The Legal Nature of the European Community: A Jurisprudential Analysis using H.L.A. Hart’s Model of Law and a Legal System

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ARTICLES

THE LEGAL NATURE OF THE EUROPEAN COMMUNITY: A JURISPRUDENTIAL ANALYSIS USING H.L.A. HART'S MODEL OF LAW AND A LEGAL SYSTEM

Mark L. Jones*

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INTRODUCTION

In the landmark decision of *Costa v. ENEL*,¹ in which the European Court of Justice unequivocally announced that European Community² law prevails over inconsistent national laws of Member States, the Court made the following ambitious claim: “By contrast with ordinary international treaties, the E.E.C. Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”³ The Court repeatedly has confirmed the direct effect and supremacy of provisions of European Community Law.⁴

Although there is abundant literature describing the content of European Community Law, there is little commentary directed toward explaining the existence, nature and extent of European Community Law from the viewpoint of legal theory.⁵ The thesis of this Article is that the legal theory articulated by H.L.A. Hart in *The Concept of Law*⁶ provides a model and framework of analysis that illustrates, explains, and supports the Court’s claim that there exists an autonomous European Community legal system that penetrates the national legal systems of the Member States, binding the national courts, and that Community Law is thus to be distinguished


². The European Community consists of three “Communities” that were established by three separate treaties:


⁴. See infra notes 132-61 and accompanying text.


from traditional international law.\(^7\)

This Article posits that, subject to certain possible limitations, Hart's theory provides a "powerful tool for analysis,"\(^8\) not only for the concept of law and a legal system in general, but particularly in the context of European Community Law and the Community legal system. Just as the question has been posed: "Is international law really law?",\(^9\) one might ask the same question in the case of the European Community, the product of a number of international treaties.\(^10\) In fact, it is not doubted seriously that European Community Law is indeed law; and Hart's theory is particularly helpful in explaining why this is so.

This contention does not depend upon Hart's claim that the term "law" can be used with regard to international law because such usage is not likely to obstruct any theoretical or practical aim\(^11\) and that the word "law" is used appropriately because there exist analogies of function and content, though not of form, with municipal law.\(^12\) This Article will make the much larger claim that, in the case of the European Community, the analogy is also one of form in that the formal structure of Community Law displays those features that characterize a well-developed "legal system." Thus, it will be argued, Community Law is "much nearer in structure to a municipal system" than traditional international law\(^13\) and consequently the use of the appellations "law" and "legal system" is undoubtedly justified.

Section One of the Article will summarize the central elements of Hart's theory. Section Two will examine European Community Law as it affects the traditional subjects of international law, namely states. Even from this limited perspective, it will be seen that European Community Law differs from traditional forms of international law and constitutes a legal system in Hart's sense. The true extent and unique nature of the Community legal system then will be revealed fully by examining in Section Three the applicability and status of Community Law within the Member States and, in particular, the manner in which the legal position of individuals is affected.

\(^7\) While advocating the explanatory power of Hart's model, the author of this Article is not suggesting, of course, that the Court of Justice itself necessarily had such a jurisprudential model in mind when making its pronouncements regarding the nature of Community Law or when using the term "legal system" in Costa (English translation from Italian language of the case).

\(^8\) H.L.A. Hart, supra note 6, at 95. The various criticisms leveled at Hart's general theory are examined infra note 65.

\(^9\) See id. at 209, where Hart broaches this question.

\(^10\) See supra note 2.

\(^11\) See H.L.A. Hart, supra note 6, at 209.

\(^12\) See id. at 231.

\(^13\) See id.
directly and indirectly by the law-making powers that the Community institutions exercise in fulfilling a wide range of governmental functions in the economic sphere.

I

PRINCIPAL ELEMENTS OF HART'S THEORY

Hart rejects Austin's theory\(^\text{14}\) that the foundation of a legal system is the majority's habitual obedience to orders that are backed by threats issued by a sovereign that obeys no one. He grounds this rejection on Austin's failure to account for various essential features of a modern municipal legal system.

Hart attempts to account for those features by formulating a theory that emphasizes two central ideas. First, in elucidating the concept of a rule, Hart distinguishes between its internal and external aspects. The internal aspect views a rule from the perspective of the members of the social group who accept the rule as a standard for regulating their behavior. The external aspect views a rule from the perspective of an observer who stands outside the social group and does not accept the rule as a standard for his own behavior.\(^\text{15}\)

Second, Hart makes a fundamental distinction between primary rules of obligation and secondary rules. Primary rules of obligation are concerned with the actions that those subject to the rule must or must not do, while secondary rules are about the primary rules themselves.\(^\text{16}\) Hart sees "the key to the science of jurisprudence"\(^\text{17}\) in the combination of these two kinds of rules. This combination is at "the heart of a legal system" and, moreover, is "a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist."\(^\text{18}\) The discussion that follows elaborates upon these two ideas—the internal/external aspects of a rule and the combination of primary and secondary rules.

A. PRIMARY RULES AND SECONDARY RULES

1. Rules in General

The existence of any rule consists of more than mere regularity of behavior and—in the case of duty-imposing rules—the regular


\(^{15}\) H.L.A. HART, supra note 6, at 86.

\(^{16}\) Id. at 92.

\(^{17}\) Id. at 79.

\(^{18}\) Id. at 95.
application of sanctions to violators. To focus on this alone ignores
the internal aspect of rules, namely, the way in which any rule func-
tions in the lives of (normally) the majority of the members of the
social group in question. Those who view a rule from the internal
point of view accept the rule as a standard or a reason for behaving
in a particular way, for judging the conduct of others, and—presum-
ably only in the case of primary rules of obligation—for imposing
sanctions on violators.

An observer who stands outside the social group and views the
rule from the external perspective may refer to the internal aspect of
a rule when he makes the statement that a given rule exists or gener-
ally is accepted by the group as a standard in practice. Such an
outside observer, however, may fail to note the very existence of
rules if he does not refer to this internal aspect but instead simply
records the regularity of behavior and the regular application of
sanctions to violators.

2. Primary Rules of Obligation

Certain rules are concerned with governing the behavior of
those subject to them; they are characterized by a varied normative
vocabulary (e.g., ought, should, must). Not all such rules, however,
should be regarded as imposing obligations or duties. According to
Hart, such a rule imposes an obligation only “when the general
demand for conformity is insistent and the social pressure brought to
bear upon those who deviate or threaten to deviate is great.” If the
social pressure takes the form of physical sanctions, the rule appro-
priately is classified as part of the law of the group, rather than part
of its morality, which is supported primarily by feelings of shame,
remorse, or guilt. The social pressure can be conceived of as a
chain that binds those subject to the obligations, the other end being
held by the group or its official representatives—e.g., obligations
under the criminal law—or entrusted by the group to a private indi-
vidual—e.g., obligations under civil law.

19. Id. at 87.
20. Id. at 88.
21. Id. at 86-87.
22. Id.
23. Id. at 83.
24. Id. at 84.
25. Id. Hart identifies two other characteristics of “obligations” that go together
with the seriousness of the social pressure supporting the rule. First, the rules are consid-
ered important because they are thought to be necessary to maintain social life, e.g., rules
restricting violence and rules requiring honesty or truth or the keeping of promises. Sec-
ond, the conduct required involves some element of self-sacrifice. See generally id. at 85.
26. Id.
3. Secondary Rules

Hart deems it possible to conceive of a society where the only means of social control consist of primary rules of obligation, provided that certain factual conditions are met. Such a form of social control, however, would suffer from three major defects, all of which can be remedied by supplementing these primary rules of obligation with secondary rules. The introduction of the remedy for each defect can be considered "a step from the pre-legal into the legal world" and "certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system."28

The first defect is the uncertainty of a simple regime of primary rules. Such a regime does not form a system but is simply a set of separate standards that lack any criteria for determining the existence or scope of a particular rule. The remedy for this defect is the introduction of a secondary "Rule of Recognition" that specifies some characteristic, e.g., legislative enactment and judicial decision, that is a conclusive, affirmative indication that the primary rule is a rule of the social group. Thus, the Rule of Recognition specifies the "criteria of validity"29 for the rules of the group or, in other words, its various "sources of law."30 The emergence of such a Rule of Recognition provides authoritative criteria that identify and unify the various rules of the group. After this occurrence, the rules are no longer a discrete, unconnected set.31

A second defect in a system of social control that is dependent solely on primary rules of obligation is the static character of a regime of primary rules. In the absence of means to change deliberately primary rules by specific acts, the rules only can change slowly. This defect is remedied by the introduction of two types of secondary power-conferring "Rules of Change": (1) those that empower a certain body to create or repeal general, primary rules of obligation, as by legislative enactment; and (2) those that empower private individuals to create particular structures of rights and duties to govern

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27. See id. at 89. Hart identifies the following three factual conditions: (1) the rules must contain restrictions on the free use of violence, theft, and deception; (2) those who accept the rules must be in the majority, because if those who rejected the rules were more than the minority, they would have too little social pressure to fear; and (3) "only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules." Id. at 89-90.
28. Id. at 91.
29. See infra notes 35-37 and accompanying text.
30. Id.
31. See H.L.A. Hart, supra note 6, at 90, 92-93.
their relationships, e.g., wills and contracts.\textsuperscript{32}

The third defect identified by Hart is the \textit{inefficiency} of the diffuse social pressure supporting the primary rules of obligation. This defect is remedied by the introduction of two types of secondary power-conferring "Rules of Adjudication": (1) those that empower certain individuals—judges—to ascertain the fact of violation of the primary rules; and (2) those that empower the judges to direct the application of sanctions by other officials.\textsuperscript{33}

"Rules of Change" and "Rules of Adjudication" are part of the "Rule of Recognition" of a system because they necessarily specify various sources of law such as legislative enactment and judicial decision.\textsuperscript{34}

\section*{B. The Rule of Recognition}

It is helpful to elaborate upon two features of Hart's Rule of Recognition in order to develop fully the thesis of this Article. The Article first will examine the complexity of the Rule of Recognition, and then will consider the existence of the Rule as a statement of fact.

\subsection*{1. The Complexity of the Rule of Recognition}

Hart's Rule of Recognition specifies the various criteria of validity for the particular rules of the system, i.e., its sources of law. It is important to note a number of points about these criteria or sources of law. First, in a modern legal system, the various criteria of validity or sources of law are numerous and the Rule of Recognition is correspondingly complex, e.g., written constitution, legislative enactment, and judicial decision.\textsuperscript{35}

Second, each source of law is ultimate in the sense that the authority for a particular rule of the system can be traced up through a hierarchy of rules that provide criteria for the validity of the rules below. This process eventually leads to some ultimate source or criterion of validity that is not itself validated by some higher rule.\textsuperscript{36}

Finally, the ultimacy of the various sources of law does not, however, imply that they are all of equal rank. Instead, they may occupy a place on a scale of superiority, and indeed one of them may

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 90-91, 93-94.
\item \textsuperscript{33} \textit{Id.} at 91, 94-95.
\item \textsuperscript{34} \textit{Id.} at 93-95.
\item \textsuperscript{35} \textit{Id.} at 98.
\item \textsuperscript{36} Hart's particular example is the purported by-law of the Oxfordshire County Council, the chain of validity being: by-law—statutory order of the Minister of Health—statute empowering the Minister to issue statutory orders—"ultimate" criterion of validity being that "what the Queen in Parliament enacts is law." \textit{See generally id.} at 103-04.
\end{itemize}
be supreme over all the others. For example, the legislature may be competent to deprive judicial precedent of its status as law and, at the same time, the legislature's power may be limited by a constitution and its enactments held invalid if they transgress those limits.37

2. The Existence of a Rule of Recognition as a Statement of Fact

In the simple regime of primary rules, the statement that a given rule exists is an external statement of fact such as might be made by an observer of the system, even though he thereby refers to the internal aspect of the rule, i.e., its general acceptance as a standard in practice.38 In the same way, Hart argues, the statement that a given Rule of Recognition exists also can be only an external statement of fact because it "exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."39 Those who use such a (normally unstated) Rule of Recognition, however, share the internal point of view because they thereby manifest their acceptance of it. Moreover, the existence of a Rule of Recognition gives new meaning to the statement that a particular rule exists. Although the statement that a Rule of Recognition exists can be only an external statement of fact (because there are no criteria for its own validity) the statement that a particular rule of the system exists now also may be an internal statement of law meaning that the rule is "valid given the system's criteria of validity."40

C. The Existence of a Legal System

Just as the statement that a Rule of Recognition "exists" is an external statement of fact, so too is the statement that a "legal system exists" in a given country or among a particular social group. This statement refers "in compressed, portmanteau form, to a number of heterogeneous social facts, usually concomitant."41 More particularly, there are certain minimum conditions that are both necessary and sufficient for the existence of a legal system, namely:

1. There exists a union of primary rules of obligation and secondary rules of change, adjudication, and recognition.
2. The officials of the system, in particular the courts, effectively accept the secondary rules as critical, common, public standards of official behavior.

37. H.L.A. Hart, supra note 6, at 102-03.
38. See supra notes 19-22 and accompanying text.
40. Id. at 107. For Hart, this also is the justification for classifying the Rule of Recognition as "law" as well as "fact." See generally id. at 107-08.
41. Id. at 109.
(3) There exists general compliance with the rules of behavior that are "valid" under the system's Rule of Recognition.42

One assumes that because the officials of the system accept the secondary rules, they also accept the rules of behavior. In the simpler regime of primary rules alone, the majority of the group also must share this internal viewpoint if there are to be any rules at all. By contrast, in the more complex case of a legal system, only the officials need share the internal viewpoint, although in a healthy society the rules will in fact also be accepted by the majority of private citizens.43 Although Hart is not explicit, one also assumes that law and a legal system are in fact the instruments by which the governmental power of a particular corresponding political order regulates the conduct of its subjects.44 Therefore, in an advanced socio-political order with a correspondingly sophisticated legal system, the officials of the legal system also may be viewed as the officials of the particular socio-political order.

