BOOK REVIEWS


Any new work in the international field and intended for use in the law school risks duplicating another in a market approaching saturation. To keep pace with the growth of international activity in a wide variety of spheres, a number of law schools now offer courses not only in traditional public international law, but in international organization and international business and commercial problems as well. As adequate Cases and Materials for these subjects already exist, one may fairly ask whether Professors Stein and Hay present anything more than interesting footnotes to fields already firmly established. They do a great deal more.

To be sure, some overlap exists (and it occasionally seems excessive and unnecessary), but this compilation goes beyond a casebook in international law or a checklist for Americans doing business abroad. Rather, the editors focus upon the significant political, military, economic and social problems of the day; and by a skillful selection and arrangement of materials they cut across traditional notions of public international law, regional organization and national legal systems. Whether the problem be agricultural prices or preventive detention, these three levels are beginning to interact ever more closely, until finally the process may affect directly the private rights of individuals and enterprises.

To this process of interaction, the editors add another dimension: the close connection between political, military and economic policy formation. Cooperation moves in all three directions. Economic objectives are pursued by the European Communities, the European Free Trade Association (EFTA) and the Organization for Economic Cooperation and Development (OECD). The North Atlantic Treaty Organization assumes responsibility for a joint military policy. All of the organizations have political implications.

Perhaps the most intriguing feature of this book is its treatment of the Atlantic Area as a unit within which law and institutions may be profit-
ably analyzed. This unit, never precisely defined, presumably includes North America and the countries participating in the European Communities and EFTA. Two caveats are in order. Although treated as a unit for pedagogical reasons, these countries, at least for the moment, share only particular interests made the subject of specific agreements, however broad. The editors wisely avoid the catchy but misleading expression "Atlantic Community." Whatever psychological leverage this expression grants to statesmen operating in a cold war context, the institutions and law-making processes belie the existence of a true community. Recent political developments reduce still further the likelihood that these nations, or any group of them, will agree in the near future to establish Atlantic Community executive, legislative and judicial institutions, as some have suggested.¹

Furthermore, one must remember that certain institutions important to the Atlantic Area, such as the General Agreement on Tariffs and Trade (GATT) and the International Monetary Fund (IMF), include members which fall outside that area by any definition. Attempts at global solutions, therefore, must consider the interests of nations with different political and economic views. These warnings in no way detract from the usefulness of the Atlantic Area as a model, and the editors appear justified in concluding that "the impact of international institutions on the life of the individual and of the enterprise, and on national law, has been deeper in Europe than in any other part of the world and has reached a level which allows for serious study."²

Despite the attractive simplicity of examining seriatim each of the institutions playing a significant role in the Atlantic Area, the editors avoid such an approach for the most part. Instead, they treat specific problems and then examine the attempts by national governments and various international and regional institutions to arrive at workable solutions. This functional approach accurately reflects the problem solving process. The legal structure of any institution depends largely upon the nature and importance of the policy objectives involved. It is proper to focus in the first place upon the policy objectives sought by cooperation and then to see if the legal structure of the institution will effect those objectives. It is not surprising, for example, in view of the specific goals sought and the importance of assuring peace between France and Germany, that the countries of the European Coal and Steel Community were willing to grant the High Authority broad power to bind private parties directly. In OECD, on the other hand, because of the number of

¹ Herter, Toward an Atlantic Community 70-73 (1963).
² P. iii.
participating countries and the general purpose of the organization, the member states were not prepared to grant it authority to make decisions having the force of domestic legislation. The Treaty of Rome, by leaving ultimate control over important matters to the Council of Ministers, adopted a middle approach. It will be interesting to see whether the nations within the European Communities attach sufficient importance to the economic and political policy objectives to agree upon the merger of those institutions not yet shared by all three Communities.\(^3\)

What are the policy objectives pursued by the countries within the Atlantic Area? The book's chapter headings give an indication: free movement of goods, protection of competition, access to economic activities, economic and social policy coordination, civil rights and military and political policy coordination. In these sectors, the nations in the Atlantic Area cooperate to a degree ranging from consultation to integration. Yet interesting conflicts remain on at least two levels. There may be a conflict between two or more of the policy objectives. If, for example, the most efficient allocation of the factors of production calls for the free movement of goods, should competition be protected even at the risk of an inefficient allocation of resources? Conflict may also arise within the context of a single policy objective. For the EEC, the free movement of goods means the elimination of internal barriers and the creation of an external one, while for GATT the primary objective is most favored nation treatment for all important trading countries. Indeed, Professors Stein and Hay introduce enough similar examples so that the cynic may choose to view the book as a study in conflict rather than in cooperation. Throughout these materials, the student is forced to determine for himself what the high priority objectives are, to what extent public authorities ought to intervene and whether the various institutions offer rational solutions to the problems posed.

