THE EUROPEAN UNION: A 'Ferment of Change' in the World

*Michael Longo**

Introduction

The search for more effective national and global institutions which protect human rights and cultural diversity and work together towards political stability, peace and social and economic development should be unrelenting. The thesis of this article is that the study of developments in supra-nationalism and communitarianism in the European Union (EU),[1] apart from broadening knowledge and thus being worthy of inquiry for its own sake, provides useful insights at three levels of socio-political organisation: the international, the national and the regional. Moreover, the EU may provide a model for co-operation among local, national and supra-national institutions to ensure that the range of measures taken by these institutions complement each other.

It is beyond the scope of this article to examine the many problems which still remain unresolved in the EU, from the post-Maastricht crisis of legitimacy (the EU's inability to balance integration and democratisation) to its failure to agree on a common European foreign or defence policy to its inability to engage actively with the current economic problems, primary among them the crisis of unemployment. On many of these issues, the EU labours under internal dissension. The EU's constituents are diverse countries whose national interests do not always converge. Thus diverse national interests are often put above the altruism usually associated with a common position.

Whilst recognising that serious problems exist, this discussion will not dwell on the negative side of the balance sheet. Rather, it acknowledges and applauds the success of the EU in enhancing prosperity, in setting standards across a range of social issues from environmental protection to consumer protection and equal opportunity, in centralising power while at the same time recognising national diversity and strengthening the role of sub-national actors in European Community (EC)[2] policy formulation. Within these perimeters, and for the purposes of this article, the EU's success is clearly demonstrated through its enlargement.[3]

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* Lecturer, Victoria University of Technology.

1 The term 'EU', introduced in Article A of the Treaty on European Union (TEU) 1992, describes the union of Member States, their combined population, GNP, etc and the EU's representation in international affairs.

2 Reference will be made throughout this article to the term 'EC' or 'European Community' or 'Community' if the context has to do with matters of law relating to the European Community Treaty 1957 or to events prior to the TEU's entry into force on 1 November 1993.

3 The EU has been enlarged to 15 members with the recent accession of Sweden,

If the EU is to be an organisational model for successful supra-national co-operation, it will be 'at the level of its internal dynamics and within the framework of its external relations'[4] with the rest of the world. At the level of its external relations, the EU represents a force for integration evidenced by the desire of countries to be part of or associated with the EU. Within the EU structure itself, the main institutions act as guardians of an ideal; the European Parliament is the guardian of democratic values, the Council is the guardian of national interests and the Commission, together with the European Court of Justice (ECJ), are guardians of the Treaty and thus of effective integration. The apparent simplicity of the structure belies the internal dynamics of the EU which are determined by the exercise of political power both within and without national boundaries. Complex norms of reciprocity and consensus operate within the EU to underpin a system which highlights the virtue of negotiated settlements and intergovernmental bargaining over blunt coercion.

An examination of the way the EC is accomplishing integration while respecting national diversity reveals a unique approach to power sharing. The Community has been expanding its spheres of competence virtually since its inception. This has been made possible by the textual dynamism of the EC Treaty, coupled with the European Court of Justice's preference for the functional approach to interpretation over other methods.[5] The Community's expansion of material competence *vis-à-vis* its Member States has largely been achieved through the Treaty's Articles 100 (the harmonisation of laws) and 235 (the strengthening of the Community's powers if the Treaty's objectives can be attained in no other way). This expansion and the Member States' reaction to it have, at times, given rise to controversy and threatened the effectiveness of the Community order. Demonstrably, these very forces culminated in the introduction of the principle of subsidiarity[6] to

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Austria and Finland.

4 J Bourrinet (1981) 'A case study of the European Community' in N Davidson et al (eds) *Regionalism and the New International Economic Order*, Pergamon Press, p 114.

5 The methods of interpretation used by the ECJ, such as 'effectiveness' and 'teleological significance', have enabled the ECJ to give effect to the fundamental tenets upon which the Community system was constructed in accordance with the philosophy of the Treaty. Through the adoption of this technique, the ECJ has construed broadly the powers of the Community. This approach is not confined to the ECJ. It has also been applied by the International Court of Justice (ICJ), as noted by Bredimas: A Bredimas (1978) *Methods of Interpretation and Community Law*, North-Holland, p 23. Bredimas goes on to cite the *Namibia* case (*Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South west Africa) Notwithstanding Security Council Resolution* 276 (1970) ICJR 1971 16) as an example of the ICJ's commitment to a teleological approach.

6 Put simply, the principle of subsidiarity, when applied in a Community context, would appear to mandate Community action only in those areas where common action by the Member States would be more efficient than separate action. Accordingly, the Community should only act where it can best

regulate the *manner* in which shared powers are exercised within the EU. The principle is thus the essence of federal structure and is accordingly capable of application at the national level, not solely in federations but in any democratic system concerned with the separation of powers between national and sub-national or regional authorities.[7] Moreover, the subsidiarity debate is also pertinent in the international sphere. International law is concerned, or should be concerned, with a diffusion of legal authority between a variety of institutional levels or systems bound together by co-operation. It is also concerned, or should be concerned, in ensuring that the level of authority best placed to respond to local, national or international needs does so. The significance of a theory which simply proclaims the need to exercise power at the level where it can do most good is self-evident both for international law and the wider international system.

