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# European Law: Yesterday, Today and Tomorrow

GEORGE A. BERMAN<sup>†</sup>

Hans Baade's career spans a period marked by the progressive recognition of European law in American academic circles. At the time that Hans Baade decided to make the United States his academic home, historical circumstances had only recently brought to American shores a whole generation of legal scholars, mostly continental European in background and training. Aided by the compelling nature of the stories about law that they had to tell, these scholars connected strategically with an American legal academy that was then only slowly and tentatively emerging from what could be described, not unfairly, as a period of relative intellectual isolation.

The law that these scholars brought to the attention of the American legal academy was of course very largely European. But it was a European law in a quite different sense than that which the term "European law" conjures these days. It was European in one or both of two ways. First, it reflected the law, more specifically the positive law, of one or more particular western or central European countries. Certain jurisdictions—preeminently, but not exclusively, France and Germany—were the most privileged in this respect. At the same time, however, this law was European in the sense of exemplifying a generalized legal tradition that dominated the European continent and that came to provide the classic comparative frame of reference for the common law, namely the continental civil law tradition.<sup>1</sup> This tradition had its boundaries, of course. It tended to exclude not only the law of common law jurisdictions within Europe (such as England or Ireland) but also, to a lesser extent, both the law of certain non-common law traditions (such as the Scandinavian) which, while incontestably European, were not incontestably civilian and, at the same time but for different reasons, the socialist law tradition that had arisen post-war on the otherwise continental civilian soil of central and eastern Europe.

The nature of the European law that prevailed during this period in turn dictated the place that European law would occupy within the American legal academy. More than any other single discipline, private international law (or conflict of laws) became European law's principal point of reception within this country's academy.<sup>2</sup> Private international law provided a suitable vehicle for receiving European law as understood in the two senses that I have described. U.S. conflict of laws methodology (like most such methodologies) opened up the prospect of American courts applying (and therefore of American lawyers consulting) the positive law of one or more foreign jurisdictions, which happened very often to be European. In order to do so effectively, American courts and lawyers not only had to place the foreign law in its context, including notably the Romanist continental civil law tradition, but also to understand it through the comparative law method. Small wonder, too, that both

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1. See generally JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985).

2. See, notably, the initial comparative law casebooks by Professors Rudolf B. Schlesinger and Arthur T. von Mehren. They appear in their current editions as RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES, TEXT AND MATERIALS* (6th ed. 1998) and ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW TRADITION* (2d ed. 1977).

foreign law and comparative law acquired a powerful European bias. (Significantly, Eurocentrism is a bias that has fueled much, though by no means all, of the criticism currently being leveled at the discipline of comparative law in the United States.<sup>3</sup>)

Moving forward to the present, European law conjures a rather different set of meanings and connotations—meanings and connotations inevitably associated with the European Union, its legal system, and its law. At one level, this is due to the fact that the past forty years have witnessed a concerted and largely successful effort to establish on the territory of multiple European nations a coherent polity based not merely on international treaties, but also on what may be described as a form of quasi-constitutional law.<sup>4</sup> It is commonly said that the emergence of a coherent and durable European law of this newer sort is due in large measure to the European Court of Justice and its formidable early case law.<sup>5</sup> But it should be remembered that the Member States themselves consented to the creation of lawmaking institutions at the European level, and that they consented to the creation of a court having authority to pronounce authoritatively on what the treaties, and the legislation adopted pursuant to those treaties, really mean. It should also be remembered that, while the Member States have occasionally taken the opportunity at subsequent intergovernmental conferences to apply brakes to the process of building a European state—brakes in the form, for example, of selectively maintaining unanimous voting in the Council, in the form of notions like “subsidiarity”<sup>6</sup> and “flexibility,”<sup>7</sup> or in the form of particularized mechanisms such as Member State “opt-outs”<sup>8</sup>—they have done little to reverse the notion of a European Union and, what is more important for our purposes, the notions of a corresponding European legal system and a European law. European law is thus not merely the product of a “power grab” by judges sitting in Luxembourg. Notwithstanding the discordant notes all around us—“constitutional reservations” by the highest courts of Germany<sup>9</sup> and Italy,<sup>10</sup> the recent partial ostracism of a Member State,<sup>11</sup> a persistent sense of democratic deficit, impulses of flexibility and subsidiarity (to which I have just referred), Euroskepticism rhetoric, disheartening national referenda like that of the Danish, doubts over the integrity and efficacy of the European Commission, anxiety over the institutional and economic challenges of enlargement—we nevertheless have a European Union and we have a European law. This is the “new” European law.