Despite all the attempts at global and regional problem solving, it remains true (although often ignored by writers with a cause) that national legal systems continue to have paramount force in determining the rights and obligations of the citizen. The editors recognize this, and their introductory chapter is a brief comparative survey of constitutional law. The constitution controls the form of a nation's participation in international arrangements, whatever their nature. All countries must

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\(^3\) The Permanent Representatives are presently studying proposals for the merger of the executives of the three Communities with a view towards the eventual merger of the Communities into a single organization. The final decision will probably depend on the choice made between closer political unity and l'Europe des patries as conceived by General De Gaulle. For discussion of the history and problems of the merger of the executives see Hellmann, *Europas organisatorische Einheit: Fusion der drei Exekutiven vor der Zusammenlegung der Verträge* [1964] *EUROPA ARCHIV* 233.
deal with the problem of the relationship between a treaty and municipal law. In those countries which recognize judicial review, the courts may have to face a number of delicate situations similar to *Missouri v. Holland.* The highest tribunal of a country within the EEC has yet to rule upon the constitutionality of the Treaty of Rome, legislation implementing it, or an act adopted by a Community institution. It appears likely, however, that the *Bundesverfassungsgericht* will soon consider such a question.\(^3a\)

Given the preeminence of national authority, will municipal courts ever come to apply, as a matter of course, the law made by an international institution? To date, approximately seventy decisions, several of which are included in the materials, have considered the role of EEC law in litigation before municipal tribunals. The Treaty of Rome, or acts taken pursuant to it, have been invoked to hold unenforceable an arrangement among German enterprises to fix resale prices and to prohibit exports to other EEC member states;\(^5\) to grant a stay in proceedings in a suit for damages based upon a charge of unfair competition under French law;\(^6\) to declare contrary to the Treaty of Rome and therefore contrary to the Italian Constitution a Regional Law of Sicily granting subsidies to the shipbuilding industry;\(^7\) to allow a French national to choose French as the language in a criminal proceeding before a Flemish court in Belgium.\(^8\) However revolutionary these decisions may be for a European, it would be a mistake to conclude that the municipal courts apply Community law in the same way our state courts enforce federally created rights. Rather, the courts seem uncomfortable in their new role

\(^{3a}\) The Fiscal Court of Rheinland-Pfalz recently requested the *Bundesverfassungsgericht* to rule on whether the German law ratifying the Treaty of Rome contains a delegation of power to the council of Ministers inconsistent with the Basic Law of the Federal Republic. Decision of Nov. 14, 1963, Finanzgericht Rheinland-Pfalz. The decision is not reported but excerpts appear in 10 *Aussenwirtschaftsdienst des Betriebs-Beraters* 26-28 (1964). A later decision by an administrative court, upholding the validity of such a delegation, expressly rejects the doubts of the Rheinland-Pfalz court. Decision of Dec. 17, 1963, Verwaltungsgericht Frankfurt/Main, summarized in 10 *Aussenwirtschaftsdienst des Betriebs-Beraters* 60-61 (1964).

\(^4\) 252 U.S. 416 (1920).


and may engage in an artless discussion of Community law before holding it inapplicable. By furnishing the text of municipal court decisions, Professors Stein and Hay push at the frontier in examining the impact of an international institution upon national law.

The editors recognize, however, that pioneering is risky business by labelling their work a "Preliminary Edition." The significance of their experiment is certain. Rough spots remain and some of them will be difficult to remove because they stem from the problem of using this kind of book with American law students. Not even the undergraduate political science major will be likely to bring to these materials a sufficient understanding of the forces behind the movement toward European integration. Space limitations clearly make impossible the addition of historical matter to the Preliminary Edition. Any student seriously interested in deriving the full benefit of these materials and in understanding the Atlantic Area would do well to read on his own a survey of the European movement toward integration.

