Boston College International and Comparative Law Review

Volume 6 | Issue 1 Article 9

12-1-1983

Political Integration Through Jurisprudence: An Analysis of the European Court of Justice's Ruling on Freedom of Movement for Workers

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I. INTRODUCTION

The European Economic Community is an international association of sovereign states.[1] The purpose and tasks of the Community are set forth in the Preamble[2] and Article 2[3] of the Treaty establishing the European Economic Community (the

1. Treaty establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter referred to as EEC Treaty, or the Treaty].

In addition to the European Economic Community, two other treaty-based communities exist: the European Coal and Steel Community and the European Atomic Energy Community. E. NOËL, WORKING TOGETHER: THE INSTITUTIONS OF THE EUROPEAN COMMUNITY 3 (1979) [hereinafter cited as NOËL]. The original six members of the European Community were Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands. *Id.* at 3 n.1. In 1973, Denmark, Ireland and the United Kingdom joined the European Economic Community. *Id.* at 3. Greece's accession in 1981 gave the Community a total of ten Member States. *Id.* at 3 n.2.

The major governing organs of the Community are the Commission, the Council of Ministers, the European Parliament and the Court of Justice. *See* D. LASOK & G. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 99-169 (2d ed. 1976) [hereinafter cited as LASOK & BRIDGE]. The Commission is composed of thirteen members from nine states chosen for their general competence in Community matters. *Id.* at 100. They are required to act solely in the interest of the Community. *Id.* Their independence from national interests makes the Commission a truly supranational institution. A "supranational" institution may at this point be defined simply as an institution "extending beyond or free of the political limitations inhering in the nation-state." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2298 (1976). "Supranational" is discussed at length in § II.A *infra*. The different roles of the Commission include acting as the executive arm of the Community, as initiator of Community policy, as guardian of the Treaties, and as exponent of the Community interest to the Council. *See generally* LASOK & BRIDGE, *supra*, at 104-09 and NOËL, *supra*, at 9-21. *See also* EEC Treaty, *supra*, art. 155.

The Council is composed of one representative from each Member State government and as such represents the sovereignty of the Member States. LASOK & BRIDGE, *supra*, at 110. The Commission submits its policy proposals to the Council for approval (generally upon a majority vote). *Id.* at 111-13. It is up to the Commission to initiate such proposals, otherwise the Council may take no action. NOËL, *supra*, at 17. Once a proposal is lodged, a dialogue begins between the Council ministers, who represent their national points of view, and the Commission, which represents the interests of the Community as a whole. *Id.* Once a policy decision has been made by the Council, it confers upon the Commission the necessary executive powers to implement such policy. LASOK & BRIDGE, *supra*, at 111.

As of July 1979, the European Parliament was composed of four hundred and ten representatives. NOËL, *supra*, at 23. It is a "fully-integrated Community institution:" there are no national representatives, only European-level political groups. *Id.* at 22. Its functions are primarily of a supervisory and advisory nature. As an advisory organ, it must be consulted by the Council before the Council makes a final decision as to certain treaty matters. The Parliament's opinions are not binding, however. As a supervisory organ, it may force the Commission to resign by a motion of censure under Article 144. 2 COMMON MKT. REP. (CCH) ¶ 4302.05. The Parliament also has certain budgetary powers. NOËL, *supra*, at 24-25.

Treaty).[4] The short-term objective of the EEC Treaty was the establishment of a customs union.[5] The eventual and ultimate aim of the Treaty is complete economic union among Member States.[6]

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2. The Preamble provides that the signatories of the Treaty:

> DETERMINED to establish the foundations of an ever closer union among the European peoples,
>
> DECIDED to ensure the economic and social progress of their countries by common action in eliminating the barriers which divide Europe,
>
> DIRECTING their efforts to the essential purpose of constantly improving the living and working conditions of their peoples,
>
> RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee a steady expansion, a balanced trade and fair competition,
>
> ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and by mitigating the backwardness of the less favoured,
>
> DESIROUS of contributing by means of a common commercial policy to the progressive abolition of restrictions on international trade,
>
> INTENDING to confirm the solidarity which binds Europe and overseas countries, and desiring, to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,
>
> RESOLVED to strengthen the safeguards of peace and liberty by establishing this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts,
>
> HAVE DECIDED to create a European Economic Community . . . .

EEC Treaty, *supra* note 1.

3. It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

EEC Treaty, *supra* note 1, art. 2.

4. EEC Treaty, *supra* note 1.

5. The community shall be based upon a customs union covering the exchange of all goods and comprising both the prohibition, as between Member States, of customs duties on importation and exportation and all charges with equivalent effect and the adoption of a common customs tariff in their relations with third countries.

EEC Treaty, *supra* note 1, art. 9(1). A fully-implemented customs union is an arrangement whereby the members agree to treat the goods produced in other member countries as if they had been produced within their own borders. THE COMMON MARKET 2 (L. Krause ed. 1964) [hereinafter cited as THE COMMON MARKET]. Implementation of the customs union was completed in 1968. LASOK & BRIDGE, *supra* note 1, at 248.

6. *See* EEC Treaty, *supra* note 1, art. 2.

> It has been suggested that customs union is a halfway house on the way to wider economic integration, a halfway house in which it is not possible to stay forever. The members must move on toward economic integration more speedily however specifically defined, or in time the customs union will break down.

C. KINDLEBERGER, INTERNATIONAL ECONOMICS 194 (4th ed. 1966) [hereinafter cited as KINDLEBERGER]. In 1967, the Commission reported that the Community was then at an intermediate phase consisting of a completed customs union but only partial economic union.

> In the years to follow, the main objective should be to achieve economic union — *sine qua non* if the common market is to function properly. . . . Economic union means all the measures required to create on the territory of the Community conditions similar to those obtaining on a domestic market. These are: (a) free movement of goods; (b) free movement of persons, services, and capital; (c) implementation of the common transport policy; (d) arrangements to protect competition from distortion; (e) provisions to guarantee that the economic policies of the Community and the Member-States share the elements needed to secure conditions similar to those obtaining on a domestic market.

EUROPEAN ECONOMIC COMMUNITY COMMISSION, TENTH GENERAL REPORT ON THE ACTIVITIES OF THE

The free movement of workers within the Community is essential to the economic union of the EEC and to the system as established under the Treaty.[7] Full integration of the Member States' economies requires the free movement of labor across borders.[8] Free movement allows for the creation of an international rather than national division of labor, enabling the economic forces of supply and demand in the employment marketplace to meet across national borders.[9] As one author notes, "[F]rom an economic point of view it seems irrational that production in one place should be hampered by a shortage of labour, when at the same time people in another region are unemployed through a lack of jobs."[10]

Articles 48-51 of the Treaty implement the Community's economic objectives by providing for the free movement of workers within the Community. Article 48 requires the general elimination of barriers to freedom of movement.[11] Article 48(2) incorporates Article 7's explicit prohibition against discrimination on the grounds of nationality, the most prominent obstacle to freedom of movement and to the

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COMMUNITY 13 (June 1967). According to Professor Charles P. Kindleberger, international economic integration requires not only free trade and an eradication of barriers to factor movement, but also harmonization of tax, wage, foreign exchange, monetary and fiscal policies. KINDLEBERGER, *supra,* at 533.

While recognized long before the post-war era, the advantages of economic integration became more important in the 1950's because technological developments increased the size of the market necessary to support efficient industry. European firms in small, fragmented markets could not compete with large U.S. firms. Larger markets and protection from U.S. products were thought necessary to sustain Euopean growth. Economic integration was seen as providing both. L. KRAUSE, EUROPEAN ECONOMIC INTEGRATION AND THE UNITED STATES 4 (1968) [hereinafter cited as KRAUSE].

European economic integration seems to have had the desired effect. Between 1959 and 1971, intra-Community trade grew at a rate of 15% whereas world trade grew at a rate of only 8%. P. MAILLET, THE CONSTRUCTION OF A EUROPEAN COMMUNITY 13 (1977).

7. EEC Treaty, *supra* note 1, arts. 48-51. *See* Bonsignore v. Oberstadtdirektor der Stadt Köln, 1975 E. Comm. Ct. J. Rep. 297, 314, 15 Comm. Mkt. L. R. 472, 483.

8. The free movement of all factors of production is a necessary element of economic integration. *See* note 5 *supra.*

9. B. SUNDBERG-WEITMAN, DISCRIMINATION ON GROUNDS OF NATIONALITY: FREE MOVEMENT OF WORKERS AND FREEDOM OF ESTABLISHING UNDER THE EEC TREATY 128 (1977) [hereinafter cited as SUNDBERG-WEITMAN].

10. *Id.*

11. Article 48 provides:

> 1. The free movement of workers shall be ensured within the Community not later than at the date of the expiry of the transitional period.
> 2. This shall involve the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other working conditions.
> 3. It shall include the right, subject to limitations justified by reasons of public order, public safety and public health:
> (*a*) to accept offers of employment actually made;
> (*b*) to move about freely for this purpose within the territory of Member States;
> (*c*) to stay in any Member State in order to carry on an employment in conformity with the legislative and administrative provisions governing the employment of the workers of that State; and
> (*d*) to live, on conditions which shall be the subject of implementing regulations to be laid down by the Commission, in the territory of a Member State after having been employed there.
> 4. The provisions of this Article shall not apply to employment in the public administration.

EEC Treaty, *supra* note 1, art. 48.

establishment of economic union.[12] Article 49 implements Article 48 by specifically authorizing the Community Council to enact legislation in two areas. The Council may act to remove administrative procedures which hinder the movement of labor, and may set up machinery for better equating labour supply with demand.[13] Article 50 encourages Member States to establish joint programs for the exchange of young workers.[14] Finally, Article 51 authorizes the Council to adopt harmonizing social security legislation so that different national social security systems will not deter workers from crossing national borders.[15]

Apart from purely economic considerations, however, the guarantee of freedom of movement for workers also contributes to social progress within the Community.[16] First, freedom of movement may reduce unemployment and overpopulation, and may thereby contribute to improving the overall standard of living within the Community.[17] Second, the guarantee of freedom of movement is a personal

12. *Id.*, art. 48(2). Article 7 provides in part: "Within the field of application of this Treaty and without prejudice to the special provisions mentioned therein, any discrimination on the grounds of nationality shall hereby be prohibited." *Id.*, art. 7.

13. Article 49 provides:

> Upon the entry into force of this Treaty, the Council, acting on a proposal of the Commission and after the Economic and Social Committee has been consulted, shall, by means of directives or regulations, lay down the measures necessary to effect progressively the free movement of workers, as defined in the preceding Article, in particular:
>
> (*a*) by ensuring close collaboration between national labour administrations;
>
> (*b*) by progressively abolishing according to a plan any such administrative procedures and practices and also any such time-limits in respect of eligibility for available employment as are applied as a result either of municipal law or of agreements previously concluded between Member States and the maintenance of which would be an obstacle to the freeing of the movement of workers;
>
> (*c*) by progressively abolishing according to a plan all such time-limits and other restrictions provided for either under municipal law or under agreements previously concluded between Member States as impose on workers of other Member States conditions for the free choice of employment different from those imposed on workers of the State concerned; and
>
> (*d*) by setting up appropriate machinery for connecting offers of employment and requests for employment, with a view to equilibrating them in such a way as to avoid serious threats to the standard of living and employment in the various regions and industries.

Id., art. 49.

14. *Id.*, art. 50.

15. Article 51 provides:

> The Council, acting by means of a unanimous vote on a proposal of the Commission, shall, in the field of social security, adopt the measures necessary to effect the free movement of workers, in particular, by introducing a system which permits an assurance to be given to migrant workers and their beneficiaries:
>
> (*a*) that, for the purposes of qualifying for and retaining the right to benefits and of the calculation of these benefits, all periods taken into consideration by the respective municipal law of the countries concerned, shall be added together; and
>
> (*b*) that these benefits will be paid to persons resident in the territories of Member States.

Id., art. 51.

16. SUNDBERG-WEITMAN, *supra* note 9, at 129. Member States' cooperation toward the free movement of labor is one facet of the general social policy of the Community. Article 117 provides: "Member States hereby agree upon the necessity to promote improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an upward direction." EEC Treaty, *supra* note 1, art. 117.

17. SUNDBERG-WEITMAN, *supra* note 9, at 129. It was with these considerations in mind that the European Social Fund and the European Coordination Bureau for Matching Job Offers and Applica-

right.[18] Employers may not regard workers merely as factors of production under the freedom of movement provisions.[19] Instead, these provisions secure for workers and their families the fundamental right of mobility.[20] Freedom of movement is one of the means by which a worker may improve his social condition while at the same time helping to satisfy the requirements of the economies of the Member States.[21]

Finally, the free movement of labor is integral to the achievement of political objectives.[22] Removal of barriers to movement is among the first steps of a process of human integration toward a Community citizenry.[23] The political unification of Europe was in fact a long-term goal of the Treaty at the time of its creation.[24] The creators of the community structure saw the formation of a political union as a desired consequence of the Treaty's blueprint for economic integration.[25] Although the system as established under the Treaty is geared primarily toward the realization of economic objectives, the processes of economic integration and political integration must, to a certain extent, proceed together.[26] The complete integration of

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tions were established. The task of the Fund is to promote "employment facilities and the geographical and occupational mobility of workers" and thereby "contribute to raising the standard of living. . . ." EEC Treaty, *supra* note 1, art. 123. The main feature of the Fund's policy is the reimbursement of Member State governments with 50% of any expenditures they may incur in retraining or resettling unemployed or underemployed labor. D. MCLACHLAN & D. SWANN, COMPETITION POLICY IN THE EUROPEAN COMMUNITY 413-14 (1967). The Coordination Bureau acts as a clearinghouse to bring employers and workers together. 1 COMMON MKT. REP. (CCH) ¶ 1022.22.

18. SUNDBERG-WEITMAN, *supra* note 9, at 130.

19. *See* Mr. and Mrs. F. v. Belgian State, 1975 E. Comm. Ct. J. Rep. 679, 696, 16 Comm. Mkt. L. R. 442, 450.

20. Reg. 1612/68, 11 J.O. COMM. EUR. (No. L. 257) 2 (1968) [hereinafter cited as Reg. 1612/68]. *See* text accompanying note 84 *infra*.

21. Preamble to Reg. 1612/68, *supra* note 20.

22. D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 126 (1980) [hereinafter cited as WYATT & DASHWOOD].

23. SUNDBERG-WEITMAN, *supra* note 9, at 131. In 1968, the vice-president of the Commission discerned in Articles 48-51 not merely an economic purpose but "an incipient form . . . of European citizenship." 1 BULL. EUR. COMM. 5-6 (1968), *as quoted in* Plender, *"An Incipient Form of European Citizenship," in* EUROPEAN LAW AND THE INDIVIDUAL 39, 40 (F. Jacobs ed. 1976).

24. P. PESCATORE, THE LAW OF INTEGRATION 23-25 (1974) [hereinafter cited as PESCATORE]. Political unification was seen as a means of countering the Soviet threat to Europe as well as giving Europe a greater voice in the world political developments, dominated since World War II by the United States and the Soviet Union. It seemed that the only way that the European countries could escape being "a footnote to history" was to create an integrated European system. KRAUSE, *supra* note 6, at 5-6.

