

Panel Statement on “Democracy without ‘a People’ ”

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I want to speak briefly about the criticism directed at the European Union not only by the usual Euroskeptics and Cassandras but also by presumably objective, friendly observers. The core of the criticism is the insufficient citizen participation in, and control over, policy that has resulted from moving political authority from the national to the supranational Community level.

The various strains of this criticism are subsumed under the heading of “democratic deficit,” a series of discrete but related concepts such as lack of popular representation, lack of legitimacy and transparency, lack of accountability, and distance between the decision-making institutions and the citizens.

The public debate over this issue gained in intensity in the early 1990s; as it expanded to include the more general issue of the Union’s future shape, other concepts such as solidarity and identity came to the fore.

The time allotted to me is obviously not enough even to scratch the surface of these complex issues, so I shall put before you two general propositions followed by two avenues for exploration.

The first general proposition ends with a query rather than an answer: When a group of democratic states creates an international regime and endows it with lawmaking powers, how much democracy must it build in and in what form? There have been complaints about the lack of transparency and fair representation of states in international institutions and pressures for private group participation particularly in environmental and trade decision making, but I know of no debate on a “democratic deficit” in an international regime except in Europe. This is so because there exists no international body with extensive, directly effective powers comparable to the “supranational” European Union. Thus, we do not get an answer from international law, although some argue that current trends indicate a broadening acceptance of the idea of

democracy, signaling an emergent general principle of international law [Thomas M. Franck, “The Emerging Right to Democratic Governance”, 86 AJIL 46 (1992)]. It would be a general principle in any case, with no specific institutional arrangements prescribed, so we do not find an answer to our question here.

My second general proposition suggests that for our purpose the democracy requirement must be viewed in the broader context of a democratic liberal state. When a group of modern liberal democratic nation-states organize what they call “a Community,” they are bound to build in three components:

- a. democracy (I shall offer a “European” definition later)
- b. constitutionalism (rule of law and protection of basic individual rights)
- c. respect for civil society and market economy.

Taking up the last point first, in the European Union area, the public-private boundary is drawn generally so as to allow ample space for an active civil society and a private sector of the economy. The Union’s single market and its monetary, economic, and social policies are based on social market economy principles.

The second component, constitutionalism (rule of law and protection of basic rights), has been in place in the Union, with some gaps generally no wider than in the legal orders of the member states. Drawing on the innovative provision in the constituent treaties and on elements in national legal systems, and guided by its own vision of the Community, the European Court of Justice has developed an original design based on a symbiotic relationship between national and Community judiciaries. In the application of Community law, citizens’ rights, including basic human rights, are protected not only against the Community institutions but against their own governments as well.

The German Constitutional Court and courts in some other member states have experienced difficulties in reconciling the supremacy of Community law with what they conceived - in their traditional positivist way - as the mandates of their national constitutions. After some four decades, they still hesitate to accept the existential shift from international to constitutional discourse [Federal Constitutional Court 2 BvR 2134/92-2 BvR 2159/92]. However, direct confrontation has been avoided thus far, and a sensible restraint is the obvious approach. It is, I believe, a mistake to speak about a crisis calling for a new Union constitutional supercourt. Despite the criticism directed at the Court of Justice, the basic scaffolding of Community rule of law is beyond question. This - I feel strongly - is of immense importance since it provides the Union with a measure of legitimacy. David Hume, in his time, considered that "our government" had "ultimately no other object or purpose but the distribution of justice," with the support of the judiciary [David Hume, *Essay V on the Origin of Government*, in Thomas Hill and Thomas Hoge Grose (eds.), *David Hume, The Philosophical Work*, 113-114, (Scientia Verlag, Aalen, 1964)]. And most recently, an American political scientist has written that in the West, the "impartial judge" came before modern democracy. [Fareed Zakaria, "The Rise of Illiberal Democracy", *For. Aff.*, Nov. Dec. 1997, 22 at 27)].

Of course there is ample room for improvement of the rule-of-law component: for example, the division of competencies between the Union and its members must be defined more clearly; the hierarchy of normative acts should be clarified; and administrative procedures should be improved.

Finally, the third component - democracy and its deficit: Here we confront three elements, the idea and practice of democracy, the nation-state, and the international system - all three interacting with each other and subject to profound mutation in the course of history.

