THE BALANCING OF COMMUNITY AND NATIONAL INTERESTS BY THE EUROPEAN COURT

BY LESLIE ZINES*

Problems similar to those that have, for many years, occupied the courts of the United States, Canada and Australia in interpreting a federal charter now confront the judicial arm of the European Community. Professor Zines develops a comparison between the approach that has found favour in the European Court and the approach of the courts of those Federations, although he admits that such a comparison has innate limitations. From a study of the revelant cases Professor Zines concludes that the European Court, by adopting a functional approach, has strengthened community rather than state interests. He discusses in detail how the Court has achieved this result by relying on the broad economic and political objects which are recognised as underlying the Treaty, rather than by strict legal construction of its provisions.

The European Economic Community is not a federal state, nor is it merely an intergovernmental organization. It has been variously described as "supra-national", "a variant of federalism",[1] "functional federalism",[2] "an association of sovereign States with a federal potential",[3] and as having "characteristics of both federal governments and of international functional organizations".[4]

The four chief institutions of the Community are (i) the Council, which consists of a Minister from each of the Member States (Article 1 of the Merger Treaty), (ii) the Commission, the members of which are appointed "by common accord of the Governments of the Member States", but who are required to be "completely independent in the performance of their duties" (Articles 10 and 11 of the Merger Treaty), (iii) the Assembly, which consists of delegates designated by the Parliaments of the Member States (Article 138) and (iv) the Court of Justice, which consists of ten judges and three advocates-general[5] appointed by common agreement of the Governments of the Member States (Article 167).

---

* LL.B. (Syd.), LL.M. (Harv.); Professor of Law and Dean of the Law School, Australian National University.

1 G. Schwarzenberger, *English Law and the Common Market* (1963) 17.

2 Peter Hay, *Federalism and Supranational Organizations* (1966).

3 D. Lasok and J. W. Bridge, *Introduction to the Law and Institutions of the European Communities* (1973).

4 A. W. Green, *Political Integration by Jurisprudence* (1969).

5 The Advocate-General has no conterpart in the court practice of common law countries and comes from French Law. Before the judges come to their decision, he is required to present a judgment of his own, setting out the argu-

At present the powers of the Assembly, which has re-christened itself the European Parliament, are very limited and bear little similarity to the powers of a parliament as normally understood in British or Continental experience. Its functions are described in the Treaty as "advisory and supervisory" (Article 137). It is proposed that it be given increasing control of about 5% of the Community budget (Part Five, Title II); but it has no general legislative power.

The real legislative and executive power is in the hands of the Council and the Commission. The Council, on which the government of each Member State is represented, is of course the institution in which State interests most predominate. The Commission, on the other hand, is regarded as the focus and watchdog of Community interests. It is by use of these two institutions that the Treaty attempts to maintain some form of political balance between Community interests and State interests and therefore between centripetal and centrifugal forces.

The prime legislative body is the Council. It differs from other intergovernmental organizations in two major respects: it can often act by means of what is called a "qualified majority" (Article 148), and it can usually take measures only in pursuance of a proposal of the Commission, which it cannot amend unless the Council acts unanimously (Article 149). As a rule, therefore, the Council cannot act unless the Commission agrees, except when all the Member States represented in the Council are unanimous; even then, the Commission must take the initiative by making a proposal.

The policy behind these rules has been somewhat undermined in recent years. A constitutional crisis occurred in 1965 during which France boycotted Council meetings because of attempts, on the Commission's initiative, to increase the powers of the Commission and the Assembly at the expense of the Council. The upshot was "the Accords of Luxemburg" under which the Member States agreed to endeavour to reach unanimous decisions on important questions. France has further insisted (though the other five did not agree) that on such questions discussion should continue until unanimous agreement was obtained.[6] It was also agreed that before making any important proposal the Commission should consult with the Committee of Permanent Representatives which consists of the representatives of the Member States. The result is that State interests and influence have gained ground.[7]

---

ments and issues, proposing a solution of the case in the light of existing principles and doctrine. The Treaty requires him to act with "complete impartiality and independence" (Article 166). The Court is not bound by the Advocate-General's submissions.

[6] Ninth General Report of the Activities of the E.E.C. (1966), 3133.

[7] L. J. Brinkhorst, *"European Law as a Legal Reality"* in *European Integration* ed. M. Hodges (1972).

To a large extent however this apparent diluting of "supra-national" elements in the Community has been offset by the decisions of the European Court, which has acted as a centralizing force expanding the powers and competence of the Community institutions at the expense of those of the Member States.

It is proposed in this article to examine the decisions of the Court concerned with the demarcation or balancing of Community and State competence. The student of federalism is struck by the similarity of many of the problems, issues and arguments presented to the European Court to those that have been faced by courts in the United States, Canada and Australia in relation to the constitutions of those countries.

Nevertheless there are important differences. The form and nature of the powers given to the Community authorities and the nature of the jurisdiction of the European Court distinguishes the European Economic Community from the Federations mentioned and, therefore, affects the role and methods of the Court in dealing with constitutional questions.

Professor Otto Kahn Freund has said that

> We must resist the temptation of thinking of the High Court of Australia or the Supreme Court of the United States when contemplating the operation of the Court of Justice of the European Communities. It is something totally different.[8]

Most cases come before the European Court under Article 177. That Article gives the Court jurisdiction to give rulings concerning the interpretation of the Treaty or of Community measures or the validity of any Community measure. Any court of a Member State may refer such a question to the European Court. In the case of a court "against whose decisions there is no judicial remedy under national law", that court is required to bring the matter before the Court of Justice. The European Court has held that it cannot, in giving judgment under Article 177, apply Community law to the facts or pronounce on the validity of State law. It can only give abstract intepretations of the Treaty or Community law or pronounce upon the validity of Community law.[9] Nevertheless the Court has affirmed the supremacy of Community law[10] and has held a number of provisions of the Treaty and of Community legislation to be "directly applicable" and incorporated into national law without any need for State legislation.[11] Such directly applicable rules confer rights on citizens which the citizens can enforce in the national

---

[8] (1972) 4 U. of Tas. L.Rev. 1, 9.

[9] *Van Gend En Loos* v. *Nederlandse Administratie Der Belastingen* [1963] C.M.L.R. 105.

[10] *Walt Wilhelm* v. *Bundeskartellamt* [1969] C.M.L.R. 100.

[11] *Van Gend En Loos* case, *supra* n. 9; G. Bebr, "Directly Applicable Provisions of Community Law: The Development of a Community Concept", 19 I. & C.L.Q. 257.

courts. Ultimately however (in contrast to the position in the Federations) this incorporation of Community legislation and rules developed by the European Court into national law depends on the constitutional rules of the Member States. By and large the precepts of the European Court have been followed by the State courts. The role, functions and influence of the European Court in demarcating authority between central and State institutions more closely resemble therefore those of, say, the High Court of Australia than the International Court of Justice.

