CHAPTER IV

In Defence of EC Law

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1 Introduction

Is EC Law in need of anyone's defence? It is indeed. Not only, however, against its familiar detractors and debunkers, protagonists of Member States' sovereignty. It is in need of defence also against its followers, its devotees, who claim that the EC legal order is the Rule of Law in Europe incorporated. Their claim founders on a single fact, plain for all to see: Brussels' unmistakable rule of the Desk.¹

In several of its verdicts the European Court of Justice has proclaimed the EC to be a Community with a constitutional charter, based on the rule of law:

'... the EEC Treaty, albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of Law'.²

The Amsterdam Treaty has picked this up and inserted Article 6 EU:

'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

To the man in the street and even to the law student in class, however, European Union and its regulations, in appearance and terminology as little as in origin, are paragons of justice, openness and accessibility. 'The main thing you need to understand about the Court of Justice of the European Community is that it has little if anything to do with justice', Michael Toner quips in his Bluff your Way in the EEC. Now this may be somewhat of a game of words. Peter Hāberle, German constitutionalist and Europeanist speaks seriously and in the same vein of a 'Europadefizit' of the European Communities.³

What Hāberle means is that the Union itself falls short of established European principles of constitutionalism and law. Indeed, rather than an open book, the EC, the Union and their Treaties are sacred scrolls accessible only to their high priests; their increasing complexity and illegibility themselves are no compliment to the rule of law.⁴ And that is only one count of the charge to

¹ Rule of the desk, a literal translation of the concept of 'bureaucracy', is antonymous if not inimical to the rule of law. I grant that the force of this point is rhetorical only.
⁴ It is symbolic how even the Treaty clean-up by renumbering decided in Amsterdam, intended to make the Treaties more accessible, has increased illegibility of EC law. It has made it more difficult to read
be made. This is why true believers in EC-law may in fact be sowing disbelief and scepticism.

Is this, then, saying that European Law and its Brussels bureaucracy amount to a regime of non-democracy alien to the rule of law, as it is claimed by opponents, most elegantly and fervently by Hartley in his recent indictment? Not quite.

Neither a true believer nor a detractor I wish in the present contribution to come out in defence of European Law, yet only after having done justice to the charges which it deserves to see levelled against it. This will make the defence of European law harder but, if successful, harder at the same time. My argument will run as follows. After summing up the charges which may reasonably be made against EC Law and in particular against the ECJ, it shall proceed to discuss the positions taken by classical or orthodox protagonists and argue their shortcomings.

From there it will move to unorthodox but more sophisticated and better tenable stances in favour of EC law and the Court of Justice, first among which is Joseph Weiler’s well known *The Transformation of EC Law*. Only after taking issue with Weiler’s thesis, the present argument will finally move to its own defence.

2 The case against EC law and its Court of Justice

In an ‘exploded’ drawing, the sort of which is normally made of technical instruments and machinery, the rule of law mechanism would feature cogs and loose parts such as impartiality, human rights, *ne bis in idem*, *nulla poena sine lege*, legal certainty, publicity, rule-based government, access to justice against the authorities, due process, separation of powers, pre-established and abstract rules, no retro-activity, equality etc. To check-up on the state of EC under the rule of law, we may deal with the principal alleged weaknesses of these elements in turn.

All this is done best by centring on the ECJ, the beating heart of EC law. Count 1: *Impartial and objective?* In his well-known taboo-breaking charge of the Court of Justice’s policy-oriented practice (1986), Danish Hjalte Rasmussen holds that the ECJ itself is too strongly involved with the objectives of European
integration to be an impartial adjudicator. The Court’s creative interpretation of both the Treaty as a whole and its individual provisions, for the sake of maximum effect (‘effet utile’), is at the expense of respect for the Member States’ terms of agreement; its appeal to the spirit (= goals) at the expense of the obvious (literal) meaning of provisions. Its warm welcome to private parties (business) and to the Community institutions is in stark contrast with its abrasive attitude towards the Member States. The proclamation of its own sacred realm (the autonomous legal order) leaves an impression that the Court is really less concerned with being and appearing to be a neutral body than it is with its own status and with the cause of integration. Rasmussen goes so far as to claim that the Court created a world of its own, severed from the real world.\(^7\)

Count 2: Rule-based government? In the context of international organization, the principle of rule-based authority is well established of old. It is so less, however, as an expression of the idea of the rule of law than of national sovereignty. Coming under the name of the ‘principle of conferred powers’, it is meant to delimit the powers of the organization to such as conferred at its establishment or in subsequent Treaties.