There is no doubt that the European Community was created according to the rules of international law, to which it is subject.[8] It is therefore unsurprising that some of its features and the principles upon which it is founded are not unique to the Community.[9] It is also true that common characteristics between the Community and international legal orders facilitate cross-fertilisation in terms of legal practice.[10] However, certain Community characteristics are distinctive, either in degree or by design: the degree of symbiosis between national and supra-national administration; the degree of co-operation between national courts in the Member States and the ECJ through the referral procedure in Article 177 of the EC Treaty;[11] the

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achieve the particular goal according to the scale and effects of the action. In practical terms the Member States would retain responsibility for areas which they are capable of managing more effectively themselves: 'Commission Communication on the principle of subsidiarity' (1992) 25 *Bull EC* 10, p 116.

7 See M Longo, 'Co-operative Federalism in Australia and the European Union: Cross-Pollinating the Green Ideal' (1997) 25 *FLR* 127.

8 In *International Fruit Company NV (GATT Judgment)* [1972] ECR 1219 at 1226–1228, the ECJ recognised international law as binding on the Community and recognised the primacy of international agreements over Community legislation.

9 See especially D Wyatt, 'New Legal Order, or Old?' (1982) 7 *Eur LR* 147; KM Meessen, 'The Application of Rules of Public International Law within Community Law' (1976) 13 *CMLR* 485; P Pescatore, 'International Law and Community Law: A Comparative Analysis' (1970) 7 *CMLR* 167; HG Schermers, 'Community Law and International Law' (1975) 12 *CMLR* 77; Bredimas (1978); and R Monaco, 'The limits of the European Community Order' (1975–76) 1 *Eur LR* 269.

10 See Wyatt (1982). Wyatt advanced the thesis that there is much to be gained from extending the sources of Community law to traditional international legal practice (p 164).

11 National courts have the power to review actions by their governments for the implementation and enforcement of Community legislation. They may apply to the ECJ pursuant to Article 177 of the Treaty for a preliminary ruling on an issue of Community law before taking a decision. The national proceedings are suspended and the ECJ is invited to rule on the Community point in question.

refinement of the doctrine of 'direct effect' which confers benefits upon the individual; and the re-invention of the concept of subsidiarity, coupled with an increase in regional autonomy. The relevance of these issues for international law extends most appropriately to questions regarding the relationship between international law and national law, the development of international institutions, the right of self-determination and generally to questions concerning power-sharing, interdependence, compliance and enforcement, that is, to the heart of international law discussion. Accordingly, there is a case to be made for international law studies to include discussion of EC law so as to inform the international law student of whether and how particular developments, ideas or concepts in the European sphere might assist in the development of international law and organisations. As Kahn-Freund has put it, the purpose here is not to discuss 'the labyrinth of minutiae in which legal thinking so easily loses its way ... [but rather to present] the great contours of the law and its dominant characteristics'.[12] If it is accepted that international law 'represents a state of legal relationships that is too little developed to provide a useful basis for the solution of ... complex problems'[13] of interdependence, then recourse to a highly organised and developed EU, comprising numerous and diverse cultures, may suggest a community-based world order.

Community Legal Order vs International Legal Order

The Community system has often been compared and contrasted with the international legal order.[14] While it is commonly acknowledged that the former emanates from the latter, there are sufficient differences to justify the conclusion that the Community indeed constitutes a separate legal system[15] which may be contrasted with traditional public international law both in terms of institutional structures and outcomes.

It will then be up to the national court to apply the ruling of the ECJ in the circumstances of the case before it: D Wyatt and A Dashwood (1987) *The Substantive Law of the EEC*, 2nd edn, Sweet & Maxwell, p 77. The ECJ has stated on numerous occasions that 'the purpose of that jurisdiction is to ensure the uniform interpretation and application of Community law, and in particular the provisions which have direct effect, through the national courts': *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205 at 1223; *Amministrazione delle Finanze* v *Salumi* [1980] ECR 1237 at 1260. Arnull states that it is in the framework of the preliminary ruling procedure that basic principles of the Community legal order, such as direct effect and supremacy of Community law have been developed: A Arnull, 'References to the European Court' (1990) 15 *Eur LR* 375, p 391.

12 O Kahn-Freund, 'Comparative Law as an Academic Subject'(1966) 82 *Law QR* 40.

13 Pescatore (1970) p 168.

14 See, for example, Pescatore (1970), Schermers (1975), Meessen (1976) and Wyatt (1982).

15 See TC Hartley (1989) *The Foundations of European Community Law*, 2nd edn, Clarendon Press, p 85.

Indeed, the ECJ has seized upon every opportunity to stress the unique legal character of the Community legal order. Community jurisprudence is replete with references to a 'new legal order',[16] the creation of its 'own legal system',[17] within which Member States have limited their sovereign rights and created a body of law which binds both their nationals and themselves. It has suited the ECJ to advance the theory of a *sui generis* legal order against which the international legal order, with all its weaknesses (particularly the lack of effective enforcement mechanisms, the absence of mandatory jurisdiction in the ICJ and an ineffective political apparatus) may be contrasted. Community law does not suffer from the weakness of international law in relation to sanctions. Even before the amendment of Article 171 (EC Treaty), which empowers the ECJ, on the instigation of the European Commission, to impose a penalty payment on a state which fails to comply with its judgments, Member States have always, for political reasons among others, been required to comply with the Court's rulings which are legally enforceable in the national courts in any event. Furthermore, the fact that the Community institutions or other Member States have failed to perform their obligations cannot relieve the Member States from carrying out theirs. Instead, the Member States are obliged to seek the appropriate legal remedy.[18]

