Principles of Public Law

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THE EUROPEAN UNION

7.1 Introduction

Any description of the 'British' constitutional system must include analysis of the law and institutions of the European Union, which today are part and parcel of the way we are governed. There are currently 15 Member States of the European Union: Austria; Belgium; Denmark; Finland; France; Ireland; Italy; Germany; Greece; Luxembourg; The Netherlands; Spain; Sweden; Portugal; and, of course, the UK. Encouraged by the success of the Union, other countries have applied to join. Estonia, Poland, the Czech Republic, Hungary, Slovenia and Cyprus are likely to be the next ones admitted as members, probably in 2003. In deciding which new members to admit, the European Union applies criteria agreed upon in 1993: that the country has 'stable institutions guaranteeing democracy, the rule of law, human rights and the protection of minorities', 'the existence of a functioning market economy' and 'the ability to take on the obligations of membership'.

This chapter considers the major constitutional questions that need to be asked about the European Union. At the outset, we need to ask why European integration is taking place and what it means for the principles of liberal democracy which, we have suggested, underpin the UK's Constitution (see above, 1.6). The European Union is an extraordinary creation. Within living memory, most of its Member States were at war with others, the second time the continent had been wracked by conflict during the 20th century. In the period after 1945, several Member States were governed by anti-democratic military dictatorships (Greece, Spain and Portugal). Several of the countries soon to accede to the European Union were ruled by totalitarian communist regimes (as was the eastern part of Germany). Today, versions of liberal democracy are practised in all Member States. Indeed, this is the main point of the European Union. It is an attempt by Nation States in one part of the world to entrench that form of political organisation – in preference to fascism and communist totalitarianism. The treaty by which Member States created the European Union proclaims that the Union is 'founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States' (Art 6 of the Treaty on European Union). These are the broad principles associated with liberal democracy (see above, 1.6). There is a paradox: the institutions of the European Union themselves suffer from a 'democratic deficit'. We are, however, running ahead of ourselves. Before examining the contribution of the European Union to constitutions based on liberal democracy, we need to understand what it is and what it does.

7.2 The legal base of the European Union

The starting point for an explanation of the European Union are the international treaties that establish it. There are two main treaties: the Treaty on European Union (TEU, or 'the Maastricht Treaty'), dating back to 1992, and the Treaty Establishing the European Communities ('EC Treaty' or sometimes 'the Treaty of Rome') dating back to 1957. Both these treaties were amended by the Treaty of Amsterdam. The revisions came into force on 1 May 1999. The amendments necessitated a renumbering of provisions in the TEU and EC Treaty. In this chapter, we shall, therefore, sometimes consider the EC Treaty and sometimes the TEU. The European Union is often described as 'a temple of three pillars'. More prosaically, this means that policy making in relation to different fields of government activity is carried out using three different processes.

7.2.1 The first pillar: the European Community

This first pillar – which may be referred to as 'the European Community', 'the EC' or simply 'the Community' – is the oldest component of the Union, tracing its roots back to the European Economic Community (EEC) established by six Member States in the 1950s. Although the Community is an integral part of the European Union, its continues to have its own separate treaty, which is linked to the TEU – the EC Treaty. From the outset, the Community contained an overarching political and constitutional aspiration, to establish 'an ever closer union among the peoples' of Europe (see, now, Art 1 of the TEU). Many of the politicians and diplomats who created the original Community in the 1950s envisaged it developing into a European federal constitutional system, similar to that of the US, in which governmental power was allocated by a constitutional document to two tiers of government.

At the heart of the Community are the four basic freedoms – freedom of movement of goods, persons (see below, 27.8), services and capital between the Member States. These are the foundations for the aim of 'establishing a common market and economic and monetary union' (Art 2 of the EC Treaty). As we have seen, the EC Treaty allocates powers to Community institutions to make policy and laws in relation to a wide range of policy areas (see above, 2.3). UK government policy in all these fields is now made in conjunction with other Member States through the elaborate institutional framework and decision making processes laid down by in the EC Treaty. Among the objectives set out in the treaty is 'the principle of an open market economy with free competition' (Art 4(2) of the EC Treaty) and:

> ... a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of

> protection and improvement in the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among the Member States [Art 2 of the EC Treaty].

Of especial significance is the Community's role in economic and monetary policy (Title VII of the EC Treaty). The Community has been following a policy of progressive convergence of monetary policy in the Member States, and January 1999 was set as the target date for the third and final phase, the adoption of a single currency. At the time of the Maastricht Treaty, the UK negotiated a derogation from this treaty obligation. A protocol to the EC Treaty provides that 'the UK shall not be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament'.

From the outset, the Community has also had a 'social dimension', in which free trade is combined with legal protection for workers, including measures for combating sex discrimination at work, and rights for consumers.

7.2.2 The second pillar: common foreign and security policy

Under the second pillar of the European Union, common foreign and security policy (CFSP), governments of Member States must 'support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity' (Art 11 of the TEU). The treaty envisages the progressive framing of a common defence policy, which, in the future, might lead to a common defence, should the Member States so decide. In the meantime, the Union implements those areas upon which Member States agree by means of the armed forces of Member States under the auspices of other military international organisations, such as the Western European Union (WEU), the North Atlantic Treaty Organisation (NATO) and the United Nations.

7.2.3 The third pillar: criminal matters

Under the European Union's third pillar, the objective of the Union is 'to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing racism and xenophobia' (Art 29 of the TEU). Several forms of criminal activity are highlighted as needing particular action: terrorism; trafficking in persons, illicit drugs and arms; offences against children; corruption and fraud. Member States are also expected to ensure the 'approximation, where necessary, of rules on criminal matters'. We look in more detail later at the decision making procedures of the third pillar (below, 7.7). Member States remain responsible for the internal policing of their own countries.

7.2.4 Sole and shared competences

Policy making and government administration, therefore, now needs to be thought of as falling into three conceptual categories (see above, 2.3 and Figure 1). In one category, the Community has sole competence to decide what should be done. Such areas include agricultural policy and decisions about imports from countries outside the EC. A second category is where there Member States and the Community share competence to make law and policy – for example, in relation to regulating competition between businesses and about imposing value added tax on goods and services. A third category are those areas where each Member State continues to enjoy freedom to make law and policy without having to use the institutions of the European Union (for instance, internal policing and many aspects of family policy and law).

