

## AN INTERVIEW WITH PROFESSOR ERIC STEIN

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The following interview with Professor Eric Stein was conducted by Professor Boris Kozolchyk and members of the staff of the *Arizona Journal of International and Comparative Law* in March, 1990.

Professor Eric Stein is a specialist in international law and his primary interest has been the European Community which he has studied from the very beginning of its existence. He is Hessel E. Yntema Professor of Law Emeritus at the University of Michigan.

*Question:* Professor Stein, please tell us about your legal biography.

*Prof. Stein:* My first legal education was at Charles University in Prague. I finished in 1937. After some legal practice, I went into the Czechoslovak Army, in which I stayed through my last assignment to a Prague unit. One day, namely March 15, 1939, I woke up in the barracks and went to the window and saw the German armored carriers in the barracks courtyard. It wasn't a very heroic resistance.

By an extraordinary set of circumstances, I got a visa for the United States at the American Consulate in Naples. This was in 1940. Years later, when I was on the staff of the United States Department of State, I recognized a colleague, then the American Ambassador designate to Pakistan, as the young vice-consul in Naples who had given me a student visa on his own responsibility and beyond his authority. In 1940 I was a refugee stranded in Italy. Only ten years later I had the privilege of serving on the American delegation to the U.N. General Assembly.

But going back where we left off. I arrived in the United States in 1940 and attended the University of Michigan Law School from 1940 to 1942. At the beginning I had some difficulty with the language, my law school notes for the first term were a mixture of Czech and English, but I fell in love with common law and managed to get on the Law Review. As a student at the Law School I was research assistant to Professors Hessel Yntema and Ernst Rabel, the leading German scholar in private international law, a refugee from the Nazis. For Professor Rabel, I checked citations in his monumental multi-volume treatise on comparative conflict of laws that was published by the Michigan Law School. A curious closing of a circle: some three decades later I was appointed to the Hessel E. Yntema chair at the Michigan law faculty.

At any rate, I went from the Law School straight into the American Army where I was trained in combat intelligence and was scheduled to take part in the Allied invasion of Sicily. By the time I completed my training, however,

the Sicilian campaign was over, so I was assigned to a unit in North Africa charged with the preparation of the Allied Military Government in Italy. This was after the Italians had concluded an armistice and the King with Marshal Badoglio escaped from the advancing German Army to Southern Italy. In Brindisi, a small port on the Adriatic, we helped the Marshal to organize the first non-fascist government of Undersecretaries. I remember calling on the Procurator General of Bari to discuss with him his appointment as Undersecretary of Justice: evidently a dutiful member of the fascist party, he became quite pale when he saw us coming in. We worked on the re-opening of the Italian courts in the war-ravaged South, checked the new Italian legislation and maintained liaison with the successive Ministers of Justice. After the Italians had become "co-belligerents" instead of enemies (we invented the concept of "co-belligerent") my group was turned into the Legal Subcommittee of the Allied Commission for Italy and we finally landed in Rome. I drew on this experience in my first legal publication, recounting the tragic dilemma that was faced by the Allied authorities in the wake of the notorious massacre at the village of Schio where the partisans killed a number of suspected fascists.<sup>1</sup>

One amusing episode. In the spring of 1944, this was in the Palace of Justice in Salerno, I was taking the usual siesta and was awakened by my boss, Colonel Richard Wilmer, who in civilian life was the Washington D.C. partner of Cravath and Swain and later co-founded the well known Washington firm of Wilmer, Cutler and Pickering. He told me that I had to write a decree providing for the abdication of the King of Italy. The King had previously agreed with the Allied Governments to withdraw in favor of his son as Regent (and grandson as the future King) as soon as the Allied forces entered Rome but he now refused to announce it. So, as a lawyer, I had to write it - in Italian. All I had to work with was a fascist treatise on constitutional law and the old Italian constitution, neither of which said anything about abdication. And at that point we were not free to consult Italian lawyers. Fortunately, perhaps under the impact of my Italian draftsmanship, the King changed his mind and his staff wrote and published the decree.

