Assessing the Legal and Institutional Regimes of the European Union in the Context of the Internal Market – The Future of International Order?

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As a matter of economic expediency, in the aftermath of World War II, Western Europe underwent a fundamental shift in regional order hitherto dictated by the sovereignty of the nation state. The scope and significance of the European Union (EU) remain unparalleled, in the context of international relations, considering the potential ramifications of taking the current trend towards regional federation to its furthest extent. It is important to distinguish from the outset between the Union as a political entity and the European Community as the legal manifestation of the common will of Member States. Thus the Community embodies the essence of the legal framework of the Union and as such remains a unique international structure. Indeed, 'in terms of the scale and sophistication of its structural apparatus and the scope of its competences the Community far exceeds any other supranational organisation'.[1] One must also distinguish between the internal market as an economic/political entity and the creation of a common market between neighbouring States, the latter embracing the 'whole range of Community activities other than those connected with the approximation of economic policies'.[2]

At the center of the collective ambitions of the Member States lies the internal market. Given the historical context of divergent national interests, the progress achieved thus far has been both significant and commendable. However, the realisation of the full potential of the internal market faces many obstacles, some inherent in the nature of the undertaking. Whilst the common heritage of diverse European cultures can be traced through many centuries, the genesis of the European Union's legal and institutional regimes remains largely a

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1 S Bronitt, F Burns and D Kinley, *Principles of European Community Law; Commentary and Materials*, (LBC, Australia, 1995), p 55.

2 D Wyatt and A Dashwood, *European Community Law*, (3rd ed, Sweet & Maxwell, United Kingdom, 1993), p 358.

phenomenon of post World War II Europe arising in response to economic necessity and fundamental shifts in ideological perspectives. Economic integration remains a fundamental aspect of the current rapid trend towards globalisation, which finds its origins in the historical development of capitalist economies.

It is unquestionable that strategic interests were the primary motivation for initial American intervention in the form of the Marshal Plan. The rationale underlying French reticence towards accepting entry by the United Kingdom in 1963 and 1967, as a potential Trojan horse for US strategic influence, were fears perhaps not completely unfounded. Having asserted itself as a superpower in the post World War Two era the US arguably sought to consolidate its strategic position in subsequent decades. It is contended that two essential aspects of the internal market stem from the influence of American restructuring. Apart from the rule of law and democracy as theoretical premises upon which the Union is based, the means by which the Marshal Plan distributed American capital among the recipient States made cooperation between them a condition precedent, at a level that previously would have been inconceivable. Furthermore, during this historical epoch the dominance of capitalist principles was firmly established in response to the perceived threat from the USSR. Thus the development of internal cooperation based primarily on capitalist free trade established conditions conducive to internal economic integration. This development may be construed as the economic and political manifestation of forces of globalisation culminating in regional interdependence. As an economic and social phenomenon globalisation necessarily entails a regional intermediary stage. In light of the current trend towards greater convergence in the international arena, it is arguable that the European Union model of State interdependence is both a product of capitalist rationality and a template for future international relations.

The imperatives of economic rationalism are numbered amongst the fundamental premises underlying both the Union and the internal market. For example, the invisible hand of the market, ie, free enterprise, is embodied in Article G of the Treaty of the European Union (TEU). This provides for the inclusion of section 3(a) requiring the adoption of a common economic policy 'conducted in accordance with the principle of an open market economy with free competition'. This may be construed as the explicit embodiment of capitalist principles that directly relate to free movement and competition policy.

Competition Policy

Competition Policy is complementary to the four freedoms of the internal market in that it seeks to regulate cross border competition, as between the competitors, where state imposed restrictions have been removed. As addressed below, the free movement of goods, services, people and capital, ie, the four freedoms, is an essential prerequisite to the realisation of the internal market. Articles 85, 86 and 92 operate as the legal limbs of competition policy, addressing concerted practices, abuse of a dominant position and the prohibition of incompatible state aid respectively. As a conceptual notion competition policy is not static; rather it alters in response to existing social and market forces. The practical application of the principles enunciated by the relevant case law is therefore problematic in terms of enforcement and certainty. Notwithstanding the difficulties inherent in such bold initiatives, it is apparent that significant measures have been taken in order to ensure the application of uniform competition policy,[3] the success of which is largely contingent upon the supremacy of Community law and the direct effect of the relevant articles. In the absence of direct effect,[4] the issue of enforcement becomes problematic.

