

1977

BOOK REVIEWS: The Party Groups in the European Parliament & The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?

Isaac E. Druker

Ira Salzman

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Isaac E. Druker & Ira Salzman, *BOOK REVIEWS: The Party Groups in the European Parliament & The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?*, 3 Brook. J. Int'l L. (1977).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol3/iss2/10>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

BOOK REVIEWS

The Party Groups in the European Parliament. JOHN FITZMAURICE. Farnborough, Hants., England: Saxon House, D.C. Heath Ltd. and Lexington, Mass.: Lexington Books, D.C. Heath & Co., 1975. Pp. xi, 228. \$17.00.

*Reviewed by Isaac E. Druker**

The European Communities¹ continue to fascinate many serious students of international and regional organizations. They increasingly compel the attention of national administrations, even outside western Europe, in the areas of international economic and monetary affairs, relations with the Third World, and foreign policy generally. Beyond academic circles and government departments, the Communities, particularly in the last decade, have become part of the "facts of life" for a growing number of American domestic and multinational enterprises, and for those who must counsel them.

Nonetheless, a perceptual myopia, as prevalent today as during several earlier periods, seems to persist concerning the achievements of the Communities, in the evaluation of both the great experiment in "State-building," and the substantive areas of common policy and common action. With respect to the latter, the vast and expanding influence of the Communities on the welfare of the citizens of the nine member States is often ignored, although the Community system is loudly denigrated for its purported failures during spectacular crises such as the oil emergency, and its lack of progress toward economic and monetary union. There is a certain irony here. Since the formation of the European Steel and Coal Community² twenty-five years ago, a general acquiescence has emerged within the Communities in the guidance of its institutions in diverse matters previously the preserve of the member States, such as the oil and steel industries, agriculture, intermember trade, and regional development. Though the disappointments are also real, they are perhaps

* A.B., Harvard College, 1958; Jurs. Drs., Leyden University, 1960; LL.B., Harvard Law School, 1963; S.J.D., Leyden University, 1975; Member, Massachusetts, New York, and District of Columbia Bars; Member, Busby, Rivkin, Sherman, Levy, and Rehm.

1. These include the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community.

2. Common Market Treaty, July 23, 1952, 261 U.N.T.S. 140.

overly dramatized precisely because of the sometimes inflated expectations of "good Europeans" and the continuing influence of the pro-integration theorists.

As difficult as it may be to formulate a balanced appraisal of the record of the Communities in substantive matters, the pitfalls in evaluating institutional development in the Communities are surely greater. In this area there are no fixed reference points. One is confronted with even larger divergences among the member States in conceptual starting point; particular constitutional history and the shifting political context influence institutional biases. Fortunately, the earlier concerns with formalistic ideal types of federal or confederal structures, or the essence of supranationalism, at one extreme, and the seductive abstractions of the functionalist integration models, at the other, have been tempered by pragmatic appraisals of institutions and key actors in the Communities and in the member States. Mr. Fitzmaurice's study is one such work. It is a perceptive, often stimulating, contribution to a realistic appreciation of how far the European Parliament has come since the early days of the European Coal and Steel Community Common Assembly, and how far, indeed, it has yet to go, to become a meaningful instrument of democratic control and initiative at the Community level.

The author limits himself, justifiably, to the main outlines of the three ambitious goals he sets: documentation of the growth of party groupings in the European Parliament; analysis of their "cohesion, unity and political maturity . . . and the extent to which they complement or coexist with the national political parties"; and analysis of the "total political environment and the decision-making process"⁴ of the Communities, within which the Parliament and the political groupings are to play a role. An introductory chapter provides an overview of the interinstitutional dynamics of the Communities' four primary organs—the Council of Ministers, the Commission, the European Parliament, and the Court—in the development, adoption, implementation, and judicial control of Community legislation. Although the analysis is overly cursory, Fitzmaurice arrives directly at the heart of the matter: the Parliament lacks true legislative powers, and thus must depend solely upon the pertinence of its deliberations and

3. J. FITZMAURICE, *THE PARTY GROUPS IN THE EUROPEAN PARLIAMENT*, at vii (1975) [hereinafter cited as *PARTY GROUPS*].

4. *Id.* at vii-viii.

the artifice of unanimous resolutions in order to exercise any leverage on the Commission and the Council. Despite the Commission's theoretical accountability to the Parliament, the contribution of the permanent missions of the member States at Brussels has become increasingly important for the preliminary brokering of national viewpoints in the development of the Commission's proposals. The quest of the member States for unanimity in the Council, as a result of the Luxemburg Agreement of 1966,⁵ which overrides those provisions of the Rome Treaties where majority voting was set forth, dilutes further the role of the Commission and the impact of the Parliament by altering available bargaining strategies.

