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The European Court of Justice: Last Hope for 1992

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COMMENTS

The European Court of Justice: Last Hope For 1992

I. INTRODUCTION

The Single European Act (SEA) set a deadline of December 31, 1992, for achieving complete integration within the European Community (EC).[1] But achievement of this goal has been stymied by the member states seeking to protect their individual interests.

The legislative and executive branches of the EC have been largely unsuccessful in their efforts to advance the EC towards integration. The two main reasons for this are the general lack of power within the legislative and executive branches and the ability of the individual member states to block legislation. Thus, the European Court is the only EC institution capable of making substantial progress toward integration. Part II of this paper discusses the lack of power within the legislative and executive branches to achieve integration by the deadline date. Part III discusses the necessary powers of a constitutional court. Part IV describes the European Court as it is today, certain obstructions placed on the Court by the SEA, and how these obstructions may be overcome.

II. BUREAUCRATIC OBSTRUCTION TO 1992

By 1992, the EC hopes to provide for economic integration through the harmonization of laws; free movement of persons, goods, and services; and the removal of internal barriers.[2] While

1. Single European Act, art. 8A, BULL. E.C., Supp., Feb., 1986 [hereinafter SEA]. The members of the EC include Belgium, Denmark, Greece, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain.

2. Treaty Establishing the European Economic Community, *signed* Mar. 25, 1957,

integration is basically economic in nature, achieving integration will require the member states to surrender a large amount of national sovereignty to the EC.[3] A number of states have balked at this requirement, slowing progress to a near standstill.[4]

The pronouncement of intent as expressed in the SEA was a step forward, but although the Act brought about some procedural advances, it has amounted to little more. The main problem facing the EC is the lack of power within the legislative and executive branches to make meaningful progress toward the ultimate goals of integration. As a result, it seems unlikely that the EC will meet its goals by the deadline date, or any time soon thereafter. To understand why this is so, something must be said of the EC institutions and the problems that prevent these institutions from pushing the member states toward integration. These institutions include the European Parliament, the Commission, the Council of Ministers (Council), the European Council, and the European Court of Justice (Court).

A. European Parliament

The European Parliament (Parliament) is the only freely elected body within the EC.[5] Primarily, its powers are "advisory and supervisory,"[6] although it has some limited powers over the EC budget,[7] and may censure the Commission.[8] Parliament also must be consulted under certain conditions by the Commission and Council.[9] Upon such consultation, Parliament may give an

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298 U.N.T.S. 3 (effective Jan. 1. 1958) [hereinafter cited as Treaty of Rome (EEC)]. An English translation is located at 1 Common Mkt. Rep. (CCH) ¶ 151 (1971).

3. Some estimates have placed the amount of national sovereignty required to be forfeited at 80%. Wash. Post, Oct. 31, 1988, at A13, col. 1.

4. *See supra* note 3. *See also* FOURTH PROGRESS REPORT OF THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT, 1989 EUR. COMM. DOC. (COM No. 311) 3-4 (1989) [hereinafter FOURTH PROGRESS REPORT]; Elazar & Greilsammer, *Federal Democracy: The U.S.A. and Europe Compared—A Political Science Perspective*, 1 INTEGRATION THROUGH LAW Bk. 1, 71, 107-08 (1986); Jacobs & Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared--A Juridical Perspective*, 1 INTEGRATION THROUGH LAW 169, 172, 175 (1986).

5. A. DALTROP, POLITICS AND THE EUROPEAN COMMUNITY, 71-72 (1986). *See also* Elazar & Greilsammer, *supra* note 4, at 108.

6. Treaty of Rome (EEC), *supra* note 2, art. 137.

7. Jacobs & Karst, *supra* note 4, at 187.

8. Treaty of Rome (EEC), *supra* note 2, art. 144. "It is considered that the vote of censure is on all the members of the Commission, and none of them should therefore be reappointed." 2 A. CAMPBELL, COMMON MARKET LAW 118 (1969). However, this is not required.

9. *See* Treaty of Rome (EEC), *supra* note 2, arts. 56, 100, 122, 126, 127, 228, 235,

opinion[10] and propose changes in the legislation.[11] Parliament also has standing to sue in the European Court,[12] and may block the accession to the EC of a non-member state.[13] Parliament, therefore, lacks any real legislative authority, and the powers it does have are insufficient to bring about any significant progress toward complete integration.

B. The Commission

The members of the Commission are "chosen by joint agreement between the governments of the member states."[14] The commissioners are to be totally independent of their respective governments,[15] and the EEC treaty provides that they may not be relieved of their positions nor may they hold any other positions.[16] The Commission is responsible for initiating[17] and implementing EC legislation and may bring before the European Court any party who fails to comply with the treaties.[18] The Commission also administers EC funds[19] and publishes an annual report.[20] Although the Commission can pass some executive

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236, 238. These provisions do not require a decision, but may imply the need for an opinion. *See also* SA Roquette Frère v. Council of the European Communities, 1980 E. Comm. Ct. J. Rep. 3333; Maizena GmbH v. Council of the European Communities, 1980 E. Comm. Ct. J. Rep. 3393.

