

EUI — Series A — 2.1.2
Cappelletti/Secombe/Weiler (Gen. Eds.)
Integration Through Law
Vol. 1: Cappelletti/Secombe/Weiler (Eds.),
Methods, Tools and Institutions
Book 2: Political Organs, Integration Techniques and Judicial Process

European University Institute
Institut Universitaire Européen
Europäisches Hochschulinstitut
Istituto Universitario Europeo

Series A

Law/Droit/Recht/Diritto

2.1.2



Badia Fiesolana — Firenze

Integration Through Law

Europe and the American Federal Experience

A Series under the General Editorship of

Mauro Cappelletti · Monica Seccombe · Joseph Weiler

Volume 1

Methods, Tools and Institutions

Book 2

Political Organs, Integration Techniques and Judicial Process

edited by

Mauro Cappelletti · Monica Seccombe · Joseph Weiler



1986

Walter de Gruyter · Berlin · New York

Library of Congress Cataloging-in-Publication Data

Main entry under title:

Integration through law.

(Series A, Law / European University Institute = Series A, Droit / Institut Universitaire Européen ; 2.1.-)

Includes index.

Contents: v. 1. Methods, tools, and institutions. bk. 1. A political, legal, and economic overview. bk. 2. Political organs, integration techniques, and judicial process. bk. 3. Forces and potential for a European identity -- v. 2. Environmental protection policy / E. Rehlinger and R. Stewart.

1. Law--European Economic Community countries.

2. Law--United States. 3. Federal government.

I. Cappelletti, Mauro. II. Seccombe, Monica. III. Weiler, Joseph, 1951- . IV. Series: Series A--Law ; 2.1, etc.

KJE5075.I58 1985

340'.2 85-16320

ISBN 0-89925-110-2 (U.S. : v. 1.2)

342

CIP-Kurztitelaufnahme der Deutschen Bibliothek

Integration through law : Europe and the American federal experience / a ser. under the general editorship of Mauro Cappelletti . . . - Berlin ; New York : de Gruyter

(European University Institute : Ser. A, Law ; 2)

NE: Cappelletti, Mauro [Hrsg.]; Istituto Universitario Europeo (Fiesole): European University Institute / A

Vol. 1. Methods, tools and institutions.

Book 2. Political organs, integration techniques and judicial process / ed. by Mauro Cappelletti . . . - 1985.

ISBN 3-11-010462-8

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Dust Cover Design: Rudolf Hübner, Berlin. — Setting: Satz-Rechen-Zentrum, Berlin.

Printing: H. Heenemann GmbH & Co., Berlin.

Binding: Verlagsbuchbinderei Dieter Mikolai, Berlin.

Printed in Germany.

Preface

The Florence Integration Through Law Series is the product of a research project centered in the Law Department of the European University Institute, and as such it reflects the research interests of the Department: it is a contextual examination of European legal developments in comparative perspective. In the general introduction to the Series (published in Book One of this volume), we explained fully the philosophy, methodology and scope of the Project. Here we wish merely to recapitulate some of the principal themes in this volume and to explain its relation to the entire Project.

The European Legal Integration Project set out to examine the role of law in, and the legal impact of, integration in Europe, using the United States federal system as a comparative point of reference. The Project was conceived and executed in two parts. In Part One (published in Volume I) a number of teams of American and European scholars examined a wide range of legal techniques and mechanisms for integration and undertook an overall general analysis of law and integration. The first book of Volume I ("A Political, Legal, and Economic Overview") establishes the comparative and interdisciplinary context, providing background studies on the political, legal and economic implications of integration in Europe and America and including studies on other federal systems (Australia, Canada, Germany and Switzerland) to add comparative perspective. In this second book the contributors analyze the pre- and post-normative stages of the legal process, examining the decision-making and implementation problems, and the role of political and judicial organs therein, and describing the various forms of normative techniques available in a federal or supranational context.

The third and final book of Volume I ("Forces and Potential for a European Identity") focusses on how the law can be harnessed to promote the governmental or integrational objectives of union. It isolates for consideration some substantive goals (foreign policy, free movement of goods and persons, human rights protection and legal education), in order to elucidate the ways in which law has been or can be used to promote substantive objectives. This approach is more fully developed in the studies in Part Two of the Project which deals in greater detail with substantive areas of federal/transnational policy and is open-ended. To date monographs have been planned in the following five areas: environmental protection, consumer protection, harmonization of corporation law and capital markets, energy policy, and regional policy. It is hoped that further studies may be undertaken in the future.