*Question:* Would you describe to us when you started working on the European Community and how?

*Prof. Stein:* As I mentioned earlier, after the war I joined the State Department, and was fortunate to be assigned to the brand new Bureau of the United Nations that was later renamed the Bureau of International Organization. These were the halcyon days of global institution-building and great hopes for one world under the rule of law. All we had in the Bureau was the

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1. E. Stein, Application of the Law of the Absent Sovereign in Territory Under Belligerent Occupation: The Schio Massacre, 46 MICH. L. REV. 341 (1948).

Charter of the United Nations, fresh from the San Francisco Conference, and the task was to organize the new institutions, the Security Council, the General Assembly and others. The Provisional Rules for the Security Council which we drafted at the time curiously enough are still in force today. This was in 1946. There were important problems and early successes - for instance, the Security Council managed to get the Soviet troops out of Afghanistan - but the erupting cold war had a profound effect on the organization and it turned into hot war in Korea. I recall the warm June days in 1950 when I was at one point on the phone between my boss in a meeting in the White House and the U.S. Mission to the United Nations in New York. It was only because the Soviets decided to boycott the Security Council that the United Nations was able to give its blessing to military action against the North Korean invaders.

It was, I believe, in 1950 that the United States appeared for the first time in its history before the International Court of Justice at The Hague and I was privileged to act as advisor to Benjamin V. Cohen, whom President Truman appointed the American representative in the case. Before that, Mr. Cohen, a brilliant lawyer, was a member of President Roosevelt's "braintrust." The Court was asked by the U.N. General Assembly to give an advisory opinion on charges of human rights violations by Bulgaria, Hungary and Romania. The proceedings didn't influence the Communist governments in Eastern Europe but they did have a noticeable impact on drafting dispute settlement clauses in international agreements.

To respond now to your question, it was in the Department in the early fifties that I began reading the dispatches from the American Embassy in Luxembourg which was the seat of the first incarnation of the European Community, the Coal and Steel Community, and I became intrigued by this enterprise from the very outset, not suspecting at the time that it would become the center of my professional life.

The aspect that interested me most was, understandably, the new Court of Justice which - as it has turned out - has played a crucial role in European integration. The Court delivered the first three opinions in December 1954. They dealt with an extremely technical problem of anti-competitive practices in the steel industry. Using these cases as a take-off point I wrote what turned out to be the first article ever to be written in English about the Court.<sup>2</sup> It was at that time I made a more or less conscious decision to focus on this development professionally.

One fortunate coincidence was the chance to meet the top lawyer at the Coal and Steel Community, Michel Gaudet. An extraordinarily talented Frenchman, he came through what they call "the great schools" of France which produce the cream of the French intelligentsia. At the time his position

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2. E. Stein, *The European Coal and Steel Community: The Beginning of Its Judicial Process*, 55 COLUM. L. REV. 985 (1955).

was that of the Director General of the Legal Service of the Coal and Steel Community. We met under amusing circumstances.

There was to be an international conference about peaceful uses of atomic energy in Geneva, Switzerland; it was planned as the first contact between nuclear physicists from the Communist East and the West. I was asked to act as political advisor to Admiral Strauss, the Chairman of the United States Atomic Energy Commission and the head of the American delegation to the conference. I was briefed in great detail in Washington because of the concern about security and leakage of information and the problem of controlling our own nuclear scientists in their talks with their Eastern European counterparts. As it developed, those two groups got together and completely ignored us. I had nothing to do. So I concentrated on my honeymoon (my wife and I got married a few days before our departure for Geneva), and on learning more about the Coal and Steel Community from Director General Gaudet who happened to be vacationing in France near Geneva. This took place in the summer of 1955, near the end of my assignment in the State Department.

Before leaving the Department of State, I called on the Secretary of State, John Foster Dulles, to say good bye. As we shook hands he said to me: "Until now when you spoke you were listened to because you spoke for the United States. But, in a classroom you will be speaking for yourself only." The implication being that I had better know what I was talking about. Strangely, however, I soon found out that whatever I said in class was promptly inscribed in class notes with only an occasional challenge.

