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European Community Law and Institutions in Perspective: Text, Cases and Readings

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EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE: TEXT, CASES AND READINGS. By *Eric Stein, Peter Hay, and Michel Waelbroeck*. Indianapolis: Bobbs-Merrill Company, Inc. 1976. Pp. iv, 1132. \$22.50. Documents. Pp. iv, 525. \$10.

After the Second World War European statesmen conceived the future political and economic development of Europe in three fundamentally different ways. The institutional arrangements eventually resulting from their deliberations and evolving within the complex framework they agreed on are the subject of *European Community Law and Institutions in Perspective: Text, Cases and Readings*.

European nationalists, whose preeminent spokesman was Charles de Gaulle, accepted as the basis for European political development the continued dominance of familiar Westphalian concepts, including the unimpaired discretion of nation-states as equal sovereigns. Recognizing the common interest of some European states in a customs union and in additional steps toward increased coordination of national economic policies, they were willing to agree to a functional organization of the traditional sort existing alongside their states as an international entity to which the states would delegate responsibility and sufficient authority to act directly in some matters without time-consuming referrals back to national authorities in their own capitals. The second school, utopian "Europeanists," advocated the creation of centralized "European" organs to which discretion would be progressively delegated by states as a means of creating a federal government. They envisaged a political development analogous to the political evolution of the United States from thirteen international persons, through confederation, to a true federation with a powerful central government of general powers. The third group, self-conscious "pragmatists," were willing to forgo outlining in advance a preferred political structure. Instead, they were anxious to concentrate on establishing an effective mechanism for the political and economic cooperation they believed desirable at the moment and on allowing it to develop as conditions, including ideologies and national conceptions, changed. The result of the blending of these approaches was the creation of a complex, many-chambered international body with both nation-state and European-oriented organs whose power reached so deeply into daily life that necessary techniques of coordination between the organization as a whole and its member states as equal sovereigns are gradually eroding the utility of national discretion in some areas without actually taking from the states the ultimate power to exercise that discretion. In a sense, the pragmatists have won, but the nationalists and Europeanists have not lost since they remain free to interpret the living whole in ways consistent with their original conceptions.

The European jurists have approached the basic documents of the European community in a way more closely analogous to the way Anglo-American lawyers approach a constitution than the way we approach statutes or contracts. This approach is reflected in significant differences in emphasis and overall concept. The nationalists interpret the three great treaties—the European Coal and Steel Community Treaty, the European Economic Community Treaty, and the European Atomic Energy Community Treaty, with the unified organs provided in the Merger Treaty of 1965 and related documents—as leaving ultimate discretion on all matters of importance to the member states acting in the Community through a Council of Ministers. The utopian planners regard them as the foundation for a federal government. They envisage an increasing role for the European Parliament, set up as a discussion group with no immediate authority except the power to force the Community's central administering organ, the European Commission, to resign. They also envision the evolution of the Commission into an executive branch of a central government responsive to the will of the Parliament. The reality involves tensions, disagreement, and the most serious apprehensions regarding each step in the process of creating the framework for increasing the power of the central government, coupled with the utmost reluctance in fact to delegate more power to it.

The materials assembled by Professors Stein, Hay, and Waelbroeck record in considerable detail the intricate growth of European community law in a way that illuminates the forces that have shaped, and will continue to shape, the forms and substance of European institutions. The organization, selection of materials, and editorial notes and commentary in the compilation make it so tightly packed that in preparing to teach a course using it I found myself underlining for special emphasis nearly every line and filling nearly all the margins with notes to myself drawing attention to implications and subtleties; such enthusiasm, if not restrained, would have rendered the entire preparation futile. The book in total is not merely a teaching tool—it is a form of treatise to be studied not only by students wishing an introductory knowledge and overview of Europe's recent institutional development, but also by experts seeking new insights into almost any specific technical problem encountered in European trade, economic organization, or political evolution. Since only time will show which cases become leading cases and which political rearrangements become the framework for genuine distributions of significant authority, without the perspective given by books like this one the student and educated amateur is almost certain to be misled by newspaper accounts and *ad hoc* analyses in the law reviews and learned journals of such steps as the first direct election of representatives to the European Parliament. For lawyers,

political scientists, and students interested in European affairs, it is a source book for documents, cases, and references that will be useful for many years to come.