There are those who view international law in a less than favourable light:

> International law exists within a society which is weakly organised and profoundly heterogeneous in the political, legislative and judicial fields. There is little need to cite the ineffectiveness of its political apparatus, paralysed by deep antagonisms, the weakness of its law-making system, based entirely on a clumsy and ineffectual apparatus of negotiated treaties, or the largely symbolic nature of its arbitration procedures and international tribunals, with their jurisdictions largely dependent on the consent of individual states.[19]

It is evident from the above discussion that international law is fundamentally flawed simply by the absence of a real legislative process coupled

16 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1 at 12.

17 *Costa* v *ENEL* [1964] ECR 585 at 593.

18 See, for example, *Commission v UK* [1977] ECR 921, where the Court stated that the Treaty prevents Member States from 'acting as judges in their own cause' (at 924). In *Commission v Luxembourg and Belgium* ([1964] ECR 625), the defendants argued, unsuccessfully, that 'since international law allows a party, injured by the failure of another party to perform its obligations, to withhold performance of its own, the Commission [had] lost the right to plead infringement of the Treaty'. The Court ruled that the Treaty requires that the Member States 'shall not take the law into their own hands' (at 631).

19 Pescatore (1970) p 170. Pescatore argued that international law is unsuited to the solution of the problems in the EC, as the EC is based on principles not common at international law, ie solidarity and integration.

with judicial control by which rules of law are effectively enforced against offending states. The absence of international judicial control compounds the problem by encouraging governments to accept international obligations which they will probably not fulfil.[20] Nevertheless, the effectiveness of the political apparatus which underpins the system, as well as its reliance upon state consent, has seen an improvement following the events of the late 1980s and early 1990s, which saw the dismantling of the Warsaw Pact. Moreover, nobody could properly dispute the fact that municipal law is increasingly being shaped by international law, primarily through the adoption by states of globally or regionally agreed obligations in treaties covering topics as diverse as climate change and labour relations. The implementation gap, of course, remains, which takes us back to the perennial problem of enforcement.

The writer does not intend to revisit the well-trodden ground concerning the effect of international law on national law or, more specifically, the effect of international law on Community law. More alluring and fertile for present purposes is the opposite contention, namely that the Community legal order, with its highly developed imperatives of peaceful co-operation and integration, is well placed to provide a useful basis for the solution of complex problems of international law.

What can be learned from the Community Experience?

What, then, can the Community system offer the rest of the world? It is submitted that the Community system is a point of reference for the wider international system, both within the framework of its relations with other organisations and countries and at the level of its internal dynamics. The European experience may inform or develop international law and its institutions in a number of distinct, yet inter-related ways.

External relations

Global consensus building It has been said that the Community's very existence advances the cause of international co-operation.[21] True as this may be, there is a stubborn belief amongst the European peoples (some more than others) that the Brussels bureaucracy cannot preserve European cultural diversity and that the Member States are already over-regulated by the central authority. It would, however, be wrong to conclude from this that present attitudes do not facilitate further European integration for despite these concerns, the EU has recently been enlarged to 15 members. The further enlargement to the East (Estonia, Poland, Czech Republic, Hungary, Slovenia) and South (Cyprus) is now open for discussion following the 1996–1997 Inter-Governmental Conference. Enlargement is an important measure of the EU's success. As the EU grows in membership, so too does the world's interest in the EU. Nations want to be part of, or associated

20 See Schermers (1975) p 78.

21 JV Louis (1993) *The Community Legal Order*, Office for Official Publications of the European Communities, p 228.

with, the EU because they want to participate in and benefit from the world's largest and possibly most influential trading bloc.

Indeed, it is above all the centripetal force of European free trade which beckons the Central and East European states to the EU door; which prevents the otherwise anti-European states within the EU from departing; and for which the Member States have *more or less* voluntarily surrendered state sovereignty. It is the same force that drives many countries to international co-operation agreements with the EU, countries such as the United States, Japan, China and Australia. Post-cold war realities have facilitated the creation of new coalitions world-wide, replacing military supremacy with the pursuit of economic growth and trade as primary objectives. The EU is located at the core of these developments. Moreover, it is evident that the EU contributes in a positive way to global consensus building while encouraging the rest of the world to embark upon regional integration. Of the EC's participation during the Earth Summit in 1992, Brinkhorst stated: '[d]espite institutional and political constraints the EC presented itself as more than a trade bloc and demonstrated that it could be a positive factor as a regional entity in global consensus building'.[22]