7.3 Is there a European constitution?

So far, we have seen that there are two important treaties. The Treaty on European Union (TEU) sets out the main objectives of the Union and deals with decision making in the second and third pillars. The EC Treaty continues to set out the objectives and institutions of what has become the first pillar of the European Union – the Community. Do these treaties amount to a written constitution? Certainly, the treaties have many characteristics of a written constitution: they lay down institutional structures and processes for making policy, legislating and adjudicating in wide fields of human activity; they confer rights and obligations; and they also lay down broad State objectives. Most of the rights contained in the EC Treaty are essentially economic ones – for instance, the rights of business enterprises, self-employed people and workers to free movement throughout all the Member States, without being discriminated against on the basis of the nationality, in order to create a single market. These rights amount to a constitutional guarantee of free trade. Like some other constitutions, the treaties also lay down broad requirements of governmental policy which have to be pursued.

One reason to suggest that the treaties are not a proper constitution, however, is that constitutions are traditionally understood to express the fundamental legal relationships between people and the State, and between different branches of the State (see above, 2.2). Even though the European Union is assuming more of the attributes commonly associated with States, such as the power to confer citizenship (Art 17 of the EC Treaty), it is not yet a body which amounts to a 'State'; it is still to be regarded primarily as a body created on the plane of public international law (see above, 2.12.1). Another reason why the treaties may stop short of being a constitution is because of what is lacking from its content. Frank Vibert explains:

> The democratic rights and civil liberties of individuals are mentioned only in passing. The Treaty is showing its age: its framers were more concerned with

> providing a supranational platform for benevolent bureaucrats than a framework and process for the exercise of political choice by the citizens of Member States [*Europe's Constitutional Future*, 1990, London: IEA, p 88].

For a discussion of the treaty as a constitution, see, further, Harden, I, 'The constitution of the European Union' [1994] PL 609; Seurin, J-L, 'Towards a European constitution? problems of political integration' [1994] PL 625; and Walker, N, 'European constitutionalism and European integration' [1996] PL 266.

7.4 The European Union and principles of liberal democracy

Having considered the scope of the European Union, we can now return to the question of what it has to do with liberal democracy. The causes of the process of integration are debated by historians. Alan Milward argues that there are currently four different, but overlapping ideas (Milward, A, 'The springs of integration', in Gowan, P and Anderson, P (eds), *A Question of Europe*, 1997, London: Verso). For some analysts, integration has occurred as nations pursue their traditional foreign policy objectives: the development of the European Union is, for them, a kind of alliance system, such as existed between European States during the 19th century, but adapted to the modern world. In particular, the European Union has been created to protect Member States from other superpowers, such as the US and the former USSR. Other historians argue that European integration is the result of the modification or rejection of traditional foreign policy objectives by European countries. The rise of the European Union should, from this point of view, be seen as the product of federalist thinkers (like Jean Monnet, the French statesman who was instrumental in initiating discussions about the European Community), who were anti-nationalist, altruistic idealists. Yet other commentators argue that integration is occurring because of the inevitable loss of sovereignty by Nation States because of economic and social developments; with increasing mobility of people and information, frontiers become permeable and new systems of government are created to cope with these facts. Milward's own analysis is that European integration should be seen as having the deliberate goal of preserving the Nation State after its collapse in Europe between 1929 and 1945. As we have noted, the State has continually adapted itself in order to survive – by introducing universal suffrage, by creating rights to welfare benefits and the provision of health care and education (see above, Chapter 3). For Milward, integration buttresses the Nation State in the pursuit of income, welfare, family security and employment. In other words, integration is motivated by the domestic policy choices of governments.

In Chapter 1, we suggested that liberal democracy has three main attributes: the importance it attaches to personal autonomy (see above, 1.6.1); government based on popular participation (see above, 1.6.2); and the role of

government institutions in providing safety and welfare for people (see above, 1.6.3). Let us consider what, if any, contribution the European Union makes to each of these characteristics.

7.4.1 Personal autonomy and the European Union

Ideas, policies and laws expressly to do with the personal autonomy of individuals and groups have not, so far, been significant in the growth of the European Union. Two factors help to explain why this is so. First, the earlier periods of development of the European Community (now the first pillar of the European Union) were mainly concerned with industry and commerce. The immediate goal of integration in the 1950s was to place the iron and coal industries, especially those of France and Germany, under the control of a supranational institutional framework in order to prevent them being used again for the purposes of war. The other important aim was to reduce barriers to trade between the Member States.

The second reason explaining why, unlike most national constitutional systems, the European Union has been able to attach little importance expressly to protecting individual autonomy, is the fact that another separate set of European institutions – the Council of Europe and the European Court of Human Rights in Strasbourg (see below, 19.6) – have had this as their main concern. All members of the European Union have also belonged to the Council of Europe (see above, 2.12.1). Some commentators worry about this situation. There have been calls for the European Union itself to become a signatory to the European Convention on Human Rights, to ensure that the institutions of the Union, in their dealings with people, properly respect basic human rights (see below, 19.11). This has not happened, but the European Union now pledges itself to:

> ... respect fundamental human rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as the result from the constitutional traditions common to the Member States, as general principles of Community law [Art 6.2 of the TEU].

Critics point to the very general and vague terms of this provision. The judicial bodies of the European Union (the European Court of Justice and Court of First Instance in Luxembourg (see below, 7.5.5 and Chapter 18)) have no clear competence to deal with human rights abuses by the European Union itself or by Member States implementing European Union policy and law. It has, nevertheless, come to recognise principles of human rights laws in its case law (see below, 19.11).

7.4.2 Popular participation in the European Union

Despite the European Union's professed aim to further a system of governance based on the principles of liberal democracy, critics diagnose deep flaws in its realisation of these objectives. There is, it is said, a 'democratic deficit' (for a general discussion of this concept, see, further, Boyce, B, 'The democratic deficit of the European Community' (1993) Parl Aff 458). Part of the complaint is that decision making and law making within the various Union institutions is insufficiently accountable to elected representatives and that the Union provides inadequate political rights to its citizens. Certainly, the European Union does not replicate the political arrangements common to liberal democracies: there is no mechanism by which citizens can 'vote out' the 'government' of the Union.

