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## Judicial Control Of The European Communities. By Gerhard Bebr

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## BOOK REVIEWS

JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES. By Gerhard Bebr;\*  
London: Stevens & Son Ltd., New York: Frederick A. Praeger, 1962.  
Pp. 268. \$10.00.

While the political and economic activities of the European Common Market have received a great deal of publicity in this country, the same is unfortunately not true of the judicial branch of the European Communities. Thus, many American lawyers are surprised to learn that the Court of Justice of the European Communities, since its establishment in 1952, has decided over 100 cases.<sup>1</sup> These range from actions instituted by Community institutions and private parties charging Member States with illegal activities,<sup>2</sup> through damage suits by importers against Community institutions,<sup>3</sup> to applications for preliminary adjudication of antitrust disputes arising before domestic tribunals.<sup>4</sup>

The jurisdiction of this Court, created first as the judicial branch of the European Coal and Steel Community,<sup>5</sup> was extended in 1958 to encompass the European Economic Community, popularly known as the European Common Market, and the European Atomic Energy Community (Euratom).<sup>6</sup> In its composition, this Court is international in nature, consisting of seven judges selected for a six-year term by the governments of the six Member States "acting in common agreement."<sup>7</sup> The official languages of the Court are French, Italian, German and Dutch.<sup>8</sup>

The function of the Court, broadly speaking, is to ensure the rule of law in

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1. Here it might be noted that the Permanent Court of International Justice during its 24 year existence decided only 58 cases, consisting of 26 advisory opinions and 32 decisions.

2. See Commission of the European Economic Community v. Italy, Case No. 7-61, 7 Sammlung der Rechtsprechung des Gerichtshofes [hereinafter cited as Sammlung] 693 (1961), deciding that Italy had violated the EEC Treaty by unilaterally suspending the importation of pork from other Member States; Humblet v. Belgium, Case No. 6-60, 6 Sammlung 1163 (1960), tax imposed by Belgium on Community official of Belgian nationality held to be inconsistent with Belgium's obligations under the Treaty.

3. Société Commerciale Antoine Vloeberghs v. High Authority, Joint Cases No. 9 and 12-60, 7 Sammlung 427 (1961) (involving American anthracite coal).

4. De Geus v. Robert Bosch GmbH, Case No. 13-61, 8 Sammlung 97 (1962).

5. The Treaty establishing the European Coal and Steel Community was signed in Paris on April 18, 1951, and entered into force on July 23, 1952.

6. The Treaties establishing the European Economic Community and the European Atomic Energy Community were signed in Rome on March 25, 1957, and entered into force on January 1, 1958.

On October 7, 1958, pursuant to Sec. II, Arts. 3 and 4 of the *Convention relating to certain institutions common to the European Communities*, the Court of Justice of the European Communities formally replaced the Court of Justice of the ECSC continuing, however, to exercise the functions of its predecessor under the ECSC Treaty.

7. At present, the Court consists of two Italian judges, while France, Germany, Belgium, Holland and Luxembourg are represented by one judge each.

8. The plaintiff generally has the choice of languages except that, if the action is instituted by a Community institution against a Member State or a private party, proceedings will be in the language of these defendants. Rules of Procedure, Art. 29 (1959): In other words, the Community institutions are presumed to speak all four languages.

the interpretation and application of the provisions of the three Treaties establishing the European Communities. Since these Treaties seek to achieve different economic objectives, the law which the Court has to administer in discharging its function as the guardian of Community legality differs depending upon the particular Treaty under which a given controversy arises. An analysis of the Court's role may thus be approached in two ways. It could be limited to one of the three Treaties<sup>9</sup> or it could attempt a comparative study of the Court's function under all three Treaties. The latter method is more difficult and as yet somewhat conjectural, because at present the great bulk of the Court's jurisprudence stems from the Treaty establishing the European Coal and Steel Community. It is, however, more useful, because it permits the presentation of a comprehensive view of the judicial structure of the Communities. This is the task the monograph under review seeks to perform. And, while I sometimes disagree with its author's conclusions, it should be said at the outset that Dr. Bebr succeeds admirably in presenting in this book a most comprehensive and systematic study of the jurisdictional framework within which the Community Court operates.

