Washington Law Review

Volume 42 | Issue 4

1-1-1967

Law and Institutions in the Atlantic Area, Readings, Cases and Problems, by Eric Stein and Peter Hay (1967)

Don Berger

BOOKS

BOOKS REVIEWED

LAW AND INSTITUTIONS IN THE ATLANTIC AREA, READINGS, CASES AND PROBLEMS. By Eric Stein and Peter Hay. Indianapolis: The Bobbs-Merrill Company, Inc. 1967. Pp. lxvii, 1152. VOL. II, DOCUMENTS.

The preliminary edition of this book[1] was prepared at a time when the Kennedy Administration's enthusiasm for an eventual Atlantic Partnership[2] was widely shared; it was published during the period of policy readjustment following President de Gaulle's veto of British membership in the Common Market. The debate on the prospects for and the nature of such a partnership continues with a noticeably more skeptical tone.[3] In spite of this change, this book is still as timely as its temporary predecessor. The issue of American participation in an Atlantic Partnership is a relatively minor aspect of the regional integration movement that is transforming established patterns of international intercourse.

The creation and development of the European Communities have not only transformed Europe but have had a profound impact on American economic, political and military policies. They have also become inspiration and model for the creation of regional institutions in Africa, Asia and Latin America.[4]

The result of such integration, whether at the economic, military or (eventually perhaps) political level, is greater than the mere creation of an additional instrumentality of the traditional type to carry on relations among its members. As illustrated by the European Communities, regional integration can create a *new kind* of international institution whose activities have a direct effect on national legal systems.

Professors Stein and Hay have enlarged the scope of their book in

[1] E. STEIN & P. HAY, CASES AND MATERIALS ON THE LAW AND INSTITUTIONS OF THE ATLANTIC AREA (prelim. ed. 1963). VOL. II, DOCUMENTS.

[2] *See* J. KRAFT, THE GRAND DESIGN (1962).

[3] H. CLEVELAND, THE ATLANTIC IDEA AND ITS EUROPEAN RIVALS (1966); Sommer, *Bonn Changes Course*, 45 FOREIGN AFFAIRS 477 (1967).

[4] Plans for the economic integration of Latin America are receiving growing attention. For a recent extensive study, see INSTITUTO INTERAMERICANO DE ESTUDIOS INTERNACIONALES, PROBLEMATICA JURIDICA E INSTITUCIONAL DE LA INTEGRACION DE AMERICA LATINA (edicion provisional 1967). *See also* Inman, *Latin American Economic Integration Developments*, 10 ABA INT'L & COMP. L. BULL. 30 (July 1966); Javits, *Last Chance for a Common Market*, 45 FOREIGN AFFAIRS 449 (1967).

response to these developments. The predominant focus of the materials included in this definitive edition is on the functioning of regional institutions, particularly the European Economic Community. As can be seen from the contents description below, however, considerable material has been added throughout the book which inquires into the relationships and interaction between regional and worldwide institutions. Thus, the activities of the General Agreement on Tariffs and Trade (GATT) and the United Nations are examined in some detail in relevant areas in an attempt to bring into focus the relationship between these worldwide institutions and the regional organizations working in the same fields. At the same time, the impact of these regional institutions on the national legal systems of their member states is given much more elaborate consideration than in the preliminary edition. For example, the interaction of Community law and national law in the Common Market receives great emphasis, especially in the areas of judicial jurisdiction and antitrust law.

The result is a volume which has approximately doubled in size. Together with the 400-page volume of documents it presents an overwhelming wealth of materials. While such wealth may be welcome to the scholar, the question nevertheless arises whether this attempt to present within one book all the issues and problems engendered by the regional integration movement which completeness demands, does not make the book unmanageable for classroom use. My answer to this question can only be accepted after a better acquaintance with the detailed subject matter and organization of the book.

International institutions are the creatures of treaties executed by sovereign nations. Chapter I of the book presents materials from American constitutional law and the constitutional law of European countries which, on a comparative basis, raise problems of constitutional limitations on treaty-making power and procedures, of delegation of national powers to international institutions and of the effect of treaties on domestic law. Especially stimulating, in view of the still lively discussions on the legal nature of supranational organizations,[5] is the material comparing aspects of German and United States federalism which invites comparative application to regional institutions.

Chapter II focuses on the institutions of the European Communities. Examined here are the legal nature of the Communities, anticipated by the "federalism" material in chapter I, and the lawmaking processes of

[5] For a recent exhaustive study, see P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS (1966).

the Community institutions. The 1965 Common Market crisis resulting from the Commission's far-reaching agricultural policy proposal is used as an example of the conflicts inherent in these two areas.