25. Wyatt and Dashwood describe the EEC Treaty as "an attempt to achieve a . . . political aim by means of economic integration." WYATT & DASHWOOD, *supra* note 22, at 126.

26. THE COMMON MARKET, *supra* note 5, at 2-3. Ernst Haas recognizes this close relationship between economic and political integration:

> The essense of supranationality lies in the tendency for economic and social decisions to "spill over" into the realm of the political, to arise from and further influence the political aspirations of the major groups and parties in democratic societies. The supranational style stresses the indirect penetration of the political by way of the economic because the "purely" economic decisions always acquire political significance in the minds of the participants.

E. Haas, *Technocracy, Pluralism and the New Europe, as reprinted in* E. STEIN, P. HAY, & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 24 (1976).

Leo Tindemans, the Prime Minister of Belgium, has similarly stated: "[T]he day that Europeans can move about within the Union, can communicate among themselves and when necessary receive medical

Member States' economies necessarily involves the partial surrender by Member States of sovereignty over their internal affairs to the governing institutions of the Community.[27] Theoretically, such political integration[28] should continue unless a point is reached at which Member States consider their remaining sovereignty more valuable than the benefit to be gained from further integration.

The European Court of Justice (ECJ) plays an important role in the economic integration of the Community,[29] since its function is to interpret the provisions of the EEC Treaty.[30] This Comment will explore the nature and extent of the ECJ's concommitant role in the political integration of the Community. The analysis of this role will focus specifically on the ECJ's decisions concerning freedom of movement of workers. These cases illustrate the Court's role in the political integration of the EEC and provide a workable model with which to study that process. The author will demonstrate that the ECJ fulfills its integrative role by (1) recognizing individual rights created under Community law, (2) injecting these guarantees of Community law into the laws of the Member States, and (3) sustaining the supranational structure of the Community.

Although the net effect of these judicial functions is to advance the political integration of the Community, the author will demonstrate that the Court's integrative role is limited. This limit is the point where Member States are no longer willing to sacrifice control over their internal affairs for the sake of the Community. The Treaty recognizes and provides for this limit in its freedom of movement provisions by allowing Member States to restrict worker movement in two situations: where the worker is a member of the host state's "public service", and where the host state's "public policy" necessitates this restriction. The author will demonstrate that the ECJ's interpretation of these provisions has had the effect of preserving an important area of discretion and autonomy for the

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care without national frontiers adding to the problems of distance, European Union will become for them a discernible reality." BULL. EUR. COMM. (Supp. 1/76) at 27-28.

27. LASOK & BRIDGE, *supra* note 1, at 24.

> [I]t is always possible to maintain the status quo and so reduce the Community to political stagnation. The Community itself has a built-in system which may either advance it towards political and institutional integration or preserve the self-contained units of sovereign states whilst developing the economy and creating wealth within the existing institutions. This depends on whether the Community institutions are strengthened at the expense of sovereignty or whether the sovereign element keeps the Community institutions in the servile role of functional bueraucracy.

Id.

28. Political integration is the process where political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political settings to a new center, whose institutions possess or demand jurisdiction over the pre-existing national states. The result of a process of political integration is a new political community, superimposed over the pre-existing ones.

E. HAAS, THE UNITING OF EUROPE 16 (1958) [hereinafter cited as HAAS]. Political integration is discussed further in § II.A *infra*.

29. *See generally* C. MANN, THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION (1972) [hereinafter cited as MANN].

30. EEC Treaty, *supra* note 1, art. 164.

Member States. However, the author concludes that the ECJ must balance the goal of preserving Member State autonomy in areas that remain important to them with that of continuing political integration through the transfer of state sovereignty to the Community as a whole. The ECJ must guard against the potential use of these exceptions by Member States to unduly restrict the guarantee of freedom of movement, thereby retarding the political integration of the Community.

II. POLITICAL INTEGRATION THROUGH JURISPRUDENCE

A. *Political Integration*

Political integration is the process by which previously independent and sovereign states place themselves under common political authority.[31] The theory of political integration rests upon the concept of the divisibility of sovereignty;[32] that is, the states involved in the process of integration gradually transfer elements of their sovereign powers to a common authority. The extent of integration of a group of nations depends largely upon the power of the integrating forces and the degree to which individual nations are willing to sacrifice their sovereign powers. Thus far, the EEC Treaty has succeeded in inducing the Member States to transfer elements of their sovereign powers to the institutions of the Community.[33] As a result, the Community has been described as "federal"[34] and "supranational."[35]

A federation is a union of independent states which share some, but not all, of their individual sovereignty.[36] This unification enables states to attain certain

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31. A. GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE 9 (1969) [hereinafter cited as GREEN]. Green defines political integration as a *result*. He does so to make it easier to identify the causes of processes which produce integration. *Id.* at 10. Another author defines integration generally as "the amalgamation of two or more units or of some of their functions. It is a non-technical, descriptive — often political — concept which emphasizes the *process* of integrating as well as a particular *condition* or level of integratedness." P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 1 (1966). Professor Ernst B. Haas defines political integration as a *process*. See note 28 *supra*.

The Community may be examined at any one stage of its development as a result of political integration. However, it would be inaccurate to assume from such an examination that the Community or political integration describes a static pattern. Member States are continually shifting "their loyalties, expectations and political settings to a new center," HASS, *supra* note 28, at 16, and are thereby sacrificing elements of their national sovereignty for the sake of the Community as a whole.

32. PESCATORE, *supra* note 24, at 30. This concept is contrary to the traditional conception in international law that sovereignty is indivisible. *Id.*

33. Scheuing, *Integration by Law: The Case of the European Community*, 11 TEXAS INT'L L. J. 549, 550 (1976) [hereinafter cited as Scheuing]. However, Scheuing identifies inherent weaknesses in the powers of the Commission, Council and Parliament as detracting from the integrative strength of the Treaty. *Id.* at 559-69.

34. *See, e.g.*, GREEN, *supra* note 31, at 10-18.

35. *See, e.g.*, PESCATORE, *supra* note 24, at 49. For an extensive analysis of the proper classification of the EEC, *see* P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 17-78 (1966).

36. GREEN, *supra* note 31, at 11.

common objectives and solve common problems more effectively.[37] Federalism achieves centralization of power and purpose while allowing the individual states to retain a degree of sovereignty and continue to exercise non-common powers at the local level.[38] Federalism is therefore a form of political integration.[39]

The EEC may qualify as a federation under this definition. However, the EEC lacks certain characteristics of historical federations. For example, the EEC lacks traditional federal powers of diplomacy and the power to raise and maintain an army.[40] Furthermore, the institutions of the Community[41] do not comprise a central "government."[42] Although classification of the community as a federation may therefore be imprecise, the EEC is also more than merely an international organization of states, like the United Nations. International organizations generally have only deliberative and consultative powers. The EEC, on the other hand, possesses real powers of control and access which it may exercise over Member States and their nationals.[43] In contrast to international organizations, the Community institutions occupy more of a governing than mediating role; they stand over, rather than between, the Member States.[44] In this sense the Community represents "not so much the restriction on sovereignty as the partial transfer of sovereignty."[45] Countries belonging to the United Nations have not made a similar sacrifice of their national sovereignty.[46]

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37. C. Friedrich, *International Federalism in Theory and Practice, in* SYSTEMS OF INTEGRATING THE INTERNATIONAL COMMUNITY 117, 121 (E. Plischke ed. 1964) [hereinafter cited as Friedrich].

38. GREEN, *supra* note 31, at 11.

39. *Id.* at 10. Federalism has also been described more accurately as a *process.*

> Federalism should not be considered a term for a static pattern, designating a particular and precisely fixed division of powers between governmental levels. Instead, federalism seems the most suitable term by which to designate the process of federalizing a political community, that is to say, the process by which a number of separate political organizations, be they states or any other kind of associations, enter into arrangements for working out solutions, adopting joint policies, and making joint decisions on joint problems.

Friedrich, *supra* note 37, at 126-27.

40. GREEN, *supra* note 31, at 16-17. Green argues persuasively that the hesitation in classifying the EEC as a federation arises from the conception that it must have the characteristics common to historical examples of federations, e.g., the United States, West Germany and Switzerland. Historically, most federal states were created in response to the needs of diplomacy and defense. *Id.* The EEC was formed more specifically for economic purposes. *See* text accompanying notes 2-6 *supra.* Green argues that the historical motivations toward the federal state have more recently been replaced by the need of federal structures to remedy certain economic and social ills. GREEN, *supra* note 31, at 17-18.

41. *See* note 1 *supra.*

42. Monnet, *A Ferment of Change,* 1 J. COMMON MKT. STUDIES 203, 206 (1962); LASOK & BRIDGE, *supra* note 1, at 23.

43. GREEN, *supra* note 31, at 9.

44. I. CLAUDE, SWORDS INTO PLOWSHARES — THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION 109-12 (4th ed. 1971), *reprinted in* E. STEIN, P. HAY & M. WAELBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE 25 (1976) [hereinafter cited as CLAUDE].

45. *Id.*

46. PESCATORE, *supra* note 24, at 30-31. Pierre Pescatore writes that the United Nations is founded upon the classical international law concept of the indivisibility of state sovereignty. This indivisibility requires that the only form which arrangements between states may take is one of coordination and cooperation. Under this concept of sovereignty, there is "no possibility of explaining the kind of

The proper classification of the Community lies instead between the characteristics of federations and international organizations.[47] This intermediate position is most accurately defined as "supranational."[48] Three elements in particular are characteristic of supranational organizations such as the Community: (1) the acceptance by a group of states of a set of values and objectives common to them and to which they must subordinate their own national interests;[49] (2) the willingness of the individual states to transfer to community institutions effective powers to achieve these objectives and their willingness to accept the decisions of Community institutions in matters falling within the scope of the Treaty;[50] and (3) the autonomy of the Community power.[51] By this definition, the supranational structure is similar to the federal structure,[52] but it lacks the narrowing characteristics which political scientists have associated with historical examples of federations. The fact that a crucial element of supranationalism is the sacrifice of national sovereignty for the sake of the Community indicates that supranationalism, like federalism, is a form of political integration.

The Treaty does not determine the specific form the completed process of political integration will assume nor does it provide a political model or time limit for completion of the integration.[53] Rather, the Treaty itself is of unlimited

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international relations . . . which develop when the possibility of a division and a refashioning of sovereignties is admitted. . . . [A]lignments built upon a refashioning of sovereignties permit variations . . . far more diverse than those possible under the international law of cooperation." *Id.* at 30-31. Furthermore, because the theory of integration rests upon the divisibility of sovereignty, the "preconceived idea of 'indivisible sovereignty' blinds men's minds to the phenomenon of integration." *Id.* at 31.

47. CLAUDE, *supra* note 44, at 25.

48. PESCATORE, *supra* note 24, at 49.

49. *Id.* at 50.

50. *Id.* at 50-51.

51. *Id.* at 51. "Limitations on national sovereignty lose their edge when the operation takes the character of a *pooling* of powers in the hands of independent institutions not identified with the personality or interests of any of the participants." *Id.* at 33 (emphasis in original). The ECJ uses this concept of the necessity of autonomy as a ground for legitimizing its judgments and building a community consensus. *Id.* The constant development of a Community consensus among the Member States' authorities and nationals is essential to the establishment and growth of the Community legal order. MANN, *supra* note 29, at 37.

52. CLAUDE, *supra* note 44, at 25. To describe the Community as supranational is to regard it as sufficiently advanced to be treated differently from international organizations; supranational institutions are defined in terms of their approximation of federal governments and their deviation from international organizations. *Id.* The Community has been described as a "partial and incipient federalism," *id.;* as an association of sovereign states with "federal potential," LASOK & BRIDGE, *supra* note 1, at 27; and as "something half-way between a true federal structure and the kind of intergovernmental cooperation we have seen in the past." Coppé, *The Economic and Political Problems of Integration,* 26 LAW & CONTEMP. PROBS. 349, 353 (1961). The inexactness with which the Community can be classified has led at least one authority to define the Community as "sui generis." W. Hallstein, lecture delivered at the Fletcher School of Law and Diplomacy, Tufts University, April 16-18, 1962. [1962-1964 Transfer Binder "Europe Today"] COMMON MKT. REP. (CCH) ¶ 9001.

53. H. Ispen, *Constitutional Perspectives of the European Communities, in* BASIC PROBLEMS OF THE EUROPEAN COMMUNITY 196 (P. Dagtoglou, ed. 1975).

duration.[54] One commentator sees the culmination of the process of political integration as the creation of a new state.[55] Another suggests that:

> European integration is developing as various units and so can continue for a long time. One can only suspect what the end result will be; but it may not be quite off the mark to prophesy the establishment of a so far unknown pluralistic political structure. Such a structure could very well permit the nations concerned to maintain to a very large extent their identity, whilst at the same time they are included in organizations which transcend the national level.[56]

As this commentator suggests, the final form of the Community is not as important as the recognition that, at this stage of integration, there is an institutional order providing for the possibility of continued community development and integration of the Member States.[57]

B. *The Role of the European Court of Justice*

In a structure such as the Community, the ECJ and the other Community institutions have the responsibility to harmonize the heterogeneous societies of the Member States and to counteract the forces of nationalism and self-interest which may divide and weaken the Community.[58] Among all of the Community institutions, the ECJ has performed this function most effectively.[59] Although the Community structure may only approximate a federation,[60] the Treaty confers upon the ECJ judicial powers similar to a supreme court in a federation.[61] The ECJ upholds the supremacy and uniformity of Community law over Member State law and it keeps the Community institutions and Member State governments within the limits of their power as defined under the Treaty.[62]

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54. EEC Treaty, *supra* note 1, art. 240.

55. H. Schwarz, *Federating Europe — But How? in* BASIC PROBLEMS OF THE EUROPEAN COMMUNITY 7 (P. Dagtoglou ed. 1975) [hereinafter cited as Schwarz].

56. H. Schneider, 'Zur politschen Theorie der Gemeinschaft,' *as quoted in* BASIC PROBLEMS OF THE EUROPEAN COMMUNITY 198 (P. Dagtoglou ed. 1975).

57. Introduction to the Fourth General Report of the Commission of the EEC, 1 COMMUNITY TOPICS 7 (1961). The process of integration has slowed in recent years, causing some commentators to believe that the Community is foundering. *See, e.g.,* Scheuing, *supra* note 33, at 563, and R. MARJOLIN, EUROPE IN SEARCH OF ITS IDENTITY 69-77 (1980). Although these claims are exaggerated, the Community has not progressed significantly beyond the common market state. *See* Stein, *Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy,* 127 U. PA. L. REV. 897, 907 (1979).

58. Schwarz, *supra* note 55, at 8.

59. Dagtoglou, *Introduction* to BASIC PROBLEMS OF THE EUROPEAN COMMUNITY at xiv (P. Dagtoglou ed. 1975); Feld & Slotnick, *"Marshalling" the European Community Court: A Comparative Study in Judicial Integration,* 25 EMORY L. J. 317, 319-20 (1976) [hereinafter cited as Feld & Slotnick].

60. *See* note 52 *supra.*

61. Feld, *The European Community Court: Its Role in the Federalizing Process,* 50 MINN. L. REV. 423, 423 (1966). *See generally* Feld & Slotnick, *supra* note 59.

62. GREEN, *supra* note 31, at 22-24; Mashaw, *Federal Issues In and About the Jurisdiction of the Court of Justice of the European Communities,* 40 TULANE L. REV. 21, 53 (1965).