In the EC-context the principle has been expressed in Articles 5 and 7 of the Treaty. The point is that laying it down in this Treaty has turned the principle into a legal rule, subject to the Court of Justice’s monopoly of interpretation, and enabled the Court to stretch it. It is ironic that the Court has done so precisely to speak against the principle’s original reason of being, to wit the sovereignty of the Member States. This it did in the ground-breaking Van Gend & Loos judgment, where it interpreted the Treaty as not a normal treaty, but one special inasmuch as it limits the Members’ sovereign rights.

Count 3: Separation of Powers? In its Les Verts judgement the Court of Justice qualified the European Community as

> ‘a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.\(^8\)

This judgement came in support of the campaign by the European Parliament to increase its standing (under 230 EC). In a famous later judgement, Chernobyl, the Court went so far as to accord the Parliament a full right of standing in inter-institutional disputes contrary to express Treaty stipulations.\(^9\) Even if this was


\(^9\) This (and Les Verts) has subsequently been codified by the Member States in their modification of the present Article 230 EC. The Treaty of Nice is again increasing the Parliament’s standing (see its new Article 230 and 300 par. 6 EC).
done to uphold and strengthen the political checks and balances (in Community jargon: ‘institutional balance’), one cannot fail to notice that the Court put itself not only above the Treaty text, but also above the very ‘institutional balance’ which it invoked to justify its own going against the Treaty text:

‘The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities’. 

‘Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives ....’.

As an aside it may be suggested that to increase the Parliament’s legal standing need not be a blessing to the institution’s political status.

Count 4: Access to justice? There is no doubt that the ECJ has greatly enhanced legal standing of private parties challenging measures from their own government for conflict with EC Law. It has done so through a liberal reading of Article 234 EC (preliminary ruling procedure) and through the development of its doctrine of ‘direct effect’. This quite revolutionary overture has been, however, less disinterested than it might seem at first glance. The Court is notably less liberal in granting access to justice to private parties challenging measures not from their own government but from EC-institutions under Article 230 EC.

Count 5: Human rights? In the field of human rights, the Court’s record, after a poor start, has been set straight in a series of judgements. There is now a well-developed doctrine of human rights protection in EC law, protection from EC authorities’ measures and from such domestic measures as are their derivatives. The Court has, however, refused to surrender its final authority in the matter to the European Court of Human Rights as the domestic jurisdictions have done. This is an interesting refusal. A number of years ago, when asked whether the EC Treaty allowed the Community to accede to the European Convention, the Court ruled that accession was not within the powers of the EC, thereby, whatever else it accomplished, keeping to itself the status of last resort in Human Rights matters concerning EC measures:

10 Case C-70/88 Chernobyl [1990] ECR I-2041, points 26 and 27.
'Such a modification of the system for the protection of human rights [accession of the EC]...would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 [now 308]. It could be brought about only by way of Treaty amendment.'

In view of the Court's boldness in matters not touching on its own privileges, this is remarkable.\footnote{Opinion 2/94 [1996] ECR-I, p. 1759 e.s.; par. 35.}

Count 6: Legal certainty and non retro-activity? 'A basic tenet of the rule of law is that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions', as write Craig and De Búrca.\footnote{Craig and De Búrca, p. 357.} In his indictment of Union law in general and the Court of Justice in particular, Hartley concludes a chapter thus:

"Community law has a particularly vague and open-textured character which gives it a flavour quite unlike that of English law: some of its rules prohibit almost anything that might "directly or indirectly, actually or potentially" have a specified effect; its provisions may mean different things in different languages; it may be badly drafted, possibly as a result of a hurriedly-contrived compromise at a Council meeting; it may be couched in language chosen precisely because it is uncertain; its application by Community and national authorities may be affected by secret agreements; and it will be interpreted by the European Court, which can take a measure which is clear, and declare that it means something quite different from what it says. As a result of this, the ordinary citizen often does not know where he stands..."\footnote{Hartley, T.C., Constitutional Problems of the European Union (above, note 5), p. 79.}

To have this point further substantiated it will suffice to read Deirdre Curtin's account in the present book about the abstruse ways in which the 'Schengen acquis' is being integrated into the Treaties.

So much for a selection of the familiar charges levelled at EC law and its Court. There is no denying that they have a good degree of reality in themselves. It is now time to take up their defence.

