Vanderbilt Journal of Transnational Law

Volume 7
Issue 3 *Summer 1974*

Article 11

1974

Book Reviews

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THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION. By C.J. Mann. The Hague: Martinus Nijhoff, 1972. Pp. xiv, 567.

The theme of this exhaustive and scholarly investigation[1] is perfectly expressed in the title, *The Function of Judicial Decision in European Economic Integration*, which at once reveals that although this is a book about law, it is of interest not only to lawyers but also to economists and to political scientists since the founders of the European Communities sought to use economic integration to bring about political integration. For the uninitiated in these matters—if any such remain—it might have been convenient to have some subtitle for the book, such as "A Study of the Court of Justice of the European Communities," for it is that Court which is its concern. But the initiated will have immediately deduced as much from the phrase "economic integration" in the title, because integration is the hallmark of the European Communities, whereas, other international European economic collaboration (whether or not based on treaty arrangements, such as the European Free Trade Organization) has not gone, and does not go, beyond cooperation. The theme is highly important, and it should be said at once that the 500 or so pages of the text will repay careful reading. The author is to be congratulated and thanked for the very great amount of work he has clearly put into his task and the enlightening nature of the result he has produced.

Upon the formation of the three European Communities, it was as if the founding Treaties, having juxtaposed the six member States with the new Institutions (the Council of Ministers, the Commission, the Parliament and the Court of Justice) that they brought into being as well as the natural or legal persons in the member States, and having laid down the framework of the rights and duties of each of these categories in respect of each other, bade

1. This work was for part fulfillment of the Doctor Juris degree of the Friedrich Wilhelm University at Bonn, Germany, which the author was awarded in 1967. Parts of the manuscript were subsequently expanded and revised to take account of developments to mid-1970.

them all proceed from that point, independently of the national legal orders of each of the member States, and of the rights and duties of natural or legal persons therein, so as to coalesce into a new, well-defined and clearly articulated form of human organization or society, to be called from the outset a Community—since, in law, that is what the three European Communities were from the entry into force of the Treaties.

It is clear that in such a situation the jurisdiction of the Court of Justice, which was established to ensure that in the interpretation and application of this Treaty the law is observed, needed to be varied. It became in fact a widespread habit in Community-Europe to refer to that jurisdiction, at least for descriptive purposes, as *constitutional* (when, in particular, the rights and duties of the Community Institutions in respect of each other and of the member States were concerned), as *international* (when the relationships of member States *inter se* in respect of Community matters were concerned), as *administrative* (when the exercise of executive powers by the Community Institutions was under challenge before the Court, on the basis of the provisions of administrative law, in the European continental sense, laid down in the treaties themselves), as *domestic* (when the Court heard disputes between employees of a Community Institution and that Institution), and so on. These descriptions were no doubt useful, especially in the early days, but they were never able to fulfil the role of precise definitions.

The author's approach is to treat the Court essentially as a constitutional court, and his intention is revealed or at least adumbrated as early as Chapter IV, well before he leaves generalization to embark, in Part Three, on his methodical analysis of the jurisprudence or case law of the court. He writes:

> This is not to say, as previous Chapters have demonstrated, that comparisons of the Community Court with the International Court of Justice are useless. Their value is greatly reduced, however, because the international law system at present lacks the disciplined constitutional framework of the Communities as well as an analogous distribution of powers within the context of judicial review. The constitutional courts of the United States and Germany, on the other hand, meet these requirements, and more. The division of powers which they supervise embraces both the horizontal one of federal-state relationships as well as the vertical one among the various branches of government. Nevertheless, the powers of each

> are so circumscribed that their authority depends to a great extent on the willing cooperation of other governmental institutions. Thus, despite certain important organizational and jurisdictional differences, the adjudication of the United States Supreme Court and the German Federal Constitutional Court will fairly reflect, though not at all perfectly, the tensions at work in the European Communities.[2]

One would not dispute this statement. The approach to the author's theme which it indicates has, moreover, the incidental advantage of allowing him to view things in part from his own homeground, besides being sufficiently broad to cover most facets of the Court's jurisdiction and to examine the effect of the exercise of that jurisdiction in promoting a coalescence (as this reviewer has suggested above) into a clearly articulated Community and in promoting, as a resultant thereof, economic integration. It may be that this approach leads to an omission, for example, in examining whether there has developed a special Community form of administrative law, itself of importance in economic integration; but set against the wide coverage that the approach undoubtedly provides, such an omission can only be of marginal consequence. So also is the possibility that the author's treatment of the Court's attitude towards interpretation of the treaties in accordance with the general principles of member State constitutions[3] might have revealed differing nuances of understanding, were he not thinking of the Court essentially as a constitutional one.