*Question:* Tell us a little bit about what you did to organize courses at the University of Michigan, how it was received, the students you started getting, and the impact it had.

*Prof. Stein:* Well, the dean at Michigan was extremely interested in peaceful uses of nuclear energy, and in my experience in the State Department. At the tail end of my assignment in the State Department, I was detached from my Bureau to help draft the Charter of the new International Atomic Energy Agency that was eventually to be established in Vienna. It was a fascinating challenge, facing a blank sheet of paper with the task of envisioning a new international organization to deal on a global basis with the uses of a brand new, revolutionary technology. So when I moved to Michigan, the dean, who himself was involved in nuclear energy law, was eager for me to carry on this particular interest. We had a seminar in this field. At the time it was a very popular, important subject because of the expected benefit of the nuclear technology as a new source of energy and new tool in health and other sciences.

I had a student, Peter Hay, a very bright fellow of German origin. We put together the first set of teaching materials for a course called Law and

Institutions in the Atlantic Area.<sup>3</sup> At that time there wasn't enough material for a course or a seminar limited to the Coal and Steel Community. So we took in the General Agreement on Tariffs and Trade (GATT), NATO and the OEEC (Organization of European Economic Cooperation), the entire complex of economic, political and security structures in what we defined as the Atlantic area. That was the first book. Peter Hay, incidentally, has made a successful career in law teaching and has just retired as law dean at the University of Illinois.

As far as I know, we started teaching in this field in the late nineteen fifties, with this particular orientation, before any European law faculty. It was certainly the first law course taught in this country and probably in this Hemisphere. We began to get an increasing number European law graduates who were interested in the field but couldn't get any training in Europe. This, of course, made it much more interesting. In these courses, we usually had one-third to one-half Europeans along with American students. We continued on this basis for several years.

On the research side, we organized a joint American-European group of experts who agreed on a set of papers that would look at the European developments specifically from the viewpoint of American public and private interest. The group included officials from the Community, academics and lawyers from both sides of the Atlantic. In 1960, we came out with a two volume publication, entitled *American Enterprise in the European Common Market: A Legal Profile*.<sup>4</sup>

By 1962 - with the additional two Communities, the European Economic Community (EEC, the "Common Market") and the European Atomic Energy Community (EURATOM) in full swing, it became apparent to me that one could not get a true picture of the working of the new institutions by following them from a distance. The Common Market began to live its own life. When an organization, whether it is the United Nations or a private corporation, starts living its life, it is not enough to know about the charter or articles of incorporation. You really have to look at the "living law" of that particular creature. Because of the friendship with Michel Gaudet, who by that time had become Director General of the Joint Legal Service of all three Communities, I was able to make arrangements to have an office at the Commission and to function almost as a member of the staff. In ten months in Brussels I learned a lot and made a number of close friendships.

One episode remains particularly vivid in my mind. At the time, the Legal Service was engaged in preparing the executive Commission's position before the Court of Justice in what was to become the European counterpart

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3. E. STEIN & P. HAY, *LAW AND INSTITUTIONS IN THE ATLANTIC AREA, READINGS, CASES AND PROBLEMS* (1963). This was preceded by a preliminary text in xeroxed form.

4. E. STEIN & T. NICHOLSON, *AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE* (1960).

to *Marbury vs. Madison*, the celebrated *Van Gend and Loos* case.<sup>5</sup> The core issue was wrapped up in a trivial controversy over the customs duties on chemicals imported from Germany to the Netherlands. But the real issue was whether the constituent treaty of the Community was an ordinary treaty to be interpreted by the traditional rules of public international law or rather a quasi-constitution to be interpreted like a national proto-federal constitution. The legal staff was sharply divided between those who, like myself, were accustomed to think in terms of public international law and those who urged the quasi-federal approach. I confess that it took me some time to understand the historic implications of the controversy: the Court established the principle that Community law, not unlike our federal law, is directly applicable to citizens of the Community and it lay the basis for the next crucial step, the affirmation of the supremacy of Community law over conflicting national law of the Member States in the areas of the Community's jurisdiction. There is no supremacy clause in the Community Treaty but the Court created it by a judicial fiat which has been accepted by the national courts and governments. It provided an indispensable foundation for the development of a legal framework of the Common Market.

