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## Introduction to the Special Issue

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# ARTICLES

## INTRODUCTION TO THE SPECIAL ISSUE

*George A. Bermann*

The subject of this year's topical issue of the *Columbia Journal of European Law* promises to be topical for some time to come. Every model of European integration that has been competing for consideration—whether within the Union institutions or within the corridors of national power, or virtually anywhere for that matter—presupposes a European identity of sorts. But just at the time that a “European” identity might hope to be developing in the midst of the “national” identities with which it was commonly contrasted, the identity “landscape” has itself been growing more complex. Forces of globalization, and more particularly the growth of global institutions (such as the World Trade Organization or the International Criminal Court), are challenging the notion that the European Union is inevitably the broadest community of interest with which the peoples of Europe might meaningfully identify. On the other hand, a still sharper challenge to the nascent European identity arises from the fact that the community with which Europeans most closely identify (and against which the progressive development of a European identity is to be measured) is in fact not a national community at all, but one or more regional or other sub-national communities.

The strength of such identities are not merely the data of cultural history. Legal scholars have long observed that the viability of the European Union legal order depends on a shared belief in the existence of a European polity. Now that Member State populations must reckon with the possibility that they and their national legal order will be legally bound by measures adopted over the political objections of their representatives in Brussels, it is all the more important that the decisionmaking apparatus at that level be invested with a strong dose of Union-wide political legitimacy. Such legitimacy may well depend on a Member State population's sense that it shares a genuine political identity with the populations of most if not all of the other Member States. Obviously, the existence of social and cultural divisions among subgroups within or across Member State populations potentially complicates the development of such a Union-wide allegiance.

Member State political leadership may well face no greater political challenge today than that of helping to build an overarching sense of “Europeanness,” while at the same time accommodating the various national, sub-national and cross-national bonds that their populations have formed on the basis of a shared history, shared language, shared culture and shared customs. Poised as the European Union is on the brink of its largest enlargements to date—boasting a more heterogeneous membership than the founders of the EU could ever have imagined—the development of a true European identity may be more elusive than ever. At the same time, the drafters of the Amsterdam Treaty have gambled on the proposition that the new provisions on “closer cooperation” that they have introduced into the treaties establishing the European Community and the European Union will better enable the Community and Union to harness the heightened centrifugal political forces that enlargement will bring. Detractors are quick to suggest that, far from fostering the emergence of a European identity, the regime of closer cooperation will only expose and harden the social, economic and political fault lines that enlargement will bring.

Will participation by the European Union and its Member States in international regimes complicate the emergence of a European identity, vis-à-vis preexisting national and regional identities, or actually facilitate it? Arguably, national and sub-national European populations will as a result progressively consider themselves citizens of the world more than citizens of a specifically European polity. Even if they do not, they may form significant social, economic and political bonds with non-European actors within the relevant international fora; obviously such bonds will not in themselves necessarily advance the elaboration of a common identity among the peoples of Europe. Conversely, Europeans may actually deepen their sense of shared identity as their representatives discover—if indeed they do—a consistent commonality of values and coincidence of interests in these international fora.

Though these tensions will preoccupy the European Union for the foreseeable future, only on occasion will they present themselves in abstract terms, that is to say, in the terms that an intergovernmental conference is likely to address them. Far more often, they will be embedded in concrete legal and political contexts, and resolved only in conjunction with the resolution of the particular legal or political issue at hand.

The contributions to this special issue of the *Journal* on “European Identity: Opposing Pulls of Globalization, Nationalism and Regionalism” address these problems both in the abstract and in a few of the concrete settings in which they arise.

From an abstract point of view, it is the notion of subsidiarity that has dominated the discussion, at least insofar as the tensions between the European Union and the Member States are concerned. (The extent to which subsidiarity bears upon global as opposed to EU initiatives, or protects regional as well as national identities, has been less fully explored.) Debate continues over the meaning and meaningfulness of subsidiarity. But, even proponents of subsidiarity (and its codification) such as Reimer von Borries and Malte Hauschild acknowledge that at some point subsidiarity’s contribution has to be assessed in practical terms. Their article accordingly asks, and tentatively answers, the necessary operational questions about subsidiarity. Has the Amsterdam Treaty’s Subsidiary Protocol advanced the effectiveness of the principle?

How useful are the Commission's annual reports to the European Council on "better lawmaking"? Has the German government's own "subsidiarity review system" contributed to making subsidiarity within the EU more effective?