An example of the book's technique in perspective is the way it traces the approaches taken by the European Court of Justice and the highest courts of the member states to the question of whether European law promulgated by community organs deriving their authority from the treaties and having direct effect within the member states by virtue of their consent given in the treaties is "superior" to national law. The book shows that excesses of language in some early cases¹ have been moderated in later cases. The techniques developed by national courts to preserve their discretion regardless of (or, by judicial construction, with a legalistically strict regard to) the words of the treaties make it more or less clear for now that some enthusiastic predictions of European unity based on interpretations of some treaty language in the mid-1960s were premature. It is an example of the extraordinary subtlety and clarity of the book that through mere juxtaposition of cases and a few questions the editors expose the internal inconsistency in the seemingly solid rationale presented by a leading British judge, Lord Denning, to sustain the United Kingdom's continuing discretion to refuse references to the European Court of Justice in apparent disregard of Article 177 of the EEC Treaty.²

It is impossible to summarize the contents of the book in a useful way. The expanded table of contents is twenty-six pages long, and a capsule version of one or two pages would be no more useful than an affirmation that the book is comprehensive regarding the European Economic Community and the general review of European Community institutions. There is, of course, room to carp about points of emphasis and coverage that the reviewer would have decided differently had he been an editor. For example, the activities of the Organization for Economic Cooperation and Development (OECD) and the Council of Europe are barely mentioned, and such an important document as the European Social Charter, reproduced in part in the documentary supplement to the forerunner volume,³ is not mentioned in the discussion of the Community's social policy

1. See, e.g., *N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Rev. Admn.*, [1963] E. Comm. Ct. J. Rep. 1, 2 Comm. Mkt. L.R. 105.

2. Compare *H. P. Bulmer Ltd. v. J. Bollinger SA*, [1974] 3 W.L.R. 202, 14 Comm. Mkt. L.R. 91 (C.A.), excerpted in E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 253 (1976), with *Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie*, [1963] E. Comm. Ct. J. Rep. 59, 2 Comm. Mkt. L. R. 224; see pages 269-70.

3. E. STEIN & P. HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA*, Documentary Supp. at 239 (1967).

at pages 1088 to 1093 of the book. A selected list of treaties proposed by the states of greater Europe under the aegis of the Council of Europe would contribute as much to an understanding of the trends of European cooperation and political development as the charts of data relating to the caseload of the European Court of Justice through 1973 that appear on pages 154 to 157 of the book or the list of Latin American treaties on pages 480 to 485. There is no need to belabor the point, and, although there may be some distortion of perspective, no careful reader of the book can be wholly ignorant of the place of the Council of Europe and other non-Community institutions in the current political scene.

It is customary when reviewing a major work by scholars of unquestioned repute for the amateur reviewer to demonstrate his close reading of the entire volume he has undertaken to review by citing some petty slips and typographical errors, normally mentioning that he is confident that they will be corrected in a later edition. One statement that may be strictly true but which seems misleading is the assertion (p. 43) that the European Parliament is the first international assembly in history to seat its members by party rather than by country. Actually, the Consultative Assembly of the Council of Europe (now called the Parliamentary Assembly) had arranged its members alphabetically, in disregard of both nationality and party, and a trend to party voting overriding national allegiance was noted in the 1950s. One might also question the editorial decision to print the submissions of Advocates General *after* the extracts from the decisions of the European Court of Justice to which they relate instead of before; since in practice the submissions chronologically precede the actual disposition of the case by the Court—for the excellent reasons set forth in the book (p. 143)—it would be easier for students to follow the logic of the Court if they too were to have the advantage of the Advocate General's submissions before grappling with the Court's logic.

Finally, the highly compressed presentation of an enormous mass of material relating to the continuous and rapid development of the law and institutions of the European Community must be outdated even before it is published. Professor Milton Handler used to alleviate his problem in the simpler area of antitrust law by publishing a review of each year's significant developments in a leading law journal. Students, practitioners, and teachers like myself who do not pretend to have expertise in European Community law and institutions and who, for various reasons, cannot easily follow current developments in Europe with the close attention they deserve, would be immeasurably grateful if a similar practice were begun with respect to the law and institutions of Europe.