The 626 Members of the European Parliament are the only directly elected representatives of the people in the Union system (see below, 7.5.2). This Parliament, it is said, has insufficient power within the law making process and cannot effectively call to account decision makers in other Union bodies – the unelected Commission, Council and European Court of Justice (the role of all of which will be explained shortly). A concomitant of European integration is that the constitutional effectiveness of national parliaments has diminished. For the UK, this means that British ministers, as part of the 15 person Council, now have powers to make legislation which they present as a *fait accompli* to MPs in the UK Parliament, who can do little more than rubber stamp them (see 6.5.2 and 7.6.2).

The European Union's powers also lack legitimacy, critics say, because the people of the UK have not truly consented to the phenomenally speedy and far-reaching growth in the governmental and law making powers of this supranational organisation. Unlike the campaigns for universal suffrage in the past, European integration clearly has not come about as the result of the demands of a mass movement of people; rather, it is was the product of visionary decisions made by a small elite of postwar politicians. The UK government under Conservative Prime Minister Edward Heath acceded to the precursor of the Union (the European Community) in 1973 without any referendum being held. After the Labour Party won the subsequent general election, a referendum was held in 1975, which posed the question 'Do you think that the UK should stay in the European Community ("the Common Market")?' Sixty seven per cent of people who voted answered yes. Nevertheless, since then, the critics argue, the Union has gained considerably greater governmental powers, the full implications of membership have become clearer, yet no further assent has been sought from the people for this project of ever greater European integration.

The counterargument is that the outcome of British general elections since the 1970s has been either a Conservative or Labour Party government committed to continued membership of the Union. The Referendum Party

campaigned in the 1997 general election for a referendum on the UK's future in the Union, but received little support. The Prime Minister Tony Blair has also dismissed calls by the leader of the Opposition, saying: 'The idea that this country should have a referendum on the Amsterdam Treaty is one the most absurd propositions that has been advanced in recent times' (HC Deb, Col 933, 9 July 1997). A more general point is that referendums do not form an essential part of the UK's democratic system; there is no legal requirement or constitutional convention that one be held before significant changes are made to the constitution. Parliament has always voted in favour of incorporating the treaties which created the European Union and its forerunner, the European Community, and this, in British law, is all that is needed. It has to be said, however, that debate has sometimes been surprisingly brief. In the House of Commons, the committee stage of the bill incorporating the Amsterdam Treaty into British law was guillotined by the government after only 12 hours.

7.4.3 Security and welfare through the European Union

At their inception, the forerunners of today's European Union were supranational institutional frameworks created by Member States in order to prevent war breaking out once more in western Europe. Member States twice went to war with each other during the first half of the 20th century; they have not done so in the second half. Measured against this, the process of European integration has been a success. As we have noted, under the second pillar, Member States now work closely on issues of common defence (see above, 7.2.2 and below, 7.7.1). But the European Union in about more than just avoiding war; under the auspices of the third pillar (see above, 7.2.3 and below), there is increasingly close co-operation between Member States to combat crime.

Many of the policy areas which fall within the competence of the European Union are directly concerned with improving the ability of governments to provide for people's material welfare. Community law lays down minimum health and safety standards in workplaces and regulates maximum working hours. Laws deal with the safety of food and with environmental issues. Funds are distributed from the richer parts of the European Union to the poorer ones. Sex equality at work is required by Community law. The agricultural and fishery sectors are subject to a great deal of central planning by the European Community. In these and other ways, capitalist enterprises are controlled and the worst consequences of industrial production (or lack of it) are mitigated.

7.5 The institutions

A single set of institutions – notably, for our purposes, the Commission, the Council, the European Parliament and the European Court of Justice – serve

the three pillars of the European Union (Art 3 of the TEU). There are, however, very important differences in the ways decisions are taken under each pillar. It is the role of the institutions under the first pillar, the Community, which marks out the European Union as a truly novel form of international organisation. Here, decision making, in those fields identified as matters for the Community by the EC Treaty, does not proceed according to traditional models of international diplomacy, in which ministers or diplomats of Nation States meet at conferences on the basis of formal equality, each having the power to veto proposals put forward when this is desirable in their particular nation's interests. Instead, the 15 Member States have conferred policy and law making powers on the institutions of the European Community, and, in so doing, have dramatically altered the position of national governments, parliaments and court systems. For decision making under the first pillar of the European Union (but not the second and third), there are several innovative features:

(a) the government of a Member State now only rarely retains a power to veto a decision which is favoured by other Member States;

(b) the institutions have independent power under the treaty to enact legislation, in the form of directives and regulations, which are binding on the Member States (even if they have voted against them) and their citizens;

(c) the governments, Parliaments and judicial systems of Member States are now subordinate to the decisions of the European Court of Justice;

(d) Member States no longer enjoy formal equality, as, when votes are taken, ministers from larger Member States have more votes than those from smaller ones (the system of qualified majority voting).

As we will see below, under the second pillar (common foreign and security policy) and the third pillar (criminal matters), decision making retains much more of a traditional, intergovernmental character. Here, the European Parliament and the European Court of Justice do not have the extensive powers which they exercise in Community matters.

7.5.1 The Commission

This consists of '20 members, who shall be chosen on the grounds of their general competence and whose independence is beyond doubt' (Art 213 of the EC Treaty). A practice has arisen that the large European Union Member States each nominate two, and the smaller members each nominate one commissioner; but once appointed, however, the commissioner is forbidden from taking instructions or favouring his or her national government. Nominations are subject to approval by the European Parliament, but the Commission is a relatively undemocratic body in the sense that it is neither elected nor subject to any great degree of accountability by citizens' elected

representatives. The justification put forward for this state of affairs is that the Commission needs to be able to act with relative autonomy from political pressure from Member States and from the European Parliament in order to further the overriding goal of European integration.

Recently serving commissioners nominated by the UK are Sir Leon Brittan (once a minister in Mrs Thatcher's Cabinet) and Neil Kinnock (formerly leader of the Labour Party). One of the commissioners becomes the President: currently (1999) the post is occupied by Romano Prodi; his two immediate predecessors were Jacques Santer and Jacques Delors.

The task of the commissioners is to further the general interest of the Community by developing policy and proposing legislation in the fields set down by the treaty. This is done through a series of 'Directorates General' (DGs, which are, in effect, departments) each headed by one of the commissioners and supported by a staff of officials. The Commission regularly meets as a whole, in private, to consider broad issues and to decide important policy. The Commission also has some regulatory functions, particularly in relation to competition and agricultural policy (on this, and the making of 'soft law', see 8.2.5 and 8.3.4). In addition, it provides executive and administrative support for the work of the European Union.

