Michigan Law Review

Volume 64 | Issue 8

1966

Scheingold: The Rule of Law in European Integration--The Path of the Schuman Plan

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THE RULE OF LAW IN EUROPEAN INTEGRATION—THE PATH OF THE SCHUMAN PLAN. By *Stuart A. Scheingold.* New Haven & London: Yale University Press. 1965. Pp. xii, 331. $7.50.

The European Court of Justice functions as the judicial body of the three European communities: the European Coal and Steel Community—the Schuman Plan (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). Mr. Scheingold's book is in large part a detailed study of the decisions of the Court of Justice with respect to the ECSC; thus, a more precise but less appealing title for this work would have been "The Role of the Court of Justice in the European Coal and Steel Community."[1] The book falls into three sections—an introduction

1. The title of this book is apparently derived from Article 31 of the Treaty of Paris which brought into being the European Coal and Steel Community; Article 31 provides that the function of the Court of Justice of the European Coal and Steel Community is to ensure the rule of law in interpretation and application of the Treaty.

which discusses the methods of adjudicating disputes at various levels of government including the ECSC, a detailed study of the decisions of the Court of Justice relating to the ECSC, and a final section which summarizes and analyzes the contribution of the court toward the process of integration in the ECSC.

At the outset, Mr. Scheingold considers in jurisprudential terms the adjudication of cases in a federal form of government, and concludes that in almost every federal system, the highest court is the "final mediator of conflicting claims" and is often asked to adjudicate questions that are essentially political. In international politics, however, the process of adjudication, being between two sovereign nations, is rooted in the consent of the two governments to the jurisdiction of the international court, and is therefore clearly distinct from the judicial process in the federal form of government. The author concludes that in the judicial sense, the ECSC stands between the classic federal pattern and the international pattern of government; the Court of Justice, although ostensibly a judicial court much like the high court of a federal system, is in fact handicapped by the nature of the other institutions of the ECSC. The institutions of the ECSC other than the Court of Justice are discussed in summary fashion.

The High Authority is the executive branch of the Community.[2] Each member state undertakes to respect the supranational character of the authority and refrains from seeking to influence its members in the execution of their duties. The second institution of the ECSC is the Council of Ministers, which, in Mr. Scheingold's view, has dominated the decision-making process of the Community. The Council, made up of representatives appointed by the various member nations, does not reflect the supranational aspect of the High Authority. Third is the European Assembly made up of delegates of the Parliament of the member states. The Assembly is referred to simply in a footnote as not yet having assumed a significant role and is dismissed with the brief statement "there is no legislature."

The Treaty of Paris, confined as it is to the coal and steel industries, endeavors to cut off these industries from the other sectors of the economy. Transportation and general economic policy are also dealt with under the Treaty but are only partially regulated. The author points out that the ECSC places immense pressures on procedures for change and adaptation, and that the procedures for

2. On April 8, 1965, the governments of the member states signed a treaty combining the three executive bodies of the European communities (the Commission of the EEC, the Commission of Euratom, and the High Authority of the ECSC) into a single Commission of the European Communities. The new Commission will exercise only the powers and authority of each of the present separate executive branches when acting on matters to which one of the treaties relates. The treaty of April 8 is now in process of ratification by the parliaments of the member states.

amending the Treaty are extremely limited, thus imposing on the institutions established by the Treaty, and particularly upon the Court of Justice, a need for amending and adapting the existing structures of the Community to the friction naturally engendered in carrying out its functions. The author might well have added that these pressures were naturally engendered because the entire *raison d'être* of the Community was to effect very substantial changes in existing methods of doing business, established over long periods of time, between industrial enterprises of substantially differing resources, capacities, and efficiencies, located in the various member countries.

The introduction also deals with the personnel of the Court and with judicial procedure. Of the fourteen persons who served as judges of the Court of Justice from its inception in 1952 until the end of 1964, the author lists five as having principal previous occupations not connected with the law, including an international trade union leader, an economist, two government officials, and one politician. In addition to the seven judges of the Court, there are two advocates general, appointed for six-year renewable terms. The advocate general[3] is required to make an independent assessment of the issues in each case which comes before the court; his conclusions are read publicly and published alongside the Court's decision. The Court is not required, however, to give any effect to his recommendations or findings.