Recognizing the emergence of a new European law is only the beginning of the inquiry. Other questions follow. What, for example, is the relationship between the older tradition of European law and the current reality of a European Union-driven European law?

3. See, e.g., Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. L. 637 (1998). See generally George A. Bermann, *The Discipline of Comparative Law in the United States*, in L'AVENIR DU DROIT COMPARÉ: UN DÉFI POUR LES JURISTES DU NOUVEAU MILLENAIRE [THE FUTURE OF COMPARATIVE LAW: A CHALLENGE FOR THE JURISTS OF THE NEW MILLENNIUM] 305 (Societe de Legislation Comparee 2000).

4. Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 208–09 (1990).

5. See generally Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

6. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1977) art. 5 [hereinafter EC TREATY].

7. See *id.* art. 11. The EC Treaty prefers the term “closer cooperation” to “flexibility,” but the general idea is the same.

8. Most “opt-outs” from Community law commitments are provided for by special protocols to the amending treaties. For an “opt-out” provided for in the body of the EC Treaty, see art. 95(5) (ex art. 100a).

9. See BVerfGE 37, 271, reprinted in GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 216 (1993) [hereinafter BERMAN, EUROPEAN COMMUNITY LAW]; BVerfGE 73, 339, reprinted in BERMAN, EUROPEAN COMMUNITY LAW, *supra* at 222.

10. See *id.* at 228–30.

11. William Drozdiak, *Protests Greet Right in Austria; As Coalition is Sworn In, Nations Impose Sanctions*, WASH. POST, Feb. 5, 2000, at A1.

To a very large extent, of course, this is a doctrinal problem that the Europeans themselves have to work out and are in fact struggling to work out. We in the U.S. legal academy are under no compulsion to reconcile or synthesize these developments. Coexist they do, however. We see this coexistence whether we look in law school curricula or in legal scholarship.

The older tradition of European law and the current reality of an EU-driven European law also stand side by side within the profession. Depending on the professional context (not to mention the field of law), the international practitioner may confront either the domestic law of a European nation (possibly heavily “harmonized” under compulsion of EU law), or European Union law as such, or, more often than not, some critical combination of national and EU law. Certainly American experts on foreign law, such as Hans Baade, will testify that the emergence of a European law in the modern sense has not lessened the call in American legal circles for experts on national European law; it has simply made the expert’s rendition of his or her services more delicate and complex, while at the same time much more exacting.

What does the emergence of an EU-based European law mean for the overall importance of European law (which, after all, is the central theme of this gathering)? It would be a mistake to regard this emergence as entailing nothing more than a substitution or partial substitution, within the consciousness of the American lawyer or professor, of law made at the supranational European level for corresponding law previously made at the national European level. The emergence of an EU-based European law is not simply a matter of seeing the center of gravity of law within Europe shift from the national to the supranational level; it is a matter of reshaping the connections between the law that is European and the law that is our own.

If, as I suggested earlier, the field of conflict of laws could at one time be regarded as European law’s principal point of entry into the legal consciousness of this country, that I think is simply no longer the case. The emerging EU-based European law is making profoundly new and important claims on us—claims that can best be understood both in terms of comparative law and international law.

To start with comparative law, I know of none of the classic “uses” of comparative law<sup>12</sup>—other perhaps than the traditional conflict of laws use—that has not been dramatically enhanced by the emergence of an EU-based European law. Among these uses I would surely count, for example, the deployment of comparative law in the service of domestic law reform.<sup>13</sup> The emergence of a body of positive law on the European level furnishes unprecedented opportunities for deploying comparative law in this time-honored law reform fashion. EU law is the comparative frame of reference par excellence for our assessments of American law, whether existing or proposed. The reasons for its becoming this frame of reference are many. But the reality is unmistakable. The United States and European Union have positioned themselves to conduct the largest and most ambitious exercise in law reform through the comparative method that the world has ever seen.<sup>14</sup>

I would also count among the core uses of comparative law its utility for affording an improved perspective on one’s own law.<sup>15</sup> I find no more persuasive evidence of this than the striking trend among American law schools toward incorporating European-level legal materials in domestic law courses. The “pervasive” curricular use of comparative law (i.e. a

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12. See George Winterton, *Comparative Law Teaching*, 23 AM. J. COMP. L. 69 (1975).