The Commission has frequently been criticised. During the late 1980s, it was seen by governments of some Member States (including the UK) as exercising too much governmental power, leaving too little to the Member States. Since then, a shift has taken place. The EC Treaty was amended to incorporate the principle of subsidiarity, signalling the limits on the powers of the Commission in particular and the Community in general (see below, 7.8.3). The Commission itself recognised the need to reign in some of its ambitions and, in 1995, took as its unofficial motto 'Doing less, better'.

Under the presidency of Jacques Santer, the Commission was subject to mounting opposition. In 1996, the European Parliament refused to approve the Commission's accounts amid accusations of large scale fraud and mismanagement of funds. In January 1999, a senior official in the Commission leaked information to the European Parliament which appeared to show that the Commission was attempting to cover up incompetence and wrongdoing. Under pressure from the European Parliament, the Commission agreed to the setting up of a committee of independent experts to investigate matters. In March 1999, the committee reported its findings of fraud and mismanagement. Several commissioners were found to have indulged in nepotism, recruiting friends and relatives to fill posts in the Community without following proper procedures. All 20 commissioners resigned. Member States, in consultation with the European Parliament, appointed new commissioners, headed by Romano Prodi (a former premier of Italy) as President.

7.5.2 The European Parliament

The European Parliament consists of 'representatives of the peoples of the States brought together in the Community' (Art 189 of the EC Treaty). There are 87 European parliamentary constituencies in the UK, each electing one MEP by a system of proportional representation. Elections are held every five years, most recently in 1998. MEPs group themselves according to political affiliations rather than in national blocks. The EC Treaty expressly recognises that 'political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union' (Art 191 of the EC Treaty). For these reasons, the European Parliament should be seen as representing political opinion throughout the Union, rather than the interests of the various Member States as such.

7.5.3 The Council

This consists of 'a representative of each Member State at ministerial level, authorised to commit the government of that Member State' (Art 203 of the EC Treaty). The Council makes decisions of policy within the fields laid down by the treaty and adopts, or rejects, legislation proposed by the Commission after it has been considered by the European Parliament.

The Council is more a process than an institution. It has no regular place at which it meets. Which minister attends meetings of the Council depends on the subject matter under discussions, so that, for example, the UK representative when employment issues are considered is the Secretary of State for Education and Employment. More than one meeting of the Council may take place simultaneously. Preparations and preliminary negotiations for Council meetings are done by a permanent committee of senior diplomats from Member States (COREPER). The late Alan Clark MP, a former UK minister, explained the process in his idiosyncratic style:

> it makes not the slightest difference to the conclusions of a meeting what ministers say at it. Everything is decided, horse-traded off by officials at COREPER ... The ministers arrive on the scene at the last minute, hot, tired, ill or drunk (sometimes all of these together), read out their piece and depart [*Alan Clark's Diaries*, quoted in (1998) *The Economist*, 8 August, p 37].

This is probably an exaggeration. When decisions have to be taken by the Council, voting is now usually according to the principle of qualified majority voting in which ministers from larger Member States have more votes than those from smaller ones (for example, a UK minister has 10 votes, whereas Denmark has only three).

7.5.4 The European Council

The European Council is the twice yearly meeting of Heads of State or government of the Member States (for the UK, that is the Prime Minister), the president of the Commission and the foreign ministers of the Member States (Art 4, TEU). Its role is to 'provide the Union with the necessary impetus for its development' and to 'define the general political guidelines thereof'. (Note that the European Council is entirely distinct from the Council of Europe, the international body under which the European Convention on Human Rights has been established (see above, 2.12.1).)

7.5.5 The European Court of Justice and the Court of First Instance

The role of the Court of Justice is to 'ensure that in the interpretation and application of [the EC Treaty] the law is observed' (Art 220 of the EC Treaty). There are 15 judges, one nominated by each Member State. The UK nominee is currently Judge David Edward, a Scottish lawyer; his predecessor was Lord Slynn. Nine Advocates General, who are judicial officers of similar status to the judges, participate in cases by delivering reasoned opinions suggesting the appropriate resolution of each case. The court usually follows the Advocate General's advice, but is not bound to do so. (Francis Jacobs QC has been an Advocate General since 1988.) In 1989, a second court, the Court of First Instance, was created to hear some, generally less important, classes of litigation. The are several different types of proceedings (which will be considered in more detail in Chapter 18):

(a) Under Art 234 of the EC Treaty (formerly Art 177 before the treaty provisions were renumbered by the Amsterdam Treaty in 1998), the Court of Justice may give preliminary rulings on points of EC law when requested to do so by courts and tribunals in the Member States. This important procedure is considered in more detail in Chapter 18.

(b) The Court of Justice is also the final arbiter as to whether the Union institutions have followed the procedures when making legislation and decisions (Art 230 annulment proceedings).

(c) The Commission and Member States may also bring proceedings in the Court of Justice to compel another Member State to fulfil its obligations under European law (Arts 226 and 228).

Through its case law, the court has developed several important principles of law, including proportionality and rights to compensation for breach of EC law.

As we shall see shortly, the court has also developed more fundamental – and controversial – constitutional principles, such as the primacy of Community law and the direct effectiveness of Community law. Indeed, the whole role of the Court of Justice has sparked criticism. Few doubt that the

Court of Justice has been a powerful force in furthering the goal of European integration. Lord Neill (who went on to chair the Committee on Standards in Public Life (see above, 6.1)) wrote, in 1995, that 'a court with a mission is not an orthodox court. It is potentially a dangerous court – the danger being that inherent in uncontrollable judicial power' (*The European Court of Justice: A Case Study in Judicial Activism*, 1995, London: European Policy Forum, p 48). He was critical of the court's approach to interpreting the treaty, saying that its methods 'have liberated the court form the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning and language of the relevant provision' (p 47). Against this view needs to be set the claim that the creation of a single market would have been impossible without the Court of Justice taking a lead in ensuring the universal application of the common rules of Community law on which it depends.

7.6 How the Community legislates

As we have noted, the novel feature of the Community – the first of the Union's three pillars – is that institutions have power under the treaty to make legislation binding in the legal systems of the Member States. Such legislation is in the form of regulations and directives (defined in Art 249 of the EC Treaty).