3 In defence of EC law and its Court

There are two distinct platforms to redeem the Court's activism, both coming in terms of the rule of law, yet each hinging on a different understanding of this notion. The one is here termed orthodox and the other unorthodox.
3.1 Orthodox defences

The orthodox redemption of the Court’s activism is well known and has different levels of sophistication.

To the original Treaty Fathers EC-law represented an alternative to power politics among the European States, including its chronic bouts of warfare. Whatever the development of European Law under the leadership of the Court, this was to be welcomed. From their original hope stems the best known and least sophisticated argument still prevailing: the one applauding the Court’s crusade against the curse of national sovereignty. It is particularly effective with beginning students of European law, who are often, albeit for different reasons, averse to authority in general and to politics in particular. And the argument makes good sense, up to a point. It is indeed one of the greater virtues of European integration to impose limits on the states’ monopoly of power. Taken to extremes, however, this argument creates false enemies and holds out false promises.

The argument’s false enemy is national sovereignty. Sovereignty in its modern variety is simply the collective term for all elements constitutive of a political entity or body politic. There is nothing wrong with the principle apart from its somewhat suspect past record and its present liability to become perverted in pathological situations, both of which it has in common with many other appreciable qualities of life. As other such qualities it must and may be made to ply to the requirements and the possibilities of time and of reason; of which it is fully capable. 15

If EC Member States now invoke sovereignty in veiled or unveiled terms, it has nothing to do with absolutism etc. Quite to the contrary, it may be to protect democratic elements in domestic decision-making. It could be the ‘democratic structure’ (a pet term of the German constitutional court), human rights and parliamentary involvement. If they invoke it against too liberal an interpretation of EC Law, it might simply be a way of seeking respect for the terms by which power was originally granted under the Treaties to the executive officials meeting in Brussels, terms approved by their parliaments in the process towards ratification of the said Treaties. 16

The argument’s false promise is more sophisticated and more relevant in the present context. It depends on a legalist and instrumentalist meaning given to the idea of the rule of law; one in which the law rules or will rule the world, to begin with the European Community. To conclude her recent book The Rule of Law in

15 As argued magnificently in his classic work by Hinsley, F.H., Sovereignty, Cambridge, 1986 (2nd).
16 There is an easy way to clear the misconceptions inherent in the sovereignty-argument: it is to conceive each of the Treaties as a bunch of distinct and individual mandates granted by parliaments to their government, to be exercised in common with other governments and therefore of necessity limited.
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the European Constitution, Ms Esteban entitles the last part: *The Rule of Law as an Instrument of European Integration* thus:

"The success of the integration through the Community Treaties has been both the use of legal instruments similar to the ones existing inside the national legal orders and the choice of legal practitioners as the creators, interpreters and, most important, addressees of those legal instruments."\(^{17}\)

Now the success of this campaign is as indisputable as are its shortcomings. As an instrument of integration, the rule of law does not seem to have led to an accomplished situation of accepted and acceptable public authority. And this should come as no surprise. Instrumentalism is a well-known culprit generally in situations marked by technocracy and bureaucracy. Ms Esteban, a sophisticated disciple of the orthodox school, goes out of her way to plead the merits of the present situation. If it has limits, these must be shortcomings of the rule of law as such:

"... the problem may lie in the incapacity of the legitimacy granted by the Rule of Law to promote by itself that public sphere at the European level. In that sense even if the Community may be named a formal Rechtsgemeinschaft, it is still lacking the existence of an active and independent civil society, and serious doubts may be expressed that a system based exclusively on the legitimacy granted by the Rule of Law, on legal procedures and institutions, can in the future give birth to that European civil society."\(^{18}\)

These doubts are a certainty for Hartley, who concludes in a sneer, putting away both the idea of the Community under the rule of law and that of the Community as an autonomous (constitutional) legal entity thus:

"The problem with this theory is that, even if it is accepted by the European Court, there is no evidence that it is accepted by any of the governments of the Member States or by any of their courts... At present, therefore, it suffers from a ‘reality deficit’: at the crucial moment, the rabbit stubbornly refuses to come out of the hat, no matter how frantically the magician waves his wand."\(^{19}\)

Now, granting the acumen and striking power of Hartley’s points, why is his argument not conclusive against legalist orthodoxy? Hartley bases his counter-

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\(^{18}\) Esteban, p. 186.

claim on the Sovereignty of Parliament, which is in the last instance, he claims, irreconcilable with autonomy of EC Law. But is not parliamentary sovereignty a legal fiction, cherished before all by the courts in Britain? From its inception it was not meant to rule reality. The idea that Parliament cannot validly limit its own powers is a salutary principle, meant to force the role of final arbiter on Parliament, on politics, not on the law. It is, in other words, a legal principle at the service of politics. This Hartley fails to realize. His argument seems to suffer from antitheticism. Antitheticism is to follow through on a successful charge by making your claim the square opposite from your opponent's. In this case it is to fall in with his legalism.