The Aims and Functions of the Community

The general scope of the European Economic Community Treaty can be gauged from some of the more important objects listed in Article 3. This Article provides for the following:

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

Many of these goals were to be achieved in stages during a transitional period of 12 years (Article 8). The transitional period ended on 1st July 1968.[12] However, not all these goals have been achieved, nor

[12] Special transitional provisions have been agreed on for the three new Members—See Act annexed to the Treaty of Accession, Article 32.

have all the powers of the Community in relation to them been exercised. To the outsider what has been achieved by the Six is none the less impressive. All customs barriers (both fiscal and protectionist) and quantitative restrictions between States have been dismantled; there is a common customs tariff in respect of trade with third countries, a common agricultural policy, rules to ensure free movement of workers, including portable pension rights and other social service benefits, a vigorous Community anti-trust policy administered by the Commission and common policy and common negotiation of commercial treaties with third countries.

Except in special circumstances bounties and subsidies that affect inter-State trade have been abolished, together with internal taxes discriminating against goods from other States. A uniform system of internal taxes—value added tax—has replaced previously varying sales, purchase excise and turn-over taxes.

On the other hand, little has been achieved in respect of transport policy, free movement of capital and the recognition of qualifications for the liberal professions. Frequent currency crises threaten the functioning of the Common Market in the absence of a monetary union.

The Nature of the Community Powers

Apart from provisions such as those associated with a bill of rights, it is broadly true to say that the theory behind federalism is that total legal competence is split between the central and state authorities. While each is limited in power, together they have all the power that the legislature of a unitary state would have. This idea in relation to Canada was expressed by Lord Atkin in *Attorney-General (Canada)* v. *Attorney-General (Ontario)*[13] when he said "in the totality of legislative powers, the Dominion and Provincial together, she [*i.e.* Canada] is fully equipped". Similarly, in the United States, while there are limitations on the power of the States to interfere with inter-State trade,[14] the federal legislature is under no such restrictions and can "step into the breach" to do what States cannot do. This is not true of Australia where section 92 binds both the Commonwealth and State Governments. There is in Australia, therefore, a gap in total legislative competence.[15]

In this respect the Treaty of The European Economic Community resembles the Australian Constitution.[16] There are some matters that were within the competence of Westminster before entry into the Community that cannot now be dealt with by the United Kingdom Parlia-

[13] [1937] A.C. 326, 354.
[14] *Cooley* v. *The Board of Wardens* (1851) 12 How. 299.
[15] *James* v. *The Commonwealth* (1936) 55 C.L.R. 1.
[16] *Cf.* Barwick C.J. in *Samuels* v. *Readers' Digest Association Pty Ltd* (1969) 120 C.L.R. 1, 14.

ment or the Community authorities either jointly or severally. Except in special circumstances (*e.g.* authorization under Article 108(3)) it is not possible to erect tariff barriers between States. Similarly, as a result of Articles 85 and 86 neither the Community nor the States can adopt a policy of encouraging cartels in relation to inter-State trade. It seems that the Treaty may prevent any State from establishing a fully fledged socialist system (Articles 37, 52-58, 90) and State power cannot be supplemented by the exercise of Community power to achieve this end.

However the more important respect in which the Community differs from the Federations is in the form of the powers granted to the central authorities. In the United States, Canada and Australia power is given to the legislatures to make laws "with respect to" or "for the regulation of" a number of subject matters that are fairly broadly described, for example trade and commerce, shipping, banking *etc.* The description of these powers does not usually contain any policy that must be pursued. The power with respect to an activity, such as commerce or shipping, enables the legislature to encourage, discourage, prohibit or monopolize the activity as it pleases.[17] It may even regulate, say, shipping or commerce for the purpose of patently pursuing ends that have little to do with shipping or commercial policy.[18]

The powers of the Community institutions however are usually given for the express purpose of achieving certain stated ends. For example, the Community is not simply empowered to take measures in relation to agriculture or trade in agricultural produce. Its powers are subject to the objectives stated in Article 39[19] and in this case even the choice of means is prescribed in Article 40; again the power in Article 51 to adopt measures in the field of social security is limited to such measures "as are necessary to provide freedom of movement for workers". The powers therefore are usually not to make laws and take measures *about subjects* but to make them *for objects.* In a very broad sense the

---

[17] *A.N.A.* v. *The Commonwealth* (1946) 71 C.L.R. 29; *The Bank Nationalization Case* (1948) 76 C.L.R. 1.

[18] *Huddart Parker* v *The Commonwealth* (1931) 44 C.L.R. 492; *Herald and Weekly Times Ltd* v. *The Commonwealth* (1966) 115 C.L.R. 418; *U.S.* v. *Darby* 312 U.S. 100 (1941).

[19] Article 39:

The objectives of the common agricultural policy shall be:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.

powers resemble in form more a grant of authority to make regulations in pursuance of a statute than a grant of legislative power under a constitution.

Entry into the European Economic Community therefore involves not merely a transfer of sovereignty but a commitment to certain policies. However, the lack of discretion and policy-making power in the Community authorities should not be exaggerated. They are not merely minor administrators of policy. Many of the objectives are very broad and in a practical sense might be contradictory. Various objects of the agricultural policy as set out in Article 39, for example, need balancing and compromise because they concern conflicting interests, such as the objective in paragraph (b) to increase the earnings of persons engaged in agriculture and that in paragraph (e) to ensure that supplies reach consumers at reasonable prices.

The European Court in relation to a case involving the European Coal and Steel Community has recognized the wide scope of discretion available to the Community in the following words—

> It is however to be understood that in practice it will be necessary to reconcile to a certain extent the various objectives of Article 3 for it is manifestly impossible to realise them all together and each one to the greatest extent, these objectives being general principles the realisation and harmonisation of which must be sought as far as possible.[20]

The General Approach of the Court

Despite the matters mentioned and other differences between the grant of legislative power to federal governments and the grant of power to Community authorities, the European Court has had to deal with a great many issues and arguments and has developed principles that are familiar to anyone who studies the constitutional decisions of the High Court of Australia and the Supreme Courts of the United States and Canada.

Some of these questions, issues and arguments include

(a) The doctrine of the reserve powers of the States;[21]

(b) When central legislation "covers the field" so as to exclude State law;[22]

---

[20] *Groupement Des Hauts-Fourneaux Et Acieries Belges* v. *High Authority*, reported in D. G. Valentine, *The Court of Justice of the European Communities* (1965) Vol. II, 511, 518. I have not followed the exact translation in Valentine. Cases before 1961 are not in the Common Market Law Reports but are all included and translated in the second volume of Valentine.

[21] *E.C. Commission* v. *France* [1970] C.M.L.R. 43.

[22] *Walt Wilhelm* v. *Bundeskartellamt* [1969] C.M.L.R. 100.

(c) The extent to which power may be delegated;[23]

(d) When a provision not directly within power may be regarded as incidental to the power or necessary or appropriate to achieve some purpose within power;[24]

(e) Whether any powers are to be implied from the nature of the Community;[25]

(f) The extent to which notions of civil liberty are relevant to the interpretation of Community power;[26]

(g) The problem of "legislative schemes" similar to that which arose in such cases as *Moran's* case[27]; and the *First Uniform Tax Case*[28] in Australia;[29]

(h) Whether provisions relating to the free movement of goods permit the individual to ignore any State rules that purport to prevent him so trading, or only a State law that has a protectionist purpose or which has the aim or effect of reducing the total volume of trade.[30]

There is general agreement among writers that the Court's decisions have resulted in a strengthening of Community power. Whether the decisions go beyond what was in the minds of the framers we do not know, because the *travaux preparatoires* have not been released. The Court therefore is forced into a position similar to that which courts in Australia and Canada impose on themselves of not looking at constitutional debates.