10. *See* A. DALTROP, *supra* note 5, at 83-84.

11. A. DALTROP, *supra* note 5, at 76. There are times when the Parliament or Council may initiate legislation, but they must go through the Commission, which is not required to act on the legislation. *Id.* at 76-77. *See also* Treaty of Rome (EEC), *supra* note 2, art. 149(2), as amended by SEA, *supra* note 1, art. 7; *The Single European Act*, Common Mkt. Rep. (CCH) ¶ 20005, 20025 (1989).

12. The Court held that Parliament had standing despite a lack of direct authorization in the treaties. European Parliament v. Council of the European Communities, 1985 E. Comm. Ct. J. Rep. 1513; 1 Common Mkt. L.R. 138 (1985).

13. Treaty of Rome (EEC), *supra* note 2, art. 237 (as amended by SEA, *supra* note 1, art. 8); *The Single European Act*, *supra* note 11, at ¶ 20025.

14. Treaty of Rome (EEC), *supra* note 2, art. 158. *See also* A. DALTROP, *supra* note 5, at 56-58.

15. Treaty of Rome (EEC), *supra* note 2, art. 157.

16. *Id.*

17. Common Mkt. Rep. (CCH) ¶ 9,054 (1988); *See also* Jacobs & Karst, *supra* note 4 at 187-91; Schrans, *The Community and its Institutions*, in THIRTY YEARS OF COMMUNITY LAW 17, 24-26 (1983). Once the Commission has adopted a proposal, it is sent to the Council for approval. The SEA has increased these powers only slightly. Article 10 allows the Council to delegate some powers to the Commission. *See* SEA, *supra* note 1, art. 10. *See also id.* arts. 8B, 8C.

18. Treaty of Rome (EEC), *supra* note 2, art. 169.

19. A. DALTROP, *supra* note 5, at 59.

20. Treaty of Rome (EEC), *supra* note 2, art. 156. *See also* Schrans, *supra* note 17, at 24.

orders, it cannot enact the major legislation necessary to integration.

C. *The Council of Ministers*

The Council of Ministers is made up of ministers from the respective member states.[21] The Council votes on Commission proposals, making them EC law.[22] Because of this, the Council has been called "the sole effective centre of power in the Community system."[23] There are two main problems with the Council, however. First, the ministers are direct representatives of the member states and therefore look out for national interests before EC interests. Second, voting has generally required unanimity.[24] These problems have made it extremely difficult for the Council to pass needed legislation because one member can veto a proposal that, while benefiting the EC as a whole, is not beneficial to the individual member.

A major advance under the SEA has been the removal of the unanimous voting requirement in certain areas.[25] The Commission has noted that the policy-making process has been markedly quickened by the implementation of majority voting, but those areas where it is not used continue to be a problem.[26] Therefore, unanimous voting requirements continue to block the EC's goal of complete integration.

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21. Jacobs & Karst, *supra* note 4, at 185.

22. Schrans, *supra* note 17, at 20-21. *See also* A. DALTROP, *supra* note 5, at 64-65; Jacobs & Karst, *supra* note 4, at 185.

23. A. DALTROP, *supra* note 5, at 65.

24. Treaty of Rome (EEC), *supra* note 2, art. 148(1). Unanimous voting was meant to be temporary, but the member States agreed it would be "unreasonable to impose majority voting where important national issues were at stake." A. DALTROP, *supra* note 5, at 65. This has slowed down the decision process and sometimes resulted in it being stopped altogether. *Id.* at 66.

25. *The Single European Act*, *supra* note 11, at ¶ 20015. Voting changes concern the free movement of workers, SEA, *supra* note 1, art. 49; approximation of national laws, *id.* art. 100; common customs tariff, *id.* art. 28; inclusion of foreign nationals in the freedom of services, *id.* art. 59; coordination of national exchange policies, *id.* art. 70(1); sea and air transport, *id,* art. 84(2). However, article 57(2) has maintained unanimity in sensitive areas. *Id.* art 57(2).

26. FOURTH PROGRESS REPORT, *supra* note 4, at 2-4. The main area of progress has been in the area of technical barriers. "Since the Single European Act entered into force, 36 measures have been adopted on the basis of Article 100A, 16 of them within less than 15 months. By contrast, no major decision has been adopted in the areas requiring unanimity. . . ." *Id.* at 2.

D. *The European Council*

The European Council consists of the heads of state of the respective governments. It is the "only body to have some jurisdiction in all fields"[27] and exercises considerable authority over the Council of Ministers.[28]

Although the European Council has the power to make great strides toward integration, actual progress by this group is likely to be insignificant. The heads of state will, almost invariably, look toward their own interests first, especially where they may be required to give up part of their sovereignty.[29] Unanimity requirements and lack of authority to independently initiate legislation will prevent progress by the European Council toward integration.

