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**THE EUROPEAN COMMUNITY IN CHANGE:  
EXIT, VOICE AND LOYALTY**

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THE EUROPEAN COMMUNITY IN CHANGE: EXIT, VOICE AND LOYALTY

I. Introduction - Voice and Exit

For several years much of my work has been an attempt to construct a general theory of the European Community system which would integrate under one explanatory principle both the political and the legal paradigm of the EEC. The result of this effort was the development of an Equilibrium Theory which explained the interaction of Normative Supranationalism (the legal paradigm) and Decisional Supranationalism (the political paradigm). This theory is best explicated in The Community System: The Dual Character of Supranationalism (1 Yearbook of European Law 267, 1981) and more elaborately in Il sistema comunitario europeo (Il Mulino, 1985).

Having done that I have searched to see whether my theory could be integrated into a more general system theory of organizations and policies. This paper is an attempt to show how my theory of equilibrium enmeshes with Albert Hirschman's impressive and widely influential theory of Voice, Exit and Loyalty. The bulk of the paper is an attempt to reconstruct my earlier writing into the Hirschman concept. At the tail end I touch on some possible practical consequences for the debate on institutional reform of the Community which has raged in the last few years.

In his seminal book Exit, Voice and Loyalty, Hirschman identified the categories of Exit and Voice with the disciplines of respectively Economics and Politics. Exit according to him corresponded to the neat world of the economist whereas Voice corresponded to the messy (and supposedly more complex) world of the political scientist.

Hirschman states:

"Exit and Voice, that is, market and non-market forces, that is, economic and political mechanisms, have been introduced as two principal actors of strictly equal rank and importance. In developing my play on that basis I hope to demonstrate to political scientists the usefulness of

economic concepts and to economists the usefulness of political concepts. This reciprocity has been lacking in recent interdisciplinary work ... (Economists) have thus succeeded in occupying large portions of the neighboring discipline while political scientists - whose inferiority complex vis-à-vis the tool-rich economist is equalled only by that of the economist vis-à-vis the physicist - have shown themselves quite eager to be colonized and have often actively joined the invaders" (emphasis in the original).

There is only one discipline which displays even greater inferiority complexes in trying to explain multifaceted social phenomena than both economics and political science: the law and lawyers. It is worth noting that for Hirschman the legal paradigm - even though he was talking about competition, a field rich, even dominated by legal regulation - did not even get a mention.

The subject of this essay is the past and future evolution of the Institutional Structure and Process of the European Community with particular emphasis on "legal Europe". However it is not my intention to try and present the juridical picture in a legal cocoon.

Hirschman says:

"A close look at this interplay (of Voice and Exit) will reveal the usefulness of certain tools of economic analysis for the understanding of political phenomena and vice versa. Even more important, the analysis of this interplay will lead to a more complete understanding of social processes than can be afforded by economic or political analysis in isolation" (emphasis in the original).

I hope to prove that the same can be said about the interplay between legal and political analysis. The interdisciplinary gap here is just as wide.

The European Community in "Crisis"

There seems to be a widespread consensus that the institutional arrangements of the EEC have proved inadequate to achieve the objectives of the Community and to deal with the tasks facing it in the future. A Community malaise - occasionally characterised by the terms lourdeur or blocage - seems to have grown deeper over the years. It is also claimed that the balance between the Community and the Member States has tilted too much "in favour" of the latter, that individual Member State interests dominate too much the Community decisional process and that the outcome is instability and continued crisis. The syndrome is so well known as to obviate any discussion.

How can one explain the emergence of this phenomenon, how is one to interpret it, and how should one evaluate the various proposals for rectifying it? These will be the underlying themes of this essay.

The interplay of Exit and Voice is also clear enough and only needs a brief reminder. Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intra-organization correction. Apart from identifying these two basic types of reaction to malperformance, Hirschman's basic insight is to identify a kind of zero-sum game between the two. Crudely put, a stronger "outlet" for Voice reduces pressure on the Exit option and can lead to more sophisticated processes of self-correction.

Although Hirschman developed his concepts to deal with the behaviour of the marketplace, he explicitly suggests that the notions of Exit and Voice may be applicable to membership behaviour in any organizational setting.