7.6.1 Regulations

A regulation has 'general application' and is 'binding in its entirety and directly applicable in all Member States'. In other words, they are a source of law in the UK legal systems without the British Government or Parliament needing to incorporate them into English law. Indeed, it is unlawful for a Member State, through its government or Parliament, to seek to give legal effect to a Community regulation by enacting national legislation: see Case 34/73 *Variola v Amministrazione delle Finanze* (1973). Many regulations are made solely by the Commission under powers delegated to it by the Council.

7.6.2 Directives

A directive is 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods' (Art 249 of the EC Treaty). In other words, this type of Community legislation creates a binding framework for achieving a particular policy, within which Member States are able to fulfil in different ways according to what is most appropriate in their national circumstances. Directives lay down a time limit, often 12 or 18 months, by which all Member States must have achieved the results laid down by the directive. This will often require national legislation, an Act of Parliament or statutory instrument, to be enacted.

The legislative processes by which the Community institutions make directives has, for many years, been notoriously labyrinthine, though the Amsterdam Treaty simplified them a little. The initiative for a proposed directive comes from the Commission and is often the result of protracted consultations with governments of Member States and pressure groups (see Harlow, C, 'A community of interests? making the most of European law' (1992) 55 MLR 331). Once a draft directive has been produced, it has to be considered and approved by the European Parliament and the Council in accordance with one of three main procedures: assent; co-decision (Art 251 of the EC Treaty); or consultation. These differ according to the degree of influence each confers on the European Parliament to make amendments or veto draft legislation and whether voting in the Council is by qualified majority or requires unanimity.

National parliaments are given no formal role during the Community legislative process. In the UK, both the House of Lords and the Commons have, however, established select committees which attempt to exert influence by taking evidence from experts, interested parties and the government and then issuing reports about draft directives (see, further, Denza, E, 'Parliamentary scrutiny of community legislation' [1993] Statute LR 56). In 1980, the UK Parliament passed a resolution which made it clear that British ministers should not vote in favour of a draft directive in Council until any parliamentary committee considering that particular proposal had concluded its deliberations and issued a report, unless there were 'special reasons' for the minister needing to vote. The Protocol on National Parliaments agreed as part of the Amsterdam Treaty has gone a little way to improving opportunities for national parliaments in the legislative process. It requires the Community to provide parliaments with timely information about proposed legislation, and it also formally establishes the Conference of European Affairs Committees (COSAC), at which parliamentarians from the Member States meet to discuss issues. There are continuing calls for national parliaments to be given a greater role in decision making and scrutiny processes in order to fill the democratic deficit.

Once a Directive is adopted by the Community, each Member State has, within the stipulated time, to ensure that its own national law and practices comply with the terms of the directive. Often, this will involve introducing new legislation into the national parliament. In the UK, this can be done by Act of Parliament (for example, the Consumer Protection Act 1987 brought Directive 85/374/EEC into English law). More commonly, directives are brought into domestic law by making a statutory instrument (on which, generally, see above, 6.8.2). The Directive on Unfair Terms in Consumer Contracts 93/13/EEC was transposed into domestic law in this way. Section 2(2) of the European Communities Act 1972 gives ministers a general power to use statutory instruments to implement directives, though Sched 2 prohibits the use of statutory instruments to impose taxation, retrospective legislation, sub-delegated legislation or the creation of new criminal offences. Using

statutory instruments has obvious advantages for the government; given the already overcrowded legislative timetable for Bills in Parliament, it would be impossible to use primary legislation to transpose all directives. The downside is that statutory instruments receive little parliamentary scrutiny in comparison to Bills. Greater opportunities to scrutinise would, though, be of little value, as once a directive has been made by the Community, a Member State and its Parliament are required by Community law to give effect to it (see above).

There is no obligation for the Act of Parliament or statutory instrument to use precisely the same wording as the directive. In the past, there was a tendency for British legislative drafters to use a traditional English style, which spells out the policy in great detail and attempts to anticipate as many contingencies as possible. The danger with this is that discrepancies may arise between the Act or statutory instrument and the original directive on which it was based. An alternative approach to drafting, known as the 'copy out' technique, is therefore gaining favour; here the text of the directive is just set out almost word for word. A potential problem with this approach is that directives normally only set out broad principles, and there is a fear that this will give English judges too much discretion to fill in detail when they are called upon to interpret the legislation.

7.7 Institutions and processes in the second and third pillars

In the previous section, we have looked at the institutions and legislative processes within the Community, the first pillar of the European Union. The decision making structures in the second pillar (common foreign and security policy) and the third pillar (police and judicial co-operation on crime) are different. They are often described as 'intergovernmental', to emphasise several features:

(a) they take place outside the procedures applicable to the Community under the first pillar;

(b) in many situations, each Member State retains the right to veto any policy which others favour;

(c) the outcome of the decision making process is not legislation binding in the legal systems of Member States (as are directives and regulations in Community law), but, rather, have a status more like international agreements binding on countries as a matter of public international law.

7.7.1 The second pillar: common foreign and security policy

Overall responsibility for defining 'the principles of and general guidelines for the common foreign and security policy, including for matters with defence

implications' lies with the European Council (Art 13 of the TEU), that is, with the twice yearly meeting of the Heads of State or government of the Member States, the president of the Commission assisted by the foreign ministers of the Member States (see above, 7.5.4). The treaty lays down no set procedures for decision making by the European Council.

The Council, that is, the more regular meetings of ministerial representatives of the Member States (see above), recommends common strategies to the European Council 'and shall implement them, in particular by adopting joint actions and common positions'. These measures do not have the direct force of law within the national legal systems of the Member States, unlike directives and regulations made within the Community. The decisions of the Council are generally taken on the basis of unanimity, not qualified majority voting, when they have military or defence implications (Art 23 of the TEU). The European Parliament is, at most, consulted by the Council and concerns are often expressed as to the lack of democratic accountability for the Union's common foreign and security policies. Examples of agreements under the second pillar are a 'Common Position on Albania to support democracy and stability' and a 'Joint Action to help the Palestinian Authority counter terrorist activities in the territories under its control'.