A more serious difficulty arises because few American law students are familiar with civil law systems and more particularly with public law in Europe. The municipal law of the member states has provided a basic tool for solving the legal problems of the European Communities, and it is not accidental that almost all American commentators on the legal aspects of the EEC have a European background. For example, the

9 A recent case in France illustrates the difficulties that may follow. The president of a French distributor of movie cameras was prosecuted for his refusal to deal with a retailer, a criminal offense under French law. The court of first instance found him guilty, ruled that the law in question had been validly adopted and levied a fine. Soc. Photo Radio Club c. Nicolas et Soc. Brandt, Tribunal Correctionnel de la Seine, July 13, 1960, [1960] D. Sommaires 122. The judgment was affirmed. Nicolas et Soc. Brandt, Cour d'Appel de Paris, Feb. 7, 1961, [1961] D. 175. The Cour de Cassation ruled that the appellate court had failed to apply the French law properly and remanded the case. Nicolas, Soc. Brandt et Soc. Photo Radio Club, Cour de Cassation (Ch. crim.), July 11, 1962, [1962] D. 497; [1962] 1 C.M.L.R. 93. During the hearing on remand, the defendant, for the first time, claimed that there existed a conflict between French law and EEC law, and therefore the court should refer the case to the Court of Justice of the European Communities for a ruling pursuant to Article 177 of the Treaty of Rome. The defendant further alleged that he had entered into an exclusive distributorship agreement with the manufacturer, that this agreement gave him the power to choose dealers and that notification of this agreement to the Commission made it valid until the Commission ruled otherwise. According to the French press, the imaginative defense caused a "sensation," and the judge, caught by surprise, ordered a three month recess. Les Echos, Jan. 25, 1963, p. 8. After the full hearing, the court found the defendant's refusal to deal illegal, and ruled that even assuming the distributorship agreement to be valid under Community law, the more severe prohibitions of French penal law remain in effect. Cour d'Appel d'Amiens, May 9, 1963, [1963] JURIS CLAUSER PERIODIQUE, II, ¶ 13222. The decision has been appealed. Le Monde, July 2, 1963, p. 14, col. 1.

10 The best work available in English is MAYNE, THE COMMUNITY OF EUROPE (1962).
comparative lawyer with some knowledge of the French *Conseil d'État* will find it easier to understand the Court of Justice of the European Communities.\(^\text{11}\) Rather than abandon the comparative approach, the editors try to make it more palatable by drawing upon American analogies which the student may recognize. In some areas, such as the protection of competition or the right of establishment, the technique works well; in others, such as the comparative study of the constitutions of the European countries, the technique is less satisfactory because of the inherent complexity of the subject matter. Where the American analogy fails to clarify sufficiently, more exposition is needed. Certainly the chapter on European constitutions could be profitably expanded to include more municipal court decisions and additional material on the relationship between the executive and judicial branches of government.

Other difficulties for the student (and perhaps the instructor as well) may arise from the ambitious sweep the editors seek to accomplish. To put under one roof, in the context of a comparative study, the global, regional and national approaches to complex military, political, economic and social problems may overburden any one book. Throughout, the editors must face the choice between a treatment so general as to be useless and inquiries into substantive problems so detailed that only a comparative law course could do the job. No easy solution can be found. It is suggested, however, that the fundamental contribution of Professors Stein and Hay is their analysis of the process of problem solving and it is there that the emphasis belongs. Material not significantly related to this analysis should be relegated to another course and should be replaced by expanding the treatment of some problems or introducing new ones. Case studies, where the editors probe such problems as the European coal crises of 1958, seem particularly instructive to emphasize the interplay of various levels in problem solving. More of the materials might have been organized in this manner. For example, Europeans have for some time been seeking assurance of a constant supply of sources of energy at reasonable prices. This goal calls into play a number of institutions. The United Nations Economic Commission for Europe has committees for coal and gas. The European Coal and Steel Community is responsible for a common policy on coal, still the source of about one-half of the Community's energy requirements. EURATOM controls the legal title to special nuclear materials but the member states issue licenses for possession. The EEC must deal with natural gas and with oil, already the most important source of energy for industrial use. The Inter-Executive Energy Committee formulates common proposals for the