To simplify the analysis I shall treat the Community in a skewed way concentrating entirely on the dialectics of Member States on the one hand and the Community as a whole and its organs on the other. There are many distortions in this type of characterization: For one, Member States have different views on different issues, including general attitudes to

European integration. Moreover, Member States are not homogenous entities with a single perception and interest in Community policies. These will change from interest group to interest group, from party to party and, obviously, will also change over time. I shall try however to concentrate on certain aspects which may genuinely be considered to pertain to the quality of being a Member State - a constituent political unit - of the integrating body.

Naturally we shall have to give specific characterizations to Exit and Voice in our context. I propose first to discuss the Exit option in the European Community. In this analysis Exit will be discussed in legal categories. I shall then introduce Voice in political categories.

## II. Exit in the European Community: Formal and Selective

Formal (or total) Exit is of course an easy notion - signifying the withdrawal of a Member State from the European Community. Lawyers have written reams about the legality or otherwise of unilateral Member State withdrawal. In a footnote to this study I reproduce the salient points of that analysis<sup>1</sup>. The juridical conclusion is that unilateral withdrawal is illegal. Exit is foreclosed. But this is precisely the type of legal analysis which gives lawyers a bad name in other disciplines.

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1 Unlike the Treaty of Paris which established the European Coal and Steel Community for a limited duration of 50 years, the Treaty of Rome establishing the EEC was, in the language of Article 240: concluded for an unlimited period.

How then should one interpret the delphic Article 240? It should be remembered that the Travaux of this Treaty of Rome have not been published and cannot therefore be used as an aid in interpretation. To be sure, the failed European Political Community, on the ashes of which the EEC Treaty was drafted, contained yet a stronger term: it was to be "indissoluble"; arguing a contrario it could be said that all that Article 240 EEC intended to convey was that the EEC was not to be limited in time (unlike the ECSC, for example, which is so limited) rather than the intention that it be perpetual. However it is doubtful how legitimate reliance on the European Political Community may be and the absence of travaux indicates that in interpretation more weight should be given to the text and the économie of the Treaty rather than to an attempt to divide the intention of the original framers from extraneous sources.

In as much as textual and contextual argument is concerned, Akehurst is convincing in pointing out that the objective of indicating that

It takes no particular insight to suggest that should a Member State consider withdrawing from the Community, the legal argument will be among the last considerations to be taken into account; if Total Exit is foreclosed, this is because of the high enmeshment of the Member States and the potential - real or perceived - political and economic losses to the withdrawing State.

Whereas the notion of Total Exit is thus not particularly helpful - or at least it does not profit particularly from legal analysis - I would introduce a different notion, that of Selective Exit. By this I mean the practice of the Member States of retaining the membership but seeking to avoid their obligations under the Treaty be it by omission or commission<sup>2</sup>.

In the life of many international organizations including the Community, Selective Exit is a much more common behaviour than Total Exit. Legal analysis may be helpful in suggesting how this type of Exit has become foreclosed, albeit not completely, with obvious consequences for the decisional behaviour of the Member States.

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the Treaty was concluded for an unlimited period would have been achieved by silence. A treaty does not normally automatically expire unless a duration is explicitly or implicitly provided. If then Article 240 EEC is to receive a non-superfluous meaning it must be that it is a non-withdrawal clause.

The Court of Justice of the European Community which is the supreme judicial body charged with interpreting the Treaty of Rome has not had occasion to give a direct response to this question. Its dicta in Commission v. France suggest that the Court would give the same negative reply.

- 2 Selective Exit could of course be regarded as a Voice type reaction given that Total Exit is foreclosed. I prefer to confine Voice, arbitrarily perhaps, to actions of the Member States within the decisional processes of the Community. Selective Exit is after all closer to Hirschman's buying boycotts.

### III. The Closure of Selective Exit

The closure of Selective Exit signifies the process curtailing the ability of the Member States to practice a selective application of the acquis communautaire - the erection of restraints on their ability to violate or disregard their binding<sup>3</sup> obligations under the Treaties and the laws adopted by the Community institutions.

In order to explain this process of closure I must recapitulate two dimensions of EEC development:

1. the "constitutionalization" of the EEC legal structure; and
2. the system of legal/judicial guarantees.