Chapter III: The Judicial Process—National, Supranational, International has been substantially expanded. Continental judicial systems differ in important respects from the Anglo-American experience with which the American law student is familiar. At the same time, there exist some surprising similarities in function which at times are not obvious to the examiner of the institutional framework.[6] To make understandable the working of the Court of Justice of the European Communities which reflects this continental tradition, the editors commence this chapter with a consideration of relevant aspects of German and French administrative courts. This is followed by an extensive inquiry into the jurisdiction of the Community Court with emphasis on problems of standing to sue and scope of review. The relationship between Community law and national law, including the complex problems of national court referral of Community law questions to the Court of Justice under article 177 of the EEC Treaty, is presented through the important case law that has become available since the publication of the preliminary edition. The chapter concludes with a short comparative excursus into the jurisdiction of the International Court of Justice.

Chapter IV: Free Movement of Goods—Payments—Commercial Policy starts with an introductory section on the economics of international trade. The General Agreement on Tariffs and Trade (GATT), the International Monetary Fund (IMF) and commodity agreements are considered as examples of trade arrangements of worldwide scope. The detailed materials present problems of tariff and nontariff barriers to trade, dumping practices, antidumping and countervailing duties, balance of payments, exchange rates and exchange controls, and an interpretation of the IMF Articles of Agreement. From worldwide arrangements the focus shifts to regional arrangements. A consideration of the work of the Organization for European Economic Cooperation (OEEC) together with a short account of the economic nature of customs unions and free trade areas precedes the comprehensive materials on the European Communities. In addition to treating the trade aspects mentioned above, the Common Market material raises additional problems of state monopolies, formulation of common agricul-

[6] *See* Hay, Book Review, 54 CALIF. L. REV. 297 (1966).

tural and commercial policies, East-West trade, trade with underdeveloped countries, and association with the Common Market. Contrasted with the customs union aspects of the Common Market is the European Free Trade Association (EFTA). The 1965 U.S.-Canada Automotive Products Agreement is used as a case study to illustrate the nature and problems of bilateral commercial treaties in international trade.

In considering all three levels of trade arrangements—worldwide, regional and bilateral—the editors have included material designed to illustrate their inter-relationship. Thus, the question of compatibility between the EEC Treaty and the U.S.-Canada Automotive Products Agreement with GATT is raised for discussion. The chapter concludes with an extensive treatment of American trade policy under the Reciprocal Trade Agreements Program, including the scope and impact of the 1962 Trade Expansion Act. A postscript on the outcome of the Kennedy Round is included which indicates the outlines of the overall agreements, the special approaches to the problems of underdeveloped countries, and the American benefits and concessions.

In the field of antitrust law, historically a matter of relatively insignificant national legislative effort in the Common Market countries until after World War II,[7] the European Communities have experienced a development which, in scope and complexity, resembles the history of American antitrust law. A reading of Chapter V: Protection of Competition demonstrates that the Community treaties' antitrust provisions, like the Sherman Act, have a "generality and adaptability comparable to that found to be desirable in constitutional provisions."[8] The EEC Commission and the Court of Justice have utilized this flexibility to shape an antitrust policy designed to meet the changing needs of the developing Common Market. In this difficult area the comparative presentation of national and Community law materials is especially helpful and effective. The student is prepared for the comparison of American antitrust approaches and the somewhat different "competition policy" approach in Europe by an introductory section designed to acquaint him with the general economic and social objectives of antitrust regulation. A second section concentrates on articles 60 (unfair and discriminatory practices) and 65 (restrictive agreements and practices) of the ECSC Treaty, comparing the *Geitling* and

[7] Riesenfeld, *The Protection of Competition*, in 2 E. STEIN & T. NICHOLSON, AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE 197, 207-94 (1960).

[8] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933).

Nold cases with two leading American cases, *Appalachian Coal* and *Socony Vacuum*.

The major focus of this tightly packed chapter is on EEC antitrust law and the special problems engendered by its evolution. The application of articles 85 and 86 of the Rome Treaty and the implementing regulations is considered in detail, including the recent Regulation No. 67/67 dealing with group exemptions for certain exclusive dealership agreements. The interaction between German and French national antitrust law, on the one hand, and Community antitrust law, on the other, in the respective national courts, and the role of the Commission and the Court of Justice in the application of Community antitrust law, both traced in considerable detail, form a highly interesting demonstration of one aspect of the developing "European law." The question of the availability of private remedies for antitrust violations where no specific antitrust legislation has expressly created them, an area of concern in American antitrust law as well, is presented by another comparative excursus into American, French, German and Community law. The concluding part of this chapter directs attention to problems of extraterritorial application of antitrust law and briefly considers antitrust approaches in bilateral treaties and in the proposed International Trade Organization.

