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Recommended Citation

Burley, Anne-Marie () "Democracy and Judicial Review in the European Community," *University of Chicago Legal Forum*: Vol. 1992: Iss. 1, Article 5.

Available at: <http://chicagounbound.uchicago.edu/uclf/vol1992/iss1/5>

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Democracy and Judicial Review in the European Community

Anne-Marie Burley†

The rumblings about the “democracy deficit” in the European Community have grown steadily louder. Once only a catch-phrase for journalists, concern about the lack of accountability on the part of Community decisionmaking bodies has grown steadily with their continuing accretion of power. In brief, as the Community comes to look more like a “government,” exercising genuine governmental power over the “citizens of the Union,”¹ those citizens wonder why the Community should not be subject to the same popular restraints imposed on their local, regional, and national governments.²

Rising concern about the democracy deficit has generated a range of responses, calling for both legal and political change. The most common response emphasizes the need to alter the formal legal structure of the Community. In a Community with superficial equivalents to a national executive, legislature, and judiciary, enhanced “democracy” has, not surprisingly, tended to focus attention on enhancing the power of the European Parliament.³ As the seat of the elected representatives of Community citizens, the logic

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¹ Treaty on European Union (“Maastricht Treaty”), Art G, 31 ILM 247 (Feb 7, 1992) (inserting a new Article 8 in the Treaty Establishing the European Economic Community).

² Roland Bieber states the issue with characteristic clarity: “Although formally separated from the institutions and the legal order of the Member States, the authority in whose name power is exercised by the Community, i.e., the ‘peoples of the States brought together in the Community,’ is identical. Therefore the form of government commonly to be found in the States necessarily has to find a structural equivalent on the Community level.” Roland Bieber, *Democratization of the European Community through the European Parliament*, 46 *Aussenwirtschaft* 391, 393 (1991). Bieber notes that the European Parliament itself has passed a resolution concerning the “democratic deficit” and cites to various positions in the literature on existence and significance of such a deficit. *Id.* at 394 nn 1-3.

³ See, for example, Siegfried Magiera, *Die Haushaltsbefugnisse des Europäischen Parlaments- Ansatz zur parlamentarischen Mitregierung auf Gemeinschaftsebene?*, in *Festschrift für Hans Jürgen Schlochauer* 829 (Walter de Gruyter, 1981); Gottfried Zieger, *Die Stellung des Europäischen Parlamentes*, in *Festschrift für Hans Jürgen Schlochauer* 947; and Koen Lenaerts, *Some Reflections on the Separation of Powers in the European Community*, 28 *Common Mkt L Rev* 11, 20 (1991).

runs, strengthening the Parliament's voice in the Community legislative process will strengthen the voice of the people. This reasoning has informed efforts to increase Parliamentary power in the recently concluded Maastricht Treaty, efforts that were only partially successful. Assuming that the Maastricht Treaty is ratified, the European Parliament will have achieved the status of a "co-decisionmaker" with the European Council and the Commission in a specified number of issue areas, but the Parliament will remain in a consultative or "co-operative" role in many other important areas.⁴

A more subtle response to the democracy deficit is both more theoretical, drawing on the fundamentals of democratic theory, and more pragmatic and political, willing to confront the roots of private-spirited opposition to the Community. The argument starts from a different diagnosis of the underlying problem. Joseph Weiler argues convincingly that majority voting diminishes the control of individual national Parliaments over the integration process, thereby subjecting the citizens of Member States to decisions favoring a majority coalition of other Member States.⁵ Even granting the European Parliament full decisionmaking powers will not solve this problem, but rather will dramatize the territorial expansion of the polity.⁶ Why should Danes who are willing to accept majority decisions by other Danes automatically be willing to accept majority decisions by Spaniards, Greeks, Dutch, and Germans?⁷ In this context, Weiler points out that De Gaulle's "Luxembourg Compromise," the informal agreement that prevented majority voting whenever a Member State felt a "vital interest" to be at stake, effectively secured the *legitimacy* of the Community.⁸ De Gaulle's solution reassured each individual national parliament that it had a veto on the Community decision-making process.⁹ Conversely, the best response to the democracy deficit is to slow and safeguard the integration process sufficiently to permit the gradual construction of a genuine European "polity,"

⁴ For a brief overview of Maastricht Treaty provisions concerning the Parliament, see Juliet Lodge, *After Maastricht: Maastricht and Political Union*, 1 *European Access* 7 (1992).