Direct democracy in Athens, in the Renaissance city-states, in the Canton of Bern became impractical and obsolete with the rise of large states. The idea of democracy was saved by the invention of representative government, but an Athenian would hardly accept it as democratic. Today in Europe, modern democracy appears in a great variety of systems in which the voice of an individual citizen is heard in varying ways and degrees. It ranges from the "omnipotent" Parliament in Westminster to the republican-presidential system in France, the consensual pattern in Switzerland, the strong regionalism in Spain, and the federal variants in Germany, Austria and Belgium.

In contemporary Europe the democratic idea has surely become a general principle of the law of the region and particularly in the European Union itself, where it was written into the preamble of the Union Treaty and made into a prerequisite of membership.

It is not surprising that the builders of the new Community would look to their own systems for a specification of the general principle. Thus - as an example of European thinking - a German constitutional scholar would break it down into five more specific principles common to the constitutions of all the Union members: the people as the source of all government power; majority rule; accountability of all public institutions; separation of powers; and an independent judiciary [Karl Doehring, "Demokratiedefizit in der Europäischen Union", DVBl. 1997, No. 19, 19 at 19-20]. But how does one apply these principles to the European Union?

Taking up again the last item first, an independent judiciary is the cornerstone of the rule of law that prevails in the Union. The fact that the judges of the European Court are appointed by "common accord" of the member governments has not been a reason to question their independence, although perhaps confirmation by the European Parliament would be desirable. Separation of powers between the legislative and the executive is blurred considerably in some

member states such as Britain and France; and the concept may not fit the Union institutions as presently structured. There is no “government” or “legislature” in the conventional sense. I shall deal with the other principles on the list later, either expressly or by implication.

Any attempt to apply literally the national models of democracy runs into two problems. To start with, as I suggested in my first proposition, by superimposing a new layer of normative activity upon the national systems, one creates a new situation for democratic representation and accountability. Even within a nation-state federation, superimposing a central power on component states unavoidably modulates the voice of an individual citizen, no matter what the representation arrangements.

And, second, modern democracy has developed within the nation-state which, however, has changed greatly from its original post-Westphalian form: its traditional “external sovereignty” has been diminished by an increasing need for international action on basic domestic problems and by the new international actors such as the many international regimes and even individuals under the new human rights system; and its “internal sovereignty” is undermined by public and private networks often working across national frontiers. Some go so far as to conclude that representative democracy in reality no longer exists [J.M. Guéhenno, *La fin de la démocratie* (Flammarion, Paris, 1993)], and that it has been replaced by a polyarchy of bureaucracy and organized interests in a modern administrative state, with massive bureaucracies, “independent” administrative agencies, and central banks.

In any event, it is vital - in thinking about how to remedy the “democratic deficit” - to recognize that the Union must develop an original version of representative democracy as it has already succeeded in designing its own original version of a rule of law.

What is the result if these general thoughts are applied to the institutions and processes of the Union and, more specifically, to its principal pillar, the European Community?

In the Community, the executive Commission ("the conscience and motor" of the Community), appointed by the governments but presumed to be independent, proposes legislation and policy, and the Council of Ministers, composed of Ministers in national governments, "disposes," originally with mere advice from the European Parliament. The European Council, comprised of the heads of member states or governments, provides general political direction. Formally, the Ministers as such in the Council are controlled by, and accountable to, their respective national parliaments. This, and the approval by these parliaments of any transfer of national powers to the Community, would appear to offer one avenue toward satisfying the representation and accountability requirement. But the reality has been different. In the first place, in foreign affairs the role of national parliaments has been notoriously limited. Moreover, there have been serious problems with the timely flow of information to and from the parliaments. Again, final decisions are made in the give-and-take negotiations of the Council meeting behind closed doors. Last, since the Council in many instances decides by a qualified majority, a Minister may be outvoted, whatever may have been his or her national mandate. A more recent complication, if one can put it that way, is the substantially increased role of the European Parliament in lawmaking, to which I shall return promptly.

To enhance the control over their respective Ministers, most of the national parliaments have established special committees to deal with Union affairs - but only some, such as the Danish, British, and the German Committees, seem to be positioned to influence, if not control, their respective Ministers.