E. *Summary*

The legislative and executive institutions do not have the power to bring about integration by 1992. Even if majority voting were instituted in all areas, the time needed to pass legislation will make it nearly impossible to meet the 1992 deadline.[30] Thus, the burden of leadership in the push toward a single Europe will fall to the European Court.[31]

III. Necessary Powers of Courts Under a Constitutional Government

Several treaties[32] serve as the EC Constitution.[33] Like all

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27. A. Daltrop, *supra* note 5, at 68. *See also* Olmi, *Introduction*, in Thirty Years of Community Law 9 (1983). Article two of the SEA finally granted legal status in the Community to the European Council. SEA, *supra* note 1, art. 2. The European Council has been in existence since 1974.

28. A. Daltrop, *supra* note 5, at 68.

29. For some general problems in this area, see *supra* note 3. *See also* Fourth Progress Report, *supra* note 4, at 3-4.

30. Fourth Progress Report, *supra* note 4, at 2-4. The Commission considered 15 months a short time, but most took much longer.

31. The European Court has been credited as being a prime mover toward European integration. Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, 2 Integration Through Law 261, 308-09 (1986).

32. Treaty Establishing the European Coal and Steel Community, *signed* April 18, 1951, 261 U.N.T.S. 143 (effective July 25, 1952) [hereinafter Treaty of Paris (ECSC)]; Treaty of Rome (EEC), *supra* note 2; Treaty Establishing the European Atomic Energy Community, *signed* March 25, 1957, 298 U.N.T.S. 169 (effective Jan. 1, 1958) [hereinafter Treaty of Rome (EAEC)]. The three treaties are separate legal entities, but they are served by one set of institutions.

constitutions, if they are to be a binding, higher law courts must give them precedent above laws that are enacted by the legislative branch of government.[34] This is even more apparent when one considers that constitutions are, by their very nature, documents that require interpretation.[35] Courts, then, must have the power to give authority to the EC Constitution. To do this, the European Court must have the authority to conduct judicial review and to apply the doctrines of stare decisis and res judicata. In addition, the Court may need to exercise a certain amount of judicial activism.

Prior to World War II, the idea of a constitution controlling the powers of government was a relatively unknown theory to most Europeans. However, the cataclysm of that war brought to light the need for a higher law that was legally binding on all governmental institutions.[36] But the acceptance of truly constitutional governments has not come about easily in Europe. The old tradition that "Parliament is supreme" still persists, particularly in countries such as France, which have a historical mistrust of the judiciary.[37]

The EC has been set up along the lines of a constitutional government.[38] As a result, the European Court, regardless of the intentions of its founders, functions as a constitutional court in a manner that is foreign to the civil system. For example, it exer-

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33. Elazar & Greilsammer, *supra* note 4, at 93. *See also* Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461, 466 (1980); Bernhardt, *The Sources of Community Law: the 'Constitution' of the Community*, in THIRTY YEARS OF COMMUNITY LAW 69 (1983); Cappalletti & Golay, *supra* note 31, at 309-10.

34. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-79 (1803).

35. *Id.* "Modern constitutions do not limit themselves to a statement of the law; they are concerned with ultimate values relating to the future activity of the state and the society." Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1215 (1966). The result is that questions are certain to arise which will demand judicial attention. *See* Cappelletti & Golay, *supra* note 31, at 264.

36. Constitutions had been enacted before the war, but they lacked force and tended to be mere "political-philosophical declarations". Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"*, 35 CATH. U.L. REV. 1, 6 (1985).

37. France's rejection of a court's authority to review arose out of the pre-revolutionary corruption of the judiciary. The courts of that time exercised their powers to prevent needed reforms that might have averted the revolution. Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 413 (1980). The solution that the French chose was to remove the reviewing powers of the judiciary and grant to them only the authority to "apply blindly, automatically, and uncreatively the supreme will of the popular legislature." *Id.*

38. *See supra* note 33.

cises powers of review, interpretation, stare decisis, and may even create law when necessary to further the goals of the EC. These powers have enabled the European Court to be a driving force in the creation of a federal system within the framework of the EC.[39]

A. Supremacy of Community Law

The European Court's original grant of jurisdiction included authority to be the final interpreter of the Treaties, directives and other EC law.[40] Using this authority, the Court declared EC law to be supreme above the laws of the member states.[41] This was a major step toward federalism and a significant self-enacted increase in the Court's authority. Despite opposition to the Court, the supremacy of EC law has been accepted by the member states.[42]

The acceptance of the supremacy of EC law has elevated the Court to a level similar to the United States Supreme Court.[43] The courts of the member states are now bound to give precedential effect to EC law and hence to the decisions of the European Court.[44] This effectively relegates the national courts

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39. A. WINTER, R. SLOAN, G. LEHNER & V. RUIZ, EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE 34-39 (1989) [hereinafter WINTER & SLOAN].