This view of the existence of the Rule of Recognition and a legal system as external statements of fact assists Hart in explaining various problematical phenomena concerning the embryology, existence, and pathology of legal systems. In those cases, there fails to be general compliance with the rules that are valid under the Rule of Recognition used by a particular set of officials. These cases may be divided into two main categories.

1. Cases of Complete Failure: Rival Claims to Govern Between Different Sets of Officials

In certain instances, rival sets of officials, using different Rules of Recognition, may claim to govern a particular social group. These situations occur most frequently as the result of political revolution, enemy occupation, or a colony's pursuit of independence. In each of these cases, a new legal system comes into existence when there is general compliance with the rules recognized as valid under the Rule of Recognition employed by the new set of officials—the revolutionary government, the enemy authorities, or the local officials. These rules, rather than the rules of the old legal system, then

42. Id. at 113.
43. Id. at 113-14.
44. Indeed it is perhaps the generality (application to all members of the community) and the ultimacy (recognition as the final authority) of the power to govern a particular community that distinguishes this governmental power, acting in its political order and expressing itself in the form of "law" and a "legal system," from other "political" orders with their corresponding rule system, e.g., the rules of a club or a church.
generally are effective in the territory.\textsuperscript{45}

The relationship between international and municipal law presents a similar case. For Hart, theories\textsuperscript{46} that assert that international law and municipal law must always form a single system within which municipal law or international law accepts the other as "valid" fly in the face of common sense by assuming that the statement that a legal system exists must be a proposition of law. Hart claims that it is more realistic to recognize that international law and municipal law may be, in fact, two separate and independent legal systems.\textsuperscript{47} Presumably therefore, to the extent that international law, in fact, is not accepted by the municipal officials as a source of law in the Rule of Recognition used by them, it cannot be part of the legal system that exists in the territory.

2. \textit{Cases of Partial Failure: Disunity Among the Same Set of Officials}

Hart distinguishes the above situations from the case where there is a division within the official world, more particularly the judiciary. For example, in South Africa in 1954, a rift occurred between the legislature and its specially-created courts and the regular courts over the legal competence and powers of the legislature.\textsuperscript{48}

Hart characterizes such a case as a disagreement in the official world over the content of the Rule of Recognition that contains the system's ultimate criteria of validity. Hart's view is that all rules contain a "core of certainty" and a "penumbra of doubt" and this is equally true of the Rule of Recognition. \textit{The same legal system} may continue to exist despite the absence of that complete official—especially judicial—consensus that prevails under normal conditions.\textsuperscript{49}

D. \textbf{INTERNATIONAL LAW}

Hart notes that at the present time the formal structure of international law more closely resembles a simple regime of primary rules of obligation than a well-developed, municipal legal system. This is because international law lacks secondary rules of change and adjudication, and arguably also lacks a secondary Rule of Recognition. Hart observes that there is no international legislature, no court with compulsory jurisdiction—a state cannot be brought

\begin{footnotesize}
\textsuperscript{45} H.L.A. Hart, supra note 6, at 114-18.
\textsuperscript{46} See, e.g., H. Kelsen, General Theory of Law and State 373-83 (1946).
\textsuperscript{47} H.L.A. Hart, supra note 6, at 118, 248n. This statement applies presumably to the extent that international law can be called a "legal system" at all. See also infra notes 50-51 & 57-58 and accompanying text.
\textsuperscript{48} See H.L.A. Hart, supra note 6, at 118-19.
\textsuperscript{49} Id. at 119.
\end{footnotesize}
before an international tribunal without its prior consent—and there are no centrally organized sanctions.\footnote{Id. at 209.} For Hart, the principles \textit{pacta sunt servanda} and "states should behave as they customarily behave" do not qualify as a Rule of Recognition ("basic norm") that confers validity on the other rules of international law. Rather, he believes that international law should be conceived of as a set of separate rules, similar to the regime of primary or customary law, that also includes rules providing for the binding force of treaties.\footnote{Id. at 228-29.}

These formal differences between municipal law and international law, however, do not justify the claim that international law is not really law at all. The rules of international law impose obligations on states despite the lack of centrally organized sanctions. The predictive analysis of law as orders backed by threats is incorrect, and all that is necessary for a rule to be binding—to impose an obligation—is that it be accepted by the majority of states as a standard of conduct and be supported with serious social pressure such as demands for conformity and insistent criticism when states deviate.\footnote{Id. at 211-13.}

Moreover, these primary rules of obligation should be classified as law rather than as morality. There exist analogies of content and function that bring such rules closer to municipal law than to morality.\footnote{For example: (1) the rules are supported by "pressure" consisting not of the triggering of feelings of shame or guilt, but rather in references to precedents, treaties, and juristic writings, etc., often with no mention of the moral worth of the act in question; (2) many of the concepts, methods, and techniques of international law are the same as those of modern municipal law; (3) like the rules of municipal law, the rules of international law frequently are morally indifferent, contain arbitrary distinctions, and often are characterized by formalities and highly specific detail, all of which are typical features of law but not of morality; and (4) in contrast to morality, there is nothing in the nature or function of international law that precludes the idea of change by legislative enactment. See generally \textit{id.} at 221-26.} In short, the use of the term "international law" obstructs no theoretical or practical aim and is justified fully upon basic principles.\footnote{Id. at 209.}

Similarly, there is no inconsistency in the notion of a sovereign state being subject to obligations that arise under rules of international law. The word "sovereign" means no more than independent. Sovereign states do not by nature stand outside the law.\footnote{Id. at 216.} To the extent, therefore, that a state's independence or autonomy is limited by binding rules of obligation under international law, its over-
Hart envisages a number of different possible forms of international authority or limits upon state sovereignty:

1. A world legislature with legally unlimited powers to regulate the internal and external affairs of all states.
2. A federal legislature, exercising legal competence only over certain specified matters or limited by guarantees of specific rights of the constituent states.
3. A regime where the only form of legal control consists of rules generally accepted as applicable to all.
4. A regime where the only form of obligation is contractual or self-imposed, i.e., a state's independence would be limited only by its consent.

The first two constructs resemble Hart's formal structure of a well-developed legal system that is characterized by a union of primary and secondary rules; one may refer to this as a strong limitation on state sovereignty. The latter two schemes, by contrast, are characterized by a lack of such a union of primary and secondary rules and thus do not form a legal system; one may refer to this as a weak limitation on state sovereignty.

Hart suggests that the present formal structure of international law resembles the third scheme. He rejects the first two constructs because they presuppose, quite contrary to the actual state of international law, the existence of secondary rules with corresponding institutions. The fourth possibility does not apply because, even though international law is largely treaty law, there are cases where a state is bound by obligations of international law that arise under rules to which it had no opportunity to consent.

Hart, therefore, rejects the voluntarist or auto-limitation theories of international law that assert that all international obligations are self-imposed. Even if, in theory, every specific action were to derive its obligatory character from a promise—as, presumably, under possibility four—this still would presuppose the existence of a rule that does not depend upon the state's consent in the individual case, namely the rule that a state is bound to do whatever it undertakes by appropriate words. *A fortiori*, Hart presumably would

56. *Id.* at 217-18.
57. *Id.* at 217.
58. Hart describes these cases as follows: (1) the emergence of a new state; (2) a state acquiring territory or undergoing some other change; and (3) the more debatable cases concerning the effect on non-parties of general or multilateral treaties. Thus, Hart seems to be making a distinction between: (1) cases where a state concludes a particular treaty and specifically gives its consent to be bound by the treaty obligations; and (2) other cases where a state has not concluded a particular treaty but is nevertheless bound by obligations of international law. *See generally id.* at 220-21.
59. *Id.* at 218-21.
60. *Id.* at 220.
reject such theories in the case of the first and second possibilities or any analogous form that is characterized by secondary rules and corresponding institutions. To assert that in such cases every specific obligation derives its obligatory character from a state's consent would be the international analogue of the social contract theories of political science.\footnote{1} This is presumably so even though it may be possible to trace the socio-political order with its system of law to some consensual act on the part of its subjects, either in terms of its historical origin—a group of individuals organizing together in society or a group of sovereign states concluding a treaty—or, in the ultimate sense, that if consent were withdrawn on a large scale, the socio-political order could disintegrate—as in the case of a political revolution, anarchy, or "secession" from a grouping of states.

E. THE SPECIAL CASE OF EUROPEAN COMMUNITY LAW

Historically, the European Community is a creature of a number of international treaties.\footnote{2} It would be incorrect, however, to view European Community Law as simply another species of traditional international law as described by Hart. European Community Law is not "law" in the Hartian sense merely because it is a set of primary rules of obligation that Member States accept as binding standards of conduct and is supported by serious social pressure such as demands for conformity and insistent criticism of deviations; and thus represents a weak limitation on state sovereignty.\footnote{3} Rather, there are two vital differences between the formal structure of traditional international law and that of European Community Law. These differences represent a particularly strong limitation upon state sovereignty and justify the common description of the Community as a "supranational" rather than an international entity.\footnote{4} First,
even viewed from the limited perspective of the traditional subjects of international law—the sovereign Member States—the formal structure of European Community Law displays those features that characterize a well-developed legal system as opposed to a simple set of primary rules. Second, Community Law and the Community legal system penetrate deeply and pervasively into the Member States. This penetration is manifested in particular by the direct and indirect modification of the legal position of individuals—the traditional subjects of municipal law.

The remainder of this Article demonstrates these two propositions and their consequences. Where the argument requires a discussion of the detailed legal rules of the Community, the Article confines itself to describing the European Economic Community (E.E.C.), which is by far the most important of the three European Communities.65


65. Hart does not discuss the European Community in The Concept of Law. He does speculate, however, that "perhaps international law is at present in a stage of transition towards acceptance of . . . forms which would bring it nearer in structure to a municipal system," and that, if and when this transition is completed, the analogies with municipal law would be analogies of form as well as of content and function. H.L.A. HART, supra note 6, at 231.

The thesis of this Article is that analysis of the European Community using Hart's concept of law and a legal system reveals that this transition has indeed been made in the case of the Community, which therefore possesses a well-developed "legal system" in the full sense as described by Hart. Moreover, a similar analysis of the structural features of other regimes of international law may be useful in attempting to evaluate the extent to which either the "general system" of international law or the various "sub-systems" of different international organizations also are in the process of making the transition towards a well-developed "legal system" in the same sense. Cf. Sorensen, Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organizations in the World Legal Order, 33 INT'L & COMP. L.Q. 559 (1983) (urging that the question whether an international organization possesses an autonomous legal system should be approached by examining law-making powers, application of law and settlement of disputes, and concluding that it probably will be possible to show that a multitude of independent systems exist).

The present writer therefore clearly accepts Hart's claim that his general theory provides a "powerful tool of analysis" for the concept of law and a legal system. This is subject, however, to the possible limitations on his general theory that have been articulated by various critics. Some of the more cogent criticisms may be enumerated as follows. First, Hart's representation of law as a system of rules is inadequate in that it fails to account for the various "principles" of law that state "a reason that argues in one direction but [do] not necessitate a particular decision . . . " as do rules. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 1-45 (1978). Second, since there may be little in common between the various types of secondary rules, it may be an over-simplification to treat them as a unified class. Third, Hart's portrayal of the internal aspect of law also may be somewhat of an over-simplification because it may not be possible to identify the precise viewpoint that animates officials towards the secondary rules. Finally, the structure of a legal system cannot be grasped adequately without an understanding of the many institutions that provide the framework for the operation of the rules of the system.
II

THE EXISTENCE OF THE COMMUNITY LEGAL SYSTEM:
MEMBER STATES AS THE SUBJECTS OF THE
COMMUNITY POLITICAL AND LEGAL ORDER

Hart has identified three conditions\(^6\) that are necessary and sufficient for the existence of a legal system as opposed to a simple set of primary rules of obligation. Because European Community Law satisfies each of these conditions, one truly may speak of the legal system of the European Community, even from the limited perspec-

For a fuller discussion of these various criticisms and possible responses, see D. Lloyd & M.D.A. Freeman, supra note 14, at 192-97. Even though these criticisms may put into question Hart's claim that certain minimum conditions are "sufficient" for the existence of a legal system, they appear to be of less moment for his claim that these conditions are "necessary" for the existence of a "legal system." It is upon the latter claim that the present writer primarily relies.

In the companion article in this issue, Professor Janis forcefully demonstrates that the rules of international law traditionally, and properly, have concerned the rights and obligations of individuals as well as states, and that individuals therefore also are to be considered as proper traditional subjects of international law in the sense of being the incumbents of rights and duties under international law. Professor Janis considers, therefore, that we should reject any definition of international law that asserts that only states are the proper subjects of international law (which he terms the positivist, subject-based definition of international law), in favor of a source-based definition that by its very nature includes individuals as its subjects. This perspective, however, should not obscure certain fundamental points. First, many rights and obligations of individuals under international law are intended to be realized within the municipal sphere. Whatever the rights and obligations of an individual as a proposition of international law, therefore, such rights and obligations usually exist in fact as part of the body of law applied to the individual within the municipal sphere only when a state performs its own obligations under international law by correctly "transforming" such rights and obligations into norms of its municipal legal system or possibly if its national courts give effect to them directly because they recognize international law as a "source" of law in the Rule of Recognition they use. See supra notes 46-47 and accompanying text & infra p. 35. Second, the private individual only gradually is being accorded the procedural privilege of prosecuting a claim before an international tribunal, as contrasted with the right to invoke international law in the courts of the municipal legal system. Finally, the formal structure of general international law and of the separate regimes of various, more traditional international organizations is deficient when compared with the formal structure of a municipal legal system or that of the Community legal system. Similarly, rights and obligations typically are not created for individuals under international law through an international organization's exercise of wide-ranging "governmental powers."