The EU system is characterised by inclusiveness, enabling its members to contribute to and take part in common development for the benefit of all concerned. As such, it represents a model for export to other experiments in regionalisation, as has already happened with the North American Free Trade Agreement (NAFTA), the Association of Southeast Asian Nations (ASEAN), the Common Market of the South (MERCOSUR) and the Asia-Pacific Economic Co-operation (APEC).[23] As the free trade organisations grow and draw others in who seek to market their goods and services, the pressure and desire for further success will lead to integration *between* regional organisations, such as the transatlantic free-trade area proposed by the United States and the EU. This would see the creation of an integrated market comprising NAFTA and the EU. The EU's integrative force, together with the centralising force exerted by 'globalisation' and the ever-increasing economic interdependence of states, will produce further integration and co-operation at the international level, pointing to a Community-based world order.

Internal dynamics

Dynamic institutions that work together Relationships between the main European Community players (the Member States, the Community and its

22 LJ Brinkhorst (1994) 'The European Community at UNCED: Lessons to be Drawn for the Future' in D Curtin and T Heukels (eds) *Institutional Dynamics of European Integration: Essays in Honour of Henry G Schermers*, Martinus Nijhoff, vol II, pp 614–15. Brinkhorst was the Director-General for Environment, Nuclear Safety and Civil Protection, European Commission, until 1994. In 1994, he was elected a Member of the European Parliament.

23 Italian Prime Minister Romano Prodi (1996) 'The European Union: A Hard but Successful Venture', speech given at European University Institute, San Domenico di Fiesole, 20 June.

institutions) are constantly being re-negotiated to reflect changing circumstances.[24] Moreover, the institutions themselves have been evolving from the time of their inception. The Community institutions are meant to work together rather than in subordination to one another, largely because of the fragmentation of functions between them. For instance, the primary power of the Council is to create legislation by adopting the proposals made by the European Commission. The Council consists of representatives of the governments of the Member States and represents the interests of those Member States. Accordingly, it is the body where the interests of the Member States find direct expression and is, at present, the main legislative organ of the Union. Generally speaking, proposals initiated by the Commission (the EU's executive organ)[25] and debated by the Parliament require a final decision by the Council. When decisions are taken, Member States are represented by the Ministers qualified for the matters under discussion (eg regarding agriculture, finance, transport, energy etc). Ministers attending these meetings are accompanied by departmental officials. A representative of the Commission also takes part in the deliberations of the Council and provision exists for negotiation on proposals put forth by the Commission. This is a feature of the unique political co-operation framework which ultimately finds expression in Article 162 of the EC Treaty.[26]

It is submitted that the constant re-negotiation by the Community players and the degree of co-operation between them, and particularly between the institutions, are the Community's major strengths. As international law is similarly confronted with defining and re-defining the role of its own institutions,[27] it may, in this process, benefit from a study of the European institutions, the co-operation between them, as well as the evolutionary nature of the EU. Regrettably, the United Nations (UN) has, over the years, proved itself slow to respond to changing international circumstances and to demands for reform.[28] A comparison with the EU, its organisational structure and its response to the need for change, will highlight some of the similarities as well as some of the differences between the two organisations.

As in the EU, the principal organs of the UN (the General Assembly and the Security Council) exercise their powers on a functional basis and can

24 D Cass (1993) 'The European Community: Subsidiarity and other developments in Power Sharing', paper presented at the First Annual Meeting of the Australian and New Zealand Society of International Law, Canberra, 28 May.

25 In fact, whilst the Commission was originally intended to be the Community's executive organ, this promise has not entirely been fulfilled as increasingly the Council is occupying this role. See J Siourthas, 'Supranational Federations: The European Community as a Model' (1993) 19(2) *Monash ULR* 273.

26 Article 162 provides that 'the Council and the Commission shall consult each other and shall settle by common accord their methods of cooperation'.

27 Cass (1993).

28 It is acknowledged that reform is a complex matter wrought with difficulties in a multipolar world. Amendments to the United Nations Charter will not be made quickly or easily, however clear the need for change may be.

be equated neither with a national legislature nor an executive, although they resemble these bodies in some of their characteristics. The General Assembly is the main deliberative organ with powers of recommendation. It is composed of representatives of each of the Member States, each of whom has one vote.[29] Decisions of the Assembly have no legally binding force for Governments, although they do carry the weight of world opinion on major international issues. Big power dominance is reflected in the organisational structure of the UN which awarded to *each of* the 5 major victorious states of the Second World War a permanent seat on an 11- (now 15-) member Security Council.[30] Such dominance has been justified in the following terms:

> upon these members would fall the brunt of the responsibility for maintaining international peace and security, and therefore, to them must be given the final decisive vote in determining how that responsibility should be exercised.[31]

Thus, the Security Council was given authority to maintain international peace and security[32] which, by virtue of its binding force on members of the UN,[33] represents a system of governance, albeit of limited scope. Yet despite more than a tripling of UN membership since 1945, the Security Council has only been expanded once, in 1965, from 11 to 15 members.[34] Ostensibly, this reluctance to keep pace with the expansion of UN membership has functioned to prevent a dilution of the very real control exercised by the permanent members over the affairs of the Council. This serves to focus attention squarely on the perceived lack of representativeness of the Security Council and more generally on notions of legitimacy.