Writing some six years before the present author, a comparably gifted researcher, Jean-Pierre Colin, examined whether the great influence of the Court of Justice in the process of coalescence and economic integration in the Communities did not in fact make it justifiable to speak of "Le gouvernement des juges dans les Communautés Européenees"—the title he gave his published work. The fundamental question that the present author examines runs so closely to that posed by Mr. Colin, though not identical therewith, that there is even some temptation to view the two in double harness. For example, the author writes: "What is the nature and source of judicial power at the level of constitutional adjudication? Some would flatly deny that such power exists—that the judiciary

2. C. MANN, THE FUNCTION OF JUDICIAL DECISION IN EUROPEAN ECONOMIC INTEGRATION 142 (1972).

3. *Id.* at 356-57.

possesses any real power in government."[4]

The present author, while still treating in general terms "The Theoretical Foundations of Judicial Decision,"[5] gives clear indications of what he is later to show as the essential feature of the Court's jurisprudence (which he examines in Part Three). Thus, at page 118 he writes: "Interpretation means not merely understanding the text as it is, but developing it (Fortbildung), completing it and, if necessary, even correcting it. 'Juristische Interpretation,' declares Esser in words *which this whole study echoes*, 'ist nicht Nachdenken des Vorgedachten, sondern Zu-Ende-Denken eines Gedachten—ja . . . Zu-Ende-Denken eines weltueberall Gedachten.' "[6] By page 169 the author is examining the "responsible limits of creative judicial decision" in terms of the realities of a judiciary's institutional setting. These realities in turn derive "to a large extent" from "the insight and experience gained from *result-oriented jurisprudence*."[7] Concluding Part Two with a backward glance over the road travelled, the author writes: "This analysis of the theoretical foundations of judicial decision has focused on the broad scope for judicial creativity in the law."[8] Only a few pages later, at the very outset of Part Three ("The Jurisprudence of the Court," which is really the substantive part of the entire work) the author can already declare:

> As a matter of method, therefore, the Court has adopted essentially a teleological approach to Treaty interpretation. It decides in terms of known Treaty objectives, but these in turn unfold in light of the "new objects or vistas" revealed through the operation of the Treaties. This approach accords with the evolutionary quality of Community law, based not as the United Nations on "orders of coordination" but rather on "orders of integration."[9]

There can surely be no doubt of the accuracy of this statement. It does not, however, represent a fresh discovery. The freshness and

4. *Id.* at 169.

5. *Id.* at 91-226 (Part Two).

6. *Id.* at 118 (footnotes omitted) (reviewer's italics). "In translation Esser's prose reads: 'Judicial interpretation is not reflecting on a prior idea, but thinking through an idea to its completion . . . indeed . . . thinking through a worldwide idea.' " *Id.* at 118 n.131.

7. *Id.* at 169 (reviewer's italics).

8. *Id.* at 223.

9. *Id.* at 233.

originality of the author's work, as well as its value, which is very great, lies in his detailed analysis of the way in which the court has performed its tasks. These he defines "as the continuing search for purpose, authority and practicability in an imperfect and ever-developing positive law."[10] It is under the three headings of the search for Purpose, Authority and Practicability, that the work of the Court is analyzed in detail in Part Three. Part One, dealing in two chapters with "The Legal Character of the Communities" and "The Jurisdiction of the Court," and Part Two, a theoretical study in two chapters of "The Concept of Law in Judicial Decision" and "The Institutional Foundations of Judicial Decision," are by their nature only an introduction to Part Three. In Part Three the author claims that "[n]ot all but certainly the most important of the 350 odd judgments of the Court, covering seventeen years from 1953 through mid-1970, are examined . . . ."[11] This work of the Court, moreover, is "tested not only against the substantive product of lines of decisions, but also in terms of the real limits to judicial power," which result from the "institutional framework" in which the Court is placed.[12]