For these reasons in particular, it is useful to analyze the European Community from the perspective of the Member States as the "traditional subjects of international law" on the one hand, and private individuals as the "traditional subjects of municipal law" on the other, even though it may be accepted—and the present writer does not understand Hart's version of positivism to deny—that the private individual indeed may be a traditional subject of international law in the sense of being the incumbent of rights and duties under international law. See generally J.G. Starke, An Introduction To International Law 66-80 (8th ed. 1977) (discussing the extent to which individuals, as well as states, are subjects of international law, and distinguishing between different possible meanings of the term "subject of international law").

66. See supra text accompanying note 42.
tive of the Member States, the traditional subjects of international law.

A. THE FIRST CONDITION: A UNION OF PRIMARY AND SECONDARY RULES OF CHANGE, ADJUDICATION, AND RECOGNITION

Even a very cursory examination reveals the extremely wide range of areas over which the Member States' freedom of action, their sovereignty, is limited by obligations under E.E.C. law. Indeed, the very scope of the E.E.C. Treaty itself may be regarded as a feature that distinguishes it from traditional international agreements. In encompassing this wide range of areas, the E.E.C. Treaty aims at the creation of a common market and, eventually, a full economic and monetary union between the Member States. The "common market" is created essentially by laying down two main

67. Article 3 of the E.E.C. Treaty enumerates the various activities of the E.E.C.:
For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) the establishment of a common customs tariff and of a common commercial policy towards third countries;
(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
(d) the adoption of a common policy in the sphere of agriculture;
(e) the adoption of a common policy in the sphere of transport;
(f) the institution of a system ensuring that competition in the common market is not distorted;
(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied;
(h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market;
(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;
(j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;
(k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

E.E.C. Treaty, supra note 2, art. 3, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 41.

68. Article 2 of the E.E.C. Treaty states:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Id., art. 2.
types of rules: (1) rules abolishing the restrictions imposed by the Member States upon the free movement of goods and the factors of production—labor, capital, and enterprise; and (2) other rules designed to supplement and support these "four freedoms," e.g., rules on competition, approximation of laws, common commercial policy, and special legal regimes for agriculture and transport.\textsuperscript{69}

In order to facilitate realization of the Community's aims, the Treaty creates a number of Community institutions upon which it confers extensive powers;\textsuperscript{70} in Hart's terminology, the Treaty contains secondary power conferring rules of change and adjudication. Indeed, the European Court of Justice regards the conferment of these sovereign powers upon the Community's own institutions to be a distinctive feature of the Community that distinguishes it from more traditional forms of international law and demonstrates its originality.\textsuperscript{71}

\section{Secondary Rules of Change}

Although the Treaties contain many detailed rules of Community Law, Community institutions still must promulgate legislation that, \textit{inter alia}, creates new primary rules that impose obligations upon the Member States. Article 189 of the E.E.C. Treaty enumerates three basic forms of binding acts—regulations, directives, and decisions.\textsuperscript{72} The nature and extent of a particular obligation varies

\textsuperscript{69.} On the whole, the creation of the common market is an easier task than the realization of an economic and monetary union. The basic steps necessary for achieving the objective of a common market already have been laid down in some detail in the E.E.C. Treaty and primarily involve the abolition of restrictions. The creation of an economic and monetary union, on the other hand, requires that positive steps be taken in the form of detailed policy choices, and the relevant Treaty provisions are rather vague and general. \textit{See}, e.g., F.R. Root, \textit{International Trade and Investment—Theory, Policy, Enterprise} 378-79 (1973).

\textsuperscript{70.} Article 4 of the E.E.C. Treaty provides in part:
1. The tasks entrusted to the Community shall be carried out by the following institutions:
   \begin{itemize}
   \item an Assembly,
   \item a Council,
   \item a Commission,
   \item a Court of Justice.
   \end{itemize}
   Each institution shall act within the limits of the powers conferred upon it by this Treaty.
2. The Council and the Commission shall be assisted by an Economic and Social Committee acting in an advisory capacity.


\textsuperscript{71.} \textit{See infra} notes 112-16 and accompanying text. These institutions, together with the Member States and private individuals, also may be regarded as subjects of the Community legal system.

\textsuperscript{72.} For further discussion concerning these acts, \textit{see infra} notes 136-38 & 151-54 and accompanying text. Article 189 provides:
according to the type of act in which it is embodied. Thus, the Community can be said to possess a "gradation of powers." 73

A Community institution is empowered to legislate only when a particular Treaty provision confers authority. 74 The controlling Treaty provision specifies what form the legislation may take and what procedure is to be followed. 75

At the risk of some generalization, the legislative process of the E.E.C. may be described very briefly as follows. 76 The principal decision-making power resides with the Council of Ministers of the European Communities. 77 This body is composed of representatives of the Member States and therefore is similar in composition to the

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In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be 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.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

E.E.C. Treaty, supra note 2, art. 189, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 73.


74. The Treaty, however, does contain a "necessary and proper clause:"

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

E.E.C. Treaty, supra note 2, art. 235, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 81.

75. For example, Article 87.1 of the E.E.C. Treaty provides:

Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.

If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the Assembly.

E.E.C. Treaty, supra note 2, art. 87.1, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 58.

76. For a more detailed description, see E. Stein, P. Hay & M. Waelbroeck, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 34-61 (1976).


To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty:

—ensure coordination of the general economic policies of the Member States;
traditional, inter-governmental decision-making bodies already known to international law. Moreover, although the Treaty calls for the majority of decisions to be made by qualified majority based on weighted voting, the Member States in practice seek to achieve unanimity in all cases where "very important interests" of one of the Member States are at stake.\textsuperscript{78}

The legislative process, however, also contains some highly original features. The Commission of the European Communities possesses the "power of initiative."\textsuperscript{79} The Commission consists of fourteen members who are nationals of the Member States and who are to act in the general interest of the Community and are to be completely independent of the Member States' governments.\textsuperscript{80} Consequently, in general, the inter-governmental Council cannot act until the independent body that represents the interests of the Community as a whole makes a proposal.\textsuperscript{81} This decision-making structure in fact has been described as a "constitutional system" created by the Treaties that "set[s] up a particular form of separation of powers."\textsuperscript{82} Furthermore, in many cases the Council is under a duty to consult the 434 member, directly-elected Assembly of the European Communities\textsuperscript{83} (European Parliament) and the Economic and Social
Committee for an advisory opinion before it takes any final decision. In practice, the Council frequently consults these bodies even in those cases where it is not under a duty to do so. This institutionalized consultation also may be regarded as an original feature of the Community political and legal system.

2. Secondary Rules of Adjudication

The European Community's institutional structure is completed by the Court of Justice of the European Communities, created to "ensure that in the interpretation and application of this Treaty the law is observed." The Court has exclusive and compulsory jurisdiction to resolve various disputes arising on the Community ("international") plane. There are three main heads of jurisdiction:

(1) Under Article 170 of the E.E.C. Treaty, a Member State may bring an action alleging another Member State's failure to fulfill its Treaty obli-

84. The Economic and Social Committee, a permanent part of the E.E.C. institutional structure whose members are appointed by the Council, is composed of representatives of the various sectors of economic and social activity, e.g., producers, farmers, workers, and representatives of the "general interest." See generally E.E.C. Treaty, supra note 2, arts. 193-98, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 73-74; Convention on Common Institutions, supra note 83, art. 5, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 244-45.

85. In addition to this institutionalized consultation, a great variety of unstructured consultations involving various groups and organizations also may take place. See E. STEIN, P. HAY & M. WAELBROECK, supra note 76, at 52-58.

86. E.E.C. Treaty, supra note 2, art. 164, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 70.

87. The jurisdiction of the Court where actions are brought by individuals challenging unlawful activity by the Community institutions, and where Community law is invoked by individuals against the national authorities or against other individuals is addressed infra notes 109-90 and accompanying text.

88. A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.
gations; Article 169\textsuperscript{89} authorizes the Commission to take similar action. These enforcement actions\textsuperscript{90} may result in a declaration that the Member State has failed to meet its Treaty obligations.

(2) Under Article 173,\textsuperscript{91} either a Member State or the other institution (Council or Commission) may bring an action to "review the legality of acts of the Council and the Commission other than recommendations or opinions" (i.e., actions to annul binding acts with legal effects).\textsuperscript{92} If successful, the action results in a declaration that the act is void.\textsuperscript{93}

(3) Under Article 175,\textsuperscript{94} a Member State or any other institution of the Community may bring an action alleging the Council's or the Commis-

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If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.


89. If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.


90. The enforcement actions under Article 170 and Article 169 are discussed in T.C. Hartley, \textit{supra} note 64, at 283-323.

91. The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

. . . .

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.


92. In Case 22/70 Commission v. Council (the E.R.T.A. case), [1971] E.C.R. 263, 10 Comm. Mkt. L.R. 335 (1971), the Court said of the action for annulment under Article 173: "An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects." \textit{Id.} at 277, 10 Comm. Mkt. L.R. at 357.

93. If the action is well founded, the Court of Justice shall declare the act concerned to be void.

In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.


94. The first and second paragraphs of Article 175 of the E.E.C. Treaty provide:

Should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution
sion's unlawful failure to act on a matter.\textsuperscript{95} In all these cases, the delinquent Member State or Community institution is "required to take the necessary measures to comply with the judgment of the Court of Justice."\textsuperscript{96}

Although these disputes arise on the Community (international) plane, the mechanisms for their resolution differ in some fundamental respects from the dispute settlement mechanisms of more traditional international law. For example, the exclusive and compulsory jurisdiction of the Court of Justice\textsuperscript{97}—indeed the very existence of a Court of Justice—the intricacy and comprehensiveness of the various types of action, and the vigilant role played by the independent Commission as "guardian of the Treaties" under Article 169 of the Treaty, all distinguish the Community's dispute resolution mechanisms from those of traditional international law.

3. The Rule of Recognition of the Community Legal System

As in the case of any well developed legal system, the Community legal system is also unified by a complex Rule of Recognition that specifies many different ultimate sources of law or criteria of validity. These various sources of law include the Treaties, the legislative and judicial acts of the institutions, international law, general principles of law pertaining to matters such as human rights and the

\begin{footnotes}
\footnote{95. See generally T.C. Hartley, \textit{ supra} note 64, at 386-412.}
\footnote{96. This language is drawn from Article 171, which pertains to proceedings under Articles 169 and 170, and from Article 176, which pertains to proceedings under Articles 173 and 175. See \textit{Document Supplement, supra} note 2, at 71-72. A Member State also may be able to bring an action for damages against the Community under Article 178 and the second paragraph of Article 215 of the E.E.C. Treaty, although there appears to be no case in which this has been attempted. Under Article 178:

The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 215.

\textit{E.E.C. Treaty, supra} note 2, art. 178, \textit{reprinted in Document Supplement, supra} note 2, at 72. The second paragraph of Article 215 provides:

\begin{quote}
In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.
\end{quote}

\footnote{97. Article 219 of the E.E.C. Treaty provides:

Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.}
\end{footnotes}
concept of legal certainty, and rules common to the national laws of the Member States. Moreover, these criteria of validity are ranked in a relative order of superiority. Thus, for example, the legislative acts of the institutions may be invalid because they violate the Treaty, general principles of human rights, or even obligations under international law that bind the Community.

B. THE SECOND AND THIRD CONDITIONS: COMMUNITY OFFICIALS’ ACCEPTANCE OF THE SECONDARY RULES AS CRITICAL, COMMON, PUBLIC STANDARDS OF OFFICIAL BEHAVIOR, AND GENERAL COMPLIANCE WITH THE RULES OF BEHAVIOR THAT ARE VALID UNDER THE COMMUNITY LEGAL SYSTEM’S RULE OF RECOGNITION

The second condition that is necessary for the existence of a legal system clearly is satisfied. There is no doubt that the officials of the system, acting through the various Community institutions—in particular the Court of Justice—accept the system’s secondary Rule of Recognition and its rules of change and adjudication as critical, common, public standards of official behavior.

98. For a discussion of Hart's Rule of Recognition, see supra notes 35-40 and accompanying text. For a discussion of the "sources of law" in the Community legal system, see Schermers, The European Court of Justice: Promoter of European Integration, 22 AM. J. Comp. L. 444, 454-57 (1974). Clearly some of these sources are more applicable to the legal position of individuals, the other subjects of the Community legal system, than to that of the Member States—for example, general principles of human rights. The position of the individual in the Community legal system is discussed infra notes 109-90 and accompanying text.


In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

Id. at 1134, 11 Comm. Mkt. L. R. at 283.


The validity, within the meaning of Article 177 of the E.E.C. Treaty, of measures taken by the institutions may be judged with reference to a provision of international law when that provision binds the Community and is capable of conferring on individuals rights which they can invoke before the courts.