Fitzmaurice identifies other, more fundamental weaknesses of the Parliament resulting from the nature of its powers under the treaties among the members of the Communities and its consequent inability to become the arena for political confrontation about the future of the Communities. Obstacles to further development arise, in his view, from its unrepresentative character related to the absence of direct elections; from the heavy demands on the members of the Parliament, who are expected to carry out a dual mandate as representatives both at home and as members of the Parliament; and from the relative indifference of the national parliaments. On the other hand, he salutes the extraordinary fashion in which the members of the Parliament have succeeded in exploiting the treaty texts to aggregate to themselves more and more of the traditional prerogatives customary in national parliaments, emphasizing the rapid creation and enhancement of the party groupings as power centers for the conduct of the Parliament's business.

With respect to the role of the party groupings, Fitzmaurice traces the coalescence at the Community level of the three broad tendencies of European political life: Social Democrat, Christian Democrat and Liberal. After describing the party groups' insertion into the general administration of the Parliament, composition of the Parliament's executive office, representation on committees, choice of *rapporteurs*, and setting of the agenda, among other things, Fitzmaurice discusses the separate political groups in detail. In each case the membership, organization, and enunciated policy position of the group are elaborated, including an

5. See 3 EUR. COMMUNITIES BULL. 8 (1966).

analysis of the role of the group's secretary-general and its decision-making apparatus. The important role of the group's secretariat in forging common positions among and in maintaining links to the national parties is underlined.

In sketching the policy orientations of each group, Fitzmaurice is particularly cogent in indicating the effect of the interplay between the Christian Democrats and the Socialists. These orientations represent, broadly speaking, the opposing tendencies of a free-market orientation tempered by intervention of the Community only to correct abuses and gross inequities, and a centralizing dirigism—a coordinating and directing role of the Community to assure balanced economic development and social justice. The Socialists are seen as the best organized, most active group, with a well-articulated and consistently adhered-to conceptualization of Community goals. Their activism on behalf of supranational objectives, including expansion of Community competence and realization of democratic control at the Community level, has forced other party groupings to define their respective positions and has tended to politicize the often overly technical Parliamentary debates.

Breaking new ground is the author's exposition of the Conservative group, which constituted the only representation of the United Kingdom in the Parliament after the Treaty of Accession⁶ following the Labourites' initial refusal to participate. The manner in which the British Conservatives, with whom several Danish conservative members are allied, have sought to introduce elements from the British parliamentary system is particularly instructive, although it remains to be seen to what extent they (or their Labour counterparts) will be able to rechannel Parliamentary practices. The exclusion of the Gaullists and Communists from a meaningful role, and the comparative subordination of the unaffiliated members of the Parliament to their colleagues in its normal activities is also touched upon. Regarding the cohesion of the various groupings, Fitzmaurice finds again that the Socialists present the highest degree of internal unity, surpassing that of the national delegations, with the Christian Democrats and Liberals approximately on a par with each other. Nonetheless, he questions whether the traditional left-right polarizations of national politics, however articulated, continue to have meaning at the European level.

6. JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES (No. L 73) 14 (1972).

Perhaps the most original and confounding analysis is found in the third part of Fitzmaurice's work in which he describes the role of the national parliaments in the Community system through the early 1970's. One can take issue with his assumptions about the role which may have originally been projected for the national parliaments in bringing the respective Council members to account and developing techniques for interparliamentary cooperation. Fitzmaurice has, however, identified what must be considered an unexpected turn of events. Precisely at a time when an increasing number of decisions with important financial consequences have passed to the Communities, when one might have foreseen a very strong pressure for rounding out the legislative and budgetary powers of the European Parliament, the national parliaments, instead, have apparently attempted to compensate, in varying degrees, by improving the flow of information about Community affairs, and experimenting with mechanisms for control of ministerial discretion in the Council. Fitzmaurice correctly points out, however, that the national parliamentary majorities are not likely to risk the fall of their governments as a routine means of bringing the straying minister to heel. He concludes that new institutional forms and a shift in the institutional balance of power at the Community level must be sought to fill the political vacuum.

In this connection, Fitzmaurice devotes a chapter to the consideration of whether development of a government-opposition polarity in the Parliament, foreshadowed by the Christian Democrat-Socialist tendencies, holds any promise. He suggests that, despite intergroup conflicts, the Parliament as a whole will continue to see itself as the pro-integration "opposition" vis-à-vis the Council and Commission, though it is inherently unable to devise effective techniques for asserting its will over these bodies.