To do justice to the EC Court, to its use of EC Law and to the rule of law in the Union, it is necessary to leave legalism and a legalist idea of the rule of law. Not to replace it by the delusion of the promised land of legal perfection, but by reading judicial activism and legal evolution as contributions to the creation of a political context.

What marks orthodox defence and its opposite parts of the Court and EC Law is not so much a legal misunderstanding but rather the lack of a political sense. This defence deludes students from interest in politics at the European plane, of which European Law is better understood to be tributary than a substitute.

One way to come to terms with the opaqueness and intractability of European Union administration is by recognizing that it is a form of politics in statu nascendi and by studying it as such (this will be demonstrated below). To justify the Court's liberties with the Treaties it is not enough to point at the right cause pursued. What needs to be put together from a reading of the situation is a presently real and politically realistic context for the Court to operate in, from which to make sense of its activism. This requires an unorthodox defence.

Now this may very well be done in terms of the rule of law. This, after all, is not a legal rule, to be applied by courts, but a political principle, which explains why the Court itself does not refer to it as an expression of the monopoly of the law and the legal order in shaping Europe. Instead, as we have noticed, it refers to the rule of law in the context of the Community constitution.

This line seems more promising to the understanding of the situation: its challenge is to discern elements of political evolution in a situation developing in legal terms and terminology.

3.2 Unorthodox defences: transformation and continuity

Unorthodox defences of the EC law and its Court of Justice will place these legal agencies in a wider than legal context, which may be a constitutional one. As will be seen, these readings will be in one of two keys: of transformation or of continuity.
3.2.1 Transformation

Probably the best known among unorthodox defenders of EC Law and its Court of Justice is Joseph Weiler. In his groundbreaking *The Transformation of Europe* (1991) Weiler reads into the Court’s jurisprudence and the Council’s legislation a dialectic of revolutionary stages or ‘mutations’ through which they carry the Community. His principal novelty is to view EC Law, its Court and its legislator not as acting in legal isolation, but as participants in the creation of a constitutional context, a creation beyond the control of either participant or beyond any logic of intention. In a constitutional context the rule of law becomes a non-legalistic argument as a matter of course.

Let me condense his argument.

In its formative period, 1965-75, Weiler argues, the EC has lived under a situation of equipoise between its legal supranational order on the one hand and its political intergovernmental order on the other. The key moment in its establishment was the Luxembourg compromise of 1966 in which the Member States won back their right of unanimity from the Treaty text. This, according to Weiler, was a political correction of the imbalance created by the Court in its landslide *Van Gend & Loos* judgement.

The new state of balance was kept until halfway the seventies when a joint drive from the Council and the Court undermined it. These two bodies collaborated in stretching the powers conferred on the Communities up to breaking point, using the formal unanimity requirements of Articles (now) 94 and 308 EC as safety pins. Thus undermined, the balance collapsed in 1986 with the forceful introduction of majority voting (now Article 95 EC) through the Single Act. Since this third ‘mutation’ (after *Van Gend & Loos* and the Luxemburg compromise) the system is being ‘impelled forward by the dysfunctions of its current architecture.’

The great merit of Weiler’s account has been to look beyond legal logic for redemption of the Court’s activism, by introducing the elements of history and politics into the argument. This, the dominant teleological reading of EC Law has always, by definition, failed to do. Teleology denies both time and politics, because its (political) purpose is clear and time is only a matter of sooner or later, indifferent to the outcome. Time and politics are drawn back into the picture by Weiler in a single sweep: that of an evolutionary reading of the situation. Evolution by contrast to teleology is unpredictable and can only be understood by looking backwards. It is not linear and does not lead to a goal. Nor is it a matter of a single logic, but involves different competing logic. This is how Weiler has allowed himself to discover ‘his’ transformation and overcome legalism, to take

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constitutionalism as his point of vantage. Constitutionalism as a way of thinking about the rule of law is of necessity historical, as the constitution is a temporal device.