Florence, December 1984

M.C., M.S., J.W.

Acknowledgements

This is one of several volumes on "Integration Through Law: Europe and the American Federal Experience" being published under the joint sponsorship of the European University Institute and the Ford Foundation, which together funded an international research project on "Methods, Tools and Potential for European Legal Integration in Light of the American Federal Experience" co-directed by Professors Mauro Cappelletti and Joseph Weiler. The Project, headquartered at the European University Institute in Florence, involved the participation of over forty scholars mostly from Europe and America. In addition to thanking the European University Institute and the Ford Foundation which were the principal sponsors, the Project Directors would like to express their gratitude to the Institutions of the European Communities, particularly the Commission, whose contribution has been most encouraging. A special acknowledgement is due to Professor Martin Shapiro of the University of California at Berkeley, who coordinated the American contributions to the Project, and also to the following law graduates who acted as Associate Editors:

Robert Helm	Karen Burke
Gwendolyn Griffith	Grayson McCouch
Deborah McIntyre	William Skrzyaniarz
Betty Meshack	Robert Wise
Bruno de Witte	Christopher Bertics

Finally we acknowledge our debt to the Project secretaries: Evie Valerio, Marie-Ange Catotti and Lisa Alisi.

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Part I

Community Policy-Making and Implementation Processes

The Political Organs and the Decision-Making Process in the United States and the European Community

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I. Introduction

Comparing the political systems and the decision-making processes of the European Community and the United States presents difficult conceptual and practical problems.

The conceptual problem is easily stated. Whereas since the mid-1960's legal developments in the EC have exhibited trends following those evolved in more sophisticated federal systems, in the forms of political institutions and decisional processes there remains a wide, seemingly unbridgeable gap between the two types of polities. To begin with, the EC was not conceived as, and is not in practice, a national government. Second, we are dealing with systems of institutions at widely divergent stages of their evolution: one, a mature and highly developed (though still evolving) entity; the other, still in the process of discovering, inventing or stumbling toward basic modes of dealing with characteristic problems. Finally, we must note that even insofar as political institutions resemble those elsewhere, or even are consciously borrowed from another system, the new setting in which they are placed makes and distorts them into something different. The U.S. Senate was never a House of Lords, and the European Court of Justice differs as much or more from the Supreme Court of the U.S. as it resembles it. Comparisons between the world of the 1780's

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The authors would like to thank Robert Helm (J. D., Stanford University, and Research Fellow, EUI, Florence) for his valuable help in editing this paper. They would also like to acknowledge the contribution of Sieglinde Schreiner (Researcher at the EUI, Florence) who programmed the statistical analysis.

and that of the 1980's are a specialized, though not negligible, aspect of this problem.

The practical-didactic problem is even more self-evident. Few political institutions and processes have attracted more scholarly attention than those of the American form of government; and no venture in transnational integration has been subjected to such close scrutiny as the European Community. It would indeed be all too easy to make of this study nothing more than a facile comparison between incomparables – a potted version of American and European political scholarship for European and American audiences respectively.

How then have we tried to overcome these two problems? It is easier to explain first what we have not done: we have not tried to develop a systematic, issue-by-issue comparison between the two sets of political institutions and decisional processes. Not only would this be futile, but it would probably be rather boring as well. Further, we have not even tried to present a single and evolving thesis deriving from the comparative analysis. If such a unified view exists, it has eluded us. Instead, we focus on a series of issues, methodological and substantive, the principal connection between them being in our view their centrality to an understanding of the political institutions and decisional processes. This study certainly takes its cue from the title of the Project: *European Integration in Light of the American Federal Experience*. The emphasis is on Europe. Thus, for example, we present for the first time the interim results of an empirical study of Community decision-making and analyze at some length problems of *implementation* of Community policy in relation to decision-making. The American experience is decidedly a background to these two components.