7.7.2 Third pillar

In the third pillar (police and judicial co-operation in criminal matters), co-operation takes place at a number of levels – from that of police forces and customs authorities up to ministerial level. Numerous working groups have been established to take responsibility for discussion of policy on specific issues. Where action is taken at the ministerial level, this is done through the Council. Voting takes place on the basis of unanimity rather than a qualified majority – in other words, each member retains a right of veto. The outcome of discussion may take various forms, including 'common positions', 'framework decisions', 'other decisions' and the adoption of international conventions (Art 34 of the TEU). None of these measures is automatically binding within the legal systems of the UK.

By use of a 'convention', Member States have established Europol, an organisation based in The Hague, through which police forces liase by exchanging information, conducting joint training and having exchange programmes. In March 1998, the Council adopted a 'common action' on indictments for the participation in criminal organisations, with Member States agreeing to make certain activities 'subject to effective, proportionate and dissuasive criminal sanction'. Another field in which there is co-operation is in the enforcement of driving bans imposed in one Member State in all other Member States. Where co-operation takes place in the form of international conventions, the problem is that they have to be ratified in each Member State

before coming in to force; they are also often subject to complex 'declarations' and 'reservations' by Member States.

Critics are concerned that this developing field of intergovernmental co-operation is not subject to effective control as it is not supervised by the Commission nor the European Parliament. The role of the European Parliament is limited to being consulted on these measures, and the jurisdiction of the European Court of Justice in relation to these matters is also limited (Art 35 of the TEU). In the UK, concern has been expressed that the decisions of British ministers under the third pillar are liable to sidestep the UK Parliament. In 1997, the House of Lords' select committee on the European Communities reported:

> We believe that Parliament owes a duty to the public to ensure that Ministers are made fully accountable for their actions in Council. The matters falling under the Third Pillar can have serious implications for the rights and freedoms of the individual, and Parliament must ensure that its procedures for monitoring work under the Third Pillar are effective [Sixth Report, Session 1997–98, para 1].

During 1997, Member States took steps towards making third pillar decision making more transparent, with publication of the timetables for discussions of various working groups, progress reports and by allowing the public access (through the internet) of proposals on criminal matters presented to the European Parliament.

7.8 Constitutional relationships between the UK, the Union and citizens

The legal connector between the Union and the UK is the European Communities Act 1972, as amended. Anyone looking there to find an explanation of the principles which regulate this relationship will be sorely disappointed. The 1972 Act is a dismal triumph for impenetrable statutory drafting techniques. Its constitutional novelty lay in the fact that it not only incorporated the text of a treaty into the legal systems of the UK, but also all past and future directives and regulations made by the Community institutions. It also brought into the national legal systems of the UK what is known as the *acquis communautaire* (defined by William Robinson as 'an amorphous phenomenon. It constitutes the body of objectives, substantives rules, policies, laws, rights, obligations, remedies and case law which are fundamental to the development of the Community legal order' in Monar, J *et al* (eds), *Butterworths Expert Guide to the European Union*, 1996, London: Butterworths, p 3).

British law has little to contribute to the discussion of the constitutional relationship between the UK and the Union, other than the overworked concept of parliamentary sovereignty. As we noted, commentators differ in

their analysis of the extent to which this has been 'lost', 'pooled' or 'transferred' as a consequences of membership of the Union (see above, Chapters 2 and 5). The notion of sovereignty is, however, only one of a number of principles which regulate constitutional relationships to the Union. As we shall see shortly, although the treaty does not spell this out expressly, the European Court of Justice has held that Community law takes priority over the laws of Member States, including their constitutional law (see below, 7.8.1). This means that the relationship between a Member State and the Union is ultimately a question of Community law.

7.8.1 Loyalty to the project

Membership requires a Member State – which means its government, Parliament, judiciary and its other emanations – to abide by the decisions and legislation made by the Community institutions. Article 10 of the EC Treaty provides:

> Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

This article (formerly Art 5) has been used by the European Court of Justice to justify several of its innovative doctrines. From time to time, governments of Member States are implacably opposed to legislation made by the Community. One recent example was the Conservative government's hostility to the Directive on Certain Aspects of Working Time 93/104/EC, a measure which sought to impose restrictions on working hours, which the British Government at the time saw as contrary to its own desired policy of deregulating working arrangements. After having unsuccessfully challenged the legal validity of the directive in proceedings before the European Court of Justice, the government was obliged to initiate legislation to bring national law into accordance with the directive, and Parliament was under an obligation to pass such legislation.

There is, then, no scope for a Member State to pick and choose which Community legislation it will comply with – so long as it remains a member. Suggestions have been made in the past that if an Act of Parliament were knowingly to enact a provision incompatible with Community law (an unlikely event), then a British court would be bound by the British constitutional principle of parliamentary sovereignty to give effect to the statute rather than the EC legislation: see *obiter dicta* of Lord Denning MR in *Macarthys Ltd v Smith* (1979) and *Blackburn v AG* (1971). This view is unlikely to be followed today. Were the issue to arise, the British court would have to

make an Art 234 reference to the European Court of Justice for it to make a preliminary ruling on this point. Article 10 of the EC Treaty (set out above), and the principle of the primacy of Community law even over Member States' constitutions, would seem to indicate only one answer.

7.8.2 Negotiating opt-outs at the treaty revisions

The main scope governments of Member States have for seeking to exempt their country from legal requirements imposed by Community law is to negotiate a formal derogation from the Treaty at one of the periodic intergovernmental conferences set up to revise the treaties (as in Maastricht in 1993 and Amsterdam in 1997). Thus, at the time of the Maastricht agreement, the last Conservative government negotiated an opt-out from the provisions of the Social Chapter of the EC Treaty, which empowered the Community to make legislation affecting working conditions. In the event, the practical implications of this opt-out arrangement was not tested, as the incoming Labour government agreed at Amsterdam that the UK should be bound by the Social Chapter. One important British opt-out which remains relates to Community policy on monetary union and the single currency.

7.8.3 The principle of subsidiarity

Another important feature of the constitutional relationships between Member States and the Union is the principle of subsidiarity, which was set down at the time of the Maastricht Treaty to allay fears in some Member States that the Commission was exercising its powers to take action and initiate Community legislation in too broad a way. Article 5 of the TEU provides:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

There has been much academic debate about the meaning and practical implementation of the subsidiarity principle (see, further, O'Keeffe, D and Twomey, P (eds), *Legal Issues of the Maastricht Treaty*, 1994, London: Wiley, especially Chapters 3–5). The Amsterdam Treaty attempts to make it less vague by providing a more detailed framework governing its application. Here we see the start of the process for the principled demarcation of powers between the Union and the Member States, giving some constitutional protection for the rights of the latter.