#### 1. The "Constitutionalization" of the EEC Legal Structure

Most non-lawyers if asked to pin-point the single most dramatic incident in the evolution of the European Community as a supranational legal order will probably identify the 1965-66 'empty chair' crisis which led in its wake to the Luxembourg Accord whereby the Member States first reluctantly and then with growing enthusiasm and conviction asserted the right of every Member State to operate a de facto veto on any Community proposal which contradicted a self-defined vital national interest. That is when "the rot began to set in".

For lawyers the real turning point in Community life occurred two years earlier in the period 1963-64. In that period, from the legal point of view, the Community underwent a real legal revolution. Some constitutionalists have suggested no less than a veritable shift in the Community Grundnorm.

The legal revolution was instigated by a series of decisions of the European Community Court of Justice. The story is very well known and I

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3 I refer only to those obligations which are binding in law. The Treaties contain many policies which are mere desiderata. The acquis communautaire will include of course the thousands of Community Regulations and the hundreds of Directives and Decisions adopted over the last three decades.

may therefore allude only to the two most famous of these decisions. As is often the case with the life of the law, they sprang from relatively trivial disputes.

The first concerned a dispute between a Dutch importer and the Netherlands customs authorities. The importer, Van Gend en Loos contested the classification of a consignment of plastic imported from the Federal Republic under a new Benelux law which had the effect of increasing by one or two points the customs he had to pay. He contended that this law was contrary to Article 12 of the Treaty which imposed a standstill on the introduction of new customs.

The Member States (not only the Netherlands) contested vigorously the propriety of the legal action. They claimed that Article 12 (and many articles like it) created an obligation on the Member States. That if Holland had violated this obligation it would be a matter to be dealt with either by the Member States themselves or by the Commission of the European Community, but that in any event an individual like Van Gend en Loos had no say in this matter. The Court<sup>4</sup> held for Van Gend en Loos and introduced the famous doctrine of Direct Effect: Clear and unconditional legal obligations of, or under, the Treaty of Rome, even if addressed to the Member State could bestow enforceable rights on individuals.

Do not underestimate the absolutely far-reaching political and economic consequences of this decision. In its wake many more followed effectively holding that the large majority of Treaty articles creating the Customs Union had similar direct effect. This meant that each time a Member State introduces a law (or fails to introduce a law) which has the effect of disturbing the operation of the Common Market, individuals may go to court and seek the disapplication of the offending measure. Moreover, where, for example in the field of taxation, it was discovered that Member States were imposing on importers taxes contrary to the Common Market rules, not only was the tax declared illegal but the authorities had to pay back all taxes illegally levied. To make things even "worse" the Court confirmed that Community Regulations could pro-

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4 Case 26/62 in: Common Market Law Reports, Vol. 2 (1963), p. 105.



duce the same direct effect and even more radically that Community Directives - which on their face are directed to the Member States - could also give rise to individual claims<sup>5</sup>.

By one judicial stroke the centre piece of the European legal political structure received a status unknown on a similar scale in any other international organization, and individuals became the real de facto vigilants of the Community order. There have been numerous cases of this type over the years including fields such as free movement of workers, sex discrimination and the like.

The second case concerned a dispute between one Mr. Costa and the Italian state electricity company ENEL<sup>6</sup>. The dispute concerned an electricity bill of no less than DM 3.- (three German Marks!). The facts need not concern us; the European Court used this case to pronounce the second of its fundamental constitutional principles. It simply wrote into the Treaties a Supremacy Clause which may be found in many federal state constitutions but was not to be found in the Treaty of Rome. Community law, per the Court, whether the Treaty itself or every Regulation, Decision and Directive of the most menial character, was to be held by national courts as supreme and overriding any conflicting national law, whether a ministerial decree or a fully fledged parliamentary enactment.

The most surprising aspect of this doctrine of supremacy was not its actual pronouncement by the European Court. It had simply followed its own logic in the Van Gend en Loos case. It was the acceptance of this doctrine by the overwhelming majority of supreme courts in the Member States. The only exception are the Conseil d'Etat in France (but not the Cour de Cassation) and the delicate problem of Britain which has no written constitution. In Germany and Italy the supreme constitutional courts also accept supremacy subject to a theoretically important but practically insignificant reservation concerning Community measures violating fundamental human rights<sup>7</sup>.