In Part Three the facts of each particular case and the economic context and effect of the Court's judgment therein are set out in a succinct and illuminating manner which gives much intellectual pleasure to the reader. It may owe much to the author's previous training in economics. But the thought-provoking, or instructive, conclusions that the author draws from the examination of the cases gives his work its special value. For the purposes of a review such as this a few examples of such conclusions must suffice. Thus, concluding a review of the coal-pricing disputes and the problem of market organization of the Ruhr enterprises, the author comments:

> By virtue of changing economic circumstances in light of the shifting requirements of Treaty goals, therefore, the concept of "normal competition" may undergo a transformation. In thus extending the scope of the [coal and steel] market to substitute and imported products, the Court has adopted the "dynamic" of [its] Advocate-General Roemer . . . . Community law has been adapted to the

10. *Id.* at 2.
11. *Id.* at 225.
12. *Id.*

> changing requirements of economic integration. The standard of market structure and with it the concept of "normal competition" have been reformulated and, in addition, complemented by a more extensive control over market behavior. There has occurred a conscious shift of emphasis from preventive to subsequent means of market control. This offers an instructive example of legal development through judicial decision.[13]

Yet, as another example, still in respect of the search for purpose, the author suggests that "the Court has been particularly cautious in substituting its views of goal balancing for those of the High Authority [of the Coal and Steel Community] and EEC Commission."[14] The Court, moreover, "possesses the ways and means for maintaining discussion before laying an issue to rest"[15]—it can so maneuver as to induce a greater Community consensus on the issue, or at least a more thorough examination of it by different interests in the Community, before finally pronouncing.

As the author enters upon the second chapter of Part Three, "The Search for Authority," it follows naturally that the author should comment: "The Court, therefore, is bound to a loyal interpretation of the Treaties, but this interpretation, to be effective, must respect the outer limits of Community consensus."[16] Twenty-four pages later he suggests: "The conscious formation of legal sources may well be the most lasting contribution of the Court to the development of authority in Community Law,"[17] and in that general connection, he remarks:

> The Court's conception of Community law . . . constitutes a radical separation of Community and Member State legal orders. It tends to stress the mutual independence rather than interdependence of both. While this has the virtue of screening the former against the paralyzing tendencies of divergent national practice, it also bears the mark of that dualist position which has so enfeebled the integrative effects of international law. Despite this rigorous formulation . . . the Court has been neither so restrained in asserting Community law nor unwilling to receive the principles and practices of the Member State legal orders. It is, therefore, well on its way to

13. *Id.* at 286.
14. *Id.* at 309.
15. *Id.* at 312.
16. *Id.* at 320.
17. *Id.* at 344.

> making the Treaty legal systems a self-constituting factor in the development of Community law. Herein lies their persuasive value.[18]

This last statement, though a provoking one like the other examples quoted, might perhaps have shown less concern for the enfeebling "dualist position" had the author been researching and writing some few years later. For it appears to the present reviewer that there has come about a better and wider understanding of the circumstances in which that dualism is submerged under the prevalence of Community law over the law of Member States, to the extent necessary for Community law to be enforced—provided the part of Community law concerned is, as the phrase now goes, "directly applicable" in the Member States. For, in the earlier years of the Communities, such elements of Community law had been thought of in terms of the traditional notion that some legal provisions may be "self-executing." Largely through the case law of the Court there has now been substituted the much more precise concept of the law "directly applicable," and the movement has been strengthened by the steady number of references to the Court from national courts, under article 177 of the EEC Treaty, for a preliminary ruling as to whether this or that element of Community law is, or is not, directly applicable in Member States. The author appears not to have been entirely abreast of this movement, for his use of the now outmoded expression "self-executing" occurs for example at page 392 (in respect of EEC Treaty Article 95(1)) and at page 402 (in respect of article 12). Later, at pages 408 and 409[19] he does not, with his usual prescience, take up the hint contained in the Court's statement (regarding EEC Treaty Article 37) that it " 'is binding on the States and concerns their nationals directly; these [nationals] can derive rights from it which are to be respected by the national courts.' "[20] This is perhaps a little disappointing to the reader in view of the treatment very early in the book of the question of "open conflict between Community and subsequent national legislation" at pages 35 and 36, in which passage the expression "directly applicable" is used in what is now its

18. *Id.* at 349.