Whether this result of enlargement of Community power by the Court is applauded or condemned it is often ascribed to one of the methods of the Court which has been variously called "functional" or "teleological" or as one which "searches for the *ratio legis* of the Treaty".[31] What is suggested by these descriptions is that the Court construes the Treaty in the light of what the Court considers it was intended to achieve in the way of economic or political goals. This approach is contrasted with ordinary grammatical rules of construction.

---

[23] *Meroni* v. *The High Authority,* Valentine Vol. II, 481.

[24] *Internationale Handelsgesellschaft* case [1972] C.M.L.R. 255. *Federation Charbonniere De Belgique* v. *High Authority,* Valentine Vol. II, 110.

[25] *Re European Road Transport Agreement*: *E.C. Commission* v. *E.C. Council* [1971] C.M.L.R. 335.

[26] *Stauder* v. *City of Ulm* [1970] C.M.L.R. 112.

[27] (1940) 63 C.L.R. 338.

[28] (1942) 65 C.L.R. 373.

[29] *Re Aids to the Textile Industry*: *France* v. *Commission of the European Communities* [1970] C.M.L.R. 351.

[30] *Syndicat National Des Importateurs Francais En Products Laitiers Et Avicoles* [1968] C.M.L.R. 81.

[31] S. A. Scheingold, *The Rule of Law in European Integration* (1965); P. Hay, *Federalism and Supranational Organizations* (1966) 185-191; R. M. Chevallier, "Methods and Reasoning of the European Court in its Interpretation of Com-

It is not true of course that this method of interpretation must lead to greater centralization of power. Whether it does or not depends on what purposes one divines from the instrument. If they are expressed as they are in the E.E.C. Treaty, they themselves need interpreting. There have been periods in the constitutional history of Australia when the judges have seen, as a paramount purpose in the Constitution, the preservation of strong States with exclusive power over their domestic affairs. This was known as the doctrine of reserved powers. Where a federal power, on a broad interpretation, might have impinged on this field, it was treated as an exception to be construed strictly.[32] Those judges who wished to enhance federal power achieved their aim by emphasising ordinary rules of construction and condemning "political" implications.[33]

The European Court has however used this method of interpreting the Treaty in relation to its actual or supposed objects to bring about the expansion of central power. Where the Treaty expressly or by implication envisages State action to preserve some State social interest which may impinge on matters under Community control, the Court has regarded those State interests as exceptions that must be construed strictly.[34] It has, however, been prepared to adopt a more literalist approach where this serves the upholding of Community competence.

The Reserved Powers of the States—Literalist Approach

Problems of reconciling State power and interests with other interests have arisen in the Federations in relation to a number of issues including characterization and the freedom of inter-State trade. In Australia and America the doctrine of reserved powers no longer holds sway with respect to characterization. In Canada it is still a problem because the Provincial powers are (unlike the other two Federations and the E.E.C.) granted expressly by the Constitution and are described as exclusive (section 92 of the British North America Act). The Canadian Federal Parliament is also granted express and exclusive powers and the residue (section 91). It has therefore been necessary for the Privy Council and

munity Law" (1964) 2 C.M.L. Rev. 21, 31. Some writers would accept "teleological" as a description of the Court's approach, but not "functional" on the ground that the latter term implies too great a regard for political and economic objects and too little regard for the text. See A. W. Green, *Political Integration by Jurisprudence* (1969) 430, 463-467, 494. This is primarily a matter of degree. In any case, the decisions dealt with later in this article and delivered since Green's book was published, indicate a trend towards greater "functionalism" in Green's sense of that word.

[32] *Union Label Case* (1908) 6 C.L.R. 469; *R.* v. *Barger* (1908) 6 C.L.R. 41.
[33] *The Engineers' Case* (1920) 28 C.L.R. 129.
[34] *Re Import Duties on Mutton*: *Germany* v. *E.C. Commission* [1967] C.M.L.R. 22; *Re Export Tax on Arts Treasures*: *E.C. Commission* v. *Italy* [1969] C.M.L.R. 1.

the Canadian Supreme Court to reconcile, for example, exclusive federal power over trade and commerce with exclusive provincial power over property and civil rights.[35]

In the United States and Australia it has been necessary to determine the extent to which State laws relating to such matters as health, safety, commercial regulations and traffic rules (what is known in the United States as the "police power") may apply to trade between the States in the light of express (in Australia) or implied (in the United States) restrictions on State power to interfere with the freedom of inter-State trade.

The E.E.C. Treaty recognizes that laws affecting inter-State trade may relate to other matters. Article 36 lists many matters that either come within the police power doctrine in America or an area in which State laws affecting inter-State trade have been upheld in Australia. That Article provides—

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Similarly Article 48, for example, makes the free movement of workers "subject to limitations justified on grounds of public policy, public security or public health". However outside these basic police power interests, the States in the E.E.C. retain control over matters that in federal countries are under the control of central authorities, such as foreign affairs, defence, monetary policy and banking.

Wurttembergische Milchverwertung-Sudmilch v. *Ugliola*[36] involved a German statute which guaranteed employment and employment rights, such as seniority, during a period of compulsory military service. An Italian working in Germany interrupted his work for 14 months to perform his compulsory military service in Italy and then resumed his job. He claimed that he should have received a larger bonus than he did because his employer did not take into account his period of service with the Italian forces. Although German law only provided for taking into account service in the German Army the worker claimed to be entitled to benefit under E.E.C. Regulations. Article 48(2) of the Treaty provides for "the abolition of any discrimination based on

---

[35] B. Laskin, *Canadian Constitutional Law* (3rd ed. 1966) ch. vii.
[36] [1970] C.M.L.R. 194.

nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". Community Regulations in pursuance of this Article provided to similar effect. The German court referred the question of the interpretation of the Community legislation to the European Court under Article 177.

The German Government argued that the law was one relating to defence, not employment, and that the former subject remained within the reserved powers of the States. The European Court, however, held that the Italian worker was, under Community legislation, entitled to have his period of military service taken into account to the extent that it was taken into account for the benefit of national workers.

Certainly the Court did not adopt an approach that could be described as purposive, teleological or functional. Nowhere is there any indication that any conflicting interests were involved or that they were relevant to the question of interpretation. Indeed the Court's reasoning resembles that of the Privy Council at its worst in dealing with the Canadian Constitution or the House of Lords at its worst in dealing with the powers of the Northern Ireland Parliament, where slogans such as "pith and substance" and words such as "direct" and "indirect" attempt to disguise a lack of discussion and reasoning about the problem.

The Court said that the German statute "belongs to the field of conditions of employment and work. Such a statute cannot, therefore, because of its indirect connection with national defence, be excluded from the scope of application" of Community Regulations with regard to conditions of employment and work.[37]

There is little doubt that in any of the three Federations referred to such a law would be regarded as directly affecting defence and properly incidental to it.