Id. at 1229, 16 Comm. Mkt. L.R. at 23. Article 177 is discussed infra notes 184-90 and accompanying text. For a fuller discussion of the relationship of international law—in particular international agreements—to the Community legal system, see T.C. HARTLEY, supra note 64, at 172-80; Bebr, Agreements Concluded by the Communities and Their Possible Direct Effect: From International Fruit Company to Kupferberg, 20 COMM. Mkt. L. REV. 35 (1983).

101. In the present context, i.e., viewing the Community legal system as one with the Member States as its subjects, the national government officials in the Council may be viewed more appropriately not as officials of the Community legal system, but rather as
As in the case of traditional international law, however, there could be some doubt regarding the third condition, i.e., whether the rules generally are efficacious. In fact, however, it seems that Member States generally do comply with their obligations under Community Law. Member States' governments may be willing, of course, to comply voluntarily with their Community obligations because they perceive such compliance to be in their mutual self-interest. As in any legal regime, however, compliance also is dependent upon the effectiveness of available dispute settlement and enforcement mechanisms that remedy and deter breaches of obligations, thus ensuring compliance (albeit involuntary).

At the international level, the remedy under Article 169 of the E.E.C. Treaty represents a significant innovative technique for the enforcement of obligations under international law—involving an independent body in a "watchdog" capacity with possible recourse to an impartial adjudicatory body with compulsory jurisdiction. Its effectiveness as an enforcement mechanism is nevertheless subject to certain limitations. First, the Commission is unable to uncover every breach of Community obligations by a Member State. Second, even when the Commission uncovers a breach, political considerations necessarily enter into its decision as to how to resolve the dispute most effectively, and the procedure may involve extensive delay.
Moreover, even where a successful action is brought against a Member State in the Court of Justice, compliance with the Court's judgment depends, under Article 171 of the Treaty, upon the "good faith" of the Member State; the Court does not possess institutional means to enforce the judgment.\footnote{106}

In addition to the procedure under Article 169, and probably more importantly, private individuals can enforce Member States' obligations by way of actions in their national courts against the national authorities of Member States. In furtherance of such a process, the Court of Justice has recognized extensively the "direct effect" of Community Law.\footnote{107} As the Court stated in the famous decision of \textit{Van Gend en Loos v. Nederlandse Administratie der Belastingen}: "The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States."\footnote{108}

The Community legal system's penetration within the Member States, and the position of the private individual under Community Law are the foci of the following section of this Article.


\footnote{107} For a discussion of the direct effect of Community Law, \textit{see infra} notes 132-54 and accompanying text.

\footnote{108} [1963] E.C.R. 1, 13, 2 Comm. Mkt. L.R. 105, 130 (1963). For a description of the case, \textit{see infra} notes 140-49 and accompanying text. For further discussion of the importance of such private enforcement of Members States' obligations by private individuals relative to the enforcement procedure under Article 169, see Stein, \textit{Lawyers, Judges and the Making of a Transnational Constitution}, 75 Am. J. INT'L L. 1, 6 (1981). The following statistics give some indication of the relative importance of these mechanisms: as of December 31, 1982, 211 cases were brought by the Commission under Articles 169 and 93 (Article 93 is an analogous procedure applying specifically in the context of state aids) as compared with 1,037 initiated by individuals and resulting in a reference under Article 177 (although, of course, not all of these involved disputes between private individuals and the national authorities of Member States). \textit{See Synopsis of the Work of the Court of Justice of the European Communities in 1982} 14, table 2 (1983). As of the same date, only two cases had been brought by a Member State under Article 170. \textit{Id.} The preliminary ruling procedure under Article 177 is described \textit{infra} notes 184-90 and accompanying text.
III
THE EXISTENCE OF THE COMMUNITY LEGAL SYSTEM:
PRIVATE INDIVIDUALS AS THE SUBJECTS OF THE
COMMUNITY POLITICAL AND LEGAL ORDER AND THE
PENETRATION OF THE COMMUNITY LEGAL SYSTEM
INTO THE MEMBER STATES

A. THE COMMUNITY CONSTITUTION

As demonstrated above,109 even viewed from the limited perspective of the traditional subjects of international law—the sovereign Member States—the European Community constitutes an advanced, international political order with a correspondingly well-developed legal system. But it is only by viewing the Community political and legal order from the perspective of its other subjects, private individuals, that its true nature and full extent are revealed.110 Although it is true that traditional international law also may seek to modify the legal position of private individuals,111 there are two relevant, fundamental distinctions between the objectives of Community Law and those of more traditional international law.

First, the legal position of individuals is modified not just by the Treaties themselves, but also by the exercise of governmental powers conferred upon the Community institutions by the Treaties. Second, the Treaties and the powers they confer are concerned with modifying the legal position of individuals over an extremely wide range of economic and social activities.

The Court of Justice identified the unique nature of the Community political and legal order—an order in which private individuals are its subjects and also are involved actively in the law-making process112—quite early when it considered the "spirit" of the E.E.C.

109. See supra notes 66-108 and accompanying text.
110. The European Community's concern for private individuals is manifested in the Preamble to the E.E.C. Treaty and the statement of objectives in Article 2. The Preamble, in relevant part, states that the Member States have decided to create a European Economic Community:
Determined to lay the foundations of an ever closer union among the peoples of Europe,
Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,
Affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples, . . .
E.E.C. Treaty, supra note 2, preamble, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 40. The text of Article 2 of the E.E.C. Treaty is reproduced supra note 68.
111. See the companion article by Professor Janis in this issue, and supra text accompanying note 65.
112. See supra notes 83-85 and accompanying text.
Treaty. In the *Van Gend en Loos* case,\(^\text{113}\) the Court described the essential features of a veritable "Community Constitution" when it stated:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that *this Treaty is more than an agreement which merely creates mutual obligations between the contracting states*. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of *institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens*. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.\(^\text{114}\)

In the view of the Court of Justice, the Treaty's conferment of sovereign powers upon Community institutions to regulate the community of states and to govern the Community "citizens"\(^\text{115}\) is the result of a *transfer* of powers from the states to the Community; this transfer of powers entails a *permanent limitation* of the Member States' sovereign rights. In other words, a new polity has resulted from a reordering of the inward-looking governmental powers of the sovereign over its traditional subjects—the private individual—as well as from a limitation upon the outward-looking sovereignty of the state as a member of the international community of states.\(^\text{116}\)


\(^{115}\) This of course means that private individuals are also the subjects of secondary power-conferring rules in the Community legal system. *See supra* notes 70-85 and accompanying text, and the discussion accompanying notes 109-90.

\(^{116}\) This transfer of sovereign power, with its attendant limitation of Member State sovereignty, was noted by the Court in the *Van Gend en Loos* case: "The conclusion to be drawn from this is 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, and the subjects of which comprise not only Member States but also their nationals." [1963] E.C.R. at 12, 2 Comm. Mkt. L.R. at 129 (1964) (emphasis added). It was confirmed one year later in *Costa*:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields,
B. PROTECTION OF THE INDIVIDUAL FROM UNLAWFUL COMMUNITY ACTIVITY

It is clear, therefore, that by creating the European Community, the Member States “have thus created a body of law which binds both their nationals and themselves.” If private individuals are to be the subjects of the Community political and legal order, and if their legal position is to be affected by the exercise of governmental powers by the Community institutions, then the Rule of Law requires that they be accorded judicial protection against the improper exercise of those powers. The system of judicial remedies provided by the E.E.C. Treaty is designed to ensure such effective judicial protection of the individual. This protection takes both “direct” and “indirect” forms.

Aggrieved individuals may bring certain direct actions against unlawful Community activity: for annulment under Article 173, for failure to act under Article 175, and for damages under Article 175.

\[\text{[1964] E.C.R. at 593, 3 Comm. Mkt. L.R. at 455 (1964) (emphasis added). The Court continued: “The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights...” Id. at 594, 3 Comm. Mkt. L.R. at 456 (emphasis added). One leading authority has described the consequences for British constitutional theory in the following manner. He contrasts the “constitutional change” resulting, for example, from any attempt to incorporate the European Convention on Human Rights, with the change brought about by British accession to the Community:}\]

An endeavour, for example, to incorporate the European Convention on Human Rights, and to entrench the measure of incorporation, could rightly raise the traditional arguments about self-limitation. It would do so since, although such a step would amount to a constitutional change, it would only be a change within a particular constitutional system, which otherwise retains its original institutional shape. The change in relation to the Communities is of a different kind. It is not simply a question of the magnitude of the change—that the consequences of the rules of the Treaty of Rome and of the derived Community legislation are far more pervasive throughout the whole legal system. Rather, what is in question is a change of the whole constitution. That results from what has been called the “re-shuffling” of the mode of exercise of State powers agreed among the Member States. It can indeed be said that two constitutional systems co-exist on the territory of each Member State. Outside the ambit of Community competences (which is not a finite area) the original pre-1973 constitution continues unaffected. Within those bounds however a different situation exists.


118. Under the second paragraph of Article 173:

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.


119. Under the third paragraph of Article 175:
In addition to these limited remedies, which are frequently unavailable because of the strict admissibility requirements, the individual is in principle assured effective indirect protection. Thus, an individual may challenge the validity of a Community act in a national court that may, and if a court of last resort must, request the European Court of Justice to give a preliminary ruling on the matter under Article 177 of the Treaty.  

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

E.E.C. Treaty, supra note 2, art. 175, reprinted in Document Supplement, supra note 2, at 72.

120. For the relevant portions of the texts of Articles 178 and 215, see supra note 96. The remedies available to Member States and Community institutions are discussed supra notes 86-97 and accompanying text.

121. Apart from time limits, a private individual must satisfy certain other requirements for an action to be admissible. First, under the second paragraph of Article 173, a private individual may challenge a decision that is actually addressed to him. In addition, he also may challenge an act that is not a decision addressed to him, provided: (a) the act is in the form of a regulation or a decision addressed to another person (private individual or Member State); and (b) the act is a "decision . . . of direct and individual concern" to him. At the risk of generalization, one can say that the Court has interpreted this language to mean that an individual may not challenge a general normative act, e.g., a true regulation, but may be able to challenge an act, even if called a regulation or decision addressed to a Member State, if it is in effect really a "disguised" decision addressed to him or a "bundle" of such disguised decisions addressed to individuals including the applicant. See generally, e.g., T.C. Hartley, supra note 64, at 352-77; Harding, The Review of E.E.C. Regulations and Decisions, 19 COMM. MKT. L. REV. 311 (1982).

Second, under the third paragraph of Article 175, a private individual may only challenge an omission to adopt an act that would, if adopted, be "addressed" to him. For a discussion of the Court's interpretation of this term, see T. C. Hartley, supra note 64, at 410-12.

Finally, neither Article 178 nor the second paragraph of Article 215 seems to contain any express limitation on the admissibility of actions by private individuals. It appears, however, that the Court will rule an action for damages inadmissible when the national court would in principle be in a position to grant the applicant a remedy against the national authorities for his claim, e.g., to recover a sum of money equal to monies paid or denied. In the case of an action for damages, moreover, it may be very difficult for the applicant to succeed on the merits, even if the action is admissible. Thus, where the act in question is a "legislative act involving choices of economic policy," the Community will be held liable for damages only where there has been a "sufficiently flagrant breach of a superior rule of law for the protection of the individual," which will only be the case in exceptional circumstances. The action for damages is discussed further in T.C. Hartley, supra note 64, at 505-46 and in Jones, The Non-Contractual Liability of the E.E.C. and the Availability of an Alternative Remedy in the National Courts, 1981 LEGAL ISSUES OF EUR. INTEGRATION 1.

122. The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(b) the validity and interpretation of acts of the institutions of the Community;

E.E.C. Treaty, supra note 2, art. 177, reprinted in Document Supplement, supra note 2, at 72. The full text of Article 177 is reproduced infra note 184. It seems generally to be accepted that, although in theory a national court that is not a court of last resort may itself declare a Community act invalid because it is not bound to refer the matter to the
C. PENETRATION OF COMMUNITY LAW AND THE COMMUNITY LEGAL SYSTEM INTO THE MEMBER STATES: APPLICATION OF HART'S MODEL OF A LEGAL SYSTEM

The preceding discussion presupposes, of course, that Community Law and the Community legal system in fact do penetrate into the Member States so as to affect the legal position of the individual. Effective penetration into the municipal sphere is by no means certain in the case of traditional international law. In contrast to traditional international law, Community Law clearly penetrates the municipal sphere. The following discussion will attempt to demonstrate why Hart's theoretical model is particularly helpful in describing this phenomenon.

I. Statement of the Issues

The existence and extent of international law's penetration of the municipal sphere depends on the attitude of the municipal courts in resolving three central issues. First, are the municipal courts prepared to recognize an international norm as such as a "source of law," i.e., is the legal system "open" to international law? Or, do the municipal courts only recognize domestic law norms as a "source of law," i.e., is the legal system "closed" to international law? This traditionally is viewed as relating to the method of "incorporating" or "receiving" international law into the municipal legal system. In Hart's terminology, the question may be stated as follows: May international law as such be one of the "sources" of law or a "criterion of validity" accepted by the system's officials as part of the Rule of Recognition? If the municipal legal system is "closed" to international law, the norm of international law can be applied by the courts only after it has been "transformed" into a norm of municipal law. The following two issues are presented, therefore, only if the municipal legal system is "open" to international law.

Second, if a norm of international law may indeed be applied as such by the municipal judge, what are the effects of that application in the municipal legal system? In particular, does the norm directly alter the legal position of individuals? In traditional parlance, a treaty provision, for example, may be directly invoked by individuals only if it is "self-executing."