A customs union such as the European Economic Community presents the businessman with a greatly expanded market in which his goods can move free from the impact of tariffs, provided he has established his enterprise within that market. To the "outsider" the common external tariff wall may become an insurmountable obstacle making it impossible for him to compete with goods produced inside the market. It is consequently no great surprise that there has been a rush among outsiders, mainly American, to become established within the Common Market. The complex factors that must be taken into account when establishment is considered form the subject of Chapter VI: Access to Economic Activity: Labor, Business Establishment, Services, and Capital. Although discussed here with emphasis on the Common Market, these factors are, of course, equally relevant to establishment in any foreign market. They include the freedom of workers to move where they are needed, the available forms of business organizations and the impact of the legal provisions creating them and governing their activities, tax considerations, potential transformation of the chosen business form as well as problems of insolvency and

liquidation, and the movement of capital across national boundaries. The chapter also calls attention to the growing need for the harmonization of divergent national laws affecting establishment and operation of enterprises. The scope of current harmonization efforts in the areas of establishment, supply of services and protection of shareholders and creditors is considered.[9] A concluding section presents for discussion the current proposals for the creation of a "European Commercial Company" form which are receiving growing attention in European legal literature.[10]

The last of the chapters dealing with international trade aspects, chapter VII, illustrates the processes, scope and impact of economic policy formulation and implementation at the governmental level. Economic planning in the United States is compared with that in France. The ECSC and EEC are examined as regional examples of economic policy formulation and implementation, followed by a consideration of the Organization for Economic Cooperation and Development (OECD) in a similar capacity. The chapter concludes with a focus on the role of the United Nations and other international and American agencies in the economic development process.

Chapter VIII turns attention to "the protection of the most important resource—and the ultimate value and goal in our society—the individual and his freedom and dignity."[11] Examined here is the work of the European Commission and European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Special attention is given to the status of the Convention in the national law of its adherents. Selected American cases are included to illustrate the evolution of comparable protection of human rights through judicial action. Although a short note refers to the activity of the United Nations in the field of human rights, this area unfortunately is not treated as expansively as it deserves. It would have been particularly appropriate to call the student's attention to the need for greater American participation in supporting the work of the United Nations in human rights.[12] There is ample literature

[9] For an extensive study of aspects of fiscal harmonization in the EEC, EFTA, Latin America, East Africa and COMECON, see FISCAL HARMONIZATION IN COMMON MARKETS (C. Shoup ed. 1967).

[10] To date, scant attention has been paid to this important development in American legal literature. This reviewer is currently preparing an article dealing with these proposals.

[11] *Preface* at xiii.

[12] Korey, *Human Rights Treaties: Why Is the U.S. Stalling?*, 45 FOREIGN AFFAIRS 414 (1967).

dealing with the failure of the United States to ratify the various human rights conventions adopted by the United Nations.[13] Excerpts from this material should have been included in this chapter better to achieve the editors' goal of exploring the interrelationship of national, regional and worldwide efforts in this important area.

Chapter IX: Military and Political Policy Coordination portrays chronologically the rise and fall of the North Atlantic Treaty Organization. Materials included deal with the Soviet response to the creation of NATO, the military and nonmilitary activities of NATO, the legal status of the organization and its forces, and the withdrawal of France and its impact on NATO. The concluding part of the chapter analyzes proposals for the political unification of the Common Market countries and then addresses itself to the larger question of American participation in an Atlantic Community or an Atlantic Partnership.

The preceding synopsis indicates the problems which, in the editors' opinion, "are most directly relevant to the law and to the legal profession."[14] No material included can be considered irrelevant. Undoubtedly some readers, giving voice to their own special interests, may lament the exclusion of some particular aspect. The important standard by which the work of Professors Stein and Hay should be judged, however, is whether the material included is adequate as a basis for fruitful classroom work or whether, in its enormous scope, it neglects to provide sufficient detail to enable comprehension. This can be determined with certainty only after actual use of the book in the classroom. My experience with the preliminary edition, both as student and instructor, leads me to believe that this new edition can be uniquely effective provided the instructor does not lose sight of the scope of his particular course and does some careful advance planning.

Considering the inherent difficulties of the materials and the lack of familiarity of American law students with the civil and public law of civil law systems,[15] it is virtually impossible to utilize all of the materials in a 3-hour semester course, whatever its titular designation. Selective omission is required.

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[13] *See* literature cited in W. BISHOP, INTERNATIONAL LAW 280-81 n.72 (2d ed. 1962).

[14] *Preface* at v. For an introduction to other aspects of regional integration, see the stimulating symposium *Conditions of World Order*, 95 DAEDALUS 455-703 (1966) as well as van den Bergh, *Contemporary Nationalism in the Western World*, 95 DAEDALUS 828 (1966) and Hoffmann, *Obstinate or Obsolete? The Fate of the Nation State and the Case of Western Europe*, 95 DAEDALUS 862 (1966).