⁵ Joseph H.H. Weiler, *The Transformation of Europe*, 100 *Yale L J* 2403, 2466-74 (1991).

⁶ This response overlaps the call for enhanced Parliamentary power, supporting it but suggesting the need to go farther.

⁷ Weiler, 100 *Yale L J* at 2466-74 (cited in note 5).

⁸ *Id.* at 2473.

⁹ *Id.*

defined as a territorial entity within which minorities will accept—as legitimate—decisions by majorities.

These two versions of the democracy deficit advance political solutions to a political problem. Yet it is also possible to imagine a *judicial* response to the democracy deficit. Although it may seem counter-intuitive to call on the one non-elected branch of the liberal democratic governmental trio as a protector or enhancer of democracy, American liberal theorists, fusing the insights of Montesquieu and Madison, have long focused on the critical importance of the courts to a well-functioning democracy. In this brief introduction, I will sketch three possible avenues of judicial contribution to the stabilization and improvement of democratic self-governance in the European Community, drawing directly on ideas suggested by several of the articles that follow and more speculatively on my own ideas as inspired by the work of several of the contributors to this Symposium.

I. ENHANCING DEMOCRATIC ACCOUNTABILITY

Sir Francis Jacobs predicted in his keynote address that the European Court of Justice ("ECJ") of the 1990s would focus more on action by Community organs than by the Member States. Arguing that the ECJ has fulfilled its main function of creating a Community legal system by enforcing Community laws and principles against Member States, he concluded that it would now emphasize checks and balances among Community organs to prevent abuses of power. Within this framework, several judicial modes of strengthening democratic accountability present themselves. The first and most direct mode is by making a special effort to protect and bolster the European Parliament in the exercise of both its traditional powers and its new rights and responsibilities under the Maastricht Treaty. If the cure for the Community's democratic ills is indeed increased Parliamentary participation in Community decisionmaking, then the ECJ can help by securing those powers until the Parliament finds its feet.

A second way in which the ECJ can enhance democracy, or at least the appearance of democracy, at the Community level is to insist on a very high degree of democratic accountability by *other* non-elected decisionmakers—the Community bureaucracy. Drawing on a wealth of examples from the history of judicial supervision of administrative agencies in the United States, Martin Shapiro focuses on the seemingly innocuous "giving reasons requirement"

embedded in Article 190 of the EEC Treaty.¹⁰ The U.S. analogue of this requirement has mutated from a simple procedural check ensuring that government officials *could* give reasons for their decisions (thereby vindicating the fundamental precept of democratic government that authority be exercised on the basis of reason rather than individual caprice) to a requirement both of transparency and of "dialogue" with affected interest groups. This trajectory has been guided by traditional liberal democratic principles of governmental accountability and by the pluralist emphasis on ensuring maximum interest group participation in the political process.¹¹ Thus far the Court of Justice has followed suit with a strong emphasis on the importance of governmental transparency and, hence, accountability in its interpretation of Article 190.¹² The ECJ has been more hesitant about imposing dialogue requirements, although Shapiro detects hints in that direction.¹³

If we assume judicial sensitivity to the democracy deficit, we might expect this emphasis on transparency to continue and the tentative steps toward increasing "dialogue" or participation requirements to accelerate. We would *not* expect, however, the ECJ to follow their U.S. brethren toward full-fledged substantive review, in which the giving reasons requirement becomes a giving *good* reasons requirement and, ultimately, a requirement that the administrator prove that she chose the *best* of several possible reasoned outcomes.¹⁴ In a Community under suspicion for bypassing normal national democratic modes of governance, the judges of the ECJ would do better to enhance the accountability of Community actions and open the doors to full participation by national groups, but then to pull back and accept the political bargain struck.