Finally, what is the status of a norm of international law that has been incorporated as such within the municipal legal system?

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Court of Justice under Article 177, this would nevertheless be improper, and the European Court in fact has proposed that Community Law be amended to preclude this possibility. See T.C. Hartley, supra note 64, at 265-66.
This involves consideration of the primacy of one norm over the other in the case of any conflict between an international law norm and a municipal law norm. In Hart's terminology, the question concerns the relative position of the various criteria of validity or sources of law on a scale of superiority in the Rule of Recognition. This question may be presented in a number of different contexts, either at the national level or, in a federal system, also at the state level. Those contexts include the status of the international law norm relative to prior legislation, implementing legislation, subsequent legislation, and constitutional law norms, e.g., guarantees of fundamental human rights.

2. Resolution of the Issues by the Monist and Dualist Schools of Thought

In general, monist theory regards international law and municipal law as part of the same system—law in general—while dualist thought regards them as two distinct legal systems with international law being intrinsically different in nature from municipal law.\(^1\) The two schools have formulated different propositions of law embodying the different theoretical solutions to the three issues discussed above.

a. The Incorporation of International Law

In monist theory, international law is clearly a source of law for a municipal court by virtue of being, by its very nature, part of the same system as municipal law. A variation of dualist theory that one may term "weak dualism" also recognizes international law as a source of law. This is so, however, only because the sovereign has decreed so and thus has given the municipal judge a mandate to have recourse to international law as a direct source of law—the "adoption" theory.\(^2\) In a more extreme version of dualism, which one may term "strong dualism," a rule of international law is never available to the municipal judge as such, but in each specific instance must be converted into a norm of municipal law before it can ever be a rule for the court—the "transformation" theory.\(^3\) Naturally, an international tribunal may be expected to be inspired by the monist philosophy on the question of incorporation, while state practice may vary considerably, some states being monist and others espous-

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125. *Ibid* at 49.
ing either weak or strong dualism.  

b. The Effect of Incorporated International Law

Where international law is available to the municipal judge as a source of law (monism or weak dualism), a norm of international law may be invoked by private individuals in a suitable case, e.g., a self-executing treaty provision. A monist, international tribunal and a municipal court espousing monism or weak dualism, however, may resolve the question whether a particular treaty provision is "self-executing" in a different manner because the question may be raised in either the international or the municipal forum. Under strong dualism, of course, there can never be a question of individuals invoking a norm of international law as such.

c. The Status of Incorporated International Law

In a weakly dualist jurisdiction, and even in a monist jurisdiction, the question of primacy may be resolved in favor of either international law or municipal law. Under strong dualism, however, there can never be a conflict between municipal law and international law in the municipal sphere, because international law as such is not a source of law to begin with, and hence municipal law always will be applied. Even adherents of strong dualism would concede, however, that international law may be held to be supreme in its own sphere. State practice also varies considerably on this issue, while a monist, international tribunal always may be expected to recognize the primacy of international law in practice.

It should be noted that international law does not require a state to adopt any particular attitude towards the reception of interna-

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126. The actual practice is more nuanced than may appear from this discussion. A state, for example, may recognize customary international law as a "source of law" while denying such a status to treaty law, as in British practice. For an overview of states' practices as to the operation of international law within the municipal sphere, see id. at 56-79; J.G. Starke, supra note 65, at 89-102.

127. In the United States, for example, treaties are automatically incorporated as part of the "supreme Law of the Land" by virtue of Article VI, clause 2 of the U.S. Constitution, i.e., in Hart's terminology, they are part of the U.S. legal system's Rule of Recognition. Broadly speaking, "self-executing" treaties—in the strict sense of Article VI, clause 2 "treaties"—and executive agreements prevail over prior inconsistent federal legislation but not over subsequent federal legislation or fundamental rights guaranteed in the Constitution. They do override, however, State constitutions and State legislation, prior or subsequent. See D.P. O'Connell, supra note 123, at 62-65; J.G. Starke, supra note 65, at 96-99. On the confusion between the two distinct concepts of incorporation and the self-executing nature of treaties in the United States, see Winter, Direct Applicability and Direct Effect, Two Distinct and Different Concepts in Community Law, 9 COMM. MKT. L. REV. 425, 427-28 (1972).
tional law into the municipal sphere. A state may perform its obligations under international law by correctly “transforming” international rules that are intended to have effects within the municipal sphere. Thus, these theoretical distinctions generally will have practical legal consequences only in the case of incorrect “transformation.”

One of the great merits of Hart’s theory is its recognition that the question whether a particular body of law and a legal system exist among a particular social group may be viewed as a question of fact, and not just as a proposition of law. Thus, international law exists in fact as part of the legal system of a state if the officials of that state accept it as part of the Rule of Recognition that they use. International law does not exist in fact as part of that legal system if it is not part of the Rule of Recognition. This is so despite whatever consequences international law may draw—as a proposition of international law—from any conflict, e.g., invalidity of a conflicting municipal norm.

This Article does not undertake a detailed examination of state practice among the Member States of the European Community regarding these various issues in the context of traditional international law. It should be noted, however, that the various constitutional laws show considerable variation.¹²⁸

¹²⁸ Some Member States are strongly dualist, so that international treaties can never be a source of law as such—for example, the United Kingdom. Italy and the Federal Republic of Germany, which also sometimes are cited as examples of “strongly dualist” jurisdictions, may be classified more accurately as “weakly dualist” in that an act of adoption may result in application of a treaty provision as such. See further the debate between Waelbroeck and March Hunnings in Waelbroeck, Enforceability of the EEC-EFTA Free Trade Agreements: A Reply, 3 EUR. L. Rev. 27, 27-29 (1978), and March Hunnings, Enforceability of the EEC-EFTA Free Trade Agreements: A Rejoinder, 3 EUR. L. Rev. 278, 278-79 (1978). Among those Member States that incorporate international treaty law as such as a source of law without the need for specific transformation, a state may accord either only limited supremacy to treaties (e.g., Luxembourg—treaties prevail only over prior legislation) or only accord supremacy on conditions (e.g., reciprocity, as in France).

Member States also vary in the extent to which they explicitly recognize the possibility of conferring powers upon international organizations. This possibility is recognized in the Netherlands, Luxembourg (temporary delegation only), Belgium, Germany, France, and Italy—the constitutions of the last two countries were drafted with traditional international organizations in mind. There is no explicit recognition in the United Kingdom.

Even in the Dutch constitution, which is perhaps the most “internationalist,” and which not only provides for the supremacy of treaties over the constitution and subsequent legislation, but which also envisages the conferment of administrative, legislative, and judicial powers on international organizations, the rule that treaties prevail over inconsistent Dutch law applies only in the case of treaties that a Dutch court declares to be self-executing. Thus, a Dutch court could interpret a treaty restrictively and so deprive it of its supreme status under the constitution. For a fuller survey of the constitutional position in the original six Member States, see Bebr, Law of the European Communities and Municipal Law, 34 MOD. L. Rev. 481, 485-87 (1971); Sasse, The Common
3. Resolution of the Issues by the European Court of Justice as Propositions of Community Law

In light of the fact that the Court of Justice is the judicial organ of what it views as a new and original political and legal order that differs from traditional forms of international law in certain fundamental respects, the legal propositions that the Court has articulated in resolving the various issues relating to the penetration of Community Law into the municipal sphere cause no great surprise. In some respects these solutions are similar to those that any international tribunal could be expected to reach. In other respects, however, they go beyond the present state of international law and reflect the original nature of the Community as a new political order with its own legal system and “Community Constitution” whose subjects are not only the Member States but also private individuals.

a. The Incorporation of Community Law and the Community Legal System into the Member States: National Officials Are to Apply the Rule of Recognition of the Community Legal System

The starting point for analyzing the question of the penetration of Community Law into the Member States is the proposition that Community Law and the Community legal system apply as such on the territory of a Member State, merely as a result of the Member State’s entry into the Community. There is no doubt that this is the view of the European Court.

In Hart’s terms, the Rule of Recognition used by the Community officials, in particular the Court of Justice, should be used also by the national officials—in particular the courts—of the Member States. National law continues to apply outside this sphere of Community Law. Thus, viewed from the perspective of the national officials of a Member State, one could say that, in the view of the Court of Justice, the Community legal system with its Rule of Recognition applies alongside the separate national system, or alternatively, that there exists one legal system with a correspondingly more complex Rule of Recognition of which the Community legal system is a part. On either view, the national officials, when acting in the

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129. See supra notes 3 & 113-16 and accompanying text.
130. See, e.g., supra note 3 and accompanying text.
131. One commentator apparently believes that within the Member States there are two Rules of Recognition in operation; he asserts that Hart seems to deny that this is possible. See Starr, supra note 5, at 263-66. An analogous problem presumably would be presented, however, in the case of any federal system when viewed from the perspec-
sphere of Community Law, also could be viewed as Community officials.

Upon entry into the Community, the Member States accept the Community political and legal order with its "Community Constitution." The original nature of this Community order determines its automatic "incorporation" and the various consequences thereof with respect to the effect of Community Law and its status relative to any conflicting national provisions.

b. The Effects of Community Law Within the Member States

As discussed previously, although international law as such may be recognized as a source of law, its particular effects may vary depending on the particular norm in question. Thus, only certain treaty provisions, i.e. "self-executing" treaty provisions, are capable of modifying directly the legal position of individuals. The same is true in the case of provisions of Community Law, although here one must make a distinction between the various sources of law. The following discussion will be confined to examining the effects of provisions of the Treaties and those of Community legislation—regulations, directives, and decisions addressed to Member States.

Although the terminology of the Court is not without ambiguity, it seems that if a provision of Community Law has "direct effects" it directly modifies the legal position of individuals. A particular provision of Community Law—whether imposing a negative obligation (a prohibition) or a positive obligation (a duty to take action)—may produce direct effects only if its wording satisfies certain criteria. The Court has refined the test for direct effects, and the various criteria may be summarized as follows:

(i) the provision is clear and unambiguous;
(ii) it is unconditional, and in particular its operation is not dependent upon:
   (a) further action to be taken by a Community institution or national authority within a certain time; or
   (b) a discretionary decision-making power within the control of an independent authority, e.g., Community institution, or national authorities of a Member State.

132. See supra pp. 32 & 34.
133. This appears to be analogous to the "self-executing" nature of a treaty provision in traditional international law parlance.
134. See T.C. HARTLEY, supra note 64, at 190-97.
Such direct effects may take two forms. First, direct effects may arise in the relationship between the individual and the national authorities of a Member State; these “vertical direct effects” may involve: (a) obligations of the national authorities and correlative rights of the individual or, (b) obligations of the individual and correlative rights of the national authorities. Second, direct effects may be produced in the relationship between individuals; this may be termed “horizontal direct effects.” The various kinds of Community Law may vary in the type of direct effects they can produce.

(i) Regulations: “Directly Applicable” Community Legislation.
The first type of Community Law considered will be the regulation, the most powerful type of legislation the Community institutions may issue. Article 189 of the E.E.C. Treaty states: “[A] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.” The term “directly applicable” in Article 189 appears to mean not only that a regulation requires no further implementing measures to perfect its normative character—it is “legally perfect”—but moreover that, unless authorized by the regulation itself, any transformation into a national law by the national authorities would indeed be improper.

That further norm creation is both unnecessary and usually would be improper does not mean, however, that the provisions of a regulation always produce direct effects. The better view is that the provisions of “directly applicable” regulations may produce direct effects only if they satisfy the various criteria summarized earlier. A regulation is, however, capable of producing either vertical or horizontal direct effects.

(ii) Treaty Provisions. Many Treaty provisions envisage and require further norm creation, i.e., transformation into national law in the form of implementing measures taken by the Member States. The Treaties do not state whether their provisions may have direct effects. In a great many cases, however, private individuals directly have invoked Treaty provisions in the national courts when a Member State either has implemented a Treaty provision incorrectly or has failed to adopt any implementing measures whatsoever. The Court of Justice has not hesitated to recognize the direct effects of

135. The Court itself does not seem to have used the terms “vertical” or “horizontal” in referring to the direct effects of provisions of Community Law. The terminology used in this Article is, however, quite coherent and familiar to Community lawyers.
136. See generally T.C. Hartley, supra note 64, at 201-04.
137. See supra note 134 and accompanying text. See also T.C. Hartley, supra note 64, at 198-201.
138. See T.C. Hartley, supra note 64, at 213.
Treaty provisions when the relevant criteria have been satisfied.\textsuperscript{139} The Court first recognized the direct effects of a Treaty provision in the \textit{Van Gend en Loos}\textsuperscript{140} case, where a private individual brought an action in the Dutch courts alleging that the Netherlands had imposed a customs duty in breach of its obligations under Article 12 of the E.E.C. Treaty.\textsuperscript{141} The Dutch national court asked the Court of Justice to give a preliminary ruling under Article 177 of the E.E.C. Treaty\textsuperscript{142} concerning the effects of Article 12. The Court stated that, in order to determine the effects of provisions of the E.E.C. Treaty, it is "necessary to consider the spirit, the general scheme and the wording of those provisions."\textsuperscript{143} After considering the spirit of the E.E.C. Treaty\textsuperscript{144} and concluding 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, and the subjects of which comprise not only Member States but also their nationals,"\textsuperscript{145} the Court declared:

Independent of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.\textsuperscript{146}

In short, a Treaty provision always may produce direct effects in an appropriate case due to the very nature of the Community. Whether a particular Treaty provision in fact does produce such a direct effect will depend on its place in the general scheme of the

\textsuperscript{139} The Court's terminology sometimes has been confusing because it has referred to Treaty provisions as being "directly applicable." The Court's apparent use of this term, in the context of Treaty provisions, to mean "directly effective" has been criticized as engendering confusion with the "direct applicability" of regulations under Article 189, which is a quite different concept. \textit{See, e.g.}, Winter, \textit{supra} note 127, at 435; Easson, \textit{The "Direct Effect" of E.E.C. Directives}, 28 INT'L AND COMP. L.Q. 319 (1979).