40. Treaty of Rome (EEC), *supra* note 2, arts. 164, 173, 174, 177.

41. The European Court took this position in Costa v. ENEL, 1964 E. Comm. Ct. J. Rep. 585, 3 Comm. Mkt. L.R. 425 (1964). Further, Community law takes precedence over prior enacted national legislation. Cappelletti, *supra* note 36, at 21-22.

42. In Administaration des Douanes v. Société Cafès Jacques Vabre, Judgment of May 24, 1975, Cass. ch. mixte, Recueil Dalloz [D.S. Jur.] 497, the *Cour de Cassation* held that French courts were bound to give application to Community law over French law where the two conflicted. The court asserted that this was not a form of judicial review, but merely the court applying the "higher law." There is a clear analogy to *Marbury*. Both attempt to minimize the infringement on the role of the legislature, but both establish in essence judicial review. In Germany, the Bundesverfassungsgericht has held that Community law is supreme. In International Handelsgesellschaft mbH v. Enfuhr und Vorratsstelle für Getreide und Futtermittel, 37 BVerfGE 271, 14 Common Mkt. L.R. 540 (1974), the Bundesverfassungsgericht qualified its position somewhat by holding that Community law was inapplicable if it conflicted with human rights protected in the *Grundgesetz* (Constitution). This may have had serious repercussions had the European Court not already held in Stauder v. City of Ulm, 1969 E. Comm. Ct. J. Rep. 419, 9 Common Mkt. L.R. 112, 119 (1969), that Community law could not violate the "fundamental rights" of the individual. *See also* Barav, *supra* note 33, at 467-68.

43. This should be qualified in that the Court depends on the national courts for enforcement. *See* Bice, *Studying the Court of Justice: What Messages for Federal Jurisdiction?*, 53 S. CAL. L. REV. 527, 529 (1980); Jacobs & Karst, *supra* note 4, at 233-34.

44. If Community laws are to be supreme, then judicial review is inevitable. Failure by the courts to strike down conflicting inferior laws would mean, by definition, that the supreme law is not supreme. *See* Cappelletti & Golay, *supra* note 31, at 263-64.

to the status of lower EC courts within the emerging federal structure.[45] It also causes another interesting side effect: it forces the courts of the member states to begin reviewing national legislative enactments as well as interpreting EC laws in order to make their decisions.[46]

B. Judicial Review and Activism

Judicial review in the EC is not without its opponents,[47] but it is an absolutely necessary and logical consequence of the constitutional nature of the EC. Like the early United States Supreme Court, the European Court was bound to assert judicial review in order to accomplish its duty of ensuring that "the interpretation and application of the Treaty . . . is observed."[48] Once the supremacy of EC law was established, judicial review could not be avoided. Interpretation of EC law would be impossible if it were based on the laws enacted by twelve separate sovereigns.

The supremacy of EC law and the right of review have established the Treaties as a constitutional groundwork. These aspects of the EC judicial system were judicially created doctrines, which leads to another aspect of a constitutional system—judicial activism.[49]

Judicial activism is required for a number of reasons. Since constitutions are considered "higher law," they tend to be less

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45. Barav, *supra* note 33, at 498-501.

46. *See supra* note 42; *See also* Elazar & Greilsammer, *supra* note 4, at 103 (1986). The Court only takes a certain number of cases each year, far fewer than are needed to satisfy the certification process.

47. *See generally* H. RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE (1986).

48. Treaty of Rome (EEC), *supra* note 2, art. 164.

49. In civil law systems many lawyers view anything beyond strict application of the law to be activism. For example, Hjalte Rasmussen has complained of the Court's judicial activism in cases such as Ursula Becker v. Finanzamt Münster-innenstadt, 1982 E. Comm. Ct. J. Rep. 53, 1 Common Mkt. L.R. 499 (1982), where the Court ordered direct application of a Community directive. Rasmussen states "To many a European lawyer this is revolting judicial behavior." H. RASMUSSEN, *supra* note 47, at 12. This may be true, but it is necessary to the smooth running of the system. This is because the power to make such decisions is indispensable in promoting constitutional law. Without this power, the individual states could simply disregard any judgement that did not suit them. The Court, absent a remedy, could have its findings nullified by legislative and judicial inaction. Barav, *supra* note 33, at 498-501. This would render the court powerless and subvert the purpose of the constitution as a restriction on governmental power. The "higher" law would no longer be "higher."

precise and more philosophical than a system of legal codes.[50] Constitutions do not lend themselves to systematic and easy analysis (as two hundred years of American case law clearly demonstrates). Rather, they must be interpreted in light of past intentions, modern day ideals, and future goals. Activism enables the Court to fill in the blanks and to apply the law in such a way that justice is satisfied. This is especially true in the EC where the constitutional nature of the EC has been much slower to develop than in the United States.[51] To achieve the goals of the Treaties, the European Court must not only interpret the Treaties, but it must also review laws of the member states and actively push toward integration.