[15] The editors recognize that requiring students to take international, compara-

This permanent edition, however, has a flexibility which the previous edition did not possess. With some supplemental reading assignments on topics not covered by the chapters dealing with international trade (expropriation, investment guarantees, trademark and patent protection and licensing), for example, this work can be an effective classroom tool in the now widely offered course in international transactions. The increasing interdependence between the legal aspects of international trade and the work of a growing number of international institutions can thus be effectively demonstrated.[16]

It undoubtedly remains true that the "ambitous sweep the editors seek to accomplish" may produce "difficulties for the student (and perhaps the instructor as well)."[17] There is no question that the excerpts included in this book will tax the energies and imagination of both student and teacher. They are taken from the writings of economists, political scientists and historians as well as jurists. The legal writings themselves encompass such divergent fields as international law, conflict of laws, public and private foreign law. Yet, in a world where the relations among nations—economic, political, military—become ever more intertwined and interdependent, the panacea of finding a "nutshell" for international legal studies has been lost. The sweep of the book is indeed ambitious, but to confine it in order to avoid difficulties would have been to ignore the realities of contemporary international developments.

Students as well as instructors will benefit by the inclusion of numerous questions, problems and notes. The extensive bibliographical notes reflect American and foreign literature through late 1966.

The new volume of documents has been brought up to date[18] and

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tive or civil law courses as a prerequisite to a course utilizing this book "runs counter to the realities of the overcrowded domestic curricula..." *Preface* at xiv.

[16] The existence of regional and worldwide institutions is, of course, not the only cause of changes in the law of international trade. For an interesting analysis of changes in international commercial law resulting, in the author's opinion, in the creation of a new universal *lex mercatoria*, see Schmitthof, *Das Neue Recht des Welthandels*, 28 RABELS ZEITSCHRIFT FÜR AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 47 (1964).

[17] Nussbaum, Book Review, 31 U. CHI. L. REV. 811, 816 (1964).

[18] Included are: the EURATOM and ECSC Treaties; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the EEC Treaty with relevant Annexes, the Protocols on the Privileges and Immunities of the European Communities, Statute of the Court of Justice and Statute of the European Investment Bank; the Merger Treaty; EEC Commission Regulations and Communications on antitrust law, including Reg. No. 19/65 and Reg. No. 67/67; Reg. No. 38/64 on the movement of labor; the General Programs on Freedom of Establishment and Free Supply of Services; the EFTA Convention; the General Agreement on Tariffs and Trade; the OECD Convention and Protocols; the Trade Expansion Act of 1962; and the Treaty of Friendship, Navigation and Commerce between the U.S. and Germany.

legibility.[19] The editors have included a new translation of the EEC Treaty which is a stylistic improvement and which corrects translation errors found in the 1962 version prepared by the British Foreign Office.[20]

While the book is intended primarily for classroom use, its value and utility transcend the classroom walls. Its contents, made more easily accessible than that of the preliminary edition by the addition of tables of cases and treaty articles and a very comprehensive topical index, is a valuable research aid to the legal practitioner and to anyone involved in the contemporary discussion of all aspects of regional integration.

In their preface Professors Stein and Hay express the conviction that "the law is more than 'a professional tool'; it has an important social purpose which can be identified and pursued only if a legal rule or institution is viewed in its social context."[21] LAW AND INSTITUTIONS IN THE ATLANTIC AREA is a valuable embodiment of this conviction. Through effective use of the comparative method the editors have traced the birth and early life of regional integration, a social phenomenon which already has transformed traditional economic, political and military relations at the transnational level. Their book effectively demonstrates the effects of this transformation on national and international legal systems. Emphasizing the experiences of European integration, the work depicts the outlines of the still growing integration movement the effects of which will be felt throughout the world in the years to come. Meticulous, wide-ranging scholarship and imaginative approaches to a complex and novel area of law combine to make this pioneering effort a book meriting admiration and praise.

Don Berger*

[19] "The miniscule type in which most of the text is set strains credulity as well as eyesight, and provides a jarring setting for treaties writ so large on modern European history." Steiner, Book Review, 58 AM. J. INT'L L. 1037, 1041 (1964).

[20] *Compare, e.g.*, the erroneous British translations of arts. 144 and 181 of the EEC Treaty and of arts. 5 and 7 of the Protocol on the Statute of the European Investment Bank *with* the translations in the STEIN & HAY volume. The British Foreign Office translation can be found in 1 CCH COMM. MKT. REP.

[21] *Preface* at v-vi. This is not a novel idea, of course; it has been emphasized for several decades by jurists with vision. *See* Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615 (1938). Its general recognition, unfortunately, is not matched by its age.

* Assistant Professor of Law, Willamette University