> Calls are sometimes heard for the Security Council to be a more democratic body, in line, it is sometimes said, with the democratic trend in States around the world. It is perhaps not surprising that, as the Security Council assumes a "legislative role", exercising new powers and using its powers more frequently, greater attention is being focussed on its representativeness.[35]

Correspondingly, if the collective opinion and authority of the Security Council is to be accepted and respected by a majority of states, 'the order

29 UN Charter 1945, Article 18.

30 Ibid, Article 23.

31 DW Bowett (1982) *The Law of International Institutions*, 4th edn, Stevens, p 28.

32 UN Charter, Article 24(1).

33 Ibid, Article 25.

34 Amendment of Article 23, ie enlargement of Security Council from 11 to 15 States, came into effect on 31 August 1965. See W Chamberlin et al (1976) *A Chronology and Fact Book of The United Nations 1941-1976*, Oceana Publications, p 59.

35 A Bracegirdle (1993) 'Role and Reform of the Security Council', paper presented at the First Annual Meeting of the Australian and New Zealand Society of International Law, Canberra, 28-30 May.

ought to be based on collective decision-making and the free and equal expression of views'.[36]

Parallel, though by no means equivalent, observations have been made in respect of the decision-making powers of the EU, which are vested essentially in the non-elected institutions rather than in the Parliament. The question of legitimacy (specifically of the integration process) and of the related problems concerning the democratic deficit, transparency and comprehensibility to the citizen are at least as relevant to the EU as to the UN. The EU is, however, much better placed to tackle and resolve these problems with the contribution of each of the Member States because it is organic and ever-changing. It is endowed with a dynamic, self-reforming spirit, evidenced by its evolution from Community to Union and the substantial revision of the Treaty of Rome 1957 by the Single European Act, the Treaty on European Union and the recently signed Treaty of Amsterdam 1997. It is submitted that the intrinsic vitality of the EU, its internal dynamism, is the manifestation of a political will to make a success of the EU, an expression of MacCormick's assertion that: '[w]hat is possible is not independent of what we believe to be possible'.[37] The Community has, from its inception, been inspired by imaginative politicians — from Monnet to Schuman, Spinelli, Delors and Kohl — the people who have 'made the practical world work'.[38] Thus, the European experience in integration is characterised by imagination and the politics of 'can-do'. It rests upon those who make the world work today to work out 'credible and well supported ideas'[39] on how the international legal order should evolve. To this end, the study of the EU's institutional dynamics can provide a useful basis for discussion on the fundamental principles, chief among them *co-operation* and *collective decision-making*, upon which the international legal order must be based.

A dynamic approach to power sharing The extension of international law into areas which were traditionally within domestic jurisdiction is incontrovertible. This has at times lead to resistance at the national level to what is largely regarded as external interference. This analysis is not confined to the international sphere. Intervention, wherever it may take place, has to justify itself. At the EU level the subsidiarity principle operates, ostensibly, to control the degree of Community interference in Member State affairs by confining the Community to its assigned powers and, in areas where concurrent legislative competence is conferred, by limiting it to action which, by reason of the scale or effects, cannot be undertaken efficiently by individual Member States acting separately. Since its introduction in the EC Treaty, the principle has been the subject of so much debate that it has virtually spawned a cottage industry among EU writers. Some feared that subsidiarity would be used to:

36 Ibid.

37 N MacCormick, 'Beyond the Sovereign State' (1993) 56 *MLR* 1 at 18.

38 Ibid.

39 Ibid.

> support a reversion of sovereign power to the Member States.... Others [saw] it as a way of progressing to greater integration while also respecting Member State diversity - the idea of maximising the exercise of sovereignty within an integrated.... legal system.[40]

Accordingly, it may be seen 'more as a slogan grappled for by rival factions than a well-elaborated principle or set of principles.'[41]

Much of the angst surrounding the subsidiarity principle has now dissipated, despite the fact that its operation in practice is by no means free from doubt. Suffice it to say that most in the Community see the principle as a means by which Community action can be scaled down rather than increased. The whole debate on the principle of subsidiarity has 'contributed to a rethinking of the institutional arrangements of the Community'.[42] Demands for the reform of the Community institutions and, in particular, for a recasting of the powers of the Commission and the Parliament have intensified in the 1990s, in recognition of the fact that the questions of further integration and enlargement of the Union cannot be resolved in isolation from the all-pervasive question of governance in a democratic context. While it is particularly applicable to federal or quasi-federal systems such as the EU, subsidiarity reveals a dynamic approach to power sharing and intergovernmental co-operation which may, with necessary modifications, be applied to the international arena.