To Dr. Bebr the "supreme function of the Court" is to keep the "dynamic political interactions of the Community organs within the framework of the Treaties and channel them towards the proclaimed Community objectives" (p. 20). The awareness that the discharge of this function is a monumental task comparable to that of our own Supreme Court comes only with the realization that the Community Court's jurisdiction in some instances is superimposed upon or concurrent with the jurisdiction of the national judicial tribunals of the six Member States; that in other instances it is exclusive; and that the characterization of the nature of this jurisdiction is not uniform in the three Treaties. Dr. Bebr approaches this jurisdictional labyrinth by dividing his study into three major parts, devoting the first to an introductory survey of the role of the Court in the structure of the European Communities; the second to "Direct Judicial Control," wherein he analyzes the judicial safeguards provided for by the Treaties against the powers granted to the various Community organs; and the third to "Indirect Judicial Controls," dealing primarily with the jurisdictional and substantive relation between Community and municipal law.

#### I. THE STRUCTURE OF THE EUROPEAN COMMUNITIES

Since an understanding of the economic policy and institutional framework of the Communities is a prerequisite to any meaningful discussion of the Court's function, Dr. Bebr sets the stage by outlining their objectives and institutional contours:

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9. For the EEC Treaty, see the excellent article by Stein and Hay, *Legal Remedies of Enterprises in the European Economic Community*, 9 Am. J. Comp. L. 375 (1960). See also, Daig, *Die Gerichtsbarkeit in der E.W.G. und der Europäischen Atomgemeinschaft*, 44 Archiv des öffentlichen Rechts 132 (1958). Both articles contain comparative references to the ECSC.

For the ECSC Treaty, see Valentine, *The Court of Justice of the ECSC* (1955).

Generally expressed, the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) seek to undo the unfortunate consequences of a national policy of economic autarchy which disrupted natural economic ties, irrespective of the economic losses inflicted. . . . In this respect Euratom stands somewhat apart for it is to construct a completely new industry from scratch so that there are practically no barriers to be torn down (p. 1).

Dr. Bebr then emphasizes a fact which is sometimes overlooked, namely, that:

The economic objectives of the Communities are similar only as to their general policy goals. The ECSC and the EEC differ notably not only in the scope of their competence, but also in their approach and in the intensity of the efforts by which they seek to transform the previously separate national economies into one unit. Limited to a narrow but vital sector of national economy, the ECSC is concentrating its efforts on forming a common and competitive coal and steel market *throughout* the Community. The EEC, on the other hand, encompasses practically the entire national economy but—so far as any comparison is permissible at all—to a less intense degree than the ECSC. . . . With a single exception [the prohibition of any discrimination on the grounds of nationality throughout the Community], the role of the EEC is merely to assure competition in inter-State trade (pp. 2-3, footnotes omitted).

In form, the institutional structure of the three Communities is similar. Thus, the EEC and Euratom each have a Commission, an independent Community executive which parallels the High Authority in the ECSC, and in all three Communities a Council of Ministers represents the interests of the Member States, while a common Parliamentary Assembly, as yet without any of the legislative powers which traditionally belong to such bodies, serves the Communities as a deliberative body.<sup>10</sup> But, as Dr. Bebr justly indicates:

Although these organs . . . are in their nature and composition similar, their power prerogatives differ in each of the Communities. . . . In the ECSC the power of decision is largely concentrated in the High Authority . . . . In most instances the Authority acts entirely or more or less independently of the Council (pp. 16-17).

This, Dr. Bebr points out, is not true in the EEC and Euratom, which clothed the Council of Ministers with broad legislative powers to the detriment of the supranational Commission. He attributes this shift in part at least to the fact that the Member States, because they delegated such vast powers over their national economies to the EEC, were unwilling to vest them entirely in a body over which they can have no real control.<sup>11</sup>

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10. The Assembly does have the power, however, to force the resignation of the Commission in a body. This no-confidence motion requires a two-thirds majority vote. See, EEC Treaty, Art. 144.

11. Since Dr. Bebr's discussion of the institutional framework of the Communities is necessarily more in the nature of a broad survey, the reader might want to consult the provocative article by Professor Stein entitled *The New Institutions*, in 1 American Enter-

II. DIRECT JUDICIAL CONTROL

While space does not permit a detailed analysis of the various legal safeguards embedded in the Treaties and Dr. Bebr's conclusions about them, it might be useful to deal with some of them briefly in order to gain a perspective of the subject matter covered in the study under review. All three Treaties furnish a remedy in the Court against illegal administrative and quasi-legislative acts emanating from the various Community institutions.<sup>12</sup> This so-called appeal for annulment sets in motion a judicial proceeding designed to invalidate administrative and quasi-legislative measures on any one of the four following grounds of illegality: lack of jurisdiction, substantial procedural violations, violation of the Treaty, or abuse of power. Complementing it is a remedy, somewhat in the nature of our mandamus and declaratory judgment proceedings, under which the Court is empowered to review the failure of one of the Community institutions to act.<sup>13</sup>