Dora Kostakopoulou advances a more visionary strategy based on a decoupling of "nationality" and "citizenship" that would permit Europeans to continue claiming a specific Member State nationality, while at the time drawing upon a common European citizenship with important social, economic and, above all, political attributes. As precedent for drawing a wider "citizenship" circle around distinctive national identities, she invokes the prevailing model of human rights protection in today's world, as well as the common Community law notion of state liability for breach of Community law. "Nested" citizenships could also offer a solution to the treatment within the territory of the European Union of third country nationals, that is, persons who by definition have no European nationality whatsoever. For Kostakopoulou, a citizenship freed from the traditional constraints of nationality would be an important vehicle for the development of civil society.

Because it is the Member State having the legally sharpest sub-national divisions, Germany positively requires that a European identity square not only with national identity, but also with such sub-national identities as may be captured by the division of the German State into *Länder*. The effort may be legally indispensable for Germany and other explicitly "federal" Member States (e.g. Austria, Belgium), but it may also be politically indispensable for other Member States which, while not federal as such, nevertheless have deeply culturally distinct subcommunities (e.g. Italy, Spain, the United Kingdom). Martin Rogoff describes the constitutional and statutory adjustments that Germany has made in the post-Maastricht era and, based on their limited performance record since that time, advances it as a paradigm for other states feeling the same or a similar imperative.

While they may foster coherence within the emerging European system, large blueprints of this sort do not alone necessarily equip us to deal with the particular problems that "the opposing pulls of globalization, nationalism and regionalism" inevitably put in our path. More often than not, the solutions that are ultimately reached are ones that offer an adequate response to the more or less concrete problems that, for one reason or another, actually present themselves.

As the contributions by Amikam Kranz and Reiner Schulze demonstrate, those problems are a diverse lot.

Amikam Kranz's examination of the *Bosman* judgment of the European Court of Justice, and its condemnation of the transfer system in European football, demonstrates the role that the application of well-established and not-so-well-established case law can play in the future development of European identity. Commentators may well disagree over the extent to which the Court innovated in *Bosman*—whether by applying the guarantee of free movement of workers (formerly Article 48 of the EC Treaty) to the rules of professional sporting associations, by treating sport as an economic activity, by rejecting application of the "internal affairs" doctrine, or by finding the regulations a barrier to cross-border access. The fact remains that the result of giving former Article 48 direct effect in the specific context of professional football was, in part, to

consolidate the notion that, even for teams denominated in local, regional or national terms, the market for football (read soccer) talent is a fully Europe-wide, and indeed international, one—much as the market for athletic talent on U.S. professional sports teams, however locally denominated, is an American and international one. Thus, depending on its context, the particularized application of general legal doctrine can itself contribute to the content and depth of the European identity.

*Bosman* illustrates the important, but nevertheless collateral, effect of treaty provisions on the shaping and sharpening of a European identity in fields where that identity has been underdeveloped. But what about the role of positive legislation in strengthening the European component of a field of law traditionally identified with Member States or their constituent parts? How, for example, is the development of a harmonious body of private law across Europe (a project that is today attracting considerable interest and making considerable progress, both as EC and non-EC initiatives) to be reconciled with a nationally entrenched—and typically codified—legislative framework for describing private legal relationships and resolving disputes that arise out of them? This is a question well worth asking on the centennial of the coming into force in Germany of the *Bürgerliches Gesetzbuch* (*BGB*), or Civil Code.

For Reiner Schulze, the synthesis is not an impossible one, even though it is further complicated by the emergence of more broadly international sources, such as the Convention on the International Sale of Goods and the UNIDROIT principles. The solution appears to lie in preserving the national codification as the private law cornerstone, but at the same time accepting the “pluralism” that European Community and more broadly international initiatives introduce, whether in the interest of a somewhat more common market or a somewhat more cosmopolitan private international law regime.

The contributions to this special issue thus reinforce the idea that the final resolution of tensions among national, regional and global affiliations within the European Union—if indeed there ever is one—will be (a) the product of both abstract and concrete reasoning, (b) the result of both the imaginative application of received principles and the enactment of specific positive legislation, and (c) the consequence of unorchestrated developments at every one of the levels—international, national and regional—that stand to participate in that resolution. If all of this is so, the definition of identities in the European context promises to be very much a slow and rather unpredictable work in progress.