European Court of Justice

The development of the European Union may be characterised as a process of gradual evolution as opposed to a specific historical event. The constitution of the EU is comprised of the totality of treaty law and legislation arising between States, the form of which is given meaning by the *aquis communitare* that adds substance to the underlying principles. In this respect the institutional success and significance of the European Court of Justice[5] (ECJ) assumes pre-eminence with respect to the formation of a progressive body of jurisprudence stemming from the self consciously pro-active role adopted by the court. As Van Gerven contends, 'judicial activism is, more often than not, the consequence of inability or unwillingness to act on the part

3 Council Regulation 17/62 regarding Commission powers of investigation etc in implementing Articles 85 and 86 of the Treaty.

4 The doctrine essentially entails the immediate enforceability of treaty provisions in national courts by individual member states. See Case 26/62, *NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; [1963] CMLR 105.

5 Articles 164-188 TEU.

of the legislature'.[6] The inability of the European Parliament to assume such a pro-active role, resulting from the historical dominance of the Council, has provided the opportunity for the nature of the Court's approach.

The significance of the role of the ECJ, in the context of the internal market, arises from the fact that interpretation of the four freedoms and competition policy, both of which are central to the internal market, are based on judgments emanating from the ECJ. Hence, the implications for socio-economic policy, business practice and future reform are paramount. A chronological analysis of the relevant case law post 1960 demonstrates a conscious effort to assert the supremacy of Community law vis-à-vis domestic law. National courts have a duty to recognise, where relevant, the exclusive jurisdiction of the Community institutions[7] whilst Article 177 EC empowers the ECJ to dictate and define the interpretation of judicial and legislative directives by way of preliminary rulings.

The requirement of Community law supremacy is largely analogous to the principle established by the Australian Constitution in that Federal law must prevail over State law to the extent of any inconsistencies.[8] In the absence of such predominance the EU, and the internal market specifically, would lack meaning and substance. This fundamental principle entailing the consensual devolution of Member State autonomy is central to the very existence of the EU as a supranational entity. A corollary of this proposition is that the process of State-weakening or disétatisation is manifest in the gradual development of the EU. Thus the latent potential for the EU to influence the future of international relations is not to be underestimated.

Coalition or Confederacy?

It follows from the progressive evolution that characterises the development of the EU, that any one treaty 'is not the end of the EU's development process but simply a step further down the road towards the ultimate goal'.[9] Thus the advent of the Treaty of Amsterdam (TOA), as of 1 May 1999, represents the next stage in an ongoing

6 W Van Gerven, 'The Role and Structure of the European Judiciary Now and in the Future' (1996) *European Law Review* 212.

7 J Temple Lang, 'The Duties of National Courts under Community Constitutional Law', February 23, 1996.

8 Australian Federal Constitution s 109.

9 Klaus Dieter Borchardt (ed), *The ABC of Community Law*, (European Documentation, 4th ed, 1994), p 10-11.

process. As to what the ultimate goal actually is remains the crucial factor. Whether the ambition of the EU is limited to a coalition of sovereign states or aspires to true confederacy underlies the constitutional legitimacy of the internal market. 'The TEU goes beyond merely the restructure of the three communities'[10] powers by creating what is, in effect, a new supranational construct known as the European Union'.[11] The EU has the institutional basis of a supranational entity, namely, an executive, judiciary, legislature and extensive bureaucracy. However supranationality entails more than a mere institutional framework; rather, it pertains directly to the sovereignty of individual nations and the legitimate authority of the State. As such, the constitutional, or perhaps legal, basis of the EU remains questionable to the extent that it is comprised of the totality of treaty law between Member States and is subject to ratification by all members as a consequence.

In characterising the EU as a mere 'notional entity', Curtin asserts that 'the popular analogy of the construction of a temple . . . implies a degree of architectural stability and aesthetic finish which is both inaccurate and pretentious'.[12] The inherent weakness in the institutional structure of the EU stems from the predominance of sovereign state interests as represented by the Council of the European Union.[13] It has been rightly contended that 'if there is any one principle that binds together the measures and case law on the internal market it is the prohibition of discriminatory measures implemented by Member States which affect the free flow of goods, persons, services and capital'.[14]

Effectively the executive of the EU, the Council, has historically maintained a dominant role with respect to final authorisation of significant activities, and has proven to be the central hindrance to the realisation of the internal market in terms of the provision and assurance of the required political will. Indeed, the potential antithesis of the freedoms necessary for the internal market is the respective national interests of individual member states which are manifested in

10 European Coal and Steel Community (ECSC), European Economic Community (EEC), and Euratom.

11 Bronitt, Burns and Kinley, note 1 above, at p 45.

12 D Curtin 'The Constitutional Structure of the Union: A Europe of bits and pieces', (1993) 30 *Common Market Law Review* 17 at 22-26, cited in Bronitt, Burns and Kinley, note 1 above, at p 53.