One obvious way of reducing the democratic deficit is to lift the veil of secrecy of the proceedings in the Commission, but above all in the Council with its pyramid of committees, which has been dubbed “the Kremlin of the West.” To make things more difficult, a vast majority of decisions are made in committees of bureaucrats and only rubber-stamped by the Council. In a sense the conflicting and collusive interaction between the Union officials and national bureaucrats in practically all fields of public affairs is at the base of Union action. Secrecy frustrates accountability and feeds the tendency to shift the balance from the legislative to executive branches within the member states. A suggestion has been made to place the entire process on the Internet. Transparency is essential to inform not only the national parliaments but the electorate as well, thus helping to form an all-European debate and opinion. Comparable problems of transparency exist in the modern administrative state.

There is substantial room for improvement here but for reasons I enumerated earlier, I do not believe the approach through national parliaments of the member states will ever provide an exclusive remedy for the democratic deficit.

The other obvious avenue is through the European Parliament. Here, history is revealing. In 1950, the European Coal and Steel Community was conceived as a technocrat regime: the so-called Common Assembly was added by Jean Monnet as an afterthought at the urging of the Dutch and others. It was composed of delegates from the national parliaments, and it had a purely advisory function. President George Washington has told us that the power to “advise” is meaningless without the power to “consent.” He went up to the U.S. Senate once for “advice” on a proposed treaty and vowed never to come back. And he kept his vow.

Today the European Parliament is an altogether different artifact. It is directly elected by universal suffrage within each member state, albeit under different electoral systems, although here also, a unification is anticipated.

The Parliament now has a significant voice on the Union budget; its assent is needed for major “constitutional” and foreign affairs decisions; and it has about an equal voice with the Council in lawmaking, although still in specified areas only.

The European Parliament must be consulted on the appointment of the President of the Commission; it approves the President and the Commission members before they are appointed by the member governments; and it may dismiss the Commission by a vote of censure. Former Commission President Jacques Delors made the intriguing suggestion that the President of the Commission should be elected directly by the people - this would certainly liven up all-Union politics. Or the President could be elected by the European Parliament.

The European Parliament appoints an ombudsman who receives citizen complaints of mismanagement in the Union system, and it may set up its own committees of inquiry. It does not have, but should be given, the powers to subpoena witnesses. Recently it grilled the President-designate of the new European Central Bank for several hours.

So the European Parliament is elected to represent the distinct peoples of the Union; it shares in budgetary and legislative powers and holds the executive Commission accountable. In March 1999, when an inquiry instituted by the European Parliament brought forth serious charges of fraud and mismanagement, the entire Commission resigned. Yet the European Parliament’s powers are still limited if one insists on a comparison with national parliaments. Thus, it has no taxing power nor does it have the formal power of legislative initiative, which is reserved to the Commission; its legislative competencies are still limited, and more importantly,

except for the legislative codecision, it has no authority over the Council or any of its members. To meet this last problem, some would want to turn the Council into an upper chamber of the European Parliament in the image of the original U.S. Senate or the German *Bundesrat* whose members are appointed by the governments of the component states of the federation.

Those who still see the member states as the “masters” of the Union (whatever this may mean) [see Jochen Abr. Frowein, “Legitimation und Wirkung des Rechts der Europäischen Union/Gemeinschaft” in Müller-Graff (ed.), *Perspektiven des Rechts in der Europäischen Union*, 105, 123-24 (C.F. Müller Verlag, Heidelberg, 1998)] would seek the improvement of representation and accountability through national parliaments only. This is likely to be the inclination of the “realists” and “intergovernmentalists.” On the other hand, those (including myself) who view the Union as a multilevel governance regime with the member states wielding major influence in a complex process see no contradiction in pursuing both the national and the European Parliament avenues. There is obviously a dialectic tension here. However, I find utterly unconvincing the attitude of those who oppose the approach through the European Parliament because they question its representative status and are against a further expansion of its powers on the ground that it cannot speak for “the European people”: they argue that there is no European people (demos), only “the peoples” in the different member states; there are no European-wide political parties, no European public debate or opinion. [These arguments are explored by J.H.H. Weiler *id.* in “European Constitutionalism and Its Discontent” (with Joel P. Trachtman), 17 *Nw.J. of Int’l L. & Bus.* 354 at 377 (No. 2/3, 1996/97)].

One simple answer to this argument is that while there may be no “European people,” the Union is not a nation-state. The European Court of Justice calls it “a new legal order”, and the German Constitutional Court sees it as a “Staatenverbund,” an association of states. Here again

it is vital to break the tie between the democratic institutions in a nation-state and the unique conceit of the Union that calls for its own idiosyncratic solution.