The issue of sovereignty The surrender of national powers to a supranational entity is nowhere more advanced today than in the EU. Membership of the EU necessarily brings with it a limitation of state sovereignty. The national parliaments of the Member States are no longer 'sovereign' over many aspects of commercial and social life, as the ECJ has pointed out on numerous occasions commencing with *Costa* v *ENEL*.[43] The resulting approach to governance has been described as a 'complex interaction of overlapping legalities'.[44] MacCormick notes that '[t]he observation that there are no remaining sovereign states in the Community does not in any way entail the proposition that therefore there must instead be a sovereign Community'.[45] Rather, there has been:

> a pooling or a fusion within the communitarian normative order of some of the states' powers of legislation, adjudication and

40 Cass (1993).

41 MacCormick (1993) p 18.

42 Cass (1993).

43 [1964] ECR 585. The Court stated that: '[b]y creating a Community ... the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves' (at 593).

44 MacCormick (1993) p 10.

45 Ibid, p 16.

> implementation of law in relation to a wide but restricted range of subjects.[46]

In a step which challenges our conception of what may be possible in the real world, MacCormick invites us to :

> think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap? If this is as possible practically as it clearly is conceptually, it would involve a diffusion of political power centres as well as legal authorities. It would depend on a high degree of relatively willing co-operation and a relatively low degree of coercion in its direct and naked forms. It would create space for a real and serious debate about the demands of subsidiarity.[47]

The EU may appear tantalisingly close to achieving such a reality. Its organisational structure features a variety of institutional systems which, in combination, exercise competencies over the whole spectrum of legislative powers, sometimes exclusively, sometimes concurrently; it is underpinned by an institutionalised form of co-operation. The EU evidences a diffusion of legal authorities, if not as yet a diffusion of political power centres. These institutional developments, the Community's approach to power-sharing and co-operation are the direct result of the surrender of state sovereignty. The Community legal system demands co-operation from its members and between the institutions precisely because power is shared.

If co-operation between nation states to achieve common objectives and the degree of compliance with international laws are a measure of the effectiveness of international law, then the EU may provide a model for intergovernmental and supranational co-operation. Furthermore, it is contended that effective international regulation and stronger international institutions will emerge as greater interdependence between states leads to increased international governance which in turn encourages the nation states to give up sovereignty on matters that are best dealt with at the international level. Given that this process may already have begun, the international community ought now be participating in the subsidiarity debate with a view to refining the principle and naturalising it within international jurisprudence. The European experience in power sharing and subsidiarity may inform or develop international law and institutions in this process. It is at least a starting point.

A related matter concerns recent developments in regionalism, evidenced by the establishment in 1994 of the Committee of the Regions (COR) representing local and regional authorities, and a move towards co-operation between European regions.[48] The establishment of the COR

46 Ibid.

47 Ibid, p 17.

48 However, the absence of a legal status for cross-border co-operation represents

legitimates the sub-national perspective and its focus on regional and local conditions. These developments may be seen to advance the functional resolution of problems which respect no borders such as environmental degradation.[49] Coupled with the proper application of the principle of subsidiarity, these developments would ensure that local and regional interests are not subsumed within the broader notion of national interest. These ideas and the related push for regional autonomy within the EU may also encourage the search for a new international vehicle for political and social expression on issues such as the right of self-determination.

Value-added 'direct effect' Whilst individuals belonging to a state are commonly recognised as the ultimate objects of International law, they are not regularly the direct subjects thereof.[50] In contrast, the ECJ's enunciation of the principle of direct effect in *Van Gend en Loos v Nederlandse Administratie der Belastingen* affirms that individuals are, as a matter of course, the subjects of the EC legal order and not merely its objects.[51] In this landmark decision, the ECJ confirmed that the nationals of Member States are directly concerned by Community Law and concluded 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 the Member-States but also their nationals. Independently 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 Member States and upon the institutions of the Community.[52]

Pescatore has remarked that at the heart of *Van Gend en Loos* is the Community call for participation of *everybody*, 'a highly political idea, drawn from a perception of the constitutional system of the Community ... which continues to inspire the whole doctrine [of direct effect] flowing from it'.[53] Ultimately, it is the democratisation of the legal order, whereby the individual is entitled to invoke a Community measure before a national

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an obstacle to full co-operation between the regions: See *Proceedings of the Conference on Interregional Co-operation: Regions in Partnership, Brussels, 14 and 15 December 1992* (1994) Office for Official Publications of the European Communities, p 9.

49 Longo (1997).

50 L Oppenheim (1955) *International Law A Treatise,* rev H Lauterpacht, orig 1912, vol 1, Longmans, pp 636–42.

51 [1963] ECR 1.

52 Ibid at 12.

53 P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 *Eur LR* 155, p 158.

court, which has 'substantially contributed to an effective application of the EEC Treaty'[54] and breathed life into the Community system. It is this feature more than any other which can potentially transform an ineffectual legal order into a highly effective one. As such, the doctrine of direct effect, as expounded by the ECJ, may inform the international law student of new possibilities for improving the effectiveness of the international legal order.