C. Inadequacy of Civil Law Courts

Because the civil law tradition in Europe rejected the ideas of judicial review and interpretation of law by the courts, traditional civil law courts are unsuited to hear constitutional claims.[52] The reason for this is that their decisions lack any binding effect upon other courts. Absent such ideas as res judicata and stare decisis, a constitution will invariably lose any force that it may have had.[53] For this reason, and to prevent governmental abuse, the European governments, like the United States, have created a limited number of special courts with jurisdiction over constitutional matters.[54]

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50. *See, e.g.*, Bernhardt, *supra* note 33, at 69-70; Cappelletti, *supra* note 36, at 6; Cappelletti & Adams, *supra* note 35, at 1215.

51. *See* Elazar & Greilsammer, *supra* note 4, at 73-74, 112; Jacobs & Karst, *supra* note 4, at 170.

52. "In part, Europe rejected judicial review because most European countries had unitary governments and no need for the institution comparable to the need created by federalism in America." Cappelletti & Golay, *supra* note 31, at 269. This need is now present within the EC due to the diversity of the member states. Another reason for this incompatibility comes from the training and traditions of the European legal profession. Cappelletti & Adams, *supra* note 35, at 1215-16.

53. Cappelletti & Adams, *supra* note 35, at 1215-16, 1222. The importance of judicial review can be highlighted with an example from South Africa. In 1952, the South African Supreme Court declared certain discriminatory laws to be unconstitutional. Parliament responded by removing from the judiciary the power of review. Cappelletti, *supra* note 36, at 9. Deprived of this power, the courts could do nothing to protect the rights of minorities.

54. *See generally* Cappelletti, *supra* note 36.

IV. THE EUROPEAN COURT

A. Introduction to the European Court

The European Court has played a leading role in the integration of the EC. Through its decisions, the Court has ensured the supremacy of EC law, secured its position as interpreter of EC law, and has gone beyond a strict reading of the Treaties to further the goals of the EC. If integration is to be achieved by 1992, this trend must continue. The Court must be prepared to give the deadline date of December 31, 1992, direct effect and rule that the Council must enact legislation which has been delayed due to unanimity requirements. To do this, the Court must first overcome restrictions the SEA attempted to place upon it. These restrictions include the declaration purporting to nullify the legal validity of the deadline date and limitations on the Court's jurisdiction. This section deals with these matters by first presenting a history of the Court and its power, followed by a discussion of the problems in the SEA and possible solutions.

1. History of the Court

The Court was established by the Treaty of Paris.[55] The two Treaties of Rome extended jurisdiction to the Court over the European Economic Community (EEC) and Atomic Energy Community (EAEC or Euratom). The Court has exclusive authority to interpret the Treaties and the laws passed under them.[56] The Court also has the power to invalidate acts made by the Council or the Commission.[57]

In exercising its authority, the Court has the duty to protect individual rights and interpret the laws "irrespective of political considerations."[58] The Treaties require the judges to be "persons

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55. *See* J. USHER, EUROPEAN COURT PRACTICE 3 (1983). *See also* Treaty of Paris (ECSC), *supra* note 32.

56. The SEA has made allowance for a supplementary court of first instance. SEA, *supra* note 1, art. 32(d). However, this court has not been created.

57. Article 174 of the Treaty of Rome (EEC) states:

> If the Court of Justice considers the recourse well founded, it shall declare the act challenged to be quashed.
>
> In the case of regulations, however, the Court of Justice shall indicate, if it considers it necessary, which of the effects of the regulation which it has quashed shall be regarded as confirmed.

Treaty of Rome (EEC), *supra* note 2, art. 174. This explicitly validates judicial review within the Community.

58. T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 26 (1981).

whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence."[59] Considering the fact that democratic involvement of the people is almost nonexistent within the EC, the independence of the Court's judges is extremely important in preserving the interests of the people.

Judges are appointed to staggered terms of six years by unanimous agreement of the member governments.[60] Once appointed, the judges are completely independent and may not be removed, except by the other judges.[61] Another factor that protects the independence of the Court is that all opinions are rendered anonymously.[62] This alleviates pressure on the judges to enter politically oriented decisions. To further ensure their independence, the judges are not permitted to hold any other positions.[63]

The Court is divided into three chambers,[64] each of which may make preliminary rulings or hear cases brought by private individuals, except in the most important cases.[65] Actions brought by EC institutions or member states are heard by the entire Court.[66] The main limiting factor on the Court's jurisdiction is that the case must arise under the Treaties or EC law.

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59. Treaty of Rome (EEC), *supra* note 2, art. 167(1); Treaty of Paris (ECSC), *supra* note 32, art. 32(b)(1); Treaty of Rome (EAEC), *supra* note 32, art. 139(1).

60. *See* WINTER & SLOAN, *supra* note 39, at 33. One judge is appointed from each member state, with an extra judge being appointed and rotated among the five largest countries, making a total of 13.

61. T. HARTLEY, *supra* note 58, at 27.

62. *Id.* at 28.

63. *Id.* There have been exceptions for some academic functions.