Furthermore, insofar as the provisions of the Treaty establishing the EEC embody the voluntary transfer of sovereign powers from the Member States to the institutions of the Community, the ECJ's interpretation of these provisions renews the agreements of the Treaty and continues this transfer of power. The protection of Community law, which the Treaty assigns to the ECJ,[63] therefore, includes the guarantee of integration.[64]

III. FREEDOM OF MOVEMENT CASES

The cases involving the guarantee of freedom of movement for workers illustrate the ways by which the ECJ advances political integration by jurisprudence. In addition, the extent to which the ECJ has recognized a freedom essential to both the economic and political integration of the Community, such as the guarantee of freedom of movement for workers, is one measure of the degree of political integration of the Community.

A. *The ECJ Applies Community Law to the Individual*

The ECJ first explicitly recognized the independent character of Community law in 1962, in *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH et al.*[65] The ECJ did not provide a justification for an autonomous Community legal order[66] until a year later in *N.V. Algemene Transport en Expeditie Onderneming van Gend & Loos v. Netherlandse Administratie Der Belastingen.*[67] The Court observed in that case that the EEC Treaty is addressed to the *peoples* of the Community as well as to the Governments.[68] The Court further noted that the purpose of the Treaty is the creation of a common market whose functioning directly concerns Community *individuals,* and that the Treaty created institutions whose exercise of power touches Community *citizens.*[69] From these observations, the ECJ concluded that the Treaty constitutes a new legal order which imposes duties on and grants additional rights to individuals of the Member States.[70]

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63. EEC Treaty, *supra* note 1, art. 164.

64. Nicolaysen, *The European Court: Its Work and Its Future, in* BASIC PROBLEMS OF THE EUROPEAN COMMUNITY 166 (P. Dagtoglou ed. 1975). Walter Hallstein, former president of the Community, once stated: "The Court of Justice . . . watches over the application of the Treaty and of the laws made by the Community. Community law lives and grows through the decisions taken by the Court, which in the last resort has the sole responsibility for interpreting it. It is therefore a major factor in integration." W. HALLSTEIN, THE TRUE PROBLEMS OF EUROPEAN INTEGRATION 10 (address given at the University of Kiel, Germany, on February 19, 1965) (available at Harvard International Legal Studies Library).

65. 1962 E. Comm. Ct. J. Rep. 45, 1 Comm. Mkt. L. R. 1.

66. "Legal order" is used to denote not only different legal jurisdictions but also a different body of substantive and procedural law.

67. 1963 E. Comm. Ct. J. Rep. 1, 2 Comm. Mkt. L. R. 105.

68. *Id.* at 12, 2 Comm. Mkt. L.R. at 129.

69. *Id.*

70. *Id.*

1. An Independent Legal Order

The major sources of this independent body of Community law are the provisions of the EEC Treaty and the regulations and directives issued by the Community Council and Commission[71] to implement these provisions.[72] These provisions, regulations and directives provide the legal basis[73] for the approximately one hundred decisions which the ECJ renders each year.[74] These decisions in turn become part of a body of Community law which influences the individual national jurisdictions in their resolution of Community-related matters.[75]

Among the clearest examples of this independent body of Community law are those instances in which the ECJ gives language of the Treaty or other Community legislation a particular community meaning. For example, in *Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*[76] (*Unger*), the court declared the term "wage earner or assimilated worker," as used in Regulation 3/58, to be a Community concept. As such, the ECJ defined the term in a manner consistent with the objectives of the Treaty.[77] To these ends the ECJ defined "wage earner" as including not only the individual who holds a job at a given moment, but also the individual who, having left his job, is capable of taking another.[78] If national courts were free to specify which persons were "wage

71. For a description of the legislative duties of the Council and Commission, *see* note 1 *supra.*

72. MANN, *supra* note 29, at 344-49; Schermers, *The European Court of Justice: Promoter of European Integration,* 22 AM. J. COMP. L. 444, 454 (1974) [hereinafter cited as Schermers]. *See* EEC Treaty, *supra* note 1, art. 189. For a thorough discussion of the regulations and directives issued in the field of freedom of movement for workers, *see* WYATT & DASHWOOD, *supra* note 22, at 125-81; and Séché, *Free Movement of Workers under Community Law,* 14 C.M.L. REV. 385 (1977).

73. MANN, *supra* note 29, at 344.

74. Schermers, *The Role of the European Court of Justice in the Harmonisation and Unification of European Law, in* INTERNATIONAL ECONOMIC AND TRADE LAW 3, 5 (C. Schmitthoff & K. Simmonds eds. 1976).

75. *Id.* For a discussion of the precedential power of the ECJ's rulings, *see* notes 148-49 and accompanying text *infra.*

76. 1964 E. Comm. Ct. J. Rep. 177, 3 Comm. Mkt, L.R. 319. Other terms in Articles 48-51 and the implementing legislation made pursuant thereto to which the ECJ has given a community meaning include "public service," "public policy," and "personal conduct." For a discussion of these terms, *see* § III.D *infra.*

77. P. WATSON, SOCIAL SECURITY LAW OF THE EUROPEAN COMMUNITY 60 (1980) [hereinafter cited as WATSON].

78. *Unger,* 1964 E. Comm. Ct. J. Rep. at 185, 3 Comm. Mkt. L.R. at 330-31.

Unger was a Dutch national living in Amsterdam. While employed, she was compulsorily insured under the Dutch National Health Insurance Act (Ziektewet). When Unger temporarily left her employment to have a child, her compulsory insurance ceased; however, she was accepted as a beneficiary of voluntary insurance provided for by the same Act. When visiting her parents in Germany one month after leaving her job, Unger fell seriously ill and required immediate medical treatment. On her return to the Netherlands, she claimed reimbursement for the expenses she incurred in Germany. She was unable to obtain that reinbursement because, under the Ziektewet, voluntarily insured persons have a right to reimbursement for expenses incurred abroad only if they have been authorized to reside abroad for convalescent purposes by the defendant social security institution. Unger had no such authorization. She appealed this decision, claiming that she was entitled to reimbursement under Article 19(1) of Regulation 3/58. This Article provides that a "wage-earner or assimilated worker" shall

earners or assimilated workers," the Member States would have the power "to modify the meaning of the concept of 'migrant worker'[79] and to eliminate at will the protection afforded by the Treaty to certain categories of person."[80] This possibility would deprive Articles 48-51 of all meaning and hamper fulfillment of the aims of the Treaty.[81] Thus, the ECJ conferred a Community meaning on the term to preserve the effectiveness of Articles 48-51.[82]

2. Community Law Confers Rights Upon the Community Individual

The ECJ's construction of a Community meaning for the team "worker" ensures that individuals falling within the definition of this term may invoke the guarantee of free movement provided by Articles 48-51. The *Unger* court emphasized the importance of this guarantee when it recognized freedom of movement as one of the "foundations" of the Community.[83] Community legislation also has recognized the close relationship between the right of free movement and the economic objectives of the Treaty:

> Free movement is a basic right of workers and their families. The mobility of manpower within the Community must be one of the means of guaranteeing for the worker a possibility of improving his living and working conditions and thereby also helping to improve his social conditions while at the same time satisfying the needs of the economies of the Member States.[84]

The right of the migrant worker to acquire and retain legal rights under the social security systems of the various Member States, which derives from Article 51 and the freedom of movement principle, exemplifies this basic relationship between economic objectives and individual rights. If national social security systems did not work together, the territorial limitations of those systems would seriously restrict the free movement of workers in three ways.[85] First, by moving to another Member State, a worker could lose the contributions he made to the social security system of the previous Member State since contributions in one Member State would not give rise to benefits in another.[86] Second, if a worker

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receive benefits if his state of health while temporarily abroad necessitates immediate medical care. The Dutch court asked the ECJ whether Mrs. Unger could be classified as a "wage-earner or assimilated worker" for the purposes of the Regulation. *Id.* at 179-80, 3 Comm. Mkt. L.R. at 319-21.

79. The "migrant worker" is not merely the seasonal worker but any worker who is a citizen of one EEC Member State and who works in another Member State.

80. *Unger*, 1964 E. Comm. Ct. J. Rep. at 184, 3 Comm. Mkt. L.R. at 331.

81. *Id.*

82. *Id.*

83. *Id.*, 3 Comm. Mkt. L.R. at 330.

84. Reg. 1612/68, *supra* note 20, *as translated in* 1 COMMON MKT. REP. (CCH) ¶ 1031.

85. Wyatt, *The Social Security Rights of Migrant Workers and Their Families*, 14 COMM. MKT. L. REV. 411, 412 (1977).

86. *Id.*

had temporarily left his family behind in another Member State, the law of the host state, while perhaps providing for increased payments because of a claimant's dependents, could nevertheless condition the increased benefit on the presence of the dependents within its national territory.[87] Third, even though a claimant might satisfy the requirements for receipt of an old age pension, he could be denied those benefits because he had moved outside the Member State.[88] These limitations in the national systems impede the free movement of labor since a worker would be reluctant to move to another Member State if he might lose social security rights already acquired.[89]

Article 51 overcomes these limitations by deterritorializing[90] and coordinating[91] the independent social security systems of the Member States so that, as a whole, they provide the migrant worker with constant social security protection.[92] Social security rights accrue to the worker and the worker carries those rights with him wherever he moves throughout the Community.[93] The ECJ has contributed to the process of coordination by liberally defining the range of individuals entitled to Community social security benefits.[94] In *Unger*,[95] the ECJ held that all persons subject to national society security legislation are "wage-earners or assimilated workers" for the purpose of Community law.[96] Under this interpretation, the

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87. *Id.*

88. *Id.*

89. WATSON, *supra* note 77, at 35.

90. *Id.*

91. *Id.*

92. *Id.* at 36. "Coordination" should be distinguished from "harmonization." Harmonization brings about a change in the substance of national law (*e.g.*, making benefits throughout the community the same amount) whereas coordination merely affects the sphere of operation of the existing systems, leaving the legal content itself unchanged. *Id.* at 30-31. Harmonization has not been particularly successful and is now seen only as a means of ensuring that certain minimum standards prevail. *Id.* at x. Harmonization, so that the same social security benefit amounts prevail throughout the Community, is not as crucial for free movement of workers as is the assurance that the worker will be covered upon moving to a new Member State. *Id.* at 50.

Coordination involves two processes. First, by means of aggregation, a worker can gain title to benefits in one Member State on the basis of contributions made under the Social security system of another Member State. *Id.* at 36. Second, the costs of benefits paid to a worker are equitably distributed among the Member States under whose legislation the worker was insured. *Id.* A Member State is required to pay benefits only in proportion to the number of contributions made or periods of employment or residence spent by the worker in that Member State. *Id.*

93. *Id.* at *viii-ix*. Furthermore, Article 51, like Article 48, is based on the fundamental right of non-discrimination on the basis of nationality. The rights of a worker recently arrived from another Member State are determined by national social security authorities in the same way as those for a worker who has been affiliated with the same social security system for his entire working life. *Id.* at ix.

94. *Id.* at 63. By defining who is entitled to Community rights, the ECJ is involved in the process of coordination; that is, the Court determines the sphere of operation of social security systems and ensures that the migrant worker is continually protected. *Id.* at 31. The ECJ is also harmonizing, however, by giving uniform meaning to those concepts which are to be applied throughout the Community. *Id.* at 41.

95. The facts of Unger are discussed at note 78 *supra*.

96. 1964 E. Comm. Ct. J. Rep. at 185, 3 Comm. Mkt, L.R. at 332. *See* WATSON, *supra* note 77, at 61.

insured but unemployed, such as Mrs. Unger,[97] are entitled to Community social security benefits such as those granted under Regulation 3/58.[98] The *Unger* court also held that those insured under a national social security system and who move from one Member State to another for non-work-related reasons are entitled to Community social security benefits.[99] The ECJ affirmed this holding in *Hessische Knappschaft v. Maison Singer et Fils.*[100] The Court supported its broad interpretation of Article 51 by reference to the ultimate purpose of that Article: the establishment of as complete freedom of movement for workers as possible.[101]

The ECJ has been similarly liberal in interpreting Article 51 and its implementing legislation in other cases that define "worker" or "wage-earner" for Community purposes.[102] Rather than confining the bases for its holdings to the economic objective of Articles 48-51, the ECJ often relies on the broader social

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97. Mrs. Unger had left work to have a child, but continued to be a beneficiary under the Dutch National Health Insurance Act. *See* note 78 *supra.*

98. WATSON, *supra* note 77, at 61. Also, protection of Article 51 may extend to the self-employed under this interpretation. This interpretation is an extension of the scope of Articles 48-51, which are intended to cover only employees (those under a contract of employment). Articles 52-58, guaranteeing the right of establishment, cover the self-employed. The ECJ could have avoided this extension by limiting the benefits of Reg. 3/58 to workers employed under a contract of employment. That it did not do so may be due to the difficulty involved in distinguishing between the employed and the self-employed. *Id.* at 64. *See* Brack v. Insurance Officer, 1976 E. Comm. Ct. J. Rep. 1429, 18 Comm. Mkt. L. R. 592, and De Cicco v. Landversicherungsanstalt Schwaben, 1968 E. Comm. Ct. J. Rep. 473, 8 Comm. Mkt. L. R. 67 (where the ECJ ruled that periods of a worker's life spent self-employed would nevertheless be included with years spent as an employee and thus qualify the individual for social security benefits legislated under Article 51).

99. WATSON, *supra* note 77, at 62.

100. 1965 E. Comm. Ct. J. Rep. 965, 5 Comm. Mkt. L. R. 82. This case involved a German national vacationing in France who was killed in a collision between his motorcycle and a cattle truck belonging to a company called Maison Singer et Fils. The German social security administration paid benefits to successors of the victim and claimed repayment from Maison Singer et Fils on the grounds that it had been subrogated to the successors under Article 52 of Regulations 3/58. Its action was dismissed by a lower French court because its considered Regulation 3 to apply only to migrant workers, whereas the victim was *vacationing* in France when the accident occurred. On appeal, the Cour d'Appel de Colmar asked the ECJ for an interpretation of the proper scope of Regulation 3. *Id.* at 967, 5 Comm. Mkt. L.R. at 82-83.