It would be wrong to infer from the above discussion that direct effect has no application in international law. It has been asserted that:

> [t]he various developments since the two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of international law. In proportion as the realization of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of international law.[55]

In *Attorney-General of Ireland* v *Burgoa*,[56] the ECJ 'appears to have acknowledged that other international agreements are capable of having "direct effect", quite independently of the Community legal order'.[57] Moreover, it has been observed that international treaties may provide for the regulation of the rights of individuals *inter se*, or the rights of individuals *vis-à-vis* the state.[58] Therefore, direct effect is not a concept unique to the Community. Of course, not all provisions of all international treaties are calculated to modify the legal relationships of private parties, but this is equally true of Community legislation. Some treaty provisions are intended to regulate inter-state relations and others still lack the clarity and precision necessary for judicial implementation.[59] Significantly, the numerous rulings of the ECJ on the question of direct effect have established direct effect as the norm rather than the exception,[60] thereby distinguishing it from the much more limited application of direct effect in the international legal system.

Notwithstanding the existence of jurisprudence at the international level which gives recognition to the concepts of direct effect and supremacy of international law, the framework within which these ideas can be developed and applied is somewhat weaker in the international sphere. There is no organic link at the international level between these principles forged from a transfer of powers from the states to an international authority, from which there emanates a body of law which binds both the states and their

54 Schermers (1975) p 89.

55 Oppenheim (1955) p 639. Lauterpacht goes on to identify 'an imposing array of treaties of a humanitarian character ... [which testify] to the intimate connection between the interests of the individual and international law' (p 641).

56 [1981] 2 CMLR 193.

57 Wyatt (1982) p 150.

58 Ibid, p 148.

59 Ibid, p 149.

60 Hartley (1989) p 194.

nationals. Nor does there exist a highly organised and co-ordinated institutional system within a complementary wider system comprising the supranational authority, the nation states and sub-national authorities. Having no foundation in the UN Charter itself,[61] direct effect and supremacy operate in a diminished form on the periphery of international legal practice, becoming relevant only where specific treaties conferring direct effect or imposing clearly defined obligations capable of implementation are in force.[62] The problem is compounded by the lack of mandatory jurisdiction in the ICJ and by the absence of an effective enforcement paradigm.

Nevertheless, the recognition given to these concepts in international law, however limited, foreshadows the possibility of transposing the European experience onto the wider international system. Direct effect increases the level of enforcement and compliance with Community law precisely because a private individual can make application to his or her national Court requesting it to not apply provisions of national law that directly contravene effective Community law.[63] Therefore, the doctrine of direct effect and the privileging of the individual which flows from it provide the basis for useful discussion on how public international law might overcome its enforcement hiatus[64] and the related problem of consensual jurisdiction.[65] Discussion could be along the following lines: states which are party to international treaties are required to comply with the obligations they impose which take precedence over conflicting national laws and are directly applicable within the states' party, irrespective of intervention on the part of the national legislatures.[66] Failure to comply with

61 Not of itself critical. The EC Treaty does not specifically refer to direct effect or supremacy, although the concepts are arguably embodied in the Treaty provisions in the sense that the objectives sought to be achieved by the Treaty could not be achieved in the absence of direct effect and supremacy, both products of the ECJ's creativity. Whilst Article 38(d) of the Statute of the International Court of Justice identifies judicial decisions and the teachings of the most highly qualified publicists as a source of international law, thereby leaving the door open to further juridical development of international law along the lines of direct effect (liberally applied) and supremacy, this would not, on its own, increase the effectiveness of international law given the consensual jurisdiction of the ICJ and its inability to enforce its own decisions.

62 National measures of adoption are usually necessary before international treaties and their obligations can be said to bind a State Party to a treaty.

63 Louis (1993) p 134.

64 The ICJ cannot enforce its own judgments and, subject to Article 94 of the UN Charter (which provides that UN members undertake to comply with any decision of the ICJ in any case in which they are a party), has to rely upon States' good faith in upholding its authority.

65 The ICJ has no mandatory jurisdiction. Article 36 of the ICJ Statute sets out the principal means by which a State can submit to the ICJ's jurisdiction.

66 Consider the current status of international obligations undertaken at international level and its effects on the internal legal system. If the State's constitutional system is described as 'monist', treaty obligations are usually incorporated nationally by assent of the legislature or, in the case of a 'dualist'

those international standards, directions or laws domestically and within set time limits have the potential to adversely affect the citizen of the defaulting state; accordingly, the aggrieved citizen should be empowered to enforce the state's obligations under the treaty, where these are sufficiently precise and unconditional, in a national court. The procedure could be coupled with a right, exerciseable by an appropriate international institution, to subject the offending state to the jurisdiction of a supra-national Court. The writer, of course, acknowledges that radical political, social and institutional changes would be necessary at both the international and state levels to give effect to such an innovation. The thrust towards greater participation by the individual must be seen as a continuum between overlapping levels of organisation: local, national and international. Thus it cannot be contemplated in isolation from the broader debate on subsidiarity and co-operation. It is fitting that with the arrival of a new millennium, fresh consideration be given to alternative global organisational structure and to the wider issue of world governance.