64. Treaty of Rome (EEC), *supra* note 2, art. 165.

65. European Court Rules of Procedure, art. 26.

66. T. HARTLEY, *supra* note 58, at 28. *See also* Treaty of Rome (EEC), *supra* note 2, art. 165. Assisting the Court in its decisions are four Advocates-General. The Treaties state:

> It shall be the duty of the Advocate-General to make reasoned submissions in open Court, with complete impartiality and independence, on cases submitted to the Court of Justice, with a view to assisting the Court in the performance of the duty assigned to it in Article 164.

Treaty of Rome (EEC), *supra* note 2, art. 166; Treaty of Rome (EAEC), *supra* note 32, art 138; Treaty of Paris (ECSC), *supra* note 32, art. 32(a). The Advocates-General must meet the same qualifications as the judges, Treaty of Rome (EEC), *supra* note 2, art. 167, and are considered to have the same status although they take no part in deliberations. T. HARTLEY, *supra* note 58, at 29.

2. *Jurisdiction of the Court*

Cases that come before the Court may be "direct actions" (actions against the EC or its member states, begun in the Court) or cases begun in national courts, which are referred to the Court for a preliminary ruling.[67] Since EC law is supreme, decisions by the Court are not subject to appeal.[68]

The SEA kept the powers of the Court basically unchanged. There are, however, two pertinent provisions concerning the Court that should be mentioned. First, the member states have attempted to limit the Court's power in the area of EC foreign policy. The SEA specifically excludes title III, which deals with foreign policy, from the Court's jurisdiction.[69] However, because this refers to actions taken outside of the Treaties by the member states, it does not greatly diminish the Court's power.[70] The second provision is the declaration on article 8A, which may have much greater significance for the establishment of a single European market.[71] This section states that no legal significance is to be attached to the goal date of December 31, 1992.[72] If valid, this may preclude any legal action to require the completion of the market.

3. *Standing*

The EEC Treaty gives the Commission the right to bring suits before the Court against member states which have failed to fulfill their obligations under the Treaties.[73] Member states and the Council may also bring suits before the Court as well as any "natural or legal person" if the case concerns "acts taken by the Council and the Commission."[74] Member states and individuals are also given authority to bring actions against the Council

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67. T. HARTLEY, *supra* note 58, at 33-34; Barav, *supra* note 33, at 477.

68. Hartley notes: "it is through its power to give preliminary rulings that the European Court has established the doctrine of direct effect and the doctrine of the supremacy of Community law over national law." T. HARTLEY, *supra* note 58, at 34. *See also* Treaty of Rome (EEC), *supra* note 2, art. 171.

69. Article 31 limits the courts jurisdiction to title II and article 32. SEA, *supra* note 1, art. 31.

70. *See* Elazar & Greilsammer, *supra* note 4, at 94-95.

71. Toth argues that this declaration has no binding effect on the Court. Toth, *The Legal Status of the Declarations Annexed to the Single European Act*, 23 COMMON MKT. L. REV. 803, 812 (1986).

72. SEA, *supra* note 1, declaration on art. 8A.

73. Treaty of Rome (EEC), *supra* note 2, art. 169.

74. *Id.*

or the Commission when these bodies have failed to act, in infringement of the Treaties.[75] Article 179 of the EEC treaty apparently allows employees of the EC to bring suits involving their employment.[76] Member states may bring cases against other member states provided the other party agrees.[77] Though not granted in the Treaties, the Court has extended standing to Parliament as well.[78]

B. The Court's Role in Establishing a Single Market

In the past, the Court has behaved much like a common law court, actively creating law at times. This willingness to go beyond a strict reading of the Treaties is a decisive factor in determining whether European integration succeeds. However, the Court's activism has also prompted concern among a number of the EC members who prefer a weak, impotent civil-law-type court. This concern has, in part, led to an attempt to limit the power of the Court in the SEA.

1. Limitations on the Court's Jurisdiction

The Court's active role in achieving integration may have been one reason for the Commission's Declaration on Article 8A.[79] It was certainly the motivating factor behind article 31,

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75. *Id.* art. 175.

76. *Id.* art 179.

77. *Id.* art. 182.

78. European Parliament v. Council of the European Communities, 1985 E. Comm. Ct. J. Rep. 1513; 1 Common Mkt. L.R. 138 (1985).

79. The Declaration on Article 8A states:

> The Conference wishes by means of the provisions in Article 8A to express its firm political will to take before 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market. SEA art. 8a.
>
> Setting the date of 31 December 1992 does not create an automatic legal effect.

SEA, *supra* note 1, declaration on art. 8A. Lonbay believes that this declaration was included specifically to prevent the Court from declaring article 8A to have direct effect at the end of 1992. But he feels this was unnecessary because "the combined effects of Articles 8B and 8C would have probably dissuaded the court from any declaration of direct effect." Lonbay, *The Single European Act*, 11 B.C. INT'L. & COMP. L. REV. 31, 63-64 (1988). Professor Toth, however, sees the declaration as having no effect:

> What ever the meaning of this statement, it is submitted that it itself can have no legal effect. It cannot in any way restrict, exclude, qualify or amend the clear provisions of Article 8A; it cannot even be taken into account by the European Court in interpreting those provisions. Therefore, if all the measures

which limits the Court's authority over the SEA to title II and article 32. However, these two provisions do not present a serious problem for the Court.