Coming back to the development of our program in Ann Arbor. By the late sixties there was already abundant legislative and judicial material coming from Brussels. There were several hundred judgments of the Court of Justice. Moreover, the idea of regional integration appeared to take a foothold in other parts of the world as a solution to economic as well as political problems. This was true in the Middle East, in some parts of Africa, in South East Asia but particularly in Latin America. So we felt we should take this potential into account in our new book which would serve both teaching and research purposes.

Let me digress to Latin America. I was invited by the Foreign Minister of El Salvador to come down with my wife to talk about the possibilities of a Common Market in Central America on the basis of an ambitious draft treaty. I thought that the possibilities for such an undertaking were anything but propitious at that particular point of time, just after the war between El Salvador and Honduras - the notorious "football war." I made two visits, the second in 1975. Shortly after that the Foreign Minister with whom I dealt was found murdered on the road outside the capital city San Salvador. At any rate, we thought we should take note in our new book of the attempts at regional associations particularly in Latin America. At the same time, the idea of an overarching Atlantic pattern was being replaced by the concept of a partnership between the United States and Europe, the "two pillars" idea as it was articulated by the Kennedy Administration. So we tried to meld these different strands, the growing European Common Market, Europe as a

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5. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E. Comm. Ct. J. Rep. 1.

possible model, and a partnership between the United States and Europe as "perspectives" for our new text which turned out to be quite widely used not only in the United States but also in Europe.<sup>6</sup> At that point we felt we needed help from a European scholar particularly in the anti-trust field and this is why we asked Professor Waelbroeck of the Free University of Brussels to join us. He worked with us also on the Supplement of some 500 pages, published in 1985. By that time, with Japan appearing on the scene, still new perspectives emerged in the complex triangular relationships of cooperation and competition that needed to be addressed with emphasis on commercial policy issues (e.g. anti-dumping) and treaty relations of the Community with non-member states. Moreover, the enlargement of the Community had significant impact that had to be noted: Britain, Denmark and Ireland joined the original Six (France, Federal Republic of Germany, Italy, The Netherlands, Belgium, Luxembourg) in 1973, Greece became the tenth member in 1981. Finally, in 1986, Spain and Portugal were admitted as the eleventh and twelfth members respectively. So that you now have a Community of twelve comprising some 325 million people. It is quite a different enterprise from what it was when we published our first text.

Obviously, the teaching program at Michigan has gone through substantial changes. The basic course which now continues through both terms is entitled "Trading in and with Europe." It is a six-hour course and it is taught by Professor Joseph Weiler who was trained in England and at the European University Institute in Florence. He succeeded me after my retirement. There is a seminar in the general field and a course on the Common Market competition policy taught by an economist. There is also at least one European visiting professor teaching a course or seminar each year.

Our research program as well as my own teaching have been marked from the outset by an emphasis on the American interest in the European developments in a broad, cooperative sense of the word, and it has been consistently comparative, projecting the European story not only against the American federal experience, but also against various disciplines of American public and private law. Here is an example. I mentioned earlier our group study on the American enterprise in the Common Market. Twenty years later, we organized another group, including members of the United States Supreme Court, the Court of Justice, American and European academics and practitioners who produced two volumes on the role of the courts in the continent-wide markets on both sides of the Atlantic.<sup>7</sup>

At this point, European Michigan alumni hold important positions at the Common Market Commission in Brussels, at the Commission of Human Rights in Strasbourg, in national governments, industry and in law practice

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6. E. STEIN & P. HAY, M. WAELEBROEK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* (1967).