In a report presented to the Jean Monnet Centenary Symposium at Brussels on 10 November 1988, Francois Duchene opined that:

> As societies become aware of the costs of international co-operation based on nation States which resist a general view, one can expect the pressures to grow for solutions which must indeed be pragmatic but also much more radical than any which have been envisaged so far. In such a world, the Community method could prove, at least in some of its features, a model for other political solutions to the problems of complex interdependence. It is one of the inner riches of the European idea that it has been, and remains, ambiguous as between the creation of a United Europe for its own sake and the introduction of a new approach to world politics. This is a faithful reflection of Monnet's own attitude, which as his memories amply demonstrate, certainly sought to promote the United States of Europe, but also saw Europe as a "ferment of change" in the world.[67]

Conclusions

The EU today is a rich source of ideas on fundamental questions regarding the re-modelling of democracy and empowerment of the individual and the division of powers between institutions and between different levels of authority (supranational, national and sub-national). The author does not contend that these fundamental issues have been resolved at the EU level. It should, however, be clear that the very issues relevant in Europe today are also particularly relevant to the future directions and needs of the

state, transmuted into domestic law by a specific act of legislative transformation.

67 'Jean Monnet's Method' in (1988) *Jean Monnet, Proceedings of Centenary Symposium organised by the Commission of the European Communities, 10 November 1988*, Office for Official Publications of the European Communities, p 34. Jean Monnet is regarded as the architect of European integration.

international community. As such, the debate on EU integration should properly extend to the international arena with a view to assimilating some of the EU's characteristics within international law and practice. Consideration of the factors leading to the integration of nation states in the EU could suggest ways in which these factors may be duplicated world-wide for the benefit of international law.

The EU means different things to different people. The Community has been described as a 'technological instrument',[68] a device which advances the resolution of post-industrial and transboundary problems, such as environmental protection, transnational trade and transport.[69] It has done so initially through the creation of an integrated market with common rules, standards and means of settling disputes within a fully functional supra-national structure. According to this vision, the Community approach to problems which respect no borders is functional. It promotes the expression of local values and places emphasis on regionalism *within* the EU so that co-operation *between* regions straddling national boundaries might be achieved. Within the international sphere, the idea that benefits can be derived from an integrated regional market has long since germinated, as evidenced by NAFTA, APEC and similar associations. The feature of supra-nationally is, of course, absent from their organisational framework. Similarly, the inverted version of regionalism which promotes collaboration between sub-national authorities across national boundaries has not yet been naturalised in international law. Yet these ideas have potential. They might, for instance, promote useful discussion on the problem of self-determination and also offer an alternative to the nation state as the 'prime vehicle for political and social expression'.[70] They may contribute to the re-conceptualisation of international organisation as agency not only for the effective resolution of transboundary problems but also political and social problems.

The EU will continue to integrate and will present to the world a monetarily and politically united EU. The reasons for this view are twofold. First, the system is underpinned by an effective and highly organised regulatory order which has developed an unprecedentedly comprehensive case law.[71] Secondly, the market demands it because there are economic advantages to be gained from further integration. This conclusion is unaffected by the probability that the EU will continue to experience crises of confidence over the next decade or so as monetary union and enlargement leads a largely sceptical public inextricably towards political union and brings to the surface the cost, albeit temporary, of further enlargement. However, with every

68 JHH Weiler (1994) 'Fin-de-siecle Europe: On Ideals and Ideology in Post-Maastricht Europe' in D Curtin and T Heukels (eds) *Institutional Dynamics of European Integration: Essays in Honour of Henry G Schermers*, Martinus Nijhoff, vol II, p 39.

69 Ibid.

70 Ibid.

71 'Law has always been a basic instrument and a central symbol of European integration': F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *MLR* 19.

new success, the world-wide integrative effects of the EU can be expected to grow.

The EU has achieved its desire for peace among its Member States.[72] The EU has also achieved or is on the road to achieving prosperity throughout the EU with regional development programs[73] and cohesion funds directed towards the poorer members of the Union in an attempt to facilitate and then standardise prosperity through better infrastructure and transport.[74] The process of integration has delivered the two essential objectives of the Community: peace and prosperity. Further integration at the monetary and political levels will entrench these values and offer the rest of the world a new approach to regional, if not world, governance and the problem of complex interdependence where the 'excesses of nationalism'[75] could be blunted by the supra-national ethos in favour of human solidarity and collaboration. As the EU draws ever closer, other international actors can be expected to be drawn closer to it. This magnetic attraction is already being evidenced by the desire on the part of the United States and other nations to forge new relationships with Europe. Talk of a transatlantic free-trade area between the United States and the EU continues to grow and is a small step in the direction of global governance, albeit on the economic plane only. History, however, informs us that an economic community can develop into something much more ambitious.

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72 Even the intractable dispute over Northern Ireland seems now closer to resolution in light of the recently ratified Northern Ireland Peace Agreement. It has been argued that the peace process has been shaped by the development of confederal structures in the EU and by the very process of EU integration: J Goodman (1998) 'Northern Ireland: A European Solution to a European Problem?', CESAA Seminar, University of Melbourne, 16 June.

73 Structural Funds are intended to deal with the problem of regional disparities and structural handicaps of certain regions within the EU.

74 Council Regulation EEC 792/93 of 30 March 1993 establishes a cohesion financial instrument to provide Community support for projects including environmental and trans-European transport infrastructure projects: OJ L 79/74, 1.4. 1993. Four Member States (Spain, Portugal, Ireland and Greece) receive assistance from the Cohesion Fund.

75 Weiler (1994) p 40.

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