European Court that European Economic Community law prevails even over the Constitutions of the Member States.

This is clearly the touchstone of whether the European Economic Community is a federal State since such supremacy is always accorded to federal law in a federal system, and is not accorded to the activities of a mere international organisation.

*6. Permanence of Union*

There is no limit of time expressed in the Treaty, so it could legally be wound up only by amendment under Art. 236.

*7. No Principle of Sovereign Equality*

It is submitted that there is no such principle operating within the legal framework of the European Economic Community. Indeed, the provisions for majority voting and supremacy of European Economic Community law directly contradict that principle. The equality that exists between the Member States is not significantly more than would exist in a federal State. The Luxembourg Accord of 1966 represented a backsliding in this regard, but it was never part of the legal arrangements and recently the Member States indicated their willingness to disregard it.

It is appropriate to conclude with a consideration of the development of the European Economic Community since its formation.

## Impact of Changes since the Inception of the European Economic Community

During the initial stages of the European Economic Community, the dismantling of trade restrictions between the Member States and related matters outlined in the Treaty dominated the deliberations of the European Economic Community organs. Often these matters were regulated quite closely in the Treaty both as to the result to be achieved and the manner of implementation.[31] There were no major problems save that in relation to the Common Agricultural policy referred to already, and many of the goals set out in the Treaty were achieved ahead of schedule. Once the initial target of a "common market" was achieved in 1970, progress slowed. This was partly a result of preoccupation with the process of admission of new members and the harsher economic climate which increased friction

30. It is an interesting observation that the United Kingdom, through lacking a written constitution could not argue in this way.
31. An example would be the elimination of customs duties between Member States. Art. 13(1) sets out quite clearly the result to be achieved — their abolition. Art. 12 prevents any new duties or increases in existing duties from the outset. Art. 14 prescribes in detail how tariffs will be reduced to zero in stages during the transition period.

over such matters as budget contributions and generally made the Member States less co-operative.

On the legal and constitutional as opposed to the economic aspect, there has probably been much greater progress towards European Union than would have been expected in 1957. This is largely a result of the activist role of the Court in first holding many provisions of the Treaty to be directly applicable, that is self-executing in the sense that they create rights and obligations directly enforceable by and against individuals without need for implementation by regulations.[32]

The greatest landmark in the Council was probably the decision to go ahead and impose a farm price rise over United Kingdom objections in 1983 by resorting to majority voting. In the Parliament, the coming of direct elections with the greater prestige it has accorded that body is probably the greatest advance.

Perhaps the ultimate test of any federal State is whether federal law can be enforced against deliberate defiance by a Member State, as by an attempt to secede unilaterally. There is no doubt that at present the European Economic Community organs neither possess the physical ability nor the political will to put down such an attempt directly. Judgments of the Court are enforceable through normal domestic methods of enforcement except against Member States.[33] However, this Governmental immunity is not particularly unusual in a legal system. It exists, for example, in the United Kingdom. On the other hand, no Member State has felt able to defy European Economic Community law indefinitely. The most serious case, that of France in refusing to remove restrictions on lamb imports from the United Kingdom in the late seventies, went to the Court twice, but France ultimately backed down.

The conclusion of the author is that while European Economic Community is a unique phenomenon which does not fit neatly into the category either of a simple international organisation or of a fully fledged federal State, it inclines more towards the latter for the reasons outlined above.

32. The landmark case is *Molkerei-Zentrale* v. *Hauptzollamt Paderborn* (1968) Rec. 1968, 226. This held Art. 95(1), prohibiting discrimination by taxation on account of the foreign origin of goods, to be directly applicable.
33. Art. 192.