Fitzmaurice concludes that the European Parliament has progressed rapidly from slender beginnings, probably exploiting the possibilities afforded by the Treaties even beyond what might have been expected. It is an "emergent political unit," the accomplishment of which compares favorably with national counterparts early in their evolution. Some of its problems relate to the crises facing parliamentary institutions throughout the Western world, confronted by enormously complex new technologies

7. PARTY GROUPS, *supra* note 3, at 205.

and rapid social change. Other problems are a function of the imbalance in power among the Community institutions resulting from the limitations of the Treaties. Broadly speaking, a shift of loyalties to the Community from its member States involves both a demonstration of efficiency in solving transnational problems and the concurrent legitimization of the new power centers. Thus, a refocusing of the executive power now shared by Council and Commission, and the imposition of effective democratic control, should constitute the core of a restructuring of the institutions. Fitzmaurice was hardly sanguine at the time of writing. Yet certain encouraging developments were already in progress, leading to the Treaty of July 22, 1975,⁸ which would strengthen the element of democratic control with respect to the entire budget by, among other things, enhancing the Parliament's power of amendment, introducing its right to reject the budget *in toto*, and establishing a new Community Court of Auditors.

Those familiar with the long, occasionally turbulent, struggle of the Parliament to expand its powers by means of the budget approval procedure may indeed cavil at the lack of detailed analysis by Fitzmaurice of the successive Treaty amendment milestones. The portions of the text relating to the organization and operation of the party groupings and the Parliament itself might have benefited from a more critical treatment of how the members of the Parliament, in general, actually acquitted themselves of their responsibilities, in terms of voting records and attendance at committee and plenary sessions. Also, several case histories might have been included to illustrate the interplay of the complex relations among the Parliament, the party groupings and the national parties, on the one hand, and the national administrations, the Council and the Commission, on the other. Nonetheless, Fitzmaurice's work yields numerous sophisticated formulations and genuine insights which aid our appreciation of the record of the European Parliament, and of the contribution of the party groupings to the development of democratic control and initiative at the Community level.

8. See 7-8 EUR. COMMUNITIES BULL. 2503 (1975).

The My Lai Massacre and Its Cover-up: Beyond the Reach of Law? JOSEPH GOLDSTEIN, BURKE MARSHALL, AND JACK SCHWARTZ. New York: The Free Press (MacMillan), 1976. Pp. xi, 586. \$10.95.

With the passage of time, the My Lai massacre has become but another impersonal historical fact, relegated to books and reports, and to scholars with patience enough to read them. This is not surprising because even the massive slaughter of World War II is much less a part of the frame of reference within which we view the world than it once was. So, even if *The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?* were what the publishing industry calls a "good read," which it is not, this book would probably not circulate widely because it deals with an incident that is popularly viewed as regrettable, but no longer of immediate importance. Even in the legal community it seems the actions of the United States government in connection with the My Lai massacre are viewed at best as but another string of legal precedents, to be hauled out again only if needed.

In an obvious effort to convince us that the problems presented by the My Lai massacre and the ensuing cover-up have received far less than their fair share of our attention, the authors have edited an unusually thought-provoking book. It is divided into three sections. The first is an introductory essay entitled "The Limits of Law: On Establishing Civilian Responsibility for the Enforcement of Laws Against War Crimes." Here, before making any detailed presentation of what happened at My Lai or what the applicable law is, the authors suggest what actions should be taken to prevent similar occurrences in the future. This helpfully establishes a framework within which the rest of the book can be analyzed.

The second section consists of Volume I of the official Army investigative report concerning My Lai. This volume, of what is commonly known as the Peers Report, consists of the analyses, findings, conclusions, and recommendations of General William R. Peers and the investigative team he supervised.¹ Of the

1. The Peers Report consisted of four volumes. Most of Volumes I and III were released to the public in November 1974. Volume III contains all the documentary evidence amassed by the Peers group other than witness testimony and reports of criminal agency investigations. Testimony and investigation reports in Volumes II and IV have not been made public because they contain substantial amounts of hearsay. See J. GOLDSTEIN, B. MARSHALL, AND J. SCHWARTZ, *THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF LAW?* 20-22 (1976).

twenty-seven specific findings contained in the Peers Report the most significant are:

1. During the period 16-19 March 1968, US Army troops of TF Barker, 11th Brigade, Americal Division, massacred a large number of noncombatants in two hamlets of Son My Village, Quang Ngai Province, Republic of Vietnam. The precise number of Vietnamese killed cannot be determined but was at least 175 and may exceed 400.