19. The author considers the treatment by the Court of the E.N.E.L. case, concerned with the nationalization of electricity by Italy.

20. *Id.* at 409.

generally accepted connotation. While discussing the earlier *Bosch* case of 1962, the author comments: "In a clear and reasoned judgment, the Court affirms the 'self-executing' character of Article 85."[21] The Court itself used the expression, of course, but that was when the story of the development of this particular aspect of judicial and Community legal thinking began—and in that judgment the Court, suspending the application of the article until the entry into force of Regulation 17, did not *need* to give expression to a concept such as "direct applicability." The author, in his final conclusions to the book, has not moved ahead: "The authorized acts as well as the self-executing provisions of the Treaties directly bind Member State nationals and their enterprises."[22]

Elsewhere his prescience is revealed. He touches on human rights as guaranteed in the individual Member States, and still occupied with "search for authority," referring to the European Convention on Human Rights, he comments in words that are almost prophetic of what the Court has since done: "While this Convention does not bind the Communities as such, it constitutes that broad core of constitutional rights recognized in all the Member States. There is every reason, therefore, to affirm the interpretation of Community law in conformity with the general principles of law embodied in the Member State constitutions."[23]

The "search for practicability" by the Court is treated from two standpoints, "the well-shaped rule" and "of rule and discretion." In respect of the former, discussion is "focused on two judicial techniques of rule formation, the legal fiction and the *per se* rule."[24] (It is challenging, incidentally, to be informed that "the utility of legal fictions lies in the *conscious* use of false statements,"[25] while for a British reader, the investigation by comparison with the essentially American *per se* rule should be revealing.) The problem in finding "the well-shaped rule" is of course that "[t]he Treaties, as may be expected, rarely offer concrete rules of law ready for unambiguous case application, [and that in] '[t]he normation of economic facts . . . [i]t is impossible to avoid the use of concepts

21. *Id.* at 452.
22. *Id.* at 508.
23. *Id.* at 358 (footnotes deleted).
24. *Id.* at 473.
25. *Id.* at 435.

which require value judgments and can be grasped only through the knowledge and evaluation of economic relationships.' "[26] "Unfortunately, the Court too readily has mistaken conceptualistic simplicity for rule practicability,"[27] the author comments, drawing attention to "the confusing and highly abstract rationale underlying the construction of EEC Article 85(1) . . . . Predictability in this important area of Community law [competition law] has greatly suffered and interested parties are forced to second-guess the Court and the path of the law."[28]

If a "high standard of clear and intelligible rules which carry their reasoning on their face in order to guide as they control . . . is the basis for certainty and predictability in the law . . . the search for practicability also has its institutional aspects. Not every legal problem, to put it bluntly, is a proper subject for the judicial rule shaping function."[29]

> Rule and Discretion [have found a degree of balance in that] the legislative and executive organs of the Communities have benefited most often from the exercise of restraint in judicial rule-making. And this perhaps for no better reason than that their acts are the grist of Community adjudication. That is to say, in part, when questions have arisen as to the appropriateness or expediency of Community measures or as to the assessment or prediction of economic facts and circumstances, the Court has been willing to recognize a certain sphere of discretion for the Community organ concerned.[30]

This discretion is considered with regard to "Timing and Enforcement of the Treaties," "Individualization in the Motivation Requirement," and "Retroactivity and Certainty in Executive Decisions."

Not all the author's conclusions may necessarily be agreed with, but enough has been said to indicate that anyone with a continuing interest in the future case law of the European Court might with advantage, in assessing it, adopt the author's criteria of purpose,

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26. *Id.* (per Advocate-General Roemer).
27. *Id.* at 473.
28. *Id.*
29. *Id.*
30. *Id.* at 474.

authority and practicability, so interestingly applied in Part Three. In Part Two, "The Theoretical Foundations of Judicial Decision," he gives the impression of being less sure of himself and the reading is more heavy-going—though that Part is certainly not without considerable value.