101. *Id.* at 971, 5 Comm. Mkt. L. R. at 94. The Court stated: "It would not be in conformity with that spirit to limit the concept of 'worker' solely to migrant workers *stricto sensu* or solely to workers required to move for the purpose of their employment." *Id.*

102. *See, e.g.,* Bestuur der Bedrifsvereniging voor de Metaalnijverheid v. Mouthaan, 1976 E. Comm. Ct. J. Rep. 1901. Article 71(1)(b) of Reg. 1408/71 requires that an individual be insured in the country of his last employment in order to be a "worker" eligible for unemployment benfits in his present host state. The ECJ ruled that respondent should be regarded as a "worker" and entitled to unemployment benefits under this Article because, although he was technically uninsured in the Member State of his previous residence, he was nevertheless eligible for social security insurance. *See also* Mr. and Mrs. F. v. Belgian State, 1975 E. Comm. Ct. J. Rep. 679, 16 Comm. Mkt. L.R. 442, where the ECJ included the child of a migrant worker within the scope of "worker" in Reg. 1408/71 and so entitled him to benefits for the handicapped. In the ECJ's view, members of an employed migrant worker's family should be entitled to the benefits granted under Member State legislation under the same conditions as nationals of the Member State.

and political objectives of that right.[103] As a result, the Court has expanded the class of beneficiaries afforded protection by Articles 48-51 to include individuals other than merely wage-earners.[104] A consequence of the ECJ's pursuit of as complete freedom of movement for workers as possible has been that rights will sometimes accrue to workers who are not migrants, or who are self-employed, or who are not workers at all.[105]

The ECJ has heard a large number of social security cases.[106] The result of these cases as a whole is that the ECJ has broadened the privileges created by Community law.[107] By increasing the quantity of rights recognized by Community law, and by broadening the application of those rights already recognized, the ECJ increases the amount of direct relationships which the supranational institutions of the community have with Community citizens.[108] The result is an increase in community power and jurisdiction at the expense of Member State sovereignty in these areas. As long as the ECJ continues broad recognition of individual rights under Community law, the Court will be promoting political integration.[109]

B. *The ECJ Injects Community Law into the Law of the Member States*

Although Community law exists as a body of law independent from the domestic law of the Member States, Community law is not completely separate from the Member States' legal systems. According to the constitutional laws of the Member States, Community law, because it is embodied in a treaty, becomes part of Member State's legal systems by way of incorporation, either by implementing legislation or automatically, following an act of the executive.[110] However, these processes do not resolve the crucial issue of which body of law controls in the event of conflict of laws.[111]

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103. WYATT & DASHWOOD, *supra* note 22, at 161.

104. WATSON, *supra* note 77, at 64. This commentator writes that Articles 48-51 envision the free movement of *workers,* and that "[t]here was no intention to facilitate the free movement of the self-employed or to encourage the general flow of persons, for whatever reason, throughout the Community." *Id.*

105. *Id.*

106. For a detailed examination of these cases, *see* GREEN, *supra* note 31, at 255-90; WYATT & DASHWOOD, *supra* note 22, at 155-81; and WATSON, *supra* note 77.

107. GREEN, *supra* note 31, at 290. "The doubtful questions presented to the Court in these cases have been resolved in favor of the existence of individual rights." *Id.*

108. *Id.* at 255.

109. *Id.* at 254-55.

110. K. LIPSTEIN, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 22 (1974) [hereinafter cited as LIPSTEIN].

111. *See generally,* Bebr, *How Supreme is Community Law in the National Courts?,* 11 COMM. MKT. L. REV. 3 (1974) [hereinafter cited as Bebr]; Bebr, *Directly Applicable Provisions of Community Law: Development of a Community Concept,* 19 INT'L & COMP. L. Q. 257 (1970) [hereinafter cited as *Directly Applicable Provisions*]; and Hay & Thompson, *The Community Court and Supremacy of Community Law: A Progress Report,* 8 VAND. J. TRANSNAT'L L. 651 (1974-1975).

1. The Priority of Community Law over National Law

The EEC Treaty does not explicitly establish the supremacy of Community Law over domestic law. However, in *Costa v. ENEL,*[112] the ECJ held that when direct conflicts occur between national and Community law, Community law must prevail over domestic law.[113] This doctrine of supremacy rests on the Court's reasoning, expressed in the *Van Gend & Loos* case,[114] that Community law exists as an independent legal order created by the partial transfer of sovereignty from the Member States to the Community.[115] The ECJ considers the supremacy of Community law to be the legal foundation of the Community, without which its legal order could not function effectively.[116] Otherwise, Member States could frustrate the objects of the Treaty by enacting or maintaining domestic law that is inconsistent with the Treaty. The concepts of supremacy and an independent Community law are therefore linked by the ECJ:

> [T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[117]

a. *The Concept of "Direct Applicability"*

Instead of explicitly proclaiming the supremacy of a particular provision of Community law, a second, more inconspicuous method by which the ECJ may ensure the same result is by finding that provision to be "directly applicable."[118] By declaring provisions of primary[119] or secondary[120] Community law to be "directly applicable" within the Member States, the ECJ directly confers upon Community citizens rights and obligations under Community law which each

112. 1964 E. Comm. Ct. J. Rep. 585, 3 Comm. Mkt. L.R. 425.

113. *Id.* at 593-94, 3 Comm. Mkt. L.R. at 455-56.

114. 1963 E. Comm. Ct. J. Rep. 1, 2 Comm. Mkt. L.R. 105. *See* text accompanying notes 67-70 *supra.*

115. 1963 E. Comm. Ct. J. Rep. at 12, 2 Comm. Mkt. L.R. at 129.

116. Bebr, *supra* note 111, at 3.

117. Costa v. ENEL, 1964 E. Comm. Ct. J. Rep at 594, 3 Comm. Mkt. L.R. at 456.

118. Bebr, *supra* note 11, at 4. The ECJ typically determines whether a provision of Community law is "directly applicable" when that provision is referred to the Court for interpretation under art. 177. *See* § III. B. 2 *infra.*

119. "Primary Community law" refers to provisions of the EEC Treaty.

120. "Secondary Community law" refers to more specific regulations and directives issued to implement Treaty provisions. Article 189 provides in part:

> For the achievement of their aims and under the conditions provided for in this Treaty, the Council and the Commission shall adopt regulations and directives. . . .
>
> Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State.
>
> Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means. . . .

EEC Treaty, *supra* note 1, art. 189.

Member State *must* recognize and protect.[121] Furthermore, domestic law which is inconsistent with Community law deemed to be "directly applicable" must be repealed or modified.[122] The guarantee of Community law supremacy is, therefore, inherent in a provision which the ECJ deems "directly applicable."[123]

At the present time, the ECJ has ruled only a limited number of EEC Treaty provisions to be "directly applicable."[124] A provision of Community law may be declared to be "directly applicable" by the ECJ if it meets three criteria.[125] First, the provision must impose upon the Member States a clear and precise obligation.[126] Second, the provision must be unconditional; if, however, it is subject to exceptions, these exceptions must be strictly defined and delimited.[127] Finally, application of the Community rule must not depend upon any subsequent legislation by either Community institutions or Member State institutions, and the rule must not allow the Member States any discretionary power with respect to its application.[128]

b. *Article 48*

The ECJ first declared that Article 48's provisions guaranteeing freedom of movement for workers were "directly applicable" in *E.C. Commission v. France*.[129] The Court focused on an alleged conflict between Article 3(2) of the French Merchant Seamen Code of 1926, which required that a certain proportion of the

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121. *See Directly Applicable Provisions, supra* note 111, at 263.

122. *See* Bebr, *supra* note 111, at 4.

123. *See id.*

124. *See* LIPSTEIN, *supra* note 110, at 29-30.

125. Van Duyn v. Home Office, 1974 E. Comm. Ct. J. Rep. 1337, 1348, 15 Comm. Mkt. L.R. 1, 8 (opinion of Advocate General Mayras). The advocates-general are "standing *amici curiae*" who submit independent and impartial interpretations of Community law to the ECJ in addition to the arguments of the parties. J. LANG, THE COMMON MARKET AND COMMON LAW 25 n.170 (1966) [hereinafter cited as LANG]. *See* EEC Treaty, *supra* note 1, art. 166.

126. *Van Duyn,* 1974 E. Comm. Ct. J. Rep. at 1348, 15 Comm. Mkt. L.R. at 8.

127. *Id.*

128. *Id.* The statutes of the Community, those regulations issued by the Council and Commission pursuant to Article 189, are by definition "directly applicable" in each Member State EEC Treaty, *supra* note 1, art. 189(2). However, to determine whether a measure is in fact a "regulation" within the meaning of Article 189 and has immediate legal effects with regard to the persons designated, the contents of the measure must conform to the three criteria outlined above. LIPSTEIN, *supra* note 110, at 30-31. The ECJ has ruled that directives may also be "directly applicable," despite the distinction drawn by Article 189, *see* note 120 *supra,* if the directive permits no discretionary interpretation by the Member States. *Van Duyn,* 1974 E. Comm. Ct. J. Rep. at 1348, 15 Comm. Mkt. L.R. at 16. "It is necessary to examine, in every case, whether the nature, general scheme and wording of the [directive] in question [is] capable of having direct effects on the relations between Member States and individuals." *Id.* Otherwise,

> where the Community authorities have, by directive, imposed on Member State the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and the latter were prevented from taking it into consideration as an element of community law.

Id.

129. 1974 E. Comm. Ct. J. Rep. 359, 14 Comm. Mkt. L.R. 216.

crew of a ship must be French nationals,[130] and Article 48 of the EEC Treaty, which requires "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other working conditions."[131] Specifically, the Commission regarded the French law to be incompatible with Article 4 of Regulation 1612/68,[132] issued under Article 48 of the Treaty.

The French government argued that it had not discriminated against nationals of other Member States because oral directions had been given by the government to maritime authorities requiring that nationals of the Community be regarded as French nationals.[133] The ECJ, however, found that the wording of the French Seamen Code and mere oral instructions given to maritime authorities gave rise to an ambiguous state of affairs.[134] This ambiguity left nationals from other Member States uncertain as to their possible rights under Community law, and thus constituted an obstacle to access to employment.[135] The Court ruled that Article 48 and Regulation 1612/68 were "directly applicable" in the legal system of every Member State.[136]

The ECJ reconfirmed in *Van Duyn v. Home Office* that Article 48 is "directly applicable" and thus confers on individuals rights which they may enforce in domestic courts.[137] The Court recognized that Article 48 imposes "on Member States a precise obligation which does not require the adoption of any further measure on the part of either the Community institutions or the Member States and which leaves them, in relation to its implementation, no discretionary power."[138] Regulations and directives issued under Article 49 to insure the free movement of labor do not create any new rights in favor of persons protected by Community law, but simply set forth detailed rules for the exercise of rights conferred directly by Article 48.[139]

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130. *Id.* at 361, 14 Comm. Mkt. L.R. at 217. In addition, Ministerial Orders of 1960 and 1969 provided that certain jobs on board ship be exclusively reserved to French nationals and that employment generally be limited to French nationals in a three-to-one ratio. *Id.*

131. EEC Treaty, *supra* note 1, art. 48.

132. Reg. 1612/68, *supra* note 20, art. 4. Article 4 of Reg. 1612/68 provides in part: "(1) Legislative, regulatory, and administrative provisions of the Member States that restrict the employment of foreign workers to a certain number or percentage per enterprise, industry, or region, or for the State as a whole, shall not be applicable to nationals of the other Member States." *Id., as translated in* 1 COMMON MKT. REP. (CCH) ¶ 1031D.

133. 1974 E. Comm. Ct. J. Rep. at 376, 14 Comm. Mkt. L.R. at 220.

134. *Id.* at 372, 14 Comm. Mkt. L.R. at 230.

135. *Id.* at 373, 14 Comm. Mkt. L.R. at 230. Moreover, the Court found that freedom of movement for workers in the French Merchant Marine "continues to be considered by the French authorities not as a matter of right but as dependent on their unilateral will." *Id.* at 372, 14 Common Mkt. L.R. at 230.

136. *Id.* at 371, 14 Comm. Mkt. L.R. at 229. "[T]hese provisions give rise, on the part of those concerned, to rights which the national authorities must respect and safeguard and as a result of which all contrary provisions of internal law are rendered inapplicable to them." *Id.*

137. 1974 E. Comm. Ct. J. Rep. at 1347, 15 Comm. Mkt. L.R. at 15.

138. *Id.*

139. Procureur du Roi v. Royer, 1976 E. Comm. Ct. J. Rep. 497, 512, 18 Comm. Mkt. L.R. 619, 638.

The concept of "direct applicability" is an important integrative tool. The direct applicability of certain Community law makes an individual falling within the scope of that law (e.g., Community workers fall within the scope of Article 48) a "private attorney general," a custodian of Community law who can enforce a Member State's obligations to him under that law in proceedings before national courts.[140] Member States must therefore expect legal action whenever their behavior is incompatible with Community law and thereby injures the rights and interests of private parties.[141] With respect to the right of freedom of movement, every migrant worker in the Community becomes a possible plaintiff seeking to ensure that his conditions of employment are equal to the domestic worker and that his freedom of movement as guaranteed under Community law is not impaired by Member State legislation or administrative practice.

2. Preliminary Rulings under Article 177

a. *Mechanics of Preliminary Rulings*

Many of the provisions of the EEC Treaty and most of the regulations issued pursuant thereto take effect upon issuance and become part of the national law which governs legal relations within each of the Member States.[142] National courts within each Member State, therefore, frequently confront questions concerning the interpretation of Community law and the validity of acts of Community institutions. Under the procedure described in Article 177,[143] inferior national courts may refer questions of Community law to the ECJ.[144] National courts of final appeal are required to refer such questions to the ECJ.[145]

The national court, rather than the parties to the litigation, formulates the issues for ECJ review.[146] The ECJ may resolve only specific questions of Community law; it may not render a decision on the merits of a particular case.[147]

140. Scheuing, *supra* note 33, at 556.

141. *See* PESCATORE, *supra* note 24, at 100.

142. *See* note 124 *supra*. *See also* Donner, *National Law and the Case Law of the Court of Justice of the European Communities*, 1 COMMON MKT. L. REV. 8 (1963).

143. EEC Treaty, *supra* note 1, art. 177.

144. LANG, *supra* note 125, at 21.

145. *Id.* at 22. National courts of last resort must refer a question to the ECJ only if its resolution is essential to the resolution of the case. *Id.* A national court that is obliged to refer a question of law to the ECJ may decline to do so on the grounds that the issue of Community law is clear and requires no further interpretation by the Court. *Id. See* Pescatore, *Interpretation of Community Law and the Doctrine of 'Acte Chair'*, *in* LEGAL PROBLEMS OF AN ENLARGED EUROPEAN COMMUNITY 41-45 (Bathurst, Simmonds, Hunnings & Welch eds. 1972).

146. MANN, *supra* note 29, at 383-84. However, there may be "participants" in the proceeding before the ECJ, whether a Member State, Community organ or the parties themselves, who may submit memoranda and suggestions to the Court. *Id.* at 383 n.323.

147. LIPSTEIN, *supra* note 110, at 330. In certain cases it may not be possible for a national court to formulate a question of Community law interpretation in the abstract. In such cases, the ECJ has applied the Treaty to the facts as found by the national court in order to better determine the content of the abstract question before it. *Id.* at 32 n.5; LANG, *supra* note 125, at 25-26.

Once the ECJ has interpreted the Community law to which it has been referred, the national court applies that interpretation to the facts of the original case. The ECJ's interpretation is binding, as a matter of law, only on the national court which refers the question to it and on all other national courts concerned with the same case.[148] However, as a matter of practice, it is likely that other national courts of the same or any other Member State, later faced with the same question, will follow the ECJ's interpretation.[149]

b. *Application of the Preliminary Ruling Process*

The ECJ normally reviews in Article 177 freedom of movement cases the allegedly discriminatory effects of national social and labor legislation on EEC non-national workers. Under the provisions of Article 48, the ECJ is bound to ensure that EEC non-nationals are treated the same as nationals with regard to conditions of employment;[150] otherwise, significant barriers to free movement between Member States may result.