At the same time, we have tried to play the differences between the two systems to our advantage. We imbed our analysis in both a theoretical and historical discussion in which we deal as best we can with the problems of trans-historical and trans-cultural comparison, and in which we also recognize, at very least, the dynamics of system change. Moreover, not only has the American model provoked us to ask many questions about Europe, but we frequently found ourselves questioning accepted wisdom about federations in general and the U.S. in particular in the light of the European analysis. We sincerely hope that both Europeans and Americans will find at least some modest new insight into their respective systems.

Our discussion begins with a survey of the present state of so-called "integration theories" and concludes that, although the theories may have proven to be inadequate, outdated, or just plain wrong, this fact may not only be in some sense liberating but also may have little to do with the continuing integration process itself – although it may still not be clear just what *is* the nature of the process set in motion by the creation of the European Communities.

In the second major component, we offer some comparative reflections on the various institutions of governance in the two systems. In the interests of keeping an already long text within a non-outrageous (or barely tolerable) length, we have not attempted an exposition or flow chart of basic processes, which are already obtainable in American government texts such as Burns and

Peltason's *Government by the People*¹ or EC manuals such as Roy Pryce's *The Politics of the European Community*;² furthermore, in reliance on other studies in these volumes,³ we have omitted a discussion of the court systems.

Following this conceptual reflection we include extensive and detailed, albeit preliminary, findings of an empirical study on Community decisional output. The Community malaise has been encapsulated in the notion of *lourdeur* – an alleged general slowdown in the Community decision-making processes. Our investigations reveal the dangers of generalization. A Community malaise no doubt exists, but its source may not be that most commonly indicated. The empirical study leads us to reassess more positively not only the role of the Commission but also of COREPER – for many, the true “culprit” responsible for the alleged European weakness.

Although most political analysis of intra-Community processes has tended to focus on policy-making, we feel that the post-decisional phase has been unjustifiably neglected. We would suggest that the question of implementation and application of policy, once adopted, is no less important, and that any erosion of the *acquis* through non-implementation or wrongful application is as dangerous to the Community as the failures of the decision-making process itself. We therefore devote considerable attention to the implementation problem. We try to give some indication of ways of identifying the problem, its magnitude and some suggestions for tackling it. Naturally our contribution can be considered as no more than a pilot study. We have not attempted to present anything of similar scope for the U.S. since that material is both more generally available,⁴ and, in any event, original studies in that system would go beyond the scope of the present effort.

Our study does not have conclusions in the classic sense of the word. Instead, we end with some general reflections on the two systems. We have not solved the problem of comparing systems at different stages of development. To our knowledge at least, political studies generally have not developed any notion of political dynamics that would aid us in that venture. The least we can

¹ J. M. BURNS & J. W. PELTASON, *GOVERNMENT BY THE PEOPLE* (11th ed., New York, Prentice-Hall, 1981).

² R. PRYCE, *THE POLITICS OF THE EUROPEAN COMMUNITY* (London, Butterworths, 1973).

³ See Jacobs & Karst, *The “Federal” Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective*, *supra* this vol., Bk. 1; Cappelletti & Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, *infra* this book.

⁴ See, e.g., S. KRISLOV, *et al.*, *COMPLIANCE AND THE LAW: A MULTI-DISCIPLINARY APPROACH* (Beverly Hills, Sage Publications, 1972); A. WILDAVSKY & J. L. PRESSMAN, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL, THIS BEING THE SAGA OF THE ECONOMIC DEVELOPMENT ADMINISTRATION AS TOLD TO BY TWO SYMPATHETIC OBSERVERS WHO SEEK TO BUILD MORALS ON RUINED HOPES* (2nd ed., Berkeley, U. Cal. P., 1979).

claim for the exercise in comparison is that it forced us to ask questions other scholars have not typically asked and, therefore, we hope it led us to some atypical answers as well.