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INTERNATIONAL PEACEKEEPING AT THE CROSSROADS: NATIONAL SUPPORT—EXPERIENCE AND PROSPECTS. By David W. Wainhouse with the assistance of Frederick P. Bohannon, James E. Knott, Anne P. Simons. Baltimore: The Johns Hopkins University Press, 1973. Pp. 634. $22.50.

As the primary function of the United Nations has shifted from the implementation of collective enforcement, as originally envisaged under Chapter 7 of the Charter, to an emphasis on the conciliation of differences in a multipolar heterosymmetrical environment, the strengthening of the peacekeeping machinery constitutes the *sine qua non* for a stable international order. For this reason, any serious study on what Dag Hammarskjold once called "preventive diplomacy" inevitably commands attention among scholars and representatives in the council of nations. This volume by Mr. Wainhouse is one such study and a most outstanding work among the recent publications on the subject.

As a sequel to an earlier study by the same author, entitled *International Peace Observation*, this work by David W. Wainhouse, a former ranking official of the State Department, focuses attention mainly on the question of national support and participation in United Nations peacekeeping activities. Combining detailed case studies with a trenchant analysis of future trends, this book covers the gamut of the complex issues of national participation in international contingents including, *inter alia*, political, financial, manpower and logistic assistance as well as organizational arrrangements on the national, international and local levels. Relevant documents selected from the Official Records of the Security Council and the General Assembly and extracts from "status of forces" agreements are appended to each chapter. Charts denoting the organizational patterns of the various operations and massive statistical tables on the composition of the contingents and financial contributions and reimbursements abound in the compendium. This notable work will stand as an indispensable guide and a standard reference for international peacekeeping for many years to come.

In the typology on peacekeeping, Mr. Wainhouse uses the generic term to cover both peacekeeping forces and peace observation missions.[1] A more analytical framework, however, has been sug-

1. D. WAINHOUSE, INTERNATIONAL PEACEKEEPING AT THE CROSSROADS: NATIONAL SUPPORT—EXPERIENCE AND PROSPECTS 1 (1973).

gested by Alan James, who in his *The Politics of Peacekeeping* differentiates between three categories of operations: (1) "patch-up activities" designed to bring about an agreement between the disputants and to assist in the execution of a settlement; (2) a "prophylactic" function for preventing a situation of conflict from deteriorating; and (3) a form of "proselytism" in which the Organization acts as an instrument either for change in pursuance of an internationally accepted norm or for the rectification of anomalies arising from a post-colonial situation. For example, truce supervisions in Palestine and in the Sinai illustrate the first category, the operations in Lebanon and Cyprus the second, and Opération des Nations Unies au Congo (ONUC) the third.

These major undertakings and other comparatively minor ones are reviewed by Mr. Wainhouse in eight long chapters covering over 300 pages in a most comprehensive and precise manner. The account on the Congo is of particular interest inasmuch as it chronicles, as does nothing else, the prodigious support and wholehearted collaboration given by the Western powers including, above all, the provision of airlift and sealift facilities, communications equipment and supplies, foodstuffs and many other items. Mr. Wainhouse comments with reason that "[i]n the case of the Congo it is possible to be categorical. No national air service, military or civilian, nor any feasible combination of such services, other than the United States, could have approached the initial airlift capability provided by the U.S. Air Force for ONUC in July-August 1960."[2] The lesson to be drawn is that superpower assistance must remain an essential factor contributing to the effectiveness and success of any large-scale international action in the future.