13 Articles 145 *et seq* EC.

14 Bronitt, Burns and Kinley, note 1 above, at p 225.

the form of restrictive practices and recalcitrant Permanent Representation in the Council. Efforts have been made to overcome the inherent weakness in the institutional structure of the EU. It has been noted that:[15]

> To smooth the way for completion of the internal market, the Single European Act allowed the Council to decide by qualified majority on approximation of laws between the Member States. A parallel framework was created for free movement reflecting the need to take account of essential issues for society . . . the Treaty of Amsterdam will further strengthen this framework.

As the legal foundation for internal market legislation Articles 100 and 100a are drafted in such broad terms as to enable the Community to take whatever measures are needed to establish a common market.[16] However, these expansive provisions are qualified, by the operation of both paragraph (2) and paragraph (4) of Article 100a. The latter effectively 'allows an escape route for a Member State which considers that harmonised rules, adopted under Article 100a by a qualified majority, do not constitute a sufficient guarantee of attaining certain public interest objectives'.[17] This highlights the primacy of Member State interests in areas of national significance. Authority stemming from *Cassis de Dijon*[18] has established that the Treaty does not prohibit the non-discriminatory application of national provisions that are necessary to serve important areas of public interest.[19] Ancillary to the preceding articles is Article 100b which establishes 'the legal basis for measures to be adopted in the final phase of the establishment of the internal market, requiring mutual recognition of the equivalence of standards that have not been harmonised'.[20]

Comparing the respective preambles to the Treaty establishing the European Coal and Steel Community (1951) (ECSC) and the Treaty establishing the European Economic Community (1957) (EEC) reflects a less expansive mandate in the latter. Representing perhaps the greatest historical success of the Union, the amalgamation of French and German industry under the auspices of the ECSC effectively es-

15 Ibid, at p 135.

16 R Dehousse, 'Community Competencies: Are There Limits to Growth?', *Europe After Maastricht: An ever closer Union*, 1994, at pp 107-112, cited in Bronitt, Burns and Kinley, note 1 above, at p 123.

17 Wyatt and Dashwood, note 2 above, at p 365.

18 120/78 *Rewe-Zentral v Bundesmonopolverwaltung fur Branntwein; Keck & Mithouard* at paragraph 15.

19 Wyatt and Dashwood, note 2 above, at p 356.

20 Ibid, at p 355.

tablished the backbone of the Union. The initial idealistic rapture fuelled by economic prosperity and the perceived triumph of democracy, whereby the signatories to the ECSC resolved to substitute for age-old rivalries the merging of their essential interest's, has been replaced by a more pragmatic approach reflecting the continuation of realistic national interest. Notwithstanding nationalist sentiment, the fact that France and Germany are signatories to the TOA reflects an ongoing confidence in the process of integration. In establishing the foundation for future integration, the ECSC overcame significant historical differences while setting a course for future reform.

The Four Freedoms

The Treaty establishing the EEC was amended by Article G of the Maastricht Treaty on European Union, with Article 3(c) providing for the creation of 'an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital'. Article 8a EEC became Article 7a EC in accordance with TEU amendments. The text remains essentially unaltered, providing that 'the internal market shall comprise an area without internal frontiers' to be achieved by the end of 1992. This deadline has, according to Commission reports, 'mobilised the necessary practical will required'[21] for the completion of the internal market. The existence of the requisite political will is also an essential element in the success of the internal market and the EU as a whole. It is apparent from the construction of this article that the four freedoms are the essence of the internal market. The legislative means for achieving the four freedoms have been established by the *Single European Act* (1986-87) (SEA).

The free movement of capital, services, people and goods is a necessary prerequisite for true economic integration, which itself cannot be divorced from the social and political implications of such radical legal and institutional reform. The obligation imposed upon Member States to secure the establishment of the four freedoms is reinforced by the provisions of Article 5 EC. This article states that 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'. This article may be construed as imposing 'a duty to

21 Commission report COM(92)2000, (11 February 1992), at p 6.

cooperate in good faith, willingly and constructively'[22] upon the Member States' respective domestic governments and, of equal importance, upon domestic judiciaries.