Even on a balance of interests view the decision could be supported having regard to the mutual defence commitment of Western Europe. The Court did not, however, take cognizance of these factors. In any case, it is a possible interpretation of Article 48(2) that it requires the abolition of discrimination based on nationality between workers of Member States, including workers that are not nationals of any Member State. In other words "workers of the Member States" may refer to domicile and place of work rather than to nationality. This is an open question. If so, however, it raises the issue whether Germany, in order to do justice to its own soldiers, should be required to make life easier for those who serve in, say, the Russian or Spanish Armies.

Whatever the true interpretation, however, the reasoning of the Court displays no consciousness, or, at any rate, no articulation of the issues involved.

---

[37] *Id.*, 201; *cf. Gallagher* v. *Lynn* [1937] A.C. 863.

The doctrine of reserved powers has also been raised by France, though in a case where the argument was perhaps less defensible.[38] France had for many years granted a lower rediscount rate for export credits than for other credits. The Commission considered that this was an "aid" within the meaning of Article 92. Article 92(1) provides—

> Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

Under Commission pressure France agreed to abolish this differential. As a result of the social upheavals of 1968 France was plunged into a monetary crisis. France informed the Commission that she expected it to approve a further reduction of the rediscount rates for exports. This was done by the Commission under Article 108(3) of the Treaty which empowers the Commission to "authorize the State which is in difficulties [as regards its balance of payments] to take protective measures, the conditions and details of which the Commission shall determine." However, France went beyond the conditions laid down by the Commission and the Commission brought an action against her under Article 169 of the Treaty[39] and the comparable provision in the Treaty relating to the European Coal and Steel Community.

Among other things, France argued that the general field of monetary policy remained within the exclusive competence of the States and the adjustment of discount rates belonged to that field. The Treaty is not silent on monetary policy but the provisions make it clear that it remains substantially within State power. Article 104 places a duty on each State to ensure the equilibrium of its balance of payments and the following Articles merely refer to co-operation and co-ordination and require States to treat their rates of exchange etc. as matters of "common concern".

While there was ground for saying that the manipulation of a bank rate should be characterized as "monetary policy" (and therefore outside direct Community control) a discriminatory rate in favour of exports could be characterized as an "aid" to exports and therefore within Article 92.

---

[38] *E.C. Commission* v. *France*: *Re Export Credits* [1970] C.M.L.R. 43.

[39] Article 169.

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

The Court held that the differential rate was inconsistent with Article 92. Any federal lawyer would not be surprised at this result. Again, however, the Court did not concern itself with the balance of conflicting interests and relied on textual analysis. It said that "The exercise of the reserved powers may not, therefore, permit the unilateral taking of measures which the Treaty forbids."[40] This, of course, begged the question.

The Court further relied on the existence of provisions such as Article 108(3) which confer on Community institutions powers of authorization and intervention, stating that such provisions would be pointless if it were possible for Member States

> under the pretence that their action fell solely within the field of monetary policy to derogate unilaterally and beyond the control of those institutions from the obligations which fall upon them under the provisions of the Treaty.[41]

This does not do justice to the point argued. Even if France's argument were accepted there would still be plenty of scope for Articles such as 108(3). France was not suggesting that she could unilaterally take any measures at all, despite the Treaty, that might alleviate her monetary problems. France was not arguing that inter-State customs duties or quantitative restrictions amounted to "monetary policy" within the reserved powers. Yet these measures could be (and have been) authorized by the Commission under Article 108. France's argument was that bank rates had an intimate connection with monetary policy.

The decision is no doubt supportable on a balance of interests basis. This was not a case of sacrificing State interests on the altar of free trade or other Community interests. The significance of provisions such as Article 108(3) is that the Treaty itself envisages a conflict of policies and provides means of reconciliation under Community control.

In dealing with these State interests there is little in the two cases discussed that can be described as purposive, functional or teleological; nor has the Court expressly seen the issues as involving an adjustment of State and Community concerns. In two other fields, however, it has consciously sought a reconciliation of Community and State policies. It has done this in relation to the notion of "covering the field" and the conflict between the aims of industrial property laws and Community rules of competition.

Balancing Community Objects and State Interests: Purposive Approach

(a) *Concurrent Powers*

Apart from direct provisions of the Treaty the main means of ousting

---

[40] *E.C. Commission* v. *France*: *Re Export Credits, supra* n. 38, 65.
[41] *Ibid.*

State competence is for the Community authorities to legislate in the area. The European Court has held that a State may not modify or abrogate any rights or privileges created by Community law, nor of course may it make lawful what the Community has made unlawful.[42]

The European Court is anxious to ensure that there should be uniform application of Community law.[43] Sometimes procedural and implementing measures have to be left to State legislation even where the Community measure is in the form of a Regulation rather than a Directive to the State. But the Court will try to keep this area down to a minimum. Even where the common customs tariff provided for very broad classifications causing great difficulty to national customs administrations, it was held (as would certainly be the case in the Federations) that the State legislature could not lay down binding rules of interpretation to supplement the Community Rules. This meant that the European Court was bombarded with rather trivial questions such as whether turkey tails should be regarded as "poultry parts" or "edible offal".[44]

The problem has arisen, however, whether the Community measures may oust State laws in the same area on the ground of "covering the field" or, to use the American expression, "pre-emption". For example, Article 75 empowers the Council to lay down "common rules applicable to international transport . . .". If Council Regulations provided for a detailed code of safety features for trucks in inter-State trade, could a State provide for additional safety features? Questions such as this have arisen in the areas of social security and anti-trust.

(i) *Social Security*

Article 51 of the Treaty provides:

> The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:
>
> (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
>
> (b) payment of benefits to persons resident in the territories of Member States.

---

[42] *Norddeutsches Vieh-und-Fleischkontor* v. *Hauptzollamt Hamberg* [1971] C.M.L.R. 281.

[43] *Costa* v. *E.N.E.L.* [1964] C.M.L.R. 425; *Hauptzollamt* v. *Waren-Import Gesellschaft Krohn and Co.* [1970] C.M.L.R. 466; *Deutsche Bakels* v. *Oberfinanzdirektion Munchen* [1971] C.M.L.R. 188.

[44] *Hauptzollamt* v. *Firma Paul G. Bollmann* [1970] C.M.L.R. 141.

The Court has used the object of this provision both to extend and to limit Community power. In order to ensure the utmost freedom of movement the word "workers" when first appearing has not been limited to "migrant workers" or to movement inter-State that is connected with employment.[45] It has been held, for example, that Community Regulations extend to a person who is not at present working but has left his employment and is capable of taking further employment[46] and to a German worker killed in France while on a holiday.[47] Although the Court has not specifically dealt with the validity of the Community Regulations made under Article 51 it has constantly, in interpreting the Regulations, referred to the object and spirit of that Article.

Community Regulations made under Article 51 giving social security institutions rights of subrogation as against a wrongdoer despite State laws to the contrary, have been treated as valid. The Court has referred to the subrogation provisions as "a logical and fair counterpart of the extension of the liabilities of these institutions over the entire territory of the Community as a result of the provisions of Regulation 3 [of the Community]".[48] This argument resembles somewhat the upholding of a provision by a Federal court on the ground that it is "incidental" to the subject matter of a power.