\textsuperscript{141} Member-States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

\textit{E.E.C. Treaty, supra} note 2, art. 12, \textit{reprinted in Document Supplement, supra} note 2, at 43.

\textsuperscript{142} For the text of Article 177 of the E.E.C. Treaty, see \textit{infra} note 184. The Article 177 procedure is discussed in detail \textit{infra} notes 184-90 and accompanying text.


\textsuperscript{144} \textit{See supra} note 114 and accompanying text.


\textsuperscript{146} \textit{Id.}, 2 Comm. Mkt. L.R. at 129 (emphasis added). An example of a right "expressly granted by the Treaty" is to be found in Article 48 of the E.E.C. Treaty (free movement of workers), while Article 85 and Article 86 of the E.E.C. Treaty (prohibiting anti-competitive practices) are examples of obligations directly imposed by the Treaty upon individuals.
Treaty and its wording. In the Van Gend en Loos case the Court declared that Article 12 "must be interpreted as producing direct effects and creating individual rights which national courts must protect."148

The Van Gend en Loos case involved the "vertical direct effects" of a Treaty provision—an individual brought an action against the national authorities—and recognized that individuals also may possess rights correlative to the "obligations which the Treaty imposes in a clearly defined way upon . . . the Member States . . . ."149 In subsequent cases, the Court recognized that certain Treaty provisions also may affect directly the relationship of individuals inter se, i.e., they may have "horizontal direct effects."150

(iii) Non-"Directly Applicable" Community Legislation: Directives and Decisions Addressed to Member States. In contrast to regulations, Article 189 does not provide that directives and decisions addressed to Member States are "directly applicable." Thus, as in the case of many Treaty provisions, further norm creation—transformation into a national norm in the form of national implementing measures by the Member States—is both envisaged and required.151 Therefore, just as in the case of Treaty provisions, a Member State

147. It now seems that the "wording" is the more important criterion. See supra note 134 and accompanying text.
149. Id. at 12, 2 Comm. Mkt. L.R. at 129.
150. See, e.g., Case 43/75 Defrenne v. SABENA, [1976] E.C.R. 455, 18 Comm. Mkt. L.R. 98 (1976), in which the Court recognized that, in the case of certain kinds of direct discrimination, "which may be identified solely by reference to the criteria laid down by Article 119 . . . [i]n such situation, at least, Article 119 is directly applicable and may thus give rise to individual rights which the courts must protect." Id. at 473-74, 18 Comm. Mkt. L.R. at 123-24. (An air hostess sued her employer in a Belgian labor court, seeking compensation on the ground that she was paid a lower salary than colleagues doing identical work, and that such discrimination was contrary to Article 119.) Article 119 of the E.E.C. Treaty provides:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

E.E.C. Treaty, supra note 2, art. 119, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 65.

151. A directive shall be 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.
either may implement the directive or decision incorrectly or fail to adopt any implementing measures whatsoever.

Here too, the Court has recognized that, in an appropriate case, the provisions of a directive or a decision addressed to a Member State may produce vertical direct effects that an individual may invoke against the delinquent national authorities. The Court apparently was motivated primarily by the consideration that "the effectiveness ("l'effet utile") of such a measure would be weakened if the nationals of that state could not invoke [the obligation imposed on the Member State] in the courts and the national courts could not take it into consideration as part of Community Law." Whether
provisions in a directive or a decision addressed to a Member State also may produce horizontal direct effects remains to be decided.  

c. The Status of Community Law in the Rule of Recognition Used by the National Officials

Despite the lack of any explicit provision in the Treaties that provides for the supremacy of Community Law over national law in the event of a conflict, the Court of Justice has taken the view that such a rule is to be implied and thus unequivocally has recognized the absolute supremacy of directly effective Community Law.  

Directly effective provisions of Community Law prevail over every kind of national law, both prior and subsequent legislation, as well as guarantees of fundamental human rights in the national constitutions. Moreover, a national judge must be permitted to recognize the supremacy of Community Law immediately and any event to give preliminary rulings on the interpretation of acts of the institutions. The same may be equally true of other non-directly effective provisions of Community Law.  

154. This issue is discussed in Easson, Can Directives Impose Obligations on Individuals?, 4 Eur. L. Rev. 67 (1979).  


156. See Costa, [1964] E.C.R. 585, 3 Comm. Mkt. L.R. 425 (1964). In Costa, the plaintiff brought an action in an Italian court, challenging his electricity bill, on the grounds that the law nationalizing the electric power industry violated both the Italian Constitution and various provisions of the E.E.C. Treaty. The Italian government contended that the reference by the Italian judge to the Court of Justice under Article 177 was "absolutely inadmissible" because the Italian judge was bound to apply Italian law. The Court of Justice ruled, however, that the reference was admissible because "a subsequent unilateral measure cannot take precedence over Community law . . . ." Id. at 599, 3 Comm. Mkt. L.R. at 460.  

157. See Case 11/70 Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel [1970] E.C.R. 1125, 11 Comm. Mkt. L.R. 255 (1972): Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. Id. at 1134, 11 Comm. Mkt. L.R. at 283. Fundamental rights are guaranteed, however, by Community Law itself, which is "inspired by the constitutional traditions common to the Member States." See supra note 99. Therefore, the Internationale Handelsgesellschaft Court held that a Council regulation that required importers and exporters to lodge a deposit as a condition for obtaining an import or export license and that provided for its forfeiture if the transaction was not carried out, could not be challenged on the grounds that it contravened certain fundamental rights guaranteed in the German Basic Law. Moreover, the Court found that the regulation did not contravene any analogous guarantee in Community law. The point is that the validity of Community Law may not be challenged on the ground that it conflicts with national law of whatever nature.
unconditionally. Consequently, any procedures of national law that may impede this immediate and unconditional application—for example, a requirement that the matter be referred to a national constitutional court for a declaration that the conflicting national law is unconstitutional—are incompatible with Community Law.

The full implications of the supremacy principle and of the new polity are apparent from the case of Amministrazione delle Finanze dello Stato v. Simmenthal. In that case, the Court, no longer content with asserting the supremacy of Community Law as an abstract principle, articulated various propositions of law regarding Community Law's concrete effect before the national judge. In addition to noting that Community Law requires that the national judge be able to recognize the supremacy of Community Law immediately and unconditionally, the Court stated:

Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

158. See infra notes 160-61 and accompanying text.
160. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary.

The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

Id. at 644, 23 Comm. Mkt. L.R. at 283-84 (emphasis added).
Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community. 161

This statement either ranks the various sources of law in the Rule of Recognition of a single legal system that is applicable at the national level, or it announces the effect of a conflict between two Rules of Recognition of two separate legal systems, both of which are applicable at the national level.

4. A Comparison of the Solutions Offered by Community Law and Traditional International Law

In some respects the solutions of Community Law are similar to those of traditional international law, while in other respects they go beyond these traditional solutions and reflect the original nature of the Community political and legal order. 162 Any international tribunal naturally will be monist in approach and therefore may be expected to formulate propositions of law that recognize: (1) the essential unity of international and municipal law, and hence the theoretical automatic incorporation of international law into the municipal sphere; (2) the self-executing nature of certain treaty provisions; (3) the primacy of international law over conflicting national law. A simple characterization of the Court's approach as monist, however, would overlook a number of essential distinctions.

First, the criteria for direct effects differ from the criteria of international law for the self-executing nature of treaties. The latter essentially are subjective criteria that are based on the intent of the contracting parties, 163 while the former, as reflected in the test used by the Court of Justice, are more objective (the spirit, general scheme and wording). 164 One authority has observed, moreover, that in the Community system direct effect is the rule rather than the

161. Id. at 643, 23 Comm. Mkt. L.R. at 283 (emphasis added). It is unclear whether the Court's statements are limited to Treaty provisions and "directly applicable" measures of the institutions. For a discussion of this issue and other aspects of the passage, see T.C. HARTLEY, supra note 64, at 221-23.

162. See supra notes 3 & 113-16 and accompanying text.

163. See Advisory Opinion on the Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. ser. B, No. 15 at 4, 17, 18. One commentator has noted that most international law scholars have read this opinion as creating a presumption against "direct effect" that is rebuttable only by explicit evidence of a contrary intention of the parties. He also has noted that the subjective interpretation principle based on the intention of the parties has been losing support in international law. Stein, supra note 108, at 9.

164. See supra notes 139-50 and accompanying text.
exception. Second, the Treaty's endowment of sovereign governmental powers upon the Community institutions is one of its essential original features, and traditional monist doctrine has yet to account explicitly for the emergence of such legislative instruments as regulations, directives, and decisions or their penetration into the municipal sphere.

Finally, traditional international law does not require states themselves to be monist. A state discharges its international obligations once it correctly gives internal effect to norms of international law intended to have such effect, whether its methods are predicated upon monism or dualism (weak or strong). The Court of Justice, however, has made it quite clear that nothing other than full and unconditional application of the various propositions of Community Law discussed above is compatible with the Community legal system: the national officials, especially the courts, are truly Community officials and are to share the same Rule of Recognition of the separate Community legal system or, alternatively, they are to regard their Rule of Recognition as being the same within the area of Community Law. Thus, the uniform application of a Rule of Recognition, with respect to both content and force, unites the Member States and the Community into one overarching legal system. Consequently, the Court consistently has resisted arguments by the national governments that, in accordance with the practice of international law, the question of penetration is to be determined by national constitutional law. The practices of Member States vary considerably and, therefore, any solution based on the provisions of traditional national constitutional law will not ensure the full and uniform application of Community Law in all the Member States. For similar reasons, the Court considers the unauthorized transformation of "directly applicable" regulations to be incompatible with Community Law. In sum, entry into the Community, with its "re-

165. T.C. Hartley, supra note 64, at 196. Hartley observes that the authors of the Treaty (and the Contracting Parties) probably did not intend the Court to have jurisdiction to decide the question of direct effect or to use such liberal criteria. See id. at 197. 166. Such a result is not, of course, inconsistent with the doctrine of monism. See T. C. Hartley, supra note 64, at 225. 167. See supra pp. 34-35. 168. See supra notes 130-31 and accompanying text. 169. See, e.g., the arguments of the national governments in the Van Gend en Loos case, [1963] E.C.R. 1, 2 Comm. Mkt. L.R. 105 (1963); Stein, supra note 108, at 4-5. 170. See supra note 128 and accompanying text. 171. See, e.g., Bebr, supra note 73, at 487. 172. See supra notes 136-38 and accompanying text; see also T.C. Hartley, supra note 64, at 201-04. On the other hand, where national implementing measures are required, e.g., in the case of Treaty provisions or directives or decisions addressed to Member States, a Member State still may be liable for failure of its government to adopt such measures, despite application of the Community measure by its national judiciary,
shuffling of the mode of exercise of state powers agreed upon among the Member States” brings about “a change of the whole constitution” of all the Member States.\textsuperscript{173}

5. \textit{Acceptance of the Court of Justice’s Solutions of Community Law by the National Officials of the Member States (in particular the Judiciaries)}

Having demonstrated that the Community legal system, with Member States as its subjects, exists \textit{in fact} at the Community (international) level,\textsuperscript{174} the question to be considered is whether this system also exists \textit{in fact} at the national level.

a. Acceptance in Fact

The various doctrines of Community Law regarding the penetration of Community Law and the Community legal system into the Member States may be viewed as elements of the Rule of Recognition of the Community legal system. Unless the national officials—in particular the courts—in \textit{fact} accept these doctrines, they will remain theoretical propositions of law, albeit perfectly “valid” within Community Law, made by one system (Community Law) about another system (national law). Only if these national officials also accept these doctrines will the Community legal system \textit{in fact} exist within the Member States\textsuperscript{175} and the national officials \textit{in fact} be acting as Community officials.

The Rule of Recognition developed by the Court of Justice, in the form of the various doctrines previously described, \textit{in fact} has been accepted by the officials of all the Member States to a greater or lesser extent.\textsuperscript{176} There is no doubt, therefore, that the Community

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\textsuperscript{173} See, \textit{e.g.}, Case 102/79 Commission v. Kingdom of Belgium, [1980] E.C.R. 1473, 30 Comm. Mkt. L.R. 282 (1981). There the Court stated that the direct effect of a directive is a “minimum guarantee arising from the binding nature of the obligation imposed on the Member States by the effect of the directives under the third paragraph of Article 189 [and] cannot justify a Member State’s absolving itself from taking in due time implementing measures sufficient to meet the purpose of each directive.” \textit{Id.} at 1487, 30 Comm. Mkt. L.R. at 294. This provides a further possible contrast with more traditional international law, where judicial application of an international rule may remedy governmental failure to adopt implementing measures. \textit{See} Schermers, \textit{The Law as it Stands Against Treaty Violations by States}, 1975 \textit{LEGAL ISSUES OF EUR. INTEGRATION} 113, 121.

\textsuperscript{174} See \textit{supra} note 116 and accompanying text.