II. The Disintegration of Integration Theory

Sometimes even clichés prove false. The evolution of the European Community is a case in point. It has developed along lines quite independent of theories, predictions or extrapolations, and is at the same time both an enormous success and a palpable failure. Its future growth is problematic, and its contraction is possible. After two decades of dizzying economic achievements, at present the most promising growth areas are political, where its record has been much less impressive. While all its basic headquarters are housed in officially temporary – or even peripatetically rotating – locations, sentiment for its permanence extends to the proposed establishment of an ineffable symbol of sovereignty, the European passport. As Stuart Scheingold writes:

It is now clear that the original integrative goals are beyond the reach of the European Community . . . It does not seem to make much sense to continue asking whether, and in what measure, each new development furthers the integrative process. But if we turn away from what is, after all, the defining issue of integration studies, what questions *are* we to pursue?⁵

In the light of these deviations from theory, skeptics today question even more than earlier the relevance of analogies based on the American experience. Of course, in the 1950's Max Beloff questioned any applicability of the U.S. experience at all. Such a case is arguable, certainly, and to some even convincing. But we shall try to indicate the existence of some precedent even in the fitful and uneven development in the American chronology. To this end, we shall examine in rather great detail the contradictory development of American federalism, with its own unequal progress and more than occasional retreats. Rather than blindly assume parallels or superciliously reject them, we shall explore the differences and analogies in some detail and with considerable dissipation.

The major intellectual disillusion concerning EC development is hardly tied to the question of historical parallelism. Rather, it is disquiet with the failure of theoretical constructs to predict, outline, or in any way to resemble the evolution that has occurred, and the thwarting of the earlier confident expectations of experienced men of affairs. It is the failure-in-success, the completeness of the cycle, the fact that form has not followed function, that puzzles, perplexes and almost paralyzes the Community's well-wishers.

The dominant approach, foreseeing a gradual unfolding of cooperation, was set by visionary statesmen and down-to-earth theorists. The former saw

⁵ Scheingold, *The Community in Perspective*, 440 ANNALS 156–57 (1978).

step-by-step economic integration as a slow but sure road to more complete European integration. Just as the Coal and Steel Community had led to the more open-ended, integrative and governmental structures of the EEC, the future would see new stages and new growth.

The academic theorists were equally sanguine, but in many ways restrained by what they thought of as hard-headed appreciation of difficulties. They saw their guru in David Mitrany, the international relations expert and world integration visionary, who had argued against wild expectations, but instead advocated concentration on specific international tasks. By isolating those responsibilities that could be best carried out internationally, and building upon them, progress toward integration would be continuous with ultimate transmutation into new dynamic types of governmental forms. The name he gave to this approach was, appropriately enough, functionalism.⁶

The academic students of – and generally cheerleaders for – the EC accepted the general notions of functionalism, but even they found this approach to society-building naive. Writers like Haas, Lindberg and Scheingold⁷ suggested that government was not just a coral reef, built of little accretions of tasks and requirements. Calling themselves neo-functionalists, they suggested that it was necessary to isolate crucial functions and to secure the loyalties of strategic elites in order to transcend old boundaries and build new loyalties. Still their approach was vulgar-Marxist – as they seemed to follow the old adage, “get them by the pocketbook and their hearts and minds will follow.”

The integrationist critics of the functionalist approach saw all this as the fallacy of the farmer who, having been able to lift a growing calf over several weeks, was convinced he could ultimately lift a cow. Such writers as Alexandre Marc, the French authority on federalism, suggested precisely because of the *lack* of analogy to the American experience, that partial steps toward integration – analogous to the Articles of Confederation stage in America (1781 to 1789) – were inappropriate. He called for immediate federalism, a true new sovereignty.⁸ This purist conception is, of course, not limited to Marc. A thin stratum of intellectuals hold to such a dream. Even among them, however, few believe the conditions for such a strong development have existed in Europe or that the EEC pre-empted a greater unification. Rather, they would prefer to avoid half-measures, which they see as inevitable failures, to preserve the opportunity, when it should come, for a pristine and potent effort. Yet though they may feel comfortable in their original criticism – and they certainly have not become converts to neo-functionalism, which has to the contrary sus-

⁶ See D. MITRANY, *A WORKING PEACE SYSTEM: AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANISATION* (London, Royal Inst. of Int'l Aff., 1943).

⁷ See, e.g., E. B. HAAS, *THE UNITING OF EUROPE* (London, Stevens, 1958); L. N. LINDBERG, *THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION* (Stanford, Stanford U.P., 1963); S. SCHEINGOLD, *THE RULE OF LAW IN EUROPEAN INTEGRATION – THE PATH OF THE SCHUMAN PLAN* (New Haven, Yale U.P., 1965).

⁸ A. MARC, *L'EUROPE DANS LE MONDE* (Paris, Payot, 1965).