\(^{11}\) Article 173 of the Treaty of Rome, which specifies the grounds for challenging a Community act before the Court of Justice, is based upon French administrative law.
High Authority and the Commissions of the EEC and EURATOM. NATO financed, and the Central Europe Operating Agency controls, the underground Central European pipeline, designed to guarantee a steady supply of fuel in time of military emergency. Furthermore, a rational energy policy necessarily affects other policy objectives of the Communities, such as the free movement of goods, the harmonization of taxation, the granting of subsidies to distressed industries and the adoption of a common commercial policy toward the socialist states which export oil. A case study would focus upon institutional and national solutions and also upon the policy choices involved. A similar approach might be adopted, at least in part, for treating the attitude of the Atlantic Area toward the developing nations,\(^{12}\) or the attempts to meet the growing danger of inflation in Europe while maintaining international liquidity. The final edition might include at least a summary of the British negotiations to enter the EEC, which highlighted the complex pattern of international obligations and which were instructive on the relationship between military, political and economic policies.\(^{13}\)

Additional case studies could be included only if some materials in the present edition were deleted. Some questions seem of marginal importance for gaining insights into the process of solving the major policy problems of the Atlantic Area. The immunity of NATO forces from local jurisdiction, for example, although it is touchy and at times arouses hard feelings, probably makes little difference in formulating a common military-political policy. Nor does the problem solving approach require much discussion of whether an injury to a United Nations civil servant gives rise to a right to compensation, or whether the UN enjoys legal personality. In any case, a course in public international law would deal with questions of this nature. It does not seem unreasonable to require a student to learn something about international law before he tackles the more difficult materials under review.

But why should an American lawyer sacrifice his time to study the law and institutions of the Atlantic Area? Professors Stein and Hay suggest three reasons: the increasing interest and involvement of the American businessman in Western Europe; the influence of institutional developments upon the policies of the United States government; and the unique

\(^{12}\) A particularly interesting study could be made of the cooperation of the European Development Fund, the French government and the Agency for International Development in building an extension to the Trans-Cameroon railway. The joint venture had significance for American business, which was afforded an opportunity to bid on the project. See 6 Journal Officiel des Communautés Européennes 192-93 (1963).

\(^{13}\) See EUROPEAN ECONOMIC COMMUNITY COMMISSION, REPORT TO THE EUROPEAN PARLIAMENT ON THE STATE OF THE NEGOTIATIONS WITH THE UNITED KINGDOM (Feb. 26, 1963).
nature of certain institutions, such as the EEC, with its power to modify national law and thereby affect commerce and industry.

What seems fundamental is that institutional developments are beginning to play an important role in decision making on the private and governmental levels. Perhaps nothing has more deeply influenced the job of the American lawyer than the general acceptance of the notion that government must take some part in modern economic life. If the impact of international institutions upon the American lawyer be less immediate and direct than New Deal legislation, it may in the long run require a change in thinking more difficult and profound. A number of American practitioners have already become familiar with the "antitrust law" of the EEC and some have filed the notification of agreements to the Commission required by Regulation 17. In the future, American lawyers will want to know whether an appeal to the Court of Justice lies if the Commission refuses to entertain a complaint by a third party who claims he has been injured by an illegal agreement. The practitioner advising the client doing business in Europe dare not disregard the possibility that a decision by the Commission declaring an agreement void under Community law may serve as the basis for a suit for damages under the civil code of a member state.

Finally, the lawyer must be aware of the extent to which his government no longer feels entirely free to make decisions alone. Although nationalism remains a strong force, many countries have come to realize that to decide independently matters traditionally thought to be exclusively within the domestic jurisdiction of the territorial sovereign no longer makes sense. The lawyer fortunate enough to have contact with the materials of Professors Stein and Hay will greatly increase his understanding of these developments, whose ultimate impact may be felt by his client.

Michael Nussbaum*


Whenever public hearings are held on proposed major federal tax legislation (as in the case of the Revenue Act of 1964) there is no dearth

14 5 JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES 204 (1962).
* Member of the New York Bar.