.

11. The commanders of TF Barker and the 11th Brigade had substantial knowledge as to the extent of the killing of noncombatants but only a portion of their information was ever reported to the Commanding General of the Americal Division.

.

19. At every command level within the Americal Division, actions were taken, both wittingly and unwittingly, which effectively suppressed information concerning the war crimes committed at Son My Village.²

The third section of the book is a collection of legal materials concerning war crimes committed during World War II and the Vietnam War. These materials include parts of treaties, selections from the Nuremburg trial proceedings, official Army documents, and various United States cases, the most pertinent of which are the numerous Calley cases. Collectively, these materials show that what occurred at My Lai was not only a flagrant violation of international law, but a violation of official Army practice and procedure as well.

After reading the book, this reviewer reread the introductory essay. It was at this point that the significance of what the authors state in the introductory essay became readily apparent. The Peers Report lists thirty soldiers in the United States Army suspected of committing serious acts or making serious omissions with regard to the massacre or the cover-up.³ The authors remind us that only one of those on the list, William Calley, was ever held to account as a result of a formal judicial proceeding. The authors make this point not on the assumption that all of those listed in the Peers Report are guilty, "but rather to demonstrate that the Army has failed to establish who among those in command and in the field were responsible, and to hold them accountable for

2. *Id.* at 314-16.

3. *Id.* at 318.

what no one will deny were war crimes.”⁴ The authors argue that this failure to determine who was ultimately accountable reflects an underlying flaw in the system of military justice. It is indicative of the Army's basic inability to regulate itself in this area.

They speculate that this inability might be caused by the basic instinct of a bureaucracy to protect itself, by lack of a clear definition of what constitutes a war crime, or by concern about the effect of enforcement of the law of war on discipline in the field during combat situations. But whatever the reason, the authors argue, there is a major deficiency in the structure of our military bureaucracy which must be remedied. The solution the authors offer is the vesting of authority for the investigation of war crimes in civilian authorities. The authority they suggest is the United States District Court for the District of Columbia, with authority for prosecution vested in the Department of Justice.

Since we, as a society, accept the Nuremburg principle that obedience to the orders of superiors is not a defense to the commission of a war crime such as the massacre of a large group of noncombatants, the issues raised by the authors are important ones. Consider some of the more specific questions they ask. It is clear that a soldier has a duty to disobey an order to commit a war crime. However, what if a soldier disobeys an order because he determines that he is being told to commit a war crime and it is subsequently determined that the order was proper? Will the military recognize good faith disobedience in the heat of battle, or must a soldier risk being second-guessed by military judges when the war is over? Concomitantly, can our Army “effectively impose upon itself obligations of lawful conduct that would impair its right to use violence?”⁵

The authors argue that the Peers Report demonstrates that a practice exists in the Army to conceal war crimes. They reason that in light of the basic lack of institutional support for anyone who feels war crimes are being committed it would take unusual courage for a soldier to disobey even the most plainly unlawful order. They feel that if we are to discourage the obedience of orders to commit war crimes we must institutionalize judicial procedures which actively support such disobedience.

4. *Id.* at 4.

5. *Id.* at 9.

While one can take issue with the solution suggested by the authors, it cannot be denied that they have raised important questions. We should not wait for the next war to deal with them. If we are to continue to handle war crimes problems on an essentially ad hoc basis, this should be an affirmative decision, not simply the result of inertia. Reading the Peers Report raises once again the issue that was constantly discussed when William Calley was tried. Was Calley the scapegoat for the entire United States Army? Was he the only one convicted because "the foxes were guarding the chicken coop?" Is this indicative, as the authors argue here, of the Army's inability to prosecute its own for war crimes?

My Lai and the problems it raises are very easy to ignore today. We are now at peace. But, as an ostensibly civilized society, we have a responsibility to remember what happened there. It was a conclusion of the official Army investigating team that:

A part of the crimes visited on the inhabitants of Son My Village included individual and group acts of murder, rape, sodomy, maiming, and assault on noncombatants and the mistreatment and killing of detainees. They further included the killing of livestock, destruction of crops, closing of wells, and the burning of dwellings within several subhamlets.⁶

These are acts which were done in the name of the people of the United States. If these acts revolt us, we must take affirmative steps to see that our system does not encourage their reoccurrence.

Ira Salzman

6. *Id.* at 315.