The very broad interpretation given to the social security Regulations (previously Regulation 3, now Regulation 1408 of 1971) is well illustrated by *Caisse de Maladie Entr'aide Medicale* v. *Compagnie Belge d'Assurances Generales sur la Vie*.[49] In that case the subrogation provisions (Article 52 of Regulation 3) were held applicable to give a right of subrogation, contrary to national law, where the worker lived and worked in Luxemburg, the car driver whose negligence resulted in his death lived and worked in Luxemburg, the social security institution was a Luxemburg organization and that institution brought action against the driver in a Luxemburg court. The only "common market" aspect was that the injury occurred while the deceased was a passenger travelling from Luxemburg to Belgium to "continue a night cheerfully begun in the Grand Duchy".

The European Court has emphasised however that as Article 51 of the Treaty is designed to further the free movement of workers, Community legislation in pursuance of that provision should not be interpreted so as to prevent greater benefits being given by State

[45] *Hessische Knappschaft* v. *Singer* [1966] C.M.L.R. 82.
[46] *Unger* v. *Bestuur Der Bedrijfsvereniging Voor Detailhandel En Ambachten* [1964] C.M.L.R. 319.
[47] *Singer* case, *supra* n. 43.
[48] *De Sociale Voorzorg* v. *Bertholet* [1966] C.M.L.R. 191, 204.
[49] [1970] C.M.L.R. 243.

legislation. It has, therefore, refused to hold that Community legislation covers the field to this extent.[50]

(ii) *Anti-Trust*

The problem of dual laws in relation to anti-trust legislation is more difficult. Article 85(1) prohibits "as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertaking and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market." Various types of illicit agreements are mentioned such as resale price maintenance and market sharing. Article 85(3) exempts an agreement, decision or practice which "contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit" provided that certain other conditions are satisfied. Regulation 17 of 1962 gives the Commission exclusive jurisdiction to determine exemptions under Article 85(3), subject of course to control by the European Court.

Can State restrictive practices legislation live alongside Community rules? The European Court has answered in the affirmative. In *Wilhelm* v. *Bundeskartellamt*[51] the Court proclaimed the rule of the primacy of Community law over State law and said that no State law can operate in a manner that is incompatible with Community decisions. It held nevertheless that the same agreement might be the object of parallel proceedings before Community authorities under Article 85 and before authorities of the Member States under State legislation.

In urging this solution the Advocate-General relied on two grounds: (a) that there may be cases which seem from the Community's point of view of legitimate but little interest while its effects from the State point of view might be much greater;[52] and (b) that stricter State laws could not generally be said to thwart the objectives of the Treaty.

As far as (b) is concerned the view expressed is far from obvious. Concentrations and cartels in the broader community may not present the same market power issue that arises where there is merely a national market. Also, it may be desired to encourage arrangements that would assist competition with American firms and to obtain the advantages of large scale production and research that it has been suggested United States enterprises have over European enterprises. The Commission has in fact been given authority to grant group

---

[50] *Caisse Regional De Securite Sociale Du Nord* v. *Torrekens* [1969] C.M.L.R. 377; *Caisse D'Assurance Vieillesse Des Travailleurs Salaries De Paris* v. *Duffy* [1971] C.M.L.R. 391.

[51] *Walt Wilhelm* v. *Bundeskartellamt* [1969] C.M.L.R. 100.

[52] *Cf. Victoria* v. *The Commonwealth* (1937) 58 C.L.R. 618.

exemptions under Article 85(3) in respect of joint purchasing, common research, rationalizing and specialization agreements (Regulation 2821 of 1971).

It is not absolutely clear from the *Wilhelm* case whether a Member State can find an agreement illegal or invalid even though the Commission has exempted it under Article 85(3). Section 10 of the European Communities Act 1972 of the United Kingdom seems to leave this question to the Restrictive Trade Practices Court.

The European Court is probably wise to treat the covering the field doctrine cautiously. In the case of restrictive trade agreements there is the further point that the Council has expressed power (not yet exercised) under Article 87(2)(e) "to determine the relationship" between national laws and Community rules.

(b) *Competition Law* v. *Industrial Property Law*

Whether one agrees or disagrees with these decisions the Court has in the above areas looked at the objects of the Community's power and in doing so upheld an area of State competence. An even more deliberate attempt to balance the interests of the Community with matters of national concern has occurred in the area of competition law and State laws relating to industrial property, but in a manner which has probably increased Community competence.

Industrial property rights are not referred to in the chapter relating to competition rules. Their only mention in the Treaty is in Article 36 which is in a chapter concerned with quantitative restrictions. The Court has refused to adopt the position that Articles 85 and 86 relating to cartels and monopolies did not affect the operation of State laws relating to industrial property rights.[53]

In *Consten and Grundig* v. *E.E.C. Commission*[54] a German company, Grundig, entered into an exclusive distributorship contract with a French company, Consten. Consten agreed not to re-export and Grundig not to sell within France. Under a supplementary agreement Grundig assigned to Consten its trademark for registration in France. The European Court held that the supplementary agreement was invalid to the extent of the restrictive clauses. The Court upheld an order of the Commission not to enforce the trademark for the purpose of preventing parallel imports into France. This was a clear over-riding of national rules relating to industrial property.

The Court has expressed concern that the object of the prohibition in Article 85(1) should not be defeated by the use of a trademark

[53] For the latter position reliance is sometimes placed on Article 222 which provides that "This Treaty shall in no way prejudice the system existing in Member States in respect of property".

[54] [1966] C.M.L.R. 418.

with the same aim as that contained in the unlawful agreement. The Court has therefore endeavoured to prevent a division of the Community into national markets taking place by an assignment of, say, a trademark to different firms in each State of the Community, each with a right to prevent imports of the goods of the other firms.[55] The result is that the right of an owner of industrial property to prevent imports from other States will be over-ridden by Community law if the right is "the object, the means, or the consequence" of an agreement prohibited by Article 85.[56]

On the other hand, the Court emphasised that the mere existence and enforcement of an industrial property right was not a violation of Article 85 or Article 86 ("abuse of a dominant position"). It could only fall under Article 85 if it were the subject of a prohibited agreement, decision or concerted practice. In *Parke, Davis & Co.* v. *Probel,*[57] the Court seemed to consider that a Dutch patent licensee was not prevented by Article 85 from obtaining an injunction preventing imports from Italy of pharmaceutical products that were not patentable in Italy. As the Advocate-General pointed out, "too great a leaning toward the freedom of competition here could become a threat to technical progress."[58] The inventor could be faced with a flood of imports from Member States where the invention was not patented or patentable. There would be little chance of obtaining fair remuneration for the research and development that went in to the invention.

Extension of the Functional Approach

In the decisions referred to above in the fields of social services, antitrust and industrial property, the Court might broadly be said to have adopted (in contrast with the "reserved power" cases) a teleological approach which had regard to the particular aims of the provisions concerned and to matters of State concern.

In a number of recent decisions, the Court has extended its functional approach by placing increasingly greater emphasis on the general aims of the Treaty as a means of extending central power in the Community and showing less concern with detailed provisions which might otherwise be thought to limit that authority. Its method seems somewhat similar to the manner of reasoning and abstraction displayed in cases relating to the doctrine of *cy pres* in charitable trusts in its more extreme manifestations. Where the Treaty lays down a means of achieving an end the tendency is to regard only the end as essential and then to reason backwards and argue as Marshall C.J. did in *McCulloch*

[55] *Sirena s.r.l.* v. *Eda s.r.l.* [1971] C.M.L.R. 260.
[56] *Id.*, 274.
[57] [1968] C.M.L.R. 47.
[58] *Id.*, 53.

v. *Maryland*,[59] that if the end is legitimate all appropriate means to that end are constitutional.