From the point of view of the rule of law there remain, however, some reservations to be made in respect of Weiler's constitutionalism. The wisdom of hindsight, to which he takes recourse, may be used in different ways. If used to discern radical changes in the past, it creates a semblance and temptation of a process run by the logic of a dialectic (to which temptation many a historian has fallen victim). It privileges discontinuity over continuity.

In looking not back but ahead, however, inasmuch as the course of reality is not laid out by this form of logic, as little as by any other, the emphasis on transformation and mutation leads to privilege the element of discontinuity over continuity, unpredictability over predictability. Relevance of such a reading must make a sharp halt at the cutting edge of the present. The very approach logically impedes one from looking ahead and, secondly, may block understanding of novelty which is outside the adopted dialectic. 21

Now this is a theoretical or even philosophical point. Its importance for the present argument is that a reading in the key of mutation is hard to fit into a rule of law logic. This stresses, after all, continuity and predictability.

3.2.2 Continuity

Let me now present a legal-political reading of the situation which draws on the wisdom of hindsight for discerning continuity rather than for mutation. The advantages are obvious. First, it is less likely to break down at the keen edge of the present and therefore may be extrapolated (with caution, always) into the future. One cannot predict the course of a stumbling drunkard or of an over-eager politician (both impelled forward into the unknown by some imbalance in themselves or in the situation), but one may predict the course of a sober cyclist who is in balance, or of a growing tree.

The other advantage is more fundamental: in contrast to the dialectic of transformation, which inevitably must be read so as to monopolize an evolution (which explains both dialectic's intransigence and the public's attention attracted by drunks and politicians and, generally, by things and people unpredictable), continuity may be looked for and found in various forms existing alongside one another.

One such line of continuity inside the context of the rule of law comes under the name of rule of reason. It is to this that my argument finally turns.

21 Weiler's argument itself goes some way to prove this. In 'Transformation' it is striking that the one great mutation of the EC (just) to come inside the time-frame of his argument, i.e. the creation of the European Union following upon the Berlin Wall's down-coming, falls totally outside its frame of reference.
In EC Law the doctrine by the name of *rule of reason*, as invented and developed by the Court of Justice and its court watchers, has become the keystone of the law of the internal market. Invented in two famous decisions, *Dassonville* (1974) and *Cassis de Dijon* (1979), the rule of reason’s significance has ever since been on the rise. Devised as an escape, to admit obviously imperative national measures not coming under the restrictive category of Article 30 EC (public policy etc.), the Rule is becoming the catch all test for a widening range of Member State measures, not only in the area of commerce (goods) but even in the field of movement of persons, services and of capital. It thus controls the borderline between the realm of the market (private interests as upheld by EC law) and that of public concerns.

A famous illustration is from the case-law books and comes under the nickname of *Danish Bottles*. For reasons of environmental protection, Denmark prohibited the use of beverage cans and of bottles other than of a standard thirty types, so as to enforce a deposit system and ban disposable containers. The Brussels Commission brought this Danish prohibition before the Court of Justice for conflict with the Market rules (notably with the present Article 28 EC). Now there is no doubt that the Danish rules did create a disadvantage for foreign imports, which are better off by disposable containers than by having to set up a re-cycling system. Yet the Court upheld a significant part of the Danish regulation. It held that

‘...the protection of the environment is “one of the Community’s essential objectives” which may as such justify certain limitations of the principle of the free movement of goods...’

In Community jargon, the general norm invented and here applied by the ECJ reads: ‘national measures taken in view of a mandatory requirement may limit the market freedoms in application of Article 28 EC’ (this author’s summary; ‘mandatory requirements’ is jargon for: reasons of the public interest. This is the norm going by the name ‘rule of reason’, a name invented by academics).

At the other hand, the Court struck down a part of the Danish regulation for being excessive in view of the environmental objective invoked, thus applying a principle built into the rule of reason, called ‘proportionality’. The national measure has to be fit to serve the purpose and lack a less harmful alternative.

Now, to come back to the subject, is the invention of this test a service to the rule of law? In a narrow sense certainly it is not, whatever the Court itself may claim. It involves no protection of poor private individuals against overbearing bureaucracy, no rule-based government; it does not create greater openness or predictability. As Weatherill and Beaumont rightly object:
'the essential concern about Cassis resides in the fear that it has promoted free trade but that the terms on which such trade will ensue are thoroughly uncertain.'

