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Hay: Federalsim and Supranational Organizations. Patterns for New Legal Structures.

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FEDERALISM AND SUPRANATIONAL ORGANIZATIONS. Patterns for New Legal Structures. By *Peter Hay*. Urbana: University of Illinois Press. 1966. Pp. 335. $7.50.

Few other events of legal significance have received as much recent attention in American law reviews as has the establishment of the three European Communities. In sheer volume, the American literature dealing with these supranational organizations probably exceeds all that has been written about them in the six Member States of the Communities. Yet, until the publication of the book under review, one topic—the nature of Community law and its relation to the domestic law of the Member States—has received relatively little attention in the United States.[1] On the other side of the Atlantic, by contrast, it has generated an intense scholarly debate.[2] We now have

1. For the most valuable American studies, see Buxbaum, *Incomplete Federalism: Jurisdiction Over Antitrust Matters in the European Economic Community*, 52 CALIF. L. REV. 56 (1964); Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491 (1965).

2. For the most recent symposia on this subject, see BRUGES, COLLÈGE D'EUROPE, DROIT COMMUNAUTAIRE ET DROIT NATIONAL (Semaine de Bruges) (1965); ZUR INTEGRATION EUROPAS (Hallstein & Schlochauer eds. 1965); *Aktuelle Fragen des europaischen Gemeinschaftsrechts*, 29 ABHANDLUGEN AUS DEM BÜRGERLICHEN RECHT, HANDELSRECHT UND WIRTSCHAFTSRECHT (Beiheft der ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 1965).

in Professor Hay's study a brilliantly searching and most comprehensive analysis of this subject. It is a scholarly achievement of first rank that is marred only by a syntax which is at times almost inscrutable.

Many of the problems which Professor Hay considers in his book have become of considerable practical importance in recent years. These problems have arisen primarily because Community law is increasingly affecting, and in some areas gradually displacing, national law as the source of private rights. This development has in turn produced a growing number of cases that cannot be decided without determining whether and to what extent Community law supersedes domestic law.[3]

The draftsmen of the Treaties establishing the European Communities no doubt intended to assure the supremacy of Community law on the domestic plane. For example, the Treaty Establishing the European Economic Community (EEC Treaty), which we shall take as our point of reference, empowers the Community that it establishes to enact legislation directly applicable within the Member States.[4] Many provisions of the Treaty, furthermore, are intended to create rights which are directly enforceable by individuals in the courts of the Member States.[5] In addition, the Treaty requires national courts to seek the Community Court's ruling before finally deciding controversies involving the interpretation of the EEC Treaty or the validity and interpretation of Community legislation.[6]

3. A number of cases are now pending before the Constitutional Court of the Federal Republic of Germany in which the constitutionality of that country's adherence to the EEC Treaty is in issue. See Hopt, *Report on Recent German Decisions*, 4 COMMON MARKET L. REV. 93, 94-95 (1966). See also, Costa v. Ente Nazionale per l'Energia Elettrica, 87 Foro Italiano, pt. I, 465 (1964), 3 COMMON MARKET L. REP. 425 (1964) [hereinafter cited as Costa v. E.N.E.L.], where the Italian Constitutional Court concluded that an Italian law enacted subsequent to Italy's domestic promulgation of the EEC Treaty would supersede an inconsistent provision of that Treaty. This thesis was rejected, at least as a matter of Community law, by the Court of Justice of the European Communities in Costa v. E.N.E.L., Case No. 6/64, 10 Sammlung der Rechtsprechung des Gerichtshofes [hereinafter cited as Sammlung] 1251, CCH COMMON MARKET REP. CT. ¶ 8023 (1964). For an extensive discussion of this landmark case, see Stein, *supra* note 1. The Community Court's decision in the *Costa* case builds on two earlier cases: Humblet v. Belgium, Case No. 6/60, 6 Sammlung 1163 (1960), reported by Buergenthal in 56 AM. J. INT'L L. 540 (1962); N.V. Algemene Transport-en Expeditie Onderneming Van Gend & Loos v. Netherlands Fiscal Administration, Case No. 26/62, 9 Sammlung 1, CCH Common Market Rep. Ct. ¶ 8008 (1963). The latter decision is analyzed by Riesenfeld & Buxbaum, *N.V. Algemene Transport-en Expeditie Onderneming Van Gend & Loos v. Administration Fiscale Neerlandaise: A Pioneering Decision of the Court of Justice of the European Communities*, 58 AM. J. INT'L L. 152 (1964).