It is of course quite legitimate to point to the important cultural differences that divide the peoples of the Union, although we have learned that these differences have a way of turning into exclusionary, xenophobic nationalism with catastrophic results. For better or worse, worldwide economy and technology have worked toward reducing these differences. But it is right to say, I believe, that democracy and legitimacy postulate a certain community of a common good and common expectations of the people that bridges the cultural differences to the extent necessary to sustain the common institutions as their powers increase [Neil MacCormick, "Democracy, Subsidiarity and Citizenship in the 'European Commonwealth'", 16 *Law and Philosophy* 331, 339 and *passim*].

The Maastricht and Amsterdam Treaties, amending the original Community Treaties, contain rudiments of institutional arrangements designed to advance this general purpose. They provide for Union citizenship superimposed on national citizenship, Unionwide political parties, and closer cooperation between national parliaments and the European Parliament. An advisory regional organ is established to bring subnational voice into the Union process. The common currency is in effect the first undertaking in which all Union people are called to participate. The "subsidiarity principle" was incorporated with the view to confining Union action to instances where the member states cannot act effectively. Of course, the proof of the pudding will be in the implementation of these provisions.

Actually, some Unionwide parties now exist, albeit in an embryonic form. The interplay between these emerging all-Union political parties, the political "groups" organized in the European Parliament on the traditional right-left pattern, and the corresponding parties in the

national parliaments promises to help politicize the working of the Union and reduce its image as a technocratic monster in the eyes of its citizens.

Although cable TV makes cross-boundary broadcasting possible, genuine all-Union mass media outlets do not exist, and the different languages are a problem. All-Union issues should be aired in the electoral campaigns for the European Parliament rather than matters of domestic politics as has been the practice thus far.

As the powers of the European Parliament increase, so do lobbying and general public interest. Current Union activities, such as the massive exchange of students and standardization of health and safety regulations, have promoted the same objective. In 1998, two hundred thousand students (5 percent of the EU student population) studied in another member state (N.Y.T., Dec. 24, 1998, A10). A wealth of proposals for further action is on the table that I have no chance to discuss here.

The historic basis of national identity within the member states appears to be shifting from ethnicity and cultural heritage to respect for constitutional order and democratic tradition. Elements of what might emerge as a "European identity" are in place, but as it evolves, it will be different from, and will coexist with, the discrete identities of the peoples in the individual member states. That, at any rate, is the hopeful vision [Ulrich R. Haltern, "Europäischer Kulturkampf: Zur Wahrung 'nationaler Identität' im Unions-Vertrag". 37 Der Staat 591, 608-609 (1998)].

My conclusion is that although much remains to be done, the Union today has the potential to develop its own system of democracy as it did in the rule-of-law area.

The respected Judge Mancini of the European Court of Justice recently launched an impassioned call for turning the Union into a European federal state as the only possible way of

eliminating the democratic deficit [G. Federico Mancini, "Europe: The Case for Statehood", 4 Eur.L.Rev. 29 (No. 1, Mar. 1998)]. Professor Weiler, who has done seminal writing on the subject, opposes the idea with equal vigor. He sees a European "global superstate" with all the vices of a major nation-state, including its own brand of exclusionary nationalism and excessive aggregation of central power. He clearly prefers a unique Community within the Union, and I am inclined to agree [J.H.H. Weiler, "Europe: The Case Against the Case for Statehood", *ibid.* 43]. I only wonder whether the Union, despite its uniqueness, will be able to resist the centrifugal or, on the contrary, the centripetal forces and avoid the historic fate of loose confederal-type structures that invariably either break up or turn into centralized states of one shape or another (American Confederation, German Bund, Belgium, Switzerland, Tito's Yugoslavia).

I personally believe the secret of the success of the European integration enterprise has been in the phased, consensual movement toward an "ever closer union among the peoples of Europe" - as the constituent treaties put it - with the ultimate shape of the "union" remaining undefined. With the Union occupied by enlargement to the east and the necessary institutional adjustments, the reform of major policies, and the introduction of a common currency, I wonder whether this is the time for seeking more democracy by radical proposals such as the adoption of a formal Union constitution or the scheme for taking the procedure for further integration out of the hands of the national governments.

Thinking about the future is important, but what is now needed to reduce the democratic deficit is the enactment of the incremental reform measures along the lines I have suggested here.