The process of arriving at this approach has been a somewhat gradual one. In its very first case for example (relating to the European Coal and Steel Community) the Court rejected an argument that it should hold that the High Authority had a particular power because it was desirable in the light of the goals of the Treaty that the Authority should have it. In language which today would be regarded as uncharacteristic, the Court said

> It is not for the Court to express its views regarding the suitability of the system laid down by the Treaty nor to suggest a revision of the Treaty, but the Court is bound according to Article 31 to ensure the observance of law in the interpretation and application of the Treaty as it stands.[60]

That, however, was a long time ago. The modern tendency is illustrated by recent cases dealing with the freedom of inter-State trade and the external affairs powers.

(a) *Freedom of Inter-State Trade*

Articles 12-17 provide for the elimination of the customs duties or "any charges having equivalent effect" on imports or exports between the States. Articles 30-37 provide similarly for the elimination of quantitative restrictions on inter-State trade. Article 95 prevents a State from imposing "directly or indirectly, on products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products". The second paragraph of that Article further prohibits the States from imposing taxation "of such a nature as to afford protection to other products".

The Court has consistently taken the view that any tax on imports or exports in inter-State trade is inconsistent with the provisions relating to the elimination of customs duties, whatever the purpose of the tax unless it is also applied to similar national products. The fact that the duty does not have a protectionist or even a fiscal purpose is irrelevant if it could add to the price of the imported product even minutely.[61]

It has sometimes been argued that the duty concerned was a payment for services, but in no case has this argument been upheld.[62] Duties held inconsistent with the Treaty include an export tax on art treasures,[63]

---

[59] (1819) 4 Wheat. 316; 4 L.Ed. 579.

[60] *France* v. *The High Authority*, Valentine Vol. II, 18, 33 (exact translation not followed).

[61] *Re Import Duties on Gingerbread*: *E.C. Commission* v. *Luxemburg and Belgium* [1963] C.M.L.R. 199.

[62] See e.g. *Import Duties on Mutton*: *Germany* v. *E.C. Commission* [1967] C.M.L.R. 22.

[63] *Re Export Tax on Art Treasures*: *E.C. Commission* v. *Italy* [1969] C.M.L.R. 1.

a levy on the import of diamonds where there were no competing domestic products and the levy was to go into a fund for diamond workers,[64] and a small charge to finance statistical information.[65]

In relation to quantitative restrictions and "all measures having equivalent effect" there has been some disagreement as to whether the measures referred to are those which have the purpose or effect of reducing the volume of trade between the States, or all measures which prevent the individual from trading (subject to those measures permitted by Article 36). This debate is somewhat reminiscent of the dispute in the High Court in the 1930's regarding the correct interpretation of section 92 of the Commonwealth Constitution. Evatt J. was the principal proponent of the view that section 92 did not strike at a State law that did not have as its aim or substantial effect the reduction in volume of inter-State trade.[66] Sir Owen Dixon on the other hand, regarded section 92 as guaranteeing the right of the individual to trade inter-State (subject to laws "regulating" that trade) whatever the purpose or effect of the law that purported to prevent him and whether it was likely to increase or decrease the total volume of inter-State trade.[67]

The French *Conseil d'Etat* has held that the restriction of importation of a particular class of goods from another Member State to a defined class of persons did not amount to a quantitative restriction or a measure of equivalent effect so long as the provision did not have as its object or effect a reduction of the quantity of those goods imported from Member States.[68]

An allied problem was whether a State could insist on an import licence in respect of inter-State trade if the licence was granted automatically and was required for purely statistical purposes. The *Cour de Cassation* of France thought the answer was "yes" and, indeed, considered that the issue was so clear that it refused to refer it to the European Court as it was required to do under Article 177.[69] The European Court, however, has stated that it regards even an automatic licensing system as equivalent to a quantitative restriction in respect of

---

[64] *Social Fonds Voor De Diamantarbeiders* v. *Brachfeld and Sons* [1969] C.M.L.R. 335.

[65] *Re Statistical Levy: E.C. Commission* v. *Italy* [1971] C.M.L.R. 611.

[66] *R.* v. *Vizzard* (1933) 50 C.L.R. 30.

[67] *Hughes and Vale Pty Ltd* v. *N.S.W.* (1953) 87 C.L.R. 49.

[68] [1968] C.M.L.R. 81. The Community authorities had taken a different view. While the above case related to tinned milk, Article 18 of Regulation 11, with respect to cereals, defined a measure of equivalent effect as including "any restriction on the grant of import or export certificates to a specified category of beneficiary".

[69] *State* v. *Cornet* [1967] C.M.L.R. 351. The *Cour d'Appel de Lyon* had come to the same conclusion on this point—[1965] C.M.L.R. 105.

inter-State trade.[70] This would hardly seem consistent with the normal meaning of "quantitative restrictions" but is consistent with the approach of regarding all hindrances to an individual's right to trade as contrary to the general aims of the Treaty.

This individual right approach was adopted in relation to Article 85 which invalidates certain agreements concerned with restrictive trade practices "which may affect trade between Member States". It was argued that before a restrictive agreement could be invalidated under Article 85 it was necessary for the Commission to show that inter-State trade in the products concerned would have been increased without the agreement. The Court, however, saw it as the general aim of the Treaty to establish a common single market between the States, "so the fact that an agreement favours an increase, even a large one, in the volume of trade between Member States is not sufficient to exclude the ability of the agreement to 'affect' the trade in the above mentioned direction".[71] It seems likely that the Court will adopt a similar view in construing quantitative restriction provisions and will not follow the French cases. In other words, the Dixon rather than the Evatt approach is, in this respect, likely to prevail.

It was noticed above, however, that in the *International Fruit* case the Court gave the phrase "quantitative restrictions . . . and . . . measures having equivalent effect" a meaning that it could in normal language hardly bear; and that it did so by looking at the supposed general aim of the Treaty, namely the right of individuals to trade freely without hindrance. The Court's emphasis on the freedom of inter-State trade has led it to ignore the detailed language of the Treaty in other respects as well.

The only restrictions the Treaty places on internal taxes on goods are contained in Article 95. They are (i) that there should be no direct or indirect discrimination against goods from other States and (ii) that such taxes on products of Member States should not afford indirect protection to other products. An internal tax on goods from another State could not be contrary to Article 95 if there were no similar domestic products and the tax did not provide any indirect protection to any other products.

In *Molkerei-Zentrale* v. *Hauptzollamt*[72] the Court took the line that, in effect, inter-State commerce must pay its way and should not be in a privileged position in regard to taxation. However, it went on to say that the States

---

[70] *International Fruit Co. Case Recueil,* XVII (1971) 1107. This case was not reported in the Common Market Law Reports at the time of writing.

[71] *Consten (Ets.) S.A. and Grundig Verkaufs—G.M.B.H.* v. *E.C. Commission* [1966] C.M.L.R. 418, 472.