4. Treaty Establishing the European Economic Community, March 25, 1957, art. 189 [hereinafter cited as E.E.C. Treaty].

5. The Community Court has not as yet had the opportunity of authoritatively identifying all the Treaty provisions that are likely to qualify as "self-executing" in nature pursuant to the test enunciated in the *Costa* and *Van Gend & Loos* cases. For a partial list of these provisions, see Hallstein, *Zu den Grundlagen und Verfassungsprinzipien der europäischen Gemeinschaften*, in ZUR INTEGRATION EUROPAS 1, 15 n.40 (Hallstein & Schlochauer eds. 1965).

6. E.E.C. Treaty art. 177. Article 177 *requires* domestic courts of last resort to seek

This institutional scheme seeks to safeguard the uniform domestic application of the Treaty and of the law enacted pursuant to it, and thus presupposes that, in the event of a conflict between Community law and national law, the former will prevail. The Treaty does not, however, empower the Community Court to invalidate domestic legislation or to set aside domestic court decisions; nor does it contain an unambiguous supremacy clause from which such powers might be inferred.[7] True, the Treaty does authorize the Community Court in actions instituted by the Community or by a Member State to find a State in default of the obligations that it has assumed by adhering to that instrument.[8] However, this authorization does not always help a domestic judge to resolve a conflict between domestic law and the law of the Treaty: he may be told by the Community Court that the national law may not supersede Community law,[9] and, at the same time, be faced with the provisions of his country's constitution which govern the domestic status of international agreements and which may compel the application of national law despite the fact that it conflicts with a provision of the Treaty, which, after all, is an international agreement.[10]

The problem becomes even more complicated once it is realized that the domestic status of international agreements varies considerably among the six Member States. In some of these States, treaties are accorded a normative rank equivalent to that of a statute and may therefore be superseded by later inconsistent domestic legislation[11] or be refused enforcement altogether if they conflict with the national constitution.[12] In other Member States, international agreements

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such a "preliminary opinion" from the Court of Justice. It also *empowers* but does not require lower domestic courts to make this request. See generally Tomuschat, *Die gerichtliche Verabentscheidung nach den Verträgen über die europäischen Gemeinschaften*, BEIRTRÄGE ZUM AUSLÄNDISCHEN *Öffentlichen Recht und Völkerrecht* No. 42 (1964).

7. The one provision which comes closest to being a supremacy clause is E.E.C. Treaty art. 189, which provides in part that Community "regulations [statutes of general applicability] . . . shall be binding in every respect and directly in each Member State."

8. E.E.C. Treaty arts. 169-71.

9. See Costa v. E.N.E.L., 87 Foro Italiano, pt. I, 465, 3 COMMON MARKET L. REP. 425 (1964).

10. For the domestic status of international agreements in the six Member States, see BEBR, JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 216-24 (1962); Stein, *supra* note 1, at 505-09. See generally Seidl-Hohenveldern, *Transformation or Adoption of International Law Into Municipal Law*, 12 INT'L & COMP. L.Q. 88 (1963).

11. This is true in Italy and in Germany. BEBR, *op. cit. supra* note 10, at 223; Menzel, *Die Geltung internationaler Verträge im innerstaatlichen Recht*, in DEUTSCHE LANDESREFERATE ZUM VI. INTERNATIONALEN KONGRESS FÜR RECHTSVERGLEICHUNG 401, 412 (Beiheft der RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1962). The same seems to be true in Belgium where this question has not as yet, however, been authoritatively settled. See Waelbroeck, *Le juge belge devant le droit international et le droit communautaire*, 2 REVUE BELGE DE DROIT INTERNATIONAL 348 (1965).