Nevertheless, there is a real question as to the validity of the Declarations[80] that were annexed to the Final Act.[81] Declarations may take the form of reservations or interpretations. According to article 2(1)(d) of the Vienna Convention on the Law of Treaties, a reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[82]

Therefore, to be a reservation the Declaration must be

(1) a unilateral statement;
(2) made by one of the memeber states;
(3) while signing;
(4) purporting to modify the provisions in some way.

The Declaration on Article 8A, however, does not fit into this pattern. The Declaration is not unilateral and, therefore, by definition cannot be a reservation.[83] "Paradoxically, the classification of such an instrument as a 'reservation' would imply or presuppose the common consent of all the parties to destroy the legal effects of that on which they have just reached an agreement."[84]

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necessary for establishing the internal market have not been adopted by 31 December 1992, the European Court will be absolutely free to determine the legal consequences that should follow from this, purely on the basis of the Single European Act and regardless of the Declaration. It will be interesting to see whether, if faced with such a situation, the Court will attach the same importance to the expiry of the period laid down in Article 8A that it attached to the expiry of the original transitional period on 31 December 1969.

Toth, *supra* note 71, at 812.

80. The Declarations referred to are statements made by various groups as to their interpretations of certain aspects of the SEA.

81. A 'Final Act' normally refers to a non-binding document that is a summary or statement of the proceedings which led to the creation of an international agreement. S. ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, 109-13 (1989).

82. Vienna Convention on the Law of Treaties, art. 2(1)(d), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (effective January 27, 1980) [hereinafter cited as Vienna Convention].

83. The context of the Declarations also indicate that they are not reservations, since several are made by non-parties to the SEA treaty.

84. Toth, *supra* note 71, at 805. In addition, the declarations made by the Presidency and the Commission can have no binding effect because they are not parties to the treaty.

If the Declaration is not a reservation, it may still be an interpretive declaration. In this case, the Declaration may be either an "integral part" or part of the "context" of the SEA.[85]

The Declaration cannot be an "integral part" of the SEA because it lacks the necessary ratification of the contracting states.[86] Article 33 states that "this Act will be ratified by the High Contracting Parties in accordance with their respective constitutional requirements."[87] But the Declarations are formally annexed to the Final Act and are not ratified by the SEA. As a result, they are not ratified pursuant to article 33,[88] nor by the Vienna Convention which requires ratification.[89] The Court has held that the Annexes of the Treaty of Paris (ECSC) were binding only because they were expressly included through article 84 of that treaty.[90] In the case of the SEA, however, the Declarations are not included by any of the act's articles.

The Court could still interpret the SEA Declarations as part of the context. Here though, the other declarations indicate article 8A is not part of the context because several non-parties made declarations. They also run into a problem created by article 31. Since article 31 limits the Court's authority to title II and

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85. *Id.* at 808.

86. *Id.* at 809. Professor Toth compares the structure of the EEC Treaty and the three Acts of Accession and concludes:

> Each of these instruments is accompanied by a Final Act which lists the various Annexes, Protocols and Declarations adopted by the respective Conference. The Annexes and Protocols are incorporated in the main instrument by means of an express provision stating that they "form an integral part thereof" (Articles 239 EEC, 158, 150 and 400 of the Acts of Accession of 1972, 1979 and 1985, respectively). There is no such provision with regard to the Declarations, from which the conclusion must be drawn that the contracting States deliberately excluded them from the legal scope of the various instruments.

Id. The inclusion of obviously invalid declarations by the Presidency and Commission might also indicate a lack of intent to attach them to the Single European Act.

87. SEA, *supra* note 1, art. 33.

88. *See* Toth, *supra* note 71, at 809.

89. Article 14 states in pertinent part, "1. The consent of a State to be bound by a treaty is expressed by ratification when:

> a) the treaty provides for such consent to be expressed by means of ratification. . . ."

Vienna Convention, *supra* note 82, art. 14. Article 33 of the SEA also calls for ratification. SEA, *supra* note 1, art. 33. The second Vienna Convention extended to international organizations like the EC. *See* Manin, *The European Communities and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 24 COMMON MKT. L. REV. 457 (1987).

90. Groupement des Industries Siderurgiques Luxembourgeoises v. High Authority, 1956 E. Comm. Ct. J. Rep. 175, 194.

article 32, the Court is prohibited from giving the Declarations legal status.[91] In his analysis, Professor Toth concluded that the Declarations to the SEA:

> (1)are not susceptible of precise legal characterization;
> (2)possess binding force neither under public international law nor under EC law;
> (3)are not subject to the jurisdiction of the Court;
> (4)can in no way restrict, exclude or modify the legal effects of the SEA;
> (5)cannot have an effect on the interpretation of the SEA by the Court.[92]

If the Court follows this analysis, it would be able to give direct effect to article 8A.