There are a number of restraints on access to the Court and on the issues over which the Court holds jurisdiction. For example, the Court is generally prohibited from reviewing the economic bases of decisions of the High Authority. If a plaintiff is a member state of the Community, its right of access to the Court is relatively clear, but the right of access of private business enterprises is limited in three ways: first, an enterprise cannot sue another enterprise before the Court of Justice; second, an enterprise is not permitted to bring suit against a member government; and third, an enterprise has only a limited right to appeal general decisions of the High Authority. The author points out, however, that an indirect method has been developed which, in substance, permits private business enterprises to bring suit against other enterprises as well as member governments, and even permits one member state in effect to bring suit against another member state. The method is simple and ingenious. The complaining business enterprise or member state first requests the High Authority to act in the desired matter. If the High Authority refuses or fails to act as requested, it is then considered by the Court

3. The author points out that there is no American equivalent of the advocate general but adds that Professor Eric Stein of the University of Michigan Law School has characterized them as "institutionalized 'amici curiae.'"

to have made an implicit negative decision. Thus, the High Authority appears in many suits more or less as a formal party, while the real defendant may be another enterprise or member state.

The second portion of the book contains a detailed survey of all of the cases brought before the Court with respect to the ECSC from its inception to December 31, 1964. The order of discussion is principally chronological, but the cases are grouped according to the subject matter giving rise to the dispute. A listing of these groupings shows the highly technical and complicated issues which the Court has been called upon to adjudicate: flexible pricing, the Belgian coal industry, the scrap shortage, integration of transportation, social and fiscal autonomy, the customs union and trade diversion, and the cartel tangle.

The concluding chapter summarizes the contribution judicial review has made in the integrative process under the Treaty and suggests that the Court has abandoned the "strict textuality of 1954 decisions on the Monnet Margin and accepted, in its stead, functional techniques," thus providing a "solid foundation for stable norms." In particular, the author points out that in the cartel area the Court has stressed the claims of the free market with particular vigor.

In discussing the 1954 decision on the Monnet Margin, the author treats at some length the probable reasons for the Court's decision, calling attention to the fact that this Court, and indeed any court, must be concerned that its decisions, whatever they may be, will be accepted by the parties involved. He states the position thus:

> The rule of law is thus caught between two opposing but equally hostile forces: on one side, the claims of the member governments and, on the other, the fluid mechanics of integration. Each in its own way offers formidable obstacles to settled norms. However, the effectiveness of the Court of Justice will not depend on the extent to which it can purge itself of these influences. Pristine adherence to traditional standards is likely to thwart the Community's legal experiment. Only by understanding the forces which buffet the Court, and by continuing to bend before them at appropriate times, can the judges live a reasonably legal life in relatively uncongenial surroundings....

Surely our own legal history in the United States contains examples of severe confrontation between our Supreme Court and the executive power of the federal government. Perhaps the best known confrontation is that exemplified by President Jackson's laconic comment on the Supreme Court's decision in *Worcester v. Georgia*[4]: "John Marshall has made his decision. Now let him enforce it."

In summary, Mr. Scheingold's book contains an extensive treatment of the decisions of the Court on the ECSC, much information

4. 31 U.S. 515 (1832).

about the Court itself, and an analysis from a jurisprudential approach of the role actually played and the role that should be played by the Court in connection with integration and development of the Community.

For the average practitioner in the United States, the book is somewhat specialized, dealing exclusively with the ECSC. Some effort on the part of the author to contrast the actual and probable role of the Court under the European Economic Community, with its role in the ECSC would have had great interest and a wide appeal. For example, a discussion of the extent of the jurisdiction of the Court and its type of jurisdiction within the EEC as contrasted to its jurisdiction within the ECSC would have been well worthwhile. Similarly, some analysis of the early decisions of the Court dealing with the EEC (those that were handed down before the end of 1964) would have been most helpful.

In addition, a somewhat more inclusive summary of the Treaty of Paris would have given the reader a better background for the author's analysis of the role of the Court and more understanding of the problems involved in the cases themselves.

Finally, some attempt to summarize the factual background of the coal and steel producing, distributing, and marketing activities within the ECSC that led the member governments to enter into the Treaty of Paris would have been of very great use in understanding the tremendous task undertaken by the member countries and by the various institutions of the ECSC.

It is clear, however, that inclusion of these points would have required a considerable expansion of the book, making it a book of greater length, wider scope, and indeed a work differing in substantial respects from the special and important task that the author set for himself.

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