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5 The Bundesfinanzhof (EuR 81, pp. 442, Bundesfinanzhof Vol. 148 (1985), pp. 393) and the Conseil d'Etat (EuR 1979, pp. 292) have refused to accept that last doctrine. The Bundesverfassungsgericht decided like the Court - Decision BvR 687/85 of April 7, 1987 - and cancelled the last decision of the Bundesfinanzhof.

6 Case 6/64 in: Common Market Law Reports, Vol. 4 (1964), p. 425.

7 Bundesverfassungsgericht, Vol. 31, p. 173, and Vol. 37, p. 271.

From the constitutional principle point of view the closure of Selective Exit was becoming a reality.

Unlike, however, federal states, the Community has no enforcement mechanisms. Decisions of the European Court of Justice are in a sense declaratory. Would it not be the case then that if a Member State was really unhappy with a Community measure and policy, he would simply defy the European Court? That after all has been the lot of the International Court of Justice in the Hague.

It is possible, in very limited circumstances, for this to happen as the case of the French ban on British mutton imports proves. But empirically, this has not happened, and the French saga (in part rooted in the exceptional refusal of the Conseil d'Etat to accept the doctrine of supremacy) is the exception that proves the rule - a rule of a high respect for the rule of law in the Community. How so?

Partly this is rooted in a general attitude to the rule of law in Western democracies, partly to a measure of loyalty towards the EEC to which I shall return later. But loyalty, to an extent was coerced. It is very difficult to defy the rule of law in the Community because of the sophisticated system of judicial review. I shall outline briefly its salient features.

## 2. The Community System of Judicial Review and the Closure of Selective Exit

As mentioned, the hierarchy of norms within the EEC is typical of a non-unitary system. The Higher Law of the Community is of course the Treaty itself. Both Community organs and the Member States may not violate in their legislative and administrative actions the Treaty. In addition, however, Member States may not violate Community Regulations, Directives and Decisions. Not surprisingly then the Community features a double-limbed system of judicial review which operates on two levels. Two sets of legislative acts and administrative measures are subject to judicial review: 1. The measures of the Community itself (acts of the Council and Commission) which are reviewable for conformity with the Treaties; and 2. Acts of the Member States which are reviewed for

their conformity with Community law and policy including the above-mentioned secondary legislation.

Needless to say, in the context of our discussion of attempts by Member States to disregard those obligations which are not to their liking, that the effectiveness of review of the second set of measures assumes critical importance. I shall focus here then only on that aspect of judicial review.

a. Judicial Review at the Community Level

Both the Commission of the EEC and individual Member States may, in accordance with Articles 169 - 172 EEC, bring an action against a Member State for failure to fulfil its obligations under the Treaty. In general failure to fulfil an obligation may take the form of inaction in implementing a Community obligation or enacting a national measure contrary to Community obligations. The very existence of a non-optional and exclusive judicial forum for adjudication of these types of disputes sets the Community above many international organizations. The role of the Commission is even more special. As noted by one commentator: "(u)nder traditional international law the enforcement of treaty obligations is a matter settled amongst the Contracting Parties themselves. Article 169, in contrast, enables an independent Community body, the Commission, to invoke the compulsory jurisdiction of the European Court against a defaulting Member State".

At the same time the "intergovernmental" character of this procedure and the consequent limitations on its efficacy are clear enough. Four weaknesses are particularly glaring:

1. The political nature of the procedure

In the first place, the decision of the Commission and/or a Member State to bring an action against an alleged violation by another Member State will often be influenced by other (extraneous) political considerations. The Commission might decide that it does not wish to threaten delicate ongoing negotiations and Member States might not wish to precipitate an international crisis. Moreover, the Commission, as required by the

infringement procedure, will strive to reach a friendly settlement with the infringing Member State. This settlement might not necessarily fully remedy legally the infringement. Finally, the Commission might be particularly reluctant to bring an action against a violation committed by a national judicial decision.