The case of *Marsman v. Rosskamp,*[151] for example, arrived before the ECJ under Article 177. In that case, the plaintiff, a Dutch national residing in Holland, worked as a metal worker in West Germany. The plaintiff's employer

148. E. WALL, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 131 (1966) [hereinafter cited as WALL]; LANG, *supra* note 125, at 26. If the same issue arises again in another proceeding before a national court, the ECJ's earlier decision does not become binding precedent to that court. Grementieri & Golden, *The United Kingdom and the European Court of Justice: An Encounter Between Common and Civil Law Traditions,* 21 AM. J. COMP. L. 664, 684 (1973) [hereinafter cited as Grementieri & Golden]. Article 177 allows a national court to refer such questions to the ECJ again, even though the issue may have been decided earlier. *Id.* at 684 n.95. This procedure permits the ECJ to amend an earlier interpretation of Community law. Such an opportunity is now before the ECJ in the context of freedom of movement of workers. *See* note 317 and accompanying text *infra.*

The United Kingdom's entry into the EEC in 1973 presented the problem of how to reconcile the Community system of preliminary rulings with the common law rule of *stare decisis.*

> The distinction in art. 177 between lower courts and the highest jurisdictions is based on the Civil Law principle that only decisions of the court of last resort have any real influence on the national jurisprudence. One must speak of "influence," of course, since it is theoretically contrary to Civil Law notions to speak of "precedent" as having any binding law-making effect beyond the case at hand. Due to the *de facto* general influence of decisions rendered by highest courts of the original member States, the Communities felt that preventing interpretation of Community law by such courts was necessary to guarantee against divergent national interpretations of that law. On the other hand, lower national courts are permitted to give interpretations of Community law, since even if such interpretations were erroneous, they would have no meaningful influence beyond the immediate case.

Grementieri & Golden, *supra,* at 686-87. The United Kingdom's accession to the EEC and the observance of the rule of *stare decisis* in that country means that binding precedents may be formed by the decisions of lower courts which are not required to refer questions of community law to the ECJ. *Id.* at 687. The likely result is non-uniform interpretations of community law. One solution is to eliminate the rule of *stare decisis* for domestic British decisions pertaining to Community law. LANG, *supra* note 125, at 20. Another authority suggests amending art. 177 to require that all courts of the Member States refer questions of Community law to the ECJ. Grementieri & Golden, *supra,* at 688-89.

149. WALL, *supra* note 148, at 131, 138-39.

150. EEC Treaty, *supra* note 1, art. 48(2). Article 48(2) incorporates the Treaty's general prohibition against discrimination on the ground of nationality contained in Article 7.

151. 1972 E. Comm. Ct. J. Rep. 1243, 12 Comm. Mkt. L.R. 501.

dismissed him when the plaintiff was incapacitated in an industrial accident.[152] Section 14 of the German Serious Injuries Act of 1953 required assent of the principal social security department before an employer could dismiss an employee.[153] The plaintiff's employer argued that the provision was inapplicable to non-Germans, and thus did not afford protection to the plaintiff.[154] The German labor tribunal questioned the validity of this provision in light of Community law, and therefore referred the issue to the ECJ for a preliminary ruling under Article 177.[155]

The ECJ interpreted Article 48 of the Treaty and Article 7 of Regulation 1612/68[156] to explicitly establish termination as one of several conditions of employment which must apply equally to indigenous workers and to workers of other Member States if there is to be true freedom of movement within the Community.[157] The ECJ also reaffirmed the principle that Article 48's prohibition on discrimination affects the social security law of each Member State, requiring that each Member State afford the nationals of other Member States employed on its territory all the advantages which its grants its own nationals.[158] The ECJ, after interpreting the Community law relevant to the national court's question,[159] directed the German labor tribunal to apply the ECJ's interpretation of law to the facts of the case.

c. *Article 177 and the Process of Integration*

Article 177 ensures uniform interpretation of Community law while leaving its actual application to the national courts.[160] The procedure of Article 177 is the only means by which the ECJ is brought into direct relationship with the national courts of the Community.[161] The institution of preliminary rulings is a process of judicial cooperation and division of powers, whereby the national

152. *Id.*

153. *Id.* at 1250, 12 Comm. Mkt. L.R. at 503.

154. *Id.*

155. *Id.* at 1245, 12 Comm. Mkt. L.R. at 502.

156. Reg. 1612/68, *supra* note 20, art. 4.

157. 1972 E. Comm Ct. J. Rep. at 1248-49, 12 Comm. Mkt. L.R. at 506.

158. *Id.*

159. The ECJ has no power to annul or interpret Member State legislation. LIPSTEIN, *supra* note 110, at 33. *But see* Casagrande v. Landeshauptstadt München, 1974 E. Comm. Ct. J. Rep. 773, 14 Comm. Mkt. L.R. 423. The Court ruled in this case that although the ECJ may not rule on the construction or validity of a national law under Article 177, it could nevertheless construe provisions of Community law and in the process conclude whether such provisions apply to measures taken by national authorities. *Id.* at 778, 14 Comm. Mkt. L.R. at 431.

Sometimes the ECJ's interpretation of Community law is so clear that no other conclusion is possible than that the national law is void. Schermers, *supra* note 72, at 448.

160. WALL, *supra* note 148, at 130.

161. *Id.* at 131. Advocate General Lagrange in the *Bosch* case stated: "[T]he provisions of Article 177 must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdictions." 1962 E. Comm. Ct. J. Rep. 45, 56, 1 Comm. Mkt. L. R. 1, 6.

court and the Court of Justice "are called upon to contribute directly and reciprocally to reaching a decision so as to ensure the uniform application of Community law in all Member States."[162] This "dialogue between the national courts" and the ECJ is, therefore, an important factor in the judicial process of integration.[163] Application of Article 177 results in the use of one communal law in national courts. Furthermore, because domestic law may not compromise the effectiveness of Community law, Community law is changing domestic law so that it conforms with the community ideal expressed in the Treaty.[164] As a consequence, "the procedure under Article 177 has served to awaken Community citizens to the spreading web and interdependence of Community and national law."[165]

d. *The ECJ's Liberal Interpretation of the Freedom of Movement Provisions*

Article 177 has been an especially effective tool of political integration when used by the ECJ in the context of freedom of movement cases. When confronted with a referral under Article 177, the ECJ has customarily ruled that, although the offending national legislation or practice may be in area apparently remote from the free movement of labor, and although the legislation or practice may only minimally or indirectly impede the free movement of workers, Community law must nevertheless prevail. As a consequence, the integrative and unifying effect of preliminary rulings has affected diverse areas of substantive national law beyond simply worker movement and the plain language of Article 48-51.[166]

The impetus for the ECJ's liberal interpretation of Article 48-51 lies partially in the importance which both the EEC Treaty and the ECJ ascribe to freedom of movement in the process of achieving economic union.[167] However, the ECJ has interpreted the free movement provisions in a more liberal manner than would be necessary to achieve merely the Treaty's economic objectives.[168] Instead, the ECJ has also acknowledged the objectives of social and political integration latent within the free movement provisions.[169] The Court recognizes that, beneath the

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162. PESCATORE, *supra* note 24, at 99, *quoting* Schwarze v. Einfuhr-und Vorratsstelle Getreide und Futtermittel, 1965 E. Comm. Ct. J. Rep. 877, 886. The ECJ has avoided presenting itself as a "superior" court. Instead, it has stressed that it is a special court with a specific task on an equal footing with national courts who have their own specific tasks. Schermers, *supra* note 72, at 447-48.

163. *See generally* MANN, *supra* note 29, at 383-432.

164. A national court therefore participates simultaneously in two separate but interwoven legal orders: Community law and that of the Member State. *See generally* Kutscher, *Community Law and the National Judge,* 89 LAW Q. REV. 487 (1973).

165. Feld & Slotnick, *supra* note 59, at 333.

166. For cases clearly falling within the purview of Article 48 and worker movement, *see, e.g.,* Michel Choquet, 1978 E. Comm. Ct. J. Rep. 2293, 24 Comm. Mkt. L. Rep. 535 (involving conditions for the issue of drivers licenses); the residency requirement and deportation cases, *e.g.,* The State v. Sagulo, 1977 E. Comm. Ct. J. Rep. 1495, 20 Comm. Mkt. L.R. 585; and the cases discussed in § III. D *infra*

167. *See* text accompanying notes 7-15 *supra.*

168. WYATT & DASHWOOD, *supra* note 22, at 126-27.

169. *See id.* Wyatt and Dashwood cite the opinion of Advocate General Trabucchi in Mr. and Mrs. F.

economic objectives of the provisions regulating free movement of labor, the inspiration for Articles 48-51 "is no less than the ultimate aim of the Treaty — 'to eliminate the barriers which divide Europe.' "[170]

In *Casagrande v. Landeshauptstadt Munchen*,[171] for example, the ECJ was called upon by a German Court to interpret the first amendment of Article 12 of Regulation 1612/68,[172] which requires that the children of an EEC non-national worker shall be admitted to a Member State's general educational programs "under the same conditions as the nationals of such State."[173] The Court specifically focused on the question of whether Article 12 applied to only actual access to educational programs, or related to all advantages the host state afforded its nationals in the educational field (e.g., educational grants).[174] Defendants argued that educational and cultural matters were not within the scope of the EEC Treaty, which they asserted was essentially concerned with economic matters.[175] The Council, in legislating about educational grants in Article 12 of Regulation 1612/68, had therefore exceeded its powers.[176] Advocate General Warner[177] agreed that the power of the Council under Article 49[178] did not include the power to legislate about educational matters per se.[179] However, the Advocate General continued, the Council's power "is a power to legislate for the freedom of movement of workers, which includes power to legislate about the education of their children."[180] The ECJ, agreed[181] with the Advocate General's conclusion that the narrower interpretation of Article 12 would violate the spirit of Regulation 1612/68,[182] the purpose of which was to facilitate the integration of the families of migrant workers, especially their children, into the host country.[183]

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v. Belgian State, in which the Advocate General eschewed a purely functional economic approach and recognized the social and political objectives of Articles 48-51:

> If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish to be a legal system corresponding to the concept of social justice and to the requirements of European integration, not only of the economy but of the people, we cannot disappoint the Belgian Court's expectations, which are more than those of legal form.

1975 E. Comm. Ct. J. Rep. at 697, 16 Comm. Mkt. L.R. at 452.

170. WYATT & DASHWOOD, *supra*, note 22, at 127.

171. 1974 E. Comm. Ct. J. Rep. 773, 14 Comm. Mkt. L.R. 423.

172. Reg. 1612/68, *supra* note 20, art. 12.

173. *Id., as translated in* 1 COMMON MKT. REP. (CCH) ¶ 1031M. The *Casagrande* case involved the son of a deceased Italian national who had worked in Munich. The son was refused an educational grant on the basis of his nationality. 1974 E. Comm. Ct. J. Rep. at 775, 14 Comm. Mkt. L.R. 424-25.

174. 1974 E. Comm. Ct. J. Rep. at 782, 14 Comm. Mkt. L.R. at 427.

175. *Id.* at 783, 14 Comm. Mkt. L.R. at 429.

176. *Id.*

177. For a description of the advocates-general, *see* note 125 *supra*.

178. EEC Treaty, *supra* note 1, art. 49.

179. 1974 E. Comm. Ct. J. Rep. at 783, 14 Comm. Mkt. L.R. at 429.

180. *Id.*

181. *Id.* at 778, 14 Comm. Mkt. L.R. at 431-32.

182. *Id.* at 784, 14 Comm. Mkt. L.R. at 429.

183. *Id.* at 782, 14 Comm. Mkt. L.R. at 427-28. The ECJ held that this integrative purpose "presup-

Similarly, in *Württembergische Milchverwertung-Südmilch AG v. Ugliola,*[184] the ECJ broadly interpreted Article 48[185] and its implementing legislation. The respondent, Ugliola, an Italian national, was employed by the appellant in the Federal Republic of Germany.[186] He interrupted his work for approximately fifteen months to perform compulsory military service in Italy and then immediately resumed work in Germany.[187] German legislation provided that military service would be taken into consideration in the calculation of one's seniority at work, which would have resulted in Ugliola's receiving a larger bonus.[188] However, Ugliola's employer and the German government contended that such legislation was inapplicable in Ugliola's case because it concerned only military law, not labor law, and therefore could not be considered as forming part of the conditions of employment and work which are subject to Community law.[189] Advocate General Gand and the ECJ, however, once again upheld the broad scope of the guarantee of freedom of movement and found that it affected even national military law.[190] The ECJ agreed that the German law at issue was clearly associated with national defense, but, because the law formed part of the "conditions of employment and work" within the meaning of Article 7 of Regulation 1612/68, the Court found that the matter was within its jurisdiction and interpretation.[191]

The ECJ broadly interpreted Article 7 of Regulation 1612/68 on a subsequent

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poses that, in the case of the child of a foreign worker who wishes to have secondary education, this child can take advantage of benefits provided by the laws of the host country relating to educational grants, under the same conditions as nationals who are in a similar position." *Id.* at 778, 14 Comm. Mkt. L.R. at 431-32. This same rationale was used by the ECJ in Michel S. v. Fonds national de reclassement social des handicapés, 1973 E. Comm. Ct. J. Rep. 457, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8324, to justify its broad interpretation of Article 12 of Reg. 1612/68 in that case. There, the ECJ held that access to "general education" as provided for in Article 12 also included rehabilitation for a worker's handicapped son.

184. 1969 E. Comm. Ct. J. Rep. 363, 9 Comm. Mkt. L. R. 194.

185. EEC Treaty, *supra* note 1, art. 48.

186. 1969 E. Comm. Ct. J. Rep. at 371, 9 Comm. Mkt. L.R. at 195.

187. *Id.*

188. *Id.* at 371-72, 9 Comm. Mkt. L.R. at 195.

189. *Id.* at 373, 9 Comm. Mkt. L.R. at 197. The Bundesarbeitsgericht, the final court of appeal in the field of labor law, asked the ECJ, pursuant to Article 177, whether such treatment of an EEC non-national worker was discriminatory and therefore prohibited under Article 48 and, more specifically, under Article 7 of Reg. 1612/68. *Id.* at 368, 9 Comm. Mkt. L.R. at 201. Article 7 of Reg. 1612/68 provides that a worker who is a national of another Member State shall enjoy the same protection and treatment given nationals of that State in respect of all conditions of employment and work. Reg. 1612/68, *supra* note 20, art. 7. Respondent's employer argued that because the German statute at issue concerned military matters and not freedom of movement of workers, it could not be considered within the scope of regulations issued under Article 49 or any other part of the Treaty. 1969 E. Comm. Ct. J. Rep. at 373, 9 Comm. Mkt. L.R. at 197. As such, defendants argued, the question was not within the jurisdiction of the ECJ. *Id.* at 374, 9 Comm. Mkt. L.R. at 198. Defendants cited EEC Treaty Articles 223(1)(b) and 224, which permit Member States to legislate freely in the area of defense. *Id.* at 373, 9 Comm. Mkt. L.R. at 197.

190. *Id.* at 374, 9 Comm. Mkt. L.R. at 198.