7.8.4 Closer co-operation

Constitutionally, perhaps the most important innovation in the 1998 Amsterdam Treaty is the enactment of a general concept of 'closer co-operation' (Arts 43–45 of the TEU) under which it will now be possible for a group of Member States to go ahead – in the first or third pillars of the Union – to use the institutional framework of the Union to develop policy initiatives and legislate without all other Member States having to be bound by these outcomes. The aim is to introduce a degree of flexibility into the project of European integration – a so called 'multi-track' Union – without undermining the integrity of the project as a whole. Great uncertainties surround how this new arrangement will operate.

7.9 Community law in national legal systems

The way in which Community law is applied by national courts is a matter of Community law, not national law. In a series of cases in the early 1960s, the Court of Justice asserted the idea that the EC Treaty has created 'a new legal order of international law'. This had two main features. One was that the 'States have limited their sovereign rights' and, accordingly, Community law takes precedence over any inconsistent national law or practice. The second feature of the new legal order is direct effect. This is the idea that 'independently of the legislation of Member States, Community law imposes obligations on individuals' and 'confers upon them rights which become part of their legal heritage'.

7.9.1 Primacy of Community law

The principle that Community law takes precedence over any inconsistent laws in Member States was well established by the Court of Justice before the UK joined the Community in 1973. In Case 26/62 *van Gend en Loos* (1963), the court stated – to the surprise of some of the Member States at the time – that 'the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields'. Shortly afterwards, the court spelt this out even more fully in Case 6/64 *Costa v ENEL* (1964):

> By creating a Community of unlimited duration, having its own legal institutions, its own personality, its own legal capacity ... and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community, and more generally form the terms and the spirit of the

> treaty, make it impossible for the States, as a corollary, to accord precedence to the unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. Such a measure cannot therefore be consistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty.

In 1970, the court held that Community law takes precedence even over the fundamental constitutional law of a Member State: see Case 11/70 *Internationale Handelsgesellschaft* (1970).

By incorporating the treaty into national law by the European Communities Act 1972, the UK constitutional system accepted this principle of primacy, though neither the treaty itself, nor the 1972 Act, actually spell it out clearly and explicitly. It was relatively late on in its membership that UK courts first had to 'disapply' inconsistent national law and give effect to Community law (see above, 5.2.4).

7.9.2 Direct effect of Community law

The basic idea of direct effect is that, in certain circumstances, provisions in Community law – in the EC Treaty itself, and regulations and directives – confer rights on individuals and business corporations which they may enforce in national courts. As we shall see shortly, sometimes the rights are enforceable only against governmental bodies, whereas in other situations, rights under Community law may also be enforced against other individuals and companies.

Direct effect of the treaty

Many provisions in the treaty are not concerned with conferring rights or obligations on anyone, but rather with setting out institutional structures and processes for decision making within the Community. Some articles, however, do deal with the freedom of people to act, and it is these which may be capable of having direct effect in domestic litigation. In Case 26/62 *van Gend en Loos* (1963), the Court of Justice held that an article which 'contains a clear and unconditional prohibition which is not a positive but a negative obligation [and] is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law' may be able to benefit the nationals of the Member State. The following treaty provisions, among others, have been held by the European Court to be directly effective: Art 28, which prohibits quantitative restrictions on imports and discriminatory measures having equivalent effect; Art 39, on the free movement workers; Art 43, conferring the right of freedom of establishment for businesses; and Art 141, which states that 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

These rights can be relied on by a person in a British court, both 'vertically' against the Member State and 'horizontally' against another private citizen or business. What bodies count as being an emanation of a Member State has been defined broadly for this purpose by the Court of Justice in Case C-188/89 *Foster v British Gas plc* (1990):

> ... a body, whatever its legal form, which is made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

Direct effect of regulations

As we have seen (above), regulations are defined as being 'directly applicable in all Member States' once made by the Community institutions (Art 249 of the EC Treaty). Like the treaty provisions, however, not all regulations create rights and obligations enforceable in national courts. For a regulation to be relied upon by a litigant in a national legal system as conferring rights or imposing obligations, its provisions must be clear and precise, unconditional and leave no room for the exercise of discretion in its implementation. Like treaty articles, regulations may be directly effective both vertically and horizontally.

Direct effect of directives

It is the application of the concept of direct effect to directives which has caused the most controversy. You may be thinking that, if directives are transposed into English law by Act of Parliament or statutory instrument (see above), then there will be no need for a litigant to seek to rely on the directive itself during the course of litigation in a national court. A variety of practical situations may, however, occur where it is still necessary to look at the directive itself. First, the government may have failed to transpose the directive into national law by the set date and so failed to confer rights set out to be achieved by the directive. Secondly, the UK Act of Parliament or statutory instrument which seeks to incorporate the directive into national law may not properly reflect the provisions of the relevant directive (either because of a mistake in drafting, or because the government took a view of what the directive requires which is not shared by the court). In these circumstances, a litigant may rely on the terms of the directive itself, provided that the rights it confers are unconditional and sufficiently precise: Case 41/74 *Van Duyn v Home Office* (1974).

The European Court of Justice has held that directives (unlike the treaty provisions and regulations considered above) can never have horizontal direct effect, only vertical effect. In other words, an individual cannot directly rely on the provisions of a directive against another individual or private business, only against an institution of the State: see Case 152/84 *Marshall v Southampton and South West AHA (Teaching)* (1986) and *Faccini Dori v Recreb* (1994). One

reason for courts limiting the principle in this way is that the wording used in Art 249 of the EC Treaty defines a directive as binding 'upon each Member State to which it is addressed', in contrast to regulations which 'have general application'. Another justification is that a Member State should not be allowed to rely upon its own breach of Community law, in failing to transpose a directive into domestic law, as a ground for denying a person rights. The distinction between horizontal and vertical direct effect can create anomalies. For example, two people – one working for a governmental body, the other for a private businesses – may have exactly the same dispute over (say) sex discrimination, but only the public sector employee will be able to rely upon any relevant directives in taking her employer to court. The private sector employee may, however, be able to apply for judicial review against the government for its failure properly to implement the directive into national law, as in *Equal Opportunities Commission v Secretary of State for Employment* (1995).