[72] [1968] C.M.L.R. 187.

> are not entitled to charge products, which because of the absence of comparable domestic products, are not subject to the restrictions of Article 95, with taxation at such a level as to restrict the free circulation of such products within the Community market area.[73]

But if the tax does not come within Article 95 it is difficult to see on what provision of the Treaty this suggested restriction on State taxing power is based. This is, therefore, not a case of interpreting a provision "teleologically" or in the light of the objects of the Treaty; rather the general object or "spirit" of the Treaty is regarded as in itself imposing restrictions.

In *Deutsche-Grammophon* v. *Metro*[74] the plaintiff sought an injunction to prohibit the sale in Germany of Polydor records by Metro who had obtained from France records originating from a subsidiary of Deutsche-Grammophon. Metro could not get them in Germany because it refused to enter into a resale price maintenance agreement. The application was based on a law passed in pursuance of a 1961 convention which provided among other things for the creation of a right in a record manufacturer "similar to copyright". In the E.E.C. area only Germany and Italy recognized such a right which included an exclusive right to reproduce and distribute the recording.

The matter was referred to the European Court by the German court for a preliminary ruling under Article 177. In view of the fact that the French company was a subsidiary of Deutsche-Grammophon it was doubtful whether Article 85 applied and also it seemed that Deutsche-Grammophon could not be said to be in a "dominant position" within the meaning of Article 86. It seemed, therefore, that the rules referred to above which had been worked out to harmonize industrial property law and competition law did not apply in this case. The Court said, however, that it was necessary to look at other provisions of the Treaty "in particular those relating to the free movement of goods".

> For this purpose reference must be made to the principles for the realization of a uniform market among the Member States which are laid down in the "Free Movement of Goods . . . and in Article 3(f) of the Treaty which provides for the establishment of a system to protect competition within the Common Market against distortions".[75]

Accordingly, it was held that it would conflict with the provisions for the Common Market if a manufacturer of recordings exercised the exclusive right granted to him by the legislation of a State to market the

---

[73] *Id.*, 224. The Court added that when the rate of tax was determined in the framework of a general national tax system there was a presumption that such restrictions on the free circulation of goods do not exist.

[74] [1971] C.M.L.R. 631.

[75] *Id.*, 656-7.

articles in order to prohibit the importation into that State of products that had been sold by him, or with his consent, in another State.

Nowhere in the judgment is there a mention of any particular provisions in respect of which the exercise of the right might be in breach. The title referred to—The Free Movement of Goods—contains 37 Articles and deals with everything from customs duties to State monopolies. This sweeping reference and the reliance on Article 3 (the general purposes clause) indicate less concern with detailed provisions and objects and more with the general goals of the Community as the Court sees them.

The case can possibly be resolved in accordance with the detailed provisions, although there is some little doubt on the matter.

The only part of Title I that could be relevant is Chapter 2 which requires the prohibition of quantitative restrictions on imports from, and exports to, Member States. No doubt quotas and embargoes were primarily in mind when the provisions were drafted (Articles 30-34). Articles 85 and 86 are the only provisions of the Treaty that directly forbid private individuals from performing acts that would interfere with the Common Market.

This case should perhaps be resolved by arguing that the German statute, in granting the right to prevent imports, was in the circumstances authorizing an individual to impose restrictions which (subject to anything in the Treaty) the State itself could not impose. What the State cannot do, it cannot authorize others to do. This view is reinforced by the context of Article 36 which is placed within Chapter 2 dealing with quantitative restrictions. Article 36 preserves, *inter alia,* industrial and commercial property rights provided they do not "constitute a means for arbitrary discrimination or disguised restriction on trade between Member States".

The result of *Deutsche-Grammophon* is that the rules developed by the Court to harmonize industrial property rules with restrictive trade agreements, etc., will now also operate in the case of a unilateral exercise of industrial property rights.

Whether or not the analysis given above is correct or convincing, it was not undertaken by the Court which preferred to rely on broad objects.

One interesting argument that was referred to by the State Court and argued before the European Court, was that the Treaty may prevent a court from enforcing private rights that are inconsistent with the objects of the Treaty. As mentioned above, the Treaty, apart from Articles 85 and 86, does not directly forbid any action by private individuals. Article 5(2) however provides that Member States "shall

abstain from any measure which could jeopardize the attainment of the objectives of the Treaty". The German court considered that this provision was binding on courts.[76]

Similar reasoning was used by the American Supreme Court in *Shelley* v. *Kramer*[77] where it was held to be contrary to the Fourteenth Amendment for a State Court to enforce a restrictive covenant on land preventing a transfer to non-caucasians. The Fourteenth Amendment prohibits any *State* from denying to persons the equal protection of the laws. It had previously been held that that provision did not prevent individuals in their private affairs from discriminating on grounds of race. It was held in *Shelley* v. *Kramer* however that enforcement by the State court constituted action by the State. This case has given rise to much controversy in the United States. It could in effect render individual action under the laws of contracts, trusts, wills, etc., subject to the restrictions that are placed on governmental action.

If the argument were to be accepted in respect of Article 5(2) of the Treaty, what would be the position of a limitation of property "to X for life, or until he obtains employment outside England, then to Y"? Would the enforcement of the gift over by court order be prohibited because inconsistent with a general object of the Treaty in Article 3(c) which requires the abolition as between Member States of obstacles to freedom of movement of persons?

(b) *The External Affairs Power*

The increasing emphasis by the Court on a functional approach leading to greater centralization is best exemplified by *Re European Road Transport Agreement*: *E.C. Commission* v. *E.C. Council*.[78]

Under the auspices of the U.N. Economic Commission for Europe an agreement was signed in 1962 by five members of the Community and some other countries concerning the work of crews of vehicles engaged in international road transport. The agreement never came into force because an insufficient number of countries ratified it. Council Regulations were made regulating the matter. It was felt that the agreement should be revised to enable more countries to become parties to it. The members of the Council discussed what attitude should be taken by the States at the negotiations then proceeding for the conclusion of a new agreement. Negotiations were concluded by the States in accordance with the discussion and a draft agreement was open for signature by them. Before the States could sign, however, Community Regulations needed to be amended. These can only be amended by the Council on a proposal of the Commission. The Commission was asked

[76] *Id.*, 644; see [1972] C.M.L.R. 35.
[77] (1948) 334 U.S. 168.
[78] [1971] C.M.L.R. 335.

to propose accordingly and refused. Instead it commenced an action to annul the Council's discussion regarding the negotiations and conclusion of the agreement by the States.[79]

The Commission in effect maintained that the negotiation of the Treaty was a matter for the Community and not for the States. The Court found in favour of the Council but in so doing disclosed a very extensive view of the Community's external relations power. The express provisions of the Treaty relating to external affairs are Articles 111-116, dealing with the Commercial Treaties; Article 238, which deals with agreements of association between the Community and the third states or international organizations; and Article 228, the first paragraph of which provides—

> 1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the Assembly where required by this Treaty.