¹⁰ Article 190 of the EEC Treaty provides, in relevant part: "Regulations, directives and decisions" of the Council and of the Commission "shall state the reasons on which they are based." Article 173 of the EEC Treaty requires all Community actions to satisfy "essential procedural requirements," a requirement that the ECJ has held extends to the giving reasons requirement.

¹¹ Martin Shapiro, *The Giving Reasons Requirement*, 1992 U Chi Legal F 179, 180, 188, 204-05.

¹² *Id.* at 200-201. Bieber similarly discusses the importance of transparency ("publicity") with respect to the European Parliament's legislative process. Bieber, 46 *Aussenwirtschaft* at 403 (cited in note 2).

¹³ Shapiro, 1992 U Chi Legal F at 205. (cited in note 11).

¹⁴ *Id.* at 186. Shapiro calls these maximum giving reasons and participation requirements "synoptic decisionmaking."

II. PROTECTING THE RIGHTS OF THE EUROPEAN POLITY

Moving from the level of tactics to strategy, from the details of the ECJ's administrative jurisprudence to broad principles of interpretation, enhanced democracy in the Community might seem to entail a general posture of judicial restraint. Hjalte Rasmussen clearly draws this inference, although his analysis focuses more on the specific problem of maintaining judicial legitimacy and authority than on a larger Community-wide crisis of democratic legitimacy. The leading critic of the ECJ's rampant "judicial activism" in forging the Community legal system,¹⁵ Rasmussen now beseeches the ECJ to step back from its insistence on "an ever closer union" and focus instead on promoting the narrower values of legal security and certainty for individual Community citizens.¹⁶ Such values are the hallmark of the rule of law that the ECJ is bound to observe in interpreting and applying the Treaty.¹⁷ Overall, Rasmussen argues a reformulation of EC-judicial jurisprudential policy must inescapably have self-restraint as its *leitmotif*.¹⁸

A version of this argument specifically designed to address the democracy deficit would emphasize the relationship between the relative activism of the ECJ and the activity level of the Community political organs. As Rasmussen points out, the necessity of countering the dormancy and stagnation of the political processes of integration provides the ECJ's preferred justification in handing down its landmark constitutional decisions. Conversely, once the political institutions resume a more active role, the ECJ can return to the less dramatic and controversial business of resolving the disputes before it.¹⁹ In a word, the peoples of the Community face the prospect of integration by judicial fiat only when the judiciary is the only force pushing for integration. As the political representatives become active, the ECJ becomes progressively more restrained, ensuring that major initiatives are taken only by agents that are directly politically accountable.

¹⁵ Rasmussen forcefully makes this case in his major work to date. See Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff, 1986).

¹⁶ Hjalte Rasmussen, *Towards a Normative Theory of Interpretation of Community Law*, 1992 U Chi Legal F 135, 159-62, 175-78.

¹⁷ See EEC, Art 164.

¹⁸ Rasmussen, 1992 U Chi Legal F at 175-78.

¹⁹ In the words of Judge Mancini, commenting on precisely this phenomenon with respect to the ECJ, "When democracy advances and politics asserts its claims, judges are bound to take a pace back." G. Frederico Mancini, *The Making of a Constitution for Europe*, 26 Common Mkt L Rev 595, 613 (1989).