2. The problem of monitoring Member State infringements

Given the vast number of Community measures it is simply impossible for the Commission to keep tabs on all practices of the Member States with a view to scrutiny and possible judicial action. Despite the myth of a huge Brussels bureaucracy, the Commission, considering the fact that two-thirds of its officials are translators of one sort or another, is an extremely lean and understaffed organization by comparison to any national bureaucracy of similar responsibilities.

3. The appropriateness of Article 169 for small violations

It is unrealistic to expect the Commission to put the entire legal machinery into full swing in the face of minor violations. Article 169 would seem more appropriate for dealing with flagrant violations of some political consequence.

4. The lack of real enforcement

Finally, although in most cases either the prospect or actual commencement of infringement proceedings are sufficient to terminate a violation and even more so an actual judgment by the Court condemning the violation, it should not be forgotten that these judgments are declaratory. There is no army to enforce them nor any real sanction in the event that a judgment is disregarded. The record of compliance with decisions of the Court by Member States is remarkable. But there are a sprinkling of instances when judgments were disregarded which highlight this weakness.

b. Judicial Review at Member State Level

These weaknesses are to an extent remedied by judicial review which takes place within the judicial system of the Member States in collaboration with the European Court of Justice. Article 177 EEC provides inter alia

that when a question concerning the interpretation of the Treaty is raised before a national court, the latter may - and if it is a court against whose decision there is no further judicial remedy then it must - suspend the national proceedings and make a request for a preliminary ruling on the correct interpretation of the Treaty, to the European Court of Justice in Luxembourg. Once this ruling is made it is remitted back to the national court which will give, on the basis of the ruling, the decision in the case before it. The national courts and the European Court are integrated thus into a unitary system of judicial review.

The European Court and national courts have made good use of this procedure. On its face the purpose of Article 177 is simply to ensure uniform interpretation of Community law throughout the Member States. However, very often the factual situation in which Article 177 comes into play is when an individual litigant pleads in the national court that a rule or measure or national practice should not be applied because they are in violation of the Community obligations of the Member State. The attempts of Member States to practice selective membership by disregarding their obligations come thus regularly to be adjudicated before their own national courts. On remission to the European Court, the latter renders its interpretation of Community law within the factual context of the case before it. Theoretically a division exists whereby the European Court may not itself rule on the application of Community law. But as one scholar notes: It is no secret, however, that in practice, when making preliminary rulings the Court has often transgressed the theoretical borderline ... it provides the national judge with an answer in which questions of law and of fact are sufficiently interwoven as to leave the national judge with only little discretion and flexibility in making his final decision.

What is important in the procedure, indeed crucial, is the fact that it is the national court which renders the final judgment. The main result of this procedure is the binding effect and enforcement value which such a decision has on a Member State - coming from its own courts - as opposed to a similar decision handed down in declaratory

fashion by the European Court itself under the previously discussed 169 procedure.

This takes care of the most dramatic weakness of that procedure, the ability of a Member State, in extremis, to disregard the strictures of the European Court. Under the 177 procedure this is not possible. A Member State - in our Western democracies - cannot disobey its own courts.

The other weakness of the 169 procedure is also remedied to some extent: individual litigants are usually not politically motivated in bringing their actions, small as well as big violations come to be adjudicated, and in terms of monitoring, the Community citizen becomes willy-nilly a decentralized agent for monitoring compliance by Member States with their treaty obligations.

### 3. The Closure of Selective Exit: Conclusion

To be sure the closure of Selective Exit is not complete. Not all cases of violation come before national courts, the success of the system depends on the collaboration between national courts and the European Court of Justice and in any event Member States may, and often have, utilized the delays of the system to gain time. But the overall effect cannot be denied: The combination of the "constitutionalization" and the system of judicial remedies has to a large extent nationalized Community obligations and has introduced on the Community level the Habit of Obedience and the respect for the rule of law which traditionally is not associated with international obligations as any student of international organizations will know.

## IV. The Closure of Exit and the Increase of Voice

### 1. The Dialectics of Voice and Exit in the EEC

We may now return to the main theme of this analysis - the relationship between Voice and Exit.

The closure of Exit in my perspective means that Community obligations, Community law and Community policies are "for real". Once adopted, and this is the crucial phrase: once adopted - Member States find it very difficult indeed to avoid them. If Exit is foreclosed, the need for Voice increases: and this is precisely what has happened in the European Community over the last three decades.