\textsuperscript{175} The Community legal system satisfies Hart’s three requirements for a legal system:

\begin{enumerate}
\item There exists a union of primary and secondary rules.
\item The officials acting through the Community institutions effectively accept these secondary rules as critical, common, public standards of official behavior.
\item There exists general compliance by the subjects of the legal system, i.e., Member States, with their obligations under Community Law.
\end{enumerate}

\textsuperscript{176} \textit{See infra} note 181.
legal system indeed does exist within the Member States, even though there may not be complete recognition in some Member States of its true nature and full extent. Although all Member States effectively have incorporated the Community legal system, acceptance may be incomplete for several reasons. First, the national judiciary may refuse to recognize the full extent of the doctrine of direct effects.177 Second, the national judiciary may accept the direct effect of Community Law, but it may not accept fully the principle of supremacy178 or the issue of supremacy may not be resolved fully.179 Finally, even where the national judiciary has accepted the direct effect of Community Law and has acknowledged its supremacy over all norms of national law—including constitutional guarantees of fundamental rights—this may be based on national constitutional law rather than on the emergence of a new Community Constitution.180

Subject to these qualifications, the direct effect and supremacy of Community Law have been accepted fully in nearly all the Member States.181 Hart’s theory is quite able to account for any cases of incomplete acceptance. Such cases may be characterized as cases of partial failure as defined by Hart—there is disunity among the set of Community officials.182 The Rule of Recognition of the Community legal system, reaching into a Member State, possesses a “penumbra of doubt.” Nevertheless, the Community legal system continues “to exist” despite the absence of that complete official consensus that prevails under normal conditions.183


178. Thus, the German and Italian Constitutional Courts reserve power to protect fundamental rights of their nationals against violations by the Community institutions. See Stein, supra note 108, at 16.

179. For example, in the United Kingdom and Denmark the courts have yet to determine the effect of a conflict between Community Law and a clearly inconsistent act of the legislature.


181. For a more detailed survey of the reaction of the national judges, see E. Stein, P. Hay & M. Waelbroeck, supra note 76, at 214-61, 288-93. As a result of this acceptance, a Member State may solve the question of the penetration of Community Law differently from the question of the penetration of traditional international law. This difference will be more striking, of course, in a “dualist” jurisdiction, especially if that dualism takes its strong form, as for example in the United Kingdom. Further discussion of the reaction of the national courts is contained in T.C. Hartley, supra note 64, at 224-46, and in the “compliance studies” discussed supra note 102.

182. See supra notes 48-49 and accompanying text.

183. Id.
b. The Role of the Preliminary Ruling Procedure Under Article 177 of the E.E.C. Treaty

A major factor contributing towards the national judiciaries' overall acceptance of Community Law and the Community legal system has been the national judiciaries' acceptance and use of the preliminary ruling procedure provided by Article 177 of the E.E.C. Treaty.\(^{184}\) This highly original feature of the Community legal system distinguishes it in yet another fundamental respect from more traditional forms of international law. The preliminary ruling procedure provides an organic link between the national judiciaries and the Court of Justice and enables the national courts to play their full role as Community officials.

The acceptance and use of the Article 177 mechanism ensures the effective penetration of the Community legal system and Community Law, provides judicial protection for private individuals' rights under Community Law, and facilitates the effective enforcement of the Community obligations of Member States.\(^{185}\) These effects are the results of several factors. First, the E.E.C. Treaty not only confers jurisdiction on the Court of Justice to give preliminary rulings concerning the validity of acts of Community institutions

\(^{184}\) Because one may doubt whether there would have been such effective acceptance of the Community legal system without such a mechanism, the importance of the Article 177 procedure cannot be overemphasized and it merits quoting in full:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

E.E.C. Treaty, supra note 2, art. 177, reprinted in Document Supplement, supra note 2, at 72. One should note that the decision whether or not to make a reference lies with the national court, not with the parties. This, together with the fact that the application of the Court's ruling remains within the exclusive jurisdiction of the national court making the reference, distinguishes the competence of the Court of Justice under Article 177 from that of a court of appeals. See T.C. Hartley, supra note 64, at 247-48. For a survey of the practices of the national judiciaries with respect to their acceptance and use of the Article 177 procedure, see Hay & Thompson, The Community Court and Supremacy of Community Law: A Progress Report, 8 Vand. J. Transnat'l L. 651, 656-58 (1975), and the "compliance studies" discussed supra note 102.

185. For a discussion of the details of the Article 177 procedure, see T.C. Hartley, supra note 64, at 247-82.
(thereby ensuring protection against unlawful Community activity), but it also confers jurisdiction to rule on the interpretation of the Treaty and the acts of the institution. The Court has characterized the various issues relating to the penetration of Community Law into the Member States—direct effect and supremacy—as questions of interpretation and thus has seized for itself jurisdiction to shape the Community Constitution. Indeed, nearly all of the Court's major “constitutional” decisions have flowed from a reference for a preliminary ruling under Article 177. Second, the existence of the preliminary ruling procedure ensures that issues of Community Law that arise in the national courts come before the Court of Justice and are resolved uniformly in accordance with Community Law. Thus a national court or tribunal always may ask for a preliminary ruling if it considers a decision on a question of Community Law necessary to enable it to issue a judgment. A court or tribunal of last resort that considers such a decision necessary, however, is under an obligation to refer the question unless the issue already has been decided by the Court or unless the correct application of Community Law is “so obvious as to leave no scope for any reasonable doubt.” Finally, the better view appears to be that preliminary rulings have effect erga omnes. Therefore, not only is the

186. The jurisdiction of the Court of Justice under the European Coal and Steel Community Treaty is somewhat more restrictive. Under Article 41 of that Treaty, the Court only has jurisdiction to give preliminary rulings on the validity of acts of the High Authority (Commission) and of the Council. E.C.S.C. Treaty, supra note 2, art. 41, reprinted in DOCUMENT SUPPLEMENT, supra note 2, at 8.

187. This seizure transpired despite early resistance by the governments of the Member States. See, for example, the submissions of the national governments in the Van Gend en Loos case, where the governments denied that the Court had any jurisdiction at all to consider the “direct effect” of Treaty provisions, and the discussion in Stein, supra note 108, at 4-5.

188. For example, all the judgments of the Court establishing the “propositions of Community Law” regarding the incorporation, direct effect, and supremacy of Community Law, which are discussed and cited in this Article, were given following such a reference. It was necessary for the Court to characterize the questions of direct effects and supremacy of Community Law as questions of “interpretation,” because Article 177 confers no jurisdiction on the Court to rule on the validity of national provisions under Community Law. A declaration that conflicting national provisions are invalid involves the application of the Court’s “interpretation.” The Court has drawn a line between its jurisdiction to interpret the Treaty and acts of the institutions, and the actual application of that interpretation to the facts of the case. This remains within the exclusive jurisdiction of the national court making the reference, although that court is obligated to apply the ruling correctly. See T.C. Hartley, supra note 64, at 280-81.

189. Case 283/81 CILFIT v. Ministry of Health, [1982] E.C.R. 3415, 3432, 36 Comm. Mkt. L.R. 472, 491 (1983). The Court laid down a number of stringent requirements that must be met before the national court or tribunal is entitled to find that the correct application of Community Law is so obvious as to leave no scope for any reasonable doubt. For a discussion of this case, as well as of the abuses of the “acte claire” doctrine by some national courts, see Bebr, The Rambling Ghost of “Cohn-Bendit”: Acte Claire and the Court of Justice, 20 COMM. Mkt. L. REV. 439 (1983); see also T.C. Hartley, supra note 64, at 269-72. On the possibility of invoking the procedure under Article 169 to enforce
national court or tribunal that makes the reference bound by the ruling, but all national courts and tribunals in all Member States are bound similarly even though they are permitted to make another reference concerning the question.\textsuperscript{190}

IV

CONCLUSIONS

This Article has attempted to demonstrate that the theories articulated by H.L.A. Hart provide an appropriate legal model that explains and supports the ambitious claims made by the European Court of Justice, namely:

(1) European Community Law constitutes an autonomous legal system that penetrates the national legal systems of the Member States and that their courts are bound to apply; and

(2) the existence of the Community legal system, and its penetration of the national legal systems, distinguishes European Community Law from traditional international law.

A. EUROPEAN COMMUNITY LAW: A WELL-DEVELOPED LEGAL SYSTEM

This Article has examined the main elements of Hart’s theory concerning the existence of a legal system. Hart has proposed three minimum conditions that are necessary and sufficient for the existence of a legal system as opposed to a simple set of primary rules of obligation. These conditions are: (1) there exists a union of primary rules of obligation and secondary rules of change, adjudication and recognition; (2) the officials of the system, particularly the courts, effectively accept the secondary rules as critical, common, public standards of official behavior; and, (3) there exists general compliance with the rules of behavior that are valid under the system’s Rule of Recognition.

By viewing the European Community polity from both the perspective of the sovereign state (the traditional subject of international law) and from that of the private individual (the traditional

\textsuperscript{190} The Court already has established that a preliminary ruling declaring an act of a Community institution invalid has such an \textit{erga omnes} effect. \textit{See} Case 166/80 International Chemical Corporation v. Amministrazione delle Finanze dello Stato, [1981] E.C.R. 1191, 1223, 37 Comm. Mkt. L.R. 593, 623 (1983). It has not yet decided, however, whether a preliminary interpretative ruling has such an effect. For a discussion of this issue and the Court’s decision in the \textit{International Chemical} case, see Bebr, \textit{Preliminary Rulings of the Court of Justice: Their Authority and Temporal Effect}, 18 COMM. MKT. L.Rv. 475 (1981); \textit{see also T.C. Hartley, supra} note 64, at 280-82. The article by Bebr also discusses the Court’s case law on the “temporal effect” of preliminary rulings, i.e., whether they have effect \textit{ex tunc} or \textit{ex nunc}.}
subject of the sovereign state), it has been demonstrated that one truly may speak of a Community political order with a Community Constitution and a legal system. The sovereign Member States are the subjects of a well-developed political and legal order since all three of Hart’s minimum conditions clearly are satisfied. Even viewed at this Community or international level, there is a clear union of primary and secondary rules. The Treaties contain secondary power-conferring rules of change and adjudication under which Community institutions exercise sovereign powers over the community of Member States. These powers were transferred to the Community institutions by the Member States, and there is a well-developed Rule of Recognition unifying the system. The officials of the system, acting through the Community institutions, effectively accept these secondary rules as critical, common, public standards of official behavior, and there is general compliance with the rules of behavior that are valid under the system’s Rule of Recognition.

It is only by examining the legal position of the private individual under Community Law, however, that the full extent and true nature of Community Law and the Community legal system become evident. The Court of Justice has formulated various propositions of law regarding the penetration of the Community legal system into the Member States. These propositions entail:

1. The application of Community Law and the Community legal system as such on the territory of a Member State, merely as a result of its entry into the Community.

2. Extensive recognition of the doctrine of the direct effect of certain provisions of "directly applicable" regulations and non-"directly applicable" Treaty provisions, directives, and decisions addressed to Member States.

3. Absolute and unqualified supremacy of directly effective Community Law over conflicting national law.

These propositions of law represent the Court’s view of the content of the Rule of Recognition that must be used by the national officials, especially the judiciary, when acting in the Community sphere. The Court has been uncompromising in its insistence that the same Rule of Recognition is to apply at the national level throughout the whole Community, thereby ensuring the effective and uniform application of Community Law within the Member States. The Court has justified this attitude by emphasizing the original and sui generis nature of the Community and by contrasting Community Law with traditional international law, focusing in particular on the transfer of sovereign powers from the Member States to the Community institutions.
The various claims made by the Court of Justice would remain mere theoretical propositions of law made by one system, Community Law, about another system, national law, unless the national officials, especially the national judiciaries, also in fact accepted them as part of their Rule of Recognition. Without such acceptance, even though these propositions of law about the existence of the Community legal system would be perfectly “valid” in Community Law, the Community legal system in fact would not exist at the national level. Because the Court’s formulation of the Rule of Recognition to be applied at the national level effectively has been fully accepted in most Member States, the Community legal system does exist in fact at the national level and the national officials do act as Community officials. This is true even though there may not be full acceptance within a particular Member State—such cases may be characterized as cases of “partial failure” where there is disunity among the set of Community officials, i.e., Community institutions, especially the Commission and Court of Justice, versus national governments and national judiciaries.

A major factor contributing to the overall acceptance, and thus effective penetration, of Community Law and the Community legal system has been the national judiciaries’ acceptance and use of the Article 177 preliminary ruling procedure. That procedure has helped to ensure that issues of Community Law that arise before the national courts come before the Court of Justice, and has enabled the Court to deliver most of its major “constitutional” judgments concerning the penetration of the Community legal system under the guise of interpreting the Treaties or acts of the institutions.

The Article 177 procedure also helps to ensure that the Community legal system in fact exists not only at the national level, with private individuals as its subjects, but also at the Community or international level, with Member States as its subjects. General compliance by the Member States with their obligations under Community Law is to a large extent dependent upon the effective penetration of Community Law into the Member States; this penetration enables private individuals to invoke Community Law before their national courts and to enforce their rights against the national authorities. This effective penetration is in turn dependent upon the existence of the Article 177 procedure and its acceptance and use by the national judiciaries. Thus, this organic link between the Court of Justice and the national judiciaries has allowed the circumvention of national governments and, perhaps more than anything else, has
contributed to the existence of the Community legal system at the Community and national levels.

B. A COMPARISON OF COMMUNITY LAW AND TRADITIONAL INTERNATIONAL LAW

In the description of European Community Law within the framework of Hart’s theoretical model of a legal system, this Article has presented several major distinctions between Community Law and traditional international law. It is worth repeating the main distinctions so that one may appreciate fully the original and *sui generis* nature of the Community political and legal order, and so that one also may draw some tentative conclusions about possible future developments in international law generally.