To see judicial restraint as an answer to a lack of political democracy accepts the conventional wisdom about the democracy deficit: that the populations of Member States fear unauthorized encroachment on their rights by unaccountable *Community institutions*. If, however, Weiler is correct in his assessment that the deeper problem is fear of loss of control not over the Commission or the ECJ, but over coalitions of other *Member States* under a system of qualified majority voting, then a bolder affirmative judicial strategy emerges.

A vital function of a judiciary in a liberal democracy is the protection of minority rights. This floor of minimum protections provides the foundation for minority acceptance of majority decisions.²⁰ In a process of political expansion that threatens to transform old majorities into new minorities, a strong supranational court may temporarily be able to perform the political role being ceded, at least in part, by national legislatures. In other words, the European Court of Justice could provide some assurances that if the Danes (or the British, the Belgians, or the Italians) must become a minority, they will not be subject to the untrammelled whim of a new majority.

One way for the ECJ to play this role is to follow recommendations that the court shift its human rights jurisprudence to focus on safeguarding the rights of individual EC citizens against the exercise of power by Community organs.²¹ The ECJ has created a Community charter of human rights, "inspired by" but not derived from the constitutional traditions of Member States and international treaties such as the European Convention on Human Rights. Although nominally a check on the exercise of Community power, the creation and evolution of this charter was in fact a largely jurisdictional gambit designed to preserve the power of the ECJ to

²⁰ See, for example, Federalist 78 (Hamilton) in Clinton Rossiter, ed, *The Federalist Papers* 469-470 (Mentor, 1961); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 29-31 (Bobbs-Merrill, 1962). Weiler has already pointed out ways in which the standard "counter-majoritarian" fears about the judiciary do not apply so readily to the Community context, observing that a "gouvernement des juges" is less worrisome when juxtaposed not against a government of democratically elected representatives, but rather against an equally unelected "gouvernement des fonctionnaires." Joseph H.H. Weiler, *Eurocracy and Distrust*, 61 Wash L Rev 1103, 1116-17 (1986). The argument advanced here goes one step farther and suggests a new role for courts during a process of democratic transition. See also Joseph H.H. Weiler, *The European Court at a Crossroads: Community Human Rights and Member State Action*, in Capotorti et. al., eds., *Du droit international au droit de l'integration: Liber Amicorum Pierre Pescatore* 821 (1987).

²¹ This is a consistent theme in Rasmussen's work.

forge and apply a uniform body of Community law.²² Human rights review bolstered the ECJ against rebellious national courts claiming the necessity and exclusive power to review claims that Community actions violated the human rights provisions in their national constitutions. Notwithstanding these initial motives, however, the potential exists for the ECJ to check the integration process sufficiently to protect the minimum rights of Community citizens finding their feet in a larger polity. Within this larger framework, the Rasmussen emphasis on legal security and certainty becomes part of a general "strategy of reassurance" designed to convince Community citizens that the shift from the national to the supranational planes does not deprive them of traditional procedural and substantive safeguards against the exercise of government power.

An even more powerful way for the ECJ to help alleviate the democracy deficit, albeit one that would require a major change in current judicial attitudes and political understandings, is for the court to safeguard the current lines of division between Member State governments and Community organs as a means of ensuring zones of autonomy for the component parts of a newly emerging whole. This proposition represents a complete reversal of the traditional judicial view that integration has seemed to require a continual encroachment on the jurisdictional preserves of the Member States—a process that Weiler has described as "jurisdictional mutation."²³ If the greatest danger facing integration beyond 1992 is indeed the *fear* of such encroachments as territorial boundaries gradually give way, then the most constructive role for the ECJ is the protection not of individual citizens' rights against government, but of their collective decisionmaking abilities as government. In this reconceptualization of European political space, the European nations represent the minorities needing at least temporary protection to ensure the stability and legitimacy of majority rule.