The attainment and assurance of the four fundamental freedoms is quantifiable to a certain extent, ie, the removal of physical, fiscal and technological barriers impairing the free movement of goods and services. This is evidenced by positive Commission reports indicating that the majority of measures initiated by the White Paper[23] have in fact been achieved.[24] More abstract obstacles and objectives remain beyond the scope of quantifiable means, such as the removal of ethnic discrimination and prejudice embodied primarily in Article 7 EC. Regardless of the more enlightened attitudes and principles that have come to characterise the European Union it is apparent that ethnocentric bigotry remains a substantial obstacle that is in many respects indelibly ingrained in minority elements of European culture. The ongoing turmoil in the Balkan states is a direct challenge to the resolve of the member states to give effect and enforce principles of human rights upon which the union is founded. It is submitted that such obstruction may be overcome to an extent by the application of the universal logic of judicial principles, which themselves reflect the economic culture common to all nationalities. Among such principles the 'large scale application of the principle of mutual recognition[25] has made it possible for whole areas of legislation to be replaced by common or compatible open systems between the Member States to ensure the free movement of goods and services'.[26] This represents a significant advancement in the achievement of the objectives of the internal market, namely, to achieve consistency, uniformity and continuity between the respective legislative regimes of the Member States.

Arguably, the free movement of goods remains the most significant of the four freedoms. Article 30 EC provides that 'quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states'. The operation of this article is subject to the provi-

22 J Temple Lang, 'The Duties of National Courts under Community Constitutional Law', February 23, 1996.

23 Completing the Internal Market, COM(85)310, (14 June, 1985).

24 Commission's seventh report (September 1992), COM(92) 383 final.

25 Article 100b TEU.

26 Commission report COM(92)2000 (11 February 1992), at p 6.

sions of Article 36, which outlines narrowly construed exceptions[27] permitting Member States to engage in specific restrictive practices. Ironically it has been the implied restrictions within Article 30 itself that have proved to be the most significant for parties seeking to establish an exception to a breach of Article 30. Quantitative restrictions are those measures which totally or partially restrain imports or goods in transit[28] and have been given an express form by Commission directive 70/50 EEC.[29] Judicial interpretation of this article has focused on the phrase 'between member states' by importing a consideration of discriminatory practices as between Member States. As such Article 30 EC will not apply if no distinction is made on the basis of nationality.[30] The fundamental legal principle of proportionality is applicable in determining the validity of a restriction enforced by a particular Member State[31] as are socio-cultural considerations in terms of the protection of the integrity of a nations' social fabric.[32] The prohibition of new, and the removal of existing, fiscal regimes has been one central objective of Community law since 1958.[33] The implications of such aspirations for established domestic regimes preceding Community law are self-evident.

The free movement of persons exists as a significant freedom and one strongly upheld by the ECJ. As the governing provision, Article 48 establishes the rights of citizens, in their capacity as workers or employees, to enjoy free movement within the external border subject to restrictions justified on the grounds of public policy, security or health.[34] *Bosman's Case*[35] reiterates the position taken by the court in upholding both the supremacy of Community law[36] and the primacy of the free movement of people[37] as to actual or potential employment. Despite the significance of this freedom as one essential to the formation of the internal market it is also one that is yet to be as-

27 Wyatt and Dashwood, note 2 above, at p 356.

28 2/73, *Geddo v Ente Nazionale Risi* [1973] ECR 865; [1974] 1 CMLR 13.

29 22 December 1969; Regarding the abolition of measures that have an effect equivalent to quantitative restriction on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty.

30 C-267/91 and C-268/91 *Keck & Mithouard* at paragraph 16.

31 72/83 *Campus Oil Ltd v Minister INPC.*

32 *Torfane Case* at paragraph 14-17.

33 Articles 12 and 13 EEC (1958).

34 Article 48(3) EC.

35 C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman.*

36 Ibid, at paragraph 81.

37 Ibid, at paragraph 90.

sured. As Wyatt and Dashwood note 'the task of justifying the maintenance, for the time being, of internal frontier controls on persons should not prove insuperable for Member States'.[38] The ongoing political differences between Ireland and the United Kingdom that necessitate restrictions on the free movement of people operate as a case in point, notwithstanding the implications of the *Schengen Agreement*.[39] On the whole, however, it must be conceded that the progress made in securing such a fundamental freedom has been substantial, albeit subject to significant reservations held by Member States.