But the rules and regulations which the institutions may issue and the parties who may challenge them differ depending upon whether the appeal for annulment or against inaction arises under the ECSC Treaty on the one hand, or the EEC and Euratom Treaties on the other. Thus, the ECSC Treaty provides in Article 14 that the High Authority, in executing the tasks entrusted to it under the Treaty "shall take decisions, formulate recommendations and issue opinions." While decisions are binding, opinions are not; recommendations, however, are "binding with respect to the objectives which they specify," leaving to those to whom they are directed "the choice of appropriate means for attaining the objectives." The EEC Treaty, in contrast, stipulates a hierarchy of five acts through which the Council and the Commission are to discharge their functions. These are regulations, directives, decisions, recommendations, and opinions. The last two have no binding effect. Regulations are measures of general applicability binding in every respect and directly applicable in each Member State. Directives "bind any Member State to which they are addressed, as to result to be achieved, while leaving to domestic agencies a competence [discretion] as to form and means." Finally, decisions are "binding in every respect for the addressees named therein."<sup>14</sup>

Under the EEC Treaty only Member States, the Council or the Commission may seek the annulment of regulations, directives and decisions, while a private party has this right only with regard to decisions addressed to him or decisions addressed to others but being of "direct and specific concern to him."<sup>15</sup>

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prise in the European Common Market: A Legal Profile 33 (Stein & Nicholson eds. 1960), which the author fails to cite.

12. ECSC Treaty, Art. 33; EEC Treaty, Art. 173; Euratom Treaty, Art. 146.

13. In the ECSC, this remedy resembles our mandamus proceeding. ECSC Treaty, Art. 35. See generally, Buergenthal, *The Private Appeal Against Illegal State Activities in the ECSC*, 11 Am. J. Comp. L. 325 (1962). The corresponding remedy under the EEC Treaty is more in the nature of a declaratory judgment proceeding. See, EEC Treaty, Art. 175; Daig, *supra* note 9, at 178.

14. EEC Treaty, Art. 189.

15. EEC Treaty, Art. 173.

Private parties subject to the jurisdiction of the ECSC, while they may seek the annulment of decisions and recommendations promulgated by the High Authority, are restricted, as distinguished from Member States and the Council, in the grounds of illegality that they may advance against these administrative measures. This limitation is accomplished by a provision in Article 33(2) of the ECSC Treaty, which distinguishes between general and individual decisions and recommendations, giving private parties the right to challenge only such general decisions and recommendations "which they deem to involve an abuse of power affecting them," while permitting them to appeal individual acts on all four grounds of illegality. Thus, unless a general act is vitiated by abuse of power,<sup>16</sup> it is not subject to an appeal for annulment instituted by a private party. Since neither Treaty defines these acts, the Court's powers are substantial. In characterizing the type or nature of a Community measure and in formulating the criteria necessary to make out an abuse of power, the Court can either limit or extend the judicial protection afforded private parties against illegal Community acts.

How has the Court approached this task? After analyzing its opinions, Dr. Bebr concludes:

The . . . trend clearly discernible in the judicial policy of the Court is the extension of the judicial protection of private parties. To attain this end the Court has broadly interpreted the notion of individual acts—and to a lesser degree the grounds of illegality. One aspect of this policy is the tendency of the Court to interpret *détournement de pouvoir* [abuse of power] in some instances in a manner very close to a Treaty violation, so as to widen the right of appeal of private parties against general acts. There is, however, an evident reticence on the part of the Court to interpret *détournement de pouvoir* too liberally, particularly in instances of appeals against general acts having quasi-legislative character. This attitude may be explained by the far-reaching consequences which may result from their annulment. To compensate for the limited right of appeal of private parties, the Court has extended an exception of illegality beyond the intended purpose and elevated it to a general principle, thus providing a highly individual protection against the concrete application of a general act (p. 241).

One might wish that the trend Dr. Bebr seems to discern were fully substantiated by the case law. It is, of course, true that by interpreting the "exception of illegality"<sup>17</sup> remedy so as to permit private litigants seeking the annul-

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16. In French law an administrative act is said to be vitiated by abuse of power (*détournement de pouvoir*) if the administrator, while complying with all objective requirements of the law, acted in the pursuit of ends different than those for which the power was delegated to him.