12. The constitutionality of international agreements and statutes may be challenged

take precedence over all prior and subsequent domestic legislation, but even in these states, treaties may in turn be superseded by later inconsistent treaties.[13] It is thus apparent that, if the EEC Treaty and the law promulgated pursuant to it are accorded the same normative rank on the domestic plane that other international agreements enjoy, conflicts may arise which national judges will in some cases have to resolve against the application of Community law. Such a result would "shake the very foundations of the Treaty."[14] If, on the other hand, it can be shown that it is erroneous to equate Community law with conventional international law, it would be possible to contend that the domestic application of the Treaty should be governed by rules other than those traditionally invoked to resolve conflicts between national law and treaty law. The book under review furnishes the conceptual basis for this latter approach.

Professor Hay starts with the premise that an analysis of the functions which the Treaty assigns to the Community in relation to its Member States is the key to an understanding of the legal nature of the Community and its law. Such an analysis reveals, in his opinion, the *federal* character of the Community and its law. This characterization assumes that the Treaty, to the extent that it empowers the Community to exercise its functions free from domestic law interference, has endowed the organization with federal law-making powers to promulgate Community law that has a directly binding and a pre-emptive effect within the Member States. The existence of these powers can only be explained, so the argument runs, by recognizing that the Member States have transferred to the Community those sovereign powers which they previously possessed over the substantive areas now covered by the Treaty. It is in "the concept of a transfer of sovereignty" that "the legal-analytic counterpart of the political-descriptive notion of supranationalism" is to be found (p. 69).

To reach this conclusion, Professor Hay rejects the traditional notion that sovereignty is an inalienable attribute of statehood. Sovereignty to him is a "collection of powers." "The possession of these powers as a sum, either with respect to a given populace, or territory, or substantive area of activity, or all, may be shared by two or more institutions, or states or a combination of them." Thus understood,

in Germany and Italy, but not in Belgium whose courts lack the power of judicial review. See authorities cited note 11 *supra*.

13. This is the case in the Netherlands, Luxembourg and apparently also in France. For the Netherlands, see Van Panhuys, *The Netherland Constitution and International Law: A Decade of Experience*, 58 AM. J. INT'L L. 88 (1964); for Luxembourg, see Pescatore, CONCLUSION ET EFFET DES TRAITÉS INTERNATIONAUX 105-07 (1964); for France, see Lagrange, *La Primauté du Droit Communautaire sur le Droit National*, in BRUGES, COLLÈGE D'EUROPE, *op. cit. supra* note 2, at 21, 33-42.

14. Conclusions of Advocate General Lagrange, Costa v. E.N.E.L., 10 Sammlung 1279, 1291, CCH COMMON MARKET REP. CT. ¶ 8023, at 7394, 7398 (1964).

sovereignty is divisible and "since a given state presumably has the totality of sovereign powers applicable to it initially, the sharing in this sum by other states or institutions will be accomplished by a transfer of some of these powers" (p. 70). In the substantive areas to which the Treaty applies, if one accepts the transfer-of-sovereignty thesis, the Community possesses both "external" sovereignty and internal pre-emptive jurisdiction, or, as Professor Hay would put it, "supreme power over the specific subject matter" that was transferred. He illustrates this proposition by showing that "a transfer to the Common Market of national jurisdiction in the field of commercial policy substitutes EEC jurisdiction for that of the member states for purposes of the internal law of the Community; it also substitutes . . . the Community for the members as the proper party in dealings with third states in the international legal community" (p. 72).

According to Professor Hay, this transfer of sovereign powers furnishes the conceptual basis for the resolution of conflicts on the domestic plane between national law and Community law in favor of the latter. "The assumption of a transfer of sovereign powers to the Community requires the conclusion that the legitimation for any given norm of Community law in the substantive areas in which powers were transferred cannot be sought any longer in national constitutional law." Because the Treaty is "the ultimate legitimation for Community law . . . it has replaced national law as the legitimation for the given substantive norm." From this "it follows that national law which is inconsistent with the Community norm must yield, because it lacks, by definition, constitutional legitimation" (p. 181). The transfer of sovereign powers does not, in Mr. Hay's view, deprive the Member States of legislative power over the substantive areas that were transferred. This would be to confuse legitimation with legislative competence, and would be difficult to reconcile with the Treaty which, with regard to many questions, either merely authorizes future pre-emption by Community law or contemplates the exercise of concurrent legislative jurisdiction. As a matter of fact, "it is in this allocation of jurisdiction between two systems (Community and national), rather than in the shift *in toto* from one to the other, that the federal principle is realized" (p. 184).