The free movement of services is inextricably linked to the right of establishment, as provided for in Article 52 EC. Such a right of establishment essentially equates to the right to set up shop and sell a service, this being the most fundamental premise of the capitalist system. As an adjunct to this right, case law also reflects the fact that consumerism and commodification may be inferred as guiding principles of the internal market. This is apparent with respect to the right of the service recipient to have access to the service,[40] by virtue of Article 59 EC which concerns interstate restrictions as between Member States. Article 60 EC provides a broadly inclusive definition of services, indirect restrictions of which remain a significant obstacle to the internal market. However, as has been demonstrated in *Commission v Italy*,[41] the Court is not reluctant to enforce a strict interpretation of Articles 52 and 59 in striking out Member State practices that are inconsistent with the principles of free movement within the internal market.

If taken to its furthest conclusion, the free movement of capital will effectively displace individual national economies as distinct economic entities, a development greatly enhanced by the adoption of a common currency. The continuation of restrictions against direct foreign investment demonstrates the requirement for some degree of regulation in order to maintain cultural integrity with respect to the mass media, military requirements and similar areas of investment that remain strictly within Member State competencies. The establishment of a common European Bank represents a significant mile-

38 Wyatt and Dashwood, note 2 above, at p 363.

39 While purporting to regulate and facilitate the free flow of foreign nationals between member and signatory States, the *Schengen Agreement* remains subject to predominant political and often strategic considerations.

40 C-45/93 *Commission v Spain* [1994] ECR 1-911 at paragraph 10 cited in Bronitt, Burns and Kinley, note 1 above, at p 288-89.

41 C-3/88, *Commission v Italian Republic* [1989] ECR 4035; [1991] 2 CMLR 115.

stone in the creation of European Monetary Union (EMU). Indeed, the realisation of such an institution constitutes a significant success in the overall development of the internal market. In order to guarantee the success of the EMU, it must first be located within the cultural and political reality of the Union.

Cultural Diversity

The maintenance of cultural diversity is assured by Article 128(1) EC by virtue of which the Community must respect the national and regional diversity of the cultures of the Member States. It is both desirable and necessary to ensure the continuation of distinct cultural and ethnic societies within the grand scheme of the Union. While the Union itself is founded on principles of interdependence and convergence, it is an unavoidable truth that the fundamental tenets of the distinct cultures underlying the Union must persist and are unlikely to be relinquished. Whilst cultural diversity in itself is a necessary precondition of the Union it also represents a significant impediment to the internal market. Indeed:[42]

> Some of the major difficulties which currently beset the development of the Single Market . . . may be regarded as technical problems caused by diversity of national tradition which are likely to be difficult [to resolve] even with the full-hearted cooperation of all those involved. What is also clear is that there are vested interests at work, which in many cases want either to delay the process or at least to manipulate it for their own purposes.

Despite their advisory role both the Economic and Social Committee and the Committee of the Regions play an important role in maintaining a balance between individual national interest and absolute centralisation of legitimate authority. The Economic and Social Committee 'exerts a strong influence on the Community's decision making process because of its composition and its political and technical terms of reference'.[43] Essentially fulfilling the function of observer, the role of the Committee is likely to increase in importance as Community competence is extended. Having been described as the guardian of subsidiarity, the Committee of the Regions fulfils a similar role. It 'reflects the Member States' strong desire not only to respect regional and local identities and prerogatives but also to involve

42 A McGee and S Weatherhill, *The Evolution of the Single Market-Harmonisation or Liberalisation*, cited in P Craig and Grainne De Burca (eds), *EU Law; Text, Cases and Materials*, (2nd Oxford University Press, United Kingdom, 1998), at p 1133.

43 Borchardt, note 9 above, at p 30.

them in the development and implementation of EU policies'.[44] The fact remains however that its function is purely advisory and it has no power to produce mandatory decisions.[45] As such, the institutions of the Community retain determinative authority.