191. *Id.*

occasion in *Fiorini v. S.N.C.F.*[192] French legislation provided that in families with three or more children under the age of 18, the father, mother and each child under 18 could receive an identity card entitling them to a reduced fare on the French National Railway (S.N.C.F.).[193] Mrs. Fiorini, an Italian national residing in France with four children under the age of 18, requested and was refused a card on the basis that the cards were only for the benefit of French citizens.[194] Mrs. Fiorini brought an action against S.N.C.F. on the grounds of Article 7(2) of Regulation 1612/68, which provides that a national of a Member State employed in another Member State shall enjoy the same social and tax advantages as national workers.[195] The Cour d'Appel of Paris[196] sought a preliminary ruling from the ECJ on the interpretation of the Article. The Court ruled that the Article applied to all social and tax advantages, whether or not attached to the contract of employment, that a national worker enjoys.[197]

The ECJ has therefore interpreted Articles 48-51 and the implementing legislation under these Articles in a consistently broad manner. Because most of the ECJ's judgments are made by way of preliminary ruling,[198] national courts must apply the Court's interpretation of Community law in a correspondingly broad manner, which in turn affects diverse areas of substantive national law. It is when the ECJ fills such gaps in Community legislation with broad interpretations that its role becomes similar to that of a legislature.[199]

C. *The ECJ Sustains the Supranational Structure of the Community*

One of the principal characteristics of supranationalism, as discussed above,[200] is that the supranational institutions stand between, rather than over, the

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192. 1975 E. Comm. Ct. J. Rep. 1085, 17 Comm. Mkt. L.R. 573.

193. *Id.* at 1086, 17 Comm. Mkt. L.R. at 574.

194. *Id.*

195. Reg. 1612/68, *supra* note 20, art. 7(2). The Tribunal de Grande Instance, Paris, dismissed her claim, agreeing with S.N.C.F. that the Article referred exclusively to an individual's status as a *worker*. 1975 E. Comm. Ct. J. Rep. at 1087, 17 Comm. Mkt. L.R. at 575. As such, the Article had no application to benefits such as a reduction card. Mrs. Fiorini appealed to the Cour d'Appel, Paris.

196. There are thirty cours d'appel in metropolitan France. A VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 103 (2nd ed. 1977). French procedure provides for review of judgments in first instance by way of appeal to these courts. *Id.* at 102. The court of last resort in the system of regular courts in France is the Cour de cassation. *Id.* at 104.

197. 1975 E. Comm. Ct. J. Rep. at 1094, 17 Comm. Mkt. L.R. at 582.

198. Schermers, *supra* note 72, at 453.

199. *See Id.* at 453-64.

> The Court is in a strong position to play a creative role when it is dealing with an unforeseen ambiguity in the detailed provisions which make up the body of the treaty. The so-called unprovided case can, indeed, be decided by reference to broad treaty goals in light of the treaty's fundamental principles. This is the variety of judicial activism that no court can escape.

S. SCHEINGOLD, THE RULE OF LAW IN EUROPEAN INTEGRATION 21 (1965). *But see* Donner, *The Constitutional Powers of the Court of Justice of the European Communities*, 11 COMM. MKT. L. REV. 127, 139-40 (1974) (where it is asserted that the ECJ is not involved in any type of legislating activity).

200. *See* notes 43-46 and accompanying text *supra*.

Member States.[201] For example, when rendering a preliminary ruling under Article 177, the ECJ does not function as a superior or appellate court which reviews the correctness of the nation court's ruling; instead, it performs its particular duties in conjunction with the national courts.[202] The ECJ performs two other functions which illustrate the Court's capacity as a supranational mediator. First, the Court has power to resolve controversies between Community institutions and governments of Member States. Second, the Court has power to resolve controversies between Member States.

1. Controversies between Community Institutions and Governments of Member States

Under Article 155,[203] the Community Commission has a duty to ensure that Member States comply with provisions of the Treaty and Community legislation. If the Commission determines that a Member State has failed to fulfill any of its Community obligations, it may first request that the Member State rectify its omission.[204] Should the Member State fail to comply with the Commission's request within the time period set by the Commission,[205] Article 169 authorizes the Commission to refer the matter to the ECJ.[206]

The ECJ has received two cases in the field of freedom of movement for workers under Article 169.[207] In *E.C. Commission v. France,*[208] as noted earlier,[209] the Commission determined that Section 3(2) of the French Merchant Seamen Code of 1926 contravened certain provisions of Regulation 1612/68.[210] Before referring this question to the Court, however, the Commission requested that the French government amend the legislation to comply with the Community provisions.[211] Although the French government agreed, it took no action. After the government ignored a second request, the Commission delivered a "rea-

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201. *See* note 44 *supra.*

202. *See* note 162 *supra.*

203. EEC Treaty, *supra* note 1, art. 155.

204. *Id.,* art. 169. Article 169 provides:

> If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.
>
> If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice.

See e.g., E.C. Commission v. France, 1974 E. Comm. Ct. J. Rep. 359, 361-62, 14 Comm. Mkt. L.R. 216, 217-18.

205. It is up to the Commission, based upon the urgency of the matter, to determine when to initiate proceedings in the ECJ. LIPSTEIN, *supra* note 110, at 314 n.4.

206. EEC Treaty, *supra* note 1, art. 169. *See* note 204 *supra. See also* LIPSTEIN, *supra* note 110, at 314.

207. EEC Treaty, *supra* note 1, art. 169.

208. 1974 E. Comm. Ct. J. Rep. 359, 14 Comm. Mkt. L.R. 216.

209. *See* text accompanying notes 129-36 *supra.*

210. Reg. 1612/68, *supra* note 20.

211. 1974 E. Comm. Ct. J. Rep. at 361, 14 Comm. Mkt. L.R. at 217.

soned opinion" to the French government under Article 169(1),[212] and requested compliance within thirty days.[213] Upon failure of the French to comply within that period, the Commission brought the matter before the Court.[214]

As part of its case, the French government challenged the existence of the Commission's legal interest to bring the matter before the Court.[215] However, the ECJ ruled that under Article 169, the Commission did not have to show the existence of a legal interest, since the Commission's duty under Article 169 was to ensure Member States' compliance with the Treaty.[216]

The Commission also utilized the procedure of Article 169[217] in *E.C. Commission v. Belgium.*[218] In that case, the Commission discovered that Belgian nationality was a prerequisite for employment in certain posts with Belgian government authorities and undertakings, irrespective of the nature of the duties to be performed.[219] The Commission considered such a hiring policy to constitute discrimination on the basis of nationality which in turn constitutes an obstacle to the free movement of workers within the Community.[220]

The ECJ reserved final judgment in *E.C. Commission v. Belgium* because it felt that it did not have sufficient facts before it regarding the various jobs at issue. The Court ordered the parties to reexamine the issue in light of the legal principles it laid out[221] and then to resubmit the case to the Court for a final judgment.[222] In *E.C. Commission v. France,* on the other hand, the ECJ ultimately agreed with the Commission's position and found that France was in violation of its obligations under the Treaty.[223] According to Article 171, France was then obliged to "take the measures required for the implementation of the judgment of the Court."[224]

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212. EEC Treaty, *supra* note 1, art. 169(1).

213. 1974 E. Comm. Ct. J. Rep. at 362, 14 Comm. Mkt. L.R. at 218.

214. *Id.*

215. *Id.* at 368, 14 Comm. Mkt. L.R. at 227.

216. *Id.* at 368-69, 14 Comm. Mkt. L.R. at 277-28.

217. EEC Treaty, *supra* note 1, art. 169.

218. 1980 E. Comm. Ct. J. Rep. 3881, 31 Comm. Mkt. L.R. 413.

219. *Id.* at 3884, 31 Comm. Mkt. L.R. at 415.

220. *Id.* The Commission was well aware of the exception in Article 48(4), which provides that discrimination on the basis of nationality is permitted in the public service. *See* note 11, *supra.* However, the Commission's view was that the exception covered only posts involving actual participation in official authority as part of their duties. 1980 E. Comm. Ct. J. Rep. at 3884-85, 31 Comm. Mkt. L.R. at 415. In other words, the positions in question (e.g., unskilled national railroad workers and nurses employed in the national health care system) would not fall within Article 48(4)'s exception because they were no different from similar posts in the private sector. *Id.* at 3885, 31 Common. Mkt. L.R. at 415.

221. *See* text accompanying notes 260-65 *infra*

222. 1980 E. Comm. Ct. J. Rep. at 3905, 31 Comm. Mkt. L.R. at 437.

223. 1974 E. Comm. Ct. J. Rep. 359, 374, 14 Comm. Mkt. L.R. 216, 231.

224. EEC Treaty, *supra* note 1, art. 171. If France had subsequently ignored the ECJ's judgment, the Court would have been without enforcement or sanction powers under the Treaty. The most that the ECJ could have done in such a situation is to issue a declaratory judgment that the Member State had failed to carry out its obligations under Article 171. LIPSTEIN, *supra* note 110, at 314-15. Any more serious sanction may evoke an undesirable response from a Member State, which may threaten the

The ECJ has sustained the Commission's suspicions of a Treaty violation in the majority of cases which the Commission has brought before it.[225] According to one member of the European Court, the high success rate of the Commission is due primarily to its nature as an objective supranational institution identified with the interests of the entire Community rather than with any secularized national interests.[226] As such, the Commission is able to provide the ECJ unbiased legal evaluations and technical information which are quite helpful to the Court in its decision-making process.[227]

The settlement of controversies by the Court in favor of the Commission has a definite integrative effect; Community law is upheld and applied and the authority of the Community institutions is enhanced. Secondly, this procedure reemphasizes and strengthens the supranational structure of the Community. The working relationship between the Commission and the ECJ, and the relationship of these two community institutions to the Member States best demonstrates the Community's resemblance to a federal system.[228]

2. Controversies between Member States

An issue may also arrive before the ECJ through the mechanics of Article 170.[229] Under Article 170, one Member State may bring an action against another Member State for the alleged infringement of an obligation under the Treaty.[230] No case has yet been brought before the ECJ by this method;[231] however, Member States have expressed opposing views on an issue before the Court[232] and have occasionally intervened in cases pending before the Court.[233]

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incipient federal structure of the Community. Instead, an appeal to public opinion of the Community may be sufficient to assure compliance. Feld & Slotnick, *supra* note 59, at 335. In no case, however, has a Member State failed to comply with a judgment of the ECJ, although in a few instances compliance has taken a long time. *Id.* at 336.

225. Feld & Slotnick, *supra* note 59, at 336. *See* GREEN, *supra* note 31, at 222-26 for a detailed analysis of the success rate of the Commission in cases in which the Commission was either a party or otherwise involved in the litigation.

In most instances in which the Commission has charged a Member State with objectionable conduct, however, the matter is settled before it reaches the ECJ by the State correcting its behavior. Intervention by the Court is only a final and exceptional sanction. PESCATORE, *supra* note 24, at 81-82.

226. PESCATORE, *supra* note 24, at 80. Pierre Pescatore has been a member of the ECJ since 1967. 3 COMMON MKT. REP. (CCH) p. 13,077.

227. *Id. See also* Schermers, *supra* note 72, at 446.

228. Feld & Slotnick, *supra* note 59, at 335. *See* notes 58-62 and accompanying text *supra*.

229. EEC Treaty, *supra* note 1, art. 170.

230. *Id.*

231. Feld & Slotnick, *supra* note 59, at 344.

232. *See* note 146 *supra*.

233. A request for intervention is a unilateral request by a Member State or Community institution to be joined to pending proceedings before the ECJ in order to support the submissions of one of the parties to the litigation. Member States and Community institutions may intervene in any circumstance; however, the intervening party may not advance independently any rights of its own or seek to establish legal propositions unrelated to the claims of the original parties. LIPSTEIN, *supra* note 110, at 342-44.

In the *Casagrande* case,[234] the Commission, together with the government of Italy,[235] argued for the broader interpretation of Community law, whereas German authorities advocated a narrower reading of the law. In *E.C. Commission v. Belgium,*[236] the governments of France, Germany and the United Kingdom intervened in the case on behalf of the government of Belgium.

The fact that these cases reached the ECJ after settlement attempts had failed indicates an intentional shifting of final decision-making from the state to Community level.[237] Problems which a Member State had previously resolved internally are now referred to the authority of the Court if that problem concerns matters covered by the Treaty.[238] This process is an illustration of how the Member States have sacrificed part of their own national sovereignty to the Community System.[239] Furthermore, the fact that Member States may voice their often conflicting opinions as to the resolution of a matter pending before the Court, and the fact that the ECJ's opinion is final and binding, illustrates the similarity of the ECJ to a supreme court in a federation.[240] As a result, the authority of the Community, and especially the ECJ, is enhanced. The case of *Marsman v. Rosskamp*[241] demonstrates the increasing tendency of Member States to seek authoritative approval from the ECJ. In *Marsman,* the Court considered whether a protection against termination of employment that the Member State provided only to nationals was violative of the Treaty. The participants in the proceeding[242] were unanimous in their proposed answer to the question. All they sought was approval of their interpretation from the final authority, the ECJ.

D. *Limits to Integration*

The cases analyzed thus far illustrate that the ECJ has consistently limited state sovereignty in favor of guaranteeing the most complete right to free movement possible under the terms of the Treaty. However, two important exceptions exist to the broad guarantees of Article 48. Under the " public policy"[243] and "public service"[244] exceptions, Member States may, in order to protect important na-

234. *See* text accompanying notes 171-81 *supra.*

235. Italy had already included the children of migrant workers in such educational grant programs. 1974 E. Comm. Ct. J. Rep. at 783, 14 Comm. Mkt. L.R. at 428.

236. 1980 E. Comm. Ct. J. Rep. 3881, 31 Comm. Mkt. L.R. 413. *See also* text accompanying notes 218-22 *supra.*

237. Feld & Slotnick, *supra* note 59, at 339.

238. *Id.*

239. *See* GREEN, *supra* note 31, at 445.

240. *See* text accompanying notes 58-64 *supra.*

241. *See* text accompanying notes 151-59 *supra.*

242. The participants in the proceeding were the plaintiff in the original action, the governments of Germany and Italy, and the Commission. 1972 E. Comm. Ct. J. Rep. at 1251, 12 Comm. Mkt. L.R. at 503.

243. EEC Treaty, *supra* note 1, art. 48(3).

244. *Id.,* art. 48(4).

tional interests, restrict freedom of worker movement. The ECJ's interpretation of these exceptions has resulted in the creation of a significant area of Member State autonomy, at the expense of further political integration.

1. The Public Service Exception

Article 48(4)[245] declares that the "provisions of this article shall not apply to employment in the public service."[246] On its face, the effect of this exception is to remove those jobs within a Member State's public service from the guarantees included in the first three paragraphs of Article 48.[247] National governments may therefore turn away applicants for government employment on the basis of nationality.

The ECJ first interpreted this exception in *Sotgiu v. Deutsche Bundespost.*[248] In this case, the German Federal Labor Court, seeking a ruling as to whether Article 7 of Regulation 1612/68[249] applied to employees in the German Postal Service,[250] referred the case to the ECJ under Article 177.

The ECJ's opinion narrowed the public service exception in two respects. The Court held that Member States could restrict the admission of foreign EEC nationals to only "certain activities in the public service."[251] In addition, the Court found that the exception did not justify discriminatory measures with regard to conditions of employment against those workers who had already been admitted to the public service.[252]

In *Sotgui,* the ECJ failed to define the interests of the Member State which this exception is designed to protect. Similarly, the ECJ did not define the "certain

245. *Id.*

246. *Id.*

247. *Id.*, art. 48.