The proposition that the Member States by adhering to the Community Treaties have relinquished the soverign powers necessary to deny the internal supremacy of Community law is not new. Its articulation is usually ascribed to Professor Carl Friedrich Ophüls,[15] who represented West Germany in the negotiations leading to the establishment of the EEC and served as legal adviser to the German delegation during the drafting of the ECSC Treaty. Ophüls' view enjoys

15. Ophüls, *Quellen und Aufbau des Europäischen Gemeinschaftsrechts*, 16 NEUE JURISTISCHE WOCHENSCHRIFT 1697 (1963).

considerable scholarly support in Europe,[16] although it has equally respectable critics even in Germany[17] whose constitution,[18] by expressly authorizing the transfer of sovereign powers to international organizations, invites the argument that the Community Treaties have in fact accomplished such a transfer. It would, however, belittle the actual value of Mr. Hay's study to say that he has made the most persuasive case yet in support of the view which Ophüls has only asserted, although that in itself is a considerable accomplishment. On the contrary, the real contribution of the book, in addition to its extremely thorough analysis of the "federal" structure of the Communities and of the constitutional problems inherent in such structure, is to be found in Professor Hay's imaginative modification of Ophüls' thesis. Ophüls assumes that the transfer of sovereign powers to the Communities extinguished whatever law-making powers the Member States possessed over the substantive areas that were transferred. He therefore denies that conflicts between Community law and national law pose conceptual problems, since if the national legislature lacks the power to legislate in the substantive areas regulated by the Treaties, a domestic law encroaching thereon is *ipso facto* a nullity.[19] This is an appealing argument. It is not, however, compatible with the pre-emption-oriented scheme of the Community Treaties. Professor Hay's conclusion—that the transfer of sovereign powers has merely shifted to the Communities the power of constitutional legitimation in the areas transferred which the Member States previously enjoyed—assures the desired Community law supremacy without distorting the "federal" scheme of the Treaties. It also avoids the untenable assumption, which is implicit in Ophüls' approach, that during the long period of transition from partial to total Community law pre-emption there must exist a legislative vacuum which the states may not fill.

It must, of course, be recognized that Professor Hay's conclusion that the Community Treaties have effected a transfer of sovereign powers is one of a number of possible theories that might reasonably be advanced. That is to say, the Treaties permit the assumption that

16. See, *e.g.*, Lagrange, *supra* note 13, at 23-26.

17. See Ipsen, *Das Verhältnis des Rechts der europäischen Gemeinschaften zum nationalen Recht*, in *Aktuelle Fragen*, *supra* note 2, at 1, who identifies four distinct German approaches to this question and concludes that Ophüls' views are by no means representative of German scholarly opinion. *Id.* at 8.

18. GRUNDGESETZ art. 24(1) provides: "The Federation may, by legislation, transfer sovereign powers to international organizations." Similar, but by no means as explicit, provisions for the transfer of sovereign powers may be found in the constitutions of the Netherlands (art. 67), Italy (art. 11), Luxembourg (art. 49 *bis*).

It should be noted, however, that even in Germany it is by no means clear that article 24 of the *Grundgesetz* permits the transferee to exercise the powers that were transferred free from the restraints of the constitution. See Ehle, *Verfassungskontrolle und Gemeinschaftsrecht*, 17 NEUE JURISTISCHE WOCHENSCHRIFT 321 (1964).

19. Ophüls, *supra* note 15, at 1699 n.10.

such a transfer has occurred, but they do not compel that conclusion. One could contend, for example, that the Member States have merely assumed an international obligation to remove all constitutional obstacles interfering with the domestic implementation of Community law, and that such an undertaking cannot, without the requisite constitutional revisions, empower national courts to disregard domestic constitutional imperatives. As a practical matter, however, these internal legal obtacles could not always be overcome as rapidly as the uniform application of Community law demands. To the extent that the thesis advanced by Professor Hay provides a sound conceptual basis for the domestic implementation of Community law free from these troublesome constitutional impediments, it serves useful purposes: it assures a smooth and orderly evolution of Community law, and, what may well be more important, it enables those European judges who find themselves increasingly hard pressed to explain and sustain the internal supremacy of Community law to achieve a result to which their governments are politically committed. Whether they will choose this road is ultimately a political rather than a legal question.

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