What is the rationale of this line, then, and how can it appear favourably in terms of the rule of law? Only an unorthodox reading can do it justice.

Let us revert to the Cassis ruling. This involved a German classification of alcoholic beverages which had the effect of excluding the marketing of the French 'Cassis' for falling below the minimum percentage required for such beverages in Germany (25%). This was a typical case of good intentions (regulation of the alcohol-market) by bureaucratic measures which by their digital nature are always to some extent arbitrary. Whatever the percentage-threshold used, high or low, by its nature it will squarely conflict with any standard issued from another bureaucracy with the same good intentions.

The Court's approach is not a substantive one; it will not conclude to prefer one standard over another. It is procedural. What it considers is whether the substantive difference between the standards prevailing in two countries justifies their effect of totally blocking trade in the field concerned. It does not contest the government's concern with the public interest, but merely cuts back the realm of the arbitrary, inherent in bureaucratic standards. The standard it superimposes on these, when reduced to its hard core, would read: a Member State may introduce standards for products which have the effect of being a nuisance to imports or exports, but only to the degree that the difference between its standard and the other country's will justify the nuisance.

One could say that the Court restores the communicative nature of standards effective in countries. It does so by subjecting bureaucracy's inherently arbitrary and incommunicative standards to the requirements of reason and communication. Hence the very apposite title of 'rule of reason'. The European Commission, in a misunderstanding of the Court's move as a new logic, a misunderstanding quite typical of a bureaucracy, proclaimed a 'general principle of equivalence and mutual recognition'. No wonder that this has never quite caught on: not logic but reason is the answer to bureaucracy.

The interesting point is that the Court of Justice is, here, not pursuing a determined course in favour of integration. Instead it in fact condones public concerns which inevitable in part constitute obstacles to trade. Nor could it do otherwise than to give these its blessing, save to be massively disapproved by the public and the governments.

What it does, however, is to convert the domestic concerns in two ways, one substantive and one procedural. The substantive conversion is that of a public concern upheld by a Member State into one upheld by the Community. No

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public concerns will be condoned as obstacles to trade which cannot be seen as European concerns:

"...the protection of the environment is "one of the Community's essential objectives", which may as such justify certain limitations of the principle of free movement of goods...In view of the foregoing, it must therefore be stated that the protection of the environment is a mandatory requirement which may limit the application of Article 30 [now 28] of the Treaty".23

Even more interesting and less well understood is the procedural side of the Court's adopted line. This does no less than affect the nature of the public interest in the Member States and consequently strikes at the heart of their reason of being. By making the difference between national standards subject to its considerations, the Court forces the Member States to come and argue their standards before itself and before each other.

This is best understood not in its legal form, but as a proto-political figure, a form of accountability. A self-evident part of domestic political relationships, political accountability in international relations is a novelty. That it should take place in an unusual forum and shape in a non-political procedure, will not do to invalidate this conclusion.

What is the upshot? It is not only to invalidate both the admiring and the critical orthodox which read the Court as an agency instrumental in implementing the Community objectives rather than its values.

More fundamentally, it dispenses with the idea of a gradual withering of the Member States through a power transfer to Brussels. Political accountability is one of those constraints which instead of reducing enhance the art, the power and authority to which they apply. This involves a paradox familiar to everyone in politics as in other intelligences.24 It would imply that the Court of Justice instead of gradually undermining the Member States may actually help to bolster them.

A reading in the simple keys of legalism and instrumentalism is a denial of the intelligence of EC Law under the Court's case law. The latter may be read instead as providing evolutionary pressure for the Member States to turn from inwardly turned into communicative bodies politic.

24 In poetry most obviously, voluntary and conventional constraints are meant to enhance the art and command of the poet, the attention of the reader and the durability of the work.
4 To conclude

A reading of the rule of reason case law as just given is a single instance of many possible re-readings of EC legal evolution. The idea is to draw from selected aspects of EC Law a sort of proto-political relevance under the rule of law. There is no fixed purpose. Neither is there a monopoly of any single logic, legal or other. Yet, in the turmoil of evolution under the constraints of the rule of law, elements of a future public authority are forming sediments at the European plane.\textsuperscript{25}

\textsuperscript{25} The author expresses his thanks to Hans van Meerten, PhD candidate at Rotterdam University, for his help, without making him in any way accountable for the line of the argument.