In what may almost be termed a "ruthless" process, Member States have taken control over all aspects of Community decision making.

This is a story even better known, especially to political scientists, and my description can be highly cryptic.

We may divide the Community decision making process into the following phases:

- the political impetus for a policy
- the technical elaboration
- the formulation of a formal proposal
- the adoption of the proposal
- the execution of the adopted proposal.

In each and every of these phases the Member States - often at the expense of the Commission - have a dominant and controlling say. The European Council (an organ dehors the Treaties) is the body which now gives the impetus for the policy agenda of the Community. Technical elaboration is already infused with Member State influence in the shape of a variety of groups of national experts and the like. In the formulation of the proposal the Commission already conducts a first, unofficial, round of negotiations with COREPER. At the adoption state, we have already referred to the Luxembourg Accord which means that every Member State has a controlling say over proposals and their adoption. Even in the execution of policies, the Commission and Community are "burdened" with a vast range of management and other regulatory committees with representatives of the Member States who can control that process as well. (In passing we should note that Member State control means governmental - executive control.) One net effect of this process has been the creation of the so-called Democratic Deficit.

Increased Voice becomes thus a code for the process which has seen the breakdown of the original structures of decision making foreseen in the Treaties. It has had the consequence of the so-called lourdeur of the Community process and is conceived by many as the source of much of the Community malaise.

Be that as it may, the relationship between Voice and Exit is nonetheless striking. The obvious, almost commonsense, reason why the Member States are so adamant to develop and retain a "loud Voice" (expressed in a power of veto etc.), is at least partly because there is no easy Exit. No one cares too much what happens in the decisional bodies of, say, the Council of Europe - whether resolutions are adopted by consensus or majority. It is so precisely because the Exit option is so easy - and I mean here as well Selective Exit. The same applies to Resolutions of the General Assembly of the United Nations, Indeed, in the UN, the only organ which claims a binding effect to its resolutions is the Security Council (although even this in real terms, unlike the Community, is a fiction). And not surprisingly, given that partial closure of selective Exit of Security Council Resolutions, Voice becomes more important, asserted through the right of veto granted to the Permanent Members who roughly represent the different families of the World Order.

#### V. The Costs and Benefits of Voice and Exit: Community - Member State Equilibrium

The closure of selective Exit has no doubt been among the most important dimensions (and with my legal bias I would say the most important dimension) in operationalizing the Common Market - at least as a Customs Union plus - as a living reality. Absent this development there is no reason to believe that the EEC would have been more in its actual operation than say the GATT or some other regional free trade area agreements.

The "price" or the "cost", if we may use these terms, has been the inevitable increase in the assertion of Voice by the organization members which in turn is at the root of the institutional crisis.



But in the dialectics of Voice and Exit one may also be tempted to see a basic, and I would suggest, essential equilibrium. If the reality of the EEC depends (and this may be contested) on the closure of Selective Exit, it must be acknowledged that the particular frog, offered for dinner by the European Court, would probably not have been swallowed if Voice had not been allowed to increase as it did. We have the clearest though not the only illustration of this in the First Accession to the Community. In all three Member States there was parliamentary concern about the doctrines of supremacy and the like. In all three Member States the standard reply, to be found in White Papers, parliamentary debates, newspaper interviews etc. was simple: Yes, there is supremacy, but we (through the power of veto i.e. Voice) can prevent any supreme measure from being adopted if it clearly violates our national interest.

The interaction between Voice and Exit explains some of the riddles of the Community. It is an organization which lurches from crisis to crisis. But the phenomenon of recurring crises has two important meanings: First, crisis means relevance. Absence of crises could mean that the Community did not matter any more. We hardly hear of a whole array of international organizations. Often this is the sign of the living dead. Secondly, what is important perhaps is that despite the crises the Community survives as a very unique entity displaying a measure of integration and cooperation which has parallels only within federal states but in which the constituent Member States have not only retained their dominance, but have even been strengthened by the Community. (How could a country like, say, Denmark or Ireland hope to have such a crucial say in important European sectors such as Fishing if not through the power of veto and other methods of increased Voice in EEC Fora?)