248. 1974 E. Comm. Ct. J. Rep. 153, [1974 Transfer Binder] COMMON MKT. REP. CCH ¶ 8257. Plaintiff was an Italian national employed by the German Postal Service. His family lived in Italy. Accordingly, plaintiff received a "separation allowance" of 7.50 DM per day, on the same basis as workers of German nationality. Government authorities increased the separation allowance to 10 DM per day for those workers residing in Germany at the time of their recruitment, while the allowance for those residing abroad at the time of their recruitment (both German and foreign alike) continued at the lower rate. The main issue before the ECJ, apart from interpretation of the public service exception, was whether Article 7(1) and (4) of Reg. 1612/68 could be interpreted as prohibiting not only discrimination on the basis of nationality, but also on the basis of residence. Facts instrumental in the ECJ's rulings were that payment of the higher rate was only temporary and was bound up with an obligation to transfer one's residence to the place of employment. In the case of workers whose residence is abroad, the allowance is paid for an indefinite period and is not bound up with any such obligation. The ECJ found that these objective differences in the situation of workers could be a valid reason for differentiating between the amounts paid. *Id.* at 164-65, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165-7.

249. *See* note 189 *supra.*

250. 1974 E. Comm. Ct. J. Rep. at 155, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165. The German court also referred two other questions relating to the discrimination to the ECJ. *See* note 248 *supra.*

251. 1974 E. Comm. Ct. J. Rep. at 162, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165-6.

252. *Id.*

activities" to which this exception applies. The Commission, however, addressed these issues in its submissions[253] to the Court. First, the Commission emphasized that if Member States were free to define the scope of the term "public service," the fundamental right of free movement would assume a different meaning from state to state. Therefore, "public service," a Community law concept, should be determined according to Community law.[254] More importantly, the Commission attempted to define more fully the "certain activities" which fall within the public service exception. In the opinion of the Commission, such positions should be limited to those which "authorize the exercise of sovereign activity with regard to individuals and thus make possible, in certain circumstances, the infringement of rights . . . ."[255] The Commission indicated that such positions include, among others, those dealing with state secrets and state security.[256]

The Advocate General's opinion agreed with the Commission. He acknowledged that Member States retain the sovereign power to determine the scope of public services necessary for the needs of their population, but that only the ECJ may define "public service" as it is used in the Treaty.[257] He also agreed that the Treaty should grant to the Member States the power to reserve for their own nationals only those positions which participate directly in the exercise of official authority over individuals or which involve internal security or defense.[258] Finally, because of the problems involved in too rigidly interpreting the exception, the Advocate General recommended a case-by-case approach, in which the ECJ should focus closely on factual criteria, such as the nature of the duties which each public servant performs.[259]

The ECJ settled some of the confusion in the interpretation of the "public service" exception by addressing each of these issues in *E.C. Commission v. Belgium.*[260] The ECJ confirmed that the definition of "public service" for the purposes of Article 48(4)[261] is a matter of Community law.[262] The Court therefore included in "public service" only those posts which "involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities."[263] The Court reasoned that "[s]uch posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance

253. For an explanation of "submissions," *see* note 146 *supra.*
254. 1974 E. Comm. Ct. J. Rep. at 158, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165-3.
255. *Id.* at 159, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165-4.
256. *Id.* at 160, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165-4.
257. *Id.* at 169, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165-9 — 9165-10.
258. *Id.* at 170, [1974 Transfer Binder] COMMON MKT. REP. (CCH) at 9165-10.
259. *Id.*
260. 1980 E. Comm. Ct. J. Rep. 3881, 31 Comm. Mkt. L.R. 413.
261. EEC Treaty, *supra* note 1, art. 48(4).
262. 1980 E. Comm. Ct. J. Rep. at 3903, 31 Comm. Mkt. L.R. at 435-36.
263. *Id.* at 3900, 31 Comm. Mkt. L.R. at 433.

to the State and reciprocity of rights and duties which form the foundation of the bond of nationality."[264] Finally, the ECJ stated that, while Article 48(4) did not permit discrimination against EEC non-nationals with regard to posts outside the "public service," the Article did permit discrimination against such individuals with regard to promotion from lower posts to more sensitive ones within the "public service."[265]

The ECJ's interpretation of the "public service" exception reveals an implicit recognition of a limit to its integrative powers. The Court is aware that Member States should retain sovereignty over the determination of qualifications for appointment to sensitive public posts. It appears at present that the furthest the ECJ is willing to go in this area is to require that posts in nationalized industries or non-official government posts be opened to EEC non-nationals. Political integration of the Community has not reached the point at which member States are willing to allow non-nationals to govern or protect their citizens. In recognition of this fact, the ECJ has refrained from allowing for that possibility in its "public service" cases. If the ECJ were to require that Member States afford EEC non-nationals equal access to these sensitive posts, despite Member State opposition to such a requirement,[266] the Court might discover that the consensus upon which its authority rests would be considerably weakened.

2. The Public Policy Exception

a. *Introduction*

Paragraph 3 of Article 48 provides that the rights of an EEC national to (1) accept offers of employment in another Member State, (2) move freely for this purpose, (3) stay in the host country while employed and (4) remain in the state after having left employment are "subject to limitations justified on the grounds of public policy, public security or public health."[267] Although the ECJ has ruled that the exception applies only to the rights expressly referred to in paragraph 3 (and thus a Member State may not abridge the guarantee of equal conditions of work and employment granted under paragraph 2 on public policy grounds),[268] the public policy exception nevertheless hinders the achievement of both the economic and political objectives of the freedom of movement provi-

264. *Id.*

265. *Id.* at 3904, 31 Comm. Mkt. L.R. at 436. Consistent with Advocate General Mayras' last point in the *Sotgiu* decision the ECJ reserved judgment in E.C. Commission v. Belgium until it is given more precise information about the duties of the various jobs in issue.

266. The governments of France, Germany and the United Kingdom intervened in E.C. Commission v. Belgium, opposing a broad interpretation of "public service." 1980 E. Comm. Ct. J. Rep. 3881, 3903, 31 Comm. Mkt. L.R. 413, 436.

267. EEC Treaty, *supra* note 1, art. 48(3).

268. Württembergische Milchverwertung — Südmilch AG v. Ugliola, 1969 E. Comm. Ct. J. Rep. 363, 369, 9 Comm. Mkt. L.R. 194, 201.

sions. The exception allows each Member State to deny entry to workers from other Member States and to deport EEC workers once within their territory on the grounds of vaguely-defined national interests. The Community Council has limited the scope of the exception in Directive 64/221,[269] which provides that states may not use the exception to serve national economic ends.[270] Nevertheless, Member States may still restrict the entry and movement of EEC non-nationals for non-economic, political reasons.

Although the ECJ has permitted each Member State to define the substance and requirements of "public policy" in light of its own national needs,[271] the Court has not allowed unfettered discretion in the application of this exception. Instead, the ECJ has advocated a strict interpretation of Article 48(3), "so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community."[272] The ECJ's decisions in this area reflect tension between Community control and Member State autonomy.

b. *Cases Interpreting the Exception*

The ECJ first interpreted the public policy exception in the case of *Van Duyn v. Home Office*.[273] Van Duyn, a Dutch national, was a practicing member of the Church of Scientology.[274] She desired to enter England to work for the College of the Church located there.[275] British immigration officials denied her entry to the country because the Secretary of State considered anyone associated with the Church to be undesirable.[276] Although the British government considered Scientology to be socially harmful,[277] the United Kingdom placed no legal restrictions upon the practice of Scientology.[278] Van Duyn claimed that refusal of leave to enter violated her rights under the laws guaranteeing free movement of workers.[279]

The ECJ found no violation of Van Duyn's rights. While the Court held that exceptions to the fundamental right of free movement had to be interpreted narrowly,[280] it ruled that competent national authorities nevertheless have some

269. 7 J. O. COMM. EUR. 850 (1964).

270. *Id.*

271. Van Duyn v. Home Office, 1974 E. Comm. Ct. J. Rep. 1337, 1350, 15 Comm. Mkt. L.R. 1, 17; and Rutili v. French Minister of the Interior 1975 E. Comm. Ct. J. Rep. 1219, 1231, 17 Comm. Mkt. L. Rep. 140, 155.

272. *Van Duyn,* 1974 E. Comm. Ct. J. Rep. at 1350, 15 Comm. Mkt. L.R. at 17.

273. 1974 E. Comm. Ct. J. Rep. 1337, 15 Comm. Mkt. L.R. 1.

274. *Id.* at 1340, 15 Comm. Mkt. L.R. at 4.

275. *Id.*

276. *Id.* at 1340, 15 Comm. Mkt. L.R. at 4-5.

277. *Id.* at 1339, 15 Comm. Mkt. L.R. at 4.

278. *Id.*

279. *Id.* at 1340, 15 Comm. Mkt. L.R. at 5. Van Duyn referred specifically to art. 48, Reg. 1612/68, and art. 3 of Dir. 64/221.

280. *Id.* at 1350, 15 Comm. Mkt. L.R. at 17.

discretion in determining the requirements of their country's public policy.[281] The Treaty sanctions such discretion inasmuch as internal social conditions vary from one Member State to another and from one period to another.[282] In accordance with this interpretation, the ECJ ruled that the Treaty did not require that the United Kingdom completely outlaw a particular activity before it could rely on the public policy exception to exclude an individual from the country on the basis of participation in that activity.[283] The consequence of such an interpretation is that a Member State can justify discrimination upon the basis of nationality, an otherwise blatant violation of Articles 7[284] and 48(2),[285] by means of the public policy exception.[286] The ECJ stated that:

> a Member State . . . can, where it deems necessary, refuse a national of another Member State the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the Member State does not place a similar restriction upon its own nationals.[287]

In *Rutili v. Minister for the Interior*,[288] the ECJ again refused to hold that the non-discrimination principle of Articles 7 and 48 restricted the use of the public policy exception. Rutili, an Italian national, had lived in France all his life. French authorities, upon learning of Rutili's subversive political and trade union activities, restricted his residence to only certain departments[289] within France because his presence in other departments was "likely to disturb public pol-

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281. *Id.*

282. *Id.*

283. *Id.* The Court stated that:

> where the competent authorities of a Member State have clearly defined their standpoint as regards the activities of a particular organization and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the Member State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.

Id.

284. EEC Treaty, *supra* note 1, art. 7.

285. *Id.*, art. 48(2).

286. 1974 E. Comm. Ct. J. Rep. at 1358, 15 Comm. Mkt. L.R. at 13. Article 7's non-discrimination principle is, by its own terms, subject to special provisions of the Treaty, such as the public policy exception. EEC Treaty, *supra* note 1, art. 7.

The ECJ also alluded to principles of international law as being supportive of such discrimination, i.e., that international law precludes a Member State from refusing its own nationals the right of entry or residence. 1974 E. Comm. Ct. J. Rep. at 1351, 15 Comm. Mkt. L. Rep. at 18. For a criticism of this ground of the ECJ's decision, *see* Note, *Free Movement of Workers in the European Economic Community: The Public Policy Exception*, 29 STAN. L. REV. 1283, 1288-89 (1977) [hereinafter cited as Note, *Free Movement*].

287. 1974 E. Comm. Ct. J. Rep. at 1351, 15 Comm. Mkt. L.R. at 18.

288. 1975 E. Comm. Ct. J. Rep. 1219, 17 Comm. Mkt. L.R. 140.

289. A department is "[o]ne of the territorial divisions of a country." BLACK'S LAW DICTIONARY 393 (rev. 5th ed. 1979). The division of France "into departments is somewhat analogous, both territorially and for governmental purposes, to the divisions of an American state into counties." *Id.*

icy."[290] Such a restriction could be placed on French nationals only for certain criminal convictions or during a state of emergency.[291] Therefore, a French national in Rutili's situation could not have been prohibited from living in certain departments of the country.

The ECJ ruled that the French government could restrict Rutili's residence only if it could restrict the residences of nationals in similar circumstances.[292] However, the ECJ avoided ruling that the non-discrimination principles of Articles 7 and 48 limit a Member State's public policy powers by finding the public policy exception to be inapplicable in Rutili's case. The Court noted that the rights guaranteed by Article 48(3) apply throughout the *entire* territory of a Member State. The ECJ reasoned that limitations to such rights, such as the public policy exception, similarly must be addressed to the entire territory. Because Rutili's situation involved only a partial territorial restriction, the Court found that France's public policy powers were not involved. Therefore, the Court could hold that Article 7 provided relief to Rutili without a consquence of that holding being that Article 7's non-discrimination principle limited the Member States' public policy powers.[293]

The result of the *Rutili* case is paradoxical. Although the French authorities could not take steps to restrict Rutili's residence within France, the judgment contained no language preventing the government from subsequently deporting him.[294] Deportation from the country on the grounds of public policy would not amount to a mere partial territorial restriction; therefore, Article 7's non-discrimination principle would not apply to provide relief to Rutili in the more drastic event of his deportation.

Two subsequent judgments of the Court have also dealt with the subject of deportation of EEC nationals from Member States of which they are not a citizen. These judgments are consistent with the paradoxical result mentioned above. In *State v. Royer,*[295] Belgian authorities ordered a French national, who had failed to observe the proper alien registration formalities, to leave the country on the ground that he was unlawfully residing there.[296] The litigation arose when Royer disobeyed the order forbidding his return to Belgium. A

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290. 1975 E. Comm. Ct. J. Rep. at 1222, 17 Comm. Mkt. L.R. at 142. *See* Regina v. Saunders, 1978 E. Comm. Ct. J. Rep. 1129, 25 Comm. Mkt. L.R. 216, where the ECJ ruled that Treaty provisions on free movement of workers are inapplicable to situations which are wholly internal to a Member State; that is, where there is no factor connecting such a situation to any of the areas covered by Community law. The ECJ found that no such factor exists where a Member State applies to its own national criminal penalties which may include a restriction on movement within its territory.

291. 1975 E. Comm. Ct. Rep. at 1233, 17 Comm. Mkt. L.R. at 156.

292. *Id.* at 1235, 17 Comm. Mkt. L.R. at 157.

293. *Id.* at 1234-35, 17 Comm. Mkt. L.R. at 157.

294. Note, *Free Movement, supra* note 286, at 1291.

295. 1976 E. Comm. Ct. J. Rep. 497, 18 Comm. Mkt. L.R. 619.

296. *Id.* at 499, 18 Comm. Mkt. L.R. at 622. The Court's opinion does not disclose whether the fact that Royer was previously prosecuted in France for various armed robberies and convicted of pandering was a factor in the authorities' decision to deport.

Belgian court referred questions of interpretation of the public policy exception to the ECJ.[297] In *State v. Watson,*[298] a British national living in Italy similarly failed to discharge obligatory Italian alien registration formalities,[299] risking a fine and possible deportation.[300] Because the case involved, *inter alia,* interpretation of the public policy exception, the Italian court referred the case to the ECJ.[301]

The ECJ in both cases ruled that, while Member States could require nationals of other Member States to report their presence in the country, deportation was not an acceptable form of punishment for failure to observe such requirements.[302] Since the issue in both cases involved the exercise of a fundamental right which the Treaty itself confers, i.e., freedom of movement of workers, the ECJ made it clear that such conduct alone could not constitute a breach of public order.[303] The ECJ held that Member States may impose penalties for failure to observe registration requirements if the penalty is not so disproportionate to the gravity of the infringement that the penalty impedes free movement.[304]

In both of these cases, the ECJ had the opportunity to establish the broader rule that the commission of a minor offense is an unjustifiable ground for deportation.[305] Instead, the *Royer* decision indicates that Member States retain significant discretion with respect to the determination of how serious an offense must be before it warrants the offender's deportation.[306] In one of the Court's

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297. 1976 E. Comm. Ct. J. Rep. at 500-01, 18 Comm. Mkt. L.R. at 623.