Regional peacekeeping activities are dealt with in three chapters stressing, in particular, the role and accomplishments of the Arab League, the Organization of American States and the Organization of African Unity. Regarding the first, Mr. Wainhouse states that its 1961 operation in Kuwait constituted "a very significant development in the Arab League system [although] it did not become the pattern for the future."[3] The OAS operation during the Dominican Crisis of 1965 is considered "a 'success' [as] [i]t was an

2. *Id.* at 333.
3. *Id.* at 427.

essential factor in providing the degree of stability required for negotiating a settlement . . . ."[4] A contrary view, it may be noted, was expressed by Lincoln P. Bloomfield who wrote in 1966 that "the O.A.S. operates in the shadow of one dominant country. The majority of the Latin American states appear to have resisted recent American efforts to make an institution out of the figleaf the O.A.S. spread over American troops in the Dominican Republic."[5] The OAU has never launched a peacekeeping force, although its Defense Commission did recommend the allocation by its members of military units to be placed when needed at the disposal of the Organization.[6] In the final analysis, regional agencies, while capable of performing a useful supporting role, could hardly be expected to be an adequate substitute for a universal security organization.

Apropos of the prospect of international peacekeeping as a permanent institution, Mr. Wainhouse has not given the readers, despite the provocative title of the book, much in-depth analysis of the position of the Soviet Union, the principal challenger of the system. Brief references, however, are made to the nonparticipation of the Soviet bloc in the UN operations with the sole exception of the initial Commission for investigating the Greek frontier incidents;[7] the controversy over the financing of UNEF and ONUC;[8] Soviet objections expressed in the Security Council against the establishment of OAS contingents during the Dominican Crises;[9] and the lukewarm support given by the Soviet Union to the operation for Cyprus.[10]

If the adamant stand of the Soviet authorities constitutes a lasting obstacle to the development of peacekeeping in the future, reference could perhaps be made to the revealing exchange between Arthur Dean and V. A. Zorin in the Eighteen-Nation Committee on Disarmament in 1961. In that forum, when Mr. Dean suggested that on the basis of the experience of the UN during the past sixteen years there existed a valuable opportunity to apply the

4. *Id.* at 593.
5. Bloomfield, *Peacekeeping and Peacemaking*, 44 FOREIGN AFFAIRS 671, 681 (1966).
6. WAINHOUSE, *supra* note 1, at 601.
7. *Id.* at 11.
8. *Id.* at 16, 17.
9. *Id.* at 486.
10. *Id.* at 349-50.

lessons of the past and to take important steps to strengthen the ability of the UN to keep the peace, "Mr. Zorin promptly responded: 'In all these cases the armed forces set up were not established in accordance with the United Nations Charter but in violation of it.' "[11] Greater attention might also be given to the multitude of documents submitted by the Soviet Government to the Committee of 33 of Peacekeeping Operations, rejecting all proposals for the institutionalization of the peacekeeping machinery on a more democratic basis through the General Assembly.

In assessing possible future developments, Mr. Wainhouse suggests two main conclusions: (1) "*Workable solutions for all the problems of UN peacekeeping (veto-free authorization, ready stand-by contingents, independent and reliable logistic support, prearranged financing, established command and control) . . . are not likely,*" and (2) "*The present pragmatic, ad hoc UN peacekeeping system, with all its imperfections, best serves U.S. interests.*"[12] This somewhat pessimistic prognosis does not seem to coincide entirely with the official policy of Washington. President Nixon, for example, stated unequivocally in his Fourth Report to Congress on United States Foreign Policy for the 1970's (May 3, 1973) that "the strengthening of the United Nations peacekeeping role is an important goal of American foreign policy." Dr. Henry Kissinger, the Secretary of State, in his address before the UN General Assembly, October 1973, deplored the impasse that had been reached in "the fruitless debate . . . over the degree of control [by the Security Council] over the peacekeeping machinery" and enjoined the assemblage to "delay no longer" and come to some agreement "on peacekeeping guidelines so that this organization can act swiftly, confidently and effectively in future crises."[13] The series of resolutions numbering 338 to 341 adopted by the Security Council in October 1973, for establishing a new UNEF on the east bank of the Suez might possibly point to a new direction for guiding international peacekeeping out of the quandary "at the crossroads."

*Poeliu Dai**

11. Neidle, *Peace-Keeping and Disarmament*, 57 AM. J. INT'L L. 46, 58 (1963).
12. WAINHOUSE, *supra* note 1, at 336-37.
13. 69 DEP'T STATE BULL. 469, 471-72 (1973).

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