The need for this sort of continual updating is apparent to any

American academic or lawyer visiting Europe. There is no doubt that our European colleagues, whatever their specialties as lawyers or their immediate concerns with ephemera such as European responses to terrorism, perceive as a steady undercurrent the dialectic of European institutional development. While the eddies and whirlpools of this tide of European events occupy newspaper headlines and preoccupy those concerned with electoral politics and economic difficulties in Europe, it is the strength of the tide and its undertow that are felt as the major forces behind enduring change. The disparity between the surface activity and underlying movement will become clearer with the advent of the now-delayed direct elections to the European Parliament. Such elections are significant for instituting a division between parliamentary responsibility of the people's representatives in their national governments and the people's representatives in influencing the actions of the European Commission. Even more important, but less obvious, direct elections will alter the balance of influence in the struggle for power between the Commission, which has a centralizing bias, and the Council of Ministers, which represents national governments in the Community. Most important, direct elections will play a decisive role as a mechanism for keeping national leaders in touch with the groundswell of European popular opinion on the feasibility of further centralization of political discretion in Europe; the tide may have reached a high point or may even already be receding despite the attempts of the "Europeanists" to make popular elections a step in the direction of further centralization.

Evidence of the deeper currents apparent to the authors of the book but not apparent to the casual visitor to Europe can be found in the increasingly clear split of legal opinion between those who view the European Court's interpretations of the fundamental treaties as giving ultimate dominance to European law in the treaties' sphere of application and those who note the increasing clarity of European national courts' emphasis on their national law, especially national constitutional law, as a limit on the discretion of central European organs. Not only have German and Italian courts more or less expressly held the powers of European organs to be limited by national safeguards of human rights, including property rights,⁴ but also many national courts have developed techniques to refuse to give full effect to the provisions of the Treaties requiring referral of questions of Treaty interpretation to the European Court of Justice for definitive interpretation. The British technique has already been cited,⁵ and even the leading case of *Costa v. E.N.E.L.*,

4. See *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] 14 Comm. Mkt. L.R. 540, 550-51; *Frontini v. Ministero delle Finanze*, [1974] Foro It. I 314, 14 Comm. Mkt. L.R. 372, 389.

5. See the extended discussion by Lord Denning in *H. P. Bulmer Ltd. v. J. Bol-*

in which the European Court of Justice in 1964 held that an Italian nationalization law had to be measured against the commitments of Italy under the EEC Treaty, was eviscerated by the Italian Court of Cassation in 1970 on the ground that the plaintiff lacked standing under Italian law to bring the action.⁶ On the other hand, in some states, such as France, there is at the moment a policy to encourage referrals to the European Court in cases of doubt.⁷ As evidence of the value of the book, all the cases cited here appear in one form or another in it.

In sum, Professors Stein, Hay, and Waelbroeck have produced a book of extraordinary breadth, depth, and clarity giving practical help as well as much food for thought to those interested in the evolution of European political institutions through law. The book's successful explication of the evolutionary processes underscores the need for supplementation as the developments so ably analyzed by them continue.

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linger SA, cited in note 2 *supra*, of the concept of when referral is "necessary" to enable the British court to render a judgment.

6. The European Court of Justice decision in *Costa v. E.N.E.L.* is in [1964] E. Comm. Ct. J. Rep. 585, 3 Comm. Mkt. L.R. 425. Its ultimate disposition by the Italian Court of Cassation is mentioned in E. STEIN, P. HAY & M. WÆLBROECK, *supra* note 2, at 211 with a citation to [1970] Foro It. I 765. The latter decision appears not to have been reported in the Common Market Law Reports, the Common Market Law Review or International Law Reports. The editors' research must be admired.

7. *Administration des Douanes v. Société Cafés Jacques Vabre*, [1975] 16 Comm. Mkt. L.R. 336, *excerpted in* E. STEIN, P. HAY & M. WÆLBROECK, *supra* note 2, at 218-21, with a note on the French Ministry of Justice's *Circulaire 75-7* of March 24, 1975, encouraging French judges to refer questions of European law to the European Court of Justice. For a scholarly analysis of the referral question by the Legal Advisor of the European Commission, see Bebr, *Article 177 of the EEC Treaty in the Practice of National Courts*, 26 INTL. & COMP. L.Q. 241 (1977) (seeing an increasing willingness of national courts to refer questions to the European Court of Justice).