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1998

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Recommended Citation

George Bermann, *Comparative Law in the New European Community*, 21 HASTINGS INT'L & COMP. L. REV. 865 (1998).

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Comparative Law in the New European Community

By GEORGE A. BERMANN*

I. Introduction

As a member and leader of America's immediate post-war generation of comparative lawyers, Rudolf Schlesinger viewed the then European Economic Community (Community) as an unprecedentedly important arena for the theory and practice of comparative law. He was right in doing so. As we know, the Community initially faced the prospect, among other things, of harmonizing the laws of six continental European countries, representing distinct branches of the European civil law tradition. Then, within a dozen years, the Community expanded to pick up members that stood on the outskirts of the European civil law tradition (Denmark) and squarely within the common law orbit (United Kingdom and Ireland).

For contemporary legal academics (particularly those trained in European law) who were looking to put the theory and instruments of comparative law learning to practical and meaningful use, a better opportunity could hardly be imagined. Legal integration on this ambitious scale promised—or rather threatened—to require a detailed comparison among the substantive laws of the Member States in comparative law's favorite context: law reform. From a substantive law point of view, the Community faced a good deal more than the prospect of aligning their external tariffs. They faced the prospect of a larger convergence. From the start, the notion of a European market without internal barriers raised broad prospects for harmonizing national economic law in a potentially bewildering range of policy areas. It became commonplace for Community law to justify virtually any harmonization measure under article 100 (and later article 100a)

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of the Treaty of Rome or, if need be, under article 235, the implied powers provision. Thus, the opportunities for law reform through the comparative method, whether practiced among civil law systems or between civil and common law systems, appeared to be practically boundless. It is a small wonder that the Community looked not only like a bold political and economic experiment, but a true comparative law adventure!

This strikes me as a perfect occasion to reflect on the nature of the comparative law enterprise in the Community in which Rudolf Schlesinger played such an important part. I do not purport in these remarks to have formed a view that is in any sense definitive for me, much less for the many others among us who have witnessed and even participated in it. However, I am prepared to venture a couple of ideas.

II. The Role of the Civil Law and Common Law Distinction in the Community's Legal Integration

As to the significance of the civil law-common law distinction in the Community's legal integration, comparatists simply may have expected too much. In retrospect, there are several reasons why the necessity of reconciling civilian and common law thinking was less urgent in the Community lawmaking process than initially envisioned, even with the eventual accession of common law members.

First, the Community sprung up fully on civil law soil and developed its legal foundations without any direct influence from a common law Member State, because there were none. In the first expansion, the Community took on a small minority of common law Member States. Subsequent expansions did not increase the common law presence, nor are there prospects for their doing so in the future.

Second, and more basic, Community law primarily developed in legal fields for which the civil law-common law distinction is simply not a highly relevant one. It is not that Community law is only about tariffs and taxes—fields for which the distinction indeed has little if any significance—because it is not. Community law is, however, mainly about economic regulation, and it is far from clear that economic regulation in the contemporary European nation-state has much to do with civil law concepts or even with civil law methods. With the rise of subsidiarity thinking, it is even less likely than before that Community law will develop in fields close to the civil or common law core of any State.

III. The Subordination of a "Neutral" Harmonization or Convergence of National Law to the Community's Pursuit of Its Own Agenda

The experience of the last forty years also shows that pursuit of a "neutral" harmonization or convergence of national law has consistently been subordinate to the Community's pursuit of its own distinctive, policy-driven legislative agenda. In retrospect this, too, should not come as any surprise. The Community's legal construction was not supposed to be an abstract exercise in comparative law. Frequently, Community law pursues objectives that may or may not correspond to the objectives of the national laws upon which it is superimposed. Competition law is the most obvious example.

Even where convergence of national laws was consciously sought through deliberate harmonization, it has not been sought as an end in itself. Rather, it was pursued with a view to determining the extent to which differences in regulatory policy among Member States could be considered as consistent with a common market and therefore tolerable within an economically integrated community. Harmonization as such was not a driving force; finding a common denominator was not the Community's agenda.

With imminent and not-so-imminent expansions of the Community, it is even less realistic to expect Community law to pursue convergence of Member State law as an end in itself. On the contrary, the Community can be expected increasingly to pursue its own distinctive policy objectives, be they consumer protection or construction of a common market in legal services. The objectives pursued reflect the evolving shape of the Community and the preoccupations of the world in which the Community operates. It will be purely incidental if these objectives implicate legal categories in which existing national laws exhibit interesting similarities or contrasts.

IV. Competition from Other Modes of Legal Analysis

Applying comparative law methodology was logical at the origins of the Community. In the intervening years, however, other approaches rose in prominence and showed their own particular utility in the Community context. Among these approaches, law and economics comes chiefly to mind. The coincidence between the growth of Community law and the rise of the law and economics movement is an important historical fact, and that movement exerts an under-

standable appeal in a setting dominated by government regulation of the economy. The relationship between comparative law analysis and economic analysis of the law is too vast and unruly a subject to enter into on this occasion. Suffice it for present purposes to say that the deliberate pursuit of competing lines of inquiry, such as law and economics, renders it difficult and quite impossible to pursue the traditional comparative line of inquiry with the accustomed rigor.

V. The Role of the Community as an International Actor

So absorbing are the challenges of internal legal integration within the Community, particularly for academic comparative lawyers, that one can easily forget that strengthening Europe's voice in the external economic and political arena was and still is among the Community's most vital purposes. This is something that our friends in the field of international relations have been telling us for some time.

Even the casual legal observer cannot fail to note that Community lawmaking is increasingly a product of international policymaking processes. The Community is among the most energetic participants in bilateral, trilateral and more fully multilateral processes. The result is that international agreements play an ever more important role in the shaping of national and regional public policy within the Community. Entry into bilateral mutual recognition agreements with the United States, development of trilateral food quality standards with the United States and Japan, and active participation in the multilateral World Trade Organization are but the most prominent examples.

This is not, of course, to suggest that comparative law has no role in this transformation. On the contrary, the trend I describe opens up new vistas for comparative law. These are not the vistas to which traditional practitioners of the comparative method in U.S. academia are accustomed, but these are the vistas that will be important in the future. Many of us have already begun pursuing the comparative law dimension of these new international processes.

VI. Conclusion

Assuming that I am not incorrect in my basic observations, what this adds up to is something quite striking. Even in the cradle of modern comparative law that is Western Europe, the tools, methods and very objectives of comparative law continue to change. Even

here, the comparatist must deal in non-traditional classifications, acknowledge non-neutral policy objectives that drive contemporary legal systems, share the terrain with disciples of other intellectual traditions, and deploy accustomed methods in an unaccustomed environment shaped by new international legal processes. Whether this scenario is one that Rudolf Schlesinger could have anticipated at the start of, or even well into, his distinguished academic career, it is one that he would certainly have relished.