7. T. SANDALOW & E. STEIN, *COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* (1982).

throughout Europe. Last spring the Law School held a reunion of its European alumni in Florence. I chaired a panel on "Europe 1992" composed of prominent representatives of three decades of our graduates and four distinct legal careers. My wife and I were deeply moved when more than 150 persons attended the dinner which was billed as a celebration of my 75th birthday.

*Question:* When did you get interested in the impact of the Common Market on private law?

*Prof. Stein:* In its earliest years Common Market law was predominantly what you would classify as public law, mostly administrative or constitutional law. The purpose was to do away with national legislation and administrative provisions and practices in the Member States that inhibited free movement of goods, workers, entrepreneurs and capital throughout the territory of the Community - the proverbial "four freedoms." As a corollary, national customs tariffs on goods coming from outside the Community had to be gradually replaced by a common external tariff, similar to our federal tariff. So the normative impact was generally in the regulatory area, the public law. But beyond the core of the objectives I have just described, that is the building of "a customs union," there were additional features, including the Community-wide law on competition and - connected with it - harmonization of national laws where the differences among these laws caused distortions of competition or made the realization of the four freedoms more difficult. One such provision in the EEC Treaty section on the freedom of establishment calls for harmonization, actually the term used is "approximation," of national company laws, the idea being that reducing the differences among these laws will facilitate the "freedom of establishment." In other words, the differences among company laws should be reduced to a point where company management would not have to worry about them in a situation where for instance a German company would want to organize a subsidiary in France or when a French investor wants to buy shares in a German company. The decisions should be made on the basis of the relevant business considerations rather than for example on the ground that the French or German law provides greater or lesser protection for shareholders. That is the idea of the Treaty. In a way the State Commissioners on Uniform Laws in this country pursue a similar objective in a great variety of American law fields. On the basis of this Treaty provision the executive Commission proposed an ambitious scheme of Community legislation (so-called directives) designed to bring about the modifications it considered should be made in national company laws.

I became interested in this phase of the Community work precisely because it represented really the first inroad into a crucial area of private law. While in Brussels, I was able to sit in meetings of the working group



elaborating one such Community directive. The group was composed of the leading company law specialists from the Member States - academics, officials and practitioners - and it was chaired by a staff member of the Commission. I had the impression of sitting in a most advanced seminar on comparative company law. At the time, this activity was given low priority by the politicians - there were urgent demands on the Community resources, so the program was very slow. I related the laborious progression toward enactment of the proposal for the first directive, dealing principally with formal requirements of incorporation, in my book that was published in 1971.<sup>8</sup> With the "Europe 1992" project, the activities in this field have accelerated sharply particularly with respect to regulations of corporate securities, accounting systems and new Community-wide forms of companies.

*Question:* Would you like to comment on the importance of the "Europe 1992" project in the light of the Community's past and speculate about the future?

*Prof. Stein:* A Dutch scholar has compared the European integration movement with the never-ending process of building a cathedral: spurts ahead alternating with stagnation, followed by leaps forward. And what is often overlooked or denied, is the political component in the economic integration, the objective of "an ever closer union among the people of Europe," in the words of the preamble to the EEC Treaty.

Looking first at the early accomplishments: we should note the success in removing - ahead of the 1970 deadline - the internal custom duties or tariff barriers on the movement of goods and setting up a common external tariff I mentioned earlier as the principal instrument of the common trade policy toward the outside world. National agricultural regulations were replaced by Community market organizations that have posed - as you undoubtedly know - some problems to American agricultural exporters. Progress was made on the other three of the "four freedoms": movement of labor, services, companies, and capital across national lines, and a common commercial policy. But a lot of so-called non-tariff and other barriers remained as obstacles to a genuine home market. Also, little was achieved toward coordination of national economic and monetary policies. One saw a distinct slowdown in the development by the mid-seventies - a distinct stagnation phase - with the Community institutions occupied by disagreements over the budget, the expensive agricultural policy, the admission procedures of new members I just talked about. Add to that the economic recession which made it difficult for governments to make the unpopular concessions necessary for further progress. The law-making machinery was seriously hampered, if not out-

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8. E. STEIN, HARMONIZATION OF EUROPEAN COMPANY LAWS NATIONAL REFORM AND TRANSNATIONAL COORDINATION (1971).

right blocked, by the unanimity required in the voting of the central law-making organ, the Council.