2. *Limitations of Articles 31 and 32*

As mentioned above, article 31 of the SEA takes title III out of the Court's jurisdiction. However, title III deals primarily with foreign policy matters which are normally controlled by the member states outside of the Treaties, so this does not constitute a severe limitation of the Court's power. Furthermore, the Court may still influence foreign policy through its powers under the Treaties.[93] As progress is made toward economic union, the Court's power is likely to increase rather than decrease. This is due to the need for the member states to give up increasingly greater amounts of sovereignty as the market nears completion.[94]

As already noted, the Court has played a large role in establishing the supremacy of EC law and the Court.[95] This trend has continued in recent cases.[96] In other areas, the Court "has also

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91. Note that the limitation on the court's jurisdiction over title III is contained within the act in article 31, but the limitation on article 8A is oddly left out and put in the form of a declaration. The drafters could easily have placed the declaration within an article of the act, but chose not to do so, and thereby put it in a much weaker position.

92. Toth, *supra* note 71, at 812.

93. Elazar and Greilsammer have noted that the Court of Justice "refuses to consider the three basic Treaties as strictly limited international conventions, and interprets them in broadly constitutional terms." Elazar & Greilsammer, *supra* note 4, at 94. It seems likely that the Court can reach foreign policy through interpretation of the treaties in much the same way that the U.S. Supreme Court has used the Commerce clause.

94. *See supra* note 29 and accompanying text.

95. *See supra* note 9 and accompanying text.

96. *See, e.g.*, Demirel v. Stadt Schwäbisch Gmünd, 1987 E. Comm. Ct. J. Rep. 3719, 1 Common Mkt. L.R. 431 (1987) (treaties made by the Council under articles 228 and 238 of the EEC Treaty were acts of Community institutions and therefore subject to

managed to extend the scope of articles 95 and 96 to cover not only export subsidies but also taxes on exports that exceed the level imposed on goods sold on the domestic market."[97] Through its interpretations, the Court has made it clear that the EC market "should be as close as possible to a 'genuine internal market.' "[98] The Commission even noted that although the member states intended to have a weak court, the Court had managed to increase its powers to perform its duties through "certain interpretative developments."[99] Thus, the Court has been willing to go beyond a strict interpretation of the Treaties when it furthers the goals of the EC.

C. *Will the Court Judicially Enforce the 1992 Deadline?*

In the past, the Court has shown itself willing to play a significant role in formulating EC policy and has even had an effect on the allotment of power between the institutions of the EC. For example, in *European Parliament v. Council of the European Communities*,[100] the Court held that Parliament has authority to bring actions against the Council despite the fact that Parliament had not been given this right by the Treaties.[101] The effect was to substantially increase the power of Parliament in its dealings with the Council and the Commission. The Court has also strengthened its power to review acts of Parliament—a power that seems to have been accepted by both Parliament and the Council.[102] The Court has also allowed Parliament to participate in preliminary ruling procedures.[103]

Given the Court's historical willingness to go beyond a strict reading of the Treaties in order to achieve the goals of the EC and its expressed belief that the EC must be as closely inte-

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Court review); Re Regional Aid Plans: Germany v E.C. Commission, 1987 E. Comm. Ct. J. Rep. 4013, 1 Common Mkt. L.R. 591 (1987) (Article 92 of the EEC treaty applied to German Länder as well as to the central government); Barra v. Belgium, 2 Common Mkt. L.R. 409 (1988) (Community law overruled national legislation regarding students from other Member States and national courts had no discretion in the matter).

97. Lonbay, *supra* note 79, at 48.

98. *Id.* at 49.

99. Rasmussen, *The Court of Justice*, in THIRTY YEARS OF COMMUNITY LAW 151, 156 (1983).

100. 1985 E. Comm. Ct. J. Rep. 1513; 1 Common Mkt. L.R. 138 (1985).

101. *Id.*

102. *See* Bieber, *Legal Developments in the European Parliament*, 5 Y.B. EUR. L. 341, 345 (1985).

103. *See id.* at 34-47.

grated as possible, it is probable that the Court will act to bring about integration by 1992.

V. Conclusion

The EC faces a number of major problems in achieving integration by 1992. Among these are the lack of power in Parliament and continuing requirements of voting unanimity in the Council. In the past, the Court has been active and successful in moving the EC towards integration. There has been effort to curb the Court's ambitions in the SEA, but if integration by 1992 is to become a reality, then the Court should take advantage of its present position as the supreme interpreter of the Treaties and declare the SEA restrictions non-binding. This will enable the Court to give legal effect to the deadline date of December 31, 1992. In light of the Court's past endeavors it is likely that the Court can and will do this, and that the member states will eventually accept such a decision.

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