I. Contrasts with Traditional International Law

Even when viewed at the Community or international level, the formal structure of Community Law differs markedly from that of more traditional international law. By contrast with traditional international law, which Hart considers to resemble more closely a simple regime of primary or customary rules, Community Law forms a well-developed legal system. The obligations of the Member States, which flow from the Treaties and the Community institutions’ exercise of the sovereign powers transferred to them by the Member States, represent a particularly strong limitation upon the external, outward-looking sovereignty of the states as members of the international community of Member States.

One may perhaps object that the form of a legal system obscures the reality of a weak limitation upon state sovereignty because the Member States *agreed* to conclude the Treaty and because the voting practice in the Council gives a Member State’s government an effective veto over the adoption of any legislative act involving its “very important interests.” While it must be conceded that the Member States have consented to be bound by the Treaties and that the adoption of Community legislation also requires their consent in the Council, this should not obscure several essential points.

First, even within the present decision-making structure, Community obligations may arise and operate independently of the consent of the Member States’ governments. In a number of instances, the Court of Justice has interpreted the Treaty in an expansive, constitutional manner, contrary to the probable intention of its authors and the Contracting Parties. For example, the Court has seized for itself jurisdiction to decide the question of direct effect of provisions of Community Law and has used liberal, objective criteria for deter-
mining such direct effect, and it has advanced the doctrine of the implied treaty-making powers of the Community under the E.E.C. Treaty. Also, once an obligation has been created, it effectively operates independently of the consent of the government of a Member State. Although the government may wish to breach its obligations, it is frequently unable to do so. This inability results not so much because of the Article 169 procedure, but more particularly, because of the vigilance of private individuals seeking to enforce their directly effective rights, and the national judiciaries' cooperation in using the Article 177 procedure. Any argument that this cooperation in fact represents the consent of the sovereign Member State to be bound by Community Law would be incoherent, especially since one organ of the "sovereign," the government, then would be in disagreement with another, the judiciary.

Second, even where a Member State's government has a choice whether to give or to withhold its consent, the exercise of that "sovereign will" may be more constrained in the context of the Community decision-making structures than in those of more traditional international law. The combination of a number of factors may lead Member States' governments to perceive that their mutual self-interest requires that they cooperate in consenting to and abiding by Community obligations.

191. See T.C. Hartley, supra note 64, at 197.

The power of the Community to conclude such an agreement is not expressly laid down in the Treaty. However . . . authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions . . . . [T]he power to bind the Community vis-a-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.

Id. at 755, 20 Comm. Mkt. L.R. at 295-96.

For a discussion of the view that the authors of the E.E.C. Treaty probably intended to restrict the Community's treaty-making power to those limited cases in which such power is conferred expressly by the Treaty, see T.C. Hartley, supra note 64, at 150-51, 164-65; Stein, supra note 108, at 24. For a discussion of the Community's treaty-making powers in general, see T.C. Hartley, supra note 64, at 145-80.

193. This perception of the benefits of cooperation may flow from many factors. For example:
(a) the wide scope of Community activities;
(b) the highly developed original institutional structure of the Community, in which:
   — an independent Commission representing the interests of the Community as a whole has the "right of initiative" and proposes legislation;
   — private individuals are involved in the law-making process;
Finally, possible future institutional developments should not be discounted. In this regard, it must be remembered that the Treaty calls for most decisions to be made by qualified majority based on weighted voting, and there seem to be some recent indications of a possible gradual return to such majority voting.\textsuperscript{194} Moreover, there is pressure to transfer more power to the democratic, directly-elected European Parliament. If the power of this institution increases, the creation of Community Law will depend less upon the consent of the governments of the Member States.

Perhaps the most unique and original feature of Community Law is that private individuals as well as the Member States are the subjects of a well-developed "legal system" that has been created by international agreement. The originality lies not so much in that Community Law seeks to modify the legal position of individuals, as in: (1) the Community institutions' exercise of governmental powers that directly and indirectly regulate the legal position of individuals over an extremely wide range of economic activities; and (2) the status of the individual as a full "procedural subject" of the Community legal system, with direct access to the "international" Court of Justice to challenge unlawful Community activity, and indirect access to the Court through use of the Article 177 procedure to protect rights against both the Community institutions and the Member States. Legislative activity directed at individuals traditionally has fallen within the competence of the municipal political and legal orders of the sovereign states. The conferment of such governmental power upon the Community institutions represents the reordering of the inward-looking governmental powers of the sovereign over its traditional subjects.

In view of this grand design of the Treaties, the doctrines of the Court regarding the penetration of Community Law should cause little surprise. In some respects, the Court's solutions to the questions of incorporation of Community Law and the effect of Community Law and its status before the national courts are similar to those that may be expected from any international tribunal. In other important respects, however, these solutions go beyond the present state of international law and reflect the original nature of the Com-

munity political and legal order; they are predicated upon the Member States' entry into a new polity that involves a "definitive limitation" of their sovereign rights, and "a change of the whole constitution" of all the Member States. As a leading authority recently has observed, the supranational European Community, although not a federal state, nevertheless possesses many characteristics typical of a federal structure.\textsuperscript{195} Seen in this light, the doctrines of the Court of

\begin{quote}
\textsuperscript{195} See generally Bridge, supra note 114. In this very interesting and illuminating article, Bridge compares the European Community system to the federal system of the United States. Bridge identifies five characteristics that are typical of a federal structure:

First, it is a permanent union of sovereign states for common purposes. 

Second, legislative authority is divided between the union and the constituent states in terms that the former has enumerated authority while the latter retain residual authority. 

Third, the laws made by both the union and the constituent states, within their assigned spheres, should operate directly on all persons and things within their respective territorial limits. 

Fourth, the union should be supreme in its assigned sphere over any contrary assertions of power by the constituent states. 

Fifth, both the union and the constituent states, within their assigned spheres, should have a complete apparatus of law enforcement.

\textit{Id.} at 133-37. Bridge notes that the Community does not possess exactly all five characteristics to the full extent typical of a federal state. For example, he notes that:

(a) Regarding the second characteristic: 

[T]here is a noticeable change of emphasis reflecting the relative scope of the United States and the European Community. Whereas in the United States the scale of federal power greatly outbalances the power of the states, in the European Community the scale of power of the member states greatly outbalances the power of the Community.

\textit{Id.} at 134-35.

(b) Regarding the fourth characteristic:

[While the transfer of sovereign power to the Community implies the absolute and unqualified supremacy of Community Law over conflicting national law,] there is evidence that there has not been a once-and-for-all transfer of powers; the transfer is a continuing process in direct relation to the evolving and dynamic nature of the Community.

\textit{Id.} at 136.

(c) Regarding the fifth characteristic:

In relation to the Community itself, however, there is a noteworthy deviation from the accepted federal principle. In the United States the enforcement of federal law is largely the responsibility of federal courts and federal agencies. In the European Community the enforcement of Community Law is largely the responsibility of the courts and agencies of the member states.

\textit{Id.}

After this analysis Bridge concludes, however, that:

[While it is clear that the European Community is not a federal state, it is equally clear that it either has or reflects many such characteristics. Like a federal state it is a creation of the law and the law supplies it with the necessary cohesive and coercive qualities. There is a federally typical division of allegiance between the Community and its constituent member states, with the original identity and much of the powers of the latter being preserved. Unlike international law and typical international organizations, the European Community has]
Justice perhaps owe more to the logic of the federal analogy than to the origin of the Community as a creation of international law, although this distinction is sometimes obscured due to the similarity of the issues involved in the relationship of federal law to state law on the one hand and that of international law to municipal law on the other. 196

a distinct and complete legal system which acts co-operatively with the laws of the member states. The European Community falls quite genuinely between the accepted categories of legal and political organization.

Id. at 137; see generally id. at 132-37.

For a further, very important, recent study comparing the European Community to the federal system of the United States, see COURTS AND FREE MARKETS (T. Sandelow & E. Stein eds. 1982), especially the introductory essay by the two editors. The study consists of a series of papers that undertake a comparative examination of the contribution made by the Supreme Court and the Court of Justice in maintaining a continent-wide “common market” in the United States and the European Community.

196. See the discussion regarding the issues involved in the penetration of international law into the municipal sphere, supra pp. 32-33, and the third and fourth characteristics of the federal structure as identified by Bridge, supra note 195.

The similarity of the issues may obscure the true sui generis and original nature of the Community. Thus, the Court's claim that the Community constitutes a new legal order sui generis in contrast to traditional international treaties recently has been questioned by a leading authority. See Wyatt, New Legal Order, or Old?, 7 EUR. L. REV. 147 (1982). Wyatt identifies four characteristics that “are alleged to emerge from the case law of the European Court” and that, it has been argued, “distance Community law from traditional public international law”:

(1) the E.E.C. Treaty modifies the legal position of persons subject to the national legal systems;
(2) Community Law overrides national law;
(3) national courts are under a direct duty to give effect to clearly defined and unconditional obligations in the E.E.C. Treaty;
(4) the techniques of interpretation applicable in Community Law are to be distinguished from those current in international practice.

Id. at 147-48. Wyatt also notes that a further argument in favor of the sui generis character of Community Law might also be made on the basis of the Court's recourse to general principles of Community Law, which are based on comparative national constitutional law and the terms of international treaties with which Member States are associated. Wyatt submits, however, that these “characteristics of Community Law . . . are quite explicable in terms of traditional international legal theory and practice . . .” Id. He maintains:

The notion of the “new legal order” owes less to an objective assessment of the legal characteristics of Community Law than to the descriptive language used by the European Court, and an understandable concern lest the grand design of the Treaty be misunderstood by national tribunals more familiar with international instruments of more limited and specialized ambit.

Id. at 147. He is forced to concede, however, that:

It is also probably true to say that the E.E.C. Treaty has had a greater practical impact on the national systems of Member States than other international treaties have had on the legal systems of their signatories, providing the European Court with the opportunity of developing an unprecedentedly comprehensive case law. The present writer does not question the sophistication of the edifice, or the grandness of the design; he would simply suggest that the “new technology” leans rather more heavily than is sometimes admitted on the previous state of the art.

Id. at 157-58.
2. Possible Implications for the Future of International Law Generally

Hart considers that the present formal structure of international law more closely resembles a simple set of primary rules or customary law, so that the analogies with municipal law are more of function and content rather than form. He nevertheless speculates that "[p]erhaps international law is at present in a stage of transition towards acceptance of . . . forms which would bring it nearer in structure to a municipal system."197 One can speculate further that international law is perhaps in the process of spawning a number of different "legal systems" created by treaties regulating different problem areas and with different states, and perhaps private individuals, as subjects of the various communities.

Hart's model of law and a legal system instructs one, however, that three minimum conditions must be satisfied before one can speak of such a "legal system" of international law binding a particular community of states or individuals as its subjects. In particular, the extent to which the condition of the sovereign states' general compliance with the rules of the system is satisfied may depend upon the creation of well-developed dispute settlement and enforcement mechanisms at the international level, e.g., Article 169 of the E.E.C. Treaty—an independent body in a "watchdog" role with possible eventual recourse to an adjudicatory body with compulsory jurisdiction. The experience of the European Community cautions even further, however, that states will perhaps satisfactorily comply with the rules of the system only if the private individual can act as a "private policeman" at the national level. The private individual will be able to perform this role only if the legal system is designed to penetrate the municipal sphere and the national judiciary gives effect to this penetration by its acceptance of the system. This in turn

Wyatt may be correct in his thesis that "nothing is to be lost, and much to be gained, from openly extending the sources of Community Law, in appropriate cases, to traditional international legal practice." Id. at 164. He appears, however, to overlook that it is precisely the "sophistication of the edifice" and the "grandness of the design" of the Treaty (the highly developed institutional structure and the transfer of legislative authority to exercise governmental powers over a wide area, entailing the creation of a new polity and "Community Constitution") together with the "greater practical impact on the national systems of Member States than other international treaties . . . " (deep and pervasive penetration of Community Law within the Member States, acceptance and use of the Article 177 mechanism) that justifies the claim that Community Law forms a "legal system" that reaches into the Member States and is more analogous to a federal structure than to traditional international law. Consequently, where the distinction is of significance, the Court may be expected to continue to shape Community Law in a "constitutional" rather than an "international law" mode and thus to promote the ever increasing integration of the Member States and their peoples in the European Community.

197. H.L.A. HART, supra note 6, at 231.
may well depend upon the existence and acceptance of a mechanism that provides an organic link between the national judiciary and the international tribunal. The willingness to "accept" the system and any such link may depend upon the scope of the legal system of international law. Perhaps it is only when the scope is sufficiently broad, perhaps indeed only when it constitutes a new polity, that the national judiciary will be induced to transfer its loyalties.

The extent to which sovereign states will agree to relinquish their sovereignty—both external and internal—and to enter a new polity of a quasi-federal nature such as the European Community, is necessarily speculative. Such developments perhaps may be expected to occur initially on a regional level. In any event, Hart counsels us that the embryology and existence of "international" political orders and their corresponding legal systems is dependent upon facts, not dogma. Perhaps the last word may be given to the scholar who noted that: "Integration—whether economic or political, or both—constitutes a continuum rather than a boundary line, and there is a twilight area rather than a clear threshold between semi-amalgamated units."199


199. Bridge, supra note 114, at 137 (quoting M. BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY 136 (1968)).