7.9.3 Principle of consistent interpretation

The rule that directives can only have direct effect vertically, that is against public bodies, has been slightly undermined by Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1992), in which the Court of Justice held that national courts had, so far as possible, to interpret all national legislation so that it conforms with any relevant directives. The practical effect of this is that rights or obligations contained in a directive may, by this sidewind, by enforced by a British court even against a private person or business. The House of Lords have added a gloss to this: the court or tribunal must carry out its task of interpretation 'without distorting the meaning of the domestic legislation' and words of the Act or statutory instrument must actually be capable of supporting an interpretation consistent with the directive: see *Webb v EMO Air Cargo UK Ltd* (1993). In other words, the English courts apply the *Marleasing* principle to choose an interpretation of legislation consistent with a directive where this is one of several plausible interpretations.

7.9.4 Compensation for breach of Community law

Following an important judgment by the European Court of Justice in Joined Cases C-6 and 9/90 *Republic of Italy v Francovich* (1991), citizens and businesses may now claim damages against a Member State which has failed to transpose a directive into its domestic law properly or at all, whether or not it had direct effect. In *Francovich*, the Italian Government should have transposed a directive into its domestic law to set up some sort of scheme (it was up to each Member State to decide precisely what kind) to ensure that employees received any outstanding wages, etc, if their employer became insolvent. Italy failed to do this by the due date. Francovich's employer went bust and he was not paid. The directive was not directly effective against the

Italian Government because the provisions lacked sufficient 'unconditionality' – the government needed to carry out several things before the scheme could be operational. But Francovich sued the Italian Government for their failure to establish a scheme. The Court of Justice held that there was a right to damages for non-transposition of a directive if three conditions were satisfied in a case. These were: the directive had to create individual rights; the content of those rights must be ascertainable from the directive itself; there was a causal link between the government's failure to transpose the directive and the individual's loss. In later cases, the Court of Justice has added the requirement that the breach of Community law must be 'sufficiently serious'. Whether this is so is for the national court hearing the damages action to determine. A failure to implement a directive within the set time limit is, of itself, a sufficiently serious breach warranting compensation: *Dillenkofer v Germany* (1997).

A right to compensation may also exist in relation to other breaches of Community law, including breaches of the EC Treaty (*R v Secretary of State for Transport ex p Factortame Ltd (No 4)* (1997) where the British Government enacted a statute incompatible with the right to freedom of establishment) and the taking of administrative action contrary to Community law (*R v Minister for Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* (1996)).

7.10 Conclusions

Membership of the Union has brought about momentous alterations in basic features of the constitutional system of the UK. The Treaty on European Union and the EC Treaty form an emergent written constitution for western Europe. Until now, the framers of the treaties have placed special importance upon constitutional guarantees for free trade and associated economic rights, some of which are enforceable by individuals and business enterprises in national courts. Through the principles of primacy of EC law, subsidiarity and, now, closer co-operation, the treaty and the European Court of Justice are venturing to set down constitutional principles to govern the developing constitutional relationships between the Union and its Member States. What stands in the way of the treaties being regarded as a proper constitution, however, is the absence of effective civil and political rights for citizens. Though the treaties and the Court of Justice have regard to such rights, especially those contained in the European Convention on Human Rights, the Union continues to suffer from a severe democratic deficit in its systems of decision making and legislation.

THE EUROPEAN UNION

Why European integration is taking place

The European Union is a paradox: it both promotes constitutional systems based on the principles of liberal democracy and undermines them because the institutions of the EU suffer from a democracy deficit. Several explanations have been put forward to explain why integration is taking place in the EU. Some stress that the formation of the EU is an aspect of foreign policy – protecting countries in Europe from other world powers and also preventing war breaking out throughout Europe as it did twice during the 20th century. Other explanations emphasise integration as an aspect of globalisation. Another sees the EU as the method by which States continue to be able to provide welfare benefits and social services to their citizens.

The legal base

The institutions and processes of EU are arranged into a 'temple of three pillars':

(a) the European Community, the longest established part of the EU;

(b) the second pillar in which Member States develop common foreign and security policy;

(c) the third pillar of police and judicial co-operation in criminal matters.

The legal basis for the EU rests on two treaties: the Treaty on European Union and the EC Treaty, both amended by the Treaty of Amsterdam which came into force in May 1999. The treaties set out the institutional and procedural arrangements for decision making. The main institutions are:

(a) the Commission;

(b) the Council;

(c) the European Parliament;

(d) the Court of Justice.

The EC Treaty also includes rights for individuals and businesses – including the 'four freedoms' of free movement of persons, goods, capital and services. It also requires equal pay for equal work between men and women.

The EU institutions, working in the European Community pillar, are empowered to make legislation in the form of directives and regulations. All Community legal rules take priority over inconsistent national laws in the

Member States. The European Court of Justice is the final arbiter on the interpretation of Community law.

In the second and third pillars, Member States have not delegated law making powers to EU institutions. Member States agree upon 'common positions' and 'joint actions'.

Constitutional relationship between the UK and EU

So far as the UK is concerned, it is the European Communities Act 1972 (as amended) which incorporates into the domestic legal systems the TEU and the EC Treaty, directives and regulations and the case law of the Court of Justice. Membership of the EU requires Member States to 'take all appropriate measures' to ensure fulfilment of their obligations, and to 'abstain from any measure which could jeopardise' the objectives of the Community. The only way that a Member State may exempt itself from a particular area of Community law is by negotiating an 'opt-out' from the EC Treaty at one of the intergovernmental conferences held every few years to revise the treaties. Member States who wish to work more closely in a particular field may now do so under the 'closer co-operation' provisions on the TEU; this may result in a 'multi-track' EU. Where competence in an area of policy is shared between Member States and the Community, the principle of subsidiarity limits the scope of Community action.

In national legal systems, Community law has primacy over any inconsistent domestic rule. Some provisions of the EC Treaty are directly effective (vertically and horizontally), meaning they create rights which may be relied upon by people in national courts. Regulations are 'directly applicable', and provisions in them may also be directly effective (vertically and horizontally). Directives may also create directly effective rights – but only vertically and after the time for implementation has passed. National courts and tribunals have an obligation to interpret national legislation so that it conforms to Community law. They may also award damages to people who suffer loss as a result of a breach of Community law by a Member State.