The closure of selective Exit and the increase in Member State Voice is one (surely not the only) basis of explaining the continued, even if at times precarious, stability of the organizational structure of the EEC.

## VI. Thinking About the Future: A Revisionist View

We may now consider the ramifications of the above analysis on current thinking about Community reform. Almost inevitably in this kind of discussion we are not only in the realm of speculation, but also deeply into ideology and values.

### a. Loyalty: false and authentic loyalty

In an almost religiously observed ritual the Community engages two or three times each decade in a process of discussing institutional reform. The malaise is always the same: *lourdeur*, democratic deficit, irrelevance. The proposed cures are also always the same: streamline in the decision making process especially by moving away from consensus decision making, give more power to the European Parliament and increase the competences of the Community. In the 70s it was environmental protection, today it is new technology - in fact the Community has competence in both fields if only the political will to exercise it exists.

What is also characteristic of this ritual is that a line is always drawn between "Community minded reformers" and "Member State minded reactionaries". Between those who wish to retain the status quo, and those who wish changes radical or otherwise. This line is drawn within Member States as well as among Member States.

I have called my future perspective revisionist because it is born from a real concern for the future of the Community, but out of that concern, my conclusion is that one should treat with extreme caution any tampering with the existing structures. (Of course to some this will be simply the conservatism of the lawyer.) In particular I would suggest that one should almost regard with alarm suggestions for tampering with the rights of the Member States which in this paper were coded as Voice.

I have already suggested that as far as competences are concerned, there is very little the Community would be prevented from doing from the legal point of view. The Treaty is drafted in such a way, and it has such flexible "elastic clauses" that it is unlikely that one would need reform in order to engage in this or that area of activity. What is needed is the agreement of the Member States to do so.

What however of decision making? And what of the European Parliament? Of course no one would have objections to technical streamlining of decision making; and if the Member States themselves unanimously agree that in some sectors of the Treaty, such as technical harmonization, there should be majority voting, there could be no objection to that either.

But the radical suggestions always go to the elimination of the veto. There are many who feel that only by such a radical change will the deep seated malaise come to an end.

My view is that this analysis fails to appreciate the more complex nature of the Community structure and process. It takes for granted the acquis communautaire and focuses only on the decision making process. This view fails to see that the legitimacy (from the point of view of the Member States - and also to an extent their peoples) of the acquis is bought at the price of Voice. Strangle the Voice and the pressure for Exit will increase, not perhaps total-formal Exit, but what we have defined as Selective Exit. This would, in my view, be fatal to the Community. It should not be forgotten that with some very few exceptions the Community has no executive. The executive of Community policy is not the Commission as many believe, but the Member States themselves who must administer Community policies. Advance policies which were achieved over the determined opposition of a Member State, and the pressure for "sabotage" at administration level will grow. Courts as well are not uninfluenced by these considerations even though they will be slow to admit it. The widespread acceptance of the supremacy of Community law by national courts may at least partially be explicable by their knowledge that their national interest had full opportunity to be vindicated at the time of adoption.

In short, such strangling of Voice would be highly destabilizing to what in my mind is the central equilibrium of the Community.

A final word must be said about the European Parliament though this would be a subject for a separate paper. There is no doubt that the

EEC has increased the power of national executives and removed whole areas of public policy from effective public scrutiny. Remedying this situation is not easy.

Giving the European Parliament independent decisional power in the face of Government opposition would have the same result, even if achieved differently, of strangling Voice with all the destabilizing consequences alluded to above.

Moreover, giving the European Parliament co-decisional power would formally close the democratic deficit but render a decisional process which is already heavy almost unbearably so.

There are no easy options in this regard. It is even clear today that the European Parliament would have a more legitimating capacity than the Ministers in the Council. The European Parliament after all is perceived as part of Brussels whereas Ministers (wrongly) are perceived as fighting the Brussels bureaucracy. But these perceptions might change with increasing powers.

The research question at least would have to be to what extent could the European Parliament substitute the Voice function of the Member States. To this I offer no concrete replies.