Several initiatives emerged: on the political side the European Parliament which - despite its title - performs essentially an advisory role in law-making, came up with a draft of a far-reaching new treaty for a "European Union." This, however, was for all practical purposes ignored by the Member Governments. On the economic side, an ambitious move was initiated by the President of the Community's Commission, Jacques Delors, with the help of his colleague, the British Commissioner Lord Cockfield and with the broad support of European business.

This was the "Europe 1992" project that did not zero in on radical institutional restructuring as did the ill-fated draft of the European Parliament. On the contrary, it concentrated on breaking down the regulatory, tax, and other barriers to a home market which still continued at a tremendous cost to government treasuries and to the public. This cost was quantified in a monumental research project commissioned by the Commission, the Cecchini Report. The authors of the report figured out, for example, how many hours it took for a truck to run from Dublin to Naples, how many hours of the driver's time are lost by the formalities at the frontiers and how much money could be saved by reducing the formalities and ultimately getting rid of any control at the internal frontiers. The core of the project, however, was the Commission's White Paper on "Completing the Internal Market" of June 1985 which offered some 300 pieces of legislative proposals (later reduced to 279) to be in force by the year 1992. That's where the 1992 comes from. The legal-institutional underpinning was provided by a new treaty negotiated by the Member States that came into effect on July 1, 1987. It amends the Community Treaties by removing the unanimity requirement in the Council with respect to most matters concerning the internal market, it sets the 1992 deadline, increases the influence of the European Parliament somewhat by introducing a procedure for a "second reading" and it confirms and broadens the Community competence in what we call "second generation policies," environment, research and technology. It also incorporates, and provides a treaty basis for the European Political Cooperation, a mechanism for a concertation of national foreign diplomatic policies which is obviously crucial for any future European Union, whatever final shape it may take.

Let me say that a large portion of the legislative program proposed in the White Paper has already been realized or is in the process of enactment, although some essential pieces, particularly in the field of indirect taxes, are still controversial. So for instance, capital will move freely throughout the Community starting as early as next July. The principal targets are harmonization of technical, health and safety standards, freeing access to services such as banking, insurance, brokerage, road and air transportation, government procurement and telecommunications. Obviously, the citizens of the

Community and companies established in the Community are the principal if not the sole beneficiaries and this may cause some competitive disadvantages for American companies. Some progress seems in the making on the economic and monetary union that is to involve ultimately common currency. The European, and for that matter non-European business appears to be responding to the new opportunities by substantially increasing investment in Europe and by manifold cross-frontier arrangements and ventures.

In one sense you may say that "Europe 1992" is little more than a very effectively orchestrated move toward accomplishing what, according to the EEC Treaty, should have been accomplished on the last day of 1969. But in fact - if one thinks of an analogy with the United States - it would be comparable to a massive modification of federal and state regulatory legislation.

With almost three years to go to the end of 1992, we can safely say that the Community has moved into a new, active phase of integration.

Be that as it may, this interview is supposed to be a contribution to a biography. Let me point to another closing of a circle and to a paradox. Here in Tucson I have completed a legal opinion in a case concerning important American interests in Europe and I have just started working on a paper for a conference in Prague requested by the new Czechoslovak government to discuss the draft of a new Czechoslovak federal Constitution. This means for me a reinvolvement in Central Europe after a severance of over half a century - the closing of this particular circle. And the paradox is between the progressively integrated, prosperous Western Europe and the liberated but impoverished Central-Eastern Europe with all the old divisive ethnic conflicts reviving in the wake of the disintegration of the Soviet empire.