In the European Communities the concept of abuse of power has a somewhat wider meaning: it encompasses a situation where an institution in exercising its powers, is guided by illegal motives or negligently pursues ends different than those for which the particular powers were granted. Advocate-General Roemer, Case No. 18-57, 5 Sammlung 119, 147 (1958-59).

17. The remedy of an "exception of illegality" permits a private party charged with a violation of an administrative or legislative enactment to challenge its legality in an action

ment of individual decisions to attack the legality of the underlying general act, the Court has extended their judicial protection. But this cannot, in my opinion, be said with regard to the other examples cited by the author. I have shown elsewhere<sup>18</sup> that the Court's jurisprudence does not support Dr. Bebr's conclusion that "the Court has so far interpreted an individual act rather liberally to the detriment of a general act so as to ensure the widest possible judicial protection of individuals" (p. 42). I wonder, furthermore, whether Dr. Bebr's excellent analysis of some of the cases, which he cites apparently to substantiate his conclusion (pp. 42-48), does not invite a contrary conclusion? Dr. Bebr's view that the Court in interpreting the notion of an abuse of power, has widened "the right of appeal of private parties against general acts" is debatable.<sup>19</sup> I know of no case, and the author cites none, wherein the Court has annulled a general act in an action instituted by a private party on the ground of abuse of power.<sup>20</sup> Be that as it may, the Court's liberal policy of permitting private parties to invoke an exception of illegality does to a large extent compensate for what, in my opinion, has been a restrictive interpretation of the right of individuals to challenge general acts.

### III. INDIRECT JUDICIAL CONTROL

The third part of this book contains probably the most comprehensive and searching analysis of the myriad problems of conflict of laws and conflict of jurisdiction arising under the three Treaties to be found in the Anglo-American literature. To note only one of them here, we might refer to Article 177 of the EEC Treaty which provides:

The Court of Justice shall be competent to make a preliminary decision concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a

to set aside the resulting sanctions. It is an exception, because it may be invoked even though the time, within which such a measure could otherwise be contested, has already expired. See ECSC Treaty, Art. 36.

18. Buergenthal, *Appeals for Annulment by Enterprises in the ECSC*, 10 Am. J. Comp. L. 227, 247-51 (1961). It might well be that in proceedings under Article 35 of the ECSC Treaty the Court has been more liberal in its characterization of individual acts. See *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority*, Case No. 30-59, 7 *Sammlung* 1 (1961).

19. See Buergenthal, *supra* at 244-247.

20. See Bonaert *et al.*, *Fragen der Nichtigkeits- und Untätigkeitsklagen nach dem Recht der EGKS* 57 (1961), also indicating that the Court has never annulled a decision on that ground.

## BOOK REVIEWS

domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice.

Apart from the fact that it is not always easy in some of the Member States, particularly Germany, to determine the domestic court of final appellate jurisdiction, neither Article 177 nor any other Treaty provision furnishes a litigant in a municipal court with a direct method for appealing to the Community Court from a domestic tribunal's finding that the question before it need not be submitted to the European Court pursuant to Article 177. That this defect is by no means insignificant is well demonstrated by Dr. Bebr and the cases collected in his study. His suggestion that "courts of final appellate jurisdiction are always and under any circumstances bound to refer a preliminary question to the Court, whenever they consider a provision of the Community law" (p. 192), seems valid, qualified only by the possible exceptions which he himself postulates in the succeeding pages of his work. The ideal solution, but one which could probably not be put into effect without an amendment of the Treaties, was suggested by Professors Stein and Hay. They proposed "the development by the Community of a procedure similar to the writ of *certiorari* in American law whereby the Community Court on request of a party could direct the national court of last resort to submit to it the record."<sup>21</sup> It may be more apparent to American lawyers, accustomed to dealing with conflicting state and federal laws, than to their European counterparts, that the absence of a remedy in the nature of the writ of *certiorari* cannot but impede the Court's function as an instrument for the harmonization of law among the six Member States.

### IV. CONCLUSION

The preceding review has, of course, hardly scratched the surface of the various problems discussed in this book. While one might disagree with some of Dr. Bebr's conclusions, it should be emphasized that his book is a valuable contribution to the literature dealing with the Court of Justice. From it the reader gains a lawyer's perspective of the function which the Court performs as the ultimate arbiter of the rapidly growing Community law. What might have become a superficial survey under someone else's pen, has been presented by Dr. Bebr as a thorough analysis of many difficult substantive and intricate procedural questions confronting the Community Court.

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21. Stein & Hay, *supra* note 9, at 423.