298. 1976 E. Comm. Ct. J. Rep. 1185, 18 Comm. Mkt. L.R. 552.

299. *Id.* at 1186-87, 18 Comm. Mkt. L.R. at 554.

300. *Id.* at 1187, 18 Comm. Mkt. L.R. at 554.

301. *Id.* at 1187-88, 18 Comm. Mkt. L.R. at 555-56.

302. *Royer,* 1976 E. Comm. Ct. J. Rep. at 513, 18 Comm. Mkt. L.R. at 639; *Watson,* 1976 E. Comm. Ct. J. Rep. at 1198, 18 Comm. Mkt. L.R. at 571-72.

303. *Royer,* 1976 E. Comm. Ct. J. Rep. at 513, 18 Comm. Mkt. L.R. at 639. The Court stated:

> Consequently any decision ordering expulsion made by the authorities of a Member State against a national of another Member State covered by the Treaty would, if it were based solely on that person's failure to comply with the legal formalities concerning the control of aliens or on the lack of a residence permit, be contrary to the provisions of the Treaty.

Id. at 513-14, 18 Comm. Mkt. L.R. at 639.

304. *Royer,* 1976 E. Comm. Ct. J. Rep. at 514, 18 Comm. Mkt. L.R. at 640; *Watson,* 1976 E. Comm. Ct. J. Rep. at 1199, 18 Comm. Mkt. L.R. at 572.

305. Earlier cases before national courts had demonstrated the need for the ECJ to clarify whether conviction for a minor offense is sufficient grounds for deportation. In Re Expulsion of an Italian National, 4 Common Mkt. L.R. 285, 288 (Landgericht, Göttingen 1963), the German court found that any one of plaintiff's offenses, which included assault, theft, fraud and driving without a license, would justify deportation. In Re Expulsion of an Italian Worker, 4 Comm. Mkt. L.R. 53, 54 (Oberverwaltungsgericht, Münster 1963), a second German court ruled that the right to expel an EEC non-national because of tax liability and convictions for fraud and reckless driving was not affected by EEC legislation. More recently, in Regina v. Secchi, 15 Common Mkt. L.R. 383, 394 (Metropolitan Magistrate, Marylebone 1975), an English court found that convictions for shoplifting, indecent exposure and "general irresponsibility" were sufficient to deport an Italian national. The English court so ruled even after consideration of Article 48. *Id.*

306. *Royer,* 1976 E. Comm. Ct. J. Rep. at 514, 18 Comm. Mkt. L.R. at 639-40. The Court stated that:

> Member States may *still* expel from their territory a national of another Member State where the requirements of public policy and public security are involved for reasons *other than* the

most recent decisions in this area, *Regina v. Bouchereau,*[307] the ECJ reaffirmed the discretion of Member States by stating that past conduct alone could constitute a sufficient threat to the requirements of public policy to warrant deportation.[308] Previous interpretation of Article 3 of Directive 64/221[309] indicated that deportation could be ordered only "for breaches of the peace and public security which might be committed by the individual affected" sometime in the future.[310] The ECJ stated that whether past conduct alone may constitute such a threat is a question for national authorities and courts to consider in each individual case.[311] However, in *Bouchereau* the ECJ also curtailed Member State discretion by increasing the gravity of an offense before the offense may constitute grounds for deportation: "[R]ecourse by a national authority to the concept of public policy presupposes . . . the existence . . . of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the *fundamental* interests of society."[312]

Two recent referrals to the ECJ demonstrate that national courts have been unable to discern the degree of misbehavior necessary to justify deportation of an EEC non-national.[313] In *Adoui v. Belgian State and City of Liege*[314] and *Cornuaille v. Belgian State,*[315] plaintiffs were both French women working in Belgium. Belgian authorities sought expulsion of the women on the grounds that both were of "doubtful moral character."[316] The Belgian court in which both actions

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failure to comply with formalities concerning the control of aliens without prejudice to the limits placed on their discretion by Community law as stated by the Court in its judgment [in *Rutili*] (emphasis added). *Id.*

307. 1977 E. Comm. Ct. J. Rep. 1999, 20 Common. Mkt. L.R. 800. In *Bouchereau,* an English court had fined the accused for possession of a relatively small amount of drugs. The English Magistrate found that such misbehavior did not rise to a level requiring deportation. The Magistrate referred questions concerning the interpretation of the public policy exception to the ECJ under Article 177.

308. *Id.* at 2013, 20 Comm. Mkt. L.R. at 823. In this regard, Advocate General Warner states:

> [C]ases do arise, exceptionally, where the personal conduct of an alien has been such that, whilst not necessarily evincing any clear propensity on his part, it has caused such deep public revulsion that public policy requires his departure. . . . I think that in such a case a Member State may exclude a national of another Member State from its territory, just as a man may exclude from his house a guest, even a relative, who has behaved in an excessively offensive fashion. Although therefore, in the nature of things, the conduct of a person relevant for the purposes of Article 3 [of Dir. 64/221] will generally be conduct that shows him to have a particular propensity, it cannot be said that that must necessarily be so.

Id. at 2022, 20 Comm. Mkt. L.R. at 812.

309. Directive 64/221, *supra* note 269, art. 3.

310. Bonsignore v. Oberstadtdirektor der Stadt Köln, 1975 E. Comm. Ct. J. Rep. 297, 307, 15 Comm. Mkt. L.R. 472, 488. *See* text accompanying notes 323-25, *infra.*

311. *Bouchereau,* 1977 E. Comm. Ct. J. Rep. at 2013, 20 Comm. Mkt. L.R. at 823. However, as Advocate General Warner indicated, *supra* note 300, it probably would be only in exceptional cases that this question would arise.

312. *Id.* at 2014, 20 Comm. Mkt. L.R. at 824 (emphasis added). However, it remains within a Member State's discretion to define the "fundamental interests" of its society.

313. The ECJ has not yet ruled on these referrals.

314. 32 Comm. Mkt. L.R. 547 (Court of First Instance, Liege, Belgium 1981).

315. 32 Comm. Mkt. L.R. 554 (Court of First Instance, Liege, Belgium 1981).

316. *Adoui,* 32 Comm. Mkt. L.R. at 548; *Cornuaille,* 32 Comm. Mkt. L.R. at 555.

were brought sought a preliminary ruling as to the limits of Member State discretion with respect to public policy. In particular, the national court asked whether a Member State may define behavhior which is not criminally punishable as constituting "a genuine and sufficiently serious threat affecting one of the fundamental interests of society" in order to expel a national of another Member State.[317] The ECJ's reply to the national court's questions should better define the gravity of misbehavior sufficient for deportation.[318]

c. *Limits to the Exception*

The ECJ is aware of the need to impose limits on the amount of discretion national authorities may exercise with respect to the public policy exception. Some limitations have been referred to in the material immediately above. Otherwise, the ECJ's efforts in this regard have taken place primarily within the Court's interpretation of Council Directive 64/221. Article 3(1) and (2) of this Directive provide that "[m]easures taken on the grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned" and "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures."[319] In *Van Duyn,* the Advocate General interpreted Article 3(1) of Directive 64/221 as requiring an individual examination of the situation of each person subjected to a decision based on the protection of public policy.[320] Such an examination would be a pre-condition for any measure taken by national authorities to restrict the free movement and employment of any migrant worker.[321] This requirement was satisfied in *Van Duyn* because the Court found that present association or membership with an organization such as the Church of Scientology constituted "personal conduct" for the purpose of the provision.[322] The Court subsequently narrowed Article 3 of Directive 64/221 in *Bonsignore v. Oberstadtdirektor der Stadt Köln,*[323] where the ECJ found that national authorities could take measures such as deportation "only to the extent to which the personal conduct of the Community national

317. *Id.* at 549 and 557. The question presents issues similar to those raised in *Van Duyn. See* text accompanying notes 273-79, *supra.* However, whether *Van Duyn* would be decided the same way today in light of subsequent decisions of the ECJ is questionable.

318. In Pescastaing v. Belgian State, 1980 E. Comm. Ct. J. Rep. 691, 29 Comm. Mkt. L.R. 685, a case with facts similar to *Adoui* and *Cornuaille* was referred to the ECJ. However, only procedural questions and not any concerning the substantive grounds for deportation were referred to the Court. *See* note 328, *infra.*

319. 7 J.O. COMM. EUR. 850 (1964).

320. 1974 E. Comm. Ct. J. Rep. at 1358, 15 Comm. Mkt. L.R. at 12-13.

321. *Id.*

322. *Id.* at 1349, 15 Comm. Mkt. L.R. at 17.

323. 1975 E. Comm. Ct. J. Rep. 297, 15 Comm. Mkt. L.R. 472. In this case, Bonsignore was an Italian worker living in Germany. He unlawfully acquired a handgun with which he later accidentally killed his brother. Bonsignore was convicted of causing death by negligence and German authorities ordered him to be deported. Subsequent appeals resulted in referral to the ECJ under Article 177 of the question whether an EEC non-national could be deported for reasons of a general deterrent nature.

who had committed an offence constituted or was likely to constitute in the future such a threat to national public policy that the continued presence of the individual . . . could no longer be tolerated."[324] Measures taken by Member States in response to conditions extraneous to the individual case, such as for deterrent purposes, would be prohibited by the Directive.[325]

To these substantive limitations on the public policy exception the Court in *Rutili* added the procedural requirements that an individual be notified of the public policy grounds that form the basis of the government's restrictions taken against him and that the right to appeal the imposition of the restrictions be required.[326] Furthermore, the ECJ in *Royer* ruled that a decision ordering expulsion cannot be executed by a Member State until the EEC non-national has exhausted his remedies guaranteed by Articles 8 and 9 of Directive 64/221.[327] Articles 8 and 9 require that an EEC non-national shall have the same procedural conditions for appeal as are available to nationals with respect to administrative law remedies and that he may exercise his right of defense before a competent authority which is not the same as that which adopted the measure restricting his freedom.[328]

d. *Summary*

The ECJ's decisions in the "public policy" area have demonstrated the Court's flexibility in recognizing the desires of the individual Member States to retain some autonomy in a uniform Community system. Political integration within the Community has not yet progressed to the point where the ECJ may define a Community "public policy."[329] The social and political values within each

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324. *Id.* at 311, 15 Comm. Mkt. L.R. at 479.

325. *Id.* at 307, 15 Comm. Mkt. L.R. at 488.

326. 1975 E. Comm. Ct. J. Rep. at 1233, 17 Comm. Mkt. L.R. at 156.

327. Directive 64/221, *supra* note 269, arts. 8 & 9.

328. *Id. See Royer,* 1976 E. Comm. Ct. J. Rep. at 515-17, 18 Comm. Mkt. L.R. at 641-42. *See also* Precastaing v. Belgian State, 1980 E. Comm. Ct. J. Rep. 691, 29 Comm. Mkt. L.R. 685. With respect to Article 8 of Dir. 64/221, the ECJ found in *Pescastaing* that expulsion did not have to be postponed until a decision is given on the success of the appeal provided that the alien is able to obtain a fair hearing and to present his defense despite the fact that he is out of the country. With respect to Article 9 of Dir. 64/221, the ECJ found that a Community alien may not be expelled until the opinion of the competent authority has been obtained and notified to him. He may then be expelled immediately, subject to his right to stay in the territory until he has instituted proceedings under Article 8 of Directive 64/221. *Pescastaing,* 1980 E. Comm. Ct. J. Rep. at 712-15, 29 Comm. Mkt. L.R. at 706-08. *See also* Regina v. Secretary of State for Home Affairs, 1980 E. Comm. Ct. Rep. 1585, 28 Comm. Mkt. L.R. 308.

329. In this regard, Advocate General Mayras submitted to the ECJ in *Van Duyn:*

> [I]f a "Community public policy" exists in areas where the Treaty has the aim or the effect of transferring directly to Community institutions power previously exercised by Member States, it can only be an *economic* public policy relating for example to Community organizations of the agricultural market. . . .
>
> On the other hand, it seems to me that, under present conditions and given the present position of the law, Member States have sole power, given the exceptions expressed in certain Community provisions . . . to take measures for the safeguarding of public security within their territory and to decide the circumstances under which that security may be endangered.

1974 E. Comm. Ct. J. Rep. at 1357, 15 Comm. Mkt. L.R. at 11 (emphasis added).

Member State remain independent of one another. Nevertheless, the ECJ has made substantial progress in defining the boundaries of discretion within which Member States may operate to compromise freedom of movement on the grounds of public policy. Whether the ECJ will further limit that discretion, thereby moving closer to a Community public policy, or whether it will retreat to its position in *Van Duyn,* remains to be seen.

IV. CONCLUSION

The provisions of the Treaty establishing the EEC embody the voluntary transfer of sovereign powers from the Member States to the institutions of the Community. It is this partial transfer of sovereignty that most clearly identifies the EEC as a supranational organization. This transfer of sovereign powers is also the central feature in the process of political integration. In its role as the final interpretor of Community law, the ECJ constantly renews the agreements of the Treaty, thereby continuing this transfer of power and advancing the process of political integration.

This Comment has used the ECJ's decisions interpreting Articles 48-51 of the Treaty as an illustration of the Court's role in the process of political integration. The ECJ has interpreted broadly the provisions guaranteeing freedom of movement for the EEC worker, and has interpreted strictly the exceptions derogating from that right. The result has been a more complete integration of the laws, economies and societies of the Member States.

The Community, however, has not yet attained complete integration of its Member States. The process of integration has slowed in recent years, causing some commentators to believe that the Community is foundering. Although these claims seem exaggerated, the Community has not progressed significantly beyond the common market state. Because the Member States continue to enjoy exclusive competence and power in certain areas, the EEC remains only a "partial and incipient" federation.[330] The Court's interpretation of the public service and public policy exceptions demonstrates that the ECJ recognizes that Member States still retain a large degree of independence in determining social standards. In its role in the process of political integration, the ECJ has therefore balanced two desirable yet potentially conflicting goals: maintaining Member State autonomy in matters which remain important to the Member States, while advancing the transfer of state sovereignty to the Community whole in other areas. This balancing role has required the ECJ to gauge the political consensus of the Community. As a result, the Court has been careful not to weigh one goal too heavily against the other. Too strong a strive for power and Community integration by the ECJ might raise opposition from the national governments and judiciaries; however, too great a restraint would prevent the Court from

330. *See* note 52, *supra.*

becoming a federal element and would result in insufficient protection of rights created by the Treaty.

As illustrated by recent referrals to the ECJ under the public policy exception, the Court is now in a position to move toward more Communal social standards. The ECJ should continue its broad interpretation of Community rights and so advance the process of integration. However, the continued success of the Court also requires that it not lose sight of its fundamental balancing role described above. The present situation of a powerful Community Court and a relatively weak Community legislative process raises the apprehension that the Court may assume an excessive role in solving questions requiring political solutions and may unilaterally form Community common policy which the Member States are not yet ready to accept. However, the ECJ's past decisions are an indication that the Court will resist such a role and continue the process of integration within the political consensus on which its legitimacy depends.

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