This approach raises three immediate objections. First, what if the large majority of Community Member States actually favor integration? The approach assumes that Weiler's diagnosis is, in

²² This claim is a theme of Weiler's analysis of the ECJ's human rights jurisprudence in *Eurocracy and Distrust*, 61 Wash L Rev at 1118-20 (cited in note 20). He also presciently pointed out that the ECJ faced a credibility gap if it proved unwilling to apply any provisions of its metaphysical human rights charter *against* Community organs in any way that might temporarily check the integration process. Id at 1119.

²³ Weiler, 100 Yale L J at 2437-50 (cited in note 5).

fact, correct: that Denmark is not an outlier; that even if the Maastricht Treaty is ratified, substantial minorities in each of the Member States will be audibly uneasy about ceding national sovereignty to Brussels.

Second, how would the ECJ implement such an approach without being blatantly political, openly putting a thumb on the Member States' side of the scale? The answer here is that the implementation of this approach would simply require the adoption of a new principle of interpretation in all cases involving a choice of competences between the Community and the Member States. All the cases that Weiler describes as instances of "jurisdictional mutation" the ECJ could now read in light of the Maastricht Treaty's emphasis on subsidiarity and democracy. Such a reading would indicate that unless the Treaty *directly and explicitly* provides for Community competence, competence must remain with the Member States.²⁴ Judge Koen Lenaerts of the European Court of First Instance similarly describes the ECJ as having acted as a "catalyst" of integration.²⁵ Where once the court, in his account, extended Community jurisdiction over a particular area such as environmental or educational policy, thereby confronting the Member States with the choice of taking action themselves on the Community level or facing "creeping legislation" by the ECJ,²⁶ or where once it changed the baseline assumptions underlying the Community harmonization process from no recognition of foreign technical standards until harmonization to recognition of all "functionally equivalent" technical restrictions,²⁷ now the ECJ would either wait for unequivocal jurisdictional signals from the political branches or give weight to existing baselines as evidence of the shared conceptions underlying existing political bargains. These are indeed specific instances of judicial restraint, but targeted restraint with a specific rationale.

The third objection asks whether the ECJ could shift ground during a "transitional" period to a larger Community polity without permanently forgoing its ability to play an overtly integrationist role. Even more concretely, can it realistically be persuaded to take such an apparently counter-intuitive tack? It is, after all, the

²⁴ Judge Lenaerts makes a similar point about the justiciability of the subsidiarity principle in the Maastricht Treaty. Koen Lenaerts, *Some Thoughts about the Interaction Between Judges and Politicians*, 1992 U Chi Legal F 93, 133.

²⁵ *Id.* at 132.

²⁶ *Id.* at 110-11.

²⁷ *Id.*

court of the *Community*. As to the first part of this question, many of the ECJ's judges have described their legal philosophy in terms explicitly connected to a broader political context, explicitly justifying their relatively "activist" stance with reference to the relative stagnation of the Community's political decisionmaking process. Such considerations cannot be written into the opinions themselves, but the ECJ and its academic oracles can continue to explain those opinions in ways that provide for a coherent and predictable case law once broad external political conditions and historical trends are taken into account. Could the current court be persuaded to shift course? Perhaps, if they could be persuaded that the goal—an ever closer Union—remains the same, but that changing circumstances dictate different means to achieve it. The ECJ itself would provide the political equivalent of a new Luxembourg Compromise, but the overall political balance necessary to legitimate the Community—this time as an emerging democratic polity—would be preserved.²⁸

If the ECJ were simultaneously to adopt this approach and to move in the direction predicted by Martin Shapiro on the administrative front, the court would effectively combine the traditional liberal democratic emphasis on the protection of minority rights with the pluralist political theory of the 1950s, emphasizing the importance of minority group access to the political process. Against the overall backdrop of a sea change in the territorial boundaries of the "polity," a strategy of incremental change and habituation would simultaneously reassure members of national populations whose interests are best promoted in the national (local) political environment while offering incentives to those groups who benefit from transnational coalitions. Creating opportunities for maximum direct participation by these interest groups in the Community decisionmaking process could help facilitate the transfer of national loyalties while maintaining temporary safeguards for those left unpersuaded.