13. SCHLESINGER ET AL., *supra* note 2, at 3–21.

14. George A. Bermann, *European Community Law from a U.S. Perspective*, 4 TUL. J. INT’L & COMP. L. 1, 9 (1995).

15. SCHLESINGER ET AL., *supra* note 2, at 21–29.

critical infusion of foreign law materials and comparative law method in domestic law courses) for which traditional comparatists valiantly, and often unavailingly, fought now seems to be naturally and quite effortlessly happening, even in the hands of American professors who are otherwise loath to consider themselves comparatists. All in all, the significance of the new Europeanization of European law for comparative law is manifest.

The impact of the new European law on the processes of international law is decidedly more difficult to trace, much less to measure, but it too is unmistakably present. We can start with exercises that lie at the border between comparative and international law, and that entail a direct linkage between the two. According to one such use, comparative law equips us to identify “general principles of law” which, in turn, constitute a source of international law.<sup>16</sup> At the same time, comparative law is said to promote the intelligent harmonization (in some cases even the unification) of diverse national laws on matters where reduction of differences would be useful or otherwise desirable. In both of these respects, the construction of contemporary European law represents not only a major comparative law adventure, but also a major international law development, albeit an international law development that at one time was (but is no longer) entirely internal to the European Union. (Both in this country and in Europe, European law was initially studied as a species of public international law.) EC law has been constructed out of a combination of these two classical comparative law exercises: divining general principles of law common to the Member States<sup>17</sup> and producing EC-level legislation that intelligently harmonizes the law of the several EU Member States.<sup>18</sup>

This brings me to the European law of tomorrow. In what ways might the European law of tomorrow—as opposed to the European law of yesterday or today—have importance for us? What is most salient about the now-emerging European law that was not salient about the European law that came before? What does the next European law layer signify?

There is little or no question about this in my mind. What we are now observing is how European law, while at one time fairly viewed as merely a product of international law, has itself become a key factor in further international lawmaking. Europe and its law are monumentally important factors of production in the development of international trade law, whether within the World Trade Organization or outside of it. European law is an equally important factor in the less well-known processes of international regulatory cooperation, be it bilateral, trilateral, or truly multilateral. Facing comparably problematic regulatory domains—competition, food and drug, aviation, telecommunications, and so on—the United States and European Union are making regulatory law, if not literally together, then at least within a framework of intense mutual awareness and reciprocal involvement in one another’s legislative and regulatory processes.<sup>19</sup> They are doing this substantively and procedurally. This is not a newer European law displacing, superseding, or even overlaying an older one. While a geological analogy is tempting, it is inapt.

Never have we faced as squarely and urgently as now the challenge of coping with so many coexistent manifestations of European law. The European Union has to show respect for the distinctive positive national laws and legal cultures of a diverse set of national jurisdictions, originally six, now fifteen, soon perhaps twenty-seven or twenty-eight. The European Union has to develop sound and effective law at the European level on all

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16. See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c), 50 Stat. 1060, Europ. T.S. No. 993.

17. See generally ANTHONY ARNULL, *THE GENERAL PRINCIPLES OF EEC LAW AND THE INDIVIDUAL* (1990).

18. See generally A.J. Easson, *EEC Directives for Harmonization of Laws: Some Problems of Validity, Implementation and Legal Effects*, 1 Y.B. EUR. L. 1 (1981).

19. See TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George Bermann et al. eds., 2000).

subjects where the internal market and the stated programmatic policies and goals of the European Union so suggest. Finally, the European Union must now, even while showing fidelity to these two sets of imperatives, also learn how to speak with a single and effective legal and regulatory voice in the international arena, an arena in which there are mighty interlocutors like the United States with which to do business, and more than occasionally do battle. It has also to act within an unprecedented international normative framework, namely the World Trade Organization. In facing this challenge, European law has clearly become the paradigm of the twenty-first century.