Subsidiarity

The exercise of Member State authority under the principle of subsidiarity is of notable import in the development of the internal market. Article 3(b) EC represents the formal adoption of the notion of subsidiarity as a fundamental principle of the Community[46] in providing that:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

It is submitted that the crucial consideration in this Article is what constitutes a sufficient scale or effect of a particular action, as to warrant Community action over that of individual Member States. It remains self evident, in the context of an interdependent polity of States, that certain issues supersede the competence of the individual nation state and as such warrant a collective response. Issues such as international health, human rights and environmental protection number among those demanding international consensus. Dehousse is unwilling to overstate the significance of the notion of subsidiarity, maintaining that 'even if the concept retains some political value, as a general guideline in favour of decentralisation . . . it's direct utility as a legal instrument is limited'.[47] Regardless of any apparent, or perceived lack of efficacy with respect to this concept, subsidiarity does remain one factor for consideration in determining the respective competence of the Community and Member States.

Analysis of the chronological progression of treaty and legislation law reflects the increasing importance of the role of the Parliament of the EU. Whilst the ambitious precedent of the ECJ has been somewhat

44 *Serving the European Union; A Citizen's Guide to the Institutions of the European Union*, (Luxembourg Office for Official Publications of the EC, 1996), at p 26.

45 Borchardt, note 9 above, at p 31.

46 Bronitt, Burns and Kinley, note 1 above, at p 122.

47 R Dehousse, 'Community Competencies: Are There Limits to Growth?, in *Europe After Maastricht: An ever closer Union*, 1994, at pp. 124-25.

curtailed, as was demonstrated in *Keck & Mithouard*,[48] the Parliament has increasingly assumed a central role in expanding the scope of the internal market. The establishment of the 'co-decision procedure' as the prevalent means of determining EU and Community policy, under the auspices of the TOA,[49] will greatly enhance the role of the Parliament, and in many respects will overcome the perceived democratic deficiency that currently detracts from the legitimacy of EU activity.

Notwithstanding the encouraging direction in which the evolution of EU institutions is currently embarked, the fact remains that Member States are still subject to the demands of domestic constituencies and as such will maintain a significant degree of control in areas sensitive to the national interest. This fact is reflected in the various protocols that have been insisted upon by particular Member States which at first glance appear to be inconsistent with the achievement of the four freedoms. Upon further inquiry however, it becomes apparent that certain exemptions from the requirements of Community law are in fact necessary for certain members to achieve the standard of economic strength required for full integration. For example, the exemption sought by Germany regarding restriction upon State aid may be seen to be necessary for the development of those geographical areas adversely affected by the process of re-integration between East and West Germany. Other exemptions reflect more strategic domestic motives such as the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and to Ireland. It is clear that 'a major part of the task for the Community institutions consist[s] of removing the justifications hitherto available to Member States under the [EC] Treaty for maintaining restrictive national provisions'.[50] It is submitted that this is to be achieved by making the national interests of Member States consistent with the imperatives of the internal market.

Social Policy

Social integration was not a priority for the architects of the European Community with economic necessity being the primary concern. As such the triumvirate of principal Communities did not provide for a social policy of any real significance. Social policy has,

48 C-267/91 and C-268/91 *Keck & Mithouard* at paragraph 14; See also *Dassonville* (Case 8/74).

49 Article 189(b).

50 Wyatt and Dashwood, note 2 above, at p 356.

to date, focused essentially on employment conditions, whereby free movement of the person essentially equates to free movement of the worker and dependants.[51] As a consequence of greater mobility between States it is arguable that such preconditions will become somewhat otiose as the cultural fabric binding the Member States assumes greater cohesion. The social consequences of blending populations whose citizenship once attached to specific and definitive national borders hold great significance in terms of the role of the State in international affairs.

The Community's declaration of intent regarding social policy is contained in Article 117 which states that 'Member States agree upon the need to promote working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained'. The difficulty arises in equating such intentions into concrete legal principles applicable to all persons recognised by Community law. Learned commentators advocate the application of a broader definition or interpretation of 'person'[52] so as to expand the ambit of the word beyond employee. The expansion of competency beyond the core economic concerns of the central pillar of the EU will undoubtedly result in greater consideration of social factors. It is apparent from the gradual evolution of the EU that economic interdependence neccessitates political integration and ultimately results in greater social convergence, which itself may be seen as a necessary extension of the internal market.