²⁸ Although theoretically neat, the next question is whether such a strategy would be preferable to a more neutral policy of judicial restraint, simply throwing the ball back to the political branches whenever possible. The arguments for sailing on a very different tack *in favor* of the Member States are that a situation of qualified majority voting will not assuage the fears of Member States in the political arena; further, the ECJ arguably needs to take more dramatic action to salvage its own reputation (and protect its future) in a number of Member States.

III. THE COURT AS "IDEA-GIVER"

From tactics to strategy to norms. Judge Lenaerts heartily endorses the prescriptions concerning a new judicial emphasis on checks and balances within the Community decision-making process, an increased focus on protecting individual rights against Community excesses of power, and "judicial protection of the interests of private parties against illegal administrative acts of Community institutions."²⁹ He claims further that the ECJ has already put many of these ideas into action, based on "the fundamental awareness that the Treaties serve as the constitution of a Community based on the rule of law."³⁰ Unlike Rasmussen, however, Lenaerts argues that because the political institutions of the Community are as committed to the rule of law as the ECJ itself, the court has "kept the confidence" of Community political institutions and often nudged them forward.³¹ Advancing a version of this argument in the language of rational choice analysis, several political scientists have recently argued that the ECJ can provide focal points for multiple political equilibria, breaking logjams and permitting a political consensus to form.³² Simply stated, this proposition views the ECJ as an "idea-giver," generating creative solutions.

Lawyers are also accustomed to thinking of courts as idea generators, but perhaps in less instrumental and pragmatic terms. Many of the "ideas" courts generate are *moral* ideas—in Alexander Bickel's phrase: "the enduring values of a society."³³ On this old-fashioned plane of analysis, the ECJ might also be expected to function as "norm-giver"—norms that resonate with the deepest values of its hearers, reminding them of their aspirations as well as their shortcomings. As conscience of the Community, rather than catalyst or referee, the ECJ could respond to the democracy deficit

²⁹ Lenaerts, 1992 U Chi Legal F at 131 (cited in note 24).

³⁰ Id at 132.

³¹ Id.

³² See Geoffrey Garrett and Barry R. Weingast, *Ideas, Interests and Institutions: Constructing the EC's Internal Market* (Paper presented at NBER Conference on Political Economics, Oct 1991).

³³ Bickel, *The Least Dangerous Branch* at 25-26 (cited in note 20).

by adopting a new *telos* for its famed teleological method of interpretation. For the 1990s, and beyond, the goal must be “an ever closer *democratic* union.”³⁴

³⁴ Case 294/83, *Partie écologiste ‘Les Verts’ v European Parliament*, 1986 ECR 1339, 1987:2 CMLR 343. In *Les Verts*, the ECJ explicitly overrode an apparent political consensus of the Member States against granting the Parliament status as defendant in cases charging Community organs with *ultra vires* action under Article 173, referring directly to the importance of the democratic principle in the Community. 1986 ECR 1-39.

The ECJ has also defended democratic principles in cases involving the institutional role of the Parliament. See Case 138/79, *SA Roquette Frères v Council*, 1980 ECR 3333, and Case 139/79, *Maizena GmbH v Council*, 1980 ECR 3393 (legislation is void if the Council ignores the requirement that the Parliament first give its opinion); and Case C-70/88, *Re Radioactive Food: European Parliament v Council*, 1990 ECR 2067, 1992:1 CMLR 91 (absence of treaty provision granting Parliament a right to bring actions for annulment “cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance” of the Community).

The ECJ has also worked to preserve democracy within the Community institutions themselves. See Case 54/75, *De Dapper v European Parliament*, 1976 ECR 1381, 1389 (Community institutions, and through them the ECJ, have a duty to ensure that Community staff “have complete freedom to choose their representatives in accordance with democratic rules”).