The Title of the Treaty relating to transport has no provisions regarding international agreements unless it could be regarded as included within the power of the Community to make "any other appropriate provisions" contained in Article 75(1)(c) of the Treaty, which at first sight seems to be going a bit far.[80]

The Advocate-General strongly urged that the Court should hold that the Community did not have any power in this respect. He said that the recognition of Community authority would involve accepting that the Community organs enjoy implied powers—

> those implied powers which have enabled the Supreme Court of the United States to enlarge the powers of the federal organ at the expense of those of the constituent States. For our part we think that the authority of the Community organs must be regarded as

---

[79] The extent to which the Community differs from a federation can be gauged from the attitudes of the parties in this case. The main legislative body of the Community was strenuously arguing that it should not have power to deal with the matter and that the State should have the power.

[80] Article 74:

The objectives of this Treaty, shall, in matters governed by this Title, be pursued by Member States within the framework of a common transport policy.

Article 75:

1. For the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council shall, acting unanimously until the end of the second stage and by a qualified majority thereafter, lay down, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly:

> being what European law calls *competences d'attribution* (in German *Enumerationsprinzip*).[81]

He said that to conclude that the Community had treaty-making capacity in this case would "involve you in creating new law in the manner of the Roman *Praetor*".[82]

The Court decided that the role of *praetor* fitted it very well. It found that the Community had capacity to enter into international agreements over "the whole extent of the field of objectives defined in a Part One of the Treaty". The reason given was that Article 210 said that "the Community shall have a legal personality". To determine its specific authority one should have regard to the whole scheme of the Treaty no less than its specific provisions.

Community competence was again to be gathered from Article 3, paragraph (c)—"adoption of a common policy in the sphere of transport". Reliance was also placed on the fact that Article 74 talks of the objectives in matters of transport being "pursued by Member States within the framework of a common transport policy" and reference was made to the "any other appropriate provisions" paragraph in Article 75.

But granted that the Community had power, why was it not concurrent? If the Council did not wish to act as a Community organ (as it did not) why could it not act as a meeting of Member States determining a common policy that each would pursue? This in fact is what the Council thought it was doing at the time. The reason given by the Court was that as a result of Article 3(c) and Article 5

> each time the Community with a view to implementing a common policy envisaged by the Treaty lays down common rules, whatever form these may take, the Member States no longer have the right

---

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;
(b) the conditions under which non-resident carriers may operate transport services within a Member State;
(c) any other appropriate provisions.

2. The provisions referred to in (a) and (b) of paragraph 1 shall be laid down during the transitional period.

3. By way of derogation from the procedure provided for in paragraph 1, where the application of provisions concerning the principles of the regulatory system for transport would be liable to have a serious effect on the standard of living and on employment in certain areas and on the operation of transport facilities, they shall be laid down by the Council acting unanimously. In so doing, the Council shall take into account the need for adaptation to the economic development which will result from establishing the common market.

[81] *Re European Road Transport Agreement*: *E.C. Commission* v. *E.C. Council*, *supra* n. 78, 350.
[82] *Id.*, 344.

acting individually or collectively to incur obligations toward non-Member States affecting those rules.[83]

In the upshot, however, the Court said that the Council was right to delegate the negotiating mandate to the States. The original negotiations were commenced before the common transport policy was sufficiently developed and authority belonged to the Member States. To have suggested to other States that they must now negotiate with the Community might have jeopardized the outcome of the negotiations. In other words, the Council did not enjoy complete freedom of action.

The result of the case is, however, that the more matters are brought within the Regulations and directives of the Community the more will the States lose their external competence. This could create great difficulties where some, but not all, of the features of a particular agreement come within an area that has been regulated at Community level.

(c) *Secondary Legislation*

The centralizing tendencies of the Court are clear. To accuse the judges for that reason of being motivated by political rather than judicial considerations is perhaps to fail to understand what is involved in the construction of constitutional instruments such as the E.E.C. Treaty. One can hardly adopt the same approach to the interpretation of a constitution as would be proper in the case of, say, the Perpetuities and Accumulations Act or other legislation that is drafted in a more detailed manner and can be amended more easily.

But the tendency of the Court to rely on general objectives rather than detailed provisions is also evident in some of the cases involving the interpretation of secondary legislation such as Council Regulations. In the *Internationale - Handelsgesellschaft* case[84] the Court had to deal with a provision of Council Regulation 16 which provided—

(a) that a certificate was required for the import into or export out of the E.E.C. of cereals;

(b) that in the case of the *import of grain* a certificate should be subject to the lodging of a surety for importation within the term of the certificate, which should be forfeited if the import did not take place within such time limit;

(c) that the Commission had authority to make regulations in a certain manner in pursuance of that Council Regulation.

The Commission's Regulations required a deposit as surety, which could be forfeited, in respect of the import and *export* of *all cereals*.

---

[83] *Id.*, 355.
[84] [1972] C.M.L.R. 255.

One need not have ever heard of the maxim *expressio unius exclusio alterius* to regard it as reasonable to conclude that the Council did not intend that there should be deposits for certificates in any case except the import of grain. It seems that the *travaux préparatoires* supported this interpretation. The Advocate-General referred to the "hawks" who wanted a rigid deposit system and the "doves" who preferred a more liberal approach. The resulting text was a compromise.

Yet the Court upheld the validity of the Commission's Regulations. They said that it was necessary to look at the aims of the Regulations as a whole. An interpretation that restricted deposits to the import of grain "would result in disturbing the harmonious working of the system".

Conclusion

As centrifugal forces in the political and executive institutions of the Community have gained ground in recent years, the Court has veered in the opposite direction. It has only been possible in this article to give some instances of the techniques that the Court follows and the results it has reached.

The Court's decisions and techniques can be evaluated in accordance with either political or legal criteria. Whether the trend toward greater centralization is approved or disapproved will depend largely on the point of view of the observer—whether, for example, he is opposed or in favour of Britain's "entering Europe" or how strongly he feels about "States' rights" or "European unity". How people in the future will see the decisions may depend on what happens to the Community. Those judges in America and Australia who furthered central power, such as John Marshall and Sir Isaac Isaacs, have come to be regarded by many as men of foresight who themselves helped to build a nation. Had these federations not survived there would no doubt have been a different verdict. Nevertheless the recent techniques of the Court in extending its functional approach to the extent of apparent disregard of specific provisions is subject to criticism from both a legal point of view and from a political standpoint which cuts across States' rights and European unity.

From the point of view of judicial craftsmanship and duty, some of the recent decisions dealt with do not measure up to the standards set by the great judges in the Federations from Marshall onwards. While it is true, and it is to their credit, that those judges interpreted the Constitution in the light of broad political goals, they exercised a law-making function allowed for by the instrument itself. The broad language and sweeping principles necessitated judicial choice and judicial statesmanship. On a variety of occasions the European Court has acted in a similar manner. But in a number of the cases referred to, particularly in the last few years, the European Court has tended to act as if it were

impatient of the provisions of the Treaty and determined not to let them stand in the way of the fulfilment of what the judges consider to be desirable political or economic ends.

This has some social and political dangers. The European Court, like the American Supreme Court, has had to struggle against opposition to its pronouncements from both governments and courts of the Member States. It has over the years been remarkably successful in strengthening its position. But because it cannot rely on the strong arm of executive power to support it, its position and influence depend on the respect which it earns from those required to obey and enforce its decisions.

It is impossible to determine what trend the Court will take in the future as it has just had added to its membership a Dane, an Irishman, and a Scotsman.