Certain 'social rights' ascribed to workers can be identified specifically, under Articles 119 and 117, and generally within the context of employment in EC law. Such social rights overlap with, while being distinguishable from 'fundamental rights' as embodied in the European Charter on Human Rights (ECHR). This represents a persisting legacy of the European Council, which will assume greater significance in the Treaty of Amsterdam. It has been noted that 'the legal order of the Union cannot be said to be synonymous with that of the Community, even if the objectives of the Union (Article B) partially overlap with those of the Community'.[53] This fact is highlighted by the inconsistencies between the Court of Human Rights and the ECJ arising from the fact that the ECHR fails to fall in a

51 Article 119 EC (Right to equal pay between genders); Article 117 EC (Declaration of intent regarding social policy).

52 Wyatt and Dashwood, note 2 above, at p 357.

53 D Curtin, 'The Constitutional Structure of the Union: A Europe of bits and pieces', (1993) 30 *Common Market Law Review* 17 at 22-26.

central conceptual pillar of competence. This shortfall is to be remedied by the TOA which clarifies Article F of the Treaty on European Union[54] by stating unequivocally that the Union is founded on principles of liberty, democracy, respect for human rights and the rule of law, principles that are theoretically common to all Member States.[55] This brings into consideration the legal principles that operate in tandem with fundamental and social rights to give the latter meaning and provide legitimacy for the legal and institutional regimes of the European Union as a whole. Of these legal principles equality as between all members of the Union, both at the State and individual level, remains of crucial significance. The issue of equality arises with respect to pay scales under Article 119 and working conditions, for example, in the context of the *Bosman Case*, Article 48(2) prohibiting prejudicial treatment on the basis of nationality.

One apparent shortfall of the legal and institutional regimes is the apparent complexity resulting from the plethora of principal and amending treaties.[56] Whilst this is a significant obstacle it is by no means insurmountable. Indeed the TOA will theoretically consolidate the legal foundations of the institutions of the Community. Measures to avoid and remove duplication at all levels are also necessary in order to ensure that excessive bureaucracy does not overbear the dynamic nature of the EU. The ECJ has affirmed the role and significance of the internal market in declaring that 'the articles of the EC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited'.[57] Such a broad statement must be qualified by the exemptions retained by Member States, either by way of express provisions contained in relevant Articles or protocols attached to the principal Treaties.

Conclusion

The primary objectives of the European Union and, by implication, the purpose of the legal and institutional regimes of the Community are embodied in Article B TEU. They essentially entail the creation

54 Article F TEU will become Article 6 once renumbered as provided by the TOA.

55 http://www.europa.eu.int/pol.

56 As a case in point, references to Articles 30, 36, 100 and 100a should be read as referring to Articles 28, 30, 94 and 95(1) respectively: Craig and De Burca, note 42 above at p 1106.

57 C-49/89, *Corsica Ferrias France v Direction generale des Douanes Francaises* [1991] 2 CMLR 227 at paragraph 8.

of an area without internal frontiers, the strengthening of economic and social cohesion, and the protection of the rights and interests of the nationals of its member States through the introduction of a citizenship of the Union. By establishing an indissoluble connection between principles of equality and justice, and the economic basis of the Union, it is contended that the foundation of Federal citizenship will be confirmed upon the premises of the four freedoms which themselves embody the economic, social and political ambitions of the Union. Principles of equality and justice must be seen to include all fundamental rights as contained in the ECHR.

The greatest obstacle yet to be overcome remains any instance of domestic national interest that is incompatible with the objectives of the Community. This problem may be resolved by making the national interest of individual member states commensurate with the objectives and ambitions of the Community and the Union as a whole. Arguably the future of the internal market lies in the relinquishment of the realist perspective hitherto held by the dominant Member States in favour of the Grotian tradition of rationalist thought which itself focuses on the role of international organisations. As an organisation rendered unique by the existence of legislative power, the Community represents a significant progression entailing the process of disétatisation,[58] ie, the breakdown of the Nation-State. It is not unreasonable to suggest that the seed of divisible sovereignty[59] will potentially germinate into the realisation of a globalised polity. The catalyst for such a process is in many respects the concept of the common market. It follows that European citizenship need not be inconsistent with patriotic sentiment attached to the Nation State. The two may be reconciled by developing the common heritage of free enterprise as reflected in the dynamics of the internal market and assured by the operation of the four freedoms.

58 M Waters, *Globalisation*, (Routledge, United Kingdom, 1995), at p 100-101.

59 D Obradovic, 'Community Law and the Doctrine of Divisible Sovereignty', (1993) *Legal Issues of European Integration* 1 at pp 6-11 cited in Bronitt, Burns and Kinley, note 1 above, at p 115.