Recent events, and particularly the conclusion of the Single European Act, give evidence to the analytical, if not normative, thesis of this study. To those who favoured a radical change in the decisional process of the Community, the Act comes of course as a disappointment - the changes in decision making are not critical and transformative. This of course need not be evidence to the equilibrium thesis, but simply to the lack of ideological commitment to a more unified Europe.

But it is worth examining one of the areas where substantive change did take place. In relation to harmonization measures new Article 100a provided for a majority vote. At first glance this contradicts the thesis. Here, after all, in a crucial area it would seem that the Member States were willing to abandon the protection of their interests through the

veto power. This impression would be at best dangerous at worst spurious. Coupled with the decision on majority voting, the Member States asserted their right to invoke the derogation encapsulated in Article 36. Under the interpretation of the Treaty by the Court, once Member States took action under Article 100, they could not avail themselves of the derogation of Article 36. Article 100a of the Single European Act purports to overturn that rule. This overturning means that if a Member State will be unhappy with a measure ex 100a, it will have at least a partial escape clause through Article 36! This is very much in line with the Exit - Voice paradigm and the equilibrium theory. They accepted a majority vote - hardening the supranational element in decision making, so inevitably the binding effect of the outcome of such a decision is correspondingly softened. The final equation remains largely the same. Some observers might even feel that with this new equation of the old equilibrium the Community is worse off in undermining the uniformity of application of Community rules throughout the member States.

#### VII. A Normative Conclusion

By way of conclusion I turn to an evaluation of the implications of the equilibrium thesis. I shall, naturally, assert the values on which this evaluation rests.

As stated, the Exit - Voice paradigm and the equilibrium theory prevents a radical change in the decisional functioning of Europe - so long of course that power of governance remains in the hands of the governments of the Member States and does not move through a "revolutionary" act to a centrally elected parliament and executive. Revolutionary acts of this type - strictly speaking illegal - took place both in the USA and Switzerland with the move from confederation to federation.

Moreover, the Exit - Voice paradigm and the equilibrium theory makes a radical change undesirable. Crudely put, under the present decisional structure a change of process to, say, majority voting, would not only be not feasible (unless accompanied by a corresponding shift in the normative outcome), but also destabilizing and as such undesirable.

To many this theory might seem not only theoretically unproven, but also pessimistic and leaving little hope for a brighter future for integrating Europe.

I do not share this pessimistic assessment for the simple reason that I find in the current European status quo a substantial realization of the original European integration ideal.

The new European construct was founded, at least in part, as a reaction to the ravages of an exclusively nation-state based system. Consequently, there would be a profound betrayal of the original idea if the end of the integration process would lead back to the same concept: a European Super-State. On the other hand the history of transnational integration teaches us that traditionally confederations (which is what Europe currently is) either moved to federations<sup>8</sup> (which I characterized as a betrayal of the European ideal) or disintegrated (which would not be a betrayal but a failure).

What Europe has achieved is a veritable political breakthrough: A system with a high degree of integration at the normative (non-exit) side coupled with the continued existence of unthreatened, and even strengthened Member States secured by a high degree of Voice on the decisional side.

The decisional-normative equilibrium, with all its difficulties, is what at the end of the day Europe opted for: Integration coupled with a true commitment to diversity and continued existence of the sovereign Member States. Sectoral improvements, increased transparency and accountability, and commitment to new material endeavours are all compatible and consonant with the status quo. But the current European model, with its uniqueness in true transnational cooperation, with its inter-national civilizing process, with the high accord it affords the individual will,

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8 It should also be remembered that all federal states have shown extraordinary centralist tendencies. In many federal states the veritable division between units and the general power is more mythical than real.

paradoxically, be threatened not only by stepping backwards but also by stepping "forwards" to a United States of Europe.

A united Europe represents a harking after power, autonomy and strength towards the outside world; it is coupled with a promise of efficiency - industrial and social - internally. These are alluring prizes to a society beset by security fears and high employment.

This is the ethos of "Trans-National Socialism" - an ethos to be rejected even if the fear of its consequences remains remote.

The sysiphean continuous and structural quest for transnational cooperation in the current Community framework, with the inevitable hardship, necessary patience, unbuilt respect for the sovereignty and sensitivities of other peoples and nations represents European civilization at its highest form. It should not be given up lightly.